

## WP/2797/2015 RESERVATION MATTERS

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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY****CIVIL APPELLATE JURISDICTION****Writ Petition NO. 2797 OF 2015**

1 The State Of Maharashtra  
Through The Chief Secretary  
Government of Maharashtra,  
Mantralaya, Mumbai - 32

2 The Principal Secretary to Government,  
General Administration Department,  
Mantralaya, Mumbai – 32

.. Petitioner(s)  
(Org. Respondents)

*Versus*

1 Shri Vijay Ghogre, Age: Adult  
Executive Engineer, Maharashtra  
Krishna Valley Development  
Corporation, Bhosale Nagar Corner,  
Pune – 411 007

2 Bapusaheb Rangnath Pawar,  
Executive Engineer, Maharashtra  
Krishna Valley Development  
Corporation, Chaskaman Project,  
Division, A2/2 Bhosari Paradise  
Raje Hills Road, Shivaji Nagar,  
Pune -20.

3 Rajendra Ramchandra Pawar,  
Superintending Engineer, Konkan  
Irrigation Development Corporation,  
Dist. Thane

4 Shivaji Maruti Upase,

Superintending Engineer,  
Executive Engineer, Maharashtra  
Krishna Valley Development  
Corporation, R/at: A/5, Swapnashilpa  
Housing Society, Near Gandhidam,  
Erandavan, pune -411004

- 5 The Executive Director,  
Maharashtra Krishna Valley Development  
Corporation, Sinchan Bhavan, Pune
- 6 The Executive Engineer,  
Konkan Irrigation Development  
Corporation, Dist : Thane
- 7 Dr. Babasaheb Ambedkar National  
Association, Flat No.103,  
Building No.4, MHADA Colony,  
Pratiksha Nagar, Sion, Mumbai-400 022
- 8 Maharashtra Officers Forum,  
Through its Secretary, Shri S.V. Sute,  
4, Kotawalnagar, Nagpur
- 9 Maharashtra Samanta Parishad,  
Through its President,  
Shri R.N. Kondhare,  
74, Mahatma Phule Peth, Pune-411 042
- 10 All India Confederation of SC/ST  
Organisation, through the President,  
Anita Chambers, Near GPO, Trimbak  
Road, Nashik.
- 11 Hemant Salvi,  
Employed as Awal Karkoon, Tahasildar,  
Ratnagiri.
- 12 Anant Shamrao Bundale,  
Employed as Awal Karkoon,Collector's Office,

Ratnagiri, Supply Branch.

- 13 Milind Shashikant Sawant  
Employed as Clerk, Tahasildar Office,  
Ratnagiri.
- 14 Nandkumar Gajanan Mahakal,  
Employed as Clerk, with the Office of Ratnagiri,  
Maharashtra
- 15 Bhaidas Dongardas Nikumbh  
[Sub Divisional Engineer]  
Residing at Harklal Nagar, Taloda,  
Dist. Nandurbar
- 16 Vimukta Jati Nomadic Tribes and  
Special Backward Classes Karmachari  
45, Sahyog, Opp. GPO, Fort,  
Mumbai 400 001
- 17 Karansingh Premsingh Patil,  
Residing at Diary Quarters,  
No. B-15, A.G. Khan Road,  
Worli, Mumbai 400 018
- 18 Shri Bramha Laman Pawar,  
R/at : B-273, Government Colony,  
Bandra (E), Mumbai-51
- 19 Shri Madhav Kundlik Avhad,  
Mangesh Dham No.2,  
Beturkarpada, Kalyan (West),  
Dist. Thane.
- 20 Shri Surendra Arjun Pachpol,  
A/A-2, A-410, Parijat, Lokvatika  
Co-op. Housing Society Ltd. Netivali,  
New Panvel, Dist. Raigad.
- 21 Shri Vinayak Vishwanath Lavate,

Keda Co-op. Housing Society Ltd.,  
Sec.-5, Plot No.11, Room No. 101,  
New Panvel, Dist : Raigad

- 22 Rakesh Yeldap Vitkar,  
A-6, Kunal Icon, Pimple Sandagaon,  
Pimpri, Pune – 27.
- 23 Panjabrao Narayanrao Naik,  
Hon. Secretary, Maharani Abhilyadevi  
Pratisthan, 301, Sangli Bhavan,  
Sector – 4, Charkhop, Kandivli(W),  
Mumbai 400 087
- 24 Akhil Bharatiya Maratha Mahasangh,  
Shree Madhav Maharaj Shinde Hall,  
5, Navalkar Lane, Mumbai 400 087
- 25 All India Confederation of SC/ST  
Organiation, 5, Pusa Road,  
Karoad Baug, New Delhi.
- 26 Yuvraj Mahalu Bhawe,  
Yeshwa Mandir, Kaushalya Nagar,  
Namvadi, Panchavati, Nashik-3.
- 27 Hanmant V. Gunale,  
Age 49, Occ. Govt. Service  
Add: Yash Sankul,  
Vidya Nagar, Karad,  
Dist. Satara
- 28 Rajan R. Shah,  
Age 39 years, Executive Engineer,  
Maharashtra Krishna Valley Development  
Corporation, Dhom Colony, Wai,  
Dist. Satara
- ... Respondent(s)  
(Nos. 1 to 4-org.Petrns.  
Nos. 5 to 26-orig.Respondt.  
Nos. 3 to 24.



**WITH**  
**Writ Petition NO. 3009 OF 2015**

- 1 Vimukta Jatis, Nomadic Tribes  
And Special Backward Class  
Employees And Officers Association,  
Mumbai, Mumbai, 49, Sahyog,  
Vth Floor, Opp. G.P.O., Fort,  
Mumbai – 1, Through its President  
Shri Rajaram G. Jadhav, age 50 years,  
Joint Secretary, Higher Tech. Dept.,  
Mantralaya, Mumbai-25,  
R/at : Y-6/86, Government Colony,  
Bandra (E), Mumbai-51
  - 2 Shri Karansingh Premsingh Patil,  
Section Officer, GAD Department,  
Mantralaya, Mumbai-25  
R/at : Dairy Quarters No. B-15,  
A. G. Khan Road, Worli, Mumbai-18
  - 3 Shri Madhav Kundlik Avhad,  
Section Officer, Finance Department,  
Mantralaya, Mumbai-25,  
R/at : Mangesh Dham No.2,  
Beturkarpada, Kalyan (West),  
Dist. Thane.
- ...Petitioners  
(Org. Respondents 14, 15, 17)

*Versus*

- 1 Vijay Ghogre, Age: Adult  
Executive Engineer, Maharashtra  
Krishna Valley Development  
Corporation, Bhosalenagar Corner,  
Pune – 411 007

- 2 Bapusaheb Rangnath Pawar,  
Executive Engineer, Maharashtra  
Krishna Valley Development  
Corporation, Chaskamuti Project,  
Division, A2/2 Bhosari Paradise  
Raje Hills Road, Shivaji Nagar,  
Pune -20.
- 3 Rajendra Ramchandra Pawar,  
Superintending Engineer, Konkan  
Irrigation Development Corporation,  
Dist. Thane
- 4 Shivaji Maruti Upase,  
Superintending Engineer,  
Executive Engineer, Maharashtra  
Krishna Valley Development  
Corporation, R/at: A/5, Swapnashilpa  
Housing Society, Near Gandhidam,  
Erandavan, Pune -411004  
...(Org. Petitioners)
- 5 The State of Maharashtra,  
Through Chief Secretary,  
Government of Maharashtra,  
Mantralaya, Mumbai 32.
- 6 The Principal Secretary,  
General Administration Department,  
Mantralaya, Mumbai-32
- 7 The Executive Director,  
Maharashtra Krishna Valley Development  
Corporation, Sinchan Bhavan, Pune
- 8 The Executive Engineer, Maharashtra  
Krishna Valley Development  
Corporation, Dist : Thane
- 9 Dr. Babasaheb Ambedkar National

Association, Flat No.103,  
Building No.4, MHADA Colony,  
Pratiksha Nagar, Sion, Mumbai-22

10 Maharashtra Officers Forum,  
Through its Secretary, Shri S.V. Sute,  
4, Kotawalnagar, Nagpur

11 Maharashtra Samanta Parishad,  
Through its President,  
Shri R.N. Kondhare,  
74, Mahatma Phule Peth, Pune-42

12 All India Confederation of SC/ST  
Organisation, through the President,  
Anita Chambers, Near GPO, Trimbak  
Road, Nashik.

13 Hemant Salvi,  
Awalkarkoon, Tahasildar Office,  
Ratnagiri.

14 Anant Shamrao Bundale,  
Awalkarkoon, Collector's Office,  
Supply Branch, Ratnagiri.

15 Milind Shashikant Sawant  
Clerk, Tahasildar Office,  
Ratnagiri.

16 Nandkumar Gajanan Mahakal,  
Clerk, Office of Ratnagiri,  
Maharashtra

17 Bhaidas Dongardas Nikumbh  
Sub Divisional Engineer,  
Harklal Nagar, Taloda,  
Dist. Nandurbar

... Org. Resp 1-13

18 Shri Bramha Laman Pawar,

Assistant, Rural Development &  
Water Conservation Department,  
Mantralaya, Mumbai-25.  
R/at : B-273, Government Colony,  
Bandra (E), Mumbai-51

.... Org. Resp 16

19 Shri Surendra Arjun Pachpol,  
Stenographer, Tourism & Cultural  
Department, Mantralaya, Mumbai-25  
R/at: A/A-2, A-410, Parijat, Lokvatika  
Co-op. Housing Society Ltd. Netivali,  
Kalyan (E), Dist: Thane

20 Shri Vinayak Vishwanath Lavate,  
Assistant, School Education & Sports  
Department, Mantralaya, Mumbai-25  
R/at : Keda Co-op. Housing Society Ltd.,  
Sec.-5, Plot No.11, Room No. 101,  
New Panvel, Dist : Raigad

... Orig.Resp 18, 19

21 Rakesh Yeldap Vitkar,  
A-6, Kunal Icon, Pimple Saudagar,  
Pimpri, Pune – 27.

22 Panjabrao Narayanrao Naik,  
Hon. Secretary, Maharani Abhilyadevi  
Pratisthan, 301, Sangli Bhavan,  
Sector – 4, Charkhop, Kandivli(W),  
Mumbai 400 087

23 Akhil Bharatiya Maratha Mahasangh,  
Shree Madhav Maharaj Shinde Hall,  
5, Navalkar Lane, Mumbai 400 087

24 All India Confederation of SC/ST  
Organiation, 5, Pusa Road,  
Karol Baug, New Delhi.

25 Yuvraj Mahalu Bhave,  
Yeshwa Mandir, Kaushalya Nagar,

Namvadi, Panchavati, Nashik-3. ... (Or Resp 20-24)  
.... Respondents

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**ORDINARY ORIGINAL CIVIL JURISDICTION**

**WRIT PETITION NO. 1590 OF 2015**

- 1 Dr. Vyankatesh T. Anchinmane  
Age – Adult, Occ: Medical Teacher,  
Residing at, Government Colony,  
Building No.2, Flat No.29,  
K. K. Marg, Haji Ali,  
Mumbai 400 034
  - 2 Dr. Satin Kalidas Meshram,  
Age – Adult, Occ: Medical Teacher,  
Residing at Plot No.75,  
V. K. Bhawan, Jagrut Nagar,  
Nagpur 440 014
  - 3 Shri Pramod Hirman More,  
Age : 38 Years,  
Occ : X ray Technician,  
G. T. Hospital, Mumbai,  
Residing at : 902, 9<sup>th</sup> Floor,  
High Rise Building,  
G. T. Hospital Compound,  
Mumbai 400 001
- ... Petitioners

vs.

- 1 State of Maharashtra  
(Summons to be served on the  
Learned Government Pleader appearing  
for State of Maharashtra under

Order XXVII, Rule 4, of the Code of Civil Procedure, 1908)

- 2 The Secretary,  
Law and Judiciary Department,  
Government of Maharashtra,  
Mantralaya, Mumbai 400 032.  
(Summons to be served on the  
Learned Government Pleader appearing  
for State of Maharashtra under  
Order XXVII, Rule 4, of the Code of Civil  
Procedure, 1908)
- 3 Mumbai Municipal Corporation  
Mumbai, Mahapalika Bhavan,  
(Summons to be served on the  
Municipal Commissioner,  
Mumbai).
- 4 Shri Vijay Ghogare,  
Executive Engineer,  
Maharashtra Krishna Valley  
Development Corporation,  
Bhosale Nagar Corner,  
Pune 411 007
- 5 Shri Bapusaheb Rangnath Pawar,  
Executive Engineer,  
Maharashtra Krishna Valley  
Development Corporation,  
Chaskaman Project Division, A2/2,  
Bhosari Paradise, Raj Hills Road,  
Shivaji Nagar, Pune 411 020
- 6 Shri Rajendra Ramchandra Pawar,  
Superintendent Engineer,  
Kokan Irrigation Development Corporation,  
Thane.
- 7 Shri Shivaji Maruti Upase,

Superintendent Engineer,  
Maharashtra Krishna Valley  
Development Corporation,  
Residing at A/5,  
Swapna Shilpa Housing Society,  
Near Gandhidham, Erandavan,  
Pune 411 004.

- 8 Shri Hanumant V. Gunale,  
Executive Engineer,  
Maharashtra Krishna Valley  
Development Corporation,  
Yashsankul, Vidyanagar,  
Karad, District – Satara
- 9 Shri Rajan R. Shah,  
Executive Engineer,  
Maharashtra Krishna Valley  
Development Corporation,  
Dhoom Colony,  
Wai, District – Satara
- 10 Principal Secretary,  
General Administration Department,  
Mantralaya, Mumbai
- 11 Executive Director,  
Maharashtra Krishna Valley  
Development Corporation,  
Sinchan Bhavan, Pune
- 12 Executive Engineer,  
Konkan Irrigation,  
Development Corporation,  
Thane.
- 13 Principal Secretary,  
Water Resources Department,  
Government of Maharashtra,  
Mantralaya, Mumbai

... Respondents

(Ori. Applicants No. 1 to 4  
Respondent Nos. 4 to 7 before  
Hon'ble MAT)

**WITH**  
**WRIT PETITION NO. 3287 OF 2004**

Best Officers Association,  
Through its Chairman,  
Shri Atul G. Patil, having its  
office at BEST House, P.O. Box No.192,  
Mumbai 400 001

...Petitioner(s)

*Versus*

- 1 The State Of Maharashtra,  
through : Chief Secretary,  
Government of Maharashtra,  
Mantralaya, Mumbai
- 2 The Principal Secretary,  
General Administration Department,  
Mantralaya, Mumbai.
- 3 The Municipal Corporation of  
Greater Mumbai, through its  
Commissioner, having its address  
at Mahapalika Bhavan,  
Mahapalika Marg,  
Mumbai 400 001
- 4 The Brihanmumbai Electric  
Supply & Transport Undertaking,  
through its General Manager,  
having its address at BEST  
Bhavan, Electric House,  
Mumbai 400 001

...Respondent(s)



Mr. Rafiq Dada, Senior Advocate/Spl. Counsel, a/w Mr. Abhinandan B. Vagyan, Govt. Pleader, a/w Mr. C.P. Yadav, AGP, a/w Mr. Vishal B. Thadani, AGP and Ms. Tintina Hazarika, for the Petitioners/State Government in WP/2797/2015.

Mr. A.Y. Sakhare, Senior Advocate, a/w Mr. Amit A. Karande, for the Petitioners in WP 3009/15 and for Respondents No. 16, 17, 19 and 21 in WP 2797/15.

Mr. Rajeev Dhawan, Senior Advocate with Mr. Atul Chitale, Senior Advocate, a/w Mr. C.T. Chandratre, for Respondents No. 1 to 4 in WP 2797/15.

Mr. C.T. Chandratre, for Applicant in CAW 2531/15 in WP 2797/15.

Mr. Nitin Deshpande, for the Applicant in CAW 161/16 in WP 2797/15.

Mr. Ashok N. Katangale, with Mr. Arun D. Nagarjun i/b Mr. A.K. Saxena, for Respondent No. 7 in WP 2797/15.

Mr. S.C. Naidu, with Mr. Rahul Tanwani and a/w Mr. Aniketh Poojari i/b Mr. C.T. Chandratre, for Respondents No. 27 and 28 in WP 2797/15.

Mr. P.V. Suryawanshi, a/w Ms. Savitri I. Gajakosh, for the Applicant in CAW 2301/15 in WP 2797/15.

Mr. A.V. Anturkar, Senior Advocate, i/b Mr. S.B. Deshmukh for the Petitioner in OS WP 1590/15.

Mr. G.K. Masand i/by Mr. Ajeet Manwani, for the Petitioner in OS WP 3287/04.

None for other respondents.

**CORAM: ANOOP V. MOHTA AND  
A. A. SAYED, JJ.**

**CLOSED FOR JUDGMENT ON: May 04, 2016  
PRONOUNCED ON : July 26, 2016**

**JUDGMENT (Per Anoop V. Mohta, J.)**

1 All the writ petitions are heard by consent as assigned expressly. The issues are common and, therefore, this concluding common decision.

**Introduction of the controversy**

2 The constitutional reservation policy always put the respective State Government in imbroglio. It is going to last long, as no one in the present scenario or otherwise is in frame of mind to compromise. Having once granted the constitutionally recognized reservation in diverse areas including in the state employment, it's total abolition is unwarrantable and without a solution. The legitimate rights once created and settled, since so many years, just cannot be taken away by a stroke of pen. It is not the case of grant of the reservation in service for the first time but question is of its continuance or discontinuance in part or full. Therefore, the crux of the matter is whether existing reservation policy, in the State

employment, can be taken away by declaring such Reservation Statute and the Promotion Circulars, ultra vires or illegal. To understand such situation and the dilemma of all the concerned, we have to see the constitutional provisions and the existing Reservation Policy.

3 The constitutional validity of Maharashtra State Public Services (Reservations for Scheduled Castes, Scheduled Tribes, De-notified Tribes (*Vimukta Jatis*), Nomadic Tribes, Special Backward Category and Other Backward Classes) Act, 2001 (the Reservation Act) and Government circular ,( GR No. BCC 2001/1887/PR. KR. 640/01/16B dated 25.05.2004) (The Promotion Circular) issued by the State of Maharashtra (The State) has been the focus of the writ petitions.

4 The Maharashtra Administrative Tribunal (MAT) by judgment and order dated 28 November 2014 in Transfer Application Nos. 1 & 2 of 2014, (transferred Writ Petition No. 8452/2004 on 18 June 2013), has declared the Reservation Act and the Promotion Circular violative of Article 16(4) and 16(4-A) of the Constitution of

India and of the judgment of Supreme Court in *M. Nagaraj and others v. Union of India and others*<sup>1</sup>.

5 The operative part of the impugned judgment is :

**“OPERATIVE ORDER**

134 Thus, for the reasons separately set out, we concur in the conclusion that the impugned Act being Maharashtra State Public Services (Reservations for Scheduled Castes, Scheduled Tribes, De-notified Tribes (*Vimukta Jatis*), Nomadic Tribes, Special Backward Category and Other Backward Classes) Act, 2001, is ultravires the Constitution and the law laid down by Hon'ble Supreme Court in the matter of **M. Nagaraj and others Vs. Union of India and others (2006) 8 SCC 212**. It will have to be and is hereby struck down.

The impugned G.R. No. BCC-2001 / 1887/pr.kr.640/01/16-B, dated 25<sup>th</sup> May, 2004 is also struck down. But we do realize that this judgment will be applicable only to the Maharashtra State

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1 (2006) 8 SCC 212

Government employees and as mentioned at the outset, the Writ Petitions filed by the employees of other employers outside the jurisdiction of this Tribunal are still pending before the Hon'ble Bombay High Court. It is almost certain that this judgment will be challenged before the Hon'ble High Court or may be Hon'ble Supreme Court. Therefore, in order to save all concerned from rushing in to the next step, we think the effectuation hereof should be put on hold. In other words, the operation hereof, should be stayed. We are so disposed in the set of the facts and circumstances to stay this order for a period of one year. The parties will be free in the meanwhile to move the Hon'ble Court before whom this order will be challenged for any direction about this period also. However, as already noted there are interim orders made by the Hon'ble High Court. The said orders are in force. They will continue to govern all concerned notwithstanding this judgment and the stay granted by us to our own judgment. We cannot and do not interfere therewith.

135 The impugned Act being Maharashtra State Public Services (Reservations for Scheduled Castes, Scheduled Tribes, De-notified Tribes (*Vimukta Jatis*), Nomadic Tribes, Special Backward Category and Other Backward Classes) Act, 2001 and impugned G.R. No. BCC-2001 / 1887/pr.kr.640/01/16-B, dated 25<sup>th</sup> May, 2004 stand hereby struck down as ultravires the Constitution and ultravires the law laid down by the Hon'ble Supreme Court inter-alia in **M. Nagaraj and others Vs. Union of India and others (2006) 8 SCC 212**. The operation hereof is stayed for a period of one year from today during which period the interim stay granted by the Hon'ble High Court shall continue to govern all concerned. Both these Transfer Applications are allowed in the above terms with no order as to costs."

6 The State, being aggrieved and affected by the judgment and order has filed Writ Petition No. 2797/2015. Another Writ Petition No.3009/2015 is filed by Vimukta Jatis, Nomadic Tribes And

Special Backward Class Employees And Officers Association being the party to the impugned judgment. Writ Petition No.3287/2004 is filed by Best Officers Association, opposing the reservation policy, will be considered on its fact based merits separately. In W.P/1590/2015, the Petitioners support the reservation policy.

7 The parties have filed their affidavits, reply, rejoinder, sur-rejoinder, in support of their respective submissions. The State affidavits are supported by the data, charts and the documents. The earlier statutes and the circulars are noted to deal with the center of attention.

Prospect in Public employment to all the social group.

8 The historical provisions of law of reservation policy of Central and the State Government are important. The relevant clauses of Article 16 of the Constitution of India read and referred by the counsel appearing for the parties from their respective points of view.

**“16. Equality of opportunity in matters of public employment.—(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.**

**(2) No citizen shall, on grounds only of religion,**

race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favor of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent.



reservation on total number of vacancies of that year.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.”

9 The conclusion in *M. Nagaraj (supra)* is :-

“121 The impugned constitutional amendments by which Articles 16(4A) and 16(4B) have been inserted flow from Article 16(4). They do not alter the structure of Article 16(4). They retain the controlling factors or the compelling reasons, namely, backwardness and inadequacy of representation which enables the States to provide for reservation keeping in mind the overall efficiency of the State administration under Article 335. These impugned amendments are confined only to SCs and STs. They do not obliterate any of the constitutional requirements, namely, ceiling-limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-classification between OBC on one hand and SCs and STs on the other hand as held in *Indra Sawhney*, the concept of post-based Roster with in-built concept of replacement as held in *R.K. Sabharwal*.

122 We reiterate that the ceiling-limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional

requirements without which the structure of equality of opportunity in Article 16 would collapse.

123 However, in this case, as stated, the main issue concerns the "extent of reservation". In this regard the concerned State will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. As stated above, the impugned provision is an enabling provision. The State is not bound to make reservation for SC/ST in matter of promotions. However if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance of Article 335. It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling-limit of 50% or obliterate the creamy layer or extend the reservation indefinitely.

124 Subject to the above, we uphold the constitutional validity of the Constitution (Seventy-seventh Amendment) Act, 1995; the Constitution (Eight-first Amendment) Act, 2000; the Constitution (Eighty-second Amendment) Act, 2000 and the Constitution (Eighty-fifth Amendment) Act, 2001.

125 We have not examined the validity of individual enactments of appropriate States and that question will be gone into in individual writ petition by the appropriate bench in accordance

with law laid down by us in the present case.”

The basic Constitutional Amendments for Scheduled Castes (SC) and Scheduled Tribes (STs) :

10 In the Constitution of India, on 17 June 1995, a new clause (4A) in Article 16, has been introduced to provide for reservation in promotion for the SC and ST. The Constitution (Eighty First Amendment) Act, 2000 enabled the State to restore the position as was prevalent before 29 August 1997, thereby recognition was given to the concept “Backlog vacancies” by treating it as a class of vacancies. The Constitution (Eighty Second Amendment) Act, 2000 dated 8 September 2000, thus a proviso to Article 335 of the Constitution has been inserted and restored the relaxations in matters of reservation in promotion.

11 The Constitution (Eighty-Fifth Amendment) Act, 2001 (dated 4.1.2002) in the interest of the Government Servant belonging to the SC and ST categories in matters of seniority on promotion to the next higher grade, an amendment is made to Article 16(4A) thereby “in matter of promotion with consequential seniority to any class” has been substituted in place of words “in matters of

promotion to any class". This amendment has been given retrospective effect i.e. 17 June 1995, the date on which Article 16 (4A) itself was brought into force.

The other interlinked constitutional Reservation Provisions.

12 We have to read following Articles of the Constitution of India, "subject to " other connected provisions.

Art.14	Equality before law
Art.15	Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth
Art.40	Organisation of village panchayats
Art.330	Reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People
Art.332	Reservation of seats for Scheduled Castes and Scheduled Tribes in the Legislative Assemblies of the States
Art.334	Reservation of seats and special representation to cease after seventy years
Art.335	Claims of Scheduled Castes and Scheduled Tribes to services and posts
Art.338	National Commission for Scheduled Castes
Art.338A	National Commission for Scheduled Tribes
Art.339	Control of the Union over the administration of Scheduled Areas and the welfare of Scheduled Tribes
Art.340	Appointment of a Commission to investigate the conditions of backward classes
Art.341	Scheduled Castes

Art.342 Scheduled Tribes

Art.366 Definitions

13 All these Articles reflect the purpose of reservation for Scheduled Tribe, Scheduled Caste and for Other Backward Class and provisions for collecting the information and the material/data for various constitutional provisions. Articles 330, 332 and 334 apportion the seats for Scheduled Caste and Scheduled Tribes in the House of the People and Legislative Assembly, on the population basis. The expression “population” means “the population as ascertained at the last preceding census of which the relevant figures have been published”. The report of 2001 is has been used for such purposes by all concerned.

14 It is stated through Article 334 that the reservations of seats and special representation ceases to effect on an expiration of a period of 70 years from the commencement of the Constitution. This is in view of Constitution 95<sup>th</sup> Amendment Act 2009 with effect from 25/01/2010, whereby the words “sixty years” are substituted by “seventy years”. This will retain the position up to year 2020.

15 Article 335 empowers the respective State or Union by keeping in mind the “efficiency of administration” to consider the claims of members of Scheduled Castes and Scheduled Tribes before an appointment to Union/State services and posts. This includes the power of relaxing qualifying marks in any examination and/or lowering the standards of evaluation, even for the reservation in the matter of promotion to any class or classes of services or posts in connection with the affairs of the Union and State. These provisions bind the State while enacting the Reservation Act.

16 Admittedly, National Commission for Scheduled Castes and Scheduled Tribes has been constituted in view of Articles 338 and 338A. All the concerned are working on every aspect of the castes to evaluate the progress of it's development. They annually report the recommendations in the interest of all. The Reservation Act and so also the promotion circulars cannot be in contravention of any of these reports or recommendations submitted by the commissions. Article 340 provides for appointment of commission to investigate the condition of socially and educationally backward classes within the territory of India and to make recommendations to improve their

condition, to provide the grants etc. Articles 341 and 342 specifically deal with Scheduled Castes and Scheduled Tribes in compliance of constitutional provisions. This includes the power of Parliament and/or the State, with the consultation of Governor, to include and to exclude from the specified list the particular caste/group/community, through the notification by the President, from time to time.

Maharashtra Scheduled List of SC & ST, OBC, SBC, DT AND NT

17 The lists of Scheduled Castes and Scheduled Tribes, Other Backward Classes, Special Backward Category, De-notified Tribes and Nomadic Tribes in Maharashtra, published and have been modified from time to time. Similar are the lists under the Constitution (Scheduled Castes) Order 1950 and the Constitution (Scheduled Tribes) Order 1950 (as amended from time to time). This includes even the Central List of Other Backward Classes referring to the Judgments of the Supreme Court relating to the reservation of 27% vacancies in civil posts and services, under the Government of India. The constitution of Expert Committee on “Creamy Layer” headed by Justice R.M.Prasad has prepared the common list covering the list of OBC for the purpose of reservation in State services, which includes apart from other 14

States, the State of Maharashtra as well. The Central list for the State has been amended and modified regularly covering the castes and communities belonged to even of OBC, apart from SC and ST so recorded above. Rarely, the castes and communities once added are deleted. There is a State list of Other Backward Classes published, modified and amended from time to time, The entries are also transferred to other list because of interpretation by the Courts. The crux is, the Central and the State Government, based upon the material available with them add and/or delete and/or bring in or out, the caste or community in the list for extending the various constitutional concession and the benefits. The process has been going on since long. It is ultimately the Central/State Government would decide, in view of enabling provision and power, to include the caste and community in the beneficiary list to provide further benefits in accordance with law. The State, therefore, required to consider the data, material collected by them to amend the list under the recognized mechanism. All the interested are entitled to claim benefits, concession in every province of the society. This definitely includes the reservation so declared in advance, before treating them in service, at the time of appointment/post and/or in promotion if so



required. The reservation process does not commence only at the time of appointment and/or granting concession to the class or categories and/or for promotion, but even prior to the same.

The State Historical reports and recommendations.

**A) THADE COMMITTEE REPORT 1961**

18 The Thade Committee constituted by the State in the year 1960. The report was given referring to the data of population of Vimukta Jati, Nomadic Tribes and Semi-Nomadic Tribes within the State. However, there was no specific recommendation, regarding these communities, made at that time, is the opponent's argument.

**B) B. D. DESHMUKH REPORT, 1964**

19 The report has dealt with the Government decision and statistical data so provided and recorded in recruitment of VJ NT community and its low percentage in reservation. The basis of backwardness is also recorded including the genesis and origin of reservation. Ultimately, the recommendations have been provided to grant reservation as VJ/NT need special consideration and, therefore, recorded that the reservation in promotion is also necessary for VJ/NT.

**C) EDATE COMMITTEE REPORT, 1999 :**

20 The recommendation so provided based upon the population of VJNT as per 1931 Census. It is recognised mode for assessing the percentage of population and percentage of reservation in proportion. After due survey, it is observed that there was inadequacy of representation. The percentage of population of VJ-A, NT-B, NT-C, NT-D are also provided for giving proper representation and the percentage of reservation.

21 The National Commission for Backward Classes Act, 1993 (for short, NCBC Act) was promulgated on 2 April 1993. The National Commission for Backward Classes has been constituted accordingly. The relevant definition of “backward classes” and “Lists” are reproduced as under:

“2(a) “backward classes” means such backward classes of citizens other than the Scheduled Castes and the Scheduled Tribes as may be specified by the Central Government in the lists;

2(c) “lists” means lists prepared by the Government of India from time to time for purposes of making provision for the reservation of appointments or posts in favour of backward classes of citizens which, in the opinion of that Government, are not adequately

represented in the services under the Government of India and any local or other authority within the territory of India or under the control of the Government of India.”

22 The function and power that the Commission is required to consider the representation/request for inclusion of any classes of citizen as backward class in the list. It also includes to consider the complaints of over-inclusion or under-inclusion of any backward classes. It is stated that the advice of the Commission shall normally be binding upon the Central Government. It is also provided to have a periodic revision of list after every succeeding period of ten years to add or delete the list of those who have seized to be backward classes.

**D) State Backward Class Commission Reports -**

23 As directed by the Supreme Court to constitute Backward Class Commission, the Standing Committee was appointed. Later on converted into State Backward Class Commission under the Chairmanship of Shri Justice Khatri. As decided, adopted the process for preparing the report. The criterion prepared by The Mandal Commission was also noted. The material and information so collected, after holding detailed inquiry by submitting even the separate Reports.

The detailed report/data, survey, material are also part of record. The Commission has dealt with about 147 representations of various communities. The proposals of 59 communities have been studied so also 95 representations were considered. Ultimately, recommendations have been made referring to inclusion and rejection. All the related issues have been considered accordingly.

24 The State has separate Backward Class Cell (General Administration Department) which has the data of inadequacy of recommendation of the backward class. It collects and updates annual data regarding representation of backward class in service.

The Reservation Act reflects the intention of the State Legislation.

25 Any Legislation reflects the intention of the Legislators – Parliamentarians. The Reservation Act, as enacted, in view of the judgments/directions/observations of the Supreme Court. An interpretation of any such statutes needs to be, by keeping in mind, the constitutional provisions and related laws and mainly including Articles 14, 15, 16, 330, 335, 341, 342 to 354 – and also 1950 Orders – and scheduled list and related State Scheduled List as amended. All these constitutional provisions are interlinked and inter-dependent to

decide the reservation policy in India.

Basic Provisions of the Reservation Act

26           The clauses of the Reservation Act read and referred by the learned counsel appearing for the parties :

Section 2. In this Act, unless the context otherwise requires,-

(a) "appointing authority" in relation to public services and posts means the authority empowered to make appointment to such services or posts;

(b) "De-notified Tribes (Vimukta Jatis)" means the Tribes declared as such by the Government from time to time;

(c) "establishment" means any office of the Government or of a local authority or statutory authority constituted under any Act of the State Legislature for the time being in force, or a University or a Company, a Corporation or a Co-operative Society in which share capital is held by the Government or any Government aided Institutions.

*Explanation.*-For the purposes of this clause the expression "Government aided institutions" shall also include institutions or industries which have been given either prior to coming into force of this Act or thereafter, aid in the form of Government land at concessional rates or any other monetary concessions by Government, or is recognised, licenced, supervised or controlled by Government;

(d) "Government" means the Government of Maharashtra;

(e) "Group 'A', 'B', 'C' or 'D' means the posts falling within the

Group 'A', 'B', 'C' or 'D', as the case may be, as classified by Government by issuing general or special orders issued in this behalf, from time to time;

(f) "Nomadic Tribes" means the Tribes wandering from place to place in search of their livelihood as declared by Government from time to time;

(g) "Other Backward Classes" means any socially and educationally backward classes of citizens as declared by the Government and includes Other Backward Classes declared by the Government of India in relation to the State of Maharashtra;

(h) "prescribed" means prescribed by rules framed by the Government under this Act;

(i) "public services and posts" means the services and posts in connection with the affairs of the State and includes services and posts in-

(i) a local authority;

(ii) a co-operative society established under the Maharashtra Co-operative Societies Act, 1960, in which Government is a shareholder;

(iii) a Board or a Corporation or a statutory body established by or under a Central or a State Act which is owned and controlled by the Government, or a Government Company as defined in section 617 of the Companies Act, 1956;

(iv) an educational institution owned and controlled by the Government, which receives grant-in-aid from the

*Government including a university established by or under a Maharashtra Act;*

*(v) any establishment; and*

*(vi) respect of which reservation was applicable by government orders on the date of commencement of this Act and which are not covered under sub-clauses (i) to (v);*

*(j) "recruitment year" means the English calendar year during which the recruitment is actually made;*

*(k) "reservation" means the reservation of post in the services for the members of Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and Other Backward Classes;*

*(l) "Scheduled Castes" and "Scheduled Tribes" shall have the meanings, respectively assigned to them in the clauses (24) and (25) of Article 366 of the Constitution of India;*

*(m) "Special Backward Category" means socially and educationally backward classes of citizens declared as a Special Backward Category by the Government."*

**Section 4.** (1) Unless otherwise provided by or under this Act, the posts reserved for the Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and Other Backward Classes shall not be filled in by the candidates not belonging to that caste, tribe, category or class for which the posts are reserved.

(2) Subject to other provisions of this Act, there shall be posts reserved for the persons belonging to the Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes,

Special Backward Category and Other Backward Classes, at the stage of direct recruitment in public services and posts specified under clause (j) of section 2, as provided below :-

<b>Description Caste/Tribe/Category/Class</b>	<b>of Percentage of vacancies or seats to be reserved</b>
(1) Scheduled Castes	13 per cent
(2) Scheduled Tribes	7 per cent
(3) De-notified Tribes (A)	3 per cent
(4) Nomadic Tribes (B)	2.5 per cent
(5) Nomadic Tribes (C )	3.5 per cent
(6) Nomadic Tribes (D)	2 per cent
(7) Special Backward Category	2 per cent
(8) Other Backward Classes	19 per cent
<b>Total:</b>	<b>52 per cent :</b>

Provided that, Government may, by an order in the Official Gazette, provide that the percentage of reservation for Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Categories and Other Backward Classes, in all posts, shall be on the basis of latest census record of population of the , -

(i) State, in the case of State cadre posts, and

(ii) concerned district, in the case of district cadre posts:

Provided further that, the principle of "Creamy Layer" shall be applicable to all categories mentioned above except Scheduled Castes and Scheduled Tribes.

Provided also that, if on the date of coming into force of this Act, if any additional reservation is in force for the Scheduled Tribes in Thane, Nashik, Dhule, Nandurbar, Raigad, Yavatmal, Chandrapur and Gadchiroli districts for direct recruitment in Groups C and D posts,



under any Government orders, such reservation shall continue to be in force till such orders are modified or revoked.

(3) The reservation specified for the categories mentioned at serial numbers (3) to (6) (both inclusive) in the table under sub-section (2) shall be inter transferable. If suitable candidates for the posts reserved for any of the said categories are not available in the same recruitment year, the posts shall be filled by appointing suitable candidates from any of the other said categories.

(4) In all posts at the divisional level or district level the percentage of reservation occurring in a recruitment year in such categories of Group-C and Group-D posts as may be notified by the Government in this behalf, shall be maintained at such divisional or district level only.

**Section 5 :** (1) The reservation in promotion shall be at all stages of promotions.

(2) On the date of coming into force of this Act, if any Government orders providing for reservation for any posts to be filled by promotion, are in force, the same shall continue to be in force unless modified or revoked, by Government.

**Section 6 :** (1) If in respect of any recruitment year, any vacancy reserved for any category of persons under sub-section (2) of section 4 remains unfilled, such vacancy shall be carried forward upto five years in case of direct recruitment and three years in case of promotion:

Provided that, on the date of commencement of this Act, if any Government order regarding filling up the posts, in case of non availability of Backward Class candidates are in force, such Government orders shall continue to be in force unless modified or revoked, by Government.

**Section 10 :** (1) The Government may, by order, provide for nomination of officers belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes in the selections, screening and departmental promotion committee for the purpose of selecting persons for appointment or promotions, as the case may be, to public

services and posts.

(2) The Government may, by order, grant such concession in respect of fees for any competitive examination or such other similar examinations or interviews, and relaxation in upper age limit as it may be considered necessary in favour of the categories of persons specified in sub-section (2) of section 4.

(3) The Government orders, in force on the date of the commencement of this Act, in respect of concessions and relaxation including concession in fees for any competitive examinations or such other similar examinations or interview and relaxation in the upper age limit shall continue to be applicable, unless modified or revoked, by Government.”

#### Impugned Promotion Circular

27 The relevant clauses of Government Notification for promotion dated 25 May 2004 (The Circular) are :-

“2 At present, Government, vide column No. 5 of the Reservation Act No. 8 published in the Govt. of Maharashtra Gazette, dated 29<sup>th</sup> January, 2004, made the following provisions:

(A) Section 5, sub section (1) :- The reservation in promotion shall be at all stages of promotions.

(B) According to Sub Section (2), on the date of coming into force of this Act, if any Government orders providing

for reservation for any posts to be filled by promotion are, are in force, the same shall continue to be in force unless modified or revoked, by Government.

3 In supersession of the orders dated 23<sup>rd</sup> May, 1974, 20<sup>th</sup> January 1975 and 23<sup>rd</sup> January 1991, the following revised orders are being issued in view of provision under Sub-Section (1) and (2) of Section 5 of the Act which has been brought into force newly.

Government Resolution for promotion:-

(A) As per the Sub Section (1) of Section 5 of the Maharashtra Act No. 8 (Reservation Act), the principle of reservation shall be applicable to those posts which are filled up by promotions. In view of this, principle of reservation in promotion shall be applicable in respect of all posts, including those posts also for which proportion of direct recruitment is more than 75%. The provisions under the Govt. Resolution dated 23.1.1991 stand cancelled.

(B) The reservation in promotions will be as follows:

(1) Scheduled Castes - 13%

(2)	Scheduled Tribes	-	07%
(3)	De-Notified Tribes (A)	-	3%
(4)	Nomadic Tribes (B)	-	2.5%
(5)	Nomadic Tribes (C)	-	3.5%
(6)	Nomadic Tribes (D)	-	2%
(7)	Special Backward Classes		2%

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Total: 33%

(C) The principle of reservation shall be applicable from 29/1/2004 onwards at all stages of promotions on posts for which there is provision of giving promotion in the Recruitment Rules and the principle of reservation was not applicable earlier.

(D) Those Backward Class of employees who have been promoted, prior to 29/1/2004, on the post above the first stage of class I posts shall be considered as having been promoted as per the seniority and merit.

(E) Posts to be filled up as per above provisions of the Act shall be filled up step by step in accordance with the

availability of vacant posts.

(F) The orders issued under G.R. No. BCC-1097/C.R. 63/97/16-B, dated 18.10.1997 shall be applicable for such cadres / posts to which principle of reservation in promotions is being made applicable newly. However, for calculating number of reserved posts, total number of sanctioned posts should not be taken into consideration. The number of vacant posts in that cadre which become available after 29/1/2004 should be taken into consideration to decide number of reserved posts as per the percentage of reservation prescribed for various backward class categories.

(G) The provisions of reservation of the Act will not be applicable in respect of the process of selection started prior to 29.1.2004 for giving promotions on posts above the first stage of class I posts and on such posts for which reservation in promotion was not previously applicable. However, for the process of selection for giving promotion to be started after 29/1/2004 the principle of reservation as per the provisions of the Act shall be applicable.”

### Historical background of the Promotion Circular

28           The Reservation Act came into force from 25 May 2004. The State Reservation Policy even before the Reservation Act, based upon the last Caste Census of 1931 and the natural growth of the population including the Population Census of 2001. There were various State Notifications/circulars published and implemented from time to time in this regard.

- 7 January 1961 : Resolution expressing sympathy for the predicament of the BSC and requiring returns to be filed on their representation in various departments. Pre 1974 : Reservations introduced at entry point in various services of the State. 23 May 1974 : Reservations in promotional posts made for (13% SC, 7% ST and 4% Denotified Tribes and Nomadic Tribes) to all posts. 28 January 1975 : Reservation in matters of promotion up to Class I (level 1 : entry point) posts recruited on the basis of positive merit. 31 July 1976 : No reservations in promotional posts where direct recruit reservations 66.6% or more. 23 January 1991 : No reservations in promotional posts

where direct recruitment reservation is 75% or more. 16 November 1992 : Mandal judgment of Supreme Court (Indira Sawhney (1992) Supp. 3 SCC 217 at prs. 827-8 p. 745-7 that reservations in matters of promotion are contrary to equality. 17 June 1995 : Constitution (77<sup>th</sup> Amendment) Act permitting promotions reservation in or SC and ST are inadequately represented. No change was made in favour of the OBCs. 18 October 1997: Resolution implementing R.K. Sabharwal's case (1997) 2 SCC 945 to ensure that percentages do not cross over the prescribed limits. 13 December 1999: Indira Sawhney II (2000) 1 SCC 168 at pr. 65 that equality is part of the basic structure of the Constitution. Note also the decision in M. G. Badappanavar (2001) 2 SCC 666 at pr. 13 reiterating that equality is part of the basic structure. 9 June 2000 : Constitution (81<sup>st</sup> Amendment) Act 2000 permitting carryover of vacancies to subsequent years. 2001 : Constitution (85<sup>th</sup> Amendment) Act 2001 seeking to grant consequential seniority for reservation promotees. 22 January 2004 : Maharashtra State Public Service (Reservation for Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic

Tribes, Special Backward Category and Other Backward Classes Act 2004 (Act of 2004). 25 May 2004 : Resolution purporting to implement the Act of 2004.

The other Promotion Rules

29           Some earlier service rules relating to seniority and promotion are :-

- 28<sup>th</sup> Jan. 1975 : Promotions upto Class I (Level I) on seniority subject to fitness and in Class I on basis of “positive merit”. Where seniority and fitness rule was applied, sympathetic consideration to be given to BCs.
- 7 April 1983 : Rules under Article 309 for Engineering cadres fixing cadre wise seniority.
- 16 September 1990 : Ajit Singh (II) (1999) 7 SCC 209 stating that to be consistent with equality, seniority would be cadre based to recognize entry point seniority.
- 25 May 2004 : Clause (D) of the Notification of 25 May 2004 suggests that all persons promoted up to 29 January 2004 have presumed merit.
- 4 February 2005 : Separate Notifications for (i) Chief Engineers (ii) Secretary, Executive Director/ Director General that appointment shall be strictly on the basis of “merit and strict selection.”

All these circulars and the rules have been acted upon by all at least till the State statutes.

Respondent's (Claimant) short submissions

30           Respondent Nos.1 to 4's submissions are :

- (i)   An examination of the rules in respect of reservations, seniority



and promotions show a haphazard reversal of earlier policies by the Promotion Circular to a manner and extent inconsistent with the requirements of the Mandal decision: Indira Sawhney (supra) and M. Nagaraj (supra).

(ii) The Reservation Act fails to disaggregate permissible reservations in promotions (for SC and ST) under Article 16 (4A) and (B) and impermissible reservations for others (OBC and other beneficiaries). This runs through the entire Act in ways that defy severability.

(iii) In any event, the Reservation Act is also invalid on other grounds on the basis of the definition of the institutions and posts the fixing of percentage and quota without examining the need for 'adequate representation', the over-barred carry over provisions, the inter-transferability of beneficiaries and ambiguous provisions on the creamy layer and other provisions.

(iv) The Promotion Circular is arbitrary, shows non-application of mind and is inconsistent with the Mandal Judgment (1992) and Article 16 (4A) and (4B) even if the constitutional amendments enacting article 16(4A) and 16(4B) are treated as valid.

(v) The Apex Court has in M. Nagaraj, (supra); Suraj Bhan Meena

v. State of Rajasthan; Uttar Pradesh Power Corporation Ltd v. Rajesh Kumar; S. Panneer Selvam v. Government of Tamil Nadu (2015) 9 SCALE 350 reiterate that the impugned Constitutional Amendments are valid because they are enabling. But any legislation or action under them must, satisfy the following requirements: compelling necessity, 50% reservation limit, inadequacy of representation, creamy layer restriction and lack of excessiveness on the basis of relevant quantifiable data.

(vi) No relevant quantified data exists to support the Reservation Act and the Promotion Circular.

31 The Respondents' gist of challenge to the respective Sections of the Reservation Act and the Promotion Circular are :

- i) Preamble to the Reservation Act does not provide for special justification for reservation of Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and Other Backward Classes.
- ii) Section 5 of the Reservation Act and the Promotion Circular to the extent it is contrary to Article 16 (4A), has been correctly struck down by the MAT.

- iii) Sections 4 and 5 of the Reservation Act are not compliant with the requirements provided in Nagaraj (supra) and in breach of the 50% rule as laid down in Indra Sawhney, R.K. Sabharwal and M. Nagaraj.
- iv) The State failed to exclude the “creamy layer” both at the stage of direct recruitment and promotions for Scheduled Castes and Scheduled Tribes and therefore reservation for Scheduled Caste and Scheduled Tribes, both at the stage of direct recruitment and promotions are required to be quashed and set aside on this ground alone.
- v) The Reservation Act also fails to satisfy the criterion of Nagaraj as regards inadequacy of representation on basis of quantifiable data and overall administrative efficiency has been correctly struck down by the MAT.
- vi) The Reservation Act is also invalid on the ground that the definition of “institutions and posts” is too wide. The over-broad carry over provisions, the inter-transferability of beneficiaries and ambiguous provisions on the creamy layer and other provisions makes the provisions of the statute unworkable.
- vii) The unworkable provisions of the Reservation Act are not

severable and therefore the entire Reservation Act was rightly struck down by the MAT.

viii) This Court has considered the law laid down by the Supreme Court as well as the Division Bench of this High Court and held that MAT had the jurisdiction to decide the constitutional challenge to the Reservation Act and that the Respondents – as Original Petitioners had the locus to maintain the said challenge.

(ix) The judicial review of impugned order passed by a statutory Tribunal under Article 226 of the Constitution of India is limited;

(x) The Tribunal has power to decide the constitutional validity of the Act and/or the Circular. The State's preliminary objection, is unsustainable about the Locus standi of original Petitioner.

32      Citations referred in the impugned judgment of MAT

M. Nagraj and ors (supra), RK Sabharwal (supra), Ajit Singh Januja & ors v. State of Punjab<sup>2</sup>, Kalyan Darhah's, Gopal Krishnaji Ketkar v.

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2 (1996) 7 SCC 209

Mohammed Haji Latif & ors<sup>3</sup>, General Manager, Southern Railway v. Rangachari Gurbus Das<sup>4</sup>, Indira Sawhney (supra), Union of India (supra), State of Kerala (supra), Akhil Bhartiya Sushikshit Karamchhari Sangh (Railway) (supra), Barium Chemicals Ltd vs. Company Law Board<sup>5</sup>, Uttar Pradesh State Power Corporation vs. Rajesh Kumar<sup>6</sup>, Reservation M. R. Balaji (supra), Shri Sanjeet Shukla v. State of Maharashtra [ Petition(L) No.2053 of 2014); PH Advani vs. Harpal Singh<sup>7</sup>, Keshavananda Bharti Case<sup>8</sup>, Virpal Singh Chauhan, (supra), Minerva Mills Ltd (supra), Suraj Bhan Meena (supra) and also relied upon judgment of Madhya Pradesh High Court in Writ Petition No.1942/2011-R. B. Rai v. State of Madhya Pradesh along with connected matters dated 30.04.2016.

33 The following Judgments have been read/referred and distinguished in addition.

a) Surajbhan Meena Vs. State of Rajasthan (supra)

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3 AIR 1962 SC 1416

4 AIR 1962 SC 36

5 1966 Supp. SCR 311

6 (2012) 7 SCC 1

7 AIR 1975 Bom 120

8 (1973) 4 SCC 225

- b) U.P. Power Corporation Vs. Rajesh Kumar & Ors.
- c) Salauddin Ahmed Vs. Samata Andolan
- d) S.V. Joshi Vs. State of Karnataka
- e) Himachal Pradesh Schedule Tribes Employees Federation Vs. Himachal Pradesh S.V.K.K. & Ors.
- f) S. Panneer Selvam Vs. The General Manager
- g) Sushil Kumar Singh & Ors. Vs. State of Bihar & Ors. (CAJ Case No. 19114 of 2012) (HC Patna)
- h) Jayanta Chakraborty & Ors. Vs. State of Tripura & Ors. (WP(C) 189 of 2011)-HC (Tripura)
- i) Sanjit Shukla Vs. State of Maharashtra, 2015(2) BCR 267-

Basic principles have been relied by all.

34 For their respective submissions, the learned senior counsel appearing for the parties have read and referred the Supreme Court judgments in the matter of such reservation and all related specific doctrines/principles from their respective points of views:

- (i) Reservation Quota limits (e.g. 50% )(Quantifiable data) "Quantitative limits" M. R. Balaji<sup>9</sup> M. Nagraj (supra)
- (ii) Treating reservation as an instance of equality and not an exception to it. N. M. Thomas,<sup>10</sup>

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<sup>9</sup> (1963) Supp. 1 SCR 439

<sup>10</sup> (1976) 2 SCC 310

- (iii) The 'carry over' principle. Devadassan,<sup>11</sup> Indra Sawhney<sup>12</sup>
- (iv) "Lowering standards", N. M. Thomas,<sup>13</sup> Akhil Bharatiya,<sup>14</sup> Vinod Kumar<sup>15</sup>
- (v) "Non-division of SC/ST on basis of further backwardness" E. V. Chinnaiah<sup>16</sup>
- (vi) "Denial of reservation in promotions", Indra Sawhney,
- (vii) "Stopping roster", R. K. Sabharwal<sup>17</sup>
- (viii) "Accelerated seniority" and "catch-up rule", Virpal Singh Chauhan,<sup>18</sup> Ajit Singh (I),<sup>19</sup> M. Nagaraj (supra)
- (ix) "Creamy layer", Indra Sawhney, Indra Sawhney (II),<sup>20</sup> Ashok Thakur,<sup>21</sup> M. Nagaraj (supra)
- (x) "Aspects of Efficiency", (Article 335) Indra Sawhney(supra) Vinod Kumar<sup>22</sup>

35 All these Supreme Court judgments on law, need no discussion. It binds all. We have to apply the law on facts and

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11 (1964) 4SCR 680

12 (1992) Supp. (3) SCC 217

13 (1976) 2 SCC 310

14 (1981) 1 SCC 246

15 (1996) 6 SCC 580

16 (2005) 1 SCC 394

17 (1995) 6 SCC 684 : (1995) 2 SCC 745

18 (1995) 6 SCC 684

19 (1996) 2 SCC 715

20 (2000) (1) SCC 168

21 (2008) 6 SCC 1

22 (1996) 6 SCC 580

circumstances of the case in hand. Most of above principles have been taken note of while deciding the points so discussed.

36 The counsel for the State and the other Petitioners in support of Reservation Act and the Promotion Circulars have referred :

- a) Census Data on caste as available in 1931, but its natural grown data
- b) The B. D. Deshmukh report is 1964,
- c) The Thade Committee 1961,
- d) The Edate Committee 1999 and
- e) Population Census reports and the judgments
- f) Various data/material/stated to be quantifiable data.

37 The State submissions & the cited judgments

- (1) General Manager, S. Rly. v. Rangachari, (1962) 2 SCR 586, (paras 23, 26).
- (2) State of Kerala v. N.M. Thomas, (1976) 2 SCC 310 (Paras 21, 24, 29, 75, 184, 186, 191 ).
- (3) Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India, (1981) 1 SCC 246 (Paras 34, 36 )
- (4) Indra Sawhney (supra) (paras 796, 797, 798, 809, 810,



860) - verify

- (5) M. Nagaraj (supra)
- (6) Commissioner of Commercial Taxes, A.P. Hyderabad vs. G. Sethumadhava Rao, 1996 (7) SCC 512 (para 10)
- (7) Union of India v. Rakesh Kumar, (2010) 4 SCC 50 (paras 41, 42, 43)
- (8) K. Krishna Murthy v. Union of India, (2010) 7 SCC 202 (paras 65, 66, 67)
- (9) Suraj Bhan Meena and ors v. State of Rajasthan, 2011 (1) SCC 467. (paras 65, 66 )
- (10) Uttar Pradesh Power Corporation Limited v. Rajesh Kumar, 2012 (7) SCC 1 (para 36)
- (11) S.V. Joshi v. State of Karnataka, (2012) 7 SCC 41 (paras 9 to 13)

Set of circumstances of the State

38

The Reservation Act came into force on 29 January 2004.

It was implemented by Government Resolution dated 25 May 2004.

By writ petition No. 8452 of 2004 filed on 11 October 2004, in the Bombay High Court, the constitutional validity of it and the legality of the Promotional was challenged.

39           On behalf of the State, Mr. Dinkar Dhondu Tiwrekar, Under Secretary, GAD, filed an affidavit and contended that, (i) There is a presumption of validity in favour of the Act, unless proven otherwise; (ii) the challenge to the Constitutional validity of Amendment to Article 16(4A) was pending before the Supreme Court and therefore, the Supreme Court was seized off the matter; (iii) by way of 77 constitutional Amendment 16(4A) was added to Article 16(4) providing for reservation in promotion and therefore the law laid down in R.K. Sabharwal's case was not applicable; (iv) Creamy Layer concept was not applicable to SC and ST; (v) 85<sup>th</sup> Amendment of the Constitution to Article 335 empowers the State to make provision in favour of members of SC and ST; (vi) the High Court passed an order directing the parties to maintain status quo. Same was the position of other Petitions.

40           On 30 March 2005, a detailed affidavit-in-reply was filed by Mr. R.G. Pawar, Deputy Secretary, GAD pointing out the law laid down by the Supreme Court in Indra Sawhney's case. Development after Indra Sawhney's case and subsequent amendment to Article

16(4A) providing for Reservation in promotion. Brief history as to why VJ/NT are treated as Backward Class. Detailed discussions have been made on the backwardness of some classes who have been termed as depressed classes and also regarding some nomadic tribes who indulged in criminal activities and were called criminal tribes. The findings of Thade Committee Report, B.D. Deshmukh Committee Report were discussed and findings therein have been given. Government Resolution gave classification of backward classes. The state Resolution dated 9 April 1965 gave the percentages of reservation against each caste as classified. GAD Resolution dated 23 May 1974 provided for reservation for promotions till first stage of class. GAD resolution of 4 August 1992 included Dhangar Community along with its sub caste in the list of VJ/NT. Order in Writ Petition No. 1142 of 1986 as well as order in Appeal No. 924 of 1986 dated 24 July 1992 were pointed out. Order dated 24 July 1992, held that until such time as the representation were made and decided Banjara and Vanjari community should be treated as synonyms of each other and confidential circular 5 March 1986 not to be acted upon. SLP against order dated 24 July 1994 dismissed by the Supreme Court. Order dated 9 June 1992 passed by MAT in O.A. No. 77/91 in Writ

Petition No. 855 of 1990 directed the State Government to appoint a Committee to decide whether Banjara and Vanjari are synonyms. Committee Appointed under chairmanship of Dr. D.G. Wadhwa on 31 July 1992. On 9 August 1993, Wadhwa Committee submitted its report that Banjara and Vanjari were not synonyms of the same group. Banjari Community came to be included in the list of VJ/NT. Constitution of Khatri Committee and its report have been discussed. Action taken by the Government on the basis of the Khatri Committee modifying the list of VJ/NT and OBC and also gave details of the extent of Backlog of each category. Detailed discussion on why VJ/NT have been provided with reservation in promotion and why creamy layer has been excluded.

41 On 20 April 2005, High Court granted Rule in Writ Petition and refused to modify the interim order of stay dated 22 February 2005 of the Promotion Circular. On 5 August 2005, the Supreme Court refused to interfere with the said order of stay.

42 On 17 August 2006, the High Court allowed Civil Application No. 1783 of 2006 filed on 6 July 2006 in Writ Petition No.

8452 of 2004 pointing out the difficulties being faced in the matter of promotions in view of the order dated 22 February 2005 as huge number of posts were vacant. The High Court by its order dated 17 August 2006, permitted the State Government to grant promotion to SC/ST only subject to outcome of the Petition. The State by Resolution dated 24 August 2006, implemented the provisions of GR dated 25 May 2004 as per order dated 17 August 2006. In the month of September 2006, Civil Application No. 2283 of 2006 was filed by the Respondent for modification of interim order dated 17 August 2006 and to stay to Government Resolution dated 24 August 2006. On 19 September 2006, the High Court passed an order whereby held that promotion given after 18 August 2006 shall be subject to final decision in Civil Application No. 2283 of 2006. On 25 September 2006, SLP No. 16485 of 2006 was filed by the Respondent in Supreme Court to challenge orders dated 17 August 2006 and 19 September 2006 passed by the High Court. On 27 September 2006, Supreme Court stayed the above orders passed by Bombay High Court.

43           An additional Affidavit-in-reply was filed challenging the maintainability of Civil Application No. 2283/2006 on various

grounds including the ground that by the Civil Application the Respondent (original Petitioner No.1) for seeking a Review of order dated 17 August 2006 passed by the High Court in Civil Application No. 1783 of 2006.

44 On 19 October 2006, the Constitutional Bench of the Supreme Court decided the matter of M. Nagaraj Vs. Union of India. (*Supra*). On 10 November 2006, the State filed an affidavit in SLP No.16485 of 2006. On 6 November 2006, the Supreme Court by order directed the Bombay High Court to consider Civil Application Nos. 1783 of 2006 and 2283 of 2006 de novo in the light of M. Nagaraj case. On 15 December 2006, the State filed Civil Application No. 3130 of 2006 in Writ Petition No. 8452 of 2004 in this Court and prayed to permit to fill in the promotional posts. On 26 December 2006, Respondent (Original Petitioner) filed Civil Application No. 134 of 2007 in Writ Petition No. 8452 of 2004 and prayed to stay the operation of the Promotion Circular and the policy of reservation in promotions. On 9 March 2007, this Court considered Civil Application Nos. 3130 of 2006, 1783 of 2006, 2283 of 2006 and by dismissing Civil Application No. 134 of 2006 passed the order

allowing the State to fill promotional posts to the extent of 67% from open category, 13% from SC, 7% from ST and remaining 13% from VJNT/SBC to remain vacant till final disposal of Writ Petition No. 8452 of 2004. On 13 March 2007, the Respondent (Original Petitioner) has challenged the order of this Court in the Supreme Court by filing SLP No. 4984 of 2007. On 9 April 2007, the State has filed an affidavit in the SLP. On 4 May 2007, the State filed Review Application (Stamp) No. 11463 of 2007 in Writ Petition No. 8452 of 2004 to vacate above order dated 9 March 2007. On 13 July 2007, this Court rejected the Review Petition. On 16 July 2007, the State pursuant to order dated 9 March 2007 passed by this Court gave promotion excluding persons belonging to VJNT/SBC. On 5 September 2007, order dated 9 March 2007 of this Court was challenged by the State in the Supreme Court vide SLP No. 18534-18537 of 2007. On 28 March 2008, the Supreme Court modified order dated 9 March 2007 and permitted the State to fill 13% posts of VJNT and SBC subject to final decision in Writ Petition.

45            On 27 December 2010, an additional Affidavit was filed by S.N. Rankhambe, Deputy Secretary, GAD in reply to the amendment

carried out by the Respondent (Original Petition ) in Writ Petition No. 8452 of 2004. The main contention raised in the said affidavit was that conjoint reading of Articles 14, 15(4), 46 of the Constitution of India gives ample power to the State to take steps and measures for the advancement of socially and economically weaker sections of the Society. Reliance was placed on Thade Committee Report, Deshmukh Committee Report, Khatri Committee Report, Indra Sawhney decision. It was pointed out that the decision to provide for Reservation was taken in the basis of data collected from various departments of the State and reading backlog pertaining to different categories of backward classes. It was pointed out that save and except making allegations the Respondent (Original Petitioner) has not been able to show any cogent evidence that there was no satisfaction on the part of the State in respect of Backwardness of the categories covered, inadequacy of the representation, maintenance of the administrative efficiency and concept of creamy layer. On 19 July 2010, the Supreme Court disposed off the SLP No. 4984 of 2007 in terms of its order dated 28 March 2008. The State had made the promotions accordingly.



46 On 17 February 2011, an additional Affidavit-in-reply was filed by S.N. Rankhambe, Deputy Secretary, GAD in Writ Petition No. 8452 of 2004. It was pointed out that history of reservation dates back to early 1880s till date and that the concept of Reservation was not new. Reliance was placed on Justice Khatri Committee Report in the light of Indra Sawhney case. Reliance was placed on Deshmukh Committee Report, pursuant to which policy decision was taken to provide reservation in promotion up to class I category. It was pointed out that an analysis of data from census of India from the year 1951 to 2001 regarding literacy and dropouts for SC and ST, it was pointed that there was a wide group in literacy between SC and ST as compared to the general category.

47 On 21 February 2012, Respondent (Original Petitioner) filed Additional Affidavit-in-reply in Writ Petition No. 8452 of 2004. It was contended that the State has violated provisions of Article 16(4A) as the mandatory three tests have not been complied with. The mandatory three tests i.e. backwardness, inadequacy of representation and reservation in promotion shall not disturb the efficiency of administration. That section 5 of the impugned Act is contrary to the

mandate laid down by the Supreme Court in the case of M. Nagaraj and other subsequent judgments. That according to the directions given in Indra Sawhney case the reservation in promotion was 33% upto first stage of Class I in service group A. Accordingly to the ratio laid down in the Judgment the reservation was to be only for a period of five years for SC and ST. However, the impugned Reservation Act was enacted providing for reservation in promotion in all stages thereby violating the mandatory requirements of Article 16 and 16(4A).

The relevant circumstances of Other Backward Classes (OBC)

48 There are various Circulars which are placed on record, whereby the community belongs to OBC have been provided with the various concession and reservation. Government Resolution dated 23 May 1974 whereby the reservation to all classes in promotion upto Class I was challenged [ 1988 (Supp.) Bom. C.R. 923 (Full Bench) – Gopalirishna Ramchandra Chavan & ors v. State of Maharashtra, but was dismissed. The Apex Court , by order dated 6.1.1998 [ 1998 (9) SCC 48 after Indira Sawhney's judgment (supra) dismissed the Appeal thereby maintained the G.R. By observing that if implemented the policy of reservation the quota is exceeded, it would be open to the

Petitioner to approach the Court. However, by Eighty-First Constitutional amendment, Article 16(4)(B) with effect from 9.6.2000 by which unfilled vacancies were considered as a separate class of vacancies, to be filled and not to consider together with the vacancies of which succeeding year for determining the ceiling of 50% as observed.

49 Certain historical background and the related proceedings which we have noted, and as submitted by the learned senior counsel appearing for the Petitioner, for OBC/VJ/NT are reproduced:

OBC Historical background

50 The demand for reservation of government jobs was made as early as 1891 with an agitation in the princely State of Travancore against the recruitment of non-natives into public service overlooking qualified native people. In 1901, Reservations were introduced in Maharashtra in the Princely State of Kolhapur by Chhatrapati Shahu Maharaj. Reservations in the princely states of Baroda and Mysore were already in force. In 1908, reservations were introduced in favour of a number of castes and communities that had little share in the administration by the British. A delegation of Muslim nawabs,

landlords, and prominent persons led by Agha Khan, leader of the Ismaili Sect, presented a memorandum demanding a share in the administration in proportion to their population. The viceroy gave it sympathetic consideration and provisions were made in the government of India Acts of 1909 and 1919 granting the Muslims due share and other facilities.

51 On 30/11/1948, The present Art 16(4) was discussed in the constituent assembly. Members like Shri. M. Ananthasayanam Ayyangar, Shri. P. Kakkan have stated that the protection of reservations for backward classes is needed even at the stage of promotions as well and the members intended that Art 16 (4) shall include reservations in promotions as well. On 26/01/1950, The Constitution of India came in force. On 1/5/1960, State of Maharashtra was formed. Prior to 1961, Nomadic Tribes i.e. wandering tribes were included in depressed classes. The Nomadic tribes identified by different names in different part of India are included in schedule caste and scheduled tribes. On 21/11/1961, As per the Thade Report the Govt under Government Resolution, Education and Social Welfare Department No. CBC – 1361/4, dated

21<sup>st</sup> November 1961 declared the communities indicated in schedule to the resolution as belonging to the Vimukta Jatis and Nomadic tribes in the state of Maharashtra. On 11/01/1964, B G Deshmukh committee submitted its report to the state government and proposed that the backward classes should be grouped into Schedules Castes, Scheduled Tribes, Denotified & Nomadic Tribes and Other Backward Classes. He stated that the DTNT are similarly situated with SC and ST and are most backward. On 09/04/1965, based on the recommendations of Shri B. D. Deshmukh Committee percentage of reservation for VJ/NT was fixed at 4%. On 23/05/1974, under GAD resolution No. BCC – 1072-J reservations for promotions were introduced for VJ/NT as they were similarly situated with SC & ST and did not have adequate representation in the State Services. The Nomadic or wandering Shepherd Class i.e. Dhangar Community came to be included in the list of VJ/NT under Govt in Social Welfare Dept Resolution No. CBC – 1089/ (203)/MVK5 dated 25<sup>th</sup> May 1990. On 4/8/1992, the percentage of VJNT was increased to 6% for appointments i.e. including recruitment and promotions. On 16/11/1992, the Constitution Bench of the Hon'ble Supreme Court In Indira Sawhney Vs. Union Of India held that Art 16(4) does not

include reservations in promotions. However, the bench held that the state might provide reservation by direct recruitment at all stages to give adequate representation at all stages. On 23/3/1994, Vanjara Community included in the list of VJNT. VJNT increased to 11%. On 19/5/1995, The State Backward Class Commission (Khatri Commission) was formed. On 17/06/1995, Parliament by 77<sup>th</sup> Constitutional amendment inserted Art 16(4) (A) permitting reservation in promotions to the Schedule Castes and Schedule Tribes. The object of the amendment was to overcome the Judgment in Indira Sawhney Case which held that reservation of appointments or posts under Art 16(4) of the Constitution is confined to initial appointment and cannot extend to reservation in the matter of promotion. It aimed to protect the interests of Scheduled Castes and Scheduled Tribes as their representation in services in the States have not reached the required level. Later it was further amended to include consequential seniority by 85<sup>th</sup> amendment. On 01/03/1996, in the case of *Ajit Singh Januja* held that the SC and though backward class candidates entitled to reservation in promotion – but open category senior candidates, though promoted later than reserved category candidate, become senior to earlier promoted backward class candidate, for

further promotion. On 12/11/1998, as per the recommendations of Mutatkar Commission and Khatri Commission list of VJNT and OBC's was modified. In 1999, Dr. Edate committee on the study of VJNT submitted its report after making a detailed and in depth study of every aspect and also taking into consideration the research made by Dr. Babasaheb Ambedkar Research institute Pune. The final list of VJNT was published by the Government of Maharashtra in 1999. On 9/6/2000, the Constitution 81<sup>st</sup> Amendment Act, 2000 inserted Art 16(4)(B) to create a distinct group of Backlog vacancies to exclude them from the ceiling limit of 50% reservations. The amendment gave legislative assent to the Judgment of *R. K. Sabharwal*.. In 2000, The Constitution 82<sup>nd</sup> Amendment Act, 2000 inserted a proviso at the end of Art 335 of the Constitution for relaxing qualifying marks and standards of evaluation in matters of reservations in promotions. This was to surmount the Judgment of *S. Vinod Kumar* (1996 (6) SCC 580). In 2001, Constitution 85<sup>th</sup> amendment act, 2001 [with retrospective effect from 17.6.1995] was issued amending Art. 16(4) (A) granting a consequential seniority to reserved category employees in their accelerated promoted posts – roster point promotes to get accelerated seniority. This amendment negated the effect of *Virpal*

Singh Chauhans Case (1995 AIR SCW 4309) and Ajit Singh Januja (I) Case (1996 AIR SCW 1196). On 31/03/2002, The National Commission to review the working of the Constitution submitted its report. The report states that the continued plight of the Denotified tribes, semi-nomadic and nomadic tribes who are distributed in the list of Scheduled Castes, Scheduled Tribes and Backward class is an eloquent illustration of the failure of the machinery of planning, financial resources allocating budgeting and administration in the country to seriously follow the mandate of Art. 46. The report further states that Art 16(4) and 16(4)(A) respectively permit reservation of appointments or posts and in matters of promotions in favour of backward classes not adequately represented in the services under the State. The report further states that the adequate representation of backward classes is, however, still a far cry and special efforts need to be made for effectively enforcing reservation of backward classes to achieve their adequate representation. On 12/10/2002, Writ Petition Nos. 319/2002, 255/2002 and 234/2002 under Art 32 were filed in the Supreme Court challenging the Constitutional validity of the said amendment Act of 2001. The Supreme court did not grant stay to the Amendment Act.



The specific case of OBC

52           On 11/10/2004, The Constitutional Validity of The Reservation Act and the Promotion Circular are challenged in WP no 8542 of 2004 and prayed also that in the alternative it may be made applicable only to SC & ST subject to compliance with guidelines laid down in M. Nagaraj Case. On 7/2/2005, the Division Bench of the Bombay High Court directed the parties to maintain status quo. On 20/2/2005, Respondent no 7 filed reply stating that the corporation is not at all concerned as they don't recruit/promote and the government department alone is concerned with the same. On 21/2/2005, Respondent no 8 filed reply stating that it is a matter of public knowledge as to what all posts are super specialized posts. That the corporation has no role to play in regulating the service conditions of the employees. The state replied as to how and why the VJNT are treated as Backward Classes. That a committee was set up in 1928 to inquire into the educational, economic and social conditions of the depressed classes and the term depressed classes included the Untouchables, Tribes, Criminal Tribes and wandering and other backward classes. The Criminal Tribes Act of 1924 identified large sections of the Nomadic Tribes as criminals. Although the act was

repealed the stigma attached to these groups still continues and are looked at with suspicion by the administration and subject to harassment at the hand of the police and the State machinery. That Thade Commission was appointed for unification of the lists of Vimukta Jaties and Nomadic Tribes and Semi Nomadic Tribes of the entire state. Shri. Thade after an intensive survey throughout the state and studying their living conditions, health needs etc and on the basis of survey recommended for adopting uniform list. His report was accepted and on 21.11.1961 the State declared the Schedule of VJNT. Later B. D. Deshmukh committee was appointed for the reservation of backward classes in the services. The committee after discussions with various departments and officers and after obtaining statistical data of the actual position from 1950 submitted its report on 11/1/1964 has recommended that the percentage of reservation should be linked to population statistics and the backward classes grouped into SC, ST, VJNT and OBC.

53           The reservation in promotions was provided from 1974 by GR dated 23/5/1974. In 1990, Dhangar and Vanjari communities were added to the list of VJNT. On 7/12/1994 certain communities

such as Govari, Mana, Koshti, Koli and Munnarwar were declared as Special Backward Class. The reservation of SBC is challenged in WP (OS) 2027 of 1997 (Anil R. Joshi Vs. State of Maharashtra) and is still pending before the High Court. As per the Judgment of Supreme Court in Indira Sawhney a committee of experts was converted into the State Backward Class Commission on 19.05.1995 under the Chairmanship of Shri. S. N. Khatri, retired judge of the Bombay High Court. The committee after considering various claims and the judgment applied its mind to the situation prevailing and formulated a practical test to determine backwardness of a class. The surveyors were trained .The committee carried exhaustive enquiry. The recommendations were placed before the Cabinet on 12/11/1998 and the lists of VJNT and OBCs was modified on the basis of these recommendations. That on the basis of these recommendations, the state has noted that the classes recommended by the committee are not adequately represented on the basis of a comparative statement prepared about the vacancies in direct recruitments as well as promotions of each category. Thus the satisfaction of the state was established.

54 On the basis of this data not to provide the benefits of the Act to VJNT and SBC would be harsh and violative of Art. 14. That given the extent of backwardness of VJNT groups and the Social exclusion that they have historically faced their situation is similar to that of the erstwhile untouchables.

55 On 28/3/2008, SLP (C) No 18534-18537/2007, SLP (C)No. 18538/2007, SLP (C)No. 18539-42/2007 were heard. The Supreme Court was pleased modify the impugned order dated 9/3/2007 to the extent that the state government may also fill the posts in respect of the 13% from VJNT & SBC candidates subject to the final decision of the pending writ petition before the High Court. On 27/12/2010, The State filed additional reply stating that Art 14 is a generic Article. Art 15 and 16 are some facets of the said Art. That 2% marginal increase in the maximum percent does not affect efficiency of administration and such marginal excess is permitted in terms by the judgment in Indira Sawhney's case. That when the state is satisfied that certain tribes in the state, though not listed as STs in the Presidential order are comparable in all respects to the listed Scheduled Tribes of the State and in the adjoining States, the State

cannot forsake its Constitutional duty to promote the economic interest and advancement of the weaker sections mandated by Art 46. It is now well settled that the fundamental right have to be interpreted in the light of the Directive Principles of State Policy. That Art 14 permits the State to make classification even beyond the scope of the classification visualized in Art 15 and Art 16. The law declared in State of Kerala V N M Thomas (1976) 2 SCC 310 (7 Judges) and approved by a larger bench of 9 Judges in Indira Sawhney makes this position very clear. That Castes and Tribes listed in the Presidential order and unlisted castes and tribes which suffer from the same degree of social, economic and educational backwardness cannot be treated differently only on the irrational ground that they were not listed in the Presidential order. Such technical view would defeat the object of the Constitution. That after analysis of available data and reports of various committees and after subjectively satisfying that there is inadequacy of representation of SC, ST, VJNT and SBC classes it is just legal and necessary to provide the reservation in Promotion at all stages. That if there would be no reservation there would be almost no representation of backward classes. That it is one of the ways of achieving economic advancement. That the opinion is

formed on the basis of data. That the Supreme Court has permitted to fill the 13% seats reserved for VJNT in promotions. That the Supreme Court has upheld the Constitutional amendments giving reservation in Promotions. That in light of M. Nagaraj Judgment State had already filed detailed reply dated 30.3.2005 pointing out that the backwardness has been identified. That various committees have identified backward classes and recommended sub classification. That the State has Special Backward Class Cell in General Administration Department which looks after the collection of Statistical data that this cell had collected the data from all departments and then the State Government has reached conclusion and decided to provide reservation at all stages of promotion. That the State has been treating VJNTs on Par with Sc and ST in State. That the State Government is of the opinion that SC, ST and VJNT & SBC continue to be backward and they are inadequately represented and it was necessary to reserve post at all stages of Reservation. The State has annexed the Chart Showing inadequacy of representation.

56            On 1/2/2011, The State filed their reply contending that the demand of reservations was made way back in the year 1891 and

provision of reservations were made in Maharashtra by Shahu Maharaj in 1901. That in 1942 communities was classified into advanced, intermediate and backward classes. That during the debates of the constituent assembly some members have stated that protection of reservations for backward classes is needed even at the stage of promotions. That Nomadic Tribes were included in depressed classes. That the VJNT communities are similar to that of Scheduled Tribes and they are included in the list of Scheduled Tribes in surrounding states. That some communities like Dhangar claim to be scheduled tribes but the State has deprived them of the status of Scheduled Tribes. That the classification and Sub-Classification of VJNT communities is done as per the recommendations of various committee like Thade Committee, B. G. Deshmukh Committee, Wadhwa Committee, Khatri Committee, Edate Committee after ascertaining the backwardness, occupational disadvantages and stigma of criminality. That as per the report of National Commission to review the working of Constitution the continued plight of these communities is an eloquent illustration of failure of state machinery and that special efforts need to be made for effectively enforcing reservation to achieve adequate representation. That there is still

backlog of VJNT communities. That the VJNT & SBC are equally placed with SC & ST and have also suffered similar deprivation and disadvantages and hence the action taken by the state is in pursuance of the rights conferred under Art 14, 16, 46 and 335 of the Constitution of India. That their backwardness and inadequacy of representation is based on the various reports of the commissions including the state backward class commission and on the exercise conducted by the State to ascertain adequacy of representation considering all the cadres of the State. That on the basis of proper research and investigations and after collection of data with material in support thereof, the backwardness, and inadequacy of representation of VJNT & SBC is established beyond doubt. That they are not less efficient than the general category of the SC and ST. That adequate representation to backward class in the service under the state includes adequate representation in all cadres and considering the cadre strength. That the adequate representation to backward class cannot be ensured without reservations if the entire cadre is filled only by promotions and not by direct recruitment. That the reservation in promotions is permissible if the ratio of direct recruits is not more than 50%. That there is nothing to presume that direct



recruits are more efficient and also the state too has not provided direct recruitment at all stages.

57 It is the case that all these communities namely SC, ST, VJNT, SBC are socially, educationally and economically backward and there was inadequacy of representation at all level and cadres. It was also evident from the past record that administrative efficiency has not suffered as after each promotion the criteria for every person in that cadre for measuring his competency and efficiency was the same and the administrative efficiency has not affected adversely in any manner since 1974. The state as also relied in the Census Data. That VJNT communities are as backward as SC and St and are treated on par with SC and ST since 1965 in all schemes. That it is not denied that these communities are equally backward like that of SC and ST. Hence this was not challenged in any court earlier. Now this history cannot be changed hurriedly to stop such the reservation benefits including to VJNTs. On 12/12/12, the State has filed the Sur- Rejoinder stating that the burden is on the original Petitioner. The original petitioner has failed to discharge his burden. There is no specific denial, with contra material to those affidavits and data placed on record by the

State and the affidavit of Other Backward Class/VJ/NT/SBC.

The averments against the Reservation Act

58 On 21.06.2012, Respondent nos 1 to 4 has filed an affidavit in rejoinder to the affidavit in reply of the state dated 27.12.2010: the action of the State is ultra vires Art 16(4)(A) of the Constitution, the separate quota for VJNT was unconstitutional and sub classification was not based on backwardness, the representation of reserve category candidates was much more than required, the date provided by respondent no 1 was misleading and incomplete. That the petitioner has no objection for providing reservation to VJNT in direct recruitment but extending the scope of reservation for promotion by ignoring criterion laid down by the Supreme Court and ignoring the legitimate claim of open category candidates is not correct. (para 26), the confidential report and gradation should not be the only criteria for maintaining efficiency in administration, the respondent has not places any report to satisfy the above test, Art 16(4)(A) provides reservation in Promotion only for SC and ST and not for other categories, Khatri Committee was appointed to identify various castes to be included in OBC and the committee has solely done the job of identification of castes to be included in the OBC. The

committee has not ascertained the backwardness, inadequacy and overall efficiency. There was no objection from any group so far as implementation of Art 16 (4) is concerned but when the same is extended to promotions it leads to reverse discrimination and affects administrative efficiency. It is stated that the words equally backward has no relevance, had the VJNT been equally backward they would have been included in SC/ST.

The case proceedings in High Court

59 On 28 November 2014, the MAT has struck down the Reservation Act and the Promotion Circular. The Judgment has been stayed by MAT itself for a period of 1 year. On 13 March 2015, Writ Petition No. 2797 of 2015 filed by the State in this Court challenging the impugned Judgment and Order. On 20 March 2015, this Court has granted interim stay to the execution and implementation of the Judgment and order of MAT. On 13 August 2015, Civil Application No. 2531 of 2015 filed by the Respondent to modify or vacate the interim order.

60 The parties have filed their respective Additional Affidavits and written submissions . On 29 April 2016, additional documents

have been tendered by the State stating it to be the part of the original Writ Petition and the record before MAT except Compilation part No. III, Districtwise caste census 1931. Part-I and Part-II consist of various Commission/Expert Committee Reports/Recommendations of all the caste in question. All these documents and materials have been placed on record by the State as to justify their reasons for enactment of the Reservation Act and the implementation of the reservation/promotion circulars. Both the learned counsel read and referred and made the additional submissions revolving around the same. Various orders have been passed, from time to time, which are part of court proceedings in record of these Writ Petitions, including of issuance of notices to all.

**13 August 2015-**

*“Stand over to 3.09.2015 FOB for final hearing.*

*2 The Registry is directed to keep all connected matters along with these matters, whether ready or unready.*

*3 The Registrar (Judicial-I) is directed to call for record and proceedings of Transfer Application Nos. 1 and 2 of 2014, in W.P. No.8452/2004 and WP/470/2005, from Maharashtra Administrative Tribunal if not already called for. He shall ensure that the record and proceedings reaches this Court on 26.08.2015.*

4 Stand over to 3.9.2015 First on Board in the caption of Final hearing.”

**3 September 2015-**

“By consent, stand over to 30 September 2015 at 1.00 p. m. for final hearing along with all other connected matters. List of connected matters be re-submitted by the respective advocates, and specifically by the learned AGP for the State, as all other matters are not listed by the office, inspite of earlier orders.

2 It is made clear that the notices be given accordingly and circulated to the Principal Bench, as well as, other Benches of this Court at Nagpur, Aurangabad and Goa, about these matters, which are relating to the Constitutional validity of the Maharashtra State Public Services (Reservation for Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis) and Nomadic Tribes, Special Backward Classes and Other Backward Classes) Act 2001 (Maharashtra Act No. VIII of 2004), (for short, “the Act”) and connected Government Resolutions. The Registry is directed to take steps and circulate the notices accordingly.

3 In the meantime, the parties to file their respective synopsis and circulate a common compilation of Judgments, if any.”

61 The Court heard the counsel for the parties only these matters by consent of the parties to avoid further delay in dealing with the validity of the act, from 30 September 2015 to 4 May 2016. The other matters to be heard, once the decision of the impugned

MAT is concluded. Other individual/association challenge of the Act would be considered on fact based writ petition, separately, after the conclusion of these matters in view of the urgency expressed.

16 April 2016-

*"1] The learned counsel appearing for the parties have concluded their respective arguments/rejoinder in Writ Petition Nos.2797 of 2015, 3009 of 2015, 1590 of 2015 and 3287 of 2004.*

*2] The learned counsel appearing for the parties seek time to file revised written submissions and connected chart.*

*3] At the request of the learned counsel, stand over to 29 April 2016. To be listed under the caption "for directions".*

**29 APRIL 2016-**

*"Mr. Yadav, the learned AGP has tendered on record (i) the compilation of contents (ii) notes on methodology adopted for deciding the backwardness and (iii) District-wise Caste Census-1931. The copies of the same are provided to the concerned parties.*

*2 So far as the District-wise Caste Census-1931 is concerned, it is stated that though reference to the same is made before the Maharashtra Administrative Tribunal (MAT), the State Government is filing the relevant pages of Districtwise Caste Census 1931, for first time in this Court.*

*3 The Respondents are also permitted to file affidavits/counter affidavits to these documents, if so advised. The parties to file revised written submissions, if*

*not already filed, by the next date.*

*4 Matters be kept on 4 May 2016 (HOB)."*

**4 May 2016-**

- "1. Arguments heard today and concluded.*
- 2. Matters are closed for Judgment.*
- 3. Parties to file revised submission, if not already filed and also to give it on pen drive."*

All the interim orders and the promotions so made are in force till this date, as being subject to final order of these Petitions.

**Specific Issues before the Tribunal. (MAT)**

62 The learned Tribunal considering the rival contentions so raised, in Paragraph 19 recorded the issues in the following terms

(i) Reservation in promotion has been challenged on two grounds.

(a) Under Article 16(4-A), no reservation in promotion can be provided to any backward class except S.C. and S.T. The Reservation Act provides for reservation in promotion to DT/NT and SBC also, which is in contravention of express provision of this Article.

(b) Even for S.C./S.T., there is no quantifiable data

available with the State to indicate that they are inadequately represented in the services under the Government.

(ii) The Reservation Act has been challenged on the following grounds :

(a) The State does not have quantifiable data on the backwardness and adequacy of representation in respect of any of the backward classes. The Act does not disclose the basis on which percentage of reservation for different backward classes have been provided. The decision of the Government is arbitrary.

(b) Though the State is empowered to provide reservation in Government service, the law is so made as to include practically every service provided in the Private sector, thus violating Articles 13 and 16 of the Constitution.

(c) The State does not have any data regarding impact of reservation on overall administrative efficiency.

(d) The law should provide for Creamy Layer, even in promotion.

(e) Even though some part of the Reservation Act may not be ultra virus, but if some other part is so found, the whole law will have to be struck down.

(iii) The Applicants have also challenged the validity of G.R. dated 25.5.2004, which is termed arbitrary and also



challenged the concept of 'presumed merit' introduced in this G.R., which goes much beyond the provision of Article 16(4-A) regarding consequential seniority.

Essential reasons for the conclusions of the matters

63 Keeping in mind the issues and the provisions of law, we are proceeding, point by point, referring to the respective titles, which are interlinked and interconnected for our final conclusion and order.

Reservations on the base of 1931 census and the natural growth of populations

64 Both the parties have read and referred B.D. Deshmukh Committee Report 1964, Thade Committee Report 1961 Edate Committee Report 1999, the State Backward Class Commission Reports, Census Reports and SBC Documents. The State has submitted and referred quantifiable data regarding inadequacy of representation and overall administrative efficiency. The reservation in promotion as provided is only 33% hence there is no violation of ceiling limit of 50%. The concept of creamy layer has been elaborated and discussed. Based upon R.K. Sabarwal and other Judgments, 100 point Roster and its adoption from 18 October 1997, the procedure of

post-based roster to avoid excess reservation is also elaborated. The basis of percentage for reservation of every caste in question referring to the Committee/Commission Reports, so referred above, has been elaborated, with the supporting material placed on record.

65 It is relevant to note that on the basis of 1931 Census and, after taking into consideration the normal rate of natural growth and increase in the population of all sorts, the Government of India and most of the States have been adopting the “population” as the source for to give adequate, proper and fair representation in seats or services. Therefore, apart from the constitutional provisions, by Resolution dated 13 September 1950, the Government of India has decided to accept the population, as the basis for fixing the percentage of the reservation in public services. In the year 1961, the population Census had taken place.

66 In the year 1971, considering the general rise in the population during the Census for the period from 1961 to 1971, the percentage of population of each backward class category was made available by the Social Welfare Department. As per 1971 Census, only

the population of SC and ST was available and not of other categories, VJNT and OBC. The figures in respect of VJNT and OBC categories have been also collected only in 1931. There was no such Census took place. Therefore, the State has been following the method of normal rate of increase of total population. The basic percentage of SC and ST converts to Buddhism was fixed 13%. ST, living outside the specified areas 7%, DTNT 4%, OBC 10%, therefore, total 33% has been recorded.

67 The percentage of reservation in VJNT was increased to 6% in the year 1992, as per the report of Wadhawa Commission. It was decided to increase 2% only thereby, the total reservation was increased from 33% to 36%. This percentage was again reviewed in view of decision of Indra Sawhney (Supra) (Mandal Commission). The State, in view of the Judgment has accepted 27% reservation for OBC on the basis of 1931 Census. This basis of Census was considered and permitted even by the Supreme Court in Indra Sawhney (Supra). It seems that the last such Caste Census has been the basis for fixing the reservation and/or providing reservation to the Sections of the backward classes as recorded above, throughout the

India and followed by the respective States also. After 1991 general Census, the review of percentage of reservation, without crossing 50% ceiling limit, has been followed and accordingly the percentage of reservation was fixed at 49.5% (SC 13, ST 7, VJ 3, NTB 3 NTC and NTD 4 and OBC 19.5=49.5%). The percentage of VJNT was revised to 11% from 6% in the year 1994 and accordingly fixed 50% as follows. SC 13%, ST 7%, DTVJ 3%, NTB 2.5%, NTC 3.5%, NTD 2%, OBC 19% Total 50%. The category of Special Backward Class/SBC was prepared in the year 1995 and based upon their estimated population added 2%, thereby, total percentage of reservation increased from 50 to 52%.

68 This assessment is ongoing procedure, as all the concerned Commissions and the departments have been proceeding to regularize and fix the percentage of reservation to struck a balance between the reserve categories and open categories in every areas. On the basis of representation and the information so collected by the State, many communities have been added to the list of VJNT and OBC. This was also on the recommendations of the State Backward Classes Commission. However, the percentage of reservation of these

categories has not been increased or decreased substantially.

69 In the year 2011, the Government of India has undertaken Caste Census while doing the Socio-economic Census. However, as stated, it was decided not to make the public and would be used only by the Registrar General of India for statistical purposes. The State, requested to provide the details of the caste census for the Socio-economic data and for fixing the backwardness and the percentage of the reservation. There are data and material on record whereby, the basis of fixing 6% of VJNT was provided and also the data and the percentage so fixed after 1994 covering the 19% so fixed. These includes 14 Vimukta Jati 3%, Bhatkya Jamati (Earlier 28 Castes prior to 1990) 2.5%, Bhatkya Jamati (Dhangar etc.) 3.5% and Bhatkya Jamati (Vanjari) 2%,

70 The Reservation Act, was based upon the Population Census of 2001. The statement is made that last general Census took place in the year 2011 after the Act. In a given case, the Government of India and/or the respective States required to take note of the new Census report for deciding the revised percentage, considering the

normal rate of increase of the population. There is no case that there is decrease of general population of any community and caste, including of the backward classes. These naturally grown data is the only contemporary data available for all such purposes.

The scope and power of Court in the setting up and fixing the percentage of respective caste/tribe

71 To fix or alter the percentage for giving adequate and proper representation to the backward and/or reserved class categories/communities, is within the realm of the respective States, even when it comes to the reservation of the other classes, than ST and SC. No decisive factor and plan are fixed or provided or available to meddle with the fraction of reservation, so fixed by the States. It is not the scope of the Writ Court under Article 226 of the Constitution of India to have a Judicial Review of percentage so fixed and or providing or withdrawing the reservation to the particular class or category. The learned counsel appearing for the parties unable to point out any Judgments whereby, any Court has fixed and/or re-fixed the percentage so decided by the respective States, based upon the material/information/data they have. to give representation to a

particular community/ caste and/or class.

72 We have noted and as the statement is made that the reservation policy prior to this Act has been implemented on the foundation of various circulars issued by the State. Those circulars were remained intact till the Statute in question. All the parties and the respective Departments and the States and the other State Authorities, had been implementing the same. This is in no way read and referred to mean that the respective challenges to the promotion and/or related aspects and/or even appointments are not pending in other High Courts and/or the Courts. All such facts based matters will be treated separately.

73 Those relevant circulars are already reproduced and referred. Normally, the scope of Judicial Review under Article 226 is quite limited to test and verify the data, material so placed on record in support of the reservation policy. The reason behind the percentage of the particular community or caste, considering the other principles of “backwardness”, “adequate representation” as per the Constitution itself, is the State's domain. It is impermissible to direct any one to

collect the data to restructure the reservation policy. The learned Senior Counsel appearing for the State reiterated their submission, by placing the additional documents on record which are stated to be the part of the record of the MAT. Those records were seen and noted as offered for the learned Members to check and/or verify. We have permitted the State to bring their supporting data on record available with the State at the time of passing of the Reservation Act or otherwise. We have gone through the same in detail.

74 The District-wise Caste Census of 1931 submitted on behalf of the State for in the High Court. District-wise Caste Census of 1931 was referred by the Supreme Court in Indra Sawhney's and M. Nagaraj (supra) and all other Judgments. Whenever there was a question of reservation figures and data, the last caste Census of 1931 was also noted. The submission and reference is always made to 1931 Census, followed by the of every decade population Census; 1961, 1971, 1991, and 2001. The point is no latest census available for any State Government to follow or proceed afresh. All have to wait for new census and it's reports. Thus the natural growing data is the available" contemporary and quantifiable data" for the purpose of such



Reservation Act/Circulars.

The affirmation of the State to have quantifiable adequate data of S.C., S.T and OBC.

75 The learned Tribunal noted the principles of Nagraj that State is required to collect the quantifiable data showing backwardness and inadequacy of representation read with compliance of Article 335 which requires the maintenance of efficiency of administration. The Tribunal has proceeded to consider the requirement of inadequacy of representation in service even of S.C. and S.T.in the state. The affidavits and material so placed on record, wrongly interpreted to say that there is no “contemporary and quantifiable data”. The Constitution itself provides and gives enabling power to State to deal with the promotion even for other backward classes apart from S.C. and S.T. in various posts, subject to Nagraj elements. The validity and/or vires, therefore, cannot be and ought not to have been decided on presumption and assumption.

76 In view of proviso to Article 335, Section 10(3) of the Reservation Act regarding concession and relaxation in fee and/or upper age could be considered at appropriate stage as is provide

various concession for promotion also. This is because the basis provisions are applicable only for S.C. and S.T. class. These “concessions and/or relaxations” are applicable to S.C. and S.T. and not to other classes also required to be considered keeping in mind the Constitutional provision which empowers the State to grant reservation at recruitment and/or at promotional stage on the foundation of their backwardness and/or inadequate representation.

State Committees, Commissions reports about “quantifiable data ” and Its Merit and Demerit

77 In paragraph 29, the learned Tribunal though recorded the gist of Committee Reports (B.D.Deshmukh, Thade, Wadhwa, B.R. Committee and State Backward Class Commission – Khatri Commission, Bapat Commission), wrongly held that the reports nowhere shows figures about the representation of the communities for inclusion in the list of V.G., N.T. O.B.C. in State Service. This is by observing further that there is total absence of any quantifiable data in these reports. It is concluded wrongly that except the B.D.Deshmukh Committee Report, there is hardly any quantifiable data about representation in Government Service of various backward communities. The Tribunal has also observed that S.C. are given more

reservations, while S.T. are given less reservations based upon the percentage of the population. The learned Tribunal noted that there was no explanation for this anomaly. It is wrongly observed that the figures are based on extrapolation and are not actual figures. It is observed further that the reservation for S.C. and S.T. more or less is in proportion to their population. However, figures in D.T. and N.T. are only guesstimates. The learned Tribunal not noted the Deshmukh Committee Report of the year 1961. The learned Tribunal refused to accept the submission based upon 50 years old D.B. Deshmukh Committee Report. These observations of learned Tribunal are wrong by misreading the Constitutional provisions and the Judgments. The Reservation Act itself provides that "Government may by an order in the Official Gazette provides that percentage of reservation for S.C. and S.T., D.T., N.T., S.B.C. category and other backward classes, in all posts, shall be on the basis of the latest census record of population of the State, in the case of State cadre posts, and concerned District, in case of District cadre posts." Apart from this enabling constitutional provision empowers the State to provide reservation of posts for various categories in proportion to their population as per the latest census report. The material has been placed on record even of

subsequent years as recorded in paragraph 29. The excessive reservation in employment, therefore, needs to be decided on the facts of the case of individual or association and/or respective department's submission .

78 The Judgment of Balaji (supra) cannot be read in isolation. The principle so laid down is also stated even about the marginal 2% excess of reservation in the present case. There are various States where reservation is more than 50 per cent. The only requirement is, as per even Nagraj (supra), State has to form its opinion on the foundation of “quantifiable data” and “adequacy of representation of Backward class”. In the same Judgment it is observed that any excessiveness needs to be decided on the facts of each case.

79 The learned Tribunal, however, wrong in concluding that the State has no quantifiable and contemporary data about backward classes in the State. It was more than 50 years old. Further observation that the State has provided reservation for S.C. and S.T., D.T. and N.T. categories in proportion to their population. However,

for the creditable data of population of D.T./N.T. i.e. VJ(A), N.T.(B), N.T.(C) and N.T.(D) categories are recorded that the reservation to them was in the population proportion as per the declared Section 4 of the Reservation Act.

Reference is made to the Cabinet Note dated 30/11/1994 about the caste

80 The reference is made to the Cabinet Note dated 30/11/1994, whereby provision is made to provide employment for five communities Gowari, Manna, Halba Koshti, Machhimar Koli, Soan Koli and Munnarwar. The State, therefore, decided in the Cabinet to create a separate category and provide 2% reservation for them. No challenge was raised at any point of time so far as circular and the order dated 30/11/1994. All have been acted upon the same since then. Having so noted and decided to give representation to said communities to say that there is no material to support the claim of S.B.C. to entitle them reservation in public employment is wrong approach. The data so reflected earlier, cannot be tested at this stage, at the instance of petitioner on vague averments or pleading. The data is recorded and provided for this category also and

strikingly, the learned Tribunal not even dealt with the circular so issued from time to time by the State announcing the criteria for backward class or category from time to time by following the due procedure of law and through the State scheduled provisions and the Circulars. All State provisions are intact till today. All the concerned have been acting upon the same. No challenge raised at any time earlier. Therefore, merely because the State has decided to utilise those earlier provisions and the circulars, through the Reservation Act, pursuant to the Supreme Court decision, the challenge even after Nagraj (supra), cannot be the basis to declare the Reservation Act ultra vires, on such assumption and presumption.

Specific Treatment to Other Backward Class - VJ/NT

81 It has been noted that the Petitioners challenge to the validity of Article 16(4A) and (4B) of the Constitution is decided in Nagraj (supra). The challenge was raised at the same time to the Reservation Act and Circular regarding promotion in question. Once the constitutional challenge goes, that itself dilutes the Petitioners' challenge to the vires of the Reservation Act. Every important aspect of reservation to SC, ST from the stage of recruitment and/or promotion have been concluded against the Petitioners and in support

of all other categories also. No specific challenge was able to sustain about the reservation provided at the recruitment stage and/or the promotional stage in view of the amended constitutional provision, so referred above. This itself endorsed the earlier practice and procedure of collecting the data and the material available with the Central/State in this regard. All the reasons given by the learned Tribunal, with regard to the material, data, adequate representation, backwardness, based upon 50 years old data, are nothing but infringing upon the basic constitutional provision and the judgments of Supreme Court including Indra Sawhney, Nagraj and others. There was no question of declaring the Reservation Act ultra vires on the wrong ground of no data, no material, and/or 50 years old data inspite of fulfillment of the principles in Nagraj and other subsequent judgments by the state. All the original Petitions should have been dismissed on these grounds itself. The wrong understanding of law and/or interpretation of Supreme Court judgments resulted into unjust and contrary declaration in question. This would definitely result into miscarriage of justice and takes away the constitutional rights of the persons, who belong to scheduled categories and/or groups. The promotional circular providing 33% reservation, as

stated to be the provision to modify and/or a clarificatory in nature, based upon the existing promotional policy for Scheduled Caste and Scheduled Tribe and for OBC, therefore could not have been declared bad in law in such fashion for the same reasons itself.

The State Quantifiable Data and updated contemporary data, though not precise but sufficient is available

82 The State has placed a comparative data of Social, educational and economic backwardness of Maharashtra State, SC/ST, VJNT and SBC as per the Census Report of 2001 and the Maharashtra State VJNT Study and Research Committee and/or Edate Committee Report of 1999. The chart of that data has submitted by the State.

We are reproducing it :

COMPARATIVE DATA OF SOCIAL, EDUCATIONAL AND ECONOMIC BACKWARDNESS OF MAHARASHTRA STATE Supreme Court, ST, VJNT AND SBC AS PER THE CENSUS REPORT OF 2001 AND MAHARASHTRA STATE VJNT STUDY AND RESEARCH COMMITTEE OR THE EDATE COMMITTEE REPORT 1999

		Social					Edu cati on	Econ omic	Ina deq uac y	
		Hou se per	Wat er Tap	Electri city	No Latri ne	TV set				
							Liter acy	Avg inco me/A		Popu latio n %



		mit						n		
	Tot al	57. 82	64. 02	77.49	64.9 2	44 .1	79.6			100
Stat e	Urb an	81. 63	89. 18	94.28	41.9 2	70 .5	85.5			57.5 7
	Rur al	40. 33	45. 54	65.17	81.7 9	24 .7	70.4			42.4 3
	Tot al	51. 35	62. 65	70.44	71.6 5	37 .7 2	71.9			10.2
SC	Urb an	71. 95	85. 81	89.56	56.1 3	63 .3 2	78.3			61.6 7
	Rur al	36. 80	46. 27	56.93	82.6 1	19 .6 4	67.9			38.3 3
	Tot al	34. 89	45. 24	52.15	79.7 6	22 .5 6	55.2			8.85
ST	Urb an	70. 48	84. 10	87.76	53.5 2	59 .8 6	74.2			12.7 1
	Rur al	23. 35	32. 63	40.60	88.2 3	10 .4 6	52.3			87.2 9
	Tot al	13. 2	18. 8	48.6	61.9	13 .4		1824 0	101 3	~2. 66
VJA	Urb an	16. 7	22. 5	62.5	36.2	22 .0		2140 3		45.2 6
	Rur al	10. 4	15. 7	37.1	83.1	6. 3		1562 3		54.7 3
	Tot al	13. 0	19. 1	51.7	59.8	13 .8		1777 7	131 0	~1.7 5
NTB	Urb	13.	20.	60.3	46.1	16		1992		56.7

	an	6	1			.4		6		5
	Rur al	12. 3	17. 9	40.4	77.8	10 .3		1495 7		43.2 4
	Tot al	11. 4	13. 7	45.5	79.2	8. 6	23.7	1407 6	169 22	~3.0 0
NTC	Urb an	17. 5	15. 0	60.0	60.0	17 .5	41.5	1058 1		15.6 9
	Rur al	10. 2	13. 5	42.8	82.8	7. 0	20.4	1472 6		84.3 1
	Tot al	15. 7	9.1	51.2	86.8	14 .0	41.9	1899 8	647 9	~1.0 0
NTD	Urb an	100	100	100	1	10 0	91.7	7542 5		3.30
	Rur al	12. 8	6.0	49.6	89.7	11 .1	40.0	1706 9		96.6 9
	Tot al									
NTC	Urb an									
	Rur al									

As on 30.6.2005 the Backlog/inadequacy of VJNT in direct recruitment and promotion at various stages was as follows :-

Category	Direct	+	Promotion	=
Inadequacy				
VJA	840	+	173	= 1,013
NTB	993	+	317	= 1,310
NTC	13580	+	3342	=
16,922				
NTD	5800	+	679	= 6,479
Total				25,724

Total Backlog/inadequacy of Backward class in direct recruitment and promotions at various stages was as follows:

Group	Backlog
A	4,713
B	4,250
C	51,781
D	18,975
Total	79,719

83 Scheduled Caste statutes upto date till 31 March 2006, VJNT status upto date till 31 March 2006, including addition of new caste in June 2008 are part of the record of Writ Petitions. A Central list of OBC (the State of Maharashtra), is also placed on record, as extracted from the concerned website. Government Resolution dated 25 May 2006 is also part of the record (the State compilations) as submitted even before the MAT whereby, certain new De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and other Backward Classes have been added (SC/ST order amended 1976, Appendix I part 10 (13%)).

84 The process of collection of data by the State and/or by the Central, normally is for all the castes/groups/categories, in

question. Every Census so read and referred, covers all these categories, apart from Central, the Committees/Commission Reports as recorded. It is difficult to dissect any of these categories as in existence since long - neither intended nor submitted by the opponent to do so. Having noted even the respective data of concerned castes/tribes, as recorded, referring to all the committee reports, cover the SC/ST and OBC also. The data, so used and utilized for all these categories, covers the issues for the purpose of these challenges. The percentage for reservation for appointment at the stage of recruitment, or even for promotions are intact for all these purposes.

The MAT misread historical value of the reservation and the base for such reservation.

85 It is necessary to note that Article 16 (4A) and (4B) have been introduced keeping in mind the directions given by the Apex Court in Indira Sawhnay's case (supra). Articles 341 and 342 of the Constitution of India permit the Authority to declare a community as Scheduled Caste or Scheduled Tribe. This is in the background of the Constitutional (Scheduled Castes) Order, 1950 and Constitutional (Scheduled Tribes) Order, 1950. The learned Members of the Tribunal failed to take note of the background and the declared policy

of the Bombay State which was in existence prior to above orders. One of such example is Government Resolution, Political and Services Department dated 23.04.1942. After the constitution of the Bombay State, backward classes were divided into three categories, Scheduled Caste, Scheduled Tribe and Other Backward Classes which were castes deemed to be as backward as the Scheduled Caste or the Scheduled Tribe. The reservation in Government posts were provided to such classes also by Resolution dated 1.11.1950 as per the prescribed percentage. The learned Tribunal, even not noted the earlier existing Bombay Primary Education Rules, 1924, whereby the classification of communities as backward and depressed classes/Tribes had been recognised. In the year 1928 a Committee was set up for such inquiry into the educational, economic and social conditions of the depressed classes. The recommendations were accepted and the list of backward class communities were prescribed even under Government Resolution of 29.05.1933 – which was subsequently revised in 1942. The reservation in Government posts was prescribed in Government Resolution of 1.11.1950 which was revised again on 24.01.1953. The modified Scheduled Castes and Scheduled Tribes List (Modification) Order, 1956 throws further light on the issue. Ultimately by

Resolution dated 18.05.1959 major concessions were made available to the OBC category. There was Criminal Tribes Act, 1871 which was replaced by Criminal Tribes Act, 1924 covering large sections of Nomadic Tribes. Though the Criminal Tribes Act was repealed in 1952, this group remained unattended. (See State affidavits).

86           The learned Tribunal failed to consider the background of formation of these Commissions/Committees and the earlier Government Resolutions, Reservation Policy and the law/Statute. The learned Tribunal, however, completely overlooked the main foundation and by misreading the Nagraj has even disturbed and interfered the percentage at the recruitment as well as promotion stage so accepted and recognised for the SC, ST classes by the Supreme Court. The learned Tribunal wrongly interpreted the reservation provided for OBCs by the State being empowered to do so, on the foundation of lack of data and the material. They have fixed the percentage also. The same has remained intact. All have been acting accordingly.

87           We have to observed that after Indira Sawhney (supra),

based upon the report of the Mandal Commission, the issue of reservation quotas for the backward classes in direct recruitment was reconsidered even by the State and decided to increase total reservation from 33% which was fixed in the year 1965 to 50% by Government Resolution dated 23.03.1994. We have noted that the State had, as per the requirement, need, representation, survey reports and/or commission reports and/or based upon the information collected and available with them, not only added but even withdrew the reservation from promotion of VJ, NT, however, protected their promotion in view of Supreme Court directives for 5 years from 16.11.1992.

88 For the present purpose, we are inclined to observe at this stage itself that in view of Indira Sawhney (supra), the State had constituted a Standing Committee consists of Experts under the Chairmanship of Dr. Mutkar on 15.03.1993 and later-on converted into State Backward Class Commission on 19.05.1995 under the Chairmanship of Justice S. N. Khatri. About 156 caste claims including OBCS/VJ/NT had been dealt with. The Committee, noting the provisions of Article 16(4) and the judgments and the observation

in Indira Sawhney (supra) proceeded to inquire and decide the caste claims. The recommendations accordingly submitted as noted. We are inclined to observe here that there is no prescribed procedure or method provided under the Constitution and/or under the law for identification of backward classes. Therefore, ultimately it is the State and/or the concerned Authority, in view of enabling constitutional provisions, but subject to other provisions of Constitution and the law required to take steps to determine backwardness and for providing due representation, as contemplated under Article 16(4). This includes available group, section and classes in society. This is also by keeping in mind the social, educational, economy and other essential conditions as laid down in Mandal Commission. The details so provided in this committee reports/commission reports, the then existing Acts, Statutes, Circulars, Reservation Policies and the percentage so fixed which now incorporated in the Act ought not to have been disturbed in such fashion at the instance of Petitioners, based upon the vague pleadings on merit, but general submissions on presumption and assumption.



Government is also a prime consideration for implementing such reservation policy, but in accordance with the law. Therefore, the State, having once treated and noted that these communities, groups, other than SC/ST, are also required representation and/or benefits being similarly placed, may not be on strict senses, but within elements of Article 16(4) are satisfied, is empowered to grant the particular percentage and the benefits of reservation to all such categories. We see there is no illegality in such extension. Therefore, in view of provision of Articles 14, 15 and 16, such express legislation is permissible. There is nothing wrong if the said benefit is continued by the State based upon the earlier statutes and the Circulars. The reservations already made based upon the earlier Circulars and the reservation policy even protected in Indira Sawhney's case, at least for further five years from the date of judgment. The State has to take decision to grant extension in such reservation. The earlier reservation policy, therefore, ought not to have been disturbed. All the parties were aware of it. The promotion is always based upon the service conditions and the State policy, if governed by the same. The reservation policy is always subject to correction. Therefore, the impugned judgment on this ground itself of declaring the whole Act

ultravires on such vague pleading and on the basis of assumption and presumption is unsustainable.

90 The decision, based upon the vague pleading of the complainant who are not governed by the Administrative Tribunal Act, is also impermissible. Any case which is not within the ambit of the MAT jurisdiction though challenge has been raised to the vires of the Reservation Act and the Circular, that itself should not have been the reason to declare the Reservation Act and the Promotion Circular ultra vires. The learned Tribunal could have passed the appropriate order if the case was not governed by the Administrative Tribunal Act and/or not within the jurisdiction of the learned Tribunal. (Transfer Application No.2/2014 = Writ petition No.470/2005 – M. V. Gunale).

Enthusiasm of increase and /or decrease of respective reservation percentage

91 The fixed percentage of granting benefits/concession needs to be respected by all the concerned. Therefore, unless those percentage are increased and/or lowered by the Central and/or State Government, in accordance with law, all are bound to grant constitutional benefits to the scheduled community and castes, for all

the purposes and also in public employment. And if it is in excess, it is required to be tested individual caste or community wise . Any increase or decrease in percentage in any class or category would affect the command of within or beyond 50% reservation, though certain degree of excess, in a given case, is permissible. The State, therefore, if quantifiable material available, want to add and/or grant such concession/benefit to certain other new categories, the State required to reassess the percentage aspects within the umbrella of “quantitative limit” so referred above. There is no issue that the State required to keep in mind the constitutional provision including the merits of the general citizen/categories.

92 This is also in the background that once the class or tribe and community is included in Presidential List (Central and/or State), even any further division of any classes would be a matter of confront, as it amounts to playing with the Presidential List published - so would be the case, if the fixed percentage is tinkered with. Any addition in the class of community and/or increase or decrease and/or addition and/or deletion of it in the list, required due process to be followed by the State. The Reservation Act and the Circular,

therefore, in our view, is well within the umbrella of law and the record. Any contra decision of the State would have caused great injustice and hardship to all the concerned. The constitutional protection and umbrella to the persons being in the list, therefore, ought not to have been disturbed, as done in the present case in spite of there being no competing material on record.

No special challenge to the inclusion and exclusion in State Caste/Tribe Lists.

93           So far as State of Maharashtra is concerned, there is a list of Special Backward Category (SBC), which is amended and modified from time to time. There is a list of De-notified Tribes (Vimukta Jati) amended and modified from time to time. There is list of Nomadic Tribes also. Above observations are applicable to these lists of S.B.C, DT/VJ/NT.

94           The caste and community list, Central or State, covering all the categories in question for which reservation under the Act and Circular as provided, have never been challenged and or tested by the original petitioners even on the stated formula of Nagraj. There is

no specific challenge raised even in this petition to the inclusion of those entries in the respective constitutionally recognized lists. The central and respective States, keeping in mind the Supreme Court Judgments, have been collecting the data, information even prior to inclusion and/or exclusion of the entries in the list, before granting the constitutional benefits/protection. Having once recognized particular community and included their names into the castes in the list, based upon the data and material available, and for want of any contra material from the other side or otherwise, the respective State is empowered to grant the benefits in accordance with law. The State has, therefore, taken the impugned decision. The detailed individual challenges on merits, if any, would be considered and/or required to be considered if the affected petitioners are able to place the sustaining material to affect their actual promotion, departmental and/or otherwise. There was no such case apart from no pleading or material to sustain the same.

The State is empowered to make reservation in State employment-recruitment and/or promotion.

Mandamus to order Reservation OR De reservation ?

95           The Apex Court in various judgments has reinforced that

no mandamus would lie to order reservation and/or de reservation and/or to collect data/material for the same. The extract of those paragraphs of respective judgments are as under :

- 1) Chairman and Managing Director, Central Bank of India vs. Central Bank of India SC/ST Employees Welfare Association (2015) 1 SCALE 169 :

“24. In the first instance, we make it clear that there is no dispute about the constitutional position envisaged in Articles 15 and 16, insofar as these provisions empower the State to take affirmative action in favour of SC/ST category persons by making reservations for them in the employment in the Union or the State (or for that matter, public sector/authorities which are treated as State Under Article 12 of the Constitution). Insofar as making of provisions for reservation in matters of promotion to any class or classes of post is concerned, such a provision can be made in favour of SC/ST category employees if, in the opinion of the State, they are not adequately represented in services under the State. Thus, no doubt, power lies with the State to make a provision, but, at the same time, courts cannot issue any mandamus to the State to necessarily make such a provision. It is for the State to act, in

a given situation, and to take such an affirmative action. of course, whenever there exists such a provision for reservation in the matters of recruitment or the promotion, it would bestow an enforceable right in favour of persons belonging to SC/ST category and on failure on the part of any authority to reserve the posts, while making selections/promotions, the beneficiaries of these provisions can approach the Court to get their rights enforced. What is to be highlighted is that existence of provision for reservation in the matter of selection or promotion, as the case may be, is the *sine qua non* for seeking mandamus as it is only when such a provision is made by the State, a right shall accrue in favour of SC/ST candidates and not otherwise.” (emphasis added)

The judgments cited by the parties in present case have been noted in this judgment.

96 It is relevant to note here that Supreme Court in *Suresh Chand Gautam v. State of Uttar Pradesh and ors.*,<sup>23</sup>, after dealing with Articles 16(4A) and (4B) and 226 and all other judgments including the basic elements of *Nagraj* has observed as follows :

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23 AIR 2016 (Supreme Court) 1321

“43 They are in different sphere than what is envisaged in Article 16(4-A) and 16(4-B) whose constitutional validity have been upheld by the Constitution Bench with certain qualifiers. They have been regarded as enabling constitutional provisions. Additionally it has been postulated that the State is not bound to make reservation for Scheduled Castes and Scheduled Tribes in matter of promotions. Therefore, there is no duty. In such a situation, to issue a mandamus to collect the data would tantamount to asking the authorities whether there is ample data to frame a rule or Regulation. This will be in a way, entering into the domain of legislation, for it is a step towards commanding to frame a legislation or a delegated legislation for reservation.

44 Recently in *Census Commissioner and Ors. v. R. Krishnamurthy*, (2015) 2 SCC 796 a three-Judge Bench while dealing with the correctness of the judgment of the high court wherein the High court had directed that the Census Department of Government of India shall take such measures towards conducting the caste-wise census in the country at the earliest and in a time-bound manner, so as to achieve the goal of social justice in its true sense, which is the need of the hour, the court analyzing the context opined thus:

“.....It is not within the domain of the court to legislate. The courts do interpret the law and in such interpretation certain creative process is involved. The courts have the jurisdiction to declare the law as unconstitutional. That too, where it is called for. The court may also fill up the gaps in certain spheres applying the doctrine of constitutional silence or abeyance. But, the courts are not to plunge into policymaking by adding something to the policy by ways of issuing a writ of mandamus.”

We have referred to the said authority as the court has



clearly held that it neither legislates nor does it issue a mandamus to legislate. The relief in the present case, when appositely appreciated, tantamounts to a prayer for issue of a mandamus to take a step towards framing of a rule or a Regulation for the purpose of reservation for Scheduled Castes and Scheduled Tribes in matter of promotions. In our considered opinion a writ of mandamus of such a nature cannot be issued.”

The basis of State's collecting information and data and the reservation policy decision, in question, based upon the available data, ought to have been respected. No Court, in view of above judgments, including *Suresh Chand (supra)*, could not have issued directions to collect the data. The State, on the contrary, to provide the promotion, to SC and ST and other backward classes, based upon the last caste census and the “population census” read with caste/categories, included in the Central, as well as, the State List to achieve the constitutional goal and has proceeded to use and utilise the quantifiable data available with them, in our view, is well within the law and the record. The beneficiaries are entitled to claim it. The declaration of the tribunal affects the rights of these beneficiaries.

#### Provisions for Promotion

97 Furthermore, it is relevant to note the observations of the Apex Court in *Suresh Chand* in paragraph 42 as under :

“42 ..... Insofar as making of provisions for reservation in matters of promotion to any class or classes of post is concerned, such a provision can be made in favour of SC/ST Civil Appeal No. of 2015 and Ors. (arising out of SLP (C) No. 4385 of 2010 and Ors.) category employees if, in the opinion of the State, they are not adequately represented in services under the State. Thus, no doubt, power lies with the State to make a provision, but, at the same time, courts cannot issue any mandamus to the State to necessarily make such a provision.....What is to be highlighted is that existence of provision for reservation in the matter of selection or promotion, as the case may be, is the sine qua non for seeking mandamus as it is only when such a provision is made by the State, a right shall accrue in favour of SC/ST candidates and not otherwise.”

(emphasis added)

It is also noted in Suresh Chand (supra) as under :

“In *Rajesh Kumar's* (AIR 2012 SC 2728) case, after culling out the principles stated in *M. Nagaraj* (supra) the Court has graphically stated that a fresh exercise in accord with the law laid down in *M. Nagaraj* (supra) is a categorical imperative. It has been held that the State can make provisions for reservation in promotion with consequential seniority on certain basis or foundation and conditions precedents have to be satisfied. ....”

The State has made the reservation considering the scheme of the constitutional provisions and the law and so also the promotion circulars.

Wisdom of State Legislation = to continue the existing reservation policy – for both stages for all.

98 Any legislation, includes statutes and the circulars is nothing but an intention of the State. The earlier Circulars were in force for similar benefits for all the categories. Those circulars and the reservation policy had been incorporated under the Reservation Act. The concerned/person belonging to these categories, therefore, are entitled for the reservation benefits including the promotion as already provided since long. The subsequent *Nagraj* elements, even if any, pending the census direction in time bound programme, as recorded in *Census Commission and others (supra)* or even otherwise, the State's decision to achieve the constitutional goal, the social justice, ought not to have been disturbed and/or interfered with. Once the fresh census, caste-wise data, available with the State as noted are available, the State is bound to take steps to revise the reservation policy, at all levels. The reasonable and sufficient time should have been granted.

Existing recognised Constitutional Reservation for SC/ST at the recruitment level and or at promotional level is settled.

99 Even during the course of arguments, there was no much argument made so far as of these reservations of SC and ST of both

the levels, recruitment, as well as, promotion. There was, even no issue discussed and/or decided and the percentage so fixed and prescribed by the Central and the State for so many years. We have noted that since the inception and/or grant of such percentage, irrespective increase of population, no such percentage is lowered and/or increased. There is no challenge and/or issue raised with regard to the extension from time to time as per Article 335. In view of this clear provisions of constitutional rights and protection granted to SC and ST class or group and/or related group, cannot be thrown away by declaring the Reservation Act unconstitutional. The effect is, the Reservation Act as declared ultra virus the reservation circulars which were in existence prior to the Reservation Act, are also not in the field now. There is no provisions pointed out whereby, those earlier circulars can be stated to be revived. The percentage so fixed, even in the circulars for the classes of SC and ST, were never challenged and/or were in the field since long. The Supreme Court Judgment in M. Nagaraj (supra), basically revolved around the issue and/or providing reservation and promotion for other backward classes. It is settled that if the case of “perversity”, “non-application of mind” and “illegal reasons” are made out, Article 226 of the

Constitution of India, needs to be invoked in the interest of justice.

Last Caste Census 1931 and natural growth binds all until new similar Caste Census is published and made effective for all the communities.

100 Admittedly, no Census has been undertaken after 1931 to determine the population of Denotified Tribes (A) (DNT), Nomadic Tribes (B) (NT-B), Nomadic Tribes (C) (NT-C), Nomadic Tribes (D) (NT-D), Special Backward Category (SBC) and Other Backward Classes (OBC) in the State. The State came to be constituted in the year 1960, by including parts of Bombay Presidency, Central Province and Berar and the State of Hyderabad, which existed during the British time. In the year 1931, the State was not in existence. The Supreme Court, has, in no case, declared that all the laws of reservation policy and/or circulars based upon 1931 Census, are bad and/or ultra virus to the Constitution. It is to be noted that even, in Indra Sawhney and M. Nagaraj (supra), though the Constitutional Bench declare the provisions ultra virus, in the year 1992, but still granted the continuation of those protections for further 5 years. There was no direction issued, even in those matters to collect the data and/or information to determine the population of respective

group or class to provide the reservation. The directions to update and to collect the information and to proceed to make the concerned reservation and/or determine the population based reservation and/or to provide adequate representation to other backward classes, are different facets altogether.

No prescribed method to identify Backward Class – Other Backward Class.

101 Even in Indra Sawhney (supra) (Mandal's Case), the Supreme Court has summarized answers to the questions in paragraph 860. Some of the answers are-

“(2) The expression 'backward class' in Article 16(4) takes in 'Other Backward Classes', SCs, STs and may be some other backward classes as well. The accent in Article 16(4) is upon social backwardness. Social backwardness leads to educational backwardness and economic backwardness. They are mutually contributory to each other and are intertwined with low occupations in the Indian society. A caste can be and quite often is a social class in India. Economic criterion cannot be the sole basis for determining the backward class of citizens contemplated by Article 16(4). The weaker sections referred to Article 46 do include SBCs referred to in Article 340 and covered by Article 16(4).”

“(4) .....

For applying this rule, the reservations should not exceed 50% of the appointments in a grade, cadre or service in any given year. Reservation can be made in a service or category only when the State is satisfied that representation of backward class of citizens therein is not adequate.”

(5) There is no constitutional bar to classification of backward classes into more backward and backward classes for the purposes of Article 16(4). The distinction should be on the basis of degrees of social backwardness. In case of such classification, however, it would be advisable - nay, necessary - to ensure equitable distribution amongst the various backward classes to avoid lumping so that one or two such classes do not eat away the entire quota leaving the other backward classes high and dry.

For excluding 'creamy layer', an economic criterion can be adopted as an indicium or measure of social advancement."

(6) A 'provision' under Article 16(4) can be made by an executive order. It is not necessary that it should be made by Parliament/Legislature.

(7) No special standard of judicial scrutiny can be predicated in matters arising under Article 16 (4). It is not possible or necessary to say more than this under this question.

(8) Reservation of appointments or posts under Article 16(4) is confined to initial appointment only and cannot extend to providing reservation in the matter of promotion. We direct that our decision on this question shall operate only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis. It is further directed that wherever reservations are already provided in the matter of promotion - be it Central Services or State Services, or for that matter services under any Corporation, authority or body falling under the definition of 'State' in Article 12 - such reservations may continue in operation for a period of five years from this day. Within this period, it would be open to the appropriate authorities to revise, modify or re-issue the relevant rules to ensure the achievement of the objective of Article 16(4). If any authority thinks that for ensuring adequate representation of 'backward class of citizens' in any service, class or category, it

is necessary to provide for direct recruitment therein, it shall be open to it to do so.” (emphasis added)

102 It is specifically observed in paragraph Nos. 796 and 797, to answer No.3 (a) is as under:-

**“796-797.** We may now summarise our discussion under Question No. 3. (a) A caste can be and quite often is a social class in India. If it is backward socially, it would be a backward class for the purposes of Article 16(4). Among non-Hindus, there are several occupational groups, sects and denominations, which for historical reasons are socially backward. They too represent backward social collectivities for the purposes of Article 16(4). (b) Neither the constitution nor the law prescribe the procedure or method of identification of backward classes. Nor is it possible or advisable for the court to lay down any such procedure or method. It must be left to the authority appointed to identify. It can adopt such method/procedure as it thinks convenient and so long as its survey covers the entire populace, no objection can be taken to it. If it does — what emerges is a “backward class of citizens” within the meaning of and for the purposes of Article 16(4). Similar process can be adopted in the case of other occupational groups, communities and classes, so as to cover the entire populace. The central idea and overall objective should be to consider all available groups, sections and classes in society. Since caste represents an existing, identifiable social group/class encompassing an overwhelming majority of the country’s population, one can well begin with it and then go to other groups, sections and classes. (c) It is not necessary for a class to be designated as a backward class that it is situated similarly to the Scheduled Castes/Scheduled Tribes. (d) ‘Creamy layer’ can be, and must be, excluded. (e) It is not correct to say that the backward class contemplated by Article 16(4) is limited to the socially and educationally backward classes referred to.



in Article 15(4) and Article 340. It is much wider. The test or requirement of social and educational backwardness cannot be applied to Scheduled Castes and Scheduled Tribes, who indubitably fall within the expression “backward class of citizens”. The accent in Article 16(4) appears to be on social backwardness. Of course, social, educational and economic backwardness are closely intertwined in the Indian context. The classes contemplated by Article 16(4) may be wider than those contemplated by Article 15(4). (emphasis added)

(f) Adequacy of Representation in the Services under the State (emphasis added)

798. ---. This opinion can be formed by the State on its own, i.e., on the basis of the material it has in its possession already or it may gather such material through a Commission/Committee, person or authority. All that is required is, there must be some material upon which the opinion is formed. Indeed, in this matter the court should show due deference to the opinion of the State, which in the present context means the executive. The executive is supposed to know the existing conditions in the society, drawn as it is from among the representatives of the people in Parliament/Legislature. It does not, however, mean that the opinion formed is beyond judicial scrutiny altogether. The scope and reach of judicial scrutiny in matters within subjective satisfaction of the executive are well and extensively stated in Barium Chemicals v. Company Law Board which need not be repeated here. Suffice it to mention that the said principles apply equally in the case of a constitutional provision like Article 16(4) which expressly places the particular fact (inadequate representation) within the subjective judgment of the State/executive.”

There is no bar to provide reservation to Other Backward Class even as per above observation. It is permissible subject to data.

Quantitative limit 50%

**“810.** While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far flung and remote areas the population inhabiting those areas might, on account of their being out of the mainstream of national life and in view of conditions peculiar to and characteristically to them, need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out.”

**“860(4).** The reservations contemplated in clause (4) of Article 16 should not exceed 50%. While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being out of the mainstream of national life and in view of the conditions peculiar to and characteristic of them need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out.

For applying this rule, the reservations should not exceed 50% of the appointments in a grade, cadre or service in any given year. Reservation can be made in a service or category only when the State is satisfied that representation of backward class of citizens therein is not adequate.”

(emphasis added)

dealing with the aspect of excess reservation, observed in the following words:-

“66 Admittedly, reservations in excess of 50% do exist in some exceptional cases, when it comes to the domain of political representation. For instance, the Legislative Assemblies of the States of Arunachal Pradesh, Nagaland, Meghalaya, Mizoram and Sikkim have reservations that are far in excess of the 50% limit. However, such a position is the outcome of exceptional considerations in relation to these areas. Similarly, vertical reservations in excess of 50% are permissible in the composition of local self-government institutions located in the Fifth Schedule Areas.”

67 In the recent decision reported as Union of India v. Rakesh Kumar this Court has explained why it may be necessary to provide reservations in favour of the Scheduled Tribes that exceed 50% of the seats in panchayats located in the Scheduled Areas. However, such exceptional considerations cannot be invoked when we are examining the quantum of reservations in favour of backward classes for the purpose of local bodies located in general areas. In such circumstances, the vertical reservations in favour of SCs/STs/OBCs cannot exceed the upper limit of 50% when taken together. It is obvious that in order to adhere to this upper ceiling, some of the States may have to modify their legislations so as to reduce the quantum of the existing quotas in favour of OBCs.”

(emphasis added)

The Backward Class Commission was established on 29.01.1953 (Kelkar Commission). The caste-wise population was reported in 1961. The Mandal Commission has also dealt with it further. The

1931 Census is the base factor for determining the population for reservation including of other classes, but is not final as updated the natural growth or estimation as available utilised to determine the reservation policy from time to time.

104 In Union of India Vs. Rakesh Kumar (Supra), in paragraph No.43, it is further observed that:-

“43 For the sake of argument, even if an analogy between Article 243-D and Article 16(4) was viable, a close reading of Indra Sawhney decision will reveal that even though an upper limit of 50% was prescribed for reservations in public employment, the said decision did recognise the need for exceptional treatment in some circumstances.”  
(emphasis added)

105 The Apex Court in S.V. Joshi (Supra), has recorded that the “State Government” shall be at liberty to make reservations in terms of the law laid down by this Court in Indra Sawhney's case (supra). The reservation upto 50% is inclusive of SC/ST and other backward classes.

106 The Apex Court in State of Kerala supra a It is stated that Article 16(4) needs to be read as a part and parcel of Article 16(1)(2). This is also keeping in mind the doctrine of equality of opportunity to

all the citizens and not only to some and inequality to others. The State power to make a relaxation regarding the age in case of backward classes of citizens is also reiterated. It is also clarified by giving illustration that any reservation, exceeding 50% required to consider from the point of view of the State depending upon the large number of backward classes of citizens and therefore, in order to give them proper representation, percentage of reservation beyond permissible limits, may not be stated to be bad in law. It is made clear that the dominant object of this provision is to take steps to make inadequate representation, adequate.

107 In Akhil Bharatiya Soshit Karmachari Sangh (Railway) (Supra), the Apex Court observed that:-

“335. The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State.”

108 In Suraj Bhan Meena (Supra), while dealing with the concepts of “Catch-up” rule and “consequential seniority” and after considering the decision in M.Nagaraj (Supra), it is observed

that:-

“65. In effect, what has been decided in *M. Nagaraj* case is part recognition of the views expressed in *Virpal Singh Chauhan* case, but at the same time upholding the validity of the Seventy-seventh, Eighty-first, Eighty-second and Eighty-fifth Amendments on the ground that the concepts of “catch-up” rule and “consequential seniority” are judicially evolved concepts and could not be elevated to the status of a constitutional principle so as to place them beyond the amending power of Parliament. Accordingly, while upholding the validity of the said amendments, the Constitution Bench added that, in any event, the requirement of Articles 16(4-A) and 16(4-B) would have to be maintained and that in order to provide for reservation, if at all, the tests indicated in Articles 16(4-A) and 16(4-B) would have to be satisfied, which could only be achieved after an inquiry as to identity.

109 The strong reliance was placed upon the *U.P. Power Corporation Limited (supra)*, by the learned counsel against the Reservation Act. It was a case based upon the facts and the then law under challenge. The Supreme Court Judgment in *Suraj Bhan, M. Nagaraj and others* has been duly noted. This covers and includes the point of ceiling limit of 50%. This also should be based upon the identity and measure quantifiable data. This Judgment has also recognized, depends upon the numerous factors and the compelling reservation claims, to be achieved by the State. In *Suraj Bhan*

(Supra) case, the State had not undertaken any exercise. It is reiterated that, the State is required to take steps as directed in M. Nagaraj (Supra), before providing for reservation for promotion with consequential seniority.

“Proper Representation” as contemplated under Article 16(1)(4) for Other Backward class permissible :

110        The term “proper representation” as contemplated under these Articles need to be read in the context of the State Government enabling power to provide reservation to the backward class/group. Having once noted and found, based upon the data, that particular group and/or class is backward and/or socially backward and are not duly represented as not belonging to Scheduled Caste/Scheduled Tribe class/group though they are equally situated, the State is empowered to extent and/or grant and/or provide such reservation permitting their representation in the State Government service and/or to grant equal benefits concession to such other community/class. The importance of granting such representation and reservation with intent to uplift the people belonging to disadvantageous group or class and all related provisions are in the

Constitution since its inception and prior to the same. The Parliament, considering the requirement, from time to time, has been extending and/or granting the span as noted under Article 325 of the Constitution. The said protection/reservation has been continuing for any one of the purposes, then the State is also under obligation to read and refer and consider the same till the situation is restricted by appropriate constitutional provisions. The representation and/or reservation conceptually means and includes the extended benefits to similarly situated backward class/group once data is collected and sufficient to act accordingly. The Court needs to consider the object and the purpose of the reservation policy. In *Ram Kumar Gijroya v. Delhi Subordinate Services Selection Board and anr.*<sup>24</sup>, the Supreme Court held that the object of providing reservation to the STs/STs and educationally and socially backward classes of the society is to remove inequality in public employment, as candidates belonging to these categories are unable to compete with the candidates belonging to the general category as a result of facing centuries of oppression and deprivation of opportunity.

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24 (2016) 4 SCC 754



Judicial Review of the Listing & the quantum of “Quantifiable & Qualitative Data of specific Class/Group”.

111 It is impossible for the Court to “list or de-list and/or specify backward class/community/group caste” even for the purpose of Article 16(4) for State or Region, or otherwise. It is the specified work of an expert body/commission or authority of the Central and/or the respective States, specifically for want of designed “straight jacket formula” for the same, except the court decisions. Such Authorities/experts need to follow the Constitutional provisions and the guidelines, issues, through the law and the Judgments announced, from time to time, to achieve the constitutional aims and objects. We have noted that the practice and procedure and the mechanism and the source so adopted by the Authorities/Commission are fair, adequate, by applying its mind, the data/information for identifying and deciding the backward class/group. There is no contra material placed on record. We have noted that no case is made out to interfere with the decision/opinion/action taken of the State in this regard. The State and the Authorities have applied it's mind to the material/data/information, submitted by the expert body personnel, through the Commission, Reports with recommendations. They have been acting fairly within the frame of law, and listed the

“caste”/”group”/’classes”, including OBC, in the respective Scheduled Lists for the constitutional benefits/concession. There is no challenge to the criterion so fixed and acted upon by the State/Authority to collect and gather information, since so many years. There is no averment/submission that the benefits were wrongly or illegally given to the concerned caste/groups. There is no such counter challenge even by other such groups/caste. There is no perversity, illegality or malafide of any kind and even allegation of non-application of mind and breach of any constitutional provisions. The whole challenge is unsustainable. The State's Reservation Act/Circulars are valid and well within the frame work of law and the record.

The Court cannot direct or restrict the collection of upgrowing data.

112 It is correct that the Census of 1961 was restricted for SC and ST only. There is nothing on record to point out any fixed procedure or mode of identification of backward classes to determine the population based representation and/or reservation or fixed percentage. There is no declared guidelines or formulae issued, how to identify and/or collect the data and to give representation to such class and/or group and/or fix the percentage for reservation. The process of collecting material/data is on, based upon the Supreme

Court judgments . Definitely, those data and/or information are of 50 years old, but it has dealt with and is a quantifiable data about the reservation in Government service of various backward communities. This is in addition to the fact that the State has also separate backward class cell, which has data for deciding the issue of adequacy of representation of backward classes. Those material and information were also part of the record, and read and referred by the respective Committees. The chart is placed on record as ordered by the Court, through the separate four volumes, in High Court also, with clear submission that except Volume I, all other data reports, comparative chart in respect of OBC and VJNT classes were part of record of the MAT. The backlog can also be of open category and it cannot be only of backward class candidates. The constitutional rights of others are also required to be protected.

The excess 2% (above 50%) reservation for recruitment stage is permissible if the data is available

113           The excess of 2%, at the stage of appointment/post and/or initial recruitment permissible, if the quantifiable data is available with the State.OBC covers SBC. The State's power is based upon the irrefutable data to justify the reservation upto 52%. The reservation

beyond 50%, if any, as noted, even from the Supreme Court Judgments so cited is not totally prohibited. Additional 2%, even if any, in the present case and in view of Reservation Act and the circulars, the scope is very limited, as it is data based decision.

114 The learned Tribunal without referring to same reasons, accepted the case of original petitioners though admittedly the Circular of promotion of 2004 in question had provided reservation only 33 per cent and certainly not exceeded 50% as contended. The learned Tribunal has wrongly accepted the case that allowing reservation and carry over a promotional process for classes other than S.C. & S.T. is in direct contravention of provisions of Article 16(4-A) and 16(4-B). It is wrongly accepted that it permits disproportionate carry over and re-fixing of quota without any basis- no such factual based case is made out. These affidavits and data having placed on record to show the recommendations made by the respective Commissions and the Committee and the various position of backlog and details which provide information and material for the State to extend reservation to these category or the groups/classes including O.B.C., V.G./N.T.

115 The recommendations of these Committees/Reports including Kaka Kalekar Commission of the year 1955, B.D.Deshmukh Report (1961) have recommended sub-classification of Backward Classes into S.C. & S.T., V.G., N.T. and O.B.C. The learned Tribunal erred by holding that these reports of Committees, before 1978, before Mandal Commission Report, and therefore, are not relevant.

116 The learned Tribunal is wrong in holding against the State by observing that “the State Government has not been able to convince the Central Government to include D.T., N.T. and O.B.C. in Maharashtra in the Schedule of S.Cs. and S.Ts”. The Tribunal's approach was wrong. There was no question of specific inclusion of these castes in the Scheduled List of SC/ST. The point is that they are equal in “backwardness” and their “adequate representation” is required in the State. The State enactments and earlier Circulars support their decisions. The issue is about treating all equals equally. The Tribunal, in this background wrongly held that Section 5(I) of the Reservation Act violates Article 16(4-A) for reservation in promotion, at all stages of promotion. This is also in the background on admitted position on

record that the State has exercised its power to provide reservation for O.B.C. as defined in the Reservation Act . Section 5(2) empowers the State to do so. The Constitutional validity of any Act or provision cannot be decided on presumption and assumption. The Circular/Resolution Clause 3A provides for reservation in promotion for backward classes other than S.C. and S.T. and so also reservation for members in VJ(A), NT and SBC .It is well within the law and the record.

No data of effecting efficiency in administration

117 Prior to the insertion of Clause (4A) to Article 16, i.e. prior to the constitution (Seventy Seventh Amendment) Act, 1995 w.e.f. June 17 1995, as per Indra Sawhney (supra), the reservation of appointment of posts under Article 16(4) was confined to initial appointments only. It is observed that such reservation cannot be provided further in the matter of promotion and/or further promotion. This was also on the foundation, that the reservation in promotion “might impair efficiency”. In M. Nagaraj (supra), the constitutional validity of amended clauses (4A) and (4B) have been upheld. It has been declared that the State has to

identify and collect quantifiable data showing backwardness of the particular class and group and inadequacy of representation of that class/group in public employment. It is further declare that this is also by keeping in mind the maintenance of efficiency in administration. This is again a subject to dealing with the facts and circumstances of the case in question. The constitutional provisions and these judgments itself empower and recognize the enabling power of the State Government to take effective steps to collect data, information after identifying the backwardness of the class with a view to provide them proper representation.

118 The Supreme Court in M. Nagaraj (supra), has even otherwise, never directed to initiate and/or mandate that all the pending matters, reservation policy based upon the existing data be rechecked, re-opened and re-identified and declared first bad in law and then framed the fresh reservation policy, by creating blankness and commotion in the society. Timely action is required but after giving reasonable time to all the concerned based upon contemporary data/material . The recent judgements support the same. Apex Court in

*Ashok Kumar Gupta and Anr. vs. State of U.P. and Ors*<sup>25</sup> has reinforced the concept of administrative efficiency in this background.

The State's bonafide action

119 This is also in the background that the basic reservation policy is in existence in the State since 1901. The State had been acted accordingly, in view of the various earlier judgments, initially in view of General Manager, Southern Railway Vs. Rangachari Gurbux Das<sup>26</sup>. The subsequent reservation was restricted to 50% in Indra Sawhney (supra), until as recorded, the reservation in promotion was not accepted. However, by the subsequent constitutional amendment, such reservation in promotion, in fact, has been accepted and maintained in M. Nagaraj (supra), except on a condition as recorded above. Therefore, the important requirements, which the Court need to see are; (a) Whether there is a material in support of the backward classes of population? (b) and/or adequate representation in various posts? (c) Whether such reservation had affected adversely to the administrative efficiency? We have noted that all these elements are in favour of the State and the Reservation Act/Circular.

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25 (1997) 5 SCC 201

26AIR 1962 SC 36



120       The State, cannot be stated to have no data whatsoever to grant such reservation, as already granted and implemented since long. The reservation in promotion was provided in the year 1974, though upto Class-I level - had been intended to be implemented by the Reservation Act. Under Section 5, the reservation extended to all the employees at all the stage of promotions also. Section 4 of the Reservation Act, itself further added that the percentage of reservation should be on the basis of latest Census record of population. The State has established the Backward Class Commission for the same. The State had relied upon various reports, commissions and their recommendations, as recorded above: Thade Committee Report of 1961; B.D. Deshmukh Committee Report 1964; Edate Committee Report 1988; the State Backward Class Commission Report; Census Report and SBC Files. We have already dealt with same in earlier paragraphs. These reports are relevant for all concerned, unless specifically challenged.

*A preliminary objection by the State*

121       The learned Members of the MAT have decided the issues in pursuance to the remand order/order passed by the High Court, as

recorded in earlier backgrounds, history/notes. The facts need to be tested after considering the provisions of the Administrative Tribunals Act, and specifically Section 15. Initially, there were objections raised before the High Court, that the related issues were required to be adjudicated by the MAT, being the Court of first instance. but by keeping the objection open.

122 The submission, therefore, by the learned Senior Counsel appearing for the State is that the MAT has exceeded its jurisdiction in deciding the constitutional virus of the Reservation Act.

123 It is submitted by the other side that there is no bar and/or any Section of provisions pointed out, which debar and/or prohibit and/or restrict the MAT in dealing with virus and/or validity of any Act and/or related circulars. Therefore, “the doctrine of appropriate and reprobate” is cited, in view of the conduct of the State and R.L. Gosin Vs. Yashpal Dhir<sup>27</sup>, and Rajasthan State Industrial Development and Investment Corporation and Anr. Vs. Diamond and Gem Development Corporation Ltd. & Anr.<sup>28</sup> .

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27AIR 1993 SC 352

28AIR 2013 SC 1241

124 So far as the jurisdiction and power of the MAT, the Supreme Court in S.P. Sampathkumar Vs. Union of India<sup>29</sup> has elaborated that the Tribunal is the substitute of the High Court and is entitled to exercise the power thereof, (para 31, 19, 93 and 99). In J.B. Chopra Vs. Union of India<sup>30</sup>, the Apex Court clarified that the MAT, being a substitute of High Court, has power and authority to adjudicate upon all the disputes relating to the service matters, including the power to deal with questions, pursuance to the constitutional validity or otherwise of such laws which violates Articles 14 and 16 of the Constitution.

125 However, the Tribunal need to act within the scope and jurisdiction as provided under the tribunal Act. There are Writ Petitions whereby, the constitutional validity of the Reservation Act itself are challenged directly in the High Court by other similarly affected persons. Those will be heard separately.

#### The Power and Jurisdiction of the tribunal-- MAT

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29AIR 1987 SC 386

301987 SC 357

126        The Supreme Court in *L. Chandra Kumar vs. Union of India*<sup>31</sup> has specifically dealt with the power and jurisdiction of MAT. In paragraph 91, the Supreme Court has emphasized that the power of judicial review is with High Court under Articles 226 and 227 where vires of the legislation is questioned. It is observed that the Tribunal should restrict themselves to deal with the matters where constitutional issues are raised. This is no way to read and mean that in service matters, the MAT cannot deal with Articles 14, 15 and 16 of the Constitution. What is contemplated is, therefore, the power of Tribunal to decide and adjudicate the issue on merits. In the present case, merely because the High Court has directed the matters to the Tribunal that itself ought not to have the reason for the Tribunal to decide the constitutional validity of the Reservation Act, based upon no pleading and/or material with regard to the merits of the promotional issues. The Tribunal ought to have acted upon as the Court of first instance in respect of the areas of the law for which they have been constituted, to decide the merits of the service matter based on facts if any, keeping in mind Article 14 to 16.

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<sup>31</sup> AIR 1997 SC 1125

Locus standi of the contesting Respondents

127 The issue of locus-standee of the original complainant, in view of above background, even if raised, but having ordered by the Division Bench after transferring the group of Writ Petitions , and as both the parties have participated before the MAT, and as the validity of the Reservation Act itself has been declared ultra virus, we are inclined to deal with the matters on validity of The Reservation act, as the confusion and non- plus situation has been created in all state reservation issues .This required to be adjudicated and decided at the earliest. Therefore heard finally these restricted matters .

128 The Apex Court in State of Maharashtra Vs. Jalgaon Municipal Council & Anr.<sup>32</sup> rejected the case and submission that the citizen and/or voter has no locus standee to challenge the constitutional virus of the Act or the ordinance. In S.P. Gupta Vs. President of India & Ors.<sup>33</sup>, and Dr. D.C. Wadhwa Vs. State of Bihar<sup>34</sup>, Chairman Railway Board Vs. Chandrima Das<sup>35</sup> and Mohd. Aslam Vs.

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32 AIR 2003 SC 1659

33 AIR 1982 SC 149

34 AIR 1987 SC 579

35 (2002) 2 SCC 465

Union of India<sup>36</sup> . These judgments need no further discussion, as we have proceeded to decide the issues so decided by the Tribunal Judgement/order.

The tribunal jurisdiction to declare Reservation Act ultra vires

129 The learned Members of the MAT have cautiously proceeded with the matter while dealing with the validity of the provisions in view of the submissions so raised and made by the parties, including noting the basic principle of presumption in favour of the constitutionality of such statute and noting that the forum has to proceed within the limitation of judicial review while examining the virus of the statute.

130 It is settled that the presumption is always in favour of validity of enactment brought by the legislatures. The scope of Judicial Review against the presumption is very limited. In view of power and scope of Article 226 of the Constitution of India and its principle to interfere, is also restricted and limited. The scope and power of MAT of “judicial review” to interfere with validly enacted

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36 (2003) 4 SCC 1

the Reservation Act, and circular, is further limited and restricted, than High Court. The Judgment and order passed by the MAT is always subject to the writ jurisdiction of the High Court. The purpose and object of the Tribunal in the Central, and the State service matters, is limited. The MAT may pass order and/or deal with the subject, which falls within the purview of the State Tribunal. Most of the service matters are on facts and respective service conditions and rules made therein. The jurisdiction of MAT therefore, required to be within the ambit of facts and respective service conditions, rules and regulations or circulars or its interpretation.

131 The prayers and reliefs were contested by the respective Departments. The MAT, being a first instance court, that itself mean and/or empower firstly to look the basic principles of law of pleading and law of burden of proof, specifically in view of settled position of law in favour of validity to any enactment. The scope of MAT to go into the factual details and data in question in case the disputed facts are involved is limited. Any enactment always has the foundation of prior and pre-collected information/data/material by the State agencies, before the cabinet, and before the legislation.

The Impugned Judgment of MAT

132        The learned Tribunal Members have, on the Transfer Applications Nos. 1 and 2 of 2004 (Writ Petition No.8452 of 2002 and Writ Petition No.470 of 2005) without dealing with the facts and the merits of the respective applications/writ petitions, dealt with the Reservation Act and the promotion Circular. No pleadings, affidavits and facts have been specifically dealt with to hold the foundation on merit to decide the validity. The learned Members have also, though noted the issue of incomplete and inadequate pleadings, proceeded to decide the vires and the validity of the Reservation Act merely because the original applicants/petitioners are State Servants. The learned Members have proceeded on the foundation that an adverse inference should be drawn if important documents were withhold. The learned Members thereby accepted the case of original petitioners/applicants that inadequate pleading or averments should not be the reason to dismiss the challenges so raised about the validity of the Reservation Act. This is on the unsupportive foundation that even if the burden of proof did lie on the original Petitioner, but as the State had withhold the important documents, the adverse inference should be drawn. (Gopal Krishnaji Ketkar v. Mohamed Haji Latif, AIR 1968 SC 1413)



The Tribunal, therefore, ultimately proceeded wrongly by observing that it is for the State to produce material to support their claim, though quantifiable data is available with them to support the same, that the various backward classes are not adequately represented in the Government service. This is in the background of no specific order to produce any particular data or material. The requisite data/material in fact were part of the record as noted earlier.

133 Furthermore, there was no specific sustainable challenge raised for want of specific pleading with regard to the vires of the Reservation Act at the stage of recruitment on the aspect of reservations of posts for all the specified categories up to 50%. We have noted that a challenge is raised also about reservation beyond 50% – excess 2% in the present case.

Abrupt discontinuation of Earlier Circular's and existing reservation policy incorporated in the Reservation Act and the Circulars.

134 By Maharashtra Government Resolution dated 9 April 1965, a provision was made for reservation in Government Service for members of backward classes SC-including converted to Buddhism, ST-living out side the specified area, De-notified Tribes and Nomadic

Tribes and other backward communities. In modifying the existing reservation, percentage was fixed for SC 13%, ST 7% DTNT 4%, and other backward communities 10%= Total 34%. These Government circulars applicable through out the State to the Department and accordingly all requisite benefits have been provided to them. The directions were issued to comply with the same also.

135 Government Resolution of 23 May 1974, even the stage of promotion was considered. Noting 50% limitation, for SC 13%, ST 7% and De notified Tribes 4%, total 24% was fixed for reservation of these classes, at the stage of promotion. That was on the basis of seniority, subject to fitness and increase to all classes,- Class-I, Class-III and Class-IV posts/ grade in service. The model roster was accordingly prepared and the concerned department and parties have acted upon the same.

136 As per the State, the reservation policy has been extended to the local bodies in the year 1995 and 1996 . The same has been implemented without specific challenge by such organizations with regard to the reservation to SC/ST and OBC. In totality, we have also

noted that the Reservation Act has not made any new changes and/or brought any new provisions for the first time, based upon the data and the material so placed on record and the then existing reservation policy through the circulars so recorded above, brought into force the Reservation Act 2001 w.e.f. 2004. There is no material placed on record to show that such circulars have been declared bad and/or illegal for want of quantifiable data. The State in its wisdom and in view of enabling power, decides to extend the same benefits to such class/group through these Statutes. This is in addition to the earlier state data.

Nagraj's Principle discussed by the Tribunal

137 The learned Tribunal members, though recorded and noted the synopsis of reports of various Committees so recorded above and its recommendations as reproduced in paragraph 27 and so also note on behalf of State, providing information about various reports with page numbers, yet by sitting as Appellate Court and/or Forum, have expressed their opinion contrary to and/or against the opinion and the reasoned decision given by the State and its expert bodies. The Apex Court in **Indira Swahney** in paragraph 842 itself recorded and restricted the scope of Court's scrutiny in such matters. This is

not the case of no material whatsoever on the contrary as per the Constitutional requirement. The State being empowered to take care of the problems and difficulties of respective communities, tribes and groups. It is under obligation to provide them representation in service and/or adequate representation in service, if case is made out. What should be the level and degree of sufficiency and/or adequacy and as there is no strict jacket formula for assessing and for arriving at a conclusion to fix and grant reservation at recruitment and/or at promotion stage, therefore, it is in State's domain. The findings and the submissions that no attempt was made by the State to conduct and exercise as done in State of Bihar in August 2012, is wrong and should not have been the basis in the facts of the case.

The State under continuous obligation to collect data for modification of Reservation Policy.

138 This, nowhere led to mean that the State is restricted and/or prohibited from continuing to collect timely data for timely correction and/or amendments to the reservation policy, as per the requirement of the society in the State. This may include addition and/or lowering of percentage and/or category at appropriate stage but in accordance with law. Mere allegation that the reservation has

adversely impacted on over all administrative efficiency is not sufficient. There ought to have on record the material to justify the same. The burden cannot be put upon the State to prove negative.

139 This also means, all these clauses independently or otherwise are required to be read and referred while dealing with the subjects of providing reservation even in promotion to SC/ST and other backward classes, but subject to the other constitutional provisions, including Articles 14, 15, 16 and 335. The State Government and/or appropriate Government is also required to restrict the duration, based upon the facts situation in so far as the ceiling limit on to carry over all the unfilled vacancies. This also means that there is no bar and/or restriction or any restriction is imposed upon the State and/or appropriate Government to enact the law providing for reservation for all. The 50% ceiling itself means and it covers not only SC and ST class and/or group but other backward class also as constitutionally fixed and as recognized and have been in existence since inception. This constitutional percentages covering all class and protection so granted in the year 1931, 1961, 1965, 1971 etc. have been followed by the most of the

States. The decision therefore, so taken by the State, initially through the circulars and subsequently through the Reservation Act in the matter of employment, was well within the frame work of law and the record.

The state Promotion policy as per the law and service rules only.

140 If the contesting Respondents or any employee not eligible for promotion unless promotions are actually given effect to and/or there is no actual threat of any kind in any particular cadre or department, there is no question to decide the case on merits. The promotion, on merit, will be tested based upon the factual data and the relevant principles of law. The promotion policy is also subject to change. The promotion policy is also not a matter of judicial review as it is the prerogative of Executive including fixation of quota and ratio. However, it is required to be within the frame work of law and the record so declared. [*Rohtas Bhankhar v. Union of India(supra)* ].

141 Promotion is a part of recruitment if service rules provide but subject to eligibility criteria; seniority cum merit or vise versa, ACR and other conditions. It is stated to be a mechanism of further appointment to the higher grade or category of post. The promotion

is not a right, but it's entitlement if otherwise fit within the promotion policy. The State is empowered to provide for promotions but subject to criterion and need or it may not provide promotion. The Court cannot direct the State/Authority to provide for promotion, if there are no such rules. The various restrictions, eligibility criteria are normally fixed by the State at the time of recruitment itself. The employees are aware of such policy of promotion at the time of "appointment" to the "post" itself. The recruitment once made on reserved category basis, at entry level that itself may not improve their overall development even for promotion. Every employee needs to work hard and to get promotion as per the conditions, apart from regular CR/ACR (Confidential Record/Annual Confidential Record). The law of appointment/promotion is settled, so also the doctrine of "creamy layer" even at the stage of promotion. [ In Ashok Kumar Gupta v. State of U. P., (1997) 5 SCC 201 "efficiency of administration" is also reinforced. ] Ajit Singh v. State of Punjab (1997) 7 SCC 209 - "Roster point" is also a point for discussion in such circumstances. The State, therefore, is entitled to make promotion rules or modify the promotion rules, for any of the category or the group. The appointment at initial stage on reservation itself may not make them

equal with general category. The selection rules or eligibility criteria, even for promotions are made by the State. The new generation, disadvantage class, even if belongs to reserved category, having exposed to new technology, in school, college or higher education, themselves surprise the State or the employer by their performances, even in public employment, because of their merits. The State, therefore, definitely need to change it's approach and so also to such reservation policy. The social, economic, education improvement itself, in a given case, entitled them to participate, at all level, with the general category. The aspects of "creamy layer", improved economic condition and education condition, itself grant and/or filter their entitlement in future promotion even for other backward class/category. The political dynamic spectrum itself cannot be the reason to give guidelines or to do list even by the Court. Let respective wings act within their declared sphere. The disadvantaged person/class cannot be treated as general category merely because they are appointed to the post because of the concession given at the time of recruitment itself. For further promotion or up-gradation, subject to filtration, the State is empowered to provide reservation policy if facts and circumstances permits.



142 The Tribunal's one member has not decided issue raised in para 19(ii)(b) about the definition of "Public Service and Posts" and "establishment". The Court will consider the same in appropriate case. We have to deal with the "Public Employment" and not the "Private Employment". Even otherwise, it is the State, in view of the constitutional provisions, to decide and/or extend the reservation policy within framework of law . Therefore, if there is specific challenge the Court would decide the same The issue raised in para 19(ii)(c) is covered in para 19(ii)(a) so also for the above reasons. The State has always power to extend the reservation policy if required. The Court cannot restrict or direct the State to bring in or out extension of reservation policy to any "State institution" or "establishment".

The Reservation in Promotion through Circular since long

143 The whole argument as recorded and agitated even before the MAT and/or otherwise by the Respondents was on the State's power of providing even 33% reservation in promotion. There was no serious dispute in the matter of basic recruitment which can be seen from the issues so raised by the Tribunal. There was no specific

challenge or issue raised about and on recruitment process. The challenge and the percentage so prescribed, based upon the circulars since long which has remained intact till this date and now converted into the Reservation Act.

The Statute need not be declared ultra-vires for the Academic purposes.

144 On going through even the affidavits, including Para 26 to 41 and the counter-affidavit filed by the parties, read with the documents, charts, statements and the various reports, so recorded above, and as those are sufficient to consider the case of the State about the existence of data, vacancy and the representation requirement for the particular community. This is also in view of the fact that there is no specific contra material, except simple denial. We have noted, apart from the backlog and the vacancies and the requirement for providing the promotions to all the categories, further material for the years 2004 to 2011 are updated upto 31 March 2013, are also placed on record through the exhibits and charts. It is necessary to know that the reservation in promotion are made subject to various orders passed by the Supreme Court and the High Courts. . No actual affected list and/or special seniority list and/or action are

placed on record by the contesting party. The Constitutional validity, therefore, in our view, ought not to have been decided only for the academic purposes.

- i) *Naresh Shridhar Mirajkar & Ors. Vs. State of Maharashtra & Ors.*<sup>37</sup> (Para 16).
- ii) *State of Karnataka Vs. Registrar General, High Court of Karnataka*<sup>38</sup>
- iii) *The State of Bihar Vs. Rai Bahadur Hurdut Roy Moti Lall Jute Mills & Anr.*<sup>39</sup>

Furthermore, the promotion rules itself required to complete many steps and stages, including availability of vacancies/posts before implementing the reservation in promotion. The promotion circular itself provides only fluctuating reservation. Even otherwise, such reservation policy is also subject to change and/or modification from time to time. Cadre-wise and/or class-wise and/or sub-distribution, even if any, of vacancies/posts would be decided on factual basis and as and when the particular department crosses the limitation of all kinds.

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37AIR 1967 SC 1

38(2000) 7 SCC 333

39AIR 1960 SC 378

145        There is no issue that the reservation in promotion is second stage/concession to the person/caste or community who have been provided concession and/or benefits at the time of recruitment/appointment to the posts. In the present case, Act provides 52% reservation, for the basic entry points are concerned, favoring all the categories subject to the set percentage. The promotional circular grants the similar benefit only to certain categories up to 33%. Therefore, apparently in promotion, there is no case of doctrine of Reservation beyond 50%. The tribunal, therefore, ought not to have intermixed the same reasons of quantifiable data and/or material as there is no specific pleading or contra material before declaring the Reservation Act and the circular bad in law. The excess promotion and/or no case of benefits to be given to the concerned caste or community in promotion, for want of quantifiable data, required to be considered only if actual and factual data and or material are placed on record. The concerned Tribunal/Authority would consider the same by assessing the merits if case is made out. This is in the background that there is no bar and/or any prohibition and on the contrary, the Supreme Court Judgments , itself provide and permit the State to extend benefit to ST and SC, even in promotion

subject to the data, which in the present case, is available. So far as other communities are concerned, the same doctrine/principles are applicable, if they are equally situated and/or placed in their backwardness and for providing reservation based upon the material and the representation so made, including the grant of similar benefit, even for the promotion. The actual uncertainty and/or complications, if any, including excess of reservation and/or representation, would be considered at the relevant stage in appropriate fact based case.

“Catch UP Rules” vis-a-vis “interse seniority” & “Roster Point”

146 The concept of “catch up rule” is well recognised while dealing with the reservation in promotion. The Supreme Court, in many judgments, has elaborated the principle referring to Article 16(4-A) read with 335 of the Constitution. “Catch Up Rule vis-a-vis Interse seniority”; “inadequacy of representation of ST and SC”; “consequential seniority”; “State's obligation to collect data”; “Roster point” - all these principles are required to be noted by the State and/or the Authority while considering the reservation in promotion. [S. Panner Selvam (*supra*). It is always necessary for the State to keep in mind “no reverse discrimination against the general category”.

“Creamy layer” applies to OBC & others

147        The concept of “creamy layer” has been elaborated from the point of view of OBCs and not referring to the SC and ST categories in *Ashok Kumar Thakur v. Union of India*<sup>40</sup> (Five Judges-Constitution Bench). The said principle has been followed and referred in subsequent judgments also including *Rajesh Kumar (supra)*. The Constitution Bench of Supreme Court in *Rohtas Bhankhar v. Union of India*<sup>41</sup> has also dealt with the aspect of “creamy layer” along with the excessiveness of ceiling of 50% and the extension of reservation indefinitely, thereby maintained the Supreme Court judgement of *Superintending Engineer, Public Health, U. T. Chandigarh vs. Kuldeep Singh & ors*, 1997(9) SCC 199. This decision of Supreme Court, therefore, need to be followed by all while applying the reservation in promotion for OBCs. That squarely is the case of the State in the case in hand.

148        The concept of doctrine of “creamy layer” create a class among the reserved category itself. Though belongs to reserved category yet, if reached to level and/or fall within the ambit of

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40(2008)6 SCC 1

41 (2014) 8 SCC 872

umbrella of "creamy layer", all the future benefits are restricted. But still their caste/class remains the same. The alike reserved category batch or group or class or individual if are not under the umbrella of creamy layer are entitle for "equal opportunity" protection" even in promotion. Time will take care if all are within the umbrella of "creamy layer". The constitutional extension for further 10 years reflects the whole intention of the people at large. In Democracy set up, there should be constitutional decision on these reservation policy first. The scope and power of judiciary are restricted. The judicial review or decision follows later. The interpretation of law is the judicial power and not the making of law.

#### MAT's finding about the Creamy Layer

149 One of the learned Tribunal, so far as the creamy layer for promotion to the O.B.C. is concerned, has refused to decide the issue as it is held that the reservation for promotion in category other than S.C. and S.T. is invalid. However the rule of Creamy Layer would not be applicable at the time of entry and/or at the time of granting of promotion to S.C. and S.T. The other tribunal member has dealt with it.

150        The observations are made that the concept of Creamy Layer should not be applied to S.C. and S.T. both for initial appointment and for promotion in the referred Supreme Court judgments.

151        In view of above, the one learned Tribunal has not dealt with the aspect of applicability of Creamy Layer to the O.B.C. category. Lastly, we came to the conclusion that a reservation in promotion for the categories other than S.C. and S.T. is valid. The aspect of Creamy Layer to promotion of O.B.C. does survive. However, it would be subject to the existing law and the State Circulars.

152        It has been noted that Section 4(2) of the reservation act itself provides that the concept of "Creamy Layer" shall be applicable to all the categories mentioned in Section, except SC and ST. The said concept has been elaborated in the Government Resolution and is amended from time to time. The State Resolution, therefore, would be applicable to all the concerned, at the respective stages.

Wrong use of the Doctrine of Severability

153        The stage of appointment/recruitment by the State/Authority always governed by the constitutional reservation of



particular caste and community and the percentage so fixed from time to time. In view of constitutional provision even for promotion, so far as Scheduled Tribes and Scheduled Castes are concerned, and in view of Supreme Court Judgments so referred above, the State is empowered to extend the benefit and concession. Therefore, if case is made out with the quantifiable data, the parallel benefits to the similarly situated person being backward and not adequately represented, the State is empowered, in view of the enabling constitutional provision, to widen the similar benefits at the time of recruitment and also at the time of promotion. Aspects of Article 14, 15 and 16 and other provisions need to be read together when it comes to granting such benefits to the equally placed castes and communities. The learned Tribunal, therefore, wrongly approached the matters. The reservation act has foundation of earlier enactments and the circulars. All historical facts and those necessities are interlinked and unjust to break down. All the reservation provisions are legitimate so also the Circulars. The severability tenet was invoked imperfectly.

#### The wrong shifting of Burden

154           The law is settled so far as the constitutional validity of

any Act/Statute are concerned. The presumption is always in favour of constitutionality of statute. In the present case various material have been placed on record including the existing data, which were noted and placed even before the Cabinet and further before the State Legislature, which ultimately had passed the Reservation Act, in the 2004 based upon 2001 census and the material so collected. The original petitioners have not placed on record any contra material to challenge the provisions, The Tribunal, though noted the measurable material placed on record in support of the said action but overlooked the same and declared the Act ultra vires, on presumption and assumption. There are persons other than the petitioners, who would be benefited by this Act and the policy, are not before the Court. Though in Transfer Petition No.2 the Tribunal has no jurisdiction to deal with certain matters of such corporation and the order of transfer, even if any, passed by the High Court, that itself is not sufficient to accept the case that the Tribunal has jurisdiction to decide the constitutional validity of the act which is beyond their jurisdiction in view of specific provisions of Administrative Tribunal Act and the Judgments of Supreme Court in relation to it. This was also by putting whole burden upon the State, in spite of quantifiable data

placed on record.

155 This is again in the background where the State if case is made out, is entitled to provide representation to such community in every field including the State service. There is nothing pointed out that once the reservation is declared to the particular community including the percentage so fixed and prescribed, the same are not extended and/or cannot be extended for the said community/group for any other purposes. We have noted even from the judgements so cited by the parties that once the reservation/representation is granted and/or extended by the State, those are applicable to the group and/or category for all the purposes. Such reservation based upon Statutes/Circulars, cannot be taken away in such fashion even in promotion matters. [ Chairman and Managing Director, Central Bank of India and ors v. Central Bank of India SC/ST Employees Welfare Association and ors.<sup>42</sup>, on the contrary enforceable constitutional rights has been created by such statutes.

The Tribunal's wrong findings

156 The learned Tribunal failed to consider the Apex Court

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<sup>42</sup> (2015) 12 SCC 308

judgment in *Commissioner of Commercial Taxes, A.P. Hyderabad and anr vs. G. Sethumadhava Rao and ors.*,<sup>43</sup> whereby Rangachari's principles have been upheld so also Thomas (supra) and Akhil Bharatiya Soshit Karmachari Sangh (Railway) v. Union of India and ors. (1981) 1 SCC 246, whereby even the rule of reservation in promotion was considered even for backward class. The learned Tribunal also failed to consider the UP Corporation and Suraj Bhan Meena Case (supra) wherein following M. Nagraj (supra), the reservation based in promotion, as stated to be permissible, subject to Nagraj's principles. Even various Committee reports with regard to the inadequacy of representation and population percentage was not duly considered. There was no challenge to the source of information and the backwardness of the backward classes and even of S.B.C. The learned Tribunal failed to note that the Supreme Court has permitted the reservation in promotion for VJ/NT category but subject to final decision. This is in the background also that the challenge was restricted to reservation in promotion and not about the reservation in direct recruitment. The other cases cited by the State were also not discussed. The learned Tribunal was wrong in relying on the

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43 (1996) 7 SCC 512

principle of “best evidence rule” by overlooking the basic principle of burden of proof in the matter of constitutional validity. The reliance on the Maratha Reservation Case was wrong, being issue after the Reservation Act and the Promotion Circular. The difference and the different percentage of all the categories itself speaks for the State's decision to grant reservation, based upon the data and the material with them.

157 The concept “any backward class of citizens” covers and includes the OBC/NT and those are socially and educationally backward classes. The learned Tribunal has misread and misinterpreted Articles 15(4), 16(4), 340 and other constitutional provisions. The learned Tribunal, though recorded that the validity of impugned Reservation Act in relation to SC and ST need to be upheld, but declared the whole Reservation Act and the Circular bad in law. The principle and protection so available to SC and ST, therefore, required to be extended to other backward classes, and/or categories, if they are similarly and equally situated and requisite data is available. The Tribunal further failed to appreciate that Barium Chemical's case (supra) required to be followed in the matter of

subjective satisfaction of the State. The issue of deemed State is fact based. The principles of Industrial Disputes Act ought not to have been extended in the matter of reservation. The observation regarding the cooperative society was also without any data and material including the finding revolving the definition of “establishment”. There was nothing to show that the reservation in promotion was as announced in excess of prescribed limit. The provisions of direct recruitment and that of promotion was wrongly interlinked and intermixed. The SBC is a part of OBC, but the Tribunal has overlooked the same. No discussion, even made about the purpose and object of Articles 338, 338-A and 340 of the Constitution including Backward Class Commission's role. The Tribunal, as noted, except declaring the Reservation Act bad in law, not even discussed the State's action of giving promotion to the reserved candidates pursuant to the order passed by the High Court and the Supreme Court. The learned Tribunal, even failed to note that the State action was based on record of 34 reports of various Commissions ,ranging from the period 1964 to 2008. The reservation in promotion, though upto class I, was recognised by the Full Bench of High Court in G. R. Chavan's case<sup>44</sup> which was confirmed by the 44 1988 (Supp) BCR 923 (FB)

Supreme Court in *G.R. Chavan v. State of Maharashtra*<sup>45</sup>. There are cases even after *Nagaraj*, specifically *U. P. Power Corporation and Suraj Bhan Meena* (supra), where reservation in promotion to the VJ/NT and/or others, has been recognised. The learned Tribunal wrongly interpreted the term “backward class of citizens” by overlooking the *Indira Sawhney*'s specific findings on other backward classes. [ *Ram Krishna Dalmiya v. Justice Tendolkar*, AIR 1958 SC 538, *M. Rathinaswami v. State of Tamil Nadu* 2009(5) SCC 628 and *Heena Kausar v. Competent Authority* 2008(14) SCC 724.

Subject to the data, any such reservation is permissible for all the classes - No total bar.

158 In *R.B. Rai Vs. State of Madhya Pradesh (Writ Petition No. 1942 of 2011) and other matters*, a Division Bench Judgment of Madhya Pradesh, at Jabalpur, for the reasons and the background, apart from the constitutional Provisions dealt with the Rules around the Madhya Pradesh Public Services (Promotion) Rules, 2002 based upon the *Nagaraj* (supra) is distinguishable on facts itself. The reservation act based upon update available data distinguishes the case.

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45 AIR 1999 SC 1530

159           The Judgment of Sushil Kumar Singh & Ors<sup>46 47</sup> are of no assistance to the clamant to pursue us to differ from the view which we have taken. Additionally, impugned resolution dated 21 August 2012, was after the Nagaraj (supra) essentials, with no extra material. The Reservation Act and the Promotion circular in question, are based upon the earlier statutes, circulars and historical background so reflected and the on hand proven records, This case is totally distinguishable on facts, as well as, on law. No such data was available is the findings. The chronological background of State including the earlier statute and circulars were not discussed including the essentials of Nagaraj (supra). We have noted in the case in hand the factual data revolving around the Nagaraj (supra) elements.

160           In Full Bench Judgment of Tripura, Agartala High Court, in Shri Jayanta Chakraborty & Ors. Vs. The State of Tripura & Ors. (WP(c) 189 of 2011), there was no such data placed on record to justify the reservation. Even otherwise, considering the reasons so recorded in

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46(2015) 2 PLJR 844

47(2015) 3 PLJR 593



this Judgment, Tripura Judgment based upon the facts of the Tripura State, cannot be made applicable to the State of Maharashtra.

161 In Ram Singh & Ors. Vs. Union of India<sup>48</sup>, the claim of Jat Community was involved, to be included in the Central Scheduled List. The role of National Commission for Backward Classes, (NCBC) is reiterated in Ram Singh & Ors.(supra), including its guideline, criteria for inclusion in the list of Other Backward Class (OBC). The challenge was to the Jat Community inclusion in the Central list of Backward Class for various States, inspite of rejection of such claim by the NCBC. In the Apex Court, the challenge was to the notification of the inclusion. This was a different and distinguishable case of no material, no data, no earlier Act/Circular but new inclusion therefore the challenge. In case in hand, the central/ State caste list entries were never challenged. We are concerned with the additional State action of providing them reservation in the State employment. The Nagaraj (supra) issue was not for discussion in this case.

162 The Apex Court in U. P. Power Corporation Ltd v. Rajesh  
48(2015) 4 SCC 697

Kumar<sup>49</sup> referring to the earlier judgments has crystallized the points which are further noted by the Supreme Court in other judgments. In *Rajesh Kumar*, Section 3(7) of the concerned Act and the Third Amendment to the Rules of 2007, as brought into force in 2007, were declared invalid, ultra vires and unconstitutional for want of data. This judgment/decision on facts, therefore, is distinguishable, but so far as the law and the points as culled out definitely govern the field. It binds all. The State is also bound to follow it. Therefore, in the case in hand, there is enough data available which is appropriate as per the requirement of the *Nagraj* elements, though may not be arithmetically accurate, but enough to continue the reservation policy. The promotion circular providing only 33% reservation itself distinguishes the present case. The factual clear-cut grievances are not on record.

163 In *S. Panner Selvam and ors. v. State of Tamil Nadu*<sup>50</sup>, the Apex Court has observed as under :

20 While considering the validity of Section of Uttar Pradesh Public Services (Reservation for Scheduled

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49 (2012) 7 SCC 1

50(2015) 10 SCC 292

Castes, Scheduled Tribes and Other Backward Classes) Act, 1994, and Rule 8A of U.P. Government Servants Seniority Rules, 1991 which provided for consequential seniority in promotions given to SCs/STs by virtue of rule of reservation/roster and holding that Section of the 1994 Act and Rule 8A of 1991 Rules are *ultra vires* as they run counter to the dictum in *M. Nagaraj's case in Uttar Pradesh Power Corporation Limited v. Rajesh Kumar and Ors.* (2012) 7 SCC 1, in paragraph (81), this Court summarized the principles as under:

(i) Vesting of the power by an enabling provision may be constitutionally valid and yet "exercise of power" by the State in a given case may be arbitrary, particularly, if the State fails to identify and measure the backwardness and inadequacy keeping in mind the efficiency of service as required Under Article 335.

(ii) Article 16(4) which protects the interests of certain sections of the society has to be balanced against Article 16(1) which protects the interests of every citizen of the entire society. They should be harmonized because they are restatements of the principle of equality Under Article 14.

(iii) Each post gets marked for the particular category of candidates to be appointed against it and any subsequent vacancy has to be filled by that category candidate.

(iv) The appropriate Government has to apply the cadre strength as a unit in the operation of the roster in order to ascertain whether a given class/group is adequately represented in the service. The cadre strength as a unit also ensures that the upper ceiling limit of 50% is not violated. Further, roster has to be post-specific and not vacancy based.

(v) The State has to form its opinion on the quantifiable data regarding adequacy of representation. Clause (4-A) of Article 16 is an enabling provision. It gives freedom to the State to provide for reservation in matters of promotion. Clause (4-A) of Article 16 applies only to SCs and STs. The

said clause is carved out of Article 16(4-A). Therefore, Clause (4-A) will be governed by the two compelling reasons-"backwardness" and "inadequacy of representation", as mentioned in Article 16(4). If the said two reasons do not exist, then the enabling provision cannot be enforced.

(vi) If the ceiling limit on the carry over of unfilled vacancies is removed, the other alternative time factor comes in and in that event, the timescale has to be imposed in the interest of efficiency in administration as mandated by Article 335. If the timescale is not kept, then posts will continue to remain vacant for years which would be detrimental to the administration. Therefore, in each case, the appropriate Government will now have to introduce the duration depending upon the fact situation.

(vii) If the appropriate Government enacts a law providing for reservation without keeping in mind the parameters in Article 16(4) and Article 335, then this Court will certainly set aside and strike down such legislation.

(viii) The constitutional limitation Under Article 335 is relaxed and not obliterated. As stated above, be it reservation or evaluation, excessiveness in either would result in violation of the constitutional mandate. This exercise, however, will depend on the facts of each case.

(ix) The concepts of efficiency, backwardness and inadequacy of representation are required to be identified and measured. That exercise depends on the availability of data. That exercise depends on numerous factors. It is for this reason that the enabling provisions are required to be made because each competing claim seeks to achieve certain goals. How best one should optimize these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment.

(x) Article 16(4), therefore, creates a field which enables a State to provide for reservation provided there exists backwardness of a class and inadequacy of representation in

employment. These are compelling reasons. They do not exist in Article 16(1). It is only when these reasons are satisfied that a State gets the power to provide for reservation in the matter of employment.

21 In the light of the above, we shall consider the factual matrix and the rival contentions urged and the purport of Rule 12 of Tamil Nadu Highways Engineering Service Rules.

37 In the result, the impugned judgment is set aside and these appeals are allowed. State Government-Respondent Nos. 1 and 2 are directed to revise the seniority list of Assistant Divisional Engineers applying the 'catch up rule' within four months. Pursuant to the impugned judgment of the Division Bench of Madras High Court, if any further promotion had been granted to the Assistant Divisional Engineers promoted from the rank of Junior Engineers following rule of reservation with consequential seniority, the same shall be reversed. Further promotion of Assistant Divisional Engineers shall be as per the revised seniority list. The parties shall bear their own costs.

164 The Supreme Court judgments have also recognised the importance of reservation to Other Backward Class but subject to the data. There is no total bar for the State to use and utilise its enabling power to provide Reservation to all the similarly placed class/group.

165 Most of the judgments cited by the contesting Respondents have been taken note of in this decision. The point required to be noted is that the conclusion and the reason so given in all Supreme

Court judgments are based upon the peculiar factual matrix and the service rules. It is necessary for the Court to consider the factual matrix which in the case in hand is missing. The Apex Court in *S. Panner Selvam(supra)*, directed to revise the seniority list and to apply 'catch up rule'. The principles/points which are reproduced in paragraph 20 are also reflected in Rajesh Kumar (supra).

166 The Tribunal has no jurisdiction to direct to frame rule/circular to change the service condition or any policy and also bound by law of precedent ought not to have declared the Reservation Act/Circular, bad in law. The Judicial decision to be taken when point for consideration on merit arises before the Tribunal in service matters. In above cases, there was no order passed by the State Tribunal under the Reservation Act. The Special Leave Petition against all above recent High Court's Judgments are pending in Supreme Court .All above reasons culminated into following sequitur.

The appointments and promotions pending the issues need protection:

167 The learned Tribunal though declared the Reservation Act and the Circular bad in law, its operation, however, postponed for one

year. This Court granted the stay of the judgment on 20/03/2015. It has been continuing till this date. Pending the issues/writ petitions, the Supreme Court and this Court have granted interim reliefs, thereby permitted the State/Department to proceed with the respective promotions even to the objected classes. However, those are made subject to the final decision of these Petitions. The appointments and promotions prior to the Tribunal's judgment and even thereafter in view of above order passed by this Court as well as Supreme Court have been acted upon by all concerned. As I am upholding the Reservation Act and the Promotion Circular, the appointments and promotions made prior to the impugned Act and in view of interim protection, based upon the interim reliefs, need to be regularised in accordance with law. The promotions cannot be disturbed, it need to be protected. This is also on the foundation of "Doctrine of Prospective Overruling" as the same is also applicable to "service jurisprudence". [ B. A. Linga Reddy v. Karnataka State Transport Authority, (2015) 4 SCC 514 and P. V. George v. State of Kerala, (2007) 3 SCC 557 ].

CONCLUSIONS :

168 The learned Tribunal has exceeded its jurisdiction by holding that no reservation in promotion can be provided to any backward class except SC and ST. It is wrong to hold that the reservation in DT/NT and SBC is in contravention of express constitutional provisions. The reasoning by the learned Tribunal that even for SC, ST, there is no quantifiable data available with the State to indicate that they are inadequately represented in the services reflects the non-application of mind to the law as well as the facts on record. There is ample material on record to justify action of State.

169 The Tribunal is wrong in holding that the Reservation Act is bad for want of quantifiable data on the backwardness and adequacy of representation in respect of any of the backward classes. The Tribunal erred in law in holding that the Reservation Act does not disclose the basis on which the percentage of reservation for different backward classes have been provided and further that the decision of the State is arbitrary. These reasons and findings further disclose the wrong approach of the Tribunal in view of the specific constitutional provisions and the percentage of reservation so fixed and declared



from time to time even through the then existing Circulars and Statutes, apart from the judgments of the Supreme Court. This is in the background that earlier Circulars and Statues were never challenged including the percentage so fixed and announced by the State since many years. The Tribunal has recognised the State's power to provide reservation in Government service, but erred in law by holding that the law so made includes every service provided even in the private sector and thereby violating Articles 13 and 16 of the Constitution of India. This was again based upon the wrong reading of the law and no data or material and/or specific challenge from such private service provider. In this process, the learned Tribunal, wrong in holding that the State does not have any data regarding impact of reservation on overall administrative efficiency. The burden was wrongly put upon the State on every points, though the data and material have been placed on record, by misreading the provision of Evidence Act and the law, . The learned Tribunal further overlooked the principle of creamy layer and the specific protection so made including the circular of the State in this regard.

170           Importantly, the Tribunal has exceeded its jurisdiction and

erred in law, though by recording that the part of the Reservation Act may not be bad but declared the whole Reservation Act and the Circular ultra vires. The Tribunal, in this process and for the same reasons, declared the promotion circular bad in law, by misreading the same and by stating that it is beyond the provision of Article 16(4-A). The Tribunal ought to have considered that every caste percentage so fixed since so many years, based upon the material available with the State. The constitutional provisions, if permit, apart from the recruitment, reservation in promotion to SC and ST category at least those clauses ought not to have been declared bad in law. Similarly placed OBC category and/or other backward category and its percentage so fixed again based upon the data and the material ought not to have been declared bad in law for the same reason.

171 All the persons equally situated and as permissible, entitled the reservation in promotion also based upon the data available. There was no reason to declare the Reservation Act and the Circular bad in law. The excess reservation and/or percentage of particular category out of those already declared could have been

tested on the fact based matter. The Tribunal's approach and the reasons to decide the validity of the Reservation Act and the Circular without contra material and data, in our view, was contrary to the Constitutional provisions, illegal and unsustainable in law. It is contrary to various Supreme Court Judgments so referred earlier.

172 All the elements as discussed under the respective heading in this judgment left with no option but to maintain the validity of the Reservation Act and Promotion Circular. All these State actions are well within the constitutional frame work based upon the record and law. It's foundation is based upon the unchallenged Statutes and Circular, at this stage, cannot be disturbed, unless and until new reservation policy is announced and implemented. There is no total bar not to provide such reservation at initial appointment/post or promotion stage, however, it is subject to the riders and conditions as announced. No reservation policy in State itself is against the Constitution and the law. The individual challenge may be tested on facts and circumstances. But there cannot be total ban or bar to the State to provide such reservation. The Constitution itself empowers the State to do so on the foundation of declared law.

For one constitutional reservation policy, the political spectrum may have different shades to follow. The importance of such facets need to be taken care by the respective States, being the part of its constitutional obligations, but within the constitutional shades and sphere.

173 The Reservation policy and related issues have been seething since long. All the concerned need to work wholeheartedly to settle it. The “Backwardness” and “the adequate representations” are required to be taken into consideration first. Then comes the actual and physical distribution of posts/seats cadre-wise or caste-wise, or the department-wise of the concerned organisation and its requirement, based upon the actual figures. The source of information and/or data is not in challenge. There is even no special challenge to the “backwardness” and “independent representation” so declared to the categories in question. The statute need not be declared ultra virus for the Academic purposes. In the Democratic system any reservation policy should have an egalitarian future.

174 The Reservation Act is valid and so also the Promotion

Circular. However, it is always subject to timely revision as and when required, based upon the quantifiable data so collected.

175 The data with the State as available is determinable, surveyable, significant, quantitative and measurable. It is unacceptable that it is non-quantifiable and non-contemporary. In *Indra Sawhney (supra)* the issues were about reservation promotion and not about the reservation at recruitment stage. The data so available of population as per the reservation policy includes the fixed percentage since so many years. No-one has challenged the said reservation policy and/or percentage for want of data at recruitment stage. In *Nagraj (supra)*, the issue was of promotion in view of Articles 16(4A) and (4B) read with other constitutional provisions. In the present case, the reservation in promotion is only 33%. Therefore, on such self-destructive submission also no Reservation Act to be declared bad in law.

176 Once the various doctrines of service jurisprudence are made applicable to the reservation in promotion for “Other Backward Class”, the equally placed person, being backward with no due

representation cannot be denied the reservation promotion in service. Once the creamy layer principle is extended to “OBC” or such related classes then only deserving employee will get reservation promotion and not all, though they were initially appointed on reservation basis.

177        The reservation for ST and SC even in promotion is permissible subject to rider of availability of “contemporary and quantifiable data”. The “contemporary and quantifiable data”, in the present case, as available, therefore, the Reservation Act and the Promotion Circular are valid.

178        The reservation for “Other Backward Classes” in recruitment and/or appointment stage is also permissible. There is no specific challenge raised in this regard. The “contemporary and quantifiable data” so placed on record are sufficient to maintain the State action, as such promotion was with rider of “creamy layer” only for OBC classes.

179        To grant two percent more reservation at recruitment stage is the decision based on the “contemporary and quantifiable

data” to provide representation to the “declared backward classes” with the rider of “creamy layer” is within the State's permissible power. The already declared fifty percentage (50%) restriction, unless reduced, the State has no option, but to increase such two percent without disturbing the existing reservation percentage. In the present case, there is no excess percentage in promotion Circular as total percentage is thirty three percent (33%). Therefore also, such reservation in the promotion, in the present case, is within the legal frame work.

180 The cadre and/or department-wise promotion challenge may be considered separately, based upon the actual facts and information placed by the aggrieved person, because of such reservation policy. In these cases basic facts are missing.

181 Once the reservation is provided under the Statute/Circular, it cannot be taken away, including the reservation in promotion. All the actions based upon the orders of the Supreme Court & the High Court's are liable to be protected. The promotions so made are liable to be continued.

182           The State to act in accordance with the law to collect fresh data and revise the state reservation policy regularly.

183           In the result, the following order :

ORDER

- (1) Impugned judgment and order dated 28 November 2014 in Transfer Application Nos. 1 & 2 of 2014, (transferred Writ Petition Nos. 8452/2004 & 470/2005 on 18 June 2013) by The Maharashtra Administrative Tribunal (MAT) is quashed and set aside.
- (2) The Reservation Act is valid. However, subject to timely revision.
- (3) The Promotion Circulars are valid. However, subject to timely revision.
- (4) The appointments and promotions so made prior to the Reservation Act and the Promotion Circular and pending the Writ Petitions, based upon the interim orders passed by the Supreme Court as well as this Court be finalised/regularised in accordance with law.
- (5) Appellate Side Writ Petition Nos. 2797/2015, 3009/2015 and Original Side Writ Petition No.1590/2015 are allowed accordingly.
- (6) In view of above, Writ Petition No. 3287/2004 is disposed of as the validity of the Reservation Act and the Promotion Circulars is upheld and all so actions



arising out of it. However, the fact based challenge to the Promotion/seniority List would be considered along with other Corporation/Undertaking matters independently on and updated averments, if such fact based fresh challenge is made.

(7) In view of disposal of Writ Petitions, Civil Application Nos. 161/2016, CAW/2301/15 and CAW/2531/2015 in Writ Petition No.2797/2015 stand disposed accordingly.

(8) There shall be no order as to costs.

**(A. A. SAYED, J.)**

**(ANOOP V. MOHTA, J.)**

Inasmuch as A. A. Sayed, J. is unable to agree with some of the views and the findings in the aforesaid judgment, he will be writing a separate judgment.

**(A. A. SAYED, J.)**

**(ANOOP V. MOHTA, J.)**

**DATED: 21 December 2016**

**JUDGMENT:** (Per A.A.Sayed, J.)

I have had the privilege of going through the erudite judgment of my learned brother Mr. Justice Anoop V. Mohta. Having deliberated over the issues raised, with all humility at my command, I am unable to persuade myself to agree entirely with the views of my learned brother. Hence, this separate judgment.

2. These Petitions under Article 226/227 of the Constitution essentially concern the legality and validity of Maharashtra State Public Services (Reservations for Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and Other Backward Classes) Act, 2001 (hereinafter referred to as 'the Reservation Act') and Government Resolution No. BCC 2001/1887/C.No.64/01/16-B dated 25 May 2004 issued by the State of Maharashtra providing for reservation in promotion (hereinafter referred to as 'the Govt Resolution on promotion' or 'the GR on promotion'). By the impugned judgment and order of the Maharashtra Administrative Tribunal ('Tribunal' for short), the Reservation Act and the GR on promotion are struck down as ultra vires to the Constitution and the law laid down in **M. Nagaraj and ors vs. Union of India and ors**, (2006) 8 SCC 212.

3. For the sake of convenience, I shall set out the facts in Writ Petition 2797 of 2015 (State of Maharashtra and Anr. v/s. Vijay Ghogare and Ors.). Shri Vijay Ghogare and 3 others (Respondent Nos. 1 to 4 in WP 2797 of

2015) were at the relevant time working as Executive Engineers/Superintendent Engineers in Maharashtra Krishna Valley Development Corporation/Konkan Irrigation Development Corporation. They had initially filed Writ Petition No.8452 of 2004 in this Court (later transferred to Tribunal and numbered Transfer Application No.1 of 2014/A.O. No.215 of 2014) seeking to declare the Reservation Act and the GR on promotion ultra vires and unconstitutional. The case of Vijay Ghogare and 3 others (hereinafter also referred to as 'the original Petitioners') in the Petition was as follows:

They belong to open category and were selected and nominated by the Maharashtra Public Service Commission (MPSC) as Class-1 Officers in the Irrigation Department in their respective establishments. The percentage of reserved category officers in posts beyond first post/stage of Class-1 is already more than the prescribed percentage for promotions in lower ranks as seen from the Charts annexed to the Petition. The State Government has no material to justify that the backward classes do not have adequate representations in services under the State, and therefore, it could not have made any reservation under the impugned Reservation Act on the specious assumption that the backward class lacks adequate representation. The impugned Reservation Act violates Article 335 of the Constitution. By the impugned Reservation Act and the impugned GR almost all the posts beyond the first post/stage of Class-1 will be occupied by the reserved category candidates thereby totally discriminating the open

category candidates in the matters of promotions. Hitherto, promotions to Class-1 posts above the first post/stage of Class 1 was on the basis of strict selection and the principles of reservations in promotions were not applicable after the first stage of Class 1 posts. All Class 1 posts by direct recruitment are filled through MPSC and inter-se seniority of the nominated Officers as per merit in MPSC examination. The impugned Reservation Act and the impugned GR provide for reservation in promotion even to De-notified Tribes (Vimukta Jatis), Nomadic Tribes and other backward categories, which is in violation of provisions of Article 16(4A) of the Constitution, which provides for reservation only to Scheduled Caste and Scheduled Tribes. The impugned Reservation Act and the impugned GR violate the provisions of Articles 14 and 16(1) and 16(4) of the Constitution, as the creamy layer in the backward class is to be treated on par with the forward class and are not entitled to benefits of reservation. Since the creamy layer is not excluded, it would be in violation of Articles 14 and 16(1) of the Constitution. The impugned Reservation Act is made applicable to Corporations, which are independent autonomous Corporations governed by independent statutory Rules and it is impermissible for the State to impose restriction and/or in any manner control their internal affairs and encroach upon their existing status and statutory Rules, under which they are governed. The impugned Reservation Act and the impugned GR provide for an unreasonable percentage of reservation in promotion, which is ex-facie without

application of mind and in absence of material as to the actual need for providing reservation or extent of such reservation in the particular establishment. Such determination of percentage could be arrived at only after appropriate data in respect of every establishment is gathered, examined and studied so as to determine the need and extent of reservation in respect of the particular category of backward classes in such establishment. The State has undertaken the exercise to fix percentage of reservation without resorting to the appropriate process of framing rules and is a classic example of blatant abuse of the power and authority and therefore amounts to colourable legislation.

4. The original Petitioners thus came with a case that the policy of the State Government with regard to reservation as provided in the Reservation Act and the GR on promotion deprives them of the benefits of promotion due to them and the Reservation Act and the GR on promotion are bad in law and ultra vires the Constitution.

5. The said Writ Petition 8452 of 2004 (Vijay Ghogare & Ors vs. The State of Maharashtra & Ors) was filed in this Court in October, 2004. During the pendency of the Petition, came the celebrated judgment of five-Judge Constitution Bench of Supreme Court in the case of **M. Nagaraj and others vs. Union of India and others**, (2006) 8 SCC 212, delivered on 19 October 2006 authored by His Lordship Justice Kapadia, as he then was. The original Petitioners, thereafter, amended the Petition to incorporate the following further grounds of challenge:

There cannot be inter-transferability of posts between (3) to (6) categories in Section 2 without reciprocal arrangement to get it back; the Nomadic tribes constitute a single class and the classification of Nomadic Tribes into (A), (B), (C) and (D) amounts to micro-classification within the same class which is not permissible; Section 3 of the Act is also unclear, vague and ambiguous and unconstitutional; the impugned Reservation Act and the impugned GR provide for complete relaxation of merit in the matter of promotions in relation to Scheduled Castes and Scheduled Tribes, which is impermissible; the overall efficiency of State administration is also required to be maintained under proviso to Article 335 and at best provides for relaxation in standards of merit only for Scheduled Castes and Scheduled Tribes; the impugned GR in clause (3D) provides for a deeming provision which presumes merit and seniority; the 50% ceiling limit of a current vacancies continues to remain on current vacancies and therefore the provisions of the impugned Reservation Act providing for 52% reservation at the time of appointment is unconstitutional. In the alternative, if the impugned GR is made applicable, the same be given effect to only to Scheduled Castes and Scheduled Tribes in the matters of promotion subject to compliance with the guidelines laid down by the Supreme Court in **M.Nagaraj's** case.

6. As indicated earlier, the said Writ Petition 8452 of 2004 (Vijay Ghogare & Ors vs. The State of Maharashtra & Ors) was initially filed in this Court. Writ Petition 470 of 2005 (Hanmant V. Gunale & Ors vs. The

State of Maharashtra & Ors) was also initially filed in this Court. The Petitioners in the said WP 470 of 2005 shall also be hereinafter referred to as the 'original Petitioners'. On 07 February 2005, this Court directed the parties to maintain status quo. During the pendency of the said Writ Petitions, several interim Applications for interventions were filed. On 22 February 2005, this Court directed that the GR on promotion shall not be implemented till further orders and the said Writ Petitions (alongwith other Writ Petitions) were listed for pre-emptory hearing on 21 June 2005. Several Applications for review/modification/vacation of the order dated 22 February 2005 were also filed, which came to be rejected by this Court on 20 April 2005. The Supreme Court also refused to interfere with the order dated 22 February 2005 of this Court. On 17 August 2006, this Court passed an order in Civil Application 1783 of 2006 permitting the State Govt to grant promotion to Scheduled Caste/Scheduled Tribe (ST/SC) employees subject to outcome of the Writ Petitions. On 24 August 2006, the State Govt issued a GR to implement the provisions of the GR on promotion dated 25 May 2004 in terms of the order dated 17 August 2006 passed by this Court in Civil Application 1783 of 2006. In September 2006, Civil Application 2283 of 2006 was filed seeking modification of the interim order dated 17 August 2006 and to stay the GR dated 24 August 2006. On 19 September 2006, this Court passed an order in Civil Application 2283 of 2006 that the promotions given after 18 August 2006 shall be subject to final decision in the Civil Application No.2283 of 2006. On 25 September

2006, SLP 16485 of 2006 was filed in the Supreme Court challenging the orders dated 17 August 2006 and 19 September 2006 of this Court. On 27 September 2006, the Supreme Court stayed the orders dated 17 August 2006 and 19 September 2006. On 19 October 2006, the 5-Judge Constitution Bench of the Supreme Court delivered the judgment in **Nagaraj**. On 6 November 2006, the Supreme Court passed an order in SLP 16485 of 2005 directing this Court to consider Civil Application Nos. 1783 and 2283 of 2006 de novo in light of **Nagaraj**. On 15 December 2006, State of Maharashtra filed Civil Application 3130 of 2006 seeking to fill in promotional posts. On 26 December 2006, Vijay Ghogare (Original Petitioner No. 1 in WP 8452 of 2004) filed Civil Application 134 of 2007 seeking stay of the GR on promotion dated 25 May 2004 and the policy of reservations in promotion. On 9 March 2007, this Court passed an order disposing of Civil Applications 3130, 1783, 2283 and 134 of 2006. This Court permitted the State Govt to fill promotional posts to the extent of 67% from open category, 13% from SC, 7% from ST and directed that the remaining posts shall remain vacant till the final disposal of Writ Petition 8452 of 2006. It was clarified that this arrangement was subject to result of the Petition. Vijay Ghogare (Original Petitioner No. 1 in WP 8452 of 2004) filed SLP 4984 of 2007 to challenge the order dated 9 March 2007 passed by this Court. The State Govt filed Review Application (St) No. 11463 of 2007 in Writ Petition 8452 of 2004 to vacate the order dated 9 March 2007, which came to be rejected by this Court. In the meanwhile,



the State Government, in terms of the order dated 9 March 2007 granted promotions excluding persons belonging to VJ/NT/SBC. On 5 September 2007, the order dated 9 March 2007 of this Court was challenged by the State Govt in the Supreme Court by filing SLPs 18534-18537 of 2007. On 28 March 2008 the Supreme Court in SLPs 18534-37 of 2007 modified this Court's order dated 9 March 2007 and permitted the State Govt to fill even the 13% posts of VJ/NT/SBC **subject to final decision in Writ Petition 8452 of 2004**. SLP 4984 of 2007 was also disposed of by the Supreme Court in terms of its order dated 28 March 2008. (emphasis supplied)

Impugned judgment and order of the Tribunal

7. On 18 June 2013, this Court transferred Writ Petition 8452 of 2004 to the Tribunal by passing a detailed order after a preliminary objection was raised by the learned Advocate General on behalf of State of Maharashtra, as regards maintainability of the Writ Petition in this Court. Upon transfer of the Writ Petition, the same was numbered as Transfer Application 1 of 2014 (OA 251 of 2014). Writ Petition 470 of 2005 was also transferred to the Tribunal and the same was numbered as Transfer Application 2 of 2014 (OA 384 of 2014). The aforementioned Transfer Applications 1 and 2 of 2014 were heard finally by the Tribunal and by a common judgment and order dated 28 November 2014, the Tribunal struck down the Reservation Act and the GR on promotion dated 25 May 2004 as being ultra vires the Constitution of India and the law laid down in **Nagaraj**. The Tribunal stayed

its judgment and order for a period of 1 year. The operative part of the impugned judgment of Tribunal reads thus:

“

OPERATIVE ORDER

134 Thus, for the reasons separately set out, we concur in the conclusion that the impugned Act being Maharashtra State Public Services (Reservations for Scheduled Castes, Scheduled Tribes, Denotified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and Other Backward Classes) Act, 2001, is ultravires the Constitution and the law laid down by Hon'ble Supreme Court in the matter of M. Nagaraj and others Vs. Union of India and others (2006) 8 SCC 212. It will have to be and is hereby struck down. The impugned G.R. No. BCC2001 / 1887/pr.kr.640/01/16B, dated 25th May, 2004 is also struck down. But we do realize that this judgment will be applicable only to the Maharashtra State Government employees and as mentioned at the outset, the Writ Petitions filed by the employees of other employers outside the jurisdiction of this Tribunal are still pending before the Hon'ble Bombay High Court. It is almost certain that this judgment will be challenged before the Hon'ble High Court or may be Hon'ble Supreme Court. Therefore, in order to save all concerned from rushing in to the next step, we think the effectuation hereof should be put on hold. In other words, the operation hereof, should be stayed. We are so disposed in the set of the facts and circumstances to stay this order for a period of one year. The parties will be free in the meanwhile to move the Hon'ble Court before whom this order will be challenged for any direction about this period also. However, as already noted there are interim orders made by the Hon'ble High Court. The said orders are in force. They will continue to govern all concerned notwithstanding this judgment and the stay granted by us to our own judgment. We cannot and do not interfere therewith.

135. The impugned Act being Maharashtra State Public Services (Reservations for Scheduled Castes, Scheduled Tribes, Denotified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and Other Backward Classes) Act, 2001 and impugned

G.R. No. BCC2001/1887/pr.kr.640/01/16B, dated 25th May, 2004 stand hereby struck down as ultravires the Constitution and ultravires the law laid down by the Hon'ble Supreme Court inter alia in M. Nagaraj and others Vs. Union of India and others (2006) 8 SCC 212. The operation hereof is stayed for a period of one year from today during which period the interim stay granted by the Hon'ble High Court shall continue to govern all concerned. Both these Transfer Applications are allowed in the above terms with no order as to costs."

### Present Writ Petitions

8. On 13 March 2015 the Writ Petition 2797 of 2015 was filed by the State Government challenging the judgment and order dated 28 November 2014 of the Tribunal. On 27 February 2015 Writ Petition 3009 of 2015 was filed by the Vimukta Jatis, Nomadic Tribes and Special Backward Class Association of Employees and Officers & Ors. (some of the Respondents in Original WP 8452 of 2004), also challenging the said judgment and order dated 28 November 2014 of the Tribunal. Apart from the aforementioned two Writ Petitions which impugn the judgment and order of the Tribunal, there are 2 other Writ Petitions filed in this Court which are also being disposed of by the present judgment. The first is Writ Petition 1590 of 2015 filed on 04-03-2015. The Petitioners therein are persons belonging to reserved category and are in the employment of the Mumbai Municipal Corporation. They claim to be affected by the impugned judgment and order of the Tribunal holding the Reservation Act and GR on promotion as ultra vires the Constitution. They were not parties before the Tribunal in T.A. 1 and 2 of 2014 and have sought leave of the Court to file

the Petition and have prayed for directions against the Respondents therein for implementing the Reservation Act. Ad-interim orders have been also passed in this Writ Petition 1590 of 2015. Formal leave is accordingly granted. The second is Writ Petition 3287 of 2004 filed on 28-10-2004. The Petitioners therein are BEST Officer's Association whose members are working in BEST, an undertaking run by the Mumbai Municipal Corporation. They have filed this Petition challenging the validity of the Reservation Act and the GR on promotion. The Petitioners in the said WP 3287 of 2004 shall also be hereinafter referred to as 'the original Petitioners' for the sake of convenience. Both BMC as well as BEST have adopted the reservation policy of the State Government. It may be stated here that this Court, by an ad-interim order dated 20 March 2015 in Writ Petition 2797 of 2015 has stayed the effect, operation, execution and implementation of the impugned judgment and order dated 28 November 2014 of the Tribunal. The said order of stay was thereafter continued pending the hearing and final disposal of the said Writ Petition.

9. We have heard learned Counsel for the parties and perused the material on record as also the various judgments cited before us.

#### Reservation Act AND GR on promotion

10. At the outset, it would be necessary to have a look at the relevant provisions of the Reservation Act and Govt Resolution on promotion, which are struck down and held ultra vires the Constitution by the Tribunal by the impugned judgment and order dated 28 November 2014. The preamble

and some of the provisions of the Reservation Act read as follows:

**"MAHARASHTRA ACT No. VIII OF 2004**

(First published, after having received the assent of the Governor in "Maharashtra Government Gazette", on the 22nd January 2004)

An Act to provide for the reservation of vacancies in a public services and posts in favour of the persons belonging to the Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and Other Backward Classes of Citizens and for matters connected therewith or incidental thereto.

WHEREAS ...

- i) (1) This Act may be called ..
- (2) It shall extend to the whole of the State of Maharashtra.
- (3) It shall come into force on such date...

2. In this Act, unless the context otherwise requires, -

- (a)...
- (b) "De-notified Tribes (Vimukta Jatis)" means the Tribes declared as such by the Government from time to time;
- (c) "establishment" means any office of the Government or of a local authority or statutory authority constituted under any Act of the State Legislature for the time being in force, or a University or a Company, a Corporation or a Co-operative Society in which share capital is held by the Government or any Government aided Institutions.

Explanation.—For the purposes of this clause the expression "Government aided institutions" shall also include institutions or industries which have been given either prior to coming into force of this Act or thereafter, aid in the form of Government land at concessional rates or any other monetary concessions by Government, or is recognised, licenced, supervised or controlled by Government;

(f) "Nomadic Tribes" means the Tribes wandering from place to place in search of their livelihood as declared by Government from time to time;

(g) "Other Backward Classes" means any socially and educationally backward classes of citizens as declared by the Government and includes Other Backward Classes declared by the Government of India in relation to the State of Maharashtra ;

(i) "public services and posts" means the services and posts in connection with the affairs of the State and includes services and posts in,—

- (i) a local authority ;
- (ii) a co-operative society established under the Maharashtra Co-operative Societies Act, 1960, in which Government is a shareholder.
- (iii) a Board or a Corporation or a statutory body established by or under a Central or a State Act which is owned and controlled by the Government or a Government Companies as defined in section 617 of the Companies Act, 1956;
- (iv) an educational institution owned and controlled by the Government, which receives grant-in-aid from the Government

including a university established by or under a Maharashtra Act

;

(v ) any establishment ; and

(vi) respect of which reservation was applicable by Government orders on the date of commencement of this Act and which are not covered under sub-clauses (i ) to (v) ;

(k) "reservation" means the reservation of post in the services for the members of Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis ), Nomadic Tribes, Special Backward Category and Other Backward Classes;

(l) "Scheduled Castes" and "Scheduled Tribes" shall have the meanings, respectively assigned to them in the clauses (24) and (25) of Article 366 of the Constitution of India ;

(m) "Special Backward Category" means socially and educationally backward classes of citizens declared as a Special Backward Category by the Government.

(1) (1) This Act shall apply to all the appointments made in public services and posts except,—

(a) the super specialised posts in Medical, Technical and Educational field;

(b) the posts to be filled by transfer or deputation ;

(c) the temporary appointments of less than forty-five days duration; and

(d) the posts which is single (isolated) in any cadre or grade.

(2)...

(2) (1) Unless otherwise provided by or under this Act, the posts reserved for the Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and Other Backward Classes shall not be filled in by the candidates not belonging to that caste, tribe, category or class for which the posts are reserved.

(2) Subject to other provisions of this Act, there shall be posts reserved for the persons belonging to the Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis ), Nomadic Tribes, Special Backward Category and Other Backward Classes, at the stage of direct recruitment in public services and posts specified under clause (j) of section 2, as provided below :—

Description of Caste/Tribe/ Category/Class	Percentage of vacancies or seats to be reserved
(1) Scheduled Castes	13 per cent.
(2) Scheduled Tribes	7 per cent.
(3) De-notified Tribes (A)	3 per cent.
(4) Nomadic Tribes (B)	2.5 per cent.
(5) Nomadic Tribes (C)	3.5 per cent.
(6) Nomadic Tribes (D)	2 per cent.
(7) Special Backward Category	2 per cent.
(8) Other Backward Classes	19 per cent.
Total	52 per cent

Provided that, Government may, by an order in the Official Gazette, provide that the percentage of reservation for Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Categories and Other Backward Classes, in all posts, shall be on the basis of latest census record of population of the,-

- State, in the case of State cadre posts, and
- concerned district, in the case of district cadre posts:

Provided further that, the principle of "Creamy Layer" shall be applicable to all categories mentioned above except Scheduled Castes and Scheduled Tribes.

Explanation I —For the purposes of this sub-section, the expressions " De-notified Tribes (A) ", " Nomadic Tribes (B)", " Nomadic Tribes (C) "and " Nomadic Tribes (D)" shall mean such Tribes or sub-Tribes, declared by Government, by general or special orders issued in this behalf, from time to time, to be "the De-notified Tribes (A)", "Nomadic Tribes (B)", " Nomadic Tribes (C)" and " Nomadic Tribes (D)".

Explanation II. —For the purposes of this sub-section, the expression "Creamy Layer" means the persons falling in the category of "Creamy Layer" as declared by Government in the Social Justice, Cultural Affairs and Sports Department by general or special orders issued in this behalf, from time to time :

Provided also that ... ..

(3) The reservation specified for the categories mentioned at serial numbers (3) to (6) (both inclusive) in the table under sub-section (2) shall be inter transferable. If suitable candidates for the posts reserved for any of the said categories are not available in the same recruitment year, the posts shall be filled by appointing suitable candidates from any of the other said categories.

(4)...

5. (1) The reservation in promotion shall be at all stages of promotions.

(2) On the date of coming into force of this Act, if any Government orders providing for reservation for any posts to be filled by promotion, are in force, the same shall continue to be in force unless modified or revoked, by Government.

6. (1) If in respect of any recruitment year, any vacancy reserved for any category of persons under sub-section ( 2 ) of section 4 remains unfilled, such vacancy shall be carried forward upto five years in case of direct recruitment and three years in case of promotion :

Provided that, on the date of commencement of this Act, if any Government order regarding filling up the posts, in case of non availability of Backward Class candidates are in force, such Government orders shall continue to be in force unless modified or revoked, by Government.

(2) When a vacancy is carried forward as provided in sub-section (1) it shall not be counted against the quota of the vacancies reserved for the concerned category of persons for the recruitment year to which it is carried forward :

Provided that ... ..

10(1) ...

(2) The Government may, by order, grant such concession in respect of fees for any competitive examination or such other similar examinations or interviews, and relaxation in upper age limit as it may be considered necessary in favour of the categories of persons specified in sub-section (2) of section 4.

1) The Government orders in force on the date of the commencement of this Act, in respect of concessions and relaxation including concession in fees for any competitive examinations or such other similar examinations or interview and relaxation in the upper age limit shall continue to be applicable, unless modified or revoked, by Government.

(1) Any appointments made, in contravention of the provisions of this Act shall be void.

(2) ...

(3) (1) The Government may, by notification in the Official Gazette, make rules to carry out the purposes of this Act.

(i) Every rule made under this Act shall be laid, as soon as may be, after it is made, before each House of the State Legislature, while it is in session for a total period of thirty days, which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in rule or both Houses agree that the rule should not be made, and notify their decision to that effect in the Official Gazette, the rule shall, from the date of publication of such decision in the Official Gazette, have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done or omitted to be done under that rule."

...

16. ...

The Govt Resolution on promotion reads thus:

"Applicability of reservations  
in promotions at all stages of promotion

Government of Maharashtra  
General Administration Department,  
Govt. Resolution No. BCC 2001/1887/C.No.64/01/16-B,  
Mantralaya, Mumbai 400 032.

Dated 25<sup>th</sup> May, 2004.

Read : 1) G.R. General Administration Department No.  
Bcc.1072/1887/C.R.No.64/01/16-B dated 23<sup>rd</sup> May, 1974.  
2)G.R. General Administration Department No. SRV-.1074D  
dated 28<sup>th</sup> January, 1975.  
3) G.R. General Administration Department No.  
Bcc.189/2551(A)/16-B, dated 23<sup>rd</sup> January, 1991.



4) G.R. General Administration Department No.  
Bcc.1097/C.R.63/97/16-B dated 18<sup>th</sup> October, 1997.

**PREAMBLE :-** By Govt. Resolution, General Administration Department No. BCC-1072/1887/C.R.No.64/01/16-B dated 23<sup>rd</sup> May, 1974, reservation in promotion was made applicable for the Backward class Officers / Employees. Similarly, by Govt. Resolution, General Administration Department No. SRV-1074/D, dated 28<sup>th</sup> January, 1975, the general principles for giving promotions from the lower post to the higher post were laid down, according to which the promotion to the posts up to first stage of class-I was to be effected as per the Seniority subject to fitness with due consideration of reservation in promotion prescribed for the Backward class employees. As per this Govt. Resolution, the promotions to the posts above the first stage of the class-I were to be effected by strict selection and the principles of reservation in promotion was not made applicable for the promotions on the posts above the first stage of the class-I posts. Besides this, by Govt. Resolution, General Administration Department No. BCC-1089/2551(A) 16-B dated 23<sup>rd</sup> January, 1991, the orders were not given to make applicable the reservation in promotion as regards the promotions in the services/cadres in which proportion of direct recruitment is more than the 75%. This means that in respect of those services/cadres in which proportion of direct recruitment was more than 75% in Class IV to Class I (upto the first stage of class-I) the reservation in promotions was not applicable.

2. At present, Government vide column No.5 of the Reservation Act No.8 published by the Govt. in the Govt. of Maharashtra Gazette, dated 29<sup>th</sup> January, 2004 made the following provisions.

(A) Section, 5, sub-section (1):- The reservation in promotion shall be at all stages of promotions.

(B) According to Sub Section (2), on the date of coming in to force of this Act, if any Government orders providing for reservation for any posts to be filled by promotions are, are in force, the same shall continue to be in force unless modified or revoked by Government.

3. In supersession of the orders dated 23<sup>rd</sup> May, 1974, 20<sup>th</sup> January 1975 and 23<sup>rd</sup> January, 1991, the following revised orders are being issued in view of provision under Sub-Section (1) and (2) of Section 5 of the Act which has been brought into force newly.

Government Resolution :-

(A) As per the Sub-Section (1) of Section 5 of the Maharashtra Act No.8 (Reservation Act), the principle of reservation shall be applicable to those posts which are filled up by promotions. In view of this, principle of reservation in promotions shall be applicable in respect of all posts, including those posts also for which proportion of direct recruitment is more than 75%. The provisions under the Government Resolution dated 23.01.1991 stands cancelled.

(B) The reservation in promotions will be as follows:-

Schedule Castes	-	13%
Schedule Tribes	-	07%
De-Notified Tribes (A)	-	3%
Nomadic Tribes (B)	-	2.5%
Nomadic Tribes (C)	-	3.5%

Nomadic Tribes (D)	-	2%
Special Backward Classes	-	2%
		-----
Total		33%
		-----

(C) The principle of reservation shall be applicable from 29.01.2004 onwards at all stages of promotions on post for which there is provision of giving promotions in the recruitment rules and principles of reservation was not applicable earlier.

(D) Those Backward class of employees who have been promoted prior to 29/1/2004, on the post above the first stage of class I posts shall be considered as having been promoted as per the seniority and merit.

(E) Posts to be filled up as per above provisions of the Act shall be filled up step by step in accordance with the availability of vacant posts.

(F) The orders issued under G.R.No.BCC-1097/C.R.63/97/16-B, dated 18.10.1997 shall be applicable for such cadres/posts to which principle of reservation in promotions is being made applicable newly. However, for calculating number of reserved posts, total number of sanctioned posts should not be taken into consideration. The number of vacant posts in that cadre which become available after 29/1/2004 should be taken into consideration to decide number of reserved posts as per the percentage of reservation prescribed for various backward class categories.

(G) The provisions of reservation of the Act will not be applicable in respect of the process of selection started prior to 29.1.2004 for giving promotions on posts above the first stage of class I posts and on such posts for which reservation in promotion was not previously applicable. However, for the process of selection for giving promotion to be started after 29/1/2004 the principle of reservation as per the provisions of the Act shall be applicable.

4. The above orders should be brought to the notice of the Heads of the Department/Heads of the Offices by the concerned Heads of the Administrative Department of the Mantralaya.

By order and in the name of the Governor of Maharashtra.

Sd/-  
(U.P.S.Madan)  
Secretary"

11. Reservations for the backward class of citizens has been a matter of perennial debate and endless litigations in our country, be it reservations for backward classes in seats for admissions to educational institutions (Article 15), or in seats for elections to house of people/legislative assemblies/municipalities (Articles 330/332/243T) or posts in public employment [Article 16(4)/16(4A)]. Prior to the Reservation Act coming into force from 29 January 2004 and the GR on promotion dated 25 May 2004, reservations were granted vide Executive Instructions/Govt Resolutions.

12. Apart from short term contract, re-employment, deputation and absorption, the other main methods of recruitment in public employment are **(i) Direct Recruitment** and **(ii) Promotion**. Pre- March 1974, there was no reservation in promotion in public employment. Post that, reservation in promotions were granted to certain backward class employees. Then came the judgment of the 9-Judge Constitution Bench of the Supreme Court in **Indra Sawhney vs. Union of India**, 1992 Supp (3) SCC 217, on 16 November 1992. The Supreme Court held that the reservations under Article 16(4) are confined to initial recruitment and cannot extend to reservation in promotion. The Supreme Court however granted limited protection and held that this direction is to come into force after five years within which period "it would be open to the appropriate authorities to revise, modify or re-issue the relevant Rules to ensure the achievement of the objective of Article 16(4)". To nullify the effect of the judgment in **Indra Sawhney**, the Central Government amended the Constitution by introducing Article 16(4A) which I shall presently discuss.

#### Issues raised before the Tribunal

13. As stated in the impugned judgment of the Tribunal, the original Petitioners had broadly raised the following issues before the Tribunal:

- “(i) Reservation in promotion has been challenged on two grounds:
  - (a) Under Article 16(4-A), no reservations in promotion can be provided to any backward class except SC and ST. The Reservation Act provides for reservation in promotion to DT/NT and SBC also, which is in contravention of express provision of this Article.

- (b) Even for SC/ST, there is no quantifiable data available with the State Government to indicate that they are inadequately represented in the services under the Government.
- (ii) The Reservation Act has been challenged on the following grounds:
- (a) The State does not have quantifiable data on the backwardness and adequacy of representation in respect of any of the backward classes. The Act does not disclose the basis on which percentage of reservation for different backward classes have been provided. The decision of the Government is arbitrary.
  - (b) Though the State is empowered to provide reservation in Government service, the law is so made as to include practically every service provided in the Private sector, thus violating Article 13 and 16 of the Constitution.
  - (c) The State does not have any data regarding impact of reservation on overall administrative efficiency.
  - (d) The law should provide for creamy layer, even in promotion.
  - (e) Even though some part of the Reservation Act may not be ultra vires, but if some part is so found, the whole law will have to be struck down.
- (iii) The GR dated 25 May 2004 is also invalid and is arbitrary and the concept of presumed merit introduced in this GR goes much beyond the provision of Article 16(4-A) regarding consequential seniority.”

#### Article 16 of the Constitution

14. It would be apposite at this juncture to see Article 16 of the Constitution. It reads thus:

**16. Equality of opportunity in matters of public employment.** (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office [under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory] prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent. reservation on total number of vacancies of that year.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

#### Govt Resolution on Promotion AND Article 16(4A)

15. As stated earlier, in **Indra Sawhney**, a 9-Judge Constitution Bench of the Supreme Court in its judgment dated 16 November 1992, held that reservation in appointments or posts under Article 16(4) is confined to initial appointment and cannot extend to reservation in promotions. The Central Government was of the view that the ruling in **Indra Sawhney**

adversely affected the interest of the Scheduled Castes and Scheduled Tribes. The Central Government therefore inserted clause (4A) in Article 16 of the Constitution vide 'The Constitution (Seventy-seventh Amendment) Act, 1995'. The 'Statement of Objects and Reasons' of the Amendment Act of 1995 reads thus:

“STATEMENT OF OBJECTS AND REASONS

**The Scheduled Castes and the Scheduled Tribes** have been enjoying the facility of reservation in promotion since 1955. The Supreme Court in its judgment dated 16th November, 1992 in the case of *Indra Sawhney and Others vs. Union of India and Others*, however, observed that reservation of appointments or posts under article 16(4) of the Constitution is confined to initial appointment and cannot extend to reservation in the matter of promotion. This ruling of the Supreme Court will adversely affect the interests of the **Scheduled Castes and the Scheduled Tribes**. Since the representation of the **Scheduled Castes and the Scheduled Tribes** in services in the States have not reached the required level, it is necessary to continue the existing dispensation of providing reservation in promotion in the case of the **Scheduled Castes and the Scheduled Tribes**. In view of the commitment of the Government to protect the interest of the **Scheduled Castes and the Scheduled Tribes**, the Government have decided to continue the existing policy of reservation in promotion for the **Scheduled Castes and the Scheduled Tribes**. To carry out this, it is necessary to amend article 16 of the Constitution by inserting a new clause(4A) in the said article to provide for reservation in promotion for the **Scheduled Castes and the Scheduled Tribes**.

The Bill seeks to achieve the aforesaid object.

NEW DELHI;

The 31st May, 1995”

(emphasis supplied)

16. From the above, it would be clear that after the insertion of clause (4A) in Article 16, if any provision for reservation in promotion is required to be made by the State Govt in public employment, the same can be confined to SC and ST only. However, on a plain reading of sub-clause (B) of Clause 3 of the Govt Resolution on promotion dated 25 May 2004, it is

seen that apart from 13% for SC and 7% for ST (total 20%), the State Govt. has provided for reservation in promotion even to non-SC and non-ST backward category of employees, namely, - 3% for De-Notified Tribes(A), 2.5% for Nomadic Tribes(B), 3.5% for Nomadic Tribes (C), 2% for Nomadic Tribes (D) and 2% for SBC (Total 13%). Consequently the percentage for reservation in promotion reached 33% when it should have been limited to 20% (for SC/ST). In my view, this was plainly impermissible and completely contrary to Article 16(4A) of the Constitution and results in excessive reservation and reverse discrimination against the open category of employees. It is pertinent to note that Article 16(4) provides that the State can make provision for reservation of appointments in favour of **any backward class**, whereas Article 16(4A) provides that the State can make provision for reservation in promotion in favour of **SC and ST**. Thus, at the highest, reservation in promotions could have been granted to SC and ST alone and to no other backward class communities. The 5-Judge Constitution Bench of Supreme Court in **Nagaraj** upheld the validity of Article 16(4A) subject to certain limitations. While dealing with the issue of constitutional validity of Article 16(4A), the Supreme Court in **Nagaraj** has in no uncertain terms held in paragraph 86 that Clause (4A) of Article 16 is carved out of Article 16(4) and applies only to SCs and STs. This is again reiterated by their Lordships in paragraphs 97 of the said judgment. In paragraph 102 and 121 also it is emphasized that Clause (4A) of Article 16 is confined to SCs and STs alone. It needs to be borne in mind that an em-

employee in public employment has no fundamental right to promotion. He has a fundamental right only to be considered for promotion. It is not possible to accept the contention that DT/NT/SBC are equally backward as ST/SC and they are required to be treated at par with and ought to get the same benefits including the benefit of reservation in promotion, as granted to SC/ST. That, in my view, is possible only if the communities under DT/NT/SBC are notified as SC/ST in the list of SC/ST in relation to the State of Maharashtra specified in the Notification issued by the President or included in the said list by the Parliament under Articles 341/342 of the Constitution. The Reservation Act itself vide section 2(l) defines Scheduled Caste and Scheduled Tribes. It states that Scheduled Castes and Scheduled Tribes shall have the meanings, respectively assigned to them in clauses (24) and (25) of Article 366 of the Constitution of India. Article 366(24) defines Scheduled Castes to mean such castes, races or tribes or parts of or group within such castes, races or tribes as are deemed under Article 341 to be Scheduled Castes for the purposes of this Constitution. Similarly, Article 366(25) defines Scheduled Tribes to mean such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes. Therefore, unless any category of backward classes is notified as Schedule Castes or Scheduled Tribes under Article 341 or 342 respectively of the Constitution of India, they would not be entitled to the benefit of reservations in promotion under Article 16(4A) of the Constitution of India. In view of the above,



the GR on promotion dated 25 May 2004 is clearly unsustainable and bad in law being contrary to Article 16(4A) and on this count alone the GR on promotion is liable to be struck down.

17. However, quite apart from the above, I find that the Govt Resolution on promotion dated 25 May 2004 is untenable even otherwise for other reasons indicated hereinbelow and being contrary to the law laid down by the judgment of the 5-Judge Constitution Bench in **Nagaraj**, as also subsequent judgments of the Supreme Court which follow **Nagaraj** viz:- (i) **Suraj Bhan Meena vs. State of Rajasthan**, (2011) 1 SCC 467 (ii) **Uttar Pradesh Power Corporation Ltd. Vs. Rajesh Kumar**, (2012) 7 SCC 1 (iii) **S. Panneer Selvam vs. Government of Tamil Nadu and Ors**, (2015) 10 SCC 292 (iv) **Ram Singh v. Union of India**, (2015) 4 SCC 697 (v) **Suresh Chand Gautam vs. State of Uttar Pradesh**, 2016 SCC OnLine SC 238, as also other judgments of the Supreme Court.

Law laid down by the 5-Judge Constitution Bench of Supreme Court in

**Nagaraj**

18. In **Nagaraj**, the 5-Judge Constitution Bench of Supreme Court in paragraph 3 culled out the following broad issues for determination before it:

“1. Validity

2. Interpretation

3. Implementation of

(i) the Constitution (Seventy-seventh Amendment) Act, 1995, the

Constitution (Eighty-first Amendment) Act, 2000, the Constitution (Eighty-second Amendment) Act, 2000, and the Constitution (Eighty-fifth Amendment) Act 2001; and, (ii) action taken in pursuance thereof which seek to reverse decisions of the Supreme Court in matters relating to promotion and their application with retrospective effect.”

It was observed in **Nagaraj** that the 77<sup>th</sup> Amendment had the effect of nullifying the decision in **Indra Sawhney** in which it was held that there can be no reservation in promotions; the 81<sup>st</sup> Amendment had the effect of nullifying the decision in **R.K Sabharwal vs. State of Punjab**, (1995) 2 SCC 745 in which it was held that carry-forward vacancies cannot be filled exceeding 50% of the posts; the 82<sup>nd</sup> Amendment had the effect of nullifying the decision in **Indra Sawhney** and other decisions which emphasize the importance of maintaining efficiency in administration; the 85<sup>th</sup> Amendment adding the words “with consequential seniority” in Article 16(4A) with retrospective effect from 17 June 1995 has been made to nullify the decision in **Ajit Singh(II) vs State of Punjab**, (1999) 7 SCC 209.

19. When Article 16(1) speaks about equality of opportunity for all citizens and Article 16(2) specifically forbids discrimination of citizens in respect of any employment or office under the State inter alia on the ground of ‘caste’, how is it that ‘caste’ is taken as the basis by the State Government to provide for reservations in public employment for backward ‘class’ of citizens under Article 16(4)? How is a balance achieved as regards protection of individual rights of citizens vis-à-vis preferential treatment to backward class of citizens in matters of public employment?

Inasmuch as the 5-judge Constitution Bench judgment of the Supreme Court in **Nagaraj** following a 9-judge Constitution Bench in **Indra Sawhney** has dealt with most of the legal issues involved in the present case, it would be apposite to extract the relevant paragraphs of **Nagaraj** in extenso, to appreciate the exposition of law on the subject. They read as under:

**“43. ... In the present case, we are concerned with the right of an individual to equal opportunity on one hand and preferential treatment to an individual belonging to a Backward Class in order to bring about an equal level-playing field in the matter of public employment.**

**... Therefore, the concept of “equality of opportunity” in public employment concerns an individual, whether that individual belongs to the general category or Backward Class. The conflicting claim of individual right under Article 16(1) and the preferential treatment given to a Backward Class has to be balanced.**

**46. The point which we are emphasising is that ultimately the present controversy is regarding the exercise of the power by the State Government depending upon the fact situation in each case. Therefore, “vesting of the power” by an enabling provision may be constitutionally valid and yet “exercise of the power” by the State in a given case may be arbitrary, particularly, if the State fails to identify and measure backwardness and inadequacy keeping in mind the efficiency of service as required under Article 335.**

**48. It is the equality “in fact” which has to be decided looking at the ground reality. Balancing comes in where the question concerns the extent of reservation. If the extent of reservation goes beyond cut-off point then it results in reverse discrimination.** Anti-discrimination legislation has a tendency of pushing towards *de facto* reservation. Therefore, a numerical benchmark is the surest immunity against charges of discrimination.

**49. Reservation is necessary for transcending caste and not**

for perpetuating it. Reservation has to be used in a limited sense otherwise it will perpetuate casteism in the country. Reservation is underwritten by a special justification. Equality in Article 16(1) is individual-specific whereas reservation in Article 16(4) and Article 16(4-A) is enabling. The discretion of the State is, however, subject to the existence of “backwardness” and “inadequacy of representation” in public employment. Backwardness has to be based on objective factors whereas inadequacy has to factually exist. This is where judicial review comes in. However, whether reservation in a given case is desirable or not, as a policy, is not for us to decide as long as the parameters mentioned in Articles 16(4) and 16(4-A) are maintained. As stated above, equity, justice and merit (Article 335)/efficiency are variables which can only be identified and measured by the State. **Therefore, in each case, a contextual case has to be made out depending upon different circumstances which may exist Statewise.**

**53.** The question of extent of reservation involves two questions:

1. Whether there is any upper-limit beyond which reservation is not permissible?
2. Whether there is any limit to which seats can be reserved in a particular year; in other words the issue is whether the percentage limit applies only on the total number of posts in the cadre or to the percentage of posts advertised every year as well?

**54.** The question of extent of reservation is closely linked to the issue whether Article 16(4) is an exception to Article 16(1) or is Article 16(4) an application of Article 16(1). If Article 16(4) is an exception to Article 16(1) then it needs to be given a limited application so as not to eclipse the general rule in Article 16(1). But if Article 16(4) is taken as an application of Article 16(1) then the two articles have to be harmonised keeping in view the interests of certain sections of the society as against the interest of the individual citizens of the society.

**59.** Giving the judgment of the Court in *Indra Sawhney* Jeevan Reddy, J. stated that Article 16(4) speaks of adequate representation not proportionate representation although proportion of population of Backward Classes to the total population would certainly be relevant. He further pointed out that Article 16(4) which protects interests of certain sections of society has to be balanced against Article 16(1) which protects the interests of every citizen of the entire society. They should be

harmonised because they are restatements of the principle of equality under Article 14.

**60. .... The fact that considerable number of members of Backward Class have been appointed/promoted against general seats in the State services may be a relevant factor for the State Government to review the question of continuing reservation for the said class.**

**79.** Reading the above judgments, we are of the view that the concept of “catch-up” rule and “consequential seniority” are judicially evolved concepts to control the extent of reservation. The source of these concepts is in service jurisprudence. These concepts cannot be elevated to the status of an axiom like secularism, constitutional sovereignty, etc. It cannot be said that by insertion of the concept of “consequential seniority” the structure of Article 16(1) stands destroyed or abrogated. It cannot be said that “equality code” under Articles 14, 15 and 16 is violated by deletion of the “catch-up” rule. These concepts are based on practices. However, such practices cannot be elevated to the status of a constitutional principle so as to be beyond the amending power of Parliament. Principles of service jurisprudence are different from constitutional limitations. Therefore, in our view neither the “catch-up” rule nor the concept of “consequential seniority” is implicit in clauses (1) and (4) of Article 16 as correctly held in *Virpal Singh Chauhan*.

**82.** Before dealing with the scope of the constitutional amendments we need to recap the judgments in *Indra Sawhney* and *R.K. Sabharwal*. In the former case the majority held that 50% rule should be applied to each year otherwise it may happen that the open competition channel may get choked if the entire cadre strength is taken as a unit. However, in *R.K. Sabharwal* this Court stated that the entire cadre strength should be taken into account to determine whether the reservation up to the quota limit has been reached. It was clarified that the judgment in *Indra Sawhney*<sup>5</sup> was confined to initial appointments and not to promotions. The operation of the roster for filling the cadre strength, by itself, ensures that the reservation remains within the ceiling limit of 50%.

**83.** In our view, the appropriate Government has to apply the cadre strength as a unit in the operation of the roster in order to ascertain whether a given class/group is adequately represented in the service. The cadre strength as a unit also

ensures that upper ceiling limit of 50% is not violated. Further, roster has to be post-specific and not vacancy based.

**86.** Clause (4-A) follows the pattern specified in clauses (3) and (4) of Article 16. **Clause (4-A) of Article 16 emphasises the opinion of the States in the matter of adequacy of representation.** It gives freedom to the State in an appropriate case depending upon the ground reality to provide for reservation in matters of promotion to any class or classes of posts in the services. The State has to form its opinion on the quantifiable data regarding adequacy of representation. Clause (4-A) of Article 16 is an enabling provision. It gives freedom to the State to provide for reservation in matters of promotion. Clause (4-A) of Article 16 applies only to SCs and STs. The said clause is carved out of Article 16(4). Therefore, clause (4-A) will be governed by the two compelling reasons— “backwardness” and “inadequacy of representation”, as mentioned in Article 16(4). If the said two reasons do not exist then the enabling provision cannot come into force. The State can make provision for reservation only if the above two circumstances exist. Further, in *Ajit Singh (II)* this Court has held that apart from “backwardness” and “inadequacy of representation” the State shall also keep in mind “overall efficiency” (Article 335). Therefore, all the three factors have to be kept in mind by the appropriate Government in providing for reservation in promotion for SCs and STs.

**97.** As stated above, clause (4-A) of Article 16 is carved out of clause (4) of Article 16. **Clause (4-A) provides benefit of reservation in promotion only to SCs and STs.**

**100.** As stated above, Article 16(4-B) lifts the 50% cap on carry-over vacancies (backlog vacancies). The ceiling limit of 50% on current vacancies continues to remain. In working out the carry-forward rule, two factors are required to be kept in mind, namely, unfilled vacancies and the time factor. This position needs to be explained.

**102.** In the matter of application of the principle of basic structure, twin tests have to be satisfied, namely, the “width test” and the test of “identity”. ....Clause (1) of Article 16 cannot prevent the State from taking cognizance of the compelling interests of Backward Classes in the society. Clauses (1) and (4) of Article 16 are restatements of the principle of

equality under Article 14. Clause (4) of Article 16 refers to affirmative action by way of reservation. **Clause (4) of Article 16, however, states that the appropriate Government is free to provide for reservation in cases where it is satisfied on the basis of quantifiable data that Backward Class is inadequately represented in the services. Therefore, in every case where the State decides to provide for reservation there must exist two circumstances, namely, “backwardness” and “inadequacy of representation”.** As stated above, equity, justice and efficiency are variable factors. These factors are context-specific. **There is no fixed yardstick to identify and measure these three factors, it will depend on the facts and circumstances of each case.** These are the limitations on the mode of the exercise of power by the State. None of these limitations have been removed by the impugned amendments. **If the State concerned fails to identify and measure backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid.** These amendments do not alter the structure of Articles 14, 15 and 16 (equity code). The parameters mentioned in Article 16(4) are retained. Clause (4-A) is derived from clause (4) of Article 16. **Clause (4-A) is confined to SCs and STs alone. ....The impugned constitutional amendments are enabling in nature. They leave it to the States to provide for reservation.** It is well settled that Parliament while enacting a law does not provide content to the “right”. The content is provided by the judgments of the Supreme Court. **If the appropriate Government enacts a law providing for reservation without keeping in mind the parameters in Article 16(4) and Article 335 then this Court will certainly set aside and strike down such legislation.** Applying the “width test”, we do not find obliteration of any of the constitutional limitations. Applying the test of “identity”, we do not find any alteration in the existing structure of the equality code. As stated above, none of the axioms like secularism, federalism, etc. which are overarching principles have been violated by the impugned constitutional amendments. Equality has two facets— “formal equality” and “proportional equality”. Proportional equality is equality “in fact” whereas formal equality is equality “in law”. Formal equality exists in the rule of law. In the case of proportional equality the State is expected to take affirmative steps in favour of disadvantaged sections of the society within the framework of liberal democracy. Egalitarian equality is proportional equality.

**104.** Applying the above tests to the present case, there is no violation of the basic structure by any of the impugned amendments, including the Constitution (Eighty-second) Amendment Act, 2000. The constitutional limitation under Article 335 is relaxed and not obliterated. **As stated above, be it reservation or evaluation, excessiveness in either would result in violation of the constitutional mandate. This exercise, however, will depend on the facts of each case.** In our view, the field of exercise of the amending power is retained by the impugned amendments, as the impugned amendments have introduced merely enabling provisions because, as stated above, merit, efficiency, backwardness and inadequacy cannot be identified and measured in vacuum. Moreover, Article 16(4-A) and Article 16(4-B) fall in the pattern of Article 16(4) and as long as the parameters mentioned in those articles are complied with by the States, the provision of reservation cannot be faulted. Articles 16(4-A) and 16(4-B) are classifications within the principle of equality under Article 16(4).

**107.** ...Article 16(4) provides for reservation for Backward Classes in cases of inadequate representation in public employment. Article 16(4) is enacted as a remedy for the past historical discriminations against a social class. The object in enacting the enabling provisions like Articles 16(4), 16(4-A) and 16(4-B) is that the State is empowered to identify and recognise the compelling interests. **If the State has quantifiable data to show backwardness and inadequacy then the State can make reservations in promotions keeping in mind maintenance of efficiency which is held to be a constitutional limitation on the discretion of the State in making reservation as indicated by Article 335. As stated above, the concepts of efficiency, backwardness, inadequacy of representation are required to be identified and measured. That exercise depends on availability of data. That exercise depends on numerous factors.** It is for this reason that enabling provisions are required to be made because each competing claim seeks to achieve certain goals. How best one should optimise these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment. ....If Articles 16(4-A) and 16(4-B) flow from Article 16(4) and if Article 16(4) is an enabling provision then Articles 16(4-A) and 16(4-B) are also enabling provisions. As long as the boundaries mentioned in Article 16(4), namely, backwardness, inadequacy and efficiency of administration are retained in Articles 16(4-A)



and 16(4-B) as controlling factors, we cannot attribute constitutional invalidity to these enabling provisions. **However, when the State fails to identify and implement the controlling factors then excessiveness comes in, which is to be decided on the facts of each case. In a given case, where excessiveness results in reverse discrimination, this Court has to examine individual cases and decide the matter in accordance with law.** This is the theory of “guided power”. We may once again repeat that equality is not violated by mere conferment of power but it is breached by arbitrary exercise of the power conferred.

**109. In conclusion, we reiterate that the object behind the impugned constitutional amendments is to confer discretion on the State to make reservations for SCs/STs in promotions subject to the circumstances and the constitutional limitations indicated above.**

**110.** As stated above, the boundaries of the width of the power, namely, the ceiling limit of 50% (the numerical benchmark), the principle of creamy layer, the compelling reasons, namely, backwardness, inadequacy of representation and the overall administrative efficiency are not obliterated by the impugned amendments. At the appropriate time, we have to consider the law as enacted by various States providing for reservation if challenged. At that time we have to see whether limitations on the exercise of power are violated. **The State is free to exercise its discretion of providing for reservation subject to limitation, namely, that there must exist compelling reasons of backwardness, inadequacy of representation in a class of post(s) keeping in mind the overall administrative efficiency. It is made clear that even if the State has reasons to make reservation, as stated above, if the impugned law violates any of the above substantive limits on the width of the power the same would be liable to be set aside.**

**112.** ...Therefore, Article 16(1) and Article 16(4) operate in different fields. **Backwardness and inadequacy of representation, therefore, operate as justifications in the sense that the State gets the power to make reservation only if backwardness and inadequacy of representation exist.** These factors are not obliterated by the impugned amendments.

**116.** As stated above, Article 14 enables classification. A

classification must be founded on intelligible differentia which distinguishes those that are grouped together from others. The differentia must have a rational relation to the object sought to be achieved by the law under challenge. In *Indra Sawhney*<sup>5</sup> an opinion was expressed by this Court vide para 802 that there is no constitutional or legal bar to the making of classification. Article 16(4-B) is also an enabling provision. It seeks to make classification on the basis of the differentia between current vacancies and carry-forward vacancies. In the case of Article 16(4-B) we must keep in mind that following the judgment in *R.K. Sabharwal*<sup>8</sup>, the concept of post-based roster is introduced. Consequently, specific slots for OBCs, SCs and STs as well as GC have to be maintained in the roster. For want of a candidate in a particular category the post may remain unfilled. Nonetheless, that slot has to be filled only by the specified category. **Therefore, by Article 16(4-B) a classification is made between current vacancies on one hand and carry-forward/backlog vacancies on the other hand. Article 16(4-B) is a direct consequence of the judgment of this Court in *R.K. Sabharwal* by which the concept of post-based roster is introduced. Therefore, in our view Articles 16(4-A) and 16(4-B) form a composite part of the scheme envisaged.** Therefore, in our view Articles 16(4), 16(4-A) and 16(4-B) together form part of the same scheme. As stated above, Articles 16(4-A) and 16(4-B) are both inspired by observations of the Supreme Court in *Indra Sawhney*<sup>5</sup> and *R.K. Sabharwal*. They have nexus with Articles 17 and 46 of the Constitution. Therefore, we uphold the classification envisaged by Articles 16(4-A) and 16(4-B). The impugned constitutional amendments, therefore, do not obliterate equality.

**117. However, the question still remains whether the State concerned has identified and valued the circumstances justifying it to make reservation. This question has to be decided casewise.** There are numerous petitions pending in this Court in which reservations made under State enactments have been challenged as excessive. **The extent of reservation has to be decided on the facts of each case.** The judgment in *Indra Sawhney* does not deal with constitutional amendments. **In our present judgment, we are upholding the validity of the constitutional amendments subject to the limitations. Therefore, in each case the Court has got to be satisfied that the State has exercised its opinion in making reservations in promotions for SCs and STs and for which the State**

concerned will have to place before the Court the requisite quantifiable data in each case and satisfy the Court that such reservations became necessary on account of inadequacy of representation of SCs/STs in a particular class or classes of posts without affecting general efficiency of service as mandated under Article 335 of the Constitution.

119. The concept of reservation in Article 16(4) is hedged by three constitutional requirements, namely, backwardness of a class, inadequacy of representation in public employment of that class and overall efficiency of the administration. These requirements are not obliterated by the impugned constitutional amendments. **Reservation is not in issue. What is in issue is the extent of reservation.** If the extent of reservation is excessive then it makes an inroad into the principle of equality under Article 16(1). Extent of reservation, as stated above, will depend on the facts of each case. Backwardness and inadequacy of representation are compelling reasons for the State Governments to provide representation in public employment. Therefore, if in a given case the court finds excessive reservation under the State enactment then such an enactment would be liable to be struck down since it would amount to derogation of the above constitutional requirements.

120. ...In *Indra Sawhney*<sup>5</sup> all the Judges except Pandian, J. held that the “means test” should be adopted to exclude the creamy layer from the protected group earmarked for reservation. In *Indra Sawhney* this Court has, therefore, accepted caste as a determinant of backwardness and yet it has struck a balance with the principle of secularism which is the basic feature of the Constitution by bringing in the concept of creamy layer. Views have often been expressed in this Court that caste should not be the determinant of backwardness and that the economic criteria alone should be the determinant of backwardness. As stated above, we are bound by the decision in *Indra Sawhney*<sup>5</sup>. The question as to the “determinant” of backwardness cannot be gone into by us in view of the binding decision. In addition to the above requirements this Court in *Indra Sawhney*<sup>5</sup> has evolved numerical benchmarks like ceiling limit of 50% based on post-specific roster coupled with the concept of replacement to provide immunity against the charge of discrimination.

### Conclusion

121. The impugned constitutional amendments by which Articles 16(4-A) and 16(4-B) have been inserted flow from Article 16(4). They do not alter the structure of Article 16(4). They retain the controlling factors or the compelling reasons, namely, backwardness and inadequacy of representation which enables the States to provide for reservation keeping in mind the overall efficiency of the State administration under Article 335. These impugned amendments are confined only to SCs and STs. They do not obliterate any of the constitutional requirements, namely, ceiling limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-classification between OBCs on one hand and SCs and STs on the other hand as held in *Indra Sawhney*, the concept of post-based roster with inbuilt concept of replacement as held in *R.K. Sabharwal*.

122. We reiterate that the ceiling limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse.

123. However, in this case, as stated above, the main issue concerns the "extent of reservation". In this regard the State concerned will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. As stated above, the impugned provision is an enabling provision. The State is not bound to make reservation for SCs/STs in matters of promotions. However, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Article 335. It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely.

124. Subject to the above, we uphold the constitutional validity of the Constitution (Seventy-seventh Amendment)

**Act, 1995; the Constitution (Eighty-first Amendment) Act, 2000; the Constitution (Eighty-second Amendment) Act, 2000 and the Constitution (Eighty-fifth Amendment) Act, 2001.**

**125. We have not examined the validity of individual enactments of appropriate States and that question will be gone into in individual writ petition by the appropriate Bench in accordance with law laid down by us in the present case”.**

(emphasis supplied)

Other judgments of Supreme Court following **Nagaraj**

20. The aforesaid judgment of **Nagaraj** has been followed in a host of other cases. In **Suraj Bhan Meena v. State of Rajasthan**, (2011) 1 SCC 467, it is held by the Supreme Court in paragraph 67 and 68 as follows:

**“67. The view of the High Court is based on the decision in *M. Nagaraj* case as no exercise was undertaken in terms of Article 16(4-A) to acquire quantifiable data regarding the inadequacy of representation of the Scheduled Caste and Scheduled Tribe communities in public services. The Rajasthan High Court has rightly quashed the Notifications dated 28-12-2002 and 25-4-2008 issued by the State of Rajasthan providing for consequential seniority and promotion to the members of the Scheduled Caste and Scheduled Tribe communities and the same does not call for any interference.**

**68. Accordingly, the claim of petitioners Suraj Bhan Meena and Sriram Choradia in Special Leave Petition (Civil) No. 6385 of 2010 will be subject to the conditions laid down in *M. Nagaraj* case<sup>3</sup> and is disposed of accordingly. Consequently, Special Leave Petitions (C) Nos. 7716, 7717, 7826 and 7838 of 2010, filed by the State of Rajasthan, are also dismissed.”**

21 In **U.P. Power Corpn. Ltd. v. Rajesh Kumar**, (2012) 7 SCC 1, in paragraphs 81, 86 and 87, it is held by the Supreme Court as under:

**“81. From the aforesaid decision in *M. Nagaraj* case and the paragraphs we have quoted hereinabove, the following principles can be carved out:**

**(i) Vesting of the power by an enabling provision may be**

**constitutionally valid and yet “exercise of power” by the State in a given case may be arbitrary, particularly, if the State fails to identify and measure the backwardness and inadequacy keeping in mind the efficiency of service as required under Article 335.**

(ii) Article 16(4) which protects the interests of certain sections of the society has to be balanced against Article 16(1) which protects the interests of every citizen of the entire society. They should be harmonised because they are restatements of the principle of equality under Article 14.

(iii) Each post gets marked for the particular category of candidates to be appointed against it and any subsequent vacancy has to be filled by that category candidate.

(iv) **The appropriate Government has to apply the cadre strength as a unit in the operation of the roster in order to ascertain whether a given class/group is adequately represented in the service. The cadre strength as a unit also ensures that the upper ceiling limit of 50% is not violated. Further, roster has to be post-specific and not vacancy based.**

(v) **The State has to form its opinion on the quantifiable data regarding adequacy of representation. Clause (4-A) of Article 16 is an enabling provision. It gives freedom to the State to provide for reservation in matters of promotion. Clause (4-A) of Article 16 applies only to SCs and STs. The said clause is carved out of Article 16(4-A). Therefore, clause (4-A) will be governed by the two compelling reasons—“backwardness” and “inadequacy of representation”, as mentioned in Article 16(4). If the said two reasons do not exist, then the enabling provision cannot be enforced.**

(vi) If the ceiling limit on the carry over of unfilled vacancies is removed, the other alternative time factor comes in and in that event, the timescale has to be imposed in the interest of efficiency in administration as mandated by Article 335. If the timescale is not kept, then posts will continue to remain vacant for years which would be detrimental to the administration. Therefore, in each case, the appropriate Government will now have to introduce the duration depending upon the fact situation.

(vii) **If the appropriate Government enacts a law providing for reservation without keeping in mind the parameters in Article 16(4) and Article 335, then this Court will certainly set aside and strike down such legislation.**

(viii) The constitutional limitation under Article 335 is relaxed and not obliterated. **As stated above, be it reservation or evaluation, excessiveness in either would result in violation of the**

constitutional mandate. This exercise, however, will depend on the facts of each case.

(ix) The concepts of efficiency, backwardness and inadequacy of representation are required to be identified and measured. That exercise depends on the availability of data. That exercise depends on numerous factors. It is for this reason that the enabling provisions are required to be made because each competing claim seeks to achieve certain goals. How best one should optimise these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment.

(x) Article 16(4), therefore, creates a field which enables a State to provide for reservation provided there exists backwardness of a class and inadequacy of representation in employment. These are compelling reasons. They do not exist in Article 16(1). It is only when these reasons are satisfied that a State gets the power to provide for reservation in the matter of employment.

86. We are of the firm view that a fresh exercise in the light of the judgment of the Constitution Bench in *M. Nagaraj* is a categorical imperative. The stand that the constitutional amendments have facilitated the reservation in promotion with consequential seniority and have given the stamp of approval to the Act and the Rules cannot withstand close scrutiny inasmuch as the Constitution Bench has clearly opined that Articles 16(4-A) and 16(4-B) are enabling provisions and the State can make provisions for the same on certain basis or foundation. **The conditions precedent have not been satisfied. No exercise has been undertaken. What has been argued with vehemence is that it is not necessary as the concept of reservation in promotion was already in vogue. We are unable to accept the said submission, for when the provisions of the Constitution are treated valid with certain conditions or riders, it becomes incumbent on the part of the State to appreciate and apply the test so that its amendments can be tested and withstand the scrutiny on parameters laid down therein.**

87. In the ultimate analysis, we conclude and hold that Section 3(7) of the 1994 Act and Rule 8-A of the 2007 Rules are ultra vires as they run counter to the dictum in *M. Nagaraj*<sup>1</sup>. Any promotion that has been given on the dictum of *Indra Sawhney*<sup>4</sup> and without the aid or assistance of Section 3(7) and Rule 8-A shall remain undisturbed.”

22 In **S. Panneer Selvam v. State of T.N.**, (2015) 10 SCC 292, it is

held by the Supreme Court as under:

**“31. The respondents’ submission regarding inadequacy of representation of Scheduled Castes/Scheduled Tribes in the Tamil Nadu Highways Engineering Service by itself is not sufficient to uphold the inadequacy of representation of SCs/STs in the said service. Even after the Eighty-fifth Amendment, the State is duty-bound to collect data so as to assess the adequacy of representation of the Scheduled Caste candidates in the service and based on the same the State should frame a policy/rules for consequential seniority. No material is placed on record that the State of Tamil Nadu has ever undertaken such exercise of collecting data of adequacy of representation of the SC/ST candidates in the Tamil Nadu Highways Engineering Service. In the absence of any rule conferring consequential seniority in the State of Tamil Nadu the “catch-up rule” is applicable even amongst Junior Engineers promoted as ADEs following rule of reservation and also for their inter se seniority amongst AEs promoted as ADEs and JEs promoted as ADEs following rule of reservation.**

23. In **Ram Singh v. Union of India**, (2015) 4 SCC 697, (reservation for Jats case) the Supreme Court held:

49...A decision as grave and important as involved in the present case which impacts the rights of many under Articles 14 and 16 of the Constitution **must be taken on the basis of contemporaneous inputs and not outdated and antiquated data.**

52...The necessary data on which the exercise has to be made, as already observed by us, has to be contemporaneous. Outdated statistics cannot provide accurate parameters for measuring backwardness for the purpose of inclusion in the List of Other Backward Classes. **This is because one may legitimately presume progressive advancement of all citizens on every front i.e. social, economic and educational. Any other view would amount to retrograde governance**

55. The perception of a self-proclaimed socially backward class of citizens or even the perception of the “advanced classes” as to the social status of the “less fortunates” cannot continue to be a constitutionally permissible yardstick for determination of backwardness, both in the context of Articles 15(4) and 16(4) of the Constitution. Neither can backwardness any longer be a matter of



determination on the basis of mathematical formulae evolved by taking into account social, economic and educational indicators. Determination of backwardness must also cease to be relative; possible wrong inclusions cannot be the basis for further inclusions but the gates would be opened only to permit entry of the most distressed. **Any other inclusion would be a serious abdication of the constitutional duty of the State.**

24. In **Suresh Chand Gautam vs. State of Uttar Pradesh**, 2016 SCC OnLine SC 238, the Supreme Court in paragraph 47 has reiterated that it is the discretion of the Government to take a decision to have reservation, and **to have reservation there is a necessity for collection of data in accordance with the principles stated in Nagaraj as the same is condition precedent and there is no constitutional obligation to make reservation in promotion.**

25. Thus, as held by the Supreme Court in the 5-Judge Constitution Bench judgment in **Nagaraj**, the extent of reservation has to be decided on the facts of each case. If the extent of reservation goes beyond cut-off point then it results in reverse discrimination. The Supreme Court inter alia upheld the validity of Article 16(4A), subject to the certain conditions. The Supreme Court held that clause (4A) of Article 16 is an enabling provision and provides for benefit of reservation in promotion only to SCs and STs. In each case, the Court has got to be satisfied that the State has exercised its opinion in making reservations in promotions for SCs and STs for which the State concerned will have to place before the Court the requisite quantifiable data and satisfy the Court that such reservations became necessary on account of inadequacy of representation of SCs/STs in a particular class or classes of posts without affecting general efficiency of

service as mandated under Article 335 of the Constitution. The Supreme Court held that the State concerned will have to show in each case the existence of the compelling reasons, namely, (1) backwardness, (2) inadequacy of representation and (3) overall administrative efficiency before making provision for reservation. It was made clear that even if the State has compelling reasons as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely. In short, one can discern the following tests which were held to be constitutional requirements in **Nagaraj** :

- (i) 50%
- (ii) Cream-layer
- (iii) Compelling reasons
- (iv) Backwardness
- (v) Inadequacy of representation
- (vi) Overall administrative efficiency

In order to balance the Constitutional mandate contained in Articles 16(4) and the Rule of Equality enshrined in Article 14 and the Rule of equal opportunity in matters of Public employment in Article 16(1), the Supreme Court in **Nagaraj** has inter alia evolved the aforesaid principles to ensure that a balance and harmony is struck between Articles 14, 19 & 21 on one hand and Articles 15(4) and 16(4) on the other hand. Each of these principles have been devised as a safeguard to ensure that the Rule of Equality enshrined in Articles 14 & 16(1) of the Constitution are balanced

with the social requirement of reservation in public employment. Equality is a part of the basic structure and it is impossible to conceive of the Constitution without equality as one of its central components. That equality is the basic feature referred to in the preamble of our Constitution is no longer debatable. Following and explaining **Nagaraj**, the Supreme Court in the subsequent judgments referred to above, has held that there is no constitutional obligation on the State Govt to provide for reservation in promotions. The Supreme Court held that if the State fails to indentify and measure backwardness and inadequacy keeping in mind the efficiency as required under Article 335 of the Constitution, the exercise of power by the State Govt may be arbitrary. To provide for reservation, the exercise of collection of data in terms of **Nagaraj** is categorical imperative and a condition precedent. That data must be contemporaneous and not outdated and antiquated.

The principles of law laid down in the aforesaid judgments need to be applied to the facts of the present case and it will be required to be seen whether the State Govt has carried out the exercise and has the necessary data in terms of **Nagaraj**, which would be crucial to arrive at a just and proper decision.

#### Importance of data

26. Quantifiable data is a judicial concept evolved to investigate and provide latest statistics so as to enable the Government bodies to

formulate the policies under Article 16(4) & Article 16 (4A) keeping in mind the equality code enshrined in Article 14 & Article 16(1) in matters of Public Employment. The importance of quantifiable data to cite a few are:

- a) Data is one way of testing excessiveness.
- b) Data ensures that reservation is need based, fair and just;
- c) Data ensures that the process of reservation is scientific and rational and reaches the truly backward class of citizen;
- d) Data assists in making reservation on “need based” i.e. those who are really backward and not on political or caste or communal considerations;
- e) Data, and more importantly contemporaneous data, is an important tool to identity new emerging groups that require protection by an affirmative action policy like reservation.
- f) Data discloses imbalances which require redressal by positive affirmative action.

Quantifiable data with regard to “adequate representation” of SC/ST in matter of promotion AND the GR on promotion

27. In terms of **Nagaraj**, the State Govt is required to satisfy the Court that it has the quantifiable data and that such reservations became necessary on account of (1) backwardness, (2) inadequacy of representation and (3) that the overall administrative efficiency is kept in mind. So far as ‘adequate representation’ in matters of promotion is concerned, it would have to be seen whether, the backward class employees in promotional posts were insufficient in number to conclude that they were not adequately represented in services of the State

Government and reservation was therefore necessary in promotion. In terms of **Nagaraj**, it was required of the State Government to place before the Court quantifiable data to come to such conclusion. According to the State Government, it has the required data to show that reservation in promotion was necessary. It is pointed out on behalf of the State Government that every year all Departments of the State Government are required to submit the backlog of vacancies in promotional posts for such backward class employees covered under the GR on promotion in their respective Departments to the General Administration Department of the State Government. The State Government has produced charts before the Tribunal as well as some charts before this Court reflecting the latest position of backlog of such unfilled vacancies. It is contended on behalf of the State Government that these charts would indicate that there was no adequate representation of such backward class employees in the services of the State in promotional posts. The State Govt has also relied upon the Deshmukh Committee Report of 1964 to contend that such exercise for finding out whether or not there was adequate representation was undertaken.

28. It is however not possible to accept the contention. The State Government in terms of **Nagaraj** was required to undertake the exercise of finding out whether or not there was adequate representation of backward class employees in promotional posts before exercising its discretion to provide reservation in promotion. That exercise has not been undertaken

by the State Government at the time of or a reasonable period prior to the issuance of the GR on promotion. There is no opinion formed by the State Government placed on record to show that on the basis of the quantifiable data of the number of backward category employees on promotional posts vis-à-vis the number of other category of employees, it became necessary for the State Government to provide for reservation for such backward class of employees. Mere production of charts to show the backlog of vacancies would not be sufficient to come to the conclusion that there was inadequate representation of such backward class employees in services of the State Govt in matters of promotion. The Deshmukh Committee Report is of the year 1964 and can hardly be said to be relevant for determining whether there was adequate representation of such backward category of employees at the time of the issuance of the GR on promotion on 25 May 2004. As held by the Supreme Court in **Ram Singh**, such decision must be taken on the basis of contemporaneous inputs and not outdated and antiquated data. A fresh exercise was therefore imperative, if the State Govt was desirous of making provision for reservation in promotion. Backlog can exist in open category too. That does not mean that there is no adequate representation of open category employees. In this regard, it would be necessary to refer to the Affidavit of Shri Vijay Ghogare, Respondent No. 1 (Original Petitioner No. 1) dated 21 June 2012 filed in Writ Petition No.2797 of 2015. In paragraph 23 of the Affidavit it is stated thus:

“23. .... The effect of reservation in promotion after the Act of 2004 has led to following three channels having opened up for reserved candidates:

Channel 1 – Promotion by reservation

Channel 2 – Promotion of reserved candidate by seniority

Channel 3 – Promotion of reserved candidates selected in open category as per merit.

With the help of these three avenues of promotion, representation of reserved candidates is now much more than required. I quote few examples on the basis of data collected from few Departments of State Government which is hereto annexed and marked as Exhibit “1”.

29. The information in Exhibit “1” to the aforementioned Affidavit was obtained under Right to Information Act. Exhibit “1” is extracted hereinbelow:

**Few Examples of how the reservation in promotion has created Reverse discrimination to open categories in various Departments**

Sr.No.	Department	Name of Post	Total post	Filled post	Posts occupied by SC candidates	Percentage of SC category against 13%
1	Water Resources Dept.	Superintending Engineer	82	71	26	36.60%
		Executive Engineer	410	394	84	21.31%
2	Energy Maharashtra Electricity Distribution Company (MAHADISCO)	Chief Engineer	29	27	11	40.74%
		Superintending Engineer	82	78	26	33.33%
		Executive Engineer	341	324	96	29.62%
3	General Administration Dept.	Under Secretary	248	241	70	28.45%

4	Public Works Dept.	Superintending Engineer	63	44	9	20.45%
		Executive Engineer	520	476	116	24.36%
5	Home Dept.	Superintendent of Police (promotee)	115	107	32	29.90%
		Dy. Superintendent of Police	517	415	112	27.70%
6.	Revenue Dept.	Deputy Collector	520	476	116	24.36%

30. The above information in Exhibit "1" is reflective of the position that the percentage occupied by SC employees are much more than 13% and there was more than adequate representation of SC candidates in the higher posts in various Departments mentioned in the said Exhibit. Though this information under RTI was obtained during the pendency of the proceedings before the Tribunal, it would fortify the fact that mere production by the State Government of charts showing the position of backlog vacancies for backward class employees would not be sufficient to indicate that there was inadequacy of representation of such backward class employees in promotional posts in the services of the State Government. Pertinently, the State Government has not given the cadre strength and total number of occupied promotional posts in the Departments category wise. In paragraph 82 of **Nagaraj**, the Supreme Court has stated that the Govt has to apply the cadre strength as a unit in the operation of the roster in order to ascertain whether a given



class/group is adequately represented. Thus, what was required of the State Government was to undertake a comprehensive exercise in terms of **Nagaraj** and not just reliance of charts showing backlog of unfilled vacancies, which would only give a distorted picture. It is also not clear how after applying the principle of carry over of unfilled vacancies and applying the principle of consequential seniority, the backlog of vacancies in promotion is worked out. The decision in **Nagaraj** came after the enactment of the Reservation Act and during the pendency of the original Writ Petitions and therefore such exercise in terms of **Nagaraj** was a must to continue with the reservation in promotions. So far as the charts produced by the State Govt showing the position of backlog post 2007 is concerned, it is noticed that the State Government had in 2008 adopted a methodology for filling up unfilled vacancies in promotion for reserved category employees relying upon a Circular dated 27-10-2008 which provides that, in certain circumstances, in the event of non-availability of a candidate belonging to a particular reserved category, the post shall be offered to next roster point category within the reservation percentage, which Circular has been set aside by the Division Bench of this Court (at Aurangabad) in **Magas Varga Karmachari Adhikari Suraksha Mahasangh v/s. State of Maharashtra and Ors.**, 2013 (5) Mh.L.J. 640. The said decision was rendered on 9 May 2013. I have already held that the promotions granted under the GR on promotion to DT/NT/SBC which constitute 13% of the reservations in promotion is bad. It is quite possible

that by applying the principle of rotation as stated in the Circular dated 27-10-2008 (which stands set aside as of 9 May 2013), few of the vacancies for which DT/NT/SBC employees may have not been available may have been filled by SC/ST employees. The data of representation of such SC/ST employees, if any, has not been produced and it is not clear if the State Govt has given effect to the judgment of the Division Bench and has taken corrective steps, if any, insofar as the promotions made from 27-10-2008 are concerned. Apart from the above, it is required to be noted that there are backward class employees covered under the GR on promotion in the State Government who are occupying unreserved posts i.e. 'own merit' candidates. There is no data placed on record of the number of such 'own merit' candidates by the State Government for the purposes of arriving at a decision regarding adequate representation of backward class of employees on promotional posts.

31. The Tribunal has closely examined the charts which were annexed to the Affidavits filed on behalf of the State Govt. The Tribunal found that in many Departments there was no backlog and there was adequate representation of SC in Group 'A' posts in the Irrigation Department. The Tribunal has in para 26 of the impugned judgment rightly observed as follows:

"26... The State is required to collect quantifiable data showing backwardness and inadequacy of representation. The State also has to comply with Article 335, which is regarding maintenance of efficiency of administration. Though all the three requirements are necessary to be met for the present, we will concentrate on the

requirements of inadequacy of representation in services of the SCs and STs in Maharashtra. It is reiterated that other two requirements are equally important while considering challenge of reservation as a whole. In Exhibit R-3 attached to the Additional Affidavit in reply dated 27.12.2010 in T.A no 1/2014 figures of back log in various Department at various level e.g. Group 'A', Group 'B', Group 'C' and Group 'D' have been given. These figures are separately given for direct recruitment and for promotion. At page 288 of the Paper Book, figures of Backlog for Group 'A' posts have been given which shows that in Irrigation Department 117 SCs and 1 ST are in excess of the reservation provided for them. At least in Group 'A' posts in Irrigation Department, there appears to be no justification for providing reservation in promotion, as there does not appears to be any inadequacy in representation of S.C. Overall, in Group 'A' posts in Maharashtra, there are 4 SCs in excess of reservation provided for them, though except in case of Irrigation Department, there is no excess representation of SCs. In many departments, there is no back log. It was argued on behalf of the Applicants that many persons belonging to SC/ST category are not counted as they are shown against open category. In our considered opinion, all persons who have claimed reservation have to be counted to determine whether that backward category is represented adequately or not. In case of reservation in promotion, the Government is in possession of full data including Caste (whether SC, ST or OBC) of each employee. It should be possible to come out with accurate data every year say on 1<sup>st</sup> January, to show the total posts in each cadre and how many of them are occupied by persons belonging to SC & ST. We have come across affidavit filed by the Chief Secretary of the State in O.A no 147 of 2010, where it is unequivocally mentioned that a person belonging to SC / ST can be promoted as per his / her seniority against an open vacancy, but he has to be adjusted against the roster point as and when it is available. Otherwise, there is danger that reservation in promotion will lead to excessiveness which would result in violation of Constitutional mandate as held by Hon'ble Supreme Court in Para 104 of **NAGRAJ's** judgment."

32. However quite apart from the above and even if we were to assume for a moment that there was some exercise carried out by the State Govt in determining whether or not there was 'adequate representation' of the backward class of employees covered under the GR on promotion dated

25 May 2004, it is seen that the entire premise on which the State Govt says that there was inadequate representation, is based on the foundation that the promotional posts for reserved category was 33% (SC/ST/DT/NT/SBC) when, as discussed in paragraph 16 above, the said percentage could not have exceeded 20 (limited to SC/ST). Hence, it would be but obvious that the stand of the State Govt that there was inadequate representation of backward class employees, which stand is based on 33% reservation in promotion, is fallacious and the entire calculation and working of the charts would be faulty and such charts could not form the basis of arriving at a conclusion that there was inadequate representation of the backward class employees in matters of promotion in the services of the State Govt.

33. As stated earlier, Article 16(4A) is an enabling provision and if the State Government is desirous of granting reservation in promotion to SC/ST, in terms of **Nagaraj** it is *sine-qua non* for the State Government to collect quantifiable data with regard to the inadequacy of representation of the SC/ST in the services of the State Government. The State Govt would be the repository of all the data and the burden was clearly on the State Government to show that it has carried out such exercise in terms of **Nagaraj** and that it is in possession of such data on the basis of which reservation in promotion became necessary, which burden, it has failed to discharge. There is no material on record to show that at the time of issuing the GR on promotion, the State Government has undertaken the

exercise to collect the relevant data and after analyzing the same, it had formed an opinion that reservation in promotion was necessary. Pertinently, in the Affidavit in Reply dated 7 February 2005 of Mr. D. D. Tiwarekar, Under Secretary, General Administrative Department filed on behalf of the State Government, it is admitted that population data was the basis for determining adequacy of representation of DT/NT/SBC.

34. In the circumstances, the data of backlog in the form of charts produced by the State Government cannot be the basis to conclude that there was inadequate representation of the SC/ST employees in promotional posts in the services of the State Government and in absence of any exercise having been undertaken by the State Government to collect quantifiable data of representation of such SC/ST employees and after analyzing that data forming an opinion that the SC/ST communities do not have adequate representation, it would have to be held that the GR on promotion dated 25 May 2004 is contrary to the law laid down in **Nagaraj** and is unsustainable. In view of the aforesaid discussion and the discussion in paragraph 15 and 16 hereinabove, it would have to be held that the Government Resolution on promotion dated 25 May 2004 is contrary to Article 16(4A) of the Constitution and contrary to the law laid down in **Nagaraj** and is bad in law and is accordingly struck down.

35. Section 4 of the Reservation Act essentially deals with reservation in direct recruitment whereas section 5 speaks about reservation in promotions. Unlike section 4, in section 5 of the Reservation Act there is no

fixed percentage of reservation set out. Section 5 is only an enabling provision and the State can issue Government Resolutions from time to time and provide for such percentage of reservation as may be necessary to ensure that the persons belonging to Scheduled Caste and Scheduled Tribe are adequately represented. In other words, under section 5 there can be fluctuating reservations vide Govt Resolutions. Hence, if the Government Resolution on promotion is issued without quantifiable data and without verifying whether SC/ST are adequately represented, then the Government Resolution on promotion would be bad and not section 5. Thus, if the Govt. Resolution on promotion is held bad, it would not impact upon the Reservation Act. Hence, no fault can be found with section 5 of the Reservation Act. It was sought to be contended that the Reservation Act is implemented vide the GR on promotion. I am unable to accept this contention as the Reservation Act came into force on 29 January 2004 whereas the GR on promotion was issued on 25 May 2004. Assuming that be so, it is clarified that the GR on promotion is not disturbed to that extent and it would be bad only to the extent indicated, and the operative part of this judgment be read accordingly. The judgment in **Commissioner of Commercial Taxes v. G. Sethumadhava Rao**, (1996) 7 SCC 512 on which reliance is placed on behalf of the State Govt., is pre-**Nagaraj** and even otherwise of no avail.

36. It needs to be emphasized that apart from 'adequate representation', the State Govt in terms of **Nagaraj** is in the first instance required to undertake the exercise to determine 'backwardness' of the SC/ST communities before granting promotions. It is reiterated that such exercise with regard to 'backwardness', is imperative in matters of promotion as well as direct recruitment. As discussed hereinbelow, the State Govt. has not undertaken the exercise of collection of quantifiable data of 'backwardness' of SC/ST and the GR on promotion would also bad on that count. In the circumstances, until such exercise of adequacy of representation and backwardness of SC/ST in terms of **Nagaraj** is undertaken by the State Government and an opinion is formed by the State Govt based on such data keeping in mind the administrative efficiency, that reservation in promotion is necessary, the SC/ST employees and open/DT/NT/SBC/OBC category of employees will have to be treated at par by the State Govt.

Quantifiable data with regard to 'backwardness' AND Census

37. In **Nagaraj**, the Supreme Court while dealing with Article 16(4) has held in paragraph 119 that the concept of reservation in Article 16(4) is hedged with three constitutional requirements, namely, backwardness of a class, inadequacy of representation in public employment of that class and overall efficiency of the administration. Thus, it is indisputable that apart from reservation in matters of promotion, even for the purposes of granting

reservation in direct recruitment, 'backwardness' is a constitutional requirement. The expression 'backward class of citizens' appearing in Article 16(4) [as well as in Article 15(4)] is not defined or explained in the Constitution.

38. In **Indra Sawhney**, whilst considering the nature, magnitude and scope of Article 16(1) and 16(4) and expression 'backward class of citizen' in Article 16(4), His Lordship Justice B.P. Jeevan Reddy (for self and for their Lordships M.H. Kania CJ, M.N. Venkatachaliah and A.M. Ahmadi JJ) made the following observations in paragraphs 746, 780, 782, 796-798:

**“746.** What does the expression “backward class of citizens” in Article 16(4) signify and how should they be identified? This has been the single most difficult question tormenting this nation. The expression is not defined in the Constitution. What does it mean then? The arguments before us mainly revolved round this question. Several shades of opinion have been presented to us ranging from one extreme to the other...

**780.** Now, we may turn to the identification of “backward class of citizens”. How do you go about it? Where do you begin? Is the method to vary from State to State, region to region and from rural to urban? What do you do in the case of religions where caste-system is not prevailing? What about other classes, groups and communities which do not wear the label of caste? Are the people living adjacent to cease-fire line (in Jammu and Kashmir) or hilly or inaccessible regions to be surveyed and identified as backward classes for the purpose of Article 16(4)? And so on and so forth are the many questions asked of us. We shall answer them. But our answers will necessarily deal with generalities of the situation and not with problems or issues of a peripheral nature which are peculiar to a particular State, district or region. Each and every situation cannot be visualised and answered. That must be left to the appropriate authorities appointed to identify. We can lay down only general guidelines.

**782.** Coming back to the question of identification, the fact remains that one has to begin somewhere — with some group, class or



section. There is no set or recognised method. There is no law or other statutory instrument prescribing the methodology. The ultimate idea is to survey the entire populace. If so, one can well begin with castes, which represent explicit identifiable social classes/groupings, more particularly when Article 16(4) seeks to ameliorate social backwardness...

**796.-797.** We may now summarise our discussion under Question No. 3. (a) A caste can be and quite often is a social class in India. If it is backward socially, it would be a backward class for the purposes of Article 16(4). Among non-Hindus, there are several occupational groups, sects and denominations, which for historical reasons are socially backward. They too represent backward social collectivities for the purposes of Article 16(4). (b) Neither the constitution nor the law prescribe the procedure or method of identification of backward classes. Nor is it possible or advisable for the court to lay down any such procedure or method. It must be left to the authority appointed to identify. It can adopt such method/procedure as it thinks convenient and so long as its survey covers the entire populace, no objection can be taken to it. Identification of the backward classes can certainly be done with reference to castes among, and along with, other groups, classes and sections of people. One can start the process with the castes, wherever they are found, apply the criteria (evolved for determining backwardness) and find out whether it satisfies the criteria. If it does — what emerges is a “backward class of citizens” within the meaning of and for the purposes of Article 16(4). Similar process can be adopted in the case of other occupational groups, communities and classes, so as to cover the entire populace. The central idea and overall objective should be to consider all available groups, sections and classes in society. Since caste represents an existing, identifiable social group/class encompassing an overwhelming majority of the country’s population, one can well begin with it and then go to other groups, sections and classes. (c) It is not necessary for a class to be designated as a backward class that it is situated similarly to the Scheduled Castes/Scheduled Tribes. (d) ‘Creamy layer’ can be, and must be, excluded. (e) It is not correct to say that the backward class contemplated by Article 16(4) is limited to the socially and educationally backward classes referred to in Article 15(4) and Article 340. It is much wider. The test or requirement of social and educational backwardness cannot be applied to Scheduled Castes and Scheduled Tribes, who indubitably fall within the expression “backward class of citizens”. The accent in Article 16(4) appears to be on social backwardness. Of course, social, educational and economic backwardness are closely intertwined in the Indian context. The classes contemplated by Article 16(4) may be wider

than those contemplated by Article 15(4).

*(f) Adequacy of Representation in the Services under the State*

**798.** Not only should a class be a backward class for meriting reservations, it should also be inadequately represented in the services under the State. The language of clause (4) makes it clear that the question whether a backward class of citizens is not adequately represented in the services under the State is a matter within the subjective satisfaction of the State. This is evident from the fact that the said requirement is preceded by the words “in the opinion of the State”. This opinion can be formed by the State on its own, i.e., on the basis of the material it has in its possession already or it may gather such material through a Commission/Committee, person or authority. All that is required is, there must be some material upon which the opinion is formed. Indeed, in this matter the court should show due deference to the opinion of the State, which in the present context means the executive. The executive is supposed to know the existing conditions in the society, drawn as it is from among the representatives of the people in Parliament/Legislature. It does not, however, mean that the opinion formed is beyond judicial scrutiny altogether. The scope and reach of judicial scrutiny in matters within subjective satisfaction of the executive are well and extensively stated in *Barium Chemicals v. Company Law Board* which need not be repeated here. Suffice it to mention that the said principles apply equally in the case of a constitutional provision like Article 16(4) which expressly places the particular fact (inadequate representation) within the subjective judgment of the State/executive.”

39. In **Ashoka Kumar Thakur vs Union of India** (2008) 6 SCC 1 in paragraph 666 His Lordship Justice Raveendran observed thus:

“**666.** Caste has divided this country for ages. It has hampered its growth. To have a casteless society will be realisation of a noble dream. To start with, the effect of reservation may appear to perpetuate caste. The immediate effect of caste-based reservation has been rather unfortunate. In the pre-reservation era people wanted to get rid of the backward tag—either social or economical. But post reservation, there is a tendency even among those who are considered as “forward”, to seek the “backward” tag, in the hope of enjoying the benefits of reservations. When more and more people aspire for “backwardness” instead of “forwardness” the country itself stagnates. Be that as it may...”

40. Thus, a person from backward caste viz. SC/ST/DT/NT/SBC/OBC does not mean that the said person would as a matter of course be entitled to the benefits under Article 16(4) and 16(4A) of the Constitution unless that person is socially, educationally and economically backward also. Caste is but a starting factor in determining backwardness amongst the backward caste communities. By way of illustration let us take a case where a person from the backward class viz.- SC/ST/DT/NT/SBC/OBC has advanced socially by coming in the mainstream of Society and he has number of people under his employment, can he said to be from backward class though he may still belong to backward caste? The answer is an emphatic 'no'. A backward 'caste' person does not per se mean a person from backward 'class' as he may not be or remain backward. Backward class really speaking is a class amongst the backward caste who may be granted benefits under Article 16(4) and 16(4A) of the Constitution (amongst other benefits). In other words backward class is a species of backward caste. To determine the backward class amongst the backward caste, an exercise is required to be undertaken by the State Government by collecting data of such backward class amongst the backward caste who can be said to be backward. Until such exercise is carried out, the State Government cannot grant benefits under Article 16(4) and 16(4A) to a person merely because that person happens to be from the backward caste community viz. ST/SC/DT/NT/SBC/OBC.

41. Let us now see what was the material produced before the Tribunal in the context of backwardness. The following Synopsis of Reports was produced before the Tribunal:

#### SYNOPSIS OF REPORTS

Sr. No.	Name of Committee	Years	Recommendation
1.	Kaka Kalekar Commission	1955	1 <sup>st</sup> Backward Class Commencement of India
2.	Shri. B.D. Deshmukh	20.11.1961	The Govt. of Maharashtra vide GR dated 26.11.1961 appointed the Committee as they found inadequate representation of Backward classes in employment, the Government observed that the Supreme Court has observed that the power of reservation conferred on State u/a 16(4) can be exercised by the State in a proper case not only by providing for reservation in appointments but also by providing reservation in selection posts. The Committee recommended Sub classification of Backward Classes into SC, ST, VJ & NT and OBC on the ground that there is backwardness that has arisen out of historic and geographical isolation of groups from the mainstream civilization and as a result these groups appear as anachronisms on the social fabric. These are the ST while Nomadic Tribes and Denotified Tribes may also be placed in a similar category even though their isolation has perhaps arisen from slightly different but parallel causes, having isolated themselves or been isolated from the mainstream because of nomadic characteristics that are peculiarly theirs. (Pg. 42, 43 of the report) Recommended Reservation SC/ST/VJNT/OBC after detailed survey.
3.	Thade	18.10.1960	For Unification of List of VJ & NT. The

## Committee

Study group on social welfare appointed by the government of Bombay for formulation of an approach to the Third Five Year Plan had recommended that a common and single list of Vimukta Jatis and Nomadic and Semi Nomadic Tribes should be prepared and that a common program for their welfare should be implemented under the Third Five Year Plan. The Study Group, therefore, recommended action for drawing up a common list of VJ-NT and SNT should be taken up during the second plan itself. Having accepted the recommendations, the Government appointed the said Thade Committee. The Committee submitted a detailed report after survey and recommended the unified list.

- |    |                          |                       |  |
|----|--------------------------|-----------------------|--|
| 4  | Lad & Page               | 1977-78               | Study the problems of Mehtar Bhangi Community.   |
| 5. | Mandal Commission        | 1978                  | To study the O.B.C. Community.   |
| 6. | Wadhwa Commission        | 1992                  | To study the Banjara & Vanjari are same community or different. On the basis of the report it was decided that the Vanjari Community should be treated as a separate entry in the list of VJ/NT communities and accordingly the Vanjari Community came to be included in the list of NT-E.                                 |
| 7. | Prof. Mutatkar Committee | Prior to 1993         | To study 147 representation of various community.  |
| 8. | Khatri Commission        | 15.3.1993 & 19.5.1995 | On the basis of Supreme Court matter in Indra Sawhney Vs. Central Govt. Matter on Supreme Court directed to constitute Backward Class Commission initially vide G.R. 15.3.1993 Standing Committee was appointed and later on converted into State Backward Class Commission under the Chairmanship of Hon. Justice Khatri. |

9. State Backward Class Commission under Chairmanship of Khatri 1<sup>st</sup> Report 4.4.1995 submitted report on 6.6.1996 After considering the Indra Sawhney judgment, the Commission prepared realistic criteria for considering backwardness. The Commission gave 3 marks for social criteria, 2 marks for educational criterion and 1 mark for economical criterion. Group / Cadre which achieved 8 or more marks out of 16 are generally considered as backward class. Necessary training was provided for the survey team. In the matters where accumulated material was found to be very less in that case recommendations were kept reserved. Detailed inquiry of such matters was carried out and separate reports were sent. Dealt with 147 representations of various communities. Near about 59 + Communities proposal were studied & recommended 95 representations were considered by committee out of 147 representation. And recommendations were made regarding inclusion and rejections.
10. State Denotified Tribes and Nomadic Tribes Study and Research Committee OR Edate Committee report 2 volumes submitted in January 1999. The Committee was formed on 11.3.1997. The committee toured entire state. The Committee consulted and deliberated with the State Backward Class Commission. The Committee also took help of Centre of Social Sciences for Socio-economic survey of these communities. The report gave statistical Socio-economic data of VJNT communities and made several recommendation.
11. State Backward Class Commission under Chairmanship of Khatri 2<sup>nd</sup> Report 13.1.1997 submitted 27 representation out of remaining 52 representation & 17 representation directly submitted were considered & near about 31+ communities proposal were considered.
12. State Backward 3<sup>rd</sup> Report 25 representation out of remaining 52

- |     |  |   |  |
|-----|--|---|--|
|     | Class Commission under Chairmanship of Khatri                | 18.9.1997                                   | representation were considered last report representation & near about 47+ communities proposal were considered.   |
| 13. | State Backward Class Commission under Chairmanship of Khatri | 4 <sup>th</sup> Report<br>22.6.1998         | Near about 47+ communities proposal were considered.   |
| 14. | State Backward Class Commission under Chairmanship of Khatri | 5 <sup>th</sup> Report<br>13.1.1999         | Near about 13+ communities proposal were considered.   |
| 15. | State Backward Class Commission under Chairmanship of Khatri | 6 <sup>th</sup> Report<br>in about<br>2000  | 221+ communities proposal were considered upto 5 <sup>th</sup> report. In this report 29 cases were considered by the committee and near about 29 communities proposal were considered.  |
| 16. | State Backward Class Commission under Chairmanship of Khatri | 7 <sup>th</sup> Report<br>in about<br>2000  | 221+ communities proposal were considered upto 5 <sup>th</sup> report. In this report 29 cases were considered by the committee and near about 29+ communities proposal were considered. |
| 17. | State Backward Class Commission                              | 8 <sup>th</sup> Report<br>in about<br>2001  | 29 cases were considered by the committee and near about 29+ communities proposal were considered.   |
| 18. | State Backward Class Commission                              | 9 <sup>th</sup> Report<br>in about<br>2002  | 7 cases were considered by the committee and near about 7+ communities proposal were considered.   |
| 19. | State Backward Class Commission                              | 10 <sup>th</sup> Report<br>in about<br>2001 | 19 cases were considered by the committee and near about 19+ communities proposal were considered.   |
| 20. | State Backward Class Commission                              | 11 <sup>th</sup> Report<br>in about<br>2003 | 13 cases were considered by the committee and near about 13+ communities proposal were considered.   |

21. State Backward Class Commission under Chairmanship of Khatri 12<sup>th</sup> Report in 2004 13 cases were considered by the committee and near about 13+ communities proposal were considered.
22. State Backward Class Commission under Chairmanship of Khatri 13<sup>th</sup> Report in 2005 13 cases were considered by the committee and near about 13+ communities proposal were considered.
23. State Backward Class Commission under Chairmanship of Bapat 14<sup>th</sup> Report in February 2005 9 cases were considered by the committee and near about 9+ communities proposal were considered.
24. State Backward Class Commission under Chairmanship of Bapat 15<sup>th</sup> Report in March 2005 10 cases were considered by the committee and near about 10+ communities proposal were considered.
25. State Backward Class Commission under Chairmanship of Bapat 16<sup>th</sup> Report in August 2005 13 cases were considered by the committee and near about 13+ communities proposal were considered.
26. State Backward Class Commission under Chairmanship of Khatri 17<sup>th</sup> Report in February 2006 12 cases were considered by the committee and near about 12+ communities proposal were considered.
27. State Backward Class Commission under Chairmanship of Bapat 18<sup>th</sup> Report in July 2006 9 cases were considered by the committee and near about 9+ communities proposal were considered.



28. State Backward Class Commission under Chairmanship of Bapat 19<sup>th</sup> Report in January 2007 12 cases were considered by the committee and near about 12+ communities proposal were considered.
29. State Backward Class Commission under Chairmanship of Bapat 20<sup>th</sup> Report in July 2007 10 cases were considered by the committee and near about 10+ communities proposal were considered.
30. State Backward Class Commission under Chairmanship of Bapat 21<sup>th</sup> Report August 2007 14 cases were considered by the committee and near about 14+ communities proposal were considered.
31. State Backward Class Commission under Chairmanship of Bapat 22<sup>nd</sup> Report in July 2008 1 cases were considered by the committee and near about 1 community's proposal were considered.
32. State Backward Class Commission under Chairmanship of Bapat. 23<sup>rd</sup> Report in August 2008 9 cases were considered by the committee and near about 9+ communities proposal were considered.

42. A note was submitted before the Tribunal on behalf of the State Government. It reads thus:

NOTE ON BEHALF OF STATE OF MAHARASHTRA

Sr. No.	Reports	Page
1.	B.D.Deshmukh Report-1964	

2. Terms of reference	3
3. Local bodies, Statutory bodies and other bodies were covered	13, 14
4. Result of Govt Decision and statistical data	21
5. Very low percent of VJNT in recruitment	38
6. Sub Classification and population basis of percentage	38, 113, 114, 125
7. Reservation in promotion cannot be rejected	44
8. Basis of backwardness	45
9. Recommendations (nos.4, 5, 7)	50
10. Data	129
11. Critics of reservation (para 157)	130
12. Genesis and origin	226
13. VJNT- needs special consideration	252
 14. <b><u>THADE COMMITTEE REPORT-1961</u></b>	
15. Introduction	2
16. History of Criminal Tribes	6
17. Criteria off Nomadic Tribes	8
 18. <b><u>EDATE COMMITTEE REPORT-1999</u></b>	
19. Recommendations	5
20. Population of VJNT as per 1931 Census. Percentage of Population (VJA-3.7%, NTB-2.64%, NTC-6.61%, NTD-2.31) Percentage of Reservation (VJA-3%, NTB-2.5, NTC-3.5, NTD-2)	30, 31
21. Survey	41
22. Inadequacy of representation	45, 46

## 23. Volume II Kept separately

## 24. STATE BACKWARD CLASS COMMISSION REPORTS

25. On the basis of Supreme Court decision in Indra Sawhney Vs. Union of India, Supreme Court directed to constitute Backward Class Commissioner. Initially vide G.R. 15.3.1993 standing Committee was appointed and later on converted into State Backward Class Commission under the Chairmanship of Hon. Justice Khatri. Bottom 2, 3
26. Process adopted for preparing the report (para 5 6, 7, 8, 9, 10) 4, 5, 6, 7, 8
27. Criterions prepared by Mandal Commission discussed (para 11)8
28. After considering the Indra Sawhney judgment the Commission prepared realistic criterions for considering backwardness. The Commission gave 3 marks of social criterions, 2 marks for educational criterion and 1 mark for economical criterion. Group / Cadre which achieved 8 or more marks out of 16 are generally considered as backward class. (para 12, 13). 9, 10, 11, 12
- Necessary training was provided for the survey team. In the matters were accumulated material was found to be very less in that case recommendations were kept reserved. Detailed inquiry of such matters was carried out and separate reports were sent. (para 14). Detailed record of data, survey material and computer data kept separately. (para 15)
- Dealt with 147 representation of various communities. Near about 59+ Communities proposal were studied & recommended 95 representations were considered by committee out of 147 representation. And recommendations were made regarding inclusion and rejections (para 16).
29. Matters considered 13-118
30. Maharashtra Other Backward Classes Commission – What & Why 119-147
31. **Volumes 2-23 of State Backward Classes Commission and other volumes kept separately**

**32. Census Reports kept separately****33. SBC file kept separately**

43. It is thus seen that the State has relied on the following Reports in order to show that they have sufficient data to support reservation:

- (i) B. D. Deshmukh Report – 1964
- (ii) Thade Committee Report – 1961
- (iii) Edate Committee Report – 1999
- (iv) State Backward Class Commission Reports
- (v) Census Reports
- (vi) SBC file

44. In the Affidavit in Reply dated 30 March 2005 of Mr. R.G. Pawar on behalf of the State Govt it is stated that after the judgment in **Indra Sawhney** the State Government appointed a Standing Committee on 15 March 1993 under the Chairmanship of Dr Mutatkar which was later converted into the State Backward Class Commission on 19 May 2005 under the Chairmanship of Justice S.N. Khatri, a former judge of this Court. The Commission considered the various claims for inclusion amongst the OBC/DT/NT and made recommendations to the Government under its reports proposing inclusion of some groups in OBC and DT/NT categories and rejected some groups. It is stated in the Affidavit that the Committee considered and formulated the following tests to determine backwardness of a Class:

**“Social Backwardness:**

1. That a class in which the percentage of male working as labour in

agricultural field, household work in factories or any other fields of labour for a period of more than 183 days per year is more than 5% as compared to the State average (State average 39%)

2. That a class in which ladies indulged in manual labour with an average of more than 5% as compared to the State average (State average 33.11%)

3. That a class in which more than 50% ladies get married before they attain the age of 16 years.

Educational:

4. That a class in which the average percentage of literacy is less than 5% as compared to the State average (except state average for Mumbai should not be taken in to account) (State average except Mumbai is 65%) (for Mumbai is 82%).

5. That a class in which the percentage of literacy amongst ladies is more than 5% than State average (State average 50%)

Economic:

6. That a class which resides in Kaccha construction house more than 10% as compared to the State average.

7. That a class in which average monthly family income is less than Rs.5,000/- in urban area and less than Rs. 1500/- in rural area.

8. That a class in which more than 40% families are landless.”

It is further stated in the said Affidavit that the Committee awarded three points for social backwardness, two points for educationally backwardness and one mark for economically backwardness. That class which received eight or more points was to be treated as backward. The Committee left the issue of adequacy representation of particular class open for consideration by the Government. The Committee observed that it was open for the Government to reject its recommendations if the Government is satisfied with a particular class though recommended to be backward class is adequately represented in the State Government.

45. After examining the aforementioned Reports, the Tribunal observed in paragraph 29 as under:

“29. Learned Chief Presenting Officer had made available all the documents cited in Para 27 above. We have scanned through these documents and our observations are as below:-

1) Shri B.D Deshmukh Committee Report : 1961

The Committee was appointed by G.R dated 24.11.1961 to examine the measures taken by the State to ensure satisfactory recruitment of the Backward Classes to the public service of the State.

The Committee recommended that there should be code or manual governing the reservation of posts for Backward Classes providing inter alia policies and principles of Government and prescribing percentages for the different categories of the Backward Classes. The Committee has collected data of S.C/S.T in Government service. The Committee in para 271 recommended that De-notified, Nomadic and Semi Nomadic Tribes should be classified under a separate category and percentage of reservation fixed in proportion to their population.

2) Thade Committee :

The Committee was mainly asked to formulate an approach to the Third Five Year Plan. The Committee recommended a unified list of VJ-NT and Semi Nomadic Tribes. It noted that there was no data about representation of these Communities in Government and made no specific recommendation regarding reservation in Government service for these Communities.

3) Wadhwa Committee : 1992

Committee held that Banjara & Vanjari are two distinct Communities. Committee did not recommend reservation for Vanjari community. It observed that Vanjaris were never notified as Vimukta Jati in the State or part of a State (Para 7.9).

4) B.R Idate Committee:

Committee recommended inter alia about communities to be included in the list of DT/NT. No figures of representation of these communities in Government service are mentioned in the report.

5) State Backward Class Commission : (Khatri Commission/Bapat Commission). This Commission submitted first Report in 1995. This Commission did not consider reservation for S.C/S.T, but mainly representations of various communities for inclusion in VJ/NT/OBC list. These Commissions have submitted a total of 23 reports so far up to August, 2008. However, in none of the reports there are any figures about representations of the communities considered for inclusion in the list of VJ-NT-OBC in Government service. In short, there is total absence of any quantifiable data in these reports.

In conclusion, except the B.D Deshmukh Committee report, there is hardly any quantifiable data about representation in Government service of various backward communities.”

The Tribunal further adverted to the Census Reports and observed:

As per Census of 1991 and 2001, the total figures of SC/ST population are as follows.

1991 :Total Population	: 789.39 lakh
S.C	: 87.58 lakh (11.1%)
S.T	: 73.18 lakh (9.27%)
2001 :Total Population	: 968.79 lakh
S.C	: 98.82 lakh (10.21%)
S.T	: 84.77 lakh (8.74%)

From these figures, it can be seen that S.C are given more reservation (13%), while S.T are given less reservation (7%) if the percentage of their population to the total population is considered. There is no explanation for this apparent anomaly. As regards population of DT/NT, Thade Committee in 1961 has estimated their population to be 15,32,000. It is mentioned in Edate Committee report that no Caste Census (except for S.C/S.T) was conducted since 1931. In 1931, population of DT/NT was 3.72 lakh. In 1999, the Committee probably relying on 1991 census figures gives the following figures:

Total Population of the State	: 768.37 lakh
VJ	: 21.07 lakh 2.7%
NT	: 44.66 Lakh <u>5.6%</u>
	<u>8.3%</u>

It may be added that these figures are based on extrapolation and are not actual figures. From these figures, it can be seen that reservation for SC/ST taken together is more or less in proportion to their population. However, figures for DT/NT are only guesstimates. For measuring backwardness of communities identified as SC/ST, however, no report later than Deshmukh Committee report is available. That report was submitted in 1961. Other Committees/Commissions have given reports about communities which were not included earlier in DT/NT or OBC lists and which wanted such inclusion. There has been no comprehensive survey covering all backward classes about backwardness of these Communities after B.D Deshmukh Committee submitted its report more than 50 years back."

The Tribunal concluded:

“ ... From the numerous observations of Hon’ble Supreme Court in NAGRAJ’s case, it is clear that that State must base its opinion on the basis of quantifiable data about backwardness, inadequacy of representation and impact on overall administrative efficiency.

It is difficult to conclude that the State has quantifiable data about backward classes in Maharashtra which is contemporary. In fact, whatever data is available, without commenting on the adequacy or qualitative aspects, it is more than 50 years old. It seems that the State has tried to provide reservation for S.C/S.T and DT/NT categories in proportion to their population. However, prima facie, for SC/ST, though total reservation of 20% is equal to their representation in total population, however, there appears to be no credible data of population of DT/NT, i.e. VJ(A), NT(B), NT(C), NT(D) category and therefore, it cannot be said whether reservation provided to them is in their proportion in the total population or not.“

(emphasis supplied)

46. Reference is also required to be made to the observations of the Tribunal in paragraph 23 of the impugned judgment and order. It reads thus:

“23. In the affidavit in reply filed by the State Government on 30.3.2005 in T.A. no 1/2014, after paragraph 15, there is a heading “Why VJ & NT be provided with reservation in promotion”. Paras 16 and 17 are reproduced below:

“(16) A similar matter was pending before the Maharashtra Administrative Tribunal (O.A. 77/91 in Writ Petition No. 855/90 Shri. Ganpat Shankarrao Dhangat Vs. State of Maharashtra & Ors.). Under its order dated 9<sup>th</sup> June 1992, the tribunal directed that the State Government should appoint a committee to go into the whole question whether the names Banjara and Vanjari are synonyms for the same community. Accordingly, Government set up a five member expert Banjara-Vanjari Committee under the chairmanship of Dr. D.G. Wadhwa, Director, Gokhale Institute of Politics and Economics on 31<sup>st</sup> July, 1992. The Committee submitted its report dated 9<sup>th</sup> August, 1993 stating that as per the prevailing position, Banjara and Vanjari were not synonyms for the same community.



(17) The recommendations of the Committee were placed before the Cabinet for consideration under note dated 22<sup>nd</sup> March, 1994. In the meeting of the Cabinet held on 23<sup>rd</sup> March, 1994, the recommendation of the Committee that Banjara and Vanjari were not synonyms for the same group was accepted. At the same time, it was decided that the Vanjari should be treated as a separate entry in the list of VJ/NT communities. Accordingly, the Vanjari community came to be included in the list of VJ/NT.

It may be seen that the State Government has arrogated powers to itself to include any community in the list of VJ/NT regardless of recommendation of Expert Committee. No reasons for not accepting the Wadhwa Committee's report are mentioned. There is no mention of population of Vanjari community and their representation in Government Service. However this community is included in VJ(NT) ....”

47. The factual findings of the Tribunal, in my view, are based on proper appreciation of the Reports and material submitted before it. There is nothing pointed out on behalf of the State Govt and other Petitioners how the said factual findings of the Tribunal can be said to be perverse.

48. In **Ram Singh**, in paragraph 49, it has been held by the Supreme Court:

“49. ... A decision as grave and important as involved in the present case which impacts the rights of many under Article 14 and 16 of the Constitution must be taken on the basis of contemporaneous inputs and not outdated and antiquated data.”

It is further observed in para 52:

“52 ... The necessary data on which the exercise has to be made, as already observed by us, has to be contemporaneous. Outdated statistics cannot provide accurate parameters for measuring backwardness for the purpose of inclusion in the Lists of the other backward classes. This is because one may legitimately presume progressive advancement of all citizens on every front i.e. social,

economic and educational. Any other view would amount to retrograde governance”.

49. The first proviso to Section 4(2) of the Reservation Act states that reservations at the stage of direct recruitments are to be made only on the basis of “latest census record of population”. It is an admitted position that after 1931 no census has been undertaken to determine the population of Denotified Tribes (A) (DNT), Nomadic Tribes (B) (NT-B), Nomadic Tribes (C) (NT-C), Nomadic Tribes (D) (NT-D), Special Backward Category (SBC) and Other Backward Classes (OBC) in the State of Maharashtra.

50. In 1931 the State of Maharashtra, as it is today, did not exist. The 1931 Census, therefore, included the population residing in areas which have no relevance for an enactment in the present State of Maharashtra. It is pointed out that in 1931 the Bombay Presidency, included population of areas in the present State of Karnataka, (Belgam, Bijapur, Dharwar, Kanara, etc., areas which are presently in Pakistan (Sind, Hyderabad, Karachi, Larkana, Sukkur, Upper Sind Frontier, etc.) present State of Gujarat, Raj. Pipla, Bala-Sinor, State of Madhya Pradesh, Khandesh, etc. It is further pointed out that the State of Maharashtra came to be constituted in the year 1960 by including parts of Bombay Presidency, Central Province and Berar and the State of Hyderabad, which existed during the British time. It is an admitted position that after constitution of the State of Maharashtra, the Census Enquiry of 1961 was restricted to enumeration of

Schedule Castes and Schedule Tribes only. There was no enumeration of any other castes. Hence, the said census will have no relevancy to the population of non-SC and non-ST. Population of a particular caste/community/group is relevant for which the reservation is contemplated. In absence of contemporaneous quantifiable data of DT/NT/SBC/OBC in the State of Maharashtra as on date of enactment of the Reservation Act or for a reasonable period prior thereto the reservation made under Section 4 of the Reservation Act for reserving posts in services under the State for candidates belonging to DT/NT/SBC/OBC is prima facie an arbitrary exercise and the fixation of percentage is not based on any contemporaneous quantifiable data in that behalf and the Census figures of aforementioned years can hardly be the basis for granting reservations to the said communities.

51. The Khatri Commission Report discloses that the Committee proceeded on the basis of sample survey. The B. D. Deshmukh Committee Report is of the year 1964. The Tribunal in the impugned judgment has rightly observed that though the Report does contain some data in respect of OBC and VJNT the Report is more than 50 years old and cannot be a basis for an enactment in exercise of enabling power under Article 16(4) in the year 2004. The argument of the State also proceeds on the premise that the census of 1931 is the basis and considering "*the normal rate of increase of general population*" it has derived the percentage of posts to be

reserved. This is contrary to the test laid down in **Nagaraj** and reiterated in **UP Power Corporation** and **Ram Singh**.

52. Most of the data is with regard to the inclusion or exclusion of certain communities from category of backward classes. The creamy layer was not excluded for non-SC and non-ST candidates. No fresh exercise was undertaken after **Nagaraj**. The Tribunal rightly held that - the figures provided by the State Government are based on extrapolation and not actual figures; the figures for DT/NT are only guesstimates; no comprehensive survey covering all backward classes was undertaken after the B.D. Deshmukh Committee report made more than 50 years ago; the census figures which were considered were for the year 1931.

53. It needs to be mentioned that in the backdrop of the judgment of **Nagaraj** and subsequent judgments of the Supreme Court, the Central Government decided to further amend the Constitution. The Constitution (One Hundred and Seventeenth Amendment) Bill, 2012 was introduced in Rajya Sabha on 5.09.2012, which was passed by Rajya Sabha on 17.12.2012 and transmitted to the Lok Sabha for consideration and passing. The Bill could not be passed in the 15<sup>th</sup> Lok Sabha and lapsed. The text of clause (4A) of Article 16, as passed by Rajya Sabha on 5.09.2012 is as under:

“Notwithstanding anything contained elsewhere in the constitution, the Scheduled Castes and the Scheduled Tribes notified under article 341 and article 342, respectively, shall be deemed to be backward and nothing in this article shall prevent the State from making any provision for reservation in matters of promotions, with consequential seniority; to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes to the extent of the percentage of reservation provided to the Scheduled Castes and the Scheduled Tribes in the services of the State.”

The Statement of Object and Reasons for the Bill reads thus:

#### “STATEMENT OF OBJECTS AND REASONS

The Scheduled Castes and the Scheduled Tribes have been provided reservation in promotions since 1955. This was discontinued following the judgment in the case of Indra Sawhney Vs. Union of India, wherein it was held that it is beyond the mandate of Article 16(4) of the Constitution of India. Subsequently, the Constitution was amended by the Constitution (Seventy-seventh Amendment) Act, 1995 and a new clause (4A) was inserted in article 16 to enable the Government to provide reservation in promotion in favour of the Scheduled Castes and the Scheduled Tribes. Subsequently, clause (4A) of article 16 was modified by the Constitution (Eighty-fifth Amendment) Act, 2001 to provide consequential seniority to the Scheduled Castes and the Scheduled Tribes candidates promoted by giving reservation. The validity of the constitutional amendments was challenged before the Supreme Court. The Supreme Court while deliberating on the issue of validity of Constitutional amendments in the case of M. Nagaraj Vs. UOI & Ors., observed that the concerned State will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation in promotion. Relying on the judgment of the Supreme Court in M. Nagaraj case, the High Court of Rajasthan and the High Court of Allahabad have struck down the provisions for reservation in promotion in the services of the State of Rajasthan and the State of Uttar Pradesh, respectively. Subsequently, the Supreme Court has upheld the decisions of these High Courts striking down provisions for reservation in respective States. **It has been observed that there is difficulty in collection of quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment. Moreover, there is uncertainty on the methodology of this exercise.** Thus, in the wake of the judgment of the Supreme Court in M. Nagaraj case, the prospects of promotion of the employees belonging to the Scheduled Castes and the Scheduled Tribes are being adversely affected. Demands for carrying out further amendment in the Constitution were raised by various quarters. A discussion on the issue of reservation in promotion was held in Parliament on 3-5-2012. Demand for

amendment of the Constitution in order to provide reservation for the Scheduled Castes and the Scheduled Tribes in promotion has been voiced by the Members of Parliament. An All-Party Meeting to discuss the issue was held on 21-08-2012. There was a general consensus to carry out amendment in the Constitution, so as to enable the State to continue the scheme of reservation in promotion for the Scheduled Castes and the Scheduled Tribes as it existed since 1995.

In view of the above, the Government has reviewed the position and has decided to move the constitutional amendment to substitute clause (4A) of article 16, with a view to provide impediment-free reservation in promotion to the Scheduled Castes and the Scheduled Tribes and to bring certainty and clarity in the matter. It is also necessary to give retrospective effect to the proposed clause (4A) of article 16 with effect from the date of coming into force of that clause as originally introduced, that is, from the 17th day of June, 1995.

NEW DELHI; V.NARAYANASAMY

The 4th September, 2012.”

54. From the aforesaid Bill and Statement of Objects and Reasons, it is apparent that after the judgment in **Nagaraj** and subsequent judgments following **Nagaraj**, the Central Government has also recognized that even in case of Scheduled Caste and Scheduled Tribe communities, if the Government desires to grant reservation in promotion, there has to be an exercise undertaken for collection of quantifiable data as regards backwardness.

55. The upshot of the above discussion is that unless the State Government undertakes the exercise of collection of quantifiable data of backwardness in terms of **Nagaraj** there can be no reservation in direct recruitment as well as in matters promotion. It is clarified that backward class under Article 16(4) means the class which has no element of 'creamy lay-

er' in it and the State Govt is also required to identify and exclude the "creamy layer" in backward class before extending the benefit of reservation. I have discussed the issue of exclusion of creamy layer a little later.

Quantitative Limitation (Reservation not to exceed 50%)

56. Ordinarily, reservation contemplated by Article 16(4) and 16(4A) ought not to exceed 50% of the total number of posts to be filled in by appointment or promotion. This Rule was laid down by the Supreme Court in the case of **M. R. Balaji vs. State of Mysore**, AIR 1963 SC 649, by a 5-Judge Constitution Bench of Supreme Court. The 9-Judge Constitution Bench of Supreme Court in **Indra Sawhney** has reiterated the said rule laid down in **M. R. Balaji**. In paragraphs of 809 and 810 of **Indra Sawhney**, the Supreme Court has held thus:

**"809.** From the above discussion, the irresistible conclusion that follows is that the reservations contemplated in clause (4) of Article 16 should not exceed 50%.

**810.** While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in farflung and remote areas the population inhabiting those areas might, on account of their being out of the mainstream of national life and in view of conditions peculiar to and characteristic to them, need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out."

The said rule i.e. quantitative limitation has thus been restated in order to ensure that the rule of Equality enshrined in Article 14 is not diluted and or

obliterated. The said rule also harmonized and balanced the Rule of Equality in Public employment contemplated by Article 16(1) and the concept of Reservation introduced by Articles 16(4) and 16(4A). In **Nagaraj** it was held that the Rule of 50% laid down in **Balaji** is a binding Rule and not a mere Rule of Prudence.

57. Reference may also be made to the judgment of the Division Bench of this Court in **Sanjeet Shukla vs. State of Maharashtra**, 2015 (2) BCR 267 (Maratha caste case). Though the said judgment is at interlocutory stage, the Division Bench has considered the law on the subject and after a conspectus of the Constitutional provisions, Constituent Assembly debates and decisions of the Supreme Court, held thus:

*“33 (i) [Article 16](#) by itself recognises "ceiling limit of 50% reservations" through insertion of clause (4B) in [Article 16](#) of the Constitution (Eighty-first Amendment) Act, 2000, after the decisions of the Supreme Court in *Indra Sawhney* case rendered in the year 1992, and in [R. K. Sabharwal & Ors. vs. State of Punjab & Ors.](#)*

*(ii) As per the law laid down by a Constitution Bench of the Supreme Court in [M. Nagaraj v. Union of India](#), and another Constitution Bench as recently as on 15 July 2014 in [Rohtas Bhankhar vs. Union of India](#), [(2014) 8 SCC 872] the ceiling limit of 50%, the concept of creamy layer and the compelling reasons, namely backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in [Article 16](#) would collapse. Even if the State has compelling reasons for providing reservations (backwardness of the concerned class, inadequacy of representation of such class in public employment and overall administrative efficiency), the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling limit of 50%.”*



58. Section 4 of the Reservation Act indisputably breaches the ceiling limit of 50%. The said ceiling limit is a binding rule and a constitutional requirement and finds a mention in Article 16(4B). The contention that the population percentage of backward class is more than 52% is without any data. The State Govt is required to justify the fixing of percentage of reservation which can happen only if there is quantifiable data before it. Absent data any reservation is unjustified. Any reservation in excess of 50% has to be on the basis of special or extra-ordinary circumstances. Prior to the year 1994 the reservations in Direct recruitment were pegged at 50%. In 1994 the State Government created a separate category of caste called Special Backward Category (SBC) and allotted 2% posts to SBCs and thereby increased the percentage of posts in Direct Recruitment to 52%. This 52% is maintained in the Reservation Act in section 4 (2). Section 4(2) of the Reservation Act violates requirement of quantitative limitation. The Government has not shown any extra ordinary circumstances or reasons for providing reservations in excess of 50% (numerical benchmark). In this regard the observations of the Tribunal in paragraph 28 of the impugned order are relevant and read thus:

“28. ...State Govt has provided 2% reservation both at entry point and in promotion for Special Backward Class (S.B.C). The Respondents No. 1 & 2 have produced a copy of Cabinet Note dated 30.11.1994 which has led to declaration of Gowari, Mana, Koshti, Koli etc as Special Backward category..”

The Tribunal has reproduced the aforesaid Cabinet Note which is in Marathi language in its entirety and observed thus:

"In Para 5 above, it is mentioned that some of the members of these Communities have shown tendency to obtain false certificate showing them as belonging to S.T category. In para 7, it is clearly mentioned that there is no solid support to demand of these communities to be included in S.T. It was suggested in the above note that these communities do not fulfill various conditions required to include them in S.T. In Para 9, it is mentioned that then Chief Minister discussed inter alia, reservation in Government employment with representatives of five communities, viz Gowari, Mana, Halba Koshti, Fisherman Koli, Sonkoli and Munnurwar and agreed to provide reservation for them and made a declaration on 28.4.1994 in the State Assembly. The note suggested that these Communities may be referred to Khatri Commission to decide in which category they should be included. In Para 10, the other alternative was given that a separate Backward category may be created and all facilities available to DT/NT category may be given to those communities and they may be provided ½ or 1% reservation in Government service. Apparently, the Cabinet decided to create a separate 'Special Backward Category' and provided 2% reservation for them. It is absolutely clear that the State had no data whatsoever, which would have justified inclusion of these communities in SBC category, which is part of OBC. There were no figures of their representation in the Government before the Cabinet and only on the basis of discussion of the Chief Minister with leaders of certain communities, the decision was taken to give them 2% reservation. On examination of reservation granted to Special Backward Category, we find that no data about their backwardness or inadequate representation is available even now. In fact, the only factor which has weighed with the Government appears to be that these castes were illegally claiming benefit of S.T categories which was found to be inadmissible. We do not find any material to support the claim of S.B.C to entitle them reservation in public employment. At the most, their claim may be referred to the State Backward Class Commission to examine whether they may be included in O.B.C. The reservation provided to S.B.C. does not fulfill any of the criterion fixed by Hon'ble Supreme Court in NAGRAJ's case (supra) and it has to be quashed."

59. From the above, it is apparent that so far as reservation of 2% SBC are concerned, it breaches the ceiling of 50% and there appears to be no extraordinary situation to justify their inclusion in the list of backward class

category as appearing in section 4(2) of the Reservation Act and the decision of inclusion of the SBC appears to be based on extraneous reasons. The reservation of 2% for SBC is required to be considered afresh by the Maharashtra State Backward Class Commission, if necessary, in terms of the operative part of this judgment.

### Creamy Layer

60. The second proviso to section 4 of the Reservation Act states that the principle of 'creamy layer' shall be applicable to all categories mentioned in section 4 except Scheduled Castes and Scheduled Tribes. The term 'Creamy layer' was first coined by his Lordship Justice Krishna Iyer in **State of Kerala v. N.M. Thomas** , AIR 1976 SC 490. In **Indra Sawhney** in paragraph 792 it has been stated that the observations in the said paragraph regarding social advancement on account of economic advancement will have no relevance in the case of SCs/STs. In **Ashoka Kumar Thakur**, His Lordship Justice K.G. Balakrishnan (as he then was) has observed that in **Indra Sawhney** it was specifically held that the discussion in this regard was confined to SCs/STs and that there can be no concept of creamy layer in SCs/STs and that the observations in **Nagraj** cannot be construed as requiring exclusion of creamy layer in SCs/STs. In view of the above, it is not really open for this Court to consider the contention on behalf of the original Petitioners that the principle of creamy layer is required to be made applicable even to SCs/STs and that section 4

is therefore bad in law even on this count. Having said that, prima facie, I find that some more clarity may be needed on the interpretation of paragraph 792 of **Indra Sawhney** as despite the observation in the said paragraph 792, in **Nagaraj** after considering **Indra Sawhney**, it has been held unanimously by the 5-Judge Constitution Bench that exclusion of creamy layer is a constitutional requirement and in **Ashoka Kumar Thakur** (which is also a 5-Judge Constitution Bench), His Lordship Justice Dalveer Bhandari has differed on this issue with His Lordship Justice K.G. Balkrishnan and observed in paragraph 389 that if the State fails to exclude SC/ST creamy layer, the reservation must fall. It appears that the other Lordships in **Ashoka Kumar Thakur** have reiterated the need to exclude creamy layer, but have not specifically dealt with SC/ST. Be that as it may, so far as non-SC and non-ST backward class of candidates are concerned, in matters of direct recruitment, the 'creamy layer' amongst the backward class are required to be identified and excluded from reservations. This is a constitutional requirement as held in **Nagaraj**. The State Govt has indubitably not carried out the exercise of identifying and excluding the creamy layer from the backward class candidates.

61. In **Indra Sawhney (2) v. Union of India, (2000) 1 SCC 168**, the Supreme Court has considered the issue of creamy layer. Referring to the judgment of the 9-Judge Constitution Bench in **Indra Sawhney**, the 3-Judge Bench observed thus:

**“8.** Caste only cannot be the basis for reservation. Reservation can be for a backward class citizen of a particular caste. Therefore, from that caste, the creamy layer and the non-backward class of citizens are to be excluded. If the caste is to be taken into consideration then for finding out the socially and economically backward class, the creamy layer of the caste is to be eliminated for granting benefit of reservation, because that creamy layer cannot be termed as socially and economically backward. These questions are exhaustively dealt with by a nine-Judge Bench of this Court in *Indra Sawhney v. Union of India* and it has been specially held that “only caste” cannot be the basis for reservation.

**13.** In *Indra Sawhney* on the question of exclusion of the “creamy layer” from the backward classes, there was agreement among eight out of the nine learned Judges of this Court. There were five separate judgments in this behalf which required the “creamy layer” to be identified and excluded.

**14.** The judgment of Jeevan Reddy, J. was rendered for himself and on behalf of three other learned Judges, Kania, C.J. and M.N. Venkatachaliah, A.M. Ahmadi, JJ. (as they then were). The said judgment laid emphasis on the relevance of caste and also stated that upon a member of the backward class reaching an “advanced social level or status”, he would no longer belong to the backward class and would have to be weeded out. Similar views were expressed by Sawant, Thommen, Kuldip Singh, and Sahai, JJ. in their separate judgments

**22.** As appears from the judgments of six out of the eight Judges, viz. Jeevan Reddy (for himself and three others), Sawant and Sahai, JJ. — (i.e. six learned Judges out of nine), — they specifically refer to those in higher services like IAS, IPS and All India Services or near about as persons who have reached a higher level of social advancement and economic status and therefore as a matter of law, such persons are declared not entitled to be treated as backward. They are to be treated as creamy layer “without further inquiry”. Likewise, persons living in sufficient affluence who are able to provide employment to others are to be treated as having reached a higher social status on account of their affluence, and therefore outside the backward class. Those holding higher levels of agricultural landholdings or getting income from property, beyond a limit, have to be excluded from the backward classes. This, in our opinion, is a judicial “*declaration*” made by this Court.

**25.** So far as the directions in *Indra Sawhney* are concerned, they are that the Central and State Governments are obliged to create separate bodies which will identify the creamy layer in the backward classes within a time frame. Point 1 is decided

accordingly.

**29.** In the context of the law laid down in *Indra Sawhney* and in *Ashoka Kumar Thakur* if the legislature of any State does not take steps to remove the defect or to effectively and realistically remove the defect to exclude the “creamy layer” from the backward classes then the benefits of reservations which are invalidly continued in favour of the “creamy layer” cannot be declared retrospectively valid merely by a legislative declaration that such creamy layer is absent as done by Section 3 of the Kerala Act. Nor can it be done by means of the validating provision contained in Section 6 of that Act. The creamy layer principle laid down in *Indra Sawhney* cannot be ignored as done by Section 6 of the said Act. We shall elaborate these aspects later. If under the guise of elimination of the “creamy layer”, the legislature makes a law which is not indeed a true elimination but is seen by the Court to be a mere cloak, then the Court will necessarily strike down such a law as violative of the principle of separation of powers and of Articles 14, 16(1) and Article 16(4).”

In view of the above, it is directed that in the event the State Government carries out the exercise of identifying the backward class, it shall exclude the creamy layer before extending the benefits of reservation.

#### Jurisdiction of Tribunal

62. Writ Petition 8452 of 2004 (which was later transferred to the Tribunal and numbered as TA 1 of 2014) was originally filed in this Court invoking Articles 226 and 227 of the Constitution. When the said Writ Petition 8452 of 2004 was called out for hearing, the Advocate General on behalf of the State of Maharashtra had raised a preliminary objection about the maintainability of the Writ Petition on the ground that it was the Maharashtra Administrative Tribunal which had jurisdiction, relying upon the 7-Judge decision of Supreme Court in **L. Chandra Kumar vs. Union**

**of India and Ors, (1997) 3 SCC 261.** It is noticed that earlier when the matter was called out at the interlocutory stage, a Division Bench of this Court had prima facie opined that the matter would affect the entire service class in the State of Maharashtra and therefore it would not be correct to contend that the dispute should go before the Tribunal. Be that as it may, in view of the objection raised on behalf of the State Government and interalia relying upon the decision of **L. Chandra Kumar**, the Division Bench, transferred the Writ Petition to the Tribunal by passing a detailed judgment on 18 June 2003. The Division Bench held that the Tribunal as a Court of first instance has been conferred such jurisdiction under the provisions of the Administrative Tribunals Act, 1985 enacted in exercise of powers under Article 323-A of the Constitution. In the circumstances, it was not really open for the State Government to now contend before us that the Tribunal has exceeded its jurisdiction as it did not have the powers which this Court alone can exercise under Articles 226 and 227 of the Constitution.

Whether the Reservation Act is required to be held ultra vires the Constitution as declared by the Tribunal?

63. The original Petitioners were essentially aggrieved by the Govt Resolution on promotion and denial of benefits of promotion to them. They were not concerned with Direct Recruitment. Inasmuch as the GR on promotion dated 25 May 2004 has been struck down by this judgment their

grievance stands redressed. In most of the decisions cited before us where the Rules/Notifications etc. were held invalid, were concerning reservation in promotion. Though the original Petitioners are right in contending that the State Government has not carried out the exercise in terms of **Nagaraj**, in my view, in the facts and circumstances of the present cases, it would not be proper to strike down the Reservation Act as a whole particularly at the instance of the original Petitioners who were essentially aggrieved by the policy of promotion under the GR on promotion. The GR on promotion was issued under the enabling provisions of section 5 of the Reservation Act and would not impact upon the Reservation Act if the said GR on promotion is held bad in law. The judgment of Supreme Court in **Nagaraj** came after the Reservation Act was enacted. The State Govt is therefore, in the interest of justice, required to be granted an opportunity to carry out the exercise in terms of **Nagaraj**, if it is desirous of granting and continuing reservation in direct recruitment under the Reservation Act. If the Reservation Act is struck down (at the instance of the original Petitioners who were essentially concerned with the Govt Resolution on promotion) it may have damaging ramifications on the administration of the State Govt. All the appointments of direct recruit employees of the State Govt. under backward class category right from 29 January 2004, which constitute 52%, would be unlawful and they may probably be required to go home. That, in my view, would be too harsh a consequence and may lead to a chaotic situation in the services of the State Government. There is a



difference between a person's employment being taken away and promotion being denied to him. So far promotion is concerned, the fundamental right, if any, is limited to be 'considered' for promotion. It needs to be borne in mind that there is a presumption of constitutionality of an enactment and the Reservation Act as far as possible needs to be saved. Except for the requirements in terms of **Nagaraj**, there is no factual or legal foundation laid down in the pleadings or the Written Submissions on behalf of the original Petitioners so as to set aside the entire Reservation Act. The submissions before us are also essentially confined to the requirements in terms of **Nagaraj**. I have gone through the provisions of the Reservation Act and prima facie do not find any provision offending the Constitution which requires the striking down of the Reservation Act as a whole. In an appropriate and fit case the provisions may be examined afresh and even read down, if necessary, and the conclusions of the Tribunal in the impugned judgment in that regard shall not stand concluded. The finding of the Tribunal, however, to the extent that the State Govt. has not carried out the exercise in terms of **Nagaraj**, cannot be faulted. The Tribunal has failed to consider that the original Petitioners were aggrieved by the policy of promotion of the State Govt and that if the GR on promotion is held invalid, it may not impact upon the Reservation Act. Having said that however, indubitably, the constitutional requirements laid down in **Nagaraj** need to be adhered to by the State Govt., if the State Govt. wants to continue reservation in public

employment. In my view, to balance equities between the backward class and forward class, a middle path needs to be adopted. In view of the judgment of the Supreme Court in **Suresh Chand Gautam**, it is not possible for this Court to issue a mandatory direction to the State Government to collect quantifiable data as regards backwardness, inadequate representation, etc. I am therefore inclined to adopt a course somewhat on the lines of the judgment of the Supreme Court in **S.V. Joshi v. State of Karnataka**, (2012) 7 SCC 41, which judgment is also authored by none other than His Lordship Justice Kapadia (as Chief Justice) who had authored the judgment in the case of **Nagaraj** too. In **S.V. Joshi**, His Lordship Chief Justice Kapadia (as he then was) on behalf of the Bench instead of declaring the enactments bad in law afforded an opportunity to the State Govts therein to carry out the exercise of collecting the data. The judgment and order of the Supreme Court in **S.V. Joshi** reads thus:

*“Writ Petitions (C) Nos. 454, 473 of 1994, 238 of 1995 and 35 of 1996*

**3.** The short question which arises for determination in these writ petitions is: whether the quantum of reservation provided for in Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointments or Posts in the Services under the State) Act, 1993, is valid? The Reservation Act received the Presidential assent on 19-7-1994.

**4.** Subsequent to the filing of the above writ petitions, Articles 15 and 16 of the Constitution have been amended vide the Constitution (Ninety-third Amendment) Act, 2005, and the Constitution (Eighty-first Amendment) Act, 2000, respectively, which Amendment Acts have been the subject-matter of subsequent decisions of this Court in *M. Nagaraj v. Union of India*<sup>1</sup>

and *Ashoka Kumar Thakur v. Union of India*<sup>2</sup> in which, inter alia, it has been laid down that if a State wants to exceed fifty per cent reservation, then it is required to base its decision on the quantifiable data. In the present case, this exercise has not been done.

5. Therefore, keeping in mind the said parameter, we direct the State to place the quantifiable data before the Tamil Nadu State Backward Classes Commission and, on the basis of such quantifiable data amongst other things, the Commission will decide the quantum of reservation. We are informed by the learned Solicitor General that such data in the form of reports, which are subsequently prepared, is already available.

6. Consequently, these writ petitions stand disposed of with a direction to the State Government to revisit and take appropriate decision in the light of what is stated above. It needs to be mentioned that the interim orders passed by this Court from time to time in relation to admissions to educational institutions shall continue to be in force and in operation for a period of one year from today.

7. In the circumstances, we are not expressing any opinion on the validity of the 1993 Act at this stage. The Registry is directed to send the records and proceedings, if any, connected to these writ petitions, back to the State.

*Writ Petition (C) No. 471 of 1994*

8. By this writ petition, the Government Order dated 25-7-1994, passed by the State of Karnataka, is sought to be challenged only to the extent that it provides for reservation in excess of fifty per cent, both in the matter of admission to educational institutions and in the matter of recruitment to service.

9. On 9-9-1994, the present writ petition had come up for directions along with IA No. 4 in Writ Petition (C) No. 438 of 1994. In this case, we are concerned only with Writ Petition (C) No. 471 of 1994. On the said date, this Court passed the order in the following terms:

“The State Government shall be at liberty to make reservations in terms of the law laid down by this Court in *Indra Sawhney case*.”

It was also made clear that the State Government can make reservations up to fifty per cent, inclusive of the Scheduled Castes,

Scheduled Tribes and Other Backward Classes.

**10.** We may state that, subsequent to the filing of this writ petition in 1994, Articles 15 and 16 of the Constitution have been amended vide the Constitution (Ninety-third Amendment) Act, 2005 and the Constitution (Eighty-first Amendment) Act, 2000, respectively. Moreover, subsequent decisions in *M. Nagaraj v. Union of India* and *Ashoka Kumar Thakur v. Union of India*, are also required to be kept in mind by the State Government, if at all, it seeks to pass any other order in near future.

**11.** Subject to the above, this writ petition stands disposed of.

*Writ Petition (C) No. 694 of 1994*

**12.** By this writ petition, challenge is laid to Sections 4, 5 and 7 of the Karnataka Scheduled Castes, Scheduled Tribes and Other Backward Classes (Reservation of Seats in Educational Institutions and of Appointments or Posts in the Services under the State) Act, 1994. By an interim order dated 11-11-1994, this Court has stayed the operation of Sections 4, 5 and 7 of the 1994 Act, which is in operation till date. It is not in dispute that, after the filing of this writ petition and during its pendency, Articles 15 and 16 of the Constitution have been amended vide the Constitution (Ninety-third Amendment) Act, 2005 and the Constitution (Eighty-first Amendment) Act, 2000, respectively.

**13.** Further, after the filing of the writ petition, various pronouncements have been made by the judgments of the Constitution Benches of this Court in *M. Nagaraj v. Union of India* and *Ashoka Kumar Thakur v. Union of India*. Under the said decisions, which have been rendered in the light of the Constitution (Eighty-first Amendment) Act, 2000 and the Constitution (Ninety-third Amendment) Act, 2005, reservation exceeding fifty per cent could be made only on the basis of quantifiable data before the Government. It appears that till today, this exercise has not been undertaken and the State Government has not collected the quantifiable data. It has not presented such data before the Court.

**14.** In the circumstances, we hereby direct the State of Karnataka to revisit Sections 4, 5 and 7 of the 1994 Act in the light of the judgments of this Court, referred to above. We give one year's time to the State Government to take appropriate decision, if so advised. The interim order dated 11-11-1994 will continue to

operate for a period of one year from today. After one year, liberty is given to the petitioner, if so advised, to move this Court if no steps are taken by the State Government, as directed above.

**15.** Subject to the above, this writ petition stands disposed of.”  
(emphasis supplied)

64. It needs to be appreciated that Article 16(4) as well as Article 16(4A) are enabling provisions as held in **Nagaraj** by Supreme Court. The State Government has to carry out the exercise in terms of **Nagaraj** some day and there cannot be any escape from that if the State Govt wishes to continue such reservation for the backward class in direct recruitment as well as in matters of promotion. It appears that after the Census of 2011 the figures of caste population are now available with the Govt. The reservations granted under the Reservation Act is based on either antiquated data or no data. Surely, there has been social, educational and economical advancement of the backward class citizens in our country in the last 4-5 decades and a fresh exercise in terms of **Nagaraj** is even otherwise imperative, if the State Govt is desirous of continuing reservation in direct recruitment as well as reservation in matters of promotion. If the State Govt. wishes to continue reservations in public employment, the State Govt. shall, if so advised, carry out the exercise of collection of quantifiable data in terms of **Nagaraj** by 31 December 2017. Unless the State Govt carries out the exercise within the stipulated period, the backward class and the forward class shall be treated at par by the State Govt. on and from 01 January 2018. It is clarified that if the State Govt carries out such exercise, it shall adhere to the other constitutional requirements viz. ceiling limit of 50% (unless extraordinary situation exists) and exclusion of the creamy layer for granting benefit of reservation.

Efficiency in administration:

65. Article 335 of the Constitution reads thus:

**“335. Claims of Scheduled Castes and Scheduled Tribes to services and posts** – The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State :

Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State”.

66. In **M.R.Balaji**, the 5-Judge Constitution Bench of the Supreme Court while advertng to the decision in **General Manager, Southern Railway v.**

**Rangachari**, AIR 1962 SC 36 observed in para 37 as follows:

**“37...** Even so, it was pointed out in the judgment that the efficiency of administration is of such a paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration; that, it was stated, was undoubtedly the effect of Article 335. Therefore, what is true in regard to Article 15(4) is equally true in regard to Article 16(4). There can be no doubt that the Constitution-makers assumed, as they were entitled to, that while making adequate reservation under Article 16(4), care would be taken not to provide for unreasonable, excessive or extravagant reservation, for that would, by eliminating general competition in a large field and by creating wide-spread dissatisfaction amongst the employees, materially affect efficiency. Therefore, like the special provision improperly made under Article 15(4), reservation made under Article 16(4) beyond the permissible and legitimate limits would be liable to be challenged as a fraud on the Constitution. In this connection it is necessary to emphasise that Article 15(4) like Article 16(4) is an enabling provision; it does not impose an obligation, but merely leaves it to the discretion of the appropriate Government to take suitable action, if necessary.”

67. In **Ashoka Kumar Thakur**, the 5-Judge Constitution Bench of Supreme Court has reiterated the aforesaid findings in **Rangachari**.

68. In view of the above, in the event the State Government is desirous of continuing reservation, it shall also consider the impact on the overall efficiency of administration and ensure that administrative efficiency is not compromised.

69. For all the aforesaid reasons, the Petitions are partly allowed and the following order is passed:

#### **ORDER**

(i) The impugned judgment and order of the Tribunal is set aside so far it holds that the Maharashtra State Public Services [Reservations for Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and Other Backward Classes] Act, 2001 is ultra vires the Constitution of India. In other words, the challenge to the validity of the said Reservation Act fails;

(ii) The Government Resolution on promotions dated 25 May 2004 is held bad in law and struck down being contrary to Article 16(4A) and contrary to the decision of 5-Judge Constitution Bench of Supreme Court in **Nagaraj**. The State Government shall take necessary corrective steps/measures within 12 weeks from today;

(iii) Inasmuch as Articles 16(4) and 16(4A) are enabling provisions, unless the State Government in terms of **Nagaraj**, if so advised, carries out the exercise of collecting quantifiable data with regard to backwardness and adequate

representation and forms an opinion that reservations are necessary after analyzing such data keeping in mind the overall administrative efficiency, the State Government shall treat the SC/ST employees and the open/OBC/DT/NT/SBC category of employees at par **in matters of promotion**. Though the Reservation Act is saved, to balance equities, it is directed that unless such exercise in terms of **Nagaraj** is carried out by 31 December 2017, the State Govt shall treat the backward class communities at par with the forward class **in direct recruitment** on and from 01 January 2018. The State Govt shall, if necessary, consider revisiting the provisions of section 4 of the Reservation Act, if and after such exercise is carried out;

(iv) Inasmuch as the reservation in direct recruitment in terms of section 4 of the Reservation Act goes beyond the 50% ceiling limit and no extraordinary circumstances have been made out by the State Government to grant 2% reservation to SBC over and above the ceiling limit of 50%, the Maharashtra State Backward Class Commission shall examine the inclusion of SBC afresh without being influenced by any earlier recommendations or Government decisions on this aspect, within a period of 3 months from today. It is however clarified that if the State Govt places before the Commission within 6 weeks from today, its decision of intention to carry out the exercise in terms of **Nagaraj** and intention to revisit section 4, if necessary, as stated in clause (iii) above, this direction shall not operate.

(v) If such exercise is not carried out and completed by the State Government within the stipulated period, it will be open for the Tribunal/Court to examine the validity of the



Reservation Act in an appropriate and fit case, without being influenced by this judgment and order.

(A.A. Sayed J.)

1. Upon pronouncement of the dissenting judgment (partly), learned GP appearing for the State requests for a stay to the effect and operation of Clauses (ii) to (v) of the operative part of the dissenting judgment.
2. Learned Counsel appearing for the Respondents-original Petitioners, oppose the same.
3. This Court from time to time has extended the stay to the impugned judgment and order of the Tribunal and the same has been in force till date and thereby the State Government was permitted to continue reservation in promotions in terms of the order dated 28 March 2008 of the Supreme Court in SLP Nos.18534-37 of 2007 modifying the interim order of this Court dated 9 March 2007. Considering the fact that the GR on promotion dated 25 May 2004 is held bad in law by the dissenting judgment (partly) and the promotions would be affected, to avoid further complications the stay granted by this Court is continued till the final decision on the Reference. It is clarified that the order dated 28 March 2008 passed by the Supreme Court modifying the interim order dated 9 March 2007 of this Court shall continue to operate till the final decision on the Reference.

(A.A. Sayed, J.)

(Anoop V. Mohta, J.)

1. The dissenting judgment (partly) of A.A.Sayed, J. is pronounced today. The judgment of Anoop V.Mohta, J. has been pronounced on 26 July 2016. So far as clause (i) of the operative part of the dissenting judgment is concerned, we have concurred.
2. In view of difference of opinion on clauses (ii) to (v) of the operative part of the dissenting judgment and order and related findings, the matters are required to be placed before the Hon'ble the Chief Justice for appropriate order/reference to the third learned Judge or a larger Bench.
3. Let the matters be accordingly placed before the Hon'ble the Chief Justice for passing appropriate order.

(A.A. Sayed, J.)

(Anoop V. Mohta, J.)