AJIT SINGH AND ORS. A

v.

THE STATE OF PUNJAB AND ORS.

SEPTEMBER 16, 1999

[DR. A.S. ANAND, C.J., K. VENKATASWAMI, G.B. PATTANAIK B
S.P. KURDUKAR AND M. JAGANNADHA RAO, JJ.]

Service Law :

Reservation in Promotion—Roster point promotees vis-a-vis-general C
candidates—Seniority—Determination of—Relevant statutory Rules providing single scheme of promotion and seniority based on seniority-cum-merit from the date of continuous officiation—Roster point promotees not promoted on the basis of seniority-cum-merit—Claim for seniority on the basis of continuous officiation—Validity of—Held, roster point promotees cannot count their D
seniority over general candidate from the date of their continuous officiation in the promotional posts—Senior general candidates at lower level reaching the promotional level later will have to be treated as senior to reserved category candidates—Seniority of reserved category candidates promoted to higher level ignoring the general category candidates has to be refixed—
However, if the reserved category candidates are otherwise eligible and posts E
are available for promotion, cannot be denied right to be considered for promotion merely because senior general candidates at initial level have not reached the promotional level—Constitution of India, 1950—Articles 14,16(1), 16(4) and 16(4A)—Punjab Secretariat Class III Service Rules, 1956.

F

Constitution of India, 1950:

Articles 16(1),16(4) and 16(4A)—Reservation in promotion—Right to be considered—Whether "Fundamental" or "Statutory"—Held, Articles 16(4) and 16(4A) do not confer any fundamental right and are only enabling G
provisions—They confer only a discretion but do not confer any duty or obligation.

Articles 16(4) and 16(4A) and 16(1) r/w 14—Reservation in promotion—Roster point promotees vis-a-vis-general candidates—Balancing of fundamental rights and rights of reserved candidate—Held, a reasonable H

A *balance has to be struck between the individual rights guaranteed under Article 16(1) and affirmative action under Articles 16(4) and 16(4A) so that there is no reverse discrimination against general candidates.*

Articles 16(4), 16(4A) and 335—Reservation in promotion—Maintenance of efficiency in administration—Necessity of.

B

Reservation in promotion—Promotions made in excess of roster point—Effect of—Held, promotions made in excess of any quota are to be treated as **adhoc**—*No seniority can be claimed from wrong application of the roster.*

Judgment—Prospectivity—Supreme Court's decision in Sabharwal and
C *Ajit Singh case—Prospective operation—Purpose and effect of.*

Respondent-State had filed the present Interlocutory Applications for 'clarification' of the Judgment of this Court in *Ajit Singh's* case. In Ajit Singh's case, a three Judge Bench of this Court observed that reserved candidates promoted at roster points cannot be treated as senior to senior
D **general candidates promoted subsequently. Similarly, earlier in *Virpal Singh's* case, a two Judge Bench of this Court held that reserved candidates promoted at roster points cannot claim seniority at promotional level against a senior general candidate promoted at later stage to the same level. However, subsequently in *Jagdish Lal's* case, a three Judge Bench of this Court held**
E **that the general rule in the Service Rules relating to seniority from the date of continuous officiation, which was applicable to candidates promoted under the normal seniority/selection procedure would also be attracted to roster point promotees as otherwise there would be discrimination against reserved candidates; the right to promotion was a statutory right while the rights of the reserved candidates under Articles 16(4) and 16(4A) were fundamental**
F **rights. Thus, the decision of this court in favour of general candidates (*Virpal Singh's* case and *Ajit Singh's* case) were reversed by the subsequent judgment of this Court (*Jagdish Lal's* case). Hence, the present Interlocutory Applications for clarification.**

G **Disposing of the applications, the Court**

HELD : 1.1. The roster point promotees (reserved category) cannot count their seniority in the promoted category from the date of their continuous officiation in the promoted post, *vis-a-vis* the general candidates who were senior to them in the lower category and who were later promoted.
H **On the other hand, the senior general candidate at the lower level, if he**

reaches the promotional level later but before the further promotion of the reserved candidate he will have to be treated as senior, at the promotional level, to the reserved candidate even if the reserved candidate was earlier promoted to that level. [555-F-G] A

Ajit Singh Januja **v.** *State of Punjab,* **[1996] 2 SCC 215 and** *Union of India* **v.** *Virpal Singh,* **[1993] 6 SCC 685, affirmed.** B

1.2. Seniority rule relating to 'continuous officiation' in promotion is part of the *general scheme* **of recruitment - by direct recruitment, promotion, etc.-in each of the services in class I, II and III and is based upon a principle of equal opportunity for promotion. It is only to such promotion that the seniority rule of 'continuous officiation' is attracted. It is not permissible to delink the seniority Rule from the recruitment Rule based on equal opportunity and apply it to promotion made on the basis of the roster which promotion are made outside the equal opportunity principle. [544-B]** C

Mohd. Bhakar **v.** *Y. Krishna Reddy,* **(1967) SLR 753 (SC);** *K. Jagadeesan* **v.** *Union of India,* **[1990] 2 SCC 228;** *Syad Khalid Rizvi* **v.** *Union of India,* **[1993] Suppl. 3 SCC 575 and** *Akhil Bharatiya Soshit Karamcahari Sangh* **v.** *Union of India,* **[1996]6 SCC 65, referred to.** D

Jagdish Lal **v.** *State of Haryana,* **[1997] 6 SCC 538 and** *Kailash Chand Joshi* **v.** *Rajasthan High Court,* **[1996]1 SCALE 752, overruled.** E

State of Maharashtra **v.** *Chandrakant Kulkarni,* **[1981] 4 SCC 130;** *Mohd. Shujat Ali* **v.** *Union of India,* **[1975] 3 SCC 76 and** *A.K. Bhatnagar* **v.** *Union of India* **[1991] 1 SCC 544, held inapplicable.**

Karam Chand **v.** *Haryana State Electricity Board,* **[1989] Suppl. 1 SCC 342 and** *General Manager, Southern Railway* **v.** *Rangachari,* **[1962] 2 SCR 586, distinguished.** F

1.3. In *Ajit Singh's* **case there were set of Rules for Class I, II and III services. The Punjab Secretariat** *Class III* **Service Rules, 1976 deal with the posts of clerk (Level 1), Assistant (Level 2) and Superintendent (Grade II) (Level 3). At each of these two levels 1 and 2, there is a roster which implements reservation. For promotion from level 1 to 2 and from Level 2 to level 3, the employees are respectively governed by Rule 7 for promotion and by Rule 9 for seniority. It is provided in** *proviso* **(iii) to Rule 7(1) that all promotions shall be made by selection on the basis of** *Seniority-cum-merit* G H

A and no person shall have a right of promotion on the basis of seniority alone. Rule 9 speaks of seniority from the date of continuous officiation. The promotion rule in Rule 7(1) *proviso* (iii) and the seniority Rule in Rule 9 under the 1976 Rules for Class III form a single scheme and are interlinked. Thus, the general candidates who are senior at Assistants' level (Level 2) and who have reached Superintendent Grade-II (Level 3) before the reserved B candidate moved to Level 4 (Supdt. Grade-I), will have to be treated as senior at the Level 3 also (Supdt. Grade-II) and it is on that basis that promotion to the post of Level 4 must be made, upon first considering the cases of the senior general candidates at Level 3. If the cases of the senior general candidates who have reached Level 3 though at a latter point of time, are not C first considered for promotion to Level 4, and if the roster point promotee at Level 3 is treated senior and promoted to Level 4, there will be violation of Articles 14 and 16(1) of the Constitution of India. Thus, in cases where the reserved candidate has reached to Level 4 ignoring the seniority of the senior general candidate at Level 3, seniority at Level 4 has to be refixed (when the junior general candidate is promoted to Level 4) on the basis of D when the time of reserved candidate for promotion to Level 4 would have come if the case of the senior general candidates was considered at Leval 3 in due time. However, the contention of general candidates that at Level 3, the roster candidate must wait at Level 3 before being promoted to Level 4— till the last senior general candidate at Level 1 reaches Level 3 cannot be E accepted as that will not amount to a reasonable balancing of the rights of the candidates in the two groups. If reserved category candidate is otherwise eligible and posts are available for promotion to Level 4, they cannot be denied right to be considered for promotion to Level 4, merely because erstwhile seniors at the entry levels have not reached Level 3. That, is the correct approach for balancing the fundamental rights under Articles 14 F and Article 16(1) on the one hand and the provisions relating to reservation in Article 16(4) and Article 16(4A). [543-E-F; 544-D; 556-E to H; 557-A]

Ajit Singh Januja v. *State of Punjab,* [1996] 2 SCC 215, affirmed.

G 2. The right to equal opportunity in the matter of promotion in the sense of a right to be "considered" for promotion is indeed a fundamental right guaranteed under Article 16(1). Article 16(1) provides to every employee otherwise eligible for promotion or who comes within the zone of consideration, a fundamental right to be "considered" for promotion. Equal opportunity here means the right to be "considered" for promotion. If a H person satisfies the eligibility and zone criteria but is not considered for

promotion, then there will be a clear infraction of his fundamental right to be "considered" for promotion, which is his personal right. However, both Articles 16(4) and 16(4A) dealing with reservation to SC/ST do not confer any fundamental right nor do they impose any constitutional duty but are only in the nature of enabling provision vesting a discretion in the State to consider providing reservation if the circumstances mentioned in those Articles so warranted. There is a marked difference in the language employed in Article 16(1) on the one hand and Article 16(4) and Article 16(4A). There is no directive or command in Article 16(4) or Article 16(4A) as in Article 16(1). But a reasonable balance has to be struck between the fundamental rights guaranteed under Article 16(1) and affirmative action under Articles 16(4) and 16(4A) so that the affirmative action does not lead to reverse discrimination. [536-F; 535-A-B; 538-A-B; 537-A]

C.A. Rajendran v. *Union of India,* [1968] 1 SCC 721; *Post Graduate Institute of Medical Education & Research* v. *Faculty Association,* [1998] 4 SCC 1, followed.

P&T SC/ST Employees' Welfare Association v. *Union of India,* [1998] 4 SCC 147; *SBI SC/ST Employees Welfare Association* v. *State Bank of India,* [1996] (4) SCC 119; *M.R. Balaji* v. *State of Mysore,* [1963] Suppl. 1 SCR 439 and *Akhil Bharatiya Soshit Karamchari Sangh (Railway)* v. *Union of India,* [1981]1 SCC 246, relied on.

Commissioner of Police v. *Gordhandas Bhanji,* [1952] SCR 135; *Triloki Nath Khosla* v. *State of Jammu and Kashmir,* [1974] 1 SCC 19 and *State of Kerala* v. *Thomas,* [1976] 2 SCC 310, referred to.

Julius v. *Lord Bishop,* [1880] 5 AS 214; *Richmond* v. *Croson and Co.,* [1989] 488 U.S. 469 and *Adarand Constructors Inc* v. *Pena,* [1995] 515 U.S. 200, referred to.

Jagdish Lal v. *State of Haryana,* [1997] 6 SCC 538; *Ashok Kumar Gupta* v. *State of U.P.,* [1997]5 SCC 201; *Comptroller and Auditor General of India Gian Prakash* v. *K.S. Jagannathan,* [1986] 2 SCC 679 and *Superintending Engineer, Public Health* v. *Kuldeep Singh,* [1997] 9 SCC 199, over ruled.

3. It is necessary to see that the rule of adequate representation in Article 16(4) for the Backward Classes and the rule of adequate representation in promotion for scheduled Castes and Scheduled Tribes under Article

A 16(4A) do not adversely affect the efficiency in administration. In fact, Article 335 takes care to make this an express constitutional limitation upon the discretion vested in the State while making provision for adequate representation for the Scheduled Castes/Tribes. Thus, in the matter of due representation in service for Backward Classes and Scheduled Castes and
B Tribes, maintenance of efficiency of administration is of paramount importance. The provisions of the Constitution must be interpreted in such a manner that a sense of competition is cultivated among all service personnels, including the reserved categories. [541-F-G]

4. It cannot be accepted that *Indira Sawhney's* case permitted
C reservations in promotions for a further period of 5 years and that during that period Article 16(4A) was incorporated in Part III of the Constitution and, therefore, the concept of seniority attached to the roster promotion, as per certain rulings then in force, must be deemed to continue and deemed to be permissible in view of Article 16(4A). *Indira Sawhney's case* did not go into issues relating to seniority and on the other hand it referred to the
D principle of balancing Article 16(4) against the right of the individual under Article 16(1). [551-B-C-D]

Indira Sawhney v. *Union of India,* [1992] Suppl. 3 SCC 251, explained and relied on.

E 5. The decision in *Mervyn's* case cannot apply to a case of reservation because the roster in *Mervyn* was intended to determine seniority while the rostar in the cases of reservation under Article 16(4) or Article 16(4A) are *not* intended to determine seniority but are merely intended to provide *'adequate representation"* at the promotional level. [552-E-F]

F *Mervyn Contindo & Ors.* v. *Collector of Customs,* [1966] 3 SCR 600, distinguished.

6.1. It is axiomatic in service jurisprudence that any promotions made wrongly in excess of any quota are to be treated as *ad hoc.* This applies to
G reservation quota as much as it applies to direct recruits and promotee cases. Such promotees cannot plead for grant of any additional benefit of seniority flowing from a wrong application of the roster. Before *Sabharwal's* case was decided, several reserved candidates got promotion in excess of their quota due to wrong application of the roster points. If the law declared in *Sabbarwal's* case were to be treated as retrospective, it would have resulted
H in reversion of several officers. This court therefore, to prevent such

reversions, declared that the finding in *Sabharwal's* case shall be operative prospectively. Thus, while promotions in excess of roster made before 10.2.95 i.e. before *Sabharwal's* case was decided were protected, such promotees cannot claim seniority. Seniority in the promotional cadre of such excess roster point promotees shall have to be reviewed after 10.2.95 and will count only from the date on which they would have otherwise got normal promotion in any future vacancy arising in a post previously occupied by a reserved candidate. [559-F-G-H; 560-A]

R.K. Sabharwal v. *State of Punjab,* **[1995] 2 SCC 745, explained and affirmed.**

6.2. Where before 1.3.96 i.e. the date of *Ajit Singh's* Judgment, at the level 3 there were reserved candidates who reached there earlier and also senior general candidates who reached there later, (but before the reserved candidate was promoted to level 4) and when inspite of the fact that the senior general candidate had to be treated as senior at level 3 (in view of *Ajit Singh),* the reserved candidate is further promoted to level 4 - without considering the fact that the senior general candidate was also available at level 3 - then, after 1.3.96, it becomes necessary to review the promotion of the reserved candidate to level 4 and reconsider the same (without causing reversion to the reserved candidate who reached level 4 *before 1.3.96*). As and when the senior reserved candidate is later promoted to level 4, the seniority at level 4 has also to be refixed on the basis of when the reserved candidate at level 3 would have got his normal promotion, treating him as junior to the senior general candidate at level 3. [560-D-E-F]

Ajit Singh Januja v. *State of Punjab,* **[1996] 2 SCC 215, explained and affirmed.**

Chander Paul v. *State of Haryana,* **[1997] 10 SCC 474, referred to.**

CIVIL APPELLATE JURISDICTION : I.A. Nos. 1-3 In Civil Appeal Nos. 3792-94 of 1989.

From the Judgment and Order dated 23.8.89 of the Punjab and Haryana High Court in C.W.P. Nos. 2190/88, 7860/87, 7861 of 1987.

C.S. Vaidyanathan, Additional Solicitor General, Harish N. Salve, Dr. Rajiv Dhawan, Hardev Singh, D.D. Thakur, L.G. Havnur, K. Parasaran, M.N. Rao, Rajiv K. Garg, Preetesh Kapur, Atul Sharma, N.D. Garg, Rajiv Dutta, Ms. Enakashi Kulshreshtha, Uday Kumar, Kapil Sharma, Hemant Sharma, K.C.

A Kaushik, (D.S. Mehra) Advs. for Ms. Anil Katiyar, Chand Kiran, Dr. K.S. Chauhan, E.C. Vidyasagar, Muqbal Chand, Prof. D.N. Sadashiv, A. Raghnath, A. Subba Rao, Anurag Mathur, Pradeep R. Tiwari, A. Mariarputham, Ms. Aruna Mathur, A.D.N. Rao, (R.S. Suri) (NP) and Ms. Sushma Suri for the appearing parties.

B The Judgment of the Court was delivered by

M. JAGANNADHA RAO, J. We have before us these three Interlocutory Applications Nos. 1 to 3 filed for "clarification" by the State of Punjab in Civil Appeal Nos. 3792-94 of 1989 (*Ajit Singh Januja & Others* v. *State of Punjab*) [1996] 2 SCC 215 (hereinafter referred to as *Ajit Singh* in this C judgment). The matter concerns a dispute relating to seniority of reserved candidates and general candidates.

At the outset we make it clear that in this judgment we are not concerned with the reservation policy of the State or with the validity of any procedure D fixing roster points for purpose of promotion of reserved candidates. We are here dealing only with a limited question relating mainly to seniority of the reserved candidates promoted at roster points.

We also make it clear that what we are deciding today is based on principles already laid down by this Court since 1950 and in particular since E 1963. Basing on those principles, we are concerned with the limited question as to whether *Union of India* v. *Virpal Singh,* [1993] 6 SCC 685 and *Ajit Singh Januja* v. *State of Punjab,* [1996] 2 SCC 215, which were earlier decided in favour of the general candidates are to be affirmed or whether the latter deviation made in *Jagdish Lal* v. *State of Haryana,* [1997] 6 SCC 538 against the general candidates, is to be accepted.

F

How these IAs 1-3 came to be filed for clarification?

The circumstances under which the State of Punjab has filed these IAs for clarification are as follows :

G Initially, in a case relating to the Indian Railways, a two Judge Bench of this Court in *Union of India* v. *Virpal Singh,* [1995] 6 SCC 685 (hereinafter referred to as Virpal) held that it was "*permissible*" for the Railways to say that reserved candidates who get promotion at the roster points would not be entitled to claim seniority at the promotional level as against senior general candidates who got promoted at a later point of time to the same level. It was H further held that "*it would be open*" to the State to provide that as and when

the senior general candidate got promoted under the rules - whether by way of a seniority rule or a selection rule - to the level to which the reserved candidate was promoted earlier, the general candidate would have to be treated as senior to the reserved candidate (the roster point promotee) at the promotional level as well, unless, of course, the reserved candidate got a further promotion by that time to a higher post. (This is described for convenience, as the 'catch up' rule)

Close on the heels of *Virpal*, came *Ajit Singh* from Punjab, before a three Judge Bench and the Bench held that the question of seniority at the promotional level had to be decided by applying the provisions of Articles 14 and 16 (1) and if any order, circular or rule provided that such reserved candidates who got promotions at roster points were to be treated as senior to the senior general candidates who were promoted later, then such an order, circular or rule would be violative of Articles 14 and 16(1). It was, however, held that the position would be different if by the time the senior general candidate got his promotion under the normal rules of seniority or selection, the reserved candidate who was promoted earlier at the roster point, had got a further promotion. In other words, the 'catch up' principle as laid down in *Virpal* was accepted. In coming to the above conclusions, the three Judge Bench relied upon the principles laid down by the nine Judge Bench in *Indira Sawhney* v. *Union of India,* [1992] Suppl. 3 SCC 251 and by the Constitution Bench in *R.K. Sabharwal* v. *State of Punjab,* [1995] 2 SCC 745. These two cases had laid down earlier the manner in which the rights of the general candidates and the reserved candidates ought to be balanced. In *Ajit Singh* the Court said the balance must be maintained in such a manner that there was no reverse discrimination against the general candidates and that any rule, circular or order which gave seniority to the reserved candidates promoted at roster point, would be violative of Articles 14 and 16(1) of the Constitution of India.

The *Indian Railways* following the law laid down in *Virpal* issued a circular on 28.2.97 tc the effect that the reserved candidates promoted at roster points could not claim seniority over the senior general candidates promoted later. The State of Punjab after following *Ajit Singh* was proceeding to revise seniority lists and make further promotions of the senior general candidates who had reached the level to which the reserved candidates had reached earlier.

At that point of time, another three Judge Bench came to decide a case from the State of Haryana in *Jagdish Lal* v. *State of Haryana,* [1997] 6 SCC

538 and took a view contrary to *Virpal* and *Ajit Singh*. It held that the general rule in the Service Rules relating to seniority from the date of continuous officiation which was applicable to candidates promoted under the normal seniority/selection procedure would be attracted even to the roster point promotees as otherwise there would be discrimination against the reserved candidates. The Bench also observed that the right to promotion was a statutory right while the rights of the reserved candidates under Article 16(4) and Article 16(4A) were fundamental rights and in that behalf, it followed *Ashok Kumar Gupta* v. *State of U.P.*, [1997] 5 SCC 201 where a similar principle had been laid down.

The Contentions in brief:

Sri Hardev Singh, learned senior counsel for the State of Punjab submitted that since *Jagdish Lal* decided something contrary to *Virpal* and *Ajit Singh* the State was in a '*quandary*' what to do.

In these IAs and the connected batch of cases which have been listed together and heard, contentions have been raised by Sri Rajeev Dhawan for the State of Haryana and Sri Altaf Ahmad, Additional Solicitor General of India for the State of Rajasthan and by Shri C.S. Vaidyanathan Addl. Solicitor General of India for the Union of India. According to the learned counsel the 'roster point promotees', (i.e. a reserved candidate at Level 1 who is promoted to Level 2 at the roster point meant for such promotion) namely, the reserved candidates cannot claim seniority on the basis of continuous officiation. However, learned Additional Solicitor General, Sri C.S. Vaidyanathan for the Indian Railways has taken a contrary stand, in spite of the fact that Railways has already accepted *Virpal* and issued a circular on 28.2.1997—that roster point promotions in the Railways did not confer seniority. Senior counsel Sri Harish Salve and others for the general candidates contended that *Virpal* and *Ajit Singh* were correctly decided and *Jagdish Lal* was wrongly decided. Senior counsel Sri K. Parasaran, Sri D.D. Thakur, Sri M.N. Rao and others including Sri Jose P. Verghese for the reserved candidates relied upon *Jagdish Lal* and they contended that *Virpal* and *Ajit Singh* were wrongly decided. The validity of the 'catch-up' rule accepted in Virpal and *Ajit Singh* in favour of general candidates was also put in issue.

One additional point was also argued. This related to the "prospectivity" of *R.K. Sabharwal* and *Ajit Singh*. In *R.K. Sabharwal* this Court has held that once the roster point promotions were all made in respect of the reserved candidates, the roster ceased to operate. Unless any of the reserved candidates already promoted had retired or been further promoted etc. and unless there

was a vacancy generated at the points already filled, fresh candidates from the reserved candidates could not be promoted by further operation of the roster. Having so held, the Court said that the judgment would be "*prospective*". The reserved candidates now contend that the above direction means that not only the reserved candidates so promoted in excess of the roster points could not be reverted but that their seniority against such excess promotions was also protected vide *Sabharwal.*

Likewise, in regard to *Ajit Singh*, the contention was as follows: Assume there are rosters at Level 1 and again at Level 2. Assume that a reserved candidate has been promoted from Level 1 to Level 2 on the basis of the roster point and again from Level 2 to Level 3 on roster point. A senior general candidate at Level 1 has later reached Level 3 and by that date the reserved candidate is still at Level 3. Assume that the plea of the general candidates that the general candidate became senior at Level 3 to the earlier promoted reserved candidate, is correct. Ignoring the senior general candidate at Level 3, the reserved candidate has been further promoted to Level 4 before 1.3.96 when *Ajit Singh* was decided. In that event, the prospective operation of *Ajit Singh* means, according to the reserved candidates, that such a reserved candidate is not only not to be reverted but his seniority at Level 4 is also to be protected. The general candidates say that after *Ajit Singh* was decided on 1.3.96 the said promotion made to Level 4, ignoring the case of the senior general candidate at Level 3, is to be reviewed and seniority at Level 3 is to be refixed. At Level 4, when the general candidate is also promoted to Level 4, the seniority of the reserved candidate has also to be fixed on the basis as to when he would have otherwise been promoted to Level 4, after considering the case of his senior general candidate at Level 3.

We shall be dealing with these main contentions in this judgment. So far as the individual points raised in the Civil Appeals, Contempt Cases and other IAs are concerned, we shall deal with them by separate judgments for convenience.

On the above contentions, the following four main points arise for consideration:

Points:

(1) Can the roster point promotees (reserved category) count their seniority in the promoted category from the date of their

A continuous officiation *vis-a-vis* general candidates who were senior to them in the lower category and who were later promoted to the same level?

(2) Have *Virpal, Ajit Singh* been correctly decided and has *Jagdish Lal* been correctly decided?

B (3) Whether the 'catch-up' principles contended for by the general candidates are tenable?

(4) What is the meaning of the 'prospective' operation of *Sabbarwal* and to what extent can *Ajit Singh* be prospective?

C *Points (1) and (2):*

A word with regard to Article 16(4) and Article 16 (4A):

Learned senior counsel for the general candidates submitted at the outset that while *Indira Sawhney* permitted reservations for a period of five years, the Constitution was amended within the said period and Article D 16(4A) was incorporated permitting reservation in promotions but restricting the same to Scheduled Castes and Scheduled Tribes. Learned counsel submitted that it was their contention that this amendment was not constitutionally permissible but this question need not be decided in this batch as separate writ petitions challenging the validity of Article 16(4A) are E pending in this Court. In view of the above stand, we shall proceed in these cases on the assumption that Article 16(4A) is valid and is not unconstitutional. At the same time, we also note the contention of the reserved candidates that Article 16(4A) must be deemed to be constitutional unless otherwise declared.

F *Articles 16(1), 16(4) and 16(4A):*

In the context of the first and second questions, it is necessary to refer to the relevant parts of Article 16 of the Constitution of India.

Sub-clauses (1), (4) and (4A) of Article 16 which have relevance in this G case read as follows:

> "*Article 16(1)—Equality of appointment in matters of public employment*—There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

H

(2)..... A

(3).....

(4) *Nothing* in this Article *shall prevent* the State from making any provision for the reservation of appointment or posts in favour of any backward class of citizens which, in the opinion of the State, is not B adequately represented in the services under the State.

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

Constitution is not static:

We shall at the outset deal with the contention raised by Sri D.D.Thakur, learned senior counsel appearing for the reserved candidates that Article D 16(4) must be interpreted keeping in mind the conditions prevailing fifty years ago when the Constitution was drafted and when Article 16(4) was incorporated in the Constitution. Learned counsel submitted that the founding fathers were conscious that a special provision for reservation was necessary to see that the backward classes of citizens were adequately represented in the services. Hence an interpretation which would advance the said objective must be E applied. Reliance was also placed on the Statement of Objects and Reasons in connection with the incorporation of Article 16(4A). In fact, all the learned counsel appearing for the reserved candidates contended that the said officers could not be treated as equals to the general candidates and that their backwardness and past social oppression must be borne in mind.

F

Nobody can deny that the above approach is the proper one while dealing with the reserved classes. The primary purpose of Article 16(4) and Article 16(4A) is due representation of certain classes in certain posts. However, we must bear in mind and not ignore that there are other provisions, namely, Articles 14, 16(1) and Article 335 of the Constitution which are also very G important. The Constitution has laid down in Articles 14 and 16(1) the permissible limits of affirmative action by way of reservation under Articles 16(4) and 16(4A). While permitting reservations at the same time, it has also placed certain limitations by way of Articles 14 and 16(1) so that there is no reverse discrimination. It has also incorporated Article 335 so that the efficiency of administration is not jeopardized. H

A While interpreting provisions of the Constitution and in particular fundamental rights of citizens, it is well to bear in mind certain fundamental concepts. In *McCulloch* v. *Maryland,* (1819) 4 Wheel (17 U.S. 316), Chief Justice Marshall cautioned that we must keep in mind that it is the Constitution that we are expounding. He said that the Constitution was intended to endure for ages to come and had consequently to be adapted to the various crises B of human affairs from time to time. Brandeis J wrote : "Our Constitution is not a straight jacket. It is a living organism. As such it is capable of growth, of expansion and of adaptation to new conditions. Growth implies changes, political, economic and social. Growth which is significant manifests itself rather in intellectual and moral conceptions of material things" (Brandeis C Papers, Harvard Law School). Similarly, in a beautiful metaphor Mr. J.M. Beck said as follows:

"The Constitution is neither, on the one hand, a Gibraltor Rock, which wholly resists the ceaseless washing of time and circumstances, nor is it, on the other hand, a sandy beach, which is slowly destroyed by erosion of the D waves. It is rather to be likened to a floating dock which, while firmly attached to its moorings, and not therefore at the caprice of the waves, *yet rises and falls with the tide of time and circumstances*" (Constitution of the United States, Yesterday, Today and Tomorrow' (1924) (Oxford University Press)."

E Such should be and would be our approach in resolving the important constitutional issues arising in these IAs and in this batch of cases.

We shall first deal with the fundamental rights under Articles 14 and 16(1) and then with the nature of the rights of the reserved candidates under Articles 16(4) and 16(4A).

F *Articles 14 and 16(1): Is right to be considered for promotion a fundamental right*?

Article 14 and Article 16(1) are closely connected. They deal with individual rights of the person. Article 14 demands that the "State shall not G deny to any person equality before the law or the equal protection of the laws". Article 16(1) issues a positive command that "there shall be equality of opportunity for all citizens in the matters relating to employment or appointment to any office under the State". It has been held repeatedly by this Court that sub-clause (1) of Article 16 is a facet of Article 14 and that it takes its roots from Article 14. The said sub-clause particularizes the H generality in Article 14 and identifies, in a constitutional sense "equality of

opportunity" in matters of employment and appointment to any office under the State. The word 'employment' being wider, there is no dispute that it takes within its fold, the aspect of promotions to posts above the stage of initial level of recruitment. Article 16(1) provides to every employee otherwise eligible for promotion or who comes within the zone of consideration, a fundamental right to be "considered" for promotion. Equal opportunity here means the right to be "considered" for promotion. If a person satisfies the eligibility and zone criteria but is not considered for promotion, then there will be a clear infraction of his fundamental right to be "considered" for promotion, which is his personal right.

"Promotion" based on equal opportunity and 'seniority' attached to such promotion are facets of fundamental right under Article 16(1):

Where promotional avenues are available, seniority becomes closely interlinked with promotion provided such a promotion is made after complying with the principle of equal opportunity stated in Article 16(1). For example, if the promotion is by rule of 'seniority-cum- suitability', the eligible seniors at the basic level as per seniority fixed at that level and who are within the zone of consideration must be first considered for promotion and be promoted if found suitable. In the promoted category they would have to count their seniority from the date of such promotion because they get promotion through a process of equal opportunity. Similarly, if the promotion from the basic level is by selection or merit or any rule involving consideration of merit, the senior who is eligible at the basic level has to be considered and if found meritorious in comparison with others, he will have to be promoted first. If he is not found so meritorious, the next in order of seniority is to be considered and if found eligible and more meritorious than the first person in the seniority list, he should be promoted. In either case, the person who is first promoted will normally count his seniority from the date of such promotion. (There are minor modifications in various services in the matter of counting of seniority of such promotees but in all cases the senior most person at the basic level is to be considered first and then the others in the line of seniority). That is how right to be considered for promotion and the 'seniority' attached to such promotion become important facets of the fundamental right guaranteed in Article 16(1).

Right to be considered for promotion is not a mere statutory right:

The question is as to whether the right to be considered for promotion is a mere statutory right or a fundamental right.

A Learned senior counsel for the general candidates submitted that in *Ashok Kumar Gupta* v. *State of U.P.*, [1997] 5 SCC 201, it has been laid down that the right to promotion is only a "statutory right" while the rights covered by Articles 16(4) and 16(4A) are "fundamental rights". Such a view has also been expressed in *Jagdish Lal* and some other latter cases where these cases have been followed. Counsel submitted that this was not the correct B constitutional position.

In this connection our attention has been invited to para 43 of *Ashok Kumar Gupta*. It reads as follows:

> C "It would thus be clear that right to promotion is a statutory right. It is not a fundamental right. The right to promotion to a post or class of posts depends upon the operation of the conditions of service. Article 16(4) read with Articles 16(1) and 14 guarantees a right to promotion to Dalits and Tribes as a fundamental right where they do not have adequate representation consistently with the efficiency of D administration... before expiry thereof (i.e. 5 years rule), Article 16(4) has come into force from 17.6.1995. Therefore, the right to promotion continues as a constitutionally guaranteed fundamental right."

A similar view was expressed in *Jagdishlal* and followed in some latter cases. In the above passage, it was laid down that promotion was a statutory E right and that Articles 16(4) and 16(4A) conferred fundamental rights.

In our opinion, the above view expressed in *Ashok Kumar Gupta*, and followed in *Jagdish Lal* and other cases, if it is intended to lay down that the right guaranteed to employees for being "considered" for promotion according to relevant rules of recruitment by promotion (i.e. whether on basis F of seniority or merit) is only a statutory right and not a fundamental right, we cannot accept the proposition. We have already stated earlier that the right to equal opportunity in the matter of promotion in the sense of a right to be "considered" for promotion is indeed a fundamental right guaranteed under Article 16(1) and this has never been doubted in any other case before *Ashok* G *Kumar Gupta*, right from 1950.

Articles 16(4) and 16(4A) do not confer any fundamental right to reservation:

We next come to the question whether Article 16(4) and Article 16(4A) H 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.....". There is a marked difference in the language employed in Article 16(1) on the one hand and Article 16(4) and Article 16(4A). There is no directive or command in Article 16(4) or Article 16(4A) as in Article 16(1). On the face of it, the above language in each of Articles 16(4) and 16(4A), is in the nature of an enabling provision and it has been so held in judgments rendered by Constitution Benches and in other cases right from 1963.

We may in this connection point out that the attention of the learned Judges who decided *Ashok Kumar Gupta* and *Jagdish Lal* was not obviously drawn to a direct case decided by a Constitution Bench in *C.A.Rajendran* v. *Union of India,* [1968] 1 SCC 721 which arose under Article 16(4). It was clearly laid down by the five Judge Bench that Article 16(4) was only an enabling provision, that Article 16(4) was not a fundamental right and that it did not impose any constitutional duty. It only conferred a *discretion* on the State. The passage in the above case reads 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 reservation for Scheduled Castes and Scheduled Tribes, either at the initial stage or at the stage of promotion. In other words, Article 16(4) *is an enabling provision* and confers *discretionary power* on the State to make a reservation of appointment in favour of backward class of citizens which, in its opinion, is not adequately represented in the services of the State."

The above principle was reiterated in two three Judge Bench judgments in *P&T SC/ST Employees' Welfare Association* v. *Union of India,* [1988] 4 SCC 147; and in *SBI SC/ST Employees Welfare Association* v. *State Bank of India,* [1996] 4 SCC 119. In fact, as long back as in 1963, in *M.R.Balaji* v. *State of Mysore,* [1963] Suppl. 1 SCR 439 (at p. 474) which was decided by Five learned Judges, the Court said the same thing in connection with Articles 15(4) and Article 16(4). Stating that Articles 15 (4) and 16 (4) were only enabling provisions, Gajendragadkar, J. (as he then was) observed:

> "In this connection, it is necessary to emphasise that Article 15 (4) like Article 16 (4) is an enabling provision, it does not impose an obligation, but merely leaves it to the discretion of the appropriate government to take suitable action, if necessary."

A Unfortunately, all these rulings of larger Benches were not brought to the notice of the Bench which decided *Ashok Kumar Gupta* and *Jagdish Lal* and to the Benches which followed these two cases. In view of the overwhelming authority right from 1963, we hold that both Articles 16(4) and 16(4A) do not confer any fundamental rights nor do they impose any constitutional duties but are only in the nature of enabling provision vesting
B a discretion in the State to consider providing reservation if the circumstances mentioned in those Articles so warranted. We accordingly hold that on this aspect *Ashok Kumar Gupta, Jagdishlal* and the cases which followed these cases do not lay down the law correctly.

C *Power is coupled with duty:*

Learned senior counsel for the reserved candidates, Sri K.Parasaran however contended that Article 16(4) and Article 16(4A) confer a power coupled with a duty and that it would be permissible to enforce such a duty by issuing a writ of mandamus. Reliance for that purpose was placed upon
D *Comptroller and Auditor General of India, Gian Prakash* v. *K.S. Jagannathan,* [1986] 2 SCC 679 and also on *Julius* v. *Lord Bishop,* (1880) 5 AC 214 which case was followed by this Court in *Commissioner of Police* v. *Gordhandas Bhanji,* [1952] SCR 135. We are unable to agree with the above contention. As pointed out earlier, the Constitution Bench of this Court in *C.A. Rajendran*
E v. *Union of India,* [1968] 1 SCR 721 held that Article 16(4) conferred a discretion and did not create any constitutional duty or obligation. In fact, in that case, a mandamus was sought to direct the Government of India to provide for reservation under Article 16(4) in certain Class I and Class II services. The Government stated that in the context of Article 335 and in the interests of efficiency of administration at those levels, it was of the view that
F there should be no reservation. The said opinion of the Government was accepted by this Court as reasonable and mandamus was refused. Even in *M.R. Balaji's* case, the Constitution Bench declared that Article 16(4) conferred only a discretion. It is true that in *Jagannathan's* case, the three Judge Bench issued a mandamus, after referring to Article 142, that the Government must
G add 25 marks to SC/ST candidates who had taken the S.A.S. Examination for promotion as Section Officers and also that, in future, a reduced minimum marks must be provided and announced before the examination. The Court also observed that the Department had not passed orders as per a general O.M. of the Government dated 21.9.1977. But the attention of the Court was not drawn to the judgment of the Constitution Bench in *C.A. Rajendran's* case
H and other cases to which we have referred earlier. Further, if the State is of

the opinion that in the interests of efficiency of administration, reservation or relaxation in marks is not appropriate, then it will not be permissible for the Court to issue a mandamus to provide for reservation or relaxation. We also note that in *Superintending Engineer, Public Health* v. *Kuldeep Singh,* [1997] 9 SCC 199, *Jagannathan's* case was followed and reference was made to Article 16(4) and Article 16(4A) and to the principle that where a power is coupled with a duty as in *Julius* v. *Lord Bishop* and *Commissioner of Police* v. *Gordhandas Bhanji*, the same could be enforced by the Court. But we may point out that even in *Kuldeep Singh's* case, no reference was made to *C.A. Rajendran* and other cases. We, accordingly, hold that the view in *Jagannathan* and *Kuldeep Singh's* cases 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 said to be laying down the correct law.

Balancing of fundamental rights under Article 16(1) and the rights of reserved candidates under Articles 16(4) and 16(4A):

Having noticed that Article 16(1) deals with a fundamental right and Article 16(4) and Article 16(4A) are enabling provisions, we next come to the need for balancing Article 16(1) and Articles 16(4) and 16(4A). Such a balancing principle was enunciated by the Constitution Bench in 1963 in *M.R. Balaji* v. *State of Mysore*, [1963] Suppl. 1 SCR 439 wherein it was stated that the interests of the reserved classes must be balanced against the interests of other segments of society. In *Indira Sawhney's* case, Jeevan Reddy, J. explained how the fundamental right of the citizens as declared in Article 16(1) has to be balanced against the claims of the reserved candidates in Article 16(4). The learned Judge stated: (See page 734 para 808):

> "It needs no emphasis to say that the principal aim of Articles 14 and 16 is equality and equality of opportunity and that clause (4) of Article 16 is a means of achieving the very same objective. Clause (4) is a special provision - though not an exception to clause (1). Both the provisions have to be harmonised keeping in mind the fact that both are restatements of the principles of equality enshrined in Article 14. The provision under Article 16(4) - conceived in the interests of certain sections of society - should be balanced against the guarantee of equality enshrined in *clause (1) of Article 16 which is a guarantee held out to every citizen and to the entire society*".

The same principle was reiterated in the judgment of the Constitution

A Bench in *Post Graduate Institute of Medical Education and Research* v. *Faculty Association,* [1998] 4 SCC 1 after referring to several earlier cases. It was stated : (P. 22)

> "The doctrine of equality of opportunity in clause (1) of Article 16 is to be reconciled in favour of backward classes under clause (4) of
B Article 16 in such a manner that the latter while serving the cause of backward classes shall not unreasonably encroach upon the field of equality."

In *Ajit Singh,* in the context of seniority for the roster point promotees it was observed : (p. 733 of SCC)
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> "For attracting meritorious and talented persons into service, a balance has to be struck, while making provisions for reservation in respect of a section of the society. This Court from time to time has been issuing directions to maintain that balance...."

D The above approach in *Balaji* in 1963, *Indira Sawhney* in 1991 later in *Ajit Singh* in 1996 and in *PGI* Case in 1998 for striking a balance between the individuals' rights under Articles 14 and 16(1) on the one hand and affirmative action under Articles 16(4) and 16(4A) on the other, appears to us to be on the same lines as the approach of the U.S. Supreme Court under the Equal
E Protection Clause in *Richmond* v. *Croson and Co.,* (1989) 488 U.S. 469 (at 493). In that case, it was stated that while dealing with the affirmative action taken in favour of African-Americans, the Equal Protection Clause which conferred individual rights have to be kept in mind by the Courts. Justice Sandra Day O'Connor observed:

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> "The Equal Protection Clause of the Fourteenth Amendment provides that "No State shall ....deny to any person within its jurisdiction the equal protection of the laws" (emphasis added). As this Court has noted in the past, the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individuals. The rights established are personal rights" (*Shelly* v. *Kraemer*) 334
G U.S. (1948)."

The same learned Judge, Justice Sandra Day O'Connor, stated again recently in *Adarand Constructors Inc* v. *Pena,* (1995) 515 U.S.200, that in such matters relating to affirmative action, the Court would launch an inquiry to ensure that the
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"*personal right* to equal protection of the laws has not been infringed." A

Thus this Court has to ensure that, in matters relating to affirmative action by the State, the rights under Articles 14 and 16 of the individual to equality of opportunity, are not affected. A reasonable balance has to be struck so that the affirmative action does not lead to reverse discrimination. We shall here refer to the speech of Dr. Ambedkar in the Constituent Assembly: B

> "Supposing, for instance, we were to concede in full the demands of these communities who have not been so far employed in the public services to the fullest extent, what would really happen is, we shall be completely *destroying the first proposition* upon which we are all agreed, that there shall be equality in opportunity." C

Krishna Iyer, J. also cautioned in *Akhil Bharatiya Soshit Karamchari Sangh (Railway)* v. *Union of India,* [1981] 1 SCC 246 (at P.286) that "care must be taken to see that classification is not pushed to such an extreme point as to make the fundamental right to equality cave in and collapse". The learned Judge relied upon *Triloki Nath Khosla* v. *State of Jammu and Kashmir,* [1974] 1 SCC 19 and *State of Kerala* v. *Thomas,* [1976] 2 SCC 310. Krishna Iyer, J. stated in *Soshit Karamchari* case, (para 102) that reservations cannot lead to an 'overkill'. At page 301, His Lordship said: D

> "The remedy of 'reservations' to correct inherited imbalances must not be an overkill." E

In other words, affirmative action stops where reverse discrimination begins.

(i) Efficiency of administration and Article 335:

It is necessary to see that the rule of adequate representation in Article 16(4) for the Backward Classes and the rule of adequate representation in promotion for Scheduled Castes and Scheduled Tribes under Article 16(4A) do not adversely affect the efficiency in administration. In fact, Article 335 takes care to make this an express constitutional limitation upon the discretion vested in the State while making provision for adequate representation for the Scheduled Castes/Tribes. Thus, in the matter of due representation in service for Backward Classes and Schedule Castes and Tribes, maintenance of efficiency of administration is of paramount importance. As pointed in *Indira Sawhney*, the provisions of the Constitution must be interpreted in such a manner that a sense of competition is cultivated among all service personnel, including the reserved categories. F G H

(ii) Reservation and effect of the Roster Point reservation:

It must be noted that whenever a reserved candidate goes for recruitment at the initial level (say Level 1), he is not going through the normal process of selection which is applied to a general candidate but gets appointment to a post reserved for his group. That is what is meant by 'reservation'. That is the effect of 'reservation'.

Now in a case where the reserved candidate has not opted to contest on his merit but has opted for the reserved post, if a roster is set at Level 1 for promotion of the reserved candidate at various roster points to level 2, the reserved candidate if he is otherwise at the end of the merit list, goes to Level 2 without competing with general candidates and he goes up by a large number of places. In a roster with 100 places, if the roster points are 8, 16, 24 etc. at each of these points the reserved candidate if he is at the end of the merit list, gets promotion to Level 2 by side-stepping several general candidates. That is the effect of the roster point promotion.

It deserves to be noticed that the roster points fixed at Level 1 are not intended to determine any seniority at Level 1 between general candidates and the reserved candidates. This aspect we shall consider again when we come to *Mervyn Contindo* v. *Collector of Customs,* [1966] 3 SCR 600 lower down. The roster point merely becomes operative whenever a vacancy reserved at Level 2 becomes available. Once such vacancies are all filled, the roster has worked itself out. Thereafter other reserved candidates can be promoted only when a vacancy at the reserved points already filled arises. That was what was decided in *R.K. Sabharwal* v. *State of Punjab.*

(iii) Seniority of roster promotees:

Question is whether roster point promotions from Level 1 to Level 2 to reserved candidates will also give seniority at Level 2? This is the crucial question.

We shall here refer to two lines of argument on behalf of the reserved candidates. *Ajit Singh* was an appeal from the judgment of the Full Bench of the Punjab and Haryana High Court in *Jaswant Singh* v. *Secretary to Govt. Punjab Education Department,* (1989) 4 S.L.R. 257. In that case, reliance was placed by the reserved candidates on a general Circular dated 19.7.69 issued by the Punjab Government which stated that the roster point promotions would also confer seniority. In fact, while dismissing the Writ petitions filed

by the general candidates the High Court declared that the State was obliged to count seniority of the reserved candidates from the date of their promotion as per the Circular dated 19.7.69. The judgment of the Full Bench was reversed by this Court in *Ajit Singh* in the appeal filed by the general candidates. That resulted in the setting aside of the above declaration regarding seniority of roster point promotees as stated in the Punjab circular dated 19.7.69.

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But before us, reliance was placed by the reserved candidates as was done in *Jagdish Lal*, upon the general seniority Rule contained in various Punjab Service Rules applicable in the Civil Secretariat, Education, Financial Commissioner, etc. Departments which Rules generally deal with method of recruitment, probation, seniority and other service conditions. All these Rules provide a *single scheme* for *recruitment* by promotion on the basis of seniority-cum-merit and then for *seniority* to be determined in the promotional post from the date of "*continuous officiation*", whenever the promotion is as per the method prescribed in those Rules. It is on this seniority rule relating to 'continuous officiation' at the promotional level that reliance was placed before us by the reserved candidates, as was done in *Jagdish Lal*. Question is whether roster points promotees can rely on such a seniority rule?

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In this context it is necessary to remember two fundamental concepts.

(a) Statutory Rules relating to promotion and seniority:

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We shall take up the rules in one of these Services in Punjab - namely the rules concerning *Ajit Singh* in which the present IAs have been filed.

There are three sets of Rules for Class I, II and III Services. The Punjab Secretariat Class III Service Rules, 1976 deal with the posts of Clerk (Level 1), Assistant (Level 2) and Superintendent (Grade II) (Level 3). At each of these two levels 1 and 2, there is a roster which implements reservation. The reservation is by way of the circular dated 19.7.1969 in Punjab. For promotion from level 1 to 2 and from Level 2 to Level 3, the employees are respectively governed by Rule 7 for promotion and by Rule 9 for seniority. It is provided in proviso (iii) to Rule 7(1) that all promotions shall be made by selection on the basis of seniority-cum-merit and no person shall have a right of promotion on the basis of seniority alone. Rule 9 speaks of seniority from the date of continuous officiation.

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The Civil Secretariat Service, *Class-II* Service rules, 1963 deal with Superintendents (Grade I) i.e. Level 4 and Rule 8(2) states that promotion to the above posts in Class II is by the method of seniority-cum-merit and Rule

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A 10 states that seniority is to be counted from the date of continuous officiation. Above Class II is class I which consists of posts of Under Secretary (Level 5) and Deputy Secretary (Level 6). Rule 6(3) of the Punjab Civil Secretariat (Class I) Rules, 1974 refers to promotion by seniority-cum-merit while Rule 8 thereof speaks of seniority by continuous officiation. For promotion to Class II and Class I, there is no roster promotion i.e. no reservation. There is B reservation only in Class III posts by way of roster at two stages.

It is clear, therefore, that the seniority rule relating to 'continuous officiation' in promotion is part of the *general scheme* of recruitment by direct recruitment, promotion, etc., in each of the Services in Class I, II and III - and C is based upon a principle of equal opportunity for promotion. In our opinion, it is only to such promotions that the seniority rule of 'continuous officiation' is attracted.

(b) Statutory rule of seniority cannot be delinked and applied to roster-point promotions:

D As stated above in *Ajit Singh*, the promotion rule in Rule 7(1) proviso (iii) and the seniority Rule in Rule 9 under the 1976 Rules for Class III form a single scheme and are interlinked. In other words, only in case the officers have reached the level of Superintendents Grade II(Level 3) in the manner mentioned in the Rule 7(1) proviso (iii) by competition between the Assistants E (Level 2) and on consideration of their cases on the basis of seniority-cum-merit, can the seniority Rule in Rule 9 relating to continuous officiation in the post of Superintendent Grade II (Level 3) be applied. Here there is a roster in *Ajit Singh* for promotion from Level 1 to Level 2 and from Level 2 to Level 3. The consequence is that in the case of roster point promotees, the said candidates who get promoted as Superintendents Grade II (Level 3) as per the F roster - having not been promoted as per Rule 7(1) proviso (iii) of the 1976 Rules i.e. upon consideration with their cases on the basis of seniority-cum-merit at the Assistant level (Level 2), - they cannot rely upon Rule 9 of the 1976 Rules dealing with seniority from the date of "continuous officiation" as Superintendents Grade II(Level 3). It is not permissible to delink the seniority Rule from the recruitment Rule based on equal opportunity and apply it to G promotions made on the basis of the roster which promotions are made outside the equal opportunity principle.

The proper balancing of rights:

In the light of the above discussion, the proper balancing of the rights, H in our view, will be as follows.

The general candidates who are senior at Assistants' level (Level 2) and who have reached Superintendent Grade-II (Level 3) before the reserved candidate moved to Level 4 (Supdt. Grade- I), will have to be treated as senior at the level 3 also (Supdt. Grade-II) and it is on that basis that promotion to the post of Level 4 must be made, upon first considering the cases of the senior general candidates at Level 3. If the cases of the senior general candidates who have reached Level 3 though at a latter point of time, are not first considered for promotion to Level 4, and if the roster point promotee at Level 3 is treated senior and promoted to level 4, there will be violation of Articles 14 and 16(1) of the Constitution of India. Such a promotion and the seniority at Level 4 has to be reviewed after the decision of *Ajit Singh.* But if reserved category candidates are otherwise eligible and posts are available for promotion to Level 4, they cannot be denied right to be considered for promotion to Level 4, merely because erstwhile seniors at the entry levels have not reached Level 3. What we have stated above accords, in fact, with what was actually stated in *Ajit Singh,* [1996] 2 SCC 715. In that case, N.P. Singh, J observed (P. 731) :

> "It also cannot be overlooked that for the first promotion from the basic grade, there was no occasion to examine their merit and suitability for promotion."

That, in our view, is the correct approach for balancing the fundamental rights under Article 14 and Article 16(1) on the one hand and the provisions relating to reservation in Article 16(4) and Article 16(4A).

Was Jagdish Lal correctly decided:

Learned senior counsel for the reserved candidates however relied upon *Jagdish Lal* to contend that the roster promotees can count seniority in the promoted post from the date of continuous officiation as against senior general candidates promoted later. On the other hand, the learned senior counsel for the general candidates contended that the said decision does not lay down the law correctly. We shall, therefore, have to refer to *Jagdish Lal.*

We were initially of the view that it may not be necessary to go into the correctness of *Jagdish Lal,* and that we could distinguish the same on the ground that all the reserved candidates there had got further promotions from the promotional level of Dy. Superintendents* before the general

*In *Jagdishalal,* the hierarchy of posts is Clerk, Assistant, Deputy Superintendent, Superintendent, etc.

A candidates reached that Level. But from the table set out in *Jagdish Lal*, it would be noticed that in that case, *Jagdish Lal*, the general candidate, reached the post of Deputy Superintendent on 27.10.87 before the reserved candidate H.S. Hira was further promoted as Superintendent on 27.5.88. Similarly, Ram Dayal, another general candidate got promoted as Deputy Superintendent on 16.1.89 before the reserved candidates Sant Lal and Ajmer B Singh got promoted as Superintendent on 8.2.90 and 1.7.90. In that view of the matter, it becomes necessary to go into the correctness of *Jagdish Lal* on merits. As we would presently show, in *Jagdish Lal*, the seniority rule which referred to continuous officiation and which applied to promotions made after providing equal opportunity as per rules - was delinked from the C promotion rule and applied to roster promotees, which, in our view, was the main reason for arriving at a different result.

Jagdish Lal arose from Haryana. The Haryana Education Directorate (State Service Class III) Rule, 1974 provided for recruitment to the posts of Clerk (Level 1), Assistant (Level 2) and Deputy Superintendent (Level 3). Rule D 9(3) stated that all promotions would have to be made by selection based on merit and taking into consideration seniority but seniority alone would not give any right to such promotions. Rule 11 provided that seniority would be counted from the date of "continuous officiation". The Court held in *Jagdish Lal* that the roster promotees who were promoted to Level 3 could count their E seniority from the date of continuous officiation in that level in view of Rule 11. From Level 1 to Level 2 and from Level 2 to Level 3, the rosters operated. From the level beyond Level 3, the posts were Superintendent, Budget Officer, Assistant Registrar and Registrar and were governed by the Haryana Education Department (State Service, Group B) Rule, 1980, and there was no reservation. In those Rules also, Rule 9(3) stated that all promotions would have to be F made by selection based on merit and taking into consideration seniority but seniority alone was not to give any right to such promotion. Rule 11 of the 1980 Rules also stated that seniority would count from the date of continuous officiation. Thus, in the Class III as well as Class II (Group B) Services, the "continuous officiation" rule was interlinked with the promotion rule based G on equal opportunity, as in *Ajit Singh*, and formed a single scheme.

The Court in *Jagdish Lal* delinked Rule 11 from the recruitment rules and applied the same to the roster promotees. For the reasons given already in regard to *Ajit Singh*, we hold that *Jagdish lal* arrived at an incorrect conclusion because of applying a rule of *continuous officiation* which was H not intended to apply to the reserved candidates promoted at roster points.

The various rulings relied upon in *Jagdish Lal* do not, in our opinion, support the conclusions arrived at in that case. Some of these rulings were those where it was held that mere empanelment in a seniority list would not confer a right to promotion. Some other cases relied upon were cases where it was held that mere chances of promotions were not 'conditions of service' which were protected. So far as the cases which held that mere inclusion of a name in a panel did not create any right to promotion, there could be no quarrel with the said proposition. So far as the cases like *State of Maharashtra* v. *Chandrakant Kulkarni,* [1981] 4 SCC 130, *Mohd. Shujat Ali* v. *Union of India,* [1975] 3 SCC 76, which held that mere chances of promotion were not conditions of service, they were not applicable to the present situation. It must be noticed that those cases arose under the States Reorganisation Act, 1956 where the words 'conditions of service' were used in Section 115(7) of that Act. The factual position there was that when employees of two different States were integrated, their seniority in the parent States necessarily got affected. The proviso to Section 115(7) of the Act required that, if the State to which they were allotted wanted to alter their "conditions of service", previous permission of the Central Government was necessary. It was in that context that it was held that mere chances of promotions were not conditions of service and there was no question of seeking the sanction of the Central Government if chances of promotion were affected after allotment to a new State. In fact, the Central Government, had issued orders, under Section 115(7) that various other conditions of service in the parent State like salary, leave etc. alone would remain protected. The above cases were therefore not in point. The case in *Mohd. Bhakar* v. *Y. Krishna Reddy,* (1967) SLR 753 SC was in fact overruled in *Mohd. Shujat Ali.* So far as *K. Jagadeesan* v. *Union of India,* [1990] 2 SCC 228 was concerned, it related to a case where a person's seniority stood affected by an amendment to the Rules and it was held that that did not make the rule retrospective. *Syed Khalid Rizvi* v. *Union of India,* [1993] Suppl. 3 SCC 575 no doubt said that there was no "*right to promotion*" but even that case accepted that there was a right to be "*considered*" for promotion. So far as *Akhil Bhartiya Soshit Karamchari Sangh* v. *Union of India,* [1996] 6 SCC 65 to which one of us (G.B. Pattanaik, J. was a party). That case, in our view, was correctly decided on facts because by the date the general candidate reached the higher category, the reserved category promotee who reached that category earlier had got a further promotion. Reference was also made in *Jagdish Lal*, to *A.K. Bhatnagar* v. *Union of India,* [1991] 1 SCC 544. That was a case where *ad hoc* recruits were regularised subsequently and were placed below regular recruits. It was held that their past *ad hoc* service could not be taken into account since they remained out of the cadre

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A until regularisation. That case, in our view, has also no application. *Jagdish Lal* is, therefore, not correctly decided.

Observations in Ashok Kumar Gupta which run contrary to Indira Sawhney and Sabharwal do not lay down correct law:

B We may state that there are various other observations made in *Ashok Kumar Gupta* and we find that they run counter to the principles laid down by the nine Judge Bench in *Indira Sawhney* and the Constitution Bench in *Sabharwal*. In our view, these observations must, therefore, be treated as not laying down the correct law. Learned counsel for the parties were in agreement with this line of approach. We, therefore, leave *Ashok Kumar Gupta* and do C not deal with it any further.

Was Virpal not decided correctly, as contended by reserved candidates?

We then come to another important point that was argued by learned senior counsel Sri K.Parasaran. It was argued that in *Virpal*, the Court was D concerned with a circular of the Railways dated 31.8.82 which permitted discounting the seniority of roster promotee from the date of continuous officiation and which also stated that his seniority should be as per the ranking in the basic level. The Court in *Virpal* held that it was "*permissible*" for the Government to do so. It was argued by Sri K.Parasaran that it was one E thing to say that it was "open" to the Government to deprive the roster promotee of the benefit of such seniority from the date of roster promotion but it was another thing to say that even if the Government thought fit to give benefit of seniority on the basis of roster promotion, the same should be tested on the anvil of Articles 14 and 16(1) of the Constitution of India. Thus, it was argued that *Ajit Singh* went far beyond *Virpal* when it held that F any circular, order or rule granting seniority to the roster promotee would be violative of Articles 14 and 16(1) of the Constitution of India.

That brings us to a close examination of the main principle laid down in *Virpal* and in *Ajit Singh*. We shall first take up *Virpal*. In *Virpal*, the facts G were that the Court was concerned with a circular dated 31.8.82 of the Railways which stated that the seniority of the roster promotees would be based on their panel position in the initial grade. The case involved two services— Guards and Station Masters. Railway Guards would be recruited as Guard C and promoted as Guard B, then as Guard A and as Guard (Special). Promotion was to be by rule of seniority-cum-suitability. In other words, these were non-H selection posts. On the other hand, in the case of Station Masters, a selection

process was involved for purposes of promotion. A

It is argued by the reserved candidates that *Virpal* was not correctly decided because in *Virpal*, the Court went by a printed Brochure and committed a factual mistake in thinking that the circular of the Railways itself required the panel seniority at the initial level to be reflected at higher levels. The same point was raised by the Indian Railways in its intervention applications IAs 10-12/98. It was argued that in *Virpal* the Court erred in not noticing the full text of the Circular dated 31.8.82 which, showed that, as per para 319 of the Railway Establishment Code, Vol.1, panels were required to be prepared at each level. B

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We have examined *Virpal* closely in the light of the above objection. In our view, the above criticism is wholly unjustified and is based upon a wrong mixing up of the separate conclusions arrived at in *Virpal* in regard to two different sets of employees. As stated earlier, the Court was there concerned with posts of Railway Guards and also with posts of Station Masters. The former (i.e. Guard posts) were posts governed by the rule of D seniority-cum-suitability. In other words, for Guards, seniority would govern subject to omission of those found unsuitable for promotion. On the other hand, Station Masters' posts were governed by selection at every level of promotion. The learned Judge, Justice Jeevan Reddy, while dealing initially with the promotions of Guards (See P.702 of SCC) from C Grade to B, from E B to A, and from A to Special Grade A pointed out that the seniority-cum-fitness rule applicable in their cases resulted in the seniority at the Level of Guard C in the initial panel being reflected from stage to stage, subject to fitness. When the learned Judge came to discuss the issues relating to Station Masters, (See SCC P. 711) where merit and selection were involved, the learned Judge stated that separate panels were to be prepared at every level F and also that those in an earlier panel would be senior to those in a latter panel. In either situation, it was laid down that the reserved candidates could not count their 'seniority' on the basis of roster point promotion. Learned Additional Solicitor General, Sri C.S. Vaidyanathan, attempted to argue that what the Court said in paras 25, 26 was wrong as it assumed that seniority G at Level 1 would get reflected in the levels higher up and what is stated in paras 46, 47 in regard to one previous panel having priority over a later panel would apply in all cases, even to Guards referred to in paras 25, 26. The said contention, in our view, is based on a mixing up of the cases of Station Masters and Guards who were governed by different rules of promotion. We are satisfied that there is no factual mistake committed in the judgment in H

A *Virpal*. In fact, subsequent to *Virpal*, the Railways accepted the judgment and issued an order on 28.2.1997 both in regard to non-selection and selection posts. The point raised in the IAs by the Railways is therefore liable to be rejected. We shall refer to these IAs again in our separate judgment relating to individual cases.

B *Did Ajit Singh go beyond Virpal and if so, was it correctly decided?*

We now deal with the points raised by the reserved candidates against the correctness of *Ajit Singh*. It was urged by learned senior counsel Sri K. Parasaran, that *Ajit Singh* went far beyond *Virpal*. It is pointed out that in *Virpal*, this Court was concerned with a circular of the Railways which stated C that the roster promotees could not, on that count, claim seniority. In that context, Jeevan Reddy, J. no doubt stated in *Virpal* See [1995] 6 SCC 684 at 701 as follows:

> "In short, it is *open to the State*, if it is so advised ..... It is permissible D for the State to do so."

But, according to learned senior counsel, Sri K. Parasaran, in *Ajit Singh*, this Court went further and stated that any rule, circular or order which gave seniority to the roster point promotees was bad and that this view is not correct. Our attention is invited to [1996] 2 SCC 715 (at 732) as follows:

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> "According to us, this question cannot be examined only on the basis of any *circular, order or rule* issued or framed by the State Government or the Union of India. *This has to be tested on the basis of our constitutional scheme of Articles 14 and 16 of the Constitution.*"

F In our opinion, there is no conflict in the principles laid down in these two judgments, nor is there anything wrong in the above elucidation of the law. In *Virpal* it was not necessary for the Court to go into the question whether any circular - if it gave seniority to the roster point promotees (reserved candidates) - could be treated as valid. But, in *Ajit Singh* which was G an appeal against the Full Bench Judgment in *Jaswant Singh* [1989] 4 SLR 257, this Court was dealing with a declaration made by the Full Bench for implementation of the Punjab circular dated 19.7.69 (see para 29 of Full Bench) which positively declared that the "roster points were seniority points". That was why in *Ajit Singh* this Court had to consider the validity of such a Circular. In *Ajit Singh* this Court held that the declaration granted in the H impugned judgment of the Full Bench in *Jaswant Singh* on the basis of the

Punjab circular would be in conflict with Article 14 and Article 16(1). This Court had therefore to lay down that any circular, order or rule issued to confer seniority to the roster point promotees, would be invalid. Thus, the decision in *Ajit Singh* cannot be found fault with.

Does Indira Sawhney protect seniority of promotees at roster point:

Learned senior counsel Sri K.Parasaran contended that *Indira Sawhney* permitted reservations in promotions for a further period of 5 years and that during that period Article 16(4A) was incorporated in Part III of the Constitution and, therefore, the concept of seniority attached to the roster promotion, as per certain rulings then in force, must be deemed to continue and deemed to be permissible in view of Article 16(4A). We may point out that *Indira Sawhney* did not have to go into issues relating to seniority and on the other hand it referred to the principle of balancing Article 16(4) against the rights of the individual under Article 16(1). It is, therefore, not possible to accept that the 5 year rule and Article 16(4A) would keep out the applicability of Article 16(1) to test the validity of any circular, order or rule which conferred seniority to the roster point promotees.

Do principles in Mervyn Contindo, [1966] 3 SCR 600 apply to reserved candidates? Does the roster point for reserved candidates at Level 1 decide seniority at Level 1?

Considerable reliance was placed by learned senior counsel Sri D.D.Thakur and Sri Raju Ramachandran on the decision of this Court in *Mervyn Contindo and Ors.* v. *Collector of Customs,* [1966] 3 SCR 600.

In that case, the service was constituted from two sources, namely direct recruits and promotees. Question of seniority arose at two levels - at the level of Appraisers and at the level of Principal Appraisers. At the initial level of Appraisers, there was a roster for determining the seniority of the direct recruits and promotees. The direct recruits were placed first in the roster and then the promotees alternatively at the basic level. The promotees who joined service earlier questioned the above rule as being violative of their seniority at the level of Appraisers in view of Article 16(1). This challenge was negatived by this Court on the ground that such "anomalies arise not on account of there being no direct recruitment for several years" and the roster point seniority was not opposed to the principle of equality of opportunity in Government service. It was said that the anomaly arose out of the fortuitous

A circumstance that in the particular service of Appraisers, for one reason or other, direct recruitment had fallen short of the quota fixed for it. The Court said: "we are not prepared to say that the rotational system of fixing seniority itself offends equality of opportunity....". To this extent the Court held against the promotees in regard to seniority at the basic level of Appraisers. The B point here is the roster points in the case of reserved candidates do not determine seniority at the basic level.

Learned senior counsel for the reserved candidates however relied upon the second part of *Mervyn* which related to seniority at the next level of Principal Appraisers. It was the contention of the direct recruits-respondents C that here again the seniority should be alternated between direct recruits and promotees as done at the basic level, though there was no such rule. Here, the promotee Appraisers contended that the seniority at the level of Principal Appraisers would be governed by the rule of continuous officiation and that there can be no rotation alternatively at this higher level on the basis of D birthmarks at the level of Appraisers. This plea of the promotees was accepted by this Court. The point here is that once the roster at the level of Appraisers is one which fixed seniority at level 1, promotions to Level 2 for Principal Appraisers, have necessarily to be made on that basis. For fixing seniority at Level 2, there is no question of placing direct recruits and promotees E alternatively. It has to be on the basis of date of promotion of each of the officers to Level 2, irrespective of their birthmarks.

The above decision in *Mervyn* cannot apply to a case of reservation because the roster in *Mervyn* was intended to determine seniority while the F roster in the cases of reservation under Article 16(4) or Article 16(4A) are not intended to determine seniority but are merely intended to provide "*adequate representation*" at the promotional level.

To what extent, Hiralal, Karamchand and Kailash Chand Joshi's cases help the reserved candidates?

G

Learned senior counsel for the reserved candidates placed strong reliance on three other decisions of this Court namely, *State of Punjab* v. *Hira Lal,* [1970] 3 SCC 567, *Karam Chand* v. *Haryana State Electricity Board,* [1989] Suppl. 1 SCC 342 and *Kailash Chand Joshi* v. *Rajasthan High Court,* [1996] H 1 SCALE 752. In *Hira Lal's* case decided by a three Judge Bench, there was

a circular issued by the Punjab Government providing, for the first time, reservation in promotional posts. The 1st respondent who was a general candidate senior to the reserved candidate (respondent 3) was not promoted while the reserved candidate though junior, was promoted. The High Court allowed the writ petition filed by the general candidate (1st respondent) on the ground of violation of Article 16(1). The said judgment was set aside in view of the law laid down in the *General Manager, Southern Railway* v. *Rangachari,* [1962] 2 SCR 586 that reservation was permissible at the promotional level. In that case, the Court had no occasion to consider any circular prescribing seniority to the roster promotees. That case is therefore not in point. *Karamchand,* decided by a two Judge Bench was, no doubt, concerned with the question of seniority of the roster point promotee. The appellant, who was from the reserved category, belonged to the Haryana State Electricity Board and the Haryana Government's circular dated 27.4.72 pointed out that the roster was meant only for reservation and not for fixing *inter-se-seniority* and that seniority depended upon the merit list prepared by the Public Service Commission or Selection Board. But the appellant, the reserved candidate relied upon Rule 9 of the Punjab PWD (Electricity Branch) Service Class III (Subordinate Posts) Rules, 1952 where Rule 9 provided seniority to be determined from the date of "regular" promotion. The limited dispute was whether his case fell within the "Exception" in Rule 9 which related to "temporary" promotees who would not get seniority upon such temporary promotion. The contention of the Board that he was a temporary promotee was not accepted by this Court on the facts of the case. No question *vis-a-vis* a general candidate arose. There are indeed certain observations that seniority of the reserved candidate had to be counted from the date of regular promotion which, in our opinion, are not correct. No question of Article 16(1) or seniority as against a general candidate arose. That case is distinguishable. In *Kailash Chand Joshi* the appellant, who was senior, belonged to the non-reserved category in the cadre of Munsifs. The respondents 3 to 11 though junior in that cadre to the appellant, were promoted as Civil Judges earlier on the basis of roster. The general candidate (appellant) got promoted as Civil Judge later and claimed seniority in the cadre of Civil Judge. By that date the roster promotee did not get any further promotion. This was not accepted by this Court in view of Rule 11. There are two aspects of this decision. Firstly, the Court did not notice that once the general candidate, the appellant, who was senior to the respondents reached the level of Civil Judge, the position would be different. Such a principle, in fact, came to be laid down shortly

A thereafter in *Virpal* by the same learned Judge who decided *Kailash Chand Joshi.* Secondly, it was not noticed that Rule 22 relating to seniority from the date of continuous officiation was closely interlinked with the promotional Rule based on equal opportunity. We may state that any observations in the above cases that the roster promotees will get seniority over the senior B general candidates who reach that level later, (but before the further promotion of the reserved candidate) cannot be accepted as correct in view of the legal position stated earlier.

A 'poignant scenario' in some cases:

C We next come to the poignant scenario in several of the matters before us. *Virpal* referred to such a scenario where all the 33 candidates who were to be considered for 11 vacancies were from the SC/ST category (see P.710 of SCC). Before us, similar facts are placed by the general candidates. The factual position is not disputed, though certain reasons have been set out by both sides which none has scientifically examined. It is to be noticed that : D (i) in *Ajit Singh* itself, - (see p.76 and PP.200-215, 232 of paper book) as on 30.9.94 out of 107 officers working as Superintendent Grade I, the first 23 officers are from Scheduled Castes. At the level of Under Secretaries, out of 19, the first 11 are from SC category. In the category of Dy. Secretary, out of four, 2 are from SC category. As on 30.9.94, the position was that at these E levels, the percentage was 22.5%, 54% and 67% respectively in the above categories. If the seniority is to be counted as per the case of the reserved candidates, the position would be that Dy. Secretaries would be 100% manned by Scheduled Castes, and Under Secretaries would again be 100% manned by Scheduled Castes while Superintendents Grade I would be so manned to the F extent of 53%.

(ii) In *Jatinderpal Singh's* case (C.A.Nos. 316-317/99) the top 134 positions of Principals (from Head Masters' source) would be from Scheduled Castes while the top 72 positions (from Head Mistress's source) would be from Scheduled Castes. It is stated that " adding this to the number awaiting G promotions", the position would be that top 217 and 111 in these categories would be Scheduled Caste candidates - which would be 100% and 71% (the posts being only 156 under each source). One does not know what will happen in posts beyond Principal, if all persons in the zone are from SC/ST category.

H (iii) In *Kamal Kant* (SLP.4945/97 from Haryana) as of today:

(a) among Deputy Secretaries, the first 8 posts are occupied by the reserved category (Scheduled Castes and Backward Classes) A

(b) among Under Secretaries (Group A) (officiating) 14 posts at the higher levels are occupied by the reserved category.

The above factual position is not, in fact disputed but it is said that this could be because the roster was operated again and again till that was stopped after *Sabharwal* was decided, but nobody has gone into the extent to which excess roster operation has created such a situation. B

In the written submissions of learned senior counsel, Sri Raju Ramachandran dated 5.8.99, such a situation of almost all top posts being manned by reserved candidates is sought to be justified as being not constitutionally inhibited. In our view, such a situation was never intended by the founding fathers. One should only read the speech of Dr. Ambedkar in the Constituent Assembly as quoted in *Indira Sawhney* (See pp. 660-661 SCC) (referred to earlier). C D

We may, however, make it clear that our decision in regard to the Article 16(1), Article 16(4) and Article 16(4A) that the rule of "continuous officiation" is applicable only to promotions made as per rules which give equal opportunity —and not otherwise, — is independently arrived at on the basis of the constitutional position and is in no way coloured or influenced by the above facts mentioned by the general candidates. E

Our Conclusions on Points 1 and 2:

We, therefore, hold that the roster point promotees (reserved category) cannot count their seniority in the promoted category from the date of their continuous officiation in the promoted post, - *vis- a-vis* the general candidates who were senior to them in the lower category and who were later promoted. On the other hand, the senior general candidate at the lower level, if he reaches the promotional level later but before the further promotion of the reserved candidate—he will have to be treated as senior, at the promotional level, to the reserved candidate even if the reserved candidate was earlier promoted to that level. We shall explain this further under Point 3. We also hold that *Virpal* and *Ajit Singh* have been correctly decided and that *Jagdish Lal* is not correctly decided. Points 1 and 2 are decided accordingly. F G

Point 3:

During the discussion under this "catch-up" point - for purposes of H

convenience, - we take the example of the cadres in *Ajit Singh* i.e. there is roster point promotion for reserved candidates for promotion from Level 1 to Level 2 and from Level 2 to Level 3. There is no roster for promotion from Level 3 to Level 4.

Two 'catch up' rules contended for by general candidates:

Now, as stated earlier, the counsel for the general candidates argued for acceptance of two catch-up rules.

Extreme 'catch-up' rule:

So far as the extreme contention of the general candidates that at Level 3, the roster candidate must wait at Level 3 - before being promoted to Level 4 - till the last senior general candidate at Level 1 reached Level 3, - we reject the same in as much as that will not amount to a reasonable balancing of the rights of the candidates in the two groups. Nor do we accept that posts must be kept vacant and no promotions of the roster candidates be made.

Other Catch-up rule:

As accepted in *Virpal* (see [1995] 6 SCC 684 at 702) and *Ajit Singh* (see [1996] 2 SCC at P.729, we hold that in case any senior general candidate at Level 2 (Assistant) reaches Level 3 (Superintendent Grade II) *before* the reserved candidate (roster point promotee) at Level 3 goes further up to Level 4 in that case the seniority at Level 3 has to be modified by placing such a general candidate above the roster promotee, reflecting their *inter se* seniority at Level 2. Further promotion to Level 4 must be on the basis of such a modified seniority at Level 3, namely, that the senior general candidate of Level 2 will remain senior also at Level 3 to the reserved candidate, even if the latter had reached Level 3 earlier and remained there when the senior general candidate reached that Level 3. In cases where the reserved candidate has gone upto Level 4 ignoring the seniority of the senior general candidate at Level 3, seniority at Level 4 has to be refixed (when the senior general candidate is promoted to Level 4) on the basis of when the time of reserved candidate for promotion to Level 4 would have come, if the case of the senior general candidates was considered at Level 3 in due time. To the above extent, we accept the first part of the contention of the learned counsel for the general candidates. Such a procedure in our view will properly balance the rights of the reserved candidates and the fundamental rights guaranteed

under Article 16(1) to the general candidates. A

No difficulty in amending seniority list:

One of the objections raised before us and which appealed to the Full Bench in *Jaswant Singh's* case was that this 'catch up' principle would lead to frequent alteration of the seniority list at Level 3. We do not find any B difficulty in this behalf. The seniority list at Level 3 would have only to be merely amended whenever the senior general candidate reaches Level 3.

Examples given by reserved candidates - do not create any anomaly:

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Learned senior counsel Sri K. Parasaran and Sri Raju Ramachandran then adverted to a situation which according to them might create serious problems if a senior general candidate is to be treated as senior at the promotional level if he reaches that level before the roster promotee goes further up. The example given refers to cases where after the roster point promotee (reserved candidate) reaches the promotional level, there is direct D recruitment or recruitment by transfer at that promotional level. Counsel submit that, if a senior general candidate is thereafter promoted and placed above the reserved candidate, can he became senior to the direct recruit and transferee? We do not find any anomaly. The direct recruit or transferee who has no grievance against the reserved candidate who was already there can E have no grievance against a senior general candidate who has a superior claim, in law, against the reserved candidate.

Even if seniority of roster point promotee does not count, experience of both groups can be considered as part of merit for further promotion: F

Before we leave point 3, we may refer to another submission made by Sri K. Parasaran, learned senior counsel for the reserved candidates. Learned counsel submitted that even if the seniority of the reserved candidates had gone up to Level 3 earlier by the roster at two levels 1 & 2 is not counted, G still the 'experience' gained by them at Level 3 well before the senior general candidate 'caught up' to that Level, cannot be disregarded for purposes of promotion to Level 4.

It is true that the roster point promotee who has reached the promotional level 3 even if he is not entitled to seniority would have gained considerable H

A 'experience' at that level. That experience is, no doubt, of considerable relevance in considering his case for further promotion to Level 4. But, at the same time, it is to be noted that the general candidates had longer experience at level 1 and level 2 and have come up to level 3 by way of competition among the general candidates at two stages. The said longer 'experience' gained by them
B at the lower levels 1 and 2 and the manner in which they have reached the level 3 to which the reserved candidate had reached earlier, are also relevant factors. The quality of the experience of these groups also needs to be kept in view. The above principle would be an equitable balancing of the 'experience' of the candidates at various levels. It will be appropriate for the Government of India or the State Government, as the case may be, to formulate guidelines
C by way of administrative orders or by way of rules in this behalf. Point 3 is disposed of accordingly.

Point 4:

D This point concerns the "prospective" operation of the two judgments in *Sabharwal* and *Ajit Singh*. The point regarding these two cases directly arises in the appeals from Punjab, Haryana and Rajasthan. The prospectivity of *Virpal* has been particularly raised by learned Additional Solicitor General, Sri C.S. Vaidyanathan, in the IAs filed by the Railways. Once again our
E approach here is to prevent reversions and avoid hardship to the reserved candidates already promoted before the two judgments and at the same time to try to balance the rights to seniority of the general candidates as against those of the reserved candidates, in the light of Article 16(1).

Prospectivity of Sabharwal:

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(i) What Sabbarwal said in regard to "prospectivity":

Before *Sabharwal* was decided on 10.2.1995, it appears that, in several services, the roster was initially put in operation and promotions at all the
G roster points were filled up. But the roster was once again operated on future vacancies, even though all the required reserved candidates were in position at the promotional level. It was not realised that once the roster points were all filled, the roster had served its purpose and fresh members of the reserved classes could claim promotional posts only if any promotional posts already filled by the reserved candidates fell vacant. This misapplication of the roster
H came to be removed for the first time on 10.2.95 when *Sabharwal* was

decided. Obviously, by that time several reserved candidates had got promotion in excess of their quota because of the wrong "re-operation" of the roster points. If the law declared in *Sabharwal* were to be treated as retroactive as is the normal position whenever the law is declared by this Court, it would have resulted in reversions of several officers of the reserved classes as their promotions before 10.2.95 by the fresh operation of the roster as aforesaid was wholly unjustified. This Court in *Sabharwal* therefore tried to prevent such reversions and declared (P. 753 of SCC, Para 11) as follows at the end of the judgment:

> "We, however, direct that the interpretation given by us to the working of the roster and our findings on this point shall be operative prospectively".

(ii) The rival contentions:

To the extent of saving the reversions of those from reserved classes promoted before 10.2.95 though such promotions were made contrary to what was decided in *Sabharwal*, there is no serious dispute from the side of the general candidates, but a contention is raised by the reserved candidates who got such promotions in excess of the reservation quota that they should in addition get the benefit of the seniority in the promotional post even if such promotion made before 10.2.95 was wrong in view of what was decided in *Sabharwal*. This plea is strongly opposed by the general candidates.

(iii) Our conclusion:

It is axiomatic in service jurisprudence that any promotions made wrongly in excess of any quota are to be treated as *ad hoc*. This applies to reservation quota as much as it applies to direct recruits and promotee cases. If a Court decides that in order only to remove hardship such roster point promotees are not to face reversions, — then it would, in our opinion be, necessary to hold—consistent with our interpretation of Articles 14 and 16(1) — that such promotees cannot plead for grant of any additional benefit of seniority flowing from a wrong application of the roster. In our view, while Courts can relieve immediate hardship arising out of a past illegality, Courts cannot grant additional benefits like seniority which have no element of immediate hardship. Thus, while promotions in excess of roster made before 10.2.95 are protected, such promotees cannot claim seniority. Seniority in the promotional cadre of such excess roster point promotees shall have to be reviewed after 10.2.95 and

A will count only from the date on which they would have otherwise got normal promotion in any future vacancy arising in a post previously occupied by a reserved candidate. That disposes of the 'prospectivity' point in relation to *Sabharwal*.

B *Prospectivity of Ajit Singh*:

Coming to the 'prospectivity' of *Ajit Singh*, decided on 1.3.96 the question is in regard to the seniority of the reserved candidates at the promotional level where such promotions have taken place before 1.3.96.

C We have accepted, while dealing with Points 1 and 2 that the reserved candidates who get promoted at two levels by roster points (say) from Level 1 to Level 2 and level 2 to level 3 cannot count their seniority at Level 3 as against senior general candidates who reached Level 3 before the reserved candidates moved upto Level 4. The general candidate has to be treated as D senior at Level 3.

Where, before 1.3.96, i.e. the date of *Ajit Singh's* judgment, at the level 3, there were reserved candidates who reached there earlier and also senior general candidates who reached there later, (but before the reserved candidate was promoted to level 4) and when in spite of the fact that the senior general E candidate had to be treated as senior at level 3 (in view of *Ajit Singh*), the reserved candidate is further promoted to level 4 - without considering the fact that the senior general candidate was also available at level 3 - then, after 1.3.96, it becomes necessary to review the promotion of the reserved candidate to level 4 and reconsider the same (without causing reversion to the reserved F candidate who reached level 4 before 1.3.96). As and when the senior reserved candidate is later promoted to level 4, the seniority at level 4 has also to be refixed on the basis of when the reserved candidate at level 3 would have got his normal promotion, treating him as junior to the senior general candidate at level 3. *Chander Paul* v. *State of Haryana,* [1997] 10 SCC 474 has to be G understood in the manner stated above.

We hold accordingly on Point 4.

We dispose of the clarification applications IAs 1 to 3/98 filed by the State of Punjab accordingly and hold that *Ajit Singh* and *Virpal* lay down the H correct law and not *Jagdish Lal*, which must be considered as confined to

correct law and not *Jagdish Lal*, which must be considered as confined to its own peculiar facts. We shall be passing separate orders in the Punjab, Haryana and Rajasthan cases and Contempt Cases and other IAs on the basis of the principles laid down in this judgment which, for convenience will be called *Ajit Singh II*. A

IAs Nos.1 to 3/98 are disposed of accordingly. B

S.V.K.I. IAs disposed of.