

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

WRIT PETITION (ST) NO. 10009 OF 2018

Union of India through
Secretary and ors. ...Petitioners
Versus
Joel Mckenzie and ors. ...Respondents

Mr. T.J. Pandian for the Petitioner/UOI
Mr. Rahul Walia for Respondent Nos.1, 6 and 7.

**CORAM : SMT. V. K. TAHILRAMANI, Acting C.J. &
M. S. SONAK, J.**

DATE : 3rd April 2018.

ORAL JUDGEMNT:

- 1] Heard learned counsel for the parties.
- 2] Rule. With the consent of and at the request of learned counsel for the parties, Rules is made returnable forthwith.
- 3] The challenge in this petition is to the judgment and order dated 19th December 2017 in O.A. No. 276 of 2017 made by the Central Administrative Tribunal (CAT), Mumbai allowing O.A. No. 276 of 2017 instituted by the respondents. By the impugned judgment and order, the

CAT has issued the following directions :

*“12. In the circumstances, it is appropriate to adopt the decision of Hon'ble CAT, Ernakulam Bench as cited above in the present case and to direct the respondent Nos.1 & 2 to immediately resubmit their proposals for promotion to respondent No.3, who shall, within four weeks, convene the DPC and consider all eligible persons without following reservation roster and decide on selections based on seniority and merit, in pursuance of the decision rendered by Hon'ble Supreme Court in landmark case of **M.Nagaraj & Os. v. Union of India and ors. (AIR 2007 SC 71)**. If the applicants as also others are found fit for promotion, they should be promoted w.e.f. the eligible date notionally and benefits calculated accordingly. The promotions so conferred shall, naturally, be subject to the decision of the Hon'ble Apex Court in the above referred SLP.”*

4] Mr. Pandian, learned counsel for the petitioners -UOI, refers to O.M. dated 30th September 2016 issued by the Department of Personnel and Training (DoPT), New Delhi to submit that a policy decision has been taken not to process promotions of reserved category persons to unreserved posts based upon DoPT O.M. dated 10th August 2010 and Railway Board circular dated 14th September 2010. Mr.Pandian submits that if the aforesaid directions in the impugned judgment and order dated 19th December 2017 are to be complied with, then, the same will conflict with the policy decision in OM dated 30th September 2016. Mr.Pandian submits that the implementation of the

directions might possibly, give rise to issues of contempt and other complications. Mr. Pandian submits that this OM, was pointed to the CAT, however, despite the same, the CAT has issued aforesaid directive by the impugned judgment and order. Mr. Pandian submits that for this reason, the impugned judgment and order is required to be set aside.

5] In the alternate, Mr. Pandian submits that the petitioners have no difficulty in principle to effect promotions from Group - B to Group - A cadre. Mr. Pandian, however, submits that such exercise can be undertaken once the special leave petition referred to in OM dated 30th September 2016 are disposed of. On this basis, Mr. Pandian submits that this court ought to modify the directions in the impugned judgment and order so as to defer their implementation until the special leave petitions before the Hon'ble Supreme Court are disposed of.

6] Mr. Walia, learned counsel for respondent Nos.1,6 and 7, submits that the contentions now raised by Mr. Pandian have been dealt with and answered by the CAT in the

impugned judgment and order. He submits that there is neither any jurisdictional error nor any perversity of approach on the part of the CAT so as to warrant any interference with the impugned judgment and order under Articles 226 and 227 of the Constitution of India.

7] Mr. Walia submits that virtually identical contentions were dealt with and disposed of by the Ernakulam Bench of the CAT in OA No. 564 of 2017 which was disposed of by judgment and order dated 31st August 2017. The Union of India had challenged the decision of the Ernakulam Bench CAT before the Hon'ble High Court of Kerala by instituting O.P. (CAT) No. 14 of 2018. The Division Bench, vide its judgment and order dated 23rd January 2018 has dismissed the said petition. Mr. Walia submits that this is yet another reason why the present petition is liable to be dismissed.

8] Mr. Walia also relies upon the decision of this Court in Writ Petition No.848 of 2018 (**Rupesh B. Ukey vs. The Union of India and ors.**) to submit that pendency of reference to a larger bench, does not, in any manner, reduce the efficacy of the pending precedent, so referred.

Mr. Walia submits that the CAT, in the impugned judgment and order, has merely directed to consider the cases of all eligible candidates for promotion to the Group - A cadre without following any reservation roster, in view of the decision of the Hon'ble Supreme Court in ***M. Nagaraj and ors. vs. Union of India and ors. - (2006) 8 SCC 212.*** He submits that such a direction is consistent not only with the decision of the Constitution Bench in *M.Nagaraj (supra)*, but also number of later decisions of the Hon'ble Supreme Court. For all these reasons, Mr. Walia submits that the present petition may be dismissed.

9] The rival contentions now fall for our determination.

10] The contentions identical to the contentions now raised by Mr. Pandian in this petition were dealt with by Ernakulam Bench of the CAT in its judgment and order dated 31st August 2017 in O.A. No. 564 of 2017. The CAT, Ernakulam Bench, had also issued a direction, similar in principle, to the direction issued in the impugned judgment and order. In fact, the CAT, Mumbai Bench has relied upon the judgment and order dated 31st August 2017 made by

the Ernakulam Bench of the CAT in making the impugned judgment and order. Applying the principle of comity, we detect no jurisdictional error whatsoever in the Mumbai Bench of the CAT following the decision of the Ernakulam Bench of the CAT on the substantially similar issue.

11] The judgment and order dated 31st August 2017 made by Ernakulam Bench of the CAT in O.A. No. 564 of 2017 was challenged by the UOI before the Division Bench of the Kerala High Court in O.P (CAT) No. 14 of 2018. Again, the contentions identical to the contentions now raised by Mr. Pandian were raised before the Division Bench of the Kerala High Court. Upon due consideration of such contentions, the Division Bench of the Kerala High Court has dismissed the petition instituted by UOI and upheld the judgment and order dated 31st August 2017 in O.A No. 564 of 2017 delivered by Ernakulam Bench by CAT.

12] In paragraphs 6 and 7 of the judgment and order dated 23rd January 2018 delivered by the Division Bench of the Kerala High Court, this is the manner in which the contentions raised by and on behalf of UOI came to be

answered.

“6. The learned ASG submits that some SLPs are pending before the Supreme Court for consideration. It is also stated that some Contempt of Court proceedings have also been filed before the Apex Court and they are also pending. The learned ASG submits that the matter could not be proceeded further in the said circumstance and hence the delay on the part of the Department. It is also pointed out that, if at all the DPC is to be convened in terms of the direction given by the Tribunal, it has to be solely for considering the name of the respondent herein and as such, the petitioners seek for interference with Ext.P4 verdict so as to enable them to proceed with the matter later, subject to the outcome of the proceedings now pending before the Hon'ble Supreme Court.

7. After hearing both sides, this Court finds that the issue stated as pending consideration before the Hon'ble Supreme Court is having absolutely no connection whatsoever with regard to the issue projected by the respondent/applicant before the Tribunal. This is more so, since the reference made to the dictum in Nagara's case (dealing with reservation in the matter of promotion) does not come in the way of the respondent/applicant in so far as he is not a person who is coming within that segment. That apart, going by the contents of the reply statement filed before the Tribunal and also as per the submission made by the learned ASG before this Court, there is absolutely no dispute with regard to the facts, figures or credentials of the respondent/applicant in relation to his rights and liberties to be considered for the post in question. In so far as there is no dispute or rival claim with regard to the post of Assistant Passport Officer, it is sure and certain, as conceded by the learned ASG, that if the DPC is convened, the respondent will be getting the due benefit. In view of the undisputed factual position as above, this Court finds that the explanation sought to be offered from the part of the petitioners in not convening the DPC is not correct or sustainable. This

is more so, since absolutely no rule is brought to the notice of this Court that DPC cannot be convened for considering the cause of a single individual. It is also relevant to note that absolutely nothing has been stated in the pleadings raised either before the Tribunal or before this Court, as to why the DPC cannot be convened for extending the benefit to the petitioner who retired from the service on 31.08.2017. The lapse, if at all any, in not convening the DPC for the years 2016-17 and 2017-18, is solely on the part of the Department and it cannot be shifted to the shoulders of the respondent under any circumstance.

In the above circumstance, we do not find any legal or factual ground to interdict the verdict passed by the Tribunal. O.P. fails and is dismissed accordingly. However, considering the fact that the time stipulated by the Tribunal is already over, we find it appropriate to grant a further time of 'three months' to the petitioners to act in terms of Ext.P4 and extend the consequential benefits to the respondent herein."

13] Upon examining the impugned judgment and order, we see no good ground to interfere with the same or to take a different view from the view taken by the Division Bench of the High Court, Kerala. In fact, upon examining the impugned judgment and order and the directions issued therein, we are of the opinion that such directions will benefit not only the eligible candidates from the unreserved category like the respondents, but also the eligible candidates from the reserved category. In terms of *M.Nagaraj (supra)* merely because the UOI is unable to

provide for reservations at the stage of promotion in the absence of quantifiable data and fulfillment of other parameters as prescribed, that is not a good reason to deny the members of reserved category the right of consideration for promotion by competing with the general category candidates. Accordingly, there is no reason to interfere with the impugned judgment and order made by the CAT.

14] The O.M. dated 30th September 2016 has been duly considered by the CAT and such consideration, is reflected in the impugned judgment and order. On basis of such O.M, there is no question of deferring promotions. On the basis of O.M, there is no question of not considering the candidatures of the members of the reserved category for promotions, no doubt without following the reservation roster as directed by the CAT. The CAT, has adopted quite balanced approach and there is no case made out to interfere with the impugned judgment and order.

15] The contention that the directions in the impugned judgment and order need not be complied with or that the

compliance ought to be deferred because the issue as to whether *M. Nagaraj (supra)* lays down the correct position in law or not, has been referred to Larger Bench, also need not detain us. Similar contention was rejected by us in our order dated 5th March 2018 in Writ Petition No. 848 of 2018.

16] In ***Ashok Sadarangani vs. Union of India - 2012 (11) SCC 321***, the Hon'ble Supreme Court has itself held that the pendency of a reference before a Larger Bench does not mean that all other proceedings involving the same issue would remain stayed till a decision was rendered in the reference. Till such time as the decisions cited at the Bar are not modified or altered in any way, they continue to hold the field.

17] In ***Manager, National Insurance Company Ltd. Vs. Saju P. Paul and anr. - AIR 2013 SC 1064***, the Hon'ble Supreme Court has held that mere pendency of certain questions before a Larger Bench would not mean that the particular course that was followed in earlier judgments could not be followed. In ***P. Sudhakar Rao vs. Govinda Rao - 2013 (8) SCC 693***, the Hon'ble Supreme

Court has held that pendency of a similar matter before a Larger Bench does not prevent the Court from dealing with the issue on merits.

18] In **State of Maharashtra vs. Sarva Shramik Sangh, Sangli - AIR 2014 SC 61**, a prayer for postponing consideration of the proceedings was made due to pendency of reference before a Larger Bench on the issue of interpretation of the concept of “industry” as laid down in **Bangalore Water Supply and Sewerage Board vs. A.Rajappa and ors. - AIR 1978 SC 548**. The Hon'ble Supreme Court, however, rejected such plea and held that pendency of the reference is no bar to decide the matter on the basis of referred decision. In this regard, the Hon'ble Supreme Court, at paragraph 20, made the following observation:

“20. As noted earlier, the reconsideration of the wide interpretation of the concept of “industry” in Bangalore Water Supply and Sewerage Board (supra) is pending before a larger bench of this Court. However, as of now we will have to follow the interpretation of law presently holding the field as per the approach taken by this Court in State of Orissa vs. Dandasi Sahu (supra), referred to above. The determination of the present pending industrial dispute cannot be kept undecided until the judgment of the larger bench is received”.

19] 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 *M. Nagaraj (supra)*.

20] For all the aforesaid reasons, we see no ground to interfere with the impugned and order. This petition is liable to be dismissed and is hereby dismissed. There shall be no order as to costs.

(M.S. SONAK, J.)

(ACTING CHIEF JUSTICE)

