



GAHC010117092016

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/5005/2016

BHAGWAN PATOR
S/O LT. AMAL CH. PATOR, R/O VILL. and P.O. NELLIE, DIST- MORIGAON

VERSUS

THE STATE OF ASSAM AND 6 ORS
REP. BY THE CHIEF SECY. TO THE GOVT. OF ASSAM, SECRETARY, DISPUR,
GHY-6

2:THE SECY. TO THE GOVT. OF ASSAM
WATER RESOURCES DEPTT.
SECRETARIAT
BLOCK-B
THIRD FLOOR
DISPUR
GHY-6

3:THE ADDL. CHIEF SECY. TO THE GOVT. OF ASSAM
WELFARE OF PLAIN TRIBES and BACKWARD CLASSES DEPTT.
DISPUR
GHY-6

4:THE SECY. TO THE GOVT. OF ASSAM
JUDICIAL DEPTT.
DISPUR
GHY-6

5:THE PRINCIPAL SECY.
PERSONNEL B DEPTT.
GOVT. OF ASSAM
DISPUR
GHY-6



6:SRI ANIL KUMAR JALAN

S/O PUSHKAR DUTTA JALAN
R/O FLAT NO- 4C
PROTECT VIEW
HENGRABARI ROAD
P.O- DISPUR
GUWAHATI-781006
KAMRUP M
ASSAM.

7:SRI SHANTANU DHAR

S/O
LT SANTI RANJAN DHAR
R/O- HOUSE NO.- 19
HARBALA ROAD
ULUBARI
GUWAHATI-781007
KAMRUP M
ASSAM

Advocate for the Petitioner : MRH BETALA

Advocate for the Respondent : MR.G BAISHYAR-6 and 7

Linked Case : WP(C)/5026/2016

EQUALITY FORUM
REP. BY ITS PRESIDENT
SHRI BHUPENDRA NATH DEKA
S/O LT. KABINDRA NATH DEKA
A RESIDENT OF GAYATRI APARTMENT
BLOCK-II
KALAPAHAR
PAHARTALI
BYE LANE NO. 3
P.S. FATASIL AMBARI
GUWAHATI - 781018
DIST. KAMRUP METRO
A SSAM
AND ITS SECRETARY SHRI ARUN CHANDRA SAHARIA S/O LT. HAIDIA



SAHARIA B.M. COMPLEX
RATNAGIRI PATH BAMUNIMADAM
GUWAHATI- 781021.

VERSUS

THE STATE OF ASSAM AND 12 ORS
REP. BY THE CHIEF SECRETARY TO THE GOVT. OF ASSAM
DISPUR
GUWAHATI-06.

2:THE ADDITIONAL CHIEF SECRETARY TO THE GOVT. OF ASSAM

WPT and BC DEPARTMENT
DISPUR
GUWAHATI - 781006.

3:THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM

DEPARTMENT OF WPT and BC
DISPUR
GUWAHATI-6.

4:THE PRINCIPAL SECRETARY TO THE GOVT. OF ASSAM

PERSONNEL B DEPARTMENT
DISPUR
GUWAHATI-6.

5:SRI DINABANDHU DEKA
S/O LATE GOPAL CHANDRA DEKA
RESIDENT OF BHETAPARA
GUWAHATI-781028
ASSAM.

6:SRI DEEP PEGU
SON OF DR NUMAL CHANDRA PEGU
RESIDENT OF MILAN NAGAR
DIBRUGARH
ASSAM
786003.

7:NAMESWAR PEGU
SON OF LATE BANGSHIDHAR PEGU
R/O BORBARI BORTILA
H. NO-132
VIP ROAD
GUWAHATI-26
KAMRUPM
ASSAM.

8:SRI HRIDOY KR. BORO
SON OF LATE RATNA KR BORO



HOUSE NO-25
BISHNU RABHA NAGAR
NOONMATI
GUWAHATI-20.
9:SMT. NIROLA PHANCHOP
ACS
WIFE OF SRI AMAR SINGH TISSO 316
ADHAR APARTMENT
FLAT NO-101
MOTHER TERESA ROAD
GUWAHATI-781020
ASSAM.
10:SMTI ETSHAR KATHAR
ACS
DAUGHTER OF SRI H.I. KATHAR
RESIDENT OF GANESHGURI GUWAHATI-781006
DISTRICT- KAMRUP ASSAM.
11:SRI RUPJYOTI DEORI

S/O LATE GHANAKANTA DEORI
R/O- UPPER DEORI GAON
P.O. NAHATIA
P.S. PULIBAR
DIST. JORHAT ASSAM
PIN-785018.
12:SRI SUKLESWAR DAS

S/O LATE MAHIN CH. DAS
R/O- SAWKUCHI
H.NO. 55
P.O. SAWKUCHI
P.S. BASISTHA
DIST.-KAMRUP M
ASSAM
PIN-781040.
13:SMT. VOSIK KATHARPI

D/O SRI LONGBI RAM ENTI KATHAR
R/O RONGTHEANG WARD NO. 7
P.O and P.S. DIPHU
DIST. KARBI ANGLONG
ASSAM
PIN-782460.

Advocate for : MS.A CHOUDHURY
Advocate for : MR D DUARA R - 5

6

9 and 10 appearing for THE STATE OF ASSAM AND 12 ORS

BEFORE
THE HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

Date of Hearing : 16.12.2021, 20.12.2021,
21.12.2021, 23.12.2021, 25.01.2022,
24.02.2022, 28.02.2022

Date of Judgment & Order : 06.06.2022

JUDGMENT & ORDER (CAY)

Heard Mr. D. K. Das, learned counsel for the petitioner in WP(C)/5005/2016 and Mr. M. K. Choudhury, learned Senior Counsel for the petitioner in WP(C)/5026/2016. Also heard Mr. D. Mazumdar, learned Additional Advocate General Assam.

1. Summary of the litigation:

A. These two writ petitions, WP(C) No. 5026/2016 and WP(C) 5005/2016 are taken up together for disposal. By way of both these writ petitions, a challenge is made to the Office Memorandum dated 03.08.2016.

B. The writ petitioner in WP(C) 5005/2016 challenges the clauses (iii) and (iv) of the said Office Memorandum dated 03.08.2016, whereas the petitioner in WP(C) 5026/2016 challenges the entire Office Memorandum.

C. The basic issues involved in the writ petitions are, firstly, the procedure adopted by the State of Assam in providing reservation in promotion in services and posts for members of the Scheduled Caste and Scheduled Tribes

under the offending OM and Secondly, the claim of consequential seniority along with right of promotion allegedly violated by insertion of clause (iv) in the O.M. The further issue is the alleged non-compliance of the dictum of the Hon'ble Apex Court pronounced in ***M. Nagraj Vs Union of India reported in (2006) 8 SCC 212*** and of the decision of this court in ***Equality Forum Vs. State of Assam reported in 2016 1 GLT 710*** (in short Equality Forum I) while issuing the Office Memorandum under Challenge.

D. As the controversy relates to provision of reservation in promotion and consequential seniority, a series of writ petitions involving individual disputes of seniority between General Category incumbents and reserved category incumbents and resultant promotion, were tagged along with these two writ petitions since the decision taken in these two writ petitions shall have a bearing on the individual issues raised in the said batch of writ petitions.

E. When this court started hearing these writ petitions, a consensus was reached amongst all the learned counsels for the parties in all the writ petitions that instead of going to the individual cases, first the two writ petitions, wherein Office Memorandum dated 03.08.2016 is under-challenge be determined. Therefore, all the learned counsels for the parties have addressed this Court on the validity of the OM dated 03.08.2016, though they are not parties in the aforesaid two writ petitions. No submissions on individual facts, merits and claims were made by the Learned Counsels. Therefore, this Court first proposes to dispose of the two writ petitions WP(C) 5005/2016 and WP(C) 5026/2016.

2. **Arguments and submissions advanced by learned counsels:**

A. **Mr. M.K. Choudhury, learned Senior counsel representing the petitioner in WP(C) 5026/2016, submits:**

I. This court in ***Equality Forum vs. the State of Assam*** reported in **(2016) 1 GLT 710** held that the State to give effect to the provision of The Assam Scheduled Caste and Scheduled Tribes (Reservation in Services and Posts) Act, 1978 (as amended) would have to justify the same with the quantifiable data as mandated in ***Nagraj*** (supra) but the impugned OM dated 03.08.2016 laying down the guideline to be followed while considering promotion in any cadre in any establishment, is in total disregard of the mandate of Equality Forum (supra) and ***Nagraj*** (supra).

II. The condition precedent and requirement for the exercise of powers available under Article 16 (4A) and (4B) that the State must carry out the exercise of acquiring quantifiable data, is not followed while issuing the Office Memorandum.

III. As this Court in ***Equality Forum*** (supra) struck down the basis of reservation i.e. the recommendation of the One Man commission and resultant OM dated 29.12.2014, the State is required to carry out a fresh exercise for acquiring quantifiable data, which has not been followed and therefore, the O.M. dated 03.08.2016 is in derogation of the mandate of ***Nagraj*** (supra) and ***Equality Forum*** (supra), and therefore, liable to be struck down.

IV. The Office Memorandum dated 03.08.2016 only lays down the procedure when promotions are affected. However, while issuing the impugned OM, the requirement of forming an opinion on the need for such reservation based on quantifiable data was not collected, which is a Constitutional mandate. Therefore, the OM dated 03.08.2016 is liable to be struck down.

V. The reservation in promotion, as laid down by the Hon'ble Apex Court in **Nagraj** (supra) cannot be claimed as a matter of right routinely but the State by way of the impugned OM dated 03.08.2016 has made the reservation therein without first fulfilling the conditions laid down in the case of **Nagraj** (supra) and **Equality Forum** (supra).

VI. The provision of Article 16 (4A) is enabling provision and if the State takes recourse to such enabling provision, it must first fulfill the conditions as laid down in **Nagraj** (supra).

VII. The reserve category candidates are not entitled to the benefits of reservation in matters of promotion until and unless the State brings on record, upon collection of quantifiable data that there exists inadequacy in representation in service.

VIII. The State has completely overlooked the cardinal necessity of carrying out the fresh exercise of acquiring the quantifiable data as spelt out in **Nagraj** (supra). Instead of carrying out such an exercise, the State has propagated the policy of reservation with a permanent feature.

IX. The State has failed to appreciate the purport of the judgment rendered in **Equality Forum** (supra) and straightaway provided a guideline for implementation of the policy of reservation, without the reservation policy being framed by following the dicta of **Nagraj** (supra).

X. No quantifiable data was collected or made available before the State could invoke the enabling provision of Article 16 (4A) of the Constitution of India.

XI. The OM has left out the responsibility of acquiring quantifiable data on backwardness and inadequacy of representation to the selection committee at

the time of consideration of promotion on a cadre wise basis. Such an approach of the State is without transparency and the same is unfair and violative of the principle of fairness in administrative action.

XII. By issuing the impugned order, the general category candidates, in case of promotion are sought to be discriminated again without any reasonable basis or jurisdiction.

B. Mr D.K. Das, learned counsel for the petitioner in WP(C) 5005/2016 submits:

I. Clause (i) of the OM dated 03.08.2016 though supports reservation in promotion, however clauses (iii) and (iv) of the said OM are the result of the non-application of mind of the State authorities to the relevant provisions of law and therefore, same is liable to be struck down.

II. While issuing and formulating the clause (ii) of guideline, the authority has failed to appreciate the concept of a separate zone of consideration concerning the SC and ST candidates and instead clubbed the SC, and ST candidates under the common zone of consideration along with un-reserved category candidates. Such clubbing of reserve category candidates with a general category in the same zone of consideration defeats the purpose of reservation.

III. Clause (iii) of the OM dated 03.08.2016 is in direct contravention with Section 5A of the Assam Scheduled Castes and Scheduled Tribes (Reservation of Posts in Services) 1978 as amended by Amendment, 2012.

IV. Section 5A (iii) of the Amendment Act, 2012 mandates that the Roster

is to be operated on the principle of replacement and not as a running account. The Amendment Act, 2012 nowhere speaks about de-reservation of posts, if no candidate belonging to the category is available. Thus OM is in violation of the mandate of 1978 Act

V. Clause 4B of Article 16 enables the State to fill up backlog vacancies and to hold a special recruitment drive for the reserve category candidates. Thus, the concept of de-reservation shall not only be violative of the mandate of Act, 1978 but also violative of clause 4B of Article 16.

VI. The impugned clause (iv) of the OM dated 03.08.2016 is in direct conflict with Article 16 (4) of the Constitution of India vis-à-vis the Act, 1978.

VII. The State authority has miserably failed to take into consideration that the reserve category candidates are entitled to consequential seniority after having accelerated promotion. Therefore, the impugned clause (iv) mandating that the case of reserved category candidates would be considered on merit only if he has not gained his seniority by way of his accelerated promotion earlier, is illegal and liable to be struck down since such benefit granted under O.M. date. 12.03.2002 cannot be taken away by incorporation of Clause (iv) in the impugned O.M.

VIII. The principle of replacement as propagated in the case of **R.K Sabarwal –Vs- State of Punjab** reported in **AIR 1995 SC 1371** and resultant Amendment Act, 2012, is sought to be taken away by way of the impugned clause-(iv) of the O.M dated. 03.08.2016.

IX. Clause (iii) of the O.M. dated 03.08.2016 is in direct conflict with the aforesaid judgment of **R.K. Sabarwal** (supra) and the Act, 1978. Therefore same is liable to be struck down.

X. By incorporating clauses (iii) and (iv) in the O.M. dated 03.08.2016, the State has violated the statutory right of the reserved category candidates as enumerated in Sections 5A (iii) and 5A(vii) of the Act, 1978 as amended up to date. Therefore, the clauses (iii) and (iv) of the offending O.M. are unconstitutional.

XI. The O.M. dated 12.03.2002 issued under enabling provision of Article 16 (4A) of the Constitution of India is still holding the field and therefore, such right cannot be taken away by insertion of clause (iv) of the impugned O.M.

C. **Mr. K N Choudhury, learned Senior counsel, Mr. S.K. Goswami and Mr. G. Baishya learned Counsels**, are not representing any of the respondents in these two writ petitions. However, as they are representing some of the respondents and petitioners involving promotion and inter-se-seniority amongst reserved and un-reserved category candidates, which are tagged along with these writ petitions. They had also advanced argument on the request of the Court and they submits as follows:

I. The Office Memorandum dated 03.08.2016 reflects the policy of the State that though there shall be reservation in promotion but no consequential seniority shall be available.

II. The Office Memorandum dated 12.03.2002 has been automatically repealed/superseded by way of issuance of the office memorandum dated 03.08.2016.

III. The intention of the State to supersede the earlier notification is manifested by the provisions of the subsequent Office Memorandum dated 03.08.2016 and therefore, it would be a repeal of the earlier O.M. dated 12.03.2002, notwithstanding the absence of the word "repeal" in the

subsequent Office Memorandum.

IV. The intention of the State has to be inferred from the later OM dated 03.08.2016 to see if it proposes to preserve, modify or completely obliterate the right and liabilities attached to the earlier Office Memorandum dated 12.03.2012.

V. In the case in hand, a total change in policy is discernible from the Office Memorandum dated 03.08.2016, since both the Office Memorandum dated 03.08.2016 and 12.03.2002 cannot exist together. Therefore, the Office Memorandum dated 12.03.2002 has impliedly been repealed by O.M. dated 03.08.2016. In support of his contention, Mr K.N. Choudhury, learned Senior Counsel relied on the judgment of Hon'ble Apex Court in ***Municipal Council Palai –Vs- T.J. Joseph*** reported in ***AIR 1963 SC 1561***. Mr. Choudhury further submits that the same principle of law shall be applicable in the case of executive instruction also.

VI. While supporting the 'catch-up rule', Mr K. N. Choudhury, learned senior counsel submits that the provision of accelerated seniority in the promotion of SCs and STs has given rise to several problems, including ignorance, seniority and meritorious background of such persons, such discrimination leads to inefficiency in services.

D. **Mr D. Mazumdar, Learned Additional Advocate General, representing the State of Assam submits:**

i. In ***M. Nagraj*** (supra), the Hon'ble Apex Court held that the exercise of collecting quantifiable data depends on numerous factors, with conflicting claims to be optimized by the administration, depending upon local prevailing conditions in public employment and accordingly the Hon'ble Apex Court held

that those factors should be identified and counter balance will depend on the fact and circumstances of each case and accordingly held that cadre should be unit of measurement of inadequacy and therefore, O.M. dated 03.08.2016 is **M Nagraj** (supra) compliant inasmuch as the O.M. dated 03.08.2016 mandates collection of quantifiable data before implementation of the policy of providing reservation in promotion.

ii. In view of the decisions in **Jarnail Singh –Vs- Laxmi Narayan Gupta reported in 2018 10 SCC 396 (in short Jarnail Singh-I)** and in **Jarnail Singh –Vs- Laxmi Narayan Gupta in Civil Appeal No. 629 of 2022 (in short Jarnail Singh-II)** the yardstick for measurement should be cadre and therefore, it is not necessary to collect data on inadequacy on the basis of population of the reserved category candidates and there is no necessity to collect separate data based on the population/group as a whole.

iii. The view expressed by the Hon'ble Apex Court in **B. K. Pavitra –Vs- Union of India** reported in **2019 16 SCC 129** that the collection of data based on the group is valid, has been overruled by the Hon'ble Apex Court in **Jarnail Singh-II** (supra) and held that cadre should be unit for measuring inadequacy in representation. Therefore, the O.M. dated 03.08.2016 is **Jarnail Singh-I** and **Jarnail Singh- II** compliant.

iv. The State has given up the policy of consequential seniority while providing reservation in promotion and the State is within its power to take such policy decision under the enabling provision of Article 16 (4A) of the Constitution of India, and the impugned Office Memorandum as well as the affidavit-in-opposition filed by the State also reflects the said policy.

v. The State is within its power and jurisdiction to make a decision to

carry forward the unfulfilled vacancy and the same has been done by way of the impugned Office Memorandum dated 03.08.2016. Such decision has been taken in the interest of efficiency in services.

vi. If a reserved category vacancy is not filled up three years continuously for want of incumbent after same being carried forward, then only same can be de-reserved and the reason behind policy is to maintain efficiency in services as the the State cannot wait for an unlimited period and keep a post vacant allowing inefficiency in administration. Further, precondition of having an approval from the WPT & BC department for such de-reservation is mandated in the Office Memorandum, to protect the interest of the reserved category candidates. Therefore, the same cannot be treated to be based on any extraneous condition or discriminatory. Therefore, Office Memorandum dated 03.08.2016 conforms with **M. Nagaraj** (supra) and **Equality Forum** (supra) and therefore, the same cannot be said to be illegal inasmuch as the State is within its authority to carry forward or not to do the same. Article 14 (4B) of the Constitution of India enables the State to do so.

E. **Mr Indraneel Chowdhury**, Learned Senior Counsel, though not representing any of the parties in these two writ petitions, but some respondents in some of the writ tagged writ petitions, was requested by this Court to address the issue of reservation in totality and accordingly, Mr Chowdhury addressed this Court. Through his eloquent argument based on in-depth knowledge on the subject, took this Court to every facet of the reservation in services, at entry-level and during promotion, the development of the concept of catch-up Rule, Constitutional amendments touching reservation in promotion and different decisions of the Hon'ble Apex Court and the ratios thereof. This Court cannot but put on record his able assistance. While

advancing the argument in support of catch-up rule, Mr. Chowdhury submits:

I. that the issue of consequential seniority was decided by the Hon'ble Apex Court in ***Union of India and Others –Vs- Virpal Singh Chauhan*** reported in ***1995 6 SCC 684***, ***Ajit Singh Januja –Vs- State of Punjab and Others*** reported in ***1996 2 SCC 715*** (in short ***Ajit Singh-I***) and ***Ajit Singh –Vs- State of Punjab and Others*** reported in ***1999 7 SCC 209*** (in short ***Ajit Singh-II***). He further submits that the Hon'ble Apex Court in the said cases introduced the catch-up rule and held that if the senior general candidate is promoted, then he will regain his seniority on promotion above the junior reserved promotes. Such principle is an equitable principle and protects the general category candidates from reverse discrimination meted against them.

II. As Article 16 (4A) of the Constitution of India, itself is an enabling provision, consequential seniority cannot be a matter of right and the State is within its power and competence either to opt for consequential seniority while providing reservation in promotion or not to provide the same, he submits.

III. Mr. Chowdhury further submits that consequential seniority with promotion leads to a situation where the juniors not only steals a march over their senior but persons, who were in higher category at the time of entry of SC and ST candidates in the service, have also been left behind. Such a situation is against the principle of equality and such a situation has never been intended by the makers of the constitution, while incorporating provision of reservation.

IV. Mr. Chowdhury submits that in aforesaid view of the matter and

in view of the decision of the Hon'ble Apex Court in ***Ajit Singh-II***, and for the reason that provision of Article 14 (4A) of the Constitution of India is only an enabling provision, it is crystal clear that the State of Assam is having a policy of providing reservation in promotion without any consequential seniority and the same needs to be upheld by this Court to protect the general category candidates from reverse discrimination.

3. **The background facts of the present litigations:**

A. **Provision of reservation in promotion in the State of Assam:**

I. The State Legislature enacted the Assam Scheduled Castes and Scheduled Tribes (Reservation of Posts in Services) Act, 1978 (hereinafter referred to as Act, 1978) with the object to provide reservation of vacancies in services and posts for the members of Scheduled Castes (in short SCs) and Scheduled Tribes (in short STs).

The Act, 1978 came into force with effect from 01.07.1979. Section 5 of the said Act, 1978 provides for reservation for members of SCs and STs in posts to be filled up by promotion, earmarking 7% for SCs and 10% for STs. The proviso to Section 5 of the Act, 1978 empowers the Government to review the implementation of the reservation policy and to take adequate measures including an increase in percentage.

II. While such provision was holding the field in the State of Assam, the Hon'ble Apex Court in ***Indra Sawhney and Others vs. Union of India and Others*** reported in ***(1992) Supplementary 3 SCC 217***, held that the Article 16 (1) of the Constitution of India contemplates reservation at the stage of initial recruitment and not at the stage of promotion. The Hon'ble Apex Court in

Indra Sawhney (supra) further held that provision of reservation in promotion would affect the efficiency of administration and same will be in violation of the principles of equality mandated under Article 16 (1). While holding so, the Apex Court further directed that the promotion already made and reservation already provided in the matter of promotion shall continue in operation for a period of 5 years from the date of the judgment. Liberty was given to the authorities to revise, modify or re-issue the relevant Rules to achieve the objective of Article 16(4) of the Constitution of India.

III. In the backdrop of the dictum of **Indra Sawhney** (supra), the Parliament amended the Constitution of India by bringing the Constitution (Seventy Seventh Amendments) Act, 1995.

The statement of object and reason of the Amendment Act, 1995 depicts that such amendment was brought with the object to provide reservation in promotion for the reason that the Schedule Castes and Scheduled Tribes have been enjoying the facility of reservation in promotion and accordingly decided to continue with the existing policy of reservation in promotion for SCs and STs. Thus, Article 16 (4A) of the Constitution of India was incorporated. Article 16 (4A) Constitution of India as amended, reads as follows:

“(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.”

IV. Thus Article 16 (4A) of the Constitution of India empowers the State to make any provision for reservation in matter of promotion, subject to forming an opinion that this class or classes are not adequately represented in the services under the State.

B. Roster point in R. K Sabarwal :

- I. The Hon'ble Apex Court in ***R. K. Sabarwal –Vs- State of Punjab*** reported in ***AIR 1995 SC 1371*** held that reservation need to be determined on the basis of number of posts in cadre and not on the basis of the vacancies. Under this principle of post-based reservation, post to be filled up by reservation for any class or classes, the same should be equal to the quota prescribed for that category.
- II. It was further held that, those reserved category candidates who are promoted/appointed on merit should be adjusted against un-reserved post and not against post meant for reserved category candidates.

C. Amendment of Act, 1978.

- I. Section 5A was inserted to the Act, 1978 by way of an amendment and introduced maintenance of post-based roster register to give effect to reservation of vacancies for SCs and STs.
- II. Section 5A (iii) mandated that roster is to be operated on the principle of replacement and not as a running account.
- III. Section 5A (viii) provides that promotion etc. are to be as per post-based roster and the policy of replacement by filling up the vacant post from eligible persons from the respective category by special drive so that the prescribed percentage of reservation is maintained.

D. Consequential seniority and Catch-up Rule:

- I. The Hon'ble Apex Court in ***Virpal Singh Chauhan (supra)*** held that

a senior general category candidate who is promoted to a higher post at a later point of time than his junior reserved category candidate promoted being a reserved category candidate, the senior shall regain his seniority over his reserved category junior in the promoted post. Such principle came to be known as Catch up Rule.

II. A similar principle was approved in the decision of the Hon'ble Apex Court in the case of **Ajit Singh-I**. It was held in **Ajit Singh-I** that reverse discrimination is to be avoided by maintaining a balance. The Hon'ble Apex Court in the said judgment further held that giving seniority to a reserved category candidate over his senior general category candidate based on roster point would violate Articles 14 and 16 of the Constitution of India.

III. A contrary view to that of **Virpal Singh Chauhan** and **Ajit Singh-I** was taken by the Hon'ble Apex Court in **Jagdishlal vs. the State of Haryana reported in (1997) 6 SCC 538**.

IV. Subsequently, in **Ajit Singh-II**, the Constitution Bench of the Hon'ble Apex Court upheld the law laid down in **Virpal Singh Chauhan** and **Ajit Singh-I** and overruled the decision of **Jagdishlal** (supra). Thus, the Catch-up rule was approved by the Constitution Bench in **Ajit Singh-II**.

V. Thereafter, the Parliament in its wisdom enacted the Constitution (Eighty Fifth Amendment) Act, 2001. The statement of object and reason of the said enactment discloses that as the Scheduled Caste and Scheduled Tribes have been enjoying the benefits of consequential seniority on their promotions based on the Rule of Reservation, the judgment of the Hon'ble Apex Court in the case of **Virpal Singh Chauhan** and **Ajit Singh-I** have adversely affected the interest of the Government servants belonging to the Scheduled Caste and

Scheduled Tribes category in the matter of seniority on promotion to the next higher grade.

The said object and reason further disclose that the Government had reviewed the position and to protect the interest of the Government servant belonging to the Scheduled Castes and Scheduled Tribes, have brought the amendment to Article 16 (4A). The said Constitutional amendment to Article 16(4A) was proposed to be given effect from 17th of June, 1995. The said amendment reads as follows:

*“2. Amendment of Article 16. –In Article 16 of the Constitution, in Clause (4A), for the words “in matters of promotion to any class”, the words **“in matters of promotion, with consequential seniority, to any class” shall be substituted.**”*

(emphasize supplied)

VI. After such amendment, an Office Memorandum bearing No. ABP 59/96/163 dated 12.03.2002 was issued incorporating the decision of the State of Assam, the principle of fixation of seniority of reserved candidates vis-à-vis general candidates in promotional posts. The said Office Memorandum reads as follows:

“GOVERNMENT OF ASSAM

DEPARTMENT OF PERSONNEL:: PERSONNEL (B)

DISPUR:: GUWAHATI

No. ABP 59/96/163 Dated, Dispute, the 12th March, 2002.

OFFICE MEMORANDUM

Subject:- FIXATION OF SENIORITY OF RESERVED CANDIDATES

Vis-à-vis GENERAL CANDIDATES IN PROMOTIONAL POSTS.

Consequent upon the amendment of Article 16 (4A) of the Constitution of India by the Constitution (Eighty fifth) Amendment Act, 2001 it has been decided that the following principle of fixation of seniority of

reserved candidates vis-à-vis general Candidates in promotional posts shall be followed:-

Scheduled castes/ scheduled Tribes Government Servants shall on their promotion, pay pension etc, shall be allowed to the concerned scheduled castes/ scheduled Tribes Government servants (without arrears by applying principle of no work no pay). For this purpose, senior scheduled castes/ scheduled tribes Government servants may be granted promotion with effect from the date of promotion of their immediate junior general/ other Backward Classes Governments servants, such promotion of scheduled castes/ scheduled tribes Governments Servants may be given with the approval of the appointing authority of the post to which the Government servant is to be promoted at each level after following normal procedure of Departmental Selection Committee and with the approval of Assam Public Service Commission.

Except seniority, other consequential benefits like promotion, pay etc. (including retriability benefits in respect of those who have already retired), allowed to General/ Other Backward Classes Government servant by virtues of implementation of office Memorandum No. ABP. 59/96/17 dated 12.06.96 and/ or in pursuance of the direction of Assam Administrative Tribunal/ Court, should be protected as personal to them. The instructions contained in this Department's office Memorandum No. ABP. 59/96/17 dated 12.06.96 stand withdrawn with effect from 12.06.96 itself and seniority of Government servant determined in the light of office Memorandum dated 12.6.96 shall be revised as if that office Memorandum was never issued.

J.P. Saikia

*Commissioner & Secretary to the Government of Assam,
Personnel Department."*

(Emphasize supplied)

E. Challenge to Article 16 (4A) and (4B) of the Constitution of India:

I. The challenge to Article 16 (4A) of the Constitution of India was

determined by the Hon'ble Apex Court in ***M. Nagraj (supra)***. The said challenge was negated by the Hon'ble Apex Court, primarily on the ground that Clause 4A is derived from clause 4 of Article 16 and Clause 4A maintains the contour of Article 16 (4).

II. It was further held that the amendment is not having any effect on the right of equality, which is a basic structure of the Constitution.

III. Thus, the Hon'ble Apex Court in ***M Nagraj*** (supra) upheld the right of the State to provide reservation in promotion and consequential seniority.

IV. It was further held that consequential seniority is a concept purely based on service jurisprudence. The incorporation of consequential seniority would not violate the mandate of equality.

V. However, the Hon'ble Apex court interpreted that before providing such reservation in promotion, the State need to have quantifiable data showing the backwardness, inadequacy of representations of these classes in service and balancing the maintenance of efficiency in services as mandated in Article 335 of the Constitution of India.

VI. In ***M. Nagraj*** (supra), it was further held that the exercise of collecting quantifiable data depends on numerous factors and conflicting claims. Such factors and claims need to be optimized by the administration depending upon local prevailing conditions in public employment. As equity justice and efficiency are variable factors and are context-specific, how these factors should be identified and counter balanced will depend on the fact and circumstance of each case. Thus, in ***M. Nagraj*** (supra) the unit and procedure of collecting quantifiable data was left to the domain of the executive.

F. UP Power Corporation:

I. In ***UP Power Corporation Limited –Vs- Rajesh Kumar and Others*** reported in **2012 7 SCC 1**, the Hon'ble Apex Court while dealing with the issue of reservation in promotion and implementation of same, reiterated the proposition made by the Hon'ble Apex Court in *M. Nagraj* (supra) and held that State has to form its opinion on the basis of quantifiable data and further held that when Article 16 (4A) of the Constitution of India are treated valid with certain conditions and riders, it becomes incumbent on the part of the State to appreciate and apply the test to withstand the scrutiny on parameters laid down therein.

G. Implementation of Nagraj:

I. After the dictum given in ***M. Nagraj*** (supra), the State of Assam constituted a 'One Man Commission' to study the need for reservation by collecting quantifiable data and to give its recommendation.

Thereafter, said One Man Commission gave its report, which was accepted by the State. Based on such approval, the State Government prescribed a procedure to carry out reservation in promotion by way of issuing one Office Memorandum No. TAD/BC/68/2011/Pt-I/46 dated 29.12.2014.

H. Challenge to O.M. dated 29.12.2014:

I. The said report of the One-Man Commission and the O.M. dated 29.12.2014 was challenged by the petitioners in WP(C) 5026/2016 i.e., the Equality Forum by way of WP(C) No.1560/2015. This court by judgment and order dated 23.12.015 quashed the One-Man Commission report holding that the said report would be of no legal consequence and would not enable the

State to give effect to the provision of the Act, 1978. It was further observed that, the reservation in promotion would remain in a dormant state till exercise of collection of quantifiable data relating to the three Constitutional requirements mandated in ***M. Nagraj*** (supra) and ***UP Power Corporation*** (supra) are complied with by the State while seeking to invoke the provision of Article 16 (4A).

II. Thereafter, in compliance with the judgment passed in ***Equality Forum-I*** (supra), the Office Memorandum dated 03.08.2016, laying down the guideline to be followed while considering the promotion in any cadre in any establishment was issued, which is under challenge in these two writ petitions. The said Office Memorandum dated 03.08.2016 being bone of contention, the relevant portion is quoted herein below:

“ GOVERNMENT OF ASSAM

DEPARTMENT OF WELFARE OF PLAINS TRIBES AND BACKWARD CLASSES

DISPUR ::::ASSAM

No. TAD/BC/68/2011/Pt-I/207

dated Dispur 3rd August, 2016

OFFICE MEMORANDUM

Subject: Review of Government Policy of Reservation in Promotion with reference to the Hon'ble Gauhati High Court judgments

With a view to bringing the policy of reservation in promotion for reserved categories in line with the directions of the Hon'ble High Court, Government have reviewed the existing procedure of effecting reservation in promotion and accordingly lays down the following guidelines to be followed while considering promotion in any cadre in any establishment-

- i) *The policy of reservation in promotion shall continue.*
- ii) *Each establishment while taking up the process of promotion in a particular cadre of a service, shall examine the representation of SC, ST (P) and ST (H) candidates in the cadre in*

comparison with the prescribed percentage of reservation and calculate shortfall if any, in the cadre with reference to that particular year. Shortfall of reservation of a particular reserved category in a cadre means the difference between the total number of reserved posts for that category in the cadre and the number of persons of that category holding the posts in the cadre. While calculating the shortfall, all candidates belonging to the same category [SC or ST(P) or ST (H)] shall be taken into account irrespective of the mode of their entry into the cadre i.e. whether on account of seniority-cum-merit or merit cum seniority, as the case may be, or through any other process admissible in law or by way of reservation. If in a particular cadre, SCs and STs are not adequately represented and shortfall is found to exist in the cadre, they may be considered as backward insofar as that particular cadre is concerned. Such shortfall shall be filled up by the concerned category of incumbents within the zone of consideration either on account of seniority-cum-merit/ merit-cum-seniority or by way of providing reservation as the case may be, till the prescribed percentage in respect of the said category is achieved.

iii) If no eligible incumbent belonging to the shortfall category is available within the zone of consideration, this will further substantiate the status of backwardness and inadequate representation of category in the cadre and therefore the number of posts that are required to meet the calculated shortfall shall be kept vacant and the vacancy shall be carried forward and filled up in the next year. In case, sufficient number of SC or ST (P) or ST (H) candidates fit for promotion against reserved posts are not available and if the posts cannot be allowed to remain vacant on grounds of maintaining efficiency in administration, the appointing authority may with full justification, refer the vacancy to the Department of WPT and BC for de-reservation, subject to the condition that no candidate belonging to the category for which the post is reserved is available within the zone of consideration placed before the annual Selection Committee/ Departmental Promotion Committee for two consecutive years. In other words, the concerned Department may move proposal for de-reservation in the third year.

iv) If an occasion arises during the promotion process, in which stipulated percentage in respect of reserved category is met, but in the gradation list/ seniority list there are candidates of reserved category who on merit is entitled to the promotion, his / her case shall be considered for promotion on merit if such candidate has not gained the seniority by way of any accelerated promotion earlier.

v) As regards the question of maintaining administrative efficiency as required under Article 335 of the Constitution of India, Hon'ble High Court held that, ".....it should be assessed applying objective measurable standards." In that sense, the Annual confidential Reports (ACR)/ Annual Performance Appraisal Reports (APAR) of the incumbent along with

the length of service, participation in training programs concerning job requirements, acquisition of degrees or diplomas or diplomas on subjects if mandatory to the job, should be considered as the yardstick of measuring efficiency.

vi) It shall be the responsibility of the concerned appointing authority to provide adequate information concerning the above to the Selection Committee (Department Promotion Committee) which shall evaluate all relevant parameters while making its recommendation.

This shall come into force with immediate effect.

Sd/-

(Rajiv Kumar Bora IAS)

Additional Chief Secretary to the Govt. of Assam,

WT & BC Department, Dispur."

H. Reconsideration of M. Nagraj:

I. The judgment of **M.Nagraj** (supra) was again reconsidered by the Constitution Bench of the Hon'ble Apex Court in **Jarnail Singh vs Laxmi Narayan Gupta reported in (2018) 10 SCC396**. The Hon'ble Apex Court in **Jarnail Singh** (supra) held that the dictum of Nagraj requiring the State to collect quantifiable data of backwardness, in so far as Scheduled Caste and Scheduled Tribes are concerned, would be contrary to the decision made in **Indra Sawhney** (supra). However, the Court upheld the other two requirements i.e., inadequacy of representation and maintenance of efficiency in administration.

II. It was clarified that quantifiable data should be collected by the State, on the parameters as stipulated in **M. Nagraj** (supra) on the inadequacy of representation, which can be tested by Courts. It was further added that data

would be relatable to the concerned cadre.

III. While interpreting **M.Nagraj** (supra), the Hon'ble Apex Court observed that Nagraj has wisely left the test for determining inadequacy of representation in the promotional post to the State.

IV. The Hon'ble Apex Court clarified that Article 16 (4A) has to be couched in language which would leave to the State to determine adequate representation depending upon the promotional post in question.

V. **B.K. Pavitra-II**

In the case of **B.K. Pavitra Vs. Union of India** reported in **(2019) 16 SCC 129**, it was held that the expression cadre is having no fixed meaning in service jurisprudence and therefore, collection of data based on a group is valid. Thus, in **B. K. Pavitra-II** (supra), approval was granted for collection of data based on groups.

It was further clarified that Courts power of judicial review on the State analysis of data on inadequacy of representation and administrative efficiency is limited as the need for reservation lies within the domain of executive and legislature.

It was further held that the Court would interfere with such legislation when it comes to a conclusion that such decision to provide reservation in promotion with consequential seniority is based on extraneous or arbitrary consideration.

It was also held that consequential seniority is a consequence of reservation in promotion and the same is not an additional benefit.

VI. **Jarnail Singh II:**

While reconsidering **Jarnail Singh-I (supra)**, the Hon'ble Apex Court in **Jarnail Singh-II (supra)**, while confirming the **Jarnail Singh-I (supra)** held that it is in the domain of the executive to determine the criteria that constitute inadequacy of representation in services.

It was further held that it is a mandatory condition to first determine inadequacy of representation before granting a reservation in promotion.

It was also clarified that such determination of inadequacy of representation is to be reviewed periodical and on a reasonable basis.

It was further affirmed that for such determination of inadequacy of representation, the unit should be the "cadre" and not the service as a whole.

Regarding the applicability of **M. Nagraj (supra)**, it was held that the dicta of **M. Nagraj (supra)**, would operate prospectively.

So far relating to the unit for collection of data based on group, approved in **B.K. Pavitra-II (supra)**, the court disapproved such proposition on the ground that the same is contrary to **M. Nagraj (supra)** and **Jarnail Singh-I (supra)**, which mandates the cadre to be unit for collection of quantifiable data.

4. The ratio of the aforesaid judgments more particularly of **M. Nagraj (supra)**, **Jarnail Singh-I (supra)**, **B.K. Pavitra-II (supra)** and **Jarnail Singh-II (supra)** can be summarized as follows:

M. Nagraj (supra):

- i. Provision of Article 16 (4A) is only an enabling provision and

therefore, the State is not bound to make reservations for SC/ST in the matter of promotions.

ii. However, if the state wishes to exercise its discretion and make such a provision, the State has to collect quantifiable data showing the backwardness and inadequacy of representation of that class in public employment in addition to compliance with Article 335.

iii. Even if the State has compelling reasons, the State will have to see that provision of reservation in promotion do not lead to excessiveness to breach the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely.

iv. The catch-up rule and consequential seniority are judicially evolved concepts based on service jurisprudence, do not violate the basic features of equality of the Constitution.

v. It cannot be said that by insertion of the concept of 'consequential seniority' the structure of Article 16(1) stands destroyed or abrogated.

vi. It cannot be said that 'equality code' under Articles 14, 15 and 16 is violated by deletion of the 'catch-up' rule."

Jarnail Singh-I:

I. The mandate of collection of quantifiable data showing backwardness of the Scheduled Castes and the Scheduled Tribes is invalid being contrary to the decision of nine-Judge Bench in ***Indra Sawhney*** (supra).

II. The principle of creamy layer applies to promotions for Scheduled Castes and Scheduled Tribes and the Creamy Layer is a principle of identification and not of equality.

III. The Court read Creamy Layer exclusion as an ingrained principle of Equality in determining the contours of reservation policy.

IV. Inadequacy of representation is to be specific to the cadre and not in proportion to SC/ST population in the State.

B.K. Pavitra –II:

I. As the determination of the need for reservation lies within the domain of the executive and legislature, the Court's power of judicial review is limited in such cases.

II. A court would only strike down the legislation, if it finds that policy of reservation/ quantifiable data relied upon is based on extraneous or arbitrary considerations.

III. The opinion of the government on the '*inadequacy of representation*' of the SCs and STs in the public services is a matter, which forms a part of the '*subjective satisfaction* of the State

Jarnail Singh-II:

i. The yardstick for determining what constitutes "inadequacy of representation" in the services was a matter of executive discretion;

ii. Determining inadequacy of representation as a pre-condition in granting reservations was mandatory, and would have to be reviewed on a periodic and "reasonable" basis;

iii. The unit of determining inadequacy of representation was the "cadre", and not the service as a whole;

iv. The judgment in ***M. Nagaraj*** (supra), would operate prospectively.

5. **Finding and Decision of the Court:**

Now let this Court deal with the issue before it based on the facts, arguments advanced and law laid down by the Hon'ble Apex Court in the following manner:

A. Whether by issuing the impugned OM, the state has not followed the mandate of **M. Nagraj** (supra) read with **Jarnail Singh-I** (Supra) and **Equality Forum** (supra) by not collecting quantifiable data and therefore, liable to be struck down?

I. As discussed hereinabove, the Hon'ble Apex Court in **M. Nagraj (supra)** while negating the challenge to the Article 16 (4A) of the Constitution of India held that the State has to collect quantifiable data showing the backwardness of class and inadequacy of representation of that class in public promotion. It further held that determination of inadequate representation depends on myriad factors which are not possible for the Court to envisage. Therefore, it was held that no yardstick can be laid down for determining the adequacy of representation for SCs and STs in promotional posts to provide reservations.

In **Jarnail Singh-II** (supra), it was also clarified that for determination of inadequacy of representation, units should be cadre and not the service as a whole.

The mandate of **B. K. Pavitra II** (supra) regarding unit for collection of data based on the group was disapproved and reaffirmed the proposition of **M. Nagraj** (supra) and **Jarnail Singh-I** (supra) in **Jarnail Singh-II** (supra) and mandated that cadre be a unit for collection of quantifiable data.

II. Clause (ii) of Impugned Notification reveals that the cadre is treated to be the unit for the collection of quantifiable data. Therefore, this court cannot

find fault with such decision.

III. The State need to collect data on inadequacy of representation while affecting the provision of Section 5 of the Act, 1978. If data collected reveals that there is adequate representation in the cadre, the state cannot provide reservation in promotion.

IV. Clauses (ii) & (iii) of the office memorandum reveals that the said office memorandum was issued to bring a policy of reservation in promotion for reserved categories in the line with the direction of this Court in ***Equality Forum*** (supra) and accordingly reviewed the procedure and laid down the guidelines to be followed while considering the promotion in any cadre in any establishment.

Thus, from the same, it is clear that impugned Office Memorandum is a guideline prescribing procedure including procedure of collection of data while considering reservation in promotion in any cadre in any establishment.

The said Office Memorandum further reflects that the policy of reservation of the State shall continue, meaning thereby that the policy of reservation in promotion mandated in Section 5 of the Act, 1978 shall continue in as much as the Act'1978 is still holding the field and not under challenge in the present lis. Therefore, this Court cannot judicially review the said provision of the Act, 1978. Further, the same is to be done before Division Bench.

V. Clause (ii) of the impugned O.M. mandates that if in a particular cadre, SCs and STs are not adequately represented and the shortfall is found to exist in the cadre, they may be considered as backward in so far as the particular cadre is concerned and such shortfall shall be filled up by concerned category of incumbents within the zone of consideration.

Thus, the said Clause-(ii) mandates for determination of backwardness based on the shortfall.

However, in **Jarnail Singh-I** (supra), the Hon'ble Apex Court held that the dictum of **M. Nagraj** (supra) requiring the State to collect quantifiable data of backwardness would be contrary to the decision made in **Indra Sawhney** (supra) in as much as Indra Sawhney does not allow for collection of quantifiable data for further determination of backwardness beyond Presidential List under Article 341 or 342 of the Constitution of India.

Therefore, in the considered opinion of this Court, such policy of the state is in derogation of the dictum of **Indra Shawney** (supra) and **Jarnail Singh-I** (supra) as backwardness is presumed by virtue of Presidential declaration.

While deciding **Equality Forum-I** (supra) and issuing the impugned Office Memorandum, the proposition of law enacted in **Jarnail Singh-I** (supra), **B. K. Pavitra-II** (supra) and **Jarnail Singh-II** (supra) was not available. Therefore, the ratio and direction in Equality Forum (supra) must be read with the subsequent decision of the Hon'ble Apex Court in **Jarnail Singh-I** (supra), **B. K. Pavitra-II** (supra), and **Jarnail Singh-II** (supra), while deciding the offending Office Memorandum.

VI. Therefore, the Argument of Mr. M. K. Choudhury, learned Senior Counsel that while issuing the impugned Office Memorandum dated 03.08.2016, no quantifiable data was collected and therefore same is liable to be struck down is rejected, more particularly in absence of challenge to the Section 5 of the Act'1978 inasmuch as the State before implementing their policy of reservation in promotion as discernable from the aforesaid Act, 1978, must have quantifiable data on inadequacy of representation as held in **Nagraj** (supra)

and clarified in **Jarnail Singh-I** (supra).

B. Whether Clause (iii) of the O.M. dated 03.08.2016 is violative of Section 5A of the Act'1978 and therefore is liable to be struck down?

I. As discussed earlier, the Hon'ble Apex Court in **R. K. Sabarwal –Vs- State of Punjab** reported in **AIR 1995 SC 1371** held that reservation need to be determined on the basis of number of posts in cadre and not on the basis of the vacancies. Under this principle of post-based reservation, post to be filled up by reservation for any class or classes, the same should be equal to the quota prescribed for that category. It was further held that, those reserved category candidates who are promoted/appointed on merit should be adjusted against un-reserved post and not against post meant for reserved category candidates.

Section 5A was inserted to the Act, 1978 by way of an amendment and introduced the principle of maintenance of post-based roster register to give effect to reservation of vacancies for SCs and STs.

II. Section 5A (iii) mandated that roster is to be operated on the principle of replacement and not as a running account.

III. Section 5A (vii) provides that in case of direct recruitment, if a candidate belonging to SC or ST is made on merit and not due to reservation, same shall not be counted towards reservation and is to be treated as general category appointments. The said Section is silent regarding application of such provision in case of promotion.

Section 5A (viii) provides that promotion etc. are to be as per post-based roster and the policy of replacement by filling up the vacant post

from eligible persons from the respected category by special drive so that the prescribed percentage of reservation is maintained.

Section 5A (x) provides that in absence of qualified SC and ST, in a particular year, the vacancy shall be carried forward and filled up in the following year.

If a reserved category vacancy is not filled up for want of qualified reserved category candidate in following three years continuously from the year the vacancy in which it was considered, the same is sought to be de-reserved subject to approval of WPT & BC department by way of Clause (iii) of the offending O.M. The reason behind such policy is stated to be for maintaining efficiency in services as the State cannot wait for an unlimited period and keep a post vacant allowing inefficiency in administration. Precondition of having an approval from the WPT & BC department for such de-reservation shall protect the interest of the reserved category candidates.

Therefore, in the considered opinion of this Court, the State is within its competent and jurisdiction to make provision for carrying forward vacancy/vacancies if could not be filled up for want of vacancies, in view of incorporation of provision of principle of carry forward.

This Court cannot also find fault with the procedure of carrying forward and de-reserving the vacancy after three years with approval from the WPT & BC Department with an object to maintain efficiency in administration inasmuch as such procedure can neither be termed as arbitrary nor based on extraneous considerations or violative of provision of Section 5A of the Act, 1978 inasmuch as the Act'1978

itself prescribes a percentage of reservation in case of promotion protecting the right of the reserved category candidates.

C. Whether the reservation policy framed by O.M. dated 12.03. 2002 is holding the field or the same has been impliedly repealed by O.M. dated 03.08.2016?

I. By now it is well settled that the State is within its power to provide reservation in promotion with consequential seniority to any class in the matter of promotion under power under Article 16 (4A). However, it is also well settled that to exercise such power and make provision for reservation in promotion with consequential seniority the State needs to collect quantifiable data relating to the inadequacy of representation of the said class subject to maintaining efficiency in administration. While collecting such data, the yardstick and unit need to be the cadre.

II. It is well settled that consequential seniority is a consequence of reservation in promotion and not an additional benefit. Article 16 (4A) of the constitution of India being an enabling provision, the State is at liberty to provide such benefit.

III. Consequent to amendment of Article 16 (4A), the state of Assam decided to follow the principle of consequential seniority, which is reflected in the Office Memorandum dated 12.03.2002. While the Office Memorandum dated 12.03.2002 was notified, the decision in **M. Nagraj** (supra), was not available. But the policy of granting promotion in reservation with consequential benefit is expressly provided in Section 5 of the 1978 Act read with notification dated 12.03.2002.

IV. In fact, in **Indra Sawhney** (supra) it was clarified that reservation can be made by legislative enactment or Rules and also by executive order. Such ratio was further clarified in **Sudhakar Baburao Nangnure –Vs- Noreshwar**

Raghunathrao Shende & Ors reported in **2020 11 SCC 399**.

V. Therefore, the Office Memorandum dated 12.03.2002 is an executive order/instruction by way of which the provision of consequential seniority while granting promotion to reserved category candidates was made by the state of Assam.

VI. The Office Memorandum dated 03.08.2016 is a document bringing review in existing procedures for affecting reservation in promotion and it is not a document providing reservation with or without consequential seniority in promotion. Secondly, the Office Memorandum dated 03.08.2016 has not expressly withdrawn or superseded the Office Memorandum dated 12.03.2002.

VII. As held in **Sudhakar** (Supra), at paragraphs 60 and 61, the Office Memorandum dated 03.08.2016 cannot be said to have impliedly superseded the Office Memorandum dated 12.03.2002.

VIII. Further, a reading of Clause-(iv) shows that the consequential seniority is withdrawn for those persons belonging to SCs or STs who are eligible for promotion on merit but got accelerated promotion to feeder cadre. The said clause nowhere declares that the policy of consequential seniority shall henceforth be not applicable to any the promotions made under Section 5 of the 1978 Act.

IX. Law is by now well settled that if the legislative intent to supersede an earlier law is expressed in the subsequent enactment, it would amount to repeal notwithstanding the absence of the word "repeal" in the later statute/enactment. The intention has to be inferred from the later enactment to see if it is proposed to preserve or modify and completely obliterate the rights

and liabilities attached to the earlier enactment.

X. In the case in hand, the two Office Memorandums i.e. dated 12.03.2002 and 03.08.2016 are incompatible for the reason that the O.M. dated 12.03.2002 is an executive order by way of which the benefit of consequential seniority was made available to the reserved category candidates and was issued subsequent to the incorporation of Article 16(4A) of the Constitution of India whereas the Office Memorandum dated 03.08.2016 lays down the procedure for collection of quantifiable data etc. while implementing the provision of Sections 5 and 5A of the Act, 1978.

XI. That being the position, this court un-hesitantly holds that the policy of providing reservation in promotion with consequential seniority is holding the field.

XII. Therefore, the argument of Mr. K. N. Choudhury, learned Senior counsel that by way of Office Memorandum dated 03.08.2016 has been issued in supersession of the O.M. dated 12.03.2002 do not find favour from this court.

D. Whether Clause (iv) is violative of Section 5 of the Act'1978 and therefore liable to be struck down?

i. Clause (iv) of the offending office memorandum provides that in a given situation when the percentage earmarked is achieved but some reserved category candidates who on its own merits are entitled to promotion, his/ her promotion shall be considered on merit subject to the further condition that the said person has not gained any seniority by way of accelerated promotion.

ii. Thus, from a reading of Clause-(iv) it is clear that the consequential seniority is withdrawn for those persons belonging to SCs or STs, who are

eligible for promotion on merit but has got accelerated promotion. The said clause nowhere declares that the policy of consequential seniority shall henceforth not be applicable to all the promotions made under Section 5 of the 1978 Act.

iii. That being the position, this court un-hesitantly holds that the policy of providing reservation in promotion with consequential seniority being holding the field as per O.M. dated 12.03.2002, the State is not within its competence and jurisdiction to deprive such service benefit to a meritorious reserved category candidates and that too without expressly bringing such policy by superseding the benefit granted under O.M. dated 12.03.2002.

7. The aforesaid determinations can be summarized in the following manner:

I. The Policy of the state in providing reservation in promotion with consequential seniority is discernable from Section 5 of the 1978 Act read with O.M. dated 12.03.2002.

II. The Office Memorandum dated 12.03.2002 shall hold the field till such policy is expressly repealed by the State.

III. O.M. dated. 03.06.2016 is notified laying procedure for collection of quantifiable data on Backwardness and inadequacy of representation and determining efficiency in administration while giving effect to such policy of providing reservation.

IV. Given the dicta of **Jarnail Singh** (supra), the O.M. dated 03.08.2016 cannot sustain so far, the same relates to the collection of data on backwardness.

V. The determination of cadre as a unit for collection of quantifiable data as laid down in OM dated 03.08.2016 conforms to the mandate of **Jarnail Singh** (supra) and **M. Nagraj** (supra) and therefore the same is upheld.

VI. The procedure as laid down for determining efficiency in administration not being arbitrary and not being based on any extraneous consideration, the same is upheld.

VII. Article 16 (4B) enables the State to carry forward vacancies and the vacancies carried forward is cannot be included in the ceiling of 50% of the year of filling up vacancies. Section 5A of the Act1978 permits carrying forward vacancies and therefore, the policy of carrying forward as provided in the office memorandum dated 03.08.2016 not being arbitrary and not being based on any extraneous consideration, same is upheld.

VIII. Given the dictum in **Jarnail Singh** (supra), the judgment made in the Equality Forum-I relating to collection of data to determine of backwardness has become redundant.

IX. Article 16 (4A) and 16 (4B) being enabling provisions, the State is at liberty to implement its policy of giving reservation in promotion with consequential seniority, at liberty to provide for reservation in promotion without consequential seniority or at liberty not to provide any reservation in promotion. However, while implementing/adopting/changing such policy, due process of law need to be followed including dicta in **M. Nagraj** (supra) clarified in **Jarnail Singh** (supra).

8. The impugned Office Memorandum dtd.03.08.2016 is interfered to the extent as indicated herein above.

9. The two writ petitions are answered in the aforesaid terms and are



disposed of. However, the parties shall bear their own cost.

10. The other writ petitions tagged herewith are to be determined individually.

JUDGE

Comparing Assistant