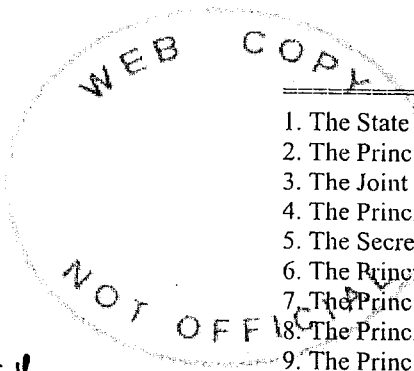


IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.1066 of 2015

IN

Civil Writ Jurisdiction Case No. 19114 of 2012



1. The State Of Bihar, Through Chief Secretary, Bihar, Patna
2. The Principal Secretary, Department Of General Administration, Bihar, Patna
3. The Joint Secretary, Department Of General Administration, Bihar, Patna
4. The Principal Secretary, SC/ST Welfare Department, Bihar, Patna
5. The Secretary, SC/ST Welfare Department, Bihar, Patna
6. The Principal Secretary, Department Of Road Construction
7. The Principal Secretary, Department Of Energy, Bihar, Patna
8. The Principal Secretary, Department Of Health, Bihar, Patna
9. The Principal Secretary, Home Department, Bihar, Patna
10. The Principal Secretary, Department Of Animal Husbandary And Fisheries, Bihar, Patna
11. The Principal Secretary, Department Of Industries, Bihar, Patna
12. The Principal Secretary, Department Of Public Health Engineering, Bihar, Patna
13. The Principal Secretary, Department Of Water Resources, Bihar, Patna
14. The Principal Secretary, Department Of Commercial Taxes, Bihar, Patna

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 03/12/15

.... Respondents-Appellants

Versus

1. Sushil Kumar Singh, Son Of Parameshwar Dayal, Resident Of Village - Neouri Koeri Bigha, P.S.-Kako, District - Jehanabad, At Present Technical Secretary To Chief Engineer, Birpur(Supaul)
2. Girish Nandan Singh, Son Of Sri Bageshwar Singh, Resident Of House No. 307, Lalita Residency, Rupaspur P.S. Rupaspur, District - Patna, Presently Technical Secretary To Engineer In Chief, Building Construction Department, Patna
3. Kripalu Pandey, Son Of Late Mahavir Pandey, Resident Of Shiv Shambhu Nagar, Ashiana Road, P.S. Rajiv Nagar, District - Patna, Presently, Under Secretary, Department Of Health, Bihar, Patna
4. Vijay Kant Sharma, Son Of Ram Bilas Singh, Resident Of Village- Chhotki Akauna, P.S. - Ghoshi, District - Jehanabad, Retired From The Post Of Under Secretary, Department Of Law, Bihar, Patna
5. Afzal Ahmad Son Of Late Dr. Md. Siddique Resident Of 3j/403, Ambar Apartment, New Patliputra Colony, P.S. - Patliputra, District - Patna, Posted As Executive Engineer, Water Resources Department, Bihar, Patna And Convenor Of Ali Pichhara - Pichhara - Alp Shankhyak Sanvarg Karamchhari Padadhikari Mahasangh

Petitioners-Respondents

6. Narendra Kumar, State General Secretary, all India Confederation of SC/ST Organization, Bihar State Unit, age-46, son of Narayan Choudhary, resident of village- Sikandrapur, Post-Shahpur, Danapurcant, District-Patna.
7. Rajendra Prasad Choudhary, age-58, son of late Devi Choudhary, resident of Mohall- Raushan Vihar Colony, Bailey Road, P.S. Danapur, District-Patna at present posted as Engineer-in-Chief, Building Construction Department, Government of Bihar.
8. All India Federation of Schedule Caste, Schedule Tribe, Backward and Minorities and Employees Welfare Association, New Delhi (In Short SCEWA

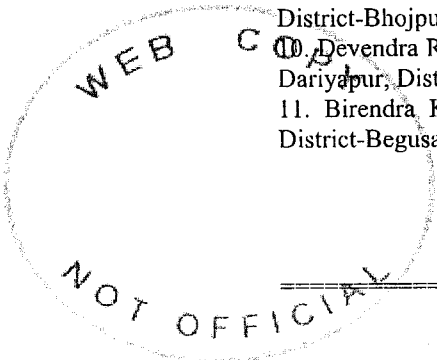
विधि पदाधिकारी,
 पत्र संख्या 2290
 प्राप्ति दिनांक 03/09/2015
 जल संसाधन विभाग, बिहार, पटना।

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- STAMB) through its President Bihar State Unit namely Harikeshwar Ram, son of Sri Harinandan Ram, At + P.O Gidha P.S. Koilwar, District- Bhojpur.
9. Harikeshwar Ram, son of Sri Harinandan Ram, at + P.O. Gidha, P.S. Koilwar, District-Bhojpur.
10. Devendra Rajak, son of late Chhotan Rajak, resident of village-Ratanpura, P.O. Dariyapur, District-Nalanda.
11. Birendra Kumar, son of Sri Baleshwar Das, Village-Singhaul, P.O. Ulaw, District-Begusarai.



..... Intervener Respondents-Respondent/s
with

=====
Letters Patent Appeal No. 1071 of 2015
IN
Civil Writ Jurisdiction Case No. 19114 of 2012
 =====

1. Narendra Kumar, State General Secretary, all India Confederation of SC/ST Organization, Bihar State Unit, age-46 years. Son of Narayan Choudhary. Resident of village - Sikandrapur, Post - Shahpur, Danapur Cant., District - Patna.
2. Rajendra Prasad Choudhary, age-58 years. Son of Late Devi Choudhary. Resident of Mohalla - Raushan Vihar Colony, Bailey Road, P.S.- Danapur, District - Patna at present posted as Engineer-in-Chief, Building Construction Department, Government of Bihar.
3. All India Federation of Schedule Caste, Schedule Tribe, Backward and Minorities and Employees Welfare Association, New Delhi (In Short SCEWA STAMB) through its President Bihar State Unit namely Harikeshwar Ram. Son of Sri Harinandan Ram. At + P.O.- Gidha, P.S.- Koilwar, District - Bhojpur.
4. Harikeshwar Ram. Son of Sri Harinandan Ram. At + P.O.- Gidha, P.S.- Koilwar, District - Bhojpur.
5. Devendra Rajak. Son of Late Chhotan Rajak. Resident of village - Ratanpura, P.O.- Dariyapur, District - Nalanda.
6. Birendra Kumar. Son of Sri Baleshwar Das. Village - Singhaul, P.O.- Ulaw, District - Begusarai.

..... Intervenors-Respondents-Appellants

Versus

1. Sunil Kumar Singh. Son of Parameshwar Dayal. Resident of Village - Neouri Koeri Bigha, P.S.- Kako, District - Jehanabad, At Present Technical Secretary To Chief Engineer, Birpur (Supaul).
2. Girish Nandan Singh. Son of Sri Bageshwar Singh. Resident of House No. 307, Lalita Residency, Rupaspur, P.S.- Rupaspur, District - Patna, Presently Technical Secretary To Engineer In Chief, Building Construction Department, Patna.
3. Kripalu Pandey. Son of Late Mahavir Pandey. Resident of Shiv Shambhu Nagar, Ashiana Road, P.S.- Rajiv Nagar, District - Patna, Presently Under Secretary, Department of Health, Bihar, Patna.
4. Vijay Kant Sharma. Son of Ram Bilash Singh. Resident of Village - Chhotki Akauna, P.S.- Ghoshi, District - Jehanabad, Retired From The Post of Under Secretary, Department of Law, Bihar, Patna.
5. Afzal Ahmad. Son of Late Dr. Md. Siddique. Resident of 3J/403, Ambar

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Apartment, New Patliputra Colony, P.S.- Patliputra, District - Patna, Posted As Executive Engineer, Water Resources Department, Bihar, Patna And Convenor of Ati Pichhara - Pichhara - Alp Shankhyak Sanvarg Karamchari Padadhikari Mahasangh. Petitioners-Respondents.

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6. The State of Bihar Through Chief Secretary, Bihar, Patna.
7. The Principal Secretary, Department of General Administration, Bihar, Patna.
8. The Joint Secretary, Department of General Administration, Bihar, Patna.
9. The Principal Secretary, SC/ST Welfare Department, Bihar, Patna.
10. The Secretary, SC/ST Welfare Department, Bihar, Patna.
11. The Principal Secretary, Department of Road Construction.
12. The Principal Secretary, Department of Energy, Bihar, Patna.
13. The Principal Secretary, Department of Health, Bihar, Patna.
14. The Principal Secretary, Home Department, Bihar, Patna.
15. The Principal Secretary, Department of Animal Husbandry and Fisheries, Bihar, Patna.
16. The Principal Secretary, Department of Industries, Bihar, Patna.
17. The Principal Secretary, Department of Public Health Engineering, Bihar, Patna.
18. The Principal Secretary, Department of Water Resources, Bihar, Patna.
19. The Principal Secretary, Department of Commercial Taxes, Bihar, Patna.

..... Respondents

Appearance :

(In LPA No. 1066 of 2015)

- For the Appellants : Mr. Paramjit Singh Patwalia, Sr. Adv.
Shri Manish Kumar, Adv.
Shri Piyush Lall, Adv.
Mr. Lalit Kishore, P.A.A.G.
- For the Respondents : Mr. Bindhyachal Singh, Adv.
Mr. Satya Prakash, Adv.
Mr. Parijat Saurav, Adv.
Mr. Ram Binod Singh, Adv.
Mr. Bipin Kr. Singh, Adv.
- For the Interveners: Mr. Dinu Kumar, Adv.
Mr. Arvind Kumar Sharma, Adv.
Mr. Shiw Kumar Prabhakar, Adv.
Mr. Rajesh Kumar Singh, Adv.

(In LPA No. 1071 of 2015)

- For the Appellants : Mr. Dinu Kumar, Adv.
Mr. Shiw Kumar Prabhakar, Adv.
Mr. Arvind Kr. Sharma, Adv.
- For the Respondents : Mr. Kaushal Kr. Jha, AAG-14

CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE SUDHIR SINGH

C.A.V. JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date: 30-07-2015

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These two Letters Patent Appeals arise out of the judgment dated 4.5.2015, passed in C.W.J.C. No.19114/12. While respondents 1 to 14 in the writ petition filed L.P.A. No.1066/15, respondents 15 to 20 therein filed L.P.A. No.1071/15.

The State of Bihar passed resolution dated 21.8.2012 (Annexure-13 to the writ petition) providing for reservation in promotion, with consequential seniority in favour of the employees belonging to Scheduled Castes and Scheduled Tribes (for short SC/STs.), working in various services of the State. This was done in exercise of power conferred upon or the liberty given to the State under Clause-(4A) of Article-16 of the Constitution of India. The writ petition was filed challenging the same. The consequential orders of promotion were also challenged by filing an interlocutory application.

The writ petitioners, i.e. the contesting respondents herein, are the employees working in various departments of the State. They challenge the resolution dated 21.8.2012 as being contrary to the letter and spirit of Article-16(4A) and violative of the principles laid down by the Hon'ble Supreme Court in its judgment in M. Nagaraj Vs. Union of India¹. The contentions advanced by the respondents were that:

1. (2006) 8 SCC 212

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- a) no finding was recorded as to backwardness, as mentioned in Nagraj's case (supra) and the observation in the report, as to the relative backwardness is alien to the concept of reservation;
- b) the second principle laid down by the Hon'ble Supreme Court as regards adequacy of representation was totally ignored, though the representation of S.C. and S.T. employees in different cadres in various services was more than adequate, and in some cases 100%, reservation in promotion with consequential seniority was provided;
- c) Though Article-16(4A) permits reservation for promotion with consequential seniority, in class, or classes, of service as distinguished from the entire service, the State provided for reservation for promotion in all the services, taking in its fold all the cadres in each of the services in the State; that too, without any time limit; and
- d) No effort was made to identify the creamy layer, as directed by the Hon'ble Supreme

Court in Nagraj' case (supra).

The State and the other beneficiaries of the reservation opposed the writ petition raising several contentions. It was pleaded that:

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- a) entire category of SC/STs. are deemed to be backward and there is no necessity to undertake any study about their backwardness;
 - b) the representation of SC/STs. in various cadres or classes in several departments is totally inadequate and the fact that there is considerable representation in some of the cadres or classes in certain services, is purely fortuitous;
 - c) being almost extension of Clause (4) of Article-16, which provides for reservation in State Services, the benefit under Clause-4A thereof cannot be restricted to any class or classes of service; and
 - d) the concept of creamy layer is totally unknown to the reservation in favour of SC/STs., as was categorically held in Indra

Sawhney Vs. Union of India.¹

Learned single Judge has undertaken extensive discussion with reference to provisions of law and decided cases, and allowed the writ petition. The impugned resolution, and the consequential promotions were also set aside. It was left open to the State, to take necessary steps strictly in accordance with the requirements under Article-16(4A) of the Constitution, as interpreted by the Hon'ble Supreme Court in Nagraj's case (supra).

Shri P.S. Patwalia, learned senior counsel for the State submits that the very approach of the learned single Judge to the entire issue was contrary to settled principles of law. He contends that time and again Hon'ble Supreme Court made it abundantly clear that the SC/STs. are to be treated as backward *per se* and, unlike in the case of economically and socially backward classes, there is no necessity to undertake any study about their backwardness. He contends that once a person belonging to SC/ST has been employed in service, which, invariably is in recognition his backwardness, there is no necessity for undertaking any fresh survey or study, about the backwardness of such candidates in the context of extending

1.1992 Supp. (3) SCC 217

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the benefit of reservation in promotions. Learned senior counsel further submits that compared to the percentage of population of the SC/STs. in the State of Bihar, their representation in the government services at various levels is totally inadequate and the impugned resolution was passed, to rectify the imbalance. He further submits that study undertaken by the State has established these facts, but the learned Judge did not take the same into account.

Learned senior counsel further submits that though in the first part of Clause-(4A), the expression "to any class or classes of posts in the services under the State" is used, the guiding factor is the adequacy or otherwise of the representation of such persons in "the services under the State", as mentioned at the end of that provision. He argues that unless reservation is provided in all the cadres and in all services, the very purpose of Clause-(4A) of Article-16 would be defeated. Elaborating further, learned senior counsel submits that if at a given time there is adequate representation of SC/ST candidates in any class or cadre of service, that would cease to exist, within a short time, either on account of forward movement of such employees to the next higher cadre, or retirement from service and since imbalances of this nature occur frequently

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throughout the year, it is not at all possible to provide reservation for promotion to any selected classes or categories of service. He cited the various statistics furnished in the report annexed with the counter affidavit that constituted the basis for the impugned resolution.

As regards the plea of creamy layer, learned senior counsel submits that in clear and unequivocal terms the Hon'ble Supreme Court, in Indra Sawhney's case (supra) held that this concept does not apply to the reservation in favour of SC/STs., and though certain observations were made by their Lordships in Nagraj's case (supra) about the creamy layer, in the ultimate result, no emphasis was given to that aspect. According to the learned senior counsel, it virtually becomes impossible, to identify the creamy layer in the category of the employees of SC/ST categories who are already in service and, if for any reason that is done, the implementation thereof would virtually cut at the root of the basis for enacting Clause-(4A) of Article-16. He placed reliance upon the judgments of the Hon'ble Supreme Court in Indra Sawhney Vs. Union of India¹, M. Nagraj Vs. Union of India², R. K. Sabharwal Vs. State of

1. (2006) 8 SCC 212

2. 1992 Supp. (3) SCC 217

Punjab¹, Ashok Kumar Thakur Vs. Union of India², Suraj Bhan Meena Vs. State of Rajasthan³, Rohtas Bhankhar Vs. Union of India⁴, Anil Chandra Vs. Radha Krishna Gaur⁵ etc.

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Sri Dinu Kumar, learned senior counsel appearing for the appellants in L.P.A. No.1071/15 has adopted the above arguments and supplemented the same on certain aspects. He urges urge that the Hon'ble Supreme Court in Ashok Kumar's case (supra) which was decided after Nagraj (supra), the Hon'ble Supreme Court clarified that the concept of creamy layer does not apply to the candidates belonging to SC/ST categories. He too placed reliance on several recent judgments of the Supreme Court referred to above.

Shri Bindhyachal Singh, learned counsel for the respondents, on the other hand, submits that the only case in which the Hon'ble Supreme Court dealt with the Constitution 77th, 81st and 85th amendment leading to insertion of Clauses-(4A) and (4B) of Article-16 is the one, in Nagraj's case and after thoroughly discussing the

1. (1995) 2 SCC 745
2. (2008) 6 SCC 1
3. (2011) 1 SCC 467
4. (2014) 8 SCC 872
5. (2009) 9 SCC 454

Various aspects thereof, their Lordships held that the State should satisfy itself on the aspects of (a) backwardness, (b) inadequacy of representation, (c) efficiency in administration, and (d) identification and segregation of creamy layer; before the benefit under Clause-(4A) is extended. He contends that, in fact, the socio-economic survey which the State Government had undertaken has identified the first three parameters, but the study proceeded on the lines of 'relative backwardness', instead of 'backwardness' as such. He submits that the relative backwardness is somewhat alien to the concept of reservation of whatever category, the reason being that even one of the richest persons can be said to be relatively backward in comparison to a person who has a little more of wealth than him and, obviously, for that reason the backwardness, in the context of reservations was determined with reference to settled and identified parameters. Learned counsel further submits that from the report prepared by the State it is manifest that in quite large number of departments, the representation of SC/ST candidates is 100%; that too, in top executive posts, apart from there being more than adequate representation in other categories, and still an omnibus reservation was

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provided for in all the services, without any limit as to time.

According to the learned counsel, the reservation under Article-16(4A) can be made in respect of class or classes of posts, in the services under the State, depending upon the representation of SC/ST employees, in contradistinction to the reservation under Article-16(4), which can be for entire services under the State. He submits that the reservation in promotion, being special and superior in nature, must be worked out in such a way that the rights that have accrued to the employees in any cadre are not defeated and trampled. He further submits that though the Hon'ble Supreme Court directed that the principle underlying Article-335, namely that the administrative efficiency shall not be compromised in the process of extending benefits to SC/STs., no attention was paid to that aspect.

It is also urged that the concept of creamy layer was very much made applicable to the reservations under Article-16(4A) by the Hon'ble Supreme Court through its judgment in Nagraj's case (supra) and the State cannot be permitted to plead to the contrary. He contends that the learned single Judge has discussed all the relevant aspects thoroughly with reference to decided cases and that no

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interference is warranted with the judgment rendered in the writ petition.

Striking a decent balance between the concept of absolute equality enshrined in Articles-14 and 16 of the Constitution of India, on the one hand, and providing measures to ensure adequate representation in the State owned educational institutions and in services under the State for the benefit of persons belonging to SC/ST candidates or socially and economically backward classes, on the other hand, was, by no means, a simple task, be it for the Parliament, State Legislatures or the Constitutional Courts. Even while recognizing the importance of the concept of equality, a semblance of protective discrimination was resorted to, in matters of that nature. Over the period, the dimensions of reservation increased. What was originally intended to be a step, just to ensure representation of such categories in admissions or employments by the State, has not only grown in proportion, but has also been extended to the promotions in government services, of course, only in favour of SC and ST categories. It is not necessary to deal with the minute aspects at this stage. Suffice it to mention that the cloud that has set on the reservation in promotions in favour of

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SC/ST candidates, as a sequel to the judgment of the Hon'ble Supreme Court in Indra Sawhney's case (supra), was sought to be removed through Constitution 77th amendment by inserting Clause-(4A) in Article-16. The scope of this was further expanded by providing the benefit of 'consequential seniority' through Constitution 77th amendment second Clause-(4A) of Article-16, as it stands now, reads as under:

(4A): " 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".

Clause-(4B), which was introduced in the year 2000, provided for carrying forward of unfilled reserved vacancies; and we are not concerned with the same.

The constitutional validity Article-16(4A) fell for consideration in Nagraj's case (supra). After dealing with the matter extensively and analysing the precedents on the subject, their Lordships summed up the conclusions in paragraph Nos.121, 122 and 123. They read:-

"121. The impugned constitutional amendments by which Articles 16(4A) and 16(4B) have been inserted flow from Article 16(4). They do not alter the structure of Article 16(4). They retain the controlling factors or the compelling reasons,

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namely, backwardness and inadequacy of representation which enables the States to provide for reservation keeping in mind the overall efficiency of the State administration under Article 335. These impugned amendments are confined only to SCs and STs. They do not obliterate any of the constitutional requirements, namely, ceiling-limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-classification between OBC on one hand and SCs and STs on the other hand as held in Indra Sawhney, the concept of post-based Roster with in-built concept of replacement as held in R.K. Sabharwal.

122. We reiterate that the ceiling-limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse.

123. However, in this case, as stated, the main issue concerns the "extent of reservation". In this regard the concerned 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. As stated above, the impugned provision is an enabling provision. The State is not bound to make reservation for SC/ST in matter of promotions. However if they wish to exercise their discretion and made 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 of Article 335. It is made clear that even if the State has compelling reasons, as stated above, the State will have to see 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."

From this what can be culled out is that the

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important factors that guide the reservations under Article-16(4A) are; (a) backwardness, (b) inadequacy of representation and (c) overall efficiency of the State administration under Article-335. It is also important to note that while providing reservation or making other provisions, the State must ensure that a) the facility so created does not lead to excessiveness so as to breach the ceiling limit of 50%, b) the creamy layer excluded and denied the benefit of reservation, and c) the facility is not extended indefinitely. In effect, 6 indicia were identified and stipulated.

It is essential to bear in mind that the reservation provided for under Article-16(4) is substantially different from the one under Article-16(4A). The former is a facility that enables persons to enter the State service by relaxing the norms of selection or the parameters of merit which are stipulated for the posts, in general. Through that process, a person who is otherwise not eligible to be appointed, is enabled to enter service under the State. The target group for this is unemployed persons, of a certain categories. In contrast, Article-16(4A) deals with the situation where the target group is already enjoying the benefit of employment on the basis of reservation under

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Article-16(4), and the effort is only to push them to higher places in the hierarchy. In a way, it can be said that while Article-16(4) deals with the primary and basic aspect of protective discrimination, i.e. reservation, the one under Article-16(4A) is about the secondary aspect. Obviously, for this reason the Parliament as well as the constitutional courts have made subtle distinction and have chosen to stipulate different parameters for the two.

For example, the benefit under Clause-16(4) is in respect of "services under the State" whereas the objective underlying Article-16(4A) is to ensure representation of the SC/ST in the "class or classes of posts in the service under the State". Similarly, the necessity to ensure that the efficiency in administration does not suffer, is applied with a bit of greater emphasis for the reservations under Article-16(4A) than the one under Article-16(4). These are only the broader aspects.

The State of Bihar intended to provide for reservation, contemplated in Article-16(4A). Taking note of the judgment of the Hon'ble Supreme Court in Nagraj's case (supra), a committee was constituted to undertake the study on all the three aspects namely backwardness, inadequacy of representation, and maintenance of

administrative efficiency. It is not necessary to refer to the litigation that preceded the preparation of the report. The purport of the judgment of the Hon'ble Supreme Court in Nagraj's case (supra) was taken into account and, in the understanding of the committee, the following conditions are required to be fulfilled, before the reservation under Article-16(4A) is made:

(a) Collecting of quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment.

(b) Ensuring compliance with Article 335 which says that while making reservation, due consideration is to be given to maintenance of efficiency of administration.

(c) Ensuring that the reservation provision does not cross the ceiling of 50% and does not obliterate the creamy layer and that the reservation does not extend indefinitely."

Thus all the six indicia mentioned in the judgment were treated as essential.

In para-11 of the report, extensive data, both as regards the backwardness as well as representation, is incorporated.

Having noted the conditions stipulated in Nagraj's case (supra), the committee, however, narrowed down its exercise. For example, it proceeded to analyse the backwardness in relative terms which, in a way, militates

against the judgment. This is evident from the executive summary of the report at page-3 which reads:

“This report has been prepared by the Department of SC & ST Welfare, Govt. of Bihar, pursuant to letter no.125 dt. 22/06/12 of the General Administration Department, Government of Bihar and with reference to the Civil Writ Jurisdiction Case No.5649 of 2008 in the High Court of judicature at Patna and the Letters Patent Appeal No.1225 of 2011 in Civil Writ Jurisdiction Case No.5649 of 2008 (with Interlocutory Application No.5968 of 2011 and Interlocutory Application No.5969 of 2011 in Letters Patent Appeal No.1225 of 2011), with the intent to determine

- ❖ the relative level of backwardness of the Scheduled Castes and Scheduled Tribes in Bihar,
- ❖ inadequacy of their representation in various government services, including Engineering Services(s), and
- ❖ the impact, if any, of SC/ST quotas in promotions on the overall administrative efficiency of government machinery.”

We are of the view that the exercise undertaken by the Committee as regards the backwardness does not accord with the principle enunciated in Nagraj's case. Learned counsel for the appellants argued that backwardness in favour of scheduled castes and scheduled tribes is treated as existing *per se* and there is no necessity to address that question at all. This may sound a bit attractive if one takes into account the general concept of reservation in favour of SCs. and STs. However, once the Constitution Bench of the Hon'ble Supreme Court in

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Nagraj's case stipulated backwardness as a condition precedent for effecting measures under Article-16(4A), the contention of the appellants cannot be accepted. In fact, they too understood that a study as regards backwardness must be undertaken and it is only when the study discloses that target group is backward, that the consequential step of reservation can be taken.

We agree with the contention of the learned Senior Counsel for the appellants that the backwardness must be in respect of social, economic and educational aspects. For this purpose, the State has to stipulate its own parameters or the indicia with reference to which the study must be undertaken. For example, if the social or educational index for an ideal society in that area is fixed at 100 points, and the study discloses that the advancement of the target group on those aspects is below 50% or any other chosen figure, an objective assessment can be said to have been made. However, no such exercise was undertaken in this case. On the other hand, the study was made in relative terms of backwardness. That does not help anyone to arrive at proper conclusions. The reason is that howsoever advanced a person or section of a society may be, he or it can be treated as a little backward, it is shown that

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there exist persons or section in a better condition. To be precise, a rich can be treated as relatively backward in comparison to neo rich. The report also discloses that the backwardness was studied on the basis of the representation of persons belonging to SC/ST with reference to the percentage of their population in general. In a way, that would be a factor relevant for adequacy or otherwise of the representation.

Coming to the second aspect, namely adequacy of representation, the Committee took into account the representation of the SC/ST employees in various departments of the Government, that too at different levels, in each service. The statistics that are made part of the report disclose that in certain cases, the representation of SC/ST employees in higher executive services is indeed 100% and in some cases more than the percentage of reservation, viz 16% (15+1). The statistics also do not depict the correct picture for the reason that in many cases the existing strength of the employees is far below, ranging from 5% to 50% of the sanctioned strength.

Be that as it may, the statistics so obtained must guide the decision whether or not to provide reservation in respect of a) some or all the services, and b)

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class or classes within each service depending on the existing representation. For example, in the Department of Water Resources, the existing representation of SC/ST employees in the class of Chief Engineer (Civil) is 100%, in the class of Superintending Engineer it is 37.2%. Similarly, in the post of Chief Engineer, Mechanical, it is 100%, Superintending Engineer, Mechanical, it is 23% and so on. In certain other services in general and classes in particular, the representation is fairly higher. Such representation is not a matter of concern for anyone not it should be. At the same time, that factor ought to have been taken into account, while taking a decision whether or not to provide reservation under Article-16(4A).

The argument advanced on behalf of the appellants that the situation obtaining at a particular time may not remain the same and after a few years it may not be possible to keep pace with changing scenario classwise or servicewise, cannot be accepted. The reason is that the facility under Article-16(4A) is not aimed at ensuring mere survival or livelihood. It results in pushing of a person most junior in the service to higher positions by stealing march over his seniors. That can be done only when the circumstances explained by the Hon'ble Supreme Court are

found to be existing.

The appellants cannot ignore the specific language employed in Clause-4(A) indication that the reservation under it shall be in a class or classes in a service, under the State, and the service as a whole as indicated in Clause (4) of Article-16.

That the reservation under Article-16(4A) of the Constitution is with reference to class or classes of posts in the service under the State is evident not only from the text of the provision, but also the various judgments rendered on the subject.

It is also essential to keep in mind that the makers of the Constitution sounded a note of caution in Article-335 that the special measures taken for the benefit of persons belonging to SC/ST category must be such that the efficiency in the administration is not compromised. Induction at the entry level through reservation may not pose any serious problem to administrative efficiency. The reason is that once a person with basic qualifications is inducted into service he would be subject to some training and methods as are applicable to anyone. On contrast, the reservation in promotion would render the concept such as seniority, merit irrelevant and enable a person belonging to

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SC/ST category to get promotion out of turn, that too with the consequential seniority.

An out of turn promotion may certainly make the person happy. However, the element of frustration or dissatisfaction in the person who is superseded cannot be ignored. The efficiency of administration which is adequately protected in Article-335 of the Constitution is likely to suffer a double dent on account of out of turn promotions. The first is that a relatively inexperienced person would occupy a higher position, and second is that an otherwise experienced and senior person is subjected to an element of frustration and he may not be able to execute with the same amount of interest as he used to do in the normal circumstances. It cannot be examined from the point of view of the beneficiary alone.

The creamy layer is another vexed question vis-à-vis the reservations under Article-16(4A). It is true that in Indra Sawhney's case (supra), the Hon'ble Supreme Court held that the concept of creamy layer does not apply to the reservations in favour of persons belonging to SC/ST category. However, in Nagraj's case (supra), their Lordships observed at more places than one, that the creamy layer must be excluded from the purview of reservation under

that provision. Not only from the body of the judgment, but also from the last sentence of the judgment this aspect is clear.

Learned senior counsel for the appellants tried to convince us that the concept of creamy layer cannot be applied to reservation in favour persons belonging to SC/ST category, and to buttress his contention, relied upon the judgment in Ashok Kumar Thakur's case (supra). That was also decided by a Constitution Bench. However, the subject-matter was the admission into educational institutions. It is, no doubt, true that Hon'ble Chief Justice Mr. K.G. Balakrishnan expressed the view that the observations of the Supreme Court in Nagraj's case in relation to creamy layer need to be treated as obiter. However, if one takes into account the judgments rendered in the same case by Hon'ble Justice Dalveer Bhandari, Hon'ble Justice Dr. Arijit Pasayat and Hon'ble Justice R.V. Raveendran, it becomes clear that a similar view was expressed. At any rate, the reservation under Article-16(4A) was not the subject-matter in that case.

In subsequent judgments such as the one in Surajbhan Mina's case (supra), Anil Chandra's case (supra) and U.P. Board Corporation Limited Vs. Rajesh Kumar and

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Ors.1, the concept of creamy layer vis-à-vis the reservations under Article-16(4A) was reiterated.

We are conscious of the fact that the parameters for identifying the creamy layer in the context of providing for reservation under Article-16(4A) are not readily available either from any enacted law or precedents. That, however, is a matter, which needs to be worked out. The ordinary parameters that are made applicable for admission into professional courses, or appointments such as the income of the candidate or the parents, may not hold good for reservations under Article-16(4A). The reason is that the person is already in service and, in many cases, holding the gazetted and senior positions.

Perhaps, some of the parameters in this behalf can be to verify whether the person belonging to the category has already availed the benefit of reservation in promotion or whether he is occupying a fairly respectable and powerful position in the service, or whether his spouse or child is employed.

It is only when an exercise in this behalf is made that an occasion may arise for testing it, and, ultimately, the last word in this behalf has to be spelt out

by their Lordships of the Hon'ble Supreme Court. Once it was held in Nagraj's case that the facility of reservation under Article-16(4A) can be extended only by excluding creamy layer, the State cannot provide for such reservation without addressing that question at all.

It must be kept in mind that the reservation is meant for ameliorating the conditions of the category or class of persons and an individual. If a person in the creamy layer is excluded, a more deserving person in the same category would get the benefit.

Another aspect is as to whether the reservation contemplated period. If one takes into account, the various provisions of the Constitution, it becomes clear that the reservation, whatever be the category, is meant to be temporary phenomenon, to enable certain disadvantaged groups of the society, to overcome the handicap. However, the facility is being treated almost as a permanent phenomenon. Obviously, taking note of this Hon'ble Supreme Court, In Nagraj's case clarified that it cannot be extended 'indefinitely' (See Para 123 of the Judgment). Therefore, the State is required to indicate the period for which, the reservation would be in force. No attention was paid to this aspect by the State, while passing the impugned

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resolution.

The learned single Judge took note of the relevant precedents, particularly the judgment in Nagraj's case and expressed the view that the exercise undertaken by the State does not satisfy in the same. Further, it was left open to the State to provide such reservation by complying with the requirements indicated under Article-16(4A) and the judgment of the Hon'ble Supreme Court in Nagraj's case. We do not find any basis to interfere with the judgment in the writ petition.

Letters Patent Appeals are dismissed.

Interlocutory application, if any, stands disposed of.

There shall be no order as to costs.

(L. Narasimha Reddy,CJ)

I agree.

(Sudhir Singh, J)

(Sudhir Singh, J)

K.C.jha/-
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