

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ WP (C) No. 7164/2005

% Reserved on : 15.12.2008
Date of decision: 19.12.2008

SATVIR SINGH ...PETITIONER
Through Mr.Kamal Mehta, Advocate

Versus

UNION OF INDIA & ORS. RESPONDENTS
Through Ms. Jyoti Singh with Mr.Aditya
Chhiber and Mr.Yadunath Singh,
Advocates

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE MOOL CHAND GARG

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| 1. | Whether the Reporters of local papers
may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be
reported in the Digest? | Yes |

MOOL CHAND GARG, J.

1. The petitioner participated in a selection process for recruitment for the post of Assistant Commandant in Central Police Organization (CPOs) held by the Ministry of Home Affairs through a specially Constituted Selection Board by way of direct recruitment. The selection Board was constituted under the second respondent for the year 2002. The petitioner was an OBC candidate.

2. Pursuant to a public advertisement, the petitioner applied and was called for written examination held on 02.03.2003. In the written examination, the petitioner was declared successful as per the

communication sent by the Secretary of the special Selection Board on 15.09.2003. The said communication asked the petitioner to participate in a Physical Efficiency Test (PET), interview and medical examination on 22.3.2004.

3. It appears that travails of the petitioner started thereafter, inasmuch as before conducting his PET, the petitioner was called for measurement of height, weight and chest measurement. In so far as height and chest is concerned, the petitioner met the minimum requirement but when the weight of the petitioner was taken, it is alleged, that for ulterior motives the officer who was entrusted with this responsibility made a wrong endorsement in respect of weight measurement in violation of the established procedure and the gazette notification. Even though the weight of the petitioner was within the prescribed standards being less than 71 Kg, the officer recorded that the petitioner was over-weight. He was also rude and curt and asked the petitioner to leave immediately.

4. The petitioner then filed a writ petition before this Court being WP(C) No.11298/2004. Along with the writ petition, the petitioner annexed the material in support of his allegation that he was discriminated against. This Court vide order dated 19.07.2004 directed the respondents to forthwith allow the petitioner to appear before the Board conducting the PET and to examine the petitioner once again so as to ascertain as to whether the petitioner in fact was over-weight.

5. Pursuant to the directions of the Division Bench of this Court

dated 19.07.2004, the PET was carried out and the petitioner was found to be eligible for taking further tests and accordingly vide order dated 04.10.2004 passed in W.P.(C) No. 11298/2004, respondents were directed to allow the petitioner to take further tests which were necessary for the purpose of recruitment for the post. The said order is reproduced hereunder:

“Heard the learned counsel appearing for the parties.

The present petition was filed by the petitioner praying for a direction to the respondents to allow the petitioner to re-appear in the medical examination including re-measurement so that the petitioner could be considered for recruitment to the post of Assistant Commandant in the Central Police Organization.

The petitioner herein qualified in the written examination that was held by the respondents. Although the petitioner qualified in the said written examination held for the purpose of recruitment to the post of Assistant Commandant yet the petitioner was disqualified on the ground of being over-weight in the measurement test held prior to the petitioner taking his physical efficiency test. Since the petitioner was disqualified being over-weight, he was not allowed to appear in the physical efficiency test. Upon going through the records and considering the entire facts and circumstances of the case, an order was passed by this Court on 19th July, 2004 allowing the petitioner to appear before the medical board, conducting the physical efficiency test, for medical examination of the petitioner and also to take his physical measurements once again so as to ascertain whether the petitioner was, in fact, over-weight. Pursuant to the said order, the petitioner once again appeared before the medical board and he was examined by the said medical board. After the said physical measurement/physical efficiency test the petitioner was not only found to be within the permissible limit of weight but he has also qualified and passed the physical efficiency test.

In view of the aforesaid position, it is ordered that the petitioner should be allowed to take further tests, which are necessary for the purpose of recruitment to the aforesaid post. If the petitioner qualifies in the said test and is found suitable in all respects and subject to his satisfying all other requirements, his case shall be considered for recruitment to one of such posts, which were advertised by the respondents. It is, however, made clear that this order is passed in the peculiar facts and circumstances of this case and the same shall not be treated as a precedent in any other case.

Petition stands allowed to the aforesaid extent and is disposed of in terms of the aforesaid order. Copy of this order be given DASTI to the counsel appearing for the parties.”

6. Despite the aforesaid order, the petitioner was not called for interview by the respondents, which was the next step towards selection. The petitioner then filed a contempt petition bearing CCP No. 45/2005, notice thereof was issued to the respondents, who filed reply to the contempt petition and also preferred a review petition against the order dated 04.10.2004. The same was dismissed by this Court vide order dated 11.02.2005 and directions were issued to the respondents to comply with the order dated 04.10.2004 in letter and spirit. The said order dated 11.02.2005 passed by a Division Bench of this Court is reproduced for the sake of reference:

"R.A.21/2005 in W.P.(C) 11298/2004

This review petition is filed by the respondents contending, inter alia, that the judgment and order dated 4th October, 2004 is required to be review in view of the fact that there were 304 candidates, who were rejected on the ground of physical measurement, out of which 66 similarly situated cases as that of the writ petitioner were rejected on the ground of over-weight/under weight. It is submitted that in case the said judgment is allowed to stand, the same would create administrative difficulties and complications for the respondents.

We have heard the learned counsel appearing for the parties on the said application. In para 17 of the counter affidavit, it is stated that from 2002 and onwards measurement of weight is done by Physical Efficiency Test Board only. In support of the said contention, a copy of the physical efficiency test chart and proforma prescribed by the Union Public Service Commission are annexed as Annexure R-6 and R-7 respectively. We have carefully perused the said annexures, which are relied upon by the respondents in their counter affidavit. Para 9.4 of the format annexed thereto indicates and clearly establishes that weight would not be disqualification at the stage of physical efficiency test. However, the same is required to be assessed for its disqualification during medical examination. In the present case, weight of the petitioner was measured before the petitioner could take the physical efficiency test. In terms of the said paragraph the respondents also could not have rejected the candidature at that stage and should have waited till medical examination. Having regard to the aforesaid criteria, which is prescribed, the petitioner could not have been declared as disqualified, at that stage, as the factor of weight should have been considered, according to the own case of the respondent, during medical examination.

It is established from the records that at the relevant time when the weight of the petitioner was measured, the aforesaid

proforma, prescribed by UPSC, was in operation and, therefore, the same is applicable to the facts and circumstances of the present case.

Counsel appearing for the respondent, however, has drawn our attention to para 20 of the counter affidavit. In our considered opinion the said statements instead of helping the respondents further the case of the petitioner, as it is an admitted position therein that with effect from 2003 and onwards for filling up the post of CPFs (Assistant Commandant) examination, overweight is not being considered as disqualification at the stage of physical efficiency test but during medical examination the same could be considered as a disqualification.

In that view of the matter, we are of the considered opinion that no review of our judgment and order is called for. The application has no merit and is dismissed. It is also reiterated that the order passed on 4th October, 2004 and this order are passed in the peculiar facts of the present case."

7. That even thereafter the respondents instead of complying with the orders dated 04.10.2004 and 11.02.2005 did not call the petitioner for interview even though they made a statement during the course of contempt petition that the petitioner will not be prejudiced and steps will be taken to ensure that he is able to undergo the complete training. In these circumstances, the Division Bench again passed an order dated 18.03.2005 directing the respondents to comply with the earlier orders, which order is also reproduced for the sake of reference:

"Counsel appearing for the respondents submits that the review petition filed by them against the judgment dated 4th October, 2004 has been dismissed. Adjournment is requested on behalf of the respondents on the ground that certified copy of the judgment has been applied for to enable the respondents to implement the same. Counsel for the respondents on instructions submits that a period of four weeks may be given to enable the respondents to implement the judgment and to place status report in that behalf before this Court. Accordingly, the respondents are given further period of four weeks for placing on record the status report of compliance with the judgment.

It is pointed out on behalf of the petitioner that training of the Assistant Commandants in the B.S.F. and C.R.P.F. has already been started and that training in the I.T.B.P. has to commence shortly and the petitioner apprehends that his rights would be prejudiced on

account of delay.

On the other hand, counsel for the respondents submits that the petitioner shall not be prejudiced and steps would be taken to ensure that he is able to undergo the complete training.

Renotify on 18th March, 2005.

Copy of this order be given dasti to the counsel for the parties."

8. The petitioner thereafter was allowed to participate in the interview held on 14.03.2005. However, it is the case of the petitioner that when the petitioner went to participate in the interview he was shocked and surprised to face with a hostile atmosphere inasmuch as he was asked various uncomfortable questions about the litigation before this Court pursuant to filing of a writ petition about his physical measurement and was made to understand that filing of the case is not sufficient as it was an Interview Board which has all the powers to reject his candidature.

9. The petitioner also filed an application for holding an independent Interview Board without participation of the officials of BSF who were annoyed with the petitioner on account of his approaching this Court earlier but his application filed in this regard was allowed to be withdrawn as this Court vide its order dated 22.03.2005 was of the view that the petitioner may agitate his other grievance, if any, by filing a separate writ petition.

10. The petitioner filed W.P.(C) No. 5868/2005, however as the result had not been declared at that time, the petitioner withdrew that writ petition, which was termed as premature but liberty was granted to the petitioner to file a fresh petition after the result is declared.

11. In an affidavit filed by the respondents to the earlier contempt petition dated 08.04.2005, it was informed that the petitioner could not make in the merit list in the interview held on 14.03.2005 and accordingly he could not be considered for the post of Assistant Commandant and it is thereafter, the petitioner filed the present writ petition.

12. Before us, it is the case of the petitioner that the respondents have ensured that the petitioner does not make it in the interview even though he otherwise made his mark, inasmuch as the total marks secured by him in the written examination were 157 which were much higher than many of the candidates who were selected. It was only in the interview he was given 92 marks out of 200 which also included overall assessment including other curricular activities where he was given only 15 out of 40 while almost every candidate was given higher marks. He could not be selected because he was given 249 marks, whereas the last selected candidate was given 251 marks. According to the petitioner, the mala fides of the respondents are writ large as the petitioner had been categorically informed even at the time of interview that since the petitioner had filed a writ petition about his measurement, he would not be successful. This also became clear when the fact of the petitioner having not made it, was not disclosed on the date of hearing of his earlier writ petition on 11.04.2005 even though the interview was held on 14.03.2005 basically to suppress and conceal the said fact from this Court, more so when the affidavit informing the result was sworn on 08.04.2005.

13. According to the petitioner, his apprehensions that he may not be selected and may be kept away by the respondents from the selection were found to be correct when the respondents disclosed the marks obtained by the petitioner in the interview board and, in particular, in respect of the extra-curricular activities, which ultimately deprived him from selection in the panel of OBC candidates just by two marks.

14. Earlier the petitioner was sought to be rejected by alleging that he was over-weight but after he was allowed to undertake the interview and was also sent for medical examination pursuant to an order passed by this Court in W.P.(C) No. 11298/2004, his merits after the interview has been wrongfully shown to be lower by granting him lesser marks in a criteria, i.e., in respect of his other extra-curricular activities despite the fact that he filled the concerned column in the form and placed on record his certificates about his participation in NCC and other activities. The others who did not even say anything in respect of that column about their curricular activities nor produced any certificates were given more marks than the petitioner so as to deprive the petitioner of the selection inasmuch as the last person appointed was granted 251 marks whereas the petitioner was granted 249 marks. This happened because more than 10 persons were granted 30 out of 40 in respect of extra-curricular activities, whereas the petitioner was only granted 15 without any rhyme or reason. It has been submitted that right from the beginning it has been the case of the petitioner that the interview proceedings held by the respondents qua the petitioner were highly prejudiced and it was apparent from day

one that the petitioner will be kept out of the selection and would not be allowed to be successful ultimately. In these circumstances, the petitioner while filing the present writ petition made the following prayers:

- a) issue a writ of certiorari and/or any other appropriate writ, order or direction of the similar nature quashing the interview proceedings for the post of Assistant Commandant held on 14.03.2005 for interviewing the petitioner.
- b) issue a writ of certiorari and/or any other appropriate writ, order or direction of the similar nature quashing the declaration of the result pursuant to the interview held on 14.03.2005 whereby the petitioner is declared unsuccessful.
- c) issue a writ of mandamus and/or any other appropriate writ, order or direction in the similar nature directing the respondents to constitute the independent interview board de-hors the officials from the respondent No. 2 being the interested party in the entire dispute between the petitioner and the respondents.
- d) Such other or further orders and/or directions as this Hon'ble Court may deem fit, just and proper.

15. The respondents have contested the proceedings by filing a counter affidavit solely on the ground that the petitioner was not able to secure enough marks so as to find a place in the merit list.

16. The respondents were directed to file relevant records. From the details of the list of the selected candidates of the OBC category in which the case of the petitioner also falls, it is apparent that the petitioner obtained 91 marks in Part-I of the objective type

examination and 66 in Part-II examination which was of descriptive type. As such, he got 157 marks out of 300 marks in written examination and thus secured marks much more than almost all the selected candidates. However, with respect to his extra-curricular activities the petitioner has been granted 15 out of 40 whereas more than 10 persons have been granted 30 out of 40 despite the fact, that in the relevant column the petitioner mentioned about his participation in various sports & other activities, the others just left the column blank. Thus, while assessing the petitioner in respect of his other extra-curricular activities, intentionally he was given the lowest marks i.e. 15 out of 40, primarily because the respondents were not willing to permit the petitioner to come in the list of the selected candidates who have been successful with 251 marks as per the list filed by the respondents themselves which includes even the interview marks which are much lower than the marks received by the petitioner which are 92 solely because he has been given the lowest marks in respect of his other extra-curricular activities i.e only 15 whereas the others were granted marks varying from 26 to 30. Had the petitioner been granted 17 instead of 15, he would have been in the select list. As a matter of fact, all persons above him who have also not been selected with even 250 marks have all been granted marks ranging from 26 to 28.

17. The respondents were asked during the course of hearing of the matter to specify the criteria which prevailed in the mind of the Selection Board for granting marks in respect of column of extra-curricular activities and as to why only 15 marks were given to the petitioner while the marks given to others varied from 26 to 30, but no

explanation could be furnished. It is surprising to note that those who did not even mention any interest in the extra-curricular activities have been granted more marks than the petitioner, who has only been granted 15 marks, despite the fact that he disclosed his extra-curricular activities and sports activities in the relevant column.

18. It is their case that out of 200 marks fixed for interview, the petitioner scored only 92 marks and therefore, after including the written examination marks his total marks stood 249, whereas the last person selected was having 251 marks. Thus, as the petitioner fell below the cut off marks, he could not be selected. It is also their case that out of 40 marks in the category of "Overall assessment including other extra-curricular activities" the petitioner got only 15 marks out of 40, whereas many others got more marks than him which also include the candidates who were not selected. Hence, it is submitted that the petitioner who once participated in the selection process cannot now question the selection and therefore, they pray that the writ petition be dismissed.

19. Learned counsel for the petitioner submitted that the manner in which the respondents conducted themselves right from the date of calling the petitioner for PET and taking his measurements which as stated above were not correct. It is apparent that the respondents have awarded lowest marks to the petitioner in respect of extra-curricular activities only to keep him out of selection. This reflects arbitrariness and malice on the part of the respondents. It has been submitted that such arbitrariness and malice tantamount to inequality

and strikes at the root of Article 14 of the Constitution of India and cannot be sustained. As such, the petitioner becomes entitled to the consequential reliefs as prayed for by him in this petition.

20. We have heard the learned counsel for the parties and have also perused the written submissions filed by them.

21. The Hon'ble Supreme Court in the case of *Ramana Dayaram Shetty Vs. International Airport Authority of India & Ors.* reported in **(1973) 3 SCC 489** has discussed the concept of equality in relation to arbitrariness. It has been held that arbitrariness in state action strikes at the very root of equality and, thus, violative of the provisions contained under Article 14 of the Constitution of India and thus, cannot be sustained.

22. Some observations made by the Apex Court in the aforesaid case are reproduced hereunder:

"10. It is a well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. This rule was enunciated by Mr. Justice Frankfurter in *Viteralli v. Seton* 359 U.S. 535 : 3 Law. Ed. (Second series) 1012 where the learned Judge said:

An executive agency must be rigorously held to the standards by which it professes its action to be judged. Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword.

This Court accepted the rule as valid and applicable in India in *A.S. Ahluwalia v. Punjab* [MANU/SC/0363/1974](#) and in subsequent decision given in *Sukhdev v. Bhagatram* [MANU/SC/0667/1975](#) Mathew, J., quoted the above-referred observations of Mr. Justice Frankfurter with approval. It may be noted that this rule, though supportable also as emanation from Article [14](#), does not rest merely on that article. It has an independent existence apart from Article [14](#). It is a rule of administrative law which has been judicially evolved as a check against exercise of arbitrary power by the executive authority. If we turn to the judgment of Mr. Justice Frankfurter and examine it, we find that he has not sought to draw support for the rule from the equality clause of the United States Constitution, but evolved it purely as a rule of administrative law. Even in England, the recent trend in administrative law is in that direction as is evident from what is stated at pages 540-41 in Prof. Waders Administrative

Law 4th edition. There is no reason why we should hesitate to adopt this rule as a part of our continually expanding administrative law. Today with tremendous expansion of welfare and social service functions, increasing control of material and economic resources and large scale assumption of industrial and commercial activities by the State, the power of the executive Government to affect the lives of the people is steadily growing. The attainment of socio-economic justice being a conscious end of State policy, there is a vast and inevitable increase in the frequency with which ordinary citizens come into relationship of direct encounter with State power-holders. This renders it necessary to structure and restrict the power of the executive Government so as to prevent its arbitrary application or exercise. Whatever be the concept of the rule of law, whether it be the meaning given by Dicey in his "The Law of the Constitution" or the definition given by Hayek in his "Road to Serfdom" and "Constitution of liberty" or the exposition set-forth by Harry Jones in his "The Rule of Law and the Welfare State", there is, as pointed out by Mathew, J., in his article on "The Welfare State, Rule of Law and Natural Justice" in "Democracy, Equality and Freedom," "substantial agreement is in juristic thought that the great purpose of the rule of law notion is the protection of the individual against arbitrary exercise of power, wherever it is found". It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affection of some right or denial of some privilege.

11. Today the Government, is a welfare State, is the regulator and dispenser of special services and provider of a large number of benefits, including jobs contracts, licences, quotas, mineral rights etc. The Government pours forth wealth, money, benefits, services, contracts, quotas and licences. The valuables dispensed by Government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth. These valuables which derive from relationships to Government are of many kinds. They comprise social security benefits, cash grants for political sufferers and the whole scheme of State and local welfare. Then again, thousands of people are employed in the State and the Central Governments and local authorities. Licences are required before one can engage in many kinds of business or work. The power of giving licences means power to withhold them and this gives control to the Government or to the agents of Government on the lives of many people. Many individuals and many more businesses enjoy largess in the form of Government contracts. These contracts often resemble subsidies. It is virtually impossible to lose money on them and many enterprises are set up primarily to do business with Government. Government owns and controls hundreds of acres of public land valuable for mining and other purposes. These resources are available for utilisation by private corporations and individuals by way of lease or licence. All these mean growth in the Government largess and with the increasing magnitude and range of governmental functions as we move closer to a welfare State, more and more of our wealth consists of these new forms. Some of these forms of wealth may be in the nature of legal rights but the large majority of them are in the nature of privileges. But on that account, can it be said that they do not enjoy any legal protection? Can they be regarded as gratuity furnished by the State so that the State may withhold, grant or revoke it at its pleasure? Is the position of the Government in this respect the same as that of a private giver? We do not think so. The law has not been slow to recognise the importance of this new kind of wealth and the need to protect individual interest in it and with that end in view, it has developed new forms of protection. Some interests in Government largess, formerly regarded as privileges, have been recognised as rights while others have been given legal protection not only by forging procedural safeguards but also by confining/structuring and checking Government discretion in the matter of grant of such largess. The discretion of the Government has been held to be not unlimited in that the Government cannot give or withhold largess in its arbitrary discretion or at its sweet will. It is insisted, as pointed out by Prof. Reich in an especially stimulating article on "The New Property" in 73 Yale Law Journal 733, "that Government action be based on standards that are not arbitrary or unauthorised." "The Government

cannot be permitted to say that it will give jobs or enter into contracts or issue quotas or licences only in favour of those having grey hair or belonging to a particular political party or professing a particular religious faith. The Government is still the Government when it acts in the matter of granting largess and it cannot act arbitrarily. It does not stand in the same position as a private individual.

12 The State need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure." This proposition would hold good in all cases of dealing by the Government with the public, where the interest sought to be protected is a privilege. It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largess including award of jobs, contracts, quotas, licences etc., must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.

21. This rule also flows directly from the doctrine of equality embodied in Article [14](#). It is now well settled as a result of the decisions of this Court in *E. P. Rayappa v. State of Tamil Nadu* [MANU/SC/0380/1973](#) and *Maneka Gandhi v. Union of India* [MANU/SC/0133/1978](#) that Article [14](#) strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non-discriminatory....."

23. Applying the aforesaid principles to the facts of this case, we are satisfied that the respondents have acted with malice and have discriminated against the petitioner in granting 15 marks to the petitioner in respect of extra-curricular activities while granting more marks to other candidates which goes upto 30 even though the petitioner was candid in having specified his interest in extra-curricular activities in the relevant column while the others kept silent, yet got more marks than the petitioner. The reason for awarding low marks to the petitioner is obvious that is to keep him out of the list of selected candidates. If no special interest is specified it can be hardly be expected that the selection board would ferret out information from the candidate given the limited time period of an interview.

24. The purpose of the respondents was to find out the particular

interest of the candidate in respect of extra-curricular activities which has nothing to do with the object for which they were being recruited. The assessment of a person in respect of the aforesaid column and particularly specified therein cannot be done on the basis of not providing any information i.e. by leaving the said column blank which is the case in respect of other candidates, some of whom have even been awarded 30 marks out of 40 and others who have been awarded more than the marks given to the petitioner. Thus, it is apparent, that there was a malice on the part of the respondents which certainly tantamounts to discrimination and thus brings inequality and such action is covered by Article 14 of the Constitution of India and can be struck down.

25. A reference can also be made to a judgment of the Hon'ble Supreme Court in the case of *Inder Prakash Gupta Vs. State of Jammu and Kashmir & Ors.* **AIR 2004 SCC 2523** where the petitioner in that case who admittedly possessed of higher qualifications and had a record of research experience, publication etc. in comparison to other selected candidates who were not having such records but was assigned minimum marks for the viva test solely with a view to downgrade him in the merit list. The Apex Court held that the marks given to the said candidate were in breach of the Statutory Rules and, therefore, the marks given to the petitioner in that case which were minimum were not sustained and it was ordered:

"We are, therefore, of the opinion that the interest of justice would be subserved if the State is directed to fully comply with the directions of the High Court by giving all benefits to the appellant herein including monetary benefits and seniority by

placing him in the select list above respondents 3 and 9. We further direct that if any respondent has been promoted to the higher post in the meantime the same would be subject to our aforementioned direction. Necessary order in this behalf must be passed by the State.”

26. Similarly, in the case of *P.Mohanan Pillai Vs. State of Kerala & Ors.* reported in **2007 (3) SCALE 548** where also the petitioner was kept out of selection by giving him lesser marks, the Court observed that it was reasonable to draw an inference of favouritism and also held that such an exercise of power to keep the person out of job tantamount to malice in law and, therefore, cannot be sustained. The relevant paragraph is reproduced as under:

“In this case allocation of marks for interview was in fact misused. It not only contravened the ratio laid down by this Court in *Ashok Kumar Yadav (supra)* and subsequent cases, but in the facts and circumstances of the case, it is reasonable to draw an inference of favouritism. The power in this case has been used by the Appointing Authority for unauthorized purpose. When a power is exercised for an unauthorized purpose, the same would amount to malice in law (see *The Manger, Govt. Branch Press and Another V. D.B.Bellippa-AIR 1979 SC 429*, *Punjab State Electricity Board V. Zora Singh and others – (2005) 6 SCC 776* and *K.K.Bhalla V. State of M.P. and others (2006) 3 SCC 581*”

27. In the case of *Punjab State Electricity Board Ltd. Vs. Zora Singh & Ors.* reported in **2005 6 SCC 776** the Hon’ble Supreme Court defined malice in law in the following words:

“A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so for the state of his mind is concerned, he acts ignorantly, and in that sense innocently’ Thus malice in its legal sense means malice such as may be assumed from the doing of a wrongful act intentionally but without just cause or excuse, or for want of reasonable or probable cause.”

28. The ‘principles of malice’ have also been considered in the same judgment in the following words:

In *State of A.P. Vs. Goverdhanlal Pitti* this Court observed:

“12. The legal meaning of malice is ‘ill will or spite towards a party and any direct or improper motive in taking an action’ This is sometimes described as malice in fact. ‘Legal malice’ or malice in law’ means something done without lawful excuse’. In other words, ‘it is an act done wrongfully and willfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard of the rights of others’. (see Words and Phrases Legally defined, 3rd Edn., London Butterworths, 1989).

13. Where malice is attributed to the State, it can never be a case of personal ill will or spite on the part of the State. If at all it is malice in legal sense, it can be described as an act which is taken with an oblique or indirect object. Prof. Wade in his authoritative work on Administrative Law (8th Edn. At p.414) based on English decisions and in the context of alleged illegal acquisition proceedings, explains that an action by the State can be described mala fide if it seeks to acquire land for a purpose not authorized by the Act.”

(See also Chairman & MD, BPL Ltd., V. S.P.Gururaja and P.Ajaneyulu V. Chief Manager, A.P.Circile, Bharat Sanchar Nigam Ltd.

29. In the facts of this case and taking into consideration the history of litigation, it is apparent that the numbers given in viva test out of 40 in particular head “Overall assessment including other extra-curricular activities”, where the petitioner has been given only 15 marks out of 40 despite his disclosing interest in other curricular activities, whereas 30 marks have been given to those who were silent in making such disclosure tantamounts to misusing/abusing the powers vested in the respondents and, thus, tantamount to arbitrariness and thus an act of discrimination qua the petitioner and is, therefore, violative of Article 14 of the Constitution of India and cannot be sustained.

30. Thus, taking into consideration the aforesaid facts, we have no hesitation in observing that it is a case where the respondents have intentionally kept the petitioner out of the select list because they were annoyed with the petitioner as he filed a writ petition challenging his rejection on the ground of his being overweight and having levelled

certain allegations qua the behaviour of the respondents and the members of the Interview Board in his earlier pleadings filed by him. The apprehension expressed by the petitioner even before the result was declared is writ large in view of the overall conduct of the respondents who have tried to justify their assessment in respect of the marks given to the petitioner in respect of the curricular activities which are lowest by stating that the marks were given by the Interview Board only on the basis of oral interview without anything stated by those candidates in the relevant column or by producing any certificates in this regard. They have placed on record the photocopies of the application form signed by the petitioner and others which fortified the aforesaid position. Thus, while we do not wish to interfere in respect of the selection criteria or the procedure adopted by the respondents, we are clear in our mind that the manner in which the marking has been done by the respondents in respect of the criteria of curricular activities deserves to be deprecated, as the said criteria is apparently applied in an arbitrary manner and, thus, brings an inequality and becomes violative of Article 14 of the Constitution and cannot stand the test of judicial scrutiny. We are conscious of the fact that the selection process pertains to the year 2002 and several persons who might have already been selected may be affected by any direction which is given by us but in this regard we can only say that the other candidates who might have been benefitted by our observations which we are going to make, but having not approached us would not be benefited by the observation made by us in their petition, if any, filed subsequently.

31. In view of aforesaid, we issue a writ of mandamus directing the respondents to treat the petitioner as selected candidate in the panel for the year 2002 by granting him 30 marks in place of 15 marks in the "Overall assessment including other extra-curricular activities" and thereby placing him in the merit list of OBC candidates over and above the last person who would have got equal marks, that is, 264 marks and to appoint him as Assistant Commandant in a cadre which would have been assigned to either the person just above him or the person just below him without paying him pay and allowance for the intervening period and by fixing his notional pay as if he has joined the service on the date when the last selected candidate joined the service and started paying him salary after fixing his salary as if he would have been selected on the date when the last selected candidate was appointed. This, of course, will be subject to petitioner undergoing training, etc. as may be required. Needful be done by the respondents within a period of three months from day. We also award the costs of Rs. 10,000/- which shall also be paid to the petitioner within a period of three months.

32. The writ petition is accordingly allowed.

MOOL CHAND GARG, J.

December 19, 2008
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SANJAY KISHAN KAUL, J.