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

WRIT PETITION NO. 7520 OF 2019

Union of India, through Secretary,
Ministry of Finance.

... Petitioner

V/s.

Sanjeev Kumar & Ors.

... Respondents

Mr. R. R. Shetty with Ms. Anamika Malhotra,
advocates for the petitioners.

Mr. Rahul Walia, advocate for the respondents.

Dr. Suresh T. Mane, advocate for the intervenors.

**CORAM: DIPANKAR DATTA, CJ &
M. G. SEWLIKAR, J.**

DATE: APRIL 13, 2022

P.C.:

1. "The Union of India", which was the first respondent in Original Application No. 623 of 2016 on the file of the Central Administrative Tribunal, Mumbai (hereafter "the Tribunal", for short), takes exception to the judgment and order dated 31st October 2017 of the Tribunal by instituting this writ petition dated 26th April 2019. The Tribunal by the impugned judgment and order proceeded to allow the original application instituted by the respondents and set aside multiple impugned orders, viz. orders dated 4th June 2014 (Annexure 'A-1'), 17th October 2014 (Annexure 'A-2'), and 25th April 2016 (Annexure 'A-4') as well as the impugned seniority list dated 22nd

January 2014 (Annexure 'A-3') relatable to reservation in promotion for candidates belonging to the SC and ST category.

2. The basic ground on which exception is taken by Mr. Shetty, learned advocate for the Union of India is that the seniority list has been set aside together with other orders without even the affected employees being brought on record as respondents in the original application and hearing them. In the process, he submits, natural justice has been brazenly violated.

3. Relying upon the decisions of the Supreme Court reported in AIR 1963 SC 786 (**Udit Narain Singh Malpaharia V/s. Additional Member, Board of Revenue, Bihar**) and (2004) 1 SCC 317 (**Khetrabasi Biswal V/s. Ajaya Kumar Baral & others**), it is contended by Mr. Shetty that the impugned judgment and order of the Tribunal is a nullity in the eye of law and as such deserves to be set aside.

4. Since particular reference has been made to paragraph 9 of **Udit Narain Singh Malpaharia** (supra), we consider it appropriate to quote the same below:

"9. The next question is whether the parties whose rights are directly affected are the necessary parties to a writ petition to quash the order of a tribunal. As we have seen, a tribunal or authority performs a judicial or quasi-judicial act after hearing parties. Its order affects the right or rights of one or the other of the parties before it. In a writ of certiorari the defeated party seeks for the quashing of the order issued by the tribunal in favour of the successful party. How can the High Court vacate the said order without the successful party being before it.

Without the presence of the successful party the High Court cannot issue a substantial order affecting his right. Any order that may be issued behind the back of such a party can be ignored by the said party, with the result that the tribunal's order would be quashed but the right vested in that party by the wrong order of the tribunal would continue to be effective. Such a party, therefore, is a necessary party and a petition filed for the issue of a writ or certiorari without making him a party or without impleading him subsequently, if allowed by the court, would certainly be incompetent. A party whose interests are directly affected is, therefore, a necessary party."

5. Reliance is also placed by Mr. Shetty on the unreported decision of a coordinate Bench of this Court dated 31st October 2018 while disposing of Writ Petition No. 2876 of 2018 filed on the Original Side (**Union of India V/s. Shri Nilesh Gaikwad & Ors.**). The Bench, according to him, was of the view that the original application suffered from the defect of non-joinder of necessary parties and no order could have been passed behind the back of the promotees likely to be prejudiced thereby. It has been pointed out by him that the impugned order of the Tribunal was quashed by the coordinate Bench only on the ground that the Tribunal quashed the order(s) granting promotion without the promotees being arrayed as respondents in the original application.

6. On merits, it is contended by Mr. Shetty that the Tribunal failed to appreciate the fact that implementation of 'catch up' rules and reservations in promotion are policy matters within the exclusive domain of the Central Government and it was absolutely inappropriate for the Tribunal to interfere with such policy decision while rendering the impugned judgment and order.

7. On the aforesaid two counts, Mr. Shetty prays that the judgment and order of the Tribunal impugned in this writ petition ought to be set aside and the matter remitted to the Tribunal for fresh consideration upon putting the affected promotee employees on notice.

8. The original applicants before the Tribunal, who are the respondents before us, are represented by Mr. Walia, learned advocate. He invites our attention to the judgment and order dated 5th March 2018 passed by another coordinate Bench of this Court while hearing Writ Petition No. 848 of 2018 (**Rupesh B. Ukey V/s. Union of India**). Rupesh B. Ukey was one of the private respondents in the original application (Original Application No. 623 of 2016) out of which this writ petition arises. The said Rupesh B. Ukey, on diverse grounds, had questioned the judgment and order dated 31st October 2017 made by the Tribunal on Original Application No. 623 of 2016. Obviously, the Union of India was a party to such proceedings and was heard by the coordinate Bench. There was also an application for intervention at the instance of the Income Tax SC/ST/OBC Employees Welfare Association (ITSEWA, Mumbai). Upon hearing the writ petition as well as the intervention application, the coordinate Bench by its judgment and order dated 5th March 2018 dismissed the writ petition as well as the intervention application. The order at paragraph 20 records that the submission of the learned counsel for the interveners was duly considered and his prayer for a remand, similar to the one raised by Mr. Shetty, was not accepted by the Bench. Having regard to such judgment and order dated 5th March 2018 attaining finality by

reason of no party carrying the same in appeal before the Supreme Court, Mr. Walia argues that insofar as the Union of India is concerned, the points raised by it in this writ petition are hit by the principle of issue estoppel. He, accordingly, prays for dismissal of the writ petition.

9. Having heard Mr. Shetty and Mr. Walia, we are first tasked to answer the question as to whether this writ petition, at the instance of the Union of India, is maintainable in view of the given facts and circumstances.

10. Mr. Shetty has fairly conceded that the point of non-joinder of necessary party was neither raised in the reply-affidavit filed before the Tribunal by the official respondents nor has it been raised in this writ petition by the Union of India. In view thereof, we need to consider whether the objection as regards non-joinder can at all be raised or should be allowed to be raised for the first time at this stage when we have expressed our mind to hear the writ petition finally. Union of India or the other official respondents having omitted to take the objection at the first instance before the Tribunal despite opportunity to so raise, we are inclined to the view that the effect of such omission must be considered on first principles of law without being influenced by precedents in the field.

11. Code of Civil Procedure, 1908 (hereafter "CPC", for short) embodies the substantive and the procedural laws governing judicial proceedings arising out of civil disputes by and between the disputing parties. Insofar as non-joinder of a

necessary party is concerned, it can be found on a bare reading of Order I Rule 9 of the CPC that although a suit may not be defeated by reason of misjoinder or non-joinder of parties, a suit could be defeated by reason of non-joinder of a necessary party. Once the matter reaches the appeal Court, it is section 99 of the CPC which is the governing provision. It ordains that a decree cannot be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder or non-joinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court. The proviso to section 99 makes the position clear that nothing in this section shall apply to non-joinder of a necessary party. However, Order I Rule 13 is important for the present case. It envisages that all objections on the ground of non-joinder or misjoinder of parties are to be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived. Pertinently, there is no proviso inserted in Rule 13 as was inserted in Rule 9 of Order I and section 99 of the CPC by Act 104 of 1976 and the legal position seems to be clear that the bar of waiver is not restricted to non-joinder of a proper party but would apply even to omission to raise any objection as to non-joinder of a necessary party, notwithstanding that the Court may, *inter alia*, allow one person to defend on behalf of all persons having similar interest under Rule 8 of Order I or that the Court may add parties under clause (2) of Rule 10 of Order I.

12. We are conscious of the provision of sub-section (1) of section 22 of the Administrative Tribunals Act, 1985 ordaining, *inter alia*, that the Tribunal is not bound by the procedure laid down in the CPC but shall be guided by the principles of natural justice. The concept of natural justice has undergone great deal of changes. In the past, it was thought that the principles included just two rules, i.e., *audi alteram partem* and *nemo debet esse judex in propria causa*. In the course of the years, however, many subsidiary rules have been added to the rules of natural justice by reason of judicial pronouncements of the Supreme Court. It has been held by the Constitution Bench in its decision reported in (1988) 2 SCC 602 (**A.R. Antulay V/s. R.S. Nayak**) that rules of natural justice embody fairness in action. It has further been held by the Court in the decision reported in (2008) 8 SCC 725 (**Dev Dutt V/s. Union of India**), after noting various precedents, that the soul of natural justice is the principle of fairness and that the rules of natural justice may be summarized in one word: fairness. Although it is not necessary here to discuss all such subsidiary rules, it would suffice to observe that though the Tribunal may not be bound by the procedure of the CPC but while being guided by the principles of natural justice, it must have due regard to fairness; and none can possibly contend with conviction that procedures in the CPC are not fair. Unless a procedure is fair, it would be violate rights of parties. In fact, in terms of sub-section (3) of section 22 of the Act, the Tribunal is vested with certain powers akin to a civil court under the CPC while it tries a suit. It would, therefore, not be wholly impermissible if the

Tribunal as well as the writ court, in course of proceedings for judicial review arising out of the Tribunal's judgment and order, are guided by the principles of natural justice and adhere to rules of fairness in adjudication of proceedings before it which could include borrowing the principles of the CPC and to apply the same to such proceedings, although the provisions of the CPC may not *stricto sensu* apply to proceedings before the Tribunal. We, therefore, proceed to examine the contention of Mr. Shetty bearing in mind the position of law as noted above.

13. Having read the aforesaid provisions of the CPC and borrowing the principles therefrom, it seems that the Union of India or the private respondents in the proceedings before the Tribunal could have raised an objection to the maintainability of the original application by contending that mere absence of the promotees as respondents before the Tribunal, who could be directly affected if relief claimed by the original applicants were granted, rendered the original application as not maintainable in law. Such objection not having been taken by the Union of India before the Tribunal and before this Court even in the pleadings, we hold that the Union must be deemed to have waived the objection. We, thus, cannot allow the Union to raise the objection as regards non-joinder of a necessary party at this stage. Indeed, not only such an objection could have been raised by a party (claiming that he is likely to be directly affected by reason of grant of relief as claimed before the Tribunal) by seeking an intervention before the impugned judgment and order came to be delivered on the ground that any decision given behind his back would be a

nullity, such a party could have also applied for review after the judgment was delivered or even instituted independent original proceedings, as can be discerned from decisions of the Supreme Court which we propose to refer a little later. However, such objection cannot be allowed to be raised at the instance of a party which had the opportunity to oppose the original application before the Tribunal by raising all the available defences including in particular the point of non-joinder as well as to raise the same point in course of an earlier round of litigation which concluded by reason of the judgment and order dated 5th March 2018 passed in Writ Petition No. 848 of 2018.

14. We find that when Writ Petition No. 848 of 2018 was decided on 5th March 2018, the Union of India had not substantively challenged the judgment and order dated 31st October 2017 but was obviously a party to the proceedings. We also find that an objection was raised on behalf of the petitioner (Rupesh B. Ukey) that the private respondents before the Tribunal had been sued in representative capacity but the predicates of Order I Rule 8 of the CPC were never complied with and this was an additional ground for setting aside the impugned judgment and order. Also, objection was in fact raised before the coordinate Bench by the interveners with reference to non-compliance with the procedure prescribed under Order I Rule 8 of the CPC and as has been noticed above, the Court did not permit such intervention on the ground that there was no merit in the writ petition itself. Curiously, the Union of India did not raise any objection referring to non-joinder of necessary parties. The decision

given by the coordinate Bench went not only against the petitioner (Rupesh B. Ukey) but also against the Union of India. It accepted the judgment and order dated 5th March 2018 and allowed it to attain finality by not proceeding higher up.

15. Accepting Mr. Walia's argument, we are inclined to hold that the point of non-joinder of necessary party cannot be raised by the Union of India before us in view of the principle of issue estoppel. The Supreme Court in its decision reported in (2005) 1 SCC 787 (**Bhanu Kumar Jain V/s. Archana Kumar**) had the occasion to trace the distinction between res judicata and issue estoppel. It was held that res judicata debars a court from exercising its jurisdiction to determine the lis if it has attained finality between the parties whereas the doctrine issue estoppel is invoked against the party. If such an issue is decided against him, he would be estopped from raising the same in the latter proceeding.

16. Reliance placed by Mr. Shetty on **Udit Narain Singh Malpaharia** (supra) appears to be thoroughly misplaced. We have quoted paragraph 9 above. The law that has been laid down in such decision is to the effect that a party who is successful before the Tribunal ought to be joined as a respondent in the proceedings before the Court if the judgment and order of the Tribunal is sought to be assailed by the parties which has lost before the Tribunal. It is, therefore, clear that the *ratio decidendi* of such decision of the Supreme Court would have no application in a case where the parties before the Tribunal are on record before the writ Court which

is approached with proceedings for a writ of certiorari to have the impugned judgment and order set aside.

17. Khetrabasi Biswal (supra) does not also assist Mr. Shetty. Although heavy reliance has been placed by Mr. Shetty on paragraphs 3 and 6 of the decision, ultimately it has to be borne in mind that the order passed in such case was in exercise of power conferred by Article 142 of the Constitution. It also does appear from the judgment that the civil appeals were at the instance of candidates who felt aggrieved by the decision of the writ court and not at the instance of the employer. The decision is, therefore, clearly distinguishable.

18. It is of course true that the coordinate Bench in **Nilesh Gaikwad** (supra) had allowed the writ petition of the Union of India and interfered with the order of the Tribunal on the ground of non-joinder of necessary parties. Those employees who had been promoted were not brought on record; yet, the Tribunal quashed the promotional panel. The decision recorded that the procedure analogous to the one under Order I Rule 8 of the CPC ought to have been followed. We, however, have our doubts as to whether on an approach being made by the Union of India, such an order could have been passed without there being any indication that the Union of India had raised an objection regarding maintainability of the original application for non-joinder of necessary parties before the Tribunal. In any event, we do not see sufficient reason to follow the said decision having regard to the peculiar fact situation of the present case. Here, the impugned judgment and order dated 31st October 2017 in Original Application No.

623 of 2016 has already been upheld by the coordinate Bench by judgment and order dated 5th March 2018. That apart, the decisions of the Supreme Court reported in (1997) 6 SCC 473 (**K. Ajit Kumar V/s. Union of India**) and (2007) 14 SCC 54 (**Rama Rao V/s. M.G. Maheshwara Rao & others**) where it has been held that a party who stands affected by reason of a judgment and order having been delivered by the Tribunal behind his back and prejudicial to his interest has the remedy of either moving the Tribunal in its review jurisdiction or by initiating original proceedings before the Tribunal do not appear to have been placed for consideration before the coordinate Bench by the parties in **Nilesh Gaikwad** (supra); therefore, we do not feel bound by the ratio, if any, of such decision.

19. Be that as it may, on a writ petition at the instance of the Union of India which was a party to the proceedings before the Tribunal and did not raise the point of non-joinder, it cannot be held by us that the Tribunal transgressed its limits in deciding the original application on merits in the absence of a party who would be affected thereby to such an extent that its judgment and order ought to be interdicted without looking into any other aspect. If indeed the original application suffered from the defect of non-joinder of a necessary party, it was the duty of the Union of India to point out the same having regard to the fact that it is the employer not only of the original applicants and the private respondents in the original application but all other promotee employees who were not joined but would have been affected by reason of the decision of the Tribunal. Union of India having failed to

raise the point before the Tribunal and in the earlier round of litigation before this Court (Writ Petition No. 848 of 2018) at the instance of Rupesh B. Ukey, we overrule the contention of Mr. Shetty.

20. Now we proceed to decide the second contention of Mr. Shetty.

21. At this stage, it would be profitable to notice the reasoning of the coordinate Bench in dismissing the writ petition on merits. It was contended on behalf of the petitioner (Rupesh B. Ukey) that the Tribunal while allowing Original Application No. 623 of 2016 had entirely relied upon the decision of the Supreme Court reported in (2017) 4 SCC 620 (**B.K. Pavitra & others V/s. Union of India & others**) to grant relief to the original applicants. The decision in **B.K. Pavitra** (supra) in turn relied on the decision of the Constitution Bench reported in (2006) 8 SCC 212 (**M. Nagaraj & others V/s. Union of India & others**). However, **M. Nagaraj** (supra) did not notice the earlier Constitution Bench decision on the same point reported in (2005) 1 SCC 394 (**E.V. Chinnaiah V/s. State of Andhra Pradesh & others**) and considering such inadvertent omission, the Division Bench of the Supreme Court vide its order reported in (2018) 1 SCC 146 (**State of Tripura & others V/s. Jayanta Chakraborty & others**) had referred the matter of backwardness of the Scheduled Castes and Scheduled Tribes as regards promotion for being revisited by an appropriate bench. It was also submitted on behalf of the said petitioner that since the issue as to whether **M. Nagaraj**

(supra) lays down the correct position in law was under consideration by the Supreme Court itself, the Bench ought to admit the writ petition and grant interim relief. Upon noticing several decisions of the Supreme Court, which lay down the law that merely because a reference has been made to a larger bench for decision does not wipe out the precedential efficacy of the decision so referred, the Bench observed that **M. Nagaraj** (supra) had been followed in several subsequent decisions by the Supreme Court including **B.K. Pavitra** (supra). Ultimately, the Bench proceeded to observe as follows:

“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 for 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.

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."

22. Insofar as merits of the writ petition is concerned, as argued by Mr. Shetty, we are *ad idem* with the coordinate Bench, which decided Writ Petition No. 848 of 2018 by its judgment and order 5th March 2018, that the Tribunal merely followed the decision in **B.K. Pavitra** (supra) and proceeded to grant relief to the original applicants. We do not sit here in appeal over the decision dated 5th March 2018 and, therefore, cannot render any contrary finding. Even otherwise, the point now raised by Mr. Shetty is that the Tribunal cannot interfere

with a policy decision. Such an argument has no force having regard to the law settled by the Supreme Court that policy decisions are not immune from judicial review and in view of what the Tribunal specifically found, which has since been given the stamp of approval by the coordinate Bench.

23. For the reasons aforesaid, we see no reason to entertain this writ petition. The same is dismissed. No costs.

24. Although the application for intervention by the applicant represented by Dr. Mane, learned advocate was allowed by an order dated 7th August 2019 of a coordinate Bench of this Court, such an order was apparently made because the Union of India had invoked the writ jurisdiction of this Court and the coordinate Bench, therefore, thought it fit and proper that the intervener should also be permitted to take exception to the impugned judgment and order along with the Union of India. Once we have dismissed the writ petition of the Union of India, the intervener cannot have any better right than the Union to have the judgment and order, impugned in these proceedings, being set aside without laying any substantive challenge. The remedy of the intervener in terms of the decisions in **K. Ajit Kumar** (supra) and **Rama Rao** (supra) lies in approaching the Tribunal for suitable relief invoking the appropriate jurisdiction. We preserve the right of the intervener to approach the Tribunal, in accordance with law.

25. Before parting, we direct that rest of the official respondents apart from the Union of India who were parties before the Tribunal but did not join it as co-petitioners in this

writ petition be impleaded as proforma respondents by Ms. Malhotra, learned advocate-on-record for the Union of India. Let the cause title of the writ petition be amended accordingly.

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Date: 2022.04.22
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(M. G. SEWLIKAR, J.)

(CHIEF JUSTICE)