

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

Civil Writ Petition No.23597 of 2017 (O&M)
Date of Decision: October 13, 2017

Ashok Kumar & others

...Petitioners

Versus

Union of India & others

...Respondents

**CORAM: HON'BLE MR.JUSTICE AJAY KUMAR MITTAL
HON'BLE MR.JUSTICE AMIT RAWAL**

Present: Mr.Raheel Kohli, Advocate for
Mr.Samir Malik, Advocate,
for the petitioners.

AMIT RAWAL, J.

1. The petitioners, who were respondents No.7, 8, 9, 10, 11, 12, 13, 15 and 16 before the Central Administrative Tribunal, Chandigarh Bench in O.A.No.60/254/2017, are aggrieved of the interim order dated 9.3.2017, whereby in an application preferred by respondent No.5-applicant, ex-parte interim stay had been granted till 23.3.2017 giving liberty to the aforementioned respondents to move an application for modification of the order.

2. Mr.Raheel Kohli Advocate for Mr.Samir Malik, learned counsel appearing on behalf of the petitioners submitted that by way of the Constitution (Seventy-Seventh Amendment), Act, 1995, a new Clause 4A was inserted in Article 16 of the Constitution of India making provision for reservation in promotions for SCs/STs. Thereafter, the catch-up rule provided that the general category/OBC officer, who had been promoted

after another officer promoted earlier by virtue of rule of reservation would regain seniority upon promotion as laid down by the Supreme Court in **Union of India & Ors. Versus Veerpal Singh Chauhan & Ors., 1995 SCC (6) 684**. In view of the judgment aforementioned, the department had issued a letter dated 30.1.1997 adding the proviso to the general principle 5 (i) contained in MHA (now DoPT) O.M.No.911/55-RPS dated 22.12.1959 and Para 2.2 of DoPT O.M.No.22011/7/86-Estt.(D) dated 3.7.1986, which envisaged that if a candidate belonging to the Scheduled Caste or the Scheduled Tribe is promoted to an immediate higher post/grade against a reserved vacancy earlier than his senior general/OBC candidate, but promoted later to the said immediate higher post/grade, the general/OBC candidate will regain his seniority over such earlier promoted candidate of the Scheduled Caste and the Scheduled Tribe in the immediate higher post/grade. The aforementioned decision rendered in **Veerpal Singh Chauhan's case (supra)**, was retrospectively overturned by Constitutional (Eighty-Fifth) Amendment w.e.f. 17.6.1995, which added the words "with consequential seniority" in Article 16(4A).

3. It was further contended that in view of the various other letters issued by the department, vide office order dated 23.9.2002 (Annexure P-2), the petitioners were promoted as Superintendent of Customs (Preventive) in the pay scale of ₹6500-200-10500. Thereafter, vide office order dated 13.5.2005 (Annexure P-3), respondent No.5, i.e., the applicant before the CAT was promoted as Superintendent of Customs (Preventive) in the pay scale of ₹7500-250-12000. During the relevant time, i.e. , at the time of the aforesaid promotions, catch-up rule was not applicable till the judgment rendered by the Supreme Court in **M.Nagraj Versus Union of India, 2006**

(8) SCC 212, which upheld the Constitutional (85th) Amendment. In 2013, Mumbai Zone-I issued tentative seniority list of Superintendent of Customs (Preventive) and called for the objections. The eligibility list was issued by the office of the Director General Human Resource Development for making further promotions to the cadre of Assistant Commissioner.

4. Learned counsel for the petitioners next argued that respondent No.5 had earlier in 2014, vide O.A.No.060/00028/2014, challenged the action of not following the catch-up rule in view of the interim directions. During the pendency of the Original Application, on 20.4.2016, draft seniority list of Superintendent of Customs (P) working in Mumbai and Goa Customs for the period from 1.7.2001 to 30.6.2015 as on 18.4.2016 was issued and respondent No.5 was assigned the seniority at appropriate position, i.e., at Sr.No.707 (ab.). Accordingly, the Original Application, aforementioned, was withdrawn vide order dated 23.1.2017 with a direction that the matter of catch-up rule be decided by the department. On 10.2.2017, respondent No.2 issued a letter to the Chief Commissioner of Customs, Mumbai holding that DoPT OM dated 21.1.2002, whereby OM dated 30.1.1997, was withdrawn, was still valid and, therefore, catch-up rule did not exist as on date and the same could not be applied in case of respondent No.5.

5. On 23.2.2017, on application of Rule of reservation, petitioners were promoted as Assistant Commissioners on adhoc basis. It is against the aforementioned action, respondent No.5, being applicant before the CAT, moved a petition before the CAT. Resultantly, the interim order came to be passed at the back of the petitioners. The order under challenge is not sustainable despite the fact that the order was extended vide order dated

23.3.2017, but the same is in contravention of Section 24 of the Administrative Tribunals Act, 1985, for, the petitioners did not receive the notice of such extension of interim order till date. The petitioners and various other persons were transferred to places out of Mumbai under the impression that the interim order dated 9.3.2017 did not continue beyond 23.3.2017 and the petitioners including the private respondents before the CAT had submitted a representation to the department to consider them for posting in Mumbai itself, citing personal reasons, but the department transferred them out of their Mumbai postings. As a result thereof, a Contempt Petition bearing No.060/00071/2017 for non-compliance of the order dated 9.3.2017 was preferred by respondent No.5. An affidavit of compliance was filed by the Chief Commissioner of Customs, Delhi Zone stating that in view of the order dated 9.3.2017, a corrigendum office order bearing No.76/2017 dated 26.5.2017 was issued on 11.8.2017, whereby the posting of the petitioners was cancelled. As a result of the aforementioned affidavit, the contempt petition was withdrawn vide order dated 22.8.2017 (Annexure P-12). No doubt, the petitioners have also preferred an application for modification of the order and quashing of the order dated 11.8.2017, which is pending adjudication, but a grave prejudice is being caused to the petitioners owing to the interim order and as such the present petition.

6. We have heard the learned counsel for the petitioners and appraised the paper book.

7. The order under challenge reads thus:-

“1. Heard.

2. The applicant herein assails order dated 10.02.2017 (Annexure A-1), whereby respondents have rejected his

*representation to follow catch up rules while considering his case for promotion in the light of **M.Nagraj vs. Union of India and Others**, (2006 (8) SCC 212) and **UOI Vs. Veerpal Singh Chauhan (JT 1995 (7) SC 231)** and subsequent law in the case of **B.K.Pavitra & Ors. vs. UOI & Ors.**, Civil Appeal No.2369 of 2011 decided on 09.02.2017. However, without following the catch up rule, the respondents have promoted private respondents to the post of Assistant Commissioner of Customs and Central Excise. Learned counsel also apprised this Court that at earlier point of time, when respondents were granting reservation in promotion without following catch up rule, applicant filed O.A.No.060/00028/2014 in which after completion of pleadings, on 09.10.2016 and 27.09.2016, respondents have informed that matter with regard to catch up rule for determining seniority has already been referred to DOPT. He, therefore, submits that once a categorical statement has been made by the respondents that they will not hold DPC and if they decide to hold DPC, they will inform before carrying out promotion. On this assurance, O.A.was disposed of on 23.01.2017 after noticing the contention made by the applicant, Co-ordinate Bench had granted liberty to the applicant to approach this Tribunal, if respondents do not follow catch up rule. He submits that contrary to stand taken by them before this Court, respondents have passed impugned order prejudicial to his rights for promotion by not following principle of catch up. He also prayed that pending this O.A., the impugned order of promotion of private respondents be stayed as respondents have relied upon instructions, which have lost sanctity in view of the latest law laid down by the Hon'ble Apex Court in the case of **B.K.Pavitra (supra)**, wherein it has been impressed upon that there shall be no reservation in promotion and principle of catch up will apply and respondents will not proceed in the matter unless they carry out the indicate mandate. However, contrary to that, the respondents have passed the impugned orders.*

3. *Issue notice to the respondents. Sh.Ram Lal Gupta, Sr.Standing Counsel for UOI accepts notice on behalf of official respondents. He seeks and is granted, 15 days time is granted to file written statement.*

4. *Let notice be issued to private respondents for 23.03.2017.*

5. *Since we are satisfied that the impugned order of promotion of private respondents is in violation of law laid down by the highest court of law in the indicated cases, the operation of the impugned order dated 23.02.2017 shall remain stay till the next date of hearing.*

6. *If facts are otherwise, the respondents shall be at liberty to move an application for modification of this order.”*

8. The aforementioned order was passed on the basis of the submissions made on behalf of the learned counsel for respondent No.5, applicant before the CAT, by applying certain provisions of the law with liberty to the respondents to move an application for modification of the same. It is open for the petitioners to point out the provisions which have not been followed by moving an application. Admittedly, the application for modification is still pending. In our view, no prejudice would be caused to the petitioners to pursue the aforementioned application in terms of the order. Further, the order dated 9.3.2017 has been challenged by filing the present writ petition in October, 2017. Two parallel remedies, in such circumstances, in our view, cannot be allowed to continue. We, thus, would refrain to express any opinion on merits or demerits of the issue as it may prejudice interest or right of contesting parties.

9. In view of what has been observed above, we do not find any justification in interfering in the impugned order at this stage. The writ petition is hereby dismissed.

10. However, it shall be open for the petitioners to pursue the application moved before the CAT for modification of the interim order.

**(AJAY KUMAR MITTAL)
JUDGE**

**(AMIT RAWAL)
JUDGE**

**October 13, 2017
ramesh**

Whether speaking/reasoned

Yes/No

Whether Reportable:

Yes/No