

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

CWP No. 4945 of 2012

Date of decision:-08.02.2016

Krishan Kumar

...Petitioner

versus

State of Haryana and others

..Respondents

CORAM: HON'BLE MS. JUSTICE RITU BAHRI

Present: Mr. Sanjiv Gupta, Advocate,
for the petitioner.

Mr. Hitesh Pandit, Addl.A.G Haryana

Ms. Gitanjali Chhabra, Advocate for
Mr. Raman B. Garg, Advocate
for respondent Nos. 2 and 3

1. To be referred to the Reporters or not?
2. Whether the judgment should be reported in the Digest? Yes

RITU BAHRI , J.

Petitioner has approached this Court praying for issuance of writ in the nature of certiorari quashing the impugned letter dated 30.10.2010 (P-11) whereby claim of the petitioner for stepping up of his pay at par with his junior counterpart of reserved category has been declined.

Petitioner who belonged to OBC category, was appointed as Steno Typist in the year 1992 in State Co-op Supply and Marketing

Federation Ltd, Panchkula (herein after to be referred as respondent-Federation'). One Mange Ram joined on the post in the year 1993 and thus was junior to the petitioner, as per seniority list (P-1). Services of petitioner and Mange Ram are governed by Hated Common Cadre Rules, 1988 (for short 'Rules 1988') In the year 1999, one post of Sr. Scale Stenographer fell vacant with respondent-Federation and which was to be filled from amongst the Steno-Typist and the candidates of all the categories were invited to appear for Stenography Test but nobody could qualify the test and in the year 2001, the said vacant post of Sr Scale Stenographer which was open for all the categories in the year 1999, was considered as reserved for Scheduled Caste category and two candidates belonging to S.C category were called for and the circulation was not made to the open eligible candidates. However, both the candidates could not qualify the test, as per result declared vide order dated 22.03.2001 (P-2) and on 03.04.2001, another chance was given to them and both qualified the test and order dated 10.04.2001 (P-3) was issued to this effect. Sh. Mange Ram being senior, was promoted to the post of Sr. Scale Stenographer vide order dated 11.04.2001 (P-4) against reserved category as per reservation policy of the Government and the petitioner who was ready to appear in the test, was not given a chance in spite of the representation given by him on 14.11.2000 (P-5), as this post was considered to be filled up from

Scheduled Caste Category candidates, as per reservation policy of the Government. The representation made by the petitioner and others, was never responded by the respondent-Federation.

Thereafter, after implementation of restructuring plan of respondent-Federation in the year 2004, three vacancies of Senior Scale Stenographer arose and the candidates of all categories were invited to appear in the stenography test. Petitioner along with three others qualified the test and the petitioner along with two others promoted to the post of Senior Scale Stenographer on 15.04.2005 (P-6).

Thereafter, on 05.03.2009, Government of Haryana issued the instructions for stepping up of pay of senior general category employees at par with their junior counterparts of reserved categories employees (P-7). These instructions were further clarified/modified vide letter dated 23.11.2009 (P-8) that the benefit of stepping up is applicable to all cadre wherever reservation in promotion is followed and thus, this benefit was also to be given to Backward class or any other category employee.

Petitioner then made request on 10.07.2009 to the respondent-Federation for grant of up-gradation by stepping up of pay at par with his junior counterparts of reserved category in the feeder post i.e Mange Ram. Again representation dated 25.02.2010 was submitted by the petitioner, which was forwarded to the Government

and the advice of the Government was sought and the matter was recommended in favour of the petitioner and he was held entitled for stepping up of his pay at par with Mange Ram w.e.f 11.04.2001 notionally and actual benefit of step up of pay to be allowed w.e. 15.04.2004. This information was received by the petitioner under RTI Act on 13.01.2011 (P-10) but the claim of the petitioner was rejected by the Government on 30.12.2010 (P-11).

Learned counsel for the petitioner contends that once a reserved category employee is promoted prior to general/unreserved category candidate then the reserved category candidate cannot be granted the accelerated seniority and whenever the general category/unreserved category employee is promoted then he is to be stepped at par with his junior counterpart in the feeder post.

Further the petitioner was not given the opportunity in the year 2001 to appear in the Stenography test, being the general category employee and the Government wrongly rejected the claim of the petitioner, which is contrary to the notification/instructions (P-7 and P-8).

Learned counsel for respondent No. 2 and 3 while referring to the written statement argued that respondent-Federation has sent the representation of the petitioner but the Government rejected the claim of the petitioner on the ground that the petitioner is not entitled

for step up.

After hearing learned counsel for the parties at length and after going through the file, this Court is of the view that the writ petition deserves to be allowed.

Reference at this stage can be made to a judgment of Honble the Supreme Court of India in ***M. Nagaraj vs. Union of India, (2006) 8 SCC 212*** wherein the Constitution (Eighty Fifth) Amendment Act, 2001, amending Article 16 (4-A) has been upheld by the Supreme Court and in para 123 and 124 observed as under:-

“123. 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 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 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.

124. Subject to the 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.”

This exercise, as mandated by the Supreme Court, has not been undertaken by the Government of Haryana. No survey has been conducted, no data has been collected, which would determine as to whether adequate reservation of scheduled caste category employees in public employment is there or not but has merely, in the light of the amendment of the Constitution, decided to grant accelerated seniority to the scheduled caste employees, who have been promoted as a consequence of reservation policy.

In the written statement filed by the respondents, nothing has been said about the exercise taken out by the respondents which would fulfil the mandate of the Supreme Court with regard to the grant of accelerated seniority to the reserved category employees. Nothing has been mentioned in the reply which would show that any data was

collected or any survey done which would show backwardness of the class and inadequacy of representation in public employment in addition to compliance with Article 335 of the Constitution of India to justify the grant of benefit of accelerated seniority to the scheduled caste employees as enabled by the Constitution in Article 16 (4-A). A fervent effort was made by him to contend that once the principle of reservation was made applicable to the spectrum of promotion, no fresh exercise is necessary nor it is required as the benefit of reservation has been given by the respondents after taking that into consideration. The efficiency of the service will also not be jeopardized in any manner. He, accordingly, states that the decision of the Government, which is reflected in the instructions dated 05.03.2009 and 23.11.2009 (Annexure P-7 and 8), is in consonance with the constitutional mandate and the consequential orders rejecting the claim of the petitioner deserve to be upheld.

Reference at this stage can further be made to judgment of Hon'ble the Supreme Court in a case of ***Ajit Singh Janjua and others vs. State of Punjab and others, JT 1999 (7) S.C. 153*** wherein it has been held that though a reserved category employee can be promoted on a higher post on the basis of reservation (roster point) but whenever a senior general category employee will be promoted to the higher post to which the reserved category candidate stands promoted,

the general category employee on such promotion shall be declared senior to the reserved category employee on that particular post and will be granted the benefit accordingly. On the basis of this judgment of the Supreme Court, Government of Haryana issued instructions dated 14.10.1999 explaining therein that no employee belonging to the reserved category of scheduled caste or backward class shall be allowed the benefit of accelerated seniority over his/her senior belonging to the general category from the feeder service under the policy of reservation.

Similar issue came up for consideration before this Court in a case of ***Prem Kumar Verma and others vs. State of Haryana, passed in CWP No. 17280 of 2011, decided on 07.08.2012*** wherein also petitioners were general category employees and were appointed, after clearing the departmental test, as Sub-Divisional Clerks before Sh. Amar Singh, a scheduled caste category employee. Since Sh. Amar Singh belongs to the scheduled caste, he was promoted as Accounts Clerk on 01.02.1982 as per the roster point granting him the benefit of reservation whereas the petitioners, who were senior to him in the feeder cadre of Sub-Divisional Clerk, were promoted as Accounts Clerk after 16.03.2006 on various dates. Thereafter, their claims for stepping up of pay, was rejected.

This Court while following the ratio of law laid down in

M. Nagaraj's case (supra) and Ajit Singh Janjua's case (supra)

allowed the writ petition and petitioners were held entitled for stepping up of their pay at par with Sh. Amar Singh from the date of their promotion to the post of Accounts Clerk. This Court held as under:-

“In view of the above, this Court has no option and hesitation to hold that the decision of the Government of Haryana, as circulated through its instructions dated 16.03.2006 (Annexure P-8), granting accelerated seniority to the scheduled caste employees as a consequence of promotion under the reservation policy, is ultra vires as the same runs counter to the dictum in M. Nagaraj’s case (supra) and, therefore, deserves to be quashed.”

In the aforesaid judgment, reference has further been made to a judgment of Hon'ble the Supreme Court of India in a case of ***U.P. Corporation Ltd v. Rajesh and others, JT 2012 (4) SC 459*** wherein Hon'ble the Supreme Court struck down the benefit of accelerated seniority and in para 39 to 41 observed as under:-

“ 39. At this stage, we think it appropriate to refer to the case of Suraj Bhan Meena and another (supra). In the said case, while interpreting the case in M.Nagaraj (supra), the two-Judge Bench has observed:

“10. In M.Nagaraj case, this Court while upholding the constitutional validity of the Constitution (77th Amendment)

Act, 1995 and the Constitution (85th Amendment) Act, 2001, clarified the position that it would not be necessary for the State Government to frame rules in respect of reservation in promotion with consequential seniority, but in case the State Government wanted to frame such rules in this regard, then it would have to satisfy itself by quantifiable data that there was backwardness, inadequacy of representation in public employment and overall administrative inefficiency and unless such an exercise was undertaken by the State Government, the rule relating to reservation in promotion with consequential seniority could not be introduced.”

40. In the said case, the State Government had not undertaken any exercise as indicated in M. Nagaraj (supra). The two-Judge Bench has noted three conditions in the said judgment. It was canvassed before the Bench that exercise to be undertaken as per the direction in M. Nagaraj (supra) was mandatory and the State cannot, either directly or indirectly, circumvent or ignore or refuse to undertake the exercise by taking recourse to the Constitution (Eighty-Fifth Amendment) Act providing for reservation for promotion with consequential seniority. While dealing with the contentions, the two-Judge Bench opined that the State is required to place before the Court the requisite quantifiable data in each case and to satisfy the Court that the said reservation became necessary on account of inadequacy of representation of Scheduled Castes and Scheduled Tribes candidates in

a particular class or classes of posts, without affecting the general efficiency of service. Eventually, the Bench opined as follows:-

“66. The position after the decision in M. Nagaraj case is 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 of ascertaining as to whether such reservation was at all required.

67. The view of the High Court is based on the decision in M. Nagaraj case as no exercise was undertaken in the terms of Article 16(4-A) to acquire quantifiable data regarding the inadequacy of representation of the Scheduled Caste and Scheduled Tribe communities in public services. The Rajasthan High Court has rightly quashed the notifications dated 28.12.2002 and 25.4.2008 issued by the State of Rajasthan providing for consequential seniority and promotion to the members of the Scheduled Caste and Scheduled Tribe communities and the same does not call for any interference.”

40.1. After so stating, the two- Judge Bench affirmed the view taken by the High Court of Rajasthan.. As has been indicated hereinbefore, it has been vehemently argued by the learned senior counsel for the State and the learned senior counsel for the Corporation that once the principle of reservation was made applicable to the spectrum of

*promotion, no fresh exercise is necessary. It is also urged that the efficiency in service is not jeopardized. Reference has been made to the Social Justice Committee Report and the chart. We need not produce the same as the said exercise was done regard being had to be the population and vacancies and not to the concepts that have been evolved in M. Nagaraj (supra). It is one thing to think that there are statutory rules or executive instructions to grant promotion but it cannot be forgotten that they were all subject to the pronouncement by this Court in **Vir Pal Singh Chauhan (supra) and Ajit Singh (II) (supra)**. We are of the firm view that a fresh exercise in the light of the judgment of the Constitution Bench in M. Nagaraj (supra) is a categorical imperative. The stand that the constitutional amendments have facilitated the reservation in promotion with consequential seniority and have given the stamp of approval to the Act and the Rules cannot withstand close scrutiny inasmuch as the Constitution Bench has clearly opined that Articles 16(4A) and 16(4B) are enabling provisions and the State can make provisions for the same on certain basis or foundation. The conditions precedent have not been satisfied. No exercise has been undertaken. What has been argued with vehemence is that it is not necessary as the concept of reservation in promotion was already in vogue. We are unable to accept the said submission, for when the provisions of the Constitution are treated valid with certain conditions or riders, it becomes incumbent on the part of the State to appreciate and apply*

the test so that its amendments can be tested and withstand the scrutiny on parameters laid down therein.”

This Court further in LPA No. 1749 of 2011 titled as ***State of Haryana and others vs. Kiran Bala and another***, decided on 26.09.2011, while deciding the appeal preferred by the State of Haryana against the judgment dated 28.04.2011 passed by the learned Single Judge in CWP No. 8318 of 2010 wherein the orders denying the benefit of stepping up of their pay at par with the juniors belonging to the reserved category who were promoted earlier to them on account of accelerated promotion, were set aside on the ground that the respondents were unable to justify their action of granting the benefit of 85th Amendment Act of 2009 vide instructions dated 16.03.2006 being contrary to the judgment of the Supreme Court in the cases of Ajit Singh Janjua (supra) and M. Nagaraj (supra). The Division Bench of this Court has also observed in its order dated 26.09.2011 that in pursuance to the judgment passed by the Supreme Court in M. Nagaraj's case (supra), State of Haryana did not carry out any exercise for ascertaining the factors noticed by the Hon'ble Supreme Court for grant of accelerated seniority and promotion pursuant to the 85th Constitutional Amendment to the reserved categories.

In the present case as well, the petitioner was not given the chance to appear in the Stenography test and Mange Ram who was

belonging to Scheduled Caste category appeared and cleared the test and was appointed as Sr. Scale Stenographer on 11.04.2001 (P-4).
Petitioner Thereafter, after implementation of restructuring plan of respondent-Federation in the year 2004, three vacancies of Senior Scale Stenographer arose and the candidates of all categories were invited to appear in the stenography test. Petitioner was appointed in the year 2005 and the petitioner along with two others promoted to the post of Senior Scale Stenographer on 15.04.2005 (P-6) and thereafter, on 05.03.2009, Government of Haryana issued the instructions for stepping up of pay of senior general category employees at par with their junior counterparts of reserved categories employees (P-7), which were further clarified/modified vide letter dated 23.11.2009 (P-8) that the benefit of stepping up is applicable to all cadre wherever reservation in promotion is followed.

Following the ratio of law laid down in the above mentioned judgments and instructions dated 05.03.2009 (P-7) and 23.11.2009 (P-8), the case of the petitioner for stepping up of his pay at par with his junior counter part, should have been extended to him, as the petitioner belonged to OBC category and was initially senior to respondent No. 4, as he was appointed in the year 1992 and Mange Ram was appointed in the year 1993 and thereafter, Mange Ram was promoted on 11.04.2001 (P-4) and petitioner was promoted on

15.04.2005 (P-6).

In view of the above, this writ petition is allowed and letter dated 30.10.2010 (P-11) is hereby quashed. Petitioner is held entitled to stepping up of his pay at par with Mange Ram from the date of his promotion to the post of Senior Scale Stenographer. The consequential benefits be released to the petitioner within a period of two months from the date of receipt of certified copy of the order.

(RITU BAHRI)
JUDGE

08.02.2016

G Arora