

(2009) 07 RAJ CK 0055
In the Rajasthan High Court

Bajrang Lal Sharma and Others	Vs	APPELLANT
State of Rajasthan and Others		RESPONDENT

Date of Decision : 09-07-2009

Acts Referred:

Constitution of India, 1950 — Article 141, 16, 226, 227, 335

Citation : (2009) 07 RAJ CK 0055

Hon'ble Judges : R.S. Chauhan, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

R.S. Chauhan, J.—In light of two applications filed under Article 226(3) of the Constitution of India, the question before this Court is whether to vacate the interim stay order dated 22.08.2008 passed by a Division Bench of this Court or not ? This case has opened up a Pandora's box of hard circumstances, of anomalous situations created by myriad Court orders, and of various legal issues. However, instead of entangling this order in a web of contentions and counter-contentions, it is proposed that the paramount issue raised in the writ petition would be dealt with, the order dated 22.08.2008 would be considered, and lastly the necessity of its continuation or vacation would be decided.

2. But before this journey can be undertaken, it is imperative to deal with the preliminary objections raised by Mr. S.P. Sharma, the learned Counsel for the petitioners, about the maintainability and the survival of the applications under Article 226(3) of the Constitution of India. It is also essential to deal with the preliminary objections raised by Mr. Sanjay Pareek, the learned Counsel for respondent No. 5 about the maintainability of the writ petition itself.

3. In order to appreciate Mr. Sharma's preliminary objection, it is imperative to first appreciate the progress of this petition through the corridors of this Court. For, this case has a quixotic history: initially the petition was filed as D.B. Civil Writ Petition before this Court on 31.07.2008. It was listed before a Division

Bench on 22.08.2008. After hearing the learned Counsel for the petitioners, the learned Division Bench was pleased to stay the Notification dated 25.04.2008. Immediately on 16.02.2009, the respondent No. 3, Mr. Suraj Bhan Meena filed an application under Article 226(3) of the Constitution of India for vacationing the ex-parte stay order. On 25.02.2009, the case was listed again before the learned Division Bench and the learned Division Bench directed that the matter be placed for hearing on 16.03.2009, and continued the interim direction till the next date. Subsequently, on 27.02.2009 respondent No. 1, the State of Rajasthan also filed an application under Article 226(3) of the Constitution of India. When the case was listed on 16.03.2009 before the learned Division Bench, the learned Counsel for the respondents raised a preliminary objection about the maintainability of the writ petition. The learned Division Bench adjourned the case and observed that it will hear the case on maintainability on the next date. On 13.04.2009, again the matter was listed before the learned Division Bench. However, while continuing the interim order, it directed the matter to be listed in the last week of April, 2009. Finally on 27.04.2009, the learned Division Bench heard the parties about the maintainability of the writ petition and directed the office to place the petition before a learned Single Bench. It further observed, "Previous order-sheet further shows that operation of this Notification was stayed on earlier date of hearing which continued till today. In this view of the matter, till the matter comes up before the learned Single Judge, operation of the impugned order would continue to be stayed which would still be considered by the learned Single Judge as and when the matter comes up before him." Consequently, the case was listed before a learned Single Bench of this Court on 13.05.2009. The parties pointed out to the Court that in other cases, namely Ajay Singh Chittora and Hanuman Singh Bhati, a co-ordinate Bench of this Court has quashed the seniority list. They further pointed out that against the said judgment one Gajendra Singh has filed an appeal and the appeal is likely to be listed on 22.05.2009. In these circumstances, the learned Single Judge directed the counsel to produce the judgment of the learned Single Bench, and the interim order passed by the learned Division Bench, if any. Meanwhile, the interim order was directed to be continued. The case came up for hearing on 22.05.2009. While the counsel for the petitioners did submit the copy of the judgment of the Single Judge dated 04.03.2009, he could not submit the interim order passed by the learned Division Bench as the Special Appeal was to be taken by the learned Division Bench on 25.05.2009. While the respondents contended that the case is squarely covered by the judgment of M. Nagaraj and Others Vs. Union of India (UOI) and Others, and by the case of U.P. Avas Evam Vikas Parishad and Another Vs. Rajendra Kumar Aggarwal and Others, , the counsel for the petitioners contested this position. The Court directed that the matter be listed on 26.05.2009. However, when the case was listed on 26.05.2009, the learned Single Judge recused himself from the case. Hence, this case before this Bench.

4. Mr. S.P. Sharma has vehemently argued that the interim order dated

22.08.2008 was continued both by the learned Division Bench and by the learned Single Judge even after the filing of the applications under Article 226(3) of the Constitution of India. Therefore, it should be presumed that the said applications were dismissed by this Court. Hence, the case cannot be taken up today on the said applications. He has further contended that according to Article 226(3) of the Constitution of India, the High Court is required to dispose of the said application within two weeks from the date of its filing or within two weeks from the date a copy of the application is given to the opposite party whichever is later. Since the applications have not been disposed of even after the appearance of the respondents before the Court, it should be presumed that their applications have been dismissed. He has heavily relied upon the order-sheet dated 25.02.2009 whereby after the appearance of respondent No. 3, still the Court had directed the matter should be listed for hearing on 16th March, 2009. According to the learned Counsel, if the case is directed to be listed for hearing and the stay order is continued especially after the appearance of respondent No. 3, this Court should presume that the applications under Article 226(3) of the Constitution of India have been dismissed.

5. On the other hand, Mr. Ashok Gaur, the learned Counsel for respondent No. 3, has contended that the presumption sought to be invoked by Mr. S.P. Sharma, is not a legal one. Therefore, the said presumption cannot be drawn. Secondly, a bare perusal of the order-sheets clearly reveal that the applications were never argued, heard, or decided either by the learned Division Bench or by the learned Single Bench. Therefore, the said applications are still pending for the decision of this Court. Thirdly, the words used in Article 226(3) are the "High Court shall dispose of the application." The words "dispose of" clearly indicate that an order on merit or demerit of the application needs to be passed. A bare perusal of the order-sheets clearly reveal that no such order has been passed. Therefore, the respondent No. 3 and the State are justified in pressing for a decision on their applications.

6. Article 226(3) of the Constitution of India bestows a right on a party respondent to seek the vacationing of an ex-prate order passed under Article 226(1). This is a valuable right granted to the respondent where a stay order has been passed behind his back. Therefore, it is imperative that an order, howsoever succinct or elaborate, should be passed on an application under Article 226(3) of the Constitution of India. Merely because the respondent appeared before the Court and just because the interim order was continued, no presumption can be drawn that the application under Article 226(3) was dismissed. Since the word used in Article 226(3) are "the High Court shall dispose of the application", clearly some reasons need to be stated before disposing of the said application. A bare perusal of the order-sheets, mentioned above, clearly reveal that neither the learned Division Bench, nor the learned Single Bench had passed any order on the merit or demerit of the said applications. In fact, according to the order dated 27.04.2009, the responsibility of hearing the said applications was shifted by the learned Division Bench to the learned Single Bench. Subsequently, the

learned Single Bench has not passed any order disposing of the said applications. Therefore, no presumption can be drawn that the applications have been dismissed by this Court. Thus, the preliminary objection raised by Mr. S.P. Sharma is devoid of any force. It is, hereby, rejected.

7. Mr. Sanjay Pareek has raised another preliminary objection by relying on the case of *L. Chandra Kumar v Union of India* and Ors AIR 1997 SC 1124. According to the learned Counsel, in the said case the Apex Court had placed an embargo on the jurisdiction of the High Courts and had restrained them from issuing any interim stay order against the Union of India. Thus, according to him, this Court cannot restrain the UPSC from proceeding with the selection process. Secondly, since the Central Administrative Tribunal (for short, "CAT") has ample power to examine the constitutional validity of a statute, the present petition should have been filed before CAT. However, both these contentions only need to be uttered, to be rejected. Firstly, what has been challenged before this Court is a Notification issued by the State government and not by the Central government.

8. Secondly, the entire process of selection is based on the seniority listed formulated by the State government. The UPSC is merely an agency for selecting and for recommending the names of officers who are found to be eligible and suitable for promotion to the IAS cadre.

9. Thirdly, in the aforesaid decision the Apex Court has not placed any prohibition on the jurisdiction of this Court. On the contrary, the Hon'ble Supreme Court has observed that the power of judicial review under Articles 226 and 227 of the Constitution of India is "the inviolable basic structure of our Constitution". Therefore, the said jurisdiction can not be ousted.

10. Fourthly, while holding that CAT has the jurisdiction to examine the constitutional validity of a statute, the said power relates to the Central laws and not to the State laws. Admittedly, the petitioners are challenging Rule 33 of the Rajasthan Administrative Service Rules, 1954 ("Rules of 1954", for short)--a service rule of the State, and are challenging a Notification also issued by the State. Therefore, obviously CAT does not have the jurisdiction to decide the constitutional validity of State Service Rules, and of the Notification issued by the State government. Hence, the preliminary objection is unacceptable.

11. Now, for the facts of the case: the policy of reservation, or affirmative discrimination, has generated a lot of heat both within our society and within our bureaucracy. The overall battle between the parties in this case is with regard to promotion from Selection Scale and Super Time Scale of the Rajasthan Administrative Service ("RAS", for short) to the Indian Administrative Service ("IAS", for short). But the skirmish between the parties is with regard to seniority, with regard to the application of "the catch-up rule", and with regard to the implementation of Article 16(4-A) of the Constitution of India. Initially Rule 33 of the Rules of 1954 provided for seniority as under:

33.Seniority : (1) Seniority of persons appointed to the lowest post of the

Service or lowest categories of posts in each of the Group/Section of the Service, as the case may be shall be determined from the date of confirmation of such persons to the said post but in respect of persons appointed by promotion to other higher posts in the Service or other higher categories of posts in each of the Group/Section in the Service, as the case may be, shall be determined from the date of their regular selection to such posts.

12. However, vide Notification dated 01.04.1997, the catch-up rule was introduced in Rule 33 of the Rules of 1954. The catch-up rule deals with the interse seniority between an officer belonging to the general category and one belonging to the reserved category. In the lowest post the seniority is assigned according to the merit reflected in the selection list. In case where a person belonging to the general category is senior to a person belonging to the reserved category, and in case the latter is promoted to the next higher post due to accelerated promotion, the question is whether the person belonging to the reserved category would rank "senior" to the person belonging to the general category once the person belonging to the general category is also eventually promoted to the next higher post or not? In order to solve this problem, through judicial interpretation, the "catch-up rule" was invented. According to the said rule, once the person belonging to the general category is promoted to the next higher post, he regains the seniority which he had in the lower post. Therefore, he "catches up" with the person who belonged to the reserved category although such a person was promoted earlier due to accelerated promotion.

13. In pursuance of the Notification dated 01.04.1997, a provisional seniority list was issued on 26.06.2000, wherein the benefit of the catch-up rule was given to the petitioners. However, subsequently, vide Notification dated 28.12.2002, while benefit of catch-up rule was revoked, the State Government clearly held out that "a candidate who has got the benefit of proviso (i.e. the benefit of catch-up rules), on promotion to an immediate higher post shall not be reverted and his seniority shall remain unaffected." Thus, the interest of those who had gotten the benefit of catch-up rule was protected by the Notification dated 28.12.2002. However, later on, vide Notification dated 25.04.2008 even this protection has been revoked. Therefore, the petitioners have challenged the validity of the Notification dated 25.04.2008. Although other circulars, namely circular dated 20.10.2000, is under challenge, although the Constitutional validity of Rule 33 of the Rules 1954 is also under challenge, but the main attack in the entire writ petition is against the Notification dated 25.04.2008. Since the Notification dated 25.04.2008 has been stayed vide order dated 22.08.2008, this Court is presently concerned only with those contentions which are raised with regard to the said Notification.

14. Mr. S.P. Sharma, the learned Counsel for the petitioners, has vehemently contended firstly, in the case of Indira Swahney v. Union of India and Ors. 1992 Supp.(3) SCC 217, the Hon"ble Supreme Court had held that the reservation of appointment or post is confined to initial appointment and cannot extend to

reservation in the matter of promotion. The said decision generated lot of heat and dust in the country. In order to address the grievance of the people, Article 16 of the Constitution of India was amended through the 77th amendment, and Article 16(4-A) was introduced into the Constitution. Initially Article 16(4-A) was as under:

16(4-A) Nothing in this article shall prevent the State from making any provision for reservation in matter 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.

15. Secondly, the concept of catch-up rule, created through judicial interpretation, equally agitated a large number of population. Therefore, in order to redress the grievance of the people, in 2001 again Article 16 was amended and specifically Article 16(4-A) was amended by the 85th amendment. After the amendment, Clause (4-A) of Article 16 reads as under:

16(4-A) Nothing in this Article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority to any class or classes of posts in the services under the State in favour of the Schedule Castes and Schedule Tribes which in the opinion of the State are not adequately represented in the service under the State.

16. This amendment inserted the words "with consequential seniority". Thus, the amendment permitted the State to do away with the concept of the catch-up rule. However, this amendment was given a retrospective effect from 17.06.1995. Therefore, according to the learned Counsel, the catch-up rule was valid and operational till 17.06.1995.

17. Thirdly, according to the decision of the Hon'ble Supreme Court in the case of M. Nagaraj and Ors. (supra), Article 16(4-A) of the Constitution of India is an enabling provision which empowers the State to make "any provision for reservation in matters of promotion, with consequential seniority to any class or classes of post in the service under the State in favour of SCs and STs." However, the State is not bound to make reservation for SCs and STs in matters of promotion. Furthermore, before the State can implement Article 16(4-A) of the Constitution of India, it must carry out certain exercise according to the Apex Court: the State has to collect quantifiable data showing backwardness of the class and inadequacy of the representation of that class in public employment, keeping in mind the maintenance of efficiency as indicated by Article 335 of the Constitution of India. Moreover, it must adhere to the concept of post based roster with inbuilt concept of replacement.

18. Fourthly, through the Notification dated 25.04.2008, the State is trying to implement Article 16(4-A) of the Constitution of India. But it has miserably failed to carry out the exercise as laid down by the Hon'ble Supreme Court in the case of M. Nagaraj and Ors. (supra).

19. Fifthly, according to the said decision, it is for the State to demonstrate to the satisfaction of the Court that it has carried out the exercise as laid down in the said case. However, the State has not produced any evidence whatsoever to demonstrate that it had carried out the exercise as prescribed by the Apex Court in the above mentioned case. In the absence of the said exercise, the Notification can not be issued.

20. Sixthly, until and unless the State demonstrates that it had carried out these exercises, the State could not have issued the Notification dated 25.04.2008. For, according to the Apex Court the carrying out of the exercise is a sine quo non precondition to the implementation of Article 16(4-A) of the Constitution of India.

21. Seventhly, in the case of All India Equality Forum, Writ Petition (C) No. 234/2002, the Hon"ble Supreme Court passed an interim order dated 11.11.2002 wherein it had ordered that those candidates who were given the benefit of catch-up rule, "such candidates were neither to be reverted from their existing post, nor their standing in the seniority list is to be affected." According to the learned Counsel, the said interim order is still operational as the said case is presently pending before the Apex Court. Despite this interim order of the Hon"ble Supreme Court, the Notification dated 25.04.2008 proposes to adversely effect the seniority of the petitioners and proposes to deprive them of the benefit of the catch-up rule. Therefore, the Notification contravenes the interim order passed by the Apex Court.

22. Lastly, although the Notification has been stayed vide order dated 22.08.2008, the State Government has forwarded the final seniority list dated 24.06.2008 and the UPSC is planing to hold a Board meeting on 10th July, 2009 for promoting Selection Scale and Super Time Scale RAS officers to the IAS cadre. According to the learned Counsel, once the Notification has been stayed by this Court, neither the State, nor the UPSC should act upon the final seniority list dated 24.06.2008, or on the final seniority list dated 15.06.2009 (the latter final seniority list is based on the former final seniority list). Hence, the learned Counsel has pleaded that the said interim stay order dated 22.08.2008 should not only be confirmed, but the respondent Nos. 1 & 2 and respondent No. 5 should be restrained from initiating the selection process for promoting the RAS officers to the IAS cadre.

23. Mr. G.S. Bapna, the learned Advocate General for the State, has strenuously opposed the contentions raised by Mr. Sharma. He has raised the following contentions before this Court: firstly, the State is facing a lot of difficulty in the functioning of the IAS cadre as no promotion has been made from the RAS cadre to the IAS cadre since 1995 . In the absence of filling up of these vacancies, the State finds it difficult to carry out its sovereign functions.

24. Secondly, the final seniority list dated 24.06.2008 was challenged by three different persons before this Court, namely Ajay Singh Chittora, Hanuman Singh Bhati, Ajay Singh. Through a common judgment dated 04.03.2009, this Court

had quashed and set aside the said seniority list. Against the said judgment, a special appeal has been filed, registered as D. B. Civil Special Appeal (Writ) No. 206/2009, before this Court. Vide order dated 26.05.2009, a Division Bench of this Court has stayed the operation of the judgment dated 04.03.2009 and has directed the State to initiate the induction process while taking into consideration the seniority list dated 24.06.2008.

25. Thirdly, considering the difficulty faced by the State, considering the order dated 26.05.2009, this Bench should also vacate the interim stay order dated 22.08.2008, and should permit the State Government and the UPSC to carry out the promotion process.

26. Fourthly, the learned Single Judge while passing the judgment dated 04.03.2009 had noticed the fact that the Notification dated 25.04.2008 was stayed by the learned Division Bench of this Court vide order dated 22.08.2008. Therefore, according to Mr. Bapna, the Notification dated 25.04.2008 is equally sub-judice before the learned Division Bench while it deals with the Special Appeal filed against the judgment dated 04.03.2009. According to him, despite the said Notification being under challenge before the learned Division Bench, the learned Division Bench has not stayed the operation of the said Notification. Therefore, in this light of the matter, the interim order staying the order of the Notification deserves to be vacated.

27. Fifthly, by staying the operation of the Notification dated 25.04.08, this Court has restored the Notification dated 28.12.02. However, under the latter Notification, the interest of only those officers was saved who "got" the benefit of the catch-up rule. According to the learned Counsel, although the petitioners were entitled to get the benefit, yet the benefit was not extended to them. Thus, they never "got" the benefit. Hence, they are not covered by the Notification dated 28.12.02.

28. However, it is pertinent to pointed out that during the course of arguments, this Court had asked a question to the learned Advocate General whether the State had carried out any exercise to collect the quantifiable data with regard to the backwardness of the class, with regard to the inadequacy of representation of these reserved class in public employment, with regard to the impact of reservation on the efficiency of the administration, with regard to adherence to the concept of post based roster with inbuilt concept of replacement, or not? This Court has also pointed out to the learned Advocate General that according to the reply submitted by the State an extremely vague stand has been taken that since Notification dated 25.04.2008 has been issued, it should be presumed that the State has carried out the said exercise. It was further pointed out to the learned Advocate General that the State has not submitted an iota of evidence to demonstrate that it had carried out the exercise as warranted and laid down by the Apex Court in the case of M. Nagaraj and Ors. (supra). To these observation and queries, the learned Advocate General frankly conceded that no such exercise has been carried out by the State prior to, or subsequent to the

Notification dated 25.04.2008.

29. Mr. Ashok Gaur, the learned Counsel for respondent No. 3, has forcefully raised the following contentions before this Court : firstly, while drawing the attention of this Court to the interim prayer clause, he has contended that a number of interim prayers were made including the prayer to stop the selection process. However, while considering the interim prayers, vide order dated 22.08.2008, the learned Division Bench did not stay the selection process. The Division Bench, in its wisdom, merely stayed the operation of the Notification dated 25.04.2008. Therefore, the present request of the petitioners to stay the selection process is deemed to have been dismissed by the learned Division Bench. Hence, the same prayer cannot be repeated by the petitioners before this Bench.

30. Secondly, while the Special Appeal arising out of the judgment dated 04.03.2009, was argued before the learned Division Bench, the stay order dated 22.08.2008 was brought its notice, yet still vide order dated 26.05.2009 the learned Division Bench has directed the State to proceed with the selection process. Therefore, in light of the order dated 26.05.2009, the interim stay order dated 22.08.2008 deserves to be vacated.

31. Thirdly, although much has been made about the catch-up rule by the petitioners, the catch-up rule was washed out by the 85th amendment of the Constitution in 2001. Since the said amendment has been given a retrospective effect from 17.06.1995, thus from 17.06.1995 the catch-up rule is inapplicable. Hence, the petitioners cannot try to take the benefit of catch-up rule at this belated stage.

32. Fourthly, the petitioners have no right to knock at the doors of this Court at the last moment seeking to prevent the initiation of the selection process which is due to commence on July 10, 2009. According to the learned Counsel, it is a conspiracy of many to deprive a few of their chance of promotion. Furthermore, many RAS officers have been waiting in the wings for the last fifteen years for their promotion to the IAS cadre. During this period many of them have already retired and many of them are hopelessly hoping that they will be promoted during their service. He has, thus, contended that the balance of convenience lies in favour of the respondent No. 3, and others like him, and not in favour of the petitioners.

33. Lastly, relying on the case of U.P. Avas Evam Vikas Parishad (supra), he has argued that this Court should not continue the interim stay order dated 22.08.2008.

34. Heard the learned Counsel for the parties, perused the interim stay order dated 22.08.2008 and the case law cited at the Bar.

35. Bereft of the various contentions raised before this Court, the cardinal issue before this Court is whether the State Government can implement Article 16(4-

A) through the Notification dated 25.04.2008 or not ? The parties are ad idem that the benefit of catch-up rule was introduced vide Notification dated 01.04.1997. Although the said benefit was revoked by the Notification dated 28.12.2002, but those persons who had gotten the benefit, their seniority was protected. Moreover, Notification dated 25.04.2008 revoked the protection given to the persons under Notification dated 28.12.2002. Most importantly, all the parties are ad idem that through the Notification dated 25.04.2008 the State Government is trying to implement Article 16(4-A) of the Constitution of India.

36. Undoubtedly, the reservation policy is a laudable vision of the State Government. Undoubtedly, the State is trying to ameliorate the condition of the reserved class through a robust reservation policy. Undoubtedly, the tyranny and oppression of the reservation classes over 5000 years of our history needs to be replaced by equality, by social and economic justice. Thus, the validity, the necessity of a reservation policy cannot be questioned. In order to wipe the tears from the faceless and voiceless classes, the parliament in its wisdom had carried out the 71st and the 85th amendment in the Constitution of India. The Constitutional validity of both these amendment have been upheld by the Apex court in the case of M. Nagaraj and Ors. (supra). Therefore, the Constitutional Validity is not the question before this Court.

37. The issue before this Court is whether the State can implement Article 16(4-A) of the Constitution of India without first carrying out the exercise as laid down by the Apex Court in the case of M. Nagaraj and Ors. (supra) or not ? While holding that Article 16(4-A) and Article 16(4-B) are enabling provisions, in the case of M. Nagaraj and Ors. (supra) the Hon"ble Supreme Court observed as under:

The State is not bound to make reservation for SCs/STs in matters of promotions. However, if they wish to exercise their discretion and make reservations in promotions, the States have to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment, keeping in mind maintenance of efficiency, as indicated by Article 335. The concepts of efficiency, backwardness, inadequacy of representation are required to be identified and measured.

38. It further held as under:

If the State concerned fails to identify and measure backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid. Furthermore, 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 exclusion requirement or extend the reservation indefinitely.

39. Lastly, the Apex Court postulated as under:

The extent of reservation has to be decided on the facts of each case. In each case the Court has got to be satisfied that the State has exercised its discretion in making reservations in promotions for SCs and STs and for which the State concerned will have to place before the Court the requisite quantifiable data in each case and satisfy the Court that such reservations became necessary on account of inadequacy of representation of SCs/STs in a particular class or classes of posts without affecting general efficiency of service as mandated under Article 335 of the Constitution.

40. Thus, in the case of *M. Nagaraj and Ors. (supra)*, the Apex Court has not only laid down the exercise which needs to be carried out by the State before implementing Article 16(4-A) of the Constitution of India, but has also placed the burden of proof on the State. It has also made the collection of the quantifiable data as a sine quo non prerequisite to the implementation of Article 16(4-A) of the Constitution of India. Hence, before issuing the Notification dated 25.04.2008, the State should have carried out the exercise as laid down by the Apex Court. But according to Mr. G.S. Bapna, the learned Advocate General, the State has not carried out the said exercise so far. According to the Apex Court, in case the said exercise is not carried out then the reservation is invalid. In the light of these facts, in the light of the concession made by the learned Advocate General, in the light of the decision in the case of *M. Nagaraj and Ors. (supra)*, prima facie the petitioners have a strong case in their favour.

41. Both Mr. G.S. Bapna and Mr. Ashok Gaur have stressed about the difficulty faced by the State, and the hardship faced by those who are waiting in the wings for their promotion. Considering the difficulty and the hardship, they have pleaded that the balance of convenience lies in favour of the respondents and not in favour of the petitioners.

42. However, the petitioners in this case are not only those RAS officers who feel deprived of the benefit of their seniority under the catch-up rule by the Notification dated 25.04.2008, but most importantly a Non-Government Organization has also appeared as a petitioner. Therefore, the issue before this Court is not just about the balance of convenience of the RAS officers who are arrayed against each other, but most importantly the issue is whether the Rule of law should prevail or the Rule of Man be perpetuated. Undoubtedly, those officers, who have waited for fifteen long years for promotion, have a reason for frustration and hopelessness, caught as they are in series of litigation. But merely because they are caught in the quagmire of life, they cannot plead that Rule of law should be sacrificed at the alter of their psychological satisfaction. Rule of law rises much above the craving of an individual, the satisfaction of an individual, the realization of an individual. Since the Rule of law binds the society and the State, since the Rule of law is above the interest of an individual, necessarily Rule of law has to be given paramount importance by a Court of law.

43. In the context of letting the Rule of law prevail, it should be kept in mind that it is a settled principle of law that where a procedure has been established for

doing of an action, the State Government is bound to adhere to that procedure. According to the decision in *M. Nagaraj and Ors. (supra)*, the State Government was duty bound to carry out the exercise prior to implementing Article 16(4-A) of the Constitution of India. But, prima facie and according to its own concession, the State Government has failed to do so. Since the procedure has not been followed, the State Government cannot plead that it be permitted to violate the procedure so as to satisfy the needs of few officers. It can not take the plea that the balance of convenience is in favor of the State or of in favor of the private respondent.

44. Moreover, if the State were alive and sensitive to the difficulties created in its functioning because of lack of promotion in the IAS cadre, the State had ample time to carry out the exercise laid down in the case of *M. Nagaraj and Ors. (supra)* in the last three years. After all, the judgment in *M. Nagaraj and Ors. (supra)* was pronounced on 19.10.2006. The State cannot be permitted to first ignore the decision of the Apex Court and then to plead its difficulties. If it is facing any difficulties, it is because of its own fault. Obviously, now it can not take the benefit of its own fault. Thus, the State cannot be permitted to implement Article 16(4-A) of the Constitution of India without first completing the exercise as required by the Apex Court.

45. Further, Article 141 of the Constitution of India clearly states that a decision of the Hon'ble Supreme Court shall be binding and shall be considered as the law of the land. In this view of the matter, the State cannot be permitted to violate the decision of the Hon'ble Supreme Court in *M. Nagaraj and Ors. (supra)*. In case, the State were permitted to violate the said decision, this Court would be permitting the State to commit an illegality, and to break the Rule of law. It is, indeed, trite to state that a Court cannot permit either the State, or a private party to break the law.

46. Furthermore, since the State cannot do indirectly what it has been prohibited from doing directly, obviously the balance of convenience lies in favour of the petitioners than in favour of the respondents. After all, the entire tenor of the writ petition is that the law laid down by the Hon'ble Supreme Court in the case of *M. Nagaraj and Ors. (supra)* should be complied with before the State is permitted to implement Article 16(4-A) of the Constitution of India. Therefore, this Court is of the opinion that the balance of convenience lies in favour of the petitioners and not in favour of the State.

47. Even if for the sake of argument, it is accepted that the balance of convenience lies in favour of the State, even then the State cannot be permitted to flout the stay order passed by the Hon'ble Supreme Court in the case of *All India Equality Forum case*. Moreover, it cannot be permitted to cleverly ignore the stay order dated 22.08.2008 while drawing up the seniority list dated 24.06.2008 and the final seniority list dated 15.06.2009. Therefore, the argument that the balance of convenience lies in favour of the State is unsustainable.

48. Similarly, even if for the sake of arguments it is accepted that the balance of convenience lies in favour of the respondent No. 3, and others like him, even then in the garb of their balance of convenience, the State cannot be permitted to flout the orders/judgment mentioned above. Moreover, a party respondent cannot claim that an illegal act be committed by the State in order to fulfill their balance of convenience. Therefore, the argument raised by the learned Counsel for the respondent No. 3 is without any merit.

49. Mr. Ashok Gaur has forcefully argued that in case the interim stay order is not vacated, an irreparable loss would be caused to the respondent No. 3 and to others like him. He has further contended that no irreparable loss would be caused to the petitioners. On the other hand, Mr. S.P. Sharma has contended that the irreparable loss would be caused both to the petitioners and to the system. According to the learned Counsel, initially the benefit of catch-up rule was given to the petitioners. The said benefit is being withdrawn by a Notification which is legally unsustainable. In case the benefit is denied, then the petitioners would not be assigned their rightful seniority. The wrongful assignment of seniority would adversely affect their chances of promotion and would have a domino effect on their service tenure. These adverse affects cannot be compensated in any terms. Hence, the irreparable loss would be that of the petitioners.

50. Moreover, illegality cannot be perpetuated. Therefore, in case illegality in the garb of selection process is permitted, the entire system would suffer. For, those whose seniority is adversely and illegally affected would become demoralized, thereby adversely affecting their efficiency. Further, those who do not deserve to be promoted, even they would be promoted. Such illegal promotions would demoralize the RAS cadre. It would, thus, afflict the entire system.

51. Admittedly, the benefit of the catch-up rule was granted to the petitioners vide Notification dated 01.04.97. This benefit continued till 28.12.02 when the catch-up rule was revoked. But even then, the interest of those persons was protected who had "got" the benefit. Of course, Mr. Bapna has argued that as the benefit of catch-up rule was not given to the petitioners, therefore, they never "got" the benefit. Hence, even under the Notification dated 28.12.02 their interest is not protected. But this contention is unacceptable. For the word "got" means not only those who were given the benefit, but would also include even those who were "entitled" to get the benefit, but were not given the benefit due to the fault on the part of the State. In case the word "got" used in the Notification dated 28.12.02 is not interpreted in this manner, the petitioners would be penalized twice. First, when they were not granted the benefit under the Notification dated 01.04.97 although they were entitled to it. And secondly, when they were denied the protection of their interest under Notification dated 28.12.02. Such a course of action would, surely, be unreasonable, unjust and unfair. Therefore, the interpretation placed by Mr. Bapna is legally unsustainable.

52. In case the Notification were permitted to operate, then the petitioners would lose the benefit of catch-up rule to which they are entitled to. With such a loss,

their seniority would be adversely affected. Their chances of promotion being compromised, would adversely affect their psyche and performance. Hence, an irreparable loss would be caused to them.

53. While considering the irreparable loss, the Court should not only reflect on the irreparable loss caused to the petitioners, but most importantly should consider the impact of the action on the bureaucracy. As noted above, the State has conceded that it has not carried out any of the exercise warranted and laid down in the case of M. Nagaraj and Ors. (supra). Thus, prima facie the Notification dated 25.04.2008 is legally unsustainable. In case, the State and respondent No. 5 were permitted to carry out the selection process, those who do not deserve to be promoted, would be promoted. Such illegal promotions would demoralize the bureaucracy, and would adversely affect its functioning. Much as this Court has sympathy for the respondents and for those RAS officers who have been looking forward to a promotion, but sympathy should not sway the judicial mind. This Court is duty bound to protect the petitioners from irreparable loss.

54. Mr. G.S. Bapna and Mr. Ashok Gaur have stressed the fact that vide order dated 26.05.2009, a Division Bench of this Court has directed the State to commence the induction process of promoting the RAS officers to the IAS cadre while relying on the final seniority list dated 24.06.2008. Therefore, they have prayed that this Court should custom tailor its order to the order dated 26.05.2009; this Court should vacate the interim stay order dated 22.08.08.

55. However, a bare perusal of the order dated 26.05.2009 reveals that no direction has been given by the learned Division Bench to the State to commence the induction process. The learned Division Bench has merely observed, "However, we direct that in case any induction process is issued by the State Government, the respondent Ajay Singh shall be considered against the vacancies of 1991-92 provisionally and the order/seniority list dated 24.06.2009 shall be taken into consideration for induction to IAS."

56. A bare perusal of these lines clearly reveal, firstly, that the learned Division Bench has used the words "in case", i. e. the word "if" in the English language. Hence, the learned Division Bench has not directed the State to begin the induction process. It has merely left it to the discretion of the State to begin or not to begin the selection process. Hence, the learned Counsel are misplaced in claiming that the learned Division Bench had issued a positive direction to the State to commence the induction of promotion process. Obviously, considering the fact that the State was well aware of the stay of the Notification dated 25.04.2008, there was no occasion for the State to begin the process of promotion.

57. Secondly, and most importantly, the entire order dated 26.05.2009 does not reveal that the learned Division Bench was even made aware that another Division Bench had already stayed the operation of the Notification dated 25-

04-08 vide its order dated 22.08.2008. Although Mr. Ashok Gaur has argued that the fact of the interim stay order dated 22.08.2008 was brought to the notice of the learned Division Bench, when it passed its order on 26.05.2009, but such a submission cannot be accepted. For, the order dated 26.05.2009 does not reflect the awareness by the learned Division Bench about the existence of the order dated 22.08.2008. In the absence of such a reflection, this Court is of the opinion that, in fact, the said order was not brought to the notice of the learned Division Bench.

58. Moreover, interestingly one of the member of the Division Bench which passed the order on 26.05.2009, namely Hon"ble Mr. Justice R. C. Gandhi, was also a member of the Division Bench which had passed the interim stay order dated 22.08.2008. In case, the order dated 22.08.2008 were brought to the notice of the learned Division Bench on 26.05.2009, the learned Judge would have certainly recalled the fact that he was a party to the interim stay order dated 22.08.2008. For this reason also this Court is of the opinion that the interim stay order dated 22.08.2008 was not brought to the notice of the learned Division Bench on 26.05.2009.

59. Lastly, in case, the order dated 22.08.2008 were brought to the notice of the learned Division Bench on 26.05.2009, the chances are that the learned Division Bench would not have left it to the discretion of the State Government to commence the selection process. After all, once the Notification itself was stayed, the question of a seniority list under the said Notification, or the question of commencing the selection process in light of the Notification could not have even arisen. Further, the learned Division Bench, naturally would have refrained itself from passing a contrary order to the interim order passed by another Division Bench of this Court on 22.08.2008. Since the High Court speaks in one voice, the court cannot blow hot and cold simultaneously. Therefore, this Court is of the firm opinion that the order dated 22.08.2008 was not brought to the notice of the learned Division Bench when it passed its order dated 26.05.2009.

60. Mr. G.S. Bapna and Mr. Ashok Gaur have emphasized on the case of U.P. Avas Evam Vikas Parishad (supra) in order to convenience this Court not to continue the stay order. But in the case of M. Nagaraj and Ors. (supra) the Hon"ble Supreme Court has held that implementation of the reservation, and its extent has to be decided fact by fact, case by case. It has also placed the burden of proof on the State to satisfy the conscience of the Court that the implementation of reservation under Article 16(4-A) of the Constitution of India is necessary, and the exercise for carrying out the implementation has been done. Until and unless the said burden of proof is discharged by the State, until and unless the necessity of reservation and the necessity of its extent is demonstrated, discussed and decided, this Court would be within its jurisdiction to stay the operation of the Notification.

61. Much has been made about the fact that initially this Court was not inclined to stay the selection process, but had merely stayed the operation of Notification

dated 25.04.2008. According to Mr. Ashok Gaur, the prayer for staying the selection process is deemed to have been dismissed. However, the said argument is untenable. A bare perusal of the interim prayer clause clearly reveals that a number of interim prayers were made to this Court, of which the paramount prayer was to stay the operation of Notification dated 25.04.2008. Obviously, once the operation of the Notification is stayed, the rest of the consequential steps, such as the formulation of the seniority list, commencement of the selection process for promotion would automatically come to a grinding halt. Therefore, the paramount prayer was naturally made that the operation of the Notification should be stayed. The learned Division Bench was also of the opinion that once the operation of the Notification is stayed, no further action, as mentioned above, could be taken by the State. But interestingly, knowing fully well that the operation of the Notification has been stayed, still the Government has drawn up the seniority list dated 24.06.08 and the final seniority list dated 15.06.2009. Since it was within the knowledge of the State that an interim stay order has been passed, the State should have refrained from drawing up the two seniority lists mentioned above. Although it is true that the seniority list dated 15.06.2009 has not been challenged by the petitioners, but Mr. G.S. Bapna, the learned Advocate General, has frankly conceded that the seniority list dated 15.06.2009 is exactly the same as the seniority list dated 24.06.2008. If that be so, then the State Government is cleverly trying to implement the seniority list dated 24.06.2008, despite the stay dated 22.08.2008. The State Government is surreptitiously trying to implement the seniority list indirectly, which it could not possibly implement directly. This Court certainly cannot permit the State to circumvent a stay order passed by this Court; this Court cannot permit the State to over-reach a stay order passed by the Apex Court in the case of All India Equality Forum case; this Court cannot permit the State to violate the law as laid by the Apex Court in the Case of M. Nagaraj and Ors. (supra).

62. For the reasons stated above, the stay order dated 22.08.2008 is, hereby, confirmed. It is further clarified that since the Notification dated 25.04.2008 is stayed by this Court, neither the State of Rajasthan, nor the Union Public Service Commission shall carry out the Board meeting scheduled for 10th July, 2009, or to commence the selection process for promotion to the IAS during the pendency of this writ petition. The applications under Article 226(3) of the Constitution of India being devoid of any merit, are, hereby, dismissed.

63. The Registry is directed to tag the file of S. B. Civil Writ Petition Nos. 7774/09, 7775/09 & 6241/08 along with the file of present writ petition.