

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

203-s **CWP Nos. 10681, 14450, 19294, 19296 to 19303, 19920 to 19922, 19924, 25628 & 25660 of 2013 (O&M)**

Director, PGIMER, Chandigarh

Vs.

The Chandigarh Administrative Tribunal, Chandigarh and others

Present: Mr. Rajesh Garg, Sr. Advocate with
 Ms. Nimrata Shergill, Advocate
 for the petitioner(s).

 Mr. Barjesh Mittal, Advocate
 for the respondents.

The Bunch of writ petitions was disposed of by the Division Bench of this Court comprising of M. Jeyapaul and Darshan Singh, J.J. on January 13, 2016. In the result, it was found that there was virtually no scope for review of the well merited common judgment passed by the Central Administrative Tribunal, Chandigarh wanting interference of this Court. However, there was difference of opinion expressed by the Bench, inasmuch as, M. Jeyapaul, J., had issued the following directions, which reads thus:-

"11. Mandate to remove injustice :-

a) *In view of the above, Union of India is directed to collect quantifiable data as regards the inadequacy of representation of the Scheduled Caste and Scheduled Tribe employees in promotion post of all cadres in all the departments, institutions and undertakings under its domain and control in which they have exercised their discretion to accord reservation in promotion and formulate a policy to grant the benefit of reservation in promotion with consequential seniority to the members of the Scheduled Caste and Scheduled Tribe in terms of Article 16(4A) of the Constitution of India.*

b) *Article 335 of the Constitution of India provides that while making appointment to services and posts in connection with the affairs of the Union of India or of a*

State, the claim of the members of Scheduled Caste and Scheduled Tribe shall be taken into consideration consistently with the maintenance of efficiency of administration. A provision has been introduced in the Article 335 by the Constitution (82nd Amendment) Act, 2000 w.e.f. 8.9.2000 to the effect that while making reservation in matters of promotion to the members of the Scheduled Castes and Scheduled Tribes, there is no bar for the States to give relaxation in qualifying marks in any examination or lower the standards of evaluation. Union of India shall also address the above proviso provided under Article 335 of the Constitution of India while formulating the policy referred to above.

The above exercise as directed by us shall be completed by Union of India within three months from the date of this judgment."

2. However, on the aforesaid issue, Darshan Singh, J., while expressing the difference of opinion had concluded as under:-

"Thus, in my humble opinion, the issuance of mandate to the Union of India for collection of quantifiable data showing backwardness of the class and inadequacy of representation of the SCs/STs employees in the promotional post and to formulate a policy to grant benefit of reservation in promotion with consequential seniority to the members of SCs/ STs is not appropriate."

3. Due to the aforesaid difference of opinion, the necessity arose to refer the matter to the third judge and in view thereof, the matter has came up before this Court.

4. Learned counsel for the parties submitted that against the main judgment delivered in the Bunch of writ petitions, whereby, the writ petitions were dismissed on January 13, 2016, the same stands assailed before the Supreme Court, where, Special Leave Petitions, after issuance of notice of motion are still pending for final

adjudication. However, it was submitted that the issue involved herein in respect of difference of opinion of the Bench noted above has since been resolved in '**Suresh Chand Gautam Vs. State of Uttar Pradesh & others, (2016)11 SCC 113**', wherein, it has been held that no such direction can be issued to the Union of India for collection of quantifiable data. The relevant and operative part of the aforesaid judgment reads thus:-

"After so stating, the larger Bench has clearly held that Article 16(4-A) and 16 (4-B) do not alter the structure of Article 16(4). The said Articles are confined to the Scheduled Castes and the Scheduled Tribes and 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 OBCs on one hand and SCs and STs on the other hand as held in **Indra Sawhney (Indra Sawhney Vs Union of India (1992) Supp. 3 SCC 217)**, the concept of post-based roster with inbuilt concept of replacement as held in **R.K. Sabharwal (R.K. Sabharwal VS. State of Punjab, (1995) 2 SCC 745)**. After so stating, the Court has adverted to the concept of "extent of reservation". In that regard, it has been opined that the State concerned is required 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. It has been clearly laid down that the State is not bound to make reservation for SCs/STs in matters of promotion. However, if the State wishes to exercise the discretion and make such provision, it 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. The expression of the opinion clearly demonstrates that the regard being had to the enabling provisions of Articles 16(4-A) and (4-B), the State is not bound to make reservation. It has a discretion to do so and the State's

discretion can only be exercised on certain conditions being satisfied. In Rajesh Kumar's case, after culling out the principles stated in **M. Nagaraj (M. Nagaraj Vs. Union of India (2006) 8 SCC 212)** the Court has graphically stated that a fresh exercise in accord with the law laid down in **M. Nagaraj** (supra) is a categorical imperative. It has been held that the State can make provisions for reservation in promotion with consequential seniority on certain basis or foundation and conditions precedents have to be satisfied. The Court has declared Section 3(9) of the 1994 Act and Rule 8-A of the 2002 Rules as unconstitutional as no fresh exercise had been undertaken. The submission of the learned counsel for the petitioners is that a command should be issued to the State of Uttar Pradesh to collect the data as enshrined in the Constitution Bench decision in **M. Nagaraj** (supra) so that benefit of reservation in promotion can be given. The relief sought may appear innocuous or simple but when the Court thinks of issue of a writ of mandamus, it has to apprise itself of an existing right or a power to be exercised regard being had to the conception of duty. The concept of power coupled with duty is always based on facts. If we keenly scrutinize the relief sought, the prayer is to issue a mandamus to the State and its functionaries to carry out an exercise for the purpose of exercising a discretion. To elucidate, the discretion is to take a decision to have the reservation, and to have reservation there is a necessity for collection of data in accordance with the principles stated in **M. Nagaraj** (supra) as the same is the condition precedent. A writ of mandamus is sought to collect material or data which is in the realm of condition precedent for exercising a discretion which flows from the enabling constitutional provision. Direction of this nature, in our considered opinion, would not come within the principle of exercise of power coupled with duty. A direction for exercise of a duty which has inherent and inseparable nexus with the constitutional provision like Article 21 of the Constitution or a statutory duty which is essential for prayer as laid down

in **Julius (Julius Vs. Lord Bishop of Oxford, (1880) 5 AC 214)** where a power is deposited with a public officer but the purpose of being used for the benefit of persons who are specifically pointed out with regard to whom a discretion is applied by the Legislature on the conditions upon which they are entitled. We are inclined to think so as the language employed in M.Nagaraj (supra) clearly states that the State is not bound to make reservation in promotion. Thus, there is no constitutional obligation. The decisions wherein this Court has placed reliance on **Julius** (supra) and the other judgments of this Court and issued directions, the language employed in the statute is different and subserves immense public interest in the said authorities, the purpose and purport are quite different.

43. Be it clearly stated, the Courts do not formulate any policy, remains away from making anything that would amount to legislation, rules and regulation or policy relating to reservation. The Courts can test the validity of the same when they are challenged. The court cannot direct for making legislation or for that matter any kind of sub-ordinate legislation. We may hasten to add that in certain decisions directions have been issued for framing of guidelines or the court has itself framed guidelines for sustaining certain rights of women, children or prisoners or under-trial prisoners. The said category of cases falls in a different compartment. They are in different sphere than what is envisaged in Article 16 (4-A) and 16 (4-B) whose constitutional validity have been upheld by the Constitution Bench with certain qualifiers. They have been regarded as enabling constitutional provisions. Additionally it has been postulated that the State is not bound to make reservation for Scheduled Castes and Scheduled Tribes in matter of promotions. Therefore, there is no duty. In such a situation, to issue a mandamus to collect the data would tantamount to asking the authorities whether there is ample data to frame a rule or regulation. This will be in a way, entering into the domain of legislation, for it is a step towards commanding to frame a legislation or a delegated

legislation for reservation.

44. Recently in **Census Commissioner & others v. R. Krishnamurthy, 2014(4) R.C.R.(Civil) 991 : 2014(6) Recent Apex Judgments (R.A.J.) 270 : (2015) 2 SCC 796** a three-Judge Bench while dealing with the correctness of the judgment of the high court wherein the High court had directed that the Census Department of Government of India shall take such measures towards conducting the caste-wise census in the country at the earliest and in a time-bound manner, so as to achieve the goal of social justice in its true sense, which is the need of the hour, the court analyzing the context opined thus:-

“Interference with the policy decision and issue of a mandamus to frame a policy in a particular manner are absolutely different. The Act has conferred power on the Central Government to issue notification regarding the manner in which the census has to be carried out and the Central Government has issued notifications, and the competent authority has issued directions. It is not within the domain of the court to legislate. The courts do interpret the law and in such interpretation certain creative process is involved. The courts have the jurisdiction to declare the law as unconstitutional. That too, where it is called for. The court may also fill up the gaps in certain spheres applying the doctrine of constitutional silence or abeyance. But, the courts are not to plunge into policy-making by adding something to the policy by ways of issuing a writ of mandamus.”

We have referred to the said authority as the court has clearly held that it neither legislates nor does it issue a mandamus to legislate. The relief in the present case, when appositely appreciated, tantamounts to a prayer for issue of a mandamus to take a step towards framing of a rule or a regulation for the purpose of reservation for Scheduled Castes and Scheduled Tribes in matter of

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promotions. In our considered opinion a writ of mandamus of such a nature cannot be issued.”

5. It was prayed that in view of the above, reference has been rendered infructuous and may be disposed of as such.
6. Reference stands disposed of accordingly.
7. Photocopy of this order be placed on the files of other connected cases.

(AJAY KUMAR MITTAL)
JUDGE

May 19, 2017
J.Ram