

(2005) 06 GAU CK 0061
In the Gauhati High Court
Case No : Writ Petition (C) No. 92 of 2005

Sukanta Saha

APPELLANT

Vs

State of Tripura and Others

RESPONDENT

Date of Decision : 24-06-2005

Acts Referred:

Constitution of India, 1950 — Article 13, 14, 16, 16(1), 16(4)
Tripura Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Act, 1991 — Section 5

Citation : (2009) 2 GLR 818 : (2005) 4 GLT 353

Hon'ble Judges : A.B. Pal, J

Bench : Single Bench

Advocate : S. Deb and S. Choudhury, for the Appellant; U.B. Saha, S. Talapatra, J. Majumder and B. Banerjee, for the Respondent

Final Decision : Dismissed

Judgement

A.B. Pal, J.—A brief survey of the facts-situations before adverting to the legal controversies may be recorded, thus:

The Petitioner herein was initially appointed as Co-operative Inspector 15.6.1988 and in due course was promoted to the post of Co-operative Officer 5.6.1997 on regular basis. The third Respondent, on the other hand, was appointed Co-operative Inspector on 31.7.1992, about four years after appointment of Petitioner, but being a member of the Scheduled Tribes community stole a march over the Petitioner and other seniors getting an accelerated promotion to the post of Cooperative Officer on 30.8.1996, nine months before the Petitioner. The final seniority list of Co-operative Officers was published on 17.7.1998 showing the third Respondent at serial No. 107 and the Petitioner at serial No. 112, thus, conferring on the third Respondent additional benefit of seniority due to longer period of service rendered by him in the post of Co-operative Officer. The next higher promotion grade is Assistant Registrar of Co-operative Societies where occurred nine vacancies at the relevant time, which have been proposed to be

filled up by the State Respondents reserving three for the Scheduled Tribes, one for the Scheduled Castes and remaining five for unreserved category. The grievance of the Petitioner is that though admittedly he was senior to the third Respondent in the grade of Co-operative Inspector, on promotion to the grade of Co-operative Officer w.e.f. 5.6.1997, after a period of about nine months from the date of accelerated promotion of the third Respondent, his seniority has not been restored in accordance with law laid down by the Supreme Court in *Ajit Singh and Others Vs. The State of Punjab and Others*, and though the third Respondent has always been treated as reserved candidate right from his appointment as Co-operative Inspector and promotion to the post of Co-operative Officer, he is now being considered by the first and second Respondents for promotion against one of the five unreserved slots. By this writ petition, he has sought a direction to the first and the second Respondents not to appoint the third Respondent as Assistant Registrar of Co-operative Societies against an unreserved slot in excess of the quota reserved for the members of the Scheduled Tribes.

2. The Respondents by filing counter-affidavit have resisted the claim of the Petitioner contending, inter alia, that no employee has the right to promotion and that there is no legal embargo against considering a reserved candidate for promotion against an unreserved vacancy. Further contention of the Respondents is that when the draft seniority list of Co-operative Officers was published, the Petitioner, who had been placed below the third Respondent, did not raise any objection and consequently, the law of acquiescence precludes him from raising objection to that seniority list after such a long lapse of time. As regards the claim of the Petitioner for restoration of his seniority on his promotion to the grade of Co-operative Officer, the Respondents contended that following the amendment of Article 16(4A) of the Constitution by Eighty-fifth Amendment the first Respondent has issued a notification on 27.1.2005 (Annexure R/4) providing that SC/ST Govt. servants shall, on their promotion, by virtue of rule of reservation/roaster and subject to relevant rules regulating seniority be entitled to consequential seniority also and that notification has been given retrospective effect from 17.6.1995. Thus, according to the Respondents, the effect of *Ajit Singh-II* (supra) having been wiped out by the above notification, issued on the strength of Article 16(4A) of the Constitution, as amended by Eighty-fifth Amendment Act, 2001, the Petitioner's claim of restoration of seniority is misplaced, devoid of any merit and so, deserves no consideration.

3. I have heard Mr. S. Deb, learned senior Counsel, assisted by Mr. S. Choudhury, learned Counsel for the Petitioner, Mr. U.B. Saha, learned senior Govt. advocate, assisted by Mr. J. Majumder, learned Counsel for the first and second Respondents and Mr. S. Talapatra, learned senior Counsel, assisted by Mr. B. Banerjee, learned Counsel for the private Respondent.

4. Adverting first to the genesis of the present controversies, the central issue of seniority, Mr. Deb advanced his first submission on the legal position prevailed

following Ajit Singh-II (supra). It is not in dispute that the law laid down by the Supreme Court relating to restoration of seniority of a senior employee, who is promoted later than the reserved junior employee, in Union of India and others etc. Vs. Virpal Singh Chauhan etc., ; Ajit Singh Januja and others Vs. State of Punjab and others, and in R.K. Sabharwal and others Vs. State of Punjab and others, was diluted by Jagdish Lal and others Vs. State of Haryana and others, and then the position has been set at right in Ajit Singh-II (supra), where the Supreme Court in para 77 held, thus:

We, therefore, hold that the roster-point promotees (reserved category) cannot, therefore, count their seniority in the promoted category from the date of their continuous officiation in the promoted post - vis-a-vis the general candidates who were senior to them in the lower category and who were later promoted. On the other hand, the senior general candidate at the lower level, if he reaches the promotional level later but before the further promotion of the reserved candidate he will have to be treated as senior, at the promotional level, to the reserved candidate even if the reserved candidate was earlier promoted to that level, Virpal and Ajit Singh have been correctly decided and Jagdish Lal is not correctly decided.

5. While dealing with the entire gamut of the reservation policy, the Apex Court made important observations in all the above noted cases, which expressed one of the several concerns that the policy of reservation should not be allowed to become a vested interest and that it has to be balanced with the other provisions of the fundamental rights contained in Articles 14 and 16(1) of the Constitution in order to avoid reverse discrimination against persons who do not belong to the reserved categories. In Ajit Singh-I it was held by the Apex Court that balance must be maintained in such a manner that there is no reverse discrimination against the general candidates and that any rule, circular or order, which gave seniority to the reserved candidates promoted earlier against a roster point, would be violative of Articles 14 and 16(1) of the Constitution. Explaining the "catch up principle" as laid down in Virpal (supra), which relied upon the principles laid down in Indra Sawhney v. Union of India 1992 Supp (3) SCC 217 and R.K. Sabharwal (supra), the Apex Court observed again in Ajit Singh-II (supra), thus:

5. Close on the heels of Virpal came Ajit Singh from Punjab, before a three-Judge Bench and the Bench held that the question of seniority at the promotional level had to be decided by applying the provisions of Articles 14 and 16(1) and if any order, circular or rule provided that such reserved candidates who got promotions at roster points were to be treated as senior to the senior general candidates who were promoted later, then such an order, circular or rule would be violative of Articles 14 and 16(1). It was, however, held that the position would be different if by the time the senior general candidate got his promotion under the normal rules of seniority or selection, the reserved candidate who was promoted earlier at the roster point, had got a further promotion. In other words, the

"catch up" principle as laid down in Virpal was accepted. In coming to the above conclusions, the three-Judge Bench relied upon the principles laid down by the nine-Judge Bench in *Indra Sawhney v. Union of India* and by the Constitution Bench in *R.K. Sabharwal v. State of Punjab*. These two cases had laid down earlier the manner in which the rights of the general candidates and the reserved candidates ought to be balanced. In *Ajit Singh* the court said the balance must be maintained in such a manner that there was no reverse discrimination against the general candidates and that any rule, circular or order which gave seniority to the reserved candidates promoted at roster point, would be violative of Articles 14 and 16(1) of the Constitution of India.

(emphasis mine)

6. The law regarding restoration of seniority having been settled, thus, in *Ajit Singh-II* (supra), Mr. Deb argues that the Constitution (Eighty-fifth Amendment) Act was enacted in 2001, which is only an enabling provision and has not laid down even by implication that the reserved employees shall be entitled to the benefit of seniority over the restored seniority of their seniors on the basis of continuous officiation in the higher post or grade due to earlier accelerated promotion. Article 16(4A) of the Constitution as amended in 2001 provides:

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

(emphasis mine)

A plain reading of the above clause makes it clear that it confers only enabling powers on the State to make provision for reservation in matters of promotion with consequential seniority meaning thereby that for providing benefit of consequential seniority, linked to promotion, suitable provision has to be made. In other words, any benefit of seniority flowing from accelerated promotion, if provided by State by making suitable provision in exercise of the powers conferred under Article 16(4A) shall not be a constitutional right, but only a legal right. In *Ajit Singh-II* (supra), the Supreme Court held in para 28:

28. We next come to the question whether Article 16(4) and Article 16(4A) guaranteed any fundamental right to reservation. It should be noted that both these articles open with a non obstante clause-Nothing in this article shall prevent the State from making any provision for reservation." There is a marked difference in the language employed in Article 16(1) on the one hand and Article 16(4) and Article 16(4A) on the other. There is no directive or command in Article 16(4) or Article 16(4A) as in Article 16(1). On the face of it, the above language in each of Articles 16(4) and 16(4A) is in the nature of an enabling provision and it has been so held in judgments rendered by Constitution Benches and in other cases right from 1963.

In support of this position, an earlier decision of the Supreme Court (Constitution Bench) in *C.A. Rejendran v. Union of India* has been quoted to highlight that Article 16(4) is not a fundamental right, but only an enabling provision. The quoted passage in para 29 of *Ajit Singh-II* (supra) reads as follows:

Our conclusion, therefore, is that Article 16(4) does not confer any right on the Petitioner and there is no constitutional duty imposed on the Government to make a reservation for Scheduled Castes and Scheduled Tribes, either at the initial stage of recruitment or at the stage of promotion. In other words Article 16(4) is an enabling provision and confers a discretionary power on the State to make a reservation of appointments in favour of backward class of citizens which, in its opinion, is not adequately represented in the services of the State.

7. It has, thus, been settled that while right to be considered for promotion is a fundamental right under Articles 14 and 16(1), the rights of reserved candidates under Article 16(4) and 16(4A) are not fundamental rights. As a matter of fact, Article 16(4) and 16(4A) by themselves confer no right on the reserved candidates. These are only enabling powers conferred on the State who may make provisions for the benefits of the reserved category and the rights emanating from such provisions shall be in the nature of legal rights only which are essentially inferior and subject to the fundamental rights to be considered for promotion under Articles 14 and 16(1) of the Constitution. Thus, the right of the Petitioner to be considered for promotion is a fundamental right while the right of the third Respondent to the seniority consequent upon earlier accelerated promotion is only a legal right. The settled legal principle is that only when promotion is based on equal opportunity and seniority is attached to such promotion, it can be said that the seniority consequent upon such promotion is a fundamental right under Article 16(1). The third Respondent got accelerated promotion, not on the basis of equal opportunity and consequently, if placed on the anvils of the above principle, his seniority consequent upon accelerated promotion is not a fundamental right, but a legal right only. The Petitioner on the other hand, has got his promotion to the post of Co-operative Officer on the basis of equal opportunity and, thus, his previous seniority shall be attached to the promotion, which is fundamental right under Articles 14 and 16(1).

8. Mr. Deb further submits that the impugned notification dated 27.1.2005 purportedly issued by way of clarification following the amended Clause (4A) of Article 16 of the Constitution, was issued after the seniority list of Co-operative Officers was finally published on 17.7.1998, which fact brings home the important point that though the law laid down by the Apex Court in *Ajit Singh-II* (supra) held the field on that date, the first and second Respondents intentionally disregarded the same by issuing the impugned seniority list. Next submission of Mr. Deb is that the impugned notification is not a law contemplated by the above amended clause and that the same being an executive clarification only cannot take the place of a law whereby a judicial pronouncement can be rendered invalid. Summing up his arguments, Mr. Deb submits that as no law has yet been

enacted pursuant to the amended provision of Article 16(4A) of the Constitution providing consequential seniority on the basis of the continuous length of officiation in favour of reserved promotees, the principles of seniority laid down in *Ajit Singh-II* (supra) are very much in force and in such a situation, the Petitioner herein being senior to the third Respondent in the grade of Co-operative Inspector is entitled to get his seniority restored in the grade of Co-operative Officer though his promotion in the higher grade had taken place ten months after that of the third Respondent.

9. Per contra, learned Counsels for the Respondents contended that Section 5 of the Tripura Scheduled Tribes, Scheduled Castes (Reservation of Vacancies in Service and Posts) Act, 1991 ("Reservation Act"), which was enacted before the Eighty-fifth amendment of the Constitution, but was eclipsed during the period *Ajit Singh-II* (supra) was in force, came to be revived after the above amendment of the Constitution and, therefore, the first and second Respondents are not required to enact any law again in order to render the ratio in *Ajit Singh-II* (supra) invalid. The other submission on this point is that the impugned notification though a clarificatory in nature is only extension of the provision contained in the Reservation Act and, therefore, it enjoys all the trappings of a "provision" as contemplated by the amended provision of Article 16(4A). In reply to the contention that the seniority list was published before the impugned clarificatory notification ignoring the law laid down in *Ajit Singh-II* (supra), learned Counsels submit that even in the absence of the impugned notification, the provisions of the Reservation Act having been revived by the Eighty-fifth amendment of the Constitution, there was nothing wrong in finalizing the seniority of the Co-operative Officers on the basis of continuous length of service in that grade. The third Respondent having more length of service than the Petitioner in the higher grade was correctly placed above the Petitioner.

10. The rival contentions compendiously traversed, thus, the controversy seems to centre round the important question whether the impugned clarificatory notification can in *Ajit Singh-II* (supra) be invalid and once a decision on this issue is taken the other controversy touching the question of seniority between the Petitioner and the third Respondent shall find easy solution.

11. The relevant part of the clarificatory notification issued by the State Respondents in General Administration (Personnel & Training) Department on 27.1.2005 is quoted below:

Government of Tripura General Administration (Personnel & Training) Department
Government Secretariat: Agartala

No. F.23(3)-GA(P& T)/2004 Dated, Agartala, the 27th January, 2005.

NOTIFICATION

Sub: General principles of seniority-seniority of SC/ST Government servants vis-a-vis the general category of Government servants.

In view of the Judgment of the Hon''ble Supreme Court of India in the case of Ajit Singh and Others Vs. The State of Punjab and Others, and the subsequent Constitution (Eighty-fifth) Amendment Act, 2001 many Departments have been seeking clarifications from the GA (P&T) Department as to how the seniority of SC/ST Government servants vis-a-vis the general category of Government servants should be determined.

2. Consequent upon the amendment of Clause (4A) of Article 16 of the Constitution of India by the Constitution (Eighty-fifth) Amendment Act, 2001 which comes into force on and from the 17th day of June, 1995, notwithstanding anything in any judgment or order passed by any court subsequent thereto, the Governor has been pleased to decide as follows:

(a) SC/ST Government servants shall, on their promotion by virtue of the Rule of reservation/roster and subject to relevant rules regulating seniority, be entitled to consequent seniority also; and

(b) this decision shall have effect from the 17th June, 1995.

By order of the Governor.

12. The effect of the above notification is that the reserved candidates on promotion shall get their consequent seniority from the date of promotion confirming thereby seniority on the basis of continuous length of service in the higher grade or the post after promotion. Nowhere in the said impugned notification, there is anything to suggest that the senior employees of general category, who have been promoted later on the basis of equal opportunity, shall not get their previous seniority restored in terms of the ratio laid down by the Supreme Court in Ajit Singh-II (supra). In other words, while the reserved employees shall get their consequential seniority with effect from the date of their promotion by virtue of the impugned notification, the senior employees of the general category promoted later in the same higher grades shall get their seniority re-stored and then continue to be senior to the reserved promotees, their consequential seniority notwithstanding. As held by the Supreme Court and discussed above, while the right of seniority of the reserved promotees from the date of promotion is only a legal right, the right of the senior employees of general category to get their seniority restored on promotion is a fundamental right. Article 16(4A) of the Constitution, as amended in 2001 provides nothing to invalidate the law of restoration of seniority, which is declared to be fundamental right against reverse discrimination and similarly. There is nothing in the impugned notification issued by the State Government to invalidate the ratio relating to restoration of seniority, as decided in Ajit Singh-II (supra).

13. This takes me to the most important question-can the Legislature make any law or the Executives make any rules or orders to invalidate the law declared by the Supreme Court? As has been noted above, in Ajit Singh-II (supra), the Supreme Court has clearly declared that "seniority at the promotional level has to be decided by applying the provisions of Articles 14 and 16(1) and if any

order, circular or rule provides that such reserved candidates, who got promotions at roster points are to be treated as senior to the senior general candidates, who were promoted later, then such an order, circular or rule would be violative of Articles 14 and 16(1)". In other words, if the restoration of seniority is denied to the senior general candidates, who are promoted later, it would amount to reverse discrimination against the general candidates, which would be violative of Articles 14 and 16(1). Is it competent for any other authority, Legislative or Executive, to substitute or obliterate such interpretation? This interpretation of the Constitution by the Supreme Court, which is the final, ultimate and absolute authority in the arena of judicial review, cannot be replaced by any other interpretation by any other authority, whether executive or legislative; This position has been crystallized by the Supreme Court in *People's Union for civil Liberties (PUCL) and Others Vs. Union of India (UOI)* and *Another*, in paras 34, 37 and 78. The relevant portions are quoted below:

34. The Legislature has no power to review the decision and set it at naught except by removing the defect which is the cause pointed out by the decision rendered by the court. If this is permitted it would sound the death knell of the rule of law as observed by this Court in various decisions.

37. The Legislature can change the basis on which a decision is rendered by this Court and change the law in general. However, this power can be exercised subject to constitutional provision, particularly, legislative competence and if it is violative of fundamental rights enshrined in Part III of the Constitution, such law would be void as provided under Article 13 of the Constitution. The Legislature also cannot declare any decision of a court of law to be void or of no effect.

78. What emerges from the above discussion can be summarized, thus:

(A) The Legislature can remove the basis of a decision rendered by a competent court thereby rendering that decision ineffective but the Legislature has no power to ask the instrumentalities of the State to disobey or disregard the decisions given by the court. A declaration that an order made by a court of law is void is normally a part of the judicial function. The Legislature cannot declare that decision rendered by the court is not binding or is of no effect.

It is true that the Legislature is entitled to change the law with retrospective effect which forms the basis of a judicial decision. This exercise of power is subject to constitutional provision, therefore, it cannot enact a law which is violative of fundamental right.

(emphasis supplied)

14. It would, thus, appear that the interpretation of the fundamental rights under Articles 14 and 16(1) of the Constitution relating to restoration of seniority on promotion of senior general candidates cannot be set at naught by any legislative or executive feat without amending or dismantling the fundamental right of equality and equal opportunity enshrined under Articles 14 and 16(1), which is

unquestionably beyond the competence of the Legislature. Thus, neither Article 16(4A), amended in 2001 nor the consequential seniority declared by the impugned notification can invalidate or has obliterated the law laid down in *Ajit Singh-II* (supra). In other words, the general category candidates on promotion to the higher grade shall continue to get their previous seniority restored and shall be treated as senior to the reserved candidates, who got accelerated promotion with their consequential seniority from the date of promotion by virtue of the above impugned notification notwithstanding/While the Eighty-fifth amendment of the Constitution and the provision made thereunder by the above notification confers a legal right on the reserved category of employees for counting their seniority from the date of promotion, they cannot and have not in any way obliterated or rendered invalid the fundamental right of the general category senior employees promoted later to get their seniority restored and treated as senior to the reserved promotees. In other words, while the reserved category candidates shall be entitled to consequential seniority due to accelerated promotion by virtue of their birth mark, not on the basis of equal opportunity and merit, the senior candidates of general category, who are promoted later on the basis of equal opportunity shall carry with them in the higher grade their previous seniority, which is their fundamental right. The two situations have nothing in conflict and can well stand together ensuring on the one hand the benefit of consequential seniority from the date of promotion in favour of the reserved category candidates and on the other conferring the benefit of past seniority on the senior general category of employees promoted later, keeping, thus, away any possibility of the reverse discrimination, which will amount to infraction of the fundamental right under Articles 14 and 16 of the Constitution as held in *Ajit Singh-II* (supra). Any other proposition which in end result eclipse the fundamental rights of general promotees by legal rights of the reserved promotees shall be unconstitutional.

15. I have carefully examined Section 5 of the Reservation Act, which as per arguments canvassed by learned Counsels for the Respondents, was eclipsed by *Ajit Singh-II* but came to be revived after Eighty-fifth Amendment of the Constitution whereby in Article 16(4-A), the State has been conferred with the power to make provision for promotion with consequential seniority in favour of Scheduled Castes or Scheduled Tribes. Section 5 provides:

5. Reservation for Scheduled Castes and Scheduled Tribes in vacancies to be filled up by promotion. - The reservation for members of the Scheduled Castes and the Scheduled Tribes in vacancies in services or posts to be filled up by promotion in any establishment shall be regulated in the following manner, namely:

(a) There shall be reservation at sixteen per cent for members of the Scheduled Castes and thirty one per cent for the members of the Scheduled Tribes.

Provided that the State Government may from time to time review the implementation of the reservation policy and take adequate measures including

increase of percentage mentioned in Sub-section (a) above.

(b) A separate hundred point roster in the form and manner set out in the Schedule shall be maintained by each establishment.

(c) The candidates belonging to the Scheduled Castes and the Scheduled Tribes who qualify for selection on merit shall be included in the general list and not against reserved quota.

There is nothing in this provision or in any other provision of the Reservation Act about seniority in general or consequential seniority of the reserved employees. Nothing therein was, therefore, eclipsed and nothing was revived. In such premises, the above submissions of learned Counsels for the Respondents is found to be without substance. If the submission of Mr. Talapatra that the State Respondents were not required to make any new provision under Article 16(4A) for consequential seniority because of the revival of the relevant provision in the Reservation Act is to be taken at its face value, he left no satisfactory answer as to why then the State Respondents hastened to issue the impugned notification. If the most probable answer is that it is only a clarificatory one and has not by itself made any substantive provision for consequential seniority, it has to be held that it has clarified nothing as no substantive provision regarding seniority, not to speak of consequential seniority exist in the Reservation Act.

16. The limited prayer of the writ Petitioner is only a direction to the State Respondents not to promote the third Respondent to the post of Assistant Registrar of Co-operative Societies in excess of the quota for reserved candidates. Such a prayer is liable to be rejected at the very threshold, as there is no law debarring the reserved candidates from being considered against unreserved vacancies, but that must be on the basis of general seniority of such candidates. In *Akhil Bhartiya Soshit Karamchari Sangh and Another Vs. Union of India*, through its Secretary, Ministry of Railway and Others, the Supreme Court in para 11 held thus,:

11. That apart, in a particular cadre after following the roster meant for reserved category candidate, there is absolutely no bar for filling up the vacancies in the general category even in favour of a candidate belonging to the reserved category if the said reserved category candidate is entitled to the same on the basis of his general seniority. No materials have been placed before us to hold that the promotion of Respondent 6 was not on the basis of his general seniority in DSK-II. In the aforesaid premises, we find no substance in the contention of Dr. Rajeev Dhavan and the SLP must fail.

(emphasis supplied)

The words "general seniority" have to be understood in the context of the above discussion that seniority flowing from accelerated promotion cannot be said to be general seniority and shall not be basis for being considered for promotion to the vacancies in general category. Keeping in line with this decision, the Supreme

Court in *Ajit Singh-II* (supra) has upheld the law regarding restoration of previous seniority of the candidates of the general category, who are promoted later, as otherwise the balance between the reserved and unreserved categories of employees is bound to be upset.

17. The 50 per cent rule of reservation has been devised by the Supreme Court in order to maintain balance so that mediocrity does not capture the entire field of administration and merit and caliber, at least to the extent of 50 per cent finds way to maintain balance and efficiency in the administration as enjoined in Article 335 of the Constitution. It may be noted here that in *R.K. Sabharwal and others Vs. State of Punjab and others*, The Supreme Court emphasized the need of making assessment periodically about the position of representation of the reserved categories in the services under the State. The relevant portion in para 4 is reproduced below for proper appreciation of the position:

4. ...It is, therefore, incumbent on the State Government to reach a conclusion that the Backward Class/Classes for which the reservation is made is not adequately represented in the State Services. While doing so the State Government may take the total population of a particular Backward class and its representation in the State Services. When the State Government after doing the necessary exercise makes the reservation and provides the extent of percentage of posts to be reserved for the said Backward Class then the percentage has to be followed strictly. The prescribed percentage cannot be varied or changed simply because some of the members of the Backward Class have already been appointed/promoted against the general seats. As mentioned above the roster point which is reserved/or a Backward Class has to be filled by Way of appointment/promotion of the member of the said class. No general category candidate can be appointed against a slot in the roster which is reserved for the Backward Class. The fact that considerable number of members of a Backward Class have been appointed/promoted against several seats in the State Services may be a relevant factor for the State Government to review the question of continuing reservation for the said class but so long as the instructions/rules providing certain percentage of reservations for the Backward Classes are operative the same have to be followed.

(emphasis supplied)

It may be worthwhile to quote here another observation of the Apex Court on this issue in *Jagdish Negi and another Vs. State of U.P. and another*,

The percentage of reservation for a given category of citizens who are socially and educationally backward should not continue indefinitely. Review should be done periodically. During review it may be found that the category of citizens ceased to be the backward class. They are in a position to adequately represent them even without reservation. In such situation, reservation for them should be discontinued.

18. On the basis of the above legal position, this Court could reject the prayer of

the Petitioner after holding that an employee of reserved category is entitled to be considered for promotion against unreserved vacancy subject to the conditions noted above. But that will not answer the entire question as the prayer is directly linked with the most important question of restoration of seniority focussed in other parts of the writ petition and precisely for that reason, I have tried to answer the question of seniority first.

It may be noted here that imbalance in reservation or excess reservation, as contended in the writ petition occur for many reasons, mainly due to misconception of the laws on the issue and their misapplication, not always bona fide particularly when motive to perpetuate reservation for vested interest takes root into subsoil of the concept. In order to enable us to appreciate the spirit and philosophy behind reservation it will not be out of context to press into service here very important and illuminating observation of Dr. B.R. Ambedkar before the Constituent Assembly and of Justice V.K. Krishna Iyer while deciding a case. Dr. Ambedkar observed:

In our country there are castes but the castes are anti-national in the first place because they bring out separation in social life. They are anti-national because they generate jealousy antipathy between the castes and castes. The seats to be reserved must be confined to minority seats and 30 per cent seats would be adequate and consistent (Constituent Assembly debate vol.12, p. 980).

The observation of Justice Iyer reads:

There is a grave constitutional risk involved in continuing the process of reservation. The success of the State action under Article 16(4) consistent in the speed with which result oriented reservation withers away as no longer a need. To lend immortality to reservation policy is to delete its *raison d'être*, to politicize this provision for communal support and party ends is to subvert the solemn undertaking of Article 16(1), to castify reservation even beyond the dismal groups of backward most people is to run a grave constitutional risk. Castes if so facto is not class in a secular State.

19. One important reason for excess reservation is continuation of the roster mechanism even after required number of reserved posts for a particular reserved category is filled up. As has been held by the Supreme Court in R.K. Sabharwal (*supra*) once the target of reservation is achieved, the roster mechanism should be discarded and in order to do the same, it is necessary for the State Government to make periodical assessment about need of representation of the reserved categories in the services under the State. The second reason is wrong roster mechanism followed by concerned authorities. After R.K. Sabharwal (*supra*) has been decided, the Union of India has devised a roster mechanism whereby reserved points have been earmarked on the basis of percentage of reservation. For example, if 15 per cent is the reservation for a category then 7th ($0.15 \times 7 - 1.05$), 14th ($0.15 \times 14 - 2.10$), 20th ($0.15 \times 20 - 3.00$) and so on should be the slots in the roster to be earmarked for that category.

This formula having not been followed the imbalance in reservation has occurred often causing heartburns and multiple litigations.

20. From the discussions made above, the following positions emerge and are held to be the correct legal positions, namely:

(a) Promotion on the basis of equal opportunity and previous seniority attached to such promotion is a fundamental right under Articles 14 and 16(1) of the Constitution while accelerated promotion and consequential seniority from the date of such promotion in favour of the reserved candidates in terms of provision made in the impugned notification under Article 16(4A) are only legal rights, which are certainly inferior and subject to the fundamental rights. The Petitioner got his promotion to the post of Co-operative Officer on the basis of equal opportunity and his previous seniority attached or tailed to such promotion is a fundamental right and, therefore, he is entitled to carry with him to the higher grade his previous seniority. The third Respondent, on the other hand, being a reserved candidate on being promoted out of turn not being on the basis of equal opportunity, to the post of Cooperative Officer is entitled to count his consequential seniority from the date of promotion by virtue of the impugned notification, which is a legal right but subject to the restored previous seniority of the Petitioner, which is a fundamental right. A legal right can not eclipse or invalidate a fundamental right.

(b) The Eighty-fifth amendment of the Constitution, amending Article 16(4A), has conferred only enabling powers on the State to make provisions for reservations in matters of promotion with consequential seniority. It confers no fundamental right of consequential seniority on promotion of reserved candidates and it has not conferred any enabling powers on the State to make a provision for obliterating the law regarding restoration of previous seniority as declared by the Supreme Court in *Ajit Singh-II* (supra).

(c) The impugned notification of the State Government (Annexure-R/4) issued under Article 16(4A) for counting consequential seniority of the reserved candidates from the date of promotion cannot and has not in any way render/ rendered invalid the law of restoration of seniority of the seniors of general category promoted later. The notification is not in conflict with *Ajit Singh-II*. Even such a provision that seniority shall be counted from the date of promotion is a normal condition of service which could be made. If at all necessary, under proviso to Article 309, without aid from Article 16(4A).

(d) A reserved candidate is entitled to be considered for promotion against a vacancy in the general category on the basis of his general seniority not on the basis of accelerated seniority.

(e) The Legislature cannot make any law or the executive cannot make any rule, order or notification to substitute, diminish or take away the power of judicial review of the court and obliterate any interpretation on the fundamental rights pronounced by the Supreme Court.

(f) The impugned notification issued under the amended provision of Article 16(4A) of the Constitution is valid inasmuch as it confers only a legal right of counting consequential seniority of the reserved candidates from the date of promotion without disturbing the restored seniority of the senior candidate of the general category.

(g) The seniority list of Co-operative Officers placing the Petitioner below the third Respondent is invalid for the reason that it has been done giving the third Respondent his consequential seniority without restoring at the same time previous seniority of the Petitioner. The seniority list shall be modified by the State Respondents before filling up the vacancies of Assistant Registrar of Co-operative Societies in general category.

(h) The State Respondents shall do well in undertaking periodical review, preferably after every five years, of the need of adequate representation of the STs and SCs taking into account presence of employees of ST/SC appointed or promoted against reserved as well as general vacancies in the light of the decision rendered in *Akhil Bhartiya Soshit Karamchari Sangh* (supra) and set at right the roster mechanism, if considered necessary, in the light of the observations made above.

(i) Section 5 of the Reservation Act has nothing about seniority, not to speak of consequential seniority. This provision or any other provision of the said Act has no bearing on the present controversy regarding restoration of seniority or consequential seniority.

21. The writ petition stands disposed of accordingly to the above extent. No cost.