

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **WRIT PETITION (CIVIL) 4135 OF 2008**

Reserved on : 14th August, 2008

Date of Decision : 9th January, 2009

SHRI BHASKARENDU DATTA MAJUMDAR Petitioner

Through: Mr. V.P. Singh, Sr. Adv. with
Mr. Ashish Vachher, Adv.

versus

UNION OF INDIA & ANOTHER Respondent

Through: Mr. R.N. Singh, Adv. for
respondent no.1.
Mr. R.K. Anand, Sr. Adv. with
Ms. Shivani Lal, Adv. for
respondent no.2.

% **CORAM:**
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

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

J U D G M E N T

SIDDHARTH MRIDUL, J.

1. By way of this writ petition the petitioner, *inter alia*, seeks a direction to the respondents to reconsider the petitioner for appointment to the post of Director (Marketing), and for quashing of communication bearing no. 7/143/05-PESB dated 7th March, 2008, circulated by the respondents for the vacancy to the post of the Director (Marketing).

2. Briefly, the facts necessary for the adjudication of the present

writ petition are that:

- (a) the petitioner joined the State Trading Corporation (respondent no.2) in the grade of Chief Marketing Manager on the 29th April, 1991. According to the petitioner he has, right from the day he joined, maintained an impeccable service record and was, therefore, given the responsibility of some very important assignments within the organization. According to the petitioner in October, 1994 one Sh. B.K. Chaturvedi joined respondent no.2 as the Chairman-cum-Managing Director(CMD). According to the petitioner the said Sh. B.K. Chaturvedi displayed an attitude of prejudice against the petitioner as well as against the earlier CMD, one Sh. S.C. Vaish. The petitioner states that, therefore, during the tenure of the new CMD three false and frivolous major penalty proceedings were initiated against the petitioner apart from the CBI registering two FIRs. In January, 1996 based on the first case registered with the CBI the petitioner was placed under suspension and his name appeared in the 'Agreed List'. Disciplinary proceedings were launched against the petitioner. On the 28th October, 1999 the CBI filed a closure report before the concerned court and the concerned court closed the FIR lodged against the petitioner, since nothing adverse was found on detailed investigation. Consequently, in December, 1999 the respondent no.2 as a sequel to the closure of the CBI case

revoked the suspension of the petitioner and reinstated him in service. On the 15th June, 2001 a departmental order was passed exonerating the petitioner from a departmental enquiry. In July, 2003 the petitioner was also promoted as General Manager of respondent no.2 on purely ad hoc basis. On behalf of the petitioner it is urged that another departmental order was passed on the 16th August, 2001 exonerating the petitioner from another departmental enquiry. However, on the 30th August, 2001 a memorandum was issued to find out as to whether the petitioner was involved in any administrative lapse. In March, 2004 the disciplinary authority exonerated the petitioner in the memorandum dated 30th August, 2001. In the meanwhile on the 15th April, 2004 another departmental order was passed exonerating the petitioner from a departmental enquiry. Thus, according to the petitioner all the departmental enquiries and criminal complaint cases were duly enquired into and investigated as per due process of law and on being found to be false accordingly ended with the petitioner being honourably acquitted of all of them. The petitioner further states that since the concerned court had closed the FIRs filed by the CBI in both the FIRs, thus, the name of the petitioner bearing in the 'Agreed List' was deemed to have been deleted. On the 28th June, 2004 the petitioner was promoted as the Chief General Manager of the respondent

no.2.

- (b) In December, 2005 the respondent no.2 circulated a post of Director (Marketing) for which a vacancy was likely to arise. Since the petitioner was eligible to be appointed to the said post, he applied for the said post on the 27th December, 2005. The petitioner alongwith other candidates ultimately appeared for an interview before the Public Enterprises Selection Board (PESB). After the interview, the PESB short listed two candidates and made a panel in which the petitioner was placed at rank no.1 and one Sh. Neeraj Mishra was placed at rank no.2, in order of preference. That on or around the 24th April, 2006, in accordance with the procedure laid down, the Central Vigilance Commission (CVC) also issued a vigilance clearance in favour of the petitioner. The recommendations of the PESB were thereafter forwarded to the Appointments Committee of the Cabinet (ACC) for final approval.
- (c) According to the petitioner, to the best of his knowledge, the Department of Commerce being the Administrative Ministry selected the name of the petitioner and forwarded it for final approval to the ACC. Further, the petitioner states that the concerned Minister of Commerce approved the name of the petitioner as a member of the ACC. The petitioner also states that his name was further

endorsed by the Home Minister as the second member of the ACC. However, according to the petitioner the file which had been sent to the Prime Minister through the Cabinet Secretary was held up on a query being raised as to why his name had been proposed in view of the alleged cases of serious dimensions pending against the petitioner at one point of time.

- (d) Consequently, even after the earlier incumbent in the post of Director (Marketing), one Sh. K.K. Sood retired on 30th November, 2006, the petitioner was not appointed, and therefore, vide representation dated 6th March, 2007 the petitioner represented against the disinformation campaign being carried out against him despite his having been exonerated in all cases. However, no reply was received to the said representation by the petitioner. The petitioner thereafter submitted another representation dated 8th March, 2007 to the Establishment Officer, Department of Administrative Reforms and Public Grievances but to no avail. The petitioner states that he thereafter submitted a representation to the Prime Minister on the 11th February, 2008. However, no reply to the said representation has been received by the petitioner. On the 7th March, 2008 the petitioner learnt about communication bearing no. 7/143/05-PESB being circulated for the vacancy of Director (Marketing), thereby inviting applications from eligible candidates. The

petitioner is aggrieved by this communication as well as by the lack of any communication to the petitioner with respect to the rejection of the petitioner's appointment.

- (e) According to the petitioner it is reliably learnt by him that the said Sh. B.K. Chaturvedi, IAS, who was earlier CMD of respondent no.2 and became the Cabinet Secretary at the relevant time, presented a disfigured picture before the ACC which resulted ultimately in the process of appointment being started afresh.

3. Mr. V.P. Singh, Senior Advocate appearing on behalf of the petitioner made twofold submissions. He firstly submitted that when the ACC makes appointments and intends to differ from the recommendations of the PESB, the former must record reasons for so differing and consequently that, even if those reasons need not be communicated to the officer concerned, the file relating to those reasons is subject to the scrutiny by the Court, when that decision is challenged. In this behalf it is relevant to point out that the records of the proceedings of ACC have been produced for the perusal of this Court. In this regard learned Senior Counsel for the petitioner has placed reliance on the following two decisions:

1. ***Union of India and Others vs. N.P. Dhamania and Others***; 1995 Supp (1) SCC 1.
2. ***S.K. Mutreja vs. Union of India & Ors.***; 117 (2004) Delhi Law Times 66.

4. In *Union of India and Others vs. N.P. Dhamania and Others (supra)*, the Supreme Court observed that:

“Recommendations of the DPC are advisory in nature. Such recommendations are not binding on the appointing authority. It is open to the appointing authority to differ with the recommendations in public interest. The ACC has however to record reasons while differing with DPC. These reasons need not be communicated to the officer concerned but it is always open to the authority concerned to produce the necessary records before the Court, when its decision is challenged.”

5. In *S.K. Mutreja vs. Union of India & Ors.(supra)*, this Court after observing that:

“17. The factum of petitioner not having figured in "doubtful integrity case list" is a relevant factor. In these circumstances, it is not for this Court to speculate, especially in view of the facts as noted, whether Appointment Committee of the Cabinet would have taken the same decision if the factual position of petitioner's name not being under doubtful integrity list was correctly given. It is a matter entirely for Appointment Committee of Cabinet to take a decision, considering all relevant factors and the weightage to be accorded to them.”

directed as under:

“18. In these circumstances, the impugned order which has been passed on processing of a note which incorrectly recorded the petitioner having been in the "list of doubtful integrity cases from 1997 to 2001" rather than falling under the Agreed List, as noted in para 15 above, to be kept under watch, cannot be sustained.....”

6. Relying on the ratio of the above decisions it was strongly urged on behalf of the petitioner that, the members of the ACC were misled by wrong and twisted facts submitted before them. Therefore, the ACC was not in a position to take a right decision with respect to the selection of the petitioner to the post of the Director (Marketing) and that therefore the respondents ought to be directed to reconsider the petitioner for the appointment to the post of Director (Marketing) of

respondent no.2, in terms of the recommendations of the PESB panel to the ACC. The petitioner, it must be observed, during the course of the arguments, confined his relief to the aforesaid prayer and did not press the other relief seeking quashing of the communication dated 7th March, 2008 and the direction sought in the petition to appoint petitioner as Director (Marketing) in terms of the recommendations of the PESB w.e.f. 1st December, 2006.

7. On the other hand, on behalf of the respondents, it was urged that the ACC was not required to go strictly in accordance with the recommendations of the PESB and could consider suitability of the candidates otherwise as well. It was further argued that vide order dated 15th April, 2004 the disciplinary authority had 'warned' the petitioner to be more careful in future in official dealings and that such warning did not amount to honourable exoneration or dropping of all charges, as was sought to be urged on behalf of the petitioner. On behalf of the respondent it was also urged that the panel based on which the petitioner seeks appointment was valid for one year only. In support of his submission counsel for the respondents relied on the following decisions:

1. ***Union of India and Another vs. Samar Singh and Others***; (1996) 10 Supreme Court Cases 555.
2. ***Chandra Prakash Tiwari and Others vs. Shakuntala Shukla and Others***; (2002) 6 Supreme Court Cases 127.
3. ***Dhananjay Malik and Others vs. State of Uttaranchal and Others***; (2008) 1 Supreme Court Cases (L&S) 1005.

8. In *Union of India and Another vs. Samar Singh and Others (supra)*, the Supreme Court whilst considering the empanelment for the post of Secretary to the Government of India or equivalent post under Central Staffing Scheme observed as under:

“11. This would show that the Committee, keeping in view the record and experience including the conceptual and leadership abilities, achievements and potential for general managements positions, had recommended 19 I.A.S. officers for holding the post of secretaries and 7 I.A.S. officers for holding a non-secretarial post. Merely because the minutes of the Committee do not contain the reason for non-selection of the respondent does not mean that there has been no proper consideration of the merits and suitability of the respondent and as a result the selection is vitiated. From the minutes of the Special Committee it is evident that in the matter of empanelment of officers the Special Committee has taken into account the criteria that are laid down for holding such selection in para 14 of the Central Staffing Scheme and, therefore, it cannot be said that the said selection is vitiated on account of non-inclusion of the name of the respondent in the panel.

12. Shri Ashok Grover, the learned Senior Counsel appearing for the respondent, has laid emphasis on the remarks in ACRs about appraisal of the performance of the respondent subsequent to his promotion on the post of Additional Secretary to which reference has been made by the Tribunal in the impugned judgment. The learned Counsel has submitted that since the performance has been rated as outstanding and excellent, the Tribunal was justified in holding that there is no proper consideration of the case of the respondent by the Special Committee. We are unable to agree. As is evident from para 14 of the Central Staffing Scheme record is one of the matters which has to be taken into consideration by the Special Committee while making the selection. Apart from the record there are other matters that have to be considered, namely, merit, competence, leadership and flair for participating in the policy-making process and the need of the Central Government which is the paramount consideration. We are unable to hold that since the performance of the respondent after his promotion as Additional Secretary had been found to be excellent and outstanding, the non-inclusion of his name from the panel by the Special Committee must lead to the inference that there was no proper consideration of the merit and suitability of the respondent for empanelment by the Special Committee.”

9. In ***Chandra Prakash Tiwari and Others vs. Shakuntala Shukla and Others(supra)***, the Supreme Court observed as under:

“32. In conclusion, this Court recorded that the issue of estoppel by conduct can only be said to be available in the event of there being a precise and unambiguous representation and it is on that score a further question arises as to whether there was any unequivocal assurance prompting the assured to alter his position or status - the situation, however, presently does not warrant such a conclusion and we are thus not in a position to lend concurrence to the contention of Dr. Dhawan pertaining to the doctrine of Estoppel by conduct. It is to be noticed at this juncture that while the doctrine of estoppel by conduct may not have any application but that does not bar a contention as regards the right to challenge an appointment upon due participation at the interview/selection. It is a remedy which stands barred and it is in this perspective in *Om Prakash Shukla v. Akhilesh Kumar Shukla*; 1986 Supp. SCC 285, a three-Judge Bench of this Court laid down in no uncertain terms that when a candidate appears at the examination without protest and subsequently found to be not successful in the examination, question of entertaining a Petition challenging the said examination would not arise.

33. Subsequently, the decision in *Om Prakash* stands followed by a later decision of this Court in *Madan Lal v. State of J&K*; (1995) 3 SCC 486, wherein this Court stated as below:

"9. Before dealing with this contention, we must keep in view the salient fact that the petitioners as well as the contesting successful candidates being respondents concerned herein, were all found eligible in the light of marks obtained in the written test, to be eligible to be called for oral interview. Up to this stage there is no dispute between the parties. The petitioners also appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned. Thus the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or

the Selection Committee was not properly constituted. In the case of *Om Prakash Shukla v. Akhilesh Kumar Shukla* it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner.

10. Therefore, the result of the interview test on merits cannot be successfully challenged by a candidate who takes a chance to get selected at the said interview and who ultimately finds himself to be unsuccessful. It is also to be kept in view that in this petition we cannot sit as a court of appeal and try to reassess the relative merits of the candidates concerned who had been assessed at the oral interview nor can the petitioners successfully urge before us that they were given less marks though their performance was better. It is for the Interview Committee which amongst others consisted of a sitting High Court Judge to judge the relative merits of the candidates who were orally interviewed, in the light of the guidelines laid down by the relevant rules governing such interviews. Therefore, the assessment on merits as made by such an expert committee cannot be brought in challenge only on the ground that the assessment was not proper or justified as that would be the function of an appellate body and we are certainly not acting as a court of appeal over the assessment made by such an expert committee."

34. There is thus no doubt that while question of any estoppel by conduct would not arise in the contextual facts but the law seem to be well settled that in the event a candidate appears at the interview and participates therein, only because the result of the interview is not 'palatable' to him, he cannot turn round and subsequently contend that the process of interview was unfair or there was some lacuna in the process."

10. In *Dhananjay Malik and Others vs. State of Uttaranchal and Others(supra)*, the Supreme Court while considering judicial review of the recruitment process on the issue of estoppel observed as follows:

"7. It is not disputed that the respondent-writ petitioners herein participated in the process of

selection knowing fully well that the educational qualification was clearly indicated in the advertisement itself as BPE or graduate with diploma in Physical Education. Having unsuccessfully participated in the process of selection without any demur they are estopped from challenging the selection criterion inter alia that the advertisement and selection with regard to requisite educational qualifications were contrary to the Rules.

8. In *Madan Lal v. State of J&K* this Court pointed out that when the petitioners appeared at the oral interview conducted by the members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned, the petitioners took a chance to get themselves selected at the said oral interview. Therefore, only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed writ petitions. This Court further pointed out that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted.

9. In the present case, as already pointed out, the respondent-writ petitioners herein participated in the selection process without any demur; they are estopped from complaining that the selection process was not in accordance with the Rules. If they think that the advertisement and selection process were not in accordance with the Rules they could have challenged the advertisement and selection process without participating in the selection process. This has not been done."

11. The records pertaining to the appointment of the petitioner have been perused. The petitioner's case was processed with the following observations:-

"The Department of Commerce has mentioned that the CVC, as the expert body in vigilance matters, found nothing adverse against Shri Majumdar and therefore the Department found no reason to go against the recommendation of the PESB for his appointment.

.....

The facts mentioned in the above communications, to which the CVC has invited specific attention of the Appointments Committee of the Cabinet, are revealing. The officer was in the Agreed Lists, and the more serious list of officers of Doubtful Integrity, in recent years. The cases against the officer, particularly those at pp 57-58 can have serious dimensions and it is unclear whether the officer has been exonerated on merits, or on lack of evidence or corroboration by witnesses etc. In any event closure of a case relating to import of sugar from Switzerland with issue of a warning is in violation of para 3.2 of the instructions dated 23rd September, 1992.

On an overview of the above facts, while there are reservations in the case, keeping in view the fact that the CVC has found nothing adverse against Shri Majumdar, Prime Minister may kindly approve the appointment of Shri B.D. Majumdar, presently Chief General Manager, as Director (Marketing), State Trading Corporation of India Limited."

However, in spite of the comments lastly made while processing the petitioner's case above, it was seen that the Prime Minister directed that the Department be asked to consider the second name, i.e. Shri Neeraj Mishra, in view of the records of Shri Majumdar, the petitioner herein. Eventually, even the second name did not meet with the approval, and it was recommended that the panel be scrapped and the post of Director (Marketing) STC be re-advertised.

12. The issue that arises for consideration based on the respective submissions of the parties and the relevant record is whether the ACC can consider the suitability of the petitioner and is not required to proceed strictly in accordance with the recommendations of the PESB and the Department of Commerce.

13. In my view the recommendations of the PESB are only advisory in nature. The recommendations cannot be said to be binding of the ACC which is the appointing authority. It is always open to the appointing authority to differ from the recommendations of the PESB. This is more so when the ACC considers the recommendations from the standpoint of public interest. The decision of not accepting the recommendations made by the PESB has to be made in good faith and for appropriate reasons. The reasons as already noticed need not be communicated to the officer concerned. Merely because the minutes of the ACC do not contain detailed reasons for the non-selection of the petitioner does not mean that there has been no proper consideration of the merits and suitability of the petitioner and that as a result the entire process is vitiated. From the records it is evident that the note processing the candidature of the petitioner appropriately and correctly reflected the conduct and disciplinary record of the petitioner and went on to recommend him by observing that even though there were reservations in his case, keeping in view the fact that the CVC had found nothing adverse against the petitioner, the appointment of the petitioner may be approved by the Prime Minister/ACC. The decision of the Prime Minister/ACC was however to the contrary in view of the records of the petitioner. In this respect, it is observed that it is the admitted position that the petitioner figured in the "Agreed List" in the years 1994-97 and in the more serious List of "Officers of Doubtful Integrity" for the years 2000 and 2004. It is also seen that CBI had recommended major penalty action against the petitioner. The CVC had also in its advice dated

22nd March, 2004 recommended that the petitioner needed to be awarded some punishment. The ACC in this context, in view of the records of the petitioner as pointed out by the CVC vide letter dated 11th September, 2006, did not find the petitioner suitable. Thus, I find that the assertion of the petitioner to the effect that the members of the ACC were misled by the Cabinet Secretary by projecting wrong and twisted facts before the former, do not hold water and are without merit. Consequently it is observed that there is no substance in the assertion made on behalf of the petitioner that therefore the ACC was not in a position to take a right decision in respect of the selection of the petitioner. It is also significant that vide order dated 15th April, 2004 the disciplinary authority had warned the petitioner to be more careful in future in official dealings and as such the service record of the petitioner could not said to be completely without blemish as was sought to be urged on behalf of the petitioner. Even the CVC had advised imposition of some penalty on the petitioner. It is another matter that instead of imposing a formal penalty, only a warning was issued to the petitioner. It is trite law to state that, when it is within the domain of the ACC to adjudge the suitability of candidates and a part of their executive function to make the appointment, no mandamus can issue in this respect to compel the ACC to exercise the discretion in a particular manner, or even to interfere in the exercise of such discretion unless and until the exercise of the discretion by the ACC is malafide or unreasonable or actuated by bias. In my opinion the decision of the ACC not to approve the appointment of the

petitioner does not suffer from any such infirmity so as to warrant interference.

14. For the foregoing reasons, I do not find any merit in the Writ Petition and consequently hereby dismiss the same, however, without any order as to costs.

SIDDHARTH MRIDUL, J.

January 09, 2009
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