

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

WRIT PETITION (L) NO. 121 OF 2019

Mumbai Port Trust SC, ST, OBC Welfare Association	}	Petitioner
versus		
Chairman and the Board of Trustees of Mumbai Port Trust and Ors.	}	Respondents

Dr.Suresh T. Mane with Mr.Prabhakar Waghmare and Mr.Ankush Kamble for the petitioner.

Mr.R.S.Pai with Ms.Sneha Pandey i/b. M/s.Motiwalla and Co. for respondent nos.1 and 2.

Mr.Rajiv Chavan-Senior Advocate with Mr.Niranjan P. Shimpi for respondent nos. 3 and 4.

Mr.V.Y.Sanglikar for respondent no.5.

**CORAM :- S. C. DHARMADHIKARI &
G. S. PATEL, JJ.**

DATED :- AUGUST 27, 2019

P.C. :-

1. This writ petition was placed before us for admission. The writ petition is by the Mumbai Port Trust S.C., S.T. and OBC Welfare Association. It is a registered association moving this court through one of its office bearer. The writ petition filed on 14th January, 2019 impugns the Circular dated 27th December, 2018 issued by the Mumbai Port Trust.

2. The respondents to this writ petition are the Chairman and the Board of Trustees of the Mumbai Port Trust, the Mumbai Port

Trust and the Union of India. Respondent no. 5 is the General Secretary, Mumbai Port Trust Non S.C., S.T. Employees Association.

3. The essential controversy in this petition, which can be conveniently disposed of, must now be summarised. The petitioner before this court is claiming to be the association representing the S.C., S.T. and OBC (Scheduled Casts, Scheduled Tribes and Other Backward Class) employees in the Mumbai Port Trust. It is an association looking after the welfare of the members of the S.C., S.T. and OBC. The petitioner says that there was a writ petition filed in this court and that writ petition and the order therein has been referred in the impugned communication. For the sake of convenience and ready reference, we reproduce this communication, copy of which is at Exhibit 'A' at pages 17 and 18 of the paper book, as under:-

"No.GAD/P/GEE-SCT-CC/HF 25/Part-IV/7931

27th December 2018

TOP PRIORITY

THE HEADS OF DEPARTMENTS
HEADS OF DIVISIONS

Sub: High Court O.O.C.J. Writ Petition No.1164 of
2012 MbPT Non SC/ST Employees
Association & Anr.

The Board of Trustees of Mumbai Port Trust
& Ors. - Implementation of High Court
judgment dated 1.12.2016.

Ref: This office circular No.GAD/P/GEE-SCT/4442
dated 9.8.2017.

In continuation to this office circular under reference, this is to bring to your notice that Writ Petition bearing no.1164 of 2012 impugning DoPT OM dated 21.1.2002 was filed by Mumbai Port Trust Non SC/ ST Employees Association against The Board of Trustees of Mumbai Port Trust & Ors. and vide Order dated 30.11.2016/ 01.12.2016, the said OM was quashed and set aside by the Hon'ble Bombay High Court.

2. In the circumstances, we have filed an Interim Application to obtain interim relief from the Hon'ble Supreme Court of India in SLP Diary No.13534 of 2017 impugning the said Order dated 30.11.2016/ 01.12.2016.

3. This is to further inform you that the Non SC/ ST Employees Association has filed Contempt Petition No. 5 of 2018 before the Hon'ble High Court alleging contempt with regard to the non-implementation of the Order of the Hon'ble High Court dated 30.11.2016/ 01.12.2016. The said Contempt Petition came up before the Hon'ble High Court on 17.12.2018. After hearing the Advocates for the parties, the Hon'ble Court was pleased to adjourn the matter till 28.01.2019 and directed MbPT to obtain immediate stay from Hon'ble Supreme Court failing which the Contempt Petition would be kept for hearing on 28.01.2019.

4. The matter is pending before Hon'ble Supreme Court and no interim relief has been granted.

5.1 However, in view of the aforesaid circumstances, **a policy decision is now taken that no promotions would be granted to SC/ ST, except those made in accordance with DoPT Oms dated 30.01.1997 & 02.07.1997.**

5.2 Further, all individual cases where all the promotions are issued on the basis of DoPT Oms dated 21.01.2002 & 11.07.2002 and which are not in consonance with the conditions laid down in AIR 2007 SC 71 in the case of M. Nagraj & Ors. v. Union of India & Ors. will be revisited and a Notice will have to be issued by respective Head of Department/ Division to each of the concerned individuals who are adversely affected, seeking their representations, as to why promotion

granted to them on basis of DoPT Oms dated 21.01.2002 & 11.07.2002 be cancelled or withdrawn pursuant to the directions of the Hon'ble Bombay High Court under Order dated 30.11.2016/ 01.12.2016 in Writ Petition No.1164 of 2012 between Mumbai Port Trust Non SC/ ST Employees Association & Anr. v/s. The Board of Trustees of Mumbai Port Trust & Ors.

6. General instructions for revisiting/ revising seniority and promotions in the light of Hon'ble High Court's order dated 30.11.2016/ 1.12.2016 in the aforesaid Writ Petition are at Annexure. The format of Notice is being forwarded separately.

7. **As per Hon'ble Bombay High Court's order dated 30.11.2016/ 1.12.2016, you are advised to comply with the instructions strictly with immediate effect and forward the compliance report to this office by 15.1.2019.**

(Smt. S.C.Patwardhan)
SR. DY. SECRETARY"

4. Together with that, at page 19, is the Annexure to this communication and that contains general instructions. That also needs to be reproduced and that reads as under:-

"General Instructions for revisiting/ reviewing seniority and promotions in the light of Hon'ble High Court's order dated 30.11.2016/ 1.12.2016 in Writ Petition No.1164 of 2012:

1. To start with, Cadre wise seniority list prevailing as on 21.1.2002 to be perused.

2. To revisit seniority and promotions effected after 21.1.2002 in each cadre, required percentage reservation and actual representation of SC/ ST employees need to be verified. For the purpose, those who were promoted against 'UR' points needs to be considered for counting actual reservation percentage.

3. If there is excess representation of SC/ ST employees, in respective Cadre strength by following procedure as at point 2 above, the promotion of junior most SC/ ST employees will have to be revisited and such

employee would be reverted, if necessary and seniority list would be revised accordingly.

4. Cases where required percentage of reservation is achieved, consequent upon reversion, such resultant vacancies will have to be filled by senior most 'UR' candidate from feeder cadre.

5. While revisiting above, Consequential seniority granted to SC/ ST candidate by virtue of implementation of DoPT OM dated 21.1.2002 will have to be reworked as per DoPT OM of 30.1.1997.

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5. Dr.Suresh Mane appearing for the petitioner would submit that the petitioner-association can challenge this communication. He would submit that this communication is premised on the fact that the order and judgment of this court gives a finality to the vexed issues. The vexed issues are whether a quantifiable data is required to give representation to the members of the S.C., S.T. and OBC in public employment. Should they be un-represented or under-represented, then, the members have to be given adequate representation. Dr.Mane would submit that now the data, which quantifies these persons into these categories, is already available. There is no question of collecting any data now. The members of the S.C., S.T. and OBC are censused and documents proving the same are available. The question is that when they are given representation in public employment, that is not restricted to initial entry, but reservation in promotion is also permissible. Once the reservation is permissible in promotion

with consequential seniority, then, both, the promotion and seniority need to be protected. There is no question of revisiting them. Allowing the Mumbai Port Trust to revisit them is, therefore, contrary to law. Dr. Mane says that this court, speaking through a Division Bench, granted ad-interim relief in this petition. That ad-interim order passed by this court on 11th February, 2019 is after hearing both sides. Now, the contesting respondent no. 5 cannot complain that this order should not be continued. This order summarises the legal issues as well. The earlier Division Bench judgment of this court is no longer a good law for it relies upon the judgment of the Hon'ble Supreme Court in the case of *M.Nagraj and Ors. vs. Union of India and Ors.*¹. The later decision of the Hon'ble Supreme Court in the case of *Jarnail Singh and Ors. vs. Lachhmi Narain Gupta and Ors.*² now overrules the judgment in the case of *M.Nagraj* (supra). Once the basis for this Court's earlier Division Bench direction is the judgment in the case of *M.Nagraj* (supra), then, that judgment no longer has a binding effect. Relying upon *Jarnail Singh* (supra), the impugned communication cannot be sustained. Hence, we should admit this petition and continue the ad-interim order.

1 (2006) 8 SCC 212

2 (2018) 10 SCC 396

6. Dr. Mane substantiated his pleas by urging that the notice itself has adverse legal consequences. The impugned communication/ notice violates the constitutional rights guaranteed to the members of the Scheduled Castes/ Tribes. Their rights cannot be interfered with in the manner done by the Mumbai Port Trust. A public body, therefore, should not act unfairly, unjustly and in a discriminatory manner in matters of public employment. For all these reasons, he would submit that we must admit the writ petition and continue the ad-interim arrangement.

7. The writ petition is contested by the Mumbai Port Trust. In the affidavit that is filed in reply on behalf of the Mumbai Port Trust, it is stated that respondent nos. 1 and 2 are implementing the judgment and order of this court. The Mumbai Port Trust has approached the Hon'ble Supreme Court against the Division Bench Judgment referred in the impugned communication. That judgment was rendered on 1st December, 2016 in Writ Petition No.1164 of 2012. Though the Mumbai Port Trust has approached the Hon'ble Supreme Court against this judgment and order, pertinently, the judgment and order has not been stayed. Respondent nos. 1 and 2 to this writ petition are not prevented from implementing and enforcing that judgment and rather they

are bound to do so because the fifth respondent to this petition has filed Contempt Petition No.5 of 2018 for not abiding by the Division Bench judgment. It is in these circumstances that the impugned communication has been issued. The Mumbai Port Trust says that it has neither violated the law nor has it ever intended to disregard any binding judgment. It is not empowered to decide one way or other about the legal position and particularly the judgment in the case of *M.Nagraj* (supra) and in the case of *Jarnail Singh* (supra).

8. The fifth respondent to this writ petition, which is represented by Mr.Sanglikar has filed an affidavit in reply. The affidavit says that, by itself, the communication does not result in withdrawal of promotion nor it affects the seniority of the members of the S.C., S.T. and OBC, whose welfare is paramount for the petitioner. All that the communication says is that in terms of the judgment of this court, the Mumbai Port Trust is bound to consider the matter. The matter has to be considered in the light of the law laid down by this court. Whether that law is still valid and good is not a matter decided by the communication itself. That matter is still open for debate. By itself, neither the members of the petitioner, who have earned promotions, are reverted nor is their seniority affected. There is only a proposal

to revisit these promotions and seniority. If there is a mere proposal and no final decision has been taken, then, the writ petition is indeed premature.

9. Alternatively and without prejudice, it is argued by Mr.Sanglikar that *Jarnail Singh* (supra) can never be said to be overruling *M. Nagraj* (supra). The only aspect on which the later judgment of the Hon'ble Supreme Court differs from *M.Nagraj* (supra) is that a quantifiable data has still to be collected, according to *M.Nagraj* (supra), but as per *Jarnail Singh* (supra) that is unnecessary. The data is already there, based on which the quantification has been done. Therefore, that need not be done again. The other question is whether the members of the petitioner welfare association are inadequately represented in the promotional posts available in the establishment of the Mumbai Port Trust. That is an aspect which must be taken into consideration and that is not overruled in *Jarnail Singh* (supra). If there is inadequate representation, then alone the promotions are justified, otherwise they are not, is the submission of Mr.Sanglikar. He relies upon the affidavit in reply filed to this writ petition.

10. Mr.Sanglikar would submit that if the writ petition is admitted and the ad-interim order is continued, that would not be

conducive to larger public interest. A public body like the Mumbai Port Trust cannot be directed to perpetuate the affairs which, *prima facie*, are not in accordance with law and constitutional mandate. It must be permitted to revisit the promotions granted on the basis of the law laid down by the Hon'ble Supreme Court, which alone is followed and reiterated in the judgment of this court. Hence, not allowing the public body to proceed in accordance with law will mean that this court has expressed a final opinion that the promotions are justified, legal and constitutional. That is not possible for this court to conclude. The notice cannot be struck down as either illegal or unconstitutional.

11. During the course of arguments, Mr.R.S.Pai arguing for respondent nos. 1 and 2 conceded that the Mumbai Port Trust moved Notice of Motion No.582 of 2018 in Review Petition (L) No.94 of 2018 in Writ Petition No.1164 of 2012. That review petition sought review of the judgment and order, based on which the impugned notice/ communication has been issued. On 26th July, 2019, the notice of motion as also the review petition was placed before a Division Bench of this court. That review petition was dismissed on that date.

12. To our mind, this development is post the ad-interim order dated 11th February, 2019. It has a great bearing on the issue

raised before us. The Mumbai Port Trust, which has issued the impugned communication, sought to resile from its obligation to enforce the judgment of this court, which was binding to it. It knew that it had approached the Hon'ble Supreme Court against that judgment and order and its implementation has not been kept in abeyance by the Hon'ble Supreme Court. It was also aware of the fact that it filed review petition seeking review of the judgment and order. *Prima facie*, the Mumbai Port Trust sought to support the cause of the petitioner before us. It took up the cause of the S.C., S.T. and O.B.C. employees by filing the review petition and pursuing it. The review petition has also been dismissed. To our mind, therefore, today the Mumbai Port Trust cannot say that it will not implement the judgment. It is the Mumbai Port Trust which has issued the notice. The Mumbai Port Trust now is conscious of the fact that it must carry this notice to its logical conclusion. All the more, when it is faced with a contempt action. The contempt petition and the order therein is also referred in the proceedings, namely, the affidavit in reply in this petition as also in the review petition. Once the Mumbai Port Trust has issued the notice so as to give effect to a binding judgment of this court, then, we do not think that it should be restrained from acting in furtherance thereof.

13. In our view, there is one more reason for not continuing the ad-interim order. That is that the impugned notice or communication by itself does not visit the individual members of the petitioner association with any adverse legal consequences. Neither the seniority is affected, nor the promotion is taken away by mere issuance of the same. In fact, the initial judgment and order dated 1st December, 2016 in Writ Petition No.1164 of 2012 is clear. The initial order in the penultimate and ultimate paragraphs outlines the issue thus:-

“70 As a result of the above discussion, the Writ Petition succeeds. We direct the Mumbai Port Trust-respondent No.1 to abide by the judgment of the Hon’ble Supreme Court in the case of M.Nagraj and particularly the conclusions reproduced in the foregoing paragraphs and give effect to it as expeditiously as possible. In giving effect to it, it shall ignore any contrary provisions or stipulations in the OM dated 21st January, 2002. It must ignore all clarifications post M.Nagaraj, including the one contained in the letter dated 18th September, 2007, give effect to and implement this judgment. We direct that all consequential steps be taken within a period of four months from the date of receipt of a copy of this judgment. We clarify that individual matters are not before us. Therefore, if there are powers available to revisit any promotions or matters concerning seniority under the Service Rules/ Regulations, then, by abiding with the same, appropriate steps be taken by the MPT. Needless to clarify that before any adverse orders are passed, the concerned employees shall be given a fair and reasonable opportunity of being heard. No orders, including taking away any promotions, seniority or reversion shall be passed without complying with the principles of natural justice. Rule made absolute in the above terms. The parties are left to bear their own costs.

71 Needless further to clarify that the Department of Personnel & Training and the Department of Shipping (Port Wings) in the Ministry of Shipping & Surface

Transport, Government of India shall not in any manner interfere with the implementation of this judgment by the Mumbai Port Trust. Any contrary directions from these Ministries so as not to allow the Mumbai Port Trust to implement and abide by this judgment would be visited with severe consequences. Needless also to further clarify that this judgment equally binds the Central Government and the above Ministries.”

14. Thus understood, the notice only requires the Mumbai Port Trust to issue appropriate communications intending to revisit the promotions. Pertinently, when *M.Nagraj* (supra) was attempted to be revisited in the case of *Jarnail Singh* (supra), the Hon’ble Supreme Court clarified the legal position by holding that the judgment in the case of *M.Nagraj* (supra) does not require any reference to a Larger (Seven Judge) Bench. Several aspects in *M.Nagraj* (supra) mandating the State to collect quantifiable data need not be implemented, according to later judgment in the case of *Jarnail Singh* (supra). That is because the *M.Nagraj* (supra) judgment, to the extent it issues that clarification or direction, runs counter to a Nine Judge Bench judgment of the Hon’ble Supreme Court in the case of *Indra Sawhney vs. Union of India*³. Therefore, each aspect of the matter, whether the promotion and seniority can be revisited or interfered with can be gone into at a later stage. Today, on the impugned communication and its plain language, the Mumbai Port Trust will have to undertake an exercise which is somewhat detailed and elaborate. It will firstly

3 AIR 1993 SCC 477

have to determine as to whether the individual cases, in which promotions have been granted, are decided in accordance with the Department of Personnel and Training - Office Memorandum and further, the action of the Mumbai Port Trust would stand on the touchstone of the judgment in the case of *M.Nagraj* (supra). Then, it will have to decide whether *M.Nagraj* (supra) and the dictum therein stands superseded or is still binding on it and consequently, even the Division Bench judgment of this court would bind it despite all assertions of the petitioner to the contrary. In other words, merely because a policy decision is taken that no promotion can be granted to the S.C., S.T. OBC, except those made in accordance with the Office Memorandum of 30th January, 1997 and 2nd July, 1997, is not a issue to be seen and determined in isolation. One would have to read the communication as a whole. If the communication is read as a whole and in its entirety, it only intends to give effect to a binding judgment of this court. That the matter is pending before the Hon'ble Supreme Court apart, the binding Division Bench judgment has to be given effect to particularly when the Hon'ble Supreme Court has not stayed its operation and implementation. That is the response expected from the Mumbai Port Trust. Once that is the factual position, then, the understanding of the Mumbai Port Trust, with regard to the binding nature of the

decision of this court, need not be upset by us, at this stage. Therefore, to the extent the Division Bench judgment of this court binds the Mumbai Port Trust, it refers to all the Office Memorandums. The communication is to revisit or revise the seniority and promotions in the light of the binding judgment of this court. This communication by itself will not lead to such revisiting or revision. The individual persons affected by this communication would have to be issued a notice, their version will have to be called for and after their explanation is considered, a decision will have to be taken by the Mumbai Port Trust as to whether they have to revisit the seniority and review/recall the promotion granted to him/ her. That individual, either by himself or collectively through the petitioner can challenge any adverse decision. Neither the issuance of this communication concludes the controversy finally nor by allowing the Mumbai Port Trust to go ahead and implement the binding judgment of this Court would mean this court has expressed a firm opinion on the promotions and seniority. All contentions in that regard of all parties are necessarily kept open. We agree with Mr.Sanglikar that the writ petition is indeed premature. Even the general instructions at page 19 of the paper book do not mandate the Mumbai Port Trust or the competent authority to pass an order revising the seniority list and revisiting the promotions granted on the basis of the

same. All that it says is there is an intent to do so and hence the impugned notice will have to be taken to its logical conclusion strictly in accordance with law and the directions of the Division Bench. At this stage, we are not called upon to decide as to whether the mandate of Articles 14 and 16(1) of the Constitution of India and the unamended clauses are violated by the amendments to the Constitution of India. We need not comment upon the issue of promotions with consequential seniority to S.C., S.T. and OBC in public employment and whether that suffers by a violation of the constitutional mandate enshrined under Article 16(1). Thus, the general mandate flowing from clause (1) is either totally diluted or whether the enabling powers enable the Parliament to provide for such reservations in promotions with seniority are matters which will have to be considered at an appropriate stage. Should the Mumbai Port Trust revisit, the promotions and revise the seniority list, such issues, as are highlighted by Dr.Mane and in the memo of the writ petition, can always be raised and should the Mumbai Port Trust drop the intended action in toto, it would be then for the fifth respondent to raise its grievances as permissible in law. At this stage, there is no occasion to entertain this writ petition. All the more on account of the subsequent development, namely, rejection of the review petition.

15. The writ petition, is therefore, disposed of with the above clarification and by keeping open all contentions. The ad-interim order is, therefore, vacated forthwith.

(G.S.PATEL, J.)

(S.C.DHARMADHIKARI, J.)