

**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH.**

CWP No.11386 of 2018(O&M)

Date of Decision:-12.02.2020

Union of India &Ors.

.....Petitioners.

Versus

Maheshinder Singh Dhindsa & Ors.

.....Respondents.

**CORAM:- HON'BLE MR. JUSTICE JASWANT SINGH
HON'BLE MR. JUSTICE SANT PARKASH**

Present:- Mr. Satya Pal Jain, Additional Solicitor General of India
assisted by Mr. Namit Kumar, Senior Panel Counsel
for the Petitioners.

Mr. D.S. Patwalia, Senior Advocate assisted by
Mr. A.S. Chadha, Advocate for contesting respondent No.1.

SANT PARKASH, J.

Union of India-Petitioner has filed the present writ petition against the order dated 08.02.2018 (P-6) passed by the Central Administrative Tribunal (for short 'The Tribunal), whereby the Original Application filed by respondent no 1- Maheshwar Singh Dhindsa (belonging to General Category) has been allowed and the impugned seniority list dated 20.05.2016 (A-3) in the cadre of Superintendent of Customs (Preventive), order dated 10.02.2017 (A-1) read with letter dated 21.02.2017 (A-1/1), whereby it is held that Catch Up Rule does not exist; and Order dated 23.02.2017 (A-2) vide which private respondents

(belonging to reserved categories), were promoted on adhoc basis to the post of Assistant Commissioner of Customs and Central Excise have been set aside, directing the official respondents to prepare a fresh relevant seniority lists in the cadre of Superintendent of Customs (Preventive) by following the principle of “Catch Up Rule” in granting the benefit of seniority to the general category employees although promoted later than the reserved category candidates but concededly senior in the feeder cadre of Preventive Officers (Customs).

The factual matrix of the case is that respondent No.1- Maheshinder Singh Dhindsa (applicant in original OA) was placed higher in merit than private respondent no.2 to 11, as per the merit list vide Annexure A-4 for appointment in the basic feeder cadre as Preventive Officers(Customs) in the year 1990-1992. Private respondent Nos. 2 to 11 (belonging to reserved category) were promoted as Superintendent of Customs (Preventive) on the basis of reservation vide order dated 17.10.2002 (A-7), whereas the senior-respondent No.1 (belonging to General Category) was promoted to the said post vide order dated 13.05.2005 (A-8). Subsequently, Union of India/petitioner notified a tentative seniority list of Superintendent of Customs (Preventive) and called for the objections. Although objections were filed by respondent no 1, however without deciding the same, an eligibility test was conducted by the office of Director General, Human Resource Development for making further promotions to the cadre of Assistant Commissioner. Consequently, respondent No. 1 Maheshwar Singh Dhindsa filed Original Application No.060/00028/2014 before the Tribunal. In the said OA, the following order was passed by the learned Tribunal on 09.10.2015:

" Ld. Counsel for respondents, on instructions from Mr. B.B. Dabral, Assistant Commissioner, Chandigarh, makes a statement at the Bar that no meeting of DPC for promotion to the post of Assistant Commissioner has been scheduled as yet and that as and when it is fixed, the date will be informed to the applicant. He further submits that objections with regard to relevant tentative seniority will be dealt with and decided before the next date of hearing. "

As per the case of respondent No.1 (applicant in OA), which is not disputed, petitioner-Union of India, after prolonging the matter for quite a long time, granted ante-dated promotion to him w.e.f. 14.10.2002 in the review Departmental Promotion Committee. The Union of India-petitioner again finalized the seniority list vide impugned circular dated 20.05.2016(A-3), once again retaining him below the reserved category candidates without considering his objections dated 29.04.2016 (A-10). Thereafter, following order was passed by the learned Tribunal on 27.09.2016:

" Ld. Counsel for respondents no.2 to 5 has stated that first part of relief claimed by the applicant has been granted by granting upgraded notional promotion to applicant w.e.f. 14.10.2002 instead of from 11.05.2005. It is stated that as regards the applicability of catch up rule to determine seniority, the matter has been referred to DOPT being nodal agency. "

Ultimately the said OA was disposed of vide order dated 23.01.2017(A-11) holding that the Union of India/petitioner would decide the matter of Catch-up principle before making any promotion in prejudice to the rights of respondent No.1.

Thereafter, respondent Nos. 2 to 11, who were juniors to respondent No. 1 in the feeder cadre of Superintendent Customs (Preventive), have been promoted in the cadre of Assistant Commissioner of Customs & Central Excise, on ad hoc basis, vide order dated 23.02.2017 (A-2), which led to the filing of OA No. 060/00254/PB/2017, whereby the

principle of “Catch-up” has not been applied.

The Tribunal considered the matter in detail and vide its impugned order dated 08.02.2018 (P-6) held that the competent authority has arbitrarily ignored the principle of “Catch-up” and wrongly applied the policy of reservation in promotion and therefore set aside the orders as referred to above.

Hence, the writ petition.

Learned senior counsel for the Union of India/petitioner has argued that principle of “Catch-up” cannot be applied in view of 85th Constitutional Amendment (2001), whereby the effect of Catch-up rule was negated. It has further been contended that the learned Tribunal wrongly relied upon the Judgment passed by Hon’ble Supreme Court in the case of **“M Nagraj and others Vs Union of India and others, (2006) 8 SCC 212**, as the judgment was not in existence in the year 2002 i.e. when respondent Nos. 2 to 11 were promoted to the post of Superintendent by following the reservation policy. It has also been submitted that promotion of respondent Nos. 2 to 11 to the posts of Assistant Commissioner were made on ad hoc basis by relying upon guidelines issued by DOPT from time to time. Lastly, it has been submitted that the Hon'ble Supreme Court in the case of **“Jarnail Singh and others Vs Lachhmi Narain Gupta and others, 2018 (10) SCC 396”** has held that the condition referred in **M. Nagraj’s case** directing the authorities to collect quantifiable data showing backwardness of the SCs and STs, was held to be contrary to Indra Sawhneys’ Judgment and therefore the finding of Tribunal to hold promotions to be bad in view of M. Nagraj’s case (supra) is against law.

On the contrary, learned senior counsel for respondent No.1

(applicant in OA) submits that the Tribunal has rightly placed reliance on the judgment passed by the Hon'ble Supreme Court in M. Nagraj's case (supra), which categorically laid down that there cannot be any reservation in promotion unless three tier exercise is carried out and till that exercise is carried out, rule of "Catch-up" will be applicable and thus, there is no escape for the Government in any manner to forgo the aforesaid rule of "Catch Up". He has further submitted that selecting a junior for promotion by ignoring his senior amounts to illegality and against common logic.

We have heard the learned senior counsel for the parties and perused the record carefully.

Before proceeding further, it would be appropriate to reproduce the relevant findings of the Hon'ble Supreme Court in the case of M. Nagraj's (supra):

" 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.

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.

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.

Subject to above, we uphold the constitutional validity of the Constitution (Seventy-Seventh Amendment) Act, 1995, the Constitution (Eighty-First Amendment) Act, 2000, the Constitution (Eighty-Second Amendment) Act, 2000 and the Constitution (Eighty-Fifth Amendment) Act, 2001.

"

From the perusal of the case file, it is evident that respondent Nos. 2 to 11 were promoted to the post of Superintendent of Customs(Preventive) by ignoring the the claim of the senior-Maheshinder Singh Dhindsa in the basic feeder cadre of Preventive Officers (Customs), while extending the benefit of reservation Policy. Upon subsequent promotion of respondent no.1-Maheshinder Singh, belonging to the General Category in the cadre of Superintendent of Customs (Preventive) was no doubt granted *antedated* date of promotion as that of the private respondents, however, was also entitled to be placed above the private respondent nos.2 to 11 in the seniority list of Superintendent of Customs (Preventive) based on the principle of Catch Up Rule, which has been wrongly denied to respondent no.1. The effect of the Catch Up Rule could only be negated in view of the 85th Constitutional Amendment and complete benefit of reservation in promotions effected provided the instructions granting benefit of such reservation were issued by following the principles laid down in **M. Nagraj's case (Supra)**. The Hon'ble Supreme Court in the case of **M. Nagraj's (supra)** while conditionally upholding the 85th Constitution amendment, mandated that it is the duty of the State to prove in each case the existence of compelling reasons for determining "inadequacy of representation", "backwardness" and "overall efficiency" before making any provision for reservation in promotion. Recently, in a judgment rendered

by the Constitution Bench of the Hon'ble Supreme Court in Jarnail Singh's case supra, the Hon'ble Supreme Court has upheld the decision rendered in the case of M. Nagaraj's (supra) to the extent of the requirement that the State had to collect quantifiable data showing adequate representation of the Scheduled Castes and the Scheduled Tribes in the service and over all administrative efficiency. For sake of convenience, relevant portion of paragraph no 17 of the Jarnail Singh's judgment is reproduced herein under:

“17. Therefore, when Nagaraj (supra) applied the creamy layer test to Scheduled Castes and Scheduled Tribes in exercise of application of the basic structure test to uphold the constitutional amendments leading to Articles 16(4-A) and 16(4-B), it did not in any manner interfere with Parliament's power under [Article 341](#) or [Article 342](#). **We are, therefore, clearly of the opinion that this part of the judgment does not need to be revisited, and consequently, there is no need to refer Nagaraj (supra) to a seven-Judge Bench. We may also add at this juncture that Nagaraj (supra) is a unanimous judgment of five learned Judges of this Court which has held sway since the year 2006.** xxx”

Xxxx In fact, the tests laid down in Nagaraj (supra) for judging whether a constitutional amendment violates basic structure have been expressly approved by a nine-Judge Bench of this Court in I.R. Coelho (Dead) by LRs. v. State of Tamil Nadu and Ors., (2007) 2 SCC 1 (See paragraphs 61, 105, and 142). The entirety of the decision, far from being clearly erroneous, correctly applies the basic structure doctrine to uphold constitutional amendments on certain conditions which are based upon the equality principle as being part of basic structure. **Thus, we may make it clear that quantifiable data shall be collected by the State, on the parameters as stipulated in Nagaraj (supra) on the inadequacy of representation, which can be tested by the Courts. We may further add that the data would be relatable to the concerned cadre”**

(Emphasis supplied)

Thus, the findings of the Tribunal are well reasoned and in consonance with the various decisions of Hon'ble Supreme Court. The argument of Ld. Senior Counsel for petitioner that M. Nagaraj's judgment has been over-ruled vis-à-vis the mandate of collecting data in Jarnail

Singh's case, is incorrect and therefore rejected.

Admittedly, the Union of India has neither made any specific provision in consonance with Article 16(4A) of the Constitution nor got collected quantifiable data showing the backwardness of the class and inadequacy of the representation of SCs/STs, in the case in hand so as to grant complete benefit of reservation in promotion i.e. no benefit of Catch Up Rule to employees belonging to General Category by placing them in seniority over the erstwhile junior-reserved category employees having availed the benefit of reservation in promotion. Thus, the Tribunal had rightly quashed the promotions of respondents no 2 to 11 as Assistant Commissioner of Customs and Central Excise, being against law and correctly directed the petitioner-UOI to apply the “catch-up” rule in fixing seniority in the feeder cadre of Superintendent of Customs (Preventive), as admittedly , respondents no 2 to 11 were promoted earlier as Superintendent of Customs (Preventive) by availing benefit of reservation vis-à-vis respondent no 1, who is otherwise senior to respondents no 2 to 11 in the **basic** feeder cadre of Preventive Officers (Customs) as per document Annexure A-4.

In view of the above discussion, instant writ petition is hereby ordered to be dismissed. Pending application(s), if any, shall also stand disposed of,in terms thereof.

(JASWANT SINGH)
JUDGE

(SANT PARKASH)
JUDGE

February 12, 2020
Vinay

<i>Whether speaking/reasoned</i>	<i>Yes/No</i>
<i>Whether Reportable</i>	<i>Yes/No</i>