

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (CIVIL) NO. 28306 OF 2017

THE STATE OF MAHARASHTRA & ANR.

Petitioner(s)

VERSUS

VIJAY GHOGRE & ORS.

Respondent(s)

WITH

Diary No(s). 28776/2017
Diary No(s). 29066/2017
Diary No(s). 30189/2017
SLP(C) No. 28446-28447/2017
Diary No(s). 33481/2017
Diary No(s). 33488/2017
Diary No(s). 34271/2017
Diary No(s). 34520/2017
Diary No(s). 35324/2017
Diary No(s). 35818/2017
Diary No(s). 35577/2017

O R D E R

When the listed matters were called for hearing for the purpose of grant of leave, Mr. K.K. Venugopal, learned Attorney General of India, placed before us an order passed by two-Judge Bench in Civil Appeal Nos. 4562-4564 of 2017 (The State of Tripura & Ors. vs. Jayanta Chakraborty & Ors.) and other connected matters, which states as under:-

"The questions posed in these cases involve the interpretation of Articles 16(4), 16(4A) and 16(4B) of the Constitution of India in the backdrop of mainly three Constitution Bench decisions - (1)"Indra Sawhney and others v. Union of India and others, (1992) Supp. (3) SCC 217, (2) E.V Chinniah v. State of A.P. and others, (2005) 1 SCC 394 and (3) M. Nagaraj and others v. Union of India and others, (2006) 8 SCC 212. One crucially relevant aspect brought to our notice is that Nagaraj (supra) and Chinniah (supra) deal with the disputed subject namely backwardness of

the SC/ST but Chinnaiah (supra) which came earlier in time has not been referred to in Nagaraj(supra). The question of further and finer interpretation on the application of Article 16(4A) has also arisen in this case. Extensive arguments have been advanced from both sides. The petitioners have argued for a re-look of Nagaraj (supra) specifically on the ground that test of backwardness ought not to be applied to SC/ST in view of Indra Sawhney (supra) and Chinnaiah(supra). On the other hand, the counsel for the respondents have referred to the cases of Suraj Bhan Meena and Another v. State of Rajasthan and others, (2011) 1 SCC 467; Uttar Pradesh Power Corporation Limited v. Rajesh Kumar and others, (2012) 7 SCC 1; S. Panneer Selvam and others v. State of Tamil Nadu and others, (2015) 10 SCC 292; Chairman and Managing Director, Central Bank of India and others v. Central Bank of India SC/ST Employees Welfare Association and others, (2015) 12 SCC 308, and Suresh Chand Gautam v. State of Uttar Pradesh and others, (2016) 11 SCC 113, to contend that the request for a revisit cannot be entertained ad nauseam. However, apart from the clamour for revisit, further questions were also raised about application of the principle of creamy layer in situations of competing claims within the same races, communities, groups or parts thereof of SC/ST notified by the President under Articles 341 and 342 of the Constitution of India.

2. Having regard to the questions involved in this case, we are of the opinion that this is a case to be heard by a Bench as per the constitutional mandate under Article 145(3) of the Constitution of India. Ordered accordingly. Place the files before the Hon'ble Chief Justice of India immediately.

3. Though the learned counsel have pressed for interim relief, we are of the view that even that stage needs to be considered by the Constitution Bench. The parties are free to mention the urgency before the Hon'ble Chief Justice of India."

Mr. Shanti Bhushan, Dr. Rajeev Dhavan, Mr. Mukul Rohtagi and Mr. Shekhar Naphade, learned senior counsel, placing reliance upon the decision of the Constitution Bench in

Bharat Petroleum Corpn. Ltd. vs. Mumbai Shramik Sangha and others, (2001) 4 SCC 448, urged that the matter could not have been directly referred to a Constitution Bench by a two-Judge Bench, more so, when the controversy has been put to rest. In the aforesaid decision, it has been held as follows :-

"1. The order of reference to a Constitution Bench is dated 13-1-1998. Two learned Judges of this Court have doubted the correctness of the scope attributed to Section 10 of the Contract Labour (Regulation and Abolition) Act, 1970 in the Constitution Bench Judgment in Gammon (India) Ltd. vs. Union of India (1974 (3) SCR 665). This is how the matter comes before us.

2. We are of the view that a decision of a Constitution Bench of this Court binds a Bench of two learned Judges of this Court and that judicial discipline obliges them to follow it, regardless of their doubts about its correctness. At the most, they could have ordered that the matter be heard by a Bench of three learned Judges.

3. Accordingly, this matter shall now be heard and decided by a Bench of two learned Judges."

Mr. Rohtagi, learned senior counsel has also drawn our attention to the decision of this Court in Suresh Chand Gautam vs. State of Uttar Pradesh & Ors., (2016) 11 SCC 13, wherein it has been ruled thus:-

"2. At the commencement of the hearing, Dr. K.S. Chauhan, learned counsel appearing for the petitioner in Writ Petition (Civil) No. 715 of 2015, had submitted that the decision in M. Nagaraj v., UOI (2006) 8 SCC 212 by the Constitution Bench requires reconsideration. For the said purpose, he has made an effort to refer to certain passages from Indra Sawhney & others v. Union of India, (1992) Supp. (3) SCC 217 & others and R.K.Sabharwal v. State of Pubjab, (1995) 2 SCC 745. We are not inclined to enter into the said issue as we are of the considered opinion that the pronouncement in M. Nagaraj (supra) is a binding precedent and has been followed in a number of authorities and that apart, it has referred to, in detail, all other

binding previous authorities of larger Benches and there does not appear any weighty argument to convince us, even for a moment, that the said decision requires any reconsideration. The submission on the said score is repelled."

According to Mr. Rohtagi, in view of the said judgment, the two-Judge Bench could not have referred the matter straightaway to the Constitution Bench.

Dr. Dhavan, learned senior counsel, in his turn would say that the two-Judge Bench was bound by the decision of this Court in M. Nagaraj and others vs. Union of India and others, (2006) 8 SCC 212, and Uttar Pradesh Power Corporation Limited vs. Rajesh Kumar and others, (2012) 7 SCC 1. He has also drawn our attention to another Constitution Bench decision of this Court in Rohtas Bhankhar and others vs. Union of India and another, (2014) 8 SCC 872, wherein the Bench has expressed:-

"7. The conclusions recorded by the Constitution Bench in M. Nagaraj v. UOI, (2006) 8 SCC 212 are also relevant and they read as under (SCC pp. 278-279, paras 121-24):-

"121. The impugned constitutional amendments by which Articles 16(4-A) and 16(4-B) 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 OBCs on one hand and SCs and STs on the other hand as held in Indra Sawhney v. Union of India, (1992) Supp. (3) SCC 217, the concept of

post-based roster with inbuilt concept of replacement as held in R.K. Sabharwal v. State of Punjab, (1995) 2 SCC 745.

122. 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.

123. However, in this case, as stated above, the main issue concerns the "extent of reservation". In this regard the State concerned 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 SCs/STs in matters 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 with 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.

124. Subject to the 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.

8. We do not think, it is necessary for us to deal with the width and scope of Article 16(4A)

any further. Insofar as U.T. Chandigarh v. Kuldeep Singh, (1997) 9 SCC 199 is concerned, we find that the matter was decided by this Court having regard to the constitutional provision contained in Article 16(4A). The view taken by this Court in Kuldeep Singh (supra) is in accord with constitutional scheme articulated in Article 16(4A). On the other hand, in S. Vinod Kumar v. UOI, (1996) 6 SCC 580, the Court failed to consider Article 16(4A). As a matter of fact, Article 16(4A) was inserted in the Constitution to undo the observations in Indra Sawhney (supra) that there cannot be a dilution of standards in matters of promotion.

9. We are in respectful agreement with the decision in Kuldeep Singh (supra) and approve the same. Ordinarily, we would have sent the matter to the Regular Bench for disposal of the matters but having regard to the nature of controversy and the fact that the Central Administrative Tribunal, Delhi (for short "the Tribunal") has followed S. Vinod Kumar (supra) which is not a good law and resultantly the 1997 O.M. is also illegal, in our view, the agony of the appellants need not be prolonged as they are entitled to the reliefs."

Having heard learned counsel for the parties in the present case, we do not intend to get into the arena whether the two-Judge Bench could have directly referred the matter to a larger Bench under Article 145(3) of the Constitution of India, when there is already a decision by the Constitution Bench and, therefore, it is thought appropriate to constitute a Constitution Bench, only to examine the issue whether the decision in M. Nagaraj and others vs. Union of India and others (supra) requires reconsideration or not.

We may hasten to clarify that we have not expressed any opinion on the correctness of the said judgment. We are only passing this order, as there is an order passed by a two-Judge Bench of this Court to place the matter before a Constitution Bench. Learned counsel for the parties, though cited the

authorities, yet very fairly stated that it can be heard by a Constitution Bench to be constituted by the Chief Justice of India.

Regard being had to the nature of the *lis* that has arisen, we think it appropriate to fix the time schedule for arguments. Mr. K.K. Venugopal, learned Attorney General for India accepts that his arguments shall not go beyond two hours. However, on our request, he accepted to finish his arguments within a span of one hour. All other learned counsel, supporting the stand of learned Attorney General, may conclude their arguments in 45 minutes. As far as the other side is concerned, they shall divide their arguments and also conclude the same within two hours. Learned counsel for the parties are requested to file their written submissions on the date the Constitution Bench assembles.

The matters be placed before the learned Chief Justice of India on the administrative side for constitution of a Constitution Bench on an appropriate date.

.....CJI.
[Dipak Misra]

.....J.
[A.K. Sikri]

.....J.
[Ashok Bhushan]

New Delhi;
November 15, 2017.

ITEM NO.301+302+303

COURT NO.1

SECTION IX

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G SPetition for Special Leave to Appeal (C) No. 28306/2017

(Arising out of impugned final judgment and order dated 04-08-2017 in CWP No. 2797/2015 passed by the High Court Of Judicature At Bombay)

STATE OF MAHARASHTRA & ANR.

Petitioner(s)

VERSUS

VIJAY GHOGRE & ORS.

Respondent(s)

(FOR ADMISSION and I.R. and IA No.108178/2017-EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT and IA No.108183/2017-EXEMPTION FROM FILING O.T. and IA No.108180/2017-PERMISSION TO FILE LENGTHY LIST OF DATES and IA No.117758/2017-PERMISSION TO FILE ADDITIONAL DOCUMENTS)

WITH

Diary No(s). 28776/2017 (XIV)

(FOR ADMISSION and I.R. and IA No.101068/2017-EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT and IA No.101064/2017-PERMISSION TO FILE SLP/TP and IA No.112655/2017-PERMISSION TO FILE ADDITIONAL DOCUMENTS)

Diary No(s). 29066/2017 (XIV)

Diary No(s). 30189/2017 (IX)

(FOR ADMISSION and I.R. and IA No.108620/2017-EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT and IA No.108623/2017-EXEMPTION FROM FILING O.T. and IA No.108613/2017-PERMISSION TO FILE SLP/TP and IA No.108619/2017-PERMISSION TO FILE LENGTHY LIST OF DATES)

SLP(C) No. 28446-28447/2017 (IX)

(FOR ADMISSION and I.R. and IA No.108765/2017-EXEMPTION FROM FILING O.T. and IA No.108766/2017-PERMISSION TO FILE LENGTHY LIST OF DATES and IA No.117968/2017-PERMISSION TO FILE ADDITIONAL DOCUMENTS and IA No.117972/2017-EXEMPTION FROM FILING O.T.)

Diary No(s). 33481/2017 (IX)

(FOR ADMISSION and I.R. and IA No.108493/2017-CONDONATION OF DELAY IN FILING and IA No.108495/2017-EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT and IA No.108499/2017-EXEMPTION FROM FILING O.T.)

Diary No(s). 33488/2017 (IX)

(FOR ADMISSION and I.R. and IA No.109200/2017-EXEMPTION FROM FILING O.T. and IA No.109198/2017-PERMISSION TO FILE SLP/TP)

Diary No(s). 34271/2017 (IX)

Diary No(s). 34520/2017 (IX)

Diary No(s). 35324/2017 (IX)

Diary No(s). 35818/2017

Diary No(s). 35577/2017

Date : 15-11-2017 These matters were called on for hearing today.

CORAM :

HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE ASHOK BHUSHAN

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Mr. Prakash Sharma, Adv.

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Mr. M. Vijaya Bhaskar, AOR

Mrs. Suchitra Atul Chitale, AOR

UPON hearing the counsel the Court made the following
O R D E R

In terms of the signed order, the matters be placed before the Chief Justice of India on the administrative side, for constitution of a Constitution Bench on an appropriate date

(Deepak Guglani)
Court Master

(H.S. Parasher)
Assistant Registrar

(Signed order is placed on the file)