

(2014) 12 DEL CK 0304

In the Delhi High Court

Case No : Writ Petition (Civil) 4062/2014 and C.M. Nos. 8154/2014 and 15589/2014

Ram Bhog Singh

APPELLANT

Vs

Rajiv Sinha

RESPONDENT

Date of Decision : 08-12-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 16, 16(4A), 226

Citation : (2014) 12 DEL CK 0304

Hon'ble Judges : Vipin Sanghi, J;S. Ravindra Bhat, J

Bench : Division Bench

Advocate : Amit Anand Tiwari, Avinash Tripathi and Abhinandan Banerjee, Advocate for the Appellant; Dheeraj Kumar and Neeti Sahu, Advocate for the Respondent

Judgement

Vipin Sanghi, J.—The present Writ Petition has been preferred by the petitioner under Article 226 of the Constitution of India to assail the order dated 22.04.2014 of the Central Administrative Tribunal, Principal Bench, Delhi (CAT/Tribunal) allowing OA No. 1958/2011, and quashing the impugned Roster Register of STS as well as directing the official respondents to comply with the conditions prescribed in M. Nagaraj and Others Vs. Union of India (UOI) and Others, , not to grant reservations to SC/ST candidates on the basis of the Roster Register prepared on the basis of reservation for the said classes, and; declaring that the first respondent/Applicant is senior to petitioner in the seniority list of STS officers corrected upto 10.06.2010.

2. The petitioner, belonging to the reserved category, and the first respondent, (an unreserved candidate) were selected in the Engineering Services Examination conducted by Union Public Service Commission (UPSC) in 1990. The applicant joined in the grade of Junior Time Scale (JTS) of Indian Broadcasting (Engineers) Service [IB(E)S] in the pay scale of Rs. 2200-75-4000 on 14.07.1992. The petitioner joined in the grade of JTS of IB(E)S in the same pay

scale on 29.07.1992. On 08.08.1997, the petitioner was promoted to the Senior Time Scale (STS) Grade in the pay scale of Rs. 10,000-325-15,200 against a vacancy arising in the reserved post. Thereafter, on 30.10.1998, the Applicant was promoted to the STS Grade in the aforesaid pay scale. Subsequently, on 01.06.2004, the petitioner was promoted to the Non-Functional Pay Scale (NFPS) Grade in the pay scale of Rs. 12,000-375-16,500, whereas the first respondent was promoted to the NFPS Grade with pay of Rs. 7,600/- on 25.06.2006, as per the Central Pay Commission report.

3. The third Respondent -the Director General, AIR Station (hereafter "DG") issued the seniority list for JTS of IB(E)S on 20.12.2007, wherein the petitioner was placed at S. No. 1081, whereas the Applicant was placed at S. No. 1025. It issued the final seniority list of the STS of IB(E)S upto 10.06.2010, wherein the petitioner was placed at S. No. 79 whereas the applicant was at S. No. 118. The DG also issued a letter dated 22.07.2010, directing all Heads to revise the seniority list of all the cadres in accordance with the DoP&T O.M. dated 21.01.2002, within a period of 3 months.

4. The Applicant represented to the DG, being aggrieved by his placement at S. No. 118 in the seniority list of STS of IB(E)S issued by the DG-AIR, but to no avail. Consequently, the applicant preferred O.A. No. 1749/2011. However, on 13.05.2011, that application was dismissed as withdrawn with liberty to file fresh a OA after incorporating the grounds that promotion was not as per the judgment of the Supreme Court in M. Nagraj (supra).

5. Thereafter, the Applicant filed O.A. No. 1958/2011 before CAT, claiming issuance of directions to the DG to declare him senior to the petitioner in the seniority list of STS officers corrected upto 10.06.2010, in view of the judgment passed in M. Nagraj (supra). The CAT, by order dated 01.06.2011, dismissed the application in limine, being barred by time. Aggrieved, the Applicant preferred W.P (C) No. 5810/2011 to this Court, which disposed of that petition with leave to the Applicant to file an application before the Tribunal for review, along with an application seeking condonation of delay. Consequently, the Applicant filed R.A. No. 377/2011, which was allowed on 23.08.2012.

6. Thereafter, the CAT, by its impugned order dated 22.04.2014, allowed the application with, inter alia, a direction that the Applicant be treated as senior to the petitioner in the roster of STS corrected upto 10.06.2010. Aggrieved by the said order of the CAT, the petitioner has preferred the present petition.

7. Learned Counsel urges that the petitioner was promoted to the STS Grade, against a vacancy for a reserved officer, on 08.08.1997 i.e. ahead of the Applicant's promotion, from 30.10.1998. Therefore, as the petitioner had a longer length of service in STS Grade, he was correctly placed higher to respondent no. 1.

8. Learned counsel for petitioner submits that the seniority list of the STS officers issued by the DG on 01.01.2008 was never challenged by Applicant where the

petitioner stood at S. No. 127 while he (the Applicant) was at S. No. 167. Learned Counsel submitted that the judgment of the Supreme Court in *M. Nagraj* (supra) applies prospectively and cannot affect the promotions already made before that. It is stated that the judgment of *M. Nagraj* (supra) is dated 19.10.2006, whereas the promotion of the petitioner was granted on 08.08.1997 and hence it would not apply in the present case. Further, in terms of the decision of the Supreme Court, once a person is given promotion on the basis of reservation, his consequential seniority cannot be taken away by applying the "catch up" rule.

9. Learned Counsel for the petitioner further submits that pursuant to the 85th Constitutional Amendment, the Government of India vide O.M. dated 21.01.2002, made provisions for retention of consequential seniority conferred on the person by virtue of his promotion on the basis of reservation, w.e.f. 17.06.1995.

10. Learned Counsel for the Applicant submits that he initially joined in the grade of JTS in IB(E)S on 14.07.1992, whereas the petitioner joined initially on 29.07.1992. The petitioner, later on, got accelerated promotion due to existence of a vacancy in the reserved post. However, applying the catch up rule, the Applicant - belonging to the general category, would regain seniority over the petitioner, who had become a senior due to reservation.

11. Learned Counsel further urges that the official respondents did not undertake the exercise in terms of Article 16(4A), Constitution of India, to compile and examine quantifiable data, on the basis of which a conscious decision could be taken - whether, or not, to grant reservation in the promotional post by examining whether there is adequate representation of the reserved classes in public employment. Hence, the grant of seniority to the petitioner above the applicant-respondent is illegal.

12. Having heard learned counsel for the parties and perused the material on record, this Court finds merit in the submission of the Applicant that certain pre-conditions must be fulfilled for providing reservation in public employment. They are: the State must show that there was a survey for providing the data to show the backwardness in that particular class, that such class is not represented adequately and compliance of Article 335 of the Constitution of India.

13. In the present case, the Applicant joined as a JTS on 14.07.1992 while petitioner joined on 29.07.1992 in the same grade. Therefore, he was senior to the petitioner in the list of JTS. However, due to a reserved vacancy in the cadre of STS, the petitioner got promoted earlier, on 08.08.1997 i.e. earlier to the applicant, who was promoted on 30.10.1998. In view of this, the petitioner gained seniority (placed at S. No. 79) over the applicant (at S. No. 118).

14. The Constitution Bench of the Supreme Court in *M. Nagraj* (supra), held as follows:

"103. In the matter of application of the principle of basic structure, twin tests have to be satisfied, namely, the "width test" and the test of "identity". As stated hereinabove, the concept of the "catch-up" rule and "consequential seniority" are not constitutional requirements. They are not implicit in Clauses (1) and (4) of Article 16. They are not constitutional limitations. They are concepts derived from service jurisprudence. They are not constitutional principles. They are not axioms like, secularism, federalism, etc. Obliteration of these concepts or insertion of these concepts does not change the equality code indicated by Articles 14, 15 and 16 of the Constitution. Clause (1) of Article 16 cannot prevent the State from taking cognizance of the compelling interests of Backward Classes in the society. Clauses (1) and (4) of Article 16 are restatements of the principle of equality under Article 14. Clause (4) of Article 16 refers to affirmative action by way of reservation. Clause (4) of Article 16, however, states that the appropriate Government is free to provide for reservation in cases where it is satisfied on the basis of quantifiable data that Backward Class is inadequately represented in the services. Therefore, in every case where the State decides to provide for reservation there must exist two circumstances, namely, "backwardness" and "inadequacy of representation". As stated above, equity, justice and efficiency are variable factors. These factors are context-specific. There is no fixed yardstick to identify and measure these three factors, it will depend on the facts and circumstances of each case. These are the limitations on the mode of the exercise of power by the State. None of these limitations have been removed by the impugned amendments. If the State concerned fails to identify and measure backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid."

(Emphasis Supplied)

The later decision in *Suraj Bhan Meena and Another Vs. State of Rajasthan and Others*, holds 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 that such reservation was at all required.

15. The State is not bound to make reservation for SC/ST in matters of promotion. In respect of promotional posts, it is obligatory for the official respondents, that an exercise to determine the extent of reservation, to be provided if at all, have regard to the adequacy of representation in the aforesaid promotional post, and thereafter, based upon such determination fill the vacancies which arise in consequence to the share of reserved categories.

16. The DG-AIR issued the final seniority list of the STS, corrected upto 10.06.2010 (wherein the petitioner was placed higher in list than the applicant), without working out the conditions mentioned in Article 16(4A) of the Constitution of India. An officer who was ranked senior in the feeder post cannot be placed below in the seniority list in the promotional cadre because of the conferment of accelerated promotion to a reserved category official, merely

because of earlier promotion on account of reservation. In the facts of the matter, the catch up rule would be applicable and the seniority of the applicant would be maintained on promotion of the petitioner as he was promoted in the reserved category vacancy.

17. The submission of the petitioner that M. Nagaraj (supra) could be applied only prospectively, in our view, has no merit. A reading of the judgment in M. Nagaraj (supra) does not demonstrate that the Supreme Court while declaring the law, sought to restrict the application of the declaration only prospectively. When the Supreme Court makes a declaration as to the law, that declaration - unless held to be prospective explicitly or by necessary implication, would have effect retrospectively. However, obviously, such declaration would not unsettle or re-open the settled and closed chapters and disputes.

18. In the present case, the final seniority list of STS was issued much after the decision of the Supreme Court in M. Nagaraj (supra). Consequently, it was not a concluded or settled issue. We, therefore, reject the submission of the petitioner that the decision in M. Nagaraj (supra) had no application to the present case.

19. We may also refer to the latest judgment of the Supreme Court in U.P. Power Corporation Ltd. Vs. Rajesh Kumar and Others, . In that case, the Supreme Court did not accept the submission that when there was no challenge to the orders issued prior to the amendment for reservation in promotion, no quantifiable data is necessary. Thus, the submission of the petitioner that the decision in M. Nagaraj (Supra) would have prospective application only cannot be accepted.

20. The CAT correctly placed reliance on the judgments of M. Nagaraj (supra) and Suraj Bhan Meena (supra) to hold that the petitioner would not gain consequential seniority over the Applicant due to promotion of the petitioner ahead of the Applicant in the reserved category. In these circumstances, the seniority list of the DG-AIR cannot be sustained.

21. In the light of the aforesaid discussion, we find no merit in this petition and the same is accordingly dismissed without order as to costs.