

CENTRAL ADMINISTRATIVE TRIBUNAL
CHANDIGARH BENCH

i)OA No.308-CH of 2010; ii)OA No.870-CH of 2011; iii)OA No.1089-CH of 2011; &
iv)OA No.921-CH of 2011
(Reserved on 17.2.2012)

Chandigarh, this the day of February, 2012

CORAM:HONBLE MR. JUSTICE S.D.ANAND, MEMBER(J)
 HONBLE MR.KHUSHI RAM, MEMBER(A)

i)OA No.308-CH of 2010:

1. Rajesh Shukla, Inspector, Union Territory, Police Chandigarh, Union Territory, Chandigarh.
2. Yash Pal, Inspector, Union Territory Police Chandigarh, Union Territory, Chandigarh.

APPLICANTS

BY ADVOCATE: SHRI ROHIT SETH

VERSUS

1. Union of India, through the Secretary, Government of India, Ministry of Home Affairs, New Delhi.
2. Chandigarh Administration, Chandigarh through administrator.
3. Inspector General of Police, Union Territory, Chandigarh Police Headquarters, Additional Deluxe Building, Sector 9, Chandigarh.
4. Kewal Krishan, Inspector, U.T. Police, Chandigarh, Union Territory, Chandigarh.
5. Kehar Singh, Inspector, U.T. Police Chandigarh, Union Territory, Chandigarh.
6. S.P.S.Sondhi, Inspector, U.T. Police Chandigarh, Union Territory, Chandigarh.
7. Bakshish Singh, Inspector, U.T. Police Chandigarh, Union Territory, Chandigarh.

RESPONDENTS

BY ADVOCATE: SHRI ASEEM RAI For Respondents 1 to 3

SHRI H.S.SETHI For Respondents 4 to 7

ii)OA No.870-CH of 2011:

1. Jaswinder Singh son of Sh.Ajit Singh, aged 46 years, Inspector, VIP Security, Union Territory Police, Chandigarh.
2. Charanjit Singh s/o Lt. Sh.Gurbachan Singh, aged 45 years, Inspector, Presently SHO Sector 39, U.T. Police Chandigarh, Union Territory, Chandigarh.
3. Sita Devi w/o Hardit Singh, aged 41 years, Inspector, Computer Section, Police HQ, U.T. Police, Chandigarh, Union Territory, Chandigarh.

APPLICANTS

BY ADVOCATE: SHRI ROHIT SETH

VERSUS

1. Union of India, through the Secretary, Government of India, Ministry of Home Affairs, New Delhi.
2. Chandigarh Administration, Chandigarh through Home Secretary.
3. Inspector General of Police, Union Territory, Chandigarh Police Headquarters, Additional Deluxe Building, Sector 9, Chandigarh.
4. Sukhwinder Pal Singh Sondhi, Inspector, presently working in Police Control Room, Sector 9, Police HQ, U.T. Police Chandigarh, Union Territory, Chandigarh.
5. Kewal Krishan, Inspector, U.T. Police, Chandigarh, Union Territory, Chandigarh

RESPONDENTS

BY ADVOCATE: SHRI ARVIND MOUDGIL For Respondents 1 to 3

SHRI D.R.SHARMA For Respondent No. 4.

iii)OA No.1089-CH of 2010:

1. Prem Singh son of Shri Jai Lal, aged 57 years, Inspector, Union Territory Police, Chandigarh.
2. Sudarshan Kumar, Inspector, U.T. Police Chandigarh, Union Territory, Chandigarh.
3. Devinder Sharma, Inspector, U.T. Police Chandigarh, Union Territory, Chandigarh.
4. Bhupinder Singh, Inspector, U.T. Police Chandigarh, Union Territory, Chandigarh.
5. Janak Singh, Inspector, U.T. Police Chandigarh, Union Territory, Chandigarh.
6. Nitya Nand, Inspector, U.T. Police Chandigarh, Union territory, Chandigarh.

APPLICANTS

BY ADVOCATE: SHRI ROHIT SETH

VERSUS

1. Union of India, through the Secretary, Government of India, Ministry of Home Affairs, New Delhi
2. Chandigarh Administration, Chandigarh through Home Secretary.
3. Inspector General of Police, Union Territory, Chandigarh Police Headquarters, Additional Deluxe Building, Sector 9-D, Chandigarh.
4. Kewal Krishan, Inspector, U.T. Police, Chandigarh, Union Territory, Chandigarh.
5. Kehar Singh, Inspector, U.T. Police Chandigarh, Union Territory, Chandigarh.

RESPONDENTS

BY ADVOCATE: SHRI ASEEM RAI For Respondents 1 to 3

SHRI H.S.SETHI For Respondents 4 & 5

iv)OA No.921-CH of 2011:

1. Sudarshan Kumar s/o Lt. Sh.SwaranSingh, Inspector, U.T. Police, Chandigarh, Union Territory, Chandigarh.
2. Devinder Sharma, Inspector, U.T. Police Chandigarh, Union Territory, Chandigarh.
3. Bhupinder Singh, Inspector, U.T. Police Chandigarh, Union Territory, Chandigarh.
4. Janak Singh, Inspector, U.T. Police Chandigarh, Union Territory, Chandigarh.
5. Nitya Nand, Inspector, U.T. Police Chandigarh, Union Territory, Chandigarh.

APPLICANT

BY ADVOCATE: SHRI ROHIT SETH

VERSUS

1. Chandigarh Administration through Administrator, Union Territory, Secretariat Sector 9, Chandigarh.
2. Home Secretary, Chandigarh Administration, Union Territory Secretariat, Sector 9, Chandigarh.
3. Inspector General of Police, Chandigarh Administration, Union Territory Secretariat, Sector 9-D, Chandigarh.
4. Kehar Singh, Inspector, U.T. Police Chandigarh, Union Territory, Chandigarh.
5. Sukhwinder Pal Singh s/o Shri Amar Chand, Inspector, Police Control Room, Chandigarh Police Headquarter, Sector 9, Chandigarh.

RESPONDENTS

BY ADVOCATE: SHRI ARVIND MOUDGIL For Respondents 1 to 3

SHRI D.R.SHARMA For Respondents 4 t& 5.

ORDER

HONBLE MR. JUSTICE S.D.ANAND, MEMBER(J):-

The noticing of facts with the required brevity and the respective stances of law argued on behalf of the parties must, we feel, precede the analysis of the merits and the culling out of the determination.

2. The applicants in OA Nos.308-CH of 2010, 870-CH of 2011 and 1089-CH of 2010 are all General Category candidates; while the private respondents therein are the reserved category candidates. The private respondents earned promotions to the higher grade at an earlier point of time. The applicants moved into the promotional grade subsequently. There is no controversy otherwise that the applicants were senior in the initial pre-promotion placement as against the private respondents herein.

3. The challenge in these OAs is to the validity of the view obtained by the official respondents to grant benefit of seniority to the private respondents because they moved into the higher grade earlier and their claim for retention of seniority is re-enforced by the 85th Amendment of the Constitution of India.

4. The plea raised, on the other hand, by the applicants is that the view obtained by the official respondents is invalid in view of the fact that the exercise for quantification had not been undertaken.

5. (It may be noticed that OA No.308-CH of 2010 had been filed by as many as 8 applicants. However, the OA qua applicants 1, 2 and 4 to 7 was dismissed as withdrawn in terms of order dated 14.2.2011, granted by a learned Coordinate Bench of this Tribunal. That OA is, thus, being prosecuted only by Applicants No.3 & 8, S/ShriYRajesh Shukla and Yash Pal.

6. Insofar as OA No.921-CH of 2011 is concerned, the applicants therein have applied for the quash-ment of the orders dated 19th August, 2011(Annexure A-1 therein) granted by this Tribunal in the matter of disposal of OA No.616-CH of 2011, titled Kehar Singh & another vs. Chandigarh Administration & others. The challenge proceeds on an averment that the orders therein had been obtained in the light of concealment and suppression of material facts by respondent No.5 as to pendency of OA No.1089-CH of 2010 in which his accelerated promotion as Inspector under reserve

category of respondent No.4 has been challenged by applicants and as to concealment of fact of pendency of another OA No.308-CH-2010 in which consequential seniority of respondents No.4 & 5 as Inspectors is under challenge, during pendency of above cases private respondents filed OA No.616-CH-2011 on 14 June 2011 whereas the earlier Original Application in which both the private respondents are party and are being represented were filed on 20.12.2010 and 16.04.2010, with the object to defeat the entire exercise of the applicants whose date of promotion as Inspector is likely to be antedated on succeeding in the earlier OAs making respondents No.4 & 5 junior to some of applicants and which exercise is likely to take away the eligibility for consideration & promotion of private respondents as DSPs in the light of law settled by Honble Supreme Court in case of K.Ajit babu vs. UOI JT 97(7) 24 SC and Gopalbandhu Biswas etc vs. Krishna Mohonty & ors. JT 1998(3) SC 279 and in the light of fact that this Honble Tribunal may not have granted the reliefs prayed for by the private respondents in the manner it has been done had it been informed of the previous pending litigation ..

7. Having noticed the factual aspect of the controversy, we proceed to notice the view announced by the Apex dispensation in various judicial pronouncements cited during the course of adjudication of these cases.

8. In Indra Sawhney vs. Union of India : 1993(1) SCT 448 (decided on 16.11.1992), the Honble Apex Court held as under:-

a)Reservations contemplated in Article 16(4) of the Constitution of India should not exceed 50% though in certain extraordinary situations, some relaxations may however become imperative;

b)An executive order making a provision is enforceable without being incorporated into the rule made under Article 309 proviso; and

c)Reservations of appointments of posts under Article 16(4) should confine only to initial appointment and cannot extend to providing reservation in the matter of promotion.

9. In Union of India vs. Virpal Singh Chauhan etc. : 1995(4) SCT 695 (decided on 10.10.1995), the Honble Apex Court affirmed the view held by it in Indra Sawhneys case (supra) to the effect that providing reservation in promotion is not warranted by Article 16(4). In that case, it was held that catch-up rule, though not implicit under Article 16(1) and 16(4), is Constitutionally valid.

10. In the meantime, the Constitution (Seventy seventh) Amendment Act, 1995 (assented on 17th June, 1995 and came into force on 17.6.1995) came into being. The amendment added Clause 4(A) after Clause 4 under Article 16 of the Constitution of India. Clause 4(A) is extracted hereunder:-

(4A) Nothing in this Article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

11. The fact and effect of Clause 4(A) aforementioned came up for consideration before the Hon'ble Apex Court in M.NAGRAJ & OTHERS vs. UNION OF INDIA : 2007(4) SCT664. On analysis of the entire conspectus, the factual scenario, and the available law, the Apex Court held that the impugned constitutional amendments is to on the reservations for SCS STs in promotion subject to the circumstances and the constitutional limits indicated above. In that context, it was observed that the amendment would give freedom to the State in an appropriate case depending upon the ground reality to provide for reservation in matters of promotion to any class of posts in the services. It was made clear that the State, in making provision for reservation in promotions has to form its opinion on the quantifiable date regarding adequacy of representation (Clause 4A) of Article 16 is an enabling provision. The following observations made by the Apex Court are indicative of what weighed with it in obtaining that view.

44. The above three concepts are independent variable concepts. The application of these concepts in public employment depends upon quantifiable date in each case. Equality in law is different from equality in fact. When we construe Article 16(4), it is equality in fact which plays the dominant role. Backward classes seek justice. General class in public employment seeks equality. The difficulty comes in when the third variable comes in, namely, efficiency in service. In the issue of reservation, we are being asked to find a stable equilibrium between justice to the backwards, equity for the forwards and efficiency for the entire system. Equity and justice in the above context are hard-concepts. However, if you add efficiency to equity and justice, the problem arises in the context of the reservation. This problem has to be examined, therefore, on the facts of each case. Therefore, Article 16(4) has to be construed in the light of Article 335 of the Constitution. Inadequacy in representation and backwardness of Scheduled Caste and Scheduled Tribes are circumstances which enable the State Government to act under Article 156(4) of the Constitution. However, as held by this Court the limitations on the discretion of the government in the matter of

reservation under Article 16(4) as well as Article 16(4A) come in the form of Article 335 of the Constitution.

46. The point which we are emphasizing is that ultimately the present controversy is regarding the exercise of the power by the State Government depending upon the fact-situation in each case. Therefore, vesting of the power by an enabling provision may be constitutionally valid and yet exercise of the 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.

86. The said clause (4A) was inserted after clause (4) of Article 16 to say that nothing in the said Article shall prevent the State from making any provision for reservation in matters of promotion to any class(s) of posts in the services under the State in favour of SCs and STs which, in the opinion of the States, are not adequately represented in the services under the State.

88. After the Constitution (Seventy Seventh Amendment) Act, 1995, this court stepped into balance the conflicting interest. This was in the case of Virpal Singh Chauhan 1 in which it was held that a roster-point promotee getting the benefit of accelerated promotion would not get consequential seniority. As such, consequential seniority constituted additional benefit and, therefore, his seniority will be governed by the panel position. According to the Government, the divisions in Virpal Singh¹ and Ajit Singh 1)²) bringing in the concept of catch up rule adversely affected the interests of SCs and STs in the matter of seniority on promotion to the next higher grade.

89. In the circumstances, clause (4A) of Article 16 was once again amended and the benefit of consequential seniority was given in addition to accelerated promotion to the roster-point promotees. Suffice it to state that, the Constitution (Eighty-Fifth Amendment) Act, 2001 was an extension of clause (4A) of Article 16. Therefore, the Constitution (Seventy Seventh Amendment) Act, 1995 has to be read with the Constitution (Eighty-Fifth Amendment) Act, 2001.

108. It is important to bear in mind the nature of constitutional amendments. They are curative by nature. Article 16(4) provides for reservation for backward classes in cases of inadequate representation in public employment. 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 interest. 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 make 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 decision 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 Article 16(4A) and 16(4B) are also enabling provisions. As long as the boundaries mentioned in Article 16(4), namely, backwardness, inadequacy and efficiency and 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 say once again repeat that equality is not violated by mere conferment of power but it is breached by arbitrary exercise of the power conferred.

APPLICATION OF DOCTRINE OF GUIDED POWER ARTICLE 335

109.

Para 44, 46, 86, 88, 89, 108 109 110 118 later portion marked

120 marked 124 marked portion

12. The above view by the summit dispensation was reiterated in SURAJ BHAN MEENA & ANOTHER VS. STATE OF RAJASTHAN & OTHERS, SLP(C) No.6385/2010, decided on 7.12.2010. The relevant observations are extracted hereunder:-

45. In effect what has been decided in M.nagrajs case (supra) is part recognition of the views expressed in Virpal Singh Chauhan's case (supra) but at the same time upholding the validity of the 77th, 81st, 82nd and 85th amendments on the ground that the concepts of catch-up rule and

consequential seniority are judicially evolved concepts and could not be elevated to the status of a constitutional principle so as to place them beyond the amending power of the Parliament. Accordingly, while upholding the validity of the said amendments, the Constitution Bench added that, in any event, the requirement of Articles 16(4-A) and 16(4-B) would have to be maintained and that in order to provide for reservation, if at all, the tests indicated in Article 16(4-A) and 16(4-B) would have to be satisfied, which could only be achieved after an inquiry as to identity.

46. The position after the decision in M.Nagrajs case (supra) is that reservation of posts in promotion is dependent on the adequacy of representation of members of the scheduled Castes and Scheduled Tribes and Backward Classes and subject to the condition of ascertaining as to whether such reservation was at all required. The view of the High Court is based on the decision in M.Nagrajs case (supra) as no exercise was undertaken in terms of Article 16(4-A) to acquire quantifiable data regarding the inadequacy of representation of the Scheduled Castes and Scheduled Tribes communities in public services. The Rajasthan High Court has rightly quashed the notifications dated 28.12.2002 and 25.4.2008 issued by the State of Rajasthan providing for consequential seniority and promotion to the members of the scheduled Castes and Scheduled Tribes communities and the same does not fall for any interference. Accordingly, the claim of Petitioners Suraj Bhan Meen be subject to the conditions laid down in M.Nagarajs case (supra) and is disposed of accordingly. Consequently, Special Leave Petition) Nos. 7716, 7717, 7826 and 7838 for 2010, filed by the State of Rajasthan, are also dismissed.

Para 45, 46 underline pencil marked portion red

13. A conjunctive perusal of the view announced by the Honble Apex Court in the Indra Sawhneys case (supra), Virpal Singh Chauhan's case (supra), M.Nagraj case (supra) and Suraj Bhan Meenas case would indicate that though the constitutional validity of the amendment under reference was upheld, it was made clear that the operational effect thereof would validly surface only if the State undertakes an appropriate survey on the quantifiable data regarding adequacy of representation of the reservation.

14. The learned counsel for the applicants canvassed a categorical averment that the official respondents not having undertaken a survey on the lines indicated in M.Nagraj case (supra), the private respondents could not decimate the catch-up principle which enabled the applicants to relate their seniority to entry into the promotional grade.

15. In resistance, the learned counsel representing the respondents asserted that the Union Territory Administration being bound by the instructions issued by the Government of India which (Govt. of India) has already affixed the percentage of reservation in government posts for the SC/ST category based on available facts and circumstances. The plea raised thereby is that the amendment by the Union territory Administration being based upon the Government of India instructions, cannot be invalidated. (Therefore, the competent authority/ rule making authority for the Respondent Administration in this regard is the Govt. of India which has already, based on available date and circumstances, fixed the extent of reservation to be provided to the Scheduled Castes in U.T. Chandigarh. The 85th Constitution Amendment would thus automatically apply as it is a conscious decision of the Parliament of India to amend the Constitution of India and provide consequential benefits of promotion (including seniority to the SCs/ STs candidates). As such, the claim of the applicant that there has to be separate or a re-assessment of the condition of persons belonging to these reserved categories by the State (in the case respondent-Administration) would not be applicable in the instant case.)

16. In replicating the plea raised that no survey had been undertaken, the learned counsel for the applicants in this O.A. relied upon the view obtained by a learned coordinate Bench of this Tribunal in Uttam Chand and Rajinder Singh vs. the Administrator OA No.566-CH of 2008 (Annexure MA-10 to the effect that no exercise in the context had been undertaken either by the State of Punjab or the Chandigarh Administration. (Admitted Administration 3 lines.

The learned counsel incontinuity also relied upon the view obtained by the learned Division Bench of Punjab & Haryana High Court in LAXMI NARAYAN GUPTA VS. JAS SINGH & OTHERS to the above effect. Para 38, page 76 marked portion.

(In that case the High Court was dealing with the plea raised in the context of reservation based promotions granted to the)

We find ourselves in complete agreement with the plea raised on behalf of the applicants. In (Tribunals case) a learned Coordinate Bench of this Tribunal recorded a finding, consensual in character, that no survey in the context had been undertaken by the Chandigarh Administration. In Laxmin Narain Gandhis case supra, a learned Division Bench of the High court recorded a finding page 76 31.1.2005. Faced with the predicament aforementioned, the learned counsel appearing on behalf of the respondents argued that the instructions issued by the Government of India cannot be wished away by the applicants.

We have not been able to persuade ourselves to agree with the line of stances argued on behalf of the respondents. It is the law of the land, as announced by the Honble Apex Court which shall rule the roost and no amount of administrative executive instructions issued at whatever level, could set the judicial view at naught.

It is apparent from the documentation placed on record that the Review Application filed by the official respondents .. too came to be negative by the learned Coordinate Bench of the Tribunal

In the light of the above discussion, we are clear in our mind that the claim raised by the applicants herein deserves to be allowed and we so hold accordingly in allowance of the following three OAs:-

Insofar as OA No.921` is concerned, it deserves to be rejected being completely denuded of merit. It is apparent from a perusal of the relevant judgment in that the applicants therein had applied for the grant of a direction to the official respondents to To implement the DPC recommendations in their favour. The grievance raised by them was that the Administration was trying to bring in officers on deputation from the State of Haryana which endeavour was not in accord with the rules which provide that the appointments to the post of DSPs were to be made 100% by promotion. There was, thus, no controversy in that OA about the seniority as between the General Category and Reserved Category candidates. That O.A. shall stand dismissed accordingly.

(JUSTICE S.D.ANAND)
MEMBER(J)

(KHUSHIRAM)
MEMBER(A)

Dated: February , 2012

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