

**HIGH COURT OF ORISSA
CUTTACK**

W.P.(C) NOs.6781 & 7359 of 2008, 17375 of 2009 & 1638 of 2010

In the matter of applications under Articles 226 and 227 of the Constitution of India.

W.P.(C) No.6781 of 2008

Lagnajit Ray & others Petitioners

versus

State of Orissa & others Opp. Parties

For Petitioners : Shri R.K. Rath, Sr. Advocate,
& Shri B. B. Mohanty, Advocate

General
Add.Govt.Advocate

For Opp.Parties : Shri Ashok Mohanty, Advocate
& Shri J.P.Patnaik,

(for Opp.Party nos.1 to 3),

Shri N.C.Panigrahi & Shri B.Routray,
Sr.Advocates, (for Opp.Party

nos.4 & 5),

Shri S. K. Nayak-I, Sr. Advocate,
(for intervenors)

W.P.(C) No.7359 of 2008

Rashid Khan & others Petitioners

versus

State of Orissa & others Opp.Parties

For Petitioners : Shri B. B. Mohanty, Advocate

For Opp. Parties : Shri J. P. Patnaik,
Add. Govt. Advocate
(for Opp.Party nos.1 to 3)

W.P.(C) No.17375 of 2009

Pramod Kumar Dash & others Petitioners

versus

State of Orissa & others Opp.Parties

For Petitioners : Shri Sanjit Mohanty, Sr.
Advocate,
& Shri B.B. Mohanty, Advocate

For Opp.Parties : Shri J.P. Patnaik,
Add. Govt. Advocate
(for Opp.Party nos.1 to 3)

W.P.(C) No.1638 of 2010

Bijaya Kumar Nayak Petitioner

versus

State of Orissa & others Opp.Parties

For Petitioner : Shri Jaganath Patnaik, Sr.
Advocate
& Shri B.B. Mohanty, Advocate

For Opp.Parties : Shri J.P. Patnaik,
Add. Govt. Advocate
(for Opp.Party nos.1 to 3)

**THE HON'BLE SHRI JUSTICE B. P. DAS
A N D
THE HON'BLE KUMARI JUSTICE SANJU PANDA**

Date of hearing : 17.12.2010 : Date of judgment : 24.12.2010

B. P. Das, J.

The petitioners in this batch of writ petitions challenge the orders passed by the Orissa Administrative Tribunal dated 17.4.2008 in O.A. No.904 (C) of 2008, dated 1.12.2009 in O.A. No.3006 (C) of 2009, dated 21.4.2008 in O.A. No.979(C) of 2008 and dated 9.5.2008 in O.A. No.1097 (C) of 2008, vide Annexure-12, and also the resolution of the General Administration Department of the State Government dated 20.3.2002, vide Annexure-5, and the gradation list of the Orissa Administrative Services, Class-I (Junior Branch) (in short "OAS-I (JB)") dated 3.3.2008, vide Annexure-7. Since common questions of fact and law are involved in the

writ petitions, they were heard together and are being disposed of by this common judgment.

2. The petitioners were appointed to O.A.S-II posts being selected by the Orissa Public Service Commission. Some of them were recruited in 1983 and some others in 1984 and 1987. They were assigned different ranks in the merit lists prepared for their respective batches by the OPSC. In the respective merit list, persons belonging to S.C. & S.T. category, who were appointed as against reserved vacancies, were placed much below in the list than the petitioners. Thus, in terms of the merit list/panel, the petitioners were senior to the appointees belonging to S.C. & S.T. category recruited in the same recruitment year. After rendering service in the post of OAS-II, the petitioners having been found suitable by the D.P.C. were promoted and appointed to the next higher rank, i.e., O.A.S-I (JB) vide Government Notification dated 26.8.2000 (Annexure-2). The petitioners joined the promotional posts and have been continuing as such since then. However, many junior OAS Officers belonging to the SC & ST category recruited along with the petitioners or even in subsequent batches in different recruitment years were also given promotion to the rank of O.A.S.-I (JB) against reserved vacancies in between 1995 and 2000 as per the Orissa Reservation of Vacancies in Posts and Services (for Scheduled Castes and Scheduled Tribes) Act and the Rules, 1975 and 1976 (in short, "O.R.V. Act & Rules"). It is stated by the petitioners that the promotions made both in favour of reserved categories and unreserved categories including the petitioners have not yet been concurred by the OPSC since the principles determining seniority inter se and the gradation list prepared from time to

time of the officers in the rank of O.A.S.-II and O.A.S.-I (JB) became the subject-matter of several protracted litigations. However, the roster point promotees belonging to the SC & ST category were given promotion to the rank of O.A.S.-I (JB) against reserved vacancies earlier irrespective of their original seniority below the general category recruits like the petitioners. But the original seniority position in the cadre of O.A.S.-II prepared by the OPSC was retained in the O.A.S.-I (JB) without any changes on the basis of the law laid down by the Hon'ble Apex Court in the case of ***Union of India & others v. Virpal Singh Chauhan & others***; AIR 1996 S.C. 448. Hence, irrespective of getting promotion in subsequent years, the inter se seniority of the petitioners vis-à-vis the S.C. & S.T. roster point promotees in the rank of O.A.S.-I (JB) was maintained in the seniority/disposition list prepared for the rank of O.A.S.-I (JB) in the year 2002 and also in the year 2004 as per the panel position prepared by the OPSC for the cadre of O.A.S.-II. The copy of the seniority list dated 16.5.2001-of officers of O.A.S.-I (JB) cadre has been filed as Annexure-3. Such seniority list was maintained in view of the 'Catch Up Rule' evolved by the Hon'ble Apex Court in the case of ***Virpal Singh Chauhan*** (supra), which was also set at rest by the Apex Court in the case of ***Ajit Singh & others v. The State of Punjab & others***, AIR 1999 S. C. 3471 (herein after "Ajit Singh Januja-II"). It is stated that Article 16(4A) was incorporated in the Constitution by way of 77th and 85th Amendment of the Constitution enabling the State to grant accelerated promotion along with consequential seniority to SC & ST reserved category employees. While the validity of such constitutional amendments was pending adjudication before the Hon'ble Apex Court in several writ petitions, the Government of India in

the Department of Personnel, Public Grievances and Pension (D.O.P&T) by its Memorandum dated 21.1.2002 under Annexure-4 decided to grant benefit of accelerated promotion along with consequential seniority in favour of roster point promotees belonging to the S.C. & S.T. category employees under the Central Government in accordance with the constitutional amendment. It is alleged that the Government of Orissa without appreciating the justification for grant of additional benefit of accelerated seniority to S.C. & S.T. category promotees working in different cadres of civil services/posts, decided to grant such benefit by mechanically accepting or adopting the D.O.P.T Office Memorandum under Annexure-4 and issued the G.A. Department resolution dated 20.3.2002 granting such benefit of accelerated promotion with consequential seniority to S.C. & S.T. promotees under Annexure-5.

3. It is further stated by the petitioners that the aforesaid G.A. Department resolution dated 20.3.2002 under Annexure-5 was challenged before the Hon'ble Apex Court in W.P.(C) No.453 of 2002 by present petitioner no.5-Srimanta Mishra and some others wherein by order dated 2.9.2002 the Hon'ble Apex Court while directing the writ petition to be heard analogously with W.P.(C) No.61 of 2002 (M.Nagraj & others v. Union of India & others), as an interim measure further directed the State-respondents not to affect the standing seniority of the petitioners during the pendency of the said writ petition. It is not disputed that subsequent to disposal of the writ petition in the case of M. Nagraj and others, W.P.(C) No.453 of 2002 was disposed of by the Hon'ble Supreme Court on 11.3.2010 giving liberty to the petitioners to move the High Court and while the matter

stood thus, the State Government in the Revenue Department prepared a provisional gradation list of officers of O.A.S.-I (JB) by taking the very Government Resolution dated 20.3.2002 (Annexure-5) as its basis. By virtue of grant of consequential seniority to the S.C. & S.T. reserved promotees, the provisional gradation list has been recast and placed for circulation on 3.3.2008 changing/unsettling the original seniority position in the cadre to the detriment of the petitioners. The provisional gradation list dated 3.3.2008 has been filed as Annexure-7. The petitioners filed objections to the provisional gradation list challenging the very basis of its preparation and citing the principles decided by the Hon'ble Apex Court in the case of **M. Nagaraj & others v. Union of India & others**; (2006) 8 SCC 212. While during the pendency of the representations the petitioners apprehended that their objections would be mechanically rejected and promotion to the next higher cadre would be considered by the D.P.C. at short notice, they filed Original Application No.904(C) of 2008 before the Orissa Administrative Tribunal, Cuttack Bench, Cuttack, inter alia for quashing the Government Resolution dated 20.3.2002 under Annexure-5 and the provisional gradation list dated 3.3.2008 under Annexure-7. Vide order under Annexure-12, the Tribunal disposed of the Original Application holding the same as premature and directed the State-respondent to dispose of the petitioners' objections.

4. It is submitted by the learned counsel for the petitioners that the petitioners were placed higher in the merit position in the select list above all the S.C. & S.T. candidates in their respective batches at the time of recruitment to O.A.S.-II and, therefore, they were senior to such S.C. & S.T. category Officers. Though such junior S.C. and S.T. Officers were promoted

to O.A.S.-I(JB) in respect of S.C & S.T. reserved vacancies as per the O.R.V. Act and Rules earlier than the petitioners, who were originally senior to them, by virtue of the 'Catch up principle' laid down in the case of **Virpal Singh Chauhan & others** (*supra*), as affirmed in the case of **Ajit Singh Januja-II** (*supra*), which was accepted by the State Government in the resolution dated 2.11.2000, the petitioners' seniority after their promotion to O.A.S.-I (JB) was restored and accordingly gradation list under Annexure-3 has been prepared and that it being the settled principle, as has been held by the Hon'ble Apex Court in the case of **M. Nagaraj** (*supra*) that the Constitution 77th and 85th Amendment of Article 16(4A) merely enables the State to enforce such constitutional provision by making law after satisfying the parameters, such as, the backwardness of S.C. & S.T. employees, inadequacy of their representation in the promotional cadre, to be determined on the basis of quantifiable data and maintenance of administrative efficiency in the service, the State Government without making any law could not have issued the provisional gradation list by recasting the seniority position by giving consequential seniority to the S.C. & S.T. promotees from the date of their promotion. It is submitted that without legislating any law after determining the aforesaid parameters, it is not open to the State to implement the provision of Article 16(4A) merely on the basis of Government Resolution under Annexure-5 which cannot be said to be a law. It is contended on behalf of the petitioners that since the Government Resolution under Annexure-5 on the basis of which the provisional list was issued was challenged before the Tribunal, the Tribunal

has gone wrong in disposing of the Original Application holding it to be premature.

5. On behalf of opposite party no.2 representing the State Government a counter affidavit has been filed stating that, as rightly observed by the Administrative Tribunal, the writ petition is premature inasmuch as it was filed challenging the provisional gradation list under Annexure-7 before it reached finality. While admitting that the original seniority of general category candidates was restored in the gradation list of O.A.S.-I (JB) dated 16.5.2001 (Annexure-3) on the basis of the 'Catch up principle' laid down by the Hon'ble Apex Court in the case of **Virpal Singh Chauhan & others** (*supra*) and **Ajit Singh Januja-II** (*supra*) and G.A. Department Resolution No.21260 dated 16.6.2000, it is stated in the counter that after the 85th Constitutional Amendment introducing accelerated promotion along with consequential seniority in favour of S.C. & S.T. employees, the Government Resolution dated 20.3.2002 (Annexure-5) was issued superseding the earlier resolution dated 16.6.2000 and that subsequently the validity of the said Constitutional Amendment having been upheld by the Apex Court in the case of **M. Nagaraj** (*supra*), the Government Resolution under Annexure-5 cannot be faulted. It is stated that there is no necessity of bringing out any law with regard to grant of accelerated seniority and determination of inter se seniority of general caste promotees vis-à-vis S.C. & S.T. roster point promotees inasmuch as the parameters or compelling reasons, as laid down in **M. Nagaraj** (*supra*), are necessary to be satisfied for future cases of promotion and it has no retrospective effect. It is stated that the principle of inter se seniority of the

Officers of O.A.S.-I (JB) is available in the O.A.S.-I (JB) Recruitment and Appointment by Promotion Rules, 1977 and the provisional gradation list has been prepared in accordance with Rule 10 (2) of the said Rules, as the State Government has not embarked upon any policy for S.C. & S.T category employees. It is also stated that the persons whose names find place in the provisional gradation list are necessary parties to the writ petition and they having not been arrayed as parties, the writ petition suffers from the defect of non-joinder of necessary parties.

6. Opposite party nos. 4 and 5 have filed a counter affidavit contending that the provisional gradation list has been prepared in accordance with Rules 10 & 11 of the O.A.S.-I (JB) Recruitment and Appointment by Promotion Rules, 1977 and the O.R.V. Act, 1975 which are State enactments. It is also stated that there is nothing wrong on the part of the Government in issuing resolution dated 20.3.2002 (Annexure-5), as it set the matter right by withdrawing the earlier faulty resolution dated 16.6.2000 issued by the Government. It is stated that the provisional gradation list is prepared on the basis of the aforesaid Rules and not on the basis of the G.A. Department Resolution under Annexure-5 or the Constitution 85th Amendment of Article 16 (4A).

7. While issuing notice to the opposite parties on 13.5.2008 this Court passed the following interim order :

“Till next listing, no action shall be taken on the basis of the provisional gradation list against which objections have already been invited, without leave of this Court. However, this will not debar the opposite parties to dispose of the objections. But

the same shall be subject to further orders of this Court.

If the gradation list is finalized, the same shall be produced before this Court prior to it is given effect to.”

During the course of hearing it was submitted by the learned State counsel that in view of the interim order, as noted above, the provisional gradation list has been finalized without any change and objections filed by the petitioners and others to the provisional gradation list have been rejected. As per direction of the Court dated 4.10.2010 the learned State counsel has produced the concerned records which show that the objections filed by the petitioners have been rejected and order has been passed to finalize the provisional gradation list dated 3.3.2008 without any change therein.

8. It may be noted that the reason for which the impugned provisional gradation list (Annexure-7) has been prepared is borne out from the note-sheet of the Government in Revenue and Disaster Management Department File No.Con.R-6/08, copy whereof obtained by the petitioners under the R.T.I. Act has been filed as Annexure-10. It is revealed from Annexure-10 that note was put up to prepare a gradation list of Officers of OAS-I (JB), as on 1.1.2008, for the purpose of conducting D.P.C. for promotion of such officers to the next higher cadre of O.A.S.-I(SB) as the earlier gradation list of Officers of O.A.S.-I (JB) dated 16.5.2001 (Annexure-3) is stated to have been locked up in litigation. Accordingly, the provisional gradation list (Annexure-7) was prepared and placed for the approval of the Commissioner-cum-Secretary, Revenue Department. It appears further that

on 20.2.2008, the Commissioner-cum-Secretary, i.e., opposite party no.2, stated in the note-sheet to the following effect :

“The promote SC/ST officers within Class-I are to be arranged in the seniority in compliance to Apex Court Nagraj Judgment i.e., based on 85th Constitutional Amendment, without ‘sliding down’. Please confirm whether it has been done accordingly.”

Thereafter, the query was answered by the Additional Secretary on 29.2.2008 stating that the provisional gradation list has been prepared without adhering to ‘catch up principle’ restoring the original position of general category officers after their promotion to O.A.S.-I(JB) and that the S.C. and S.T. Officers are arranged as per their position at the time of promotion without any change. Accordingly, the file was put up before opposite party no.2 for approval of the draft gradation list. Opposite party no.2, thereafter, approved the draft provisional gradation list which was issued by office order dated 3.3.2008 vide Annexure-7.

9. It is apparent that the aforesaid provisional gradation list has been prepared giving a go-bye to the ‘catch up principle’ laid down by the Hon’ble Apex Court and following the Constitution 85th Amendment of Article 16 (4A) giving consequential seniority to the S.C. & S.T. O.A.S. Officers, who were, though initially junior to the general caste officers, promoted earlier than them to the next higher cadre of OAS-I(JB) against roster vacancies. So, there is no manner of doubt nor any denial that the seniority position of the petitioners and other general caste officers, which had been restored in the gradation list dated 16.5.2001 of O.A.S.-I(JB) by

applying the 'catch up principle', has been given a go-bye and their seniority position has been changed in the impugned provisional gradation list.

10. Keeping in view the averments made by the parties in their pleadings and the contentions raised by them, the following issues arise for determination;

- (i) whether the 'catch up principle' evolved by the Hon'ble Apex Court still governs the field after the constitution 85th Amendment and whether the judgment of the Apex Court in the case of **M. Nagaraj** (supra) that upheld the validity of the constitutional amendment has given a go bye to the 'catch up rule' ?
- (ii) Whether in absence of any law made by the State in exercise of enabling power conferred under Article 16(4) and 16 (4A) after satisfying the necessary parameters laid down in **M. Nagaraj** (supra), it is open to the State Government to abandon the 'catch up principle' by issuing the resolution dated 20.3.2002 (Annexure-5) ?
- (iii) Whether the impugned provisional gradation list that abandoned the earlier gradation list dated 16.5.2001 has been prepared in pursuance of the provisions of the ORV Act 1975 and/or Rule 10(2) of the O.A.S.(I) Recruitment Rules, 1977 ?
- (iv) Whether the provisional gradation list is legally valid and justified ?
- (v) Whether the finding arrived at by the Orissa Administrative Tribunal, Cuttack Bench, Cuttack that the Original Application was premature and not maintainable is justified and legally sustainable

and whether the writ petition in the present form is maintainable or not ?

Issue No.(iii) :

11. It is apposite to consider issue no.(iii) at first. It is seen earlier that the State Government in its counter affidavit admitted that the original seniority of general category officers was restored in the gradation list of O.A.S.-I (JB) dated 16.5.2001 on the basis of the 'catch up rule' laid down by the Hon'ble Apex Court in the case of **Virpal Singh** and **Ajit Singh Januja-II** (supra) and G. A. Department Resolution No.21260 dated 16.6.2000. It is also admitted in the counter that in view of the Constitution 85th Amendment introducing accelerated promotion along with consequential seniority in favour of S.C. & S.T. employees, the validity of which was upheld in the case of M. Nagraj (supra), the Government Resolution dated 23.3.2002 (Annexure-5) was issued superseding the earlier resolution dated 16.6.2000. There is no dispute that the impugned provisional gradation list under Annexure-7 has been prepared giving consequential seniority to the S.C. and S.T. roster point promotees by recasting the gradation list dated 16.5.2001 which had been prepared following the 'catch up rule'. The basis of preparation of such provisional gradation list is said to be the provision in Rule 10(2) of the O.A.S.-I (JB) Recruitment and Appointment by promotion Rule 1977 (in short "1977 Rules"). Similarly, private opposite party nos. 4 and 5 have stated in their counter affidavit that the provisional gradation list has been prepared in accordance with Rules 10 and 11

of the 1977 Rules and the provisions of the O.R.V. Act and Rules, 1975 and 1976. Rule 11 of the 1977 Rules provides that notwithstanding anything contained in the Rules, vacancies shall be reserved for promotion in favour of candidates belonging to Scheduled Caste and Scheduled Tribe in accordance with the existing laws in force. In other words, the law that governs reservation of vacancies in posts and services in favour of S.Cs. & S.Ts, i.e., the O.R.V. Act and Rules, 1975 and 1976 shall apply in the matter of promotion to O.A.S.-I (JB). Rule 11 of 1977 Rules, however, does not make any provision for inter se seniority in the cadre of O.A.S.-I(JB). Reservation in promotional post under the State Services is available only in respect of Class-I post at the lowest rung as per clause-(c) of the second proviso to sub-section (2) of Section 4 of the O.R.V. Act, 1975 and not to any higher Class-I post in the service. With reference to the Orissa Administrative Service, therefore, vacancies are reserved in O.A.S.-I(JB), which is the lowest rung of the Class-I posts, to the extent provided under the O.R.V. Act and Rules. The O.R.V. Act and Rules, however, do not make any provision for determining seniority or inter se seniority of reserved candidates and general candidates in the promotional cadre. Rule 10(1) of the 1977 Rules provides that appointment to the service shall be made in the order in which the names of members of the O.A.S. Class-II appear in the 'select list'. Rule 10(2) provides that the inter se seniority of officers appointed to the service shall be determined by the order indicated in the select list. Preparation of select list by the Selection Board for the purpose of

appointment by promotion to O.A.S.-I(JB) has been provided for in Rule-5 of 1977 Rules which is quoted hereunder :

“5. Conditions of eligibility for promotion-

- (1) The Selection Board shall ordinarily meet at intervals of not less than six months and not more than one year and prepare a list of such members of Orissa Administrative Service, Class-II as are held by them to be suitable for appointment to the service. The number of members of the Orissa Administrative Service, Class-II, included in the list shall not be more than twice the number of vacancies anticipated in the course of a period of twelve months commencing from the date of preparation of the list or ten per cent of the posts available in the cadre, whichever is greater.
- (2) The Selection Board shall consider for inclusion in the said list the cases of the members of the Orissa Administrative Service, Class-II, in order of seniority, up to a number not more than thrice the number referred to in sub-rule(1) :

Provided that the Selection Board shall not consider the case of a member of the Orissa Administrative Service, Class-II unless on the first day of January of the year when it meets, he is substantive in the Orissa Administrative Service, Class-II and has completed not less than six years of service (whether officiating or substantive) in a post of Orissa Administrative Service, Class-II:

Provided further that a member of Orissa Administrative Service, Class-II who has already been appointed as “probationer” in the Orissa Administrative Service, Class-I (Junior) or appointed to officiate in the Orissa Administrative Service, Class-I shall not be

considered by the Selection Board for their appointment to the Orissa Administrative Service, Class-I (Junior Branch).

- (3) The Selection for inclusion in the list shall be based on merit and suitability in all respects with due regard to seniority.
- (4) The names of the officers included in the list shall be arranged in order of seniority in the Orissa Administrative Service, Class-II: provided that any junior officer who in the opinion of the Selection Board, is of exceptional merit and suitability may be assigned a place in the list higher than that of officers senior to him.
- (5) The list shall be reviewed and revised every year.
- (6) If in the process of selection, review or revision it is proposed to supersede any member of the Orissa Administrative Service, Class-II, the Selection Board shall record its reason for the proposed supersession.”

The select list prepared by the Selection Board is to be sent to the Orissa Public Service Commission for their consideration and recommendation in terms of Rules 6 and 7. In accordance with Rule 8, the select list reaches finality on approval by Government with modifications or otherwise after consideration of the recommendations of the Public Service Commission.

It is clear from the provisions of Rule-5 of 1977 Rules as seen above, that though selection for inclusion in the list shall be based on merit and suitability in all respects with due regard to seniority, the names of officers included in the list shall be arranged in order of seniority in O.A.S.-II subject to the only rider that any

junior officer, who, in the opinion of the Selection Board, is of exceptional merit and suitability may be assigned a place in the list higher than that of officers senior to him. It is clear that the inter se seniority of officers appointed to O.A.S.-I (JB), as provided in Rule 10(2) of the Rules, shall be as per the final 'select list' in respect of all those officers, who have been considered and placed in the select list in any given meeting of the Selection Board as finally approved by the Government. The Rule has, however, no reference to inter se seniority of general candidates considered and placed in the select list in any given Selection Board meeting vis-à-vis the S.C. and S.T. candidates, who were considered and placed in the select list in the same meeting or a different meeting for their accelerated promotion on the basis of reservation against roster point vacancies. It, therefore, cannot be said that the provisional gradation list of O.A.S.-I (JB) under Annexure-7 has been prepared in accordance with Rule 10(2) of the 1977 Rules, as contended by the opposite parties.

On the contrary, as has been noted in the Government file (Annexure-10), particularly the query made by the Commissioner-cum-Secretary which was answered by the Additional Secretary on 29.2.2008, it is apparent that the provisional gradation list has been prepared on the basis of 85th Constitutional amendment by giving consequential seniority to the S.C. & S.T. Officers, those who were junior to the general caste officers in the feeder cadre and were promoted earlier to them against reserved roster point vacancies, by giving a go bye to the 'catch of rule' and thereby abandoning the

extant gradation list dated 16.5.2001. Issue no.(iii) stands answered accordingly.

Issue No.(i), (ii) and (iv) :

12. In order to decide whether the preparation of provisional gradation list by abandoning the 'catch of rule' and thereby recasting the gradation list dated 16.5.2001 is legally justified or not, it is appropriate to find out what the 'catch up rule' is as evolved by the Hon'ble Apex Court and whether it still governs the field. The 'catch up rule' was evolved in **Virpal Singh Chauhan** (supra) where the question inter alia was about determination of seniority between general candidates and candidates belonging to reserved classes in the promoted category of railway guards. The Hon'ble Apex Court said in paragraph-24 as follows :

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

give the accelerated-or what may be called, the consequential-seniority.....”

It was further held in the concluding paragraph-28 as follows :

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

13. In the case of **Ajit Singh Januja & others v. State of Punjab & others**; AIR 1996 SC 1189 (herein after referred to as “Ajit Singh Janjua-I”) being confronted with the question of determination of inter se seniority of reserved candidates and general candidates, the Hon’ble Apex Court observed that the question cannot be examined “only” on the basis of any circular, order or Rule issued/framed by any State Government or the Union of India and the same has to be tested on the basis of the constitutional scheme of equal opportunity enshrined in Articles 14 and 16 of the Constitution. The Court also relied on the decision in **Indra Sawhney v. Union of India, 1992 Supp. (3) SCC 217**, and observed that though Article 16 (4) enables the State to make provision for reservation in appointment or posts in

favour of any backward class of citizens but at the same time Article 335 of the Constitution which enjoins to take into consideration maintenance of efficiency in administration cannot be lost sight of. Approving the “catch up rule”, the Hon’ble Apex Court in *Ajit Singh Januja-I* concurred with the view in ***Virpal Singh Chauhan*** (supra) and held as under :

“ 16. We respectfully concur with the view in *Union of India v. Virpal Singh Chauhan JT (1995) 7 SC 231*, (supra) that seniority between the reserved category candidates and general candidates in the promoted category shall continue to be governed by their panel position i.e., with reference to their inter se seniority in the lower grade. The rule of reservation gives accelerated promotion, but it does not give the accelerated ‘consequential seniority’. If a Scheduled Caste/Scheduled Tribe candidate is promoted earlier because of the rule of reservation/roster and his senior belonging to the general category candidate is promoted later to that higher grade the general category candidate shall regain his seniority over such earlier promoted scheduled caste/tribe candidate. As already pointed out above that when a scheduled caste/tribe candidate is promoted earlier by applying the rule of reservation/roster against a post reserved for such scheduled caste/tribe candidate, in this process he does not supersede his seniors belonging to the general category. In this process there was no occasion to examine the merit of such scheduled caste/tribe candidate vis-à-vis his seniors belonging to the general category. As such it will be only

rational, just and proper to hold that when the general category candidate is promoted later from the lower grade to the higher grade, he will be considered senior to a candidate belonging to the scheduled caste/tribe who had been given accelerated promotion against the post reserved for him. Whenever a question arises for filling up a post reserved for scheduled caste/tribe candidate in still higher grade then such candidate belonging to scheduled caste/tribe shall be promoted first but when the consideration is in respect of promotion against the general category post in still higher grade then the general category candidate who has been promoted later shall be considered senior and his case shall be considered first for promotion applying either principle of seniority cum merit or merit cum seniority. If this rule and procedure is not applied then result will be that majority of the posts in the higher grade shall be held at one stage by persons who have not only entered in service on basis of reservation and roster but have excluded the general category candidates from being promoted to the posts reserved for general category candidates merely on the ground of their initial accelerated promotions. This will not be consistent with the requirement or the spirit of Article 16(4) or Article 335 of the Constitution.”

14. In ***Ajit Singh Januja-II*** (supra), the Hon’ble Apex Court, stating that ***Virpal Singh Chauhan*** and ***Ajit Singh Januja-I*** have been correctly decided, held as under :

“76. 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 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.....”

15. In **Indra Sawhney** (supra), it was held that reservation in appointment or posts under Article 16(4) is confined to initial appointment and cannot be extended to reservation in the matter of promotion. Feeling that the said judgment adversely affects the interest of S.Cs. & S.Ts. in service, the Government felt it necessary to continue the policy of providing reservation in promotion to S.Cs and S.Ts and, therefore, brought in the 77th Amendment in 1995 by introducing Clause(4-A) in Article 16 of the Constitution. Similarly, the Government felt that the decisions in **Virpal Singh Chauhan** and **Ajit Singh Januja-II** (supra) which evolved the concept of ‘catch up rule’ adversely affect the interests of the S.Cs and S.Ts in the matter of seniority on promotion in the next higher grade. The Legislature, therefore, once again amended Clause (4-A) of Article 16 by the Constitution 85th Amendment Act 2001 by conferring the benefit of consequential seniority on S.C. & S.T. roster point promotees in the

promotional grade. The constitutional validity inter alia of the Constitution 77th Amendment and 85th Amendment was challenged before the Apex Court in ***M. Nagaraj*** mainly on the ground that such amendments violate the basic structure of the Constitution. Elucidating the question of application of the principle of basic structure, the Hon'ble Apex Court observed as follows :

“ 102. In the matter of application of the principle of basic structure, twin tests have to be satisfied, namely, the “width test” and the test of “identity”. As stated hereinabove, the concept of the “catch-up” rule and “consequential seniority” are not constitutional requirements. They are not implicit in clauses (1) and (4) of Article 16. They are not constitutional limitations. They are concepts derived from service jurisprudence. They are not constitutional principles. They are not axioms like, secularism, federalism, etc. Obliteration of these concepts or insertion of these concepts does not change the equality code indicated by Articles 14, 15 and 16 of the Constitution. Clause (1) of Article 16 cannot prevent the State from taking cognizance of the compelling interests of Backward Classes in the society. Clauses (1) and (4) of Article 16 are restatements of the principle of equality under Article 14. Clause (4) of Article 16 refers to affirmative action by way of reservation. Clause (4) of Article 16, however, states that the appropriate Government is free to provide for reservation in cases where it is satisfied on the basis of quantifiable data that Backward Class is

inadequately represented in the services. Therefore, in every case where the State decides to provide for reservation there must exist two circumstances, namely, “backwardness” and “inadequacy of representation”. As stated above, equity, justice and efficiency are variable factors. These factors are context-specific. There is no fixed yardstick to identify and measure these three factors, it will depend on the facts and circumstances of each case. These are the limitations on the mode of the exercise of power by the State. None of these limitations have been removed by the impugned amendments. If the State concerned fails to identify and measure backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid. These amendments do not alter the structure of Articles 14, 15 and 16 (equity code). The parameters mentioned in Article 16(4) are retained. Clause (4-A) is derived from clause (4) of Article 16. Clause (4-A) is confined to SCs and STs alone. Therefore, the present case does not change the identity of the Constitution. The word “amendment” connotes change. The question is whether the impugned amendments discard the original Constitution. It was vehemently urged on behalf of the petitioners that the Statement of Objects and Reasons indicates that the impugned amendments have been promulgated by Parliament to overrule the decisions of this Court. We do not find any merit in this argument. Under Article 141 of the Constitution the pronouncement of this Court is the law of the land. The judgments of this Court in Virpal

Singh¹, Ajit Singh (I)², Ajit Singh (II)³ and Indra Sawhney⁵ were judgments delivered by this Court which enunciated the law of the land”.

(Emphasis supplied)

It is apparent from the observation of the Apex Court in the above quoted paragraph (italicised) that the ‘catch up rule’ still governs the field being law of the land unless and until the appropriate Government enacts law providing for reservation keeping in mind the parameters in Article 16(4) and (4-A). Therefore, though ***M. Nagaraj*** (supra) upheld the validity of the constitutional amendment, it has not overruled or given a go-bye to the ‘catch up rule’. The Constitution 85th Amendment does not by itself confer the additional benefit of consequential seniority on the S.C. and S.T. candidates in the promotional post for their accelerated promotion against reserved posts/roster points since clause (4-A) of Article 16 is merely enabling in nature. This is amply made clear in the observation of the Apex Court in ***M. Nagaraj***, as seen above. It has further been held therein as follows :

“ In our view, the field of exercise of the amending power is retained by the impugned amendments, as the impugned amendments have introduced merely enabling provisions because, as stated above, merit, efficiency, backwardness and inadequacy cannot be identified and measured in vacuum. Moreover, Article 16(4-A) and Article 16 (4-B) fall in the pattern of Article 16(4) and as long as the parameters mentioned in those articles are complied with by the States, the provision of

reservation cannot be faulted. Articles 16(4-A) and 16(4-B) are classifications within the principle of equality under Article 16(4).....”

16. In exercise of enabling power under Article 16(4-A), the State has to identify and recognize the compelling reasons in making law providing for accelerated promotion and consequential seniority in favour of S.C. & S.T. candidates. Therefore, in ***M. Nagarj*** (supra), the Hon’ble Apex Court said:

“107. It is important to bear in mind the nature of constitutional amendments. They are curative by nature. Article 16(4) provides for reservation for Backward Classes in cases of inadequate representation in public employment. Article 16(4) is enacted as a remedy for the past historical discriminations against a social class. The object in enacting the enabling provisions like Articles 16(4), 16(4-A) and 16(4-B) is that the State is empowered to identify and recognize the compelling interests. If the State has quantifiable data to show backwardness and inadequacy then the State can make reservations in promotions keeping in mind maintenance of efficiency which is held to be a constitutional limitation on the discretion of the State in making reservation as indicated by Article 335. As stated above, the concepts of efficiency, backwardness, inadequacy of representation are required to be identified and measured. That exercise depends on availability of data. That exercise depends on numerous factors. It is for this reason that enabling provisions are required to be made because each competing claim seeks to

achieve certain goals. How best one should optimize these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment. This is amply demonstrated by the various decisions of this Court discussed hereinabove. Therefore, there is a basic difference between “equality in law” and “equality in fact” (See Affirmative Action by William Darity). If Articles 16(4-A) and 16(4-B) flow from Article 16(4) and if Article 16(4) is an enabling provision then Articles 16(4-A) and 16(4-B) are also enabling provisions. As long as the boundaries mentioned in Article 16(4), namely, backwardness, inadequacy and efficiency of administration are retained in Articles 16(4-A) and 16(4-B) as controlling factors, we cannot attribute constitutional invalidity to these enabling provisions. However, when the State fails to identify and implement the controlling factors then excessiveness comes in, which is to be decided on the facts of each case. In a given case, where excessiveness results in reverse discrimination, this Court has to examine individual cases and decide the matter in accordance with law. This is the theory of “guided power”. We may once again repeat that equality is not violated by mere conferment of power but it is breached by arbitrary exercise of the power conferred.”

Lastly, while ultimately holding the Constitutional Amendments valid, the Apex Court held as under :

“ 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.....”

17. The principles regarding the ambit of power of the State under Article 16(4-A) of the Constitution, as decided in the case of **M. Nagaraj** (supra), has also been followed by the Hon'ble Supreme Court in the recent decision in **Anil Chandra & others v. Radha Krishna Gaur & others**: (2009) 9 SCC 454. In that case, subsequent to the judgment of the Apex Court in **M. Nagaraj** (supra), the U.P. Government framed the U.P. Government Servants Seniority (Third Amendment) Rules, 2007 providing for consequential seniority to promotees belonging to S.Cs and STs as per roster/rule of reservation from the date of their promotion and further issued a letter directing to effect necessary amendment in the seniority list as per the amended rule. The U.P. Jal Nigam, which was following the State

Government Servants Seniority Rules, adopted the said amended rules and issued tentative joint seniority list of Engineers at higher levels. The validity of the aforesaid amended Seniority Rules was challenged by the Engineers of the Irrigation Department by filing writ petition before the High Court, Allahabad, Lucknow Bench, wherein the division Bench of the High Court passed an interim order directing not to change or disturb the seniority of Engineers that was existing prior to the enforcement of the Government Servants Seniority (Third Amendment) Rules, 2007. The aforesaid interim order was challenged before the Apex Court in appeal. Hon'ble Supreme Court taking note of the principles laid down in **M. Nagaraj** (supra) upheld the interim order passed by the Allahabad High Court holding as follows :

“ In the present case and in the facts and circumstances stated herein earlier, we are of the view that it was the constitutional obligation of the State, at the time of providing reservation in the matter of promotion to identify the class or classes of posts in the service for which reservation is required, however, neither any effort has been made to identify the class or classes of posts for which reservation is to be provided in promotion nor any exercise has been done to quantify the extent of reservation. Adequate reservation does not mean proportional representation. Rule 8-A has been inserted mechanically without taking into consideration the prerequisites for making such a provision as required under Article 16(4-A) of the Constitution of India. The ceiling limit of 50%, the concept of

creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse. However, in this case, as stated, the main issue concerns the “extent of reservation” and in this regard, the State should have shown the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation.”

18. It is admitted by the State in this case that the gradation list dated 16.5.2001 of O.A.S.-I(JB) was prepared by following the ‘catch up rule’ and the petitioners and other general O.A.S.-Class-II Officers, who were admittedly senior to the S.C. and S.T. Officers, but were promoted later, were assigned their seniority in the list as per the panel. The said gradation list must be held to have been correctly prepared in view of the stand taken by the State. Unless and until the State Government makes a law for conferring the benefit of consequential seniority on the S.C. & S.T. officers, who were though admittedly junior to the general caste and other category of officers but got promoted to O.A.S.-I(JB) earlier against reserved roster point vacancies and which law must also satisfy the parameters as laid down in **M. Nagaraj** (supra), such as existence of compelling reasons, namely, backwardness of the S.C. and S.T. category, inadequacy of their representation in the particular service and maintenance of

overall administrative efficiency, the gradation list dated 16.5.2001 is not liable to change. The backwardness and inadequacy of representation must be based on quantifiable data justifying the necessity of conferring the benefit.

In a latest decision of the apex Court in the case of ***Suraj Bhan Meena & anr. V. State of Rajasthan & ors., SLP (C) Nos.7716, 7717, 7826 & 7838 of 2010***, computer generated copy of which was furnished to us, the Court in paragraph 46 stated the position after the decision in ***M. Nagaraj*** (supra) 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 and held thus :

“..... The view of the High Court is based on the decision in *M. Nagaraj's* case (supra) as no exercise was undertaken in terms of Article 16(4-A) to acquire quantifiable data regarding the inadequacy of representation of the Scheduled Castes and Scheduled Tribes communities in public services. The Rajasthan High Court has rightly quashed the notifications dated 28.12.2002 and 25.4.2008 issued by the State of Rajasthan providing for consequential seniority and promotion to the members of the Scheduled Castes and Scheduled Tribes communities and the same does not call for any interference. Accordingly, the claim of Petitioners Suraj Bhan Meena and Sriram Choradia in Special Leave Petition (Civil) No.6385 of 2010 will be subject to

the conditions laid down in M. Nagaraj's case (supra) and is disposed of accordingly. Consequently, Special Leave Petition (C) Nos.7716, 7717, 7826 and 7838 of 2010, filed by the State of Rajasthan, are also dismissed."

The stand taken by the State Government in its counter affidavit that there is no necessity for bringing out any law with regard to grant of accelerated seniority cannot be countenanced in view of the law laid down in **M. Nagaraj** (supra).

19. The Government have issued resolution dated 20.3.2002 (Annexure-5) for fixation of inter se seniority of general caste government servants vis-à-vis S.C. & S.T. government servants in promotional posts by conferring the benefit of accelerated/ consequential seniority on the S.C. & S.T. roster point promotees. The resolution has been issued pursuant to the instruction contained in Government of India DOPT Office Memorandum dated 21.1.2002 and evidently based on the amendment of Article 16(4-A) of the Constitution. The resolution can neither be termed as law made in exercise of enabling power of the State under Article 16(4-A) nor does it satisfy the parameters laid down for enacting the law by the State in exercise of enabling power under the said provision. The Resolution has no legal basis and, therefore, cannot be sustained.

20. In view of our conclusion that the gradation list dated 16.5.2001 of O.A.S.-I (JB) under Annexure-3 was prepared correctly by following the 'catch up rule' and that admittedly the State Government having not made any law for conferring the additional

benefit of consequential seniority on the S.C. and S.T. roster point promotees in the cadre of O.A.S.-I(JB) in exercise of its enabling power under Article 16(4-A) of the Constitution after complying with the necessary parameters as noted above, the preparation of the provisional gradation list under Annexure-7 by abandoning the 'catch up rule' and changing the gradation list under Annexure-3 is legally impermissible and as such invalid.

Issue No.(v) :

21. The Orissa Administrative Tribunal did not entertain the Original Applications of the petitioners and disposed of the same as premature, as because representations/objections of the petitioners and others against the provisional gradation list were pending before the State Government. Order was, therefore, passed by the Tribunal directing the State Government to dispose of the representations. As has been seen earlier, in W.P.(C) No.6781 of 2008 this Court has passed interim order with direction not to take any action on the basis of provisional gradation list but at the same time given liberty to the State to dispose of the objections filed against the provisional gradation list which shall be subject to the order of the Court. It was further ordered that the gradation list if finalized shall be produced before the Court prior to it is given effect to.

It is admitted on behalf of the State at the time of hearing that the objections raised by the petitioners and others have been rejected and the provisional gradation list has been finalized without any change. The Government file, CON-R-22/08, which has been

produced, reveals that by Government order dated 2.12.2009 the provisional gradation list (Annexure-7) has been finalized and the objections raised by the petitioners and others have been rejected. In particular, the points raised on behalf of the petitioners in this writ petition, which were also raised before the Tribunal were raised in their objections. The objections have been rejected by the State on the grounds that the concept of 'catch up rule' earlier decided by the Hon'ble Supreme Court has no effect after the 85th Constitutional Amendment and the judgment passed in **M. Nagaraj** (supra), and that the principle adopted in the gradation list of 2001 was not supported by any rule and it has no validity after the Constitutional amendment, and that the provision of any new reservation policy to be formulated in future may not have retrospective effect, and that the provisional gradation list is based on the provision of Rule 10(2) of the 1977 Rules. In view of the conclusions reached by us, we have no hesitation to hold that none of the grounds of rejection of the objections is legally sustainable. It is clear that the legally wrong premise on which the provisional gradation list was prepared also continues in finalizing the provisional gradation list and, therefore, neither the provisional gradation list under Annexure-7 nor the final gradation list can be acted upon unless and until the State makes a law after ascertaining quantifiable data with regard to backwardness of the S.Cs. & S.Ts. and the inadequacy of their representation in the particular service, further by keeping in view the efficiency in the administration. Driving the petitioners to file fresh Original Applications before the

Administrative Tribunal against final gradation list on the self-same grounds on which the provisional gradation list had been challenged would not only cause hardship to the petitioners but also amount to multiplicity of proceeding. In the circumstances, we are of the view that the writ petitions are maintainable in their present form.

22. In the light of the discussions made above, the writ petitions are allowed and the orders of the Tribunal under Annexure-12, the Government Resolution dated 20.3.2002 (Annexure-5) and the Gradation List dated 3.3.2008 (Annexure-7) as finalised are quashed.

All pending misc. cases are dismissed.

Parties are directed to bear their own costs.

Sd/-

.....
B. P. Das, J.

Sanju Panda, J. Respectfully I agree.

Sd/-

.....
Sanju Panda, J.

Orissa High Court, Cuttack.
December 24, 2010 / Chhatoi