
(2016) 02 GAU CK 0052
In the Gauhati High Court
Case No : WP(C) No. 1329 of 2012

Bishnu Momin & Others

APPELLANT

Vs

Assam Public Service Commission & Others

RESPONDENT

Date of Decision : 22-02-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2016) 3 GauLJ 108 : (2016) 3 GauLR 429

Hon'ble Judges : Ujjal Bhuyan, J.

Bench : Single Bench

Advocate : M. Sarania and S.U. Ahmed, Advocates, for the Appellant; C. Baruah, L.P. Sarma and R. Thakuria, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Ujjal Bhuyan, J.— Heard Mr. M. Sarania, learned counsel for the petitioners and Mr. C. Baruah, learned Standing Counsel, Assam Public Service Commission (APSC). Also heard Mr. R. Thakuria, learned counsel for respondent Nos. 7 to 14.

2. By filing this petition under Article 226 of the Constitution of India, petitioners seek quashing of promotion order dated 03.03.2012 of respondent Nos. 7 to 14 from Junior Administrative Assistant (JAA) to Senior Administrative Assistant (SAA) and further seeks a direction to the respondents to promote them to the post of Junior Administrative Assistant against roster points earmarked for reserved category candidates by applying the principle of reservation.

3. Petitioners belong to reserved categories. Petitioner No. 1 belongs to Scheduled Tribe (Hills) [ST(H)]. Petitioner No. 2 belongs to Scheduled Tribe (Plains) [ST(P)] and petitioner No. 3 belongs to Scheduled Caste [SC]. It is stated that petitioner No. 1 entered service of the Assam Public Service Commission on 08.05.1997 as Lower Division Assistant, which post has now been re-designated as Junior Administrative Assistant (JAA). Petitioner Nos. 2 and 3 were initially appointed as Typist on 31.08.1991. Thereafter, they were

promoted to the post of JAA, on 16.09.2005 and on 24.02.2003, respectively. Since then, petitioners are working as Junior Administrative Assistant (JAA) in the APSC.

4. According to the petitioners, as per Rule 5 (1) of the Assam Public Service Commission (Non-Gazetted) Ministerial Staff Service Rules, 2004, the post of Upper Division Assistant, since redesignated as Senior Administrative Assistant (SAA), is a promotional post. The eligibility requirement for such promotion is 4 (four) years of service in the rank of JAA. Thus, JAA is the feeder cadre for the promotional cadre of SAA.

5. All the petitioners have rendered more than 4 (four) years of qualifying service as JAA. Therefore, they have attained the eligibility for such promotion to SAA. Cadre strength of SAA is 35. The Assam Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Act, 1978, (hereinafter, referred to as "1978 Reservation Act", in short), as amended, and the Rules framed thereunder provide for reservation to SC, ST(P) and ST(H), both in direct recruitment as well as in promotion. The percentage of reservation earmarked for the said categories is as follows:-

ST(P)

-

10.00%

ST(H)

-

5.00%

SC

-

7%.

6. According to the petitioners, having regard to the cadre strength of 35 and considering the percentage of reservation, there should be 4 roster points for the ST(P), 2 roster points for ST (H) and 4 roster points for SC, i.e., 10 in total in the cadre of SAA. But against this, there are only 5 (five) reserved category employees in the cadre of SAA, who are as follows:-

(1) Sri S L Kakati (SC)

(2) Smt Shusama Das (SC)

(3) Sri Sarat Chandra Boro [ST(P)]

(4) Sri A C Deuri [ST(P)]

(5) Smt Champawati Pator [ST(H)]

7. On 03.03.2012, respondent No. 2, i.e., Secretary, APSC, issued an order promoting 9 (nine) JAAs including respondent Nos. 7 to 14 to the post of SAA. Out of these, only one belongs to ST(P) and the remaining 8 (eight) do not belong to either of the 3 (three) reserved categories with which the present writ petition is concerned. Respondent Nos. 7 to 14 belong to unreserved (UR) category.

8. It is the contention of the petitioners that when there were 5 (five) backlog vacancies for the aforesaid reserved categories in the cadre of SAA, recommending only one ST(P) candidate for promotion was not at all justified. Petitioners being reserved category candidates were entitled to a consideration for promotion against the quota earmarked for the reserved categories. In this connection, a representation was submitted before respondent No. 2 on 05.03.2012. As no remedial steps were taken on the basis of such representation, present writ petition has been filed seeking the reliefs as indicated above.

9. Respondent Nos. 1, 2 and 6 (APSC) have filed a common affidavit. Stand taken in the said affidavit is that percentage of reservation applicable to SC, ST(P) and ST(H) being 7%, 10% and 5% respectively, they are entitled to 6 (six) posts in the cadre of SAA having cadre strength of 35, which would be SC-2, ST(P)-3 and ST(H)-1. It is stated that against the aforesaid entitlement, there are 2 (two) SC category employees who are in position, 2 (two) belong to ST(P), who are in position and 1 (one) belonging to ST(H), who are in position. That left only 1 (one) vacancy for ST(P). Therefore, no illegality was committed by promoting only one ST(P) candidate on 03.03.2012, namely, Sri Khirendra Kumar Bodo. The promotion exercise was carried out following the order of this court dated 26.09.2011, passed in WP(C) No. 5020 of 2011, which was a case relating to promotion from JAA to SAA and in which case this Court had directed that while giving promotion, APSC should not give promotion in excess of reservation provided under the Rules.

10. In their common counter affidavit, respondent Nos. 7 to 14 have stated that the promotion exercise in which they were promoted from JAA to SAA was carried out keeping in mind the provisions contained in Section 5 of the 1978 Reservation Act. According to the said respondents, in a cadre strength of 35 in SAA, by applying the percentage of reservation/quota, for ST(P), it would be 3.5, for SC, it would be 2.45 and for ST(H), it would be 1.75. Therefore, it is contended that APSC authorities had rightly earmarked 3 (three) posts for ST(P), 2 (two) posts for SC and one post for ST(H). Since 1 (one) ST (P) candidate has been promoted vide the order dated 03.03.2012, all the vacancies earmarked for ST(P), ST(H) and SC in the cadre of SAA have been filled up by employees belonging to the said categories. Therefore, no illegality has been committed by the APSC authorities. Consequently, no interference is called for. Service details of respondent Nos. 7 to 14 have been mentioned. It is stated that the said respondents were promoted from JAA to SAA after about 19-20 years of service

as JAA. Contending that there is no illegality in the impugned promotional exercise, the said respondents seek dismissal of the writ petition.

11. Respondent Nos. 3 and 4, i.e., State of Assam in the WPT and BC Department has filed an affidavit, which is, however, formal in nature.

12. In the reply to the affidavit of APSC, petitioners have reiterated the averments made in the writ petition and have asserted that non-promotion of the petitioners to the cadre of SAA as reserved category candidates was illegal. It is contended that the quota earmarked by the APSC authorities for the aforesaid categories is not correct. This has resulted in denial of promotion to the petitioners.

13. Submissions made by learned counsel for the parties are on pleaded lines and therefore, a detailed reference to the submissions so made is considered not necessary. However, the submissions made have been considered.

14. There is no dispute at the Bar that under the 1978 Reservation Act, as amended, 10% of the cadre strength of a post is earmarked for ST(P), 5% for ST(H) and 7% for SC. It is also not disputed that cadre strength of SAA is 35. On a mathematical calculation, 10% of 35 would be 3.5 and by applying the rounding off principle, it would be 4.5% of 35 would be 1.75 and after rounding off, it would be 2. On the other hand, 7% for SC would be 2.45 and after rounding off, it would be 2 (two). Thus, reservation quota for the aforesaid 3 (three) categories in the post of SAA having cadre strength of 35 would be as under:-

ST(P)

-

4

ST(H)

-

2

SC

-

2

15. Therefore, the total number of posts earmarked for the aforesaid categories in the cadre strength of 35 would be 8. This also corresponds to the overall percentage of reservation for the aforesaid 3 (three) categories, i.e., 10% + 5% + 7% = 22%, 22% of 35 would be 7.70 and after rounding off, it would be 8.

16. In the course of hearing, learned Standing Counsel, APSC had produced the roster register in the cadre of SAA. This Court by order dated 08.12.2015, prima

facie observed that there appeared to be an error in working out the earmarked roster points for SC, ST(P) and ST(H) categories commensurate to the reservation percentage provided to such categories. Court also noticed that against the roster points earmarked for the reserved categories, employees belonging to unreserved categories were in position. Court, therefore, observed that the roster register may have to be reworked.

17. On 05.01.2016, learned Standing Counsel placed before the Court the roster register in the cadre of SAA having cadre strength of 35, which according to him was reworked. The reworked roster register was taken on record. From a perusal of the revised roster register, Court found that roster point 30 is earmarked for ST (H) and roster point 35 is earmarked for ST(P). Both the roster points are shown vacant and as backlog vacancies. In the light of the revised roster register, Court was of the prima facie view that petitioner Nos. 1 and 2, belonging to ST(H) and ST(P) categories, may be entitled to a consideration for promotion against the said roster points.

18. In the gradation list of JAA, the petitioners are placed at Serial Nos. 20, 31 and 27 respectively. However, respondent Nos. 7 to 14 were placed at Serial Nos. 1 to 4 and 6 to 9 in the said gradation list having higher seniority position than the petitioners. At this stage, it may be useful to refer to the minutes of the meeting of the Selection Board held on 02.03.2012, which recommended promotion from JAA to SAA. Relevant portion of the minutes are as under:-

"The Board was informed that out of 9(nine) vacancies in the cadre of UDA, 5 vacancies were due to creation of new posts by the Govt. in 2011, 2 vacancies were due to promotion of Sri T. Sarma & Sri K. Das to the rank of Supdt. in 2011, 1 vacancy due to retirement of Sri K. Deka in 2011 and 1 resultant vacancy due to promotion of one UDA to Supdt. in 2012.

The following 32 numbers of LDAs as per gradation list come under the zone of consideration against 8 numbers of vacancies arisen in 2011.

Sl. Nos.

Name of incumbent

1.

SRI TILAK CH DAS

2.

MRS. AJANTA DUTTA

3.

SRI SHYAMANTA HAZARIKA

4.

SRI NAGEN CH SARMA

5.

SYEDA RESHMA BEGUM

6.

SRI KRISHNA KANTA NATH

7.

MS. SANTANA GOGOI

8.

SRI DHARMA BARUAH

9.

SRI BHUTESH SARMA

10.

SRI DILIP KR CHETIA

11.

SRI UJJAL DUTTA

12.

SRI KHIKENDRA KR BORO, STP

13.

SRI MONOMOHAN BAISHYA, SC

14.

SRI DANDIDHAR KALITA

15.

SYED MOSRAF HUSSAIN

16.

MD. ABBAS ALI AHMED

17.

SRI BISWAJIT ROY

18.

MS. SUKLA DAS

19.

MS. BINITA SARMA

20.

SRI BISHNU MOMIN, STH

21.

MS. JAMUNA PATAR, STH

22.

MS. SANTANA BARMAN, STH

23.

SRI MANOJ KR SARMA

24.

SRI PROMOD CH KALITA

25.

MS. IVA DAS

26.

SRI DWIJENDRA MOHAN SARMA

27.

SRI DILIP KR MUDOI, SC

28.

SRI AMAL BISWAS

29.

MS. P. BARPATRA GOHAIN, OBC

30.

MS. KAMALA DEVI

31.

SRI M.S. NARZARI, STP

32.

SRI J.C. DUTTA

Against 1(one) vacancy arisen in 2012, 4 (four) numbers of incumbents mentioned above from Sl. No.1 to 12 excluding 8 incumbents come under the zone of consideration.

In pursuant to the Hon"ble Gauhati High Court's order dated 26-09-011 in WP(C) No.5020/2011 and the decision taken thereon by the Commission in its meeting dated 24-02-2012, there is one backlog for STP in the cadre of UDA.

The Board examined all the factors including ACRs, gradation list, Reservation/Backlog, relevant records etc. of all the incumbents coming under the zone of consideration for last 5 years.

The Board observed that the ACRs of Syeda Reshma Begum, LDA (Sl. No.5) are not very satisfactory. From the documents available in the office, it is seen that she is a psychiatric patient as a result of which, no responsible works could be entrusted to her even in the LDA stage. Further, her act on 17-02-2012 which was telecast through the electronic media has lowered the prestige of APSC in the eyes of public for which explanation has been called from her.

Hence, the Board decided not to consider her for promotion to the post of UDA at this stage.

After considering all the relevant factors, the Board recommended the following 9(nine) numbers of LDAs for promotion to the cadre of UDA against 9(nine) numbers of vacancy (including one STP backlog) on seniority-cum-merit basis:

Sl. Nos.

Lower Divisions Assistant (LDA)

1.

SRI KHIENDRA KR BORO, ST(P) [against ST(P) backlog]

2.

SRI TILAK CH DAS

3.

MRS AJANTA DUTTA

4.

SRI SHYAMANTA HAZARIKA

5.

SRI NAGEN CH SARMA

6.

SRI KRISHNA KANTA NATH

7.

MS SANTANA GOGOI

8.

SRI DHARMA BARUAH

9.

SRI BHUTESH SARMA"

Thus, it can be seen that barring the re-commendee at Serial No. 1 Sri Khirendra Kumar Boro, whose seniority position in the feeder cadre was at Serial No. 12 and who has been recommended as ST(P) candidate against a backlog vacancy for the said category, the other re-commendees from Serial Nos. 2 to 9 were recommended for promotion against the current vacancies as UR category. However, all of them were senior to the petitioners in the feeder category of JAA.

19. The roster register in the cadre of SAA as reworked and submitted before the Court by the learned Standing Counsel may now be looked into, which is extracted hereunder:-

SL.No.

Roster Point No.

Name

Date of appointment

Whether belongs to SC/ST(P)/ST(H)/UR

Filled as UR or as reserved for SC/ST(P)/ST(H)

1

2

3

4

5

6

1.

UR

Sri Bijoy Kr. Baruah

18.02.1991

2.

UR

Ms. Dwipannita Mukherjee

11.1.1996

3.

UR

Ms. Jayanti Das

25.02.2003

4.

UR

Vacant

5.

ST(P)-1

Sri Sarat Boro

02.04.2007

ST(P)

6.

UR

Sri Samiran Bayan

08.04.2004

7.

UR

Ms. Jaya Baruah

02.09.2004

8.

SC-1

Sri S.L. Kakati

01.03.2007

SC

9.

UR

Sri Dinesh Bez

16.09.2005

OBC

10.

ST(H)-1

Ms. C. Pator

30.01.2009

ST(H)

11.

UR

Sri Naba Kr. Das

01.04.2006

12.

UR

Sri Bhudev Das

01.04.2006

13.

UR

Md. Mehtab Hussain

22.07.2006

14.

UR

Sri Dilip Kr. Goswami

01.12.2006

15.

ST(P)-2

Sri Abhoy Chandra Deuri

02.05.2009

ST(P)

16.

UR

Sri Mohen Mazi

18.01.2007

MOBC

17.

UR

Md. Abu Kasim

17.11.2008

18.

UR

Ms. Jutika Bhattacharjee

12/05/10

19.

UR

Sri Nirendra Nath Sarma

03.01.2011

20.

UR

Sri Mahendra Pator

03.01.2011

21.

UR

Ms. Ajanta Dutta

OBC

22.

SC-2,

Ms. Sushama Das Rajkhowa

23.03.2009

SC

23.

UR

Sri Symanta Hazarika

24.

UR

Sri Nagen Chandra Sharma

25.

ST(P)-3

Sri Khiren Boro

ST(P)

26.

UR

Sri Krishna Kanta Nath

OBC

27.

UR

Ms. Santana Gogoi

OBC

28.

UR

Sri Dharma Baruah

OBC

29.

UR

Sri Bhutesh Ch. Sarma

30.

ST(H)-2

Vacant (Back log)

ST(H)

31.

UR

Sri Dilip Kr. Chetia

OBC

32.

UR

Sri Ujjal Dutta

OBC

33.

UR

Sri Monmohan Baishya

SC

34.

UR

Sri Dandidhar Kalita

35.

ST(P)-4

Vacant (Back log)

ST(P)

It is seen from the above that after respondent Nos. 7 to 14, i.e, upto roster point 29 in the roster register of SAA, 4 (four) more JAAs have been promoted to SAA, i.e., Serial Nos. 31, 32, 32, 33 and 34, who were all senior to the petitioners in the cadre of JAA. It can further be seen that employees upto Serial No. 14 in the gradation list of JAA have been promoted to SAA.

20. Since the respondents have stated that they have reworked the roster register, in all probability, the same has not been notified by the respondents. Therefore, at this stage, without expressing any opinion on the correctness or otherwise of the roster register as above, Court is of the view that it would be appropriate if the said roster register is notified and objections are invited from the concerned persons who may feel aggrieved by such roster register.

21. As already noticed above, petitioners seek promotion on the basis of reservation. The question relating to reservation in promotion in Government/ public services has been gone into by this Court in the recent case of Equality Forum v. State of Assam; in WP(C) No. 1560 of 2015, which was disposed of vide common judgment and order dated 23.12.2015. In the said case, the report submitted by the One-Man-Commission appointed by the State to study and acquire quantifiable data on the compelling conditions of backwardness of SCs and STs, inadequacy of representation in various Government services and posts and impact of such reservation on overall efficiency in public administration was put to challenge. In the said judgment, the decisions of the Apex Court in M. Nagaraj v. Union of India reported in (2006) 8 SCC 212 and UP Power

Corporation Ltd. v. Rajesh Kumar, reported in (2012) 7 SCC 1; were duly considered; so also the provisions of the 1978 Reservation Act, as amended. Various other judgments of the Apex Court were taken into consideration and ultimately this Court held as follows:-

"62. Thus, it was held that the State is not bound to provide reservation for SCs and STs in matters of promotion. However, if the State wishes to make such a provision, which is permissible under Articles 16(4A) and 16(4-B), the State has to collect the quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment. In addition, the State must also ensure compliance of Article 335. In other words, before providing for reservation in promotion, the State must examine and make an assessment of the backwardness and inadequacy of representation which must be consistent with overall administrative efficiency. These three i.e., backwardness of the class, inadequacy of representation of that class in public employment and maintenance of efficiency of administration have been held by the Hon'ble Supreme Court in M Nagaraj (supra) as constitutional requirements which are required to be fulfilled/satisfied before providing for reservation to SCs and STs in promotion.

63. Whether there should be reservation for SCs and STs in promotion in services under the State or not is a matter of policy. But if the State wants to make such a provision, which it is empowered to do by virtue of the enabling provision of Article 16 (4-A), it must satisfy the twin tests of backwardness of the class and inadequacy of representation of that class in the public service or services which must then be harmonised with the maintenance of overall efficiency in administration. These three factors have been held to be constitutional requirements. The State must form its opinion whether to provide for reservation to SCs and STs in promotion or not keeping in mind the above three requirements based on the quantifiable data. Until this is done, the State would be precluded from invoking the enabling provision. In M. Nagaraj (supra), the Constitution Bench specifically declared that if the two compelling reasons of backwardness and inadequacy of representation do not exist, then the enabling provision cannot come into force; the State can make provision for reservation in promotion only if the above two circumstances exist. Even then also, it must keep in mind maintenance of efficiency in administration which has been held to be a constitutional limitation on the discretion of the State to make provision for reservation in promotion. Question as to whether the State concerned has identified and valued the circumstances justifying it to make reservation is to be decided "case-wise". The question of reservation has to be decided on the facts of "each case". It was declared that validity of the constitutional amendments were upheld subject to the limitations. Therefore, it has been held that in "each case" the Court has got to be satisfied that the State has exercised its option in making reservation in promotion 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 reservation has become necessary on

account of inadequacy of representation of SCs and STs in a particular class or classes of posts without affecting the general efficiency of service.

64. The decision rendered by the Constitution Bench in *M Nagaraj* (supra) was extensively referred to and relied upon in the subsequent case of *Suraj Bhan Meena* (supra). In that case, notification of the Rajasthan Government providing for consequential seniority to the members of SC and ST following accelerated promotion was interfered with by the Rajasthan High Court. The question which was considered by the Supreme Court was whether the amended provision of Article 16 (4-A) of the Constitution intended that those belonging to the SC and ST communities, who had been promoted against reserved quota would also be entitled to consequential seniority on account of such promotion or would the catch-up rule prevail. Referring to various decisions of the Supreme Court from *Indra Sawhney* (supra) to *M. Nagaraj* (supra), it was held that the State is not bound to make reservation for SCs and STs in matters of promotion, but the State could collect quantifiable data touching upon backwardness of the applicants and inadequacy of representation of that class in public employment for the purpose of compliance with Article 335 of the Constitution. It has been held that the position after the decision in *M Nagaraj* (supra), is that reservation of posts in promotion is dependent on the inadequacy of representation of members of SCs and STs and subject to the condition of ascertaining as to whether such reservation was at all required. As no exercise was undertaken to acquire quantifiable data regarding inadequacy of representation of SCs and STs in public services, the Apex Court held that the Rajasthan High Court had rightly quashed the Government notification providing promotion and consequential seniority to SCs and STs on promotion.

65. Finally, the Hon'ble Supreme Court in *UP Power Corporation Limited* (supra), after in-depth analysis of *M. Nagaraj* (supra), culled out the following principles which are quoted here under:-

"81. From the aforesaid decision in *M. Nagaraj* case and the paragraphs we have quoted herein above, the following principles can be carved out:-

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

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

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

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

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

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

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

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

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

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

66. The Hon"ble Supreme Court declared that it was of the firm view that a fresh exercise in the light of the Constitution Bench judgment in M. Nagaraj (supra) is

a categorical imperative. It has been clarified that Articles 16 (4-A) and 16(4-B) are enabling provisions which enable the State to make provision for reservation in promotion for SCs and STs subject to fulfilment of the conditions precedent which are constitutional requirements.

67. Thus, from a careful analysis of the pronouncements of the Apex Court in *M. Nagaraj* (supra), *Suraj Bhan Meena* (supra) and *Uttar Pradesh Power Corporation Limited* (supra), what is discernible is that the quantifiable data regarding backwardness and inadequacy of representation has to be acquired in respect of the promotional cadres. It has been stated and re-stated by the Apex Court that the requisite quantifiable data would be scrutinised in each case. In other words, the quantifiable data has to be both service and cadre specific. What the One-Man Commission has done is that it has made a general statement about backwardness of SCs and STs and has not provided quantifiable data either on backwardness or on inadequacy of representation having regard to the promotional posts. Whether there is adequate representation or not has to be decided cadre-wise having regard to the service where the cadre is placed. Once it is found that in a particular cadre there is adequate representation of SCs and STs, providing for reservation to such communities in promotion to such cadre would not be justified.

68. It is true that following the law laid down by the Apex Court in *Indra Sawhney*, SCs and STs are deemed to be backward. It is further true that the concept of creamy layer is not applicable to SCs and STs. However, having said that, Court is of the considered opinion that the above factors would be relevant only at the time of initial recruitment. At the time of promotion, in the event reservation is sought to be introduced, then an assessment of backwardness of the said communities having regard to their representation in the promotional cadre(s) would have to be carried out.

69. Backwardness of SCs and STs vis-a-vis promotion would have to be determined cadre-wise. If in a particular cadre, SCs and STs are not adequately represented, they may be considered as backward in so far that particular cadre is concerned. Conversely, if in a particular cadre, SCs and STs are adequately represented, then they may not be considered as backward for the purpose of promotion to that particular cadre. Therefore, it is quite evident that the concepts of backwardness and inadequacy of representation in the context of reservation in promotion are inter-twined.

70. The Full Bench of the High Court of Jayanta Chakaraborty & Ors. v. State of Tripura & Ors. [WP(C) No.189/2011 and other connected cases] decided on 09-04-2015 has taken the following view:-

"?????. backwardness of SCs and STs in the context of promotion in Government service will be closely interlinked to their inadequacy of representation in that particular Government service. We are of the view that this backwardness would be directly related to the inadequacy of the representation of the SCs and STs in

the promotional cadres. In case, the SCs and STs are adequately represented in the cadre whether by means of reservation or on the basis of merit, then they cease to be backward for the purposes of getting benefit of reservation in promotion and this will have to be determined on cadre to cadre basis".

I am in respectful agreement with the above view of the Tripura High Court.

71. The factum of SCs and STs being appointed/promoted against the open/unreserve posts in the State services is also a relevant factor to be considered while ascertaining both backwardness and inadequacy of representation.

72. Ascertainment of backwardness and inadequacy of representation of SCs and STs in the promotional cadres based on quantifiable data is a continuous process and cannot be a onetime exercise. As pointed out by the Apex Court, the situation has to be assessed and reviewed on each occasion when reservation in promotion is contemplated.

73. There is one more aspect, which needs to be mentioned. While examining the question of overall efficiency in the administration because of reservation in promotion, what is seen from the report of the One-Man Commission is that it has made an observation that there is no relaxation of eligibility criteria in matters of promotion for candidates belonging to SCs and STs. They must have the eligibility at par with the unreserve candidates and only then can they be promoted against posts earmarked for a particular category. In the understanding of the Court what Article 335 visualizes is impact on overall efficiency in the administration because of reservation in promotion. What is, therefore, required to be assessed is the effect on administrative efficiency due to the presence of reserve category candidates in the cadre because of accelerated promotion on account of reservation in promotion. Whether the presence of the reserve category candidates in the particular cadre on account of accelerated promotion due to reservation has impacted the administration adversely is required to be assessed by applying objective measurable standards. No doubt, it is a difficult task but nonetheless it has to be carried out if the State desires to provide for reservation in promotion.

74. As held in *M. Nagaraj (supra)*, implementation of the scheme of reservation in promotion and collection of quantifiable data for the same to form an opinion on backwardness and inadequacy of representation and to harmonise the same with the constitutional limitation of efficiency in administration under Article 335 is a categorical imperative. Collection of data and the opinion based thereon rendered by the One Man Commission do not conform to the norms laid down by the Apex Court in *M. Nagaraj*. Therefore, there can be no manner of doubt that the exercise carried out by the One-Man Commission does not fulfil the mandate laid down in *M. Nagaraj (supra)*. The cabinet memorandum prepared by the WPT and BC Department while forwarding the recommendation of the One Man Commission to the Cabinet for approval also completely missed the point by stating in paragraph 8 thereof that the general established fact is that SCs and

STs are comparatively lagging behind the general category in many areas like justice, social, economic and political fields; otherwise, the reservation provision would not have come into existence in the Constitution. Therefore, according to the WPT and BC Department, further analytical study in this regard in the name of collecting quantifiable data would be denial of justice to the SCs and STs. I am afraid the WPT and BC Department had completely misdirected itself and had totally overlooked the mandate of the Apex Court in *M. Nagaraj*, which has vitiated the cabinet memorandum and the consequent approval of the Cabinet to such recommendation. Though State has made provision for reservation in promotion by enacting the 1978 Act, which was amended in the year 2012, implementation of the same would depend on acquiring of quantifiable data with regard to the 2 (two) compelling reasons, which exercise has to be carried out cadre-wise in the context of the service where the cadre is placed. That having not been done, the report of the One-Man Commission would be of no legal consequence and would not enable the State to give effect to the provisions of the 1978 Act as amended in so far reservation in promotion is concerned. At the cost of repetition, it is reiterated that if the State desires to give effect to the provisions of the 1978 Act as amended in the year 2012 by providing for reservation in promotion, it would have to justify the same with the help of quantifiable data to show presence of the 2 (two) compelling reasons, backwardness and inadequacy of representation, cadre-wise in the context of the service where the cadre is placed, which would then have to be harmonised with efficiency in administration as mandated under Article 335."

22. In the light of the findings given by this Court in *Equality Forum* (supra), Court is of the view that no positive direction can be issued to the respondents to consider promotion of the petitioners on the basis of reservation. However, notwithstanding the above, if the respondents want to give effect to the provisions of the 1978 Reservation Act to consider the claim of the petitioners for promotion to the cadre of SAA on the basis of reservation, they would have to justify the same with the help of quantifiable data identifying and measuring backwardness and inadequacy of representation of the said reserved categories in the promotional cadre in the context of the service where the cadre is placed keeping in mind the efficiency of service. However, no mandamus can be issued to the respondents to carry out such an exercise. Additionally, it may be pointed out that since there is no challenge to the promotion of Sri Khirendra Chandra Boro on the basis of reservation or to the non-recommendation of Syeda Reshma Begum (Serial No. 9 in the gradation list of JAA), for promotion, Court would refrain from expressing any opinion in this regard.

23. In the light of the above, the prayer made by the petitioners cannot be acceded to. Accordingly, subject to the observations made above, writ petition is dismissed. No cost(s).