

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

Date of decision: 24th May, 2011

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W.P.(C) 7007/2010

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MR. YOGESH YADAV

..... Petitioner

Through: Mr. Preet Pal Singh, Advocate

Versus

UNION OF INDIA & ANR.

..... Respondents

Through: Mr. Parag P. Tripathi, ASG with Mr. Rajiv Saxena & Ms. Mahima Gupta, Advocates for R-2.

AND

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W.P.(C) 914/2011

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VIKAS GACHLI

..... Petitioner

Through: Mr. Anil Grover & Mr. Parvinder Chauhan, Advocates

Versus

COMPETITION COMMISSION OF INDIA Respondent

Through: Mr. Parag P. Tripathi, ASG with Mr. Rajiv Saxena & Ms. Mahima Gupta, Advocates.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | No |
| 2. | To be referred to the reporter or not? | No |
| 3. | Whether the judgment should be reported in the Digest? | No |

RAJIV SAHAJ ENDLAW, J.

1. The petitioner in W.P.(C) No.7007/2010 had applied for appointment in the respondent No.2 Competition Commission of India (CCI) to the post of Deputy Director (Law) in the Other Backward Classes (OBC) Category. The petitioner in W.P.(C) No.914/2011 had also applied for the same post though in the Scheduled Caste (SC) Category. Both being unsuccessful, preferred these writ petitions impugning the selection procedure and seeking the relief of appointment. Notices of the writ petition were issued. Vide order dated 20th October, 2010 in W.P.(C) No.7007/2010, the respondent CCI was directed to keep one post available in the OBC Category till the disposal of the writ petition. Similarly vide order dated 11th February, 2011 in W.P.(C) No.914/2011, the respondent CCI was restrained from appointing any person other than the petitioner to the post of Deputy Director (Law) in the SC Category. The matters came up before this Court on 10th May, 2011, when it was the contention of the learned ASG appearing on behalf of CCI that the matter in controversy in these two petitions was the same as in W.P.(C) No.8272/2010 titled ***Devi Darshan Seth Vs. UOI*** decided on 5th May, 2011. The matters were adjourned to today to enable the counsels for the petitioners to consider the said judgment.

2. ***Devi Darshan Seth*** (supra) was concerned with the appointment to the post of Joint Director (Law). However, the procedure for selection for Joint Director (Law) and Deputy Director (Law) was the same, save that

there are thirteen (13) posts for Deputy Director (Law) of which nine (9) are in the Unreserved Category, three (3) reserved for OBC Category and one (1) for SC Category.

3. Even though it appears that the matters are fully covered by the judgment in ***Devi Darshan Seth*** but the counsel for the petitioners have contended that certain aspects were not argued / noticed in ***Devi Darshan Seth***. Need is not felt to repeat the entire factual controversy and reference in that regard may be made to the judgment in ***Devi Darshan Seth*** and only the additional points / features urged by the counsels for the petitioners are noticed hereafter.

4. It is contended that the judgment in ***Devi Darshan Seth*** does not notice the instructions in writing issued to the candidates and which are filed along with these petitions. On enquiry as to how and when the said written instructions were communicated, it is informed that the same were distributed along with the admit card for the written test held. The counsels rely on Clauses 4 and 9 of the said written instructions and which are as under:

“4. The selection to all the positions advertised will be based on a written test followed by an interview. The written test will carry 80% of the marks and interview will have 20% of the marks. The written test will be in two parts. The first part will be based on multiple choice questions for 50 marks. There is no negative marking in this multiple choice questions. The second part carrying 30 marks will be distributed to the descriptive questions on the subject of your

specialization within the broad outline of the subject of specialization as indicated in the advertisement;

9. *Candidates who do not secure 50% of the marks in the test will not be called for the interview. However, for candidates belonging to the reserved categories, the cut off marks will be 40% of the total marks;”*

5. The judgment in ***Devi Darshan Seth*** also records that the written test was to be of 80% marks and interview of 20% marks and that the eligibility to be called for interview was of 50% marks in the written test for Unreserved Category candidates and of 40% marks for the Reserved Category candidates.

6. The counsels have however contended that it was not noticed in ***Devi Darshan Seth*** that such instructions were issued in writing; that once the instructions are issued in writing, there could be no other criteria for selection than as prescribed in the said instructions and the dicta in ***Hemani Malhotra Vs. High Court of Delhi*** (2008) 7 SCC 11, though noticed in ***Devi Darshan Seth*** but distinguished, would apply.

7. The counsels have also urged that the cut off marks of 65% provided by the respondent CCI are arbitrary and irrational. It is contended that the Reserved Category candidates having been required to secure only 40% marks in the written test, were required to secure only 32 marks out of the written test of 80 marks; that by laying down cut off marks of 65%, the respondent CCI was expecting the Reserved Category candidates to secure

the impossible of 33 marks out of 20 marks in the interview, to be selected.

8. Reliance is also placed on:

(i) ***K. Manjusree Vs. State of A.P.*** (2008) 3 SCC 512 laying down that after the commencement of the selection process, the criteria of minimum marks for the interview could not have been introduced and the introduction of the requirement of minimum marks for interview after the entire selection process (consisting in that case also of written examination and interview) was completed amounted to changing the rules of the game after the game was played and which was held to be impermissible;

(ii) ***N.T. Devin Katti Vs. Karnataka Public Service Commission*** (1990) 3 SCC 157 laying down that candidates who apply, and undergo written or viva voce test acquire vested right for being considered for selection in accordance with the terms and conditions contained in the advertisement, unless the advertisement itself indicates a contrary intention and that the right of consideration crystallizes on the date of publication of advertisement. It was further held that any amendment of the rules or orders pending the selection should not affect the validity of the selection unless the amended Rules or the amended orders are expressly made applicable to pending selections;

(iii) ***Durgacharan Misra Vs. State of Orissa*** (1987) 4 SCC 646 also laying down that there is no power to prescribe the minimum standard at the viva-voce test for determining the suitability of candidates.

However the said observation was made on interpretation of the Rules of appointment under consideration in that case and not for general application. Else, the Supreme court in ***Lila Dhar Vs. State of Rajasthan*** (1981) 4 SCC 159 has held that the observations in certain judgments relating to admission to educational institutions that there can be no minimum marks for interview, have no applicability in matters of recruitment for employment in which interview is vital to determine the suitability of the candidate for the job;

(iv) ***Umesh Chandra Shukla Vs. Union of India*** (1985) 3 SCC 721 holding that the Selection Committee has no power to prescribe the minimum marks which a candidate should obtain in the aggregate different from the minimum already prescribed by the Rules.

The said judgment again is on interpretation of the Rules under consideration therein;

(v) ***Ramesh Kumar Vs. High Court of Delhi*** MANU/SC/0079/2010 again on interpretation of the Recruitment

Rules under consideration therein, holding that the same did not permit fixation of minimum marks.

9. During the course of hearing it was informed that of the 13 posts for Deputy Director (Law) only 5 out of 9 in the Unreserved Category have been filled up but none of the 3 posts in the OBC Category or one post for the SC Category has been filled up in pursuance to the selection aforesaid. The learned ASG has informed that another advertisement has already been issued inviting applications and in which advertisement it has now been provided that for appointment minimum of 65% aggregate marks in written test (of 80 marks) and interview (of 20 marks) are required.

10. It was enquired from the counsels for the petitioners whether the criteria evolved even if during the selection process earlier undertaken has been uniformly applied or not and whether it is the case of the petitioners that anyone not fulfilling the criteria has been appointed. No such case has been made out. The only argument is after having secured eligibility for being called for interview, the respondent CCI was bound to appoint the top three candidates in the OBC Category to the three posts of Deputy Director (Law) in the said Category and the candidate with the best marks in the SC Category, irrespective of whatsoever their total marks were.

11. I am unable to accept the said contention. The advertisement earlier issued categorically provided that mere fulfilling of minimum qualifications by itself would not entitle any applicant to be called for

interview. It is more so true for appointment. Even otherwise, the position in law as noticed in ***Devi Darshan Seth*** is that there is no right to appointment.

12. The learned ASG has contended that the law laid down in the judgments relied upon by the petitioners is, that after the commencement of the selection process creation of new disqualification intended to eliminate candidates otherwise eligible for consideration, is not permitted. Attention is invited to para 8 of the judgment in ***Manjusree*** where it is noticed that owing to the changes effected certain candidates were eliminated from consideration and certain others who as per the terms earlier advertised were not eligible for consideration, became eligible for consideration. Similarly, attention is invited to para 3 of the judgment in ***Durgacharan Misra*** where also the change in terms made certain candidates eligible for consideration ineligible. The learned ASG has contended that with the introduction of the minimum marks of 70% for Unreserved Candidate and 65% for Reserved Category for appointment, none had been disqualified and the respondent CCI is fully entitled to seek appointment of candidates of a certain standard. It is reiterated that there is no indefeasible right of appointment.

13. The learned ASG has also contended that no case of *mala fide* is made out; there are no allegations with particulars; no animus has been imputed to any person; the persons if any with such animus have not been impleaded.

14. I have considered the judgments cited by the counsels for the petitioners and the written instructions stated to have been issued and which definitely were not considered in *Devi Darshan Seth*. However the same in my opinion do not call for re-consideration of what has been held in *Devi Darshan Seth*. The learned ASG is correct in contending that the present is not a case as was covered by the judgments cited by the counsels for the petitioners and which were concerned with creation of new disqualifications. In the present case, the selection criteria evolved by the respondent CCI making such appointments for the first time has been found to have been uniformly applied to all concerned. If the petitioners have failed to meet the same, they cannot seek a mandamus for appointment. It is not as if, they have not been considered. Their cases have been considered and having been found to be not making the minimum standard which respondent CCI has applied and which is now in the fresh applications invited, openly advertised, have no right to appointment.

There is no merit in the writ petitions; the same are dismissed.

No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

MAY24, 2011/‘gsr/bs’