

Reserved

CENTRAL ADMINISTRATIVE TRIBUNAL, JABALPUR BENCH
CIRCUIT SITTING: BILASPUR

Original Application No.203/00804/2015

Jabalpur, this Monday, the 23rd day of July, 2018

HON'BLE SHRI NAVIN TANDON, ADMINISTRATIVE MEMBER
HON'BLE SHRI RAMESH SINGH THAKUR, JUDICIAL MEMBER

Kaushik Mukhopadhyay, S/o Late A.K.Mukhopadhyay,
Aged about 60 years, Retd. OS, SECR/BSP,
R/o Flat No. 51, Zeenat Vihar Phase-II, Ganesh Nagar,
Bilaspur, Chhattisgarh-495001 **-Applicant**

(By Advocate –**Shri A.V.Shridhar**)

V e r s u s

1. Union of India-Through the Secretary, Railway Board,
Rail Bhawan, Raisena Road, New Delhi-110001
2. General Manager, South East Central Railway,
New GM Building, Bilaspur, Chhattisgarh-495004
3. Chief Personnel Officer, GM Office Complex,
South East Central Railway, Bilaspur, Chhattisgarh-495004
4. Assistant Personnel Officer, South East Central Railway,
Bilaspur, Chhattisgarh-495004
5. Praveen Kumar S/o Not known to the applicant,
Aged about 40 years, posted at Chief Office Superintendent,
o/o Chief Commercial Manager, South East Central Railway,
Bilaspur, Chhattisgarh-495004 **-Respondents**

(By Advocate –**Shri R.N.Pusty** for official respondents)

(Date of reserving the order- 18.04.2018)

O R D E R

By Navin Tandon, AM:-

The applicant is aggrieved by his non-promotion to the post
of Chief Office Superintendent on the basis of restructuring in Pay

band-II Grade Pay 4600 (9300-34800) due to element of reservation. Hence he has filed this Original Application.

2. The brief facts as stated by the applicant are that the applicant superannuated on 30.04.2015 as Office Superintendent II from South East Central Railway, Bilaspur.

2.1 Vide impugned Office Memorandum dated 20.08.2015 (Annexure A-2) the respondents declared the result of suitability test of Commercial Department of Headquarters against restructuring in terms of Estt.Rule No.175/2013 (RBE No.102/2013) for empanelment to the post of Chief Office Superintendent, in which the name of respondent No.5 is placed at serial No.2. The applicant states that the respondents have not considered his promotion to the post of Chief Office Superintendent and granted the same to respondent No. 5, who is junior to the applicant, vide impugned order dated 01.09.2015 (Annexure A-1) with effect from 01.11.2013.

2.2 The applicant submitted that the restructuring of Group C cadre is done on the basis of RBE No. 102/2013, relevant extract of which reads as under:-

“The restructuring of the cadre will be with reference to the sanctioned cadre strength as on 01-11-2013. The staff who will be placed in higher grade pay as a result of implantation of these orders will draw pay in higher grades w.e.f. 01.11.2013. The benefit of restructuring will be restricted to the persons who are working in a particular cadre on the cutoff date i.e. 01-11-2013.”

2.3 The applicant further avers that he was working on the post of Office Superintendent on cutoff date i.e. 01.11.2013. Thus, he was eligible to be considered for promotion on the date of implementation of the order of restructuring of Group C post of Chief Office Superintendent. In support of his claim the applicant has filed a copy of the provisional seniority list of Office Superintendent published on 10/12.06.2013 as Annexure A-3.

2.4 It is the case of the applicant that despite having specific knowledge about various judicial pronouncements, the authorities have not considered the case of the applicant for promotion to the post of Chief Office Superintendent. The respondents have applied the element of reservation in restructuring promotion and granted the promotion to his junior respondent No.5.

3. The following reliefs have been sought for by the applicant in this Original Application:-

“8. Relief Sought :

(8.1) That, the learned Tribunal may kindly be pleased to call the entire records pertaining to the case of the applicants.

(8.2) That, the Hon'ble Tribunal may kindly be pleased to quash the office order No. NG/481/2014 dated 01.09.2015 (Annexure A-1) and Office Memorandum No. NG/453/2015 dated 20.08.2015 (Annexure A-2) to the extent they pertain to private respondent No.5.

(8.3) That, the Hon'ble Tribunal may kindly be pleased to direct the respondents to consider the case of the applicant for grant of restructuring promotion to the post of Chief Office Superintendent w.e.f. 01.11.2013 in view of RBE 102/2013.

(8.4) Cost of the petition be awarded to the applicants.

(8.5) Any other relief which the learned Tribunal deems fit and proper may be awarded”.

4. The respondents in their reply have averred that the applicant was working as Office Superintendent in pay band Rs. 9300-34800 with Grade Pay Rs.4200 in the Office of Chief Commercial Manager, South East Central Railway, Bilaspur from 11.04.2006. The Railway Board vide their Circular No.RBE 102/2013 dated 08.10.2013, circulated under SECR's Estt. Rule No.175/2013 (Annexure R-1), has decided, with the approval of the President, that the Group 'C' categories of staff as indicated in Annexures 'A' to 'H' to the said circular should be restructured in accordance with the revised percentages indicated therein.

4.1 Respondents further submit that due to restructuring the cadre of Chief Office Superintendent has been increased from 5 to

7(Annexure R-2) and 2 new posts of Chief Office Superintendent have been increased.

4.2 The respondents further stated that in Para 4.7 of RBE No. 102/2013 dated 08.10.2013 the Railway Board clearly stated that employees who retire/resign or expire in between the period from the date of effect of these orders to the date of actual implementation of these orders, will be eligible for fixation benefits and arrears under these orders w.e.f. 01-11-2013, if they are otherwise eligible for the said benefit.

4.3 Respondents further averred that Para 9 of said RBE No. 102/2013 dated 08.10.2013 states that the existing instructions with regard to reservation of SC/ST wherever applicable will continue to apply. Looking to the above provisions one Shri A. Shrinivas Rao who belongs to UR category and Shri Praveen Kumar (respondent No.5) who belongs to SC category have been considered for promotion to the post of Chief Office Superintendent.

4.4 Respondents in their reply further submit that the applicant belongs to General community candidate and his name is at Sl. No. 2 of the seniority list of Office Superintendent. He has already been retired from service on 30.04.2015. Despite retirement he could

have been considered for promotion as per provision vide Para 4.7 of the above said rule. The Railway Board had issued RBE No.114/1997 (Annexure R-3) with directions to follow post based roster. As per “L” type roster register, the points are identified as “UR” and “SC”. However, since only one post/vacancy was assessed for UR, the applicant was not considered for promotion to the post of Chief Office Superintendent.

5. We find that Ms. Sudha Agrawal, learned counsel had filed her Vakalatnama on behalf of private respondent No.5 on 09.03.2016 and had sought for two weeks time to file reply. However, thereafter neither any reply was filed on behalf of respondent No.5 nor anybody appeared on his behalf.

5.1 Hence, we have heard learned counsel of applicant and learned counsel for the official respondents. We have also carefully perused the pleadings available on record.

6. The issue involved in this Original Application is no longer *res integra*, as the same has already been decided by the Principal Bench of this Tribunal in Original Application No.3476/2013 (**Ram Pher Yadav & others Vs. Union of India and others**) and other connected Original Applications, vide order dated

22.01.2018. Relevant paragraphs of the said order dated 22.01.2018 passed by the Principal Bench of this Tribunal read as under:

“All these batch of OAs are pertaining to the issue of reservations in promotions and hence are being disposed of by way of this common order.

(2). Heard all the counsels for the parties and perused the pleadings on record.

(3). In M. Nagaraj & Ors. Vs. Union of India & Others, (2006) 8 SCC 212, the Constitution Bench of the Hon'ble Apex Court observed as under:-

“2. The facts in the above writ petition, which is the lead petition, are as follows:

*Petitioners have invoked Article 32 of the Constitution for a writ in the nature of certiorari to quash the Constitution (Eighty-Fifth Amendment] Act, 2001 inserting Article 16(4A) of the Constitution retrospectively from 17.6.1995 **providing reservation in promotion with consequential seniority** as being unconstitutional and violative of the basic structure. According to the petitioners, the impugned amendment reverses the decisions of this Court in the case of Union of India and others v. Virpal Singh Chauhan and others, Ajit Singh Januja and others v. State of Punjab and others (Ajit Singh-I), Ajit Singh and others (II) v. State of Punjab and others, Ajit Singh and others (III) v. State of Punjab and others, Indra Sawhney and others v. Union of India, and M. G. Badappanavar and another v. State of Karnataka and others. Petitioners say that the Parliament has appropriated the judicial power to itself and has acted as an appellate authority by reversing the judicial pronouncements of this Court by the use of power of amendment as done by the impugned amendment and is, therefore, violative of the basic structure of the Constitution. The said amendment is, therefore, constitutionally invalid and is liable to be set aside. Petitioners have further pleaded that the amendment also seeks to alter the fundamental right of equality which is part of the basic structure of the Constitution.*

*Petitioners say that the equality in the context of Article 16(1) connotes "accelerated promotion" so as not to include consequential seniority. Petitioners say that by attaching consequential seniority to the accelerated promotion, the impugned amendment violates equality in Article 14 read with Article 16(1). Petitioners further say that by providing reservation in the matter of promotion with consequential seniority, there is impairment of efficiency. Petitioners say that in the case of **Indra Sawhney** decided on 16.11.1992, this Court has held that under Article 16(4), reservation to the backward classes is permissible only at the time of initial recruitment and not in promotion. Petitioners say that contrary to the said judgment delivered on 16.11.1992, the Parliament enacted the Constitution (Seventy-Seventh Amendment) Act, 1995. By the said amendment, Article 16(4A) was inserted, which reintroduced reservation in promotion. The Constitution (Seventy-Seventh Amendment) Act, 1995 is also challenged by some of the petitioners. Petitioners say that if accelerated seniority is given to the roster-point promotees, the consequences would be disastrous....” After referring to a series of authorities, the Court concluded as follows:*

*“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**"*

*(4). In **Suresh Chand Gutam Vs. State of Uttar Pradesh and Others**, AIR 2016 SC 1321, a batch of Writ Petitions were preferred under Article 32 of the Constitution of India praying to issue a direction in the nature of mandamus commanding the respondent Government to enforce appropriately the constitutional mandate as contained under the provisions of Articles 16(4A), 16(4B) and 335 of the Constitution of India or in the alternative, for a direction to the respondents to constitute a Committee or appoint a Commission chaired either by a retired Judge of the High Court or Supreme Court in making survey and collecting*

*necessary qualitative data of the Scheduled Casts and the Scheduled Tribes in the services of the State for granting reservation in promotion in the light of direction given in **M. Nagaraj & Others v. Union of India & Others** (supra). It was held as under:-*

“43. Be it clearly stated, the Courts do not formulate any policy, remains away from making anything that would amount to legislation, rules and regulation or policy relating to reservation. The Courts can test the validity of the same when they are challenged. The court cannot direct for making legislation or for that matter any kind of sub-ordinate legislation. We may hasten to add that in certain decisions directions have been issued for framing of guidelines or the court has itself framed guidelines for sustaining certain rights of women, children or prisoners or under-trial prisoners. The said category of cases falls in a different compartment. They are in different sphere than what is envisaged in Article 16 (4-A) and 16 (4-B) whose constitutional validity have been upheld by the Constitution Bench with certain qualifiers. They have been regarded as enabling constitutional provisions. Additionally it has been postulated that the State is not bound to make reservation for Scheduled Castes and Scheduled Tribes in matter of promotions. Therefore, there is no duty. In such a situation, to issue a mandamus to collect the data would tantamount to asking the authorities whether there is ample data to frame a rule or regulation. This will be in a way, entering into the domain of legislation, for it is a step towards commanding to frame a legislation or a delegated legislation for reservation.

*44. Recently in **Census Commissioner & others v. R. Krishnamurthy** a three-Judge Bench while dealing with the correctness of the judgment of the high court wherein the High court had directed that the Census Department of Government of India shall take such measures towards conducting the caste-wise census in the country at the earliest and in a time-bound manner, so as to achieve the goal of social justice in its true sense, which is the need of the hour, the court analyzing the context opined thus :-*

“Interference with the policy decision and issue of a mandamus to frame a policy in a particular

manner are absolutely different. The Act has conferred power on the Central Government to issue notification regarding the manner in which the census has to be carried out and the Central Government has issued notifications, and the competent authority has issued directions. It is not within the domain of the court to legislate. The courts do interpret the law and in such interpretation certain creative process is involved. The courts have the jurisdiction to declare the law as unconstitutional. That too, where it is called for. The court may also fill up the gaps in certain spheres applying the doctrine of constitutional silence or abeyance. But, the courts are not to plunge into policy-making by adding something to the policy by ways of issuing a writ of mandamus.”

We have referred to the said authority as the court has clearly held that it neither legislates nor does it issue a mandamus to legislate. The relief in the present case, when appositely appreciated tantamounts to a prayer for issue of a mandamus to take a step towards framing of a rule or a regulation for the purpose of reservation for Scheduled Castes and Scheduled Tribes in matter of promotions. In our considered opinion a writ of mandamus of such a nature cannot be issued.”

and accordingly, dismissed the Writ Petitions.

(5). *The categorical finding by the Hon’ble Apex Court in **M. Nagaraj** (supra), as explained in the aforesaid recent decision in **Suresh Chand Gautam** (supra), is that the State is not bound to make reservation for SCs/STs in matters of promotion and, however, if the State wishes to exercise the discretion and make such provision, it 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.*

(6). *It is not in dispute that the respondents have not conducted the exercise as mandated by the Constitution Bench in **M. Nagaraj** (supra) and without conducting the same, no State/Authority can apply the rule of reservation in promotion. It is also not in dispute that the decision in **M.***

Nagaraj (supra) is not reversed/modified/stayed in any other subsequent decision of the Hon'ble Apex Court till date. The learned counsel for respondents submits that since the issue of "whether the judgment of **M. Nagaraj** needs to be revisited or not" was referred to a Constitution Bench in the matter of **The State of Tripura & Others Vs. Jayanta Chakraborty & Ors.** in Civil Appeal Nos.4562-4564 of 2017 & batch dated 14.11.2017, the OA may be adjourned sine die till the Hon'ble Apex Court decides the said issue.

(7). The Hon'ble Apex Court in its order dated 14.11.2017 in **The State of Tripura & Ors. Vs. Jayanta Chakraborty & Ors.** observed as under :-

"The questions posed in these cases involve the interpretation of Articles 16(4), 16(4A) and 16(4B) of the Constitution of India in the backdrop of mainly three Constitution Bench decisions – (1) **Indra Sawhney and others v. Union of India and others** 1992 Supp. (3) SCC 217, (2) **E.V Chinnaiiah v. State of A.P. and others** (2005) 1 SCC 394 and (3) **M. Nagaraj and others v. Union of India and others** (2006) 8 SCC 212. One crucially relevant aspect brought to our notice is that **Nagaraj (supra)** and **Chinnaiiah (supra)** deal with the disputed subject namely backwardness of the SC/ST but **Chinnaiiah (supra)** which came earlier in time has not been referred to in **Nagaraj (supra)**. The question of further and finer interpretation on the application of Article 16(4A) has also arisen in this case. Extensive arguments have been advanced from both sides. The petitioners have argued for a re-look of **Nagaraj (supra)** specifically on the ground that test of backwardness ought not to be applied to SC/ST in view of **Indra Sawhney (supra)** and **Chinnaiiah (supra)**. On the other hand, the counsel for the respondents have referred to the cases of (4) **Suraj Bhan Meena and Another v. State of Rajasthan and others** (2011) 1 SCC 467; (5) **Uttar Pradesh Power Corporation Limited v. Rajesh Kumar and others** (2012) 7 SCC 1; (6) **S. Panneer Selvam and others v. State of Tamil Nadu and others** (2015) 10 SCC 292; (7) **Chairman and Managing Director, Central Bank of India and others v. Central Bank of India SC/ST Employees Welfare Association and others** (2015) 12

SCC 308; and (8) **Suresh Chand Gautam v. State of Uttar Pradesh and others** (2016) 11 SCC 113 to contend that the request for a revisit cannot be entertained *ad nauseam*. However, apart from the clamour for revisit, further questions were also raised about application of the principle of creamy layer in situations of competing claims within the same races, communities, groups or parts thereof of SC/ST notified by the President under Articles 341 and 342 of the Constitution of India.”

2. Having regard to the questions involved in this case, we are of the opinion that this is a case to be heard by a Bench as per the constitutional mandate under Article 145(3) of the Constitution of India. Ordered accordingly. Place the files before the Hon’ble Chief Justice of India immediately.

3. Though the learned counsel have pressed for interim relief, we are of the view that even that stage needs to be considered by the Constitution Bench. The parties are free to mention the urgency before the Hon’ble Chief Justice of India.”

(8). *In Ashok Sadarangani & Another Vs. Union of India* (2012) 11 SCC 321, Hon’ble Apex Court held as under:-

“19. As was indicated in **Harbhajan Singh's** case (*supra*), the pendency of a reference to a larger Bench, does not mean that all other proceedings involving the same issue would remain stayed till a decision was rendered in the reference. The reference made in **Gian Singh's** case (*supra*) need not, therefore, detain us. Till such time as the decisions cited at the Bar are not modified or altered in any way, they continue to hold the field.”

(9). As held in **Ashok Sadarangani** (*supra*), once the legal principle was decided by Hon’ble Apex Court and as long as the same is neither reversed nor modified by any other decision, the said settled principle has to be followed, irrespective of the fact that the same is pending before any higher forum or before a Larger Bench or before a Constitution Bench.

(10). It is also the settled principle of law that once the principle is declared by the Hon’ble Apex Court in a

particular manner with retrospective implication, any contrary circulars/ Orders/ Memorandums issued prior to or subsequent to the said declaration, are non-est and cannot be followed.

(II). Coming to the facts of the individual cases, it is seen that certain OAs were filed questioning the orders of the respondents wherein the rule of reservation was followed in promotions and that certain OAs were filed seeking to restrain the respondents from following the reservations in promotions. Similarly in certain OAs, as an interim measure, the respondents were restrained from proceeding further to give effect to the rule of reservation in promotions and whereas in certain OAs their action in following reservations in promotions was made subject to the result of the OAs. In any event, in view of the above referred categorical declaration of the law by the Hon'ble Apex Court in M. Nagaraj (supra) unless the mandatory exercise of collecting the quantifiable data is conducted, no authority or Government can follow the rule of reservation in promotions. Since admittedly in Railways or in any other respondent department, no such exercise is conducted, their action in following the rule of reservation in promotions is unsustainable”.

7. In this case we find that respondents have not controverted the specific stand of the applicant that before making selection, the respondents have not carried out the mandatory exercise of collecting quantifiable data as envisaged in **M.Nagaraj** (supra). Thus, we are in full agreement with the findings arrived at by the Principal Bench in the aforementioned case.

8. Accordingly, this Original Application is allowed. The impugned promotion order dated 01.09.2015 (Annexure A-1) and Office Memorandum dated 20.08.2015 (Annexure A-2) are

quashed and set aside to the extent they pertain to private respondent No.5. The official respondents are directed to consider the case of the applicant for grant of restructuring promotion to the post of Chief Office Superintendent, without the element of rule of reservation, and if found suitable grant him all consequential benefits, within a period of three months from the date of communication of this order. The financial benefits drawn by the respondent No.5 consequent to his promotion as Chief Office Superintendent shall not be recovered. No costs.

(Ramesh Singh Thakur)
Judicial Member

(Navin Tandon)
Administrative Member

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