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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO.2045 OF 2014

1] The Mahanagar Telephone Nigam Ltd
Republican Employees Union,
through its General Secretary
Shri Dilip Ghayvat

2] Mr. M. Pratap, TTA,
MTNL Mumbai LD (Productive)
Mumbai-400 086.

3] Shri V.R. Gavali, TTA,
MTNL Mumbai LD (Productive),
Kalyan- 421 301.

....Petitioners

Vs.

1] The Mahanagar Telephone Nigam Ltd
Through the CMD & Executive Director,
Mumbai-400 028.

2] Union of India,
Through the Secretary to the Government of India
New Delhi- 110 001.

3] The Secretary to the Government of India,
Ministry of Personnel, Grievances and Pensions,
North Block, New Delhi- 110 001.

....Respondents

Mr. Ashok D. Shetty for Petitioners.
Mr. Advait Sethna for Respondent No.1.
Mrs. Neeta Masurkar i/b Mr. Vinay Shankar Masurkar for Respondent
Nos.2 and 3.

**CORAM: R.M. BORDE AND
A.S. GADKARI, JJ.**

**Reserved On: 31st January 2017.
Pronounced On: 28th February 2017.**

JUDGMENT (PER R.M. BORDE, J.):-

Heard.

2] Rule. By consent of the parties, petition is taken up for final disposal at the admission stage.

3] The questions that are posed for our consideration in the instant petition are (I) as to whether the Central Administrative Tribunal failed to consider the correct interpretation of the office memorandum dated 3.10.2000, in view of the expressions “restoration” and “inoperative” contained therein. (II) Whether the amendment incorporated in the Constitutional provision that Article 335 will be operative for the purposes of prescribing lower standard of assessment of S.C. and S.T. Category candidates in matter of promotion from the date of assent of the President of India or from the date of issuance of office memorandum by the Government of India and the effect of the issuance of office memorandum on 3.10.2000. (III) Whether the office memorandum read with the

constitutional provision has an effect of restoring the position prevailing prior to decision of the Government of India and its Order of 1997 withdrawing 1970 Order issued by the Department of Personnel relaxing the standard for SC/ST Government employees in the departmental competitive/confirmation and promotional examination. (IV) Whether it would be obligatory on the part of the respondent No.3 to give effect to the amendment of Article 335 of the Constitution of India from 3.10.2000 i.e. the date of issuance of office memorandum by the Union of India though the President of India assented to the amendment on 8.9.2000 and lastly (V) the effect of the Constitutional Bench's decision in Civil Appeal Nos.6046-6047 of 2004 in the matter of Rohtas Bhankhar & Others Vs. Union of India & Anr. decided by the Apex on 15.7.2014.

4] The Petitioner No.1 is the Trade Union registered under the Trade Union Act, 1926, whereas the Petitioner Nos.2 and 3 are the members of Petitioner No.1 and employees of respondent No.1. The respondent No.1-The Maharashtra Telephone Nigam Ltd. is the Government India undertaking and is state within the meaning of Article 12 of the Constitution of India and as such amenable to the writ jurisdiction of the High Court. The Respondent No.2 is the Government of India.

5] The respondent No.1 in the year 2000 undertook a special recruitment drive to fill up the backlog of the reserved quota/vacancies in promotion as well as direct recruitment which were unfilled from 1995 onwards. The Respondent No.1 conducted the departmental qualifying examination on 7.5.2000 for filling up quota/vacancies prescribed for SC/ST categories in the year 1995 to 1999. The employees listed in para-3 of the petition, which forms category of Telecom Technical Assistant, appeared in the said departmental qualifying examination. As per recruitment rules, 50% of the posts are to be filled up by direct recruitment and 50% by promotion from the departmental candidates. The Rule-8 of the Recruitment Rules provides for concession/relaxations to be provided for the Scheduled Castes and Scheduled Tribes, Ex-Servicemen and other special categories of persons in accordance with the orders passed by the Central Government from time to time. The qualifying marks prescribed for candidates belonging to Scheduled Castes and Scheduled Tribes for clearing the departmental examination is 33%, whereas the bench mark for general category candidates is 40%. The respondent No.1 declared the result on 14.9.2000 of the examination conducted on 7.5.2000 and the candidates listed in para-3 of the petition were declared unsuccessful at written examination. The department did not apply the

relaxed standard though the candidates belonged to Scheduled Castes and Scheduled Tribes categories, however, applied the general standard of securing 40% marks at written examination.

6] The Central Government from time to time issued office memorandums approving the relaxed standard for clearing departmental examination in respect of candidates belonging to Scheduled Castes and Scheduled Tribes categories. The office memorandums issued on 25.7.1970, 23.12.1970, 17.7.1971, 21.1.1977 and 31.1.1978 prescribed relaxation of standards in departmental examination for promotion and the departmental confirmation examination. However, after the decision of the Supreme Court in the matter of ***S. Vinod Kumar Vs. Union of India & Ors.*** ***case (JT 1996 (8) SC 643)***, an office memorandum came to be issued on 22.7.1997 laying down that there shall not be separate standard of evaluation of candidates belonging to Scheduled Castes and Scheduled Tribes for promotion. After enforcement of amendment to Article 335 of the Constitution of India, with a view to give effect to the Constitutional mandate, the Central Government issued an office memorandum dated 3.10.2000 deciding to restore relaxation/concession with immediate effect in the matter of promotion for the candidates belonging to SC/ST

prescribing the Lower Qualifying marks, lesser standards of evaluation that existed prior to 22.7.1997 and as contained in the earlier office memorandum.

7] The petitioner approached the Central Administrative Tribunal by presenting the Original Application No.586 of 2011. The Central Administrative Tribunal, Mumbai dismissed the Original Application holding that the decision of the Central Government would operate from the date of issuance of office memorandum dated 3.10.2000 and shall not apply from the date of assent accorded by the President of India to the amendment to Article 335 of Constitution. The Central Administrative Tribunal took a view that the explanation to Article 335 of the Constitution read with Article 16(4) is an enabling provision prescribing reservation in the matters of promotions and it would be operational from the date of issuance of office memorandum i.e. the decision of the Central Government.

8] The office memorandum dated 25.7.1970 prescribes relaxation of standards of selection of SC/ST candidates against the reserved categories. A decision is taken by the Central Government that in

case of direct recruitment by assessment through examination or otherwise if sufficient number of Scheduled Castes and Scheduled Tribes candidates are not available on the basis of the general standard to fill all the vacancies reserved for such reserved categories, candidates belonging to reserved categories may be selected to fill up the remaining vacancies reserved for them provided they are not found unfit for such post or posts. Thus to the extent the number of vacancies reserved for the Scheduled Castes and Scheduled Tribes which cannot be filled on the basis of application of general standards, candidates belonging to such reserved categories will, as at present, be taken by relaxed standard to make up the deficiency in the reserved quota, subject to fitness of such candidates for appointment to the post/posts in question. The decision contained in the office memorandum dated 25.7.1970 in respect of direct recruitment has been made applicable in respect of departmental competitive examination for promotion and for departmental confirmation examination.

9] The Union of India issued an office memorandum on 21.1.1977 relating to relaxation of standard in respect of Scheduled Castes and Scheduled Tribes candidates in qualifying examination for promotion to the higher grade on the basis of seniority subject to fitness. A decision has been

taken to extend suitable relaxation in the qualifying standards, in such examinations, in case of Scheduled Castes and Scheduled Tribes candidates. The extent of relaxation is to be determined whenever such examination is held taking into account all relevant factors including (I) the number of vacancies reserved, (ii) the performance of Scheduled Caste/ Scheduled Tribe candidates as well as general candidates in that examination, (iii) the minimum standard of fitness for appointment to the post and (iv) the overall strength of the cadre and that of the Scheduled Castes and Scheduled Tribes in the cadre.

10] In the matter of *Indra Sawhney Vs. Union of India & Ors.* [1992 Supp. 3 SCC 217], the Supreme Court has declared that, the Article 16(4) does not contemplate or permit reservation in the matter of promotion. It is clarified in para 831 that, it would not be permissible for the State to extend concession and relaxation to members of reserved category without compromising the efficiency of the administration. It is further reiterated that it would not be permissible to prescribe lower qualifying marks or lesser level of evaluation of members of reserved category since it would compromise the efficiency of the administration. It is further stated that it may be permissible to prescribe reasonable lesser

qualifying marks for evaluation for the O.B.C. SC and ST consistent with efficiency of the administration and the nature of duties attached to the office concerned in the matter of direct recruitment. Such a course would not be permitted in the matter of promotions for the reasons mentioned in the judgment.

11] Placing reliance on the decision in the matter of *Indra Sawhney*, the Supreme Court in the matter of ***S. Vinod Kumar & Anr. Vs. Union of India & Ors. [(1996) 6 SCC 580]***, held that so far as the provisions of lower qualifying marks or lesser level of evaluation in the matter of promotion is concerned, it is not permissible under Article 16(4) of the Constitution in view of command contained in Article 335 of the Constitution. In other words, even if it is assumed for the sake of argument that reservation is permitted by Article 16(4) in the matter of promotions, a provision for lower qualifying marks or lesser level of evaluation is not permissible in the matter of promotions, by virtue of Article 335. After the decision in the matter of *S. Vinod Kumar (supra)*, in order to give effect thereto, the Union Government issued an office memorandum dated 22.7.1997 where under it was decided to withdraw the instructions contained in the office memorandum 21.1.1977, so far these provides for

lower qualifying marks for Scheduled Caste and Scheduled Tribe candidates in the departmental qualifying/competition examination for promotion. It is further clarified that, the effect of the revised instructions is that henceforth there shall be no separate standard of evaluation for candidates of the Scheduled Caste and Scheduled Tribes and the assessment of all the candidates for the purpose shall be with reference to uniform standards. Post the decision in the matter of *S. Vinod Kumar's case*, Article 335 of the Constitution was amended by 82nd Amendment of 2000 and a proviso was inserted which reads as under:

“Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for any class or classes of services or posts in connect with the affairs of the Union or of a State.”

12] The proviso to Article 335 was added for providing benefit of reservation in promotions to the Scheduled Castes and the Scheduled Tribes categories alone. The amendment was necessitated in view of the Judgment of the Apex Court in the matter of *S. Vinod Kumar* which took the view that the relaxation in the matter of promotion in favour of

reserved categories was not permissible under Article 16(4) in view of the command contained in the Article 335. The Amendment to Article 335 of the Constitution was assented by the President of India on 8.9.2000. The Central Government thereafter issued an office memorandum on 3.10.2000 thereby restoring the relaxation prior to issuance of office memorandum dated 22.7.1997. The paragraph-3 of the office memorandum dated 3.10.2000 reads as under:

“In pursuance of the enabling proviso of Article 335 of the Constitution, it has now been decided to restore with immediate effect, the relaxations/concessions in the matters of promotion for candidates belonging to SCs/STs by way of lower qualifying marks, lesser standards of evaluation that existed prior to 22.7.1997 and as contained in the instructions issued by the Department of Personnel and Training from time to time including OM No.8.12.69-Estt.(SCT) dated 23.12.1970, No.36021/10/76-Estt (SCT dated 21.1.1977 and para 6, 3, 2 of the DPC guidelines contained in Department of Personnel and Training OM No.22011/5/86 Estt. (D) dated 10.4.1989. In other words the effect of these instructions would be that the Department of Personnel and Training's OM No.36012/23/96 Estt. (Res) dated 22nd July 1997 becomes inoperative from the date of issuance of this OM.”

13] The Central Administrative Tribunal considered the effect of amendment to Article 335 of the Constitution as well as the office memorandum dated 3.10.2000. The Tribunal took a view that, the Constitutional Amendment Act clearly indicates that it is only an enabling provision permitting the Government to provide relaxation, but did not mandate the date from which it shall come into effect. The Tribunal therefore took a view that; the benefits should be available only from the date of the Order issued by the Government expressly providing for relaxation. According to the Tribunal, the date of amendment of the Constitution is not relevant, but what is relevant is the date of issuance of an office memorandum dated 3.10.2000 i.e. the decision of the Union Government to restore the benefits of relaxation which were earlier withdrawn between 27.7.1997 to 2.10.2000. The Tribunal as such concluded that, since result of the examination were declared in the instant matter prior to the date of issuance of office memorandum, the petitioners are not entitled to claim the benefits of relaxation and as such the Original Application came to be dismissed.

14] The learned counsel appearing for the petitioners state that, the office memorandum issued by the Union Government on 3.10.2000 has not

been properly construed by the Central Administrative Tribunal. That the office memorandum does not confer any new relaxation or any added benefits, however, it seeks to restore relaxation/concession in the matter of promotion for the candidates belonging to the Scheduled Castes and Scheduled Tribes. The office memorandum has effect of restoring the benefits and it shall apply to the case in hand. It is also contended by the learned counsel appearing for the petitioners, that the constitutional amendment to Article 335 enforced since 8.9.2000 shall apply and the petitioners are entitled to claim benefit. It is further contended that the relaxation/concessions were prevailing since year 1970 and those were withdrawn by office memorandum issued in the year 1997. The subsequent office memorandum dated 3.10.2000 has an effect of restoring the earlier position/relaxations/concessions and as such it will apply to the claims post amendment to Article 335. The learned counsel for the petitioners has invited our attention to the Judgment in the matter of *Rohtas Bhankhar's* case decided by the Constitutional Bench of the Supreme Court of India.

15] The two- Judge Bench of the Supreme Court formulated points for consideration in the matter, those are: whether it was permissible for authorities to fix lesser number of qualifying marks for reserved candidates

in the matter of ‘promotion’. The Bench noticed three Judgments of the Supreme Court namely (1) *Indra Sawhney*, (2) *S. Vinod Kumar* and (3) *Kuldeep Singh* and observed that in Kuldeep Singh’s case the Court did not notice the observation of majority as well as observations of Sawant, J. in Indra Sawhney and the matter needed to be heard by a three-Judge Bench. The Constitutional Bench dealing with the issue in para-3 of the Judgment recorded thus:

“Though Article 16(4A) had been brought into Constitution by the Constitution (Seventy-Seventh Amendment) Act, 1995 with effect from 17.6.1995, S. Vinod Kumar’s case did not take into consideration this constitutional provision. In our view, S. Vinod Kumar is per incuriam”

16] It must be noticed that in *S. Vinod Kumar’s* case, a view was taken relying upon *Indra Sawhney’s* Judgment that so far as the provision for lower qualifying marks or lower level of evaluation in the matter of promotion is concerned, it is not permissible under Article 16(4) of the Constitution of India in view of the command contained in the Article 335 of the Constitution. In other words, even if it is assumed for the sake of argument that reservation is permitted by Article 16(4) in the matter of promotions, a provision for lower qualifying marks or lesser level of

evaluation is not permissible in the matter of promotions, by virtue of Article 335.

17] The Apex Court in the matter of *Rohtas Bhankar* observed that, though Article 16(4A) had been brought into Constitution by the Constitution (Seventy-Seventh Amendment) Act, 1995 with effect from 17.6.1995, the same was not noticed in the matter of S. Vinod Kumar's case and as such the decision is per incurium. It must be noticed that post decision in S. Vinod Kumar by virtue of Constitution Eighty-seven Amendment Act, proviso has been appended to Article 335 of the Constitution with effect from 8.9.2000. The Apex Court in the matter of Rohtas Bhankhar also considered the view taken by the Constitutional Bench in the matter of M. Nagraj as well as in the matter of Kuldeep Singh and agreed with the decision in Kuldeep Singh's case and approved the same. In para-10 of the Judgment in the matter of Rohtas Bhankhar the Apex Court observed thus:

“We are respectful agreement with the decision in Kuldeep Singh and approve the same. Ordinarily, we would have sent the matter to the Regular Bench for disposal of the matter but having regard to the nature of controversy and the fact that the Central Administrative Tribunal, Delhi (for short “the

Tribunal”) has followed S. Vinod Kumar which is not a good law and resultantly 1997 O.M. is also illegal, in our view, the agony of the appellants need not be prolonged as they are entitled to the reliefs”

18] The Supreme Court in the matter of *Rohtas Bhankhar* while allowing the appeal has also set aside the memorandum dated 22.7.1997 declaring it to be illegal. The effect of declaration of office memorandum dated 22.7.1997 illegal is that, the earlier position existed prior thereto stands restored. In the matter before the Supreme Court a direction was issued to modify the results of Limited Departmental Competitive Examination conducted for selection of Section Officers/Stenographers by providing for reservation and to extend all consequential benefits to the appellants before the Supreme Court. The same course needs to be adopted in the instant matter. It would be appropriate to refer to some of the observations in the matter of Kuldeep Singh. The Supreme Court in the matter of Kuldeep Singh in para 22 of the Judgment has observed that, “*The object of the said Office Memorandum dated 21.1.1977, is to provide an adequate opportunity of promotion to the members of the Scheduled Castes and the Scheduled Tribes. By reason of the provisions of Article 16(4) of the Constitution a treatment to the members of the Scheduled*

Castes and the Scheduled Tribes different from that given to others in the matters relating to employment or appointment to any office under the State does not violate the Fundamental Right to equality of opportunity for all citizens in such matters guaranteed by Article 16(1) of the Constitution. It is now well settled by decisions of the Supreme Court that the reservation in favour of backward classes of citizens, including the members of the Scheduled Castes and the Scheduled Tribes, as contemplated by Article 16(4) can be made not merely in respect of initial recruitment but also in respect of posts to which promotions are to be made". The said view taken in the Kuldeep Singh's case has been conferred by the Constitutional Bench in the matter of Rohtas Bhankhar.

19] The Constitutional Bench in the matter of *Rohtas Bhankhar* observed that the view taken by the Central Administrative Tribunal is unsustainable and deserves to be set aside. The Apex Court in the matter of Rohtas Bhankhar's case has specifically declared the office memorandum dated 22.7.1997 to be illegal. The office memorandum issued post constitutional amendment dated 3.10.2000 also restored the benefits/concessions/relaxations prevailing prior to 22.7.1997 and it does not confer any new benefit. The view taken by the Tribunal that the

decision of the Union Government granting relaxation in favour of Scheduled Castes and Scheduled Tribes categories candidates in the matter of promotion would apply after issuance of office memorandum, is unsustainable. Since the Supreme Court had declared office memorandum to be illegal and even otherwise looking to the language applied in the memorandum dated 3.10.2000, view taken by the Central Administrative Tribunal that the decision of granting relaxation would apply post issuance of memorandum is unsustainable. The view as taken by the Tribunal if permitted to hold the field, it would defeat and frustrate the public policies in the matter of reservation. For the aforesaid reasons, the writ petition deserves to be allowed.

20] For the reasons recorded above, we pass following order:

- (i)** The Writ Petition is allowed.
- (ii)** The Order passed by the Central Administrative Tribunal dated 14th March 2014 is hereby quashed and set aside.
- (iii)** The respondents are directed to give effect to the office memorandum dated 17.6.1995 and apply it to the cases of the petitioners and issue appropriate consequential orders.
- (iv)** The office memorandum shall be deemed to apply since the

earlier decision withdrawing the concession dated 22.7.1997 has been declared to be illegal by the Constitutional Bench in the matter of Rohtas Bhankhar's case.

21] Rule is accordingly made absolute. There shall be no order as to costs.

(A.S. GADKARI,J.)

(R.M. BORDE, J.)