

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

CWP No. 16039 of 2014 (O&M)

Date of decision : 20.2.2018

Aman Kumar

.. Petitioner

versus

State of Punjab and others

.. Respondents

**Coram: Hon'ble Mr. Justice Rajesh Bindal
Hon'ble Mr. Justice B. S. Walia**

Present: Mr. D. S. Rawat, Advocate, for the petitioner (s), except
in CWP No. 21588/ 2015,
Mr. J. S. Rana, Advocate, for the petitioners
in CWP No. 21588/2015.

Mr. Vikas Mohan Gupta, Additional Advocate General, Punjab.

Mr. G. S. Attariwala, Advocate, for respondent no. 3
in CWP No. 16039/2014.

Mr. Amrit Paul, Advocate, for respondent no. 4
in CWP No. 13802/2015.

Rajesh Bindal, J.

1. This order will dispose of seven writ petitions bearing CWP Nos. 9270 of 2011, 16039 of 2014, 13802, 21588 of 2015, 13332, 13969, 19174, and 21785 of 2016, as common questions of law and facts are involved therein.

2. However, the facts have been extracted from CWP No. 16039 of 2014.

3. Challenge in the present petition is to the vires of the Punjab Scheduled Castes and Backward Classes (Reservation of Services), Act, 2006 (for short, 'the Act'), which provides for reservation in promotion.

4. The brief contention raised by learned counsel for the petitioners is that Sections 4(3), 4(4) and 4(8) of the Act provide for reservation in promotion. It was further submitted that though there is enabling provision inserted vide 85th Constitutional Amendment as Article 16(4-A) in the Constitution of India, however, reservation in promotion could be provided only if there is quantifiable data available showing backwardness of the classes and inadequacy of their representation in public appointment keeping in view Article 335 of the Constitution of India. This view was expressed by Hon'ble the Supreme Court in M. Nagaraj and others vs Union of India and others (2006) 8 Supreme Court Cases 212, while upholding validity of Article 16(4-A) of the Constitution of India. It is not in dispute in the present case that there is no quantifiable data collected by the State, which could support their decision to provide reservation in promotion.

5. Reliance was also placed on judgment of this Court in Rajbir Singh vs State of Haryana and others 2015 (1) RSJ 393, where reservation provided in promotion without collecting quantifiable data was struck down. It was further submitted that there is penal provision provided in Section 8 of the Act, whereby if any officer or official is found guilty of committing any omission or commission in contravention of the provisions of the Act, he shall be punishable under the provisions of the Punjab Civil Services (Punishment and Appeal) Rules, 1970 or any other relevant service Rules.

6. On the other hand, learned counsel for the State submitted that the State is bound to implement the Scheme as envisaged in the Constitution of India providing for reservation to the Scheduled Castes, Scheduled

Tribes and Backward Classes. It is not limited to reservation in fresh appointments, rather at the time of promotion also, they are to be given benefit of reservation. It was for that purpose that the Act was enacted, however, he did not have any answer to the judgment of Hon'ble the Supreme Court in M. Nagaraj's case (supra). Further that at present there is no quantifiable data available showing representation of the reserved category candidates in service working in different departments on different posts.

7. It was further submitted that the Committee has now been constituted to collect the data, which held its meeting on 28.12.2017.

8. Learned counsel appearing for the University submitted that it is only following the Act and the guidelines issued by the State and are bound by that, hence, whatever direction is given, they will comply with the same.

9. Heard learned counsel for the parties and perused the paper book.

10. Issue regarding reservation in promotion with reference to various judgments of Hon'ble the Supreme Court starting from M. Nagaraj's case (supra), where constitutional validity of Article 16(4-A) of the Constitution of India was under challenge, was considered by this Court in Rajbir Singh's case (supra). The opinion expressed was that Article 16 (4-A) of the Constitution of India is an enabling provision. However, power conferred under that Article can be exercised only after the State forms an opinion on the basis of quantifiable data regarding inadequate representation of members of Scheduled Castes, Scheduled Tribes and Backward Classes in service, with a caveat that such power can be exercised

keeping in view the overall efficiency in service as envisaged under Article 335 of the Constitution of India. Relevant paras thereof are extracted below:-

“15. The validity of Article 16 (4A) of the Constitution of India, inserted retrospectively from 17.6.1995, providing for reservation in promotion with consequential seniority, was considered by a Constitution Bench of Hon'ble the Supreme Court in M. Nagaraj's case (supra), wherein while upholding the vires of Article 16 (4A) of the Constitution of India, it was opined that the same is merely an enabling provision. The State is not bound to make reservation for Schedule Castes and Schedule Tribes in the matter of promotion. However, if the State wishes to exercise the discretion and make such provision for promotion, it has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment. In addition thereto, it was opined that compliance of Article 335 of the Constitution of India providing for maintenance of efficiency of administration while granting reservation is to be ensured. Relevant paras thereof are extracted below:

“48. It is the equality “in fact” which has to be decided looking at the ground reality. Balancing comes in where the question concerns the extent of reservation. If the extent of reservation goes beyond cut-off point then it results in reverse discrimination. Anti-discrimination has a tendency of pushing towards de facto reservation. Therefore, a numerical benchmark is the surest immunity against charges of discrimination.

49. Reservation is necessary for transcending caste and not for perpetuating it. Reservation has to be used in a limited sense otherwise it will

perpetuate casteism in the country. Reservation is under-written by a special justification. Equality in Article 16 (1) is individual -specific whereas reservation in Article 16 (4) and Article 16 (4-A) is enabling. The discretion of the State is, however, subject to the existence of “backwardness” and “inadequacy of representation” in public employment. Backwardness has to be based on objective factors whereas inadequacy has to factually exist. This is where judicial review comes in. However, whether reservation in a given case is desirable or not, as a policy, is not for us to decide as long as the parameters mentioned in Articles 16 (4) and 16 (4-A) are maintained. As stated above, equity, justice and merit (Article 335)/efficiency are variables which can only be identified and measured by the State. Therefore, in each case, a contextual case has to be made out depending upon different circumstances which may exist State-wise.

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87. Clause (4A) follows the pattern specified in clauses (3) and (4) of Article 16. Clause (4A) of Article 16 emphasizes the opinion of the States in the matter of adequacy of representation. It gives freedom to the State in an appropriate case depending upon the ground reality to provide for reservation in matters of promotion to any class or classes of posts in the services. The State has to form its opinion on the quantifiable data regarding adequacy of representation. Clause (4A) of Article 16 is an enabling provision. It gives freedom to the State to provide for reservation in matters of promotion. Clause (4A) of Article 16 applies only

to SCs and STs. The said clause is carved out of Article 16 (4). Therefore, clause (4A) will be governed by the two compelling reasons - “backwardness” and “inadequacy of representation”, as mentioned in Article 16 (4). If the said two reasons do not exist then the enabling provision cannot come into force. The State can make provision for reservation only if the above two circumstances exist. Further in Ajit Singh (II) 3, this Court has held that apart from “backwardness” and “inadequacy of representation” the State shall also keep in mind “overall efficiency” (Article 335). Therefore, all the three factors have to be kept in mind by the appropriate Government by providing for reservation in promotion for SCs and STs.

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103. Clause (4) of Article 16, however, states that the appropriate Government is free to provide for reservation in cases where it is satisfied on the basis of quantifiable data that backward class is inadequately represented in the services. Therefore, in every case where the State decides to provide for reservation there must exist two circumstances, namely, 'backwardness' and 'inadequacy of representation'. As stated above – equity, justice and efficiency are variable factors. These factors are context-specific. There is no fixed yardstick to identify and measure these three factors, it will depend on the facts and circumstances of each case. These are the limitations on the mode of the exercise of power by the State. None of these limitations have been removed by the impugned amendments. If the

concerned State fails to identify and measure backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid. These amendments do not alter the structure of Articles 14, 15 and 16 (equity code). The parameters mentioned in Article 16 (4) are retained. Clause (4A) is derived from clause (4) of Article 16. Clause (4A) is confined to SCs and STs alone. Therefore, the present case does not change the identity of the Constitution.....

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108 Article 16(4) is enacted as a remedy for the past historical discriminations against a social class. The object in enacting the enabling provisions like Articles 16(4), 16 (4A) and 16 (4B) is that the State is empowered to identify and recognize the compelling interests. If the State has quantifiable data to show backwardness and inadequacy then the State can make reservations in promotions keeping in mind maintenance of efficiency which is held to be a constitutional limitation on the discretion of the State in making reservation as indicated by Article 335. As stated above, the concepts of efficiency, backwardness, inadequacy of representation are required to be identified and measured. That exercise depends on availability of data. That exercise depends on numerous factors. It is for this reason that enabling provisions are required to be made because each competing claim seeks to achieve certain goals. How best one should optimize these conflicting claims can only be done by the administration in the context of local prevailing conditions in public

employment. This is amply demonstrated by the various decisions of this court discussed hereinabove. Therefore, there is a basic difference between “equality in law” and “equality in fact” (See: 'Affirmative Action' by William Darity). If Articles 16 (4A) and 16 (4B) flow from Article 16 (4) and if Article 16 (4) is an enabling provision then Articles 16 (4A) and 16 (4B) are also enabling provisions. As long as the boundaries mentioned in Article 16 (4), namely, backwardness, inadequacy and efficiency of administration are retained in Articles 16 (4A) and 16 (4B) as controlling factors, we cannot attribute constitutional invalidity to these enabling provisions. However, when the State fails to identify and implement the controlling factors then excessiveness comes in, which is to be decided on the facts of each case. In a given case, where excessiveness results in reverse discrimination, this court has to examine individual cases and decide the matter in accordance with law. This is the theory of 'guided power'. We may once again repeat that equality is not violated by mere conferment of power but it is breached by arbitrary exercise of the power conferred.

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122. The impugned constitutional amendments by which Articles 16 (4A) and 16 (4B) 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 Sawhney, the concept of post-based Roster with in-built concept of replacement as held in R. K. Sabharwal.

123. 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.

124. 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.”

16. The issue was subsequently considered by Hon'ble the Supreme Court in Suraj Bhan Meena's case (supra), wherein judgment of Rajasthan High Court quashing the notification providing for reservation in promotion to Schedule Castes and Schedule Tribes communities was set aside in the absence of a quantifiable data prepared in terms of the judgment of Hon'ble the Supreme Court in M. Nagaraj's case (supra).

17. The aforesaid judgments of Hon'ble the Supreme Court in M. Nagaraj's case (supra) and Suraj Bhan Meena's case (supra) were followed in U. P. Power Corporation Ltd.'s case (supra), where the principles laid down in M. Nagaraj's case (supra) were summed up, *inter-alia*, in the following terms:

“i) Vesting of the power by an enabling provision may constitutionally valid and yet 'exercise of power' by the State in a given case may be arbitrary, particularly, if the State fails to identify and measure backwardness and inadequacy keeping in mind the efficiency of service as required under Article 335.

ii) Article 16 (4) which protects the interests of certain sections of the society has to be balanced against Article 16 (1) which protects the interests of every citizen of the entire society. They should be harmonized because they are restatements of the principle of equality under Article 14.

iv) The appropriate Government has to apply the cadre strength as a unit in the operation of the roster in order to ascertain whether a given class/group is adequately represented in the service. The cadre strength as a unit also ensures that the upper ceiling-limit of 50% is not violated. Further roster has to be post-specific and not vacancy based.

v) The State has to form its opinion on the quantifiable data regarding adequacy of representation. Clause (4A) of Article 16 is an enabling provision. It gives freedom to the State to provide for reservation in matters of promotion. Clause (4A) of Article 16 applies only to SCs and STs. The said clause is carved out of Article 16 (4A). Therefore, Clause (4A) will be governed by the two compelling reasons - “backwardness” and “inadequacy of representation”, as mentioned in Article 16 (4). If the said two reasons do not exist, then the enabling provision cannot be enforced.

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vii) If the appropriate Government enacts a law providing for reservation without keeping in mind the parameters in Article 16 (4) and Article 335, then this Court will certainly set aside and strike down such legislation.

viii) The constitutional limitation under Article 335 is relaxed and not obliterated. As stated above, be it reservation or evaluation, excessiveness in either would result in violation of the constitutional mandate. This exercise, however, will depend on the facts of each case.

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x) Article 16 (4), therefore, creates a field which enables a State to provide for reservation provided there exists backwardness of a class and inadequacy of representation in employment. These are compelling reasons. They do not exist in Article 16 (1). It is only when these reasons are satisfied that a State gets the power to provide for reservation in the matter of employment.”

18. Thereafter, the matter came up for consideration before this Court in Prem Kumar Verma's case (supra), whereby the 2006 policy, issued on 16.3.2006, providing for accelerated seniority and promotion to Schedule Castes employees was under challenge. This Court, while relying upon the judgments of Hon'ble the Supreme Court in M. Nagaraj, Suraj Bhan Meena and U. P. Power Corporation Ltd.'s cases (supra), struck down the aforesaid policy. The judgment was upheld in appeal in Devender Sachdeva's case (supra).

19. What can be culled out from the aforesaid judgments on the issue of reservation in promotion is that Article 16 (4A) of the Constitution of India is an enabling provision, however, the powers conferred under that Article can be exercised only after the State forms an opinion on the basis of quantifiable data regarding inadequacy of representation of the members of Schedule Castes/Scheduled Tribes in the service. However, the power can be exercised keeping in view over-all efficiency in service as envisaged under Article 335 of the Constitution of India.”

11. Similar view was expressed by Division Bench of this Court in Bharat Sanchar Nigam Limited and another vs Shri Naveen Sharma and others 2018 (1) SLR 339, where order passed by the Central Administrative Tribunal striking down reservation in promotion in the absence of quantified data, was upheld.

12. Sections 4(3), 4(4) and 4(8) of the Act provide for reservation in promotion. Section 8 of the Act provides penal provision. Relevant provisions of Sections 4(3), 4(4) and 4(8) and Section 8 of the Act are extracted below:-

“Section 4

(1) and (2) xx xx

(3) The percentage of reservation for filling up the vacancies by promotion by Scheduled Castes in Group 'A' and Group 'B' services shall be fourteen per cent.

(4) The percentage of reservation for filling up the vacancies by promotion by Scheduled Castes in Group 'C' and Group 'D' services shall be twenty per cent.

(5) to (7) xx xx xx

(8) Reservation shall also be applicable to proforma promotion and appointment by transfer.

Section 8.

If any officer or official is found guilty of committing any omission or commission in contravening the provisions of this Act, he shall be punishable under the provisions of the Punjab Civil Services (Punishment and Appeal) Rules, 1970 or any other relevant service Rules.”

13. The stand taken by the State in the affidavit filed by Krishan Kumar, Under Secretary, Government of Punjab, Department of Welfare of SCs & Bcs, dated 18.11.2015, is extracted below:-

“On the question of inadequacy of representation, the text of Article 16 is clear that it is a matter for the State to determine. The Welfare Department had filed a short affidavit dated 24-2-2014 in the Hon'ble Court, that fresh data regarding representation to Scheduled Castes in

Group-'A' and Group-'B' was collected from 61 branches from various departments at that time and the balance data was being collected.

It is brought to the notice of the Hon'ble Court that the data collected till date, from 47 administrative departments, though not complete and faulty to some extent; (some departments have not given due data of some govt. bodies like Corporations, Universities, Boards, Companies, Societies, Market Committees and Municipal Councils etc. under them) indicates that representation of SCs in Promotion quota in Group-A, Group B, Group C and Group D is 19.07%, 16.34%, 27.47% and 31.78% respectively, against the minimum promotion quota of 14% in group A and Group B and 20% in Group C and Group D services of the State (Copy of the data collected so far, from the Administrative Departments is annexed as Annexure R-1); which is well within the quantitative limit as fixed in the Indra Sawhney case.” (emphasis supplied).

14. A perusal of the aforesaid stand taken in the reply shows that data from all the administrative departments has not been collected and the same is faulty to some extent or it can be said that the same is not reliable. It was further pointed out at the time of hearing that the Committee has now been constituted to collect quantifiable data of representation of various reserved category employees in public appointment at different level which held its meeting on 28.12.2017. Meaning thereby that as on today there is no quantifiable data available which could justify any reservation or percentage of reservation in promotion.

15. In view of our aforesaid discussion, once it is undisputed position on record that there is no quantifiable data available as on today, reservation in promotion could not be justified.

16. For the reasons mentioned above, the provisions of Sections 4 (3), 4(4) and 4(8) of the Act to the extent these provide for percentage of quota in promotion are struck down. The writ petitions are disposed of accordingly.

(Rajesh Bindal)
Judge

20.2.2018
vs

(B. S. Walia)
Judge

Whether speaking/ reasoned
Whether Reportable

Yes/No
Yes/No