

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 13th September, 2011.

WRIT PETITION (CIVIL) NO.6526/2011

IQBAL KHATRI AND ORS

Through

..... Petitioner

Mr. Sanjeev Sachdeva, Sr.
Advocate with Mr. Ankur Garg
and Mr. Sougat Ganguly,
Advocates.

versus

EMPLOYEES STATE INSURANCE CORPORATION AND ANR

..... Respondent

Through

Ms. Rekha Palli and Ms. Punam
Singh, Advocates.

WRIT PETITION (CIVIL) NO. 6627/2011

DHEERAJ TANWAR

Through

..... Petitioner

Mr. Manish Jain, Mr. Ankur
Garg and Mr. Sougat Ganguly,
Advocates.

versus

ESIC AND ANR

Through

..... Respondent

Ms. Rekha Palli and Ms. Punam
Singh, Advocates.

WRIT PETITION (CIVIL) NO.6628/2011

SAT PAL GAHLOT

Through

..... Petitioner

Mr. Manish Jain, Mr. Ankur
Garg and Mr. Sougat Ganguly,
Advocates.

versus

ESIC AND ANR

..... Respondent
Through Ms. Rekha Palli and Ms. Punam
Singh, Advocates.

WRIT PETITION (CIVIL) NO. 6629/2011

BIJENDER SINGH

..... Petitioner
Through Mr. Manish Jain, Mr. Ankur
Garg and Mr. Sougat Ganguly,
Advocates.

versus

ESIC AND ANR

..... Respondent
Through Ms. Rekha Palli and Ms. Punam
Singh, Advocates.

WRIT PETITION (CIVIL) NO. 6630/2011

SAMAR SINGH

..... Petitioner
Through Mr. Manish Jain, Mr. Ankur
Garg and Mr. Sougat Ganguly,
Advocates.

versus

ESIC AND ANR

..... Respondent
Through Ms. Rekha Palli and Ms. Punam
Singh, Advocates.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SANJIV KHANNA

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.

DIPAK MISRA, C.J.:

Invoking the jurisdiction of this Court under Articles 226 and 227 of the Constitution of India, the petitioners have challenged the order dated 30th August, 2011 passed by the Central Administrative Tribunal, Principal Bench, New Delhi (for short, 'the tribunal') in four original applications preferred under Section 19 of the Administrative Tribunals Act, 1985. As the tribunal has disposed of the original applications by a common order, we propose to dispose of these writ petitions by a singular order.

2. The respondent, Employees State Insurance Corporation (ESIC), published an advertisement in May 2004 for filling up the posts of Nursing Orderly. It was mentioned in the said advertisement that the number of posts are 75. The bifurcation of posts was 38 (unreserved), 11 (Scheduled Castes) and 26 (Other Backward Classes). The petitioners applied for the said post in the OBC category as they belong to the Jat community which falls in the OBC category as per the list under the Government of National Capital Territory of Delhi. They were selected in the said category and accordingly appointed.

3. ESIC, by order dated 30th May, 2011, terminated the services of the petitioners with immediate effect on the ground that the petitioners could not have been considered in the OBC category as the Jat

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community does not find place in the OBC list prepared by the Central Government.

4. Being aggrieved by the aforesaid order of termination, the petitioners knocked at the door of the tribunal and the tribunal, relying on its decision in *Shyam & Others Vs. Employees State Insurance Corporation Ltd. & Others* (TA-38/2010) decided on 1st December, 2010 came to hold that as the petitioners were not covered in the category of OBC list prepared by the Union of India, their cases could not have been considered in the said category by the ESIC and there being a fundamental flaw in the appointment, the order of termination could not be interfered with. Expressing such a view, the tribunal dismissed the original applications.

5. We have heard Mr. Sanjeev Sachdeva, learned senior counsel appearing for the petitioner in W.P.(C) No.6526/2011, and Mr. Manish Jain, learned counsel for the petitioner in other writ petitions. The learned counsel for the petitioners have raised the following contentions:-

(i) The tribunal has failed to take note of the language employed in the advertisement inasmuch as the advertisement does not specify from which category certificate i.e., State list or Central list, should be filed, but it only mentions 'OBC category' and, therefore, the order

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impugned becomes unsustainable in law.

(ii) There is no cavil over the factum that the petitioners belong to Jat community in Delhi and when they have been extended/conferred the benefit of appointment without any kind of stipulation, the employer could not have terminated their services as there had been no misrepresentation by them.

(iii) The decision in *Satish Kumar and Another Vs. Union of India and Others* (LPA No.529/2004) decided on 3rd August, 2007 is distinguishable inasmuch as in the said case, the advertisement stipulated what was required from a candidate being the production of the certificate pertaining to OBC category and when there is no such postulate in the advertisement, the order of termination is untenable and the stamp of approval given to it by the tribunal is vulnerable.

6. Ms. Rekha Palli, learned counsel appearing for the ESIC, combating the aforesaid submissions, contended that there is a clear cut distinction between the list prepared by the Central Government and the State Government and unless an applicant falls in the category mentioned in the Central List, he cannot avail the benefit of OBC category as the ESIC has come into existence by virtue of the Employees State Insurance Corporation Act, 1948 and it is a central government corporation, and, therefore, the central list has to prevail.

The learned counsel would further submit that there is a laudable purpose behind the same inasmuch as a particular community may not be available in number of States and in that contingency, reservation would stand restricted to one or two cases. It is contended by her that while the advertisement nowhere stipulates anything in this regard except mentioning "OBC category" and number of posts in the OBC category, when the advertisement has been issued by a central corporation, it is clearly luculent that a candidate belonging to the OBC category which finds place in the central list has the eligibility to apply in that category and no objection can be taken in that regard by raising a mercurial plea that which category can apply was not mentioned in the advertisement. Elaborating the same, it is urged by her that when there are decisions in the field, the Central Government has its own significance and sanctity and in no circumstances can an advertisement override the same. Ms. Palli would further submit that an attempt to distinguish the decision in *Satish Kumar* (supra) is an exercise in futility because in the said decision, though it was mentioned that there was reference to the advertisement, yet that will not be sufficient to draw a distinction as the ratio applies to the case at hand on all fours.

7. To appreciate the rivalised submissions raised at the Bar, we have carefully perused the order passed by the tribunal and bestowed

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our anxious consideration on the submissions canvassed by the learned counsel for the parties. The centipodal issue that emanates for consideration is whether a candidate belonging to OBC category could have applied in the same category for a post under the Corporation which is a central corporation created by an enactment of the Parliament. It is not disputed before us that the Jat community does not find mention in the central list. In the case of *Satish Kumar* (supra), a Division Bench of this Court referred to the factual matrix and the conditions incorporated in the advertisement and expressed the view as follows:-

“7. The Central Government has notified communities that are OBCs and entitled to employment on posts reserved for OBCs. Jat community is not included in the said list notified by the Central Government. AAI, the respondent is a public sector enterprise belonging to the Central Government and is following the Central Government list with regard to appointment to posts reserved for OBCs. Being a Central Government enterprise, it is bound by the instructions issued by the Central Government in this regard. The Central Government vide its Office Memorandum dated 13th January, 1995 has stipulated that instructions issued thereunder would govern public sector enterprise, financial institutions and public sector banks, that is, all public sector enterprises. By another Office Memorandum dated 22nd October, 1993, the Central Government has specified that OBC certificate for appointment to reserved posts should be in terms of the prescribed proforma, which the appellants must produce to be eligible for appointment to the reserved post. There is no specific challenge to the said

notifications in the writ petition. We are not examining the vires and validity of the said notifications.

8. As Jat community is not notified in the Central list, therefore, the appellants cannot claim any right to appointment to posts reserved for OBCs in AAI, a Central Government enterprise, which are required to be filled up from persons belonging to the communities mentioned in the Central OBC list.

9. x x x x x

10. As far as appointment of OBCs is concerned, the Central Government has its own list and as per notifications issued by the Central Government, appointments in AAI can only be made from candidates belonging to the communities mentioned in the said list. In several decisions, the Supreme Court has clarified that Schedule Castes and Schedule Tribes belonging to a particular area of the country must be given protection so long as and to the extent they are entitled to, in order to become equal with others, but Scheduled Castes/Scheduled Tribes who migrate from the State of origin to another State in search of employment or for educational purposes or the like, cannot be treated as persons belonging to Scheduled Castes/Scheduled Tribes of the State to which they migrate. Relying on and referring to the decision in *Marri Chandra Shekhar Rao versus Dean, Seth G.S. Medical College [(1990) 3 SCC 130]*, it was held by the Hon'ble Supreme Court in the case of *Action Committee on Issue of Caste Certificate to Scheduled Castes and Scheduled Tribes in the State of Maharashtra versus Union of India, [(1994) 5 SCC 244]*, that-

"16. We may add that considerations for specifying a particular caste or tribe or class for inclusion in the list of Scheduled Castes/Schedule Tribes or backward classes in a given State would depend on the nature and extent of disadvantages and social hardships suffered by that caste, tribe or class in that State which may be totally non est in another State to which persons belonging thereto may migrate. Coincidentally it may be

that a caste or tribe bearing the same nomenclature is specified in two States but the considerations on the basis of which they have been specified may be totally different. So also the degree of disadvantages of various elements which constitute the input for specification may also be totally different. Therefore, merely because a given caste is specified in State A as a Scheduled Caste does not necessarily mean that if there be another caste bearing the same nomenclature in another State the person belonging to the former would be entitled to the rights, privileges and benefits admissible to a member of the Scheduled Caste of the latter State "for the purposes of this Constitution". This is an aspect which has to be kept in mind and which was very much in the minds of the Constitution-makers as is evident from the choice of language of Articles 341 and 342 of the Constitution. That is why in answer to a question by Mr Jaipal Singh, Dr Ambedkar answered as under :

"He asked me another question and it was this. Supposing a member of a Scheduled Tribe living in a tribal area migrates to another part of the territory of India, which is outside both the scheduled area and the tribal area, will he be able to claim from the local Government, within whose jurisdiction he may be residing the same privileges which he would be entitled to when he is residing within the scheduled area or within the tribal area? It is a difficult question for me to answer. If that matter is agitated in quarters where a decision on a matter like this would lie, we would certainly be able to give some answer to the question in the form of some clause in this Constitution. But so far as the present Constitution stands, a member of a Scheduled Tribe going outside the scheduled area or tribal area would certainly not be entitled to carry with him the privileges that he is entitled to when he is residing in a scheduled area or a tribal area. So far as I can see, it will be practicably impossible to

enforce the provisions that apply to tribal areas or scheduled areas, in areas other than those which are covered by them..."

Relying on this statement the Constitution Bench ruled that the petitioner was not entitled to admission to the medical college on the basis that he belonged to a Scheduled Tribe in the State of his origin."

8. Mr. Sachdeva, learned senior counsel, in his endeavour to distinguish the said decision, has propounded that in *Satish Kumar* (supra) there was a stipulation in the advertisement pertaining to the category mentioned in the select list. In our considered opinion, the same cannot be regarded as a distinguishing factor. If we appreciate the submission of Mr. Sachdeva and Mr. Jain, it would mean that because of the non-stipulation, the petitioners had applied and, therefore, they should not be allowed to suffer. The aforesaid stance may not be a ground to hold against the petitioners pertaining to misrepresentation or suppression of any fact, but that would not enure to their benefit as it is not a case of misrepresentation or incorrect representation. It relates to getting benefits of a particular category. Either one belongs to the said category or does not belong. If he does not belong, he has no right. The selection becomes dehors the law and, therefore, the order of appointment has been lanced by the ESIC.

9. At this juncture, we are obliged to address another contention of

Mr. Sachdeva and Mr. Jain that the petitioners were appointed in 2006 and are continuing, but because of the decision rendered by the tribunal in the case of *Shyam and Others* (supra), they have been visited with the order of termination. It is argued by them that at the stage when the advertisement was published, there was no distinction between the Central list and State list and, therefore, adverse consequences could not have visited them. It is urged by them that the clarification only came into existence in 2008 after the amendment. The learned counsel has referred to the office memorandum dated 4th June, 2008. It reads as follows:-

“No.36028/1/2008-Estt.(Res)
Government of India
Ministry of Personnel, Public Grievances & Pensions
Department of Personnel & Training
New Delhi, dated 4th June, 2008
OFFICE MEMORANDUM

Subject:- Clarification regarding reservation under
OBC category

The under undersigned is directed to refer to the Ministry of Labour & Employment's O.M.No.A-12034/2/2008-SS.I dated 7th May 2008 on the above noted subject and to say that the candidates belonging only to such castes/communities are entitled to get the benefit of reservation in services under the Government of India which are included in the OBC list prepared by the Ministry of Social Justice & Empowerment, Government of India.”

10. The said memorandum is a clarification of the earlier circular.

The tribunal in the case of *Shyam and Others* (supra) has referred to

the office memorandum of the DOP&T dated 13th August, 1990 as modified on 8th September, 1993 and 13th January, 1995. It states as follows:-

“(d) The OBCs for the purpose of the aforesaid reservation would compromise, in the first phase, the castes and communities which are common to both the lists in the report of the Mandal Commission and the State Governments’ Lists. A list of such castes and communities is being issue separately by the Ministry of Welfare. (See Appendix-2).”

11. Thus, there remains no trace of doubt that it was precisely a clarificatory circular relating to the applicability of the Central list in respect of an institution under the Central Government and as the petitioners did not belong to the OBC category under the Central list, they could not have been appointed in the ESIC, a central institution.

12. The last limb of submission of the learned counsel for the petitioners is that the petitioners had worked for more than five years and that their services could not have been terminated and thus, they should have been allowed to continue. In oppugnation to the same, Ms. Palli has commended us to the decision in the case of ***Kishorilal Charmakar and Another Vs. District Education Officer and Another*** (1998) 9 SCC 395 wherein it has been held as follows:-

“4. From the material on record, it is clear that the appointments which were given to the

appellants were under a bona fide mistake by considering them as Scheduled Tribe candidates, though it is clear that this mistake was not occasioned on account of any mistake by the appellants. Three out of four appellants belong to the Scheduled Caste category and had given their case certificate while the fourth appellant was in the open category and had not submitted any certificate. The mistake appears to be on the part of the respondents. On discovery of the mistake, they had immediately corrected the situation and the Tribunal has upheld their right to correct this mistake."

13. In view of the aforesaid enunciation of law, we are disposed of to think that the order of the tribunal really cannot be found fault with. The petitioners could not have been in a position to be appointed had they not been treated as OBC category candidates. Once a candidate, who does not belong to a particular category, gets an appointment, he really encroaches in the field of reservation and destroys the concept of reservation which is impermissible in law.

14. In view of the aforesaid analysis, we do not perceive any merit in these writ petitions and the same accordingly stand dismissed without any order as to costs.

Asipak M...
CHIEF JUSTICE
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SANJIV KHANNA, J.

SEPTEMBER 13, 2011
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