

**(2011) 11 MAD CK 0098**

**In the Madras High Court**

**Case No :** W.A. No"s. 113 and 207 of 2009

V. Vivekanandan and V. Appadurai

APPELLANT

Vs

S. Pannerselvam and Others <BR>U. Palaniappan Vs S.  
Pannerselvam and Others

RESPONDENT

**Date of Decision :** 25-11-2011

**Acts Referred:**

Constitution of India, 1950 — Article 14, 15, 16, 16(2), 16(4)

**Citation :** (2011) 11 MAD CK 0098

**Hon'ble Judges :** K.K. Sasidharan, J; Elipe Dharma Rao, J

**Bench :** Division Bench

**Advocate :** Sriram Panchu, for Mr. P.V. Balasubramanian in WA. 113/2009 and Mrs. Nalini Chidambaram, for Mrs. C. Uma in WA. Nos. 207 and 208 of 2009, for the Appellant; Vijay Narayan, for Mr. N. Subramanian for Respondent-3 in WA. No. 113/2009 and R1 to R4 in WA. Nos. 207 and 208/09, Mr. V.T. Gopalan, for Mr. M.A. Gowthaman for Respondent-4 in WA. No. 113/2009, Mr. R. Thiagarajan, for Mr. M. Muthappan for Respondent-5 in WA. No. 113/2009 and Mr. S. Ramasamy, A.A.G. Assisted by Mr.G. Desingh Special Govt. Pleader for Respondents 6 and 7 in WA. No. 113/2009 and Respondents 5 and 6 in WA. Nos. 207 and 208/09, for the Respondent

**Final Decision :** Allowed

## Judgement

Elipe Dharma Rao, J.—Aggrieved by the order of the learned single Judge in interfering with the seniority list of the Assistant Divisional Engineers of the Highways Department, dated 29.4.2004, the promotees, have come forward with the present appeals.

2. The learned single Judge in the impugned order has narrated the entire background of facts leading to the litigation in detail and we feel it not necessary to reiterate the same once again, however, brief facts in order to understand the case are reproduced hereunder :-

In the Tamil Nadu Highways Department, there were two services in respect of Engineers and Para Engineering Staff, viz., Tamil Nadu Highways Engineering

Service and Tamil Nadu Highways Engineering Subordinate Service. The categories of Chief Engineer, Superintending Engineer, Divisional Engineer and Assistant Divisional Engineer initially fall under the Tamil Nadu Highways Engineering Service, whereas the other categories, viz., Assistant Engineer, Junior Engineer, Overseers, etc., fall under the Tamil Nadu Highways Engineering Subordinate Service. Subsequently, by G.O.Ms.No. 807, Public Works Department, dated 24.05.1993, the category of Assistant Engineer was brought into Tamil Nadu Highways Engineering Service from the Tamil Nadu Highways Engineering Subordinate Service with retrospective effect from 17.2.1971. Promotion to the post of Divisional Engineers including Deputy Chief Engineers is from the post of Assistant Engineers. The post of Assistant Engineers is to be filled by direct recruitment or recruitment by transfer from Junior Engineers or Supervisors in the Tamil Nadu Highways Engineering Subordinate Service in the ratio of 3: 1 i.e., first three vacancies shall be filled or reserved to be filled by recruitment by transfer from permanent Junior Engineers and the fourth vacancy shall be filled by recruitment by transfer from among permanent supervisors of the Tamil Nadu Highways Engineering Service.

3. While the matter stood thus, the Department published seniority list of Assistant Engineers and Junior Engineers as on 01.01.1993, dated 18.4.1994 and the list fit for the post of Assistant Divisional Engineers from the cadre of Assistant Engineer, dated 6.4.1995. The aforesaid Seniority List came to be challenged by an Assistant Engineer, who was subsequently re-designated as Assistant Divisional Engineer before the Tamil Nadu Administrative Tribunal on the ground that the respondents therein are juniors to him in the list of Assistant Engineers, which was done by the Department applying the rule of reservation and that application of Rule 12 of Special Rules to the promotion was erroneous. The Tribunal, by relying upon the decision of the Supreme Court in *Ajit Singh Januja and others Vs. State of Punjab and others*, allowed the Original Application by observing as follows :

... So, even though respondents 4 to 8, 10, 12 to 15 came to be promoted as Assistant Divisional Engineers earlier to the applicant in the panel of Assistant Divisional Engineers fit for promotion as Divisional Engineers, they cannot be placed above the applicant by virtue of the accelerated promotion in view of the reservation rule. Instead the rank has to be reckoned only on the basis of that given by the Tamil Nadu Public Service Commission when they were recruited as Assistant Engineers. Thus the applicant who is admittedly senior to respondents 4 to 9, 10 and 12 to 15 in the order of Assistant Engineer who will regain the seniority over them in the category of Assistant Divisional Engineer as their accelerated promotion as Assistant Divisional Engineer was only on account of application of the rule of reservation.

4. This decision of the Tribunal came to be challenged by the unsuccessful Assistant Engineers before the Hon'ble Supreme Court in *Special Leave to Appeal (Civil) No. (3) 24455/96*, which was dismissed by order dated

18.12.1996. Subsequent to the aforesaid decisions, the Department vide proceedings in G.O.Ms.No. 78, dated 3.4.1998, approved the adhoc list of Assistant Engineers and Junior Engineers fit for temporary promotion as Assistant Divisional Engineer, where under the appellants in W.A.No. 113 of 2009 were promoted as Assistant Divisional Engineers, however, subject to the implementation of the order passed in the earlier O.As. Thereafter, the seniority list of officers serving as Assistant Divisional Engineer (Highways) as on 1.4.2004, dated 29.4.2004, was issued. Subsequently, the Association of Tamil Nadu Highways Engineers, made a representation dated 6.7.2004 pointing out the irregularities in the seniority list of Assistant Divisional Engineers. Thereafter, vide order dated 19.8.2005 in G.O.(Ms) No. 169, the Department approved the list of Assistant Divisional Engineers fit for promotion temporarily as Divisional Engineers in the Highways Department under General Rule 39(a)(i) of the Tamil Nadu State and Subordinate Service Rules.

5. Aggrieved by the seniority list fit for the promotion of Assistant Divisional Engineers, dated 29.4.2004 and the subsequent seniority list fit for promotion to the post of Divisional Engineer, dated 19.8.2005, the Assistant Engineers, who were selected through Tamil Nadu Public Service Commission towards general category, filed the writ petitions mainly on the ground that they were appointed earlier to the appellants under general category and, since the appellants belong to Scheduled Caste, on the basis of the rule of reservation, they were promoted earlier to them. It is their specific claim that though such promotion was based on rule of reservation, that would not reverse the seniority in the promotional post of the seniors in the feeder category, who gained promotion subsequently. On the question of accelerated promotion and seniority, the learned single Judge by placing strong reliance upon the decisions of the Supreme Court in *Union of India and others etc. Vs. Virpal Singh Chauhan etc.*, , *Ajit Singh Januja and others Vs. State of Punjab and others*, , *R.K. Sabharwal and others Vs. State of Punjab and others*, , *Ajit Singh and Others Vs. The State of Punjab and Others*, , *M. Nagaraj and Others Vs. Union of India (UOI) and Others*, and various other decisions factually observed as follows :-

65. Perusal of the service particulars show that Mr. R. Abishekarajan (sic. Abishekarajanathan) and Mr. Gowthamaraja, petitioners 1 and 2 in W.P.No. 39142 of 2005, belonging to Schedule Caste Community were selected as Assistant Engineers in Highways Engineering Subordinate Service in the open competition during the year 1982 and subsequently appointed as Assistant Divisional Engineers by recruitment by transfer on 21.01.1991 and 01.05.1991 respectively, by applying Rule 12 of the Tamil Nadu Highways Engineering Service. It is further evident from the Tabular Column, the respondents, viz., Mr. U. Palanaiappan, (third respondent in W.P. No. 33735 and 39142 of 2005) and Thiru. V. Vivekanandan and Thiru. V. Appadurai (respondents 3 and 4 in W.P.No. 34047 of 2005) belonging to the Scheduled Caste Community, have been appointed to the post of Assistant Divisional Engineer on 12.05.1999, 16.06.1998 and 29.04.1998 respectively seven years later than the petitioners 1

and 2 in W.P.No. 39142 of 2006. Even though Mr. Abeishkarajanathan and Mr. M.K. Gowthamaraja (Petitioners 1 and in W.P.No. 39142 of 2006) belonging to the Scheduled Caste community, were appointed by recruitment by transfer to the post of Assistant Divisional Engineer, they have been assigned seniority in the post of Assistant Divisional Engineers at Sl.No. 1204 and 1299 respectively, below the general category candidates, following the Ajit Singh (I)'s case, without taking into consideration the date of their continuous service in the promotional post of Assistant Divisional Engineers. Whereas, the official respondents by applying a different yardstick, in the case of Mr. U. Palaniappan (third respondent in W.P.No. 33735 and 39142 of 2006) and Mr. V. Vivekanandan and Mr. V. Appadurai, respondents 3 and 4 in W.P.No. 34077 of 2006, placed them above the general category candidates by applying rule of reservation as provided in Rule 12 of the Tamil Nadu Highways Engineering Rules, I do not find any plausible reason either in the counter affidavit of the respondents or in their submissions for the deviation, which is apparent on the face of the record.

6. The learned single Judge further proceeded to observe as follows:

73. In view of the above, this Court of the considered view that the official respondents have failed to follow the dictum laid down by the Supreme Court in the above referred judgments and erroneously issued the seniority list of Assistant Divisional Engineers, Tamil Nadu Highways Engineering Service, by ignoring the principle of "catch up rule", vis-a-vis "inter-se seniority" of the seniors, who have gained promotion subsequently. The decision relied on by the learned counsel for the respondents in Chandravathi P.K., v. C.K. Saji reported in (2004) 3 SCC 734, is inapposite to the facts of the case.

7. Ultimately, the learned single Judge allowed the writ petitions by setting aside the seniority list dated 29.04.2004 and directed to prepare the revised seniority list of Assistant Divisional Engineers. Aggrieved by the aforesaid order, the present writ appeals have been preferred.

8. The Appellants in W.A.No. 103 of 2009 had joined as Junior Engineers on 30.4.1985 and 29.4.1985 respectively in the Tamil Nadu Highways Engineering Subordinate Service and, subsequently, got promoted as Assistant Divisional Engineers on 03.4.1998 following the rule of reservation and further promoted as Divisional Engineer as per G.O.Ms.No. 169, dated 19.8.2005, which was under challenge. They belong to Schedule Caste community. The respondents in the aforesaid Writ Appeal were initially appointed as Assistant Engineers temporarily and subsequently selected through Tamil Nadu Public Service Commission in 1982.

The appellant in W.A.Nos.207 and 208 of 2009, namely, Thiru U. Palaniappan, a Diploma Holder in Engineering, got appointed as Junior Engineer in the Tamil Nadu Highways Engineering Subordinate Service on 13.04.1987 and as Assistant Divisional Engineer on 12.05.1999 by recruitment of transfer following rule of reservation.

9. Mr. Sriram Panchu, learned Senior Counsel for the appellant, contended that the appellants and the private respondents belong to two different categories and services in the Engineering Service as the former were diploma holders, whereas the latter were Engineering graduates in a gazetted post. Therefore, according to the learned Senior Counsel, the services of the appellants and the respondents cannot be compared and the "catch up" rule relied on by the learned single Judge following the decisions of the Supreme Court is not applicable to the facts of the present case. He further submitted that the aforesaid two streams merge for the first time only in the post of Assistant Divisional Engineer and if at all, a common seniority list could be drawn, the same could be done only at the level of Assistant Divisional Engineer and not in the other subordinate posts. He has also submitted that the promotions given to the appellants were not accelerated promotions on account of reservation, but were made following the Rule 9(b) of the services rules. Apart from the aforesaid contentions, the learned Senior Counsel has also submitted, by drawing our attention to Article 16(4-A) of the Constitution of India that the Constitution by amending Article 16(4), by 85th amendment, has protected the consequential seniority arising out of accelerated promotions and when such amendment is held to be valid and not ultra vires by the Supreme Court in M. Nagaraj's case (cited supra), the learned single Judge ought not to have allowed the writ petitions.

10. Mrs. Nalini Chidambaram, learned Senior Counsel appearing for the appellants in the connected Writ Appeals, contended that the private respondents are not the aggrieved parties as they have been promoted to the post of Assistant Divisional Engineer from the post of Assistant Engineers, whereas the appellants were recruited by transfer from Junior Engineer and if at all if there is any grievance only the general category Junior Engineers could file the writ proceedings. Learned Senior Counsel also reiterated the contentions raised in the other writ appeal that the principles of "catch up" rule do not apply to the present case as the two categories do not belong to a common feeder post. Learned Senior Counsel has also contended that Rule 12 of the Tamil Nadu Highways Engineering Service Rules applies to the appointment of Assistant Divisional Engineer only by recruitment on transfer and not to the category of Junior Engineer as it falls under the Tamil Nadu Highways Engineering Subordinate Service. With regard to Article 16(4-A) of the Constitution, the learned Senior Counsel submitted that even assuming that the "catch up" rule applies, Article 16(4-A) preserves the seniority of the appellants.

11. Mr. Vijay Narayan, learned Senior Counsel appearing for Respondents 3 to 5 in W.A.No. 113 of 2009, reiterated once again the contentions raised before the learned single Judge. He stressed the contention that these respondents having been appointed as Assistant Engineers through the Tamil Nadu Public Service Commission as early as in the year 1982 and they being seniors in the post of Assistant Engineers, the learned single Judge has rightly rejected the contentions of the appellants by relying on various decisions of the Supreme Court and the said reasoned order of the learned single Judge should not be interfered by this

Court. In respect of application of Article 16(4-A) to the present case, the learned Senior Counsel contended that the power conferred under the aforesaid amendment has been exercised arbitrarily and therefore the appellants are not entitled to the protection available under Article 16(4-A).

12. Mr. Ramasamy, learned Addl. Advocate General, appearing for the State submitted that the order passed in O.A.No. 2186 of 1996, which was confirmed by the Supreme Court, is not applicable to the appointments made in the Tamil Nadu Highways Engineering Subordinate Service by recruitment on transfer and it would be applicable only to the category of Assistant Engineers in the other service.

13. On a perusal of the entire materials placed on record and upon hearing all the parties, the point which arises for consideration is "whether the "catch up" rule relied on by the learned single Judge in order to reject the claim of the appellants is applicable to the present case and whether there is any excessiveness to refuse applicability of Article 16(4-A) of the Constitution to the case on hand"?

14. It is not in dispute that there were two separate service rules among the engineering personnel in the Highways Department, viz., the Tamil Nadu Highways Engineering Service Rules and the Tamil Nadu Highways Engineering Subordinate Service Rules and, as per G.O.Ms.No. 807, dated 24.5.1993, the categories of Assistant Engineer, Assistant Divisional Engineer, Divisional Engineer, Superintending Engineer and the Chief Engineer fell under the Tamil Nadu Highways Engineering Service Rules, whereas the categories of Junior Engineer, Supervisor, and other subordinate posts are governed by the Tamil Nadu Highways Engineering Subordinate Service Rules. In the present case, we are concerned with the seniority list fit for promotion to the post of Assistant Divisional Engineers, dated 29.4.2004. The service rules provide the method of recruitment to the post of Assistant Divisional Engineer. As per which, the post of Assistant Divisional Engineer shall be made from the categories of Assistant Engineer and Junior Engineer in the ratio of 3: 1 respectively. Rule 12 of the Tamil Nadu Highways Engineering Service Rules provides for Reservation of appointments. As per Rule 12, the rule of reservation of appointments shall apply to the appointment of Assistant Divisional Engineers by direct recruitment and recruitment by transfer separately and the appointment of Assistant Engineers by direct recruitment. In other words, the appointment of Assistant Divisional Engineers shall be made from the Assistant Engineers and Junior Engineers in the ratio of 3:1 respectively by applying the rule of reservation.

15. In order to ascertain whether the "catch up" rule is applicable to the present case, one has to go by the decisions rendered by the Honourable Supreme Court. The "catch up" rule came to be applied by the Supreme Court first in the decision of Union of India and others etc. Vs. Virpal Singh Chauhan etc., . In the aforesaid decision, after considering the decision in R.K. Sabharwal and others Vs. State of Punjab and others, , regarding seniority between the general

candidates and the reserved candidates, the Hon''ble Apex Court has held as follows :

25.... Hence, the seniority between the reserved category candidates and general candidates in the promoted category shall continue to be governed by their panel position. We have discussed hereinbefore the meaning of the expression "panel" and held that in case of non-selection posts, no "panel" is prepared or is necessary to be prepared. If so, the question arises, what did the circular/letter dated 31-8-1982 mean when it spoke of seniority being governed by the panel position? In our opinion, it should mean the panel prepared by the selecting authority at the time of selection for Grade "C". It is the seniority in this panel which must be reflected in each of the higher grades. This means that while the rule of reservation gives accelerated promotion, it does not give the accelerated - or what may be called, the consequential - seniority.

It has been further observed:

29.... In other words, even if a Scheduled Caste/Scheduled Tribe candidate is promoted earlier by virtue of rule of reservation/roster than his senior general candidate and the senior general candidate is promoted later to the said higher grade, the general candidate regains his seniority over such earlier promoted Scheduled Caste/Scheduled Tribe candidate. The earlier promotion of the Scheduled Caste/Scheduled Tribe candidate in such a situation does not confer upon him seniority over the general candidate even though the general candidate is promoted later to that category.

16. The learned counsel appearing for the contesting Respondents mainly relied on the aforesaid decision, particularly the emphasised portion to contend that even when a scheduled caste candidate is promoted earlier than his senior general candidate, the general candidate would regain his seniority and such promotion to the scheduled caste candidate would not confer any seniority over the general candidate.

17. The aforesaid view taken by the Supreme Court in Virpal Singh Chauhan's case was subsequently confirmed in Ajit Singh Januja and others Vs. State of Punjab and others, . In the subsequent decision, the seniority of the reserved category candidates over the general category candidates was further diluted by observing as follows:-

16. 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 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 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.

18. In the subsequent decision in *Ajit Singh and Others Vs. The State of Punjab and Others*, , the aforesaid two decisions came to be questioned. Further it was urged on behalf of the reserved candidates that the decision in *Ajit Singh Januja* has went far beyond the decision in *Virpal Singh Chauhan*. Considering the said decisions, the Supreme Court observed as follows :

66.... In our opinion, there is no conflict in the principles laid down in these two judgments, nor is there anything wrong in the above elucidation of the law. In *Virpal* it was not necessary for the Court to go into the question whether any circular - if it gave seniority to the roster-point promotees (reserved candidates) - could be treated as valid. But, in *Ajit Singh* which was an appeal against the Full Bench judgment in *Jaswant Singh* this Court was dealing with a declaration made by the Full Bench for implementation of the Punjab circular dated 19-7-1969 (see para 29 of the Full Bench) which positively declared that the "roster points were seniority points". That was why in *Ajit Singh* this Court had to consider the validity of such a circular. In *Ajit Singh* this Court held that the declaration granted in the impugned judgment of the Full Bench in *Jaswant Singh* on the basis of the Punjab circular would be in conflict with Article 14 and Article 16(1). This Court had therefore to lay down that any circular, order or rule issued to confer seniority to the roster-point promotees would be invalid. Thus, the decision in *Ajit Singh* cannot be found fault with.

Ultimately, the Apex Court held as follows :

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 remained there when the senior general candidate reached that Level 3. In cases where the reserved candidate has gone up to 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.

19. All the aforesaid decisions came to be considered by a Constitutional Bench of the Apex Court in M. Nagaraj and Others Vs. Union of India (UOI) and Others, . After considering the aforesaid decisions it was laid down as under :

79. Reading the above judgments, we are of the view that the concept of "catch-up" rule and "consequential seniority" are judicially evolved concepts to control the extent of reservation. The source of these concepts is in 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 "equality code" under Articles 14, 15 and 16 is violated by deletion of the "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 Parliament. Principles of service jurisprudence are different from constitutional limitations. Therefore, in our view neither the "catch-up" rule nor the concept of "consequential seniority" is implicit in clauses (1) and (4) of Article 16 as correctly held in Virpal Singh Chauhan.

20. From the aforesaid decisions, there is no quarrel over the proposition that "catch up rule" and "consequential seniority" are two separate concepts in the service jurisprudence and they neither destroy the structure of Article 16(1) nor violate the "equality code" contemplated under the Articles 14, 15 and 16. Further, the Nagaraj case has amply made it clear that application of "catch up rule" depends upon the facts of every case and that cannot be a binding

precedent. Therefore, in the present case, one has to see as to whether the "catch up rule" would be applicable in the light of the Constitutional Amendments.

21. In the above context, one of the contentions of the learned Senior Counsel appearing for the appellants is that the benefit of consequential seniority given in addition to the accelerated promotion under Article 16(4-A) was not considered by the learned single Judge in the impugned order.

22. Since much relevance has been placed on the 85th Amendment, viz., Article 16(4-A) to the Constitution, it would be profitable to note down the amendment as well as the background on which the aforesaid amendment was brought into existence.

23. In M. Nagaraj's case, 77th Amendment relating to 16(4-A) in 1995, 85th Amendment regarding 16(4-A) in 2001 and their objects were gone in detail by the Apex Court and those objects and the observations made by the Apex Court, being relevant to the present case, are extracted in extenso.

85. The Supreme Court in its judgment dated 16-11-1992 in Indra Sawhney stated that reservation in appointments or posts under Article 16(4) is confined to initial appointment and cannot extend to reservation in the matter of promotion. Prior to the judgment in Indra Sawhney reservation in promotion existed. The Government felt that the judgment of this Court in Indra Sawhney adversely affected the interests of SCs and STs in services, as they had not reached the required level. Therefore, the Government felt that it was necessary to continue the existing policy of providing reservation in promotion confined to SCs and STs alone. We quote herein below the Statement of Objects and Reasons with the text of the Constitution (Seventy-seventh Amendment) Act, 1995 introducing clause (4-A) in Article 16 of the Constitution:

#### 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 16-11-1992 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 extend 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 has 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 (4-A) 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-

(4-A) 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 favor 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.

The said clause (4-A) was inserted after clause (4) of Article 16 to say that nothing in the said article shall prevent the State from making any provision for reservation in matters of promotion to any class(es) of posts in the services under the State in favor of SCs and STs which, in the opinion of the States, are not adequately represented in the services under the State.

86.... Clause (4-A) of Article 16 applies only to SCs and STs. The said clause is carved out of Article 16(4). Therefore, clause (4-A) will be governed by the two compelling reasons- "backwardness" and "inadequacy of representation", as mentioned in Article 16(4). If the said two reasons do not exist then the enabling provision cannot come into force. The State can make provision for reservation only if the above two circumstances exist. Further, in *Ajit Singh (II)* this Court has held that apart from "backwardness" and "inadequacy of representation" the State shall also keep in mind "overall efficiency" (Article 335). Therefore, all the three factors have to be kept in mind by the appropriate Government in providing for reservation in promotion for SCs and STs.

87. After the Constitution (Seventy-seventh Amendment) Act, 1995 this Court stepped in to balance the conflicting interests. This was in *Virpal Singh Chauhan* in which it was held that a roster-point promotee getting the benefit of accelerated promotion would not get consequential seniority. As such, consequential seniority constituted additional benefit and, therefore, his seniority will be governed by the panel position. According to the Government, the decisions in *Virpal Singh* and *Ajit Singh (I)* bringing in the concept of "catch-up" rule adversely affected the interests of SCs and STs in the matter of seniority on promotion to the next higher grade.

88. In the circumstances, clause (4-A) of Article 16 was once again amended and the benefit of consequential seniority was given in addition to accelerated promotion to the roster-point promotees. Suffice it to state that the Constitution

(Eighty-fifth Amendment) Act, 2001 was an extension of clause (4-A) of Article 16. Therefore, the Constitution (Seventy-seventh Amendment) Act, 1995 has to be read with the Constitution (Eighty-fifth Amendment) Act, 2001.

89. We quote herein below the Statement of Objects and Reasons with the text of the Constitution (Eighty-fifth Amendment) Act, 2001:

#### 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 OM dated 30-1-1997, 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 OM dated 30-1-1997 immediately. Mere withdrawal of the OM dated 30-1-1997 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(4-A) 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(4-A) with effect from the date of coming into force of Article 16(4-A) 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 4-1-2002

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 (4-A), 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.

90. Reading the Constitution (Seventy-seventh Amendment) Act, 1995 with the Constitution (Eighty-fifth Amendment) Act, 2001, clause (4-A) of Article 16 now reads as follows:

16. (4-A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favor 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.

91. The question in the present case concerns the width of the amending powers of Parliament. The key issue is-whether any constitutional limitation mentioned in Article 16(4) and Article 335 stands obliterated by the above constitutional amendments.

92. In R.K. Sabharwal the issue was concerning operation of roster system. This Court stated that the entire cadre strength should be taken into account to determine whether reservation up to the required limit has been reached. It was held that if the roster is prepared on the basis of the cadre strength, that by itself would ensure that the reservation would remain within the ceiling limit of 50%. In substance, the Court said that in the case of hundred-point roster each post gets marked for the category of candidate to be appointed against it and any subsequent vacancy has to be filled up by that category candidate alone (replacement theory).

93. The question which remained in controversy, however, was concerning the rule of "carry-forward". In Indra Sawhney this Court held that the number of vacancies to be filled up on the basis of reservation in a year including the "carry-forward" reservations should in no case exceed the ceiling limit of 50%.

94. However, the Government found that total reservation in a year for SCs, STs and OBCs combined together had already reached 49 1/2% and if the judgment of this Court in Indra Sawhney had to be applied it became difficult to fill "backlog vacancies". According to the Government, in some cases the total of the current and backlog vacancies was likely to exceed the ceiling limit of 50%. Therefore, the Government inserted clause (4-B) after clause (4-A) in Article 16 vide the Constitution (Eighty-first Amendment) Act, 2000.

97. As stated above, clause (4-A) of Article 16 is carved out of clause (4) of Article 16. Clause (4-A) provides benefit of reservation in promotion only to SCs and STs. In S. Vinod Kumar v. Union of India this Court held that relaxation of qualifying marks and standards of evaluation in matters of reservation in promotion was not permissible under Article 16(4) in view of Article 335 of the Constitution. This was also the view in Indra Sawhney.

24. After taking note of the aforesaid constitutional amendments, the Apex Court proceeded to ascertain whether those amendments would violate the principle of

basic structure by posing a question as to whether the constitutional limitations on the amending power of Parliament are obliterated by the impugned amendments so as to violate the basic structure of the Constitution.

25. The Apex Court proceeded to answer the aforesaid question as follows :

102. In the matter of application of the principle of basic structure, twin tests have to be satisfied, namely, the "width test" and the test of "identity". As stated hereinabove, the concept of the "catch-up" rule and "consequential seniority" are not constitutional requirements. They are not implicit in clauses (1) and (4) of Article 16. They are not constitutional limitations. They are concepts derived from service jurisprudence. They are not constitutional principles. They are not axioms like, secularism, federalism, etc. Obliteration of these concepts or insertion of these concepts does not change the equality code indicated by Articles 14, 15 and 16 of the Constitution. Clause (1) of Article 16 cannot prevent the State from taking cognizance of the compelling interests of Backward Classes in the society. Clauses (1) and (4) of Article 16 are restatements of the principle of equality under Article 14. Clause (4) of Article 16 refers to affirmative action by way of reservation. Clause (4) of Article 16, however, states that the appropriate Government is free to provide for reservation in cases where it is satisfied on the basis of quantifiable data that Backward Class is inadequately represented in the services. Therefore, in every case where the State decides to provide for reservation there must exist two circumstances, namely, "backwardness" and "inadequacy of representation". As stated above, equity, justice and efficiency are variable factors. These factors are context-specific. There is no fixed yardstick to identify and measure these three factors, it will depend on the facts and circumstances of each case. These are the limitations on the mode of the exercise of power by the State. None of these limitations have been removed by the impugned amendments. If the State concerned fails to identify and measure backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid. These amendments do not alter the structure of Articles 14, 15 and 16 (equity code). The parameters mentioned in Article 16(4) are retained. Clause (4-A) is derived from clause (4) of Article 16. Clause (4-A) is confined to SCs and STs alone. Therefore, the present case does not change the identity of the Constitution.

26. By applying the aforesaid two tests, the Apex Court proceeded further to observe as follows :

104. Applying the above tests to the present case, there is no violation of the basic structure by any of the impugned amendments, including the Constitution (Eighty-second) Amendment Act, 2000. The constitutional limitation under Article 335 is relaxed and not obliterated. As stated above, be it reservation or evaluation, excessiveness in either would result in violation of the constitutional mandate. This exercise, however, will depend on the facts of each case. In our view, the field of exercise of the amending power is retained by the impugned amendments, as the impugned amendments have introduced merely enabling

provisions because, as stated above, merit, efficiency, backwardness and inadequacy cannot be identified and measured in vacuum. Moreover, Article 16(4-A) and Article 16(4-B) fall in the pattern of Article 16(4) and as long as the parameters mentioned in those articles are complied with by the States, the provision of reservation cannot be faulted. Articles 16(4-A) and 16(4-B) are classifications within the principle of equality under Article 16(4).

116.... Therefore, in our view Articles 16(4-A) and 16(4-B) form a composite part of the scheme envisaged. Therefore, in our view Articles 16(4), 16(4-A) and 16(4-B) together form part of the same scheme. As stated above, Articles 16(4-A) and 16(4-B) are both inspired by observations of the Supreme Court in *Indra Sawhney* and *R.K. Sabharwal*. They have nexus with Articles 17 and 46 of the Constitution. Therefore, we uphold the classification envisaged by Articles 16(4-A) and 16(4-B). The impugned constitutional amendments, therefore, do not obliterate equality.

27. The Supreme Court further proceeded to observe as follows:

121. The impugned constitutional amendments by which Articles 16(4-A) and 16(4-B) have been inserted flow from Article 16(4). They do not alter the structure of Article 16(4). They retain the controlling factors or the compelling reasons, namely, backwardness and inadequacy of representation which enables the States to provide for reservation keeping in mind the overall efficiency of the State administration under Article 335. These impugned amendments are confined only to SCs and STs. They do not obliterate any of the constitutional requirements, namely, ceiling limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-classification between OBCs on one hand and SCs and STs on the other hand as held in *Indra Sawhney*, the concept of post-based roster with inbuilt concept of replacement as held in *R.K. Sabharwal*.

28. The aforesaid decision has given a green signal to the Constitutional amendments by observing that until the inadequacy and efficiency of administration are retained in Article 16(4-A) and 16(4-B) as controlling factors, the Court cannot attribute constitutional invalidity to those enabling provisions and when the State fails to identify and implement the controlling factors then excessiveness comes in, which has to be decided on the facts of each case.

29. In the background of the aforesaid decision, in the present case, one has to see as to whether there was any such excessiveness, resulting discrimination.

30. The main contention raised on behalf of the private respondents is that they were initially appointed as Assistant Engineers through the Tamil Nadu Public Service Commission in 1982 and the appellants were regularized in the post of Junior Engineer only in 1984-85 and, therefore, the seniority list prepared by the Department making the appellants as senior to the respondents is illegal and perverse.

31. In the Tamil Nadu Highways Department, there were two services in respect of Engineers and Para Engineering Staff, viz., Tamil Nadu Highways Engineering Service and Tamil Nadu Highways Engineering Subordinate Service. By G.O.Ms.No. 807, Public Works Department, dated 24.05.1993, the category of Assistant Engineer was brought into Tamil Nadu Highways Engineering Service from the Tamil Nadu Highways Engineering Subordinate Service with retrospective effect from 17.2.1971. Therefore, there cannot be any dispute that right from 1971, the Assistant Engineers and Junior Engineers are placed under two different services and there is no common seniority between the Assistant Engineers and the Junior Engineers. The method of recruitment for the post of Assistant Divisional Engineer is appointment from the categories of Assistant Engineers and the Junior Engineers in the ratio of 3: 1 i.e., first three vacancies shall be filled or reserved to be filled by recruitment by transfer from permanent Junior Engineers and every fourth vacancy shall be filled by recruitment by transfer from among permanent supervisors of the Tamil Nadu Highways Engineering Service. It is also not in dispute that Rule 12 of the Tamil Nadu Highways Engineering Subordinate Service Rules contemplates application of rule of reservation for the appointment of Assistant Divisional Engineers by recruitment by transfer. Rule 12 is as follows :

12. Reservation of appointment : The rule of reservation of appointments (General Rule 22) shall apply to the appointment of Assistant Divisional Engineers by direct recruitment and recruitment by transfer separately and to the appointment of Assistant Engineers by direct recruitment.

32. A reading of the aforesaid Rule makes it clear that the rule of reservation shall apply to the appointment of Assistant Divisional Engineers by direct recruitment as well as recruitment by transfer separately. In the present case, we are concerned with the seniority list of Assistant Divisional Engineers. No doubt, the State, by following the aforesaid rule of reservation, has given promotion to the Junior Engineers to the post of Assistant Divisional Engineers. The grievance of the private respondents is that the Assistant Engineers and Junior Engineers belonging to the Scheduled Caste are promoted as Assistant Divisional Engineers much earlier to the General Category candidates, thereby denying promotion to the Assistant Engineers of General Category.

33. We are not able to accept the contention of the private respondents. When the cadre of the Junior Engineers and the Assistant Engineers are different and they were not merged at any point of time, the Assistant Engineers belonging to the General Category cannot question the promotion given to the Junior Engineers/Assistant Engineers by the State by following the rule of reservation. When there is a specific rule providing reservation of appointment, which is applicable to the appointment in Assistant Divisional Engineer, the Assistant Engineers belonging to the General Category cannot contend that the rule of reservation is not applicable to the Junior Engineers/Assistant Engineers of the reserved category. Moreover, the Rule of Reservation does not apply in the case

of promotions as that of the respondents, who were direct recruits, but applicable in the case of recruitment by transfer such as the appellants.

34. The learned single Judge mainly relying upon the decisions of the Supreme Court in Virpal Singh Chauhan case, Ajit Singh Januja case, Ajit Singh II case, M. Nagaraj case and the earlier decision of the Tribunal in O.A.No. 2186 of 1996 came to a conclusion that the senior general candidates at the lower level have to be treated as senior at the promotional level over and above the reserved candidates even though they were promoted earlier to that level.

35. The learned single Judge has failed to take note of the purport and import of the Article 16(4-A) of the Constitution. There is no whisper in the impugned order with regard to the applicability of Article 16(4-A) to the present case. The object of amending Article 16(4-A) is to give consequential seniority in addition to accelerated promotion to the roster-point promotees. One should not ignore the Statement of Objects and Reasons for bringing the aforesaid amendment. In view of the decisions of the Supreme Court in Virpal Singh Chauhan and Ajit Singh Januja, sine in the view of the Government of India, they had 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, in order to protect the interest of the government servants belonging to Scheduled Castes and Scheduled Tribes, the amended Article 16(4-A) was brought into existence by Constitutional 85th amendment. After extracting the Statements and Objects and Article 16(4-A), in M. Nagaraj case, while upholding the validity of the Constitutional Amendments viz., Article 16(4-A) and 16(4-B), the Apex Court has made it very clear that when there is excessiveness, which has to be decided on the facts of each case, constitutional invalidity can be attributed. The learned single Judge did not find any arbitrariness or excessiveness in the promotions given to the appellants in the light of Article 16(4-A) and Rule 12 of the Rules. It is also to be noted that the Honourable Supreme Court had no occasion to go into the validity of Article 16(4-A) in the decisions of Ajit Singh Januja, Ajit Singh II, Virpal Singh Chauhan cases, the decisions which are mainly relied on by the learned single Judge to allow the writ petitions, as they were earlier to the amendment. In fact only to overcome the difficulties of the said judgments of the Hon'ble Apex Court, Article 16(4-A) was further amended by Constitution 85th amendment. Considering the Constitutional effect of Article 16(4-A) and the facts of the case, we have no hesitation to reverse the findings rendered by the learned single Judge.

For the aforesaid reasons, the writ appeals are allowed. No costs. Consequently, the connected Miscellaneous Petitions are closed.