
(2010) 02 RAJ CK 0132
In the Rajasthan High Court

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

Date of Decision : 05-02-2010

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 15, 15(5), 16
Rajasthan Administrative Service Rules, 1954 — Rule 11, 28A, 33, 4, 7
Rajasthan Various Service Rules, 1972 — Rule 25, 25(1)

Citation : (2011) 3 RLW 2405 : (2010) 1 WLN 338

Hon'ble Judges : Raghuendra S. Rthore, J; Narendra Kumar Jain, J

Bench : Division Bench

Judgement

Narendra Kumar Jain, J.—D.B. Civil Special Appeal (Writ) No. 618/2008 State of Rajasthan and Anr. v. Bajrang Lal Sharma and Ors. is directed against the order dated 09.07.2009 passed by the learned Single Judge on two applications under Article 226(3) of the Constitution of India i.e. S.B. Civil Misc. Applications No. 8046/2009 and 6550/2009 in S.B. Civil Writ Petition No. 8104/2008, whereby both, the applications were dismissed and the ad-interim ex-parte stay order dated 22.8.2008 was confirmed till the disposal of the writ petition.

2. On 27.7.2009, the said special appeal was listed before the Division Bench presided by the then Hon'ble Acting Chief Justice, and it was directed that appeal be listed on 29.7.2009 alongwith the appeals No. 05313/2009, 610/2009, 611/2009 & 612/2009 and writ petition 8157/2009. The above cases were listed on 20.10.2009 and the Division Bench passed an order that, "as suggested and agreed by both the parties, the registry is directed to list the writ petitions as well as the special appeals" (14 in number), as mentioned in the order. Again on 26.10.2009, the Division Bench passed an order to list the cases alongwith the connected matters, as mentioned in the order. Thereafter, the matters were listed on 4.12.2009, and on that date, one of the member of Division Bench made an exception, therefore, the matters were put up before Hon'ble the Chief Justice on 17.12.2009, who constituted this Bench for hearing the above matters as well as other connected matters, as mentioned in the note-sheet of the

registry. In these circumstances, these matters have come up before us for hearing.

3. We have heard the learned Counsel for the parties and examined the record.

4. Since common questions of fact and law are involved in these matters, therefore, they are being disposed of by this common order.

5. Since the writ petitions as well as special appeals have been tagged together and writ petition No. 8104/2008 is the main case, therefore, we are referring the facts of the said writ petition.

6. Petitioners No. 1 to 10, who are members of the Rajasthan Administrative Service, have preferred this writ petition under Article 226 of the Constitution of India challenging the Notification dated 25.4.2008 (Annexure-14), whereby the Government of Rajasthan, while exercising powers conferred by the proviso to Article 309 of the Constitution of India, amended the Rajasthan Various Service Rules, (hereinafter referred to as "the Various Service Rules"), as mentioned in the Schedule appended therewith with effect from 28.12.2002, whereby the following existing proviso to the rule, as mentioned in Column No. 3 against each of the Service Rules (110 in number), listed in Column No. 2 of the said Schedule, has been deleted:

Provided that a candidate who has got the benefit of proviso inserted vide Notification No. F.7 (1) DOP/A-II/96 dated 01.04.1997 on promotion to an immediate higher post shall not be reverted and his seniority shall remain unaffected. This proviso is subject to final decision of the Hon"ble Supreme Court of India in Writ Petition (Civil) No. 234/2002 All India Equality Forum v. Union of India and Ors..

7. The petitioners have also prayed; to issue appropriate writ directing the respondents to strictly adhere to the "catch up" rule and revise the seniority of all the petitioners in comparison to the candidates belonging to Scheduled Castes and Scheduled Tribes (for short" the SCs and the STs) after giving the benefit of regaining of the seniority by the general/OBC category candidates as envisaged by the Notification dated 1.4.1997 (Annexure-3) and provisional seniority list dated 26.6.2000 of Selection Scale of the RAS (Annexure-4); to restrain the respondents from providing the consequential seniority to the candidates belonging to the SCs and the STs as the Rajasthan Administrative Service Rules, 1954 (hereinafter referred to as "the RAS Rules) were not framed in pursuance of Article 16(4-A) of the Constitution of India. In the alternative, if Rule 33 of the RAS Rules talks about giving benefit of consequential seniority then that rule may be declared unconstitutional to the extent it provides consequential seniority to the employees of the SC and the ST category.

8. The petitioners have given the facts in respect of petitioner No. 1 Bajrang Lal Sharma, respondent No. 3 Suraj Bhan Meena and respondent No. 4 Sriram Choradia.

9. It is pleaded that petitioner No. 1, respondent No. 3 and respondent No. 4 were inducted in the Rajasthan Administrative Service in December 1982 through selection by the Rajasthan Public Service Commission. The respondent-State issued a provisional seniority list of Rajasthan Administrative Service (R.A.S.) Selection Scale vide notice dated 26.6.2000 as on 1.4.1997, wherein petitioner No. 1 Bajrang Lal was placed at Serial No. 129 whereas the names of respondents No. 3 and 4 namely, Suraj Bhan Meena (ST) and Sriram Choradia (SC) were placed at Serial No. 142 and 147 respectively. This seniority list was issued in pursuance of order of the Hon'ble Apex Court dated 16.9.1999 in the case of Ajit Singh-II v. State of Punjab (1997) 7 SCC 209 and Anr. order of the Hon'ble Apex Court dated 16.9.1999 in the case of Shri Ram Prasad Etc. Etc. Vs. Shri D.K. Vijay and Others Etc. Etc., and Or judgments of the Rajasthan High Court/Appellate Tribunal and circulars of Department of Personnel (DOP). Again a provisional seniority list was issued on 27.11.2003 and 12.5.2008. Now, the Government of Rajasthan has published the final seniority lists of Super Time Scale and Selection Scale of the RAS on 24.6.2008 as on 1.4.2007 (Annexure-1) and provisional seniority list dated 02.07.2008 as on 1.4.2008 (Annexure-2), wherein names of petitioner No. 1 and respondents No. 3 and 4 have been mentioned as under:

Petitioner No. 1 (Bajrang Lal Sharma):

Seniority Lists dated:

24.6.2008 at S. No. 170 as on 01.04.1997 (Selection Scale)

02.7.2008 at S. No. 107 as on 01.04.2008 (Selection Scale)

He was given the benefit of Selection Scale against the vacancy of the year 1994-95.

Respondent No. 3 (Suraj Bhan Meena):

Seniority Lists dated:

24.6.2008 at S. No. 72 as on 1.4.1997 (Selection Scale)

02.7.2008 at S. No. 34 as on 1.4.2008 (Super Time Scale)

He was given the benefit of Selection Scale against the vacancy of the year 1991-92 and Super Time Scale in the year 2005-06.

Respondent No. 4 (Sriram Choradia):

Seniority List dated:

24.6.2008 at S. No. 101 as on 1.4.1997 (Selection Scale)

2.7.2008 at S. No. 53 as on 1.4.2008 (Selection Scale)

He was given the benefit of Selection Scale against the vacancy of the year 1992-93.

10. Shri Sanjeev Prakash Sharma, the learned Counsel for the petitioners argued that the impugned Notification dated 25.4.2008 is illegal on two counts. First, is that the proviso dated 28.12.2002 which was added in the Various Service Rules, was subject to the final decision of the Hon''ble Supreme Court in Writ Petition (Civil) No. 234/2002 (All India Equality Forum v. Union of India and Ors.) but the said writ petition (Civil) No. 234/2002 has not been decided finally so far by the Hon''ble Supreme Court vide order dated 19.10.2006. Therefore, during pendency of the said writ petition before the Hon''ble Apex Court, it was not proper for the respondents to delete the proviso in the Various Service Rules including the RAS Rules. Secondly, the deletion of the proviso in the Various Service Rules vide the Notification dated 25.4.2008, amounts to giving consequential seniority to the candidates belonging to the SCs and the STs, which could not have been given without collecting the required quantifiable data to reach to a conclusion that reservation is required in promotion and to show that the State was having any compelling reason, namely, backwardness, inadequacy of representation and that it would not cause any overall administrative efficiency before providing reservation in promotion with consequential seniority, as held by the Hon''ble Supreme Court in the case of M. Nagaraj and Others Vs. Union of India (UOI) and Others, . Since the State Government has not complied with the direction of the Hon''ble Supreme Court before issuing the impugned Notification dated 25.4.2008, therefore, the said notification is liable to be quashed being violative of the directions of the Hon''ble Apex Court in M. Nagaraj's case (supra).

11. Mr. Sharma further argued that the Hon''ble Supreme Court in the case of Indra Sawhney and Ors. v. Union of India and Ors. reported in 1992 Supp. (3) SCC 217 , has held that Article 16(4) of the Constitution does not permit reservations in the matter of promotion. Thereafter, the Constitution (Seventy-Seventh Amendment) Act, 1995 came into force on 17.6.1995. Later on, the Hon''ble Supreme Court in the cases of Union of India and others etc. Vs. Virpal Singh Chauhan etc., , Ajit Singh Januja and others Vs. State of Punjab and others, and Ajit Singh and Others Vs. The State of Punjab and Others, , introduced the "catch-Up" rule and held that if the senior general candidate is promoted then he will regain his seniority on promotion post above junior reserved promotees. It was also held that consequential seniority on promotion post is not covered by Article 16(4-A). The State Government also added the similar "proviso" vide Notification dated 1.4.1997 at the next serial number in the Various Service Rules including the Rajasthan Administrative Service Rules.

12. The Parliament, in its wisdom, further amended the Constitution on 4.1.2002 by way of "The Constitution (Eighty-Fifth Amendment) Act, 2001", to give the benefit of consequential seniority to reserved category candidates with effect from 17.6.1995. The constitutional validity of both the aforesaid Constitution Amendment Acts was challenged before the Hon''ble Supreme Court in number of writ petitions including writ petitions filed by M.Nagaraj and All India Equality Forum and during pendency of the writ petition before the Hon''ble Apex Court,

an interim order was passed protecting the promotion and seniority of general/OBC category candidates during pendency of the writ petition. The Government of Rajasthan while deleting the proviso added vide the Notification dated 1.4.1997, inserted the new proviso vide the Notification dated 28.12.2002.

13. The Hon"ble Apex Court in M.Nagaraj's case on 19.10.2006, while upholding the constitutional validity of the Constitution (Seventy-Seventh Amendment) Act, 1995 and the Constitution (Eighty-Fifth Amendment) Act, 2001, made it clear that it will not be necessary for the State Government to frame rule in respect of reservation in promotion with consequential seniority, but in case the State Government is willing to frame the rule in this regard then it has to satisfy, by quantifiable data, that there, is backwardness, inadequacy of representation in public employment and overall administrative efficiency, and unless that exercise is done by the State Government, the rule relating to reservation in promotion with consequential seniority, cannot be introduced.

14. Mr. Sharma further contended that if the State Government was willing to frame rule in this regard then the same could have been done after doing necessary exercise, by collecting quantifiable data and forming an opinion that there is backwardness, inadequacy of representation in public employment and overall administrative efficiency, as observed by the Hon"ble Supreme Court M. Nagaraj's case (supra). But what the State has done in the present case is that they have deleted the "proviso" which was inserted on 1.4.1997 on the basis of "catch-up" rule vide Notification dated 28.12.2002 and further deleted the new "proviso" added on 28.12.2002 vide Notification dated 25.4.2008 in Various Service Rules of the State. The net result of it is that the State Government has provided consequential seniority to the SCs and the STs, without undergoing any exercise in respect of three conditions as laid down in the judgment of the Hon"ble Apex Court in M. Nagaraj's case (supra).

15. In these circumstances, the impugned Notification dated 25.4.2008 is liable to be declared as ultra vires to the provisions of the Constitution of India as well as contrary to the judgment of the Hon"ble Apex Court in M. Nagaraj's case (supra).

16. The next submission of Mr. Sharma is with regard to the wrongful seniority list published inspite of their being a judgment passed by Division Bench of this Court in the case of B.K. Sharma and Anr. v. State of Rajasthan and Ors. reported in 1998 (2) WLC 583 and the judgment of the Hon"ble Apex Court in the case of Shri Ram Prasad Etc. Etc. Vs. Shri D.K. Vijay and Others Etc. Etc., . It is submitted that combined seniority list of the RAS cadre was published by the State Government on 22.4.1995 which carried names of the petitioner's alongwith other RAS officers; the same was quashed by the High Court, and it was held that Rule 33 of the RAS Rules nowhere provides for consequential seniority to reserved category promotees. Thus after the judgments in B.K. Sharma's and Ram Prasad's cases (supra), the consequential seniority could not have been assigned to reserved promotees above the senior general/OBC

persons. After the judgment in Ram Prasad's case (supra) by the Hon'ble Apex Court, a vested right was created of having seniority over all reserved category persons by general category persons as per interpretation of Rule 33 of the RAS Rules. Rule 33 has not been amended thereafter except to withdraw the notifications dated 1.4.1997 and 28.12.2002. He, therefore, contended that vested or accrued rights in the matters of promotion, seniority, substantive appointments etc. of the employees cannot be taken back retrospectively. Such an act of the State Government is arbitrary, discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the Constitution of India.

17. Mr. R.C. Joshi, the learned Counsel appearing on behalf of the petitioners contended that he has challenged both the notifications i.e. 28.12.2002 and 25.4.2008 in writ petitions No. 7774/2009 and 7775/2009. He contended that so far as argument with regard to notification dated 25.4.2008 is concerned, Mr. Sanjeev Prakash Sharma has already argued the case at length, and he adopts his arguments. So far as notification dated 28.12.2002 is concerned, he contended that this notification is also illegal and violative of Articles 14 and 16 of the Constitution. By way of the Constitutional (Seventy-Seventh Amendment) Act, 1995, an enabling provision with regard to accelerated promotion was made by inserting the words "reservation in promotion" in Clause (4A) in Article 16 of the Constitution which was considered and it was clarified by the Hon'ble Apex Court in the cases of Union of India v. Virpal Singh Chauhan's case (supra) as well as Ajit Singh-I (supra) that the reserved promotees be entitled for accelerated promotion, but they will not be entitled to get accelerated seniority. The same view was further taken by the Constitution Bench of the Hon'ble Apex Court on 16.9.1999 while deciding Ajit Singh-II case. In view of the judgment delivered in Virpal Singh Chauhan's case (supra) and further in the case of Ajit Singh-I, the State Government vide Notification dated 1.4.1997 inserted the new proviso in Various Service Rules, as mentioned in the said notification, whereby benefit of regaining seniority was given to General/OBC candidates above such earlier promoted candidates of the SC/ST in the immediate higher post/grade. Subsequently, "The Constitution (Eighty-Fifth Amendment) Act, 2001 was passed on 4.1.2002 with effect from 16.9.1995 with regard to consequential seniority to reserved promotees. The number of writ petitions were filed before the Hon'ble Apex Court challenging the constitutional validity of "The Constitution (Seventy-Seventh Amendment) Act, 1995" as well as "The Constitution (Eighty-Fifth Amendment) Act, 2001". The interim order was passed by the Hon'ble Apex Court in M. Nagaraj's case (supra) as well as in the case of All India Equality Forum v. Union of India that the general/OBC candidates who have already been promoted, they will not be reverted and their seniority will not be disturbed. Vide the Constitution (Eighty-Fifth Amendment) Act, the words "with consequential seniority" was inserted in Clause (4A) of Article 16 of the Constitution after the words "reservation in promotion", but it was only an enabling provision and the said amendment was under challenge before the Hon'ble Apex Court. The matter was sub-judice before the Hon'ble Apex Court and during that period itself,

without waiting for the decision of the Apex Court in M. Nagaraj's case and in the case of All India Equality Forum v. Union of India, the State Government wrongly withdrew earlier notification dated 1.4.1997 vide Notification dated 28.12.2002. Now the Hon'ble Apex Court in M. Nagaraj's case vide judgment dated 19.10.2006 while upholding the constitutional validity of the Constitution (Eighty-Fifth Amendment) Act, has made it mandatory on the part of the State Government to go for three exercises, as mentioned in the judgment in case any rule is to be framed by the State for reservation in promotion with consequential seniority. Admittedly, no exercise was done by the State Government before amending the Various Service Rules including the RAS Rules vide Notification dated 28.12.2002, and therefore, it is liable to be quashed.

18. Apart from the above, he further contended that proviso introduced vide notification dated 1.4.1997 had already been upheld and the rights of number of persons belonging to the general/OBC category regarding their regaining seniority above their junior reserved promotees had already been upheld by the Division Bench of this Court in B.K. Sharma's case (supra) and by the Hon'ble Apex Court in the case of Ram Prasad v. D.K. Vijay (supra). Therefore, the Notification dated 28.12.2002 whereby earlier proviso introduced vide Notification dated 1.4.1997 has been withdrawn, tantamount to neatening the judgment of the Division Bench of this Court in B.K. Sharma's case (supra) and the judgment of the Hon'ble Apex Court in the case of Ram Prasad v. D.K. Vijay (Supra). He therefore, contended that the Notification dated 28.12.2002 is also liable to be quashed by this Court.

19. Learned Counsel for the petitioners, in support of their submissions, referred to the judgment of the Hon'ble Apex Court in the cases of M. Nagaraj and Others Vs. Union of India (UOI) and Others, ; Indra Sawhney and Ors. v. Union of India and Ors. 1992 Supp. (3) SCC 217; Union of India and Ors. v. Virpal Singh Chauhan and Ors. (1995) 6 SCC 654 ; Ajit Singh Januja and others Vs. State of Punjab and others, ; Ajit Singh (II) and Ors. v. State of Punjab and Ors. (1997) 7 SCC 209; Shri Ram Prasad Etc. Etc. Vs. Shri D.K. Vijay and Others Etc. Etc., ; Anil Chandra and Others Vs. Radha Krishna Gaur and Others, ; R.K. Sabharwal and others Vs. State of Punjab and others, ; State of Bihar and Another Vs. Bal Mukund Sah and Others, ; A.P. Public Service Commission Vs. Baloji Badhavath and Others, ; M.G. Badaopanavar and Anr. v. State of Karnataka and Ors. (2001) 2 SCC 666 ; D.P. Sharma and Others Vs. Union of India and Another, ; Chairman, Railway Board and others Vs. C.R. Rangadhamaiah and others, ; AIR 1997 3127 (SC); Rajesh Kumar Gupta and Others Vs. State of U.P. and Others, ; Arun Tewari and Ors. v. Zila Mansavi Shikshak Sangh and Ors. AIR 1998 SC 331 ; Tridip Kumar Dingal and Others Vs. State of West Bengal and Others, ; the judgment of the Division Bench of this Court in the case of B.K. Sharma and Anr. v. State of Rajasthan and Ors. 1998 (2) WLC 583 and the judgment of the Himachal Pradesh High Court in the case of Himachal Pradesh Samanaya Varg Karamchari Kalayan Mahasangh v. State of Himachal Pradesh and Ors. CWP-T. No. 2628 of 2008 decided on 18.9.2009).

20. Shri G.S. Bapna, the learned Advocate General contended that the State Government is empowered under proviso to Article 309 of the Constitution to frame, amend, add or delete any rule subject to constitutional limitations, which have not been breached in the present case. Although the Constitution (Seventy-Seventh Amendment) Act, 1995 came into force on 17.6.1995, but in the cases of Virpal Singh Chouhan (supra) and Ajit Singh (supra), the Hon''ble Apex Court held that if the senior and general category. candidate is promoted then he will regain his seniority on promotion post above junior reserved promotees. It was also held that consequential seniority on promotion post is not covered by Article 16(4-A). The State Government, therefore, added similar rule in Various Service Rules including the RAS Rules vide Notification dated 1.4.1997. However, the Constitution (Eighty-Fifth Amendment) Act, 2001 came on 4.1.2002 with effect from 17.6.1995. The number of writ petitions were preferred before the Hon''ble Supreme Court challenging the constitutional validity of the Constitution (Seventy-Seventh Amendment) Act, 1995 and the Constitution (Eighty-Fifth Amendment) Act, 2001, wherein interim order was passed that the general/OBC persons who have already got the benefit of promotion will not be reverted and their seniority shall remain unaffected. The respondents, therefore, deleted the proviso from the Various Service Rules, which were added on 1.4.1997 and added new proviso under Various Service Rules vide Notification dated 28.12.2002, which was in consonance with the interim order passed by the Hon''ble Apex Court.

21. Now, the Hon''ble Apex Court upheld the constitutional validity of both the Amendments inserted in the Constitution vide order dated 19.10.2006 in M. Nagaraj''s case (supra). Therefore, while exercising the powers under proviso to Article 309 of the Constitution, the State Government vide its Notification dated 25.4.2008, deleted the proviso added vide Notification dated 28.12.2002 in Various Service Rules. Since the State Government is empowered to add or delete any rule, there is no illegality in issuing the Notification dated 25.4.2008. It is within competence of the State Government to add or delete any rule and the State Government has exercised its powers. The legislative competence of the State cannot be allowed to be challenged.

22. He further contended that although a seniority list dated 26.6.2000 was issued on the basis of judgment of the Hon''ble Apex Court dated 16.9.1999 in the case of Ajit Singh Juneja v. State of Punjab (supra) and order dated 16.9.1999 in the case of Ram Prasad v. D.K. Vijay (supra), but no person belonging to RAS was promoted on that basis till issuance of Notification dated 28.12.2002. Therefore, no right vested in any of the petitioners which can be said to have been taken away vide Notification dated 25.4.2008, He contended that seniority is not a fundamental right and if position of petitioner is changed in seniority list on the basis of impugned notification then the same cannot be said to be taking away the vested or accrued right. The petitioners cannot compel the State Government to keep any rule on the statute. The respondents have not done anything vide Notification dated 25.4.2008 except deleting the proviso

added vide Notification dated 28.12.2002.

23. He further argued that three exercises which are required to be carried out as held by the Hon''ble Apex Court in M. Nagaraj's case (supra) before framing any rule, are to be carried out only in matters relating to "reservation in promotion" and not with regard to "consequential seniority". The action of the respondents is, therefore, not violative of the ratio laid down by the Hon''ble Apex Court in M. Nagaraj's case (supra). The forming of opinion by the State Government that the SCs and the STs are adequately represented or not has to be made at the time of providing reservation in promotion and not for consequential seniority. The respondents issued a notification providing reservation to SC & ST classes way back on 10.2.1975 in promotion.

24. He further contended that the judgment delivered by the Hon''ble Apex Court in Indra Sawhney's case (supra) was negated by the Constitution (Seventy-Seventh Amendment) Act, 1995 and the judgments of the Hon''ble Apex Court delivered in the cases of Virpal Singh Chouhan (supra) and Ajit Singh -I (supra) were negated by the Constitution (Eighty-Fifth Amendment) Act, 2001. The impugned notifications are in accordance with the provisions of the Constitution, and therefore, the same cannot be declared ultra vires to the Constitution by this Court.

25. He further contended that there is a provision for consequential seniority in Rule 33 of the RAS Rules, therefore, reserve category candidates are entitled for consequential seniority as per Rule 33 itself. However, he admitted that after the judgment delivered by the Hon''ble Apex Court in M. Nagaraj's case, Rule 33 has not been amended providing reservation in promotion with consequential seniority to SC/ST candidates. He also admitted that no exercise with regard to three conditions laid down by the Hon''ble Apex Court in M. Nagaraj's case has been done before issuing notifications dated 28.12.2002 and 25.4.2008. His explanation is that the said exercise is required for reservation in promotion and not for consequential seniority. He, therefore, contended that there is no merit in the writ petition and the same is liable to be dismissed.

26. Learned Advocate General appearing on behalf of the State, in support of his submissions, referred to the judgment of the Hon''ble Apex Court in the cases of Indra Sawhney and Ors. v. Union of India and Ors. 1992 Supp. (3) SCC 217 ; M. Nagaraj and Others Vs. Union of India (UOI) and Others, ; Union of India and others etc. Vs. Virpal Singh Chauhan etc., ; Ajit Singh Januja and others Vs. State of Punjab and others, ; Ajit Singh (II) and Ors. v. State of Punjab and Ors. (1997) 7 SCC 209 ; A. Janardhana Vs. Union of India (UOI) and Others, ; B.S. Vadera Vs. Union of India (UOI) and Others, ; Raj Kumar Vs. Union of India (UOI) and Others, ; AIR 1997 3127 (SC) .

27. Mr. Ashok Gaur, the learned Counsel appearing on behalf of respondent No. 3-Suraj Bhan Meena, contended that the Hon''ble Apex Court, while deciding the Indra Sawhney's case (supra) on 16.11.1992, made it clear that the existing

rule relating to reservation in promotion to the SCs and the STs would continue in operation for five years and within this period, it would be open to the appropriate authorities to revise, modify or reissue the relevant rules to ensure the achievement of the objective of Article 16(4) of the Constitution. However, before the said period of five years could have ended on 16.11.1997. "The Constitution (Seventy-Seventh Amendment) Act, 1995" came into force on 17.6.1995 giving enabling powers to the State Government to frame rules with regard to reservation in promotion. Subsequently, the "catch-up" rule was introduced by the Hon'ble Supreme Court in the cases of Virpal Singh Chauhan (supra) and Ajit Singh-I (supra), the State of Rajasthan added "proviso" below seniority rule in Various Service Rules vide Notification dated 1.4.1997 giving benefit of regaining seniority to senior General/OBC category persons. However, the Central Government further amended the Constitution by way of Constitution (Eighty-Fifth Amendment) Act, 2001 on 4.1.2002 with effect from 17.6.1995 giving further enabling powers to the State Government to give benefit of "consequential seniority" to the SC and the ST roster promotees.

28. He further argued that a provisional seniority list of R.A.S. officers was published as on 26.6.2000, wherein senior general category candidates were placed above the merit promotees as well as roster promotees. However, the said seniority list was challenged by way of writ petition filed by merit promotee styled as "Hanuman Singh Bhati v. State of Rajasthan and Ors. (S.B. Civil Writ Petition No. 2966/2000) and other connected writ petitions and the learned Single Judge of this Court vide its judgment dated 30.5.2001 quashed the provisional seniority list dated 26.6.2000. Thereafter, special appeal was preferred and the judgment of the learned Single Judge dated 30.5.2001 was upheld by the Division Bench. SLP was also preferred against the order of the Division Bench and the appeal arising out of it is still pending before the Hon'ble Apex Court, wherein by way of an interim order dated 25.2.2002, the contempt proceedings were stayed. He, therefore, contended that since no senior general category candidate was promoted in pursuance of regaining seniority rule dated 1.4.1997 till it was withdrawn on 28.12.2002, therefore, no right is accrued or vested in any of the petitioners. The rights of promotion and seniority, as per notification dated 1.4.1997, was protected by adding new proviso on 28.12.2002, but after insertion of the provision relating to "consequential seniority" in Article 16(4-A) by way of the Constitution (Eighty-Fifth Amendment) Act, 2001 and upholding of its constitutional validity by the Hon'ble Supreme Court in M. Nagaraj's case (supra), the protected rule dated 28.12.2002 was also withdrawn vide the notification dated 25.4.2008 with effect from 28.12.2002. The State is empowered to insert, amend or delete any provision of the statutory rule with retrospective effect. Since no vested or accrued rights have been taken back vide Notification dated 25.4.2008, therefore, he contended that there is no merit in the writ petition and the same is liable to be dismissed. He has also referred to the prayer of the writ petition and contended that since the petitioners want to revise the seniority list of number of Rajasthan

Administrative Service officers and have not impleaded all of them as party in the writ petition, therefore, the present writ petition is liable to be dismissed on the ground of non-joinder of necessary party also.

29. Learned Counsel appearing on behalf of respondent No. 3, in support of his submissions, referred to the judgment of the Hon''ble Apex Court in the cases of Indra Sawhney and Ors. v. Union of India and Ors. 1992 Supp. (3) SCC 217 ; M. Nagaraj and Others Vs. Union of India (UOI) and Others, ; Union of India and others etc. Vs. Virpal Singh Chauhan etc., ; Ajit Singh Januja and others Vs. State of Punjab and others, ; Ajit Singh (II) and Ors. v. State of Punjab and Ors. (1997) 7 SCC 209 ; Jagdish Lal and others Vs. State of Haryana and others, ; Shri Ram Prasad Etc. Etc. Vs. Shri D.K. Vijay and Others Etc. Etc., ; and the judgment of this Court in the cases of B.K. Sharma and Anr. v. State of Rajasthan and Ors. 1998 (2) WLC 583; Hanuman Singh Bhati v. State of Rajasthan and Ors. (SB Civil Writ Petition No. 2966/2000 decided on 30.5.2001). He has also referred Civil Appeal No. 171/2002 (State of Rajasthan v. Hanuman Singh Bhati) and Writ Petition (Civil) No. 234/2002 (All India Equality Forum v. Union of India and Ors.).

30. Mr. Hari Prasad Verma, learned Counsel appearing on behalf of respondent No. 4-Sriram Choradia, the SC candidate, contended that SC/ST is not a caste but it is a class. Since it is a class based reservation and creamy layer is applicable for OBC and not for SC/ST, he argued that after upholding of the constitutional validity of the Constitution (Seventy-Seventh Amendment) Act, 1995 and the Constitution (Eighty-Fifth Amendment) Act, 2001 by the Hon''ble Apex Court, nothing remains to be decided in the present case and therefore, the writ petition is liable to be dismissed.

31. Learned Counsel appearing on behalf of the respondent No. 4 referred to the judgment of the Hon''ble Apex Court in the case of Ashoka Kumar Thakur Vs. Union of India (UOI) and Others, .

32. Mr.Ajeet Kumar Sharma, learned Counsel appearing on behalf of the intervenor argued that all the applicants are senior to both the parties, therefore, neither he is supporting nor opposing the writ petition or special appeals, but the interest of applicants have been affected by the interim order passed in D.B. Civil Special Appeal (Writ) No. 618/2009. Therefore, the interim order be suitably modified giving a way to promotion of the applicants on the posts of Indian Administrative Service (IAS). Since we were hearing the matters finally, therefore, interim stay order was neither vacated nor modified by us. It is also relevant to mention that interim order was challenged by State before the Hon''ble Supreme Court and the same was not interfered with.

33. Mr. Sanjeev Prakash Sharma, learned Counsel appearing on behalf of the petitioners, in rejoinder, contended that required exercise by the State Government, as per M.Nagaraj case (supra), is necessary for giving the benefit of consequential seniority also to the reserved promotees. He contended that he

has also challenged the rule relating to reservation in promotion in the writ petition. While giving reply to the objections raised on behalf of respondent No. 3 about non-joinder of necessary parties, he contended that it is a settled law that a person in representative capacity of a class or group can be impleaded as party respondent. In case a representative of a class or group is impleaded as one of the respondent, then the writ petition cannot be thrown on this ground. He has already impleaded respondent No. 3 as a representative of ST category persons and respondent No. 4 as a representative of SC category persons, therefore, he has impleaded the necessary parties in the case. He has not sought any relief against any individual so as to implead a particular person as a party to the writ petition.

34. We have considered the submissions of learned Counsel for the parties.

35. First of all, we will now take up the preliminary objection raised on behalf of the respondent No. 3 about maintainability of the writ petition or its dismissal on the ground of non-joinder of necessary parties.

36. It is contended that the petitioners have challenged the seniority list without impleading all the affected persons as party respondents in the writ petition, and in their absence, their rights cannot be determined by this Court.

37. The petitioners replied that the number of affected persons is too large that it is neither possible to implead all of them as party nor there is any requirement of law in this regard. He contended that as per the settled proposition of law, if some of the respondents are impleaded in representative capacity on behalf of the affected persons then it is sufficient compliance. The petitioners have already impleaded Suraj Bhan Meena as respondent No. 3 as representative of the ST candidates and has further impleaded Sri Ram Choradia as respondent No. 4 as representative of the SC category. The respondents No. 3 and 4 have argued the case at length in representative capacity also.

38. We have considered the submission of the learned Counsel for the parties and we find that in this bunch of writ petitions, the main challenge is about Notifications dated 25.4.2008 and 28.12.2002, and therefore, the dispute is in between general and SC/ST candidates about their seniority on promotion post. No relief against any individual has been sought in the writ petitions. The Hon'ble Apex Court in the cases of Rajesh Kumar Gupta and Others Vs. State of U.P. and Others, , Arun Tewari v. Zila Mansvi Shikshak Sangh AIR 1998 SC 331 and Tridip Kumar Dingal and Others Vs. State of West Bengal and Others, , has held that if some of the respondents are impleaded in representative capacity considering that their number was too large for all of them to be joined individually as respondents, their writ petition cannot be dismissed only for the reason that all the persons who would be vitally affected, have not been impleaded as party. Since the petitioners have already impleaded Suraj Bhan Meena as respondent No. 3 as representative of the ST candidates and has further impleaded Sriram Choradia as respondent No. 4 as representative of the

SC category, we do not find any substance in the preliminary objection of the respondent No. 3, and the same is hereby overruled.

39. Now following questions remain for our consideration in these matters on the basis of submissions of learned Counsel for the parties:

1. Whether Notification dated 25.4.2008 which came into force with effect from 28.12.2002, is violative of Articles 14 and 16 of the Constitution, as it takes away the vested and accrued rights retrospectively?

2. Whether Notification dated 28.12.2002 is violative of Articles 14 and 16 of the Constitution?

40. Before considering the above questions, it would be relevant to refer the relevant rules and the case law cited at the Bar and also the legislative history of the Rules as well as Constitutional provisions relating to the present case.

41. The Rajasthan Administrative Service Rules, 1954 were published in the Rajasthan Rajpatra dated 9.7.1954. Rule 4(c) defines "by promotion" means by the method prescribed by Rule 7(1)(b). Rule 7 relates to "Source of Recruitment". Rule 7(1)(b) reads as under:

...

(b) by promotion of Tehsildars.

42. Rule 8 is in respect of reservation of vacancies for the Scheduled Castes and Scheduled Tribes, which reads as under:

(1) Reservation of vacancies for the Scheduled Castes and Scheduled Tribes shall be in accordance with orders of the Government for such reservation in force at the time of recruitment i.e. by direct recruitment and by promotion.

(2) The vacancies so reserved for promotion shall be filled in by seniority cum merit and merit.

(3) In filling the vacancies so reserved the eligible candidates who are members of the Scheduled Castes and the Scheduled Tribes shall be considered for appointment in the order in which their names appear in the list prepared for direct recruitment by the Commission for post falling in its purview, and by the Appointing Authority in other cases and the Departmental Promotion Committee or the Appointing Authority as the case may be in the case of promotees, irrespective of their relative rank as compared with other candidates.

(4) Appointment shall be made strictly in accordance with the rosters prescribed separately for direct recruitment and promotion. In the event of non - availability of the eligible and suitable candidates amongst the Scheduled Castes and the Scheduled Tribes as the case may be, in a particular year, the vacancies so reserved for them shall be carried forward until the suitable Scheduled Castes and the Scheduled Tribes candidate(s), as the case may be, are available. In any circumstances no vacancy reserved for Scheduled Castes and the Scheduled

Tribes candidates shall be filled by promotion as well as by direct recruitment from general category candidates. However, in exceptional cases where in the public interest the Appointing Authority feels that it is necessary to fill up the vacant reserved post(s) by promotion from the general category candidates on urgent temporary basis, the Appointing Authority may make a reference to the Department of Personnel and after obtaining prior approval of the Department of Personnel, they may fill up such posts(s) by promoting the general category candidate(s) on urgent temporary basis clearly stating in the promotion order that the General category candidate(s) who are being promoted on urgent temporary basis against the vacant post reserved for Scheduled Castes or the Scheduled Tribes candidates, as the case may be, shall have to vacate the post as and when the candidate(s) of that category become available.

Provided that there shall be no carry forward of the vacancies in posts or class/category, group of posts in any cadre of service to which promotions are made on the basis of merit alone, under these Rules.

43. Rule 33 is an important and relevant rule for the purpose of present controversy. It relates to seniority. Rule 33 is quoted as under:

33. Seniority "Seniority of persons appointment to the post encadred in the service shall be determined from the date of appointment on the post after regular selection in accordance with the provisions of these rules. Appointment on ad hoc or urgent temporary basis shall not be deemed to be appointment after regular selection.

Provided:

(i) that the seniority inter se of the persons appointed to the service before the commencement of these Rules shall be such as may have been determined or as hereafter be determined by the State Government in accordance with the principles and instructions set out in Schedule V;

(ii) that persons who are appointed to the Service by promotion and by special selections during a year or whose appointment is deemed to have been made during a particular year interm of the provisions of the Rajasthan Service (Recruitment by promotion against vacancies of earlier years) Rules, 1972 shall rank senior to those appointed by direct recruitment during that year. Persons appointed to the service by promotion deemed to have been so appointed in a particular year shall rank senior to those appointed or deemed to have been appointed by Special Selection during the same year. Persons appointed to a service by promotion from Tehsildars shall rank senior to the one appointed by promotion from the post of Inspector Grade-I of Devasthan Department during the same year.

(iii) Deleted,

(iv) Deleted,

(v) Deleted.

(vi) that the persons selected and appointed as a result of a selection, which is not subject to review and revision, shall rank senior to the persons who are selected and appointed as a result of sub-subsequent selection;

Seniority inter se of persons selected on the basis of seniority cum-merit and on the basis of merit in the same selection shall be the same as in the next below grade.

(vii) that the seniority inter se of the persons appointed to the Service on the result of one and the same examination, except those who do not join the Service when a vacancy is offered to them, shall follow the order in which they have been placed in the list prepared by the Commission under Rule 25;

(viii) Deleted,

(ix) Deleted,

(x) Deleted.

(2) In determination seniority of persons appointed to the Service in accordance with the provisions of Sub-rule (1) Government, if satisfied of any error or omission having been made in the seniority list (in consequence of incorrect data supplied by the persons appointed to the Service or otherwise) shall have the power:

(i) to fit in and adjust any person so appointed at such position therein as it may deem just and proper, and

(ii) to alter the position for the time being of any such person in the said list:

Provided - that changes in the seniority list of persons covered by proviso (i) of Sub-rule (1) will not be made by Government after 31-12-1958.

3. This will have effect from the 9th day of July, 1954.

44. A proviso was added below other provisos in Rule 33 by way of notification dated 1.4.1997 giving benefit of regaining seniority to senior general/OBC candidates, which is reproduced as under:

That if a candidate belonging to the Scheduled Caste/Scheduled Tribe is promoted to an immediate higher post/grade against a reserved vacancy earlier than his senior general/U.B.C. candidate who is promoted later to the said immediate higher post/grade, the general/O.B.C. candidate will regain his seniority over such earlier promoted candidates of the Scheduled Caste/Scheduled Tribe in the immediate higher post/grade.

45. Vide notification dated 28.12.2002, the above proviso inserted vide notification dated 1.4.1997 was deleted and new proviso was substituted protecting the rights of seniority and promotion in pursuance of notification dated

1.4.1997. The new proviso which was substituted on 28.12.2002 reads as under:

Provided that a candidate who has got the benefit of proviso inserted vide Notification No. F.7 (1) DOP/A-II/96 dated 01.04.1997 on promotion to an immediate higher post shall not be reverted and his seniority shall remain uneffected. This proviso is subject to final decision of the Hon"ble Supreme Court of India in Writ Petition (Civil) No. 234/2002 All India Equality Forum v. Union of India and Ors..

46. Vide notification dated 25.4.2008, the proviso which was added below all the provisos in Rule 33 vide notification dated 28.12.2002, has been deleted. The relevant portion of the notification dated 25.4.2008 is as under:

2. Amendment:- The following existing proviso to rule as mentioned in Column No. 3 against each of the Service Rules, listed in Column No. 2 of the Schedule given below is hereby deleted, namely:

Provided that a candidate who has got the benefit of proviso inserted vide Notification No. F.7 (1) DOP/A-II/96 dated 01.04.1997 on promotion to an immediate higher post shall not be reverted and his seniority shall remain uneffected. This proviso is subject to final decision of the Hon"ble Supreme Court of India in Writ Petition (Civil) No. 234/2002 All India Equality Forum v. Union of India and Ors..

47. As per submissions of the learned Advocate General, a circular was issued by the State of Rajasthan on 10.2.1975 providing for reservation in the matter of promotion to the extent of 16% for the SCs and 12% for the STs.

48. The Hon"ble Apex Court vide judgment dated 16.11.1992 in Indra Sawhney and Ors. v. Union of India and Ors. (supra) held that Article 16(4) does not permit any provision for reservation in the matter of promotion. Para 859(7) of the judgment reads as under:

...

(7) Article 16(4) does not permit provision for reservation in the matter of promotion. This rule shall, however, have only prospective operation and shall not affect the promotions already made, whether made on regular basis or on any other basis. We direct that our decision on this question shall operate only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis. It is further directed that wherever reservations are already provided in the matter of promotion - be it Central Services or State Services, or for that matter services under any Corporation, authority or body falling under the definition of "State" in Article 12 - such reservations may continue in operation for a period of five years from this day. Within this period, it would be open to the appropriate authorities to revise, modify or reissue the relevant rules to ensure the achievement of the objective of Article 16(4). If any authority thinks that for ensuring adequate representation or backward class 01 citizens in any service, class or category, it is necessary to

provide for direct recruitment therein, it shall be open to it to do so. (Ahmadi, J. expresses no opinion on this question upholding the preliminary objection of Union of India). It would not be impermissible for the State to extend concessions and relaxations to members of reserved categories in the matter of promotion without compromising the efficiency of administration.

(emphasis supplied)

49. The above para makes it clear that earlier rules relating to promotion were continued for a period of five years and liberty was granted to the concerned/appropriate Governments to make rules in this regard. However, before expiry of five years period and to nullify the above judgment of the Hon''ble Apex Court, the Central Government brought the Constitution (Seventy-Seventh Amendment) Act, 1995 on 17.6.1995, which reads as under:

The Constitution (Seventy-Seventh Amendment) Act, 1995

Statement of Objects and Reasons.- The Scheduled Castes and the Scheduled Tribes have been enjoying the facility of reservation in promotion since 1955. The Supreme Court in its judgment dated 16th November, 1992 in the case of Indra Sawhney v. Union of India, however, observed that reservation of appointments or posts under Article 16(4) of the Constitution is confined to initial appointment and cannot extent to reservation in the matter of promotion. This ruling of the Supreme Court will adversely affect the interests of the Scheduled Castes and the Scheduled Tribes. Since the representation of the Scheduled Castes and the Scheduled Tribes in services in the States have not reached the required level, it is necessary to continue the existing dispensation of providing reservation in promotion in the case of the Scheduled Castes and the Scheduled Tribes. In view of the commitment of the Government to protect the interests of the Scheduled Castes and the Scheduled Tribes, the Government have decided to continue the existing policy of reservation in promotion for the Scheduled Castes and the Scheduled Tribes. To carry this out, it is necessary to amend Article 16 of the Constitution by inserting a new Clause (4A) in the said Article to provide for reservation in promotion for the Scheduled Castes and the Scheduled Tribes.

2. The Bill seeks to achieve the aforesaid object. An Act further to amend the Constitution of India Be it enacted by Parliament in the Forty-sixth Year of the Republic of India as follows:

1. Short title. This Act may be called the Constitution (Seventy-seventh Amendment) Act, 1995.

2. Amendment of Article 16. - In Article 16 of the Constitution, after Clause (4), the following clause shall be inserted, namely:

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

services under the State.

50. Though the enabling provision was made in the Constitution in respect of reservation in promotion by way of the Constitution (Seventy-Seventh Amendment) Act, 1995, however, the Hon"ble Apex Court, for the first time, in Virpal Singh Chauhan's case (supra), introduced the "catch-up" rule and held that if the senior general candidate is promoted then he will regain his seniority on promotion post above junior reserved promotee. The Hon"ble Apex Court held that the consequential seniority on promotion post is not covered by Article 16(4-A). Para 27 of the judgment in the case of Union of India and Ors. v. Virpal Singh Chauhan (supra) is reproduced as under:

We are of the opinion that the aforesaid circulars/letters providing for reservation in favour of Scheduled Castes/Scheduled Tribes candidates, rosters and their operation and on the subject of seniority as between general candidates and reserved category candidates, being in the nature of special rules prevail over the general instructions contained in Volume-I of the Indian Railway Establishment Manual including those contained in Paras 306, 309 and 319 et al. Accordingly, "we agree with the conclusion of the Tribunal in the order under appeal (Virpal Singh Chauhan) though we may not agree with all the reasons given by the Tribunal. In other words, we may not agree with the view expressed by the Tribunal that a harmonious reading of Clauses (1) and (4) of Article 16 should mean that a reserved category candidate promoted earlier than his senior general category candidate in the feeder category shall necessarily be junior in the promoted category to such general category candidate. No such principle may be said to be implicit in the said clauses. But inasmuch the Railway Board's circulars herein concerned do provide specifically for such a situation and since they cannot be said to be violative of the constitutional provisions, they must prevail and have to be given effect to. It is not brought to our notice that the said instructions are inconsistent in any manner with any of the statutory provisions or statutory rules relevant in this behalf.

51. The same view was further taken by the Hon"ble Apex Court in Ajit Singh Juneja-I v. State of Punjab and Ors. (supra). Para 16 of the judgment is reproduced as under:

We respectfully concur with the view in Union of India v. Virpal Singh Chauhan that seniority between the reserved category candidates and general candidates in the promoted category shall continue to be governed by their panel position i.e. with reference to their inter se seniority in the lower grade. The rule of reservation gives accelerated promotion, but it does not give the accelerated "consequential seniority". If a Scheduled Caste/Scheduled Tribe candidate is promoted earlier because of the rule of reservation/roster and his senior belonging to the general category candidate is promoted later to that higher grade the general category candidate shall regain his seniority over such earlier promoted Scheduled Caste/Tribe candidate. As already pointed out above that when a Scheduled caste/Tribe candidate is promoted earlier by applying the rule

of reservation/roster against a post reserved for such Scheduled caste/Tribe candidate, in this process he does not supersede his seniors belonging to the general category. In this process there was no occasion to examine the merit of such Scheduled Caste/Tribe candidate vis-?-vis his seniors belonging to the general category. As such it will be only rational, just and proper to hold that when the general category candidate is promoted later from the lower grade to the higher grade, he will be considered senior to a candidate belonging to the Scheduled Caste/Tribe who had been given accelerated promotion against the post reserved for him. Whenever a question arises for filling up a post reserved for Scheduled Caste/Tribe candidate in a still higher grade then such candidate belonging to Scheduled Caste/Tribe shall be promoted first but when the consideration is in respect of promotion against the general category post in a still higher grade then the general category candidate who has been promoted later shall be considered senior and his case shall be considered first for promotion applying either principle of seniority-cum-merit or merit-cum-seniority. If this rule and procedure is not applied then result will be that majority of the posts in the higher grade shall be held at one stage by persons who have not only entered in service on the basis of reservation and roster but have excluded the general category candidates from being promoted to the posts reserved for general category candidates merely on the ground of their initial accelerated promotions. This will not be consistent with the requirement or the spirit of Article 16(4) or Article 335 of the Constitution.

(emphasis supplied)

52. The Constitution Bench of the Hon"ble Apex Court in the case of *Ajit Singh Juneja II v. State of Punjab and Ors.* (supra) further approved the "catch-up" rule and followed its earlier judgments given in *Virpal Singh Chauhan* and *Ajit Singh-I's* case (supra). Paras 81 of the judgment is reproduced as under:

81. As accepted in *Virpal* (see SCC at p.702) and *Ajit Singh* (see SCC at p.729), we hold that in case any senior general candidate at Level 2 (Assistant) reaches Level 3 (Superintendent Grade II) before the reserved candidate (roster point promotee) at Level 3 goes further up to Level 4 in that case the seniority at Level 3 has to be modified by placing such a general candidate above the roster promotee, reflecting their inter se seniority at Level 2. Further promotion to Level 4 must be on the basis of such a modified seniority at Level 3, namely, that the senior general candidate of Level 2 will remain senior also at Level 3 to the reserved candidate, even if the latter had reached Level 3 earlier and 42 remained there when the senior general candidate reached that Level 3. In cases where the reserved candidate has gone upto Level 4 ignoring the seniority of the senior general candidate at Level 3, seniority at Level 4 has to be refixed (when the senior general candidate is promoted to Level 4) on the basis of when the time of reserved candidate for promotion to Level 4 would have come, if the case of the senior general candidates was considered at Level 3 in due time. To the above extent, we accept the first part of the contention of the learned Counsel

for the general candidates. Such a procedure" in our view will properly balance the rights of the reserved candidates and the fundamental rights guaranteed under Article 16(1) to the general candidates.

(emphasis supplied)

53. In the case of M.G. Badappanavar and Anr. v. State of Karnataka and Ors. (supra), the Hon''ble Apex Court held that the equality is the basic feature of the Constitution of India and any treatment of equals as unequally or unequals as equals will be violation of the basic structure of the Constitution of India. Therefore, if consequential seniority is given to the roster point promotees it will violate the equality principle which is part of the basic structure of the Constitution. Even Article 16(4-A) cannot, therefore, be of any help to the reserved candidates.

54. In the case of Jagdish Lal and Ors. v. State of Haryana and Ors. (supra), the Hon''ble Apex Court held that the SC/ST candidates will get seniority with reference to the date of their promotion. The plea of general candidates on the basis of the judgment of the Hon''ble Apex Court in the cases of Virpal Singh Chauhan (supra), Ajit Singh I(supra), was rejected. The relevant portion or Para 17 of the judgment reads as under:

...Thus, we hold that the euphoria had by the general candidates from the ratios in Virpal Chauhan and Ajit Singh cases is short lived; it does not help in so realising the correct implications arising from the aforesaid ratios. It is settled law that administrative instructions supplement the law but do not supplant the law. It fills only yawning gaps. The administrative instructions issued by the Haryana Government after Ajit Singh's case flies in the face of statutory Rule 11 of the Rules. Therefore, it crushes itself with the grinding teeth of the above statutory Rule 11 and the principles. Thus considered, we hold that the view taken by the High Court in that behalf is correct in law and is not vitiated by any infirmity in law. We further hold that the reserved candidates became senior to the general candidates in each successive cadre/grade from Assistant to Superintendent in Class III Service and 5th respondent in Class I Service. Their seniority is not and cannot have the effect of getting wiped out after the promotion of general candidates from their respective dates of promotion. The general candidates remain junior in higher echelons to the reserved candidates as was held by the High Court.

55. It is relevant to mention that the judgment in the case of Jagdish Lal v. State of Haryana (supra) was over-ruled by the Constitution Bench of the Hon''ble Apex Court in Ajit Singh II's case v. State of Punjab (supra).

56. In the case of Hanuman Singh Bhati v. State of Rajasthan and Ors. (SBCWP No. 2966/2000 decided by the learned Single Judge vide judgment dated 30.5.2001 and other connected writ petitions, the Single Bench of this Court considered the dispute regarding inter se seniority in between the general category candidates and held that merit promotees will rank senior to the

seniority promotees. The reserved category promotees have to be taken to be entitled to tentative seniority alone which would depend on promotions of other candidates senior to them at lower level. The last operative portion of the judgment reads as under:

...

The decision of the State Government to place the merit promotees below the seniority promotees is, therefore, arbitrary and violative of Articles 14 and 16 of the Constitution of India. The provisional seniority lists prepared on the basis of the aforesaid decision of the State Govt. therefore, are also arbitrary and violative of Articles 14 and 16 of the Constitution of India. The impugned decisions, circular dated 11.2.2000 and the seniority lists dated 26.2.2000 are all quashed. The State Government shall now prepare provisional seniority list in which the merit promotees shall not be placed below seniority promotees only because seniority promotees have to be placed above reserved category promotees senior to them at lower level and such reserved category promotees were promoted earlier than the merit promotees. The reserved category promotees have to be taken to be entitled to tentative seniority alone which would depend on promotions of other candidates senior to them at lower level.

(emphasis supplied)

57. The aforesaid judgment was challenged by the State of Rajasthan by way of DBSAW No. 560/2001 and other connected special appeals. The Division Bench of this Court vide judgment dated 12.9.2001 upheld the judgment of the learned Single Judge with slight modifications. Para 23 of the judgment reads as under:

For the reasons aforementioned we confirm the impugned order of the learned Single Judge with slight modification. We make it clear that no finality shall be attached to the provisional seniority list drawn in pursuance to the order of learned Single Judge. It would be open to challenge by the affected members of RAS. The objections so raised shall be reasonably considered by the three member committee headed by the Chief Secretary and thereafter final seniority list shall be published.

58. It is relevant to mention that ten special appeals were decided by the Division Bench vide judgment dated 12.9.2001, but the State of Rajasthan preferred only one SLP against the judgment in the case of Hanman Singh Bhati (DBSAW No. 560/2001) and the Civil Appeal No. 171/2002 arising out of it, is still pending before the Hon''ble Apex Court as contended by the learned Counsel for the parties. The order dated 25.2.2002 passed by the Hon''ble Apex Court in Civil Appeal No. 171/2002, State of Rajasthan v. Hanuman Singh Bhati and Ors. was referred during the course of arguments to show that only contempt proceedings were stayed in the matter and operation of the orders of Division Bench and Single Bench was not stayed. The order dated 25.2.2002 is reproduced as under:

Counter affidavit be filed within three weeks and rejoinder within three weeks there after. List after six weeks. Contempt is stayed in the meantime.

59. To nullify the aforesaid four judgments of the Hon"ble Apex Court, the Central Government has further brought "The Constitution (Eighty-Fifth Amendment) Act, 2001" on 4.1.2002 with effect from 17.6.1995 which reads as under:

The Constitution (Eighty-Fifth Amendment) Act, 2001 Statement of Objects and Reasons.-The Government servants belonging to the Scheduled Castes and the Scheduled Tribes had been enjoying the benefit of consequential seniority on their promotion on the basis of rule of reservation. The judgments of the Supreme Court in the case of Union of India v. Virpal Singh Chauhan and Ajit Singh Januja v. State of Punjab, which led to the issue of the O.M. dated 30th January, 1997, have adversely affected the interest of the Government servants belonging to the Scheduled Castes and Scheduled Tribes category in the matter of seniority on promotion to the next higher grade. This has led to considerable anxiety and representations have also been received from various quarters including Members of Parliament to protect the interest of the Government servants belonging to Scheduled Castes and Scheduled Tribes.

2. The Government has reviewed the position in the light of views received from various quarters and in order to protect the interest of the Government servants belonging to the Scheduled Castes and Scheduled Tribes, it has been decided to negate the effect of O.M. dated 30th January 1997 immediately. Mere withdrawal of the O.M. dated 30th January, 1997 will not meet the desired purpose and review or revision of seniority of the Government servants and grant of consequential benefits to such Government servants will also be necessary. This will require amendment to Article 16(4A) of the Constitution to provide for consequential seniority in the case of promotion by virtue of rule of reservation. It is also necessary to give retrospective effect to the proposed constitutional amendment to Article 16(4A) with effect from the date of coming into force of Article 16(4A) itself, that is, from the 17th day of June, 1995.

3. The Bill seeks to achieve the aforesaid objects.

Received the assent of the President on the 4th January, 2002 An Act further to amend the Constitution of India.

Be it enacted by Parliament in the Fifty-second Year of the Republic of India as follows:

1. Short title and commencement.- (1) This Act may be called the Constitution (Eighty-fifth Amendment) Act, 2001.

(2) It shall be deemed to have come into force on the 17th day of June 1995.

2. Amendment of Article 16. -In Article 16 of the Constitution, in Clause (4A), for the words "in matters of promotion to any class", the words "in matters of

promotion, with consequential seniority, to any class" shall be substituted.

60. The Constitutional validity of the Constitution (Seventy-Seventh Amendment) Act, 1995 and the Constitution (Eighty-Fifth Amendment) Act, 2001 was challenged before the Hon'ble Apex Court in *M. Nagaraj v. Union of India* (supra) and Or various writ petitions including Writ Petition (Civil) No. 234/2002, *All India Equality Forum v. Union of India* and Ors. wherein the State of Rajasthan was one of the respondents. The Constitution Bench upheld the constitutional validity of the Constitution (Seventy-Seventh Amendment) Act, 1995 and the Constitution (Eighty-Fifth Amendment) Act, 2001 vide judgment dated 19.10.2006. Para 124 of the judgment is reproduced as under:

Subject to the above, we uphold the constitutional validity of the % Constitution (Seventy-Seventh Amendment) Act, 1995, the Constitution (Eighty-First Amendment) Act, 2000, the Constitution (Eighty-Second Amendment) Act, 2000 and the Constitution (Eighty-Fifth Amendment) Act, 2001.

(emphasis supplied)

61. It is relevant to mention that while upholding the constitutional validity of the Constitution (Seventy-Seventh Amendment) Act, 1995 and the Constitution (Eighty-Fifth Amendment) Act, 2001, the Hon'ble Apex Court specifically directed that the State is not bound to make reservation for the SCs and the STs in the matters of promotion. However, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Article 335. Para 123 of *M. Nagaraj*'s case (supra) is reproduced as under:

However, in this case, as stated above, the main issue concerns the "extent of reservation". In this regard the State concerned will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. As stated above, the impugned provision is an enabling provision. The State is not bound to make reservation for SCs/STs in matter of promotions. However, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance of Article 335. It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling-limit of 50% or obliterate the creamy layer or extend the reservation indefinitely.

(emphasis supplied)

62. In the case of *B.K. Sharma and Anr. v. State of Rajasthan and Ors.* 1998 (2) WLC (Raj.) 583, the writ petitioners in writ petition No. 2545/96 and other connected writ petitions, were members of the Rajasthan Administrative Service

and they had challenged the vires of Rule 8 and 33 of the RAS Rules, 1954," being violative of Articles 14 and 16 of the Constitution of India. The members of the Rajasthan Police Service also preferred writ petitions, which were connected in B.K. Sharma's case (supra). This Court allowed the writ petitions and quashed the impugned orders by which the benefit of accelerated promotions was extended to the private respondents belong to the SC/ST/OBC. It was also directed that the petitioners whose seniority has been adversely affected, consequent upon passing of the impugned orders which are subject matter of challenge in the writ petitions, shall be entitled to regain their original seniority and the respondents are directed to restore the said seniority to the petitioners with effect from the due date i.e. the date when their immediate juniors(private respondents) were promoted with all consequential benefits. The writ petitions were filed by senior general candidates for regaining their seniority in promotion post on the basis of judgment of the Hon'ble Apex Court in the case of Union of India v. Virpal Singh Ch.mhan (supra) and Ajit Singh I (supra) and during the pendency of the writ petition, a proviso in this regard was also added below other provisos to Rule 33 of the RAS Rules alongwith Various Service Rules vide notification dated 1.4.1997 which was quoted in para 7 of the judgment. Therefore, the notification dated 1.4.1997 was also taken into consideration by the Division Bench. Para 47 of B.K. Sharma's case (supra) is reproduced as under:

As a result of above discussions, we are of the view that the petitioners deserve to succeed and accordingly the aforesaid writ petitions are allowed with the following directions:

- (a) The impugned orders dated 19.1.1996/2.2.1996 passed by the respondents in DBCWP No. 2812/96 by which the benefit of accelerated promotions has been extended to the private respondents belonging to the SC/ST/BC, are quashed and set-aside;
- (b) Seniority list dated 1.7.1987 circulated vide Annexure-3 dated 30.6.1990 in DBCWP No. 3086/1996 as well as the seniority list dated 30.6.1990 and the orders dated 19.1.1996/2.2.1996 passed by the respondents in DBCWP No. 6208/1996, seniority list dated 23.4.1997 and the order dated 5.4.1997 in DBCWP No. 4918/1997 in R.P.S. matters are quashed and set-aside.
- (c) Combined seniority list published by the respondents in DBCWP Nos. 2545/1996, 2675/1996, 4726/1997 (646/97) and 2963/1996 dated 22.4.1995 (in R.A.S. matters) pertaining to grant of selection grade in Rajasthan Administrative Services of SC/ST/BC candidates are quashed and set-aside.
- (d) Rules 8, 9, 28A and 33 of the Rules of 1954 are held intra-vires of the Constitution of India and are not open to challenge;
- (e) Benefit of reservation to the SC/ST/BC candidates in the matter of promotions to higher posts from State Service i.e. R.P.S. and R.A.S. to I.P.S. and I.A.S. respectively should not exceed the prescribed percentage quota i.e. 28%

since otherwise it would adversely affect the service career of the general category candidates and the benefit of this prescribed percentage in the matter of reservation should only be conferred at the time of initial entry in service and should not extend in the matter of promotions.

(f) All promotions made from SC/ST/BC category candidates to R.P.S and R.A.S and from said cadres to I.P.S and I.A.S., respectively in excess of the prescribed percentage quota i.e. 28% as fixed by the State Government for reserved category candidates by which the benefit of accelerated promotions have been conferred on the private respondents are quashed and set-aside.

(g) the petitioners whose seniority has been adversely affected consequent upon the passing of the impugned orders which are subject matter of challenge in the aforesaid writ petitions shall be entitled to regain their original seniority and the respondents are directed to restore the said seniority to the petitioners with effect from due date, i.e., the date when their immediate juniors (private respondents) Were promoted with all consequential benefits; and

(h) Review D.P.C shall be convened by the respondents with a period of 8 weeks from the date of receipt of certified copy of this order which shall draw a fresh seniority list out of the combined category of general as well as SC/ST/BC candidates and promotions to next higher post to R.P.S and R.A.S and to I.P.S and I.A.S cadres, respectively shall be made having due regard to the original panel position in strict order of seniority of the petitioners as well as the private respondents in accordance with the rules. The revised seniority list shall be published by the respondents positively within a period of 60 days thereafter.

(emphasis supplied)

63. The above judgment of the Division Bench was challenged by the reserved candidates by way of SLP before the Hon"ble Apex Court styled as "Ram Prasad v. D.K. Vijay" which was decided by the Hon"ble Apex Court on 16.9.1999 [reported in Shri Ram Prasad Etc. Etc. Vs. Shri D.K. Vijay and Others Etc. Etc.,], and the appeals filed by the reserved candidates were dismissed subject to some concession as mentioned in the judgment. The Hon"ble Apex Court held that the result is that officers from the reserved category who were promoted at the roster points before 1.4.97 shall not be reverted but their seniority in the promoted category shall be governed by the principles enumerated under Points 1 to 3 in the cases of Ajit Singh No. 1 and Ajit Singh No. II. The principle of regaining of seniority by the general candidates was upheld. Para 21 and 22 of the judgment in Ram Prasad"s case are reproduced as under:

21. In view of the peculiar facts of these cases, we are inclined to accede to this contention. The result is that officers from the reserved category who were promoted at the roster points before 1.4.97 shall not be reverted but their seniority in the promoted category shall be governed by the principles enumerated under Points 1 to 3 in Ajit Singh I and Ajit Singh II. The prospectivity of Sabharwal as explained under Point 4 in Ajit Singh II is not

disturbed. So far as prospectivity of Ajit Singh I is concerned, the principles in Ajit Singh II in Point 4 will apply but subject to postponement of 1.3.96 to 1.4.97.

22. In other words, we agree that there is no need to revert those reserved category officers, if they were promoted even beyond 1.3.96 but before 1.4.97. To give an example - in the case of two rosters from Level 1 to Level 2 and Level 2 to Level 3, if the reserved candidate was promoted before 1.4.97 to Level 4, such reserved candidate need not be reverted. If by the date of promotion of the reserved candidate before 1.4.97 from Level 3, the senior general candidate at Level 2 has reached Level 3, he has to be considered as senior at Level 3 to the reserved candidate because the latter was still at Level 3 on that date. But if such a general candidate's seniority was ignored and the reserved candidate was treated as senior at level 3 and promoted to Level 4, this has to be rectified after 1.3.96 by following Ajit Singh I as explained in Ajit Singh II. In other words, if a reserved candidate was promoted to Level 4 before 1.4.97, without considering the case of the senior general candidate who had reached Level 3 before such promotion, such reserved candidate need not be reverted but the said promotion to Level 4 is to be reviewed and seniority at Level 3 and Level 4 (as and when the general candidate is promoted to Level 4) is to be refixed.

(emphasis supplied)

64. In the case of *State of Bihar v. Bal Mukund Sah* (supra), the Hon'ble Apex Court also considered the merit and efficiency in administration of justice in the matter relating to reservation in judiciary, and held as under:

58. ...It is now time for us to take stock of the situation. In the light of the Constitutional scheme guaranteeing independence of Judiciary and separation of powers between the executive and the judiciary, the Constitution-makers have taken care to see by enacting relevant provisions for the recruitment of eligible persons to discharge judicial functions from grass-root level of the Judiciary up to the apex level of the District Judiciary, that rules made by the Governor in consultation with the High Court in case of recruitment at grass-root level and the recommendation of the High Court for appointments at the apex level of the District Judiciary under Article 233, remain the sole repository of power to effect such recruitments and appointments. It is easy to visualise that if suitable and competent candidates are not recruited at both these levels, the out turn of the judicial product would not be of that high level which is expected of judicial officers so as to meet the expectations of suffering humanity representing class of litigants who come for redressed of their legal grievances at the hands of competent, impartial and objective Judiciary. The Presiding Officer of the Court if not being fully equipped with legal grounding may not be able to deliver goods which the litigating public expects him to deliver. Thus, to ensure the recruitment of the best available talent both at grass-root level as well as at apex level of District Judiciary, Articles 233 and 234 have permitted full interaction between the High Court which is the expert body controlling the District Judiciary and the Governor who is the appointing authority and who almost carries out the

ministerial function of appointing recommended candidates both by the Public Service Commission and the High Court at the grass-root level and also has to appoint only those candidates who are recommended by the High Court for appointment at the apex level of District Judiciary. Any independent outside inroad on this exercise by legislative enactment by the State Legislature which would not require consultation with an expert agency like the High Court would necessarily fall foul on the touchstone of the Constitutional scheme envisaging insulation of judicial appointments from interference by outside agencies, bypassing the High Court, whether being the Governor or for that matter Council of Ministers advising him or the Legislature. For judicial appointments the real and efficacious advice contemplated to be given to the Governor while framing rules under Article 234 or for making appointments on the recommendations of the High Court under Article 233 emanates only from the High Court which forms the bedrock and very soul of these exercises. It is axiomatic that the High Court, which is the real expert body in the field in which vests the control over Subordinate Judiciary, has a pivotal role to play in the recruitments of judicial officers whose working has to be thereafter controlled by it under Article 235 once they join the Judicial Service after undergoing filtering process at the relevant entry points. It is easy to visualise that when control over District Judiciary under Article 235 is solely vested in the High Court, then the High Court must have a say as to what type of material should be made available to it both at the grass-root level of District Judiciary as well as apex level thereof so as to effectively ensure the dispensation of justice through such agencies with ultimate object of securing efficient administration of justice for the suffering litigating humanity. Under these circumstances, it is impossible to countenance bypassing of the High Court either at the level of appointment at grass-root level or at the apex level of the District Judiciary. The rules framed by the Governor as per Article 234 after following due procedure and the appointments to be made by in under Article 233 by way of direct recruitment to the District Judiciary solely on the basis of the recommendation of the High Court clearly project a complete and insulated scheme of recruitment to the Subordinate Judiciary. This completely insulated scheme as envisaged by the founders of the Constitution cannot be tinkered with by any outside agency de hors the permissible exercise envisaged by the twin Articles 233 and 234. It is a misnomer to suggest that any imposition of scheme of reservation for filling up vacancies in already existing, created and sanctioned posts in any cadre of district judges or Subordinate Judiciary will have nothing to do with the concept of recruitment and appointment for filling up such vacancies. Any scheme of reservation foisted on the High Court without consultation with it directly results in truncating the High Courts power of playing a vital role in the recruitment of eligible candidates to fill up these vacancies and hence such appointments on reserved posts would remain totally ultra vires the scheme of the Constitution enacted for that purpose by the founding fathers. It is also to be noted that the concept of social justice underlying the scheme of reservation under Article 16(4) read with Article 335 cannot be said to be one which the High Court would necessarily ignore being a

responsible Constitutional functionary. In fact what is required is that the right decision should be arrived at in the right manner. In the facts of the present case, it is an admitted position that the High Court of Patna has already consented to have 14% reservation for SC candidates and 10% reservation for ST candidates in recruitment of Munsiffs and Magistrates at grassroot level of Subordinate Judiciary and rules framed under Article 234 by the Governor of Bihar in consultation with the High Court have permitted such reservation. Thus, it is not as if the purpose of reservation cannot be achieved without reference to the High Court. But as the saying goes you can take a horse to the water but cannot make it drink by force. Thus what is expected of the executive and the Governor is to have an effective dialogue with the High Court so that an appropriate reservation scheme can be adopted by way of rules under Article 234 and even by prescribing quota of reservations of posts for direct recruits to District Judiciary under Article 233 if found necessary and feasible. That is the Constitutional scheme which is required to be followed both by the High Court and by the executive represented through the Governor. But this thrust of the Constitutional scheme cannot be given a go-bye nor can the entire apple-cart be turned to pasture by the legislature standing aloof in exercising its supposed independent Legislative power dehors the High Courts consultation.

(emphasis supplied)

65. In the case of A.P. Public Service Commission Vs. Baloji Badhavath and Others, , the Hon"ble Supreme Court held that shortlisting of the candidates for main examination based on performance in preliminary examination is permissible if tested on the touchstone of Article 335, the State is bound to devise some procedure to shortlist candidates considering its limited resources, to restrict lakhs of candidates from appearing at examination and interview. It was further held that category-wise reservation would be detrimental to the interest of meritorious candidates belonging to the reserved categories, and would give rise to complexity since reservation to women and handicapped persons is on horizontal basis. The Hon"ble Apex Court held that proviso to Article 335 is applicable only for the purpose of promotion. Lowering of marks for the candidates belonging to the reserved category is not a constitutional mandate at the threshold. The minimum marks prescribed at the initial stage for all categories including the reserved category was upheld. Paras 18 and 29 to 32 are reproduced as under:

18. The Constitution of India lays down provisions for both protective discrimination as also affirmative action. Reservation of posts for the disadvantaged class of people as also seats in educational institutions are provided for by reason of Articles 15 and 16 of the Constitution of India. Reservation made for the members of the Scheduled Castes, Scheduled Tribes and Other Backward Classes would, however, be subject to Article 335 of the Constitution of India. Concededly, Constitution of India can claim reservation as a matter of right. The provisions contained in Articles 15 and 16 of the Constitution

of India are merely enabling provisions. No writ of or in the nature of mandamus, thus could be issued.

29. Indisputably, the preliminary examination is not a part of the main examination. The merit of the candidate is not judged thereby. Only an eligibility criterion is fixed. The papers for holding the examination comprise of General Studies and Mental Ability. Such a test must be held to be necessary for the purpose of judging the basic eligibility of the candidates to hold the tests. How and in what manner the State as also the Commission would comply with the constitutional requirements of Article 335 of the Constitution of India should ordinarily not be allowed to be questioned.

30. The proviso appended to Article 335 of the Constitution, to which our attention has been drawn by Mr. Rao, cannot be said to have any application whatsoever in this case. Lowering of marks for the candidates belonging to the reserved candidates (sic categories) is not a constitutional mandate at the threshold. It is permissible only for the purpose of promotion. Those who possess the basic eligibility would be entitled to appear at the main examination. While doing so, in regard to General English whereas the minimum qualifying marks are 40% for OCs, it would be 35% for BCs. and 30% for SC/STs and physically handicapped persons. However, those marks were not to be counted for ranking.

31. We have noticed hereinbefore, that candidates belonging to the reserved categories as specified in the notification are not required to pay any fee. Their age is relaxed upto five years. It is, therefore, not correct to contend that what is given by one hand is sought to be taken by another. They can, thus, appear in the examination for a number of times. Indisputably, the right conferred upon the respondents writ-petitioners in terms of Rules 22 and 22-A of the Andhra Pradesh State and Subordinate Service Rules, 1996 was to be protected. The extent of relaxation has been recognized. By reason of such a provision, the right to be considered has not been taken away.

32. Judging of merit may be at several tiers. It may undergo several filtrations. Ultimately, the constitutional scheme is to have the candidates who would be able to serve the society and discharge the functions attached to the office. Vacancies are not filled up by way of charity. Emphasis has all along been made, times without number, to select candidates and/or students based upon their merit in each category. The disadvantaged group or the socially backward people may not be able to compete with the open category people but that would not mean that they would not be able to pass the basic minimum criteria laid down therefor.

(emphasis supplied)

66. In the case of Wazir Chand and Another Vs. State of Haryana, the Hon'ble Apex Court considered the retrospectively of criterion for determination of seniority and held that rules will have prospective effect only. Rules cannot impair the existing rights of officials who were appointed long prior to coming

into force of the Rules. That being their right, the Rules cannot take it away to their prejudice. Paras No. 4 to 6 are reproduced as under:

4. We have perused the judgment of the Division Bench and also considered the submissions of the parties. The view taken by the Division Bench appears to be erroneous. The Rules, no doubt provide that all persons substantially appointed to a grade shall rank senior to those holding officiating appointments in the grade. But the Rules have no retrospective effect. It could not impair the existing rights of officials who were appointed long prior to the Rules came into force. The office memorandums to which learned single Judge has referred in detail and which we have extracted above clearly laid down that length of service should be the guiding principle of arranging the inter-se seniority of officials. The appellants being governed by those memorandums had the right to have their seniority determined accordingly before the Rules came into force. That being their right, the Rules cannot take it away to their prejudice. The Division Bench was, therefore, clearly in error in directing that the seniority shall follow their respective confirmations.

5. In construing similar office memorandums in a different context, this is what this Court has observed in *Union of India v. M. Ravi Varma* SCC p. 386, para 14, "As the said Office Memorandum has, except in certain cases with which we are not concerned, applied the rule of seniority contained in the Annexure thereto only to employees appointed after the date of that Memorandum, there is no escape from the conclusion that the seniority of Ganapathi Kini and Ravi Varma, respondents, who were appointed prior to December 22, 1959 would have to be determined on the basis of their length of service in accordance with Office Memorandum dated June 22, 1949 and not on the basis of the date of their confirmation."

6. These considerations apply equally to the present case as well. The general rule is if seniority is to be regulated in a particular manner in a given period, it shall be given effect to, and shall not be varied to disadvantage retrospectively. The view taken by the Division Bench, which is in substance contrary to this principle is not sound and cannot be supported.

(emphasis supplied)

67. The Hon''ble Apex court in the case of AIR 1997 3127 (SC) , in para 198, held that though the legislature may be empowered to enact a law and give it retrospective effect but such law cannot take away any accrued or vested rights of the employees. The Hon''ble Apex Court, however, considered the other judgments and held that mere chances of promotion are not conditions of services and the fact that there was reduction in the chances of promotion did not tantamount to a change in the conditions of service. A right to be considered for promotion is a term of service, but mere chances of promotion are not. A mere right to take advantage of the provisions of an Act is not an accrued right. The Hon''ble Apex Court, therefore, held that there is no bar for the legislature to

amend the law in consequence of which the inter se position in rank of Executive Engineer might get altered.

68. In the case of *B.S. Vadera v. Union of India and Ors.* (supra), the Hon''ble Apex Court held that the appropriate legislation will have full effect both prospectively and retrospectively. The rules can be framed with prospective effect. Para 24 of the judgment is reproduced as under:

It is also significant to note that the proviso to Article 309, clearly lays down that "any rules so made shall have effect, subject to the provisions of any such Act". The clear and unambiguous expressions, used in the Constitution, must be given their full and unrestricted meaning, unless hedged-in, by any limitations, the rules, which have to be "subject to the provisions of the Constitution, shall have effect, "subject to the provisions of any such Act. That is, if the appropriate Legislature has passed an Act, under Article 309, the rules, framed. under the Proviso will have effect-subject to that Act; but, in the absence of any Act, of the appropriate Legislature, on the matter, "in our opinion, the rules, made by the President, or by such person as he may direct, are to have full effect, both prospectively and retrospectively. Apart from the limitations" pointed out above there is none other, imposed by the proviso to Article 309, regarding the ambit of the operation of such rules. In other words, the rules, unless they can be impeached on grounds such as breach of Part 111, or any other Constitutional provision, must be enforced, if made by the appropriate authority.

69. In the case of *Raj Kumar v. Union of India and Ors.* (supra), the Hon''ble Apex Court held that rule can be amended retrospectively. The relevant portion of Para 2 of the judgment reads as under:

...There is no doubt that this rule is a valid rule because it is now well established that rules made under the proviso to Article 309 of the Constitution are legislative in character and therefore can be given effect to retrospectively.

70. In the case of *Ashoka Kumar Thakur v. Union of India and Ors.* (supra), the constitution Bench of the Hon''ble Apex Court held that Article 15(5) of the Constitution of India is valid to the extent that it permits reservation for socially and educationally backward classes in State or State-aided educational institutions subject to the exclusion in the "creamy layer" from the OBCs. The majority of Judges i.e. four out of five held that the question of validity of the inclusion of private unaided institutions within the purview of Article 15(5) left open for a later occasion. However, Hon''ble Mr. Justice Dalveer Bhandari held that the said inclusion of private unaided institutions is in violation of the basic structure of the Constitution and hence invalid.

71. Now we proceed to decide both the questions mentioned above which were mainly argued at length by both the parties. Question No. 1. : Whether Notification dated 25.4.2008 which came into force with effect from 28.12.2002, is violative of Articles 14 and 16 of the Constitution, as it takes away the vested and accrued rights retrospectively?

72. Mr. Sanjeev Prakash Sharma, the learned Counsel for petitioners, Bajrang Lal Sharma & others argued that on the basis of judgment in the cases of Virpal Singh Chauhan and Ajit Singh I decided by the Hon'ble Apex Court, the officers belonging to the General/OBC category of Rajasthan Administrative Service filed writ petition Nos. 2545/1996 and other three connected writ petitions i.e. 2675/1996, 4726/96(646/97) & 2963/1996 in the year 1996 challenging the vires of Rules 8 and 33 of the RAS Rules consequent upon which the benefit of accelerated promotions to next promotional posts were extended to the candidates belonging to the reserved quota i.e. the SCs and STs and who were also granted the benefit of accelerated seniority. The petitioners in those writ petitions sought directions from this Court for restoration of their seniority above the roster promotees. During the pendency of writ petition, the respondent-Government amended the Various Service Rules including the RAS Rules vide Notification dated 1.4.1997 giving the benefit of seniority to senior general/Other Backward Classes candidates who were promoted later to the said immediate higher post/grade above the candidates belonging to the SCs and the STs who were earlier promoted. The members of the Rajasthan police Service also filed similar writ petitions and all were tagged and decided by the common order dated 2.4.1998 by the Division Bench of this Court (B.K. Sharma and Anr. v. State of Rajasthan and Ors. (supra)). This Court allowed the writ petition and one of the directions was that senior general/OBC candidates will regain their seniority on immediate higher post. The above judgment was challenged by the reserved candidates before the Hon'ble Apex Court by way of Civil Appeal No. 2866/1998 (Ram Prasad v. D.K. Vijay (supra) and other connected appeals, which were decided on 16.9.1999. The Hon'ble Apex Court held that inter se seniority must be determined on the basis of decision in the cases of Ajit Singh I and Ajit Singh II on points 1 to 3 stated therein, meaning thereby, the Notification dated 1.4.1997 was upheld and the benefit of regaining seniority on promotional post was maintained. Therefore, the matter attained finality. So far as members of the Rajasthan Police Service are concerned, the judgments of the Division Bench, in the case of B.K. Sharma (supra) and the Hon'ble Apex Court in the case of Ram Prasad v. D.K. Vijay (supra) were acted upon. The State Government published a revised seniority list of Rajasthan Police Service officers on the basis of regaining principle as on 1.4.1997 and thereafter, the review DPC was convened for considering cases of promotions from Rajasthan Police Service to the Indian Police Service, and on the basis of revised seniority list, senior general/OBC candidates were promoted in I.P.S. including Mr. B.K. Sharma and reserved promotees like Mr.Chunni Lal etc., were reverted. In: the Rajasthan Administrative Service also, the State Government complied with the directions given in the judgments in the cases of B.K. Sharma (supra) and Ram Prasad v. D.K. Vijay (supra) referred above and issued a provisional seniority list on that basis on 26.6.2000 and the senior general/OBC candidates were shown above the reserved promotees on immediate higher post. Since the selection scale in Rajasthan Administrative Service is granted 50% by merit and 50% by seniority cum merit, seniority becomes important and the principle to frame the seniority,

had already been finalised by the Hon''ble Apex Court. Therefore, the rights of seniority and promotion which had vested in the petitioners, as per the judgment of the Hon''ble Apex Court, itself is being taken back by the impugned notification.

73. Mr. S.C. Gupta, the learned Counsel appearing on behalf of petitioner Gyan Prakash Gupta contended that on the basis of seniority list, may be provisional, issued on the basis of Notification dated 1.4.1997 upheld by the Hon''ble Apex Court, 15 persons including the petitioner Gyan Prakash Gupta and Shiv Narayan were promoted in Super Time Scale under Rule 31 of the RAS Rules against the year 2001-02 for a period of one year vide the order dated 29.11.2005. The respondent-State extended the order of promotion in Super Time Scale of 50 persons vide the order dated 26.12.2006. The earlier orders were further extended vide the order dated 9.7.2008. He, therefore, contended that even the petitioners and other similarly situated persons were promoted in Super Time Scale. Therefore, the right which stood vested is being taken back by the State Government by issuing the impugned Notification dated 25.4.2008, and therefore, the same is violative of Article 14 and 16 of the Constitution of India.

74. The submission of Mr. G.S. Bapna, the learned Advocate General is that no member of Rajasthan Administrative Service was promoted during the period from 1.4.1997 to 28.12.2002, and therefore, no right is accrued to them, So far as change, in position in the seniority list on the basis of impugned notification is concerned, the same cannot be said to have taken away the accrued or vested right as higher position in seniority list is not a vested right.

75. Mr. Ashbk Gaur, the learned Counsel appearing on behalf of respondent No. 3, a reserved candidate, contended that although a provisional seniority list dated 26.6.2000 was issued in pursuance of the order of the Hon''ble Apex Court in the case of Ram Prasad v. D.K. Vijay but there after final seniority list was never issued and the said provisional seniority list dated 26.6.2000 has been quashed by the Single Bench of this Court vide order dated 30.5.2001 in the case of Hanuman Singh Bhati CWP No. 2966/2000 and the said judgment was upheld by the Division Bench also vide its judgment dated 12.9.2001. The SLP was preferred against the judgment of the Division Bench and the matter is now pending before the Hon''ble Apex Court in CA No. 171/2002 wherein the Hon''ble Apex Court has stayed the contempt proceedings vide the order dated 25.2.2002. In these circumstances, it cannot be said that the rights of the petitioners have been finalized or they have acquired any right.

76. We have considered the submissions of the learned Counsel for the parties.

77. Article 14 guarantees equality before law and equal protection of laws. Article 15 protects citizens against discrimination. The word "employment" being wider, there is no dispute that it takes within its fold, the aspect of promotions to posts above the stage of level of recruitment.

78. Article 16(1) provides to every employee otherwise eligible for promotion or

who comes within the zone of consideration, a fundamental right to be "considered" for promotion. Equal opportunity here means the right to be "considered" for promotion. If a person satisfies the eligibility and zone criteria but is not considered for promotion, then there will be a clear infringement of his fundamental right to be "considered" for promotion, which is his personal right. Promotion being a condition of service and having regard to the requirements thereof it was expected that the employer-State should have followed the said principle.

79. Where promotional avenues are available, seniority becomes closely interlinked with promotion provided such a promotion is made after complying with the principle of equal opportunity stated in Article 16(1). For example, if the promotion is by rule of "seniority-cum-suitability", the eligible seniors at the basic level as per seniority fixed at that level and who are within the zone of consideration must be first considered for promotion and be promoted if found suitable. In the promoted category they would have to count their seniority from the date of such promotion because they get promotion through a process of equal opportunity. Similarly, if the promotion from the basic level is by selection or merit or any rule involving consideration of merit, the senior who is eligible at the basic level has to be considered and if found meritorious in comparison with others, he will have to be promoted first. If he is not found so meritorious, the next in order of seniority is to be considered and if found eligible and more meritorious than the first person in the seniority list, he should be promoted. In either case, the person who is first promoted will normally count his seniority from the date of such promotion. That is how right to be considered for promotion and the "seniority" attached to such promotion become important facets of the fundamental right guaranteed in Article 16(1).

80. The principles of seniority-cum-merit and merit-cum-seniority are conceptually different. For the former, greater emphasis is laid in seniority, though it is not the determinative factor, while in the later, merit is the determinative factor. Providing a quota is not new in the service jurisprudence and whenever the feeder category itself consists of different category of persons and when they are considered for any promotion, the employer fixes a quota for each category so that the promotional cadre would be equi-balanced and at the same time, category of persons in the feeder category would get the opportunity of being considered for promotion. This provision actually effectuates the constitutional mandate engrafted in Article 16(1), as it would offer equality of opportunity in the matters relating to employment and it would not be the monopoly of a specified category of persons in the feeder category to get promotions.

81. Where the seniority list prepared by the Government ignored the date of selection of the employees and there was also violation of the quota rule, it was not only erroneous but also violative of Articles 14 and 16 of the Constitution and was liable to be quashed.

82. If the rules were to be interpreted in a manner conferring seniority to the roster point promotees who have not gone through the normal channel where basic seniority or selection process was involved, then the rules would be ultra vires of Articles 14 and 16 of the Constitution of India. Article 16(4-A) could not also help. Such seniority, if given, would amount to treating unequals equally, rather, more than equals. Equality is a basic feature of the Constitution of India and any treatment of equals unequally or unequals as equals will be violative of basic structure of the Constitution.

83. In the case of *State of Gujarat and Another Vs. Raman Lal Keshav Lal Soni and Others*, , the Constitution Bench of the Hon''ble Apex court considered the retrospective amendment in the facts and circumstances of that case and held that the legislature is undoubtedly competent to legislate with retrospective effect to take away or impair any vested right acquired under existing laws but since the laws are made under a written Constitution, and have to conform to the do''s and don''ts of the Constitution, neither prospective nor retrospective laws can be made so as to contravene Fundamental Rights. The law must satisfy the requirements of the Constitution today taking in to account the accrued acquired right of the parties today. The law cannot say, twenty years as the parties had no rights, therefore, the requirements of the Constitution will be satisfied if the law is dated back by twenty years. We are concerned with today''s rights and not yesterday''s. A legislature cannot legislate today with defence to a situation that obtained twenty years ago and ignore the March of events and the constitutional rights accrued in the course of the twenty years. That would be most arbitrary, unreasonable and a negation of history.

84. In the case of *Ex-Capt. K.C. Arora and Another Vs. State of Haryana and Others*, , three-Judge Bench of the Hon''ble Apex Court held that the amendment of law taking away vested rights with retrospective effect is invalid, if it is violative of the present acquired or accrued fundamental rights of the affected person. The Government of Punjab prior to the formation of Haryana made statutory rules under Article 309 of the Constitution which are called "The Punjab National Emergency (Concessions) Rules, 1965". Rule 5 was relating to seniority, promotion, increment, pension and leave of Government employees. It says that the period spent on military service by a Government employee shall count for seniority, promotion, increment and pension in the service of post held by him immediately before his joining the military service. According to these rules and the previous assurances given by the Government the petitioners were to be given seniority by counting period of military service for the purpose of determining seniority, increments and pension etc. Immediately on appointment of the petitioners as temporary Assistant Engineers they became entitled to get their seniority fixed giving them the benefit of their military service but the gradation list prepared, however, did not include the military service of the petitioners for the purpose of fixation of their seniority. The State of Haryana just to deprive the petitioners, and others similarly situated, of military service amended the rules with retrospective effect from 1st November, 1966 vide

Haryana Government Gazette Notification No. G.S.R.77/Const/Article 309/Amend/(1)/76 dated 22nd March, 1976. The definition of "military service" was amended. The Hon''ble Apex Court considered and held that this notification dated 22.3.1976 has been issued with retrospective effect from November 1, 1966 and restricted the benefits of military service upto January 10, 1968, the date on which, the first emergency was lifted with the result that the vested rights which accrued to the petitioners in 1969, 1970 and 1971 have been taken away. The Hon''ble Apex Court considered the right of seniority, promotion, increment, pension and leave of Government employees as vested and accrued right. The judgment of the Constitution Bench in the case of State of Gujarat v. Raman Lal Keshav Lal Soni (Supra) was also considered in Paras 22 and 23 and the Hon''ble Apex. Court held that the law appears to be well settled and the Haryana Government cannot take away the accrued rights of the petitioners and the appellants by making amendment of the rules with retrospective effect and declared the Notification dated 22.3.1976 to be ultra vires of the Constitution, insofar as they affect prejudicially persons who had acquired rights stated therein.

85. In the case of Commissioner of Agricultural Income Tax, Trivandrum Vs. Kerala Estate Mooriad Chalapuram, , the Hon''ble Apex Court considered the Punjab Service of Engineers, Class I, PWD (Irrigation Branch) Rules, 1964. The Hon''ble Apex Court observed that the unamended Rule 6(b) conferred a vested right on persons like the petitioners which could not be taken away by retrospective amendment of Rule 6(b). Any rule which affects the right of a person to be considered for promotion is a condition of service although mere chance of promotion may not be. The power to frame rules to regulate the conditions of service under the proviso to Article 309 carries with it the power to amend or alter the rules with a retrospective effect. An authority competent to lay down qualifications for promotion, is also competent to change the qualifications. The rules defining qualifications and suitability for promotion are conditions of service and they can be changed retrospectively. This rule is, however, subject to a well recognized principle that the benefits acquired under the existing rules cannot be taken away by an amendment with retrospective effect, that is to say, there is no power to make such a rule under the proviso to Article 309 which affects or impairs vested rights.

86. In the case of P.D. Aggarwal and Others Vs. State of U.P. and Others, , the Hon''ble Apex Court considered the rights of Assistant Engineers appointed on temporary basis under the unamended rules and entitled them to the benefit of the entire period of their service from the date of such appointment for the purposes of inter se seniority and promotion along with the appointees to the permanent posts. Therefore, on the basis of Rule 23 as it was before the amendment made in 1971, held that the Assistant Engineers are entitled to have their seniority reckoned from the date of their being members of the service. The Hon''ble Apex Court held that the amendments of 1969 and 1971 were not only disadvantageous to the future recruits against temporary vacancies but they were made applicable retrospectively from March 1, 1962 even to existing

officers recruited against temporary vacancies through the Public Service Commission. It is well settled that any rule which affects the rights of a person to be considered for promotion is a condition of service. Though the Government has power under proviso to Article 309 to make such rules and to amend them giving retrospective effect, but if the rules purport to take away the vested rights and are arbitrary and not reasonable then such retrospective amendments are subject to judicial scrutiny if they have infringed Articles 14 and 16. For promotion from Assistant Engineer to the post of Executive Engineer seniority-cum-merit is the criterion in accordance with the service rules in question.

87. In the case of Union of India (UOI) and Others Vs. Tushar Ranjan Mohanty and Others, , the Hon"ble Apex Court considered that the respondents in that appeal who were members of Indian Statistical Service. The respondent No. 1 belonged to the general category whereas respondents No. 2 to 9 belonged to the Scheduled Castes. Respondents 2 to 9 were promoted from Grade IV to Grade III against vacancies for SCs & STs under the instructions of the Government of India from time to time. Respondent No. 1 being senior to respondents 2 to 9 in the Grade, successfully impugned his supersession before the Central Administrative Tribunal on the ground that reservation in respect of appointments by promotion, was not permitted under the Rules. The Tribunal, without disturbing the promotion of respondents 2 to 9, granted to respondent No. 1 necessary relief in respect of promotion and seniority over respondents No. 2 to 9. Subsequently, Rule 13 was amended with effect from 27.11.1972 by the notification dated 20.2.1989 and the reservation for Scheduled Castes and Scheduled Tribes was provided even in the appointments made by way of promotion. On the basis of this amendment the appellant Union of India sought quashment of the Tribunal's decision in respect of the promotion of respondent No. 1. Respondent No. 1 in turn challenged the validity of the retrospective amendment of the Rules. The Hon"ble Apex Court while dismissing the appeal of the Union of India, held, "The legislatures and the competent authority under Article 309 of the Constitution of India have the power to make laws with retrospective effect. This power, however, cannot be used to justify the arbitrary, illegal or unconstitutional acts of the Executive. When a person is deprived of an accrued right vested in him under a statute or under the Constitution and he successfully challenges the same in the court of law, the legislature cannot render the said right and the relief obtained nugatory by enacting retrospective legislation.

88. In the case of K. Ravindranath Pai and another Vs. State of Karnataka and another, , considered that both the appellants were belonging to the common cadre of Junior Engineers upto 8.1.1974. That cadre got bifurcated into the cadre of Junior Engineers (Division I) for graduates and Junior Engineers (Division II) for nongraduates with effect from 9.1.1974. Therefore, on 9.1.1974 respondents were required to fit the appellants in the proper cadre. Obviously and admittedly on 9.1.1974 the appellants were having graduation degrees. In fact both of them had got their degrees since long from 1967 and 1970 respectively. Consequently,

when the question of allotting the appellants to the proper bifurcated cadre of Junior Engineers with effect from 9.1.1974 came up, the respondents were bound to treat the appellants as belonging to the bifurcated cadre of Junior Engineers (Division-I) for graduates with effect from 9.1.1974. They cannot be treated as belonging to the Junior Engineers (Division-I) from 1967 and 1970 retrospectively as such a separate cadre of Junior Engineers (Division-I) did not exist during that period. The Hon'ble Apex Court held that in view of the settled legal position, therefore, it must be held that the Act insofar as it sought to introduce by Section 2(1)(i), retrospective bifurcation of the common cadre of Junior Engineers into two cadres of Junior Engineers (Division I) for graduates and Junior Engineers (Division-II) for non-graduates from 1.11.1956 is inoperative at law. It must be held, on a parity reasoning which appealed to the High Court when it held in writ petition No. 3182 of 1973 and connected matters, that Section 2(1)(ii) could not operate retrospectively to destroy common pay scales available to both the Junior Engineers graduates and non-graduates. Section 2(1)(i) also could not operate retrospectively to bifurcate the said common cadre with effect from 1.11.1956. It will also have only prospective effect. Consequently, the bifurcation of pay scales as well as of the common cadre of Junior Engineers would legally become effective at the highest from 9.1.1974 when the Government order of even date introducing such a scheme saw the light of the day.

89. In the case of K. Narayanan and others Vs. State of Karnataka and others, , the Hon'ble Apex Court considered the retrospective operation of the rules and held that the rules operate prospectively. Retrospectivity is exception. Even where the statute permits framing of rule with retrospective effect the exercise of power must not operate discriminately or in violation of any constitutional right so as to affect vested right. The rule-making authority should not be permitted normally to act in the past. The impugned rule made in 1985 permitting appointment by transfer and making it operative from 1976 subject to availability of vacancy in effect results in appointing a Junior Engineer in 1986 with effect from 1976. Retrospectivity of the rules is a camouflage for appointment of Junior Engineers from a back date. The rule operates viciously against all those Assistant Engineers who were appointed between 1976 to 1975.

90. The Hon'ble Apex Court in the case of R.S. Ajara and Others Vs. State of Gujarat and Others, held that a benefit that has accrued under the existing rules cannot be taken away by an amendment with retrospective effect. No statutory rule or administrative order can whittle down or destroy any right which has become crystallised. No rule can be framed under the proviso to Article 309 of the Constitution which affects or impairs the vested rights. Para 16 of the judgment is reproduced as under:

The resolution dated 31-1-1992 has been assailed by the promotee officers on the ground that it is retrospective in operation and affects their rights. The law in this field is well settled by the decisions of this Court. A benefit that has accrued

under the existing rules cannot be taken away by an amendment with retrospective effect and no statutory rule or administrative order can whittle down or destroy any right which has become crystallized and no rule can be framed under the proviso to Article 309 of the Constitution which affects or impairs the vested rights. Can it be said that the resolution dated 31-1-1992 makes any change in the existing provision governing the seniority so as to take away or deprive the respondents of a right which has accrued to them or which has crystallized? As noticed earlier, the 1981 Rules do not contain any principle governing the seniority of Assistant Conservators of Forests appointed under the said Rules. Shri P.P. Rao has invited our attention to the Handbook for Personnel Officers issued by the General Administrative Department of the Government Gujarat. In para 1 of Chapter V, dealing with Seniority, it is stated:

In the case of direct recruits appointed on probation, the seniority would be determined ordinarily with reference to the date of their appointment on probation while in the case of the promotees, seniority would be determined with, reference to the date of their promotion to long-term vacancies

(emphasis supplied)

91. The Constitution Bench of the Hon'ble Apex Court again in case of *Chairman, Railway Board and Ors. v. C.R. (sic) and Ors. (supra)* considered its earlier judgment in the case of *State of Gujarat v. Raman Lal Keshav Lal Soni* referred above and held that expressions "vested rights" or "accrued rights" have been used while striking down the impugned provisions which had been given retrospective operation so as to have an adverse effect in the matter of promotion, seniority, substantive appointment etc., of the employees, taking away the benefit already available to the employee under the existing rule is arbitrary, discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the Constitution. Para 20, 22, 23, 24 and 34 in the case of *Chairman, Railway Board* are reproduced as under:

20. It can, therefore, be said that a rule which operates in future so as to govern future rights of those already in service cannot be assailed on the ground of retroactivity as being violative of Articles 14 and 16 of the Constitution, but a rule which seeks to reverse from an anterior date a benefit which has been granted or availed of, e.g., promotion or pay scale, can be assailed as being violative of Articles 14 and 16 of the Constitution to the extent it operates retrospectively.

22. In *State of Gujarat v. Raman Lal Keshav Lal Soni* decided by a Constitution Bench of the Court, the question was whether the status of ex-ministerial employees who had been allocated to the Panchayat service as Secretaries, Officers and Servants of Gram and Nagar Panchayats under the Gujarat Panchayat Act, 1961 as government servants could be extinguished by making retrospective amendment of the said Act in 1978. Striking down the said amendment on the ground that it offended Articles 311 and 14 of the

Constitution, this Court said:

The legislature is undoubtedly competent to legislate with retrospective effect to take away or impair any vested right acquired under existing laws but since the laws are made under a written Constitution, and have to conform to the do's and don'ts of the Constitution neither prospective nor retrospective laws can be made so as to contravene Fundamental Rights. The law must satisfy the requirements of the Constitution today taking into account the accrued or acquired rights of the parties today. The law cannot say, twenty years ago the parties had no rights, therefore, the requirements of the Constitution will be satisfied if the law is dated back by twenty years. We are concerned with today's rights and not yesterday's. The legislature cannot legislate today with reference to a situation that obtained twenty years ago and ignore the march of events and the constitutional rights accrued in the course of the twenty years. That would be most arbitrary, unreasonable and a negation of history.

23. The said decision in *Raman Lal Keshav Lal Soni and Ors.* (supra) of the Constitution Bench of this Court has been followed by various Division Benches of this Court.

24. In many of these decisions the expressions "vested rights" or "accrued rights" have been used while striking down the impugned provisions which had been given retrospective operation so as to have an adverse effect in the matter of promotion, seniority, substantive appointment, etc. of the employees. The said expressions have been used in the context of a right flowing under the relevant rule which was sought to be altered with effect from an anterior date and thereby taking away the benefits available under the rule in force at that time. It has been held that such an amendment having retrospective operation which has the effect of taking away a benefit already available to the employee under the existing rule is arbitrary, discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the Constitution. We are unable to hold that these decisions are not in consonance with the decisions in *Roshan Lal Tandon*, *B.S. Yadav* and *Raman Lal Keshav Lal Soni*.

(emphasis supplied)

34. ...The Full Bench of the Tribunal has, in our opinion, rightly taken the view that the amendments that were made in Rule 2544 by the impugned notifications dated 5.12.1988, to the extent the said amendments have been given retrospective effect so as to reduce the maximum limit from 75% to 45% in respect of the period from 1.1.1973 to 31.3.1979 and reduce it to 55% in respect of the period from 1.4.1979, are unreasonable and arbitrary and are violative of the rights guaranteed under Articles 14 and 16 of the Constitution.

92. So far as facts of the present case are concerned, it is clear that *B.K. Sharma's* and other connected writ petitions were filed before the Division Bench of this Court challenging the accelerated promotions as well as consequential seniority to the members of the reserved category on the basis of ratio laid down

by the Hon''ble Apex Court in Virpal Singh Chouhan's case (supra) and Ajit Singh-I's case (supra), and during the pendency of the writ petition, the respondent-State itself amended the rule by adding proviso below the existing provisos in the Various Service Rules including the RAS Rules-on 1.4.1997 giving the benefit of regaining of seniority to senior general/OBC candidates above the reserved promotees on the next higher/promotion post. The writ petitions filed by the members of RAS as well as the RPS were clubbed. The Division Bench of this Court allowed the writ petition vide the judgment dated 2.4.1998. The said judgment was upheld by the Hon''ble Apex Court with slight modification in Ram Prasad's case (supra) on 16.9.1999. The Hon''ble Apex Court held that inter se seniority vis-?-vis roster point promotees and general category promotees will be determined on the basis of judgment in the cases of Ajit Singh I and Ajit Singh II (supra) on points 1 to 3 stated therein. Therefore, the notification dated 1.4.1997 whereby the proviso was added below the existing proviso in the Various Service Rules was upheld by the Hon''ble Apex Court also. Therefore the accrued rights stood vested in the petitioners and other similarly situated persons. It is relevant to mention that so far as the members of the Rajasthan Police Service are concerned, the order of the Division Bench of this Court as well as the Hon''ble Supreme Court referred above were implemented and the persons who were given accelerated seniority were reverted and whom were deprived of the same benefit were promoted. In the RAS also, the judgments in the cases of B.K. Sharma (supra) and Ram Prasad v. D.K. Vijay (supra) were complied with and on that basis, a provisional seniority list was issued on 26.6.2000, wherein the name of petitioner No. 1 Bajrang Lal Sharma as on 1.4.1997 was mentioned at Serial No. 129, whereas the names of respondents No. 3 and 4 namely, Suraj Bhan Meena and Sriram Choradia were mentioned at Serial No. 142 and 147 respectively. The said right of seniority in the petitioners, above the respondents (reserved promotees) stood vested as per final adjudication of their rights by the Hon''ble Supreme Court in Ram Prasad v. D.K. Vijay decided on 16.9.1999. However, there was some dispute amongst General category candidates that merit promotees should be treated as senior and they should be placed above the seniority promotees. Therefore, the said seniority list was challenged by the merit promotees amongst the general promotess and the Single Bench of this Court vide its judgment dated 30.5.2001 decided the controversy and held that merit promotees will rank senior and will be placed above the general seniority promotees. The Single Bench judgment was upheld by the Division Bench also vide judgment dated 12.9.2001. It was also decided that roster point promotees will rank junior from both the general category promotees. It is relevant to mention that the roster point promotee did not challenge the order of the Division Bench in this regard and it is only the State of Rajasthan who has challenged the order of the Division Bench before the Hon''ble Apex Court against general category promotees on the ground that seniority promotees should be placed above the merit promotees. The Civil Appeal No. 171/2002 State of Rajasthan v. Hanuman Singh Bhati and Ors. in this regard is pending before the Hon''ble Apex Court as stated by the learned Counsel for both

the parties. However, the Hon''ble Apex Court has not stayed the operation of the order of the Single Bench or the Division Bench.

93. The accrued rights stood vested in the petitioners under the Notification dated 1.4.1997, by judgment of Division Bench dated 2.4.1998 in B.K. Sharma v. State of Rajasthan and the judgment of the Hon''ble Apex Court dated 16.9.1999 in Ram Prasad v. D.K. Vijay, have been taken away by the State Government retrospectively vide Notification dated 25.4.2008 and has made the above judgment of the Division Bench and Hon''ble Supreme Court redundant, which is not permissible. The Hon''ble Supreme Court in the case of Union of India (UOI) and Others Vs. Tushar Ranjan Mohanty and Others, held, When a person is deprived of an accrued right vested in him under a statute or under the Constitution and he successfully challenges the same in the Court of law, the legislature cannot render the said right and the relief obtained nugatory by enacting retrospective legislation.

94. The Constitution Bench of the Hon''ble Supreme Court in the case of Chairman, Railway Board v. C.R. Rangadhamaiah (supra) held''s rule which seeks to reverse from an anterior date, a benefit which has been granted or availed of, e.g., promotion or pay scale, can be assailed as being violative, of Articles 14 and 16 of the Constitution to the extent it operates retrospectively. The Hon''ble Constitution Bench also considered its number of earlier judgments and observed that "In many of these decisions the expressions "vested rights" or "accrued rights" have been used while striking down the impugned provisions which had been given retrospective operation so as to have an adverse effect in the matter of promotion, seniority, substantive appointment, etc. of the employees. The said expressions have been used in the context of a right flowing under the relevant rule which was sought to be altered with effect from an anterior date and thereby taking away the benefits available under the rule in force at that time. It has been held that such an amendment having retrospective operation which has the effect of taking away a benefit already available to the employee under the existing rule is arbitrary, discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the Constitution....

95. The above discussion makes it clear that retrospective effect of Notification dated 25.4.2008 has taken away the accrued and vested rights of the petitioners, therefore, it is arbitrary, discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the Constitution. Therefore, we declare the Notification dated 25.4.2008 as ultra vires to the Constitution and the same is hereby quashed.

Question No. 2:

Whether the Notification dated 28.12.2002 is violative of Articles 14 and 16. of the Constitution?

96. Vide Notification dated 28.12.2002, the State Government made amendment in the Various Service Rules as specified in the Schedule, whereby existing

proviso inserted vide Notification dated 1.4.1997, has been deleted with effect from 1.4.1997 and by the same notification dated 28.12.2002, a new proviso was added that a candidate who has got the benefit of proviso inserted vide Notification 01.04.1997 on promotion to an immediate higher post shall not be reverted and his seniority shall remain unaffected. 97. The Rajasthan Administrative Service Rules were framed in the year 1954. Rule 8 of the said Rules provide for reservation of vacancies for the SC/ST. Rule 33 relates to seniority. It says that seniority of persons appointed to the post encadred in the service shall be determined from the date of appointment on the post after regular selection in accordance with the provisions of these rules. Appointment on ad hoc or urgent temporary basis shall not be deemed to be appointment after regular selection. Sub-rule (vi) of Rule 33 says that the persons selected and appointed as a result of selection, which is not subject to review and revision, shall rank senior to the persons who are selected and appointed as a result of subsequent selection.

97. In the case of Indra Sawhney (supra), the Hon"ble Apex Court held that Article 16(4) does not permit reservation in the matter of promotion. The Hon"ble Apex Court made it clear that on this question, their decision shall operate only prospective and shall not affect the promotions already made, whether made" on temporary or officiating or regular/permanent basis. It was further directed that wherever reseervations are already provided in the matter of promotion - be it Central Services or State Services, or for that matter services under any Corporation, authority or body falling under the definition of State in Article 12 such reservations may continue in operation for a period of five years from this day. Within this period it would be open to the appropriate authorities to revise, modify or reissue the relevant rules to ensure the achievement of the objective of Article 16(4). If any authority thinks that for ensuring adequate representation of "backward class of citizens" in any service, class or category it is necessary to provide for direct recruitment therein,-it shall be open to it to do so. It was also made clear that it would be impermissible for the State to extend the concessions and relaxations to members of reserved categories in the matter of promotion without compromising the efficiency of the administration.

98. In view of the commitment of government to protect the interest of SC/ST category, the Central Government decided to continue the existing policy of reservation in the matter of promotion for the SC/ST. To carry out this, Article 16 of the Constitution of India was amended with effect from 17.6.1995 by inserting the new Clause (4-A) in the said Article to provide for reservation in promotion of SC/ST. The new Clause (4-A) reads as under:

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

99. After the above amendment made in the Constitution, the Hon''ble Apex Court in the case of Union of India v. Virpal Singh Chauhan (supra) held that a roster point promotees getting benefit of accelerated promotion would not get consequential seniority. The same view was further accepted by the Hon''ble Apex Court in the case of Ajit Singh-I(supra).

100. In view of the above decision of the Hon''ble Apex court, the State of Rajasthan, in exercise of powers conferred by the proviso to Article 309 of the Constitution of India, made an amendment in various service rules of Rajasthan on 1.4.1997 by adding new proviso after existing last proviso of rule, which reads as under:

That if a candidate belonging to the Scheduled Caste/Scheduled Tribe is promoted to an immediate higher post/grade against a reserved vacancy earlier than his senior general/OBC candidate who is promoted later to the said immediate higher post/grade, the general/OBC candidate will regain his seniority over such earlier promoted candidates of the Scheduled Caste/Scheduled Tribe in the immediate higher post/grade.

101. The State Government by way of above-referred amendment on 1.4.1997 protected the seniority of senior general/OBC candidates that they will regain their seniority over reserved promotees of the SC/ST promoted earlier in the immediate higher post/grade.

102. In view of the above two decisions of the Hon''ble Apex Court in the cases of Virpal Singh Chauhan (supra) and Ajit Singh-I (supra), Clause (4-A) of Article 16 was again amended and benefit of "consequential seniority" was given in addition to accelerated promotion to the roster point promotees by the Constitution (Eighty-Fifth Amendment) Act, 2001 on 4.1.2002 with effect from 17.6.1995. The number of writ petitions were preferred in the Hon''ble Apex court challenging the constitutional validity of the the Constitution (Seventy-Seventh Amendment) Act, 1995 and the Constitution (Eighty-Fifth Amendment) Act, 2001 including the writ petition (civil) No. 61/2002 M. Nagaraj and writ petition (civil) No. 234/2002 All India Equality Forum, wherein the State of Rajasthan was also impleaded as party. As mentioned above, while deciding the question No. 1, the interim orders were passed in both the writ petitions.

103. In view of the Constitution (Eighty-Fifth Amendment) Act, 2001 and the interim orders passed in the writ petitions in the Hon''ble Apex Court, the respondent-State of Rajasthan further amended the Rajasthan Various Service Rules on 28.12.2002 deleting the "proviso" which was added on 1.4.1997 with effect from 1.4.1997 and added new proviso with effect from the date of issuance of the notification, which is reproduced as under:

Provided that a candidate who has got the benefit of proviso inserted vide Notification No. F.7 (1) DOP/A-II/96 dated 01.04.1997 on promotion to an immediate higher post shall not be reverted and his seniority shall remain unaffected. This proviso is subject to final decision of the Hon''ble Supreme Court

of India in Writ Petition (Civil) No. 234/2002 AH India Equality Forum v. Union of India and Ors..

104. The constitutional validity of the Constitution (Seventy-Seventh Amendment) Act, 1995 and the Constitution (Eighty-Fifth Amendment) Act, 2001 was upheld by the Hon''ble Apex Court in M. Nagaraj's case (supra) on 19.10.2006. However, individual cases were not decided and were left open to be decided by the appropriate Benches in accordance with the law laid down in the said order. The first writ petition (civil) No. 234/2002 All India Equality Forum v. Union of India and Ors. wherein the State of Rajasthan is respondent No. 4, is still pending in the Hon''ble Apex Court. The State of Rajasthan further amended the Various Service Rules vide impugned Notification dated 25.4.2008 and with effect from 28.12.2002 and the proviso which was added/inserted vide Notification dated 28.12.2002 was deleted. In pursuance of this amended provision, the respondent State issued revised seniority list of RAS offices and all the reserved promotees were shown senior and placed above the senior general candidates who got the benefit of earlier amended rule by way of proviso with effect from 1.4.1997 based on two judgments of the Hon''ble Apex Court in the cases of Virpal Singh Chauhan (supra) and Ajit Singh-I (supra). The said Notifications dated 28.12.2002 and 25.4.2008 as well as seniority list issued in pursuance thereof are under challenge in this writ petition preferred on behalf of the senior general candidates/members of the Rajasthan Administrative Service.

105. The Hon''ble Apex Court, while upholding the constitutional validity of the Constitution (Seventy-Seventh Amendment) Act, 1995 and the Constitution (Eighty-Fifth Amendment) Act, 2001 in M. Nagaraj's case (supra), in para 79 onwards, specifically laid down that the concepts of "catch up" rule and "consequential seniority" are judicially evolved concepts to control the extent of reservation. The source of these concepts is service jurisprudence. These concepts cannot be elevated to the status of an axiom like secularism, constitutional sovereignty, etc. It cannot be said that by insertion of the concept of "consequential seniority" the structure of Article 16(1) stands destroyed or abrogated. It cannot be said that the "equality code" under Articles 14, 15 and 16 of the Constitution is violated by deletion of "catch-up" rule. These concepts are based on practices. However, such practices cannot be elevated to the status of a constitutional principle so as to be beyond the amending power of the Parliament. In para 80, the Hon''ble Apex Court referred its earlier judgment in the case of M.G. Badappanavar (supra) and observed that the service rule concerned did not contemplate computation of seniority in respect of roster promotions. The Hon''ble Apex Court also referred the earlier judgments in the cases of Virpal Singh Chauhan (supra) and Ajit Singh-I(supra) and held that roster promotions were meant only for the limited purpose of due representation of backward classes at various levels of service and, therefore, such roster promotion did not confer consequential seniority to the roster point promotees. In the case of Ajit Singh II (supra) the circular which gave seniority to the roster-point promotees was held to be violative of Articles 14 and 16. It was further

held in M.G. Badappanavar that equality is the basic feature of the Constitution and any treatment of equals as unequals or any treatment of unequals as equals violated the basic structure of the Constitution, For this proposition, reliance was placed on the judgment in the case of Indra Sawhney (supra) while holding that if creamy layer among Backward Classes were given some benefits as Backward Classes, it will amount to equals being treated unequals. Further in Para 81 of M. Nagaraj case (supra), the Hon''ble Apex Court observed that in the cases of M.G. Badappanavar (supra) and Ajit Singh I(supra), the question of validity of Constitutional Amendments was not involved, and these cases were essentially concerned with the "weightage". Whether weightage of earlier accelerated promotion with consequential seniority should be given or not to be given are matters which would fall within the discretion of the appropriate Government, keeping in mind the backwardness, inadequacy of representation in public employment and overall efficiency of services.

106. Article 16(4) provides for reservation for Backward Classes in cases of inadequate representation in public employment. Article 16(4) is enacted as a remedy for the past historical discriminations against a social class. The object in enacting the enabling provisions like Articles 16(4), 16(4-A) and 16(4-B) is that the State is empowered to identify and recognise the compelling interests. If the State has quantifiable data to show backwardness and inadequacy then the State can make reservations in promotions keeping in mind maintenance of efficiency which is held to be a constitutional limitation on the discretion of the State in making reservation as indicated by Article 335. The concept of efficiency, backwardness, inadequacy of representation are required to be identified and measured. That exercise depends on availability of data. That exercise depends on numerous factors. It is for this reason that 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. Therefore, there is a basic difference between "equality in law" and "equality in fact". However, when the State fails to identify and implement the controlling factors then excessiveness comes in, which is to be decided on the facts of each case. Efficiency in administration is held to be a constitutional limitation on the discretion vested in the State to provide for reservation in public employment. In Para 108 of M. Nagaraj case, the Hon''ble Apex Court specifically opined that even after insertion of proviso in Article 335, the limitation of overall efficiency is not obliterated. Reason is that "efficiency" is a variable factor. It is for the State concerned to decide in a given case, whether the overall efficiency of the system is affected.

107. In Indra Sawhney's case, the Hon''ble Apex Court considered the merit and efficiency in administration with reference to Articles 15 and 16 and it was observed that the relevance and significance of merit at the stage of initial recruitment cannot be ignored. It cannot also be ignored that the very idea of reservation implies selection of a less meritorious person. At the same time, we

recognise that this much cost has to be paid, if the constitutional promise of social justice is to be redeemed. So far as Articles 16 and 335 are concerned, relevant paras No. 836, 837 and 838 are reproduced as under:

836. We do not think it necessary to express ourselves at any length on the correctness or otherwise of the opposing points of view referred to above. (It is, however, necessary to point out that the mandate - if it can be called that - of Article 335 is to take the claims of members of SC/ST in consideration, consistent with the maintenance of efficiency of administration. It would be a misreading of the article to say that the mandate is maintenance of efficiency of administration. Maybe, it is wrong to treat merit as synonymous with efficiency in administration and that merit is but a component of the efficiency of an administrator. Even so, the relevance and significance of merit at the stage of initial recruitment cannot be ignored. It cannot also be ignored that the very idea of reservation implies selection of a less meritorious person. At the same time, we recognise that this much cost has to be paid, if the constitutional promise of social justice is to be redeemed. We also firmly believe that given an opportunity, members of these classes are bound to overcome their initial disadvantages and would compete with - and may, in some cases, excel - members of open competition. It is undeniable that nature has endowed merit upon members of backward classes as much as it has endowed upon members of other classes and that what is required is an opportunity to prove it. It may not, therefore, be said that reservations are anti-meritarian. Merit there is even among the reserved candidates and the small difference that may be allowed at the stage of initial recruitment is bound to disappear in course of time. These members too will compete with and improve their efficiency along with others.

837. Having said this, we must append a note of clarification. In some cases arising under Article 15, this Court has upheld the removal of minimum qualifying marks, in the case of Scheduled Caste/Scheduled Tribe candidates, in the matter of admission to medical courses. For example, in *State of M.P. v. Nivedita Jain*, admission to medical course was regulated by an entrance test (called Pre-Medical Test). For general candidates, the minimum qualifying marks were 50% in the aggregate and 33% in each subject. For Scheduled Caste/Scheduled Tribe candidates, however, it was 40% and 30% respectively. On finding that 104 Scheduled Caste/Scheduled Tribe candidates equal to the number of the seats reserved for them did not qualify on the above standard, the Government did away with the said minimum standard together. The Government's action was challenged in this Court but was upheld. Since it was a case under Article 15, Article 335 had no relevance and was not applied. But in the case of Article 16, Article 335 would be relevant and any order on the lines of the order of the Government of Madhya Pradesh (in *Nivedita Jain*) would not be permissible, being inconsistent with the efficiency of administration. To wit, in the matter of appointment of Medical Officers, the Government or the Public Service Commission cannot say that there shall be no minimum qualifying marks for Scheduled Caste/Scheduled Tribe candidates, while prescribing a minimum for

others. It may be permissible for the Government to prescribe a reasonably lower standard for Scheduled Castes/Scheduled Tribes/Backward Classes - consistent with the requirements of efficiency of administration - it would not be permissible not to prescribe any such minimum standard at all. While prescribing the lower minimum standard for reserved category, the nature of duties attached to the post and the interest of the general public should also be kept in mind.

838. While on Article 335, we are of the opinion that there are certain services and positions where either on account of the nature of duties attached to them or the level (in the hierarchy) at which they obtain, merit as explained hereinabove, alone counts. In such situations, it may not be advisable to provide for reservations. For example, technical posts in research development organizations, departments, institutions, in specialties and super-specialties in medicine, engineering and other courses in physical sciences and mathematics, in defence services and in the establishments connected therewith. Similarly, in the case of posts at the higher echelon e.g., Professors (in Education), Pilots in Indian Airlines and Air India, Scientists and Technicians in nuclear and space application, provision for reservation would not be advisable.

108. In *H.P. Samanaya Varg Karamchari Kalayan Mahasangh v. State of H.P. and Ors.* CWPT No. 2628/2008 decided by the Division Bench of the Himachal Pradesh High Court on 18.9.2009, the State of Himachal Pradesh issued instructions dated 7.9.2007 which makes provision for reservation in the matter of promotions with consequential seniority for all classes of post in the service under the State in favour of the SC/ST. The State instructions were challenged by Himachal Pradesh Samanaya Varg Karamchari Kalayan Mahasangh. The Division Bench considered the judgment of the Hon'ble Apex Court in the cases of *Indra Sawhney* (supra), *R.K. Sabharwal* (supra) and *M. Nagaraj* (supra), and after quoting the relevant paras of *M. Nagaraj*'s case, held that the State has not carried out any exercise before issuing the instructions to collect the quantifiable data on the lines indicated in *M. Nagaraj*'s case to show backwardness, inadequacy of representation and overall efficiency of State administration, and therefore, allowed the writ petition and quashed the instructions. The last operative portion of the judgment reads as under:

...In the present case, admittedly, the State before issuing the instructions has not carried out any such exercise to collect such data. The reason given by the State is that in the State of Himachal Pradesh there was already a provision for reservation in promotion prior to the judgment in *Indra Sawhney*'s case and thus collection of data as mandated in *M. Nagaraj*'s case is not required. This submission is totally without any basis. In Himachal Pradesh reservation was provided in promotion prior to the judgment in *Indra Sawhney*'s case. After *Indra Sawhney*'s case such reservation could not have been permitted beyond the period of 5 years. To get over this judgment the constitutional amendments were enacted. The Apex Court in no uncertain terms while upholding the constitutional amendments held that the collection of quantifiable data to

establish backwardness and inadequacy of representation keeping in view the efficiency of administration of the State is necessary before making reservations. This requirement never existed prior to the judgment. According to the State it had after due consideration decided to make provision for reservations in promotion much earlier. "Due consideration" is totally different from collecting quantifiable data. This exercise has to be conducted and no reservation in promotion can be made without conducting such an exercise. Therefore, the State cannot be permitted to make reservations till such exercise is carried out and clear-cut quantifiable data is collected on the lines indicated in M. Nagaraj's case. We may also point out that other than making vague reference to "due consideration" having been done, till date the State has not produced before us any clear-cut quantifiable data which could establish the need for reservation.

Merely because the amended provision of the Constitution enable the State to make reservation is no ground not to collect data. Therefore, the instructions have to be struck down as being violative of the law laid down in M. Nagaraj's case by the Apex court.

No doubt under the provisions of Article 16(4B) the State is entitled to grant consequential seniority on promotion to the members belonging to the scheduled castes and scheduled tribes but there must be data available with the State Government to show that the scheduled castes and scheduled tribes are inadequately represented in the services or in the cadre to which promotions have to be made. Therefore, also these instructions are illegal and liable to be set aside.

It has also been contended on behalf of the petitioners that the observations of the Apex Court in M. Nagaraj's case in para 121 introduce the concept of creamy layer even with regard to scheduled castes and scheduled tribes. This argument cannot be accepted. The observations made in para 121 are general in nature. It would be pertinent to mention that in Indra Sawhney's case it was clearly stated that the concept of creamy layer was only applicable to OBCs. In M. Nagaraj's case the Apex Court has only stated that the concept of creamy layer should be kept in mind while making reservations. It has nowhere specifically held that the concept of creamy layer is applicable to SCs and STs also. The reference made to the concept of creamy layer in para 121, appears to be a general observation with regard to the concept of reservation in respect of all classes including OBCs and not in respect of scheduled castes and scheduled tribes only.

In view of the above discussion, we allow the writ petition and hold that until the State collects data and material establishing the need for reservation by collecting quantifiable data to show backwardness, inadequacy of representation and keeping in mind the overall efficiency of State administration, the State is not entitled to make reservation in promotion for the scheduled castes and scheduled tribes. The impugned instructions are accordingly quashed.

Since we have quashed the impugned instructions on these grounds we have not

gone into the other arguments raised with regard to the challenge to different portions of the instructions.

109. In the case of Anil Chandra and Others Vs. Radha Krishna Gaur and Others, , the Government of Uttar Pradesh issued notification on 14.9.2007 by which the U.P. Government Servants Seniority (Third Amendment) Rules, 2007 were issued. Rule 8-A of the said Rules was relating to entitlement of consequential seniority to a person belonging to Scheduled Castes or Scheduled Tribes. The said Rules were issued after upholding the constitutional validity of the Constitution (Eighty-Fifth Amendment) Act, 2001 by the Hon''ble Apex Court in M. Nagaraj's case (supra). The validity of the aforesaid Rule 8-A was challenged by the engineers of the Irrigation Department by way of writ petition before the High Court of Allahabad, Lucknow Bench, Lucknow and some other persons who were working on the post of Superintending Engineer in U.P. Jal Nigam. The High Court in the writ petition filed by the Engineers of the Irrigation Department passed an interim order by which the seniority of the petitioners in that writ petition and other promoted officers, which was in existence prior to the enforcement of the aforesaid Rules of 2007, shall not be disturbed in pursuance of the said Rules and no reversion shall be effected. Similarly, in another writ petition, the Division Bench by an interim order directed that the seniority of the respondents which was in existence prior to the enforcement of the aforesaid Rules of 2007 shall not be disturbed in pursuance of the Rules. The said interim orders were challenged before the Hon''ble Apex Court. The Hon''ble Apex Court considered its earlier judgment in M. Nagaraj's case (supra) wherein Constitution Bench held that the provisions contained in Article 16(4-A) of the Constitution of India is the only enabling provision and the State is not bound to make reservation for SCs/STs in the matter of promotion. However, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Article 335 of the Constitution of India. The Hon''ble Apex Court observed that in the present case, neither any effort has been made to identify the class or classes of posts for which reservation is to be provided in promotion nor any exercise has been done to quantify the extent of reservation. The Hon''ble Apex Court, therefore, dismissed the appeals and upheld the interim order of the Division Bench of the High Court of, Allahabad. Para 17 and 20 of the judgment are reproduced as under:

17. In the present case and in the facts and circumstances stated herein earlier, we are of the view that it was the constitutional obligation of the State, at the time of providing reservation in the matter of promotion to identify the class or classes of posts in the service for which reservation is required, however, neither any effort has been made to identify the class or classes of posts for which reservation is to be provided in promotion nor any exercise has been done to quantify the extent of reservation. Adequate reservation does not mean proportional representation. Rule 8(A) has been inserted mechanically without

taking into consideration the perquisites for making such a provision as required under Article 16(4-A) of the Constitution of India. The ceiling limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which, the structure of equality of opportunity in Article 16 would collapse. However, in this case, as stated, the main issue concerns the "extent of reservation" and in this regard, the State should have shown the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation.

20. In the light of the reasons above-mentioned, we are of the view that the High Court was fully justified in granting the present interim order and there is no infirmity in the same. Since the interim order passed by the High Court, which has not been interfered with by us in this judgment, we make it clear that the grant of interim order and any observation made by the High Court while granting interim order and any observations made by us in this order shall not influence the High Court to decide the writ petition on merits and the High Court shall not be influenced by any of the observations made by us in this order.

110. The exercise by the State as per M. Nagaraj's case in respect of three compelling reasons by collecting quantifiable datas showing backwardness of the class and inadequacy of representation of that class in public employment and compliance with regard to Article 335 of the Constitution before making any rule providing reservation in promotion with consequential seniority for SCs and STs candidates is necessary, otherwise as held by the Hon'ble Apex Court in Ajit Singh Juneja-I's case, "the result will be that majority of the posts in the higher grade shall be held at one stage by persons who have not only entered in service on the basis of reservation and roster but have excluded the general category candidates from being promoted to the posts reserved for general category candidates merely on the ground of their initial accelerated promotions and this will not be consistent with the requirement of the spirit of Article 16(4) or Article 335 of the Constitution."

111. The above discussion makes it clear that Clause (4A) of Article 16 was only an enabling provision and as held by the Hon'ble Apex Court in M.Nagaraj's case (supra), that "the State is not bound to make reservation for the SCs and the STs in the matters of promotion. However, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Article 335". Admittedly, the said exercise has not been done by the State Government either before amending the Various Service Rules including the RAS Rules vide Notification dated 28.12.2002 or before issuing Notification dated 25.4.2008.

112. The learned Advocate General, in this regard, conceded while arguing the application under Article 226(3) of the Constitution in SBCWP No. 8104/2008,

before the learned Single Judge. The said admission of the learned Advocate General finds place in the impugned order dated 9.7.2009 passed by the learned Single Judge. The learned Advocate General fairly and frankly admitted that the required exercise as per M. Nagaraj's case (supra) was not done by the State before issuing Notifications dated 25.4.2008 or 28.12.2002. The State Government could not have amended the Various Service Rules on 28.12.2002 only on the basis of the Constitution (Eighty-Fifth Amendment) Act on 4.1.2002, as the same was only an enabling provision, and in case the State Government wanted to give effect to the Constitution (Eighty-Fifth Amendment) Act, then the three exercises, as mentioned in M. Nagaraj's case (supra), was necessary, which were admittedly not carried out before issuing the impugned notification. Therefore, the impugned Notification dated 28.12.2002 is violative of Articles 14, 16 and 16(4A) of the Constitution, and the same is liable to be declared ultra vires to the Constitution.

113. Apart from the above, it is also to be noted that the amendment in the Various Service Rules vide Notification dated 1.4.1997 was upheld by the Division Bench of this Court in B.K. Sharma's case (supra) and also by the Hon'ble Apex Court in the case of Ram Prasad v. D.K. Vijay (supra). Vide the aforesaid two judgments, the right of seniority and promotion had vested in the persons belonging to general/OBC categories. Therefore, to nullify the judgment of B.K. Sharma's case and the Hon'ble Apex Court in the case of Ram Prasad v. D.K. Vijay (supra), and to deprive the petitioners from their accrued and vested right under statute and above judgments, the Various Service Rules including the RAS Rules, could not have been amended vide Notification dated 28.12.2002 with effect from 1.4.1997, as held by the Hon'ble Supreme Court in Union of India (UOI) and Others Vs. Tushar Ranjan Mohanty and Others, and Chairman, Railway Board and others Vs. C.R. Rangadhamaiah and others, .

114. In view of above discussion, the notification dated 28.12.2002 is liable to be quashed, and the same is hereby quashed and set aside.

115. In view of our findings on both the questions, the writ petitions No. 8104/2008, 6241/2008 and 7775/2009 are allowed and Notifications dated 28.12.2002 and 25.4.2008 are declared ultra vires to the provisions of Articles 14 and 16 of the Constitution, and the same are hereby quashed and set aside. All consequential orders or actions taken by respondent-State including seniority list of Super Time Scale as well as Selection Scale of the Rajasthan Administrative Service officers, on the basis of above notifications are also quashed and set aside.

116. Special Appeal (Writ) Nos. 618/2009, 3/2010, 611/2009 and 610/2009 are directed against interim orders passed in aforesaid writ petitions. Since the writ petitions have been disposed off finally, the special appeals are dismissed as in fruituous.

117. The parties are directed to bear their own costs.