

GAHC010193002013



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

Case No. : WP(C)/4034/2013

EQUALITY FORUM

REP. BY ITS SECRETARY, SHRI BHABEN KALITA S/O LT. KASI KALITA R/O
NABIN NAGAR, PRABHATI APARTMENTS, HOUSE NO. 4,
GUWAHATI-781024, DIST. KAMRUP, ASSAM.

VERSUS

THE STATE OF ASSAM AND 7 ORS

REP. BY THE CHIEF SECRETARY TO THE GOVT. OF ASSAM, DISPUR,
GUWAHATI-781006.

2:THE PRINCIPAL SECRETARY TO THE GOVT. OF ASSAM

PERSONNEL B DEPARTMENT

DISPUR

GUWAHATI-781006.

3:THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM

LEGISLATIVE DEPARTMENT

DISPUR

GUWAHATI- 781006.

4:THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM

IRRIGATION DEPARTMENT

DISPUR

GUWAHATI- 781006.

5:THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM

WATER RESOURCES DEPARTMENT

DISPUR

GUWAHATI- 781006.

6:THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM

PUBLIC WORKS DEPARTMENT
DISPUR
GUWAHATI- 781006.

7:THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM

DEPARTMENT OF WPT AND BC
DISPUR
GUWAHATI- 781006.

8:THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM

JUDICIAL DEPARTMENT
DISPUR
GUWAHATI-781006.

9:SRI DINABANDHU DEKA
S/O LATE GOPAL CHANDRA DEKA
RESIDENT OF BHETAPARA
GUWAHATI-781028
ASSAM.

10:SRI JAGDISH PRASAD HARIJAN
S/O BHOLA BASFORE
R/O HOUSE NO-11
CHANDMARI COLONY
PUB SARANIA
GUWAHATI-3
ASSAM.

11:SRI DEEP PEGU
SON OF DR NUMAL CHANDRA PEGU
RESIDENT OF MILAN NAGAR
DIBRUGARH.

12:SRI SUSONG PRATAP SING TERANG
ASSISTANT ENGINEER IN THE OFFICE OF THE ADDITIONAL CHIEF
ENGINEER
HILLSR and B. S/O LATE JOY SING TERANG
R/O LORULANGSO
WARD NO. 5
DIPHU TOWN
KARBI ANGLONG
DISTRICT-KARBI ANGLONG
ASSAM.

13:SRI BUDDHO TERON
ASSISTANT ENGINEER IN THE OFFICE OF THE EXECUTIVE ENGINEER
HILLS R and B. S/O LATE BIREN TERON
R/O RANGKHELANG
WARD NO. 8
DIPHU TOWN
KARBI ANGLONG
DISTRICT-KARBI ANGLONG
ASSAM.

14:SRI LUNSE MILLICK
ASSISTANT ENGINEER IN THE OFFICE OF THE ADDITIONAL CHIEF
ENGINEER
HILLSR and B. S/O LATE DURMEN MILLICK
R/O RONGMANVE
WARD NO.5
DIPHU TOWN
KARBI ANGLONG
DISTRICT-KARBI ANGLONG
ASSAM.

15:SRI RAJENDRA PRASAD DAS
EXECUTIVE ENGINEER BASKA WATER RESOURCES DIVISION
MUSSALPUR.

16:SRI PRAGYA NANDA DAS
EXECUTIVE ENGINEER
SILCHAR WATER RESOURCES DIVISION
SILCHAR.

17:SRI RANJIT KR. DEKA
EXECUTIVE ENGINEER
MAJULI WATER RESOURCES DIVISION
MAJULI.

18:SRI SWAPAN KUMAR DAS
SON OF LATE PRAKASH CH. DAS
HOUSE NO-7
SRI RAM PATH
NANDANPUR
P.O- JAPORIGOG
P.S- DISPUR
KAMRUPM
ASSAM.

19:SHRI LAKHINANDAN PEGU
SON OF SRI MONI KANTA PEGU

RESIDENT OF HENGRABARI
P.O- DISPUR
DISTRICT- KAMRUP
ASSAM.

20:SRI NARAYAN PRASAD DAS
SON OF LATE HOMESWAR DAS
RESIDENT OF RAHA
P.O- RAHA
P.S- RAHA
DISTRICT- NAGAON
ASSAM

Advocate for the Petitioner : MR.M K CHOUDHURY

Advocate for the Respondent : GA, ASSAM

Linked Case : WP(C)/2752/2013

MD. SHAKEEL SAADULLAH and ANR
S/O MD. SADULLAH
R/O LAKHIMI NAGAR
HATIGAON
GUWAHATI

2: GAUTAM DAS GUPTA
S/O LT. J.N. DAS GUPTA
R/O A.K. AZAD ROAD
REHABARI
GUWAHATI
VERSUS

THE STATE OF ASSAM AND 5 ORS
REPRESENTED BY THE CHIEF SECRETARY TO THE GOVT. OF ASSAM
DISPUR
GHY-6

2:THE COMMISSIONER SECRETARY TO THE GOVT. OF ASSAM
FINANCE TAXATION DEPARTMENT
DISPUR
GHY-6

3:THE PRINCIPAL SECRETARY TO THE GOVT. OF ASSAM
PERSONNEL B DEPARTMENT
DISPUR
GHY-6

4:THE COMMISSIONER and SECRETARY TO THE GOVT. OF ASSAM
LEGISLATIVE DEPARTMENT

DISPUR

GHY-6

5:THE COMMISSIONER and SECRETARY TO THE GOVT. OF ASSAM
DEPARTMENT OF WPT AND BC

DISPUR

GHY-6

6:THE COMMISSIONER and SECRETARY TO THE GOVT. OF ASSAM
JUDICIAL DEPARTMENT

DISPUR

GHY-6

Advocate for : U K NAIR

Advocate for : SC

FINANCE appearing for THE STATE OF ASSAM AND 5 ORS

For the Petitioners : Mr. M.K. Choudhury, Sr. Adv.

Mr. M. Sarma, Adv.

Mr. G. Baishya, Adv.

For the Respondents:

Mr. D. Mazumdar, AAG, Assam.

Mr. D. K. Das, Adv.

Mr. H. Betala, Adv.

BEFORE

**HON'BLE THE CHIEF JUSTICE
THE HON'BLE MR. JUSTICE SUMAN SHYAM**

Date of hearing : 02/04/2024.

Date of judgement : 23/04/2024.

JUDGEMENT AND ORDER (CAV)

Suman Shyam, J

1. The writ petitioner in WP(C) 4034/2013, viz. "Equality Forum" is a society registered under the Societies Registration Act, 1960 and has approached this Court by filing the above noted writ petition with the following prayers :-

"(I) To issue a writ in the nature of Certiorari for setting aside and quashing the impugned Assam Scheduled Caste and Scheduled Tribes (Reservation of vacancies in Service and Post) (Amendment) Act, 2012;

(II) *To issue a writ in the nature of Certiorari for setting aside and quashing the impugned provision of Section 5 of the Assam Scheduled Caste and Scheduled Tribes (Reservation of vacancies in Service and Post) Act 1978;*

(III) *To issue a writ in the nature of Mandamus directing the respondent authorities to comply with the requirements of Article 16(4) A of the Constitution of India as well as the Apex Court's pronouncements as regard conducting afresh of the preliminary exercise for forming of opinion and for identifying the need of reservation and thereafter, on being satisfied as so, proceed for making laws for providing reservation (if required) in the matters of promotion in the Irrigation, P.W.D., Water Resources Departments to the cadre of Executive Engineers, Superintending Engineers, Additional Chief Engineers in the Department of Irrigation and to the cadres of Executive Engineers, Superintending Engineers, Additional Chief Engineers in the Departments of Water Resources, Public Works Department;*

(IV). *To issue a writ in the nature of Mandamus directing the respondent authorities to forbear from making any provisions for reservations in the present promotion process already initiated in the Departments of Irrigation, Public Works Department and Water Resources Department, Assam to the aforesaid cadres of Executive Engineers, Superintending Engineers, Additional Chief Engineers in the Department of Irrigation and to the cadres of Executive Engineers, Superintending Engineers, Additional Chief Engineers in the Departments of Water Resources, Public Works Department till the required exercise to identify the need for reservation is not carried out in terms with the mandate of Article 16(4)A of the Constitution of India."*

2. Writ petition No. WP(C) 2752/2013 has been preferred by 2(two) individual petitioners who are serving under the establishment of Commissioner of Taxes, Assam. In this writ petition also, the petitioners have prayed for quashing the *Assam Scheduled Caste and Scheduled Tribes (Reservation of vacancies in Service and Post) (Amendment) Act, 2012 (herein after referred to as the Amended Act of 2012)* as well as the provision of section 5 of the parent Act, viz. *Assam Scheduled Caste and Scheduled Tribes (Reservation of*

Vacancies in Service and Post) Act, 1978 (herein after referred to as the Act of 1978); for setting aside the notifications dated 08/03/2013 and 13/03/2013 notifying Post Based Roster Register for the cadre of Deputy Commissioner of Taxes in the department of Finance (Taxation) as well as for other consequential reliefs.

3. From the pleadings in both the writ petitions, it is apparent that the primary challenge in both the writ petitions is in respect of section 5 of the Act of 1978 as well as section 5A of the Amendment Act of 2012. According to the writ petitioners, the State had failed to gather quantifiable data before enacting either section 5 of the Act of 1978 or section 5A of the Amendment Act of 2012 as regards adequacy of representation of Scheduled Caste (SC) and Scheduled Tribe (ST) candidates in service and also pertaining to maintenance of efficiency in administration, which were *sin-e-qua-non* for making provision for reservation in promotion as per the decision of the Hon'ble Supreme Court rendered in the case of ***M. Nagraj Vs. Union of India*** reported in **(2006) 8 SCC 212** as well as the case of ***Jarnail Singh Vs. Lachhmi Narain Gupta & others*** reported in **(2018) 10 SCC 396 (in short Jarnail Singh –I)**. As such, submit the petitioners, the statute is liable to be struck down on such ground and the departmental authorities are also liable to be directed to first collect quantifiable data on the question of adequate representation of the reserved category candidates in service and also on the point of efficiency in administration before enacting any law for providing reservation in promotion.

4. Mr. M.K. Choudhury, learned senior counsel appearing for the writ petitioner in WP(C) 4034/2013 has addressed elaborate arguments by referring to the decision in the case of ***M. Nagraj (Supra)*** and ***Jarnail Singh –I (Supra)*** to contend that the enactments under challenge in the writ petition are clearly in violation of the law laid down by the Supreme Court in the aforementioned cases. It is also the submission of Mr. Choudhury that the issue raised by the Writ Petitioners in this proceeding has been substantially addressed in an earlier decision of this Court rendered in the case of ***Equality Forum Vs. State of Assam*** reported in **(2016) 1 GLT 710** wherein, the learned Single Judge had interfered with the report of the "One Man Commission" constituted for the purpose of submitting a report on collection of "quantifiable data" and also the consequential Office Memorandum dated 29/12/2014 prescribing the procedure to provide reservation in promotion on the ground that the same were in violation of the law laid down in the case of ***M. Nagraj***

(Supra). Accordingly, a direction was issued to the State Government to carryout the exercise of collection of “quantifiable data” and till such time the exercise is completed, the provisions of the Act of 1978 providing for reservation in promotion is to remain in dormant state. Mr. Choudhury submits that the decision in **Equality Forum (Supra)** establishes beyond doubt that unless a proper mechanism for collection of “quantifiable data” on the relevant parameters is put in place by the State Government, the provisions of the Act of 1978, in so far as, reservation in the matter of promotion is concerned, cannot be implemented.

5. Mr. G. Baishya, learned counsel appearing for the writ petitioners in WP(C) 2752/2013 has supported the arguments advanced by Mr. M.K. Choudhury, learned senior counsel appearing in the other writ petition and has further argued, by relying upon the decision of the Supreme Court rendered in the case of **U.P. Power Corporation Limited Vs. Rajesh Kumar and others** reported in **(2012) 7 SCC 1** that the State has to form its opinion as regards the requirement of reservation in promotion under Article 16 (4-A) of the Constitution of India based on “quantifiable data” as the same is the mandate of the Supreme Court in the case of **M. Nagraj (Supra)**. He has further argued that any legislation which does not conform to the law laid down in the case of **M. Nagraj (Supra)** would be liable to struck down by the Court.

6. By referring to the decision in **Jarnail Singh-I (Supra)** and **B. K. Pavitra & others Vs. Union of India & others** reported in **(2019) 16 SCC 129**, Mr. Baishya has submitted that the Court would be justified in interfering with any legislation on reaching a conclusion that the basis of providing reservation in promotion and consequential seniority is done in an arbitrary manner and without any reasonable basis.

7. The arguments advanced by the learned counsel for the writ petitioners have been strongly refuted by Mr. D. Mazumdar, learned Additional Advocate General, Assam appearing for the State, who has argued that there can be no quarrel with the proposition of law laid down in the case of **M. Nagraj (Supra)**, **Jarnail Singh-I (Supra)**, **U.P. Power Corporation Ltd. (Supra)** as well as **B. K. Pavitra (Supra)** nor is it the stand of the State that reservation in promotion and consequential seniority can be provided without collecting “quantifiable data” pertaining to the adequacy of representation in service and also the factor of efficiency in administration. According to Mr. Mazumdar, being conscious of the law laid

down in the case of ***M. Nagraj (Supra)*** and in view of the observations made by the learned Single Judge in the case of ***Equality Form-I (Supra)***, the Government of Assam had issued Office Memorandum bearing No. TAD/BC/68/2011/Pt-I/207 dated 03/08/2016 laying down the procedure and guidelines for effecting reservation in promotion. Mr. Mazumdar submits that the said notification contains adequate mechanism for collection of “quantifiable data” as per the law laid down in the case of ***M. Nagraj (Supra)*** and, therefore, at this point of time, there is no justifiable ground for this Court to interfere in the matter.

8. The learned AAG, Assam, has further argued that the petitioners in WP(C) 4034/2013 i.e. “Equality Form” had unsuccessfully challenged the notification dated 03/08/2016. He submits that the said notification was not only upheld by the learned Single Judge in the case of ***Bhagawan Pator and another Vs. State of Assam and others*** reported in ***(2022) 3 GLT 530*** but the decision of the learned Single Judge had also been affirmed by the Division Bench in the case of ***Ivy Gohain Dasgupta & Ors Vs. Bhagawan Pator & Ors*** reported in ***2023 (4) GLT 864***.

9. Contending that the decision rendered in the case of ***Ivy Gohain Dasgupta (Supra)*** having attained finality and the Division Bench having interfered with the observations made by the learned Single Judge in para 47 of ***Equality Form-I (Supra)***, there is no impediment for the departments to proceed now with reservation in promotion in terms of the O.M. dated 03/08/2016 by giving consequential seniority. To that extent, submits Mr. Mazumdar, there is no merit in these writ petitions and the same are liable to be dismissed.

10. Mr. D.K. Das, learned counsel for the private respondents in WP(C) No. 4034/2013 has also strongly opposed the prayers made in the writ petitions by contending that law is firmly settled that Article 16 (4-A) is merely an enabling provision and it will be open for the State to provide adequate legal frame work for granting reservation in promotion. In the present case, submits Mr. Das, the State of Assam had not only issued various Office Memorandums from time to time so as to provide for reservation in promotion but had also issued OM dated 03/08/2016 laying down the mechanism for collecting “quantifiable data” by following the decision in ***M. Nagraj (Supra)***. Contending that the mechanism laid down by the OM dated 03/08/2016 is also in consonance with the decision of the Supreme Court

rendered in the case of ***Indra Sawhney Vs. Union of India and others*** reported in ***(1992) Suppl-3 SCC 217*** as well as the decision in the case of ***R. K. Sabarwal Vs. State of Punjab*** reported in ***AIR 1995 SC 1371***, which had introduced post based reservation in place of cadre based reservation, Mr. Das has argued that the contentions advanced by the petitioners' counsel are wholly untenable in law and hence, liable to be rejected by this Court.

11. We have considered the submissions made at the Bar and have also carefully gone through the materials available on record. The core questions arising for determination in both the Writ Petitions are as to whether, the State Government has come up with adequate mechanism for collecting "quantifiable data" for providing reservation in promotion and consequential seniority to SC/ST candidates in terms of the decisions rendered in ***M. Nagraj (Supra)*** and ***Jarnail Singh-I (Supra)*** and if not, whether the impugned statute is liable to be quashed/struck down on such count? The answer to the said questions, in our opinion, would primarily depend on the scheme of section 5A of the Amendment Act of 2012 as well as the import of the OM dated 03/08/2016.

12. Before advertng to the various legal issues raised by the learned counsel for the parties, we deem it appropriate to briefly survey the legal frame work operating in the State of Assam for providing reservation in promotion.

13. As noted above, the Assam State Legislative Assembly had framed the Act of 1978 providing for reservation in promotion. Section 5 of the Act is relevant for the purpose of this case and, therefore, the same is reproduced herein below for ready reference :-

"5. Reservation for SC and ST in vacancies to be filled up by promotion

— Reservation for members of Scheduled Castes and Scheduled Tribes in vacancies to be filled up by promotion in any establishment shall be regulated in the following manner :-

(a) There shall be reservation at seven percent for members of the Scheduled Castes and ten per cent for the members of Scheduled Tribes (Plains) and five per cent for the members of the Scheduled Tribes (Hills); Provided that the State Government may from time to time review the implementation of the reservation policy and take adequate measures including increase of percentage, mentioned in Clause 5(a) of this Bill.

(b) A separate twenty point roster in the form given in the Schedule shall be maintained by every establishment.”

14. The procedure for giving effect to section 5 of the Act of 1978 has been laid down in section 5A, which was inserted by the Amendment Act of 2012. Section 5A is reproduced herein below for ready reference :-

“5A. The reservation for the members of the Scheduled Castes and the Scheduled Tribes in services or posts in an Establishment shall be given effect to in the following manner :-

(i) A post-based Roster Register shall be maintained to give effect to the reservation of vacancies for Scheduled Castes and Scheduled Tribes. Such roster shall be based on the Model Roster as per Schedule I and II appended to this Act and shall be adopted for the purpose by each Establishment in such manner that the prescribed percentage of reservation is maintained in each cadre.

(ii) Each Appointing authority shall prepare and notify the roster based on the principles laid down in this Act and maintain Roster Register in a manner containing such number of points as are equivalent to the number of posts in a cadre. In case of any increase or decrease in the cadre strength, the roster shall correspondingly be expanded or contracted;

(iii) The roster is to be operated on the principle of replacement and not as a running account. In other words, the points at which reservation for different categories applies are fixed as per the roster and vacancies caused by retirement etc. of persons occupying those points shall be filled up by appointment of persons of the respective categories;

(iv) Separate rosters are to be maintained for giving effect to reservation in direct recruitment and promotion;

(v) Cadre, for the purpose of a roster, shall mean a particular grade and shall comprise the number of posts to be filled by a particular mode of recruitment in terms of the applicable recruitment rules. Thus,

in a cadre of say, 100 posts, where the recruitment rules prescribe a ratio of 50:50 for direct recruitment and promotion, two rosters- one for direct recruitment and one for promotion (when reservation in promotion applies) – each comprising 50 points shall be drawn up on the lines of the respective rosters;

(vi) Since reservation does not apply to transfer on deputation or transfer, where the recruitment rules prescribe a percentage of posts to be filled by this method, such posts shall be excluded while preparing the roster;

(vii) Appointments of candidates belonging to Scheduled Castes and Scheduled Tribes which were made on merit and not due to reservation, are not to be counted towards reservation so far as direct recruitment is concerned. In other words, they are to be treated as general category appointments;

(viii) For initial adoption of this post based roster, the existing backlog vacancies in a cadre where the prescribed percentage of reservation for the Scheduled Castes and Scheduled Tribes has not been achieved as per post-based roster prepared under this Amendment Act, shall be considered as vacancies released by recruitment, resignation, promotion etc. of the persons belonging to the said reserved categories and the same are to be filled up by direct recruitment or by promotion of eligible persons from the respective categories by special rive so that the prescribed percentage of reservation is maintained;

(ix) Before making an appointment by direct recruitment, the Appointing authority shall ascertain by consulting the Roster Register maintained by each Establishment, whether the post is reserved or unreserved and if it is reserved, for whom it is so reserved. Immediately after an appointment is made, the particulars thereof shall be entered in the Roster Register and signed by the Appointing authority;

(x) In the absence of a qualified Scheduled Castes or Scheduled Tribes candidate, as the case may be, in a particular year, the vacancy

shall be carried forward and filled up in the next year;

(xi) Every establishment shall prepare and notify the roster for each cadre equivalent to the number of posts which the concurrence of the Personnel Department and Welfare of Plain Tribes and Backward Classes Department;

(xii) The roster shall be maintained separately for permanent and temporary posts;

(xiii) A vacancy caused due to any reason whatsoever, except termination of service during probation, shall be treated as a fresh vacancy;

(xiv) A candidate who claims to be a member of the Scheduled Castes or the Scheduled Tribes shall support his candidature by a Certificate from Deputy Commissioner/Sub-Divisional Officer or from such other authority as may be prescribed by rules made under the Act.”

15. Earlier, the Government of Assam, through the Personnel (B) Department, had issued Office Memorandum dated 12/03/2002 laying down the criteria for fixation of seniority of reserved category candidates vis-à-vis general category candidates in the promotional post. The aforesaid OM was evidently issued in the wake of the 85th constitutional amendment inserting Article 16 (4-A) in the Constitution. The aforesaid notification continued to hold the field, thus governing the rights and interest of promotee candidates belonging to the SC & ST communities. However, after the decision in the case of ***M. Nagraj (Supra)***, it became obligatory for the State to come up with a mechanism for collecting “quantifiable data” for the purpose of effecting promotion of SC/ST candidates and for providing consequential seniority. In view of the decision rendered in the case of ***M. Nagraj (Supra)***, the State Government of Assam had constituted an “One Man Commission” with the objective of conducting a study in the matter of collecting “quantifiable data” for making recommendations for reservation in promotion and to submit its report. The “One Man Commission” gave its report which was accepted by the State Government and thereafter, the Government had issued Office Memorandum dated 29/12/2014 prescribing the procedure to be followed for reservation in

promotion.

16. The OM dated 29/12/2014 was put to challenge by the "Equality Form" by instituting WP(C) 1560/2015. The aforesaid writ petition, along with another petition being registered as WP(C) 5026/2016, jointly came up for consideration and the learned Single Judge had disposed of both the writ petitions by judgement dated 23/12/2015, quashing the "One Man Commission" report by holding that the said report would be of no consequence and could not enable the State to give effect to the provisions of the Act of 1978. The relevant paragraph in the aforesaid decisions (***Equality Forum-I –Supra***) i.e. paragraph 47, is quoted herein below for ready reference :-

"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."

17. After the decision in ***Equality Form-I (Supra)***, the Government of Assam had come up with another OM dated 03/08/2016 with a view to give effect to the law laid down in the case of ***M. Nagaraj (Supra)***. The contents of the OM dated 03/08/2016 are reproduced herein below for ready reference :-

"GOVERNMENT OF ASSAM

DEPARTMENT OF WELFARE OF PLAINS TRIBES AND BACKWARD CLASSES

DISPUR ::::ASSAM

No. TAD/BC/68/2011/Pt-I/207 dated Dispur 3rd 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."*

18. It would be pertinent to note herein that in the case of **M. Nagraj (Supra)**, Article 16(4-A) and (4-B) were put under challenge. While negating the challenge to the aforesaid constitutional provisions, the Supreme Court had held that while the State would have the right to provide for reservation in promotion and consequential seniority, there would be need to collect "quantifiable data" showing the inadequacy of representation of these classes in service and also the requirement to balance the maintenance of efficiency in service as per the mandate of Article 335 of the Constitution of India. It was further observed that the exercise of collecting "quantifiable data" would depend on numerous factors and conflicting claims, which need to be optimized by the administration depending on the local prevailing conditions in employment.

19. The OM dated 03/08/2016 was the subject matter of challenge in 2 (two) writ petitions viz. WP(C) 5005/2016 and WP(C) 5026/2016, which were disposed of by the learned Single Judge by judgement dated 06/06/2022, rendered in the case of **Bhagawan Pator & Another**. In the judgement rendered in **Bhagawan Pator (Supra)**, the learned Single Judge had surveyed the law governing the subject in great details and after a threadbare analysis of the principles emanating from the decision rendered in the cases of **R. K. Sabarwal (Supra)**, **Indra Sawhney (Supra)**, **Jarnail Singh-I (Supra)**, **B. K. Pavitra (Supra)**, **U.P. Power Corporation Ltd. (Supra)**, **Equality Form-I (Supra)**, it was held that the OM dated 03/08/2016 laying down the procedure for collection of "quantifiable data"

on the question of inadequacy of representation and determination of efficiency in administration for the purpose of implementing the policy of reservation in promotion and the prescription of cadre as a unit for collection of “quantifiable data”, as laid down by the said OM, conforms to the law laid down in the case of **M. Nagraj (Supra)** and **Jarnail Singh-I (Supra)**. Having held as above the learned Single Judge had rejected the challenge made to the OM dated 03/08/2016. It must, however be mentioned herein that in the case of **Bhagawan Pator (Supra)**, the question of legality and validity of section 5 of the Act of 1978 and section 5A of the Amendment Act of 2012 was not an issue raised for determination by the Court nor was the aforesaid aspect of the matter gone into by the learned Single Judge.

20. The decision of the learned Single Judge in **Bhagawan Pator (Supra)**, was challenged in 3(three) different appeals which were numbered and registered as WA 48/2022, 162/2022 and 239/2022. The 3 (three) writ appeals were disposed of by the Division Bench by judgement dated 10/08/2023 rendered in the case of **Ivy Gohain Dasgupta (Supra)**, dismissing all the appeals while affirming the validity of the OM dated 03/08/2016.

21. In the case of **Ivy Gohain Dasgupta (Supra)**, the Division Bench had made the following observations in paragraph 45 pertaining to the mechanism provided under clause ‘IV’ of the OM dated 03/08/2016, which are reproduced herein below for ready reference :-

“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."

22. It is to be noted herein that in the case of ***Ivy Gohain Dasgupta (Supra)***, the Division Bench had also disagreed with the opinion expressed by the learned Single Judge in paragraph 47 in the case of ***Equality Form-I (Supra)***. Although the present writ petitioner i.e. "Equality Form" was a party to the proceeding before the Division Bench in ***Ivy Gohain Dasgupta (Supra)***, yet, no appeal was preferred against the Division Bench judgement, as a result of which, the findings and observations of the Division Bench in the said decision have attained finality, in the eyes of law. If that be so, there is no scope for this Court to conclude that the OM dated 03/08/2016 does not provide for adequate mechanism for collecting "quantifiable data" as per the law laid down in the case of ***M. Nagraj (Supra)***.

23. During the course of argument, Mr. M.K. Choudhury, learned Senior Counsel for the petitioner had made an attempt to convince this Court that the decision rendered in the case of ***Ivy Gohain Dasgupta (Supra)***, is a judgement *per incuriam* as the same did not correctly take note of the law laid down by the Supreme Court in the case of ***M. Nagraj (Supra)***. According to Mr. Choudhury, ***Ivy Gohain Dasgupta (Supra)*** does not lay down the correct law and hence, the said decision be ignored by this Court. We are afraid, on a careful reading of the judgement rendered in the case of ***Ivy Gohain Dasgupta (Supra)***, we are unable to agree with such submission of the learned senior counsel. Rather, we find that the Division Bench has elaborately dealt with the law laid down by the Supreme Court in all the relevant decisions including the decision rendered in the case of ***M. Nagraj (Supra)***. As such, we are of the considered opinion that the decision in the case of ***Ivy Gohain Dasgupta (Supra)*** cannot be ignored by this Court as a decision rendered *per incuriam*. Rather, we are of the opinion that the decision rendered in the case of ***Ivy Gohain Dasgupta (Supra)*** by a coordinate Bench will be binding on this Court.

24. In ***State of Bihar Vs. Kalika Kuer alias Kalika Singh and others*** reported in ***(2003) 5 SCC 448***, the Supreme Court has observed that "..... the earlier judgement may

seem to be not correct yet it will have the binding effect on the later Bench of coordinate jurisdiction. Easy course of saying that earlier decision was rendered per incuriam is not permissible and the matter will have to be resolved in two ways – either to follow the earlier decision or refer the matter to a larger Bench to examine the issue, in case it is held that earlier decision is not correct on merits.....”. On a careful reading of the decision rendered in the case of ***Ivy Gohain Dasgupta (Supra)***, we do not find any justifiable ground to disagree with the findings recorded therein. As such, the question of referring the matter to a larger Bench does not arise in this case.

25. From a careful analysis of scheme of section 5A of the amended Act, 2012, we find that the said provisions lay down a discreet and dynamic mechanism not only for collection of “quantifiable data” on the question of adequate representation of backward class candidate in service but also provides for a mechanism to assess the adequacy of efficiency in administration. The mechanism for providing reservation in promotion, as envisaged by section 5A of the Act of 2012, has been further streamlined by issuing the OM dated 03/08/2016, the validity of which has already been upheld by the Division Bench of this Court in ***Ivy Gohain Dasgupta (Supra)*** which has attained finality in the eyes of law.

26. In the case of ***Jarnail Singh & Ors. Vs. Lachhmi Narain Gupta & Ors*** reported in ***(2022) 10 SCC 595 (Jarnail Singh-II)***, the Supreme Court has observed that the exercise of identifying and measuring efficiency, backwardness and inadequacy of representation on the basis of data depend on numerous factors. Having regard to the conflicting claims which may seek to achieve certain goals, how best one should optimize the conflicting claims, can be best examined by the Administration by taking note of the local prevailing conditions in public employment. In ***Jarnail Singh –II (Supra)*** the Supreme Court had also taken note of the law laid down in ***M. Nagraj (Supra)*** wherein, it was observed that validity of law made by the State Governments providing reservation in promotion would have to be decided on a case to case basis for the purpose of establishing whether the adequacy of representation is supported by “quantifiable data” and hence, no yardstick can be laid down by the Court for determining the adequacy of representation of SCs and STs in promotional post for the purpose of providing reservation.

27. After examining the materials available on record, we are of the considered opinion that by enacting section 5A of the Amendment Act of 2012 followed by issuance of OM dated

03/08/2016, the Government of Assam has put in place adequate mechanism for collecting “quantifiable data” for the purpose of granting promotion to the reserved category candidates and also for fixing their consequential seniority, by fulfilling the mandate flowing from the decisions rendered in the case of **Jarnail Singh-I (Supra) & M. Nagraj (Supra)**.

28. Law is well settled that a statute can be struck down only if the same suffers from lack of legislative competence or is found to be in violation of the Fundamental Rights guaranteed under Part-III of the Constitution of India. In **State of Andhra Pradesh and others Vs. Mc. Dowell & Company and others** reported in **(1996) 3 SCC 709**, the Supreme Court has held that the law made by the Parliament or the Legislator, can be struck down by the Courts on two grounds and two grounds alone, viz. (1) lack of legislative competence and (2) violation of any of the Fundamental Rights guaranteed in Part-III of the Constitution or any other constitutional provision. There is no third ground.

29. In the present case, as has been noted above, the challenge to the provisions of the statute is on the ground of non-compliance with the mandate flowing from the decision of the Supreme Court rendered in the case of **M. Nagraj (Supra)** and **Jarnail Singh-I (Supra)**. However, in view of the discussions made in the foregoing paragraphs, we are unable to accept the plea raised by the petitioners in these two writ petitions. On the contrary, we are of the unhesitant opinion that the mandate of **M. Nagraj (Supra)** and **Jarnail Singh-I (Supra)** have been adequately met by the State Government by issuing appropriate notification in the form of OM dated 03/08/2016. Therefore, there is no scope for this Court to strike down the provisions of the Act of 1978 as well as the Amendment Act of 2012, on the grounds urged by the petitioners.

30. For the foregoing reasons, both these writ petitions are found to be devoid of any merit. The same are accordingly dismissed.

Parties to bear their own costs.

JUDGE

CHIEF JUSTICE

Sukhamay

Comparing Assistant