

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 848 OF 2018

Rupesh B. Ukey ...Petitioner
Versus
The Union of India and ors. ...Respondents

**WITH
CIVIL APPLICATION NO. 539 OF 2018
IN
WRIT PETITION NO. 848 OF 2018**

Rupesh B. Ukey ...Petitioner
Versus
The Union of India and ors. ...Respondents
AND
Income Tax SC/ST/OBC
Employees Welfare Association
(ITSEWA Mumbai) .. Intervener

Mr. Rajeshwar G. Panchal a/w. Mr. Mohan Rawat and
Mr.A.R. Kozi for the Petitioner.

Mr. Rui Rodrigues i/b Mr.A.A. Garge for Respondent Nos.1 to
3/UOI.

Mr. Rahul Walia for Respondent Nos.4 to 8.

Mr. Murtaza M. Najmi a/w. Mr. S.Shamim i/b Shamim & Co.
for the Intervenor in CAW 539/2018.

**CORAM : SMT. V. K. TAHILRAMANI, Acting C.J. &
M. S. SONAK, J.**

DATE : 5th MARCH 2018

P.C.

1] Heard learned counsel for the parties.

2] Civil Application No. 539 of 2018 is not on board, but at the request of and with the consent of learned counsel for the parties, the same is taken on board.

3] The challenge in this petition is to the judgment and order dated 31st October 2017 made by the Central Administrative Tribunal, Mumbai (CAT) in Original Application No. 623 of 2016. The operative portion of the impugned judgment and order is contained in paragraph 18, which reads as follows:

"18. In the light of the aforesaid prismatic reasons, the instant OA is hereby accepted. As a consequence thereof, the impugned orders dt.4.6.2014 (Annexure-A-1), dt.17.10.2014 (Annexure-A-2), dt. 25.4.2016 (Annexure-A-4) and the impugned seniority list dt. 22.1.2014 (Annexure-A-3) relatable to the reservation in promotion and for non-application of Catch up Rule, and all other relatable consequential factors/actions are set aside. At the same time, the respondents are directed to strictly follow the ratio of law laid down in BK.Pavitra's case (supra) by Hon'ble Apex Court, while promoting officers to the next higher posts and to determine the inter se seniority of promoted officers by strictly following the Catch up Rule. However, the parties are left to bear their own costs."

4] Mr. Panchal, learned counsel for the petitioner, submits that the CAT has almost entirely relied upon the decision of the Hon'ble Supreme Court in the case of **B.K.**

Pavitra and ors. vs. Union of India and ors. - (2017) 4 SCC 620, in order to grant relief to the original applicants, who have been impleaded as respondents herein. He submits that *B.K. Pavitra (supra)* in turn relies upon the ruling of the Constitution Bench in ***M.Nagaraj and ors. vs. Union of India and ors. - (2006) 8 SCC 212***. He submits that recently, that is on 14th November 2017, the Division Bench of the Hon'ble Supreme Court in case of ***The State of Tripura and ors. vs. Jayanta Chakraborty and ors. (Civil Appeal No(s).4562-4564 of 2017)*** has ordered that the issue as to whether the decision in case of *M. Nagaraj (supra)* is required to be revisited or not be referred by Larger Bench as per the constitutional mandate under Article 145(3). Mr. Panchal submits that in the order dated 14th November 2017, the Division Bench has made a specific reference to one crucial relevant aspect that *M.Nagaraj (supra)* and ***E.V. Chinnaiah vs. State of A.P. and ors. - (2005)1 SCC 394*** dealt with the disputed subject namely backwardness of the SC/ST, but *Chinnaiah (supra)* which was delivered earlier in point of time has not been referred to in *M.Nagaraj (supra)*. On such basis, Mr.Panchal submits that

the CAT was not justified in basing its decision on *B.K. Pavitra (supra)*. Mr. Panchal submits that since *M. Nagaraj (supra)* makes no reference to *Chinnaiah (supra)*, the CAT was not at all justified in relying upon *M.Nagaraj (supra)*. In any case, Mr. Panchal submits now that issue as to whether *M.Nagaraj (supra)* lays down correct position in law or not has been referred to Larger Bench, this Court, may admit this petition and grant interim reliefs. Mr. Panchal also submits that the respondent Nos. 4 to 8 before the CAT were sought to be sued in representative capacity. However, the predicates of Order 1 Rule 8 of CPC were never complied with and this is an additional ground to set aside the impugned judgment and order made by the CAT.

5] Mr. Murtaza Najmi, learned counsel appearing for the intervenors, submitted that the CAT has mechanically applied the ratio of *M.Nagaraj (supra)* without going into the question as to whether the three principles laid down in *M.Nagaraj (supra)* have been indeed complied with by the UOI/CBDT or not. He submits that there is no absolute bar for providing reservation at the stage of promotions for the members of SC/ST category. He, therefore, submits that it

was incumbent upon the CAT to have examined in detail as to whether the exercise directed in *M.Nagaraj (supra)*, i.e., the existence of quantifiable data etc., has been carried out or not. He submits that since such an exercise was never carried out by the CAT, the impugned judgment and order is liable to be set aside and the matter remanded to the CAT for fresh consideration of the original application.

6] Mr. Rahul Walia, learned counsel for respondent Nos.4 to 8 submits that merely because the issue as to whether *M.Nagaraj (supra)* lays down the correct position in law or not has been referred to Larger Bench does not mean or imply that the law laid down in *M.Nagaraj (supra)* is no longer good law or that it in no manner binds the Courts and Tribunals throughout the country. He relies on ***Ashok Sadarangani vs. Union of India - 2012 (11) SCC 321*** to submit that reference of case to Larger Bench for decision, does not in any manner, reduce the efficacy of the binding precedent, so referred.

7] Mr. Walia further submits that in the present case, there was no dispute that the predicates in *M.Nagaraj*

(*supra*) before any reservations can be made at the stage of promotions were complied with by UOI/CBDT. He, therefore, submits that there is no reason for any remand. He submits that this is precisely the reason as to why the UOI/CBDT have not even bother to challenge the impugned judgment and order made by the CAT. Mr. Walia further submits that there was nothing wrong in suing the respondents in representative capacity. He submits that UOI/CBDT were not at all authorised in making reservations at the stage of promotions without complying with mandatory conditions prescribed in *M.Nagaraj (supra)*. Mr.Walia submits that in any case, the petitioner was very much impleaded as a respondent to the original application and therefore, the petitioner lacks the *locus standi* to raise the issue of alleged non-compliance with the procedure prescribed in Order 1 Rule 8 of the CPC.

8] The rival contentions now fall for our determination.

9] From perusal of the impugned judgment and order, we find that the CAT has based its decision on the decision of the Hon'ble Supreme Court in *B.K. Pavitra (supra)*, which

in turn is based upon the ruling of the Constitution Bench in the case of *M.Nagaraj (supra)*.

10] Both *B.K. Pavitra (supra)* and *M. Nagaraj (supra)* accept the position that there can be reservations at the stage of promotions in favour of members of SC/ST in terms of provisions in Article 16(4-A) of the Constitution of India, but before such reservations are effected, it is for the State/UOI to place material on record that there was compelling necessity for exercise of such power and the decision of the State/UOI was based on material including the study that overall efficiency is not compromised. In *B.K. Pavitra (supra)* the Hon'ble Supreme Court found error in the approach of the High Court, which had held that it was for the petitioners to plead and prove that overall efficiency was adversely affected by giving consequential seniority to junior persons, who got promotions on account of reservation. The Hon'ble Supreme Court has held that in absence of exercise of collecting quantifiable data of backwardness of the reservation class and the inadequacy of their representation in public employment, it is the "*Catch up Rule*" , which fully applies.

11] In this case, there is nothing to suggest that UOI/CBDT had placed any material on record regards compliance with the exercise as directed by the Hon'ble Supreme Court in the aforesaid decisions before exercise of powers under Article 16(4-A) of the Constitution of India. There is no material placed on record to indicate that the UOI/CBDT had indeed collected quantifiable data of backwardness of the reserved classes and inadequacy of their representation in the public employment with which we are concerned in this petition. Accordingly, there is no case made out for remand as suggested by Mr. Murtaza Najmi, learned counsel for the intervener.

12] No doubt, the Hon'ble Supreme Court by its order dated 14th November 2017, in *Jayanta Chakraborty (supra)* has referred the issue of correctness of *M.Nagaraj (supra)* to Larger Bench in terms of Article 145(3) of the Constitution of India. However, that by itself does not wipe out the precedential efficacy of *M.Nagaraj (supra)*, which has been followed in several decisions by the Hon'ble Supreme Court itself, including, in the case of *B.K. Pavitra (supra)*. The decision in the case of *M.Nagaraj (supra)*,

therefore, continues to bind the CAT as well as this Court and it is not open either to the CAT or this Court to simply refuse to follow *M.Nagaraj(supra)* on the basis of the order dated 14th November 2017 in *Jayanta Chakraborty (supra)*.

13] In the order dated 14th November 2017, no doubt, there is reference to *Chinnaiah (supra)*, a decision of an earlier date not being referred to in *M.Nagaraj (supra)*. However, despite noting this circumstance, the Division Bench of the Hon'ble Supreme Court not only made reference to Larger Bench under Article 145(3) , but also stated that even the issue of interim relief needs to be considered only by the Constitution Bench. Accordingly, it is not possible to accept the submission of Mr. Panchal that the CAT or for that matter this Court need not follow *M.Nagaraj (supra)* in view of the order dated 14th November 2017 in *Jayanta Chakraborty (supra)*.

14] In *Ashok Sadarangani (supra)*, the Hon'ble Supreme Court has itself held that the pendency of a reference before a Larger Bench does not mean that all other proceedings involving the same issue would remain stayed

till a decision was rendered in the reference. Till such time as the decisions cited at the Bar are not modified or altered in any way, they continue to hold the field.

15] In ***Manager, National Insurance Company Ltd. Vs. Saju P. Paul and anr. - AIR 2013 SC 1064***, the Hon'ble Supreme Court has held that mere pendency of certain questions before a Larger Bench would not mean that the particular course that was followed in earlier judgments could not be followed. In ***P. Sudhakar Rao vs. Govinda Rao - 2013 (8) SCC 693***, the Hon'ble Supreme Court has held that pendency of a similar matter before a Larger Bench does not prevent the Court from dealing with the issue on merits.

16] In ***State of Maharashtra vs. Sarva Shramik Sangh, Sangli - AIR 2014 SC 61***, a prayer for postponing consideration of the proceedings was made due to pendency of reference before a Larger Bench on the issue of interpretation of the concept of “industry” as laid down in ***Bangalore Water Supply and Sewerage Board vs. A.Rajappa and ors. - AIR 1978 SC 548***. The Hon'ble

Supreme Court, however, rejected such plea and held that pendency of the reference is no bar to decide the matter on the basis of referred decision. In this regard, the Hon'ble Supreme Court, at paragraph 20, made the following observation:

“20. ... As noted earlier, the reconsideration of the wide interpretation of the concept of “industry” in Bangalore Water Supply and Sewerage Board (supra) is pending before a larger bench of this Court. However, as of now we will have to follow the interpretation of law presently holding the field as per the approach taken by this Court in State of Orissa vs. Dandasi Sahu (supra), referred to above. The determination of the present pending industrial dispute cannot be kept undecided until the judgment of the larger bench is received”.

17] Taking into consideration the aforesaid position, we see no reason to interfere with the impugned judgment and order made by the CAT, which has merely followed the decisions of the Supreme Court in *B.K. Pavitra (supra)* and *M. Nagaraj (supra)*.

18] The petitioner, was undoubtedly, the respondent before the CAT. The petitioner has contested the matter before CAT on merits. At the behest of the petitioner, therefore, there is no reason to entertain any challenge

based upon alleged non-compliance with the procedure prescribed under Order 1 Rule 8 of the CPC.

19] For the aforesaid reasons, the petition is liable to be dismissed and is hereby dismissed.

20] Since, we are dismissing the main petition at the threshold, there is no question of permitting any interventions, though, we have heard Mr. Murtaza Najmi, learned counsel for the interveners and even considered but not accepted his submission for remand of the matter.

21] For the aforesaid reasons, this petition and civil application are dismissed. There shall be no order as to costs.

(M.S. SONAK, J.)

(ACTING CHIEF JUSTICE)