

Reserved

Case :- SERVICE SINGLE No. - 5472 of 2015

Petitioner :- Manoj Kumar

Respondent :- State Of U.P. Through Commissioner Vill. Development Lko. &

Counsel for Petitioner :- Anil Kumar,Ram Kripal

Counsel for Respondent :- C.S.C.

Hon'ble Dinesh Kumar Singh,J.

1. The petitioner has impugned the order dated 28.8.2015 passed by the District Development Officer, Faizabad (Now Ayodhya Ji), by means of which he has been demoted to a Class-IV post, in pursuance of the Government Order No.8/4/1/2002 TC-1-Ka-2/2015 dated 21.8.2015.

2. The petitioner was initially appointed as a Messenger (Patravahak) on 6.5.1994, in pursuance of the resolution passed by the District Level Selection Committee dated 28.4.1994, on a temporary basis. It was made clear that the appointment was completely temporary and could be dispensed with without giving any notice. The Government issued an order dated 31.8.1982 providing reservation to Class-IV employees upon promotion to the post of Class-III. According to the aforesaid Government Order, Class-IV employees who had completed five years of satisfactory regular service, are eligible for promotion, to the extent of 15% quota, to the lower class clerks in Class-III posts. The petitioner had completed five years continuous service on 5.5.1999, and according to the petitioner he was called by letter dated 19.9.2003 to participate in the interview for promotion to the post of Junior Clerk in Class-III. However, the interview could not be conducted on that date and the same was adjourned to 20.1.2004. Thereafter, the petitioner was promoted to the post of Junior Clerk vide order dated 3.2.2004. He was further promoted to the post of Senior Clerk on 25.9.2006, again upon receiving the benefit of reservation. The petitioner's case is that he was promoted not against the vacancy reserved for Scheduled Caste candidate, but as a general category candidate. However, from the letter dated 16.1.2004 (Annexure-6), it is evident that the promotion was made against the post reserved for a Scheduled Caste candidate. By the impugned order, the petitioner has been

demoted to Class-IV post in pursuance to the Government Order No.8/4/1/2002 TC-1-Ka-2/2015 dated 21.8.2015.

3. The Hon'ble Supreme Court of India in the case of ***M. Nagaraj and others v. Union of India and others*** (2006) 8 SCC 212, wherein validity of Articles 16 (4-A) and 16 (4-B) was under challenge on the ground that these Articles violated the basic structure of the Constitution, has clearly laid down the law in relation to equal opportunity in employment. For the sake of convenience Articles 16 (4-A) and (4-B) are quoted herein under :-

"16. Equality of opportunity in matters of public employment.—(1)-(4)***

(4-A) 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.

(4-B) 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 (4-A) 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."

4. In paragraphs 101, 102 and 104 of the judgement in the case of M. Nagaraj (supra), the Supreme Court has observed as under :-

"101. The key question which arises in the matter of the challenge to the constitutional validity of the impugned amending Acts is — whether the constitutional limitations on the amending power of Parliament are obliterated by the impugned amendments so as to violate the basic structure of the Constitution.

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”. As stated hereinabove, the concept of the “catch-up” rule and “consequential seniority” are not constitutional requirements. They are not implicit in clauses (1) and (4) of Article 16. They are not constitutional limitations. They are concepts derived from service jurisprudence. They are not constitutional principles. They are not axioms like, secularism, federalism, etc. Obliteration of these concepts or insertion of these concepts does not change the equality code indicated by Articles 14, 15 and 16 of the Constitution. 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. Therefore, the present case does not change the identity of the Constitution. The word “amendment” connotes change. The question is—whether the impugned amendments discard the original Constitution. It was vehemently urged on behalf of the petitioners that the Statement of Objects and Reasons indicates that the impugned amendments have been promulgated by Parliament to overrule the decisions of this Court. We do not find any merit in this argument. Under Article 141 of the Constitution the pronouncement of this Court is the law of the land. The judgments of this Court in *Virpal Singh [Union of India v. Virpal Singh Chauhan, (1995) 6 SCC 684 : 1996 SCC (L&S) 1]*, *Ajit Singh (1) [Ajit Singh Januja v. State of Punjab, (1996) 2 SCC 715 : 1996 SCC (L&S) 540]*, *Ajit Singh (2) [Ajit Singh (2) v. State of Punjab, (1999) 7 SCC 209 : 1999 SCC (L&S) 1239]* and *Indra Sawhney [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1]* were judgments delivered by this Court which enunciated the law of the land. It is that law which is sought to be changed by the impugned constitutional amendments. 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).”

5. The Hon'ble Supreme Court has concluded the aforesaid judgment as under :-

"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 subclassification between OBCs on one hand and SCs and STs on the other hand as held in Indra Sawhney [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1] , the concept of post-based roster with inbuilt concept of

replacement as held in R.K. Sabharwal [R.K. Sabharwal v. State of Punjab, (1995) 2 SCC 745 : 1995 SCC (L&S) 548] .

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.”

6. Section 3 (7) of the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 (for short "the Act, 1994") and Rule 8-A of the U.P. Government Servants Seniority Rules, 1991 (for short "Rules, 1991") have been the subject matter of challenge before the Hon'ble Supreme Court in the case of ***Uttar Pradesh Power Corporation Limited v. Rajesh Kumar and others***, (2012) 7 SCC 1. The Act, 1994 was enacted by the State Legislature to provide for the reservation in public services and posts, in favour of the persons belonging to the Scheduled Castes, Scheduled Tribes and Other Backward Classes of citizens, and for matters connected therewith or incidental thereto. For ready reference, Section 3(7) of the Act, 1994 reads as under :-

"3. Reservation in favour of Scheduled Castes, Scheduled Tribes and other Backward Classes.—(1)-(6)* * *

(7) If, on the date of commencement of this Act, reservation was in force under government orders for appointment to posts to be filled by promotion, such government orders shall continue to be applicable till they are modified or revoked.”

7. Rule 8-A of Rules, 1991 which was inserted by the Uttar Pradesh Government Servants Seniority (First Amendment) Rules, 2002 on 18.10.2002 reads as under :-

"8-A. Entitlement of consequential seniority to a person belonging to Scheduled Castes or Scheduled Tribes.
—Notwithstanding anything contained in Rules 6, 7 or 8 of these Rules, a person belonging to the Scheduled Castes or Scheduled Tribes shall, on his promotion by virtue of rule of reservation/roster, be entitled to consequential seniority also".

8. On 13.5.2005, Rule 8-A of Rules, 1991 was omitted by the Uttar Pradesh Government Servants Seniority (Second Amendment) Rules, 2005. However, it was provided in the said rules that the promotions made in accordance with the revised seniority, as determined under Rule 8-A prior to the commencement of the Rules, 2005, would not be affected. Thereafter, on 14.9.2007 by way of the Uttar Pradesh Government Servants Seniority (Third Amendment) Rules, 2007, Rule 8-A was inserted in the same language, which has been extracted in the preceding paragraphs, and the said amendment was given retrospective effect providing that it would be deemed to have come into force on 17.6.1995.

9. The Hon'ble Supreme Court in the case of UPPCL (supra) has held that Section 3(7) of the Act, 1994 and Rule 8-A of Rules, 2007 are ultra vires as they are contradictory to the judgment of the Supreme Court rendered in the case of M. Nagaraj (supra). However, any promotion which has been made on the dictum of the judgement in the case of ***Indra Sawhney v. Union of India***, 1992 Supp (3) SCC 217, and without aid or assistance of Section 3(7) of the Act, 1994 and Rule 8-A of Rules, 1991, shall remain undisturbed. Hon'ble Supreme Court has also held that a fresh exercise in the light of the judgement in M. Nagaraj's case (supra) is an imperative. Paragraphs 86 and 87 of the judgement in UPPCL (supra) are reproduced as under :-

"86. We are of the firm view that a fresh exercise in the light of the judgment of the Constitution Bench in M. Nagaraj [(2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013 : AIR 2007 SC 71] 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 [(2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013 : AIR 2007 SC 71] . Any promotion that has been given on the dictum of Indra Sawhney [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385 : AIR 1993 SC 477] and without the aid or assistance of Section 3(7) and Rule 8-A shall remain undisturbed."

10. After the aforesaid judgement was rendered by the Hon'ble Supreme Court in the case of UPPCL (supra), the Government issued Government Order No.8/4/1/2002 TC-1-Ka-2/2015 dated 21.8.2015. In the aforesaid order, it has been provided to take corrective measures in respect of the employees who were given promotions on the basis of reservation, and consequential seniority, before 28.4.2012 and after 15.11.1997. It was said that those employees who were promoted under the provisions of Section 3(7) of the Act, 1994 and given seniority in pursuance to Rule 8-A of Rules, 1991 should be demoted and be placed on a position where immediate junior to such an employee was working.

11. The Hon'ble Supreme Court after passing the judgement in the case of UPPCL (supra), vide order dated 24.11.2015 in Contempt Petition (C) No.214/2013 in C.A. No.2679/2011 and other connected contempt petitions directed that if anyone was aggrieved by his demotion, he/she would be at liberty to make a representation and should be afforded an opportunity of hearing, and such representation to be decided within a period of eight weeks from the date of receipt of the representation. It was further directed that anyone who was aggrieved by the decision of the competent authority would be entitled to file an application in the disposed of civil appeal, and

other connected appeals, and the competent authority should pass a reasoned order, so that it could be appreciated by the Supreme Court.

12. The correctness of the decision in the case of M. Nagaraj (supra) has been the subject matter in the judgement of the Supreme Court in the case of **Jarnail Singh and others v. Lachhmi Narain Gupta and others**, (2018) 10 SCC 396, which has been decided by a Constitution Bench of the Supreme Court vide judgement and order dated 26.8.2018. The Hon'ble Supreme Court in the aforesaid judgement has held that the direction in the case of M. Nagaraj (supra) that the State would require to show quantifiable data showing backwardness of the Scheduled Casts and Scheduled Tribes for giving reservation to them in public employment, is clearly contradictory to the ratio of law laid down in the case of Indra Sawhney (supra). Except for that part of the judgment, the Supreme Court has upheld the other part of the judgment in the case of M. Nagaraj (supra). Paragraphs 14, 15, 19, 20 and 21 of the aforesaid judgment read as under :-

"This brings us to whether the judgment in Nagaraj [M. Nagaraj v. Union of India, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] needs to be revisited on the other grounds that have been argued before us. Insofar as the State having to show quantifiable data as far as backwardness of the class is concerned, we are afraid that we must reject Shri Shanti Bhushan's argument. The reference to "class" is to the Scheduled Castes and the Scheduled Tribes, and their inadequacy of representation in public employment. It is clear, therefore, that Nagaraj [M. Nagaraj v. Union of India, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] has, in unmistakable terms, stated that the State has to collect quantifiable data showing backwardness of the Scheduled Castes and the Scheduled Tribes. We are afraid that this portion of the judgment is directly contrary to the nine-Judge Bench in Indra Sawhney (1) [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1] . Jeevan Reddy, J., speaking for himself and three other learned Judges, had clearly held:

"[t]he test or requirement of social and educational backwardness cannot be applied to the Scheduled Castes and the Scheduled Tribes, who indubitably fall within the expression "backward class of citizens". (See SCC p. 727, paras 796 to 797.)

Equally, Dr Justice Thommen, in his conclusion at para 323(4), had held as follows:

"323. Summary

(4) Only such classes of citizens who are socially and educationally backward are qualified to be identified as Backward Classes. To be accepted as Backward Classes for

the purpose of reservation under Article 15 or Article 16, their backwardness must have been either recognised by means of a notification by the President under Article 341 or Article 342 declaring them to be Scheduled Castes or Scheduled Tribes, or, on an objective consideration, identified by the State to be socially and educationally so backward by reason of identified prior discrimination and its continuing ill effects as to be comparable to the Scheduled Castes or the Scheduled Tribes. In the case of the Scheduled Castes or the Scheduled Tribes, these conditions are, in view of the notifications, presumed to be satisfied.”

In fact, Chinnaiiah [E.V. Chinnaiiah v. State of A.P., (2005) 1 SCC 394 : (2008) 2 SCC (L&S) 329] has referred to the Scheduled Castes as being the most backward among the Backward Classes (see para 43). This is for the reason that the Presidential List contains only those castes or groups or parts thereof, which have been regarded as untouchables. Similarly, the Presidential List of Scheduled Tribes only refers to those tribes in remote backward areas who are socially extremely backward. Thus, it is clear that when Nagaraj [M. Nagaraj v. Union of India, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] requires the States to collect quantifiable data on backwardness, insofar as Scheduled Castes and Scheduled Tribes are concerned, this would clearly be contrary to Indra Sawhney (1) [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1] and would have to be declared to be bad on this ground.”

However, when it comes to the creamy layer principle, it is important to note that this principle sounds in Articles 14 and 16(1), as unequals within the same class are being treated equally with other members of that class. The genesis of this principle is to be found in State of Kerala v. N.M. Thomas [State of Kerala v. N.M. Thomas, (1976) 2 SCC 310 : 1976 SCC (L&S) 227] . This case was concerned with a test-relaxation rule in promotions from lower division clerks to upper division clerks. By a 5:2 majority judgment, the said rule was upheld as a rule that could be justified on the basis that it became necessary as a means of generally giving a leg-up to Backward Classes. In para 124, Krishna Iyer, J. opined: (SCC p. 363)

“124. A word of sociological caution. In the light of experience, here and elsewhere, the danger of “reservation”, it seems to me, is threefold. Its benefits, by and large, are snatched away by the top creamy layer of the “backward” caste or class, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake. Secondly, this claim is overplayed extravagantly in democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment, but wish to wear the “weaker section” label as a means to score over their near-equals

formally categorised as the upper brackets. Lastly, a lasting solution to the problem comes only from improvement of social environment, added educational facilities and cross-fertilisation of castes by inter-caste and inter-class marriages sponsored as a massive State programme, and this solution is calculatedly hidden from view by the higher "backward" groups with a vested interest in the plums of backwardism. But social science research, not judicial impressionism, will alone tell the whole truth and a constant process of objective re-evaluation of progress registered by the "underdog" categories is essential lest a once deserving "reservation" should be degraded into "reverse discrimination". Innovations in administrative strategy to help the really untouched, most backward classes also emerge from such socio-legal studies and audit exercises, if dispassionately made. In fact, research conducted by the A.N. Sinha Institute of Social Studies, Patna, has revealed a dual society among harijans, a tiny elite gobbling up the benefits and the darker layers sleeping distances away from the special concessions. For them, Articles 46 and 335 remain a "noble romance" [As Huxley called it in "Administrative Nihilism" (Methods and Results, Vol. 4 of Collected Essays).], the bonanza going to the "higher" Harijans. I mention this in the present case because lower division clerks are likely to be drawn from the lowest levels of Harijan humanity and promotion prospects being accelerated by withdrawing, for a time, "test" qualifications for this category may perhaps delve deeper. An equalitarian breakthrough in a hierarchical structure has to use many weapons and Rule 13-AA perhaps is one."

(emphasis in original)

The whole object of reservation is to see that Backward Classes of citizens move forward so that they may march hand in hand with other citizens of India on an equal basis. This will not be possible if only the creamy layer within that class bag all the coveted jobs in the public sector and perpetuate themselves, leaving the rest of the class as backward as they always were. This being the case, it is clear that when a court applies the creamy layer principle to Scheduled Castes and Scheduled Tribes, it does not in any manner tinker with the Presidential List under Articles 341 or 342 of the Constitution of India. The caste or group or sub-group named in the said List continues exactly as before. It is only those persons within that group or sub-group, who have come out of untouchability or backwardness by virtue of belonging to the creamy layer, who are excluded from the benefit of reservation. Even these persons who are contained within the group or sub-group in the Presidential Lists continue to be within those Lists. It is only when it comes to the application of the reservation principle under Articles 14 and 16 that the creamy layer within that sub-group is not given the benefit of such reservation.

We have already seen that, even without the help of the first part of Article 16(4-A) of the 2012 Amendment Bill, the providing of quantifiable data on backwardness when it comes to Scheduled Castes and Scheduled Tribes, has already been held by us to be contrary to the majority in Indra Sawhney (1) [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1] . So far as the second part of the substituted Article 16(4-A) contained in the Bill is concerned, we may notice that the proportionality to the population of Scheduled Castes and Scheduled Tribes is not something that occurs in Article 16(4-A) as enacted, which must be contrasted with Article 330. We may only add that Article 46, which is a provision occurring in the Directive Principles of State Policy, has always made the distinction between the Scheduled Castes and the Scheduled Tribes and other weaker sections of the people. Article 46 reads as follows:-

“46. Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections.—*The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.”*

This being the case, it is easy to see the pattern of Article 46 being followed in Article 16(4) and Article 16(4-A). Whereas “Backward Classes” in Article 16(4) is equivalent to the “weaker sections of the people” in Article 46, and is the overall genus, the species of Scheduled Castes and Scheduled Tribes is separately mentioned in the latter part of Article 46 and Article 16(4-A). This is for the reason, as has been pointed out by us earlier, that the Scheduled Castes and the Scheduled Tribes are the most backward or the weakest of the weaker sections of society, and are, therefore, presumed to be backward. Shri Dwivedi's argument that as a member of a Scheduled Caste or a Scheduled Tribe reaches the higher posts, he/she no longer has the taint of either untouchability or backwardness, as the case may be, and that therefore, the State can judge the absence of backwardness as the posts go higher, is an argument that goes to the validity of Article 16(4-A). If we were to accept this argument, logically, we would have to strike down Article 16(4-A), as the necessity for continuing reservation for a Scheduled Caste and/or Scheduled Tribe member in the higher posts would then disappear. Since the object of Articles 16(4-A) and 16(4-B) is to do away with the nine-Judge Bench in Indra Sawhney (1) [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1] when it came to reservation in promotions in favour of the Scheduled Castes and Scheduled Tribes, that object must be given effect to, and has been given effect by the judgment in Nagaraj [M. Nagaraj v. Union of India, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] . This being the case, we cannot countenance an argument which would

indirectly revisit the basis or foundation of the constitutional amendments themselves, in order that one small part of Nagaraj [M. Nagaraj v. Union of India, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] be upheld, namely, that there be quantifiable data for judging backwardness of the Scheduled Castes and the Scheduled Tribes in promotional posts. We may hasten to add that Shri Dwivedi's argument cannot be confused with the concept of "creamy layer" which, as has been pointed out by us hereinabove, applies to persons within the Scheduled Castes or the Scheduled Tribes who no longer require reservation, as opposed to posts beyond the entry stage, which may be occupied by members of the Scheduled Castes or the Scheduled Tribes.

The learned Attorney General also requested us to lay down that the proportion of Scheduled Castes and Scheduled Tribes to the population of India should be taken to be the test for determining whether they are adequately represented in promotional posts for the purpose of Article 16(4-A). He complained that Nagaraj [M. Nagaraj v. Union of India, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] ought to have stated this, but has said nothing on this aspect. According to us, Nagaraj [M. Nagaraj v. Union of India, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] has wisely left the test for determining adequacy of representation in promotional posts to the States for the simple reason that as the post gets higher, it may be necessary, even if a proportionality test to the population as a whole is taken into account, to reduce the number of Scheduled Castes and Scheduled Tribes in promotional posts, as one goes upwards. This is for the simple reason that efficiency of administration has to be looked at every time promotions are made. As has been pointed out by B.P. Jeevan Reddy, J.'s judgment in Indra Sawhney (1) [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1] , there may be certain posts right at the top, where reservation is impermissible altogether. For this reason, we make it clear that Article 16(4-A) has been couched in language which would leave it to the States to determine adequate representation depending upon the promotional post that is in question. For this purpose, the contrast of Articles 16(4-A) and 16(4-B) with Article 330 of the Constitution is important. Article 330 reads as follows:-

“330. Reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People.—(1) Seats shall be reserved in the House of the People for—

(a) the Scheduled Castes;

(b) the Scheduled Tribes except the Scheduled Tribes in the autonomous districts of Assam; and

(c) the Scheduled Tribes in the autonomous districts of Assam.

(2) The number of seats reserved in any State or Union Territory for the Scheduled Castes or the Scheduled Tribes

under clause (1) shall bear, as nearly as may be, the same proportion to the total number of seats allotted to that State or Union Territory in the House of the People as the population of the Scheduled Castes in the State or Union Territory or of the Scheduled Tribes in the State or Union Territory or part of the State or Union Territory, as the case may be, in respect of which seats are so reserved, bears to the total population of the State or Union Territory.

(3) Notwithstanding anything contained in clause (2), the number of seats reserved in the House of the People for the Scheduled Tribes in the autonomous districts of Assam shall bear to the total number of seats allotted to that State a proportion not less than the population of the Scheduled Tribes in the said autonomous districts bears to the total population of the State.

Explanation.—In this Article and in Article 332, the expression “population” means the population as ascertained at the last preceding census of which the relevant figures have been published:

Provided that the reference in this Explanation to the last preceding census of which the relevant figures have been published shall, until the relevant figures for the first census taken after the year 2026 have been published, be construed as a reference to the 2001 census.”

It can be seen that when seats are to be reserved in the House of the People for the Scheduled Castes and Scheduled Tribes, the test of proportionality to the population is mandated by the Constitution. The difference in language between this provision and Article 16(4-A) is important, and we decline the invitation of the learned Attorney General to say any more in this behalf.

Thus, we conclude that the judgment in Nagaraj [M. Nagaraj v. Union of India, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] does not need to be referred to a seven-Judge Bench. However, the conclusion in Nagaraj [M. Nagaraj v. Union of India, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] that the State has to collect quantifiable data showing backwardness of the Scheduled Castes and the Scheduled Tribes, being contrary to the nine-Judge Bench in Indra Sawhney (1) [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1] is held to be invalid to this extent.”

13. Learned counsel for the petitioner has impugned the order dated 28.8.2015 on the ground that the Hon'ble Supreme Court in the case of Jarnail Singh (supra) has held that the judgement in M. Nagaraj's case (supra), so far as it directed the State to collect the quantifiable data of backwardness of the Scheduled Caste and Scheduled Tribes for giving them reservation in public employment, has been held to be bad law and, therefore, the judgement of the Supreme Court in the case of UPPCL

(supra), which was pronounced on the basis of the ratio of M. Nagaraj 's case (supra) can be said to have been over ruled. He has further submitted that the Government Order dated 21.8.2015, whereby the petitioner has been directed to be demoted, as well as the demotion order are unconstitutional and contrary to the judgement of the Supreme Court in the case of Jarnail Singh (supra) and violative of Articles 16 (4-A) and 16(4-B) of the Constitution of India and are liable to be struck down.

14. The second limb of submission of learned counsel for the petitioner is that the petitioner was not promoted against the post reserved for Scheduled Caste candidate. He has further submitted that the petitioner was promoted in pursuance to the Government Order 31.8.1982, whereby 15% of Class-III posts have been earmarked for promotion from Class-IV employees, who have completed five years of continuous satisfactory service. The petitioner was duly qualified to be promoted inasmuch as he had completed five years of satisfactory service and his promotion was not against the post meant for Scheduled Caste candidate, therefore, the petitioner ought not to have been demoted in pursuance to the judgement and order passed by the Supreme Court in the case of UPPCL (supra), wherein the Supreme Court has struck down Section 3(7) of the Act, 1994 and Rule 8-A of Rules, 1991.

15. On the other hand, the stand of the State, as it comes out from the counter affidavit, is that after the judgement of the Supreme Court in the case of UPPCL (supra), the Government had issued the Government Order dated 21.8.2015 to implement the aforesaid judgement of the Supreme Court. Paragraph six of the aforesaid Government Order clearly lays down that those employees who have been promoted under the reservation quota after 15.11.1997 and before 28.4.2012 are to be demoted to the place where immediate junior of such an employee is working. The Government Order has been issued to implement the aforesaid judgement of the Supreme Court and, therefore, it is neither illegal nor unconstitutional as is being contended by the learned counsel for the petitioner.

16. It has further been stated in the counter affidavit that the petitioner was promoted from the post of Peon to the Junior Clerk, vide order dated 3.2.2004, against a post reserved for Scheduled Caste candidate with the aid of Section 3(7) of the Act, 1994. Thereafter, the petitioner was promoted to the post of Senior Clerk under the reservation quota meant for Scheduled Caste category on 25.9.2006. Since Section 3(7) of the Act, 1994 and Rule

8-A of Rules, 1991 have been declared to be ultra vires and unconstitutional, the promotions given on the basis of the aforesaid Section and Rule were illegal and, therefore, in view of the judgement of the Supreme Court in the case of UPPCL (supra), the petitioner has been demoted vide order dated 28.8.2015.

17. I have considered the rival submissions of the parties carefully.

18. The Hon'ble Supreme Court in the case of Jarnail Singh (supra) has not over ruled the judgment rendered in the case of UPPCL (supra). The Supreme Court has held that it is open to the State to collect the quantifiable data, in respect of adequacy of representation of the Scheduled Caste and Scheduled Tribe candidates, on promotional posts in the State.

19. The promotions were made without collecting the quantifiable data regarding adequacy of representation of Scheduled Caste and Scheduled Tribe candidates on promotional posts, the Supreme Court in the case of UPPCL (supra) has struck down the provisions of Section 3(7) of the Act, 1994 and Rule 8-A of Rules, 1991 and this judgement has not been over ruled. The State Government has issued the Government Order dated 21.8.2015 to implement the aforesaid judgement. Therefore, if the petitioner was promoted giving the benefit of reservation and consequential seniority on promotional posts, then in view of the judgement of the Supreme Court in the case of UPPCL (supra), he was liable to be demoted as per the Government order dated 21.8.2015.

20. The changed view of law of the Supreme Court in the case of Jarnail Singh (supra) will not reopen the decision taken in the case of UPPCL (supra). There is difference between a "decision" of the Court and the "view of law" expressed by the Court. The Supreme Court has explained the difference in the case of ***Natural Resources Allocation, in re, Special Reference No.1 of 2012***. (2012) 10 SCC 1. Paragraphs 46 to 48 of the aforesaid judgment which are relevant for the purposes of this case are extracted herein below:-

"46.Black's Law Dictionary defines a "decision" as "a determination arrived at after consideration of facts, and, in legal context, law"; an "opinion" as

"[t]he statement by a Judge or court of the decision reached in regard to a cause tried or argued before them, expounding the law as applied to the case, and detailing the reasons upon which the judgment is based;"

and explains the difference between a “decision” and “opinion” as follows:

“‘Decision’ is not necessarily synonymous with ‘opinion’. A decision of the court is its judgment; the opinion is the reasons given for that judgment, or the expression of the views of the Judge.”

47. Therefore, references in para 85 of Cauvery (2) [1993 Supp (1) SCC 96 (2)] to “decision” and “view of law” must be severed from each other. The learned Judge observes that in case of a decision, the appellate structure is exhausted after a pronouncement by the Supreme Court. Therefore, the only option left to the parties is of review or curative jurisdiction (a remedy carved out in the judgment in Rupa Ashok Hurra v. Ashok Hurra [(2002) 4 SCC 388]). After the exercise of those limited options, the parties concerned have absolutely no relief with regard to the dispute: it is considered settled for eternity in the eye of the law. However, what is not eternal and still malleable in the eye of the law is the opinion or “view of law” pronounced in the course of reaching the decision. Sawant, J. in Cauvery (2) [1993 Supp (1) SCC 96 (2)] clarifies that unlike this Court's appellate power, its power to overrule a previous precedent is an outcome of its inherent power when he says: (SCC p. 145, para 85)

“85. ... it does not do so sitting in appeal and exercising an appellate jurisdiction over the earlier decision. It does so in exercise of its inherent power and only in exceptional circumstances....”

This Court has pointed out the difference between the two expressions in Rupa Ashok Hurra [(2002) 4 SCC 388] , in the following words: (SCC p. 406, para 24)

“24. There is no gainsaying that the Supreme Court is the court of last resort—the final court on questions both of fact and of law including constitutional law. The law declared by this Court is the law of the land: it is precedent for itself and for all the courts/tribunals and authorities in India. In a judgment there will be declaration of law and its application to the facts of the case to render a decision on the dispute between the parties to the lis. It is necessary to bear in mind that the principles in regard to the highest court departing from its binding precedent are different from the grounds on which a final judgment between the parties can be reconsidered. Here, we are mainly concerned with the latter. However, when reconsideration of a judgment of this Court is sought, the finality attached both to the law declared as well as to the decision made in the case, is normally brought under challenge.”

48. Therefore, there are two limitations—one jurisdictional and the other self-imposed:

48.1. The first limitation is that a decision of this Court can be reviewed only under Article 137 or a curative petition and in no other way. It was in this context that in para 85 of Cauvery (2) [1993 Supp (1) SCC 96 (2)] , this Court had stated that the

President can refer a question of law when this Court has not decided it. Mr Harish Salve, learned Senior Counsel, is right when he argues that once a lis between parties is decided, the operative decree can only be opened in review. Overruling the judgment—as a precedent—does not reopen the decree.

48.2. The second limitation, a self-imposed rule of judicial discipline, was that overruling the opinion of the Court on a legal issue does not constitute sitting in appeal, but is done only in exceptional circumstances, such as when the earlier decision is per incuriam or is delivered in the absence of relevant or material facts or if it is manifestly wrong and capable of causing public mischief. For this proposition, the Court relied upon the judgment in Bengal Immunity case [AIR 1955 SC 661 : (1955) 2 SCR 603] wherein it was held that when Article 141 lays down that the law declared by this Court shall be binding on all courts within the territory of India, it quite obviously refers to courts other than this Court; and that the Court would normally follow past precedents save and except where it was necessary to reconsider the correctness of law laid down in that judgment. In fact, the overruling of a principle of law is not an outcome of appellate jurisdiction but a consequence of its inherent power. This inherent power can be exercised as long as a previous decree vis-à-vis a lis inter partes is not affected. It is the attempt to overturn the decision of a previous case that is problematic, which is why the Court observed that: [Cauvery (2) case [1993 Supp (1) SCC 96 (2)] , SCC p. 145, para 85]

“85. ... Under the Constitution such appellate jurisdiction does not vest in this Court, nor can it be vested in it by the President under Article 143.”

21. Now the question is whether the petitioner was promoted against the post reserved for Scheduled Caste candidate. From perusal of the letter dated 16.1.2004 (Annexure-6), it is evident that one post of Junior Clerk in the category of Scheduled Caste was vacant and promotion on the said post was to be made from the Scheduled Caste category candidates working in Class-IV. The selection committee was constituted on 4.9.2003, in which candidates from reserved category were called for to face the interview for promotion to the post of Junior Clerk. The petitioner was found suitable and he was promoted vide order dated 3.2.2004, against the post reserved for Scheduled Caste candidates. Therefore, the contention of learned counsel for the petitioner that the petitioner was promoted against the general category post is not borne out from the record. The petitioner was again promoted to the post of Senior Clerk on 25.9.2006, against the post meant for Scheduled Caste candidate giving the benefit of reservation.

22. In view of the aforesaid, since the petitioner was promoted by applying the provisions of Section 3(7) of the Act, 1994 and Rule 8-A of

Rules, 1991, I find that the impugned order dated 28.8.2018 passed in pursuance to the Government Order dated 21.8.2015, which has been issued in compliance of the judgement of the Supreme Court in the case of Uttar Pradesh Power Corporation Limited (supra), is just and proper and does not require any interference by this Court.

23. Thus, the present writ petition fails and is dismissed.

24. However, no order as to costs.

(Dinesh Kumar Singh, J.)

Order Date :- April 2nd , 2019

Rao/-