

Central Administrative Tribunal Principal Bench, New Delhi

O.A. No.4186/2012

Order reserved on 23rd May 2016

Order pronounced on 1st June, 2016

Hon'ble Mr. P.K. Basu, Member (A)
Hon'ble Dr. Brahm Avtar Agrawal, Member (J)

1. Nimmi Sisodia
w/o Mr. Anil Kumar Sisodia
r/o House No.128, Rameshwar Nagar
Azadpur, Delhi -33
2. Balbir Singh s/o Mr. Satya Singh
r/o H.No.A-5, Sawan Park
Ashok Vihar Phase III
Delhi-52
3. Ghanshayam Srivastava
s/o Mr. Ishwar Sharan Srivastava
R/o F-1/172, Gyan Khand-I
Indirapuram, Ghaziabad, UP
4. Anupama Singh d/o Mr. K.G. Verma
d/o Mr. K.G. Verma
r/o 78 A, Satyam Enclave
Near P S Vivek Vihar
Delhi-95
5. Vijendra Kumar s/o Mr. Sumer Singh Swami
Flat No.201, Plot No.9
Yash Apartments, Dwarka
Sector-11, Delhi-75

..Applicants

(Mr. Ranjan Kumar, Advocate)

Versus

1. Govt. of NCT of Delhi
Through Chief Secretary
Delhi Government
Delhi Secretariat, New Delhi-2
2. Directorate of Prosecution
Through Director Mr. B S Joon
Tis Hazari Courts, Delhi-54

3. Union Public Service Commission
Through its Chairman
Dholpur House, Shahjahan Road
New Delhi-69
4. Principal Secretary (Home)
Government of National Capital
Territory of Delhi, Home Department
5th Level, C Wing, Delhi Secretariat
IP Estate, New Delhi
5. Subhash Chandra, Addl. Public Prosecutor
Presently posted at Tis Hazari Courts, Delhi
6. Neelam Narang, Addl. Public Prosecutor
Presently posted at Tis Hazari Courts, Delhi
7. Dushyant Kumar Siwatch, Addl. Public Prosecutor
Presently posted at Dwarka District Courts, Delhi
8. Birender Singh Dagar, Addl. Public Prosecutor
Presently posted at Police Training College (PTC), Delhi
9. Aditya Kumar, Addl. Public Prosecutor
Presently posted at Saket District Courts, Delhi
10. Ram Kishor Gurjar, Addl. Public Prosecutor
Presently posted at Saket District Courts, Delhi
11. Pravin Kumar Samadhiya, Addl. Public Prosecutor
Presently posted at Tis Hazari Courts, Delhi
12. Ravinder Kumar, Addl. Public Prosecutor
Presently posted at Karkardooma Courts, Delhi
13. Harvinder Kumar Nar, Addl. Public Prosecutor
Presently posted at Tis Hazari Courts, Delhi
14. Sanjay Kumar, Addl. Public Prosecutor
Presently posted at Karkardooma Courts, Delhi
15. Subhash Chander Sroai, Addl. Public Prosecutor
Presently posted at Rohini Courts, Delhi
16. Promila, Addl. Public Prosecutor
Presently posted at Tis Hazari Courts, Delhi
17. Surinder Kumar Kain, Addl. Public Prosecutor
Presently posted at Saket Courts, Delhi
18. Virender Singh, Addl. Public Prosecutor
Presently posted at Tis Hazari Courts, Delhi

19. Pramod Kumar, Addl. Public Prosecutor
Presently posted at Rohini District Courts, Delhi
20. Inder Kumar, Addl. Public Prosecutor
Presently posted at Patiala House Courts, Delhi
21. Shiv Kumar, Addl. Public Prosecutor
Presently posted at Rohini Courts, Delhi
22. Vijender Kumar, Addl. Public Prosecutor
Presently posted at Tis Hazari Courts, Delhi
23. George M.X., Addl. Public Prosecutor
Presently posted at Police Training College (PTC), Delhi
All respondent Nos. 5 to 23
To be served through Department
Directorate of Prosecution
Govt. of NCT of Delhi
Tis Hazari Courts, Delhi-54

..Respondents

(Mr. B.N. Pathak, Advocate for respondent Nos. 1, 2 and 4,
Mr. Rajinder Nischal, Advocate for respondent No.3,
Mr. R K Sharma, Advocate for respondent Nos.8 & 10,
Mr. Sanjay Kumar for Mr. Sunil Kumar Jha, Advocate for respondent
No.16 - Nemo for remaining respondents)

O R D E R

Mr. P.K. Basu:

The applicants are working as Assistant Public Prosecutor (Assistant PP) in the Directorate of Prosecution, Govt. of NCT of Delhi. They all were appointed in the year 1999. These Assistant PPs are eligible for promotion and appointment to the post of Additional Public Prosecutor (Additional PP), subject to clearing the Departmental Promotion Committee (DPC), based on seniority-cum-merit. The applicants state that as per the Recruitment Rules (Annexure P-3), the post of Additional PP is to be filled by promotion from amongst the Assistant PP with seven years of service in the Grade. It is pointed out that these Recruitment Rules do not stipulate any reservation in promotion for SC/ST. It is stated that in February 2009,

26 Assistant PPs were promoted to the post of Additional PP purely on *ad hoc* basis and thereafter no promotions have been made against regular vacancies till date. The relevant order regarding 26 *ad hoc* promotees is dated 10.02.2009 (Annexure P-4). In this order, it was clarified that “The above appointment shall not confer upon them any claim or right for regular appointment or seniority or for appointment to this post or any other equivalent post under Government of National Capital Territory of Delhi. Their *ad hoc* promotion as Additional Public Prosecutor will automatically cease after the expiry of six months or when the posts are filled up on regular basis whichever is earlier.”

2. It is contended that the Assistant PPs of 1999 batch have all become eligible to be considered for promotion to the post of Additional PPs against the regular posts and by way of promotion depending upon the seniority-cum-merit.

3. The applicants came to know in May 2012 that the Department of Home has recommended to the DPC for promotion of only those candidates, who are appointed as Assistant PPs in the year 2009 on purely *ad hoc* basis, as against 39 regular vacancies and the names of remaining eligible candidates from 1999 batch, including the applicants, have not been recommended for consideration. The learned counsel for applicants states that this is in clear violation of the Recruitment Rules and also against the ratio of judgments of Hon’ble Supreme Court in **M. Nagaraj & others v. Union of India & others**, JT 2006 (9) SC 191; **Suraj Bhan Meena & another v. State of Rajasthan & others**, (2011) 1 SCC 467 and **U.P.**

Power Corporation Ltd. v. Rajesh Kumar & others, 2012 (4) SCALE 687.

4. In this regard, the applicants made a representation to the Hon'ble Lt. Governor on 31.05.2012 (Annexure P-5).

5. It is further stated that through an information sought under Right to Information Act, 2005 the applicants have learnt that there are 71 sanctioned strength of Additional PPs in the Department; 62 Additional PPs working in the Department, out of which 39 were on regular basis and 23 were on *ad hoc* basis. Thus, 9 posts of Additional PPs were still lying vacant. It was further learnt through RTI Application that out of 62 posts, 37 of them come under the reserved category – 24 SC category, 9 ST category, 4 OBC category and the rest 25 general category.

The applicants, therefore, argue that from this data it will be clear that there would be no “inadequacy of representation” in the post of Additional PP.

6. It is further submitted that there are 11 candidates, who are junior to applicant Nos. 1 and 4, and 10 candidates, who are juniors to applicant Nos. 2, 3 and 5, and their names have been recommended for consideration for promotion to the post of Additional PP.

7. When no response was received on their aforesaid representation dated 31.05.2012, the applicants again submitted representation dated 06.09.2012 (Annexure P-8). They have also filed letter dated 04.09.2012 (Annexure P-9) addressed to the Chief Secretary, Govt. of NCT of Delhi by the Union Public Service Commission (UPSC) on the subject of “Promotion

to the post of Additional Public Prosecutor in the Directorate of Prosecution, Govt. of NCT of Delhi”, in which the UPSC had observed that in many cases received by the Commission, the Recruitment Rules relevant to the concerned posts have been framed long ago and, therefore, in accordance with the O.M. dated 18.03.1988 issued by the Department of Personnel & Training (DoPT), it requested the Govt. of NCT of Delhi to review the relevant Recruitment Rules in terms of the Instructions expeditiously.

8. At Annexure P-11, the applicants have filed letter dated 14.09.2012 written by the Deputy Secretary (Home-I), Govt. of NCT of Delhi to the Additional Secretary, Vigilance Department, Govt. of NCT of Delhi intimating that the DPC held on 28.08.2012 has recommended the names of 20 Assistant PPs (included in that letter) for promotion to the post of Additional PPs and sought vigilance clearance report/status in respect of the officers. However, in reply dated 28.09.2012 to an RTI Application (Annexure P-12), the respondents have replied that “As on date, promotion order has not been issued on the basis of DPC held on 28th August, 2012”.

In this reply, the following has also been stated:

“3. No separate policy is there in Home Department for filling up the backlog vacancies against OBC/SC/ST categories for the posts of Addl. P.Ps. against regular posts.

4. Out of 79 posts of Addl. Public Prosecutors 12 posts are reserved for SC and 06 posts are reserved for ST categories. No reservation is available for OBC category.”

9. The applicants had earlier approached this Tribunal by filing O.A. No.3046/2012, which was dismissed as withdrawn, in terms of the Order dated 14.09.2012, with grant of liberty to file another O.A. with the same

cause of action with better particulars. This O.A. has been filed being aggrieved by the inaction of the respondents praying for the following reliefs:-

“a) To set aside and quash the DPC conducted on 28.08.2012 and pursuant recommendation made for the promotion of Assistant Public Prosecutors to the post of Additional Public Prosecutors, as being held and made in contravention of law and violative of rules and ultra-vires the Constitution of India and stay all the recommendation/decision taken pursuant thereto, if any, for the promotion and appointment of Assistant Public Prosecutors to the post of Additional Public Prosecutors pursuant to the said D.P.C. (Annexure P-1 and Annexure P-11); and/or

b) Issue appropriate direction(s)/order (s) to the respondents to consider the name of applicants and all the other eligible candidates similarly placed and otherwise eligible for promotion and appointment to the post of Additional Public Prosecutors; and/or

c) Costs.

d) Pass such other and further orders, as this Hon’ble Court/Tribunal may deem fit and proper in the facts and circumstances of the case.”

10. The main argument of learned counsel for applicants is that there is no provision for reservation of SC/ST candidates in the Recruitment Rules for promotion to the post of Additional PP. Moreover, this is also against the ratio laid down by the Apex Court in **M. Nagaraj & others v. Union of India & others, Suraj Bhan Meena & another v. State of Rajasthan & others** and **U.P. Power Corporation Limited v. Rajesh Kumar & others** (supra), wherein it has been held as follows:-

“121. The impugned constitutional amendments by which Articles 16(4-A) and 16(4-B) 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 OBCs on one hand and SCs and STs on the other hand as held in Indra Sawhney, the concept of post-based roster with inbuilt 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 above, the main issue concerns the “extent of reservation”. In this regard the State concerned 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 SCs/STs in matters 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 with 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 excursiveness so as to breach the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely.”

11. It is stated that nowhere in the reply or during the course of arguments, the applicants have stated that they have undertaken the exercise, as laid down by the Apex Court in the aforementioned case.

12. The second issue raised by the learned counsel for applicants is that even for argument sake, if we consider that the official respondents have examined all issues laid down by the Apex Court, as mentioned above, the data obtained through RTI Application clearly shows that more than 50% of the posts of Additional PP are held by the personnel under the reserved category, which goes to show that there is no “inadequacy of representation” for reserved category posts of Additional PP.

13. Thirdly, it is argued that all the personnel recommended for consideration for promotion to the post of Additional PP were made Additional PPs on *ad hoc* basis and in the relevant order dated 10.02.2009 (Annexure P-4), it has been made clear that “The above appointment shall not confer upon them any claim or right for regular appointment or seniority or for appointment to this post or any other equivalent post under Government of National Capital Territory of Delhi. Their adhoc promotion as Additional Public Prosecutor will automatically cease after the expiry of six months or when the posts are filled up on regular basis whichever is earlier.”

14. Lastly, it is argued that even now, as per the information gathered through RTI, there are 9 posts of Additional PP, which are lying vacant, against which 5 applicants can easily be adjusted.

15. In paragraph 1 of the reply filed on behalf of respondent Nos. 1, 2 and 4, it has been stated that the DPC was conducted in accordance with the procedure laid down in the guidelines circulated by the DoPT vide O.M. dated 10.04.1989. Moreover, it is stated that the process for filling up of 27 posts of Additional PP by promotion and holding of DPC had been started on 24.07.2009, i.e., much before the judgment of Hon’ble Supreme in **U.P. Power Corporation Limited v. Rajesh Kumar & others** (supra).

16. It is pointed out that in Note 2 of the Recruitment Rules (Annexure R-3), it has been provided that “Nothing in these rules shall affect reservation and other concessions required to be provided for Scheduled Castes/Scheduled Tribes and other special categories of persons in

accordance with the order issued by the Central Government from time to time.” It is, therefore, stated that the averments of the applicants that the Govt. of NCT of Delhi has no Rule, which prescribed the reservation for SC/ST candidates, are baseless.

17. Learned counsel for respondent Nos. 1, 2 and 4 further contested the claim of the applicants that more than 50% posts are filled up by reserved category candidates and stated that out of 68 posts of Additional PP, 46 Additional PPs belong to general category, 22 to SC and ST categories and there is no reservation for OBC category candidates in promotion. Therefore, learned counsel for said respondents contended that the representation of SC/ST is not adequate.

18. Learned counsel for respondent No.3 (UPSC) stated that it holds the DPC based on the vacancies intimated by the user Department as also the vacancies reserved for SC/ST and the UPSC cannot go beyond that.

19. Learned counsel for private respondent Nos. 8 and 10, i.e., Mr. Birender Singh Dagar and Mr. Ram Kishor Gurjar respectively, stated that they have always been on the top of the merit list. In this regard, they referred to Annexure P-2 filed by the applicants, which is the list of Assistant PPs as on 01.09.2000, in which the name of respondent No.8, Mr. Birender Singh Dagar appears at Sl. No.72 and that of respondent No.10, Mr. Ram Kishor Gurjar appears at Sl.No.74, whereas the names of the applicants, through this petition, appear at Sl. Nos. 94 (Nimmi Sisodia), 100 (Balbir Singh), 99 (Ghanshayam Srivastava), 91 (Anupama Singh) and 101 (Vijendra Kumar, OBC), respectively.

20. It is, therefore, stated that since they (private respondent Nos. 8 and 10) have come on their own merit and not under reservation, their promotion should be held as valid, and that their rights cannot be affected.

21. The applicants have also relied upon the following judgments in support of their claim that reservation in promotion is not permissible, unless the directions of the Apex Court are followed, as stipulated in **M. Nagaraj & others v. Union of India & others, Suraj Bhan Meena & another v. State of Rajasthan & others** and **U.P. Power Corporation Limited v. Rajesh Kumar & others** (supra). They are as follows:-

- i) **Jayanta Chakraborty & others v. The State of Tripura & others** (W.P. (C) No.189/2011 with connected petitions) decided on 09.04.2015 and
- ii) **Sushil Kumar Singh & others v. The State of Bihar & others** (Civil Writ Jurisdiction Case No.19114/2012) decided on 04.05.2015.

22. Heard the learned counsel for the parties and perused the record/judgments.

23. Clearly, the official respondents have not followed the ratio laid down by the Apex Court, as they have not taken any exercise as stipulated in the cases cited above.

24. Claim of the applicants and the counter claim of the respondents about adequacy or inadequacy of reservation of candidates in the cadre of Additional PP is of no consideration, unless the official respondents had

undertaken the detailed exercise, as mentioned above. Therefore, these contentions have to be ignored. There is no doubt also that the official respondents' stand that they have followed certain DoPT's Instructions on the point of reservation in promotion, will not hold good, as once the law has been laid down by the Apex Court, no Notification of the Government will have any impact and the law shall prevail.

25. In our view, the argument put forth by learned counsel for respondent Nos. 1, 2 and 4 that the DPC had been held on 28.08.2012, which was much before the judgment of the Hon'ble Supreme Court in the case of **U.P. Power Corporation Limited v. Rajesh Kumar & others** (supra), is not acceptable. In any case, the judgment of Apex Court in **M. Nagaraj & others v. Union of India & others** was available with them in 2006 itself.

26. Lastly, recommending the names of only 26 Assistant PPs, who had been promoted as Additional PP was also inappropriate, as has been made clear in the relevant order dated 10.02.2009 (Annexure P-4) that "The above appointment shall not confer upon them any claim or right for regular appointment or seniority or for appointment to this post or any other equivalent post under Government of National Capital Territory of Delhi. Their adhoc promotion as Additional Public Prosecutor will automatically cease after the expiry of six months or when the posts are filled up on regular basis whichever is earlier."

27. Therefore, whichever way we look at it, the process of recommending the names and holding of DPC has been against the law of the land and cannot be sustained. Though respondent Nos. 8 and 10 are right in their

stand that they were always on top of the list and beyond this controversy and hence their right should be protected, their cases cannot be segregated as the action of official respondents is *void ab initio* and against the law settled by the Apex Court.

28. We have no doubt in our mind that the DPC conducted on 28.08.2012 and pursuant recommendations made by the DPC cannot sustain and, therefore, the recommendations of the DPC, as contained in the Minutes of the meeting held on 28.08.2012, become null and void. We also quash and set aside the order dated 14.09.2012 (Annexure P-11) issued by the official respondents and direct the official respondents to undertake the exercise of promotion of Assistant PPs to the post of Additional PP, strictly in accordance with the law settled by the Hon'ble Supreme Court in **M. Nagaraj & others v. Union of India & others, Suraj Bhan Meena & another v. State of Rajasthan & others** and **U.P. Power Corporation Limited v. Rajesh Kumar & others** (supra), which holds the field. The official respondents shall complete this exercise within a period of 90 (ninety) days from the date of receipt of a copy of this Order.

29. With the aforementioned observations, the O.A. is disposed of. No costs.

(Dr. Brahm Avtar Agrawal)
Member (J)

(P.K. Basu)
Member (A)

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