

**CENTRAL ADMINISTRATIVE TRIBUNAL
CHANDIGARH BENCH**

**ORIGINAL APPLICATION NO.060/00348/2016
Chandigarh, this the 29th day of January, 2018**

**CORAM: HON'BLE MR. JUSTICE M.S. SULLAR, MEMBER (J) &
HON'BLE MS. P. GOPINATH, MEMBER (A).**

Kesang Jamwal, age about 60 years, wife of Late Sh. Kuldeep Singh Jamwal, File No. 300, Assistant Nursing Superintendent, CTVS OT, Advanced Cardiac Center, PGIMER, Sector 12, Chandigarh (Group-B).

.....Applicant

(Argued by: Mr. Barjesh Mittal, Advocate)

VERSUS

1. Post Graduate Institute of Medical Education and Research, Sector 12, Chandigarh through its Director
2. Medical Superintendent, Post Graduate Institute of Medical Education and Research, Sector 12, Chandigarh.

....RESPONDENTS

(Argued by: Mr. Sanjay Goyal, Advocate,
for Ms. Nimrata Shergill, Advocate)

**ORDER (Oral)
JUSTICE M.S. SULLAR, MEMBER (J)**

1. The applicant Ms. Kesang Jamwal wife of Late Kuldeep Singh Jamwal, Assistant Nursing Superintendent (ANS) of POST GRADUATE INSTITUTE OF MEDICAL EDUCATION & RESEARCH, CHANDIGARH (for brevity “PGIMER”), has preferred the instant Original Application (OA), for direction to the competent authority of the PGIMER to convene a review meeting of the Departmental Promotion Committee (DPC) to consider her case and case of similarly situated eligible candidates, belonging to the general category, for promotion to the post of Deputy Nursing Superintendent (DNS), in accordance with instructions as laid

down in the Model Calendar, dated 28.1.2015 (Annexure A-2) issued by the Department of Personnel & Training (DoPT) and in accordance with law, inter-alia, on the following grounds :-

(i) That it is on the record of the respondents as proved from Annexure A-1 and A-7 i.e. the minutes of the DPC and the copy of recruitment rules that there are total 22 posts in the cadre of DNS i.e. UR=18, SC=03 and ST=1 and as per the list mentioned in the body of the petition, it is crystal clear that against the sanctioned quota of 03 SC posts, already 06 SC officials are working and against 01 ST post, 02 ST officials are working and against 18 UR posts only 03 UR candidates are working out of which 01 more is retiring on 30.04.2016 which clearly shows that respondents have committed gross illegality in law as there is no inadequacy of reserved category officials on the post of Deputy Nursing Superintendent in the respondent department and the action of the respondents in not considering the case of the applicant in the DPC held on 06.05.2013 (A-1) whereby the names of 03 junior SC category candidates were considered by the respondents and in spite of 12 clear vacancies of DNS available on the date of DPC, the respondents illegally and arbitrarily considered only 06 persons ignoring the right of consideration of the applicant who was also fully eligible for being considered for the promotion to the said post, thus, the respondents have committed gross illegality and the said action of the respondents in not considering the applicant for promotion to the cadre of DNS in the said DPC is totally illegal, arbitrary, nonest and untenable in the eyes of law and is liable to be quashed / set aside in the interest of the justice.

(ii) That the promotion of the junior SC category candidates vide order dated 16.06.2015 (A-4) to the post of DNS was with a rider of subject to final decision of 'Catch up rule' cases pending before the Hon'ble High Court which have since been decided in favour of general category candidates by the Hon'ble High Court vide judgment dated 13.01.2016, thus, the respondents were duty bound under law to convene review DPC / fresh DPC strictly in accordance with Govt. of India DoPT OM dated 28.01.2015 (A-2) for the vacancy year 2016-2017 wherein it has been laid down that in department / ministries following financial year based vacancy year, the crucial date of eligibility has to be taken as 1st April, 2016 and the DPC has to be held during the month of January to February, 2016. Thus, the action of the respondents PGIMER who is following financial year based vacancy year in non convening of DPC/review DPC firstly in accordance with the judgment passed by Hon'ble Punjab and Haryana High Court and secondly as per the strict instructions of DoPT OM dated 28.01.2015 has caused great prejudice to the applicant as her right of consideration for promotion to the post of DNS has been illegally and arbitrarily delayed and is hit by the law as laid down by Hon'ble Delhi High Court in the case of Sunil Kumar Mehra Vs. MCD and another reported as 2013 (4) SCT 85, wherein the Hon'ble Court has categorically held that non convening of DPC in time by the respondents without there being any lawful excuse amount to "Malice in Law".

(iii) That as has been categorically mention in the receding paras of the OA and as gathered by the applicant, the respondents have already given officiating charge of DNS to one Smt. Sunita T. Ram who is much junior to the applicant and belongs to ST category and has posted her in A block PGIMER. Similarly, 04 more junior SC/ST category candidates as gathered by the applicant are shortly to be granted officiating promotion to the cadre of DNS by the respondents over and above the applicant which is in violation of the law as laid down by Hon'ble Punjab and Haryana High Court in case titled Shingara Chand and other Vs. Punjab Water Supply and Sewerage

Board and others, reported as 2000 (2) SCT 195, and is also totally against the law as mandated by Constitution Bench of Hon'ble Apex Court in the case of M. Nagraj and other as well as the latest judicial pronouncement by Hon'ble Punjab and Haryana High Court vide judgment dated 13.01.2016 in the case of PGI itself, thus, on this score as well, the action of the respondents PGIMER in not convening the review DPC/fresh DPC for considering the name of the applicant for the vacancy year 2016-17 in terms of OM dated 28.01.2015 (A-2) is untenable and thus liable to be quashed / set aside by this Hon'ble Tribunal in the interest of justice.

(iv) That it is on record that the applicant has completed the requisite eligibility condition of 05 years regular service in the cadre of Assistant Nursing Superintendent as on 02.04.2010 (A-3) and is fully eligible for consideration as well as for promotion to the cadre of DNS being the senior most general category candidate and also taking into consideration the fact that out of the cadre strength quota of UR category which is 18, as present only 03 UR candidates are working as DNS and out of which one candidate is going to retire on attaining the age of superannuation w.e.f. 30.04.2016, thus, the non consideration of the case of the applicant for promotion to DNS by non convening DPC without there being any lawful excuse on the part of respondents and also in derogation of the DoPT OM dated 28.01.2015 (A-2) is totally erroneous and honest in law. Thus, on this score as well, the respondents are liable to grant right of consideration to the applicant for promotion to the cadre of DNS by convening review DPC/fresh DPC in the interest of justice.

5. Levelling a variety of allegations and narrating the sequence of events in detail, in all, the applicant claims that she is eligible to be considered for promotion to the post of DNS but the competent authority intends to promote the junior SC candidates, without following the catch-up rule and by wrongly applying the policy of reservation in promotion, which according to her, is arbitrary and illegal. On the strength of the aforesaid grounds, the applicant seeks to direct the respondents to consider her case for promotion to the post of DNS, in the manner indicated hereinabove.

6. On the contrary, the respondents have refuted the claim of the applicant and filed the reply, wherein, it was pleaded that the Hon'ble High Court directed to consider the candidates belonging to General category as well as belonging to reserved category for promotion to the post of DNS . Since the general category candidates attained eligibility in February, 2015, subject to their suitability and other eligibility, so liberty was granted to the reserved category candidates to approach the

competent authority to seek appropriate relief in case the cases pertaining to catch up rule are decided in favour of the reserved category candidates. It was alleged that after the decision of the Hon'ble High Court, dated 29.1.2015, rendered in CWP No. 18331-CAT-2014 titled

Mrs. Sukhwinder Kaur & Others Vs. CAT Chandigarh & Others

(Annexure A-10), the screening for DPC was held on 26.3.2015 to consider their cases for promotion. The actual DPC was held on 6.5.2015 and eligible candidates were considered and promoted on 16.6.2015. The applicant was stated to be not eligible to be considered for promotion, when the screening was conducted for promotion. Thus, her claim is not tenable. Instead of reproducing the contents of the reply in toto, and in order to avoid repetition of facts, suffice it to say that while virtually acknowledging the factual matrix and reiterating the validity of the impugned action, the respondents have stoutly denied all other allegations and grounds contained in the OA, and prayed for its dismissal.

7. Controverting the pleadings in reply filed by the respondents, and reiterating the grounds contained in the OA, the applicant has filed the rejoinder. That is how, we are seized of the matter.

8. Having heard the learned counsel for the parties, having gone through the record with their valuable help and after considering the entire matter, we are of the firm view that the instant OA deserves to be accepted, in the manner, and for the grounds, mentioned herein below.

9. As depicted herein above, the facts of the case are neither intricate, nor much disputed, and fall within a very narrow compass, to decide the real controversy between the parties, involved in the present case.

10. Such thus being the position on record, now the short and significant question, that arises for our consideration, in this case is, as

to whether the competent authority is expected to follow the catch-up rule and not to apply the policy of reservation in promotion to the post of DNS, in the given peculiar facts and special circumstances of this case or not?

11. Having regard to the rival contentions of the learned counsel for the parties, to our mind, the answer must obviously be in the affirmative, in this regard.

12. As is evident from the record that the PGIMER is mainly relying upon the observations of the Hon'ble High Court in the decision, Annexure A-10, whereby the Writ Petition was disposed of in the following terms :-

“i. Let respondents No.4 to 6 as well as the petitioners be considered for promotion to the post of Deputy Nursing Superintendents in February, 2015 as soon as the former attain eligibility and subject to their suitability and other eligibility conditions, all of them can be promoted by way of common order.

ii. Owing to their left out service, the official respondents would give effect to the order passed by the Tribunal for the purpose of *inter-se* seniority.

iii. However, if this Court, in other cases which are pending consideration, takes a view in favour of reserved category candidates, the petitioners shall indeed be at liberty to approach the competent authority to seek appropriate relief in accordance with such judgement.”

13. It is not a matter of dispute that the guidelines contained in Model Calendar for the DPC (Annexure A-2) issued by the Ministry of Personnel, Public Grievances and Pensions (DoP&T), New Delhi, has to be followed, by the respondents.

14. Not only that, the competent authority is also duty bound to follow the catch-up rule and not to apply the policy of reservation in promotion. This matter is no longer res *integra* and is now well settled.

15. An identical issue came to be decided in a recent judgment in the case of **S. Panneer Selvam v. State of Tamil Nadu**, 2015(10) SCC 292. The question before the Hon'ble Apex Court was whether in absence of

any policy decision by the State for giving consequential seniority to candidates promoted on the basis of reservation prior to a senior general category candidate, claim for consequential seniority could be accepted. Answering the question in the negative, it was held that in absence of provision for consequential seniority, 'catch up' rule will be applicable and the roster point promotees cannot claim such consequential seniority. The senior general candidates will regain their seniority on being promoted. Observations relevant in this regard are as follows:

"33. ..If we look at the above comparative table of the service particulars of the appellants and the respondents, it is seen that the contesting respondents U. Palaniappan joined the service almost seven years after the appellants, his seniority is automatically accelerated at an unprecedented rate and as on 1-4-2004 his seniority rank as ADE is 150 and seniority of V. Appadurai is 120. The appellants who are qualified and senior than the contesting respondents are placed much below in rank in comparison to the person belonging to the reserved class promotees who were promoted following the rule of reservation.

It is to be noted that the private respondents in the present case have been promoted temporarily under Rule 39(a) and Rule 10(a)(i) of the General Rules with the condition that their inclusion in the promotional order shall not confer on them any right whatsoever in the service. Determination of seniority is a vital aspect in the service career of an employee and his future promotion is dependent on this. Therefore, determination of seniority must be based on some principles which are just and fair. In the absence of any policy decision taken or rules framed by the State of Tamil Nadu regarding Tamil Nadu Highways Engineering Service, accelerated promotion given to the respondents following rule of reservation in terms of Rule 12 will not give them consequential accelerated seniority.

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36. In the absence of any provision for consequential seniority in the rules, the "catch-up rule" will be applicable and the roster-point reserved category promotees cannot count their seniority in the promoted category from the date of their promotion and the senior general candidates if later reach the promotional level, general candidates will regain their seniority. The Division Bench appears to have proceeded on an erroneous footing that Article 16(4-A) of the Constitution of India automatically gives the consequential seniority in addition to accelerated promotion to the roster-point promotees and the judgment of the Division Bench cannot be sustained."

16. Sequelly, in the case of **B.K. Pavitra & Others Vs. Union of India & Others**, (2017) 4 SCC 620, the Hon'ble Supreme Court, relying upon its earlier decisions, has ruled (in para 29), as under :-

"29. It is clear from the above discussion in S. Panneer Selvam case, that exercise for determining "inadequacy of

representation", "backwardness" and "overall efficiency", is a must for exercise of power under Article 16(4-A). Mere fact that there is no proportionate representation in promotional posts for the population of SCs and STs is not by itself enough to grant consequential seniority to promotees who are otherwise junior and thereby denying seniority to those who are given promotion later on account of reservation policy. It is for the State to place material on record that there was compelling necessity for exercise of such power and decision of the State was based on material including the study that overall efficiency is not compromised. In the present case, no such exercise has been undertaken. The High Court erroneously observed that it was for the petitioners to plead and prove that the overall efficiency was adversely affected by giving consequential seniority to junior persons who got promotion on account of reservation. Plea that persons promoted at the same time were allowed to retain their seniority in the lower cadre is untenable and ignores the fact that a senior person may be promoted later and not at same time on account of roster point reservation. Depriving him of his seniority affects his further chances of promotion. Further plea that seniority was not a fundamental right is equally without any merit in the present context. In absence of exercise under Article 16(4-A), it is the 'catch up' rule which fully applies. It is not necessary to go into the question whether the Corporation concerned had adopted the rule of consequential seniority."

17. Likewise, Hon'ble High Court of Punjab and Haryana in the case of

Bharat Sanchar Nigam Limited & Another Vs. Shri Naveen Sharma and others, CWP No. 26882 of 2016 decided on 23.12.2016, has held as under :

"5. After considering the matter in detail and relying upon the law laid down by the Apex Court in **M.Nagraj's** case (supra) and other judgments as noticed in its order dated 30.09.2016, it has been categorically recorded by the Tribunal that there can be no reservation in promotion without collecting quantifiable data of backwardness of the reserved classes and inadequacy of their representation in public employment. In the present case, no such data was held to be collected by the official respondents. Thus, the respondents could not grant reservation in promotion. It has been further recorded by the Tribunal that the reservation in promotion cannot be permitted merely on the basis of shortfall in vacancies of one category or one cadre of one department or one entity or unit only which would be against the principles laid down by the Apex Court. The relevant findings recorded by the Tribunal read thus:-

"13. We have carefully considered the matter. It was not necessary to implead the candidates of SC/ST categories as party to the O.A. because the O.A. was filed even before the examination was held and, therefore, candidates of those categories were not identifiable at that time. Moreover, the challenge is to policy of official respondents regarding reservation in promotion and for this reason also, it was not essential to implead the candidates of the reserved categories as party to the O.A. Accordingly objection of official respondents to this effect is overruled.

14. As regards merit, the applicants are entitled to succeed in view of judgments in the cases of **M.Nagraj** (supra), **Suraj Bhan, Meena** (supra), **Lachhmi Narayan Gupta** (supra), **Rajesh Shukla and another** (supra), **Sukhwinder Singh** (supra) and **Narender Singh** (supra). According to these judgments, there can be no reservation in promotion without collecting quantifiable data of backwardness of the reserved classes and inadequacy of their representation in public employment. No such data has however been collected by the official respondents. Consequently, the respondents cannot grant reservation in promotion.

15. Contention of respondents based on summary of vacancies as given in Annexure R.1 cannot be accepted. Firstly the said summary relates to the position as on 1.1.2015 and not of the year 2010-11 for which LDCE was held on 21.6.2015. Secondly even according to said summary, ST candidates were over represented in the quota of promotion on the basis of seniority-cum-fitness whereas SC candidates were represented almost according to their quota. In the quota of promotion by LDCE, of course, there was shortfall in both reserved categories. However, the reservation in promotion cannot be permitted merely on the basis of shortfall in vacancies of one category or one cadre of one department or one entity or unit only. It would be completely against the letter, spirit, purport and intent of **M.Nagraj** (supra). Quantifiable data regarding public employment has to be collected as per dictum of Hon'ble Supreme Court in **M.Nagraj** (supra) but it has not been so done. BSNL is following OMs of DoPT and admittedly DoPT has not carried out any exercise to collect identifiable data in terms of **M.Nagraj** (supra). Even BSNL has not done so. For this reason, BSNL submitted in the case of SC/ST Welfare Association (supra) that they were disabled from taking steps to remove the shortfall in vacancies of reserved categories. However, official respondents have now taken U turn in the instant case. This cannot be permitted.

Accordingly, we conclude that there can be no reservation in promotion. Action of the respondents to the contrary cannot be sustained.”

18. Admittedly, the PGIMER has neither followed the pointed calendar for promotion, Annexure A-2, issued by the DoPT, nor applied catch-up principle and wrongly applied the reservation policy of promotion, which is not legally permissible.

19. Therefore, it is held that the competent authority is duty bound to follow the calendar for promotion, Annexure A-2, re-determine the seniority in ANS cadre by following the catch-up principle and then to consider the eligible persons including applicant for promotion to the post of DNS. The ratio of law laid down by the Hon'ble Apex Court in the

aforesaid judgment is, ***mutatis mutandis***, applicable to the instant controversy, and is the complete answer to the problem in hand.

20. No other point, worth consideration, has either been urged or pressed by the learned counsel for the parties.

21. In the light of the aforesaid prismatic reasons, the instant OA is hereby accepted. As a consequence thereof, the respondents are directed to re-determine the seniority in the cadre of ANS by following the catch-up principle and then to convene the meeting of the DPC to consider the case of the applicant along with others, (if they are otherwise eligible), for making promotion to the post of DNS, without applying the policy of reservation in promotion and in accordance with rules & law, within a period of three months from the date of receipt of a certified copy of this order. However, the parties are left to bear their own costs.

(P. GOPINATH)
MEMBER (A)

(JUSTICE M.S. SULLAR)
MEMBER (J)
29.01.2018

HC*

