

SUDHAKAR BABURAO NANGNURE

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v.

NORESHWAR RAGHUNATHRAO SHENDE & ORS.

(Civil Appeal Nos. 2468-2470 of 2019)

MARCH 05, 2019

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**[DR DHANANJAYA Y CHANDRACHUD AND
HEMANT GUPTA, JJ.]**

Service Law – Promotion – ‘Catch-up’ Rule – Appellant, belonging to open category, joined service as Planning Assistant in the Government of Maharashtra – Appellant and the first respondent, Scheduled Caste, selected for the post of Town Planner on 1st July, 1992 – Appellant promoted as Deputy Director of Town Planning (DDTP) on 1st November, 2003– First respondent promoted as DDTP on 3rd August, 2006 – In the promotional cadre of Joint Director of Town Planning (JDTP), the first respondent was promoted on 11th August, 2011 while the appellant was promoted as JDTP on 2nd July, 2013 – Appellant filed OA before the Maharashtra Administrative Tribunal – In the meanwhile, the first respondent was promoted as Director of Town Planning (DTP) on 30th April, 2016 – OA allowed – High Court set aside the said decision – Appellant filed Special Leave Petition – Withdrawn – Appellant filed review before the High Court – Dismissed – Appellant’s case that once he was promoted as JDTP, the ‘catch-up’ rule must govern and consequently, he must gain seniority over the first respondent and that the first respondent was not entitled to claim consequential seniority on the basis of his earlier promotion in the cadre of JDTP – Held: Preliminary objection to the present appeal that recourse to Supreme Court was barred after the High Court decided the review petitions, not accepted – Government Resolution dated 20th October, 1997 was issued stipulating that an officer belonging to Backward Class will retain seniority in the promotional cadre and that it was not necessary to revise the seniority – GR dated 20th March, 2003 was issued referring to the said GR clarifying that the seniority between backward class and non-backward class candidates in government service in the promotional cadre would be governed by the regular date of promotion – Incorporating the

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- A *principle of consequential seniority, GR dated 20th March, 2003 adverted to r.4, 1982 Rules which stipulated that seniority in a post is determined by the length of continuous service – Further, GR dated 20th March 2003 has not been abrogated upon the enactment of the 2004 Act – Said GR was not challenged before the Tribunal – Such a challenge cannot be entertained at this stage – Further,*
- B *eligibility has to be considered on the date of the occurrence of the vacancy – On 30th April, 2016, the appellant did not fulfill the eligibility of three years' experience as JDTP, required for the post of DTP – Seniority by itself cannot prevail where a senior lacks eligibility for promotion – Even if accepted, the applicability of the*
- C *catch-up rule will also not obviate the requirement of the appellant fulfilling the condition of eligibility for promotion, on the date when the vacancy occurred – Appellant has also not challenged the appointment of the first respondent as JDTP – Judgment of the High Court does not call for interference – Maharashtra Civil Services (Regulation of Seniority) Rules, 1982 – r.4 – Maharashtra State*
- D *Public Services Reservation for Scheduled Castes, Scheduled Tribes, Denotified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and Other Backward Classes Act, 2001 [Act VIII of 2004] – ss. 3-6, 11 - Directorate of Town Planning and Valuation (Recruitment) Rules, 2011 - r-3 - Consitution of India - Art. 16.*
- E *Service Law – Promotion – Seniority and Eligibility – Held: Seniority and eligibility are distinct concepts in service jurisprudence – Seniority by itself cannot prevail where a senior lacks eligibility for promotion to a higher post.*
- F **The appellant, belonging to open category, joined the service as Planning Assistant in the Government of Maharashtra. The appellant and the first respondent, Scheduled Caste, were selected for the post of Town Planner on 1st July, 1992. Appellant was promoted as Deputy Director of Town Planning (DDTP) on 1st November, 2003 and the first respondent was promoted as**
- G **DDTP on 3 Aug. 2006. In the promotional cadre of Joint Director of Town Planning (JDTP), the first respondent was promoted on 11th August 2011 while the appellant was promoted as JDTP on 2nd July, 2013. The appellant filed OA before the Maharashtra Administrative Tribunal. In the meanwhile, the first respondent**
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was promoted as Director of Town Planning (DTP) on 30th April, 2016. OA was allowed. The High Court set aside the said decision. Appellant filed Special Leave Petition, which was withdrawn with the liberty to file review petition before the High Court. Appellant filed review petition before the High Court, which was dismissed. Hence, the present appeals.

Dismissing the appeals, the Court

HELD: Civil Appeal Nos 2468-2470 of 2019 @ Special Leave Petition (Civil) Nos. 8769-8771 of 2018:

1.1 On 20 October 1997, a Government Resolution was issued stipulating that an officer belonging to a Backward Class will retain seniority in the promotional cadre and that it is not necessary to revise the seniority. On 20 March 2003, another GR was issued *inter alia* with reference to the earlier GR noted above. The GR states that following the amendment to Article 16 by the insertion of Clause (4A), it has been decided that the instructions for regulating seniority of officers belonging to the Backward Classes and the general category in the promoted cadre would be governed by the earlier Government Resolutions dated 21 June 1982 and 20 October 1997. The GR clarified that the seniority between backward class and non-backward class candidates in government service in the promotional cadre would be governed by the regular date of promotion. [Paras 49, 50] [978-E; 979-A-B]

1.2 The GR dated 20 March 2003 was issued after the constitutional amendment to Article 16 (4A) by which consequential seniority was incorporated into that provision. Maharashtra State Public Services Reservation for Scheduled Castes, Scheduled Tribes, Denotified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and Other Backward Classes Act, 2001 [Act VIII of 2004] (Reservation Act 2004) was enacted by the State legislature in 2001. The assent of the Governor was received on 20 January 2004 and it was published in the Official Gazette on 22 January 2004. The enactment has come into force after the 85th constitutional amendment. Prior to the enforcement of the Act, reservations were confined upto the entry level in Group I posts. As a result of the enactment of

A the law, reservations are applicable to all appointments in public services and posts [except categories covered by clauses (a) to (d) of sub-section (1) of Section 3]. Section 3 deals with the applicability of the Act and Section 4 deals with reservation and percentages. [Paras 52-54] [980-A, F-G; 981-A]

B 1.3 Sub-section (1) of Section 5 stipulates that reservation in promotion shall be at all stages of promotions. Consequently, promotions within Class I posts are also governed by the rule of reservation. A provision for reservation can be incorporated in an executive order. The Reservation Act has not dealt with issue of consequential seniority. Sub-section (2) of Section 5 saves government orders providing for reservation of any posts to be filled in promotion which were in force on the date of the enactment of the Act. Similarly, the proviso to sub-section (1) of Section 6 saves government orders regarding the filling up of unfilled posts reserved for Backward Class candidates in force on the date of the commencement of the Act. The GR dated 20 March 2003 deals with the determination of seniority while sub-section (2) of Section 5 deals with orders providing for reservation. The GR dated 20 March 2003 is not a government order which falls within the purview of either sub-section (2) of Section 5 or the proviso to sub-section (1) of Section 6. However, the enactment of the Act by the state legislature cannot be construed as a legislative intent to override or abrogate the principle of consequential seniority incorporated in government resolutions. A provision for consequential seniority can certainly be incorporated in an executive order issued in pursuance of the provisions of Article 162 of the Constitution. The Government Resolution dated 20 March 2003 has not been abrogated upon the enactment of the Reservation Act 2004. The Reservation Act 2004 does not deal with the principle of consequential seniority. It would be impermissible to read the Act as having superseded the applicable government orders on consequential seniority, in the absence of clear words providing for such an effect. [Paras 56, 59 and 60] [982-H; 983-E-H; 984-A-C]

H 1.4 The GR dated 20 March 2003, while incorporating the principle of consequential seniority, reiterated the GR dated 20 October 1997. It also adverts to the Seniority Rules 1982 of which

Rule 4 specifically stipulates that the length of continuous service will be determinative of seniority in respect of posts and cadres in the service. A challenge to the GR dated 20 March 2003 is conspicuous by its absence in the reliefs which were sought before the Maharashtra Administrative Tribunal. Entertaining a challenge to the validity of a Government Resolution incorporating the principle of consequential seniority without a specific challenge being addressed before the Tribunal would simply be impermissible. Entertaining such a challenge at this stage will have serious consequences in the entire State of Maharashtra by upsetting a significant number of promotions which may have already been granted to candidates belonging to the reserved category. The State government, in the pleadings before the Tribunal and the High Court was not called upon to justify the basis of its decision to adopt consequential seniority in the absence of a challenge being squarely set up in the forum of first instance. A challenge to the resolution providing for consequential seniority is indeed a serious matter. Such a challenge calls upon the court to upset a policy circular which has been issued with the avowed objective of safeguarding consequential seniority which was, as the constitutional history indicates, a clear purpose underlying the 85th Amendment to the Constitution. Such constitutional challenges cannot be bandied about without specific pleadings. Such an exercise would be impermissible in the absence of a frontal challenge. [Paras 62, 64 and 65] [984-E-F; 985-C-F]

1.5 In the present case, there is a specific provision for consequential seniority in the GR dated 20 March 2003. Absent a challenge to the GR in the proceedings which were initiated before the Tribunal, such a challenge cannot be entertained at this stage. [Paras 70] [987-B]

1.6 Eligibility has to be considered on the date of the occurrence of the vacancy. On 30 April 2016, the appellant did not fulfill the eligibility required for the post of DTP. In assailing the decision of the first respondent, the appellant has submitted that the promotion of the first respondent as JDTP on 11 August 2011 was under a circular dated 27 October 2008 which has been struck down by the Bombay High Court. The High Court in

A dealing with this submission has held that the order of promotion, when it was issued on 11 August 2011 had an imprint of legality. Moreover, even the appellant adopted the position that since promotion was given to the first respondent in terms of the Government Circular dated 27 October 2008, he believed that he had no reason to object to the seniority list of JDTP published on 28 August 2014. That apart, the High Court has noted that after the promotion of the first respondent on 11 August 2011, the appellant was promoted on 2 July 2013 and it was only when the second seniority list was finalized on 15 January 2016 that the appellant filed an OA in February 2016. In the meantime, the appellant had worked as JDTP for a period of nearly five years. The delay has, justifiably weighed with the High Court. Coupled with this is an equally relevant consideration which must weigh with the court: the appellant has not challenged the appointment of the first respondent as JDTP. Having failed to challenge the appointment, it is now not open to the appellant to assert that the appointment must be treated as void on the ground that the circular on the basis of which the first respondent was promoted has subsequently been set aside in a judgment of the Bombay High Court.[Paras 78, 79] [990-D-G; 991-A-B]

1.7 The appointment of the first respondent as JDTP has not been assailed in the OA filed before the Tribunal. Consequently, it is not open to the appellant to lay a challenge on the ground that the appointment was based on a circular which was held to be invalid after the appointment was made. The submission that the appointment is fortuitous within the meaning of Rule 3(f) is but another modality of seeking to deprive the first respondent of the consequence of his appointment and to his consequential seniority. The fact that the vacancy occurred on 30 April 2016, on the retirement of the then DTP has not been disputed in the course of the submissions of the appellant. On the date when the vacancy occurred, the appellant clearly did not fulfill the eligibility criterion of three years' experience as JDTP. The appellant who was promoted on 2 July 2013 did not fulfill the criterion prescribed by Rule 3, Directorate of Town Planning and Valuation (Recruitment) Rules 2011. Seniority and eligibility are

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distinct concepts in service jurisprudence. Seniority by itself cannot prevail where a senior lacks eligibility for promotion to a higher post. Even if the contention of the appellant on the applicability of the catch-up rule were to be accepted, that will not obviate the requirement of his fulfilling the condition of eligibility for promotion to the next higher post, on the date when the vacancy occurred. [Paras 80-82] [991-C-D, F-G, 992-E-F]

1.8 The appellant failed to challenge the appointment of the first respondent as JDTP on 11 August 2011. The appellant failed to challenge the circular dated 20 March 2003 providing for consequential seniority. The substratum of the challenge which has been developed before Supreme Court is without basis in the pleadings. The ingenuity and industry of the learned counsel who appeared on behalf of the appellant cannot, in the ultimate analysis, be a substitute for a deficient pleading. The appellant did not at any stage challenge the appointment of the respondent to the post of JDTP nor did he challenge the GR dated 20 March 2003 providing for consequential seniority. The appellant was not eligible for the post of DTP on 30 April 2016, when the vacancy occurred. He cannot, hence, challenge the appointment of the first respondent. The judgment of the High Court does not call for any interference. [Paras 83, 85 and 86] [992-F-G; 993-D-E]

Civil Appeal Nos 2471-2473 of 2019 @ Special Leave Petition (Civil) Nos. 14041- 14043 of 2018:

1.9 In view of the judgment in Civil Appeals @ Special Leave Petition (Civil) Nos. 8769-8771 of 2018, these appeals are also dismissed. [993-G]

MA Nos 2983-2985 of 2019 in Special Leave Petition (Civil) Nos. 33086-33088 of 2017

1.10 In view of the judgment in Civil Appeals @ Special Leave Petition (Civil) Nos. 8769-8771 of 2018, these MAs are disposed of, in terms of the judgment and order in the lead appeals. [994-B]

Suseel Finance & Leasing Co. v. M Lata (2004) 13 SCC 675; Abhishek Malviya v. Additional Welfare

- A *Commissioner (2008) 3 SCC 108 ; Vinod Kapoor v State of Goa (2012) 12 SCC 378 : [2012] 8 SCR 1089; Sandhya Educational Society v. Union of India (2014) 7 SCC 701; Bussa Overseas and Properties Private Limited v. Union of India (2016) 4 SCC 696: [2016] 1 SCR 266 – distinguished.*
- B *Indra Sawhney v Union of India (1992) 3 Suppl. SCC 217 : [1992] 2 Suppl. SCR 454 – followed.*
- C *Maharashtra Chamber of Housing Industry v Municipal Corporation of Greater Mumbai Decision dated 16th August 2016 in SLP (C) No.024660 & 024661 of 2016; R Prabha Devi v Union of India (1988) 2 SCC 233:[1988] 3 SCR 147 – relied on.*
- D *M Nagaraj v Union of India (2006) 8 SCC 212; Magas Varga Karmachari Adhikari Suraksha Mahasangh v State of Maharashtra Decision of Bombay High Court in Writ Petition No. 3077 of 2011; Union of India v Virpal Singh Chauhan (1995) 6 SCC 684 : [1995] 4 Suppl. SCR 158; Ajit Singh Januja v State of Punjab (1996) 2 SCC 715 : [1996] 3 SCR 125 ; Jagdish Lal v State of Haryana (1997) 6 SCC 538 ; Ajit Singh (II) v. State of Punjab (1999) 7 SCC 209 : [1999] 2 Suppl. SCR 521; Jarnail Singh v. Lachhmi Narain Gupta (2018) 10 SCC 396; Suraj Bhan Meena v State of Rajasthan (2011) 1 SCC 467 : [2010] 14 SCR 532; Uttar Pradesh Power Corporation Limited v. Rajesh Kumar (2012) 7 SCC 1: [2012] 4 SCR 118; S Panneer Selvam v. State of Tamil Nadu (2015) 10 SCC 292; B K Pavitra v. Union of India (2017) 4 SCC 620 : [2017] 1 SCR 631; Gaurav Pradhan v State of Rajasthan (2018) 11 SCC 352 : [2017] 8 SCR 951; Roshan Lal v .International Airport Authority of India (1980) Suppl. SCC 449; P Chitharanja Menon v. A Balakrishnan (1977) 3 SCC 255 : [1977] 3 SCR 687; Amarjeet Singh v. Devi Ratan (2010) 1 SCC 417 : [2009] 15 SCR 1010; Palure Bhaskar Rao v. P Ramaseshaiah (2017) 5 SCC 783 : [2017] 3 SCR 226; Sanjay K Sinha-II v. State of Bihar (2004) 10 SCC 734 : [2004]*
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2 Suppl. SCR 834 ; Bhupendra Nath Hazarika v. State of Assam (2013) 2 SCC 516 : [2012] 12 SCR 587; PV George v. State of Kerala (2007) 3 SCC 557 : [2007] 1 SCR 1198 ; BA Linga Reddy v. Karnataka State Transport Authority (2015) 4 SCC 515 – referred to.

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Case Law Reference

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(2006) 8 SCC 212	referred to	Para 9
(2004) 13 SCC 675	distinguished	Para 23
(2008) 3 SCC 108	distinguished	Para 25
[2012] 8 SCR 1089	distinguished	Para 26
(2014) 7 SCC 701	distinguished	Para 26
[2016] 1 SCR 266	distinguished	Para 26
[1992] 2 Suppl. SCR 454	followed	Para 31
[1995] 4 Suppl. SCR 158	referred to	Para 36
[1996] 3 SCR 125	referred to	Para 38
(1997) 6 SCC 538	referred to	Para 39
[1999] 2 Suppl. SCR 521	referred to	Para 39
(2018) 10 SCC 396	referred to	Para 42
[2010] 14 SCR 532	referred to	Para 43
[2012] 4 SCR 118	referred to	Para 43
(2015) 10 SCC 292	referred to	Para 43
[2017] 1 SCR 631	referred to	Para 43
[2017] 8 SCR 951	referred to	Para 52
(1980) Suppl. SCC 449	referred to	Para 78
[1977] 3 SCR 687	referred to	Para 78
[2009] 15 SCR 1010	referred to	Para 78
[1988] 3 SCR 147	relied on	Para 82
[2017] 3 SCR 226	referred to	Para 82

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A	[2004] 2 Suppl. SCR 834	referred to	Para 84
	[2012] 12 SCR 587	referred to	Para 84
	[2007] 1 SCR 1198	referred to	Para 84
	(2015) 4 SCC 515	referred to	Para 84

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CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 2468-2470 of 2019.

C From the Judgment and Order dated 21.03.2018 of the High Court of Judicature at Bombay in Review Petition No. 17 of 2018 in Writ Petition No. 9291 of 2016, Review Petition No. 18 of 2018 in Writ Petition No. 8859 of 2016 and Review Petition No. 19 of 2018 in Writ Petition No. 8860 of 2016.

With

D Civil Appeal Nos. 2471-2473 of 2019 And M.A. Nos. 2983-2985 of 2018 in S.L.P.(Civil) Nos. 33086-33088 of 2017.

E Chander Uday Singh, Paramjit Singh Patwalia, V. Giri, R.P. Bhatt, Sanjay R. Hegde, Sr. Advs., Sagar N. Pahune Patil, Gopal Balwant Sathe, Ravindra Keshavrao Adsure, Siddheshwar N. Biradar, Ms. Natasha Dalmia, Nishant Ramakantrao Katneshwarkar, Makarand D. Adkar, Braj K. Mishra, Vijay Kumar, Mustafa A. Khan, Sagar Mane, Amit Bhardwaj, Krishna Dev J., Ms. Aparna Jha, Sudhanshu S. Choudhary, Ms. Surabhi Guleria, Satyajit A. Desai, Ms. Anagha A. Desai, Advs. for the appearing parties.

F The Judgment of the Court was delivered by

DR DHANANJAYA Y CHANDRACHUD, J.

CIVIL APPEAL Nos.2468-2470 OF 2019:

@ SPECIAL LEAVE PETITION (CIVIL) Nos. 8769-8771 OF 2018

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1. Leave granted.

2. The High Court of Judicature at Bombay, speaking through a Division Bench, dismissed three review petitions seeking a review of its

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judgment dated 16 November 2017. The review petitions were instituted before the High Court following an order of a two judge Bench of this Court dated 12 December 2017. Finding that there was no reason to review the earlier judgment, consistent with the settled parameters governing the exercise of that jurisdiction, the High Court dismissed the review petitions on 21 March 2018.

3. The original petitioner before the High Court is in appeal.

4. The appellant as well as the first respondent are officers in the service of the Government of Maharashtra. The appellant belongs to the open category while the first respondent belongs to a Scheduled Caste. The chart with relevant details regarding their appointments and promotions in the service of the state is provided thus:

POSTING	SUDHAKAR NANGNURE (OPEN CATEGORY)	NORESHWAR SHENDE (SC)
Planning Assistant	6.5.1983	--
Assistant Town Planner	6.5.1988	--
Town Planner	1.7.1992	1.7.1992
Dy. Director of Town Planning (DDTP)	1.11.2003	3.8.2006
Joint Director of Town Planning (JDTP)	2.7.2013	11.8.2011
Director of Town Planning (DTP, MS)	Eligible to be promoted on 3.7.2016	Promoted on 30.4.2016 subject to outcome of O.A. No.269/2016.

5. The appellant joined service as a Planning Assistant in the Government of Maharashtra on 6 May 1983. Both the appellant and the first respondent were selected for the post of Town Planner on 1 July 1992, in the course of a process initiated by the Maharashtra Public Service Commission¹. The appellant was promoted as Deputy Director of Town Planning² on 1 November 2003, by a nomination through the MPSC. The first respondent was promoted as DDTP on 3 August 2006.

¹MPSC

²DDTP

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6. In the promotional cadre of Joint Director of Town Planning³, there were two posts, one for open category candidates and the second for reservation on roster points. On 7 January 2011, the post of JDTP was vacant for a Scheduled Tribe candidate under the roster. However, relying upon a circular dated 27 October 2008 of the General Administration Department⁴, the name of the first respondent was recommended on 7 January 2011. Though the first respondent belongs to a Scheduled Caste, he was promoted on an ad-hoc basis to the post of JDTP on 11 August 2011. On 2 July 2013, by virtue of a Government Resolution⁵ dated 29 December 2012, the cadre strength of JDTP was enhanced to eight posts, of which five posts were meant for the open category while three posts were reserved. On 2 July 2013, the appellant was promoted to the post of JDTP.

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7. Essentially, the case of the appellant is that in the seniority list of DDTPs, he ranked senior to the first respondent. The first respondent was promoted as JDTP on 11 August 2011 while the appellant was promoted later on 2 July 2013. The appellant claims that once he was promoted as JDTP, the ‘catch-up’ rule must govern and in consequence, he must gain seniority over the first respondent. In order to appreciate this aspect of the appellant’s grievance, material facts pertaining to the seniority list are provided thus:

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SENIORITY LIST

(i) 14 February 2011

A circular for seniority list of DDTPs as on 1 January 2009 was issued. The appellant stood at serial no 3 and the first respondent stood at serial no 9;

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(ii) 1 June 2014

A letter was issued for the provisional seniority list of JDTPs as on 1 January 2014 on the basis of “date of appointment on present post”;

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(iii) 28 August 2014

A circular was issued for the final seniority list of JDTPs as on 1 January 2014 on the basis of “date of appointment on present post”;

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³JDTP

⁴GAD

⁵GR

(iv) 15 January 2016

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A circular was issued for final seniority list of JDTPs as on 1 January 2015 on the basis of “date of regular appointment/regularized date of promotion”;

(v) 8 March 2016

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In response to a query under the Right to Information Act 2005, the appellant was informed that the promotion of the first respondent would be regularized with the concurrence of GAD and with the approval of the MPSC in future; and

(vi) 30 April 2016

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The incumbent in the post of Director of Town Planning⁶ was due to retire upon which the post would fall vacant.

8. After lodging an objection to the seniority list dated 15 January 2016, the appellant filed an Original Application⁷ before the Maharashtra Administrative Tribunal⁸. Simply put, the case of the appellant before the Tribunal was that even assuming that the promotion of the first respondent as JDTP on 11 August 2011 (prior to the promotion of the appellant) against a reserved vacancy was regular in nature, he was not entitled to claim consequential seniority on the basis of his earlier promotion in the cadre of JDTP as against the appellant (a candidate from the general category) who was senior to him in the feeder cadre of DDTP.

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9. In the submission of the appellant, the grant of consequential seniority to persons belonging to the reserved categories promoted earlier than their seniors in the feeder cadre had not been expressly provided for by the State government in the Maharashtra Civil Services Seniority Rules or elsewhere. The appellant also submitted that the State of Maharashtra had not undertaken any exercise to quantify and demonstrate the inadequacy of representation to the Scheduled Castes in the matter of promotion to the senior cadre in the Town Planning and Valuation Department (Recruitment) Rules 1984. Absent such an exercise, it was urged that the mandate of a Constitution Bench decision of this Court in

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⁶ DTP

⁷ O.A. 269 of 2016

⁸ The Tribunal

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A **M Nagaraj v Union of India**⁹(“Nagaraj”) had not been fulfilled. With this grievance, the appellant asserted that:

- B (i) As regards his promotion on 11 August 2011 as JDTP from the cadre of DDTP, the first respondent as a Scheduled Caste candidate was not entitled to a vacancy which was reserved for a Scheduled Tribe candidate. However, he was promoted as JDTP on the basis of a GAD circular dated 27 October 2008. This circular was held to be *ultra vires* by a judgment of a Division Bench of the Bombay High Court in **Magas Varga Karmachari-Adhikari Suraksha Mahasangh v State of Maharashtra** (“Mahasangh”) rendered on 9 May 2013 at its Aurangabad Bench¹⁰. According to the decision, the circular was contrary to the provisions of the Maharashtra State Public Services Reservation for Scheduled Castes, Schedules Tribes, Denotified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and Other Backward Classes Act 2001¹¹;
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- D (ii) The promotion of the first respondent as JDTP on 11 August 2011 was fortuitous and not a regular appointment. Hence, he is not entitled to claim the benefits of his promotion as JDTP and has been wrongly shown as senior to the appellant in the final seniority list of the cadre; and
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- F (iii) The final seniority list published by the State on 15 January 2016 is in breach of the settled position of law governing consequential seniority for reserved category promotees as settled by the Constitution Bench of this Court in **Nagaraj** (supra).

10. Principally, on the above grounds, the appellant sought the following reliefs before the Tribunal:

- G (i) Setting aside of the final seniority list as on 1 January 2015, published by the State on 15 January 2016 for the cadre of JDTP;

⁹(2006) 8 SCC 212

¹⁰Writ Petition No. 3077 of 2011

¹¹Act VIII of 2004. “Reservation Act 2004”

- (ii) A direction to review and revise the seniority list in the cadre of JDTP as on 1 January 2015, by fixing the seniority of the appellant above the first respondent in conformity with his position in seniority in the feeder cadre of DDTP; and A
- (iii) An order restraining the State from undertaking the exercise of selection for promotion to the post of DDTP on the basis of the final seniority list published on 15 January 2016 until it is reviewed and revised. B

11. By an interim order dated 1 April 2016, the Tribunal directed that the decision of the government would be subject to the outcome of the OA pending before it. Soon thereafter, on 2 April 2016, the GAD Establishment Board – I conducted a meeting where the first respondent was recommended for promotion to the post of DTP. In a writ petition challenging the interim order of the Tribunal, the High Court directed the Tribunal to decide the pending OA by 30 April 2016 (the post of DDTP was due to fall vacant on the retirement of the incumbent on 30 April 2016). On 18 April 2016, the Tribunal concluded the hearing and, while reserving the judgment, directed the case to be posted for pronouncement of judgment on 2 May 2016. Shortly before that date, the State government promoted the first respondent to the post of DTP on 30 April 2016. The Tribunal by its judgment dated 2 May 2016 allowed the OA. It quashed the seniority list dated 15 January 2016 of JDTPs and issued directions for the preparation of a fresh seniority list by deciding the date of regular promotion of the first respondent, whereupon a fresh promotion order was directed to be issued to the post of DTP. C D E

12. The first respondent instituted proceedings¹² under Article 226 of the Constitution before the High Court to challenge the decisions of the Tribunal. The State government challenged the decision of the Tribunal¹³. By its judgment dated 16 November 2017, the High Court allowed the writ petitions and set aside the decision of the Tribunal. The appellant moved this Court in proceedings under Article 136 of the Constitution to assail the decision of the High Court. F G

¹² Writ Petition No. 8859 of 2016 was instituted to challenge the order of the Tribunal condoning delay; Writ Petition No. 8860 of 2016 was instituted against the judgment of the Tribunal in OA No. 269 of 201.

¹³ Writ Petition No. 9291 of 2016

A 13. On 12 December 2017, when the Special Leave Petition was heard, this Court passed the following order:

“Mr. Ranjit Kumar, learned senior counsel appearing for the petitioner, points out that though the issue of catch up was raised before the High Court, the same has not been considered.

B If that be so, it is for the petitioner to pursue his remedies available to him under law on that issue.

Without prejudice to such liberty, these special leave petitions are permitted to be withdrawn.

C We make it clear that we have not considered the matter on merits. However, it will be open to the parties on both the sides to take all available contentions before the High Court on the point of catch up.”

D In terms of the liberty granted by this Court, the appellant moved the High Court in review. The review petitions, as stated earlier, were dismissed on 21 March 2018. Aggrieved by the judgment of the High Court in review and the original judgment in the writ petitions, the appellant moved this Court afresh under Article 136 of the Constitution¹⁴.

E 14. During the pendency of these proceedings, the appellant has instituted Miscellaneous Applications¹⁵ along with an interlocutory application¹⁶. By the Miscellaneous Applications, the appellant has sought a clarification of the order dated 12 December 2017 so as to seek specific permission from this Court to move afresh if the review were to fail before the High Court. On 28 November 2018, notice was issued on the Miscellaneous Applications.

F 15. A preliminary objection has been taken to the maintainability of the Special Leave Petition by Mr R P Bhatt, learned Senior Counsel appearing on behalf of the first respondent. Mr Bhatt urged that as a result of the order of this Court dated 12 December 2017, all issues other than the application of the catch-up rule were given up when liberty was granted to the appellant to move the High Court by way of review. G Once the review was rejected by the High Court, the following consequences must according to the submission ensue:

¹⁴SLP (C) Nos. 8769-71 of 2018 was filed against the judgment in review; SLP (C) Nos. 14041-43 of 2018 were filed against the judgment in the writ petitions.

H ¹⁵MA Nos. 2983-85 of 2018

¹⁶IA No. 167323 of 2018

- (i) A challenge to the original order of the High Court allowing the writ petitions is barred, in the absence of liberty being granted to the appellant to move afresh after the review was dismissed against the original order assailed in the Special Leave Petition; A
- (ii) A challenge under Article 136 of the Constitution solely against an order on a review petition is not maintainable. B

In support of the submission, certain decisions of this Court have been relied upon which would be adverted to hereafter.

16. The first task of this Court is to construe the order dated 12 December 2017. As the order indicates, the grievance of the appellant was that though the issue of the catch-up rule was raised before the High Court, it had not been considered. A two judge Bench of this Court consisting of Hon'ble Mr Justice Kurian Joseph and Hon'ble Mr Justice Amitava Roy, which heard the Special Leave Petitions, observed in response to the submission that "if that be so, it is for the petitioner to pursue his remedies available to him under law on that issue". This Court permitted the Special Leave Petitions to be withdrawn "without prejudice to such liberty". Leaving it open to the contesting parties to take up all available contentions before the High Court on the issue of catch-up, the Bench observed that : C D

"We make it clear that we have not considered the matter on merits." E

17. What emerges from the order dated 12 December 2017 is that:

- (i) Liberty was granted to the appellant specifically to pursue the remedies available in law on the grievance that the issue of catch-up, though raised, had not been considered by the High Court; and F
- (ii) This Court had not considered the matter on merits.

The reservation of liberty to the appellant to adopt a suitable remedy in law, to pursue the grievance that a submission which was urged before the High Court had not been considered would evidently be a reference to the remedy by way of a review. G

18. It is well settled that if a submission which has been urged before the High Court has not been noticed or considered, it is to the H

- A High Court that the aggrieved litigant must turn for the rectification of the record. But, apart from this, the observation in the order dated 12 December 2017 that this Court had not considered the matter on merits is of crucial significance. The purpose of that clarification was to ensure that the issues which were raised (in any event with regard to the catch-up rule) were entirely open, to be urged before the High Court in the first instance and thereafter, if the appellant were to be aggrieved, in further proceedings before this Court. The above observation of this Court was not merely intended to keep the issue of the non-consideration of the catch-up rule open to be urged before the High Court. That this issue was kept open, is evident from the last part of the order dated 12 December 2017 which specifically keeps open the contentions of the parties to be urged before the High Court. In addition, the order of this Court carefully enunciates that “we have not considered the matter on merits”.

- D 19. In view of this clear clarification, it is impossible to accept the preliminary objection that a recourse to this Court is barred after the High Court decided the review petitions. To take any other view would effectively deny access to justice to the appellant. Evidently, the grievance of the appellant was not considered by this Court on merits on 12 December 2017. To adopt a construction which would deprive the appellant of the remedy of moving this Court after the decision of the High Court in review would lead to an egregious failure of justice. Such a construction must be eschewed.

- F 20. We would like to note an important aspect of the matter here which reflects on the *bona fides* of the appellant. The appellant moved a Miscellaneous Application on 22 November 2018 by way of abundant caution, for seeking a clarification of the order dated 12 December 2017. The appellant sought a clarification to the effect that upon the disposal of the review petitions by the High Court, it would be open to challenge the order in review as well as the original order before this Court.

- G 21. One of the members of the earlier Bench, Hon’ble Mr Justice Kurian Joseph, was due to demit office on 29 November 2018. The Miscellaneous Application was instituted on 22 November 2018. On 28 November 2018, a Bench consisting of Hon’ble Mr Justice Kurian Joseph

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and one of us (Hon’ble Mr Justice Hemant Gupta) issued notice on the A
Miscellaneous Application.

22. We accordingly clarify the earlier order dated 12 December
2017 by directing that it would be open to the appellant, if aggrieved by
the order that may be passed by the High Court in review to challenge B
both the order in review and original orders in the writ petitions. However,
this liberty is confined to the issue of the catch-up rule. In issuing this
clarification, we have also been guided by an earlier precedent of a two
judge Bench of this Court in **the Maharashtra Chamber of Housing
Industry v Municipal Corporation of Greater Mumbai**¹⁷. A Bench
of this Court consisting of Hon’ble Mr Justice S A Bobde and Hon’ble C
Mr Justice Ashok Bhushan passed an order on 16 August 2016¹⁸ in the
following terms:

“In the circumstances, we permit the petitioner to approach the
High Court with a review petition along with appropriate application
for impleadment. The High Court shall decide the issues raised D
by the petitioner afresh, as expeditiously as possible.”

The Special Leave Petitions were accordingly disposed of.

23. Subsequently, on 5 December 2017, while considering an
application for modification/recall of the earlier order, a two judge Bench
consisting of Hon’ble Mr Justice S A Bobde and Hon’ble Mr Justice L E
Nageswara Rao observed thus:

“Having regard to the circumstances of the case and the
importance of the matter which affects the construction activities
in the entire city of Mumbai, we consider it appropriate to modify
our earlier order dated 16.08.2016 passed in SLP(C) Nos.24660- F
24661 of 2016, by expressly granting liberty to the petitioner to
challenge the impugned PIL order as well as the impugned Review
order before this Court.

We order accordingly.

Hence, the aforesaid applications for modification/recall are G
disposed of in the above terms.”

¹⁷SLP (C)...2016.CC No. 14855 of 2016, dated 16 August 2016.

¹⁸SLP (CC) NO 14855 of 2016

A Learned Senior Counsel appearing on behalf of the first respondent relied on a judgment of this Court in **Suseel Finance & Leasing Co. v M Lata**¹⁹ where it was held thus:

B “1. These special leave petitions are against an order dated 12-12-2003 passed in review petitions. It must be mentioned that against the main judgment, special leave petitions had earlier been filed. However, when those special leave petitions reached hearing on 1-9-2003, the following order came to be passed:

C “After arguing for some time, the learned counsel for the petitioners seeks permission to withdraw the special leave petitions to seek review of the order of the National Commission. Permission is granted. Accordingly, the special leave petitions are dismissed as withdrawn.”

D It is clear from the order that the matter was argued for some time. It is clear that the Court was against the petitioners. Thus, as has become common nowadays, counsel applied for withdrawal on the ground that a review will be applied for.

E 2. Thereafter the review applications were filed before the High Court which have now been dismissed. By these special leave petitions the order dismissing the review petitions has been challenged.

F 3. In the case of *Shanker Motiram Nale v. Shiolalsing Gannusing Rajput* [(1994) 2 SCC 753] it has been held by this Court that against an order rejecting an application for review, a special leave petition is not maintainable. This authority is directly on the point in issue.”

G 24. In the above case, it is evident that the petitioners had sought permission to withdraw the Special Leave Petition, after arguing the matter for some time, to seek a review of the order which was impugned. Granting permission, the Special Leave Petition was dismissed as withdrawn. It is clear therefore that there was nothing to indicate that the court had granted permission to move this Court afresh against the original order after the review was decided.

¹⁹(2004) 13 SCC 675

25. In **Abhishek Malviya v Additional Welfare Commissioner**²⁰, a Special Leave Petition was filed before this Court against an order of the Additional Welfare Commissioner in a matter involving a claim for compensation arising out of the Bhopal Gas Leak Disaster. One of the grounds of challenge was that the Additional Welfare Commissioner had referred to the appellant as deceased. This Court dismissed the Special Leave Petition as withdrawn, recording the submission of the appellant that he wishes to move the Additional Welfare Commissioner for correction of the order. After the Additional Welfare Commissioner passed a fresh order, writ proceedings were initiated before the High Court. The High Court held that by the earlier order of this Court, liberty was reserved only to move the Additional Welfare Commissioner to correct a typographical error in appeal. This Court affirmed the order of the High Court, holding that its earlier order had merely reserved liberty to move the Additional Welfare Commissioner for correction of a typographical error.

26. In **Vinod Kapoor v State of Goa**²¹, a Special Leave Petition before this Court was dismissed as withdrawn, recording that the petitioner had filed a review petition in the High Court. No liberty was taken to file a fresh Special Leave Petition against the original order of the High Court. In that context, this Court held thus:

“As the appellant has withdrawn the special leave to appeal against the order dated 29-1-2000 [Vinod Kapoor v. State of Goa, WP (C) No. 253 of 1999, order dated 29-1-2000 (Bom)] of the High Court with permission to pursue his remedy by way of review instead and had not taken the liberty from this Court to challenge the order dated 29-1-2000 afresh by way of special leave in case he did not get relief in the review application, he is precluded from challenging the order dated 29-1-2000 of the High Court by way of special leave to appeal under Article 136 of the Constitution.”

The same view was reiterated by another Bench of two judges of this Court in **Sandhya Educational Society v Union of India**²² (“Sandhya Education Society”), where this Court had permitted the withdrawal of a Special Leave Petition with liberty to institute a review petition before the High Court. No liberty was granted to file a fresh

²⁰(2008) 3 SCC 108

²¹(2012) 12 SCC 378

²²(2014) 7 SCC 701

A Special Leave Petition thereafter. This Court held that once a Special Leave Petition is dismissed as withdrawn without obtaining appropriate permission to file a fresh Special Leave Petition after exhausting the remedy of a review petition before the High Court, it would not be maintainable. The Court held thus:

B “16. This Court in *Vinod Kapoor v. State of Goa* [(2012) 12 SCC 378 : AIR 2012 SC 3722], has categorically observed that once the special leave petition is dismissed as withdrawn without obtaining appropriate permission to file a special leave petition once over again after exhausting the remedy of review petition before the High Court, the same is not maintainable.

C 17. The issue raised in this appeal is identical with the issue raised and considered by this Court in *Vinod Kapoor v. State of Goa* [(2012) 12 SCC 378 : AIR 2012 SC 3722] . Therefore, while accepting the contentions of the learned counsel for the respondent, we hold that the petition filed by the appellant is not maintainable.”

D The view in **Sandhya Educational Society** (supra) was reiterated in **Bussa Overseas and Properties Private Limited v Union of India**²³, where this Court held thus:

E “30. The decisions pertaining to maintainability of special leave petition or for that matter appeal have to be seemly understood. Though in the decision in *Shanker Motiram Nale* [*Shanker Motiram Nale v. Shiolalsing Gannusing Rajput*, (1994) 2 SCC 753] the two-Judge Bench referred to Order 47 Rule 7 of the Code of Civil Procedure that bars an appeal against the order of the court rejecting the review, it is not to be understood that the Court has curtailed the plenary jurisdiction under Article 136 of the Constitution by taking recourse to the provisions in the Code of Civil Procedure. It has to be understood that the Court has evolved and formulated a principle that if the basic judgment is not assailed and the challenge is only to the order passed in review, this Court is obliged not to entertain such special leave petition. The said principle has gained the authoritative status and has been treated as a precedential principle for more than two decades and we are disposed to think that there is hardly any necessity not to be guided by the said precedent.”

H ²³(2016) 4 SCC 696

27. In the present case, we find, for the reasons which we have indicated above, a clear distinction on facts. While disposing of the earlier Special Leave Petition to enable the appellant to pursue his remedies on the contention that the issue of catch-up though raised was not considered by the High Court, this Court expressly clarified that it had not considered the matter on merits. In the absence of such a clarification, the withdrawal of the Special Leave Petition would have led to the inference that the appellant had not been granted liberty to move this Court afresh. On the other hand, the clear purpose and intent of the observation that this Court had not considered the matter on merits was to keep open all the remedies of the appellant before the High Court in the first instance and thereafter before this Court on the issue of the catch-up rule.

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28. By the clarification that we have issued on the Miscellaneous Applications, we have set the matter at rest. For the above reasons, we do not find any merit in the preliminary objection.

29. Mr P S Patwalia, learned Senior Counsel appearing on behalf of the appellant urged the following submissions:

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- (i) The appellant was senior to the first respondent in the feeder cadre of DDTP;
- (ii) Even assuming that the promotion of the first respondent as JDTP was on a regular basis, the appellant would “catch-up” on his promotion and regain his seniority over the first respondent in the promotional post;
- (iii) The circular of the Government of Maharashtra dated 20 March 2003 cannot be construed as granting consequential seniority to a reserved candidate on the promotion to a higher post, in the absence of the collection of quantifiable date, as required by the decision of this Court in Nagaraj (supra);
- (iii) When the circular dated 20 March 2003 was issued, reservation in the state services was only until the entry level of class-I posts, in this case DDTP;
- (iv) Reservation within the Class-I posts was brought about for the first time by Reservation Act 2004;

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- A (v) Sections 5 and 6 of the Reservation Act 2004 specifically save certain existing circulars and it occupies the field. No other circular, including the circular on consequential seniority is saved. Under Section 11, anything done in violation of the Act is void;
- B (vi) The circular dated 27 October 2008 on which basis promotion was granted to the first respondent on 2 August 2011 against a post reserved for a Scheduled Tribe candidate, was quashed by the Bombay High Court²⁴ on the ground that it was *ultra vires* the Reservation Act 2004. Since the promotion of the first respondent was on the basis of the circular which was quashed, his appointment contrary to the rules would not entitle him to seniority; and
- C (vii) The circular dated 20 March 2003 provides for the grant of consequential seniority where a reserved candidate has been promoted on a regular basis. The promotion of the first respondent being ad-hoc, would not entitle him to consequential seniority.
- D 30. On the other hand, Mr V Giri, learned Senior Counsel appearing on behalf of the first respondent urged the following submissions:
- E (i) The scope of adjudication before this Court must be restricted only to the applicability of the principle of catch-up;
- (ii) The promotion of the first respondent dated 11 August 2011 to the post of JDTP was not challenged by the appellant in the OA before the Tribunal and cannot be permitted to be challenged, directly or indirectly, in these proceedings;
- F (iii) The necessary concomitant for the application of the principle of catch-up is that the promotion of the first respondent dated 11 August 2011 must be taken to be valid and regular; and
- (iv) Consequently, the submission of the appellant that the promotion of the first respondent as JDTP was ad-hoc, fortuitous or irregular cannot be agitated before this Court.
- G 31. On the applicability of the principle of catch-up, Mr V Giri urged the following submissions:

²⁴2013 (5) Maharashtra Law Journal 640

- (i) Rule 4 of the Maharashtra Civil Services (Regulation of Seniority) Rules 1982²⁵, stipulates that the seniority of a government servant in a post is ordinarily determined by the length of their continuous service; A
- (ii) Section 5(1) of the Reservation Act 2004 stipulates that reservation shall be at all stages of promotion, thereby giving effect to the constitutional right under Article 16 (4A); B
- (iii) Section 5(2) saves all government orders which provide for reservation of posts by promotion;
- (iv) In the judgment of this Court in **Indra Sawhney v Union of India**²⁶ (“Indra Sawhney”), it was held that the principle of consequential seniority can be enunciated in a rule or executive order. Consequently, the State government was competent to provide for consequential seniority in its GR dated 20 March 2003; C
- (v) By a GR dated 20 October 1997, it was stipulated that a Backward Class officer will retain seniority in a promotional cadre by the date of regular appointment, according to the seniority rules; and D
- (vi) The GR dated 20 March 2003 was issued after the amendment of Article 16 (4A) by the 85th Amendment, expressly recognizing that seniority among Backward Classes/non-Backward Class candidates in government service in the promoted cadre shall be fixed on the basis of the regular dates of their promotion. E

32. On the above grounds, it was urged that the principle of catch-up would not be applicable. Finally, it was urged that even presuming that the seniority of the appellant is protected in the cadre of JDTP, he did not have the requisite eligibility to be considered for promotion to the post of DTP for the following reasons: F

- (i) Rule 3 of the Directorate of Town Planning and Valuation (Recruitment) Rules 2011 prescribes that an officer holding the post of JDTP must serve in the post for a minimum of three years to be considered eligible for promotion to the post of DTP; G

²⁵Seniority Rules 1982

²⁶1992 Supp. (3) SCC 217

A (ii) Upon the superannuation of the incumbent in the post of DTP, a vacancy arose in the post on 30 April 2016;

(iii) On the date on which a vacancy occurred in the post of DTP, the appellant did not fulfill the eligibility criterion of three years' experience as JDTP and the first respondent being the senior most eligible officer was entitled to and eligible for the post;

B and

(iv) Seniority and eligibility are distinct concepts and if a senior is not otherwise eligible for consideration under the rules of promotion, seniority will have to give way to an eligible junior.

C The catch-up rule, it was submitted, will not provide actual service to the appellant to fulfill the eligibility requirement for the post of DTP. On 30 April 2016, the appellant did not complete three years of actual service in the post of JDTP for being eligible for the post of DTP.

D 33. The rival submissions now fall for consideration.

34. Clause (1) of Article 16 of the Constitution stipulates that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. The expression 'appointment' was interpreted by a Bench of nine Judges of this Court in **Indra Sawhney** (supra) to exclude reservations in promotional posts.

E The expression 'appointment' was construed to refer to initial appointments and hence not to promotional avenues. After this decision, the Parliament in its constituent capacity amended Article 16 by the Constitution (Seventy-seventh) Amendment Act 1995 with effect from 17 June 1995. Clause (4A) of Article 16 as introduced by the Seventy-

F Seventh Amendment read thus:

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

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By virtue of Clause (4A), an enabling provision was introduced as a result of which nothing contained in the Article would prevent the

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State from making reservations in promotion in the services under the State for Scheduled Castes and Tribes which, in its opinion, are not adequately represented in its service. A

35. A line of cases before this Court considered the effect of an accelerated promotion granted to a member of a Scheduled Caste or Scheduled Tribe in terms of consequential seniority in a higher post. More specifically, the vexed issue was whether a member of such a caste and tribe who obtains promotion earlier than a senior belonging to the general or open category in the feeder cadre would retain that seniority on the latter being promoted to a higher post. B

36. In **Union of India v Virpal Singh Chauhan**²⁷(“Virpal Singh Chauhan”), a two judge Bench of this Court held that the State could provide that a candidate who had been promoted earlier on the basis of reservation and on the application of the roster would not be entitled to seniority over a senior belonging to the general category in the feeder category. A senior belonging to the general category who is promoted to a higher post subsequently would regain seniority over the reserved candidate. C D

37. The decision in **Virpal Singh Chauhan** (supra) led to the Constitution (Eighty-fifth Amendment) Act 2001 with effect from 17 June 1995. Clause (4A), as amended, expanded the ambit of the earlier provision by enabling the State to also provide for consequential seniority, while making the provision for reservation in matters of promotion. Clause (4A) of Article 16, in its present form, reads thus: E

“(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 State, are not adequately represented in the services under the State.” F

38. The principle which has been enunciated in **Virpal Singh Chauhan** (supra) has come to be known as the ‘catch-up’ rule. In **Ajit Singh Januja v State of Punjab**²⁸(“Ajit Singh I”), a three judge Bench of this Court adopted the catch-up rule propounded in **Virpal Singh Chauhan** (supra). This Court held that a balance has to be maintained G

²⁷(1995) 6 SCC 684

²⁸(1996) 2 SCC 715

A so as to avoid reverse discrimination and a rule or circular which gives seniority to a candidate belonging to the reserved category promoted on the basis of the roster point would violate Articles 14 and 16 of the Constitution.

B 39. A contrary view was taken by another three Judge Bench in **Jagdish Lal v State of Haryana**²⁹ (“Jagdish Lal”) to the effect that by virtue of the principle of continuous officiation, a candidate belonging to the reserved category who is promoted earlier than a general candidate due to an accelerated promotion would not lose seniority in the higher cadre. This conflict of decisions was resolved by a Constitution Bench in **Ajit Singh (II) v State of Punjab**³⁰ (“Ajit Singh II”). The Constitution C Bench upheld the principle laid down in **Virpal Singh Chauhan** (supra) and **Ajit Singh I** (supra) and disapproved of the decision in **Jagdish Lal** (supra). This Court held thus:

D “77. We, therefore, hold that the roster-point promotees (reserved category) cannot count their seniority in the promoted category from the date of their continuous officiation in the promoted post, — vis-à-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 E 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. We shall explain this further under Point 3. We also hold that Virpal [(1995) 6 SCC 684 : 1996 SCC (L&S) 1 : (1995) 31 ATC 813] and Ajit Singh [(1996) 2 SCC 715 : 1996 SCC (L&S) 540 : (1996) 33 ATC 239] have F been correctly decided and that Jagdish Lal [(1997) 6 SCC 538 : 1997 SCC (L&S) 1550] is not correctly decided. Points 1 and 2 are decided accordingly.”

G 40. The constitutional validity of clauses (4A) and (4B) of Article 16 of the Constitution was dealt with in a decision of a Constitution Bench of this Court in **Nagaraj** (supra). **Nagaraj** (supra) laid down that the catch-up rule and the concept of the consequential seniority are essentially precepts of service jurisprudence. They cannot, in the view of the Constitution Bench, be elevated to the status of a component of

²⁹(1997) 6 SCC 538

H ³⁰(1999) 7 SCC 209

the basic structure. These precepts have been held to be practices as distinct from constitutional principles. The consequence is that they do not lie beyond the amending power of Parliament: neither the catch-up rule nor consequential seniority are elements of clauses (1) or (4) of Article 16. These have been held to be the principles evolved to control the extent of reservation.

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41. The validity of clause (4A) and (4B) of Article 16 has been upheld by the Constitution Bench in **Nagaraj** on the rationale that “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”³¹. **Nagaraj** (supra) held that the State must demonstrate in each case the existence of compelling reasons, namely (i) backwardness; (ii) inadequacy of representation; and (iii) overall administrative efficiency before providing for reservation. Construing clauses (4A) and (4B) of Article 16 to be enabling, **Nagaraj** (supra) holds that if the State wishes to exercise its discretion under the enabling provisions, it must collect quantifiable data showing backwardness of the class as well as inadequacy of representation of that class in public employment in addition to complying with the norm of efficiency embodied in Article 335. The Court held thus:

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

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³¹**Nagaraj** at page 278

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A 42. In the recent decision of a Constitution Bench of this Court in **Jarnail Singh v Lachhmi Narain Gupta**³²(“Jarnail Singh”), **Nagaraj** (supra) has been followed save and except for the dictum requiring the State to demonstrate backwardness as a condition for the exercise of the enabling power in making reservations in promotion for Scheduled Castes and Tribes. This part of the judgment in **Nagaraj** (supra) has been held to be inconsistent with the nine Judge Bench decision in **Indra Sawhney** (supra). The Court in **Jarnail Singh** (supra) held thus:

B “..It is clear, therefore, that Nagaraj (supra) has, in unmistakable terms, stated that the State has to collect quantifiable data showing backwardness of the Scheduled Castes and the Scheduled Tribes.
C We are afraid that this portion of the judgment is directly contrary to the nine-Judge Bench in **Indra Sawhney** (1) (supra). Jeevan Reddy, J., speaking for himself and three other learned Judges, had clearly held, “[t]he test or requirement of social and educational backwardness cannot be applied to Scheduled Castes and
D Scheduled Tribes, who indubitably fall within the expression “backward class of citizens”.”

Justice RF Nariman, speaking for the Constitution Bench held thus:

E “..Thus, it is clear that when Nagaraj (supra) required the States to collect quantifiable data on backwardness, insofar as Scheduled Castes and Scheduled Tribes are concerned, this would clearly be contrary to the **Indra Sawhney** (1) (supra) and would have to be declared to be bad on this ground.”

F 43. The decision in **Nagaraj** (supra) has been followed in several subsequent decisions of this Court: (i) **Suraj Bhan Meena v State of Rajasthan**³³(“Suraj Bhan Meena”); (ii) **Uttar Pradesh Power Corporation Limited v Rajesh Kumar**³⁴(“UP Power Corporation”); (iii) **S Panneer Selvam v State of Tamil Nadu**³⁵(“Panneer Selvam”); and (iv) **B K Pavitra v Union of India**³⁶(“B K Pavitra”).

G ³²(2018) 10 SCC 396

³³(2011) 1 SCC 467

³⁴(2012) 7 SCC 1

³⁵(2015) 10 SCC 292

³⁶(2017) 4 SCC 620

44. In **Suraj Bhan Meena** (supra) the question which arose for consideration before a two judge Bench of this Court was formulated thus: A

“49. The primary question which we are called upon to answer in these five special leave petitions is whether the amended provisions of Article 16(4-A) of the Constitution intended that those belonging to the Scheduled Caste and Scheduled Tribe communities, who had been promoted against reserved quota, would also be entitled to consequential seniority on account of such promotions, or would the “catch-up” rule prevail.” B

Answering this question, this Court held thus: C

“66. The position after the decision in M. Nagaraj case [(2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] is that reservation of posts in promotion is dependent on the inadequacy of representation of members of the Scheduled Castes and Scheduled Tribes and Backward Classes and subject to the condition of ascertaining as to whether such reservation was at all required.” D

The Court held that since no exercise was carried out by the State of Rajasthan to acquire quantifiable data regarding the inadequacy of representation of Scheduled Castes and Tribes in public services in the state, the High Court was justified in quashing the notifications providing for consequential seniority and promotion. E

45. In **Panneer Selvam** (supra) the issue before a two Judge Bench of this Court was thus:

“1.1. (i) In the absence of policy decision taken by the State/rules framed pursuant to the enabling provision of Article 16(4-A) of the Constitution of India, whether a reserved category candidate promoted on the basis of reservation earlier than his senior general category candidate in the feeder category can claim consequential seniority in the promotional post?” F

Rule 12 of the sub-rules to the Tamil Nadu Highways and Engineering Service provided as follows: G

“12. **Reservation of appointment.-** The rule of reservation of appointments (General Rule 22) shall apply to the appointment of

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- A Assistant Divisional Engineers by direct recruitment and recruitment by transfer separately and the appointment of Assistant Engineers by direct recruitment.”

Under Rule 12, reserved category Assistant and Junior Engineers had secured promotion as Assistant Divisional Engineers earlier than their counterparts belonging to the general category as a result of accelerated promotion following the rule of reservation.

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46. Justice R Banumathi, speaking for the two Judge Bench held that Rule 12 did not provide for consequential seniority to candidates drawn from the reserved category who are granted accelerated promotion and, in the absence of a specific provision or policy, consequential seniority could not be granted:
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“26. The true legislative intent under Article 16(4-A) of the Constitution is to enable the State to make provision or frame rules giving consequential seniority for the accelerated promotion gained based on the rule of reservation. Rule 12 evidently does not provide for the consequential seniority for reserved category promotees at any point of time. The consequential seniority for such reserved category promotees can be fixed only if there is express provision for such reserved category promotees in the State rules. In the absence of any specific provision or policy decision taken by the State Government for consequential seniority for reserved category accelerated promotees, there is no question of automatic application of Article 16(4-A) of the Constitution.”

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The Court noted that the appellants who belonged to the general category were not questioning the accelerated promotion granted to their counterparts from the reserved category by following the rule of reservation but were only seeking the application of the catch-up rule in the fixation of seniority in the promotional cadre. The Court held that in the absence of any provision of consequential seniority in the rules, the catch-up rule will prevail:

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- “36. In the absence of any provision for consequential seniority in the rules, the “*catch-up rule*” will be applicable and the roster-point reserved category promotees cannot count their seniority in the promoted category from the date of their promotion and the senior general candidates if later reach the promotional level,
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general candidates will regain their seniority. The Division Bench appears to have proceeded on an erroneous footing that Article 16(4-A) of the Constitution of India automatically gives the consequential seniority in addition to accelerated promotion to the roster-point promotees and the judgment of the Division Bench cannot be sustained.”

47. The decision in **Panneer Selvam** (supra) has since been followed by a two judge Bench of this Court in **B K Pavitra** (supra). Justice AK Goel, speaking for the Bench held thus:

“29. It is clear from the above discussion in S. Panneer Selvam case [S. Panneer Selvam v. State of T.N., (2015) 10 SCC 292 : (2016) 1 SCC (L&S) 76] that exercise for determining “inadequacy of representation”, “backwardness” and “overall efficiency”, is a must for exercise of power under Article 16(4-A). Mere fact that there is no proportionate representation in promotional posts for the population of SCs and STs is not by itself enough to grant consequential seniority to promotees who are otherwise junior and thereby denying seniority to those who are given promotion later on account of reservation policy. It is for the State to place material on record that there was compelling necessity for exercise of such power and decision of the State was based on material including the study that overall efficiency is not compromised. In the present case, no such exercise has been undertaken. The High Court erroneously observed that it was for the petitioners to plead and prove that the overall efficiency was adversely affected by giving consequential seniority to junior persons who got promotion on account of reservation. Plea that persons promoted at the same time were allowed to retain their seniority in the lower cadre is untenable and ignores the fact that a senior person may be promoted later and not at the same time on account of roster point reservation. Depriving him of his seniority affects his further chances of promotion. Further plea that seniority was not a fundamental right is equally without any merit in the present context. In absence of exercise under Article 16(4-A), it is the “catch-up” rule which fully applies. It is not necessary to go into the question whether the Corporation concerned had adopted the rule of consequential seniority.”

A 48. Rule 4 of the Maharashtra Civil Service (Regulation of Seniority) Rules 1982 lays down the general principles of seniority. The substantive part of Rule 4(1) reads thus:

“4. **General principles of seniority:-**

B (1) Subject to the other provisions of these rules, the seniority of a Government servant in any post, cadre or service shall ordinarily be determined on the length of his continuous service therein.”

The second proviso to Rule 4(1) is as follows:

C “Provided further that, the service, if any, rendered by him as a result of fortuitous appointment (except in a case where the competent authority certifies that, it was not expedient / possible or practicable to make a regular appointment strictly in accordance with the ratio of recruitment as prescribed in relevant recruitment rules, with the brief reasons recorded therefor), shall be excluded in computing the length of service and for the purpose of seniority he shall be deemed to have been appointed to the post or in the cadre or service on the date on which his regular appointment is made in accordance with the provisions of the relevant recruitment rules.”

D 49. On 20 October 1997, a Government Resolution was issued stipulating that an officer belonging to a Backward Class will retain seniority in the promotional cadre and that it is not necessary to revise the seniority. The GR adverts to the decision of this Court in **Virpal Singh Chauhan** (supra) and to the orders which were issued on 19 April 1997 for regulating the seniority of employees in government services, following a circular dated 30 January 1997 of the Union government. The GR is founded on the judgment in **Jagdish Lal** (supra) and provides thus:

E “2[A] If any Backward Class employee / Officer is already promoted in promotional cadre, then it is not necessary to revise his seniority in said cadre. Similarly, it is not necessary to revise the seniority lists which were in existence on 30.1.1997.”

G 50. On 20 March 2003, another GR was issued *inter alia* with reference to the earlier GR noted above. The GR states that following the amendment to Article 16 by the insertion of Clause (4A), it has been decided that the instructions for regulating seniority of officers belonging

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to the Backward Classes and the general category in the promoted cadre would be governed by the earlier Government Resolutions dated 21 June 1982 and 20 October 1997. The GR clarified that the seniority between backward class and non-backward class candidates in government service in the promotional cadre would be governed by the regular date of promotion:

“3. Considering the said amendment made by the Union Government to Constitution of India and accordingly the orders issued on 21.1.2002, the State Government has now decided that the instructions issued for regulating the seniority amongst the employees/ officers of Backward Classes / Non-Backward Classes in Government Service in the promoted cadre vide the circular of 21st June 1982 and the instructions stipulated in the orders dated 20.10.1997 shall continue to remain in force. Hence, seniority amongst the Backward Classes / Non Backward Class candidates in government service in the promoted cadre shall be fixed on the basis of their respective regular date of promotion given to them as per their sequence in the select list of Backward Class and non-Backward candidates.”

51. The submission which has been urged on behalf of the first respondent is that:

- (i) The GR dated 20 March 2003 has been issued in pursuance of the 85th constitutional amendment by which the words “with consequential seniority” were inserted in Clause (4A) of Article 16;
- (ii) The decision of this Court in **Indra Sawney** (supra) contemplates that a reservation in favour of the backward classes can also be provided by means of an executive order;
- (iii) Section 5(1) of the Reservation Act 2004 stipulates that reservation in promotion shall be at all stages of promotion and in doing so, gives effect to Article 16(4A); and
- (iv) Section 5(2) of the Reservation Act 2004 saves all government orders which provide for reservation for any posts to be filled by way of promotion. Consequently it is urged that all prior government orders have been explicitly saved after the enactment of the Reservation Act 2004.

A 52. The GR dated 20 March 2003 was issued after the constitutional amendment to Article 16 (4A) by which consequential seniority was incorporated into that provision. The decision of this Court in **Indra Sawhney** (supra) indeed contemplated that a provision for reservation can be made by a legislative enactment or rules and also by an executive order. The judgment of Justice Jeevan Reddy formulated the following among other issues for decision:

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“1. (a) Whether the ‘provision’ contemplated by Article 16(4) must necessarily be made by the legislative wing of the State?

C (b) If the answer to clause (a) is in the negative, whether an executive order making such a provision is enforceable without incorporating it into a rule made under the proviso to Article 309?”

Answering this issue the decision holds:

D “(1) (a) It is not necessary that the ‘provision’ under Article 16(4) should necessarily be made by the Parliament/Legislature. Such a provision can be made by the Executive also. Local bodies, Statutory Corporations and other instrumentalities of the State falling under Article 12 of the Constitution are themselves competent to make such a provision, if so advised. (Paras 735-737)

E (b) An executive order making a provision under Article 16(4) is enforceable the moment it is made and issued. (Paras 738-740)”

[See also in this context **Gaurav Pradhan v State of Rajasthan**³⁷.]

F 53. The Reservation Act 2004 was enacted by the State legislature in 2001. The assent of the Governor was received on 20 January 2004 and it was published in the Official Gazette on 22 January 2004. The enactment has come into force after the 85th constitutional amendment. Prior to the enforcement of the Act, reservations were confined upto the entry level in Group I posts, this being common ground during the course of the hearing. As a result of the enactment of the law, reservations are applicable to all appointments in public services and posts [except categories covered by clauses (a) to (d) of sub-section (1) of Section 3].

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³⁷(2018) 11 SCC 352

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54. Section 3 deals with the applicability of the Act and Section 4 deals with reservation and percentages: A

“Section 3 - Applicability

(1) This Act shall apply to all appointments made in public services and posts except,-

(a) the super specialised posts in Medical, Technical and Educational field; B

(b) the posts to be filled by transfer or deputation;

(c) the temporary appointments of less than forty-five days duration; and

(d) the posts which is single (isolated) in any cadre or grade.” C

Sub Sections (1) and (2) of Section 4 read thus:

“Section 4 - Reservation and percentage

(1) Unless otherwise provided by or under this Act, the posts reserved for the Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and Other Backward Classes shall not be filled in by the candidates not belonging to that, caste, tribe, category or class for which the posts are reserved. D

(2) Subject to other provisions of this Act, there shall be posts reserved for the persons belonging to the Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and Other Backward Classes, at the stage of direct recruitment in public services and posts specified under clause (j) of section 2, as provided below :- E

Description of Caste/Tribe/Category/Class	Percentage of vacancies or seats to be reserved
(1) Scheduled Castes	13 per cent
(2) Scheduled Tribes	7 per cent
(3) De-notified Tribes (A)	3 per cent
(4) Nomadic Tribes (B)	2.5 per cent
(5) Nomadic Tribes (C)	3.5 per cent
(6) Nomadic Tribes (D)	2 per cent
(7) Special Backward Category	2 per cent
(8) Other Backward Classes	19 per cent
Total	52 per cent

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A Sub-section (3) of Section 4 provides thus:

“(3) The reservation specified for the categories mentioned at serial numbers (3) to (6) (both inclusive) in the table under sub-section (2) shall be inter transferable. If suitable candidates for the posts reserved for any of the said categories are not available in the same recruitment year, the posts shall be filled by appointing suitable candidates from any of the other said categories.”

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55. Sections 5 and 6 provide thus:

“Section 5 - Reservation in promotion

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(1) The reservation in promotion shall be at all stages of promotions.

(2) On the date of coming into force of this Act, if any Government orders providing for reservation for any posts to be filled by promotion, are in force, the same shall continue to be in force unless modified or revoked, by Government.

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Section 6 - Carrying forward of reserved vacancies

(1) If in respect of any recruitment year, any vacancy reserved for any category of persons under sub-section (2) of section 4 remains unfilled, such vacancy shall be carried forward upto five years in case of direct recruitment and three years in case of promotion:

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Provided that, on the date of commencement of this Act, if any Government orders regarding filling up the posts, in case of non availability of Backward Class candidates are in force, such Government orders shall continue to be in force unless modified or revoked, by Government.”

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Section 11 provides thus:

“Section 11 - Irregular appointments void protection of action taken in good faith

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Any appointments made, in contravention of the provisions of this Act shall be void.”

56. Sub-section (1) of Section 5 stipulates that reservation in promotion shall be at all stages of promotions. Consequently, promotions within Class I posts are also governed by the rule of reservation.

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57. According to the appellant, the Reservation Act 2004 clearly provides in sub-section (2) of Section 5 and the proviso to sub-section (1) of Section 6, which category of government orders predating the Act stand saved. Mr Patwalia submits that the long title to the Reservation Act 2004 indicates that the law was enacted to provide for reservation and “for matters connected therewith or incidental thereto”. The submission is that while making a law for the purpose of reservation, the state government did not incorporate a provision for consequential seniority. Moreover, the proviso to Section 6 saves government orders dealing with the filling up of unfilled posts reserved for backward class candidates. Hence, it was urged that the GR dated 20 March 2003 does not survive the enactment of the Reservation Act 2004 and in any event, it has not been saved by Section 5 or Section 6. Moreover, Section 11 stipulates that any appointment made in contravention of the provisions of the Act shall be void.

58. On the other hand, Mr Giri has met this submission by urging that the Reservation Act 2004 does not deal with the issue of consequential seniority. Hence the GR dated 20 March 2003 will continue to apply. It was urged that though the GR dated 20 March 2003 is an executive order, this is a valid or competent mode of giving effect to the principle of consequential seniority as recognized by the decision of this Court in **Indra Sawhney** (supra).

59. We have already noticed the decision in **Indra Sawhney** (supra) as having laid down that a provision for reservation can be incorporated in an executive order. We are not inclined to accede to the submission of the appellant that the GR dated 20 March 2003 will cease to remain in force after the enactment of the Reservation Act 2004. The Reservation Act has not dealt with issue of consequential seniority. Sub-section (2) of Section 5 saves government orders providing for reservation of any posts to be filled in promotion which were in force on the date of the enactment of the Act. Similarly, the proviso to sub-section (1) of Section 6 saves government orders regarding the filling up of unfilled posts reserved for Backward Class candidates in force on the date of the commencement of the Act. The GR dated 20 March 2003 deals with the determination of seniority while sub-section (2) of Section 5 deals with orders providing for reservation. The GR dated 20 March 2003 is undoubtedly not a government order which falls within the purview of either sub-section (2) of Section 5 or the proviso to sub-section (1) of

A Section 6. However, the enactment of the Act by the state legislature cannot be construed as a legislative intent to override or abrogate the principle of consequential seniority incorporated in government resolutions. A provision for consequential seniority can certainly be incorporated in an executive order issued in pursuance of the provisions of Article 162 of the Constitution.³⁸

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C 60. The Government Resolution dated 20 March 2003 has not been abrogated upon the enactment of the Reservation Act 2004. The Reservation Act 2004 does not deal with the principle of consequential seniority. It would be impermissible to read the Act as having superseded the applicable government orders on consequential seniority, in the absence of clear words providing for such an effect.

D 61. A further submission which was urged on behalf of the appellant is that until the Reservation Act 2004 was enacted, reservations in promotions were not available within Class I posts. Mr Patwalia urged that when the GR dated 20 March 2003 was issued, there was no reservation within Class 1 posts and that in consequence, consequential seniority needs to be restricted in its application to posts other than Class 1 posts.

E 62. This again, is an attempt to urge the Court to read the GR dated 20 March 2003 in a restrictive manner on the basis of the Reservation Act 2004. The GR dated 20 March 2003, while incorporating the principle of consequential seniority, reiterates the GR dated 20 October 1997. It also adverts to the Seniority Rules 1982 of which Rule 4 specifically stipulates that the length of continuous service will be determinative of seniority in respect of posts and cadres in the service. Accepting the submission of the appellant would lead to an anomalous situation where consequential seniority will be made applicable to posts below Class 1, and the catch-up rule will apply to Class 1 posts. An interpretation which results in this anomaly must be eschewed, particularly in the absence of a challenge to the GR dated 20 March 2003 and the Seniority Rules of 1982.

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³⁸ “162. Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws:

H Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof.”

63. The appellant has, in the course of the submissions of Mr Patwalia, sought to urge that the GR dated 20 March 2003 is contrary to the ratio of the decision of the Constitution Bench of this Court in **Nagaraj** (supra). It was urged that before a provision for consequential seniority can be incorporated, the state is under a mandate to collect quantifiable data with reference to (i) inadequacy of representation; and (ii) the effect on the efficiency of administration. Mr Patwalia urged that in the absence of quantifiable data, the GR dated 20 March 2003 is *ultra vires*. In this context, it was urged that in the absence of an exercise by the state to collect quantifiable data, the principle enunciated by this Court in **Nagaraj** (supra) and as applied by the subsequent decisions of this Court in **Suraj BhanMeena** (supra), **UP Power Corporation** (supra), **Panneer Selvam** (supra) and **B KPavitra** (supra) would be attracted.

64. A challenge to the GR dated 20 March 2003 is conspicuous by its absence in the reliefs which were sought before the Maharashtra Administrative Tribunal. We have adverted to the reliefs claimed in an earlier part of this judgment and they are indicative only of a challenge to seniority. Entertaining a challenge to the validity of a Government Resolution incorporating the principle of consequential seniority without a specific challenge being addressed before the Tribunal would simply be impermissible. Entertaining such a challenge at this stage will have serious consequences in the entire State of Maharashtra by upsetting a significant number of promotions which may have already been granted to candidates belonging to the reserved category. The State government, in the pleadings before the Tribunal and the High Court was not called upon to justify the basis of its decision to adopt consequential seniority in the absence of a challenge being squarely set up in the forum of first instance.

65. A challenge to the resolution providing for consequential seniority is indeed a serious matter. Such a challenge calls upon the court to upset a policy circular which has been issued with the avowed objective of safeguarding consequential seniority which was, as our constitutional history indicates, a clear purpose underlying the 85th Amendment to the Constitution. Such constitutional challenges cannot be bandied about without specific pleadings. We are clearly of the view that such an exercise would be impermissible in the absence of a frontal challenge.

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A 66. In **Suraj Bhan Meena** (supra), the petitioners had challenged a notification dated 25 April 2008 issued by the State of Rajasthan under the proviso to Article 309 of the Constitution, amending the Rajasthan “Various Service Rules” with effect from 28 December 2012. This was challenged on the ground that the deletion amounted to giving consequential seniority to candidates belonging to the Scheduled Castes and Tribes without carrying out the exercise of collecting quantifiable data.

B 67. In **UP Power Corporation** (supra), there was a specific challenge before the High Court of Judicature at Allahabad to the validity of Rule 8-A of the UP Government Servants Seniority Rules 2007. Section 3 of the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act 1994 and Rule 8-A of the 1991 Rules brought into force in 2007 were challenged as being *ultra vires* and unconstitutional. As a consequence, the consequential orders relating to seniority were impugned. Once again, the challenge was on the ground that the exercise which was required in pursuance of the decision of this Court in **Nagaraj** (supra) had not been carried out.

C 68. In **Panneer Selvam** (supra), Rule 12 of the Special Rules to Tamil Nadu Highways Engineering Service provided that the rule of reservation of appointments (General Rule 22) shall apply to the appointment of Assistant Divisional Engineers by direct recruitment and by transfer of the appointment of Assistant Engineers. This Court held that Rule 12 did not provide for consequential seniority and, in the absence of a provision for consequential seniority catch-up rule will be applicable. The litigation in **Panneer Selvam** (supra) did not engage a situation such as the present where the GR dated 20 March 2003 specifically provides for consequential seniority.

D 69. The decision in **BK Pavitra** (supra) involved a specific challenge to the validity of the 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. The Act was struck down by a two judge Bench of this Court on the ground that the State had not undertaken an exercise to establish a “compelling necessity” since no material had been placed by the State on record.

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70. All these decisions (except the decision in **Panneer Selvam**) involved a specific challenge to the validity of administrative notifications or, as the case may be, an Act of the legislature. **Panneer Selvam** (supra) was a case where in the absence of a provision for consequential seniority, it was held that the catch-up rule will prevail. In the present case, there is a specific provision for consequential seniority in the GR dated 20 March 2003. Absent a challenge to the GR in the proceedings which were initiated before the Tribunal, such a challenge cannot be entertained at this stage.

71. On behalf of the appellant, it has been urged that the promotion which was granted to the first respondent on 11 August 2011 as JDTP is purely ad-hoc and has not been regularized. This submission has been buttressed by relying upon three documents:

(i) The promotion order dated 11 August 2011 which states that an ad-hoc promotion has been granted to the first respondent on the post of JDTP, subject to the outcome of the decision of the Bombay High Court in Writ Petition 8452 of 2004;

(ii) The counter affidavit filed by the State before the MAT which states that:

“Shri N R Shende (Scheduled Caste) was promoted as Joint Director of Town Planning on 11/08/2011 after following due procedure and provisions of prevailing rules for promotion, with the approval of General Administration Department, Establishment Board as well as Government. Though his promotion is on adhoc basis, and on regular post, it will be regularized with the approval of Maharashtra Public Service Commission. Even the applicant is also promoted on upgraded post of Joint Director of Town Planning on ad-hoc basis vide Government Resolution dated 02/07/2013 and it also will be regularized with the approval of Maharashtra Public Service Commission.”

(iii) A reply to a query addressed by the appellant under the Right to Information Act 2005 on 8 March 2016 stating that:

“Mr N R Shende, Joint Director, Town Planning has been granted adhoc promotion to the post of Joint Director of Town Planning vide Government Resolution No. TPV-1110/624/CR.170/2010/

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A UD-27 dt. 11.08.2011. Provision is made that said promotion will be regularized with concurrence of General Administration Department and approval of Maharashtra Public Service Commission.”

B 72. Another limb of the submission is that the promotion which was granted to the first respondent was in terms of the GAD Circular dated 27 October 2008 which contemplated the inter-changeability of reserved posts between reserved categories. The circular was struck down by the Bombay High Court on the ground that after the enactment of the Reservation Act 2004, interchangeability of posts was specifically prohibited. Moreover, it was submitted that a regular post of JDTP became available to the first respondent only when the cadre strength increased from two to eight on 29 December 2012, resulting in a simultaneous increase in the posts for reserved categories from one to three. The submissions of the appellant have been countered by urging that the reason why the promotion of the first respondent has been treated as ad-hoc is because there was a challenge pending to the Reservation Act 2004 at the material time before the Tribunal / High Court in Writ Petition 8452 of 2004.

E 73. The submission of the appellant is based on the hypothesis that the promotion of the first respondent is ad-hoc and hence, he is not entitled to consequential seniority in terms of the GR dated 20 March 2003, which speaks of the “regular date of promotion”. In assessing this submission, it is necessary to note that the order of promotion dated 11 August 2011 indicates the reason as to why the promotion was treated as ad-hoc. The reason was the pendency of Writ Petition 8452 of 2004 before the Bombay High Court where there was a challenge to the Reservation Act 2004. Indeed, the order of promotion dated 2 July 2013 by which the appellant was promoted to the post of JDTP also states that the promotion is ad-hoc. Significantly, in the case of the appellant as well, the reason why the promotion is treated as ad-hoc is also the pendency of Writ Petition 8452 of 2004.

G 74. A policy circular was issued by the State of Maharashtra on 1 April 2008 to all departments directing that promotions will be subject to the outcome of the decision in the above Writ Petition. Special Leave Petitions against the judgment of the Bombay High Court in the

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Writ Petition³⁹ are pending adjudication before this Court. The Tribunal, by its order dated 28 November 2014 struck down the Reservation Act, 2004 and the GR dated 25 May 2004. The judgment of the Tribunal was stayed by the Bombay High Court on 20 March 2015. On 4 August 2017, the High Court set aside the decision of the Tribunal to the extent that it struck down the Reservation Act 2004. The High Court kept the issue of constitutional validity open. The State of Maharashtra has filed a Special Leave Petition which is pending before this Court.

75. Mr Giri, learned Senior Counsel appearing on behalf of the first respondent submitted that though the word ad-hoc has been used in the order of promotion, the due process of promotion was followed before the first respondent was promoted to the post of JDTP. In urging this submission, Mr Giri has relied on the communication dated 7 January 2011 of the Deputy Secretary to the Government of Maharashtra to the Principal Secretary, Services, GAD. He submits that (i) only two posts were available in the cadre of JDTP, one of which is set apart for the reserved categories; (ii) no other eligible officer was available to fill up the said post from amongst the reserved categories and hence the first respondent was recommended for promotion; and (iii) in any event, the appellant who is an open category candidate cannot have a right of appointment to a post for the reserved categories on which the first respondent was appointed.

76. Alternately, it has been urged on behalf of the first respondent that even presuming that the seniority of the appellant is protected in the cadre of JDTP, the fact remains that he did not have the requisite eligibility to be considered for promotion to the post of Director, Town Planning. The appellant was promoted to the post of JDTP on 2 July 2013. Mr Giri has urged that even if the catch-up rule were to prevail on the ground that the promotion of the first respondent is only ad-hoc: (i) Rule 3 of the Directorate of Town Planning and Valuation (Recruitment) Rules 2011 prescribes that an officer holding the post of JDTP must necessarily serve in the post for a minimum of three years to be considered eligible for promotion to the post of DTP; (ii) upon superannuation of Mr Rajan Kop from the post of DTP, a vacancy in the post arose on 30 April 2016; (iii) as on the date when the vacancy occurred in the post of DTP, the appellant did not fulfill the eligibility criterion of three years' experience

³⁹SLP (C) No 28306 of 2017 and others

- A as JDTP and the first respondent as the senior-most eligible officer, was entitled to be appointed to the post. The state has issued a GR dated 5 October 2015 under which the condition prescribing the minimum required experience for promotion cannot be relaxed; and (iv) seniority and eligibility are different concepts and merely because a person is senior does not make an individual eligible for consideration.
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77. On the above foundation, it has been urged that even if the catch-up rule is made applicable to the appellant in the post of JDTP, he was not eligible to be considered for promotion as DTP in terms of Rule 3 which requires a minimum of three years' experience as JDTP. The catch-up rule, in this submission, provides for a notional state of affairs vis-à-vis a person who was earlier promoted under a reserved category. In other words, the catch-up rule will not provide actual service required to fulfill the requirement of eligibility.

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78. Eligibility has to be considered on the date of the occurrence of the vacancy. On 30 April 2016, the appellant did not fulfill the eligibility required for the post of DTP. In assailing the decision of the first respondent, as we have noted, the appellant has submitted that the promotion of the first respondent as JDTP on 11 August 2011 was under a circular dated 27 October 2008 which has been struck down by the Bombay High Court. The High Court in dealing with this submission has held that the order of promotion, when it was issued on 11 August 2011 had an imprint of legality. Moreover, even the appellant adopted the position that since promotion was given to the first respondent in terms of the Government Circular dated 27 October 2008, he believed that he had no reason to object to the seniority list of JDTP published on 28 August 2014. That apart, the High Court has noted that after the promotion of the first respondent on 11 August 2011, the appellant was promoted on 2 July 2013 and it was only when the second seniority list was finalized on 15 January 2016 that the appellant filed an OA in February 2016. In the meantime, the appellant had worked as JDTP for a period of nearly five years. In declining to allow the issue of seniority to be challenged at this belated stage, the High Court relied upon the decisions of this Court in **Roshan Lal v International Airport Authority of India**⁴⁰, **P Chitharanja Menon v A Balakrishnan**⁴¹ and **Amarjeet Singh v Devi Ratan**⁴².

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⁴⁰(1980) Suppl.SCC 449

⁴¹(1977) 3 SCC 255

H ⁴²(2010) 1 SCC 417

79. The delay has, in our view, justifiably weighed with the High Court. Coupled with this is an equally relevant consideration which must weigh with the court: the appellant has not challenged the appointment of the first respondent as JDTP. Having failed to challenge the appointment, it is now not open to the appellant to assert that the appointment must be treated as void on the ground that the circular on the basis of which the first respondent was promoted has subsequently been set aside in a judgment of the Bombay High Court⁴³.

80. The first respondent has urged that his appointment as JDTP was not challenged by the appellant for the reason that any challenge would have attracted the bar of limitation. Whatever be the reason, the fact remains that the appointment of the first respondent as JDTP has not been assailed in the OA filed before the Tribunal. Consequently, it is not open to the appellant to lay a challenge on the ground that the appointment was based on a circular which was held to be invalid after the appointment was made. The submission that the appointment is fortuitous within the meaning of Rule 3(f) is but another modality of seeking to deprive the first respondent of the consequence of his appointment and to his consequential seniority.

81. Rule 3 of the Directorate of Town Planning and Valuation (Recruitment) Rules 2011 provides as follows:

“3. Appointment to the post of the Director of Town Planning, Group-A shall be made by promotion of a suitable person on the basis of strict selection with due regard to seniority, from amongst the persons holding the post of Joint Director of Town Planning in the Directorate, having not less than three years regular service in that post.”

The fact that the vacancy occurred on 30 April 2016, on the retirement of the then DTP has not been disputed in the course of the submissions of the appellant. On the date when the vacancy occurred, the appellant clearly did not fulfill the eligibility criterion of three years' experience as JDTP. The appellant who was promoted on 2 July 2013 did not fulfill the criterion prescribed by Rule 3. The contention urged by Mr Patwalia that the tenure served by the appellant in the posts of DDTP and JDTP must be coupled together for the purpose of determining

⁴³Mahasangh, (2013) 5 Mh LJ 640

- A eligibility cannot be accepted as Rule 3 clearly stipulates that an eligible JDTP must have three years of regular service in that post.

82. In **R Prabha Devi v Union of India**⁴⁴, a two Judge Bench of this Court formulated the principle in the following terms:

- B “The rule-making authority is competent to frame rules laying down eligibility condition for promotion to a higher post. When such an eligibility condition has been laid down by service rules, it cannot be said that a direct recruit who is senior to the promotees is not required to comply with the eligibility condition and he is entitled to be considered for promotion to the higher post merely on the basis of his seniority.

- C ...
- D Seniority in a particular cadre does not entitle a public servant for promotion to a higher post unless he fulfils the eligibility condition prescribed by the relevant rules. A person must be eligible for promotion having regard to the qualifications prescribed for the post before he can be considered for promotion. Seniority will be relevant only amongst persons eligible. Seniority cannot be substituted for eligibility nor can override it in the matter of promotion to the next higher post.”

- E Seniority and eligibility are distinct concepts in service jurisprudence. Seniority by itself cannot prevail where a senior lacks eligibility for promotion to a higher post [See in this context **Palure Bhaskar Rao v P Ramaseshaiah**⁴⁵]. Even if the contention of the appellant on the applicability of the catch-up rule were to be accepted, that will not obviate the requirement of his fulfilling the condition of
- F eligibility for promotion to the next higher post, on the date when the vacancy occurred.

- G 83. The appellant failed to challenge the appointment of the first respondent as JDTP on 11 August 2011. The appellant failed to challenge the circular dated 20 March 2003 providing for consequential seniority. The substratum of the challenge which has been developed before this Court is without basis in the pleadings. The ingenuity and industry of the learned counsel who appeared on behalf of the appellant cannot, in the ultimate analysis, be a substitute for a deficient pleading.

⁴⁴ (1988) 2 SCC 233

⁴⁵ (2017) 5 SCC 783

84. A submission was sought to be advanced on the basis of the principle that an appointment made contrary to the rules is merely fortuitous and does not confer the benefit of seniority on the appointee over and above the regular/substantive appointees to the service (**Sanjay K Sinha-II v State of Bihar**)⁴⁶. The same principle was emphasized in **Bhupendra Nath Hazarika v State of Assam**⁴⁷:

“..when the infrastructure is founded on total illegal edifice, the endeavor to put forth a claim for counting the previous service to build a pyramid is bound to founder.”

[See also **PV George v State of Kerala**⁴⁸ and **BA Linga Reddy v Karnataka State Transport Authority**⁴⁹(relied upon to buttress the submission that the power of the High Court to strike down cannot be exercised prospectively)].

85. The answer to the submissions is simple: the appellant did not at any stage challenge the appointment of the respondent to the post of JDTP nor did he challenge the GR dated 20 March 2003 providing for consequential seniority. The appellant was not eligible for the post of DTP on 30 April 2016, when the vacancy occurred. He cannot, hence, challenge the appointment of the first respondent.

86. For the above reasons, we have come to the conclusion that there is no substance in the appeals. The judgment of the High Court does not call for any interference, though for the reasons which we have indicated. The Civil Appeals shall stand dismissed. There shall be no order as to costs.

CIVIL APPEAL Nos 2471-2473 OF 2019

@ SPECIAL LEAVE PETITION (CIVIL) Nos. 14041-14043 OF 2018

87. In view of the judgment in Civil Appeals @ Special Leave Petition(C) Nos 8769-8771 of 2018 rendered today, these appeals are also dismissed with no order as to costs.

⁴⁶(2004) 10 SCC 734 at 742

⁴⁷(2013) 2 SCC 516

⁴⁸(2007) 3 SCC 557

⁴⁹(2015) 4 SCC 515

A **MA Nos 2983-2985 OF 2019**

@ SPECIAL LEAVE PETITION (CIVIL) Nos.33086-33088 OF 2017

- B 88. In view of the judgment in Civil Appeals @ Special Leave Petition (C) Nos 8769-8771 of 2018 rendered today, these MAs are disposed of, in terms of the judgment and order in the lead appeals.

Divya Pandey

Appeals dismissed.