

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

Date of decision: 5th May, 2011.

+ W.P.(C) 8272/2010

% DEVI DARSHAN SETH Petitioner

Through: Mr. Harish Pandey, Adv.

Versus

UNION OF INDIA & ORS. Respondents

Through: Mr. Neeraj Chaudhary, Mr. Ritesh Kumar & Mr. Mohit Auluck, Advocates for R-1.

Mr. Parag P. Tripathi, ASG with Mr. Rajiv Saxena, Ms. Mahima Gupta & Mr. D.K. Pradhan, Advocates for R-2 CCI.

Mr. Chirag Jamwal & Mr. Ajay K. Upadhyay, Advocates for R-3.

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? | Yes |
| 2. | To be referred to the reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

RAJIV SAHAI ENDLAW, J.

1. The petitioner claiming to be belonging to the Other Backward Classes (OBC) category, in response to the invitation by the respondent no.2

Competition Commission of India (CCI), of applications for direct recruitment to various posts therein, applied for the posts of Joint Director (Law) and Deputy Director (Law). The “mode of selection” prescribed was as under:

“7. All the applications received by the due date will be screened with reference to the minimum qualification criteria. From amongst the eligible candidates, suitable candidates will be short listed through a transparent mechanism and the short listed candidates will be called for interview before final selection. Mere fulfilling of minimum qualifications by itself would not entitle any applicant for being called for interview.”

2. It is the case of the respondent no. 2 CCI and not controverted by the petitioner that due to the overwhelming response received from candidates, CCI decided to undertake the selection to all the posts based on a written test followed by an interview with the written test being of 80 marks and interview of 20 marks.

3. The petitioner appeared in the written test for both the aforesaid posts, was called for interview for the post of Joint Director (Law) on 15th March,

2010 and for the post of Deputy Director (Law) on 19th March, 2010. It is the case of the petitioner that the CCI without publishing the result of the written examination had merely issued call letters to the successful candidates calling them for interview and thus the *inter se* merit of candidates who appeared in the written test remained unknown to all. The petitioner, pursuant to the interview did not hear from CCI and after gathering information through the medium of 'Right to Information Act' (RTI) filed this writ petition averring that appointments had been made in a non-transparent manner and in disregard to the criteria for reservation for OBCs. The petitioner has claimed the relief of directing the respondent no.2 CCI to apply the reservation policy of 27% for OBCs in the matter of appointments to the various posts and has sought direction for his appointment against the vacancy of Joint Director (Law) with retrospective date i.e. from the date on which the respondent no.3, selected as Joint Director (Law) in CCI in pursuance to the invitation aforesaid, was offered appointment.

4. The petitioner having confined his relief to the post of Joint Director (Law) only, hereinafter facts concerning the said post alone shall be discussed.

5. Notice of the writ petition and of the application for interim relief seeking to restrain CCI from making any further appointment for the post of Joint Director (Law) was issued. Counter affidavit has been filed by CCI. The respondent no.3 has adopted the counter affidavit of CCI. The petitioner has filed rejoinder to the said counter affidavit. The counsel for the petitioner and the learned ASG appearing for the respondent no.2 CCI have been heard.

6. CCI in its counter affidavit has pleaded that in exercise of powers under Section 17 r/w Section 63 of the Competition Act, 2002, recruitment rules were framed by the Central Government, prescribing the eligibility, educational qualifications, age limit and other conditions for posts in CCI; that the task of conducting the written test for the post was assigned to the National Law School of India University, Bangalore and the results of the written test were maintained in sealed cover and not handed over to the

Interview Board even, so to maintain absolute impartiality in selection process; that candidates in the Unreserved Category securing minimum 50% marks and candidates in the Reserved Category securing minimum of 40% marks in the written test were called for interview in proportion of five times the number of vacancies where the vacancies to the particular post were ten or less and three times the number of vacancies where the total number of vacancies were more than ten; that the issue regarding drawing of consolidated list of candidates with composite marks of written test and interview was considered by CCI in its special meeting held on 31st March, 2010 when it was decided that the candidates securing 70% or more marks in the Unreserved Category and 65% or more marks in the Reserved Category would be selected and appointed; it was so decided desiring that the vacancies be filled up on the basis of merit and selection of candidates below the said marks, may not be suitable for discharging the functions of the post; that the petitioner secured only 61 marks out of 100 for the post of Joint Director (Law) and having not secured the benchmark of 65 marks as laid down for appointment under the Reserved Category, was not appointed.

7. CCI in its counter affidavit qua the reservation policy has pleaded that it has adhered to the guidelines contained in the Notification dated 2nd July, 1997 issued by the Department of Personnel & Training of the Government of India. It is pleaded and again is not in dispute that there were seven posts of Joint Director, three (3) in the stream of Law, three (3) in the stream of Economics and one (1) in the stream of Financial Analysis; of the said seven posts, one was reserved for OBC and one for Scheduled Castes (SC) category. It is further pleaded that the posts of Joint Director (Law), Joint Director (Economics) and Joint Director (Financial Analysis) were grouped together for the purposes of reservation in accordance with the guidelines in the Office Memorandum dated 2nd July, 1997 (supra) i.e. out of the seven posts of Joint Director, any one in any of the three streams could be left for OBCs and any one in any of the three streams for SC/ST and that CCI was not required to necessarily fill up the reserved seat for OBC from the stream of Law only.

8. It is further the plea of CCI that the petitioner having participated in the selection process which did not require reservation for OBCs in the

stream of Law only, cannot now be allowed to challenge the same after being unsuccessful. Reliance in this regard is placed on ***Ranbir Singh Vs. GGSIP University*** MANU/DE/1003/2008 and ***K.H. Siraj Vs. High Court of Kerala*** AIR 2006 SC 2339.

9. CCI has further pleaded that since only six candidates were able to achieve the benchmark decided in the meeting of 31st March, 2010, three posts in the stream of Law were filled up from the candidates in the Unreserved Category and two posts in the stream of Economics were filled up with one each from the Unreserved and from the SC category and one post in the stream of Financial Analysis was filled up from the Unreserved Category and one post in the stream of Economics has been kept vacant against the OBC category.

10. The petitioner in his rejoinder has *inter alia* pleaded that it is borne out from the counter affidavit of CCI that it had not laid down the benchmark of 70% for Unreserved Category and 65% marks for Reserved Category till the stage of interview and contends that the same was incorporated in the selection process only to eliminate the petitioner; it is

also averred that no such information as to the decision averred of 31st March, 2010 was disclosed in the reply dated 21st October, 2010 to the RTI query and was taken for the first time by way of Corrigendum thereto dated 10th November, 2010, even though the appointments were made on 21st April, 2010. Reliance is placed on *Hemani Malhotra Vs. High Court of Delhi* (2008) 7 SCC 11 to contend that the rules of the game which means the eligibility criteria, benchmark etc. were required to be laid down before the start of the selection process and could not have been added/changed amidst the selection process.

11. It is also pleaded in the rejoinder that while in the qualifying marks, a difference of 10% was maintained between the Unreserved and the Reserved Category, in the benchmark purportedly laid down for the first time on 31st March, 2010, difference of only 5% marks was maintained between the Reserved and the Unreserved Category. It is contended that there was no reason for the said variation and had the difference of 10% in the benchmark been maintained i.e. of 70% for the Unreserved Category and 60% for the Reserved Category, the petitioner having secured 61%, would have been

entitled to the appointment, having obtained the highest marks amongst OBC candidates in all the three streams. It is averred that the difference was reduced from 10% in qualifying marks to 5% in the benchmark only to ensure the appointment of respondent no.3.

12. With respect to the reservation policy applied by the CCI, the petitioner in the rejoinder has pleaded that the OBC candidate i.e. the petitioner himself, who secured the highest marks in all the three streams ought to have been appointed.

13. The petitioner, merely for the reason of having participated in the selection process and having been found eligible as per the parameters laid down, cannot claim any right of appointment. It is the settled position in law that even a selected candidate has no right of appointment. Reference in this regard can be made to *Punjab SEB v. Malkiat Singh* (2005) 9 SCC 22, *State of U.P. v. Rajkumar Sharma* (2006) 3 SCC 330 & *S.S. Balu v. State of Kerala* (2009) 2 SCC 479.

14. The invitation of applications in fact even did not lay down that written test of 80 marks and interview of 20 marks would be held and/or

with qualifying marks of 50% for Unreserved and 40% for Reserved Category candidates. Clause 7 of the said invitation set out hereinabove merely provided for screening of the candidates with reference to the minimum qualification criteria. It was further declared that “mere fulfilling of minimum qualifications by itself would not entitle any applicant for being called for interview”. The procedure of written test and interview was designed only because of the large number of applications received. The petitioner at that time did not object that the selection process being adopted by CCI was not disclosed in the invitation of applications and took his chance by appearing in the written test and the interview. Reliance on ***Hemani Malhotra*** (supra) is misconceived. The Supreme Court in that case was concerned with variation of the criteria laid down after the selection process had begun. In the present case as aforesaid, no criteria was laid down and the criteria was being evolved during the process of selection. It cannot be lost sight of that CCI though created under the Act of 2002 but has become functional only in the year 2009 and the appointments were being made for the first time. There were thus no precedent of such appointments.

No *mala fide* can be imputed to CCI in evolving the process along the way to selection.

15. The Supreme Court in ***M.P. Public Service Commission v. Navnit Kumar Potdar*** (1994) 6 SCC 293 held that once applications are received and the Selection Board applies its mind to evolve any rational and reasonable basis on which the list of applicants should be shortlisted, the process of selection commences. Similarly, in ***Govt. of A.P. v. P. Dilip Kumar*** (1993) 2 SCC 310 it was held that it is open to the recruiting agency to screen candidates due for consideration at the threshold of the process of selection by prescribing higher eligibility qualification so that the field of selection can be narrowed down with the ultimate objective of promoting candidates with higher education to enter the zone of consideration. Similarly, in ***UOI v. T. Sundararaman*** (1997) 4 SCC 664 it was held that where the number of applications received in response to an advertisement is large, and it will not be convenient or possible to interview all the candidates, the number can be restricted to a reasonable limit on the basis of qualification and experience higher than the minimum prescribed in the

advertisement, provided that the criteria is reasonable and not arbitrary having regard to the post for which selection is to be made.

16. The next question for consideration is whether any illegality can be imputed to the difference of 5% only in the benchmark for the Unreserved and the Reserved Category candidates. The counsel for the petitioner has neither been able to plead nor urge that the difference has to be necessarily of 10%. The Constitution Bench of the Apex Court in para 358 (i.e. the opinion of Pasayat and Thakker, JJ.) of *Ashoka Kumar Thakur v. UOI* (2008) 6 SCC 1, even in relation to educational Institutions suggested that five (5) grace marks below the minimum eligibility marks fixed for General Category can be given to the OBCs. The opinions of other Judges also suggest a difference of not more than 10 marks out of 100, below that of General Category for OBCs. The Supreme Court in *Andhra Pradesh Public Service Commission v. Baloji Badhavath* (2009) 5 SCC 1 also appears to suggest a difference of 5% between the Unreserved and the Reserved category. Merely because in the qualifying marks the difference of 10% was maintained, would not compel the CCI to maintain the same difference in

the benchmark for appointment also. There is no identity between qualifying marks in the written test for being eligible to be invited for interview and the benchmark for appointment. An employer required to follow the Policy of Reservation, is entitled to apply different Rules at different stages so far as framed in accordance with law.

17. The last question for consideration is whether the reservation policy has been breached in the matter of the CCI not reserving one out of three posts of Joint Director (Law) for the OBC category. In this regard again, I find that the invitation for applications itself had clubbed the posts of Joint Director in the streams of Law, Economics and Financial Analysis and prescribed reservation of only one post out of seven for OBC without specifying whether it could be in the stream of Law or Economics or Financial Analysis. The petitioner at that time did not raise any objection; he did not contend that since there were three posts of Joint Director (Law), one should be reserved for OBC. The petitioner after having been unsuccessful cannot be permitted to raise the said challenge. The law in this

regard is also well settled. Reference may be made to the recent Apex Court decision in *Manish Kumar Shahi v. State of Bihar* (2010) 12 SCC 576.

18. Even otherwise, I have wondered as to how, when the reservation prescribed for OBCs is of 27% only, could CCI have reserved one out of three posts of Joint Director (Law) for OBC; if that were to be the position then similarly one out of three posts of Joint Director (Economics) also would have been required to be reserved for OBC and which would have led to reservation for OBCs in excess of the prescribed 27%. It is for this reason only that the Office Memorandum dated 2nd July, 1997 of the Ministry of Personnel prescribes for grouping of posts in small cadres of up to thirteen posts. The CCI was thus within its right to reserve the post for OBC in any of the three streams of Joint Director which were clubbed together in accordance with the said directive and which also passes the test of logic as aforesaid.

19. I am even otherwise of the opinion that an employer, especially a specialist Body as CCI is, is entitled to appoint/employ the best talent available as long as not contravening law and no restrictions can be placed

on their choice. The respondent no.3 admittedly secured more marks in the written test and the interview than the petitioner and no error can be found in the decision of CCI to make appointments to all the three posts of Joint Director in the stream of Law and leaving the post reserved for OBC to be filled up in the stream of Economics.

20. The settled legal position is that there is no constraint on the Government in respect of the number of appointments to be made or in fixing higher score of marks for the purpose of selection and it is open to the Government to, with a view to maintain high standards of competence, fix a score which is much higher than the one required for mere eligibility. (see *State of Haryana v. Subash Chander Marwaha* (1974) 3 SCC 220)

21. The counsel for the petitioner has also contended that even if the petitioner did not meet the benchmark criteria laid down, the post for OBC should have been carried forward. The argument is misconceived. The post reserved for OBC candidates has not been filled up and the learned ASG has stated that fresh invitations therefor will be invited in due course. The petitioner is wrong in contending that the post was for the stream of

Law only. It was neither so shown in the invitation applying applications nor was required to be so, as aforesaid.

22. The petitioner is thus not found entitled to the relief claimed. The writ petition is dismissed. No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

MAY 05, 2011

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(corrected and released on 20th May, 2011)