
(2019) 11 UK CK 0110

In the Uttarakhand High Court

Case No : Review Application No. 389 Of 2019 In Writ Petition (S/B) No. 117 Of 2019

Gyan Chand

APPELLANT

Vs

State Of Uttarakhand And Others

RESPONDENT

Date of Decision : 15-11-2019

Acts Referred:

Uttar Pradesh Public Services (Reservation For Scheduled Castes, Scheduled Tribes And Other Backward Classes) Act, 1994 — Section 3(7)
Constitution Of India, 1950 — Article 16(4A), 335

Citation : (2019) 11 UK CK 0110

Hon'ble Judges : Ramesh Ranganathan, CJ;N.S. Dhanik, J

Bench : Division Bench

Advocate : M.S. Tyagi, H.M. Bhatia, C.S. Rawat, B.P. Nautiyal, Mohd. Matloob

Final Decision : Disposed Of

Judgement

Ramesh Ranganathan, CJ

1. A preliminary objection is raised by Mr. M.S. Tyagi, learned Senior Counsel appearing on behalf of the petitioner, that, in the absence of an application seeking condonation of the delay in filing the Review Application, this Court would not be justified in examining the Review Application on its merits. Mr. B.P. Nautiyal, learned Senior Counsel appearing on behalf of the review applicants, would submit that there is no delay in filing the Review Application and the contention, urged on behalf of the respondent-writ petitioner that there is a delay of 01 day in preferring the Review Application, is not tenable.

2. The order under review was passed on 01.04.2019, and the application, to be furnished a certified copy of the said order was made on 24.04.2019. The certified copy, of the order under review, was prepared on 06.05.2019 and the Review Application was filed on 14.05.2019. The submission of Mr. M.S. Tyagi, learned Senior Counsel for the petitioner, is that the 30 days limitation period, for preferring a Review Application, should be computed as (i) 23 days between

01.04.2019 and 24.04.2019 excluding 01.04.2019; and (ii) 08 days from the date on which the certified copy was prepared on 06.05.2019 till the Review Application was filed on 14.05.2019, which would then come to 31 days i.e. 01 day beyond the 30 days limitation period.

3. No application seeking condonation of delay has, admittedly, been filed. Consequently, it is only if the Review Application has been preferred within the 30 days limitation period, can it be entertained. Mr. B.P. Nautiyal, learned Senior Counsel appearing on behalf of the review applicants, would rely on Ramkrishna Bhau Dajiba Bhau and Ors. v. Shrawan Kisan Patil and Ors. : AIR 1944 NAGPUR 356, and Govindan Vijayan v. Karambi Parvathy : AIR 1961 KERALA 207, to contend that, in the light of the law declared in the aforesaid judgments, both the days, i.e. the day on which an application is made to be furnished a certified copy, and the day on which it is delivered should be excluded.

4. In the light of the law declared in Ramkrishna Bhau Dajiba Bhau and Ors. v. Shrawan Kisan Patil and Ors. : AIR 1944 NAGPUR 356 and Govindan Vijayan v. Karambi Parvathy : AIR 1961 KERALA 207, and excluding both the days i.e. the date of preparation of the certified copy i.e. 06.05.2019 and the date of its receipt, the Review Application has been filed within time. We see no reason, therefore, not to examine the Review Application on its merits or to reject the Review Application on the ground of delay of 01 day in preferring the Review Application.

5. This application is filed seeking review of the order passed by us in Writ Petition (S/B) No. 117 of 2019 dated 01.04.2019 wherein we had opined that, since the judgment of the earlier Division Bench of this Court in Vinod Prakash Nautiyal and others v. State of Uttarakhand and others (judgment in Writ Petition (S/B) No. 45 of 2011 dated 10.07.2012) had only struck down Section 3(7) of the U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 (for short 'the 1994 Act') and nothing more, reservation could be provided, as held by the Supreme Court in Indra Sawhney v. Union of India : 1992 Suppl. (3) SCC 217, even by way of Government Orders, and not necessarily only by legislation-plenary or subordinate; and if the Government of Uttarakhand had either adopted the earlier notifications issued by the Government of Uttar Pradesh, or had issued notifications after its creation on 09.11.2000, providing reservation in promotion in favour of the Scheduled Castes and the Scheduled Tribes, then those notifications would remain in force, as its validity was not put in issue before the Division Bench in Vinod Prakash Nautiyal; and the challenge in those proceedings was confined only to the constitutional validity of Section 3(7) of the 1994 Act whereby legislative sanction was given to the earlier Government Orders in force. We had made it clear that, even if there were no such Government Orders in force in the State of Uttarakhand, Article 16(4-A) of the Constitution of India, an enabling provision, conferred power on the Government of Uttarakhand to take necessary steps, if they so choose, to provide reservation in promotion in favour of the Scheduled

Castes and the Scheduled Tribes, without having to gather quantifiable data regarding either their backwardness or the adequacy of their representation in services.

6. In coming to such a conclusion, we had relied on *Jarnail Singh and others v. Lachhmi Narain Gupta and others* : (2018) 10 SCC 396, wherein the Supreme Court had opined that the conclusion in *M. Nagaraj and others v. Union of India and others* : (2006) 8 SCC 212, that the State Government should collect quantifiable data showing backwardness of the Scheduled Castes and the Scheduled Tribes, was contrary to the nine-Judge Bench judgment in *Indra Sawhney*; and was invalid to this extent. We had, in the order under review, opined that, in the light of the clarification issued by the Constitution Bench in *Jarnail Singh*, and in view of the nine-Judge Bench judgment of the Supreme Court in *Indra Sawhney*, it was wholly unnecessary for the State Government to collect quantifiable data regarding representation of the Scheduled Castes and the Scheduled Tribes in services, or regarding their backwardness, before providing reservation in their favour in promotion posts.

7. Mr. B.P. Nautiyal, learned Senior Counsel appearing on behalf of the review applicants, would submit that the Supreme Court in *Jarnail Singh* had expressed its concurrence with the law laid down earlier in *M. Nagaraj*, except to the extent the State Government was directed to collect quantifiable data regarding backwardness of the Scheduled Castes and the Scheduled Tribes before providing reservation in promotion in their favour; in passing the order under review, the Division Bench may have been justified in holding that it was unnecessary for the State Government to collect quantifiable data regarding backwardness of the Scheduled Castes and the Scheduled Tribes before providing reservation, in their favour, in promotion posts; the Division Bench was, however, in error in holding that it was unnecessary for the State Government to collect quantifiable data regarding adequacy of representation of the Scheduled Castes and the Scheduled Tribes in services; the judgment of the Supreme Court, in *M. Nagaraj*, obligated the State Government to collect quantifiable data regarding adequacy of representation of the Scheduled Castes and the Scheduled Tribes in services; this conclusion, in *M. Nagaraj*, has not been faulted in the later judgment of the Supreme Court in *Jarnail Singh*; the State Government is, therefore, obligated to collect quantifiable data regarding adequacy of representation of the Scheduled Castes and the Scheduled Tribes in services before providing reservation, in their favour, in promotional posts; and the conclusion to the contrary, both in paragraphs 6 and 10 of the order under review, suffers from an error apparent on the face of record necessitating its being set aside.

8. In *M. Nagaraj*, the Supreme Court observed thus:

".....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 excessiveness so as to breach the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely....."

(emphasis supplied)

9. In *Jarnail Singh*, the Supreme Court observed:

".....This brings us to whether the judgment in *Nagaraj* needs to be revisited on the other grounds that have been argued before us. In so far as the State having to show quantifiable data as far as backwardness of the class is concerned, we are afraid that we must reject Shri Shanti Bhushan's argument. The reference to "class" is to the Scheduled Castes and the Scheduled Tribes, and their inadequacy of representation in public employment. It is clear, therefore, that *Nagaraj* has, in unmistakable terms, stated that the State has to collect quantifiable data showing backwardness of the Scheduled Castes and the Scheduled Tribes. We are afraid that this portion of the judgment is directly contrary to the nine-Judge Bench in *Indra Sawhney* (1).....

.....In fact, *Chinnaiah* has referred to the Scheduled Castes as being the most backward among the Backward Classes (see para 43). This is for the reason that the Presidential List contains only those castes or groups or parts thereof, which have been regarded as untouchables. Similarly, the Presidential List of Scheduled Tribes only refers to those tribes in remote backward areas who are socially extremely backward. Thus, it is clear that when *Nagaraj* requires the States to collect quantifiable data on backwardness, in so far as Scheduled Castes and Scheduled Tribes are concerned, this would clearly be contrary to *Indra Sawhney* (1) and would have to be declared to be bad on this ground.....

.....In fact, the tests laid down in *Nagaraj* for judging whether a constitutional amendment violates basic structure have been expressly approved by a nine-Judge Bench of this Court in *I.R. Coelho v. State of T.N.* (see paras 61, 105, and 142). The entirety of the decision, far from being clearly erroneous, correctly applies the basic structure doctrine to uphold constitutional amendments on certain conditions which are based upon the equality principle as being part of basic structure. Thus, we may make it clear that quantifiable data shall be collected by the State, on the parameters as stipulated in *Nagaraj* on the inadequacy of representation, which can be tested by the courts. We may further add that the data would be relatable to the cadre concerned.....

.....Thus, we conclude that the judgment in *Nagaraj* does not need to be referred

to a seven-Judge Bench. However, the conclusion in Nagaraj that the State has to collect quantifiable data showing backwardness of the Scheduled Castes and the Scheduled Tribes, being contrary to the nine-Judge Bench in Indra Sawhney (1) is held to be invalid to this extent....."

(emphasis supplied)

10. The law declared in M. Nagaraj was reiterated by the Supreme Court in Jarnail Singh and it was held that quantifiable data shall be collected by the State, on the parameters as stipulated in M. Nagaraj, on the inadequacy of representation, which could be tested by the Courts. Since the State Government, both in terms of M. Nagaraj and Jarnail Singh, is required to collect quantifiable data on the inadequacy of representation of the Scheduled Castes and the Scheduled Tribes in services, before providing reservation in promotion in their favour, the order under review, whereby the State Government was held entitled to provide reservation in promotion, without collecting quantifiable data regarding the inadequacy of representation of the Scheduled Castes and the Scheduled Tribes in services, suffers from an error apparent on the face of record.

11. The order under review, to the extent it held that it was unnecessary for the State Government to collect quantifiable data regarding representation of the Scheduled Castes and the Scheduled Tribes in services (refer to paragraphs 6 and 10 of the order under review) must be and is accordingly set aside. We, accordingly, hold that, while it is unnecessary for the State Government to collect quantifiable data regarding backwardness of the Scheduled Castes and the Scheduled Tribes, they are obligated to collect quantifiable data regarding inadequacy of representation of the Scheduled Castes and the Scheduled Tribes in services before providing reservation in promotion in their favour.

12. Mr. M.S. Tyagi, learned Senior Counsel appearing on behalf of the petitioner, would refer to Clause 3 of the Uttar Pradesh Lok Seva (Scheduled Caste, Scheduled Tribe and Other Backward Caste Reservation) Act (Uttaranchal Adaptation and Modification) Order, 2001, which was notified on 30.08.2001, to contend that the State Government has already undertaken such an exercise, and has reduced the percentage of reservation in favour of the Scheduled Castes from 21 percent to 19 percent, and had increased the percentage of reservation in favour of the Scheduled Tribes from 02 percent to 4 percent; pursuant thereto the State Government had, by its Order No.1455/Personnel-2/2001 dated 31.08.2001, prepared a roster to be applied while providing reservation in promotion; the said roster provides for 19 percent of the posts to be reserved in favour of the Scheduled Castes, and 04 percent posts to be reserved in favour of the Scheduled Tribes; thereafter the Government Order dated 17.02.2004 was issued directing departments to prepare cadre-wise roster register in different cadres; Government Order No. 87/XXX(2)/2006 dated 21.01.2006 was issued providing 19 percent reservation in promotion in favour of the Scheduled Castes and 04 percent reservation in promotion in favour of the Scheduled Tribes; since the percentage of reservation, provided in favour of the Scheduled Castes, was

reduced from 21 percent to 19 percent, it is evident that such a reduction was made only after quantifiable data, regarding inadequate representation of the Scheduled Castes and the Scheduled Tribes in services, was collected; and it is unnecessary for the State Government to be directed to undertake such an exercise all over again.

13. While the aforesaid Government Orders, no doubt, provide 19 percent reservation in promotion in favour of the Scheduled Castes and 04 percent reservation in promotion in favour of the Scheduled Tribes, which is at variance with what was provided before the State of Uttarakhand was created on 09.11.2000, it is not clear whether such a reduction, in the percentage of reservation in favour of the Scheduled Castes, and an increase in favour of the Scheduled Tribes, was made after collecting quantifiable data regarding the inadequacy of their representation in services. All the Government Orders referred to hereinabove were issued before the judgment of the Supreme Court in *M. Nagaraj* on 19.10.2006.

14. Both Mr. C.S. Rawat, learned Additional Chief Standing Counsel appearing on behalf of the State of Uttarakhand, and Mr. B.P. Nautiyal, learned Senior Counsel appearing on behalf of the review-applicants, would contend that no exercise, for collecting quantifiable data regarding inadequacy of representation of the Scheduled Castes and the Scheduled Tribes in services, has been undertaken by the State Government so far.

15. It is no doubt true that Article 16 (4-A) of the Constitution of India is an enabling provision, and the State Government is not obligated thereby to provide reservation in promotion in favour of the Scheduled Castes and the Scheduled Tribes. As Article 16 (4-A) enables the State Government to provide reservation in promotion in favour of the Scheduled Castes and the Scheduled Tribes, and such reservation can only be provided after the State Government collects data regarding the inadequacy of their representation in services, we are of the view that the State Government should be directed to collect quantifiable data regarding the adequacy/inadequacy of representation of the Scheduled Castes and the Scheduled Tribes in services as it would then enable the State Government to take a considered decision whether or not reservation in promotion should be provided in favour of the Scheduled Castes and the Scheduled Tribes.

16. Suffice it, in such circumstances, to modify the order under review and direct the State Government to collect quantifiable data, regarding the adequacy/inadequacy of representation of the Scheduled Castes and the Scheduled Tribes in the services of the State, with utmost expedition and, in any event, within four months from the date of production of a certified copy of this order. After such quantifiable data is collected, the State Government may take a considered decision on whether or not to provide reservation in promotion in favour of the Scheduled Castes and the Scheduled Tribes. We make it clear that, since Article 16(4-A) of the Constitution of India is an enabling provision, it is for the State

Government to take a decision as to whether or not reservation should be provided in favour of the Scheduled Castes and the Scheduled Tribes in promotional posts. All that we have now directed the State Government to do is to collect quantifiable data regarding the adequacy/inadequacy of representation of the Scheduled Castes and the Scheduled Tribes in the services of the State, and then consider whether or not it should provide reservation in promotion in their favour.

17. The Review Application is, accordingly, disposed of. No costs.