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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Judgement reserved on: 10.08.2021**  
**Judgement pronounced on: 26.10.2021**

% **W.P.(C) 2633/2021 and CM APPL. 7795/2021**

GYAN SINGH & ORS. .... Petitioners

Through: Dr. K.S. Chauhan, Advocate.

*versus*

UNION OF INDIA & ORS. .... Respondents

Through: Mr Ravi Prakash, CGSC for UOI.  
Mr Rajeev Sharma, Sr. Advocate  
with Ms Radhalakshmi R., Mr Rajat  
Krishna, Mr Saket Chandra ad Mr.  
Bhaskar Anand, Advocates for R-1 to  
R-3.  
Mr Apurb Lal, Advocate for R-4 to  
R-5.

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SHAKDHER**

**HON'BLE MR. JUSTICE TALWANT SINGH**

**RAJIV SHAKDHER, J. :**

**TABLE OF CONTENTS**

|                                                                                        |   |
|----------------------------------------------------------------------------------------|---|
| Background:- .....                                                                     | 3 |
| Submissions of the Counsel for the parties:- .....                                     | 6 |
| Submissions of the petitioner .....                                                    | 6 |
| Submissions on behalf of the official respondents i.e., respondent nos. 1 to 3:- ..... | 8 |

|                                                                                       |    |
|---------------------------------------------------------------------------------------|----|
| Submissions on behalf of the private respondents i.e., respondent nos. 4 and 5:-..... | 8  |
| Analysis and reasons:- .....                                                          | 10 |
| Conclusion:-.....                                                                     | 23 |

**Preface:-**

1. This writ petition is directed against the order dated 03.02.2021, passed by the Central Administrative Tribunal [in short 'the Tribunal'] in O.A. No.4016/2016.
2. The principal litigating parties are two sets of employees who work for respondent no. 2 i.e., Prasar Bharati. The petitioners represent one set while respondent nos. 4 and 5 represent another set of employees. The remaining parties are the official respondents. The petitioners belong to the reserved categories i.e., Scheduled Caste (SC) and Scheduled Tribe (ST) while respondent nos.4 and 5 belong to the Unreserved (UR) category. [For the sake of brevity, wherever required, the petitioners as also respondent nos. 4 and 5 will be collectively referred to as "employees", unless the context requires otherwise.]
3. The core issue which arises for consideration is: whether the petitioners should get the benefit of consequential seniority on having been promoted to the post of Cameraman Grade-I, having regard to the fact that most of them were promoted to the said post on date(s) earlier to respondent nos. 4 and 5.

3.1. This issue arises in the backdrop of an accepted position that respondent nos. 4 and 5 were appointed to the feeder post [i.e., the post of Cameraman Grade-II] earlier in point of time than the petitioners.

3.2. The Tribunal, via the impugned judgment, has ruled in favour of respondent nos. 4 and 5 by applying the “catch-up rule”. Being aggrieved, the petitioners have approached this court and assailed the impugned order of the Tribunal, on various grounds.

**Background:-**

4. Before we proceed further, it would help if we were to set forth the dates of appointment and promotion of the litigating parties in a tabular form. It would be relevant to note, at this stage, that some of those who are part of this action have been accorded further promotion to the post of “video executive”.

| Employees       | Category | Appointment to the post of Cameraman Grade-II | Promotion to the post of Cameraman Grade-I [i.e., the date it came into effect.] | Promotion to the post of Video Executive [i.e., the date it came into effect.] |
|-----------------|----------|-----------------------------------------------|----------------------------------------------------------------------------------|--------------------------------------------------------------------------------|
| Gyan Singh (P1) | SC       | 16.02.1986                                    | 16.11.2004                                                                       | 18.07.2017                                                                     |

|                            |    |            |            |            |
|----------------------------|----|------------|------------|------------|
| K.K.<br>Ganpathy<br>(P2)   | SC | 22.07.1985 | 22.11.2004 | 18.07.2017 |
| Bhagyanwan<br>(P3)         | ST | 30.03.1999 | 08.12.2005 | 18.07.2017 |
| Udey Ram<br>(P4)           | SC | 08.12.1987 | 14.02.2013 | N.A.       |
| Sudhir<br>Gangahar<br>(R4) | UR | 05.01.1985 | 29.06.2012 | N.A.       |
| Indu Sunil<br>Dang (R5)    | UR | 16.02.1986 | 29.06.2012 | N.A.       |

4.1. As would be evident upon perusal of the aforementioned tabular chart, respondent nos. 4 and 5 were promoted to the post of Cameraman Grade-I on 29.06.2012, while petitioner nos. 1, 2 and 3 were promoted to the very same post on 16.11.2004, 22.11.2004 and 08.12.2005 respectively.

4.2. Given this position, once respondent nos. 4 and 5 were promoted to the post of Cameraman Grade-I on 29.06.2012, they were of the view that the seniority list for the post of Cameraman Grade-I should reflect that they were senior to the petitioners.

4.3. Consequently, representations were made by respondent no. 5 to official respondent i.e., respondent no.3, on 30.05.2013, 19.02.2014 and 03.01.2015. The burden of the said representations was that the "catch-up rule" should be applied to him, and once course correction is made, the corrected seniority list should be published.

4.4. It appears that the representations did not bear fruit as expected. However, with the Supreme Court rendering its judgment on 27.08.2015, in the case of *S. Panneer Selvam & Ors. vs. State of Tamil Nadu & Ors.* (2015) 10 SCC 292<sup>1</sup>, a new hope sprung in the hearts of respondent nos. 4 and 5, as the judgment, inter alia, held that, in the absence of a provision being made in the rules concerning consequential seniority, the catch-up rule would apply. In other words, the roster-point reserved category promotees could not count their seniority in the promotional post from the date of their promotion, in the absence of the rules making a provision to that effect.

4.5. This resulted in respondent nos. 4 and 5 filing fresh representations on 01.02.2016, 03.02.2016 and 31.05.2016. However, the official respondents, contrary to the expectations of respondent nos. 4 and 5, published a final seniority list on 01.11.2016, fixing the seniority list of Cameraman Grade-I as on 01.11.2016 [hereafter referred to as the "impugned seniority list"]. In the impugned seniority list, the petitioners, who fall in the SC/ST category were shown as senior to respondent nos. 4 and 5 i.e., candidates falling in the UR category. Being aggrieved, respondent nos. 4 and 5 lodged an action,

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<sup>1</sup> In short "*S. Panneer Selvam* case"

on 17.11.2016, with the Tribunal; which, as noted above, was registered as O.A. 4016/2016.

4.6. Pending the decision of the Tribunal, as reflected in the tabular chart set out hereinabove, petitioner nos. 1, 2 and 3 were promoted to the next higher grade i.e., the post of video executive, with effect from 18.07.2017.

4.7. For completion of narration of facts and events, it needs to be noted that, in the first instance, the Tribunal allowed O.A. No.4016/2016 on 21.11.2017. Since the petitioners were not arrayed as parties to the said O.A., they filed a writ petition in this court i.e., W.P.(C.) No. 2297/2018. This court, *vide* order dated 22.11.2018, set aside the order of the Tribunal and remitted the matter for fresh consideration.

4.8. Upon remand, the petitioners were arrayed as parties to O.A. No. 4016/2016, which, as noted above, was allowed *via* the impugned order dated 03.02.2021.

**Submissions of the Counsel for the parties:-**

5. In this background, arguments on behalf of the petitioners were advanced by Dr K.S. Chauhan, Advocate, while submissions on behalf of respondent nos. 4 and 5 were advanced by Mr. Apurb Lal, Advocate.

**Submissions of the petitioner**

6. The submissions made by Dr Chauhan can be, broadly, paraphrased as follows:

(i) The Tribunal had made a serious error in not factoring in, the impact of the Constitution (Seventy-seventh Amendment) Act, 1995 [hereafter referred as “77<sup>th</sup> Amendment Act”] and the Constitution (Eighty-fifth Amendment) Act, 2001 [hereafter referred as “85<sup>th</sup> Amendment Act”]. By the 77<sup>th</sup> Amendment Act, clause 4A was inserted in Article 16 of the Constitution, which was further amended, via the 85<sup>th</sup> Amendment Act. In other words, the amendments in the first instance provided for reservation in matters of promotion, and thereafter, made it clear that consequential seniority would also be accorded to the candidates falling in reserved categories i.e., SC/ST category, who in the opinion of the State, were not adequately represented in the services under the State.

(ii) Importantly, the aforementioned amendments were made with retrospective effect i.e., 17.06.1995.

(iii) The Department of Personnel & Training (DoPT), vide Office Memorandum (OM) No.220011/1/2001-Estt.(D) dated 21.01.2002 had implemented what was enabled by the constitution under Article 16(4A). Thus, with the issuance of the said OM, reservation in matters of promotion, with consequential seniority, and with retrospective effect i.e., 17.06.1995 became a reality. Furthermore, OM dated 21.01.2002 superseded the earlier OM i.e., No.220011/1/96-Estt.(D), dated 30.01.1997. This OM, which, impeded the grant of consequential seniority to SC/ST employees, was rooted in the judgment of the Supreme court rendered in the *S. Panneer Selvam* case.

(iv) The judgment of the Supreme Court rendered in *Sudhakar Babu Rao Nangure vs. Noreshwar Raghunathrao Shende* (2020) 11 SCC 399, removed whatever doubts there were, *vis-a-vis* the grant of consequential seniority to SC/ST employees once they were promoted to the higher post.

(v) The judgment of the Supreme Court rendered in *M. Nagraj vs. Union of India* (2006) 8 SCC 212<sup>2</sup>, to the extent it observed that before providing reservation in matters of promotion to a promotional post, the State would have to demonstrate backwardness by relying upon quantifiable data had been disapproved by the Supreme Court in a later judgment rendered in *Jarnail Singh vs. Lachhmi Narain Gupta* (2018) 10 SCC 396, which in turn, relied upon the observations made by the nine-judge bench in *Indra Sawhney & Ors. vs. Union of India & Ors.* AIR 1993 SC 477.

6.1 Apart from the judgment rendered in the *Sudhakar Babu Rao* case, reliance was also placed on the judgment of the Kerala High Court dated 05.11.2020 in OP (CAT) No.212/2019 titled *T. Sidhardha Reddy & Ors. vs. Rajive Kumar Gupta & Ors.*

**Submissions on behalf of the official respondents i.e., respondent nos. 1 to 3:-**

7. Mr Rajeev Sharma, learned senior counsel, as an officer of the Court, made submissions, in line with the arguments advanced by Dr Chauhan.

**Submissions on behalf of the private respondents i.e., respondent nos. 4 and 5:-**

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<sup>2</sup> In short "*M. Nagraj* case"

8. Mr Lal, in rebuttal, made the following submissions:

(i) The amendments brought about by the virtue of the 77<sup>th</sup> Amendment Act and 85<sup>th</sup> Amendment Act are merely enabling. The State, while providing reservation in matters of promotion, is required to place quantifiable data before the Court concerning the backwardness of SC/ST employees, inadequacy of their representation in the promotional cadre, and the effect that it would have on administrative efficiency. Thus, without a legislative enactment and/or policy decision, it is not open to the State to implement the provisions of Article 16(4A) of the Constitution, based on the OM dated 21.01.2002. The OM dated 21.01.2002 is not a policy decision, and rather the said OM has been issued on the back of the 85<sup>th</sup> Amendment Act.

(ii) Although, the Supreme Court in the **Jarnail Singh** case has held that, the State need not present quantifiable data concerning backwardness, it still needs to present relevant data pertaining to the representation of SC/ST candidates in the promotional cadre, and the impact that it would have on administrative efficiency; to that extent, the directions contained in **M. Nagraj** case hold the field.

(iii) The OM dated 21.01.2002 can neither be termed as law nor can it be termed as the policy of the State. The said OM is only advisory.

(iv) A Division bench of this Court, *vide* judgement dated 08.12.2014, passed in W.P.(C.) 4062/2014 titled **Ram Bhog Singh vs Rajiv Sinha & Ors.** has considered the impact of the OM dated 21.01.2002, while applying

the catch-up rule. The Special Leave Petition i.e., S.L.P.(C.) No.11255/2015 preferred against the said judgment was dismissed *in limine*, on 03.04.2017.

**Analysis and reasons:-**

9. We have heard the counsel for the parties and perused the record.

9.1. As noted at the outset, the issue which we are required to rule upon is: whether the petitioners should be accorded the benefit of consequential seniority, upon being promoted to the post of Cameraman Grade-I on a date earlier than the date, on which respondent nos. 4 and 5 were promoted?

10. In this context, we are required to examine the impact of the OM dated 21.01.2002. Before we get to this point, the following facts need to be borne in mind: The dates of initial appointment and promotion of the litigating parties i.e., the employees are not in dispute. [Admittedly, respondent nos. 4 and 5 were appointed to the post of Cameraman Grade-II on 05.01.1985 (Sudhir Gangahar) and 16.02.1986 (Indu Sunil Dang), while the petitioners were appointed to the same post i.e., Cameraman Grade-II on 16.02.1986 (Gyan Singh), 22.07.1985 (K.K. Ganapathy), 30.03.1999 (Bhagyan), and 08.12.1987 (Udey Ram).]

10.1. It is also not in dispute that, the petitioners, who fall in the SC/ST category, were promoted to the next higher grade i.e. Cameraman Grade-I much earlier than respondent nos. 4 and 5. [The petitioners were promoted on 16.11.2004, 22.11.2004, 08.12.2005 and 14.02.2013, whereas respondent nos. 4 and 5 were promoted on 29.06.2012.]

10.2. The issue concerning reservation in matters of promotion, and the grant of consequential seniority to such promotees was paved with the passing of the 77<sup>th</sup> and 85<sup>th</sup> Amendment Act(s). Concededly, these amendments were given retrospective effect i.e., were brought into force with effect from 17.06.1995.

10.3. Therefore, with the insertion of clause (4A) in Article 16 of the Constitution, an enabling power has been conferred on the State for making provisions for reservation in matters of promotion, and conferring consequential seniority, *vis-a-vis* any class or classes of post in services, under the sway of the State. These reservations in promotional cadre can, now, be made in the favour of SC/ST employees, if, in the opinion of the State, they are not adequately represented in services under the State.

10.4. The official respondents had, thus, published the impugned seniority list dated 01.11.2016, perhaps bearing in mind the provisions laid down in the Constitution.

11. The Tribunal, via the brief impugned order, while noticing the amendments brought about to Article 16 of the Constitution [see para 8 of the impugned order], proceeded to knock out the petitioners for the following reasons:

(i) Since the amendments made to Article 16 of the Constitution only enabled conferment of consequential seniority, the same could not have been granted, unless relevant principles were incorporated in the rules. According to the Tribunal, this could have been done either by amending the

relevant recruitment rules or by issuing a separate circular, which had the force of law. Since neither of the two routes was followed, the judgment rendered in the *S. Panneer Selvam* case would come to the aid of respondent nos. 4 and 5 i.e., the original applicants before the Tribunal.

(ii) The OM dated 21.01.2002 was advisory, inasmuch as, it did not have the effect of modifying the relevant recruitment rules.

11.1. Therefore, what has come through is that there is a common ground, which of course, cannot be doubted now, that reservations can be made in favour of SC/ST employees in matters of promotion, along with consequential seniority. The litigating parties are only at odds with regard to the implementation of the enabling provision made in clause (4A) of Article 16 of the Constitution.

11.2. The petitioners contend that the OM dated 21.01.2002 has the full force of law. It is also contended by the petitioners that, in the absence of an Act, the State can provide for reservation in matters of promotion, in favour of SC/ST employees, through executive orders.

11.3. It would be relevant, therefore, at this juncture, to extract the material part of the OM dated 21.01.2002:-

*“1. The Seniority of a person appointed to a post is determined according to the general principle 5(i) contained in MHA OM No. 9/11/55-RPS dated 22.12.1959 and para 2.2 in DOPT OM No. 22011/7/86-Estt. (D) dated 3.7.1986 read with DOPT OM No. 20011/5/90 Estt (D) dated 4.11.1992 (copy enclosed). Seniority of such persons is determined by the order of*

*merit indicated at the time of initial appointment and seniority of persons promoted to various grades is determined in the order of selection for such promotion. Thus, as per the aforementioned instructions, persons appointed through an earlier selection would enbloc be senior to those promoted through subsequent selection.*

*2. This position was reviewed subsequent to the judgment of the Supreme Court dated 10.10.1995 in the case of Union of India Vs. Virpal Singh Chauhan etc. (JT 1995(7) SC.231) and it was decided vide DOPT OM No. 2001111/96-Estt.(D), dated 30.1.1997, to modify the then existing policy by addition of the proviso to general principle 5 (i) contained in MHA (now DOPT) OM No. 9/11/55-RPS dated 22.12.1959 and para 2.2 in DOPT OM No. 20011/7/86-Estt.(D) dated 3.7.1986 which stipulated that if a candidate belonging to the Scheduled Caste or the Scheduled Tribe is promoted to an immediate higher post/ grade against a reserved vacancy earlier than his senior general/OBC candidate who is promoted later to the said immediate higher post/grade, the general/OBC candidate will regain his seniority over such earlier promoted candidate of the Scheduled Caste and the Scheduled Tribe in the immediate higher post/grade.*

*3. The Government have now decided to negate the effects of the DOP&T OM dated 30th January, 1997 by amending Article 16( 4A) of the Constitution right from the date of its inclusion in the Constitution i.e. 17th June, 1995 with a view to allow the Government servants belonging to SCs/STs to retain the seniority in the case of promotion by virtue of rule of reservation. In other words, the candidates belonging to general/OBC category promoted later will be placed junior to the SC/ST Government servants promoted earlier even though by virtue of the rule of reservation.*

4. Therefore, in pursuance of the aforementioned Constitution (Eighty fifth) Amendment Act, 2001, it has been decided as follows:

(i) (a) SC/ST Government servants shall, on their promotion by virtue of rule of reservation/roster, be entitled to consequential seniority also; and

(b) the above decision shall be effective from 17th June, 1995

(ii) The instructions contained in DOPT OM No. 2001111/96- Estt (D) dated 30.1.1997 as well as the clarifications contained in DOPT OM No.20011/2/97- Estt. (D) dated 21.3.1997 shall stand withdrawn w.e.f. 30.1.1997 itself.

(iii) Seniority of Government servants determined in the light of O.M. dated 30.1.1997 shall be revised as if that O.M. was never issued.

(iv) (a) On the basis of the revised seniority, consequential benefits like promotion, pay pension, etc. should be allowed to the concerned SC/ST Government servants (but without arrears by applying principle of no work no pay)

(b) For this purpose, senior SC/ST Government servants may be granted promotion with effect from the date of promotion of their immediate junior general/OBC Government servants.

(c) Such promotion of SC/ST Government servant may be ordered with the approval of Appointing Authority of the post to which the Government servant is to be promoted at each level after following normal procedure of DPC (including consultation with UPSC).

*(v) Except seniority other consequential benefits like promotion, pay etc. (including retrial benefits in respect of those who have already retired) allowed to general/OBC Government servant by virtue of implementation of O.M. No. dated 30.1.1997 and/or in pursuance of the directions of CAT/Court should be protected as personal to them.*

*5. All Ministries/Departments are requested to bring the above decisions to the notice of all concerned for guidance and compliance. Necessary action to implement the decisions contained in para 4 (iii) above may be completed within three months from the date of issue of these instructions and necessary action to implement the decision at para (iv) above may be completed within 6 months from the date of issue of these instructions.*

*6. Hindi version will follow.”*

11.4. A careful perusal of paragraph 3 of the aforesaid OM i.e., OM dated 21.01.2002 would show that it negates the catch-up rule, and thus, emphasizes that employees, who belong to the General/OBC category, will be junior to the SC/ST category employees, if they are promoted earlier to the General/OBC category employees.

11.5. Likewise, sub-para (i) in paragraph 4 states in no uncertain terms that, SC/ST candidates on promotion by virtue of the rule of reservation/roster would be entitled to consequential seniority. In particular, stress is laid on the fact that this decision would be given effect from 17.06.1995.

11.6. Pertinently, sub-para (ii) in paragraph 4 of the very same OM states in no uncertain terms that the earlier OM dated 30.01.1997, and the clarifications contained in the OM dated 21.03.1997, stand withdrawn.

11.7. Importantly, sub-para (iii) of paragraph 4 of the aforesaid OM highlights the fact that the seniority of the Government servants, which, up until then, had been determined in light of the OM dated 30.01.1997, shall stand revised as if the said OM was never issued. Furthermore, sub-para (iv) of paragraph 4 provides that, based on the revised seniority list, consequential benefits would be accorded to the concerned SC/ST employees, *albeit*, without arrears by applying the principle of “no work no pay”.

11.8. Paragraph 5 of the above-mentioned OM, which, according to us, is also material, states, unambiguously, that—“all Ministries/departments are required to bring the above decisions to the notice of all concerned for guidance and compliance. Necessary action to implement the decisions contained in para 4 (iii) above may be completed within three months from the date of issue of these instructions.” Likewise, a timeline has been placed in the very same paragraph for implementing the decision contained in paragraph 4(iv) i.e., six months from the date of issuance of the OM i.e., OM dated 20.01.2002.

12. To our minds, this [i.e., OM dated 21.01.2002] is an executive order of the Government of India and not a guideline, as it requires compliance within the timeline stipulated, by all ministries/departments. Thus, respondent no.2 i.e., Prasar Bharati, which is a department under the

Ministry of Information & Broadcasting, is surely covered by this executive order.

12.1. The argument that, reservation in matters of promotion, and concerning consequential seniority, cannot be progressed based on an executive order, is an issue, which is no longer *res integra*. Mr. Chauhan and Mr. Sharma are, in our view, right in their contention that, this issue has received the Supreme Court's imprimatur in the decision rendered in the ***Sudharkar Babu Rao*** case. For the sake of convenience and a clearer appreciation of arguments advanced before us, the relevant parts of the said judgment are extracted hereafter:

*“29. Mr. P.S. Patwalia, learned Senior Counsel appearing on behalf of the Appellant urged the following submissions:*

*(i) The Appellant was senior to the first Respondent in the feeder cadre of DDTP;*

*(ii) Even assuming that the promotion of the first Respondent as JDTP was on a regular basis, the Appellant would "catch-up" on his promotion and regain his seniority over the first Respondent in the promotional post;*

*(iii) The circular of the Government of Maharashtra dated 20 March 2003 cannot be construed as granting consequential seniority to a reserved candidate on the promotion to a higher post, in the absence of the collection of quantifiable date, as required by the decision of this Court in Nagaraj (supra);*

*(iii) When the circular dated 20 March 2003 was issued, reservation in the state services was only until the entry level of class-I posts, in this case DDTP;*

*(iv) Reservation within the Class-I posts was brought about for the first time by Reservation Act 2004;*

(v) Sections 5 and 6 of the Reservation Act 2004 specifically save certain existing circulars and it occupies the field. No other circular, including the circular on consequential seniority is saved. Under Section 11, anything done in violation of the Act is void;

(vi) The circular dated 27 October 2008 on which basis promotion was granted to the first Respondent on 2 August 2011 against a post reserved for a Scheduled Tribe candidate, was quashed by the Bombay High Court<sup>18</sup> on the ground that it was ultra vires the Reservation Act 2004. Since the promotion of the first Respondent was on the basis of the circular which was quashed, his appointment contrary to the Rules would not entitle him to seniority; and

(vii) The circular dated 20 March 2003 provides for the grant of consequential seniority where a reserved candidate has been promoted on a regular basis. The promotion of the first Respondent being ad-hoc, would not entitle him to consequential seniority.

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42. In the recent decision of a Constitution Bench of this Court in *Jarnail Singh v. Lachhmi Narain Gupta* ("*Jarnail Singh*"), *Nagaraj* (*supra*) has been followed save and except for the dictum requiring the State to demonstrate backwardness as a condition for the exercise of the enabling power in making reservations in promotion for Scheduled Castes and Tribes. This part of the judgment in *Nagaraj* (*supra*) has been held to be inconsistent with the nine Judge Bench decision in *Indra Sawhney* (*supra*). The Court in *Jarnail Singh* (*supra*) held thus:

"..It is clear, therefore, that *Nagaraj* (*supra*) has, in unmistakable terms, stated that the State has to collect quantifiable data showing backwardness of the Scheduled Castes and the Scheduled Tribes. We are afraid that this portion of the judgment is directly contrary to the nine-Judge Bench in *Indra Sawhney* (1) (*supra*). *Jeevan Reddy, J.*, speaking for himself and three other learned Judges, had clearly held, "[t]he test or requirement of social and educational backwardness cannot be applied to Scheduled Castes and Scheduled Tribes, who indubitably fall within the expression "backward class of citizens"."

*Justice RF Nariman, speaking for the Constitution Bench held thus:*

*“..Thus, it is clear that when Nagaraj (supra) required the States to collect quantifiable data on backwardness, insofar as Scheduled Castes and Scheduled Tribes are concerned, this would clearly be contrary to the Indra Sawhney (1) (supra) and would have to be declared to be bad on this ground.”*

*43. The decision in Nagaraj (supra) has been followed in several subsequent decisions of this Court: (i) Suraj Bhan Meena v. State of Rajasthan ("Suraj Bhan Meena"); (ii) Uttar Pradesh Power Corporation Limited v. Rajesh Kumar ("UP Power Corporation"); (iii) S. Panneer Selvam v. State of Tamil Nadu ("Panneer Selvam"); and (iv) B.K. Pavitra v. Union of India ("B K Pavitra").*

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*45. In Panneer Selvam (supra) the issue before a two Judge Bench of this Court was thus:*

*“1.1. (i) In the absence of policy decision taken by the State/rules framed pursuant to the enabling provision of Article 16(4-A) of the Constitution of India, whether a reserved category candidate promoted on the basis of reservation earlier than his senior general category candidate in the feeder category can claim consequential seniority in the promotional post?”*

*Rule 12 of the sub-rules to the Tamil Nadu Highways and Engineering Service provided as follows:*

*“12. Reservation of appointment.- The Rule of reservation of appointments (General Rule 22) shall apply to the appointment of Assistant Divisional Engineers by direct recruitment and recruitment by transfer separately and the appointment of Assistant Engineers by direct recruitment.”*

*Under Rule 12, reserved category Assistant and Junior Engineers had secured promotion as Assistant Divisional Engineers earlier than their counterparts belonging to the general category as a result of accelerated promotion following the Rule of reservation.*

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52. The GR dated 20 March 2003 was issued after the constitutional amendment to Article 16 (4A) by which consequential seniority was incorporated into that provision. The decision of this Court in *Indra Sawhney (supra)* indeed contemplated that a provision for reservation can be made by a legislative enactment or Rules and also by an executive order. The judgment of Justice Jeevan Reddy formulated the following among other issues for decision:

1. (a) Whether the 'provision' contemplated by Article 16(4) must necessarily be made by the legislative wing of the State?

(b) If the answer to Clause (a) is in the negative, whether an executive order making such a provision is enforceable without incorporating it into a Rule made under the proviso to Article 309?

Answering this issue the decision holds:

(1) (a) It is not necessary that the 'provision' Under Article 16(4) should necessarily be made by the Parliament/Legislature. Such a provision can be made by the Executive also. Local bodies, Statutory Corporations and other instrumentalities of the State falling Under Article 12 of the Constitution are themselves competent to make such a provision, if so advised. (Paras 735-737)

(b) An executive order making a provision Under Article 16(4) is enforceable the moment it is made and issued. (Paras 738-740)

[See also in this context *Gaurav Pradhan v. State of Rajasthan*]

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63. The Appellant has, in the course of the submissions of Mr. Patwalia, sought to urge that the GR dated 20 March 2003 is contrary to the ratio of the decision of the Constitution Bench of this Court in *Nagaraj (supra)*. It was urged that before a provision for consequential seniority can be incorporated, the state is under a mandate to collect quantifiable data with reference to (i) inadequacy of representation; and (ii) the effect on the efficiency of administration. Mr. Patwalia urged that in the absence of quantifiable

*data, the GR dated 20 March 2003 is ultra vires. In this context, it was urged that in the absence of an exercise by the state to collect quantifiable data, the principle enunciated by this Court in Nagaraj (supra) and as applied by the subsequent decisions of this Court in Suraj Bhan Meena (supra), UP Power Corporation (supra), Panneer Selvam (supra) and B K Pavitra (supra) would be attracted.*

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*68. In Panneer Selvam (supra), Rule 12 of the Special Rules to Tamil Nadu Highways Engineering Service provided that the Rule of reservation of appointments (General Rule 22) shall apply to the appointment of Assistant Divisional Engineers by direct recruitment and by transfer of the appointment of Assistant Engineers. This Court held that Rule 12 did not provide for consequential seniority and, in the absence of a provision for consequential seniority catch-up Rule will be applicable. The litigation in Panneer Selvam (supra) did not engage a situation such as the present where the GR dated 20 March 2003 specifically provides for consequential seniority.”*

12.2. A perusal of the aforesaid extract, taken from the judgment of the Supreme Court in the **Sudhakar Babu Rao** case, would show that the judgment in the **S. Panneer Selvam** case was considered by the Court. The Court distinguished the said case on the ground that, in the **S. Panneer Selvam** case, the Court did not have before it an executive order, taking forward the enabling provision made in clause (4A) of Article 16 of the Constitution.

12.3. Furthermore, the reliance placed on the judgement in **Ram Bhog** case is misplaced, as the said judgement was rendered, prior to the Supreme Court judgement in **Sudhakar Babu Rao** case.

12.4. In the instant case as well, as noted above, in our opinion, the OM dated 21.01.2002 is an executive order, which seeks to implement the  
W.P.(C.) 2633/2021

Page 21 of 24

amendments made in the Constitution, via the 77<sup>th</sup> and 85<sup>th</sup> Amendment Act(s).

13. It is important to note that, the aspect concerning the purported non-fulfilment of other directions contained in the **M. Nagraj** case i.e., the inadequacy of representation of SC/ST employees in the promotional cadre and/or the effect it could have on the administrative efficiency, would have attained criticality, if the OM dated 21.01.2002 had been assailed by respondent nos. 4 and 5 before the Tribunal. A perusal of the impugned order does not show that this aspect of the matter was pressed before the Tribunal, although, there was a reference to the same in the O.A. filed before the Tribunal.

13.1. Before this Court, although, notice was issued to respondent nos. 4 and 5 on 05.05.2021, no counter-affidavit or cross-objection has been filed to demonstrate that, such a ground [as referred to hereinabove] was pressed before the Tribunal, and that the Tribunal despite being called upon to do so had not rendered a ruling qua the said issue, while disposing of the O.A.

13.2. As noted above, the prayers made in the O.A. were the following:

- “i. Quash the seniority list dated 1.11.20 16.*
- ii. Direct the respondents to issue the revised seniority list in view of the judgment dated 27.08.2015 passed by Hon'ble Supreme Court in the matter of S. Paneerselvam & others Vs Government of Tamilnadu & Others.*

iii. *Pass such other and further orders as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the present case."*

13.2(a) Thus, it is quite clear that respondent nos. 4 and 5 only assailed the impugned seniority list i.e., seniority list dated 01.11.2016. There was no challenge laid to the OM dated 21.01.2002. Had OM dated 21.01.2002 been challenged, the official respondents would have had the opportunity to demonstrate as to, how it was on facts and in law, tenable.

**Conclusion:-**

14. Thus, for the foregoing reasons, we are of the view that, since the impugned order dated 03.02.2021, passed by the Tribunal, is not in line with the judgment of the Supreme Court rendered in the *Sudhakar Babu Rao* case, it deserves to be set aside.

14.1. It is ordered accordingly.

15. The result would be that the impugned seniority list dated 01.11.2016, in its original form, would get revived.

15.1. Resultantly, the petitioners would be entitled to consequential seniority, as contended by them before the Tribunal.

15.2. Consequently, the pending application shall also stand closed.

16. However, there shall be no order as to costs.

**RAJIV SHAKDHER, J.**

**TALWANT SINGH, J.**

**OCTOBER 26, 2021/pmc**

