

CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH, MUMBAI.

ORIGINAL APPLICATION NOS.: 629 of 2001

Date of Decision : 27.02.2007

Shri P. K. Krishnaunni, Applicant.

Shri S. P. Saxena, Advocate for the applicant.

VERSUS

Union of India & others, Respondents.

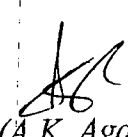
Shri V. G. Rege and
Shri K. K. Waghmare, Advocate for Respondents.

CORAM :

Hon'ble Shri A. K. Agarwal, Vice-Chairman.

Hon'ble Shri Muzaffar Husain, Member (J).

1. To be referred to the reporter or not ?
2. Whether it needs to be circulated to other Benches of the Tribunal ?
3. Library.


(A.K. Agarwal)
Vice-Chairman

CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH, MUMBAI.

ORIGINAL APPLICATION NO.: 629 of 2001

Dated this Thursday the 27th day of February, 2007.

CORAM : Hon'ble Shri A. K. Agarwal, Vice-Chairman.

Hon'ble Shri Muzaffar Hussain, Member (J).

P. K. Krishnaunni,
U.D.C., C.G.H.S.,
Swasthya Bhawan,
Mukundnagar, Pune - 37.

... Applicant

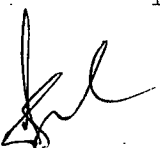
(By Advocate Shri S.P. Saxena)

VERSUS

1. Union of India through
The Secretary,
Ministry of Health &
Family Welfare,
Nirman Bhawan,
New Delhi - 110 011.
2. The Director,
C.G.H.S., Nirman Bhavan,
New Delhi - 110 011.
3. The Additional Director,
C.G.H.S., Mukundnagar,
Pune - 37.
4. Shri A. S. Gaikwad,
Office Superintendent,
Office of C.G.H.S.,
Swasthya Bhawan,
Mukundnagar,
Pune - 37.

... Respondents.

(By Advocate Shri V.G. Rege
for Respondents No. 1 to 3,
and Shri K.K. Waghmare
for Respondent No. 4)

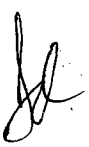


O R D E R


Per : Shri A. K. Agarwal, Vice-Chairman.

The applicant has filed this O.A. seeking a declaration that he is senior to R-4 in the cadre of U.D.C. as on 14.03.1996 when R-4 was promoted as Office Superintendent and also a direction to the respondents to hold a review D.P.C. for considering his case for promotion to the post of Office Superintendent.

2. The facts of the case in brief are as follows :- The applicant was selected as L.D.C. through Staff Selection Commission in the year 1978 and was due for promotion as U.D.C. w.e.f. 1983. However, the respondents in the year 1987 promoted one Shri K.S. Prasad, a junior to the applicant, as U.D.C. superseding the applicant. The applicant then file an O.A. No. 866/99 which was allowed by the Tribunal vide its order dated 28.08.2000. when the respondents' counsel submitted before the Tribunal that the applicant has been found suitable by the D.P.C. held on 08.08.2000 for the post of UDC as well as for the post of Statistical Assistant. The respondents thereafter vide order dated 10.11.2000 promoted the applicant on the post of U.D.C., with retrospective effect from 12.05.1987 i.e. from the date when his junior in the cadre of L.D.C. was promoted.




3. The applicant has submitted that Respondent No. 4, who was junior to him in the cadre of L.D.C., was promoted as U.D.C. with effect from 09.04.1984 against a post reserved for schedule caste by giving accelerated promotion. The applicant was given promotion on the post of U.D.C. from the date when his junior, a general candidate, was promoted i.e. 12.05.1987. The next promotion post is that of Office Superintendent. The respondents promoted R-4 on the post of Office Superintendent on a regular basis w.e.f. 14.03.1996. Presumably this was done on the basis that R-4 was promoted as U.D.C. in April, 1984 while the applicant was given retrospective promotion w.e.f. May, 1987. The applicant has submitted that in view of the judgement given by the Apex Court in the case of Ajit Singh Vs. State of Punjab he should have been treated as senior to R-4 on the basis of catch-up principle i.e. based upon the seniority in the feeder cadre of L.D.C. The applicant w.e.f. 10.02.1995 has gained seniority over R-4 in view of the judgement in the case of R.K. Sabharwal rendered by the Supreme Court. Thus, on 14.03.1996 when R-4 was promoted as Office Superintendent, the applicant was senior to him in the feeder cadre of UDC. The applicant has further submitted that promotion to the post of Office Superintendent is made by adopting a non selection method i.e. On seniority-cum-fitness basis. The fact that the DPC found him fit for promotion as UDC from a retrospective date he was also entitled for



consideration for promotion for the next post i.e. Office Superintendent. The applicant made representations on 16.11.2000 and 09.04.2001 requesting the respondents to give him deemed promotion on the post of Office Superintendent from the date R-4 was promoted i.e. 14.03.1996. In the absence of any favourable decision on his representation the applicant has filed this O.A.

4. The learned counsel for the applicant, Shri S.P. Saxena, submitted that the applicant was not promoted as U.D.C. in the year 1987, at the first stage, presumably because he had some adverse entries in the ACR. However, on a representation made against the adverse entries the same were expunged. Thereafter the applicant had filed another O.A. and during the pendency of the O.A. the respondents had held a review D.P.C. and declared the applicant as fit for promotion. The applicant was promoted as U.D.C. with retrospective effect from 1987. The learned counsel submitted that no doubt R-4 was promoted as U.D.C. with effect from 09.04.1984 while the applicant was promoted w.e.f. 12.05.1987 but keeping in view the ratio laid down by the Apex Court the applicant will gain seniority since he was senior in the feeder cadre. Thus, he has to be treated senior in the cadre of U.D.C. to R-4 notwithstanding that his date of promotion is a later one. The learned counsel submitted that the Apex Court in the case of Veerpal Singh Chavan Vs. Union of India & Others [1995 (1)]



SCC 684/ had held that the catch-up principle will apply only when the schedule caste candidate and the general candidate are in the same cadre and not when the schedule caste candidate has got promotion to the next higher cadre. Since in the year 1987 R-4 was only a U.D.C., i.e. in the same cadre therefore the applicant will get seniority over him. The learned counsel stated that this principle was reconfirmed by the Apex Court in the case of Ajit Singh Juneja V/s. State of Punjab [1996 (1) SCC 715/.

5. The learned counsel for the applicant continuing his submissions stated that the seniority and consideration for promotion are two different things. Seniority is not a constitutional right and is governed by the rules while a person who is senior has a right for being considered for promotion. The learned counsel stated that Article 16 (4-A) of the Constitution is an enabling provision. It cannot abrogate provision of Article 16 (1). Drawing our attention towards the recruitment rules, the learned counsel stated that the post of Office Superintendent is to be filled by promotion, failing which by deputation. For promotion - UDCs and Stenographers with five years service in the concerned city with minimum of two years of experience in administrative work are eligible. He further stated that in Pune there is only one sanctioned post of Office Superintendent. In Column 5 of the recruitment rules

it is clearly stated that it is a non selection post. Therefore, seniority-cum-fitness principle will apply and the person who is senior, if he is found fit, has to be promoted, while the applicant has not even been considered. The learned counsel stated that R-4 was promoted as Office Superintendent w.e.f. 10.07.1992 only on an ad hoc basis. His regular promotion came only on 14.03.1996. On this date the applicant was certainly senior to R-4. The learned counsel stated that the seniority has to be given to the applicant keeping in view the ratio of catch-up principle laid down by the Apex Court. He argued that before such verdict of the Apex Court there were no statutory rules for giving seniority but there were only departmental instructions. Concluding his submissions, the learned counsel for applicant stated that the O.A. should be allowed and the respondents be directed to consider the case of the applicant for promotion to the post of Office Superintendent as on 14.03.1996 since as on that date he was senior to R-4 in the cadre of U.D.C.

6. The learned counsel for respondents, Shri V.G. Rege, initially drew our attention towards DOPT O.M. Dated 21.01.2002 filed along with the written statement wherein it is specifically mentioned as follows :

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 "The Government has now decided to negate the effects of the DoP&T, O.M. Dated the 30th January, 1997 by amending Article 16 (4-A) of the Constitution right from the date of its inclusion in the Constitution, i.e., 17th June, 1995, with a view to allow the Government servants belonging to Scs/STs to retain the seniority in the case of promotion by virtue of reservation."

The learned counsel stated that even in the verdict of R.K. Sabharwal (supra) the Supreme Court had held that the earlier positions are not to be disturbed. Therefore, as a result of the verdict relied upon by the Applicant's counsel, the respondents were not expected to make any readjustment in the seniority. R-4 was undoubtedly promoted in the cadre of UDC in the year 1984. The learned counsel further stated that the DOPT O.M. dated 21.01.2002 has not been challenged by the applicant. He stated that the provisions of this O.Ms. are binding as long as the O.M. is valid. In view of this, the seniority of R-4 cannot be disturbed. He further contended that in the earlier O.A. No. 866 filed by the applicant in 1999 he had not sought any relief against the seniority of R-4. In that O.A. he had only sought a direction for consideration of his case for promotion to the post of Statistical Assistant from the date his junior general candidate was promoted. The question of seniority vis-a-vis schedule caste candidate was not raised in that O.A. The learned counsel contended that the applicant cannot raise such question now at this stage. The learned counsel further stated that the 85th Amendment to the Constitution, on the basis of which DOPT O.M. dated 21.01.2002 was issued, was challenged in the Apex Court and the Apex Court in the case of M. Nagaraj & Others Vs. Union of India & Others [2006 (8) SCC 212] has upheld the constitutional amendment. He drew our attention towards following observations of the Apex Court :


"The concept of reservation in Article 16 (4) is hedged by three constitutional requirements, namely, backwardness of a class, inadequacy of representation in public employment of that class and overall efficiency of the administration. These requirements are not obliterated by the impugned constitutional amendments. Reservation is not in issue. What is in issue is the extent of reservation. If the extent of reservation is excessive then it makes an inroad into the principle of equality under Article 16 (1). Extent of reservation, as stated above, will depend on the facts of each case. Backwardness and inadequacy of representation are compelling reasons for the State Governments to provide representation in public employment."

The learned counsel contended that since the State in providing for reservation has not gone beyond 50% the limit laid down by the Apex Court in Indra Sawhney's case, therefore, the present level cannot be called as an excessive reservation. As far as giving of seniority through catch-up principle is concerned, the constitutional amendment negating such principle has already been upheld by the Apex Court in the case of Nagaraj & Others (supra). In view of this, the applicant has no case and the O.A. deserves to be dismissed.

7. The learned counsel for applicant in reply stated that the contention of the respondents' side of not challenging the issue of seniority in time has no merit. He submitted that the applicant was given promotion on the post of UDC with effect from 1987 only after the matter was agitated in the Tribunal and such order was issued by the respondents only in the year 2000. Before this date the applicant could not

agitate the issue of seniority over R-4 in the cadre of U.D.C. Moreover, in the case of Nagaraj & Others (supra) the Apex Court has only upheld the enabling power of the Government to work out the modalities reservation.

8. We have heard both the learned counsel at length and have perused the material available on record, including the judgments relied upon by both the parties. The learned counsel for applicant has relied upon a verdict of the Apex Court in the case of Central Board of Dawoodi Bohra Community & Another Vs. State of Maharashtra & Another [2005 (2) SCC 673] wherein it was held that a law laid down by Supreme Court is binding on any subsequent Bench of co-equal strength. Further, it will be open only for a Bench of co-equal strength to express an opinion doubting the correctness of the view taken by the Bench whose decision is being doubted, whereupon the matter may be placed for hearing before a Bench larger than the one whose decision is being doubted. The learned counsel contended that the verdict of the Apex Court in the case of Indra Sawhney Vs. Union of India & Others [AIR 1993 SC 477] was given by a Bench of nine Judges. He contended that the view taken by the Apex Court in the case of M. Nagaraj & Others (supra) is of a Bench of five Judges. Therefore, according to him any view taken by the Apex Court in M. Nagaraj & Others, to the extent it contravenes the ratio laid down by the Apex Court in the case of Indra Sawhney (supra) cannot be held binding.



9. The learned Counsel for applicant had also contended that the fundamental right guaranteed by Article 16 (1) of the Constitution cannot be taken away by Article 16(4) or 16(4-A). By such pleading the learned counsel is in fact challenging the constitutional validity of Article 16 (4) and 16(4-A) on the grounds that its provision are repugnant to the freedom guaranteed by Article 16 (1). Article 16 of the Constitution has been discussed in great detail by the Apex Court in the case of M. Nagaraj & Others (supra) and they have upheld the classification envisaged by Article 16 (4-A) and 16(4-B). In para 49 of the judgment of M. Nagaraj (supra) the Apex Court has observed as follows :

"Equity in Article 16(1) is individual-specific whereas reservation in Article 16(4) and Article 16(4-A) is enabling. The discretion of the State is, however, subject to the existence of "backwardness" and "inadequacy of representation" in public employment. Backwardness has to be based on objective factors whereas inadequacy has to factually exist. This is where judicial review comes in. However, whether reservation in a given case is desirable or not, as a policy, is not for us to decide as long as the parameters mentioned in Article 16(4) and 16(4-A) are maintained."

Further, in para 102 the Apex Court has made following observations :

"Clause (1) of Article 16 cannot prevent the State from taking cognizance of the compelling interests of Backward Classes in the society. Clauses (1) and (4) of Article 16 are restatements of the principle of equality under Article 14. Clause (4) of Article 16 refers to affirmative action by way of reservation. Clause (4) of Article 16, however, states that the appropriate Government is free to provide

for reservation in cases where it is satisfied on the basis of quantifiable data that reservation in cases where it is satisfied on the basis of quantifiable data that Backward Class is inadequately represented in the services. Therefore, in every case where the State decides to provide for reservation there must exist two circumstances, namely, "backwardness" and "inadequacy of representation". If the State concerned fails to identify and measure backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid."

Observations of the Apex Court made in para 112 are set out below :

"At one point of time Article 16(4) was read by the Supreme Court as an exception to Article 16 (1). That controversy got settled in Indra Sawhney. The words "nothing in this article" in Article 16 (4) represents a legal device allowing positive discrimination in favour of a class. Therefore, Article 16(4) relates to "a class apart". Article 16 (4), therefore, creates a field which enables a State to provide for reservation provided there exists backwardness of a Class and inadequacy of representation in employment. These are compelling reasons. They do not exist in Article 16 (1). It is only when these reasons are satisfied that a State gets the power to provide for reservation in matters of employment. Therefore, Article 16 (1) and Article 16 (4) operate in different fields."

10. As far as objection from the applicant's side on the ratio laid down by the Apex Court in the case of M. Nagaraj & Others (supra) on the ground that it is not in conformity with decision of a larger Bench in Indra Sawhney (supra) case, we find that the Apex Court in the case of M. Nagaraj has also discussed its earlier view expressed in the case of Indira Sawhney. In view of this, we hold that the ratio laid down by the Apex Court in the case of M. Nagaraj & Others (supra) on all the issues is binding upon us.

11. The provision for reservation of SC/ST in the case of promotion has been discussed and upheld by the Apex Court. The earlier view regarding seniority in the promoted cadre taken by the Apex Court in the case of Veerpal Singh Chauhan (supra) that a general candidate will catch up in seniority was negated by 85th Amendment to the Constitution. The Apex Court in the case of M. Nagaraj & Others has upheld the validity of 85th Amendment to the Constitution. On the catch-up principle the observation of the Apex Court in the case of M. Nagaraj are as follows :

"Reading the above judgments, we are of the view that the concept of "catch-up" rule and "consequential seniority" are judicially evolved concepts to control the extent of reservation. The source of these concepts is in service jurisprudence. These concepts cannot be elevated to the status of an axiom like secularism, constitutional sovereignty, etc. It cannot be said that by insertion of the concept of "consequential seniority" the structure of Article 16(1) stands destroyed or abrogated. It cannot be said that "equality code" under Articles 14, 15 and 16 is violated by deletion of the "catch-up" rule."

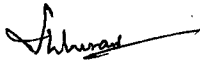
12. In view of the observations of the Apex Court cited above, the obvious conclusion is that provision of reservation for SC/ST in promotion and also the provision of allowing them to retain seniority, if promoted earlier, are legally valid. As mentioned above, 85th amendment to the Constitution amending Article 16(4-A) w.e.f. 17.02.1995 provides that a member of SC/ST promoted earlier, even on the basis of reservation, will retain his seniority. In the present

case, Respondent No. 4 was promoted as Office Superintendent on a regular basis w.e.f. 14.03.1996. At that point of time, in view of analysis of the case hereinabove the applicant was junior to R-4 not withstanding his seniority in the feeder cadre of U.D.C. in the year 1987 since R-4 was promoted as UDC in the year 1984. The applicant was eligible for the benefit of catch-up principle only up to 17.02.1995 but not thereafter. The contention of the applicant is that since before 85th Amendment of the Constitution the benefit of the ratio laid down by the Apex Court in the case of Veerpal Singh Chavan (supra) was very much available, therefore on his promotion in the year 1987 he should have been placed senior to R-4. The seniority gained in the year 1984 could not be disturbed, especially when the Apex Court in the case of R.K. Sabharwal (supra) had held that the earlier cases need not be reopened and the benefit be prospective w.e.f. 10.02.1995.

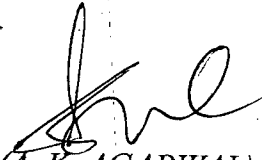
13. The main contention of the applicant is that since his promotion to the post of UDC, though made in the year 2000, was effective from 12.05.1987, therefore, in the cadre of UDC he should be declared senior to R-4. As per facts of the case R-4 was promoted to the post of UDC w.e.f. 09.04.1984 and in view of clear verdict of the Apex Court in the case of R.K. Sabharwal (supra) and Veerpal Singh Chauhan (supra) that for the benefit of catch-up principle the

promotions already made earlier will not be affected, we hold that R-4 continues to remain senior to the applicant. The catch-up principle is no longer valid after 85th amendment to the Constitution which has also been upheld by the Apex Court in the case of M. Nagaraj (supra).

14. In view of the foregoing discussion we hold that the O.A. is devoid of merit. The same is dismissed with no order as to costs.



(MUZAFFAR HUSAIN)
MEMBER (J)



(A. K. AGARWAL)
VICE-CHAIRMAN.

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