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**(2016) 03 GAU CK 0072**  
**In the Gauhati High Court**  
**Case No : WP (C) No. 3581 of 2015**

Rakesh Agarwala

APPELLANT

Vs

State of Assam and Ors.

RESPONDENT

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**Date of Decision :** 31-03-2016

**Acts Referred:**

Constitution of India, 1950 — Article 226

**Citation :** (2016) 4 GauLR 135 : (2016) 3 GauLT 464

**Hon'ble Judges :** Ujjal Bhuyan, J.

**Bench :** Single Bench

**Advocate :** Dr. Ashok Saraf, Sr. Advocate, Mr. U.K. Nair, Mr. A. Goyal, Mr. P. Baruah, Mr. Z. Islam and Mr. P. Das, Advocates, for the Appellant; Mr. S. Saikia, SC, Finance (Taxation) Department, Mr. D.K. Das and Mr. H. Betala, Advocates, for the Respondent

**Final Decision :** Disposed Off

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## Judgement

Ujjal Bhuyan, J. (Oral) - By filing this petition under Article 226 of the Constitution of India, petitioner seeks quashing of notification dated 08.03.2013, issued by the Commissioner and Secretary to the Government of Assam, Finance (Taxation) Department, laying down post-based Roster in the cadre of Joint Commissioner of Taxes under Finance (Taxation) Department and further seeks a direction to consider the case of the petitioner and other eligible candidates in the cadre of Deputy Commissioner of Taxes for promotion to the cadre of Joint Commissioner of Taxes without applying the principle of reservation.

2. Case of the petitioner is that he is serving as Deputy Commissioner of Taxes in the Finance (Taxation) Department, Government of Assam. In the gradation list of Deputy Commissioner of Taxes, petitioner's position is at Serial No. 2. Position of respondent No. 4 is at Serial No. 6. Be it stated that petitioner belongs to the general category, whereas, respondent no. 4 belongs to Scheduled Tribes (Plains) [ST (P)] category.

3. As per the rules governing recruitment, post of Joint Commissioner of Taxes is

higher than the post of Deputy Commissioner of Taxes and the higher post is filled up by way of promotion from the feeder cadre of Deputy Commissioner. Cadre strength of Deputy Commissioner is 15, whereas, that of Joint Commissioner is 5. It appears that both petitioner and respondent No. 4 have claimed eligibility for promotion to Joint Commissioner of Taxes. By the impugned notification dated 08.03.2013, a 14 point roster has been prepared for the cadre of Joint Commissioner of Taxes, in which roster points 1, 2, 3 and 4 are earmarked for unreserved category. The 5th roster point is earmarked for ST (P) category. Roster points 6 and 7 are earmarked for unreserved category. Roster point 8 is reserved for Scheduled Castes (SC) category. Thereafter, roster points 9 to 13 are earmarked for unreserved category followed by roster point 14, which is earmarked for Scheduled Tribe (Hills) [ST (H)].

4. According to the petitioner, 2 (two) vacancies in the cadre of Joint Commissioner of Taxes are available to be filled up by way of promotion. The Officer at Serial No. 1 in the gradation list of Deputy Commissioner belongs to ST (H). Apprehension is expressed by the petitioner that by applying the principle of reservation the second vacancy may also be filled up by respondent No. 4 superseding the petitioner. In this connection, petitioner had submitted a representation dated 18.11.2014 before the Principal Secretary to the Government of Assam, Finance Department, contending that in a cadre of 5 (five), there cannot be any reservation having regard to the percentage of reservation provided by the Statute. The said authority was requested to consider the case of the petitioner for promotion to the cadre of Joint Commissioner of Taxes without applying the principle of reservation. However, there was no response to the said representation. Aggrieved, present writ petition has been filed.

5. Contention of the petitioner is that under The Assam Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Act, 1978 (hereinafter, referred to as the "Reservation Act"), specific percentage of reservation is provided to the 3 (three) reserved categories as under:-

Scheduled Caste (SC)

- 7%

Scheduled Tribe (Plains) [ST (P)]

- 10%

Scheduled Tribe (Hills) [ST (H)]

- 5%

Total

- 22%

5.1. It is contended that having regard to the above percentage statutorily

prescribed, there cannot be any reservation for either of the 3 (three) reserved categories in the cadre of Joint Commissioner of Taxes having cadre strength of 5. Notification dated 08.03.2013 has been assailed on the ground that it goes beyond the percentage of reservation statutorily prescribed; there cannot be 14 point roster in a cadre having 5 (five) posts. Therefore, it is contended that in the cadre of Joint Commissioner of Taxes there cannot be any earmarking of roster points for the 3 (three) reserved categories. Promotion will have to be made on the basis of the recruitment rules, dehors the Reservation Act.

6. Respondent Nos. 1 and 2 have filed a common affidavit. Stand taken in the affidavit is that the Reservation Act was amended in the year 2012 by the Assam Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) (Amendment) Act, 2012 (hereinafter, referred to as "Amendment Act of 2012"), whereby 10% of the posts are earmarked for ST (P) category. In the 100 point model roster, the roster points earmarked for ST (P) would be 5, 15, 25, 35, 45, 55, 65, 75, 85 and 95. Since roster point No. 5 is earmarked for ST (P) category, therefore, in a cadre of 5, roster point No. 5 would stand earmarked for ST(P) category as in the case of cadre of Joint Commissioner of Taxes. It is stated that the Amendment Act of 2012 came into force w.e.f. 21.08.2012, after obtaining views of the Welfare of Plains Tribes and Backward Classes Department, Government of Assam, [hereinafter, referred to as "WP(T) & BC Department"], making provision vide impugned notification dated 08.03.2013, earmarking the roster point at Serial No. 5 reserved for ST (P) category candidate for promotional purpose. It is further stated that having regard to the controversy in question, views of the WP(T) & BC Department was sought for and by the endorsement dated 31.08.2015, the said Department expressed the view that number of posts in the cadre of Joint Commissioner being 5 (five) and having regard to the prescribed percentage of reservation being 22%, 1 (one) post could be earmarked for the reserved categories. In the roster, 1 (one) incumbent belonging to SC is already in office. Therefore, providing for reservation point for ST (P) as a result of rotation may be skipped for the time being. Impugned notification has been justified on the ground that the same has been issued following the Amendment Act of 2012 and with the concurrence of WP(T) and BC Department. Regarding the petitioner, it is stated that his case for promotion is under active consideration of the Government.

7. Respondent No. 4 has filed affidavit. In the said affidavit, the progression of law relating to reservation in promotion has been highlighted right from the decision of the Apex Court in the famous case of Indra Sawhney v. Union of India; reported in 1992 Suppl. (3) SCC 217, right up to 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. It is contended that impugned notification dated 08.03.2013 has been issued on the basis of the Amendment Act of 2012 and without challenging the constitutionality of such Act it is not open to the petitioner to assail the validity of the said notification. It is contended that the State legislature had the competence to enact the Reservation Act as well as the

Amendment Act of 2012 as per the constitutional provision. Overall percentage of reservation prescribed being 22, it is much below the ceiling of 50%. It is admitted that 2 (two) posts in the cadre of Joint Commissioner of Taxes are vacant. The officer at Serial No. 1 in the gradation list of Deputy Commissioner of Taxes by virtue of his seniority is entitled to be considered for the first vacancy, whereas, respondent No. 4 being the senior most ST (P) candidate is required to be considered for the second vacancy which corresponds to the 5th roster point earmarked for ST (P). It is further contended that the roster prepared for the cadre of Joint Commissioner of Taxes as per the impugned notification is based on the model post-based roster for less than 13 (thirteen) posts, which provides for earmarking of roster points to the 3 (three) reserved categories on rotational basis, as otherwise it may lead to a situation where reserved categories would not stand a chance of getting promotion. It is contended that 10% reservation for ST(P) in a cadre strength of 5 (five) works out to .5 and by applying the rounding off principle, it is required to be taken as 1. Therefore, earmarking of the 5th roster point for ST(P) is fully justified.

8. Respondent No. 4 has also filed an affidavit objecting to the stand taken by respondent Nos. 1 and 2 in their counter affidavit to the effect that since one post in the cadre of Joint Commissioner is being held by an SC officer, reservation roster point for ST(P) as a result of rotation may be skipped for the time being. In the said affidavit, while contesting the stand of WP(T) and BC Department, it is contended that such an opinion has no sanction of law.

9. Petitioner has filed reply affidavit to the counter affidavits filed by respondent Nos. 1 and 2 as well as by respondent No. 4.

10. Heard Dr. A.K. Saraf, learned Senior Counsel, assisted by Mr. U.K. Nair, learned counsel for the petitioner and Mr. S. Saikia, learned Standing Counsel, Finance (Taxation) Department. Also heard Mr. D.K. Das, learned counsel for respondent No. 4.

11. Dr. Saraf submits that the very basis of the 14 point roster is invalid as it is beyond the statutory prescription of reservation provided for ST(P) by the Reservation Act. He submits that if the statutory percentage of reservation does not support earmarking of any roster point for the reserved categories in the particular cadre, earmarking of such posts for the reserved category in the roster would be legally and constitutionally impermissible. There cannot be reservation in a cadre strength of 5 (five) keeping in mind the percentage of reservation for the reserved categories fixed by the Reservation Act. He submits that if by applying the rounding off principle, .5 is treated as 1 and thereby 1 (one) post is earmarked for ST (P) in a cadre of 5 (five), it would amount to reservation to the extent of 20%, which would be way beyond the prescribed percentage of 10 for ST(P). Therefore, such rounding off principle would not be applicable in the instant case. He further submits that clubbing of reservation percentage prescribed for all the three reserved categories to justify earmarking of 1 (one) roster point for ST(P) in the cadre would not be permissible. In support of his

submissions Dr. Saraf has referred to the following decisions:-

- 1) R.K. Sabharwal v. State of Punjab; (1995) 2 SCC 745;
- 2) Post Graduate Institute of Medical Education & Research, Chandigarh v. Faculty Association; (1998) 4 SCC 1;
- 3) R.S. Garg v. State of Uttar Pradesh; (2006) 6 SCC 430;
- 4) Deba Kumar Dutta v. State of Assam; (2012) 2 GLR 207;
- 5) Pabitra Hazarika v. State of Assam; (Writ Appeal No. 39 of 2011; Disposed of on 28.06.2013);
- 6) Equality Forum v. State of Assam; (2016) 1 GLR 407.

12. Per contra, Mr. Das, learned counsel for respondent No. 4 vehemently argues that there is no basis for the argument advanced on behalf of the petitioner. Roster with 14 points, which is an L-shaped form of roster applicable in cases of cadres having strength of 13 and less has been prepared on the basis of Office Memorandum dated 29.12.2014 of the WP(T) and BC Department implementing post-based reservation following Amendment Act of 2012. He submits that the L-shaped roster has been prepared to provide benefit of reservation to the reserved categories on rotational basis as otherwise it would result in a situation, where only 1 (one) stream of the reserved category would get representation to the exclusion of the others, which would be contrary to the very object and purport of Article 16 (4) of the Constitution of India. In any case, percentage of reservation for ST (P) being 10, in a cadre having strength of 5, it works out to .5. By application of the rounding off principle .5 is required to be treated as 1 and therefore, 1 (one) post in a cadre strength of 5 is required to be earmarked for ST(P), which has rightly been done in the present case. Thus, petitioner cannot have any grievance to earmarking of the 5th roster point for ST (P) category. In support of his submissions, Mr. Das has placed reliance on the following decisions:-

- 1) Bachhittar Singh v. State of Punjab; AIR 1963 SC 395;
- 2) R.K. Sabharwal v. State of Punjab; (1995) 2 SCC 745;
- 3) State of Uttar Pradesh v. Pawan Kumar Tiwari; (2005) 2 SCC 10;
- 4) Swapan Kumar Das v. State of Assam; [Writ Petition (Civil) No. 1222 of 2014; disposed of on 08.05.2015];
- 5) Akhilesh Kumar Singh v. Ram Dawan; (Civil Appeal No. 1931 of 2010; disposed of on 23.09.2015);
- 6) Union of India v. Madhav; (1997) 2 SCC 332;
- 7) Post Graduate Institute of Medical Education & Research, Chandigarh v. Faculty Association; (1998) 4 SCC 1.

13. Learned Standing Counsel, Finance (Taxation) Department, has generally supported the stand taken by the Government in the affidavit.

14. Submissions made have been considered. Decisions cited at the Bar have also been perused.

15. Question for consideration in this proceeding is the legality and validity of the notification dated 08.03.2013, providing for a 14 point roster earmarking roster points 5, 8 and 14 for ST(P), SC and ST(H) categories respectively in the cadre of Joint Commissioner of Taxes having cadre strength of 5.

16. The Reservation Act was enacted to provide for reservation of vacancies in services and posts for members of SCs and STs, both at the time of initial recruitment as well as at the time of promotion. Section 5 provides that reservation for members of SCs and STs in posts to be filled up by promotion in any establishment would be regulated in the following manner:-

"(a) There shall be reservation at seven percent for members of the Scheduled Castes and ten percent for the members of Scheduled Tribes (Plains) and five percent for the members of the Scheduled Tribes (Hills):

Provided that the State Government may from time to time review the implementation of the reservation policy and take adequate measures including increase of percentage, mentioned in Clause 5 (a) of this Act."

Under the Reservation Act, a 20 point model roster was provided earmarking various roster points for the aforesaid reserved categories maintaining the prescribed percentage of reservation. Thus, the Reservation Act provided 7% reservation for SCs, 10% for ST(P) and 5% for ST(H), both at the time of initial recruitment and at the time of promotion as well.

17. In 2012, the Reservation Act was amended and in place of reservation of vacancies in services and posts, the same has been replaced by - reservation of posts in services, while percentage of reservation has been maintained. The Amendment Act of 2012 has introduced post based reservation in place of vacancy based reservation, which was practised earlier. Section 5 (a), as introduced by the Amendment Act of 2012, provides that a post-based model roster shall be maintained to give effect to the reservation of vacancies for SCs and STs. Appointing authority is required to notify the roster based on the principles laid down in the Reservation Act, as amended. The roster is to be maintained and operated on the principle of replacement and not as a running account. In other words, in the event of vacancy in the roster point earmarked for the particular reserved category, that roster point shall be filled up by appointment of a person belonging to that category and none else.

18. The change brought by the Amendment Act of 2012 is that as per the unamended provision, reservation was intended to be vacancy based, whereas after amendment, it has now been made post-based. This has been necessitated because of the decision of the Apex Court in the case of R.K. Sabharwal (supra).

At this stage, it may be useful to briefly refer to the decision of the Apex Court in R.K. Sabharwal (supra), which was also a case relating to reservation in promotion. The Apex Court explained the expressions- "post" and "vacancy". The word-"post" has been explained to mean an appointment, job, office or employment; a position to which a person is appointed. On the other hand, "vacancy" means an unoccupied post or office. It was thus explained that there must be a "post" in existence to enable the "vacancy" to occur. Cadre strength is always measured by the number of posts comprising the cadre. Right to be considered for appointment can only be claimed in respect of a post in a cadre. Consequently, the percentage of reservation has to be worked out in relation to the number of posts which form the cadre strength. Finally, the Apex Court clarified that the concept of "vacancy" has no relevance in operating the percentage of reservation. The Apex Court further held that roster points would operate by way of replacement.

19. Thus, it was following the decision of the Apex Court in R.K. Sabharwal (supra) that necessary amendment was brought to the Reservation Act as noticed above.

20. Reverting back to the Reservation Act as amended, which has already been noticed above, 7% reservation is provided for SC, 10% for ST(P) and 5% for ST(H), total 22%. This case is concerned with the cadre of Joint Commissioner of Taxes, where the number of posts is 5. 7% in a cadre strength of 5 works out to .35; 10% works out to .50 and 5% works out to .25. Before dilating further on this aspect, it would be apposite to refer to the 14 point roster prepared by the Department for the cadre of Joint Commissioner of Taxes vide impugned notification dated 08.03.2013. As noticed above, the cadre strength is 5. Therefore, is it permissible for the respondents to prepare a roster of 14 (fourteen) posts in a cadre having 5 (five) posts?. In R.K. Sabharwal (supra), the Apex Court has held that right to be considered for appointment can only be claimed in respect of a post in a cadre. Cadre strength is always measured by the number of posts comprising a cadre. Percentage of reservation has to be worked out in relation to the number of posts forming the cadre strength. Concept of vacancy has no relevance in operating the percentage of reservation. If that be so, preparation of a roster-register beyond 5 (five) posts, which is the prescribed cadre strength, appears to be fictional as there is no post beyond 5 (five). 14 (fourteen) point roster register prepared for a cadre having strength of 5 is being justified on the ground of proportionality so that reservation for the 3 (three) categories may be provided on proportional basis to ensure that none of the 3 (three) categories are left out. But by doing so, what is sought to be done is to provide or earmark roster points against vacancies and not against posts, which is not permissible in view of the law laid down in R.K. Sabharwal (supra). There cannot be 8th and 14th posts in a cadre of 5. Therefore, earmarking of roster points beyond 5 as provided in the impugned notification dated 08.03.2013 would in effect amount to providing vacancy based roster points through the back door.

21. This now brings the question as to whether in a cadre of 5, one post is required to be earmarked for ST(P) having regard to the percentage of reservation provided to such category, i.e., 10% which works out to .50.

22. In Pawan Kumar Tiwari (supra), the Apex Court held that the rule of rounding off is based on logic and common sense. If a part is one-half or more, its value shall be increased to one and if part is less than half then its value shall be none. 46.50 should be rounded off to 47 and not to 46. If this principle is applied, certainly, .50 would have to be treated as 1, which would then justify earmarking of 1 (one) post out of 5 (five) for ST(P). But the same may not be the final and the last word.

23. In Khanindra Nath Choudhury v. State of Assam; reported in 2007 (4) GLT 587, a Single Bench of this Court was confronted with the question as to whether in a cadre strength of 4 (four) there can be any reservation for the reserved categories as per the percentage provided under the Reservation Act. After referring to various decisions of the Apex Court, this Court held that the principle that in a single post cadre, reservation at any point of time on account of rotation of roster would bring about a situation, where such post would be kept exclusively reserved for the members of the reserved category to the total exclusion of the general category would be equally applicable to a case where cadre strength is 4.

24. At this stage, the decision of the Apex Court in R.S. Garg (supra) may be noticed. That was a case where under the Reservation Act, 21% was reserved for SC. The cadre under consideration had 6 (six) posts, but the existing roster register provided 2 (two) roster points for SC categories. The Apex Court held that if the roster was to be followed 2 (two) posts would be reserved for the SC category candidates, which would exceed the reservation of 21%. Apex Court held that Court is not concerned with the reasonableness or otherwise of the percentage of reservation; if 21% of posts have been reserved for SC, the roster points for SC cannot exceed the quota. It was made clear that in the event of any conflict between percentage of reservation and roster, the former shall prevail. In the facts and circumstances of that case, it was held that the roster to fill up the posts by reserved category candidates in the manner provided did not meet the constitutional requirements.

25. In Deba Kumar Dutta (supra), this Court after taking into account the statutory percentage of reservation for the 3 (three) categories, i.e., SC, ST(P) and ST(H), held that in the cadre of Additional Chief Engineer in the Water Resources Department having cadre strength of 7 (seven), 7 (seven), 10 (ten) and 5 (five) percent would come to 0.49, 0.70 and 0.35 respectively. It was held that no posts could be reserved for any of the reserved category candidates in the said cadre as it would exceed the prescribed percentage of reservation provided to each of the reserved categories.

26. It appears that against the aforesaid decision, a writ appeal was preferred in

the case of Pabitra Hazarika (supra). The Division Bench not only upheld the view taken by the learned Single Judge in Deba Kumar Dutta (supra), but also held that clubbing together the entire percentage of reservation of the 3 (three) reserved categories for the purpose of finding out the quota of reservation fixed in a cadre for the purpose of promotion is wholly not permissible. The Division Bench agreed with the view taken by the Single Bench that percentage of reservation as envisaged in respect of each reserved category under the relevant statute can only be taken to determine the extent of reservation permissible in respect of each of the categories in a cadre.

27. The above view has been followed in the case of Binod Kumar Agarwala v. State of Assam; reported in 2014 (4) GLT 174. That was a case relating to promotion from Deputy Registrar to Joint Registrar in the Cooperation Department, Government of Assam. Cadre of Joint Registrar consists of 7 (seven) posts. Applying the above decisions, a Single Bench of this Court held that earmarking of roster points for the reserved categories as per the prescribed percentage of reservation would not be permissible in the cadre of Joint Registrar.

28. Therefore, though logically 0.50% should be rounded off as 1, the peril in doing so would be that if it is taken to be so, it would result in exceeding the percentage of reservation for ST(P) statutorily fixed. Earmarking of 1 (one) post in a cadre of 5 would amount to 20% reservation, whereas under the Statute, the percentage is 10. That being the position, the rounding off principle may not be applied in a case of this nature as application of such principle would lead to violation of statutory percentage of reservation.

29. In Swapan Kumar Das (supra), relied upon by Mr. Das, learned counsel for respondent No. 4, the Court was not called upon to decide the validity of the L-shaped roster. That was a case where petitioner claimed that he belonged to SC category and acquired eligibility to be considered for promotion against the 8th roster point as SC candidate in the 14 point L-shaped roster. As pointed out above, the said roster register was not put to challenge or questioned by contesting parties. In the facts and circumstances of that case, direction was issued to the respondents for promoting the petitioner against the rotational post earmarked for SC category, i.e., the 8th roster point. No binding ratio has been laid down in the said case. It was a decision arrived at in the facts and circumstances of that particular case only.

30. In Akhilesh Kumar Singh (supra), also relied upon by respondent No. 4, the question before the Apex Court was whether a single post cadre could be earmarked to be filled up only by way of promotion from amongst the employees working in the feeder cadre. It was contended that this would tantamount to 100% reservation. The Apex Court clarified that the concept of reservation, which finds place in Article 16 (4) of the Constitution, does not apply to the concept of promotional quota from the feeder cadre. Therefore, if there is a singular post in the cadre, it may be filled up by way of promotion from amongst the eligible candidates from the feeder cadre. Adopting such a method or taking

such a route does not remotely touch the idea of reservation. Therefore, the said decision does not support the case of respondent No. 4.

31. Finally, in the case of Equality Forum (supra), this Court was called upon to decide the constitutionality of the One-Man-Commission report dated 10.03.2014, Cabinet decision dated 02.11.2014 and Government Office Memorandum dated 29.12.2014, justifying reservation in promotion. After surveying the law holding the field including the decisions in M Nagaraj (supra), Suraj Bhan Meena v. State of Rajasthan; reported in (2011) 1 SCC 467 and UP Power Corporation Limited (supra), this Court held that the report of the One-Man-Commission did not conform to the norms laid down in M Nagaraj (supra). Accordingly, it was held that the report of the One-Man-Commission would be of no legal consequence. The Cabinet decision accordingly stood vitiated. The provisions of the Reservation Act would remain in a dormant state till the State acquires quantifiable data showing presence of the 2 (two) compelling reasons, i.e., backwardness of the community and inadequacy of representation cadre-wise. Till acquiring of such quantifiable data, which would enable the State to provide reservation in promotion, the State would not be able to give effect to the provisions of 1978 Act, as amended. Relevant portion of the judgment rendered in Equality Forum (supra) is extracted hereunder:-

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 Tripura in *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."

32. The net result of the above deliberation is that the notification dated 08.03.2013 is legally unsustainable and is accordingly set aside and quashed. Promotion from Deputy Commissioner of Taxes to Joint Commissioner of Taxes shall be carried out on the basis of recruitment rules in force without any additional weightage of reservation as provided under the Reservation Act, as amended.

33. Writ petition is allowed.

34. However, there shall be no order as to cost(s).