

GAHC010133812022



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WA/46/2023

IVY GOHAIN DASGUPTA
CHIEF ENGINEER (INCHARGE) (SINCE RETIRED) RESIDENT OF QUARTER
NO. 74, CHANDMARI WATER RESOURCES COLONY, CHANDMARI,
GUWAHATI 781003

VERSUS

BHAGWAN PATOR AND 11 ORS.
S/O LT. AMAL CH. PATOR, R/O VILL. and P.O. NELLIE, DIST- MORIGAON

2:THE STATE OF ASSAM
REP. BY THE CHIEF SECY. TO THE GOVT. OF ASSAM
SECRETARIATE
DISPUR
GHY-6

3:THE SECY. TO THE GOVT. OF ASSAM
WATER RESOURCES DEPTT.
SECRETARIAT
BLOCK-B
THIRD FLOOR
DISPUR
GHY-6

4:THE ADDL. CHIEF SECY. TO THE GOVT. OF ASSAM
WELFARE OF PLAIN TRIBES and BACKWARD CLASSES DEPTT.
DISPUR
GHY-6

5:THE SECY. TO THE GOVT. OF ASSAM
JUDICIAL DEPTT.
DISPUR
GHY-6

6:THE PRINCIPAL SECY.
PERSONNEL B DEPTT.
GOVT. OF ASSAM
DISPUR
GHY-6

7:THE COMMISSIONER AND SECRETARY
TO THE GOVT. OF ASSAM
PERSONNEL (B) DEPT. DISPUR
GHY-6

8:THE LEGAL REMEMBRANCER AND SECY. TO THE GOVT. OF ASSAM
JUDICIAL DEPTT.
DISPUR
GHY-6

9:SRI ABANI MOHAN HAZARIKA
ADDL. CHIEF ENGINEER
AWRMI
OFFICE OF THE ADDL. CHIEF ENGINEER
WATER RESOURCES DEPT
BASISTHA
GUWAHATI 781029
ASSAM

10:PRANAB KUMAR TURUNG
S/O LATE LECHAM TURUNG
ADDL. CHIEF ENGINEER
CACHAR AND HILLS
WATER RESOURCES DEPT. SILCHAR
RESIDENT OF NO. 1 GANDHAKORAI GOAN
PO AND PS SARUPATHAR
DIST GOLAGHAT
ASSAM
785601

11:SRI ANIL KUMAR JALAN

S/O PUSHKAR DUTTA JALAN
RESIDENT OF FLAT NO. 4C
PROTECT VIEW
HENGRABARI ROAD
DISPUR

GUWAHATI 781006

12:SRI SHANTANU DHAR

S./O LATE SANTI RANJAN DHAR
RESIDENT OF HOUSE NO 19
HARBALA ROAD
ULUBARI
GUWAHATI 781007
KAMRUP M ASSA

Advocate for the Petitioner : MR. K N CHOUDHURY

Advocate for the Respondent : GA, ASSAM

Linked Case : WA/239/2022

EQUALITY FORUM
REP. BY ITS SECRETARY

SHRI ARUN CHANDRA SAHARIA

S/O LT. HAIDIA SAHARIA

B.M. COMPLEX
RATNAGIRI PATH

BAMUNIMAIDAM
GUWAHATI- 781021.

VERSUS

THE STATE OF ASSAM AND 12 ORS.
REP. BY THE CHIEF SECRETARY TO THE GOVT. OF ASSAM
DISPUR
GUWAHATI - 781006.

2:THE ADDITIONAL CHIEF SECRETARY TO THE GOVERNMENT OF ASSAM
WPT AND BC DEPARTMENT
DISPUR
GUWAHATI - 781006.

3:THE COMMISSIONER AND SECRETARY TO THE GOVERNMENT OF

ASSAM
DEPARTMENT OF WPT AND BC
DISPUR
GUWAHATI - 781006.
4:THE PRINCIPAL SECRETARY TO THE GOVERNMENT OF ASSAM
PERSONNEL (B) DEPARTMENT
DISPUR
GUWAHATI - 781006.
5:DINABANDHU DEKA
S/O LATE GOPAL CHANDRA DEKA

R/O BHETAPARA GUWAHATI-781028
ASSAM.
6:DEEP PEGU
S/O DR. NUMAL CHANDRA PEGU

R/O MILAN NAGAR
DIBRUGARH
ASSAM -786003.
7:NAMESWAR PEGU
S/O LATE BANGSHIDHAR PEGU

R/O BORBARI BORTILA
H. NO-132
VIP ROAD
GUWAHATI-781026
KAMRUP (M)
ASSAM.
8:HRIDOY KR. BORO
S/O LATE RATNA KR BORO

R/O HOUSE NO-25
BISHNU RABHA NAGAR
NOONMATI
GUWAHATI-781020.
9:NIROLA PHANCHOPI ACS
W/O SRI AMAR SINGH TISSO

R/O 316 ADHAR APARTMENT
FLAT NO-101
MOTHER TERESA ROAD
GUWAHATI-781020
ASSAM.
10:ETSHAR KATHAR ACS
D/O SRI H.I. KATHAR

R/O GANESHGURI
GUWAHATI-781006

DISTRICT- KAMRUP
ASSAM.
11:RUPJYOTI DEORI
S/O LATE GHANAKANTA DEORI

R/O UPPER DEORI GAON

P.O.- NAHATIA
P.S.- PULIBAR
DIST.- JORHAT
ASSAM
PIN-785018.
12:SUKLESWAR DAS
S/O LATE MAHIN CH. DAS

R/O SAWKUCHI
HOUSE NO. 55

P.O.- SAWKUCHI
P.S.- BASISTHA
DIST.- KAMRUP (M) ASSAM
PIN-781040.
13:VOSIK KATHARPI
D/O SRI LONGBI RAM ENTI KATHAR

R/O RONGTHEANG
WARD NO. 7

P.O. AND P.S. DIPHU
DIST.- KARBI ANGLONG ASSAM
PIN-782460.
14:SANJAI KUMAR MAHANTA (INTERVENOR)
SON OF LATE NRIPENDRA NATH MAHANTA
R/O ABIRKUNJ APARTMENT
M.T. ROAD
HATIGARH
GUWAHATI-781021
DISTRICT- KAMRUP(M)
ASSAM.

Advocate for : MR. M K CHOUDHURY

Advocate for : GA

ASSAM appearing for THE STATE OF ASSAM AND 12 ORS.

Linked Case : WA/162/2023

SANJAI KUMAR MAHANTA
S/O LATE NRIPENDRA NATH MAHANTA
RESIDENT OF ABIRKUNJ APARTMENT
M.T ROAD
HATIGARH
GUWAHATI 781021
DIST KAMRUP M ASSAM

VERSUS

BHAGWAN PATOR AND 22 ORS. B
S/O LATE AMAL CH. PATOR
RESIDENT OF VILLAGE AND PO NELLIE
DIST MORIGAON

2:THE STATE OF ASSAM
REPRESENTED BY THE CHIEF SECRETARY TO THE GOVT. OF ASSAM
SECRETARIATE
DISPUR GUWAHATI 06

3:THE SECY. TO THE GOVT. OF ASSAM
WATER RESOURCES DEPTT.
SECRETARIAT
BLOCK-B
THIRD FLOOR
DISPUR
GHY-6

4:THE ADDL. CHIEF SECY. TO THE GOVT. OF ASSAM
WELFARE OF PLAIN TRIBES AND BACKWARD CLASSES DEPTT.
DISPUR
GHY-6

5:THE SECY. TO THE GOVT. OF ASSAM
JUDICIAL DEPTT.
DISPUR
GHY-6

6:THE PRINCIPAL SECY.
PERSONNEL (B) DEPTT.
GOVT. OF ASSAM
DISPUR
GHY-6

7:ANIL KUMAR JALAN
S/O PUSHKAR DUTTA JALAN
R/O FLAT NO- 4C
PROTECT VIEW
HENGRABARI ROAD
P.O- DISPUR
GUWAHATI-781006

KAMRUP (M)
ASSAM
8:SHANTANU DHAR
S/O LT SANTI RANJAN DHAR
R/O- HOUSE NO.- 19
HARBALA ROAD
ULUBARI
GUWAHATI-781007
KAMRUP (M)
ASSAM
9:JOGEN BAISHYA
SUPERINTENDENT ENGINEER
NORTH KAMRUP CIRCLE
IRRIGATION DEPARTMENT
DIST-NALBARI
10:AJIT KUMAR SARKAR
DEPUTY CHIEF ADMINISTRATOR
UPPER ASSAM CAD AUTHORITY
KATIMARI
DIST-NAGAON
11:DHIRAJ SAIKIA
DIRECTOR DESIGN
MINOR IRRIGATION
OFFICE OF THE CHIEF ENGINEER
IRRIGATION DEPARTMENT
CHANDMARI
GUWAHATI-781003
12:BHAIRAB KEOT
DEPUTY CHIEF ENGINEER
MINOR
OFFICE OF THE CHIEF ENGINEER
IRRIGATION DEPARTMENT
CHANDMARI
GUWAHATI-781003
13:GHANA SONOWAL
SUPERINTENDENT ENGINEER
DIBRUGARH CIRCLE
IRRIGATION DEPARTMENT
DIBRUGARH
ASSAM
14:DIMBA NATH MILI
DIRECTOR DESIGN
OFFICE OF THE ADDITIONAL CHIEF ENGINEER
ZONE-II
IRRIGATION DEPARTMENT
TEZPUR
ASSAM
15:JOYBINON LONGMALAI

SUPERINTENDENT ENGINEER
DIPHU CIRCLE
KARBI ANGLONG
ASSAM

16:PABITRA KR MEDAK
SUPERINTENDENT ENGINEER
IRRIGATION DEPARTMENT
NORTH LAKHIMPUR CIRCLE
LAKHIMPUR
ASSAM

17:SUMIT DAS
SUPERINTENDENT ENGINEER
SILCHAR CIRCLE
IRRIGATION DEPARTMENT
SILCHAR
ASSAM

18:BABUL CH. SONOWAL
SUPERINTENDENT ENGINEER
GOALPARA CIRCLE
IRRIGATION DEPARTMENT
GOALPARA
ASSAM

19:HEMANTA KR. MILI
DEPUTY ADMINISTRATOR
LOWER ASSAM CABA
CHANDMARI
GUWAHATI-781003

20:MONORANJAN BRAHMA
SUPERINTENDENT ENGINEER
MANGALDOI CIRCLE
IRRIGATION DEPARTMENT
MANGALDOI
ASSAM

21:MRIGEN BORO
SUPERINTENDENT ENGINEER
GUWAHATI CIRCLE
IRRIGATION DEPARTMENT
ULUBARI
GUWAHATI

Advocate for : MR. K N CHOUDHURY

Advocate for : MR D MAHANTA appearing for BHAGWAN PATOR AND 22 ORS. B

BEFORE
HONOURABLE MR. JUSTICE ACHINTYA MALLA BUJOR BARUA
HONOURABLE MR. JUSTICE ROBIN PHUKAN

ORDER

Date : 10.08.2023
(A.M. Bujor Barua)

Heard Mr. KN Choudhury, learned Senior Counsel assisted by Mr. N Gautam, learned counsel for the appellant in WA No. 46/2023 and WA No. 162/2023 and Mr. MK Choudhury, learned Senior Counsel assisted by Mr. M Sarma, learned counsel for the appellant in WA No. 239/2022. Also heard Mr. DK Das, learned counsel for the respondent Bhagwan Pator, Mr. D Mozumdar, learned Additional Advocate General for the authorities in the State of the Assam and Mr. D Mahanta, learned counsel for the respondents No. 11, 12 and 13 in WA No. 163/2023.

2. The facts and circumstances leading to the present appeals flow from the Constitution Seventy Seventh Amendment introducing Article 16(4A) by which it was provided that nothing shall prevent the State from making any provisions for reservation in the matters of promotion to any class or classes of posts in the services under the State in favour of Scheduled Castes and Scheduled Tribes, which in the opinion of the State, are not adequately represented in the services under the State and the Constitution (Eighty Fifth) Amendment wherein an amendment was brought in to the Article 16 (4A) providing for reservation in the matters of promotion with consequential seniority. The Constitution Seventy Seventh Amendment to the Constitution is as per the Constitution (Seventy Seventh Amendment) Act, 1995 and the Constitution (Eighty Fifth) Amendment is as per the Constitution (Eighty Fifth Amendment) Act, 2001.

3. It has to be taken note that in the State of Assam by the Assam Act XII of

1979 i.e. the Assam Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Act, 1978 (in short, the Act of 1978), as per Section 5 thereof, reservation for Scheduled Castes and Scheduled Tribes in the posts to be filled up by promotion was already statutorily provided for.

4. After the Seventy Seventh and Eighty Fifth Amendment to the Constitution, the Government of Assam through the Department of Personnel (B) had issued an Office Memorandum under the signature of the Commissioner and Secretary to the Government of Assam in the Personnel Department bearing No. ABP.59/96/163 dated 12.03.2002 providing for consequential seniority to the Scheduled Castes and Scheduled Tribes Government servants on their promotion by virtue of the rules of reservation and the Office Memorandum clearly provides that such provision was consequent upon the amendment of Article 16(4A) of the Constitution of India by the Constitution Eighty Fifth Amendment Act, 2001. In other words, it has to be understood that by virtue of Section 5 of the Act of 1978 the provisions for reservation in promotion to the reserved category candidates was already introduced in the State of Assam prior to Seventy Seventh Amendment of the Constitution, whereas by the Office Memorandum dated 12.03.2002 even the consequential seniority upon such reservation on promotion being acted upon was also provided pursuant to the Eighty Fifth Amendment of the Constitution.

5. It is also to be taken note that by the Assam Act XIX of 2012 notified by the Notification No. LGL.128/2011/40 dated 21.08.2012 and published in the Assam Gazette Extraordinary No. 383 dated 21.08.2012, Section 5A was introduced after Section 5 of the Act of 1978. Section 5A of the Act of 1978 provides for a post based roster for implementing reservation in promotion for the members of reserved category. After the amendment of the Act of 1978 by

the Assam Act XIX of 2012, the Office Memorandum bearing No.TAD/BC/68/2011/Pt-1/146 dated 29.12.2014 was issued under the signature of the Principal Secretary to the Government of Assam in the WPT & BC Department.

6. The opening paragraph of the Office Memorandum dated 29.12.2014 provides that the guidelines were in order to implement the post based roster reservation in the matters of reservation of posts for Scheduled Castes and Scheduled Tribes both plains and hills, in direct recruitment and promotions.

7. Considering the nature of arguments raised, it would be relevant to take note of the provisions of Clause 1.11 of the Office Memorandum dated 29.12.2014 as well as Clause 14 which are extracted below:

“1.11 These rosters are an aid to determine the entitlement of different categories with regard to the quota reserved for them in matters of appointment and promotion. They are not intended to determine seniority in the cadre.

14. All existing orders on the subject are deemed to have been amended to the extent herein.”

8. WP(C) No.1560/2015 and WP(C) No.2680/2015 were instituted by a registered society in the name of Equality Forum and four other persons serving as Assistant Engineer (Civil) in the Irrigation Department and seeking promotion to the next cadre of Assistant Executive Engineer, respectively. In both the writ petitions an issue was raised that as per the judgment rendered by the Hon'ble Supreme Court in *M. Nagaraj & Ors. Vs. Union of India & ors. reported in (2006)8 SCC 212* and *U.P. Power Corporation Ltd. Vs. Rajesh Kumar & ors. reported in (2012)7 SCC 1*, there is a requirement of the State to have a quantifiable data on the backwardness and inadequacy of the representation of

the reserved category candidates for the purpose of promotion. According to the petitioners in the said two writ petitions, in the State of Assam no process was initiated for obtaining the quantifiable data as required in *M. Nagaraj (supra)* and *U.P. Power Corporation Ltd. (supra)*, apart from the report of an one man committee comprising of Sri H Sonowal, the then Commissioner and Secretary to the Government of Assam in the Welfare of Plains Tribes and Backward Classes, which report was also inadequate and unacceptable, and as such further continuation with the provisions of reservation in promotion as well as providing for consequential seniority would be unsustainable in law. In the said two writ petitions referred as Equality Forum, as reported in *2016(1) GLT 710*, by the judgment and order dated 23.12.2015, in paragraph 47 thereof, it was provided that till the exercise of collection of quantifiable data relating to the three constitutional requirements of backwardness of the class, inadequacy of representation in public service and overall efficiency in the administration in the event of reservation, as mandated in *M. Nagaraj (supra)* and *U.P. Power Corporation Ltd. (supra)* is done and an opinion is formed by the State based upon the quantifiable data so collected as to whether the enabling provisions of Article 16(4A) is to be invoked, reservation in promotion would remain in a dormant state. The paragraph 47 of the judgment in Equality Forum (*supra*) is extracted hereinbelow:-

“47. In a separate proceeding relating to reservation in promotion in the Irrigation Department (MC No. 726 of 2014 in WP(C) No. 707 of 2014), this Court held that there was no quantifiable data before the State regarding the 3 (three) constitutional requirements, namely, backwardness of the class, inadequacy of representation in public services and overall efficiency in administration in the event of reservation in promotion. It was held that in the absence of such quantifiable data question of forming any opinion by the State to invoke the enabling provision of Article 16 (4-A) would not arise. Accordingly, it was held that till the exercise of collection of quantifiable data relating to the three constitutional requirements as mandated in M Nagaraj (supra) and Uttar

Pradesh Corporation Limited (supra) and formation of opinion by the State based on the quantifiable data so collected that the enabling provision of Article 16 (4-A) is to be invoked was carried out, the 1978 Act as amended in 2012 in so far it provides for reservation in promotion would remain in a dormant state."

9. In paragraph 67 of the judgment of Equality Forum (supra), it was provided that the quantifiable data has to be both service and cadre specific and what the one man commission appointed by the Government of Assam to collect the quantifiable data had done was that it had made a general statement on the backwardness of the scheduled castes and schedule tribes and had not provided quantifiable data either on the backwardness or on the inadequacy of representation having regard to the promotional posts. It further provided that if upon undertaking the exercise of collecting data, it was found that in a particular cadre there is adequate representation of the scheduled castes and schedule tribes, providing for reservation in promotion to such cadre would not be justified. In paragraph 68 it was provided that in the event reservation is sought to be introduced, then an assessment of backwardness of the communities having regard to their representation in the promotional cadres would have to be carried out. In paragraph 74 of the judgment in Equality Forum (supra) it was provided that though the State had made provision for reservation in promotion by enacting the Act of 1978, which was amended in the year 2012, implementation of the same would depend on acquiring the quantifiable data, which exercise has to be carried out cadre wise in the context of the service where the cadre is placed. Accordingly, it was provided that reservation in promotion would have to be justified with the help of the quantifiable data to show presence of two of the compelling reasons i.e. backwardness and inadequacy of representation cadre wise, which would then have to be harmonized with the efficiency in administration as mandated under Article 335. Paragraph 74 of the judgment in Equality Forum (supra) is extracted

herein below:-

“74. As held in M. Nagaraj (supra), implementation of the scheme of reservation in promotion and collection of quantifiable data for the same to form an opinion on backwardness and inadequacy of representation and to harmonise the same with the constitutional limitation of efficiency in administration under Article 335 is a categorical imperative. Collection of data and the opinion based thereon rendered by the One Man Commission do not conform to the norms laid down by the Apex Court in M. Nagaraj. Therefore, there can be no manner of doubt that the exercise carried out by the One-Man Commission does not fulfil the mandate laid down in M. Nagaraj (supra). The cabinet memorandum prepared by the WPT and BC Department while forwarding the recommendation of the One Man Commission to the Cabinet for approval also completely missed the point by stating in paragraph 8

thereof that the general established fact is that SCs and STs are comparatively lagging behind the general category in many areas like justice, social, economic and political fields; otherwise, the reservation provision would not have come into existence in the Constitution. Therefore, according to the WPT and BC Department, further analytical study in this regard in the name of collecting quantifiable data would be denial of justice to the SCs and STs. I am afraid the WPT and BC Department had completely misdirected itself and had totally overlooked the mandate of the Apex Court in M. Nagaraj, which has vitiated the cabinet memorandum and the consequent approval of the Cabinet to such recommendation. Though State has made provision for reservation in promotion by enacting the 1978 Act, which was amended in the year 2012, implementation of the same would depend on acquiring of quantifiable data with regard to the 2(two) compelling reasons, which exercise has to be carried out cadre-wise in the context of the service where the cadre is placed. That having not been done, the report of the One-Man Commission would be of no legal consequence and would not enable the State to give effect to the provisions of the 1978 Act as amended in so far reservation in promotion is concerned. At the cost of repetition, it is reiterated that if the State desires to give effect to the provisions of the 1978 Act as amended in the year 2012 by providing for reservation in promotion, it would have to justify the same with the help of quantifiable data to show presence of the 2(two) compelling reasons, backwardness and inadequacy of representation, cadre-wise in the context of the service where the cadre is placed, which would then have to be harmonised with efficiency in administration as mandated under Article 335.”

10. Pursuant to the judgment dated 23.12.2015 in Equality Forum (supra), the Government of Assam in the Department of Welfare of Plains Tribes and Backward Classes issued the Office Memorandum No.TAD/BC/68/2011/Pt-I/207 dated 03.08.2016. The opening paragraph of the said Office Memorandum

dated 03.08.2016 provides that it was issued as per the guidelines laid down by the Hon'ble Supreme Court in M. Nagaraj (supra) and U.P. Power Corporation Ltd. (supra). Thereafter in the first paragraph itself reference is made to the report of the one man committee appointed by the Government of Assam for collecting quantifiable data which was assailed before the High Court in Equality Forum (supra) and accordingly, the provisions of the judgment dated 23.12.2015 in Equality Forum (supra) is referred and quoted. The subject matter of the Office Memorandum dated 03.08.2016 is stated to be "Review of Government Policy of Reservation in Promotion with reference to the Hon'ble Gauhati High Court judgments".

11. The Office Memorandum dated 03.08.2016 is extracted as below:

“ GOVERNMENT OF ASSAM

DEPARTMENT OF WELFARE OF PLAINS TRIBES AND BACKWARD CLASSES

DISPUR ::::ASSAM

No. TAD/BC/68/2011/Pt-I/207 dated Dispur 3 rd August, 2016

OFFICE MEMORANDUM

Subject: Review of Government Policy of Reservation in Promotion with reference to the Hon'ble Gauhati High Court judgments

With a view to bringing the policy of reservation in promotion for reserved categories in line with the directions of the Hon'ble High Court, Government have reviewed the existing procedure of effecting reservation in promotion and accordingly lays down the following guidelines to be followed while considering promotion in any cadre in any establishment

- i) The policy of reservation in promotion shall continue.*
- ii) Each establishment while taking up the process of promotion in a particular cadre of a service, shall examine the representation of SC, ST (P) and ST (H) candidates in the cadre in comparison with the prescribed percentage of reservation and calculate shortfall if any, in the cadre with reference to that particular year. Shortfall of reservation of a particular*

reserved category in a cadre means the difference between the total number of reserved posts for that category in the cadre and the number of persons of that category holding the posts in the cadre. While calculating the shortfall, all candidates belonging to the same category [SC or ST(P) or ST (H)] shall be taken into account irrespective of the mode of their entry into the cadre i.e. whether on account of seniority-cum-merit or merit cum seniority, as the case may be, or through any other process admissible in law or by way of reservation. If in a particular cadre, SCs and STs are not adequately represented and shortfall is found to exist in the cadre, they may be considered as backward insofar as that particular cadre is concerned. Such shortfall shall be filled up by the concerned category of incumbents within the zone of consideration either on account of seniority-cum-merit/ merit-cum-seniority or by way of providing reservation as the case may be, till the prescribed percentage in respect of the said category is achieved.

- iii) *If no eligible incumbent belonging to the shortfall category is available within the zone of consideration, this will further substantiate the status of backwardness and inadequate representation of category in the cadre and therefore the number of posts that are required to meet the calculated shortfall shall be kept vacant and the vacancy shall be carried forward and filled up in the next year. In case, sufficient number of SC or ST (P) or ST (H) candidates fit for promotion against reserved posts are not available and if the posts cannot be allowed to remain vacant on grounds of maintaining efficiency in administration, the appointing authority may with full justification, refer the vacancy to the Department of WPT and BC for de-reservation, subject to the condition that no candidate belonging to the category for which the post is reserved is available within the zone of consideration placed before the annual Selection Committee/ Departmental Promotion Committee for two consecutive years. In other words, the concerned Department may move proposal for de-reservation in the third year.*
- iv) *If an occasion arises during the promotion process, in which stipulated percentage in respect of reserved category is met, but in the gradation list/ seniority list there are candidates of reserved category who on merit is entitled to the promotion, his / her case shall be considered for promotion on merit if such candidate has not gained the seniority by way of any accelerated promotion earlier.*
- v) *As regards the question of maintaining administrative efficiency as required under Article 335 of the Constitution of India, Hon'ble High Court held that, ".....it should be assessed applying objective measurable standards." In that sense, the Annual confidential Reports (ACR)/ Annual Performance Appraisal Reports (APAR) of the incumbent along with the length of service, participation in training programs concerning job requirements, acquisition of degrees or diplomas or diplomas on subjects*

if mandatory to the job, should be considered as the yardstick of measuring efficiency.

- vi) *It shall be the responsibility of the concerned appointing authority to provide adequate information concerning the above to the Selection Committee (Department Promotion Committee) which shall evaluate all relevant parameters while making its recommendation.*

This shall come into force with immediate effect.

Sd/-

(Rajiv Kumar Bora IAS)

*Additional Chief Secretary to the Govt. of Assam, WT & BC
Department, Dispur.”*

12. The respondent No. 1 in WA No. 46/2023 namely, Shri Bhagwan Pator instituted WP(C) No. 5005/2016 assailing the Clauses (iii) and (iv) of the Office Memorandum dated 03.08.2016 on the ground that it would have been an effect of de-reservation in respect of promotion and secondly, promotion on the basis of merit which is otherwise due to the reserved category candidates would be taken away. The society Equality Forum which had earlier instituted the writ petition resulting in the judgment dated 23.12.2015 in Equality Forum (supra) had instituted WP(C) No. 5026/2016 assailing the entire Office Memorandum dated 03.08.2016 on the ground that although in paragraph 47 of the judgment in Equality Forum (supra), it was provided that the reservation in promotion would be kept in a dormant state till such time the quantifiable data is collected by the State in respect of backwardness and inadequacy of representation of the reserved candidates and also harmonize with the efficiency in administration as required under Article 335, but by the Office Memorandum, reservation in promotion is sought to be brought back without adhering to the requirement of collection of quantifiable data.

13. The two writ petitions being WP(C)No.5005/2016 and WP(C)5026/2016

was decided by the learned Single Judge by the Judgment and Order dated 06.06.2022.

14. Without going into the arguments and counter arguments that were raised by the parties in the aforesaid two writ petitions, we take note of the determinations that had been made by the learned Single Judge at paragraph 7 of the said judgment dated 06.06.2022 which are extracted as below:

“7. The aforesaid determinations can be summarized in the following manner:

- I. The Policy of the state in providing reservation in promotion with consequential seniority is discernable from Section 5 of the 1978 Act read with O.M. dated 12.03.2002.*
- II. The Office Memorandum dated 12.03.2002 shall hold the field till such policy is expressly repealed by the State.*
- III. O.M. dated. 03.06.2016 is notified laying procedure for collection of quantifiable data on Backwardness and inadequacy of representation and determining efficiency in administration while giving effect to such policy of providing reservation.”*

15. In paragraph D(iii) of the said judgment it has further been held as extracted:

“D(iii) That being the position, this court un-hesitantly holds that the policy of providing reservation in promotion with consequential seniority being holding the field as per O.M. dated 12.03.2002, the State is not within its competence and jurisdiction to deprive such service benefit to a meritorious reserved category candidates and that too without expressly bringing such policy by superseding the benefit granted under O.M. dated 12.03.2002.”

16. From the judgment and order dated 06.06.2022 of the learned Single Judge, it is discernible that in respect of the challenge to Clause (iv) of the Office Memorandum dated 20.01.2016, it has been provided that the policy of

providing reservation in promotion with consequential seniority having been holding the field as per the Office Memorandum dated 12.03.2002, the State is not within its competence and jurisdiction to deprive such benefit to a meritorious reserved category candidate and that too without expressly bringing such policy by superseding the benefits granted under the Office Memorandum dated 12.03.2002. With regard to the challenge of the society Equality Forum as regards the entire Office Memorandum dated 03.08.2016, it has been provided in the order dated 06.06.2022 of the learned Single Judge in paragraph 7(VIII) that given the dictum of the Honb'ble Supreme Court in *Jarnail Singh Vs. Laxmi Narayan Gupta* reported in *2018 (10) SCC 396*, the judgment dated 23.12.2015 rendered in Equality Forum (supra) has become redundant. In other words, by the judgment dated 06.06.2022 in WP(C) No. 5005/2016 and WP(C) No. 5026/2016, the learned Single Judge firstly held that Clause (iv) of the Office Memorandum dated 03.08.2016 has to be interpreted in a manner that the policy of reservation in promotion with consequential seniority benefit having been provided by the Office Memorandum dated 12.03.2002, it is beyond the competence of the State to deny service benefit to a meritorious reserved category candidate without superseding the earlier Office Memorandum dated 12.03.2002 and with regard to the claim of the society Equality Forum that although in paragraph 47 of the judgment in Equality Forum (supra) it has been provided that till the quantifiable data is collected the policy of reservation shall remain dormant but the requirement of keeping the policy dormant shall not hold good in view of the subsequent judgment of the Hon'ble Supreme Court rendered in *Jarnail Singh-I* (supra).

17. Smti. Ivy Gohain Dasgupta who is an unreserved category candidate and is a respondent in WP(C)No.2999/2020 had instituted IA(C) No.2033/2022 seeking

leave to file an appeal against the judgment and order dated 06.06.2022 in WP(C)No.5005/2016 and WP(C)5026/2016 on the ground that the conclusions arrived therein had adversely affected the legal rights of the said applicant. Along with the interlocutory application, a memo of writ appeal was also presented before the Registry which was not numbered at that stage. IA(C)No. 2033/2022 was given its consideration by the order dated 31.12.2023 granting leave to Smti. Ivy Gohain Dasgupta to prefer an appeal against the judgment and order dated 06.06.2006 in WP(C) No. 5005/2016 and WP(C) No. 5026/2016. In the circumstance WA No. 46/2023 had been registered. Some of the unreserved category candidates had instituted WA No.162/2023 also being aggrieved by the judgment and order dated 06.06.2022 in WP(C)No. 5005/2016 and WP(C) No. 5026/2016.

18. The society Equality Forum who were the writ petitioner in WP(C)No.5026/2016 had instituted WA No.239/2022 on their own grounds being aggrieved by the conclusion of the learned Single Judge as regards their plea that inspite of the judgment in Equality Forum (supra) in paragraph 47, reservation in promotion have not been kept in a dormant state and by the Office Memorandum dated 03.08.2016, reservation in promotion was allowed in some manner without collecting the necessary quantifiable date.

19. Mr. KN Choudhury, learned senior counsel for the appellant Smti. Ivy Gohain Dasgupta and the other appellants in WA No.162/2023 has raised the contention that by the Office Memorandum dated 29.12.2014 the consequential seniority meted to the reserved category candidates by the earlier Office Memorandum dated 12.03.2002 had been superseded, meaning thereby that the provisions of the consequential seniority pursuant to the enabling provisions of the Constitution (Eighty Fifth) amendment had been withdrawn. Accordingly,

Mr. KN Choudhury, learned Senior Counsel assails the conclusion of the learned Single Judge in the judgment and order dated 06.06.2022 in WP(C)No.5005/2016 and WP(C)5026/2016.

20. As regards Clause (iv) of the Office Memorandum dated 03.08.2016 it is the submission of Mr. KN Choudhury, learned senior counsel that as consequential seniority itself has been withdrawn by the State authority no further question remains on any claim of the reserved category candidates for consideration on merit pursuant to their consequential seniority. Mr. KN Choudhury, learned Senior Counsel substantiated his contentions by referring to Clauses 1.11 and 14 of the Office Memorandum dated 29.12.2014 that a conjoint reading of the provisions of the said two clauses would make it apparent that the earlier provision of consequential seniority meted by the Office Memorandum dated 12.03.2002 had been withdrawn. It is also the submission of Mr. KN Choudhury, learned Senior Counsel that consequential seniority is pursuant to an enabling provision under Article 16 (4A) of the Constitution as introduced by the Constitution (Eighty Fifth) amendment and, therefore, it being an enabling provision, it always remain a discretion of the State authorities to withdraw the consequential seniority as per their requirement.

21. Mr. DK Das, learned counsel for the respondent Sri Bhagwan Pator *per contra* contends that Clauses 1.11 and 14 of the Office Memorandum dated 29.12.2014 even on a conjoint reading do not indicate in any manner that the consequential seniority meted by the earlier Office Memorandum dated 12.03.2002 had been withdrawn.

22. Mr. MK Choudhury, learned Senior Counsel for the appellant Equality Forum on the other hand has raised the contention that the provisions of paragraph 47 of the judgment in Equality Forum (*supra*) [hereinafter for convenience referred

as Equality Forum-I(supra)] was explicit enough to provide that till such time the quantifiable data on the elements of backwardness and inadequacy in representation coupled with a harmonization of administrative efficiency under Article 335 is obtained, the provisions for reservation in promotion would remain dormant, and therefore as no collection of any such quantifiable data has been put on record, the embargo provided by paragraph 47 of the judgment in Equality Forum (supra) prevails and no such benefit of reservation in promotion can be given to any of the reserved category candidates let alone giving any consequential seniority.

23. Mr. DK Das, learned counsel for the respondents who represents all the reserved category candidates *per contra* raises the contention that in Jarnail Singh-I (supra) in paragraphs 32 and 36 the Supreme Court having provided that the provisions in M Nagaraj (supra), providing that the State has to collect quantifiable data showing backwardness of the Scheduled Caste and Scheduled Tribe being contrary to the *Nine Judges Bench in Indra Sawhany Vs. Union of India and Others reported in 1992 Supp.(3) SCC 217*, to be invalid to such extent that as there is a presumption of backwardness in favour of the Scheduled Caste and Scheduled Tribe communities, therefore there may not be a further requirement to obtain any quantifiable data to substantiate their backwardness.

24. The relevant portion of the paragraphs 32 and 36 of Jarnail Singh-I(supra) are extracted as below:

“32. It will be seen that this Bill contains two things that are different from Article 16(4-A) as already enacted. First and foremost, it clarifies that the Scheduled Castes and the Scheduled Tribes that are notified under Articles 341 and 342 shall be deemed to be backward, which makes it clear that no quantifiable data is necessary to determine backwardness.....”

36. 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.”

25. Mr. DK Das, learned counsel also refers to the judgment of the Supreme Court rendered in *M Nagaraj(supra)*, wherein in paragraph 47 it has been provided that the collection of data as regards inadequacy in representation of the reserved category candidates would have to be done cadre wise and submits that as the collection of data as regards inadequacy would have to be done cadre wise, therefore, there cannot be a centralized procedure set in place for collection of the data regarding inadequacy in representation and such inadequacy would have to be determined cadre wise and case wise in respect of every such promotion under consideration in respect of any given cadre.

26. It is the further contention of Mr. DK Das, learned counsel for the reserved category candidates that the Hon’ble Supreme Court in *B.K. Pavitra and others Vs. Union of India and others*, reported in (2019) 16 SCC 129, in paragraph 126 had held that the framers of the Constitution did not define what is meant by the phrase “efficiency of administration” and that Article 335 cannot be construed on the basis of a stereotypical assumption that roster point promotees drawn from the Scheduled Castes and Scheduled Tribes are not efficient or that efficiency is reduced by appointing them. It is also provided in paragraph 116 of the said judgment that no citizen can be discriminated on account of religion or race.

27. Paragraphs 116 and 126 of *B.K. Pavitra (supra)* are extracted as below:

“116. By recognising that formal equality of opportunity will be insufficient in fulfilling the transformative goal of the Constitution, these members recognised that the conception of equality of opportunity must recognise and account for existing societal inequalities. The most revealing debates as to how the Constituent Assembly understood equality of opportunity under the Constitution took place on 30-11-1948. Members debated draft Article 10 (which would go on to become Article 16 of the Constitution). In these debates, some members understood sub-clause (4) (providing for reservations) as an exception to the general rule of formal equality enunciated in sub-clause (1). Illustratively, an articulation of this position was made by Mohammad Ismail Khan, who stated : (CAD Vol. VII)

“... there can be only one of these two things—either there can be clear equal opportunity or special consideration. Article 10 says there shall be equality of opportunity, then it emphasises the fact by a negative clause that no citizen shall be discriminated on account of religion or race. It is quite good, but when no indication is given whether this would override Article 296 or Article 296 is independent of it, we are certainly left in the lurch. What would be the fate of the minorities? [Article 296 stated that special considerations shall be shown to minorities to ensure representation in the services]...”

126. The Constitution does not define what the Framers meant by the phrase “efficiency of administration”. Article 335 cannot be construed on the basis of a stereotypical assumption that roster point promotees drawn from the SCs and STs are not efficient or that efficiency is reduced by appointing them. This is stereotypical because it masks deep-rooted social prejudice. The benchmark for the efficiency of administration is not some disembodied, abstract ideal measured by the performance of a qualified open category candidate. Efficiency of administration in the affairs of the Union or of a State must be defined in an inclusive sense, where diverse segments of society find representation as a true aspiration of governance by and for the people. If, as we hold, the Constitution mandates realisation of substantive equality in the engagement of the fundamental rights with the directive principles, inclusion together with the recognition of the plurality and diversity of the nation constitutes a valid constitutional basis for defining efficiency. Our benchmarks will define our outcomes. If this benchmark of efficiency is grounded in exclusion, it will produce a pattern of governance which is skewed against the marginalised. If this benchmark of efficiency is grounded in equal access, our outcomes will reflect the commitment of the Constitution to produce a just social order. Otherwise, our past will haunt the inability of our society to move away from being deeply unequal to one which is founded on liberty and fraternity. Hence, while interpreting Article 335, it is necessary to liberate the concept of efficiency from a one-sided approach which ignores the need for and the positive effects of the inclusion of diverse segments of society on the efficiency of

administration of the Union or of a State. Establishing the position of the SCs and STs as worthy participants in affairs of governance is intrinsic to an equal citizenship. Equal citizenship recognises governance which is inclusive but also ensures that those segments of our society which have suffered a history of prejudice, discrimination and oppression have a real voice in governance. Since inclusion is inseparable from a well-governed society, there is, in our view, no antithesis between maintaining the efficiency of administration and considering the claims of the SCs and STs to appointments to services and posts in connection with the affairs of the Union or of a State."

28. Accordingly, it is the contention of Mr. DK Das, learned counsel for the reserved category candidates that the Hon'ble Supreme Court of India having done away with the requirement of collection of quantifiable data regarding backwardness and also having held that collection of quantifiable data regarding inefficiency in administration cannot be on a stereotypical assumption that reserved category candidates are otherwise inefficient in administration, what further remains is the collection of quantifiable data in respect of adequacy or inadequacy of representation of reserved category candidates. But, again the collection of quantifiable data in respect of adequacy or inadequacy of representation had also been circumscribed by the Hon'ble Supreme Court in *Jarnail Singh and Others Vs. Lachmi Narain Gupta and Others* in Civil Appeal No. 629/2022 (*Jarnail Singh-II*) and therefore such collection of quantifiable data would now have to be understood as per the circumscribed requirement as provided by the Hon'ble Supreme Court. As the circumscribed requirement is to collect quantifiable data cadre wise and service wise, therefore, it would be more prudent if instead of undertaking an exercise to obtain the quantifiable data in a comprehensive manner applicable for the whole of the State in respect of all such cadres and services that are in place, the same purpose can be achieved if the Departmental Promotion Committee while considering any promotion to the respective cadres, before proceeding with the promotion,

obtains the quantifiable data regarding adequacy or inadequacy of representation of reserved category candidates in respect of such promoted cadre for which the promotion process would be undertaken.

29. With regard to the contention raised by Mr. KN Choudhury, learned senior counsel for the appellant Smti. Ivy Gohain Dasgupta and the other appellants that the provision for consequential seniority having been provided by the Constitution (Eight Fifth) amendment, which itself is an enabling provision, it is always the discretion of the State authorities who provides for such consequential seniority to also withdraw the provision of the consequential seniority, it is taken note that an enabling provision in a statute is understood to be a provision which does not provide for any specific provision, but the statutory provision enables the executive to provide for such provision, if otherwise advised or justified under the law, meaning thereby that it is a discretion vested on the executive authority through delegation to either provide for or not to provide for such provisions. The only compelling circumstance that remains would be that once in exercise of the enabling provision if a particular provision is provided for, till such provision remains in place, it would be binding for all as regards the requirement to implement such provision. But, at the same time, in the same manner in which a discretion was vested in the executive authorities to provide for such provision, if so advised and justified under the law, equally it would also be open for the State authorities to withdraw such provision as per their own discretion again subject to if justified in the circumstance as well as under law. From such point of view, we are in agreement with Mr. KN Choudhury, learned Senior Counsel that the Office Memorandum dated 29.12.2014 could have also withdrawn the benefit of consequential seniority meted to the reserved category candidate by the earlier

Office Memorandum dated 12.03.2002. But at the same time, although the enabling provision enables the State authorities to withdraw such benefit, but what would further have to be examined as to whether the Office Memorandum dated 29.12.2014 in fact withdraws the benefit of consequential seniority meted by the Office Memorandum dated 12.03.2002.

30. To substantiate the contention that the Office Memorandum dated 29.12.2014 had in fact withdrawn the consequential seniority earlier given by the Office Memorandum dated 12.03.2002, Mr. KN Choudhury, learned Senior Counsel relies upon the Clauses 1.11 and 14 of the Office Memorandum dated 29.12.2014. A reading of Clause 1.11 of the Office Memorandum dated 29.12.2014 makes it discernible that the rosters are in aid to determine the entitlement of different categories with regard to the quota reserved for them, but they are not entitled to determine the seniority. In other words, we are required to interpret the meaning of the word 'they' appearing in Clause 1.11.

31. The expression 'they' refers to the earlier sentence in Clause 1.11 i.e. that the rosters are an aid to determine the entitlement of different categories. In other words, the expression 'they' refers to the rosters. The first paragraph of the Office Memorandum dated 29.12.2014 provides that the Office Memorandum had been issued consequent upon the amendment to the Act of 1978 and the acceptance of the recommendation of the one man commission constituted by the Government of Assam.

32. We have taken note that the recommendation of the one man commission referred in the Office Memorandum dated 29.12.2014 had in the meantime been held to be unacceptable as per the judgment of this Court in Equality Forum (supra). At this stage, we take note that in fact there are two judgments available, both in respect of petitions instituted by the society Equality Forum.

One such is the judgment dated 23.12.2015 rendered in WP(C) No. 1560/2015 and WP(C) No. 2680/2015, reported in 2016 (1) GLT 710 and the other is the judgment and order dated 06.06.2022 in WP(C) No. 5005/2016 and WP(C) No. 5026/2016. For clarity and convenience, we refer the judgment rendered in Equality Forum (supra) reported in 2016 (1) GLT 710 to be Equality Forum-I and the judgment dated 06.06.2022 in WP(C) No. 5005/2016 and WP(C) No. 5026/2016 to be Equality Forum-II.

33. In other words, the purport of the Office Memorandum dated 29.12.2014 has to be understood that it was issued consequent upon the amendment to the Act of 1978. As noted above, by the Assam Act XIX of 2012, the Act of 1978 had been amended by which Section 5A thereof had been introduced. It had also been taken note hereinabove that Section 5A of the Act of 1978 provides for post based roster for implementing reservation in promotion.

34. As the Office Memorandum dated 29.12.2014 had been issued consequent upon the amendment by which Section 5A of the Act of 1978 had been introduced, the word 'roster' in Clause 1.11 and the further provision that the roster do not intend to determine seniority would have to be understood in the context of Section 5A. All that Section 5A of the Act of 1978 provides is that earlier the reservation in promotion was given effect by following the procedure of vacancies, but upon introduction of Section 5A, the same would be done by following the roster point in the roster scale.

35. If a reservation in promotion is given effect or implemented based upon the roster point in the roster scale, there is always a possibility that a reserved category candidate may be promoted against the post which may be a little higher up in the roster scale as the said roster point post may have fallen vacant. In that circumstance, the provision of Clause 1.11 would have to be

understood that the seniority referred therein related to the roster would mean that if a reserved category candidate is promoted against a roster post which would be a little higher in the roster scale in comparison to the other promotees who may be a little lower in the roster scale, the same will not entail any seniority over the others, who were also promoted in the same process but placed perhaps a little lower in the roster scale. In other words, placement of a reserved category candidate in a given roster point irrespective of the position would not determine the seniority of such candidates and the seniority would be determined otherwise under the law depending on the manner and circumstance in which the promotion was given effect.

36. It being the meaning of the provision of Clause 1.11, it must be understood that Clause 1.11 of the Office Memorandum dated 29.12.2014 does not relate to any consequential seniority of a reserved category candidate. In the context of the meaning attributed to Clause 1.11 in the manner indicated above, when we read the provision of Clause 14 of the Office Memorandum dated 29.12.2014, it is noticed that the said Clause provides that all existing orders on the subject are deemed to have been amended to the extent as provided in the said Office Memorandum. The expression 'are deemed to have been amended to the extent hereinabove' would mean that it also includes the extent as provided in Clause 1.11 meaning thereby that the aspect of determination of seniority provided therein is not related to any consequential seniority, but it relates to a provision that by following the roster point system, if a reserved category candidate is promoted in a post, which is otherwise a little higher in the roster scale, it being positioned in the higher in the roster scale, will not determine the seniority of that person over others who may be promoted against a post in the roster scale which may be a little lower.

37. Accordingly, it would have to be concluded that a conjoint reading of Clause 1.11 and Clause 14 of the Office Memorandum dated 29.12.2014 would mean that the consequential seniority that was otherwise meted by the Office Memorandum dated 12.03.2002 had not been withdrawn.

38. With regard to the contention of Mr. MK Choudhury, learned senior counsel for the petitioner in WA No. 239/2022, we take note that as per paragraph 47 of the judgment dated 23.12.2015 in Equality Forum-I (supra) there is an expressed prohibition by a judicial pronouncement that till such quantifiable data on backwardness, inadequacy of the representation and inefficiency in administration is collected no reservation in promotion in favour of the reserved category candidates can be further carried forward. But paragraph 74 of the judgment dated 23.12.2015 in Equality Forum-I (supra) provides for collection of quantifiable data in respect of backwardness of the reserved category candidates as well as inadequacy of their representation which again would have to be determined cadre wise and service wise in the respective departments and further, upon such data being obtained there would be a requirement of harmonization with the efficiency in administration as provided under Article 335 of the Constitution of India. But the requirement of the provisions in the judgment dated 23.12.2015 in Equality Forum-I (supra) would again have to be read in the context of the submissions of Mr. DK Das, learned counsel for the unreserved category candidates that in paragraph 36 of Jarnail Singh-I (supra) there is a presumption in law in favour of backwardness of the reserved category candidates and in view of such presumption in law there is no further requirement of obtaining any quantifiable data to substantiate the backwardness.

39. The said provision being rendered by a Constitution Bench judgment of

the Hon'ble Supreme Court, when read together with the provisions of the judgment in Equality Forum-I (*supra*) it has to be understood that there would be no further requirement under the law for any collection of quantifiable data to substantiate the backwardness of the reserved category candidates inasmuch as there is a presumption in law as regards the existence of backwardness. Further, we also have to take note that in paragraph 47 of the judgment of Hon'ble Supreme Court in *Jarnail Singh-II (supra)* it has been provided that the adequacy or inadequacy of representation of reserved category candidates would have to be determined cadre wise, service wise and in the given relevant department. The said provision is also consistent with the provisions in paragraph 74 of the judgment dated 23.12.2015 in Equality Forum-I (*supra*) that the collection of quantifiable data regarding adequacy or inadequacy of representation would have to be determined cadre wise, service wise and department wise.

40. If the determination of the quantifiable data is for adequacy or inadequacy of representation of the reserved category candidates in a given cadre of a service in a particular department of the Government, we are in agreement with the contentions raised by Mr. DK Das, learned counsel for the respondent Sri Bhagwan Pator that it would be more prudent and appropriate to undertake such exercise through the Departmental Promotion Committee (in short, DPC) itself before embarking upon a promotion process for a given cadre. The same would be prudent *inasmuch as* the DPC will have all the data before it as to the cadre strength of the promoted cadre where the promotion is to be considered and out of the total cadre strength how many posts in the cadre are to be earmarked for the reserved category candidates and out of the earmarked reserved category posts how many posts are being occupied by the reserved

category candidates. In other words, if the reserved category candidates are occupying all the posts earmarked for the reserved category candidates in a given cadre it can be easily understood that in that given cadre there is an adequacy of the representation of the reserved category candidates and in the event the number of the reserved category candidates in the cadre is less than the number of posts earmarked for the reserved category candidates, it has to be understood that there is an inadequacy of representation in that given cadre. If the determination would be made in the above manner, we are of the view that it would be more appropriate and apposite for the DPC to make such determination. But again such determination would have to be made before initiating the actual promotion process.

41. As regards the third requirement of obtaining quantifiable data that it should also harmonize with the inefficiency in administration, we take note of the provisions of the judgment of the Hon'ble Supreme Court in *B.K. Pavitra-II (supra)* wherein in paragraph 126 it has been provided that inefficiency in administration referred to Article 335 cannot be construed on the basis of a stereotypical assumption that roster point promotees drawn from the Scheduled Castes and Scheduled Tribes communities are not efficient or that efficiency is reduced by appointing them and secondly, the provisions in paragraph 116 of the said judgment wherein by referring to the Constituent Assembly debates in respect of the position expressed by Mohammad Ismail Khan no citizen shall be discriminated on account of religion or race meaning thereby that an interpretation is sought to be given that, if across the board the reserved category candidates are construed to be inefficient or contributing to the inefficiency in the administration without specific factual determination, it would be a discrimination on account of race which would be impermissible under

Article 15 of the Constitution of India.

42. As a determination of the quantifiable data on the inefficiency in administration across the board in respect of reserved category candidates would amount to a discrimination on account of race which is prohibited under Article 15 of the Constitution of India, we also have to hold that the requirement of obtaining quantifiable data on effect of inefficiency in administration because of the reservation in promotion meted to the reserved category candidates would also be a violation of Article 15 of the Constitution of India and hence, impermissible.

43. As the three contentions raised by Mr. MK Choudhury, learned Senior Counsel for the petitioner in WA No. 239/2022 are answered as indicated above, meaning thereby that as per the judgment of the Hon'ble Supreme Court rendered in paragraph 36 in the Jarnail Singh-I (supra) there is no requirement of obtaining quantifiable data as regards backwardness and as per the judgment rendered by the Hon'ble Supreme Court in paragraphs 116 and 126 of B.K. Pavitra-II (supra) quantifiable data on inefficiency in administration across the board in respect of the reserved category candidates cannot be obtained and further as the quantifiable data in respect of adequacy or inadequacy of the representation of the reserved category candidates can also be done at the level of the DPC in respect of the cadre for which the promotion process had been initiated, we are of the view that the prohibition imposed by paragraph 47 in judgment dated 23.12.2015 in Equality Forum-I (supra) would have to be understood in the manner indicated. In other words as there would not be any requirement of obtaining quantifiable data on backwardness and inefficiency in administration and obtaining the data regarding adequacy or inadequacy of the representation can be done at the level of the DPC, the prohibition imposed by

paragraph 47 in Equality Forum-I (supra) would now no longer hold good subject to the condition that the DPC before embarking upon each and every promotion process undertakes an exercise to determine the adequacy or inadequacy of representation of the reserved category candidates in that particular given cadre where promotion is sought to be made.

44. Now, as regards the interpretation of Clause (iv) of the Office Memorandum dated 03.08.2016 we again quote the said provisions which is as below:

iv) If an occasion arises during the promotion process, in which stipulated percentage in respect of reserved category is met, but in the gradation list/ seniority list there are candidates of reserved category who on merit is entitled to the promotion, his / her case shall be considered for promotion on merit if such candidate has not gained the seniority by way of any accelerated promotion earlier.

45. A reading of the Clause (iv) makes it discernable that if an occasion arises during the promotion process in which stipulated percentage in respect of reserved category is met but in the gradation list/seniority list there are candidates of reserved category candidates who on merit are also entitled to a promotion, his/her cases are to be considered for promotion on merit only if such candidate has not given seniority by way of any accelerated promotion. It would mean that if a reserved category candidate is seeking for a promotion against any post in the promoted cadre which is earmarked for a reserved category candidate, he would be entitled to the benefits of consequential seniority as provided in the Office Memorandum dated 12.03.2002 but on the other hand if the posts earmarked for the reserved category candidates are already exhausted by being occupied by the reserved category candidates but in the gradation lists there remains some further reserved category candidates, they can compete for promotion against the unreserved posts but in such event

they would not be entitled to the benefits under the consequential seniority and on the other hand if on the basis of their seniority otherwise i.e. without taking note of the consequential seniority they are within the zone of consideration, such candidates can be considered for promotion.

46. Upon the issues being raised in the present appeals having been decided in the manner indicated above, it is further provided that the decisions rendered in the present judgment in WA No. 46/2023, WA No. 162/2023 and WA No. 239/2022 would prevail over all such provisions of the learned Single Judge in the judgment dated 06.06.2022 in WP(C) No. 5005/2016 and 5026/2016 but in respect of any other provisions which may not be contrary or inconsistent with the provisions of this judgment the same may prevail, but with a further clarification that if any such provisions of the judgment of the learned Single Judge is in conflict or contradictory to any of the provisions in the present judgment, such provisions and the judgment of the learned Single Judge stands modified accordingly.

47. It is stated that in the meantime by the Office Memorandum dated 18.01.2023 the provisions of consequential seniority has been withdrawn and the catch up principle has been reintroduced. We are not observing anything on merit on the said Office Memorandum and as we have been told that the said Office Memorandum is under challenge in separate writ petitions which shall be determined on its own merit, the consequences of such Office Memorandum shall also be subject to what may be provided in such proceedings.

Writ appeals stand disposed of in the above terms.

JUDGE

JUDGE

Comparing Assistant