

*** HON'BLE SRI JUSTICE RAMESH RANGANATHAN**

AND

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

+ WRIT PETITION NOs.39158 OF 2013, 9942, 12704, 15138, 16280, 16733, 20302, 25901, 27439, 32984, OF 2014, 727, 775, 1965, 2710 AND 2844 of 2015

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% Dated 29-04-2015

Union of India rep., by the Secretary (Establishment), Ministry of Railways,
Railway Board, New Delhi. And others

.... Petitioners

Vs.

\$ B. Lakxmi Narayana, S/o B. Mallaiah, aged 52 years and others.

.... Respondents

! Counsel for the petitioners: Sri G.S. Sanghi, Learned Senior Standing Counsel
for Railways, Smt. Pushpender Kaur, Learned Standing Counsel for Railways; Sri
G. Vidyasagar, Learned Senior Counsel, Sri J. Sudheer, Sri K. Chidambaram
and Sri A. Durga Bhaskar

^ Counsel for respondents: Sri K.R.K.V. Prasad

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? Citations:

1. (2006 (8) SCC 212
2. (2011) 1 SCC 467
3. (2012 (7) SCC 1

4. (2011) 12 SCC 695: (2011) 12 SCC 695
5. (1987) 2 SCC 555
6. (2008) 17 SCC 491
7. (2012) 5 SCC 370
8. 167 L Ed 2d 929 : 127 S Ct 1955
9. (2013) 5 SCC 427)
10. AIR 1953 SC 235
11. (2010) 4 SCC 518
12. (2011) 11 SCC 786
13. (2010) 2 SCC 733
14. (2010) 9 SCC 157
15. 1993 Suppl (1) SCC 594
16. (1999) 7 SCC 303
17. (2001) 8 SCC 133
18. (2006) 6 SCC 666
19. (2009) 14 SCC 406
20. (2007) 5 SCC 447
21. (2012) 3 SCC 442
22. (2008) 9 SCC 242
23. (1975) 4 SCC 285
24. (1976) 2 SCC 895
25. (2000) 2 SCC 48
26. (2001) 6 SCC 637
27. (2007) 9 SCC 274
28. (2008) 1 SCC 210
29. (2009) 1 SCC 168
30. (2010) 12 SCC 471
31. (1974) 1 SCC 317
32. (1969) 1 SCC 110
33. 1995 Supl. (3) SCC 231
34. (1996) 6 SCC 267
35. (1995) 5 SCC 680
36. (2013) 12 SCC 489
37. (2014) 1 SCC 144
38. (2011) 6 SCC 570
39. (1984) 4 SCC 251
40. (2009) 1 SCC 768
41. (1974) 4 SCC 335
42. (1983) 3 SCC 601
43. AIR 1993 SC 477

44. (1995) 2 SCC 745
45. (1999) 7 SCC 209
46. (2012) 7 SCC 41
47. (2008) 6 SCC 1
48. (Judgment in Civil Appeal No.209 of 2015 dated 09.01.2015)
49. (2015) 1 SCC 347
50. 1991 Supp (2) SCC 497

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COMMON ORDER: (per Hon'ble Sri Justice Ramesh Ranganathan)

This batch of Writ Petitions is filed by the Union of India represented by the Secretary, Ministry of Railways, and the unofficial respondents in the O.As, aggrieved by the orders passed by the Central Administrative Tribunal, Hyderabad Bench, (hereinafter referred to as "Tribunal"), in allowing the O.As and in setting aside the action of the Railways in including candidates, belonging to the Scheduled Castes and the Scheduled Tribes, in the select panel for different posts, and in directing the Railways to finalise promotion/selection only after collecting necessary data in compliance with the pre-conditions laid down in the Constitution Bench judgment of the Supreme Court in **M. Nagaraj v. Union of India**.

The respondents herein, i.e., applicants in the O.As, are all employees of the Railways working in different cadres. They invoked the jurisdiction of the Tribunal aggrieved by the action of the Railways in promoting members of the Scheduled Castes and the Scheduled Tribes, who were juniors to them in service, on the basis of reservation. They contended before the Tribunal that such reservation was in violation of the law declared by the Supreme Court in **M. Nagaraj**¹; **Suraj Bhan Meena v. State of Rajasthan**, and **Uttar Pradesh Power Corporation Limited v.**

Rajesh Kumar. They sought a direction that the select list, which included candidates belonging to the reserved category, be set aside; the select list be revised by following seniority in the feeder category; and the applicants (other than those who belong to the reserved category) be promoted with all consequential benefits.

By its order in O.A.No.203 of 2013 and O.A.Nos.1417 and 1433 of 2012 dated 12.07.2013 (which is under challenge in W.P. No.39158 of 2013), the Tribunal held that post-2006 the question of reservation in promotion, and consequential benefits etc., would be governed by the judgment of the Supreme Court in **M. Nagaraj**¹; the Supreme Court in **Suraj Bhan Meena**² and in **Uttar Pradesh Power Corporation Limited**³ had followed the earlier judgment of the Constitution Bench in **M. Nagaraj**¹; the Railways was not able to demonstrate that they had undertaken the exercise to collect quantifiable data as envisaged in **M. Nagaraj**¹; the applicants had rightly urged that the Railways, if they had to continue with reservation in promotion with consequential benefits, had to collect quantifiable data, and satisfy the parameters laid down in **M. Nagaraj**¹ and, if they had not done so, their action would be illegal; the Railways had merely stated, in their reply, that they were following the Railway Board's Circulars and DOP&T instructions; the judgment of the Supreme Court, in **M. Nagaraj**¹, was categorical; and, in the light of the said judgment, the O.As should be allowed.

In its order in O.A. No.125 of 2014 dated 15.01.2015 (which is under challenge in W.P.No.775 of 2015) the Tribunal rejected the preliminary objection of the petitioners herein that the O.A. was barred by limitation. After referring extensively to the judgment of the Supreme Court in **M. Nagaraj**¹, the Tribunal held that the applicants had contended that the Railway authorities did not comply with the directions of the Supreme Court, in **M. Nagaraj**¹, for providing reservation in promotion; they had further contended that the Railways was bound to collect data to show that the reserved candidates were inadequately represented in the services, and they had overall administrative efficiency; no exercise had been carried out by the authorities to collect such data; the main objection raised by the applicants was that the authorities did not undertake any exercise before providing reservation in promotion; the mandatory exercise, stipulated by the Constitution Bench in **M. Nagaraj**¹, required the State to collect quantifiable data showing (i) backwardness of

the class, (ii) inadequacy of representation of that class, (iii) compliance with Article 335 of the Constitution of India; these directions were not complied by the Railways; admittedly the condition precedent, as laid down by the Supreme Court in **M. Nagaraj**¹, was not satisfied; no exercise had been undertaken by the Railways before providing reservation in promotion by the impugned selection; the Railways had merely stated that reservation was required in promotional posts, without collecting necessary data of the reserved candidates in the select list, and without satisfying the preconditions laid down in **M. Nagaraj**¹; and the impugned promotions were not valid. The selection of reserved candidates, and their inclusion in the select list, was quashed and the Railways were directed to provide reservation in promotion, after collecting necessary data, as laid down by the Supreme Court in **M. Nagaraj**¹.

It is contended, on behalf of the petitioners, that no factual foundation was laid by the applicants before the Tribunal to show that the order of the Supreme Court in **M. Nagaraj**¹ had been violated; the O.A. was liable to be dismissed on the ground of limitation; the burden was on the respondents-applicants to establish violation of Articles 14 and 16 (1) of the Constitution of India, by the reservation provided under Article 16 (4) and 16 (4-A); this onus was not discharged by them; the respondents-applicants had only challenged the covering letter dated 22.01.2014, and not the original order issued by the Railway Board dated 22.01.2014; the Tribunal had not assigned any reasons for allowing the O.As; no rule or circular had been challenged before the Tribunal; there was no plea in the O.As regarding excessive representation or of persons included in the select list not being backward; even the seniority list was challenged belatedly; the Tribunal did not examine the circulars applicable in this regard; the respondents-applicants, who have not participated in the selection, cannot turn around and question the very selection itself; the original selection list dated 24.04.2006, and the subsequent circulars of 2008 and 2010 have not been challenged; the Tribunal is the Court of first instance; the material on record could alone have been considered by the Tribunal; in the absence of pleadings, this Court would not take upon itself the task of examining this issue; there is no averment in the O.A. that the Scheduled Castes and the Scheduled Tribes are not backward or that there is excessive representation or even that, by providing reservation in promotion, efficiency in administration would be adversely affected; the grounds of challenge, to the validity of the selection list, should be clear and

specific; the onus is on the person, who invokes the jurisdiction of the Tribunal, to show how the judgment in **M. Nagaraj**¹ has not been followed; neither is there any pleading nor is there any finding except to refer to the judgment in **M. Nagaraj**¹; contentions, not even raised in O.A, have been referred to in the order, as if they had been raised; only the issue was decided in **M. Nagaraj**¹, and all the cases were referred back to the appropriate Bench; the judgments in **Suraj Bhan Meena**² and **Uttar Pradesh Power Corporation Limited**³ were decided on the factual matrix of those cases wherein there was a challenge to the circulars/rules; the Supreme Court, in **M. Nagaraj**¹, did not hold that there should be no reservation in promotion or that reservation should only be provided after the exercise is completed; any finding recorded, without any plea, is a perverse finding; the order passed without factual foundation is liable to be set aside; the policy of the Railways, in providing reservation in promotion, has been in existence for several decades; the validity of the action of the railways can only be examined in properly constituted proceedings wherein factual foundation is laid; no rejoinder was filed, by the applicants in the O.A, to the counters filed in reply to the O.As; even otherwise, the Railways have fulfilled the parameters, laid down in **M. Nagaraj**¹, in providing reservation in promotion; and the order of the Tribunal must be set aside.

On the other hand it is contended, on behalf of the respondents-applicants, that the select list, prepared vide memo dated 01.08.2011, was initially operated only till serial No.166; the life of the panel, which was for two years, expired on 31.07.2013; it is only by letter dated 22.01.2014 was the life of the panel extended; but for such extension, the earlier select list would have ceased to operate; the respondents-applicants have invoked the jurisdiction of the Tribunal within one year of the proceedings dated 22.01.2014 whereby the life of the panel was extended; the law laid down by the Supreme Court, in **M. Nagaraj**, required the Railways to show that they had gathered adequate data to provide reservation in promotion; as the Railways had failed to place any such data, the Tribunal was justified in setting aside the select list, and in directing the Railways to follow the law declared in **M. Nagaraj**¹; the State is bound to place data before the Court to show that the law declared by the Supreme Court, in **M. Nagaraj**¹, has been complied with; the validity of the DoPT circulars was considered by the Principal Bench of the Central

Administrative Tribunal in O.A.No.2211 of 2008 dated 02.12.2010; and the impugned order of the Tribunal is valid, and does not necessitate interference.

Heard Sri G.S. Sanghi, Learned Senior Standing Counsel for Railways, Smt. Pushpender Kaur, Learned Standing Counsel for Railways, Sri G. Vidyasagar, Learned Senior Counsel, Sri J. Sudheer, Sri K. Chidambaram and Sri A. Durga Bhaskar, Learned Counsel appearing on behalf of the petitioners and Sri K.R.K.V. Prasad, Learned Counsel appearing on behalf of the respondents. It is convenient to examine the submissions, made by Learned Counsel on either side, under different heads.

I. HAS FACTUAL FOUNDATION BEEN LAID, IN THE PLEADINGS BEFORE THE TRIBUNAL, JUSTIFYING GRANT OF RELIEF?

It is contended on behalf of the petitioners that no factual foundation was laid, in the applications filed in the various O.As before the Tribunal, to show how the order of the Supreme Court in **M. Nagaraj**¹, **Suraj Bhan Meena**²; and **Uttar Pradesh Power Corporation Limited**³ had been violated by the Railways; in **M. Nagaraj**¹ the Supreme Court had, after declaring the law, directed the matters to be posted before the regular bench for examination, of the applicability of the law declared by it, in each individual case; a bald and vague averment that the Railways had failed to adhere to the order of the Supreme Court, in the aforesaid judgments, would not suffice; factual details, of the manner in which the Railways had violated the aforesaid judgments of the Supreme Court, should have been pleaded; it is only if factual foundation had been laid in this regard, in the applications filed in support of the various O.As, could the Tribunal have recorded its findings thereupon; any finding recorded by the Tribunal, not supported by the pleadings on record, is an error of law apparent on the face of the record; the burden lies heavily on the respondents-applicants, who had invoked the jurisdiction of the Tribunal, to establish that the reservation provided, in terms of Article 16(4A) and 16(4B), by the Railways violated their fundamental rights under Articles 14 and 16(1) of the Constitution of India; no rule or circular has been challenged in any of the O.As; the circulars issued by the Railways between the years 2008 to 2010, (after the judgment of the Supreme Court in **M. Nagaraj**¹), have also not been put in issue; in the absence of any plea, the Tribunal was not justified in examining these issues;

this Court would also not examine these issues for the first time in writ proceedings, as the Tribunal is the Court of first instance; there is no averment in the O.As, that the members of the Scheduled Castes, who are being considered for promotion, are not backward; there is also no averment that the representation in services, of the Scheduled Castes, is excessive; the O.As do not even state, much less detail, how providing reservation in promotion for the Scheduled Castes and the Scheduled Tribes would affect efficiency in administration; the grounds of challenge to the select list, whereby members of the Scheduled Castes and the Scheduled Tribes were sought to be promoted, should be clear and specific; neither is there any plea in the O.As nor has the Tribunal recorded any finding on whether and how the Railways had acted contrary to the judgment of the Supreme Court, in **M. Nagaraj**¹, in providing reservation in promotion in favour of the Scheduled Castes and the Scheduled Tribes; mere reference to the judgment of the Supreme Court in **M. Nagaraj**¹, in the applications filed in support of the O.As, would not suffice; the Tribunal ought to have dismissed the O.As. on the ground of lack of pleadings; on the contrary, the Tribunal has dealt with the contentions which have not even been pleaded in the O.As, but were put forth only during the course of arguments; any finding, recorded without any plea, is a perverse finding; the policy of the Railways, in providing reservation in promotion, has been in existence for the past several decades; though the plea, of absence of pleadings, was raised by the petitioners herein in their counter filed before the Tribunal, the applicants in the O.As chose not to file any rejoinder thereto; and, on this short ground alone, the impugned orders of the Tribunal necessitate being set aside.

On the other hand it is contended, on behalf of the respondents-applicants, that the contention of the Railways having providing reservation in promotion even after the law declared by the Supreme Court in **M. Nagaraj**¹, without first ascertaining whether the parameters prescribed for providing reservations in promotion were satisfied, has been raised in the O.As; it would suffice for the applicants to raise such a plea; it is not necessary for the said plea to be elaborated in detail; the law declared by the Supreme Court, in **M. Nagaraj**¹, required the Railways to place data before the Tribunal to show that the parameters, stipulated in the said judgment, were satisfied; no such material was placed by the Railways before the Tribunal; even in the present Writ Petitions, the Railways have not shown how the parameters, laid down by the Supreme Court in **M. Nagaraj**¹, are satisfied; it

is only if these parameters are satisfied, can reservations be provided, in favour of the Scheduled Castes and the Scheduled Tribes, in promotion; as the onus was on the Railways to show that they had complied with the parameters, before providing reservation in promotion, the Tribunal was justified in setting aside the promotions of the unofficial respondents in the O.As; and the pleadings in the O.As sufficiently show that reservation was being provided, for the Scheduled Castes and the Scheduled Tribes, in promotion without fulfilling the parameters laid down by the Supreme Court in **M. Nagaraj**¹; and the order of the Tribunal does not necessitate interference on this ground.

No party should be permitted to travel beyond its pleading, and all necessary and material facts should be pleaded by the party in support of the case set up by it. (**National Textile Corpn. Ltd. v. Nareshkumar Badrikumar Jagad; Ram Sarup Gupta v. Bishun Narain Inter College; Bachhaj Nahar v. Nilima Mandal**). Pleadings are the foundation of litigation. There must be enough factual allegations to raise a right to relief above the speculative level. The pleadings must contain something more than a statement of facts that merely create a suspicion of a legally cognizable right of action. (**Maria Margarida Sequeira Fernandes v. Erasmo Jack de Sequeira; Bell Atlantic Corporation v. Twombly**). A party must take appropriate pleadings, and lay down the factual foundation, so that the court may reach a just conclusion. (**Rajasthan State Industrial Development & Investment Corpn. v. Subhash Sindhi Coop. Housing Society**). Pleadings and particulars are necessary to enable the court to decide the rights of the parties. As a rule relief, not founded on the pleadings, should not be granted. A decision cannot be based on grounds outside the pleadings of the parties. (**National Textile Corpn. Ltd.**⁴; **Trojan & Co. v. Nagappa Chettiar; State of Maharashtra v. Hindustan Construction Co. Ltd.** and **Kalyan Singh Chouhan v. C.P. Joshi**).

A new ground raising a pure question of law or a legal issue, for which no inquiry/proof is required, can be permitted to be raised by the Court at any stage of the proceedings, (**National Textile Corpn. Ltd.**⁴; **Sanghvi Reconditioners (P) Ltd. v. Union of India**; and **Greater Mohali Area Development Authority v. Manju Jain**), but a question of fact, which requires investigation and inquiry and for which no factual foundation has been laid by a party before the Court or the Tribunal, cannot be allowed to be agitated. If the Court, for some compelling circumstances, desires to entertain a new factual plea, it must give due opportunity to the opposite

party to controvert the same and adduce evidence to substantiate its pleadings. It is not permissible for the Court to consider a new case on facts or mixed question of fact and law which was not the case of the parties before the Court or the Tribunal below. (**Greater Mohali Area Development Authority**¹⁴; **State of U.P. v. Dr. Anupam Gupta; Ram Kumar Agarwal v. Thawar Das; Vasantha Viswanathan v. V.K. Elayalwar; Anup Kumar Kundu v. Sudip Charan Chakraborty; Tirupati Jute Industries (P) Ltd. v. State of W.B. and Sanghvi Reconditioners (P) Ltd.**¹³).

In **Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & ETIO**, the Supreme Court held that, for attracting Article 14, necessary facts are required to be pleaded; the foundational facts, as to how the statutory provision was discriminatory, had not been stated; the respondents did not have the opportunity to meet the said contention; and such factual foundation, unless it was apparent from the statute itself, could not be permitted to be laid later. In **Bangalore Development Authority v. Aircraft Employees' Coop. Society Ltd.**, the Supreme Court held that, though the applicants had pleaded that a provision was discriminatory, no factual foundation was laid in support of this plea; and, in the absence of such foundation, the Court was not justified in recording its conclusion that the impugned provision was violative of the equality clause contained in Article 14 of the Constitution.

In **Union of India v. Pushpa Rani**, the Supreme Court held:-

“.....The point which remains to be considered is whether the order of the Tribunal, which has been confirmed by the High Court, can be maintained by applying the ratio of *M. Nagaraj case*⁶. Dr. Rajeev Dhavan, learned Senior Counsel appearing for some of the respondents, made strenuous efforts to convince us that the policy of reservation cannot be applied at the stage of making promotions because the Railway Administration did not produce any evidence to show that Scheduled Castes and Scheduled Tribes were not adequately represented in different cadres and that the efficiency of administration will not be jeopardised by reserving posts for Scheduled Castes and Scheduled Tribes, but we have not felt persuaded to accept this submission. **In the applications filed by them, the respondents did not plead that the application of the policy of reservation would lead to excessive representation of the members of Scheduled Castes and Scheduled Tribes, or that the existing policy of reservation framed by the Government of India was not preceded by an exercise in relation to the issue of adequacy of their representation. Rather, the thrust of their claim was that restructuring of different cadres in Group C and D resulted in upgradation of posts and the policy of reservation cannot be applied qua upgraded posts. Therefore, the Union of India and the Railway Administration did not get opportunity to show that the employees belonging to Scheduled Castes and Scheduled Tribes did not have adequate representation in different cadres; that the outer limit of reservation i.e. 50% will not be violated by applying the policy of reservation and that the efficiency of administration will not be jeopardised by applying the policy of reservation. Therefore, it is neither possible nor desirable to entertain a totally new plea raised on behalf of the respondents, more so, because adjudication of such plea calls for a detailed investigation into the issues of facts.....**”(emphasis supplied).

As the Learned Counsel appearing on behalf of the petitioners have referred mainly to the documents filed in W.P. No.39158 of 2013 and W.P. No.775 of 2015, it is convenient to refer to the pleadings in the O.As which are the subject matter of these Writ Petitions to ascertain whether factual foundation was laid by the respondents-applicants for the relief sought for in the O.As. In O.A. No.1433 of 2012, (the order passed in which is under challenge in W.P. No.39158 of 2013), the respondents-applicants questioned the action of the Railways in observing, vide memo dated 04.12.2012, the rule of reservation, and the principle of “own merit”, in respect of SC/ST employees in promotions while publishing the select list for the post of Passenger Guards/Senior Passenger Guards in the Secunderabad Division. In the said O.A, the respondent-applicants pleaded that they were working as Senior Goods Guards; their names were reflected in the seniority list published by the Secunderabad Division; the Secunderabad Division of the Railways, without issuing any notification and without declaring the number of vacancies, had published the select list for the post of Passenger Guards/Senior Passenger Guards, vide memo dated 04.12.2012; the railways had followed the rule of reservation in promotion, in violation of the law declared by the Supreme Court, and the earlier orders of the Central Administrative Tribunal; while publishing the panel, the names of members of the Scheduled Castes and the Scheduled Tribes were considered on their “own merit” against unreserved posts; a large number of employees belonging to SC/ST, who were juniors to the petitioners, were included in the select list; as the respondents had followed the rule of reservation in promotion, including the “own merit” concept, 15 posts had been filled up by SC/ST employees who had joined in the goods guard cadre subsequent to the respondents-applicants; as a result of the policy of reservation in promotion, employees, who belonged to SC/ST category, were promoted ahead of them to the post of Senior Goods Guards in the years 2008-2011; on account of such accelerated promotion, and the advantage of seniority they gained, members belonging to the SCs and STs were further promoted to the post of passenger guards/senior passenger guards; the selection was finalised without transparency, and without issuing any notification; the vacancies, which included anticipated vacancies, were filled up by a large number of juniors to the applicants; some of the promotees have been impleaded as party respondents in the O.As; as the rule of reservation in promotions was observed, even after the judgment of the Supreme Court in **M. Nagaraj**¹, SC/ST employees, who were juniors to the

applicants, would get accelerated promotion to the post of senior goods guards with the further benefit of seniority; they would then march ahead of the applicants; the Railways had filled up vacancies, in the category of Passenger Guards/Senior Passenger Guards, by providing reservation in promotion, and applying the principle of “own merit” in respect of SC/ST employees, even after Courts/Tribunals have held that the said policy/instruction is illegal and arbitrary; the action of the respondents, in considering a large number of SC/ST employees for promotion to the post of passenger guard/senior passenger guard, based on the existing seniority list in the feeder category of senior goods guard, (which list was prepared on the basis of the accelerated promotion given to SC/ST employees), is arbitrary and illegal; such promotions were given, despite the law declared by the Supreme Court; the Government could not follow the policy of reservation in promotion without complying with the criteria/parameters laid down in **M. Nagaraj**¹ and **Suraj Bhan Meena**²; the aforesaid judgments have been followed by the Principal Bench of the Central Administrative Tribunal and other High Courts in the country; directions were given by Courts/Tribunals to the Government not to follow the principle of “own merit” in respect of SC/ST employees; the relevant instructions were struck down as it had resulted in excess operation of the roster point relating to SC/STs; in view of the decision of the Supreme Court, in **M. Nagaraj**¹, reservation in promotion and granting consequential seniority to the SC/ST employees, without following the pre-conditions laid down in Articles 16(4A) and 16(4B) of the Constitution, is illegal; and the respondents had issued the select list resulting in a large number of junior SC/ST employees being granted higher status/promotion detrimental to the interests of seniors such as the applicants.

In the application filed in O.A. No.125 of 2014 (the order passed in which is under challenge in W.P. No.775 of 2015), the applicants stated that, in view of passage of time resulting in expiry of the life of panel i.e., two years, they had submitted a representation dated 31.07.2013 requesting the fourth respondent to issue a fresh select list in supersession of the operating panel dated 01.08.2011, as they were seniors to the SC/ST employees enlisted in the said panel; the respondents should have issued proceedings to extend the currency of the panel only to the extent of the unreserved zone, but not to the zone relating to the roster point of SC/ST, as that would result in juniors to the applicants, whose names were included in the select list and who belonged to SC/STs, being promoted in violation

of the settled law; the Railways was promoting juniors, following the principles of reservation in promotion, in disregard to the law laid down by the Supreme Court and other Courts/Tribunals, though no quantifiable data, on the parameters laid down by the Supreme Court, has been published; implementation of the policy of reservation in promotion, without complying with the criteria/parameters laid down in **M. Nagaraj¹, Suraj Bhan Meena², and Uttar Pradesh Power Corporation Limited³**, is illegal; as a result the applicants, who belong to the unreserved category, are not being promoted; and the action of the Railway Board in seeking to extend the currency of the panel, even though the Tribunal had declared such a panel containing junior SC/ST employees as illegal, is in violation of Articles 14, 16 and 21 of the Constitution of India.

As shall be referred to in detail hereinafter in this order, the Constitution Bench of the Supreme Court in **M. Nagaraj¹**, held that before exercising the enabling power, under Articles 16(4-A) and (4-B) of the Constitution of India to provide reservation in promotion and in conferring the benefit of consequential seniority in favour of the Scheduled Castes and the Scheduled Tribes, the State should collect quantifiable data showing backwardness of the class, inadequacy of representation of that class in public employment, and compliance of the requirement of maintaining overall efficiency in administration as stipulated in Article 335 of the Constitution. In view of the law declared by the Supreme Court, in **M. Nagaraj¹**, compliance with the aforesaid parameters by the Railways is a condition precedent for providing reservation in promotion in favour of the Scheduled Castes and the Scheduled Tribes.

As the relief sought for by the respondents-applicants before the Tribunal was to set aside the promotions given to the members of the Scheduled Castes and the Scheduled Tribes, on the ground that the Railways could not have provided reservation in promotion to higher posts, without complying with the aforesaid parameters laid down in **M. Nagaraj¹**, it would suffice if there are specific averments in this regard in the O.As, filed by the respondents-applicants, before the Tribunal. As is evident from the averments, in the O.As referred to hereinabove, the respondents-applicants have pleaded that the Government was not entitled to follow the policy of reservation in promotion without complying with the criteria/parameters laid down in **M. Nagaraj¹** and **Suraj Bhan Meena²**; in view of the decision of the

Supreme Court, in **M. Nagaraj**¹, reservation in promotion and granting consequential seniority to SC/ST employees, without following the pre-conditions laid down in Articles 16(4-A) and 16(4-B) of the Constitution, is illegal; the respondents (Railways) were consistently giving promotion to juniors, following the principles of reservation in promotion, in disregard to the law laid down by the Supreme Court and other Courts/Tribunals, though no quantifiable data, on the parameters laid down by the Supreme Court, have been published; and implementation of the policy of reservation in promotion, without complying with the criteria/parameters laid down in **M. Nagaraj**¹, **Suraj Bhan Meena**², and **Uttar Pradesh Power Corporation Limited**³ is illegal. Sufficient pleas have been taken in the O.As, and adequate factual foundation has been laid therein, for the Court/Tribunal to reach a just conclusion, and to enable it to decide the rights of the parties to the relief sought for.

In **Pushpa Rani**²², the applicants did not even plead, in the O.As filed before the Tribunal, that application of the policy of reservation would lead to excessive representation of the members of the Scheduled Castes and the Scheduled Tribes, or that the existing policy of reservation framed by the Government was not preceded by an exercise in relation to the issue of adequacy of their representation. Reliance placed by the petitioners, on **Pushpa Rani**²², is misplaced. We see no merit in the contention, urged on behalf of the petitioners, that the orders passed by the Tribunal necessitate interference on the ground that they were passed even in the absence of pleadings sufficient to grant relief.

II. WERE THE O.As FILED BY THE RESPONDENTS- APPLICANTS BEYOND THE PERIOD OF LIMITATION PRESCRIBED UNDER SECTION 21 OF THE ADMINISTRATIVE TRIBUNALS ACT?

It is contended, on behalf of the petitioners, that the select list dated 01.08.2011, which forms the basis for providing reservation in promotion for the Scheduled Castes and the Scheduled Tribes, has not been subjected to challenge in the O.As filed before the Tribunal; the respondents-applicants have also not questioned the original order dated 22.01.2014, but have only questioned the covering letter of the same date; the belated challenge to the select list, beyond the

period of limitation prescribed in Section 21 of the Administrative Tribunals Act, could only have been entertained by the Tribunal if a petition had been filed to condone the delay; neither was any such petition filed before the Tribunal, nor did the Tribunal condone the delay; and as the selection now made, is on the basis of the select list dated 01.08.2011, any belated challenge thereto, beyond the period of limitation prescribed in Section 21 of the Administrative Tribunals Act, should not have been entertained by the Tribunal.

On the other hand it is contended, on behalf of the respondents in these Writ Petitions (applicants in the O.As), that the select list, in memo dated 01.08.2011, was initially operated only upto serial No.166 thereat; it was not operated thereafter; the currency of the panel is only for two years which expired by 31.03.2013; it is by proceedings dated 22.01.2014 that the life of the panel was extended; but for such extension the panel, prepared pursuant to the select list dated 01.08.2011, would not have been operated; the respondents herein (applicants in the O.As) are aggrieved by the life of the panel being extended by proceedings dated 22.01.2014; they invoked the jurisdiction of the Tribunal just a few months after the proceedings dated 22.01.2014 was issued; the O.As filed by them can neither be said to be barred by limitation nor to be hit by delay and laches; and the Tribunal was justified in entertaining the O.As and deciding them on merits.

No party can claim relief as a matter of right, as one of the grounds for refusing relief is if the person approaching the court is guilty of delay and laches. The Court, exercising public law jurisdiction, does not encourage agitation of stale claims where the right of third parties have crystallised in the interregnum. (**Aflatoon v. Lt. Governor of Delhi; State of Mysore v. V.K. Kangan; Municipal Council, Ahmednagar v. Shah Hyder Beig; Inder Jit Gupta v. Union of India; Shiv Dass v. Union of India; A.P. SRTC v. N. Satyanarayana; City and Industrial Development Corpn. v. Dosu Aardeshir Bhiwandiwalla; Shiba Shankar Mohapatra v. State of Orissa**). A party should approach the court just after accrual of the cause of the complaint. The principle on which the court proceeds, in refusing relief to the petitioner on the ground of laches or delay, is that the rights, which have accrued to others by reason of the delay in filing the application/writ petition, should not be allowed to be disturbed unless there is a reasonable explanation for the delay. The action of courts cannot harm innocent parties if their rights emerge by reason of delay on the part of the person moving the Court. (**Shiba Shankar**

Mohapatra³⁰; Ramchandra Shankar Deodhar v. State of Maharashtra; Tilokchand Motichand v. H.B. Munshi).

In **Secy. to Govt. of India v. Shivram Mahadu Gaikwad**, the Supreme Court held:-

“.....When we turn to the judgment of the Tribunal we find that there is no mention about the question of limitation even though it stared in the face. **It would immediately occur to anyone that since the order of discharge was of 7-10-1986 and the application was filed in 1990, it was clearly barred by limitation unless an application for condoning the delay was made under Section 21(3) of the Administrative Tribunals Act. No such application was in fact made.** Even if it was the contention of the employee that he was suffering from schizophrenia, that could have been projected as a ground for condonation of delay under sub-section (3) of Section 21 of the said statute. **Even otherwise without insisting on the formality of an application under Section 21(3) if the Tribunal had dealt with the question of limitation in the context of Section 21 we may have refrained from interfering with the order of the Tribunal under Article 136, but it seems that the Tribunal totally overlooked this question which clearly stared in the face. Even the employee made no effort to explain the delay and seek condonation. We find no valid explanation on record for coming to the conclusion that the case for condonation of delay is made out.** In the circumstances, there is no doubt that the application was clearly barred by limitation.....” (emphasis supplied).

As Section 21(2) of the Administrative Tribunals Act gives a right to make an application within one year of the grievances covered under clauses (a) and (b) of Section 21(1), and within the outer limit of six months in respect of the grievances covered under Section 21(2), the applicant need not give any explanation for the delay having occurred during that period. The applicant is entitled, as of right, to invoke the jurisdiction of the Tribunal for redressal of his grievance. It is only if the application is filed beyond that period, does the need arise to give a satisfactory explanation for the delay caused till the date of filing of the application. The question of satisfaction of the Tribunal, in this regard, would arise only thereafter. Section 21(3) starts with a non obstante clause, which wipes out the effect of Section 21(2), and the need arises thereby to furnish a satisfactory explanation for the delay which occasioned after the expiry of the period prescribed in Section 21(1) and (2). (**State of Karnataka v. S.M. Kotrayya**).

Among the reliefs sought for in O.A.No.020/00125/ 2014 (the order passed in which is under challenge in W.P.No.775 of 2015), is to declare that the permission accorded by the Railway Board, vide their letter dated 22.1.2014, extending the currency of the panel could not be applied to the select list for the post of Loco-Pilot (goods) as it is illegal. By proceedings dated 01.08.2011, a select list of employees was prepared for promotion to the post of Loco Pilot (goods) pursuant to a suitability test conducted by the committee, on the basis of perusal of the records, on

26.07.2011. The select list contains, from serial No.167 downwards, members of the Scheduled Castes and the Scheduled Tribes who were placed in the select list as reservation was provided in promotion. The said memo dated 01.08.2011 records that there was a short fall of 12 Scheduled Castes and 35 Scheduled Tribes; there were no Scheduled Castes/Scheduled Tribes employees eligible and available for whom the 47 vacancies were kept; and the select list was provisional.

By proceedings dated 22.01.2014, the South Central Railways, after referring to the Railway Board's letter of the same date ie., 22.01.2014, communicated the approval of the Railway Board for extension of the currency of the panel, for promotion to the post of Loco Pilot (goods), which had expired on 31.07.2013 for a period of one year as a special case. It is not in dispute that the currency of the panel, prepared pursuant to the select list dated 01.08.2011, was for a period of two years and expired by 31.07.2013. But for the extension granted by the Railway Board vide circular dated 22.01.2014, the panel could not have been operated after 31.07.2013. If the period of limitation under Section 21 of the Administrative Tribunals Act is reckoned from the date of the Railway Board's Circular dated 22.01.2014, the said O.A. was filed within the period of limitation.

In Kuldip Chand v. Union of India, the Supreme Court held:-

“..... It is next contended by Mr M.M. Kashyap, learned counsel for the appellant, that Ashok Kumar disputed the correctness of the seniority list made on 23-12-1982 in his representations dated 10-1-1983 and 1-8-1983 which were duly considered and rejected. He allowed it to become final as he did not challenge the same till post of accountant became vacant. When it was rejected, he filed the writ petition in the High Court. **There is a considerable delay in claiming his seniority over the appellant. It is true that the seniority list was prepared as early as on 23-12-1982 but no vacancy had arisen thereafter and, therefore, the mere rejection of the claim for seniority does not disentitle him to claim his seniority over the appellant for consideration by the respondent-Union.**

When the aforesaid facts are taken into consideration, it would be obvious that the preparation of seniority list per se was illegal. Therefore, the mere fact that he did not challenge the seniority list, which was illegally prepared, till he was aggrieved for non-consideration of the claim to the post of accountant, his legitimate right to be considered cannot be denied. Under these circumstances, the delay is of no consequence for considering the claims of Ashok Kumar for the post of accountant.....”

(emphasis supplied)

As shall be detailed hereinafter, the select list dated 01.08.2011, providing reservation in promotion, was prepared by the Railways without gathering data, and even without formation of opinion on the parameters stipulated in **M.Nagaraj**¹. Having acted illegally in preparing the select list dated 01.08.2011, the Railways

cannot be heard to contend that a belated challenge to their illegal act should not have been entertained by the Tribunal.

III. WERE THE O.As, FILED BEFORE THE TRIBUNAL, LIABLE TO BE DISMISSED FOR NON-JOINDER OF NECESSARY PARTIES?

It is contended, on behalf of the petitioners, that the affected candidates have not been impleaded as party respondents to the O.As; their selection, based on the select list dated 01.08.2011, cannot therefore be set aside; the O.As ought to have been dismissed by the Tribunal for non-joinder of necessary parties; and the Tribunal had erred in entertaining the O.As, and in granting relief, in the absence of those Scheduled Castes and the Scheduled Tribes employees, whose names were included in the select list, being arrayed as respondents in the O.As filed before the Tribunal.

On the other hand it is contended, on behalf of the respondents (applicants in the O.As filed before the Tribunal), that the action of the Railways, in providing reservation in promotion without undertaking the exercise of identifying backwardness, examining whether or not efficiency in administration would be effected thereby, and whether members of the Scheduled Castes and Scheduled Tribes were adequately represented, was under challenge in the O.As filed before the Tribunal; the law declared by the Supreme Court, in **M. Nagaraj**¹, required the Railways to provide reservation in promotion only after obtaining necessary data and on satisfying itself, on the basis of such data, that these parameters were satisfied; consequently the Railways could have provided reservations in promotion, in favour of the Scheduled Castes and the Scheduled Tribes, only after undertaking such an exercise; as the Railways have not gathered data, which is the pre-requisite for providing reservation in promotion for the Scheduled Castes and the Scheduled Tribes, their action in operating the select list dated 01.08.2011, and thereby providing reservation in promotion, was under challenge in the O.As; the promotions, given to any particular member of the Scheduled Castes and the Scheduled Tribes, whose name was included in the select list was not under challenge in the O.As filed before the Tribunal; as such, the only necessary party was the the Railways, which has been arrayed as a respondent in all the O.As;

persons, whose names are found in the select list, are not necessary parties to the O.As. wherein the challenge is to the action of the Railways in providing reservation in promotion; and the contention, of non-joinder of necessary parties, necessitates rejection.

In **Prashant Ramesh Chakkarwar v. UPSC**, the Supreme Court held that the High Court did not commit any error by non-suiting the petitioners, on the ground of non-impleadment of the selected candidates as parties to the original applications and the writ petitions; if the methodology of moderation adopted by the Commission was faulted, the entire selection would have to be quashed; and that was not possible without giving an opportunity of hearing to those who had been selected and appointed in different cadres. In **State of Rajasthan v. Uchhab Lal Chhanwal**, the Supreme Court held that, on a perusal of the writ petition, it was noticed that there were specific averments that juniors in the gradation list had been promoted; they had not been arrayed as parties; in the event, the order passed by the High Court was affirmed, persons who were seniors to the respondents in the promotional cadre were bound to become juniors, regard being had to their seniority position in the feeder cadre; no order, that would adversely affect him, could be passed behind the back of the person; and such an order, if passed, is in violation of principles of natural justice, and is liable to be ignored as not binding on such a party. (**Uchhab Lal Chhanwal**³⁷; **J.S. Yadav v. State of U.P.**).

If a person challenges the selection process, successful candidates or at least some of them are necessary parties. (**Uchhab Lal Chhanwal**³⁷; **Prabodh Verma v. State of U.P.**; **Tridip Kumar Dingal v. State of W.B.**). In the O.As filed by the respondents-applicants before the Tribunal, some of the persons whose names were included in the select list, even if not all of them, were arrayed as respondents.

The order of the Central Administrative Tribunal, Hyderabad Bench in O.A.No.203 of 2013 and O.A.Nos.1417 and 1433 of 2012, is under challenge in W.P.No.39158 of 2013. The respondents in O.A.No.1433 of 2012 are the Union of India represented by the Secretary (Establishment), Ministry of Railways; the General Manager, South Central Railway; the Divisional Railway Manager, South Central Railway; and respondents 4 to 18, the members of the Scheduled Castes and the Scheduled Tribes who were extended the benefit of reservation in promotion. The relief sought for in the said O.A. is to call for the records in Memo

dated 04.12.2012, pertaining to the selection for the post of Passenger Guard/Senior Passenger Guard, in following the principles of reservation in promotion, and on own merit, in respect of the Scheduled Castes and the Scheduled Tribes employees who were the erstwhile juniors to the applicants, as illegal and in violation of the law settled by the Supreme Court (ie the judgment of the Constitution Bench of the Supreme Court in **M. Nagaraj**¹). While a consequential direction is also sought, among others, that the applicants also be promoted, the challenge in the O.As are mainly to the action of the Railways in providing reservation in promotion without fulfilling the parameters laid down by the Supreme Court in **M. Nagaraj**¹.

The order of the Central Administrative Tribunal, Hyderabad Bench, in O.A.No.020/00125/2014 dated 01.01.2015, is under challenge in W.P.No.775 of 2015. The respondents in O.A.No.020/00125/2014 are the Union of India represented by the Secretary (Establishment), Ministry of Railways; the General Manager, South Central Railway; the Chief Personnel Officer, South Central Railway; the Senior Divisional Personnel Officer, South Central Railway; and respondents 5 to 15, the members of the Scheduled Castes and the Scheduled Tribes who were extended the benefit of reservation in promotion. The relief sought for in the said O.A. is to declare that the permission accorded by the Railway Board, to extend the currency of the panel vide letter dated 22.01.2014, cannot be applied to the select list for the post of Loco Pilot (Goods) as it is illegal and arbitrary; to quash and set aside the select list dated 01.08.2011 from Sl.No.207 to 259; and to direct the official respondents to finalise the promotion/selection after collecting necessary data in accordance with the pre-conditions laid down by the Supreme Court (ie in the Constitution Bench judgment of the Supreme Court in **M. Nagaraj**¹).

In cases where the validity of policy decisions are impeached, on the ground of their being violative of Constitutional provisions, such proceedings are analogous to those in which the constitutionality of a statutory rule is assailed. In such proceedings the necessary parties to be impleaded are those against whom the relief is sought, and in whose absence no effective decision can be rendered by the Court. In the present case, the relief is claimed only against the Railways and their action, in providing reservations in promotion in favour of the Scheduled Castes and Scheduled Tribes without fulfilling the parameters prescribed for the exercise of the enabling power under Articles 16(4A) and 16(4B), has been subjected to challenge. In all the O.As the Ministry of Railways and their representatives have been arrayed

as respondents. The employees, who are likely to be affected as a result, are, at the most, proper parties and not necessary parties, and the non-joinder of all of them would not be fatal to the O.As filed before the Tribunal. (**GM, South Central Rly. v. A.V.R. Siddhantti**). As relief is sought only against the Ministry of Railways and their representatives, even if technically all the promoted employees are not before the court, the petition is not liable to fail on that ground. (**A. Janardhana v. Union of India; A.V.R. Siddhantti**⁴¹).

IV. HAS THE RAILWAYS FULFILLED THE PARAMETERS, STIPULATED BY THE SUPREME COURT IN “M.NAGARAJ”, BEFORE PROVIDING RESERVATION IN PROMOTION?

Before examining the submission, urged on behalf of the Railways, that reservation in promotion is justified as the parameters prescribed in **M. Nagaraj**¹ are satisfied, it is useful to briefly refer to the circumstances in which the Constitution was amended by the insertion of Articles 16(4-A) and 16(4-B) and the proviso to Article 335, and to the law declared by the Supreme Court in **M. Nagaraj**¹ regarding the circumstances in which the State could exercise its enabling power under Articles 16(4-A) and 16(4-B) to provide reservation in promotion, and to extend the benefit of consequential seniority, in favour of the Scheduled Castes and the Scheduled Tribes.

The concept of reservation under Article 16(4) is hedged by three constitutional requirements, namely, backwardness of a class, inadequacy of representation in public employment of that class and its effect on the overall efficiency in administration. If the extent of reservation is excessive, it then makes inroads into the principle of equality under Article 16(1). Backwardness and inadequacy of representation are compelling reasons for the State to provide representation in public employment. If, in a given case, the court finds excessive reservation under the enactment/rules then such an enactment/rule would be liable to be struck down since it would amount to derogation of the constitutional requirements. (**M. Nagaraj**¹).

Prior to the judgment of the Supreme Court in **Indra Sawhney v. Union of India**, reservation in promotion existed. In **Indra Sawhney**⁴³, the Supreme Court held that reservation in appointments or posts under Article 16(4) is confined to the

initial appointment, and does not extend to reservation in matters of promotion. The Union Government was of the view that the judgment, in **Indra Sawhney**⁴³, adversely affected the interests of the Scheduled Castes and the Scheduled Tribes in services, and felt it necessary to continue the existing policy of providing reservation in promotion, confining it to Scheduled Castes and the Scheduled Tribes alone. Clause (4-A) was inserted after clause (4) of Article 16 of the Constitution. (**M. Nagaraj**¹). Article 16(4A) of the Constitution of India, introduced by the Constitution Seventy-seventh Amendment Act, 1995 with effect from 17.06.1995, read thus:

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

By the Constitution Eighty-first Amendment Act, 2000, Article 16(4B) was introduced in the Constitution. Article 16(4B) reads thus:

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

By the Constitution (Eighty-second Amendment) Act, 2000, a proviso was inserted to Article 335 of the Constitution. After its amendment, Article 335 and its proviso read thus:

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

Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State”.

Article 16(4A), which was inserted by the Constitution Seventy-seventh Amendment Act, 1995, was amended by the Constitution Eighty-fifth Amendment Act, 2001 with retrospective effect from 17.6.1995, and the words “**with consequential seniority**”, was inserted in Article 16(4A) between the words

“provision for reservation in matters of promotion” and ***“to any class or classes of posts in the services under the State”***. After its amendment Article 16(4A) reads thus:-

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

In **M. Nagaraj**¹, the validity, the interpretation, and the implementation of the Constitution (Seventy-seventh Amendment) Act, 1995, the Constitution (Eighty-first Amendment) Act, 2000, the Constitution (Eighty-second Amendment) Act, 2000, and the Constitution (Eighty-fifth Amendment) Act, 2001 was under challenge. In addition, the Supreme Court was called upon to examine whether the action taken pursuant thereto, which sought to reverse with retrospective effect the decisions of the Supreme Court in matters relating to promotion was valid; and whether, by virtue of the aforesaid constitutional amendments, the power of Parliament under Articles 16(4-A) and (4-B) was so enlarged as to obliterate any or all the limitations of Articles 16(4) and 335 of the Constitution. While upholding the validity of the aforesaid amendments, the Supreme Court held that Article 16(4-A) is confined to the Scheduled Castes and the Scheduled Tribes; as Articles 16(4-A) and 16(4-B) flow from Article 16(4), and since Article 16(4) is an enabling provision, Articles 16(4-A) and 16(4-B) are also enabling provisions; as the constitutional amendments, by which Articles 16(4-A) and 16(4-B) were inserted, flowed from Article 16(4) they did not alter its structure; the boundaries of the width of the power under Article 16(4) were not obliterated by, and were retained in, Articles 16(4-A) and 16(4-B); when the State fails to identify and implement the controlling factors then excessiveness comes in; Article 16(4-A) and 16(4-B) retain the controlling factors or the compelling reasons, namely, backwardness and inadequacy of representation which enables the States to provide reservation keeping in mind the overall efficiency of the State administration under Article 335; they do not also obliterate the constitutional requirements, namely, ceiling limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-classification between OBCs on the one hand and SCs and STs on the other as held in **Indra Sawhney**⁴³, and the concept of post-based roster, with inbuilt concept of replacement, as held in **R.K. Sabharwal v. State of Punjab**; whether reservation, in a given case, is desirable as

a policy or not, is not for Courts to decide as long as the parameters mentioned in Articles 16(4) and 16(4-A) are maintained; equity, justice and merit (Article 335)/efficiency are variables which can only be identified and measured by the State; the discretion of the State, in providing reservation under the enabling provisions of Article 16(4) and Article 16(4-A) of the Constitution, is subject to the existence of “backwardness” and “inadequacy of representation” in public employment; “backwardness” must be based on objective factors, and “inadequacy” should factually exist; though “vesting of the power”, by the enabling provisions of Articles 16(4-A) and (4-B), is constitutionally valid, yet “exercise of the power” by the State, in a given case, may be arbitrary, particularly if the State fails to identify and measure backwardness and inadequacy keeping in mind the efficiency of service as required under Article 335; the concepts of efficiency, backwardness, inadequacy of representation are required to be identified and measured; that exercise depends on availability of data, and on numerous factors; if the State has quantifiable data to show backwardness and inadequacy, it can then

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make reservations in promotions keeping in mind maintenance of efficiency which is a constitutional limitation on the discretion of the State as indicated by Article 335; as Articles 16(4-A) and 16(4-B) are enabling provisions, the State is not bound to make reservation for SCs/STs in matters of promotion; however, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class, and inadequacy of representation of that class in public employment, in addition to compliance with Article 335; and, even if the State has compelling reasons, it must ensure that its reservation provision does not lead to excessiveness so as to breach the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely.

There is no fixed yardstick to identify and measure the three variable factors of equity, justice and efficiency. If the concerned State fails to identify and measure backwardness, inadequacy and overall administrative efficiency then, in that event, the provision for reservation would be invalid. (**M. Nagaraj**¹). The question, whether the concerned State has identified and valued the circumstances justifying its making reservation, must be decided on the facts and circumstances of each case. The Court must be satisfied, in each case, that the State has exercised its opinion in making reservation in promotions for SCs and STs, for which the concerned State should place the requisite quantifiable data, and satisfy the Court that such reservation has become necessary on account of inadequacy of representation of

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SCs/STs in a particular class or classes of posts without affecting the general efficiency of service as mandated under Article 335 of the Constitution. With regards the “extent of reservation”, the State will have to show, in each case, the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. If, in a given case, the court finds excessive reservation under a State enactment, then such an enactment would be liable to be struck down since it would amount to derogation of the constitutional requirements. (**M. Nagaraj**¹).

Bearing these aspects in mind, let us now examine whether the petitioner-Railways is justified in its submission that the reservation provided by them, in favour of the Scheduled Castes and the Scheduled Tribes for promotion to higher posts, satisfies the parameters laid down by the Supreme Court in **M. Nagaraj**¹.

In the affidavit filed in support of W.P. No.39158 of 2013, by the Union of India and the South Central Railway, it is stated that, from out of the total sanctioned

posts, posts were reserved in promotions considering 15% and 7.5% representation for the Scheduled Castes and the Scheduled Tribes; the backlog unfilled posts, which were reserved for the Scheduled Tribes was 1941, which showed that the Scheduled Castes and the Scheduled Tribes were not adequately represented in promotional categories; reservation in promotions was, therefore, justified; quantified data was obtained, with regards adequacy of representation of the Scheduled Castes and the Scheduled Tribes in the cadre of passenger guards, before the select list was finalised; the same was incorporated by the Railways in the counter filed by them before the Tribunal; the table extracted in the counter showed that, as against the reservation prescribed for the Scheduled Castes at 15% and for the Scheduled Tribes at 7.5%, the existing staff, belonging to these two categories, were lower than the number of posts required to be provided if reservation, of the aforesaid percentage, was to be adhered to; and, considering the 15% and 7.5% reservation required to be provided in their favour, the data showed that the Scheduled Castes and the Scheduled Tribes were not adequately represented in the cadre of passenger guards.

With regards backwardness and efficiency in administration, it is stated that the Scheduled Castes and the Scheduled Tribes form a separate class by themselves, and are construed to be backward communities; the Constitution 82nd Amendment Act provided that nothing in the Article shall prevent, in making any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes, relaxation in qualifying marks in any examination or lowering the standards in so far as evaluation for reservation, in matters of promotion to any class or classes of service of posts in connection with the affairs of the Union or the State, was concerned; in the instant case, as the post of passenger guards was a safety category post, no relaxation whatsoever, as enshrined in the Article, had been provided in the Selection in question; as the aforesaid twin requirements, for providing reservations, were complied with, the rights of the Scheduled Castes/Scheduled Tribes, for reservation in promotion, was protected by the Constitutional Amendments.

Even in their counter, filed before the Tribunal, the Railways contended that, in terms of the Railway Board's circular dated 29.01.2009, it was clarified that the

Scheduled Castes/Scheduled Tribes who had been promoted, during the period from 07.08.2002 to 06.05.2005, by the non-selection method by virtue of their seniority in the feeder grade or otherwise, in excess of the reservation quota were to be adjusted against the reserved vacancies arising in future; by its Circular dated 01.09.2010, the Railway Board had clarified that members of the Scheduled Castes and the Scheduled Tribes, appointed by promotion on their own merit and seniority and not owing to reservation or relaxation of qualifications, were required to be adjusted against the unreserved points of the reservation roster, irrespective of whether the promotion was made by the selection or the non-selection method; these orders were made with effect from 21.08.1997 i.e., the date from which post based roster was introduced in the Railways; however staff, promoted prior to issuance of the said circulars, were required to be reverted; the short fall in the categories of Scheduled Castes and Scheduled Tribes, if any, was required to be made good through vacancies arising in future.

The counter, filed by the Railways before the Tribunal, further details the reservation required to be provided for the Scheduled Castes and the Scheduled Tribes at 15% and 7.5% respectively. It then takes note of the existing staff in the reserved category, to conclude that, as the existing staff fall short of the required number of posts to be reserved for the Scheduled Castes and the Scheduled Tribes, vacancies still exist which are required to be filled up. Reference is also made to the Departmental of Personnel and Training, Union of India O.M. dated 29.09.2007, and the earlier O.M. dated 29.05.2007 circulated by the Railway Board. It is further stated that, in terms of the Railway Board's instructions issued in proceedings dated 01.09.2010 and 20.06.2003, employees belonging to SC/ST category, appointed by promotion on their own merit and seniority and not owing to reservation or relaxation of qualifications, were required to be adjusted against the unreserved points of the reservation roster, irrespective of whether promotion was made by selection or non-selection method. Reliance is also placed on the DOP&T circular dated 29.03.2007 in this regard.

Clause (4-A) of Article 16 gives freedom to the State to provide for reservation in matters of promotion to any class or classes of posts in the services of the State.

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Article 16(4-A) is governed by two compelling reasons— “backwardness” and “inadequacy of representation”, as mentioned in Article 16(4). In every case where the State decides to provide for reservation in promotion, there must exist two circumstances, namely, “backwardness” and “inadequacy of representation”. The State must form its opinion on gathering quantifiable data in this regard. If these two reasons do not exist, then the enabling provision cannot be enforced. The State can make provision for reservation only if these two circumstances exist. (**M. Nagaraj**¹). Apart from “backwardness” and “inadequacy of representation” the State should also keep in mind “overall efficiency” (Article 335). All the three factors should be borne in mind, by the appropriate Government, in providing for reservation in promotion for SCs and STs. (**M. Nagaraj**¹; **Ajit Singh (II) v. State of Punjab**).

The law declared by the Supreme Court, in **M. Nagaraj**¹, requires the State to identify and measure the existence of “backwardness” and “inadequacy of representation” in public employment, keeping in mind the need to maintain overall efficiency in administration. It is only if the State has quantifiable data to show “backwardness” and “inadequacy of representation”, can it then provide reservation in promotion, that too after taking into consideration the effect of reservation on the overall efficiency in administration. The exercise of gathering the necessary data must precede the exercise of formation of opinion on the need to provide reservation in promotion; and the exercise of formation of opinion must precede a decision being taken to provide reservation. A post-decision justification, that too in the counter filed before the Tribunal or in the Writ Petition filed before this Court, would not suffice. The petitioner-Railways should have placed before the Tribunal, the quantifiable data, if any, gathered by it before making provision for reservation, to show the existence of compelling reasons (ie (1) backwardness, (2) inadequacy of

representation, and (3) overall administrative efficiency) to provide reservation.

As reliance is placed thereupon by the Learned Standing Counsel for the Railways, it is also necessary to refer to the circulars, issued by the DOPT and the Railways, subsequent to the judgment of the Supreme Court in **M. Nagaraj**¹. By their memo dated 21.06.2007, the Southern Railway circulated a copy of the Railway Board's letter dated 29.05.2007, along with a copy of the letter issued by the DOPT, Govt. of India dated 29.03.2007. The Railways circular dated 29.05.2007, refers to the judgment of the Supreme Court in **M. Nagaraj**¹, and to the DOPT circular dated 29.03.2007, to state that the DOP&T had advised that reference to creamy layer, in the concluding paragraph and the other portions of the judgment in **M. Nagaraj**¹, did not relate to the Scheduled Castes and the Scheduled Tribes; the DOPT had, in consultation with the law officers of the Government, examined whether the judgment in **M. Nagaraj**¹ introduced the concept of creamy layer for the Scheduled Castes and the Scheduled Tribes; they had been advised that the observations made in **M. Nagaraj**¹, regarding creamy layer amongst the Scheduled Castes and the Scheduled Tribes, were mere obiter dicta, *per incuriam* and to not flow from, and cannot be reconciled with, the nine judge bench judgment of the Supreme Court in **Indra Sawhney**⁴³; and the reference to creamy layer, in the concluding paragraph and other portions of the judgment, did not relate to the Scheduled Castes and the Scheduled Tribes.

In its circular dated 29.02.2008, the Railway Board, after referring to the judgment of the Supreme Court in **M. Nagaraj**¹, observed that, in the light of the said judgment, the seniority of the Scheduled Castes/Scheduled Tribes railway servants, promoted by virtue of the rule of reservation/roster, should be regulated in terms of the instructions contained in the Board's letters dated 08.03.2002 and 13.01.2005 whereby it was directed that railway servants, on their promotion by virtue of the rule of reservation/roster, were entitled to consequential seniority also. By its proceedings dated 10.08.2010, the DOPT, Government of India clarified that the members of the Scheduled Castes and the Scheduled Tribes, appointed by promotion on their own merit and seniority and not owing to reservation or relaxation of qualifications, would be adjusted against unreserved points of the reservation roster, irrespective of whether promotion was made by the selection method or the non-selection method; and these orders would take effect from 02.07.1997 i.e., the

date of which the post based reservation was introduced.

None of these circulars deal specifically with the parameters required to be satisfied before the enabling power, under Article 16(4A) and 16(4B) of the Constitution of India, can be exercised to provide reservation in promotion in favour of the Scheduled Castes and the Scheduled Tribes. The fact that the Union Government did not find it convenient to gather data, with regards the parameters laid down in **M. Nagaraj**¹, is evident from their endeavour to have Article 16(4A) of the Constitution amended. By the Constitution (One Hundred Seventeenth Amendment) Bill, 2012, Article 16(4-A) was sought to be substituted by the following clause, namely:—

“(4A) Notwithstanding anything contained elsewhere in the Constitution, the Scheduled Castes and the Scheduled Tribes notified under Article 341 and Article 342, respectively, shall be deemed to be backward and nothing in this Article or in Article 335 shall prevent the State from making any provision for reservation in matters of promotions, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes to the extent of the percentage of reservation provided to the Scheduled Castes and the Scheduled Tribes in the services of the State.”.

The statement of objects and reasons for the said Bill provides that the Scheduled Castes and the Scheduled Tribes have been provided reservation in promotions since 1955; this was discontinued following the judgment in **Indra Sawhney**⁴³, wherein it was held that it was beyond the mandate of Article 16(4) of the Constitution of India; subsequently, the Constitution was amended by the Constitution (Seventy-seventh Amendment) Act, 1995 and a new clause (4A) was inserted in Article 16 to enable the Government to provide reservation in promotion in favour of the Scheduled Castes and the Scheduled Tribes; subsequently, clause (4A) of Article 16 was modified by the Constitution (Eighty-fifth Amendment) Act, 2001 to provide consequential seniority to the Scheduled Castes and the Scheduled Tribes candidates promoted by giving reservation; the validity of the constitutional amendments was challenged before the Supreme Court; the Supreme Court, while deliberating on the issue of validity of Constitutional amendments in the case of **M. Nagaraj**¹, observed that the concerned State will have to show in each case the existence of compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency, before making provision for reservation in promotion; relying on the judgment of the Supreme Court in **M. Nagaraj**¹, the High Court of Rajasthan and the High Court of Allahabad had struck

down the provisions for reservation in promotion in the services of the State of Rajasthan and the State of Uttar Pradesh, respectively; subsequently, the Supreme Court had upheld the decisions of these High Courts striking down the provisions for reservation in respective States; it had been observed that there was difficulty in collection of quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment; moreover, there was uncertainty on the methodology of this exercise; in the wake of the judgment of the Supreme Court in **M. Nagaraj**¹, the prospects of promotion of the employees, belonging to the Scheduled Castes and the Scheduled Tribes, were being adversely affected; demands for carrying out further amendment in the Constitution were raised by various quarters; a discussion on the issue of reservation in promotion was held in Parliament on 3.5.2012; demand for amendment of the Constitution, in order to provide reservation for the Scheduled Castes and the Scheduled Tribes in promotion, had been voiced by Members of Parliament; an All-Party Meeting to discuss the issue was held on 21-08-2012; there was a general consensus to carry out an amendment in the Constitution, so as to enable the State to continue the scheme of reservation in promotion for the Scheduled Castes and the Scheduled Tribes as it existed since 1995; in view of the above, the Government had reviewed the position, and had decided to move the constitutional amendment to substitute clause (4A) of Article 16, with a view to provide impediment-free reservation in promotion to the Scheduled Castes and the Scheduled Tribes, and to bring certainty and clarity in the matter; and it was also necessary to give retrospective effect to the proposed clause (4A) of Article 16 with effect from the date of coming into force of that clause as originally introduced, ie from the 17th day of June, 1995.

Even though Article 16(4-A) has not yet been amended, as was sought to be done by the Constitution (One hundred and seventeenth amendment) Bill, 2012, the DOPT, Government of India, by its proceedings dated 07.01.2014, informed the Union Public Service Commission that, in view of the judgment of the High Court of Rajasthan and Uttar Pradesh striking down reservation in promotion by the respective State Governments, and keeping in view the observations of the Supreme Court in **M. Nagaraj**¹, it was decided by the Government of India to bring the Constitutional Amendment Bill, by suitably changing Article 16(4A), to do away with the conditions

laid down in **M. Nagaraj**¹; the constitutional amendment bill was passed by the Rajya Sabha in 2012, and was pending consideration before the Lok Sabha; since the Government of India had taken an in-principle decision to continue reservation in promotion by bringing the constitutional amendment bill, which had already been passed by the Rajya Sabha, it would be appropriate to continue the existing practice of continuation of reservation in promotion, as per the existing procedure adopted by the Departmental Promotional committees. The Union Public Service Commission was requested to take further necessary action accordingly. It is evident, therefore, that the parameters laid down in **M. Nagaraj**¹, as conditions precedent for the exercise of the enabling power under Article 16(4-A), to provide reservation in promotion for the Scheduled Castes and the Scheduled Tribes, have not been fulfilled till date.

V. JUDGMENTS OF THE SUPREME COURT ON WHICH RELIANCE IS PLACED BY COUNSEL ON EITHER SIDE:

As Learned Counsel on either side have referred to several judgments of the Supreme Court, it is necessary to note what has been declared therein. In **S.V. Joshi v. State of Karnataka**, the Supreme Court held that Articles 15 and 16 of the Constitution had been amended by the Constitution (Ninety-third Amendment) Act, 2005, and the Constitution (Eighty-first Amendment) Act, 2000, respectively; these Amendment Acts were the subject-matter of the subsequent decisions in **M. Nagaraj**¹ and **Ashoka Kumar Thakur v. Union of India** in which, inter alia, it had been laid down that, if a State wanted to exceed fifty per cent reservation, it was then required to base its decision on quantifiable data; in the case before it, this exercise had not been done; and keeping in mind the said parameters, the State should place quantifiable data before the Tamil Nadu State Backward Classes Commission and, on the basis of such quantifiable data amongst other things, the Commission should decide the quantum of reservation.

In **Suraj Bhan Meena**², it was contended that, in the absence of any data in relation to the Scheduled Castes and the Scheduled Tribes, the parameters laid down in **M. Nagaraj**¹ were not fulfilled; Rule 33 of the Rajasthan Administrative Service Rules, 1954, providing for consequential seniority, was unconstitutional as no exercise had been undertaken by the State pursuant to Article 16(4-A) of the

Constitution; and since the State did not undertake the exercise, which was mandatory in terms of the judgment in **M. Nagaraj**¹, the State could not, either directly or indirectly, circumvent or ignore or refuse to undertake the exercise by taking recourse to the Constitution (Eighty-fifth Amendment) Act providing for reservation in promotion with consequential seniority. It is in this context that the Supreme Court observed that, in **M. Nagaraj**¹, the Constitution Bench had held that the State was not bound to make reservation for Scheduled Castes and the Scheduled Tribes candidates in matters of promotion but, if it wished, it could collect quantifiable data touching upon the backwardness of the applicants, and inadequacy of representation of that class in public employment, for the purpose of compliance with Article 335 of the Constitution; and in order to provide for

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reservation, if at all, the tests indicated in Articles 16(4-A) and 16(4-B) would have to be satisfied, which could only be achieved after an inquiry as to identity.

The Supreme Court, in **Suraj Bhan Meena**², further held that the position, after the decision in **M. Nagaraj**¹, was that reservation in promotion was dependent on the inadequacy of representation of members of the Scheduled Castes and the Scheduled Tribes and Backward Classes; it was subject to the condition of ascertaining whether such reservation was at all required; the view of the Rajasthan High Court, which was under challenge before it, was based on the decision in **M. Nagaraj**¹ as no exercise was undertaken in terms of Article 16(4-A) to acquire quantifiable data regarding the inadequacy of representation of the Scheduled Caste and Scheduled Tribe communities in public services; and the Rajasthan High Court had rightly quashed the notifications issued by the State of Rajasthan providing for consequential seniority and promotion to members of the Scheduled

Castes and the Scheduled Tribes.

In **Uttar Pradesh Power Corporation Limited**³ it was contended, both on behalf of the State Government and the U.P. Power Corporation, that once the principle of reservation was made applicable to the spectrum of promotion, no fresh exercise was necessary; and efficiency in service was not jeopardised. It is in this context that the Supreme Court held:-

“.....We are of the firm view that a fresh exercise in the light of the judgment of the Constitution Bench in *M. Nagaraj*¹ is a categorical imperative. **The stand that the constitutional amendments have facilitated the reservation in promotion with consequential seniority and have given the stamp of approval to the Act and the Rules cannot withstand close scrutiny in as much as the Constitution Bench has clearly opined that Articles 16(4-A) and 16(4-B) are enabling provisions and the State can make provisions for the same on certain basis or foundation. The conditions precedent have not been satisfied. No exercise has been undertaken. What has been argued with vehemence is that it is not necessary as the concept of reservation in promotion was already in vogue. We are unable to accept the said submission, for when the provisions of the Constitution are treated valid with certain conditions or riders, it becomes incumbent on the part of the State to appreciate and apply the test so that its amendments can be tested and withstand the scrutiny on parameters laid down therein.....**” (emphasis supplied).

In **Chairman and Managing Director, Central Bank of India v. Central Bank of India SC/ST Employees Welfare Association**, the order of the Madras High Court, holding that the O.M. dated 13.08.1997 made a provision for reservation in favour of the Scheduled Castes and the Scheduled Tribes, was under challenge before the Supreme Court. After referring to the Constitution Bench judgment in **M.Nagaraj**¹, the Supreme Court observed that clauses (4) and (4-A) of Article 16 of the Constitution are only enabling provisions which permit the State to make provision for reservation of certain categories of persons; reservation in matters of promotion to any class or classes of posts can be made in favour of SC/ST category employees if, in the opinion of the State, they are not adequately represented in services under the State; the power lies with the State to make such a provision, but the Courts cannot issue any mandamus to the State to, necessarily, make such a provision; it is for the State to act, in a given situation, and to take such affirmative action; wherever there exists such a provision, for reservation in matters of recruitment or promotion, it would bestow an enforceable right in favour of persons belonging to the SC/ST category; failure on the part of any authority to reserve the posts, while making selections/ promotions, would enable the beneficiaries of these provisions to approach the Courts to get their rights enforced; and existence of a provision for reservation, in matters of selection or promotion as the case may be, is the *sine qua non* for seeking a mandamus as only when such a provision is made by the State, a

right accrues in favour of SC/ST candidates, and not otherwise.

The question whether the State could provide reservation in matters of promotion, without gathering data and forming its opinion on the parameters laid down by the Supreme Court in **M.Nagaraj**¹, did not arise for consideration in **Central Bank of India**⁴⁸. Nor were the earlier judgments of the Supreme Court in **Suraj Bhan Meena**² and **Uttar Pradesh Power Corporation Limited**³ noticed therein. It is only if the parameters laid down in **M.Nagaraj**¹ are satisfied and a provision is made for reservation in promotions in favour of the SCs/STs thereafter, would it confer an enforceable right in favour of the members of the Scheduled Castes and the Scheduled Tribes to claim the benefit of reservation in promotions, and not otherwise. Reliance placed by the petitioners, on **Central Bank of India**⁴⁸, is, therefore, misplaced.

The Supreme Court, in **Suraj Bhan Meena**² and **Uttar Pradesh Power Corporation Limited**³, have followed and reiterated the law declared in **M. Nagaraj**¹. It is no doubt true that the rules made by the Government were under challenge therein. It is also true that the Supreme Court, in **M. Nagaraj**¹, did not examine the validity of individual State enactments, and held that the question would be gone into, in individual writ petitions, by the appropriate Bench in accordance with the law laid down in the said judgment. In the present case, the Railways have only been following the policy, of providing reservation in promotion, which were in existence even prior to the judgment of the Supreme Court in **M. Nagaraj**¹. As the Railways was required to gather data, and form its opinion before providing reservation, continuance of the earlier policy of reservation in promotion, without undertaking the exercise of gathering data and formation of opinion, is illegal.

VI. IS NOTIFICATION OF THE SCHEDULED CASTES AND THE SCHEDULED TRIBES, BY THE PRESIDENTIAL ORDER MADE UNDER ARTICLES 341 AND 342 OF THE CONSTITUTION OF INDIA, NOT SUFFICIENT PROOF OF THEIR BACKWARDNESS?

It is also contended, on behalf of the petitioners, that the very fact that the

Scheduled Castes and the Scheduled Tribes are notified in the Presidential Order, under Articles 341 and 342 of the Constitution, is proof of their backwardness. Similar contentions did not find favour with the Supreme Court. In **Uttar Pradesh Power Corporation Limited**³, it was contended, on behalf of the appellants, that once an incumbent belongs to the Scheduled Caste/Scheduled Tribe category, it is conclusive that he suffers from backwardness and no further enquiry is necessary; the requirement of having quantifiable data is not a new concept propounded in **M.**

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Nagaraj¹, but is a reiteration of the earlier view enunciated in **Indra Sawhney**⁴³; the emphasis on backwardness is absolutely misconceived, for Scheduled Castes/Scheduled Tribes are duly notified as such in the Presidential List by virtue of Articles 341 and 342 of the Constitution; their exclusion from the list can be done by the amendment of the Presidential Order alone; hence, any kind of collection of data as regards backwardness is an exercise in futility; there is only one list of Scheduled Castes/Scheduled Tribes, and this list constitutes one group for the purpose of reservation; this list cannot be interfered with, disturbed, regrouped or reclassified by the State; there may not be exclusion by engrafting the principle of backwardness for the purpose of reservation in promotion; data was immediately collected after the 1994 Act; therefore no fresh data was necessary to be collected after the decision rendered by the Constitution Bench in **M. Nagaraj**¹; the efficiency of service, as encapsuled in Article 335 of the Constitution, has been duly respected by providing a uniform minimum standard in matters of promotion as far as the Corporation is concerned; when there was no challenge to the orders, issued prior to the amendment for reservation in promotion, no quantifiable data was necessary; the Government, in its wisdom, had carried out the assessment earlier, and had decided to continue the policy; to lay down the principle that, in view of the decision in **M. Nagaraj**¹, a fresh exercise is necessary

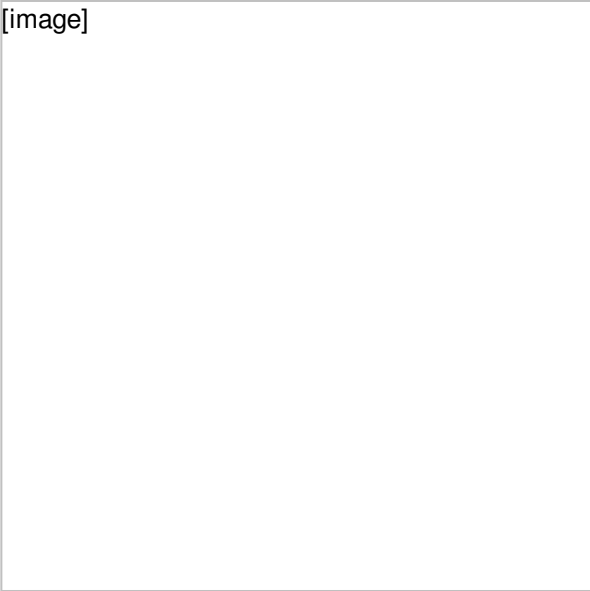
would tantamount to putting the concept in the realm of inherent fallacy; the decision in **Suraj Bhan Meena**² is not a binding precedent; the intention of Parliament, at the time of exercise of its constitutional power to give retrospective effect to the Eighty-fifth amendment, is that the representation of Scheduled Castes/Scheduled Tribes in the services in the States has not reached the required level, and it is necessary to continue the existing position of providing reservation in promotion in the case of Scheduled Castes/Scheduled Tribes; and **M. Nagaraj**¹ does not lay down that the quantifiable data of backwardness should be collected with respect to eligible Scheduled Caste/Scheduled Tribe employees seeking promotion. It is in this context that the Supreme Court held:-

“.... from the aforesaid decision in *M. Nagaraj case*¹ and the paragraphs we have quoted hereinabove, the following principles can be carved out:

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

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

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



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

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

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

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

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

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

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

.....In the said *Suraj Bhan case*²¹, the State Government had not undertaken any exercise as indicated in *M. Nagara*¹. The two-Judge Bench has noted three conditions in the said judgment. It was canvassed before the Bench that exercise to be undertaken as per the direction in *M. Nagara*¹ was mandatory and the State cannot, either directly or indirectly, circumvent or ignore or refuse to undertake the exercise by taking recourse to the Constitution (Eighty-fifth Amendment) Act providing for reservation for promotion with consequential seniority. While dealing with the contentions, the two-Judge Bench opined that the State is required to place before the Court the requisite quantifiable data in each case and to satisfy the Court that the said reservation became necessary on account of inadequacy of representation of the Scheduled Caste and Scheduled Tribe candidates in a particular class or classes of posts, without affecting the general efficiency of service.....

.....We are of the firm view that a fresh exercise in the light of the judgment of the Constitution Bench in *M. Nagara*¹ is a categorical imperative. The stand that the constitutional amendments have facilitated the reservation in promotion with consequential seniority and have given the stamp of approval to the Act and the Rules cannot withstand close scrutiny inasmuch as the Constitution Bench has clearly opined that Articles 16(4-A) and 16(4-B) are enabling provisions and the State can make provisions for the same on certain basis or foundation. The conditions precedent have not been satisfied. No exercise has been undertaken. What has been argued with vehemence is that it is not necessary as the concept of reservation in promotion was already in vogue. We are unable to accept the said submission, for when the provisions of the Constitution are treated valid with certain conditions or riders, it becomes incumbent on the part of the State to appreciate and apply the test so that its amendments can be tested and withstand the scrutiny on parameters laid down therein.” (emphasis supplied).

The law declared by the Supreme Court, in **Uttar Pradesh Power Corporation Limited**³, is binding on this Court and, notwithstanding the persuasive submission made on behalf of the petitioners, it is not open to this Court to take a different view.

In **Indra Sawhney**⁴³ (a nine-judge bench judgment of the Supreme Court) it was held that backward classes under Article 16(4) would also include SCs/STs for

whose entry into services, provision is also made under Article 335; while Article 16(4) is couched in an enabling language, Article 335 is in a mandatory cast; it became necessary to make the additional provision of reservation for SCs/STs under Article 335 because for them the reservation in services were to be made as obligatory; it is because of the mandate of Article 335 and the level of backwardness of the SCs/STs - the most backward among the backward classes - that it also became necessary to caution and emphasise in the same vein, that the imperative claims of the SCs/STs shall be taken into consideration consistently with the efficiency of the administration, and not by sacrificing it; as Scheduled Castes and Scheduled Tribes are also the members of the backward classes of citizens, within the meaning of Article 16(4), the nature of backwardness of the backward class of citizens is implicit in Article 16(4) itself; Clause (4) of Article 15 specifically mentions that nothing in Article 15, or in clause (2) of Article 29, shall prevent the State from making any special provision for the advancement of any "socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes"; it groups "socially and educationally backward classes" with "Scheduled Castes and Scheduled Tribes"; and, when it is remembered that Articles 341 and 342 enable the President to specify by notification, the Scheduled Castes and Scheduled Tribes, it can hardly be debated that such specifications, from time to time, may only be from the socially and educationally backward classes or from classes whose economic backwardness is on account of their social and educational backwardness.

After holding that backwardness and inadequacy of representation operate as a justification in the sense that the State gets the power to make reservation only if backwardness and inadequacy of representation exist, the Supreme Court, in **M.**

Nagaraj¹, held:-

“.....At this stage, one aspect needs to be mentioned. Social justice is concerned with the distribution of benefits and burdens. The basis of distribution is the area of conflict between rights, needs and means. These three criteria can be put under two concepts of equality, namely, “formal equality” and “proportional equality”. Formal equality means that law treats everyone equal. Concept of egalitarian equality is the concept of proportional equality and it expects the States to take affirmative action in favour of disadvantaged sections of society within the framework of democratic polity. In **Indra Sawhney**⁵ all the Judges except Pandian, J. held that the “means test” should be adopted to exclude the creamy layer from the protected group earmarked for reservation. In **Indra Sawhney**⁵ this Court has, therefore, accepted caste as a determinant of backwardness and yet it

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has struck a balance with the principle of secularism which is the basic feature of the Constitution by bringing in the concept of creamy layer. Views have often been expressed in this Court that caste should not be the determinant of backwardness and that the economic criteria alone should be the determinant of backwardness. As stated above, we are bound by the decision in *Indra Sawhney*⁵. The question as to the “determinant” of backwardness cannot be gone into by us in view of the binding decision. In addition to the above requirements this Court in *Indra Sawhney*⁵ has evolved numerical benchmarks like ceiling limit of 50% based on post-specific roster coupled with the concept of replacement to provide immunity against the charge of discrimination.....”

(emphasis supplied)

As noted hereinabove, the Constitution Bench, in **M. Nagaraj**¹, has specifically held that the question of “**determinants**” of backwardness could not be gone into by them in view of binding decision in **Indra Sawhney**⁴³. The manner in which “backwardness” is to be identified is for the Union Government to decide, and the Supreme Court, in **M. Nagaraj**¹, has not stipulated the manner in which “backwardness” should be determined. As the Supreme Court, in **Indra Sawhney**⁴³, has held that the Scheduled Castes and the Scheduled Tribes are the most backward among the backward classes the Railways are not precluded, after gathering the required data, from also taking into consideration the law declared by the Supreme Court in **Indra Sawhney**⁴³ as aforementioned, and the Presidential Order issued under Articles 341 and 342 of the Constitution of India, in forming its opinion regarding “backwardness”. Needless to state that the Railways would, in addition, be required to ascertain whether the Scheduled Castes/Scheduled Tribes are inadequately represented in the Railway services, and to take into consideration maintenance of over all efficiency in Railway administration, in forming its opinion on the need to provide reservation in promotion.

VII. PARITY IN TREATMENT:

As service jurisprudence postulates that all similarly situated persons should be treated similarly, normally, when a particular set of employees are given relief by the Court, all other identically situated persons need to be treated alike by extending that benefit. Not doing so would amount to discrimination, and would be violative of Article 14 of the Constitution of India. The normal rule is that, merely because other similarly situated persons did not approach the Court earlier, they are not to be treated differently. This principle is subject to well-recognised exceptions in the form of laches and delay as well as acquiescence. Those persons, who do not challenge the wrongful action in their cases, acquiesce thereto and wake up after a long delay, only because their counterparts who had approached the court earlier had succeeded in their efforts, cannot claim that the benefit of the judgment, rendered in the case of similarly situated persons, should be extended to them. They would be treated as fence-sitters and laches and delay, and/or acquiescence, would be a valid ground to dismiss their claim. However, this exception may not apply in those cases where the judgment pronounced by the Court is a judgment in rem with the intention to give benefit to all similarly situated persons, whether they had approached the court or not. (**State of U.P. v. Arvind Kumar Srivastava**).

In **G.C. Ghosh v. Union of India**, the Supreme Court held:-

“.....Reliance has been placed by the petitioners on the decision of the Allahabad High Court in *Union of India v. Smt Afsar Jahan Begum* rendered in Special Appeal No. 9 of 1975 on March 12, 1979. The aforesaid decision has been accepted by the Railway Administration in the sense that no special leave petition was preferred in this Court and the matter finally rested there. The petitioners who are employees of Eastern Railway have contended that they are entitled to the same treatment as is being accorded to their counterparts in the Northern Railway in pursuance to the aforesaid decision rendered by the Allahabad High Court which has become final as between the Railway Administration on the one hand and the employees of the Northern Railway on the other. In the light of the command of Articles 14 and 16 of the Constitution of India the same treatment is required to be accorded to the petitioners regardless of the fact that they are serving in Eastern Railway unless it is shown that there is some distinguishing feature, for according a different treatment. Learned Additional Solicitor General appearing for the Railway Administration is not in a position to contend that there is any such special distinguishing feature to justify denying of uniformity in treatment. The prayer of the writ petitioners must accordingly be granted to the aforesaid extent. It is therefore directed that the petitioners should be accorded the same treatment as their counterparts are being accorded in the Northern Railway in regard to treating the running allowance granted to the running staff as part of the pay when they are transferred or promoted to a stationary post during the period they hold the officiating in the stationary post to the same extent and in the same manner as enjoined by the Allahabad High Court pursuant to the aforesaid judgment.”

(emphasis supplied)

The very same issue, relating to reservation in promotions in the Railways,

fell for consideration before the Central Administrative Tribunal, Principal Bench, New Delhi. The Principal Bench of CAT, by its order in O.A. No.2211 of 2008 dated 02.12.2010, noted the case of the applicants that the pre-conditions spelt out in **M. Nagaraj**¹ had not been complied with; and reservation in promotion, with accelerated seniority, was required to be worked out as per the settled law on the issue. After noting that the Railways had not worked out, or even applied their mind, regarding the preconditions stipulated in the judgment of the Supreme Court in **M. Nagaraj**¹, before giving effect to the provisions of Article 16(4A), the Principal Bench, CAT quashed the circular dated 29.02.2008 by which the seniority of the Scheduled Castes/Scheduled Tribes railway servants, promoted by virtue of rule of reservation/roster, was to be regulated. While setting aside the said circular instructions dated 29.02.2008, the Principal Bench CAT directed the Railways not to give accelerated seniority to the members of the Scheduled Castes and the Scheduled Tribes till such time the preconditions, on which alone Article 16(4A) of the Constitution was to operate, were complied with.

It is represented before us that the aforesaid order of the Principal Bench of CAT has been implemented by the Railways. If that be so, it does not stand to reason that employees, belonging to other zones of the Railways, should be treated differently, more so as the respondents-applicants are not guilty of delay and laches in invoking the jurisdiction of the Tribunal.

VIII. CONCLUSION:

As the Tribunal has merely followed the law laid down by the Supreme Court in **M. Nagaraj**¹, in allowing the O.As, the orders of the Tribunal, to the extent it declared the action of the Railways in providing reservation in promotion without fulfilling the parameters laid down in **M. Nagaraj**¹ to be illegal, do not necessitate interference. The fact however remains that, despite the amendment to the Constitution by insertion of Articles 16(4-A) and (4-B) nearly fourteen years ago, the members of the Scheduled Castes and the Scheduled Tribes still face uncertainty on whether or not they are entitled for reservation in promotion, and to be extended the benefit of consequential seniority. This predicament, they find themselves in, is for no fault of theirs but is on account of the failure of the Union of India to gather data, and form its opinion, on the parameters laid down by the Supreme Court in **M. Nagaraj**¹. The prevailing uncertainty can only be put an end to if the petitioner-

Railway is directed to undertake the aforesaid exercise, and take a decision, within a specified time frame.

The Writ Petitions are, accordingly, disposed of directing the petitioner-Railways to undertake and complete the exercise of gathering data, and forming its opinion on the parameters laid down by the Supreme Court in **M. Nagaraj**¹, with utmost expedition and, in any event, not later than six months from the date of receipt of a copy of this Order. As this stalemate cannot be permitted to effect railway administration, and the services it renders to the public at large, it is open to the petitioner-Railways to make in-charge arrangements in the interregnum, making it clear to those, who are given charge of the posts, that this arrangement is temporary and would continue only till the exercise of formation of opinion, on the need to provide reservation in promotion, is completed. The miscellaneous petitions pending, if any, shall also stand disposed of. No costs.

(RAMESH RANGANATHAN, J)

(M.SATYANARAYANA MURTHY, J)

Date: 29.04.2015.

Note: L.R. copy to be marked

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