

A H. P. SCHEDULED TRIBES EMPLOYEES FEDERATION
& ANR.

v.

HIMACHAL PRADESH S. V. K. K. & ORS.
INTERLOCUTORY APPLICATION NO. 6 OF 2012

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IN
SPECIAL LEAVE PETITION (C.) NO. 30143 OF 2009

SEPTEMBER 13, 2013

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[SURINDER SINGH NIJJAR AND
PINAKI CHANDRA GHOSE, JJ.]

SERVICE LAW:

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Reservation in promotion – Consequential seniority – Compliance of direction in M. Nagaraj’s case – State of Himachal Pradesh issuing circulars dated 7.9.2007 and 23.1.2010 – Plea of State Government to await the finalization of 117th Constitution Amendment – Held: The material on record indicates the intention of the State not to comply with the earlier decision to implement the policy of reservation in promotions and the grant of consequential seniority – State Government, directed to take a final decision on the issue — The proposed 117th Constitutional Amendment would not adversely affect the merits of the claim of petitioner, for grant of promotion with consequential seniority.

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Practice and Procedure:

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Statement made by counsel before Court – Disposal of case accordingly — Held: When a statement is made before the court it is, as a matter of course, assumed that it is made sincerely and is not an effort to over-reach the court — The statement by the counsel is not expected to be flippant, mischievous, misleading and certainly not false — This confidence in statements made by the counsel is founded on

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the assumption that the counsel is aware that he is an officer of the court. A

On 7.9.2007, with a view to give effect to the 85th Amendment to the Constitution, the State of Himachal Pradesh issued instructions by letter No. PER (AP)-C-F (1)-1/2005, and thereby provided for assignment of consequential seniority to the members of Scheduled Castes and Scheduled Tribes in service under the State. The policy was to take effect from 17.6.1995. The instructions were challenged by respondent No. 1 and the High Court by order dated 18.09.2009 relying upon *M. Nagaraj*¹, allowed the writ petition, and quashed the instructions dated 07.09.2007 as the State Government had issued the instructions without collecting the (quantifiable) data. The State Government by letter dated 16.11.2009, rescinded the instructions dated 07.09.2007. The judgment of the High Court dated 18.09.2009 was challenged in SLP (Civil) No. 30143 of 2009 by Himachal Pradesh Schedules Tribes Employees Federation, and Himachal Pradesh SC/ST Government Employees Welfare Association. By order dated 26.04.2010, the Supreme Court disposed of the SLP No. 30143 of 2009 and the contempt petition No. 27 of 2010 on the undertaking given by the State to collect more details with regard to representation of SCs/STs and to pass appropriate orders. The State Government was stated to have collected the necessary data. Thereafter I. A. No. 6 was filed by the petitioner seeking a direction to the State to take a decision on the issue of reservation on the basis of data already collected or submitted to Cabinet Sub Committee on 25.04.2011. The Court, by order dated 06.09.2012, directed the State Government to take the necessary policy decision on the question of providing reservation to the members of Scheduled Castes and

1. *M. Nagaraj & Ors. v. Union of India & Ors.* 2006 (7) Suppl. SCR 336.

A Scheduled Tribes in the matter of promotion in the services within the State. On 31.01.2013, the State directed that since the Constitution (117th Amendment) Bill, 2012 was pending consideration in Parliament, the matter regarding implementation of Constitution (85th
 B Amendment) Act, 2001 in the State may be deferred. On 04.02.2013, the State Government sought modification of the restriction placed by the Court by order dated 07.01.2013, whereby the State was directed not to make any promotions. The State Government prayed that the
 C existing reservation system in promotions be continued till the finalization of matter relating to the Constitution (117th Amendment) Bill, 2012.

Allowing the I. A., the Court

D HELD: 1.1. The issue relates only to ensuring that the respondent-State implements its own decisions. The only excuse given by the State for not implementing its decision dated 31.01.2013 is the pendency of the 117th Amendment Bill. The State had admitted that necessary
 E data had been collected and placed before the Cabinet Sub-Committee on 25.04.2011, which has the base as on 31.10.2009. The State also affirmed that fresh data showing the position as on 30.06.2011 would be available shortly. Therefore, it is patently apparent that there is no
 F impediment in the way of the respondent State to take the necessary policy decision on the basis of the available data. Non-compliance of the direction in *M. Nagaraj* was the sole reason for which the High Court has quashed the instructions dated 07.09.2007. With the collection of
 G the necessary data, there exists no justifiable reason not to take the required decision. [para 28] [402-E-H; 403-A]

1.2. The State has taken a policy decision for implementation of the 85th Constitution Amendment Act. Instructions dated 07.09.2007, had been issued for
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implementation of the policy decision. In these instructions, the Government had decided to grant seniority to SC/ST employees. But this circular dated 07.09.2007 was withdrawn by Circular dated 16.11.2209. However, the implementation of this Circular was stayed by this Court on 04.12.2009. The State then issued another Circular No. PER(AP)-C-F(1)/2009 dated 20.01.2010 withdrawing circular dated 16.11.2009. Thus, the situation prevalent prior to the Circular dated 07.09.2007 was again operative for making promotions. Thereafter another Circular was issued on 23.01.2010 amending the circular dated 16.11.2009 by substituting words "wherever reservation is available" with the words "wherever consequential seniority by virtue of reservation will be applicable." The issuance of so many circulars is indication of the intention of the State not to comply with the earlier decision to implement the policy of reservation in promotions and the grant of consequential seniority. Therefore, a statement was made before this Court on 26.04.2010 on the basis of which the SLP was disposed of. This Court is of the opinion that the statement was only to avoid a decision on merits with regard to the correctness of the impugned judgment of the High Court. [para 29] [403-C-H; 404-A-B]

2.1. When a statement is made before this Court it is, as a matter of course; assumed that it is made sincerely and is not an effort to over-reach the court. Numerous matters even involving momentous questions of law are very often disposed of by this Court on the basis of the statement made by the counsel for the parties. The statement is accepted as it is assumed without doubt, to be honest, sincere, truthful, solemn and in the interest of justice. The statement by the counsel is not expected to be *flippant, mischievous, misleading and certainly not false*. This confidence in statements made by the counsel is founded on the assumption that the counsel is aware

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A that he is an officer of the Court. [para 30] [404-B-D]

Rendel v. Worsley (1967) 1 QB 443 - referred to.

2.2. In the instant case, on 26.04.2010 a statement was made on behalf of the State Government that “the state intends to collect more details with regard to representation of the SCs/STs and to pass appropriate orders within a reasonable time, i.e., approximately within three months after collecting the necessary details and datas.” It can not be said that the applicants are seeking a mandamus to adopt a policy in reservation. They want the State to implement its own decisions. [para 30] [405-B-C, D-E]

2.3. The final excuse offered by the State is that it awaits the finalization of the 117th Constitution Amendment. The reasons put forward for not honouring the statement solemnly made to this Court on 26.04.2010 cannot be accepted. This Court has been more than considerate to the requests made by the State for extension of time. The proposed 117th Constitutional Amendment would not adversely affect the merits of the claim of the petitioners for grant of promotion with consequential seniority. The purpose of amendment is to remove any impediment in the grant of consequential seniority upon promotion on the basis of reservation. [para 32-33] [405-G-H; 406-A-B, E-F]

2.4. Furthermore, the proposed amendment is to be introduced with retrospective effect from 17.6. 1995. In this view of the matter, there can be no impediment in the way of the State Government to implement the policy of reservation which existed till the issuance of the various instructions prior to the making of the Statement before this Court on 26.4. 2010. The State Government is directed to take a final decision on the issue either on the basis of the data already submitted to the Cabinet Sub-Committee on 25.4.2011 or on the basis of the data

reflecting the position as on 30.6.2011. [para 34-35] [408-G-H; 409-B] A

M. Nagaraj & Ors. Vs. Union of India & Ors. 2006 (7) Suppl. SCR 336 = 2006 (8) SCC 212 – referred to.

Karam Chand Vs. Haryana State Electricity Board & Ors. 1988 (3) Suppl. SCR 702 = 1989 (1) Suppl. SCC 342, *Indra Sawhney & Ors. Vs. Union of India & Ors.* 1992 (2) Suppl. SCR 454 = 1992 (3) Suppl. SCC 217; *R.K. Sabharwal & Ors. Vs. State of Punjab & Ors.*, 1995 (2) SCR 35 = 1995 (2) SCC 745; *Salauddin Ahmed & Anr. Vs. Samta Andolan* 2012 (7) SCR 402 = 2012 (10) SCC 235, *Union of India & Ors. Vs. Virpal Singh Chauhan & Ors.* 1995 (4) Suppl. SCR 158 = 1995 (6) SCC 684, *Ajit Singh Januja & Ors. Vs. State of Punjab & Ors.* 1996 (3) SCR 125 = 1996 (2) SCC 715, *Chander Pal & Ors. Vs. State of Haryana* 1997 (10) SCC 474, *Jagdish Lal & Ors. Vs. State of Haryana & Ors.* 1997 (6) SCC 538, *Ajit Singh & Ors. (II) Vs. State of Punjab & Ors.* 1999 (2) Suppl. SCR 521 = 1999 (7) SCC 209; *Suraj Bhan Meena & Anr. Vs. State of Rajasthan & Ors.* 2010 (14) SCR 532= 2011(1) SCC 467; and *Uttar Pradesh Power Corporation Limited Vs. Rajesh Kumar & Ors.* 2012 (4) SCR 118 = 2012 (7) SCC 1; *C.A. Rajendran Vs. Union of India (UOI) & Ors.* 1968 (1) SCR 721; and *Union of India Vs. R. Rajeshwaran & Anr.* 2003 (9) SCC 294 - cited. B C D E

Case Law Reference:

1988 (3) Suppl.SCR 702	cited	para 6	F
1992 (2) Suppl. SCR 454	cited	para 7	
1995 (2) SCR 35	cited	para 7	
2006 (7) Suppl. SCR 336	referred to	para 10	G
2012 (7) SCR 402	cited	para 21	
1995 (4) Suppl. SCR 158	cited	para 22	
1996 (3) SCR 125	cited	para 22	
1996 (2) SCC 715	cited	para 22	H

A	1997 (10) SCC 474	cited	para 22
	1997 (6) SCC 538	cited	para 22
	1999 (2) Suppl. SCR 521	cited	para 22
	2010 (14) SCR 532	cited	para 22
B	2012 (4) SCR 118	cited	para 22
	1968 (1) SCR 721	cited	para 23
	2003 (9) SCC 294	cited	para 23
	(1967) 1 QB 443	referred to	para 30

C CIVIL APPELLATE JURISDICTION : I.A. No. 6

IN

SLP (Civil) No(s). 30143 of 2009.

With

D Contempt Petition (C) No. 91 of 2013.

IN

SLP (Civil) No. 30143 of 2009.

E From the Judgment & Order dated 18.09.2009 of the High Court of Himachal Pradesh at Shimla in Civil Writ Petition Transferred No. 2628 of 2008.

F Vijay Hansaria, Dr. Rajeev Dhawan, Kanika Singh, Ashok Mathur, Debasis Misra, Kiran Suri, S.J. Amith, Suryanaryana Singh, Pragati Neekhara, Varinder Kumar Sharma, P.V. Yogeswaran for the appearing parties.

The Judgment of the Court was delivered by

G **SURINDER SINGH NIJJAR, J.** 1. This Interlocutory Application No.6 was filed on 16th March, 2012, by the appellants herein in the S.L.P. (Civil) No. 30143 of 2009, seeking direction to the State of Himachal Pradesh to take a decision on the issue of reservation in promotions on basis of data already collected or submitted to Cabinet Sub Committee on 25th April, 2011 within a period of one month. For the

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purpose of adjudicating the present I.A., it would be pertinent to make a reference to facts concerning S.L.P. (Civil) No. 30143 of 2009 that was disposed of by this Court on 26th April, 2010. A

2. SLP (Civil) No. 30143 of 2009 was filed against judgment and order dated 18th September, 2009 passed by the High Court of Himachal Pradesh. By the said judgment/order, the High Court allowed the CWP-T No. 2628 of 2008 and thereby quashed the instructions dated 7th September, 2007 issued by the State of Himachal Pradesh. The said instructions made provision for reservation in promotions with consequential seniority in favour of Scheduled Castes and Scheduled Tribes in all classes of posts in services under the State. B C

3. The aforesaid S.L.P. was disposed of on 26th April, 2010 by passing the following order:- D

“The State of Himachal Pradesh has issued a Circular on 07.09.2007 as regards the promotion of SCs/STs in the State service. The said circular was challenged by the respondent no.1 and the circular was quashed by the High Court by the impugned judgment. Learned counsel appearing for the State submits that the circular issued on 07.09.2007 has since been withdrawn as the State intends to collect more details with regard to representation of SCs/STs and to pass appropriate orders within reasonable time i.e. approximately within three months after collecting necessary details and datas. The petitioner would be at liberty to take appropriate steps, if any adverse order is passed. This Special Leave Petition and the Contempt Petition are thus disposed of finally.” E F G

4. Although the present I.A.No.6 is filed in the disposed of SLP, it would be appropriate to notice the manner, in which the order dated 16th April, 2010 came to be passed. H

A 5. On 27th November, 1972, Government of India issued instructions vide letter No. 27-2/71-Estt(SCT), whereby provision was made for providing reservation in promotion for the members of Scheduled Castes and Scheduled Tribes. On 24th April, 1973, State of Himachal Pradesh issued instructions
 B vide Letter No. 2-11/72-DP (Appt.), whereby reservation was provided for promotion of employees. On 9th/13th August, 1973, State of Himachal Pradesh issued instructions vide Letter
 C No 2-11/72-DP (Apptt.), and thereby, followed the Reservation policy of the Union Government relating to promotion for the members of Scheduled Castes and Scheduled Tribes. It may be mentioned here that the Reservation Policy of the Union Government was set out in Letter/Order dated 2nd March, 1972, 24th March, 1972 and 11th August, 1972, 28th October 1972, 30th January, 1973 and 12th March, 1973.

D 6. Meanwhile on 31st October, 1988, this Court in the case of *Karam Chand Vs. Haryana State Electricity Board & Ors.*,¹ approved the grant of consequential seniority in promotions given to Scheduled Castes and Scheduled Tribes. The State of Himachal Pradesh, by instructions vide letter No. PER (AP-
 E II) F (1)-1/87 dated 31st January, 1989, introduced Reservation Roster in both direct recruitment and promotions.

F 7. Later, a Constitution Bench of this Court in *Indra Sawhney & Ors. Vs. Union of India & Ors.*² held that reservation in promotion is not permissible under Article 16(4) of Constitution and directed to discontinue such reservations after 5 years. Thereafter, in *R.K. Sabharwal & Ors. Vs. State of Punjab & Ors.*,³ this court held that the operation of roster must stop running when the prescribed quota of posts have been occupied by the reserved category. It was in this backdrop that
 G the Parliament of India enacted Constitution (77th Amendment)

1. (1989) Supp 1 SCC 342.

2. 1992 (Supp) 3 SCC 217.

H 3. 1995 (2) SCC 745

Act, 1995, thereby adding Article 16(4A) which permits the State to provide reservation in matters of promotion to Scheduled castes and Scheduled Tribes. In 2001, Parliament approved Constitution (85th Amendment) Act, permitting promotions with consequential seniority to government service. A

8. On 7th September, 2007, with a view to give effect to the 85th Amendment to the Constitution, the State of Himachal Pradesh issued instructions vide letter No. PER (AP)-C-F (1)-1/2005, and thereby provided for assignment of consequential seniority to the members of Scheduled Castes and Scheduled Tribes in service under the State. The policy was to take effect from 17th June, 1995. The instructions further provided, as under:- B C

“Thus as a result of this decision of State Government to implement the aforesaid amendment with effect from 17.6.1995, State Government employees belonging to Scheduled Castes and Scheduled Tribes shall also be entitled to consequential seniority on promotion by virtue of rule of reservation. However, controlling factors or compelling reasons, namely, backwardness and inadequacy of representation which enable the State to provide for reservation keeping in mind the over all efficiency of State administration under Article 335 will continue to apply with mandatory compliance of Constitutional requirement of Ceiling limit of 50% quantitative limitation. Moreover it is made clear that in the State of Himachal Pradesh the State Government has already made provision for reservation in promotion after due consideration prior to 19.10.2006, thus, collection of data as mandated by para 124 of the judgment in M.Nagaraj case (AIR 2007 Sc.71) is not required.” D E F G

9. The instructions were challenged by respondent No.1 herein by filing Original Application No. 19 of 2008 before the Himachal Pradesh Administrative Tribunal, Shimla. Since the Administrative Tribunal was thereafter abolished, the O.A. was H

A transferred to be heard and adjudicated by the High Court of Himachal Pradesh at Shimla and was renumbered as Civil Writ Petition –T No. 2628 of 2008. By the impugned order dated 18th September, 2009, the High Court allowed the writ petition, and quashed the instructions dated 7th September, 2007.

B 10. In its judgment, the High Court *inter alia* relied upon the law laid down in *M. Nagaraj & Ors. Vs. Union of India & Ors.*⁴ The High Court noticed that the State was bound to collect data to show that the so called backward classes are actually backward and they are inadequately represented in the service under the State. It was also held that the State has to provide for reservations in such a manner that the efficiency of administration is not adversely affected. The High Court then proceeded to determine that whether such an exercise was undertaken by the State while issuing instructions dated 7th September, 2007. The High Court came to the conclusion that the State admittedly has not carried out any such exercise to collect such data. The reason provided by the State for not carrying out such an exercise was that since there was already a policy for providing reservation in promotion in the State prior to the judgment in *Indra Sawhney's* case (supra), collection of data as mandated in *M. Nagaraj's* case (supra) is not required. It was also urged on behalf of the State that the decision for providing reservations in promotions was taken after "due consideration". These reasons were rejected by the High Court, and it was held that:

G "Due Consideration' is totally different from collecting quantifiable data. This exercise has to be conducted and no reservation in promotion can be made without conducting such an exercise. Therefore, the State cannot be permitted to make reservations till such exercise is carried out and clear-cut quantifiable data is collected on the lines indicated in *M. Nagaraj's* case. We may also point

H 4. (2006) 8 SCC 212.

out that other than making vague reference to “due consideration” having been done, till date the State has not produced before us any clear-cut quantifiable data which could establish the need for reservation.

Merely because the amended provision of the Constitution enable the State to make reservation is no ground not to collect data. Therefore, the instructions have to be struck down as being violat^e of the law laid down in M. Nagaraj’s case by the Apex Court.”

11. In compliance with the aforesaid directions, the State of Himachal Pradesh, vide letter No. PER (AP)-C-F (1)01/2009 dated 16th November, 2009, rescinded the instructions dated 7th September, 2007. In the letter (dated 16th November, 2009), the State of Himachal Pradesh also directed that all the promotions made on or after 7th September, 2007 may be regulated in accordance with the procedure applicable prior to the said date. The letter also made it clear that promotion policy has to be interpreted in the manner “as if the instructions dated 7th September, 2007 and subsequent instructions thereof had never been issued.”

12. The judgment of the High Court dated 18th September, 2009 was challenged in the Civil Appeal @ SLP (Civil) No. 30143 of 2009, filed by Himachal Pradesh Schedules Tribes Employees Federation, and Himachal Pradesh SC/ST Government Employees Welfare Association. This Court, by order dated 4th December, 2009 issued notice and granted interim stay on the operation of the impugned judgment. Meanwhile, the State Government withdrew the instructions dated 16th November, 2009 and issued fresh instructions vide letter dated 20th January, 2010, which were further amended by letter dated 16th March, 2010. By the aforesaid two letters, the Government Departments were refrained from making further promotions where consequential seniority is involved.

13. By order dated 26th April, 2010, this Court disposed

A of the S.L.P. (Civil) No. 30143 of 2009 and the contempt petition No. 27 of 2010 on the undertaking given by the State. In the said order, this court *inter alia* observed as under:

B “Learned counsel appearing for the State submits that the circular issued on 07.09.2007 has since been withdrawn as the State intends to collect more details with regard to representation of SCs/STs and to pass appropriate orders within reasonable time i.e. approximately within three months after collecting necessary details and datas (sic). The petitioner would be at liberty to take appropriate steps, if any adverse order is passed. This Special Leave Petition and the Contempt Petition are thus disposed of finally.”

D 14. This Court, by order dated 7th July, 2010, dismissed I.A. No. 5 in the aforesaid SLP seeking modification/clarification of the aforesaid order.

E 15. It appears that the State of Himachal Pradesh collected the necessary data as on 31st December, 2011. This is evident from the answers given to the Assembly Question Unstarred No.196, to which the reply was given on 4th April, 2012. The question was specific in the following terms:

F “(a) How much is the present SC/ST backlog in the State; and
(b) What steps the Government is taking to fill-up the backlog of these categories?”

G The answer to the aforesaid question (a) and (b) was that “The necessary information is at Annexure - “A”.”

H 16. A perusal of the Annexure-A shows that the details of backlog position of Scheduled Castes/Scheduled Tribes in direct recruitment and promotion in the services of the State and Boards/Corporations/Public Sector Undertakings etc. as

on 31st December, 2011, is clearly indicated.

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17. It was in this backdrop that I.A. No. 6 came to be preferred by the petitioner herein on 16th March, 2012, seeking a direction to the State to take a decision on the issue of reservation on the basis of data already collected or submitted to Cabinet Sub Committee on 25th April, 2011 within a period of one month. The petitioner also prayed for stay on all the promotions, pending the decision taken in this case. This Court, by order dated 6th September, 2012, directed inter alia as under:

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“In our opinion, in the facts and circumstances of this case, it is necessary for the State of Himachal Pradesh to take the necessary policy decision on the question of providing reservation to the members of Scheduled Castes and Scheduled Tribes in the matter of promotion in the services within the State of Himachal Pradesh, within a period eight weeks from the date of receipt of a copy of this order.”

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The State of Himachal Pradesh is directed to place on record the compliance report before the next date of hearing.”

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This direction was given upon consideration of the submission of the State in its reply to this I.A. dated 4th July, 2012, that the petitioners themselves had reservations with regard to the data placed before the Cabinet Sub-Committee on 25th April, 2011. Accordingly, the Government decided to collect afresh data and material showing position as on 30th June, 2011. According to the respondent State, the policy decision would have to relate to the data showing the position as on 30th June, 2011, which would be available shortly.

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18. On 2nd November, 2012, an I.A. was filed by the State of Himachal Pradesh in the Civil Appeal, seeking extension of time for complying with the order of this Court until 31st January,

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- A 2013. By order dated 7th January, 2013, this Court granted extension to the State of Himachal Pradesh as sought and further directed it not to make any promotions in the meantime. On 11th January, 2013, the State of Himachal Pradesh issued instructions to all the departments to stop granting promotions.
- B On 31st January, 2013, the State of Himachal Pradesh in Letter No. PER (AP)-C-F(1)-2/2011 noticed that since the Constitution (117th Amendment) Bill, 2012 is pending consideration in the Parliament, the matter regarding implementation of Constitution (85th Amendment) Act, 2001 in the state may be deferred. It was also decided that the instructions dated 11th January, 2013 issued pursuant to interim order dated 7th January, 2013 in I.A. No. 6 of 2012 in SLP (Civil) No. 30143 of 2009 will continue in operation in the meantime. On 4th February, 2013, the State of Himachal Pradesh sought modification of the restriction placed by this Court by order dated 7th January, 2013, whereby the State was directed not to make any promotions. The stand taken in the said affidavit was that since the Constitution (117th Amendment) Bill, 2012 is pending consideration in the Parliament, the matter regarding implementation of Constitution (85th Amendment) Act, 2001 in the state may be deferred. The State Government also prayed that the existing reservation system in promotions be continued till the finalization of matter relating to the Constitution (117th Amendment) Bill, 2012.

F **Submissions:**

G 19. Mr. Vijay Hansaria, learned senior counsel appeared for the appellants. Whereas, Dr. Rajeev Dhawan, learned senior counsel appeared for the respondent no.1, State of Himachal Pradesh.

H 20. Mr. Hansaria submitted that the State Government has already taken a decision to provide reservation in promotion. In its order dated 31st January, 2013, the State Government mentions that the existing system for providing reservation, prior to order dated 7th September, 2007 will continue. Therefore,

mandamus is to be issued not for providing reservations but to direct the State to implement its own policy decision. A

21. Mr. Hansaria further submitted that the data collected by the State reveals that there is backlog in the government services. Further, it was submitted that data was available to the State Government on 31st October, 2009, but this fact was suppressed from this Court. It was also argued that the defence put by the State that they deferred the matter concerning implementation of 85th Amendment on the ground of 117th Amendment Bill is without any basis since it already has the data. Thus, they must take a decision thereon. Learned senior counsel relied upon *Salauddin Ahmed & Anr. Vs. Samta Andolan*,⁵ to submit that this Court had earlier directed the State to comply with the directions given in *M. Nagaraj* (supra) and *Suraj Bhan Meena* (supra). B
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22. Dr. Dhawan, learned senior counsel, firstly, reiterated the well known principles concerning the concept of reservation laid down by this Court in the following cases: *Indra Sawhney* (supra), *R.K.Sabharwal* (supra), *Union of India & Ors. Vs. Virpal Singh Chauhan & Ors.*⁶, *Ajit Singh Januja & Ors. Vs. State of Punjab & Ors.*⁷, *Chander Pal & Ors. Vs. State of Haryana*⁸, *Jagdish Lal & Ors. Vs. State of Haryana & Ors.*⁹, *Ajit Singh & Ors. (II) Vs. State of Punjab & Ors.*¹⁰ Dr. Dhawan relied upon *M. Nagaraj's* case (supra), and submitted that this Court has laid down certain conditions which are required to be complied with by the State before providing Reservation under Article 16(4). The learned senior counsel relied on the following observations of this Court: E
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5. (2012) 10 SCC 235. G

6. (1995) 6 SCC 684.

7. (1996) 2 SCC 715.

8. (1997) 10 SCC 474.

9. (1997) 6 SCC 538.

10. (1999) 7 SCC 209) H

A “As stated above, the boundaries of the width of the power, namely, the ceiling-limit of 50% (the numerical benchmark), the principle of creamy layer, the compelling reasons, namely, backwardness, inadequacy of representation and the overall administrative efficiency are not obliterated by the impugned amendments. At the appropriate time, we have to consider the law as enacted by various States providing for reservation if challenged. At that time we have to see whether limitations on the exercise of power are violated. The State is free to exercise its discretion of providing for reservation subject to limitation, namely, that there must exist compelling reasons of backwardness, inadequacy of representation in a class of post(s) keeping in mind the overall administrative efficiency. It is made clear that even if the State has reasons to make reservation, as stated above, if the impugned law violates any of the above substantive limits on the width of the power the same would be liable to be set aside.”

E Further, Dr. Dhawan submitted that this Court, applying the aforesaid ratio in *M. Nagaraj's* case(supra), quashed the reservation policy of the respective states in *Suraj Bhan Meena & Anr. Vs. State of Rajasthan & Ors.*¹¹ and *Uttar Pradesh Power Corporation Limited Vs. Rajesh Kumar & Ors.*¹²

F 23. Dr. Dhawan further submitted that no mandamus would lie to order reservations or de-reservations because Article 16(4), (4A) & (4B) are enabling provisions. Learned senior counsel relied upon *C.A. Rajendran Vs. Union of India (UOI) & Ors.*¹³ *Union of India Vs. R. Rajeshwaran & Anr.*¹⁴ and *Ajit Singh (II)'s* case (supra).

G 11. (2011) 1 SCC 467.

12. (2012) 7 SCC 1.

13. 1968 (1) SCR 721.

H 14. (2003) 9 SCC 294.

24. We have very carefully considered the submissions made by the learned counsel for the parties.

25. Undoubtedly, in the case of *C.A. Rajendran* (supra), this Court has held as follows:-

“Our conclusion therefore is that Article 16(4) does not confer any right on the petitioner and there is no constitutional duty imposed on the Government to make a reservation for Scheduled Castes and Scheduled Tribes, either at the initial stage of recruitment or at the stage of promotion. In other words, Article 16(4) is an enabling provision and confers a discretionary power on the State to make a reservation of appointments in favour of backward class of citizens which, in its opinion, is not adequately represented in the Services of the State. We are accordingly of the opinion that the petitioner is unable to make good his submission on this aspect of the case.”

26. Similarly, in *R.Rajeshwaran* (supra), this Court observed as follows:-

“9. In *Ajit Singh (II) v. State of Punjab* this Court held that Article 16(4) of the Constitution confers a discretion and does not create any constitutional duty and obligation. Language of Article 15(4) is identical and the view in *Comptroller and Auditor General of India, Gian Prakash v. K.S. Jagannathan and Superintending Engineer, Public Health v. Kuldeep Singh* that a mandamus can be issued either to provide for reservation or for relaxation is not correct and runs counter to judgments of earlier Constitution Benches and, therefore, these two judgments cannot be held to be laying down the correct law. In these circumstances, neither the respondent in the present case could have sought for a direction nor the High Court could have granted the same.”

27. The aforesaid dicta reiterated the earlier

A pronouncement of this Court in *Ajit Singh (II)*'s case (*supra*), wherein this Court observed as follows:-

B 28. We next come to the question whether Article 16(4)
and Article 16(4-A) guaranteed any fundamental right to
reservation. It should be noted that both these articles
open with a non obstante clause — “Nothing in this Article
shall prevent the State from making any provision for
reservation....” (emphasis supplied) There is a marked
difference in the language employed in Article 16(1) on the
one hand and Article 16(4) and Article 16(4-A) on the other.
C There is no directive or command in Article 16(4) or Article
16(4-A) as in Article 16(1). On the face of it, the above
language in each of Articles 16(4) and 16(4-A) is in the
nature of an enabling provision and it has been so held in
D judgments rendered by Constitution Benches and in other
cases right from 1963.

28. In our opinion, the reliance placed on the aforesaid
observations by Dr. Dhwan is misplaced. Controversy herein
is not about whether the court can issue mandamus to
E introduce the policy of reservation. The issue relates only to
ensuring that the respondent-State implements its own
decisions. The only excuse given by the State for not
implementing its decision dated 31st January, 2013 is the
pendency of the 117th Amendment Bill. As noticed earlier, the
F State had admitted in answer to the unstarred Assembly
question that necessary data had been collected. Furthermore,
in the reply dated 4th July, 2012 to this application the State
has admitted the existence of the data which was placed before
the Cabinet Sub-Committee on 25th April, 2011, which has the
G base as on 31st October, 2009. The State also affirmed that
fresh data showing the position as on 30th June, 2011, would
be available shortly. Therefore, it is patently apparent that there
is no impediment in the way of the respondent State to take
the necessary policy decision on the basis of the available data.
H Non-compliance of the direction in *M. Nagaraj* was the sole

reason for which the High Court had quashed the instructions dated 7th September, 2007. With the collection of the necessary data, there exists no justifiable reason not to take the required decision. A

29. The State has very skilfully avoided a decision on merits in SLP (C) No.30143 of 2009. Thereafter, it is a series of false starts to avoid the implementation of their own decision and the directions issued by this Court. In our opinion, that this cat and mouse game has gone far enough. Therefore, we will not content ourselves with the justification that the State has to await the outcome of the 117th Amendment. We see no relevance of the amendment to the implementation by the State of its earlier decision making reservation in promotions. It has taken a policy decision for implementation of the 85th Constitution Amendment Act. Instructions dated 7th September, 2007 had been issued for implementation of the policy decision. In these instructions, H.P. Government had decided to grant seniority to SC/ST employees. But this circular dated 7th September, 2007 was withdrawn in compliance of the High Court judgment by issuing Circular No. PER(AP)-CF(1)-1/2009 dated 16th November, 2009. But the implementation of this Circular was stayed by this Court in SLP (C) No.30143 of 2009 on 4th December, 2009. The State then issued another Circular No. PER(AP)-C-F(1)-1/2009 dated 20th January, 2010 withdrawing circular dated 16th November, 2009. Thus, the situation prevalent prior to the Circular dated 7th September, 2007 was again operative for making promotions. Thereafter another Circular was issued on 23rd January, 2010 amending the circular dated 16th November, 2009 by substituting words "wherever reservation is available" with the words "wherever consequential seniority by virtue of reservation will be applicable." The issuance of so many circulars is indication of the intention of the State not to comply with the earlier decision to implement the policy of reservation in promotions and the grant of consequential seniority. Therefore, a clever statement was made before this Court on B
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A 26th April, 2010 on the basis of which the SLP was disposed of. We are of the opinion that the statement was only to avoid a decision on merits with regard to the correctness of the impugned judgment of the High Court.

B 30. When a statement is made before this Court it is, as a matter of course, assumed that it is made sincerely and is not an effort to over-reach the court. Numerous matters even involving momentous questions of law are very often disposed of by this Court on the basis of the statement made by the learned counsel for the parties. The statement is accepted as
 C it is assumed without doubt, to be honest, sincere, truthful, solemn and in the interest of justice. The statement by the counsel is not expected to be *flippant, mischievous, misleading and certainly not false*. This confidence in statements made by the learned counsel is founded on the
 D assumption that the counsel is aware that he is an officer of the Court. Here we would like to allude to the words of Lord Denning, in the case of *Rendel vs. Worsley*¹⁵ about the conduct expected of an Advocate. "As an advocate, he is a minister of justice equally with the Judge.....I say "all he
 E *honourably can*" because his duty is not only to his client. He has a duty to the Court which is *paramount*. It is a mistake to suppose that he is the mouthpiece of his client to say what he wants: or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause
 F of truth and justice. He must not consciously mis-state the facts. He must not knowingly conceal the truth. He must not unjustly make a charge of fraud, that is, without evidence to support it. He must produce all the relevant authorities, even those that are against him. He must see that his client discloses, if ordered,
 G the relevant documents, even those that are fatal to his case. He must disregard the most specific instructions of his client, if they conflicts with his duty to the court. The code which requires a Barrister to do all this is not a code of law. It is the

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 15. [1967] 1 QB 443.

code of honour.” In our opinion, the aforesaid dicta of Lord Denning is an apt exposition of the very high standard of moral, ethical and professional conduct expected to be maintained by members of the legal profession. We expect no less of an Advocate/Counsel in this country. Here, in this case, on 26th April, 2010 a statement was made on behalf of the State of H.P. that “the state intends to collect more details with regard to representation of the SCs/STs and to pass appropriate orders within a reasonable time, i.e., approximately within three months after collecting the necessary details and datas.” Having very deftly avoided a decision on merits in the SLP (C) No.30143 of 2009, the State has totally failed to live up to the solemn statement made to this Court. It has hedged and hemmed and prevaricated from 26th April, 2010 till date. In spite of the requisite data being available, the policy of reservation already adopted by the State has not been implemented. We, therefore, do not agree with Dr. Dhawan that the applicants are seeking a mandamus to adopt a policy in reservation. From the above narration, it is evident that the applicants want the State to implement its own decisions.

31. The prayer is :

“Direct the Respondent/State Government to decide the case in time bound manner on the basis of data already available/submitted to Cabinet Sub Committee on 25.4.2011 within a period of one month and ;

Further direct stay on all promotions pending decision taken in this Case.”

32. The final excuse offered by the State for not granting the aforesaid relief is that the State now awaits the finalisation of the 117th Constitution Amendment. We decline to accept the reasons put forward for not honouring the statement solemnly made to this Court on 26th April, 2010. This Court has been more than considerate to the requests made by the State for extension of time. This last excuse about awaiting the

A finalisation of the proposed 117th Constitutional Amendment is the proverbial last straw on the camel's back. As stated earlier, the proposed 117th Constitutional Amendment would not adversely affect the merits of the clam of the petitioner for grant of promotion with consequential seniority. By the aforesaid proposed amendment, the existing Article 16 clause (4A) is to be substituted by the following clause 4A:-

C “(4A) Notwithstanding anything contained elsewhere in the Constitution, the Scheduled Castes and the Scheduled Tribes notified under article 341 and article 342, respectively, shall be deemed to be backward and nothing in this article or in article 335 shall prevent the State from making any provision for reservation in matters of promotions, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes to the extent of the percentage of reservation provided to the Scheduled Castes and the Scheduled Tribes in the services of the State.”

E 33. A bare perusal of the aforesaid would show that the purpose of amendment is to remove any impediment in the grant of consequential seniority upon promotion on the basis of reservation. The aforesaid conclusion is stated explicitly in the Statement of Objects and Reasons for the proposed 117th Constitutional amendment. For facility of reference, the Statement of Objects and Reasons is reproduced hereunder:-

“Statement of Objects and Reasons

G The Scheduled Castes and the Scheduled Tribes have been provided reservation in promotions since 1955. This was discontinued following the judgment in the case of Indra Sawhney Vs. Union of India, wherein it was held that it is beyond the mandate of Article 16(4) of the Constitution of India. Subsequently, the Constitution was amended by the Constitution (Seventy-seventh Amendment) Act, 1995

and a new clause (4A) was inserted in article 16 to enable the Government to provide reservation in promotion in favour of the Scheduled Castes and the Scheduled Tribes. Subsequently, clause (4A) of article 16 was modified by the Constitution (Eighty-fifth Amendment) Act, 2001 to provide consequential seniority to the Scheduled Castes and the Scheduled Tribes candidates promoted by giving reservation. A
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The validity of the constitutional amendments was challenged before the Supreme Court. The Supreme Court while deliberating on the issue of validity of Constitutional amendments in the case of *M. Nagaraj Vs. UOI & Ors.*, observed that the concerned State 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 in promotion. C
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Relying on the judgment of the Supreme Court in *M. Nagaraj* case, the High Court of Rajasthan and the High Court of Allahabad have struck down the provisions for reservation in promotion in the services of the State of Rajasthan and the State of Uttar Pradesh, respectively. Subsequently, the Supreme Court has upheld the decisions of these High Courts striking down provisions for reservation in respective States. E
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It has been observed that there is difficulty in collection of quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment. Moreover, there is uncertainty on the methodology of this exercise. G

Thus, in the wake of the judgment of the Supreme Court in *M. Nagaraj* case, the prospects of promotion of the employees belonging to the Scheduled Castes and the Scheduled Tribes are being adversely affected. H

A Demands for carrying out further amendment in the
 Constitution were raised by various quarters. A discussion
 on the issue of reservation in promotion was held in
 Parliament on 3-5-2012. Demand for amendment of the
 Constitution in order to provide reservation for the
 B Scheduled Castes and the Scheduled Tribes in promotion
 has been voiced by the Members of Parliament. An All-
 Party Meeting to discuss the issue was held on 21-08-
 2012. There was a general consensus to carry out
 amendment in the Constitution, so as to enable the State
 C to continue the scheme of reservation in promotion for the
 Scheduled Castes and the Scheduled Tribes as it existed
 since 1995.

D In view of the above, the Government has reviewed the
 position and has decided to move the constitutional
 amendment to substitute clause (4A) of article 16, with a
 view to provide impediment-free reservation in promotion
 to the Scheduled Castes and the Scheduled Tribes and
 to bring certainty and clarity in the matter. It is also
 E necessary to give retrospective effect to the proposed
 clause (4A) of article 16 with effect from the date of
 coming into force of that clause as originally introduced,
 that is, from the 17th day of June, 1995.”

F 34. The aforesaid leaves no manner of doubt that the
 amendment is with the view to provide *impediment free*
 reservation in promotion to the Scheduled-Castes and
 Scheduled-Tribes and to bring certainty and clarity in the matter.
 Furthermore, the aforesaid proposed amendment is to be
 introduced with retrospective effect from 17th June, 1995. In
 G view of the above, there can be no impediment in the way of
 the State Government to implement the policy of reservation
 which existed till the issuance of the various instructions prior
 to the making of the Statement before this Court on 26th April,
 2010. It is time to put an end to this charade; this never ending

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process of extensions and hold the State to honour its statements. A

35. We, therefore, allow this Interlocutory Application and direct the State of Himachal Pradesh to take a final decision on the issue either on the basis of the data already submitted to the Cabinet Sub-Committee on 25th April, 2011 or on the basis of the data reflecting the position as on 30th June, 2011, within a period of three months from today. Till a final decision is taken, the direction restraining the State of Himachal Pradesh from making any promotion shall continue. B

R.P.

I.A. allowed. C