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HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment Reserved on: 24/08/2020****Judgment Delivered on : 14/09/2020****Writ Petition (S) No. 2227 of 2020**

1. Union of India, through its Secretary, Ministry of Finance, Department of Revenue, North Block, New Delhi – 110001
2. Central Board of Excise & Customs, through Chairman, Revenue Department, North Block, New Delhi – 110008
3. The Chief Commissioner, Customs & Central Excise and Central Tax, Cadre Controlling Authority, MP, Chattisgarh & Nagpur Region, 48 Administrative Area, Areara Hills, Hoshangabad Road, Bhopal – 462011
4. The Principal Commissioner, Customs & Central Excise and Central Tax, Raipur, Chattisgarh 492001

Versus

1. Himanshu Verma S/o Late Shri P.C.Verma, aged about 59 years, presently working as Superintendent, Central Excise, Raipur, Chhattisgarh- 492001
2. P.K.Kale S/o Late Shri P.R.Kale, aged about 57 years, presently working as Superintendent, Central Excise, Raipur, Chhattisgarh 492001
3. S.C.Agrawal S/o Late Shri J.P.Agrawal, aged about 57 years, presently working as Superintendent, Central Excise, Raipur, Chhattisgarh 492001
4. Nishit Chandra Mathur S/o Late Shri M.C.Mathur, aged about 56 years, presently working as Superintendent, Central Excise, Raipur, Chhattisgarh, 492001
5. Chandra Kumar Sahu S/o Shri Sahib Ram Sahu, aged about 59 years, presently working as Superintendent, Central Excise, Raipur, Chhattisgarh, 492001
6. A.K.Khan, S/o Late Shri I.H.Khan, aged about 57 years, presently working as Superintendent, Central Excise, Raipur, Chhattisgarh, 492001

7. Pankaj Saran S/o Late Shri Sairaghubin Saran, aged about 59 years, presently working as Superintendent, Central Excise, Raipur, Chhattisgarh, 492001
8. Rakesh Gauraha S/o Late Shri Bhagwat Prasad Gauraha, aged about 59 years, presently working as Superintendent, Central Excise, Raipur, Chhattisgarh, 492001
9. A. Babu Rao S/o Shri A.V., aged about 56 years, presently working as Superintendent, Central Excise, Raipur, Chhattisgarh, 492001
10. S.P.Deshpande S/o Shri Prabhakar Deshpande, aged about 61 years, retired as Superintendent, Central Excise, Raipur, Chhattisgarh, 492001
11. Naru Siggh Patra S/o Shri S.C.Patra, aged about 59 years, presently working as Superintendent, Central Excise, Raipur, Chhattisgarh, 492001
12. Gopal Prasad Joshi S/o Late Shri Banmali Joshi, aged about 54 years, presently working as Superintendent, Central Excise, Raipur, Chhattisgarh, 492001
13. Jasrim Kindo, aged about 59 years, presently working as Superintendent, Central Excise, Raipur, Chhattisgarh, 492001
14. Kripanand Bharti, aged about 58 years, presently working as Superintendent, Central Excise, Raipur, Chhattisgarh, 492001
15. Gangadhar Majhi, aged about 53 years, presently working as Superintendent, Central Excise, Raipur, Chhattisgarh, 492001

For Petitioners	: Shri B. Gopa Kumar, Assistant Solicitor General
For Respondent No. 1 to 12	: Shri A.V.Shridhar, Advocate
For Respondent No. 13	: Shri Rohit Sharma, Advocate
For Respondent No. 14 & 15	: Shri C.R.Sahu, Advocate
For Intervenor	: Shri Ajay Shrivastava, Advocate

Hon'ble Shri P.R. Ramachandra Menon, Chief Justice
Hon'ble Shri Parth Prateem Sahu, Judge

C.A.V. Judgment

Per P.R. Ramachandra Menon, Chief Justice

1. Whether seniority can be conferred to the Scheduled Caste/Scheduled Tribe candidates who are given promotion in the reserved slots earlier than the Senior General Category candidates in the feeder cadre, without effecting any legislation or passing any executive orders by the Government as envisaged under Article 16(4A) of the Constitution of India, ignoring the “**Catch-up rule**” formulated by the Constitution Bench of the Apex Court in ***Union of India v. Virpal Singh Chauhan***; {(1995) 6 SCC 684} and as accepted by the subsequent Constitution Bench in ***Ajit Singh (II) v. State of Punjab***; {(1999) 7 SCC 209} ? Whether it can be done so, without collecting the data as to the inadequacy of representation of such class as mandated by the Constitution Bench of the Apex Court in ***M. Nagraj v. Union of India***; {(2006) 8 SCC 212} and as accepted by the subsequent Constitution Bench in ***Jarnail Singh v. Lachhmi Narain Gupta & Others***; (2018) 10 SCC 396 ? These are the questions to be considered in this writ petition filed by the Central Government and the authorities of the Central Excise/Customs Department, challenging the verdict passed by the Central Administrative Tribunal, Jabalpur Bench, Circuit Sitting Bilaspur (*for short ‘the Tribunal’*) answering the said questions in the ‘Negative’.

2. The genesis of the dispute reveals that the Respondents 1 to 12 were working as Inspectors in the Department with settled seniority over the Respondents 13 to 15. But the Respondents 13 to 15, by virtue of their being members of the Scheduled Caste/Scheduled Tribe community came to be promoted earlier, on extending the benefit of Article 16(4A) of the Constitution of India and it was thereafter, that the Respondents No. 1 to 12 came to be

promoted to the cadre of Superintendent. But once the seniors were also promoted to the above cadre, by virtue of the law of “**Catch-up rule**” evolved by the Apex Court in **Virpal Singh Chauhan** (supra) and accepted in **Ajit Singh (II)** (supra), they were to be placed above the Respondents 13 to 15 (juniors who got promoted earlier in the reserved segment), which however was not given effect to. A seniority list was prepared giving seniority to the Respondents 13 to 15 in the cadre of Superintendent, above the Respondents 1 to 12, merely with reference to an Office Memorandum of instructions dated 21.01.2002 (Annexure A-1/2) of the Department of Personnel and Training. Met with the situation, the Respondents 1 to 12 approached the Tribunal seeking for a direction to the competent authority to prepare a fresh combined seniority list in the cadre of Superintendent, Central Excise by following the principle of “**Catch up rule**” and also to direct the authorities concerned to consider the eligible candidates for promotion to the post of Assistant Commissioner, Central Excise, after preparation of the seniority list of Superintendents of Central Excise, following the “**Catch up rule**”.

3. When the matter came up for consideration before the Tribunal on 23.03.2018, Annexure P/2 order was passed directing to maintain *status quo* regarding convening of the proposed DPC. The Petitioners herein filed their reply and an MA to vacate the interim order, pointing out that the reliance sought to be placed by the Applicants in the Original Application to have granted the interim order, based on another interim order passed by the Tribunal was not correct, as there was factual difference between the two cases. It was also pointed out that because of the interim order, *ad hoc* DPC for the year 2018 and 2019 was stayed and officers were getting retired all over India, every month, without getting promotion. Reference was also made to some orders passed by the Apex Court in some cases permitting to hold

ad hoc DPC to conduct promotion from the 'reserved to reserved' and the 'unreserved to unreserved' segments. It was further pointed out that, as per the various rulings of the Apex Court, it was abundantly clear that the “Catch up rule” was not a constitutional requirement and that there was no merit in the Original Application, either in law or on facts.

4. The Tribunal considered the MA and rejected the same on 21.08.2019, ordering the Original Application to be listed for final hearing on 18.09.2019. The Petitioners sought to challenge the order by filing Writ Petition (S) No. 9669 of 2019. Interference was declined in the said matter, observing that as per the very impugned order dated 21.08.2019 (while rejecting the petition to vacate the stay) the Original Application itself was directed to be listed for final hearing on 18.09.2019 i.e. within one month itself (though, it came to be adjourned on the request of the parties). In the said circumstances, based on the submissions made on behalf of the Petitioners to cause an ‘urgent hearing’ and the “consensus” expressed from both the sides, the writ petition was disposed of as per Annexure P/3 judgment dated 25.11.2019, expressing the hope and desire to have the issue heard and finalized by the Tribunal.

5. Pursuant to the above proceedings, the Original Application came to be finally heard by the Tribunal and Annexure P/1 order was passed on 22.01.2020 itself, whereby it was held that the course pursued by the official Respondents in the Original Application, permitting the Scheduled Caste/Scheduled Tribe candidates to retain their seniority, ignoring the “**Catch up rule**”, without formulating any provision/law in this regard and without collecting the data to hold that there was inadequacy in their representation, was quite bad and not sustainable, in view of the law declared by the Apex Court in **Virpal Singh Chauhan** (supra) and also in **Sudhakar Baburao Nangnure v. Noreshwar Raghunathrao Shende**; {SLP(Civil) No. 8769-8771 of 2018, decided on 05.03.2019}. It was

accordingly, that a declaration was made that the seniority of the private Respondents who were promoted as Superintendents earlier than the seniors/Applicants, based on the reservation in promotion, should be decided as per the “**Catch up rule**” evolved by the Apex Court in **Virpal Singh Chauhan** (supra). Consequential direction was also given to the official Respondents to prepare a revised seniority list as per the “**Catch up rule**” within 120 days from the date of communication of the order, which is put to challenge in this writ petition.

6. It is to be noted that the writ petition has been moulded by the Petitioners mainly pointing out that a similar issue had come up for consideration before the Central Administrative Tribunal, Chandigarh and the Original Application filed by the Applicants seeking for similar prayers were allowed as per Annexure P/4 judgment dated 08.02.2018. But the said judgment was subjected to challenge by filing necessary proceedings before the High Court of Punjab & Haryana, wherein an interim order of stay was granted on 02.02.2018 as borne by Annexure P/5, also observing that the related issues were already referred to a larger Bench of the Apex Court including as per Annexure P/6 order passed on 14.11.2017 in **State of Tripura & Others v. Jayanta Chakraborty & Others**; {(2018) 1 SCC 146}. It is contended that the Tribunal has failed to appreciate the effect of the Constitution (Eighty-fifth Amendment) Act, 2001 whereby Article 16(4A) was amended with effect from 17.06.1995 i.e. the date of its inclusion in the Constitution, enabling the Government servants belonging to the Scheduled Caste/Scheduled Tribe to retain their seniority on promotion, by virtue of the rule of reservation. It is in the said context, that the Government has issued DoPT Office Memorandum No. 20011/1/2001-Estt.(D), dated 21.01.2002 directing all the Ministries/Departments to take necessary action for giving

consequential seniority and benefits to the Scheduled Caste/Scheduled Tribe Government servants concerned.

7. Shri B. Gopa Kumar, the learned Assistant Solicitor General addressed the Court in tune with the pleadings raised in the writ petition. Reference was made to the relevant provisions in the Constitution and also the rulings rendered by the Apex Court touching the issue as to the reservation in promotion. According to the learned Assistant Solicitor General, in view of the clear mandate and the purpose of the amendment of the Constitution, touching Article 16(4A), it was quite open for the Government servants belonging to the Scheduled Caste/Scheduled Tribe who came to be promoted by virtue of Article 16(4A) earlier than the seniors in the feeder category (Applicants) to retain their seniority and hence, Annexure P/1 verdict of the Tribunal requires to be interdicted. It was also pointed out that, since a similar verdict passed by the Central Administrative Tribunal, Chandigarh has already been stayed by the High Court of Punjab and Haryana (vide Annexure P/5) adjourning the case *sine die* in view of the pendency of the related issues before the Apex Court {as borne by Annexure P/6 in ***State of Tripura*** case (supra)}, it was not correct or proper for the Tribunal to have the matter finalized as per Annexure P/1 judgment, instead of waiting for the outcome of the issue pending before the Apex Court, as to the right to retain the seniority by the Scheduled Caste/Scheduled Tribe candidates and as to the non-applicability of the “**Catch up rule**”.

8. We heard Shri A.V.Shridhar, the learned counsel for the Respondents 1 to 12 (Applicants in the Original Application) as well as Shri Rohit Sharma (for Respondent No. 13) and Shri C.R.Sahu, the learned counsel for the Respondents 14 and 15; who are the party Respondents before the Tribunal, in detail.

9. At the very outset, we would like to note that there is absolutely no basis for the submission from the part of the Petitioners that the Tribunal ought to have waited till the issue stated as pending before the Apex Court was finalized, keeping the Original Application pending. As discernible from Annexure P/3 verdict passed by this Court (in Writ Petition (S) No. 9669 of 2019), the urgency pointed out from the part of the Petitioners was noted therein, simultaneously observing that the Tribunal had ordered the matter to be listed for final hearing in the very next month; which however was got adjourned at the instance of the parties including the Petitioners causing a further listing on 22.01.2020. It was on the basis of the “consensus” expressed including from the part of the Petitioners, that the matter was disposed off by this Court, expressing the hope and desire that the Tribunal would finalise the matter immediately, which has been given effect to by the Tribunal by passing Annexure P/1 verdict on 22.01.2020 itself. Having pressed the matter as urgent and having succeeded in getting the matter finalized, the Petitioners are not justified in taking a somersault when the outcome turned against the Petitioners, to contend that the matter ought to have been kept pending by the Tribunal.

10. With regard to the merits, the concept of ‘reservation’ is not something which can be claimed as a matter of right under the Constitution. The provision for reservation, whether it be under Article 16(4), 16(4A) or 16(4B) is only an enabling provision, conferring the power upon the Parliament/ State to provide for reservation, if so necessitated. It actually stands as an exception to the fundamental right guaranteed under Article 16(1) providing that there shall be equality in the matters of public employment for all citizens. When **Article 16(3)** confers power upon the Parliament for making any law to provide for reservation for a class or classes of employment or appointment to an office under the Government or any local authority within a

State or Union Territory stipulating the requirement as to the residence within that State or Union Territory prior to such employment or appointment, **Article 16(4)** enables the State to make provision for reservation in appointment or posts in favour of any backward class of citizens who is not adequately represented in the service under the State, as found by the State. Obviously, the term 'backward class' under Article 16(4) is of wider magnitude; which includes the Scheduled Castes, the Scheduled Tribes or the other persons of the backward community/class.

11. By the passage of time, the Parliament felt the necessity to provide reservation in the matters of promotion as well, to the Scheduled Castes and Scheduled Tribes, who in the opinion of the State were not adequately represented in the service under the State. It was accordingly, that sub-article (4A) was introduced as part of Article 16, as per the Constitution (Seventy-seventh Amendment) Act, 1995 *w.e.f* 17.06.1995; which reads as follows:

“16(4A) Nothing in this article shall prevent the State from making any provision for reservation or classes of posts in the service 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”

12. A question came up for consideration before the Apex Court as to whether the junior members belonging to the Scheduled Castes/Scheduled Tribes category who got an early promotion in exercise of the power under Article 16(4A), over and above the seniors in the feeder category, would be eligible to retain their seniority in the promoted cadre even after the seniors get promoted to the said cadre, though subsequently. After a threadbare analysis of the relevant provisions of law, the object behind introduction of sub-article (4A) as part of Article 16 and such other relevant aspects, it was declared by the Apex Court in ***Virpal Singh Chouhan*** (*supra*) that seniority cannot be assigned to the juniors who got accelerated promotion under

Article 16(4A) while holding that reservation can be there not only at the stage of initial appointment, but also at every stage of subsequent promotions; it was made clear that the roster indicating reserved points for giving effect to the Quota for Scheduled Castes/Scheduled Tribes would not affect the seniority. The Apex Court evolved a principle, termed as “**Catch up rule**” holding that there is nothing wrong on the part of the State in giving early promotions to the junior members belonging to the Scheduled Caste/Scheduled Tribe categories in terms of Article 16(4A) but the seniors who got promoted subsequently, based on their merit and seniority could catch up the seniority and would be placed above the juniors who got early promotion merely because of Article 16(4A). This verdict pulled the trigger causing much annoyance to the Government, which made the Parliament to bring up an amendment to Article 16(4A) to confer consequential seniority as well; vide the 85th Amendment to the Constitution to overreach the judgment in **Virpal Singh Chauhan** (supra).

13. Section 16(4A) as amended after **Virpal Singh Chouhan** (supra) vide the 85th Amendment, 2001 is extracted below:

“16(4A) Nothing in this article shall prevent the State from making any provision for reservation [in matters of promotion, with consequential seniority, to any class] or classes of posts in the service 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”

14. The constitutional validity of the Constitution (Eighty-fifth Amendment) Act, 2001 enabling the State to provide consequential seniority with reference to the reservation in promotion as envisaged under Article 16(4A) was put to challenge before the Apex Court in **M. Nagaraj** (supra). The conclusion reached by the Apex Court is that the amendment by way of Article 16(4A) and 16(4B) flow from Article 16(4) and they do not alter the structure of Article

16(4) and further that they are retaining the controlling factors or the compelling reasons; namely the 'backwardness' and 'inadequacy of representation'; which enable the State to provide for reservation without compromising the overall efficiency of the State administration under Article 335. Reiterating the ceiling limit of reservation at 50% as held by a 'Nine Judges Bench' of the Apex Court in **Indra Sawhney v. Union of India**; {(1992) Supp 3 SCC 217} and the concept of 'post based roster' evolved in **R.K.Sabharwal v. State of Punjab** {(1995) 2 SCC 745}, it was held that the State is not bound to make reservation for the Scheduled Castes and Scheduled Tribes in the matter of promotions. But, if they wish to exercise their discretion and make any such provision, the State had to collect quantifiable data taking the backwardness of the class and inadequacy of representation of that class in public employment, in addition to compliance with Article 335 of the Constitution. Even in such a case, the Apex Court held that the reservation cannot lead to any excess so as to breach the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely. It was subject to the above observation, that the constitutional validity of the 77th Amendment of 1995, 81st Amendment of 2000, 82nd Amendment of 2000 and 85th Amendment of 2001 was upheld, while answering the reference and leaving it open to the appropriate Bench to deal with validity of the individual enactments of the States in the individual writ petitions.

15. A question was mooted before the Apex Court as to the need to re-visit the law laid down in **M. Nagaraj** (supra). The said issue projected in various Special Leave Petitions (Civil) was considered elaborately by a Constitution Bench of the Apex Court in **Jarnail Singh** (supra) with reference to the rival contentions and the various case laws. The Bench observed in paragraph 17 of the judgment, that when **M. Nagaraj** (supra) applied the creamy layer test to

the Scheduled Castes and Scheduled Tribes in exercise of application of the basic structure test to uphold the constitutional amendments leading to Article 16(4A) and 16(4B), it did not interfere with the Parliament's power under Article 341 or 342 in any manner. It was accordingly observed that, the said part of the judgment in ***M. Nagraj*** (supra) did not require to be re-visited and hence, there was no need to refer ***M. Nagraj*** (supra) to a 7 Judge Bench; simultaneously adding that ***M. Nagraj*** (supra) was a unanimous judgment of 5 Judges passed in the year 2006 which was repeatedly being followed and applied in a number of judgments of the Apex Court. Observing that the test laid down in ***M. Nagraj*** (supra) for judging whether a constitutional amendment violates the basic structure have been expressly approved by a 'Nine Judges Bench' of the Apex Court in ***I.R.Coelho (Dead) by LRs. v. State of Tamil Nadu & Others***; {(2007) 2 SCC 1, paragraphs 61, 105 and 142}. The Apex Court held that ***Jarnail Singh*** (supra) made it clear that, though the conclusion in ***M. Nagraj*** (supra) that the State has to collect quantifiable data showing the **backwardness** of the Scheduled Castes/Scheduled Tribes will not be sustainable, being contrary to the 'Nine Judges Bench' verdict in ***Indra Sawhney*** (supra), the declaration/ direction that quantifiable data shall be collected by the State on the parameters as stipulated in ***M. Nagraj*** (supra) on the inadequacy of representation stands good, which can be tested by the Courts.

16. Referring to the law declared by the Constitution Bench in ***M.Nagraj*** (supra), the Apex Court in a subsequent decision in ***Uttar Pradesh Power Corporation Limited v. Rajesh Kumar & Others***; {(2012) 7 SCC 1}, has held that the State has to form an opinion on the 'quantifiable data' regarding the adequacy of representation so as to extend the benefit of reservation in promotion under clause (4A) of Article 16 of the Constitution. Article 16(4) 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 which do not exist in Article 16(1) and it is only when these reasons are satisfied, that the State would get the power to provide for reservation in the matter of employment.

17. In ***S. Panneer Selvam & Others v. State of Tamil Nadu & Others***; {(2015) 10 SCC 292}, the question considered by the Apex Court was, whether in absence of any provision/policy decision by the State for giving consequential seniority to the candidates promoted on the basis of reservation prior to the general category candidate, claim for consequential seniority could be accepted; which was answered in the “negative” holding that in the absence of provision for consequential seniority, “**Catch up rule**” will be applicable and the roster point promotees cannot claim such consequential seniority. Similarly, in ***B.K.Pavitra I v. Union of India***; {(2017) 4 SCC 620 : AIR 2017 SC 820}, the Apex Court noted that the consequential seniority is not automatic to the junior promotees in the reserved category under Article 16(4A) of the Constitution and that it is for the State to place materials on record to infer that there was compelling necessity for exercise of such power and the decision of the State was based on such materials, including the study that the overall efficiency was not compromised. Observing that no such exercise was undertaken in the case in hand, it was held that the High Court had made erroneous observations in this regard attributing the burden of proof on the petitioners to establish that the overall efficiency was affected adversely because of giving consequential seniority to the junior persons in the said cadre. The Apex Court has observed that the plea that seniority was not a fundamental right was equally without any merit in the given context and in the absence of an exercise under Article 16(4A) of the Constitution, it is the “Catch up rule” which will govern the field.

18. In ***B.K.Pavitra II v. Union of India & Others***; {AIR 2019 SC 2723}, validity of the Karnataka Extension of Consequential Seniority to Government Servants Promoted on the Basis of Reservation (to the Posts in the Civil Services of the State) Act, 2018, was the subject matter of dispute. The enactment provided for consequential seniority to the persons belonging to the Scheduled Castes/Scheduled Tribes promoted under the reservation policy of the State of Karnataka, protecting such consequential seniority from 24.04.1978. This Act was preceded by the Karnataka Determination of Seniority of the Government Servants Promoted on the Basis of the Reservation (to the Posts in the Civil Services of the State) Act, 2002, which was under challenge in ***B.K.Pavitra I*** (supra), that came to be finalized by a 'Two Judges Bench' of the Apex Court, as discussed already, declaring that the provisions in the Reservation Act, 2002 to the extent of doing away with the "**Catch up rule**" and providing consequential seniority to the persons belonging to Scheduled Castes/Scheduled Tribes on promotion against roster points to be ultra vires to Articles 14 and 16 of the Constitution. The contention in ***B.K.Pavitra II*** (supra) was that it was not open to the legislative body governed by the parameters of the Constitution to override a judicial decision without taking away its substratum. The version of the State was that they had conducted an exercise for collecting quantifiable data, and hence, there was nothing wrong. After elaborate discussion, it was concluded that the challenge to the constitutional validity of the Reservation Act, 2018 was lacking in substance. It was observed that, following the decision of ***B.K.Pavitra I*** (supra), the State Government had duly carried out the exercise of collecting and analyzing the data or the compelling factors adverted to by the Constitution Bench in ***M. Nagaraj*** (supra) and hence, the Reservation Act, 2018 had cured the deficiency which was noticed by ***B.K.Pavitra I*** (supra), in respect of the Reservation Act, 2002; thus upholding the enactment (Reservation Act, 2018).

19. The matter has come up for consideration before the Apex Court quite recently as well. In ***Mukesh Kumar & Others. V. State of Uttarakhand & Others***, {Civil Appeal No. 1226 of 2020, decided on 07.02.2020}, the controversy pertains to reservation to the Scheduled Caste/Scheduled Tribe to the post of Assistant Engineer (Civil) in the Public Works Department in the Government of Uttarakhand. The point considered by the Apex Court (as noted in paragraph 10 of the judgment) was whether the State Government was bound to make reservations in public posts and whether the decision taken by the State Government, not to provide reservation in promotion can be only on the basis of quantifiable data relating to adequacy of representation of persons belonging to the Scheduled Castes/Scheduled Tribes ? The two-Judges Bench of the Apex Court held that Article 16(4) and 16(4A) of the Constitution do not confer a fundamental right to claim reservation in promotion; which are only enabling provisions as made clear in ***Ajit Singh II*** (supra). It was also noted that, by virtue of the settled law, the Government cannot be directed to provide reservation for appointment in public posts, as already held in ***C.A.Rajendran v. Union of India & Others*** {1968 SCR (1) 721} and that the State is not bound to make reservation for the Scheduled Castes/Scheduled Tribes in the matters of promotion. However, if they wish to exercise their discretion and make any such provision, it is obligatory for the State to collect quantifiable data showing the inadequacy of representation of that class in public service and this will enable the State to place the relevant materials as to the requisite quantifiable data and satisfy the Court, if at all there arises any challenge in this regard. It has been further observed in paragraph 12, that the language in clauses (4) and (4A) of Article 16 is quite clear; according to which the inadequacy of representation is a matter within the subjective satisfaction of the State and the State can form its own opinion on the basis of the materials collected/to be collected in this regard. So also, it is abundantly clear from the

judgments of the Apex Court in **Indra Sawhney** (supra), **Ajit Singh II** (supra), **M.Nagraj** (supra) and **Jarnail Singh (supra)** that Article 16(4) and 16(4A) of the Constitution are only enabling provisions and that collection of quantifiable data showing the inadequacy of representation of Scheduled Castes/Scheduled Tribe in a public service is a *sine qua non* for providing reservations in promotion. This collection of data, however is held as not required when the State Government decides not to provide any reservation. Even if the under representation of the Scheduled Castes/Scheduled Tribes in public service is brought to the notice of the Court, no mandamus can be issued by the Court to provide the reservation in view of the binding precedents on the subject. It was accordingly, that the verdict passed by the High Court of Uttarakhand directing the State to collect the data even when the State had decided not to make any reservation in promotion, was declared as bad and hence set aside as wholly unnecessary.

20. As rightly noted by the Tribunal in Annexure P/1 judgment, no provision/law has been enacted by the Petitioners/Government who were the official Respondents in the Original Application, to provide for consequential seniority on accelerated promotion to the Scheduled Castes/Scheduled Tribes in terms of Section 16(4A) of the Constitution. The pleadings on record do not reveal that any collection of quantifiable data was made by the Petitioners. There is no such pleading as well. The only case put up by the Petitioners is that, the Ministry of DoPT had issued an Office Memorandum No. 20011/1/2001-Estt.(D), dated 21.01.2002 instructing all the Ministries/Departments to take necessary action for giving consequential seniority and benefits to the Scheduled Caste/Scheduled Tribe Government servants concerned. The question is whether this 'Office Memorandum' could be taken as a 'law' or provision made by the Government, to give effect to the

consequential seniority based on the reservation in promotion envisaged under Article 16(4A) of the Constitution?

21. A similar question as referred to above had come up for consideration before the Central Administrative Tribunal, Orissa and thereafter before the Orissa High Court. The challenge was against a Circular/Resolution issued by the Government of Orissa, based on the Office Memorandum dated 21.01.2002 issued by the Central Government as mentioned above, so as to provide consequential seniority pursuant to the reservation in promotion given to the juniors belonging to Scheduled Castes/Scheduled Tribes in terms of Article 16(4A) of the Constitution. Challenge was also there against the seniority list prepared and notified by the State, giving consequential seniority to such promotees belonging to the Scheduled Castes/Scheduled Tribes superseding their seniors in the feeder cadre. After hearing both the sides, the High Court of Orissa, placing reliance on the verdicts passed by the Apex Court in this regard, interdicted the proceedings of the State, whereby the Resolution/Circular and the seniority list were set aside; giving appropriate/ consequential directions to give effect to the “**Catch up rule**” and to have the seniority re-fixed and pursued for considering the promotions involved. The said verdict was sought to be challenged by the aggrieved party-Respondents before the Apex Court in **Parvakar Mallick & Another v. State of Orissa & Others**; {AIR 2020 SC 2122}. The Apex Court observed, there was no dispute that, after the 85th Constitution Amendment {amending Article 16(4A)}, the State of Orissa had neither issued any Executive Order nor had enacted any Legislation for conferring the benefit of seniority to the officers belonging to the Scheduled Castes/Scheduled Tribes category who were promoted against the reserved vacancies. It was merely with reference to the instructions-Office Memorandum dated 21.01.2002 issued by the Government of India, that the State of Orissa had passed a Resolution dated

20.03.2002 instructing all the Departments of Government to extend the benefit of seniority to the Scheduled Castes/Scheduled Tribes Government servants on promotion by virtue of the rule of reservation and it was accordingly, that the gradation list was also prepared. The Apex Court noted in paragraph 11, that as per the law declared by the Constitution Bench of the Apex Court in ***M. Nagraj*** (supra), though the State was not bound to make reservation for Scheduled Castes/Scheduled Tribes in matters of promotion, if they wished to exercise their discretion and make reservation in promotion, the States had to collect quantifiable data; particularly with reference to inadequacy of representation of that class in public employment, keeping in mind maintenance of efficiency, as indicated by Article 335 of the Constitution. Reference was also made to a 'Two-Judges Bench' verdict in ***Suraj Bhan Meena & Another v. State of Rajasthan & Others***; {(2011) 1 SCC 467} and ***B.K.Pavitra II*** (supra) to the effect that collection of quantifiable data and ascertaining the inadequacy of representation of members belonging to the Scheduled Caste/Scheduled Tribe is the condition precedent for issuing notification providing benefit of reservation with consequential seniority. The declaration made by the Apex Court in the relevant judgments was that, in the absence of such mandatory exercise by the State, the “**Catch up rule**” would apply. Further reference was made to the dictum laid down in ***M. Nagraj*** (supra) and ***Jarnail Singh*** (supra) as discussed already. It was held by the Bench that the State Government's Resolution dated 20.03.2002, based on the instructions issued by the Government of India on 21.01.2002, without examining the inadequacy of representation in the posts was not correct or sustainable, they having no force of any law. It was categorically held that the Government Resolution dated 20.03.2002 can neither be termed as a 'law' made in exercise of enabling power of the State under Article 16(4A); nor does it satisfy the parameters laid down in various decisions by the Apex Court, adding that

there was no legal basis for such resolution. It was accordingly held that the verdict passed by the High Court did not warrant any interference, thus dismissing the appeal.

22. As noted already, the only ground on which the Petitioners have moulded their case to sustain consequential seniority on promotion to the junior members belonging to the Scheduled Castes/Scheduled Tribes is that the 1st Petitioner-Government had issued Office Memorandum dated 21.01.2002, in this regard. It was the scope of the very same OM, based on which the Government of Orissa had issued a Resolution on 20.03.2002 to confer consequential seniority in terms of Article 16(4A), that was considered by the Apex Court in ***Parvarkar Mallick*** (supra). This being the position, the issue involved herein is squarely covered by the verdict passed by the Apex Court in ***Parvarkar Mallick*** (supra). Annexure P/1 order passed by the Tribunal is in conformity with the rulings rendered by the Apex Court on the point. As discussed above, since no quantifiable data has been collected to confer any consequential seniority on promotion in the reserved slots to the members of Scheduled Castes/Scheduled Tribes in terms of Article 16(4A), but for issuance of the Office Memorandum dated 21.01.2002, which is neither a 'law' nor an Executive order, the prayer to interdict the verdict passed by the Tribunal is not liable to be entertained.

23. The writ petition is devoid of any merit. It is dismissed accordingly.

Sd/-
(P.R. Ramachandra Menon)
CHIEF JUSTICE

Sd/-
(Parth Prateem Sahu)
JUDGE