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PRAVAKAR MALLICK & ANR.

v.

THE STATE OF ORISSA & ORS.

(Civil Appeal No. 3240 of 2011)

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APRIL 17, 2020

**[MOHAN M. SHANTANAGOUNDAR
AND R. SUBHASH REDDY, JJ.]**

Constitution (Eighty-Fifth) Amendment Act, 2001 –

- C *Art.16(4A) – Respondents were appointed to Orissa Administrative Service-II (OAS-II) posts – They were senior to appointees belonging to SC/ST category and were subsequently promoted in next higher category, OAS-I(JB) – Appellants and others belonging to SC/ST category, recruited with the respondents in subsequent batches, were given promotion to the rank of OAS-I(JB) against*
- D *reserved vacancies during 1995 & 2000 – Original seniority position in the cadre of OAS-II prepared by Public Service Commission was retained without any changes – Irrespective of getting promotion in subsequent years, the inter se seniority of respondents and the SC/ST roster point promotees in the rank of OAS-I was maintained in the seniority list dated 16.05.2001 –*
- E *Art.16(4A) was amended by 85th amendment – State of Orissa issued Resolution dated. 20.03.2002 issuing instructions to all the departments to extend the benefit of seniority for SC/ST govt. servants on promotion by virtue of rule of reservation – Gradation List dated. 03.03.2008 prepared by altering the seniority of*
- F *respondents, contrary to the list dated.16.05.2001 – OA filed by respondents – Dismissed by Tribunal – Writ petition allowed – Held: Seniority for general category officers was restored in the Gradation List of OAS-I(JB) dated 16.05.2001, by extending the benefit of “Catch Up Rule”, evolved by Supreme Court in the case*
- G *of Virpal Singh Chauhan subsequently accepted in Ajit Singh (II) – Validity of 85th amendment was upheld in the case of M.Nagaraj – After the said amendment, amending Art.16(4A) which enabled the State to extend the benefit of promotion with consequential seniority by examining the adequacy of representation to SCs/STs in the State services, the State of Orissa has admittedly not made any provision,*
- H *either by way of legislation or an executive order, to extend such*

benefit in the Class-I Services – Government Resolution dated 20.03.2002 is issued merely based on the instructions issued by Govt. of India, without examining the adequacy of representation in posts – It has no legal basis – Seniority/Gradation List dated 16.05.2001 of OAS-I (JB) was prepared correctly following the ratio laid down by Supreme Court – In absence of any law or decision by way of executive order based on acceptable material for conferring additional benefit of consequential seniority, the Gradation List dated 03.03.2008 was prepared by altering the positions maintained in List dated 16.05.2001 – Well reasoned judgment of the High Court is not interfered with – Service Law.

Dismissing the appeals, the Court

HELD: 1.1 The seniority for general category officers was restored in the Gradation List of OAS-I(JB) which was prepared on 16.05.2001, by extending the benefit of “Catch Up Rule”, evolved by this Court in the case of Virpal Singh Chauhan which is subsequently accepted in the case of Ajit Singh (II). After Constitution (Eighty-Fifth) Amendment Act, 2001, amending Article 16(4A) of the Constitution which enabled the State to extend the benefit of promotion with consequential seniority by examining the adequacy of representation to scheduled castes and scheduled tribes in the State services, the State of Orissa has not made any provision, either by way of legislation or by an executive order, to extend such benefit in the Class-I Services. The advocate for State specifically admitted that the Govt. has not issued any executive order or has passed any legislation. The Government Resolution dated 20.03.2002 is issued merely based on the instructions issued by the Government of India, without examining the adequacy of representation in posts. Government Resolution dated 20.03.2002 can neither be termed as law made in exercise of enabling power of the State under Article 16(4A), nor does it satisfy the parameters laid down in the various decisions of this Court. The Resolution has no legal basis. The Seniority/Gradation List dated 16.05.2001 of OAS-I (JB) was prepared correctly by following the ratio laid down by this Court and in absence of any law or decision by way of executive order based on acceptable material for conferring additional benefit of consequential seniority, the Gradation List dated 03.03.2008 was

- A prepared by altering the positions which were maintained in the List dated 16.05.2001. While it is open for the State to confer benefit even through an executive order by applying mandatory requirements as contemplated under Article 16(4A) but the Resolution dated 20.03.2002 is merely issued by referring to the instructions of the Union of India without examining the adequacy of representation in promotional posts, as held by this Court. [Paras 12, 13] [231-D-H; 232-A-F]
- B instructions of the Union of India without examining the adequacy of representation in promotional posts, as held by this Court. [Paras 12, 13] [231-D-H; 232-A-F]

M. Nagaraj & Ors. v. Union of India & Ors. (2006) 8

SCC 212 : [2006] 7 Suppl. SCR 336 ; Ajit Singh &

- C *Ors. (II) v. State of Punjab & Ors. (1999) 7 SCC 209 : [1999] 2 Suppl. SCR 521 – followed.*

Jarnail Singh & Ors. v. Lachhmi Narain Gupta & Ors. (2018) 10 SCC 396 : [2018] 10 SCR 663 – held inapplicable.

- D *Union of India & Ors. v. Virpal Singh Chauhan & Ors. (1995) 6 SCC 684 ; [1995] 4 Suppl. SCR 158 ; Suraj Bhan Meena & Anr. v. State of Rajasthan & Ors. (2011) 1 SCC 467 : [2010] 14 SCR 532 ; B.K. Pavitra & Ors. v. Union of India & Ors. (2017) 4 SCC 620 : [2017] 1 SCR 631 – relied on.*

- E *Indra Sawhney & Ors. v. Union of India & Ors. (1992) Supp. 3 SCC 217 : [1992] 2 Suppl. SCR 454 ; Jagdish Lal & Ors. v. State of Haryana & Ors. (1997) 6 SCC 538 – referred to.*

Case Law Reference

F	[2006] 7 Suppl. SCR 336	followed	Para 3
	[1995] 4 Suppl. SCR 158	relied on	Para 4
	(1997) 6 SCC 538	referred to	Para 4
G	[1999] 2 Suppl. SCR 521	followed	Para 4
	[2010] 14 SCR 532	relied on	Para 11
H	[2017] 1 SCR 631	relied on	Para 11
	[2018] 10 SCR 663	held inapplicable	Para 11
	[1992] 2 Suppl. SCR 454	referred to	Para 11

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3240 A
of 2011.

From the Judgment and Order dated 24.12.2010 of the High Court of Orissa at Cuttack in Writ Petition (Civil) No. 6781 of 2008.

With

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Civil Appeal No. 4421 of 2011

A. Subba Rao, K.L.D.S. Vinober, Naresh Kumar, Advs. for the Appellants.

Shibashish Misra, S. Debabrata Reddy, Chandan Kumar Mandal, Ms. Rajdipa Behura, Philomon K., Ms. Nansika Sahu, Ms. Neha V., Ashray Behura, A. Venayagam Balan, Sibo Sankar Mishra, Niranjan Sahu, Advs., for the Respondents.

The Judgment of the Court was delivered by

R. SUBHASH REDDY, J.

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Civil Appeal No.3240 of 2011

1. This civil appeal is filed, aggrieved by the judgment and order dated 24.12.2010 passed by the High Court of Orissa at Cuttack in W.P.(C) No.6781 of 2008. By the aforesaid order, writ petition filed by respondent nos.4 to 8 herein, is allowed by setting aside the order dated 17.04.2008 passed in O.A.No.904(C) of 2008 etc. by the Orissa Administrative Tribunal and the Government Resolution dated 20.03.2002 and the consequential Gradation List dated 03.03.2008 of Orissa Administrative Services, Class-I (Junior Branch) are quashed.

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2. In view of the instructions issued in Office Memorandum dated 21.01.2002, by the Government of India, Ministry of Personnel, Public Grievances and Pensions, the Government of Orissa has passed Resolution dated 20.03.2002. By the aforesaid Resolution, while withdrawing the earlier instructions, for fixation of seniority of Scheduled Caste/Scheduled Tribe (SC/ST) government servants on promotion by virtue of rule of reservation, the State Government has issued instructions to the effect that the "Catch Up Principle" adopted earlier by the State Government in General Administration Department Resolution No.39374 dated 02.11.2000 shall not be followed any longer. It is further ordered that the government servants belonging to SCs/ STs shall retain their seniority in the case of promotion by virtue of rule

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- A of reservation. In the said G.O. it is further clarified that the government servants belonging to general/OBC category promoted later will be placed junior to the SC/ST government servants promoted earlier, by virtue of rule of reservation.
3. The High Court has allowed the abovementioned writ petition B and the connected writ petitions and quashed the aforesaid G.O. and Gradation List dated 03.03.2008 mainly on the ground that, unless and until the State Government makes a law for conferring the benefit of promotion with consequential seniority to SC/ST candidates, they are not entitled to claim seniority in the promoted categories over the general category candidates. The said writ petition is allowed, following the C judgment of this Court in the case of **M. Nagaraj & Ors. v. Union of India & Ors.**¹.
4. The respondent-writ petitioners were appointed to Orissa Administrative Service-II (OAS-II) posts pursuant to selections made D by the Orissa Public Service Commission. They were recruited during the years 1983, 1984 and 1987. They were assigned different ranks in the merit list for their respective batches prepared by the Public Service Commission. In the above said merit list, persons belonging to SC/ST category, who were appointed against the reserved vacancies were placed below the writ petitioners. Thus, the writ petitioners were senior E to appointees belonging to SC/ST category. The respondent-writ petitioners were subsequently promoted and appointed in the next higher category, i.e., Orissa Administrative Service-I (OAS-I)(JB) vide Government Notification dated 26.08.2000. The appellants and some others belonging to SC and ST category, recruited along with the respondent-writ petitioners in subsequent batches, were given promotion F to the rank of OAS-I(JB) against reserved vacancies during the year 1995 and 2000 as provided under Orissa Reservation of Vacancies in Posts and Services (For Scheduled Castes and Scheduled Tribes) Act, 1975 and the rules made thereunder. The seniority of reserved categories and unreserved categories, including that of the respondent- G writ petitioners was not finalised by the Public Service Commission since the principles determining seniority, inter se, was the subject matter of several litigations. The original seniority position in the cadre of OAS-II prepared by the Public Service Commission was retained without any changes in view of the judgment of this Court in the case of **Union**
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- H ¹ (2006) 8 SCC 212

of India & Ors. v. Virpal Singh Chauhan & Ors.². Irrespective of getting promotion in subsequent years, the inter se seniority of the respondent-writ petitioners and the SC/ST roster point promotees in the rank of OAS-I was maintained in the seniority list prepared on 16.05.2001. Article 16(4A) of the Constitution of India was amended by 85th amendment, enabling the State to grant benefit of promotion with consequential seniority to SC/ST reserved category officers. By Constitution (85th) Amendment Act of 2001, Article 16(4A) was amended and for the words, “in matters of promotion to any class”, the words, “in matters of promotion with consequential seniority to any class” were substituted. In the judgment of this Court in the case of **M. Nagaraj**¹ a Constitution Bench of this Court, while upholding the Constitution (85th) Amendment Act of 2001 held that, the State is not bound to make reservation for SCs/STs in matter of promotions. However it was held that, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Article 335 of the Constitution of India. It is further made clear that even if the State has compelling reasons, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling of 50% or obliterate the creamy layer or extend the reservation indefinitely. In the case of **Virpal Singh Chauhan**², this Court has held that reserved promoted candidates are not entitled to seniority in the promoted post and if the general category candidate reaches the said post, he is entitled to seniority over the promotees to reserved vacancies. Subsequently, a three-Judge Bench judgment of this Court in the case of **Jagdish Lal & Ors. v. State of Haryana & Ors.**³ has held that reserved promoted category candidates are entitled to seniority, in the promoted posts and not as per the feeder cadre. Subsequently, a Constitution Bench of this Court in the case of **Ajit Singh & Ors. (II) v. State of Punjab & Ors.**⁴ has overruled the judgment in the case of **Jagdish Lal**³ and upheld the principle, viz., “Catch Up Rule”, as mentioned in the judgment in the case of **Virpal Singh Chauhan**².

² AIR 1996 SC 448 = (1995) 6 SCC 684

³ (1997) 6 SCC 538

⁴ (1999) 7 SCC 209

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- A 5. In view of the “Catch Up Rule” evolved by this Court in the case of **Virpal Singh Chauhan**², which is approved by this Court, subsequently in the case of **Ajit Singh (II)**⁴, the seniority list dated 16.05.2001, of officers of OAS-I(JB Cadre) has been prepared. In such list, the roster point promotees belonging to SC/ST category, who were given promotion to OAS-I(JB) against reserved vacancies earlier, irrespective of their original seniority in the feeder cadre, were shown below the respondent-writ petitioners. It is not in dispute that after 85th Constitution Amendment amending Article 16(4A) of the Constitution, the State of Orissa has neither issued any executive order nor enacted any legislation for conferring benefit of seniority for officers belonging to SC/ST category who are promoted against reserved vacancies. Referring to instructions issued by the Government of India, the State of Orissa has issued Resolution dated 20.03.2002 issuing instructions to all the departments of the Government to extend the benefit of seniority for scheduled caste and scheduled tribe government servants on promotion by virtue of rule of reservation. Pursuant to such Government Resolution dated 20.03.2002, Gradation List dated 03.03.2008 was prepared by altering the seniority of the respondent-writ petitioners, contrary to the list dated 16.05.2001.
- B 6. At first instance, the respondent-writ petitioners approached the Orissa Administrative Tribunal by filing Original Application, but the said application was dismissed on the ground that it was premature. Thereafter, respondent-writ petitioners have approached the High Court questioning the orders of the Tribunal and sought further reliefs for quashment of Government Resolution and the consequential Gradation List. The writ petition is allowed by a common order in a batch of cases by the High Court mainly on the ground that, the Government Resolution dated 20.03.2002 can neither be termed as a law in exercise of enabling power of the State under Article 16(4A), nor does it satisfy the parameters laid down by this Court. The High Court further held that there is no legal basis for such Resolution and accordingly quashed the Government Resolution and consequential Gradation List.
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- H 7. We have heard Sri A. Subba Rao, learned counsel appearing for the appellants; learned counsel for the State of Orissa; and the learned counsel representing one of the writ petitioners.
- H 8. Sri Subba Rao, learned counsel appearing for the appellants has primarily contended that as per the judgment of this Court in the

case of **M. Nagaraj**¹ this Court has upheld the amendment to Article 16(4A) of the Constitution by 85th Constitution Amendment and held that it is always open for the State to extend the benefit of reservation with consequential seniority, either by executive order or by way of legislation. When the Government has taken decision by way of Resolution dated 20.03.2002, same is quashed by the High Court without assigning any valid reasons. It is further submitted that the Orissa Act 38 of 1975, i.e., The Orissa Reservation of Vacancies in Post and Services (For Scheduled Castes and Scheduled Tribes) Act, 1975 is in force, in the State and by the said Act, benefit of reservation has been extended to scheduled castes and scheduled tribes, in promotions also. The learned counsel has placed reliance on Section 10 of the said Act, to buttress his submission that as per the same, the promoted SC/ST candidates are entitled for benefit of seniority.

9. The learned counsel appearing for the State of Orissa has fairly submitted that after 85th Constitution Amendment by which Article 16(4A) was amended, there is neither any legislation in the State of Orissa nor any executive order by the Government, to extend the benefit of promotion to the reserved vacancies with consequential seniority.

10. Having heard the learned counsels on both sides we have perused the impugned order and other material on record.

11. It is clear from the material placed on record that the seniority for general category officers was restored in the Gradation List of OAS-I(JB) which was prepared on 16.05.2001, by extending the benefit of “Catch Up Rule”, evolved by this Court in the case of **Virpal Singh Chauhan**² which is subsequently accepted in the case of **Ajit Singh (II)**⁴. After Constitution (Eighty-Fifth) Amendment Act, 2001, Article 16(4A) reads as under :

“16. Equality of opportunity in matters of public employment.-(1)

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(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

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- A services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.”
- The above said amended constitutional provision makes it clear that in case the State is of opinion, SC & STs are not adequately represented, State is empowered to make a provision for reservation in matters of promotion with consequential seniority, to any class. When the validity of the constitutional amendment was questioned, same was upheld by this Court in the case of **M. Nagaraj**¹. In the aforesaid judgment, a Constitution Bench of this Court has held that the State is not bound to make reservation for SCs/STs in matters of promotion.
- C However, if they wish to exercise their discretion and make reservations in promotion, the States have to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment, keeping in mind maintenance of efficiency, as indicated by Article 335 of the Constitution of India. It is further held that such exercise depends on availability of data. In the case of **Suraj Bhan Meena & Anr. V. State of Rajasthan & Ors.**⁵ a two-Judge Bench of this Court has considered the validity of notifications, providing for promotion of members of SC/ST with consequential seniority, issued by the State Government. In the aforesaid judgment, it is held by this Court that the need for collecting quantifiable data and ascertaining inadequacy of representation of members belonging to SC/STs is a condition precedent for issuing notifications providing benefit of reservation with consequential seniority. Further, in the case of **B.K. Pavitra & Ors. v. Union of India & Ors.**⁶ this Court has held that the determination of ‘inadequacy of representation’, ‘backwardness’ and ‘overall efficiency’ is mandatory for exercising power under Article 16(4A). It is further held in the said case that the mere fact that there is no proportionate representation in promotional posts for reserved category candidates, by itself is not sufficient to extend the benefit of consequential seniority to promotees who are otherwise juniors. It is held that in absence of such mandatory exercise by the State the “Catch Up Rule” fully applies. In the case of **Jarnail Singh & Ors. v. Lachhmi Narain Gupta & Ors.**⁷ while answering the reference a Constitution Bench of this Court has held that the judgment in the case

⁵ (2011) 1 SCC 467

⁶ (2017) 4 SCC 620

H ⁷ (2018) 10 SCC 396

of **M. Nagaraj**¹ need not be revisited by referring to a seven-Judge Bench. At the same time it held that the conclusion in **M. Nagaraj**¹ that the State has to collect quantifiable data showing backwardness of scheduled castes and scheduled tribes is held to be invalid on the ground that the same runs contrary to 9-Judge Bench judgment of this Court in the case of **Indra Sawhney & Ors. v. Union of India & Ors.**⁸. It is also held in the said judgment that Article 16(4A) has been couched in language which would leave it to the States to determine adequate representation depending upon the promotional post in question. Further in the case of **B.K. Pavitra & Ors. v. Union of India & Ors.**⁹ this Court while considering the validity of Karnataka Determination of Seniority of the Government Servants Promoted on the Basis of Reservation (to the Posts in the Civil Services of the State) Act, 2002 has upheld the Act on the ground that same was enacted by making study regarding inadequacy of representation, and overall administrative efficiency.

12. In view of the judgments as referred above, in this case, it is to be noticed that after Constitution (Eighty-Fifth) Amendment Act, 2001, amending Article 16(4A) of the Constitution which enabled the State to extend the benefit of promotion with consequential seniority by examining the adequacy of representation to scheduled castes and scheduled tribes in the State services, the State of Orissa has not made any provision, either by way of legislation or by an executive order, to extend such benefit in the Class-I Services. The advocate for State specifically admitted that the Govt. has not issued any executive order or has passed any legislation. The Government Resolution dated 20.03.2002 is issued merely based on the instructions issued by the Government of India, without examining the adequacy of representation in posts. As is evident from the order of the High Court, the State in its counter affidavit has taken the stand that there is no necessity for bringing out any law to extend the benefit of seniority for those who are promoted in reserved vacancies. Government Resolution dated 20.03.2002 can neither be termed as law made in exercise of enabling power of the State under Article 16(4A), nor does it satisfy the parameters laid down in the various decisions of this Court. The Resolution has no legal basis. The Seniority/Gradation List dated

⁸ 1992 Supp. (3) SCC 217

⁹ 2019 SCC OnLine SC 694

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- A 16.05.2001 of OAS-I (JB) was prepared correctly by following the ratio laid down by this Court and in absence of any law or decision by way of executive order based on acceptable material for conferring additional benefit of consequential seniority, the Gradation List dated 03.03.2008 was prepared by altering the positions which were maintained in the List dated 16.05.2001. While it is open for the State to confer benefit even through an executive order by applying mandatory requirements as contemplated under Article 16(4A) but the Resolution dated 20.03.2002 is merely issued by referring to the instructions of the Union of India without examining the adequacy of representation in promotional posts, as held by this Court.
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- C 13. Further, the submission of the learned counsel – Sri A. Subba Rao – that the benefit of reservation in promotion is given in the services of OAS-I for scheduled caste and scheduled tribe officers as per Section 10 of Orissa Act 38 of 1975, but same cannot be countenanced for the reason that such Act was enacted by the State of Orissa in the
- D year 1975 but no provision is brought to our notice in such Act for giving the benefit of seniority for the promotees who were promoted in reserved vacancies. In absence of any provision in the said Act for conferring the benefit of seniority, and in absence of any amendment after Constitution (Eighty-Fifth) Amendment Act of 2001, by which Article 16(4A) was amended, benefit of seniority cannot be extended
- E relying on Section 10 of the Act. In view of the stand of the respondent-State in the counter affidavit filed in the writ petition and further in view of the submission made by the learned counsel for the State of Orissa that no benefit of seniority was extended by any State Act or by any executive order by examining adequate representation in terms of Article
- F 16(4A) of the Constitution, we do not find any merit in this appeal so as to interfere with the well reasoned judgment of the High Court. The judgment of this Court rendered in the case of **Jarnail Singh**⁷ relied on by the learned counsel for the appellants also would not take any further the case of the appellants. In the said judgment also for giving the benefit of promotion with consequential seniority, the need to examine
- G adequate representation in posts in terms of the judgment of this Court in the case of **M. Nagaraj**¹ is maintained. As such, the said judgment would not render any assistance for the case of appellants.
- H 14. For the aforesaid reasons, the appeal is dismissed with no order as to costs.

Civil Appeal No.4421 of 2011

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15. The appellants in this appeal, who were not parties before the High Court, have also sought the same relief as has been sought in Civil Appeal No.3240 of 2011. In view of dismissal of Civil Appeal No.3240 of 2011, this appeal also stands dismissed.

Divya Pandey

Appeals dismissed.