

**CENTRAL ADMINISTRATIVE TRIBUNAL
CHANDIGARH BENCH**

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...
(Reserved on 24.04.2015)

OA No. 060/01043/2014

Date of decision- 26.5.2015.

...
CORAM: HON'BLE MR. SANJEEV KAUSHIK, MEMBER (J)
HON'BLE MR. UDAY KUMAR VARMA, MEMBER (A)

- ...
1. Krishan Dutt son of Durga Dass Sharma, age 54 years, Superintendent, Hqrs. (Review), CE Commissionerate, Chandigarh-I Commissionerate, Chandigarh.
 2. Rajinder Prasad Sharma son of Shiv Kumar Sharma, age 54 years, Superintendent, Central Excise Division, Range III, Baddi, Himachal Pradesh.
 3. I.S. Sidhu son of J.S. Sidhu, aged 50 years, Superintendent, Service Tax Division Range-I, Chandigarh.
 4. Prem Kumar son of Sarwan Dass, age 57 years, Superintendent, Hqrs. (Audit), Central Excise Commissionerate Chandigarh-II.
 5. Sanjeev Thapar son of Tarsem Lal Thapar, aged 56 years, Superintendent, Hqrs. (Audit), Central Excise Commissionerate, Chandigarh-II.
 6. T.M.S. Sidhu son of Ranjit Singh Sidhu, aged 56 years, Superintendent, Hqrs. (Audit), Central Excise Division, Ludhiana.

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7. Sanjeev Singh son of Surat Singh, aged 48 years, Superintendent, Division (Tech.), Central Excise Division Derabassi.
8. Anuj Sharma son of Raminder Kumar Sharma, aged 49 years, Superintendent, Central Excise Commissionerate, Range-III, Division-I, Ludhiana.
9. Anil Khanna son of Jawahar Khanna, aged 46 years, Superintendent, T.FC Salamabad (J&K).
10. Sanjeev Aggarwal son of Late Sh. Desh Prem Azad, aged 47 years, Superintendent, Division (Tech.), Central Excise Division, Derabassi.

...APPLICANTS

BY ADVOCATE : Sh. V.K. Sharma.

VERSUS

1. Union of India through the Revenue Secretary to Government of India, Ministry of Finance, Department of Revenue, New Delhi.
2. The Secretary, Government of India, Ministry of Personnel, Public Grievances and Pension, DOP&T, North Block, New Delhi.
3. Union Public Service Commission through its Secretary, Dholpur House, New Delhi.

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4. The Chairman, Central Board of Excise and Customs, Ministry of Finance, North Block, New Delhi.
5. Chief Commissioner of Customs and Central Excise, Chandigarh-II, Chandigarh.
6. Om Parkash Negi, Assistant Commissioner, Office of Directorate General of Central Excise Intelligence, West Block-VIII, Wing No.VI, R.K. Puram, New Delhi-110066.
7. Sonam Angdui, Assistant Commissioner, Office of Chief Commissionerate, Audit-I, Ahmedabad.
8. R.K. Negi, Assistant Commissioner, IGI Airport, New Delhi-11037.
9. Ravinder Singh, Assistant Commissioner, Service Tax Commissionerate Delhi-III, Delhi.

...RESPONDENTS

BY ADVOCATE: Sh. Sanjay Goyal, counsel for respondent no. 1 to 5.
Sh. D.R. Sharma, counsel for respondent nos. 6 to 9.

ORDER

HON'BLE MR. SANJEEV KAUSHIK, MEMBER (J):-

Challenge in the Original Application is to the Order No. 192/2014 dated 22.10.2014 to extent that the official respondents have granted promotion to the private respondent nos. 6 to 9, who

belong to reserved category, and are juniors to them to the grade of Assistant Commissioner of Customs & Central Excise, by granting reservation in promotion in inviolation of law laid down in various decisions of the Hon'ble Supreme Court recently being **Suraj Bhan Meena & Another Vs. State of Rajasthan & Others**. The applicants have also sought issuance of a direction to the respondents to revise the seniority list of the Superintendents in all zones, on the basis of the mandate given by the Courts with regard to 'no reservation in promotion' to the post of Assistant Commissioner of Customs and Central Excise and quash the order dated 07.01.2014 (Annexure A-1/1) issued by respondent no. 2-DoPT advising the departments to continue with the reservation in promotion. It is further prayed to direct the respondents to reconvene the DPC meeting to consider and promote the applicants and other similar situated persons, who are eligible, as Assistant Commissioner of Customs and Central Excise by ignoring the rule of reservation in promotion from the date when vacancies become available with all the consequential benefits.

2. The undisputed facts, which born out from a conjective perusal of the pleadings leading to filing of present O.A are that the applicants initially joined duties as Inspector on various dates on regular basis in the respondent-Central Excise Department. On the basis their performance and fulfillment of eligibility conditions, they were

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promoted to the posts of Superintendents on various dates and continues to work as such. The private respondent nos. 6 to 9, who are junior to the applicants, have been shown senior in all India seniority list of superintendents, as prepared for the purpose of promotion, to the post of Assistant Commissioner, Central Excise. Details of same is annexed as Annexure A-3 and Annexure A-4 and seniority list is attached as Annexure A-5. The next promotional post in the hierarchy is of Assistant Commissioner, Customs and Central Excise, which is governed by the rules known as 'Indian Customs and Central Excise Service (Group 'A') Rules, 1987 as amended in 1992, 1993, 1998 and 2004. Rule 5 contained in part II of the said rules deals with method of recruitment to the service and percentage of vacancies to be filled in certain grades of the services.

3. The solitary contention at the hand of the applicants is that since it has already been held by the highest court of law that there cannot be any reservation in promotion until the necessary exercise as mandated in the case of **M. Nagraj & Ors. Vs. U.O.I & Ors.**, 2006 (8) SCC 212, is carried out, the official respondents cannot grant reservation in promotion. The mandate in M.Nagraj (supra) case has been followed across the country by the courts of law. Following the same, this Tribunal has allowed the various petitions holding that there shall be no reservation in promotion including in cases of customs

department itself which was subject matter before the jurisdictional High Court in CWP No. 13218/2009 titled **Lachhmi Narain Gupta and Others Vs. Jarnail Singh and Others** decided on 15.07.2011. Order of this court was affirmed and now issue is pending for adjudication before the Hon'ble Supreme Court where there is no stay. Despite the clear mandate in case of M.Nagraj (supra) subsequently followed in case of *Suraj Bhan Meena (Supra)* where it was held that if state has to make any provision for reservation in matters of promotion with consequential seniority to any class of posts in the service under the state in favour of Scheduled Castes and Scheduled Tribes, where the state is of the opinion that such classes are not adequately represented in the service of the state, it has to that carry out proper study and then make enabling provision, but without carrying out such exercise, respondents continue to grant reservation in promotion. It has been held that it is not that consequential seniority on promotion against Roster Point is automatic. The state can frame rules based upon the survey conducted by State showing that there is inadequacy in representation of the SC & ST category. Till such survey is conducted, constitutional seniority can not be extended. Despite the above settled law, the official respondents, vide impugned order, have promoted the private respondents who belong to reserved

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category without collecting the data, as mandated in M. Nagraj's case (supra).

4. The official respondents have filed a detailed written statement wherein they have admitted the contention of the applicants and submitted that inadvertently a mistake has been committed by the authorities resulting in issuance of seniority list where persons junior to the applicants have been considered and shown senior and consequently, they have been promoted by ignoring the mandate as per the settled law. It is so admitted in para 2 of the 'Preliminary Submission'. It is also submitted that the respondents are bound to follow the OM dated 07.01.2014 issued by the DoPT where respondent no. 2 i.e. DoPT has written a letter to the UPSC in the shape of advisory to continue with existing reservation policy in promotion. The private respondents have also filed a separate written statement disputing the factual accuracy of the averments made in the O.A.

5. We have heard Sh. V.K. Sharma, learned counsel for the applicants, Sh. Sanjay Goyal, Senior panel counsel for respondent no. 1 to 5 and Sh. D. R. Sharma, learned counsel for the private respondents no. 6 to 9.

6. Sh. V.K. Sharma, learned counsel for the applicants submitted that this O.A can be disposed of in view of the respondents own admission wherein they have admitted that a mistake has occurred

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and they will rectify the same, firstly, by issuing the revised seniority list and secondly, by holding the review DPC. He also pointed out that advice by the DoPT to UPSC as contained in letter dated 07.01.2014 has been considered and rejected by the Allahabad Bench of this Tribunal in case of **Sunil Kumar Rajpoot & Ors. Vs. Union of India and Ors.** (O.A No. 1502/2012) decided on 15.11.2014 holding that same is against the dictum of the Hon'ble Apex Court as mandated in the case of M. Nagraj (supra). Therefore, he submitted that the respondents be directed firstly to carry out the exercise for issuing the revised seniority list, thereafter, on the basis of that seniority list, by ignoring the reservation in promotion, the eligible persons may be promoted to the post of Assistant Commissioner as per their seniority. The counsel for the official respondents was not in position to rebut what has been submitted by Sh. V.K. Sharma, learned counsel for the applicants. Same was the position of Sh. D.R. Sharma, learned counsel for the private respondents.

7. We have given our thoughtful consideration to the entire matter and perused the pleadings of the parties as available on record and the judgments cited by counsels with the able assistance of respective counsels.

8. The issue with regard to the grant of consequential seniority on account of reservation in promotion is no more res-integra. Before

answering the above poser, we would like to notice here that question relating to reservation in promotional posts fell for consideration of the Hon'ble Apex Court in case in **Indra Sawhney's case** (supra) (AIR 1993 SC 477) wherein impact of Article 16(4) of the constitution, relating to the State's powers for making provision for reservation in appointment or posts in favour of any backward class of citizens, which in the opinion of the state was not adequately represented in services under the state, was considered. Further question for determination was whether such power extended to promotional posts. The Hon'ble Supreme Court answered the question by holding that Article 16 (4) does not permit provision for reservation in the matter of promotion. Further, such rule was to be given effect to only prospectively and would not affect the promotions already made, whether made on regular basis or on any other basis. Ultimately the court held that that Article 16(4) does not permit provision for reservation in the matter of promotion.

9. It has been held by the highest court of law that there was to be no reservation in promotion unless the Government of India undertakes the exercise as mandated in case of M. Nagraj (supra) wherein validity of Article 16 (4-A) of Constitution of India was deliberated by their Lordships. After analyzing the complete law on the subject, conclusion has been recorded in paras 120, 121 & 122 in the

judgment holding that the clause empowers the state to make any provision for reservation in matters of promotion with consequential seniority to any class of posts in the service under the state in favour of Scheduled Castes and Scheduled Tribes where the state is of the opinion that such classes are not adequately represented in the service of the state. It is not that consequential seniority on promotion against Roster Point is automatic. The state can frame rule based upon the survey conducted by State showing that there is inadequacy in representation of the State SC & ST category. Till such survey is conducted, constitutional seniority can not be extended. The conclusion as recorded in paras 120 to 123 of M. Nagaraj's case, reads as under:-

"121. The impugned constitutional amendments by which Articles 16(4A) and 16(4B) have been inserted flow from Article 16(4). They do not alter the structure of Article 16(4). They retain the controlling factors or the compelling reasons, namely, backwardness and inadequacy of representation which enables the States to provide for reservation keeping in mind the overall efficiency of the State administration under Article 335. These impugned amendments are confined only to SCs and STs. They do not obliterate any of the constitutional requirements, namely, ceiling-limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-classification between OBC on one hand and SCs and STs on the other hand as held in Indra Sawhney, the concept of post-based Roster with in-built concept of replacement as held in R.K. Sabharwal.

122. We reiterate that the ceiling-limit of 50%, the concept of creamy layer and the compelling reasons,

namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse.

123. However, in this case, as stated, the main issue concerns the "extent of reservation". In this regard the concerned State will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. As stated above, the impugned provision is an enabling provision. The State is not bound to make reservation for SC/ST in matter of promotions. However if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance of Article 335. It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling-limit of 50% or obliterate the creamy layer or extend the reservation indefinitely."

10. Subsequently, the same view was followed in case of Suraj Bhan Meena (supra) wherein their lordship has held as under:-

"60. The vital issue which fell for determination was whether by virtue of the implementation of the Constitutional Amendments, the power of Parliament was enlarged to such an extent so as to ignore all constitutional limitations and requirements.

61. Applying the "width" test and "identity" test, the Constitution Bench held that firstly it is the width of the power under the impugned amendments introducing amended Articles 16(4-A) and 16(4-B) that had to be tested. Applying the said tests, the Constitution Bench, after referring to the various decisions of this Court on the subject, came to the conclusion that the Court has to be

satisfied that the State had exercised its power in making reservation for Scheduled Castes and Scheduled Tribes candidates in accordance with the mandate of Article 335 of the Constitution, for which the State concerned would have to place before the Court the requisite quantifiable data in each case and to satisfy the Court that such reservation became necessary on account of inadequacy of representation of Scheduled Castes and Scheduled Tribes candidates in a particular class or classes of posts, without affecting the general efficiency of service.

62. The Constitution Bench went on to observe that the Constitutional equality is inherent in the rule of law. However, its reach is limited because its primary concern is not with efficiency of the public law, but with its enforcement and application. The Constitution Bench also observed that the width of the power and the power to amend together with its limitations, would have to be found in the Constitution itself. It was held that the extension of reservation would depend on the facts of each case. In case the reservation was excessive, it would have to be struck down.

63. It was further held that the impugned Constitution Amendments, introducing Article 16(4-A) and 16(4-B), had been inserted and flow from Article 16(4), but they do not alter the structure of Article 16(4) of the Constitution. They do not wipe out any of the Constitutional requirements such as ceiling limit and the concept of creamy layer on one hand and Scheduled Castes and Scheduled Tribes on the other hand, as was held in Indra Sawhney's case (supra).

64. Ultimately, after the entire exercise, the Constitution Bench held that the State is not bound to make reservation for Scheduled Castes and Scheduled Tribes candidates in matters of promotion but if it wished, it could collect quantifiable data touching backwardness of the applicants and inadequacy of representation of that class in public employment for the purpose of compliance with Article 335 of the Constitution.

65. In effect, what has been decided in M. Nagaraj's case (supra) is part recognition of the views expressed in

Virpal Singh Chauhan's case (supra), but at the same time upholding the validity of the 77th, 81st, 82nd and 85th amendments on the ground that the concepts of "catch-up" rule and "consequential seniority" are judicially evolved concepts and could not be elevated to the status of a constitutional principle so as to place them beyond the amending power of the Parliament. Accordingly, while upholding the validity of the said amendments, the Constitution Bench added that, in any event, the requirement of Articles 16(4-A) and 16(4-B) would have to be maintained and that in order to provide for reservation, if at all, the tests indicated in Article 16(4-A) and 16(4-B) would have to be satisfied, which could only be achieved after an inquiry as to identity.

66. 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.

67. 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(4-A) to acquire quantifiable data regarding the inadequacy of representation of the Schedule Castes and Scheduled Tribes communities in public services. The Rajasthan High Court has rightly quashed the notifications 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.

68. 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.

69. Having regard to the nature of the facts involved, each party will bear its own cost. "

11. We may notice herein that recently their lordship of the Hon'ble Supreme Court in case of **South Central Railway Employees Cooperative Credit Society Employees Union Vs. B. Yashodabai & Ors.** 2015 (1) SCC (Labour & Services) 582 have considered the judgment passed by the Hon'ble Madras High Court in which it was tried to take another view contrary to the law in the case of M. Nagraj by saying that few points were not dealt by the constitutional bench but same was set-aside by the Hon'ble Supreme Court by upholding by mandate in case of M. Nagraj. The Hon'ble Supreme Court held as under:-

"15. If the view taken by the High Court is accepted, in our opinion, there would be total chaos in this country because in that case there would be no finality to any order passed by this Court. When a higher court has rendered a particular decision, the said decision must be followed by a subordinate or lower court unless it is distinguished or overruled or set aside. The High Court had considered several provisions which, in its opinion, had not been considered or argued before this Court when C.A. No.4343 of 1988 was decided. If the litigants or lawyers are permitted to argue that something what was correct, but was not argued earlier before the higher court and on that ground if the courts below are permitted to take a different view in a matter, possibly the entire law in relation to the precedents and ratio decidendi will have to be re-written and, in our opinion, that cannot be done.

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Moreover, by not following the law laid down by this Court, the High Court or the Subordinate Courts would also be violating the provisions of Article 141 of the Constitution of India."

Therefore, the law laid down in case of M. Nagraj (supra) holds the field and any deviation from the same amounts to violation of settled mandate by the Constitutional Bench. Now considering the letter dated 07.01.2014 issued by the Nodal Ministry- DoPT which is advisory in nature also, cannot stand. Suffice to record herein that till date the

Government of India has not carried that any exercise showing that there is inadequacy in representation of the State SC & ST category in terms of the mandate in case of M. Nagraj (Supra). The amendment of Article 16(4) of the Constitution of India has been approved by the law maker, therefore, this letter dated 07.01.2014 cannot be applied which is also considered by the Allahabad Bench of this Tribunal by holding that same cannot be enforced until there is amendment in Article 16 (A) of the Constitution of India and said judgment has been upheld by the Jurisdictional High Court as informed by the applicants.

2. Since in this case, the respondents have themselves come forward to say that they will rectify their mistake by issuing the revised seniority list on the basis of the above settled law, therefore, we are not recording any findings in this case as they agree that further promotions will be made as per the revised seniority list.

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13. In view of the above background, the present O.A is disposed of in the terms that the respondents will issue the revised seniority list and based there upon, they will convene a review DPC and will consider the eligible person for further promotion as per merit in the list without the element of reservation in promotion, expeditiously.

14. No costs.


(UDAY KUMAR VARMA)
MEMBER (A)


(SANJEEV KAUSHIK)
MEMBER (J)

Dated: 26.5.2015

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