

**CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH, CUTTACK**

OA No. 593 of 2019

Present : Hon'ble Mr.Gokul Chandra Pati, Member (A)
Hon'ble Mr. Swarup Kumar Mishra, Member (J)

Sasmitarani Pradhan, aged about 38 years, W/o Prakash Kumar Danga – at present working as Compiler(Group-C) under Director of Census Operations, Odisha, Unit-9, Janpath, Bhubaneswar-751 022, District-Khorda, Resident of Qr.No.II/24, Census Staff Colony, Ruchika Market, Baramunda, Bhubaneswar-751 003.

...Applicant

-VERSUS-

1. Union of India represented through Registrar General of India Home Affairs & Census Commissioner, 2/A, Mansingh Road, New Delhi-11.
2. Director, Census Operations of Odisha, Unit-IX, Janpath, Bhubaneswar-751 022, Dist-Khordha.
3. Joint Director, Census Operations, Unit-IX, Janpath, Bhubaneswar-751 022, Dist-Khordha, Odisha.

...Respondents

For the applicant : Mr.N.R.Routray, counsel
Smt. J.Pradhan, counsel
Mr.J.K.Choudhury, counsel
Mr.S.K.Mohanty, counsel

For the respondents: Mr.G.R.Verma, counsel

Heard & reserved on : 19.12.2019 Order on : 14.01.2020

O R D E R

Per Mr. Gokul Chandra Pati, Member (A)

Applicant is presently working as Compiler (Group-C) under the Director of Census Operations, Bhubaneswar. She has approached this Tribunal in this O.A. seeking for the following reliefs:

- “i) To direct the Respondents to promote the applicant to the post of Senior Compiler w.e.f. 29.07.2019.
- ii) And to direct the Respondents to grant all consequential service and financial benefits.”

2. Briefly stated, the facts of the matter are that initially, the applicant joined as Compiler on 06.07.2009 being posted to the office of Respondent No.2. Vide Office Memorandum dated 20.06.2019, a provisional seniority list of Compilers as on 01.04.2019 was published by the Directorate of Census Operations, in which the name of the applicant finds place at Sl.No.14. The DPC for considering promotion to the post of Senior Compiler met on

28.06.2019 and recommended the names of 14 Compilers for such promotion. According to applicant, one Sanjay Kumar Mahalik whose name finds place at Sl.No.15 of the seniority list was promoted to Senior Compiler whereas she being senior was left out of consideration. Ventilating her grievance, the applicant submitted a representation dated 28.08.2019 (A/3) to the Joint Director, Directorate of Census Operations, Bhubaneswar, which, however, having not been considered, this Original Application has been filed seeking for the reliefs as aforesaid.

3. It is the case of the applicant that as per the Recruitment Rules, Compiler with five years' service is eligible to be considered for promotion to the post of Senior Compiler. Sri Sanjay Kumar Mahalik, whose name finds place at Sl.No.15 of the seniority list and is junior to the applicant was promoted to Senior Compiler on the ground that he belongs to SC category thereby ignoring her seniority. According to applicant, in view of the decision of Hon'ble Apex Court in M.Nagaraj and Ors. Vs. UOI & Ors. [(2006) 8 SCC 212, there should be no reservation in the matter of promotion. Further, the Hon'ble Supreme Court in Journal Singh & Ors. Vs. UOI & Ors. vide judgment dated 29.09.2018 has reiterated the same view. Based on this, the applicant has urged that there being no principle of reservation in the matter of promotion, the applicant's seniority should not have been ignored in order to give effect to promotion to Sri Sanjay Kumar Mahalik, on the ground that he belongs to SC category.

4. The respondents have filed a short reply without disputing the factual aspects of the matter. It is pointed out that the applicant belongs to OBC category. According to respondents, DPC for considering promotion of Compilers to Senior Compilers was held on 28.06.2019 and as on that date, the resultant vacancies were 12, apart from three posts of Senior Compiler being anticipated vacancies within next six months and as such, the DPC took into consideration the total number of resultant vacancies of Senior Compilers as 15. As per Recruitment Rules, 15% of posts are to be reserved for SC and 7.5% is to be reserved for ST candidates. Thus, out of 15 posts of Senior Compiler, as per Reservation Roster under Promotion Quota, 12 posts were earmarked for UR, 02 posts for SC and 01 post for ST respectively. Respondents have submitted that according to DOP&T OM dated 10.08.2010 (R/1), which clarifies that SC/ST candidates appointed by promotion on their own merit and seniority and not owing to reservation or relaxation of qualification will be adjusted against unreserved points of reservation roster irrespective of whether the promotion is made by selection method or non-selection method. In the above backdrop, 12 candidates in the seniority list were considered against UR vacancies on merit in which 3 SC candidates were considered against UR vacancies. Besides, 2 SC candidates at Sl.No.13 and 15 of the seniority list were considered as per reservation roster under promotion

quota reserved for SC. As there was no ST candidate available in the extended zone of consideration, the post of Senior Compiler meant for ST category candidate remained vacant. According to respondents, in all, 14 posts of Senior Compiler were filled up on promotion vide order dated 28.06.2019 (R/2) in pursuance of DOP&T OM dated 10.08.2010, as mentioned above. Respondents have pointed out that the applicant although was found fit, but she could not be promoted as Senior Compiler, due to want of vacancy belonging to UR category.

5. Applicant has filed a rejoinder to the counter-reply reiterating the ground that since the position of law has been settled by the Hon'ble Supreme Court in M.Nagaraj case (supra) way back in the year 2006, the Recruitment Rules framed by the Respondents in the year 2013, being in contravention of the law laid down by the Hon'ble Supreme Court to the effect that there should not be any reservation in the matter of promotion and promotion to the next higher post is to be considered as per the seniority and since this was not followed, the respondents should be directed to consider the case of the applicant, who is senior to Shri Sanjay Kumar Mahalik, for promotion with effect from the date of promotion of Shri Mahalik.

6. We have heard the learned counsels for both the sides and perused the records. Applicant has relied on a decision of this Tribunal in O.A.No.260/00913/2016 dated 21.06.2018 (A/4) directing the departmental authorities therein to revert the persons promoted on the basis of reservation. On a perusal of the said decision, it appears that the applicant in the said O.A. had challenged the notification dated 09.01.2016 issued by the Railway Administration notifying for filling up 43 numbers of posts of Chief Loco Inspector, of which 33 posts were meant for UR, 07 for SC and 03 for ST. The point urged by the applicant in that O.A. was that reservation of 07 posts for SC and 03 posts for ST in promotion by way of bifurcating the vacancies vis-a-vis the roster point of SC/ST was misconceived as no quantifiable data for framing any rule to follow reservation in promotion was collected in terms of the law laid down by the Hon'ble Supreme Court in the case of M.Nagraj, as a result of which the applicants, who are senior to many reserved candidates are going to be deprived of their right for being considered for promotion to the post of Chief Loco Inspector. This Tribunal, placed reliance on the decisions in M.Nagraj case (supra) as well as the decision of Hon'ble Supreme Court in Suraj Bhan Meena & Anr. Vs. State of Rajasthan & Ors. in Special Leave Petition (Civil) No.6385/2010 disposed of on 07.12.2010 which has been extracted in the order dated 21.6.2018 in O.A. No. 913/2016 as hereunder:

“46. The position after the decision in M.Nagaraj's case (supra) is that reservation of posts in promotion is dependent on the inadequacy of representation of members of the Scheduled Castes and Scheduled Tribes and Backward Classes and subject to the condition of ascertaining as to whether

such reservation was at all required. The view of the High Court is based on the decision in M.Nagaraj's case (supra) as no exercise was undertaken in terms of Article 16(5-A) to acquire quantifiable data regarding the inadequacy of representation of the Scheduled Casts and Scheduled Tribes communities in public services. The Rajasthan High Court has rightly quashed the notification dated 28.12.2002 and 25.4.2008 issued by the State of Rajasthan providing for consequential seniority and promotion to the members of the Scheduled Castes and Scheduled Tribes communities and the same does not call for any interference. Accordingly, the claim of Petitioners Suraj Bhan Meena and Sriram Choradia in Special leave Petition (Civil) No.6385 of 2010 will be subject to the conditions laid down in M.Nagaraj's case (supra) and is disposed of accordingly. Consequently, Special Leave Petition (C) Nos. 7716, 7717, 7826 and 7838 of 2010 filed by the State of Rajasthan, are also dismissed".

7. Having recorded so, this Tribunal held in OA No. 903/2016 as under :

"8. The above being the position of fact and law, the OA is allowed. The impugned orders being contrary to law are hereby quashed. The Respondents are directed to revert the persons, who have been given promotion on the basis of reservation, as such an exercise under Article 16[4-A] can be undertaken only after the State takes opinion that such class of persons are not adequately represented in the service under the State, which is equally applicable to Railway, and not otherwise.

9. The present exercise of rectifying illegal promotion given to reserved category candidates solely on the basis of reservation ignoring eligible general candidates be completed within a period of four months. If the department feels that there will be administrative difficulty in implementing the order in that event they are to give promotion to the general candidates who have been overlooked by such promotion of Scheduled Caste and Scheduled Tribe employees, so that the right of promotion of unreserved candidates are not affected, as Article 335 remains a guiding principle for maintenance of efficiency of administration in connection with the affairs of the Union or State.

10. Furthermore, in a recent decision [(2015) 10 SCC 292, S.Panner Selvam & ors. vs. State of Tamil Nadu and others], Their Lordships of the Hon'ble Apex Court have categorically held that catch-up rule would be applicable in such circumstances, i.e., reserved category promotes cannot count their seniority in the promoted category from the date of their promotion, and if the senior general candidates later reach the promotional level, general candidates will remain their seniority. These observations of the Hon'ble Apex Court have to be kept in mind before undertaking any exercise, so that the action of the respondents cannot have the effect of nullifying the judgment of Hon'ble Supreme Court. Further, it is clarified that till quantified date collected by the State machinery or any further clarification made by a Constitutional Bench judgment of the Hon'ble Apex Court, there shall not be any reservation in promotional post. No costs".

It is noticed that in the above cited order, the direction of the Tribunal not to have any reservation in promotional post was subject to "further clarification made by a constitutional Bench judgment of the Hon'ble Apex Court."

8. A Constitutional Bench of Hon'ble Apex Court for the case of **Jarnail Singh & others vs.Lachhmi Narain Gupta & Others in the Civil Appeal No. 30621/2011** [AIR 2018 SC 240] has held on the issue of reservation in promotion as under (vide judgment dated 26.9.2018) :-

" The present group of cases arises out of two reference orders – the first by a two-Judge Bench referred to in a second reference order, dated 15.11.2017, which is by a three-Judge Bench, which has referred the correctness of the

decision in *M. Nagaraj v. Union of India*, (2006) 8 SCC 212, ("Nagaraj"), to a Constitution Bench.

.....

3. We have heard wide-ranging arguments on either side for a couple of days, raising several points. However, ultimately, we have confined arguments to two points which require serious consideration. The learned Attorney General for India, Shri K.K. Venugopal, led the charge for reconsideration of *Nagaraj* (supra). According to the learned Attorney General, *Nagaraj* (supra) needs to be revisited on these two points. First, when *Nagaraj* (supra) states that the State has to collect quantifiable data showing backwardness, such observation would be contrary to the nine-Judge Bench in *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217, ("Indra Sawhney (1)"), as it has been held therein that the Scheduled Castes and the Scheduled Tribes are the most backward among backward classes and it is, therefore, presumed that once they are contained in the Presidential List under Articles 341 and 342 of the Constitution of India, there is no question of showing backwardness of the Scheduled Castes and the Scheduled Tribes all over again. Secondly, according to the learned Attorney General, the creamy layer concept has not been applied in *Indra Sawhney (1)* (supra) to the Scheduled Castes and the Scheduled Tribes and *Nagaraj* (supra) has misread the aforesaid judgment to apply this concept to the Scheduled Castes and the Scheduled Tribes. According to the learned Attorney General, once the Scheduled Castes and the Scheduled Tribes have been set out in the Presidential List, they shall be deemed to be Scheduled Castes and Scheduled Tribes, and the said List cannot be altered by anybody except Parliament under Articles 341 and 342....."

9. After examining the provisions of the Constitution of India and the case laws on the question of reservation in promotion, Hon'ble Apex Court has finally held in *Jarnail Singh* (supra) as under:-

"21. Thus, we conclude that the judgment in *Nagaraj* (supra) does not need to be referred to a seven-Judge Bench. However, the conclusion in *Nagaraj* (supra) that the State has to collect quantifiable data showing backwardness of the Scheduled Castes and the Scheduled Tribes, being contrary to the nine-Judge Bench in *Indra Sawhney (1)* (supra) is held to be invalid to this extent."

10. It is clear that the judgment in the case of *Jarnail Singh* (supra), which has been referred to by the applicant in the Rejoinder, has held the direction to collect quantifiable data regarding SC and ST while allowing reservation in promotion as per the judgment in the case of *Nagraj* (supra) to be invalid. The order dated 21.6.2018 of the Tribunal (Annexure-A/4) in OA No. 913/2016, which has also been relied upon by the applicant in addition to the judgment of Hon'ble Apex Court in the case of *M. Nagraj* (supra) to justify her claim in the OA, had no occasion to take into account the judgment in the case of *Jarnail Singh* (supra) which was subsequently pronounced. It is clear from the said order dated 21.6.2018 of the Tribunal that the order was based on the judgment in the case of *M.Nagraj* (supra) and other cases, requiring collection of quantifiable data for before allowing reservation for SC and ST in promotion.

11. Similarly, the order dated 24.8.2018 (Annexure-A/5) of Hon'ble High Court in W.P. (C) No. 14639/2018, which was filed to challenge the order dated 21.6.2018 of the Tribunal, had followed the law laid down in the case of *M.Nagraj* (supra), which has been modified after the judgment in the case of *Jarnail Singh* (supra) as discussed earlier. Hence, as per the settled law for

reservation in promotion as per the judgment in the case of Jarnail Singh (supra), the reservation for Scheduled Caste and Scheduled Tribe in promotion is permissible as per the extant rules without the requirement of collection of quantifiable data.

12. In this OA, the contention in para 3 (d) of the Short Reply filed by the respondents, is that the reservation for SC and ST in promotion as per the order dated 28.6.2019 (Annexure-A/1), is in accordance with the Recruitment Rules (in short RR) and such contention of the respondents has not been contradicted in the Rejoinder filed by the applicant. It is mentioned in para 3 of the Rejoinder that the RR issued in 2013 with provision for reservation violated the judgment of Hon'ble Apex Court without challenging the said RR in this OA.

13. For the reasons as discussed above, the claim for promotion from the date of promotion of Sri Sanjay Kumar Mahalik who is admittedly the applicant's junior and who was promoted against the reserved vacancy for promotion to the post of Sr. Compiler as per the RR, is not justified in the light of the judgment of Hon'ble Apex Court in the case of Jarnail Singh (supra), modifying the judgment in the case of M.Nagraj (supra) as discussed earlier. Hence, the justifications furnished by the applicant in her pleadings are not adequate to justify any interference of this Tribunal in the matter.

14. It is noticed that the respondents have averred in their Short Reply that the representation dated 28.8.2019 (Annexure-A/3) of the applicant requesting to consider her case against an existing vacant post which was not filled up due to non-availability of ST candidate, is pending for consideration of the respondents. Hence, this OA is disposed of with direction to the respondents/competent authority to consider the said representation dated 28.8.2019 of the applicant as per the provisions of law if the same is pending and to dispose of the same by passing a speaking order copy of which is to be communicated to the applicant within three months from the date of receipt of a copy of this order. If the said representation is already disposed of in the meantime, then decision taken be informed to the applicant within the time as stipulated above. There will be no order as to cost.

(SWARUP KUMAR MISHRA)
MEMBER (J)

(GOKUL CHANDRA PATI)
MEMBER (A)

