

(2017) 01 OHC CK 0037
In the Orissa High Court
Case No : 2683 of 2002

State of Odisha and Another

APPELLANT

Vs

Rabinarayan Nayak and Others

RESPONDENT

Date of Decision : 06-01-2017

Acts Referred:

[Constitution of India](#), [Article 226](#), [Article 227](#), [Article 16\(4A\)](#) - Power of High Courts to Issue certain writs - Power of superintendence over all courts by the High Court -

Citation : (2017) 01 OHC CK 0037

Hon'ble Judges : Sanju Panda, Sujit Narayan Prasad

Bench : DIVISION BENCH

Advocate : P.K. Nanda, S. S. Ray, M. R. Parida, A. K. Nayak, P. R. Sethi

Final Decision : Dismissed

Judgement

1. The State of Odisha, being aggrieved with the order dtd.10th August, 2001 passed by Central Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No.643 of 1999 have invoked the jurisdiction of this court conferred under Articles 226 and 227 of the Constitution of India, whereby and where under the Tribunal has directed to re-fix the seniority of the applicant, i.e. the opposite party no.1 prior to holding of meeting of selection committee and to place a list of officers within the zone of consideration assigning them in order of seniority and directed the respondents to conduct a review meeting of the selection committee, consider the cases of officers on the basis of corrected list who are coming within the zone of consideration in accordance with their seniority, to be completed within stipulated period.

2. The fact of the case is that the opposite party No.1, Rabinarayan Nayak, applicant before the learned Tribunal, was promoted to Orissa Forest Service Class-II and is a promotee of 1978-80. The opposite party no.2 herein, the opposite party no.5 before the learned Tribunal, is a direct recruit of 1979-81.

The opposite party no.2 was junior to the petitioner in Orissa Forest Service Class-II (herein after referred as O.F.S.-II). In the seniority list of OFS Class-II the name of the opposite party no.1 appears against Sl. No.215 and the name of the opposite party no.2 appears against sl. no.268 who belongs to scheduled caste category and as such he was promoted to O.F.S. Class-I on 29.05.1992 over the head of his seniors who belong to general category. The opposite party no.1 was promoted to O.F.S. class-I on 31.7.1999. The selection committee, for promotion from State Forest Service to Indian Forest Service, had conducted its meeting on 14.10.1999 for fulfilling the three vacancies and the zone of consideration was 12 and as such the State Authorities, in their letter dtd.17.8.1999, forwarded names of 12 officers belonging to O.F.S. Class-I amongst whom the opposite party no.2 was shown against sl. no.8, K. C, Hansda against sl. No.9, Sudhakar Mallick against sl. no.10, Abhimanyu Behera against sl. no.11 and the opposite party no.1 against sl. no.12. The applicant was the last person in the list of officers within the zone of consideration.

The opposite party no.1 had filed representations before the respondents for fixing his seniority in O.F.S. Class-I in accordance with the decision of Hon''ble Supreme Court rendered in the case of Virpal Singh Chauhan Etc. Vrs. Union of India and Others, reported in 1995 6 SCC 684, Ajit Singh and Others Vrs. State of Punjab and Others, reported in 1996 2 SCC 715, Ajit Singh -II Vrs. State of Punjab and others, reported in 1999 7 SCC 209 and Jagdish Lal and Others Vrs. State of Haryana and Others, reported in 1997 6 SCC 538 wherein the proposition has been laid down that when a reserved category candidate gets promotion to higher grade earlier than his senior in the feeder cadre because of his reserved status, then his senior, on getting promotion to the higher grade in his turn will get back his seniority over the reserved category candidates who had been promoted earlier which is in short is known as "catch up theory". When the grievance of the petitioner has not been redressed, he has approached the Central Administrative Tribunal of its Cuttack Bench, Cuttack and the learned Tribunal after taking into consideration the proposition laid down by Hon''ble Apex Court in the cases referred herein above has passed the following directions:-

"xxxxxx But admittedly in the revised seniority position the applicant has been shown above K. C. Hansda, Sudhakar Mallick and Abhimanyu Behera. In view of this, it was incorrect on the part of the respondents not to refix seniority prior to holding of meeting of the Selection Committee and to place a list of officers within the zone of consideration assigning them on order of seniority which was palpably wrong. Because of the inaction of respondent nos.2 and 3 the applicant cannot be made to suffer. In view of this, we direct the respondents that a review meeting of the Selection Committee should be held and a correct list of officers coming within the zone of consideration in accordance with their seniority should be placed before the Review Selection Committee. We also direct that the applicant should be allowed the benefit of the decisions of the Hon''ble Supreme Court in the cases referred to by us earlier. The above exercise should be

completed within a period of 120 (one hundred twenty) days from the date of receipt of copy of this order."

The Union of India, being aggrieved with the order passed by the learned Tribunal, have invoked the jurisdiction of this court conferred under Articles 226 and 227 of the Constitution of India assailing the order on the ground that the 85th amendment of Constitution of India has come into effect w.e.f.17.6.1995 by incorporating the word "consequential" under the provision of Article 16(4-A) and as such the seniority list already prepared needs no interference, since the opposite party no.2 has been protected by virtue of the constitutional amendment enacted by inserting word "consequential" under Article 16(4-A) of the Constitution of India.

3. This court has issued notice to the parties, in terms thereof the parties had appeared including the opposite party no.2 through their learned counsels, but none represented on behalf of the opposite party no.2.

4. We have heard learned counsels for the petitioner and gone through the records including the order impugned in the instant writ petition. Before going into the factual aspect of this case, it is relevant to bring on record the various pronouncements of Hon"ble Apex Court regarding the benefit of reservation to be given to the scheduled caste and scheduled tribe categories in the matter of appointment and the constitutional mandate in this regard. Article 16 clause (1) and (2) guarantee equality of opportunity to all citizens in the matter of appointment to any office or to any other employment under the State. Clauses (3) to (5) however, lay down several exceptions to the above rule of equal opportunity, these are;

(i) though any citizen of India, irrespective of his residence, is eligible for any office or employment under the Government of India, residence may be laid down as a condition for a particular classes of employment under a State or any local authority therein, by an Act of Parliament in that behalf.

(ii) The State may reserve any post or appointment in favour of any backward class of citizen who, in the opinion of the State, are not adequately represented in the services under the State.

(iii) Offices connected with religious or denominational institutions may be reserved for members profession any particular religion or belonging to a particular denomination.

Article 16 is applicable in the case of an appointment. It does not speak of fixation of seniority. Seniority as such is not a Fundamental Right. Clause (4) of Article 16 permits reservation of backward classes of citizens who are not, in the opinion of the State, adequately represented in the services of the State, as per the judgment rendered by the Constitution Bench of Hon"ble Supreme Court in the case of Indra Sawhney Vrs. Union of India, reported in AIR 1993 SC 477 the ceiling limit of reservation has been fixed to 50% of the vacancy of that year.

Since the Constitution does not contain provision for accelerated seniority and once the class of reserved category got promotion, even though junior in the feeder grade over and above the un reserved category employee, then they became senior in the next cadre irrespective of his seniority position in the feeder grade in comparison with the unreserved category candidate and in order to deal with such situation the Hon''ble Apex Court has laid down the proposition in the case of Virpal Singh Chauhan Etc. Vrs. Union of India and Others (supra) wherein at paragraph 24 it has been held that the reserved category candidate belonging to SC / ST would not be entitled for benefit of consequential seniority.

This position of law has been reiterated by the Hon''ble Apex Court in the subsequent decision, i.e. in the case of Ajit Singh Vrs. State of Punjba (supra), R. K. Sabharwal and Others Vrs. State of Punjab and Others, reported in (1995) 2 SCC 745, Ajit Singh -II Vrs. State of Punjhan (supr), Jagdish Lal and Others Vrs. State of Haryana and Others (supra).

The Parliament, in order to come out with the situation of exceeding the limit of reservation from the ceiling of 50%, has come out with the 81st constitutional amendment Act, 2000 and to provide the benefit of accelerated seniority has come out with the 85th constitutional amendment Act, 2001. The 85th constitutional amendment Act, 2001 amended the constitutional provision by inserting a word "consequential" under Article 16(4-A) of the Constitution of India. The virus of the 81st constitutional amendment Act, 82nd constitutional amendment Act and 85th constitutional amendment Act has been challenged before the Hon''ble Supreme Court in the case of M. Nagraj and Others Vrs. Union of India, reported in 2006 (8) SCC 212 wherein their Lordships of the Hon''ble Apex Court have endorsed the 85th amendment making it enabling provision with the condition stipulated at paragraphs 121, 122, 123, 124 and 125, for ready reference the paragraphs are quoted herein below:-

"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 OBC on one hand and SCs and STs on the other hand as held in Indra Sawhney⁵, 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.

124. Subject to above, we uphold the constitutional validity of the Constitution (Seventy-Seventh Amendment) Act, 1995, the Constitution (Eighty-First Amendment) Act, 2000, the Constitution (Eighty-Second Amendment) Act, 2000 and the Constitution (Eighty-Fifth Amendment) Act, 2001.

125. We have not examined the validity of individual enactments of appropriate States and that question will be gone into in individual writ petition by the appropriate bench in accordance with law laid down by us in the present case."

It is evident from the judgment rendered by Hon''ble Supreme Court in the case of M. Nagraj (supra) that before granting benefit of accelerated seniority the State is supposed to follow the basic requirement as has been laid down by the Hon''ble Supreme Court in the said case at paragraph 121, i.e. (i) backwardness, (ii) inadequacy of representation and (iii) overall efficiency of the administration under Art.335, subject to the rule laid down by the Hon''ble Apex Court in the case of R.K. Sabarwal (supra), meaning thereby the benefit of accelerated seniority has been made enabling provision subject to taking certain steps by the State.

After pronouncement of judgment in the case of M. Nagraj, since the 85th constitutional amendment has been made enabling provision, can it be said to be automatic process for granting accelerated seniority, this issue has been dealt with by Hon''ble Supreme Court in the case of S. Panneer Selvan and Others Vrs. Government of Tamil Nadu and Orders, reported in 2015 10 SCC 292 wherein their Lordships have been pleased to hold that in absence of quantifiable data having not been collected in view of the proposition laid down by Hon''ble Apex Court as per paragraph 121 of the judgment rendered in the case of M. Nagraj the principle of "catch up theory" will remain in force.

5. We have considered the fact of this case in the light of the legal proposition as has been referred herein above. The fact which is not in dispute that the opposite party no.1 being an unreserved candidate, was promoted to O.F.S. Class-II being a promotee of 1978-80 while opposite party no.2, a direct recruit of 1979-81.

The opposite party no.2 who belongs to scheduled caste category was junior to the petitioner in O.F.S. Class-II which is the basic cadre. In the seniority list of O.F.S. Class-II the applicants name appears against sl. no.125 while the name of opposite party no.2 appears against sl. no.268. The opposite party no.2 being a scheduled caste category and considering the fact that post under O.F.S. Class-II under the scheduled caste was vacant, he was promoted to Class-I on 29.5.1992, the opposite party no.1 was promoted to Class-I on 31.7.1999. The State authority, for consideration of the case of the selection from amongst the officers belonging to State Forest Cadre has convened a meeting for its selection in the Indian Forest Service cadre for which a seniority list was prepared and on the basis of the promotion given in favour of opposite party no.2 in the OFS Class-I on 29.5.1992, he has been shown as senior to that of the opposite party no.1 even though he was promoted in O.F.S. Class-I on 31.7.1999. The State authorities, for the reason best known to them, have not rectified the seniority position in the gradation list by following the principle of "catch up theory" and since during the relevant time that was the legal proposition settled by the Hon"ble Apex Court right from the judgment rendered in the case of Virpal Singh Chauhan Etc. Vrs. Union of India and Others (supra), Ajit Singh Vrs. State of Punjba (supra), R. K. Sabharwal and Others Vrs. State of Punjab and Others, reported in (1995) 2 SCC 745, Ajit Singh -II Vrs. State of Punjhan (supra), Jagdish Lal and Others Vrs. State of Haryana and Others (supra) and allowed to continue the seniority list showing the petitioner junior to the opposite party no.2 and as such the petitioner was shown at sl. no.12 out of the list of the candidates under the consideration zone for fulfilling the three vacancies under the Indian Forest Service cadre and therefore the opposite party no.1 being aggrieved with his position in the seniority list, being not in consonance with the rule of the land, has approached the learned Central Administrative Tribunal for redressal of his grievance. The learned Tribunal has, considered the submission of the parties and putting reliance upon the rule of the land prevalent during the relevant time, passed the order directing the authority to re-fix the seniority and to convene the meeting of review selection committee.

The Union of India has challenged the said order on the basis of the fact that in the meanwhile the 85th amendment has been enacted upon having given effect to w.e.f.17.6.1995 and as such the seniority list needs no interference, but the stand of the Union is not sustainable in the eye of law in view of the fact that nothing has been brought on record with respect to the fact as to whether the guideline laid down by Hon"ble Apex Court at paragraph 121 of the judgment rendered in the case of M. Nagraj (supra) has been followed by the State, hence in absence thereof the 85th Constitutional amendment cannot be held to be effective.

The question fell for consideration before the Hon"ble Apex Court in the case of S. Panneer Selvan and Others Vrs. Government of Tamil Nadu and Orders (supra) as to what would be the situation if the State has not collected quantifiable data in terms of the guideline laid down at paragraph 121 of the judgment rendered in

the case of M. Nagraj (supra), while answering the issue, the Hon''ble Apex Court has been pleased to hold that in absence of quantifiable data, the "catch up theory" will be applicable.

Thus in view of the legal position as above and in view of the fact that the State has not come up with the stand that it has collected quantifiable data, as required, as per the rule laid down by Hon''ble Apex Court in the case of M. Nagraj (supra), the 85th amendment cannot be held to be effective and taking into consideration this aspect of the matter we have examined the order passed by the Tribunal and found that it has committed no error in passing the order, accordingly the same needs no interference.

In the result the writ petition fails and is dismissed.