

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **WP(C) No.2596/2010**

Reserved on: 15.10.2014

Date of decision: 07.11.2014

IN THE MATTER OF:
DEVESH BBYAN

..... Petitioner

Through: Mr. Zile Singh Bbyan, father of the
petitioner in person

versus

CHAIRMAN AND MANAGING DIRECTOR,
NATIONAL AVIATION COMPANY OF INDIA LTD. Respondent
Through Ms. Meenakshi Sood, Advocate

CORAM
HON'BLE MS.JUSTICE HIMA KOHLI

HIMA KOHLI, J.

1. The petitioner is aggrieved by the communication dated 8.12.2008 issued by the respondent Air India(erstwhile National Aviation Company of India Ltd.), intimating him that he was found unsuitable in the Simulator Flight Proficiency Test and resultantly, was not selected for the post of a Trainee Pilot.

2. In a nutshell, the facts of the case are that in December 2007, the respondent Air India(erstwhile National Aviation Company of India Ltd.) (hereinafter referred to as '**the respondent company**') had issued an advertisement in various newspapers inviting applications for the posts of

Trainee Pilots. As per the practice adopted by the respondent company, it adopts three modes for recruitment of Trainee Pilots, i.e., through Special Drive, Open Drive and by way of circulating a Staff Notice. The subject advertisement was issued under the Open Drive and applications were invited from Indian citizens belonging to the general category and the SC/ST/OBC community for filling up a total of 30 notified vacancies. Out of the 30 vacancies notified by the respondent company, 15 posts were meant for candidates belonging to the general category, 5 posts were for candidates belonging to the SC category, 2 posts were for candidates belonging to the ST category and 8 posts were for candidates belonging to the OBC category.

3. The selection procedure prescribed by the respondent company was divided into three stages, namely, a written test, then a psychometric test that was to be followed by a personal interview. The candidates who were shortlisted after the personal interview, were required to undergo the final test, i.e. the Simulator Flight Proficiency Test (in short '**SFP Test**') and only those who could clear the said test, were selected by the respondent company for appointment to the post of Trainee Pilots. As per the procedure followed by the respondent company, as against the general candidates, the SC/ST candidates were given relaxation in the

selection norms in the following manner:

(a) Age - Relaxation of five years

(b) Written Test - qualifying marks for SC/ST candidates were prescribed as 60% as against 70% prescribed for the general candidates.

(c) Interview - qualifying marks for SC/ST candidates were prescribed as 60% as against 70% prescribed for the general candidates.

No relaxation was permitted for the candidates of any category when undergoing the SFP Test.

4. The petitioner herein had applied for the post of Trainee Pilot in the SC category in response to the Open Drive advertisement issued by the respondent company in December 2007. He appeared for the written test at Mumbai on 9.2.2008. Upon clearing the said test, the petitioner underwent the psychometric Test. The results of the said test were declared on 14.2.2008 and the petitioner was cleared in the same. Thereafter, he was called for a personal interview. The results of the personal interview declared on 19.2.2008, revealed that the petitioner had passed the said test as well. Coming to the last and final test, namely, the SFP Test, the said test was conducted by a panel of expert Pilots under the supervision of an independent observer. The petitioner took the SFP Test on 20.2.2008, but he could not clear the same. Thereafter, on a representation made by the petitioner, the respondent company issued the impugned communication dated 8.12.2008, informing

him that having failed to clear the SFP Test, he was not selected for the post of Trainee Pilot. Aggrieved by the aforesaid rejection letter, the petitioner has filed the present petition.

5. Mr.Zile Singh Bbyan, father of the petitioner had argued the matter on behalf of his son as his attorney. Mr.Bbyan urged that having passed in the written test, the psychometric test and the personal interview, the petitioner ought to have been selected by the respondent company as a Trainee Pilot and his inability to clear the SFP Test should not have been held against him. It was urged that too much importance was given by the respondent company to the SFP Test, without taking into consideration the fact that the petitioner had successfully undergone a course for obtaining a commercial pilot licence (CPL) and the said licence was issued only after he had passed the SFP Test, which is a part of the training imparted in the said course.

6. In the course of addressing arguments, Mr.Bbyan had pointed out that an application under the RTI Act was filed on behalf of the petitioner with the respondent company for obtaining information regarding the declaration of the results of the SFP Test that was conducted on 20.2.2008 and the total number of vacant posts that were reserved for the SC/ST candidates. He submitted that contrary to the details furnished by the respondent company in para 10 of the counter affidavit filed on 26.7.2011, as per the information that was furnished by the respondent

company in its reply dated 27.8.2009 enclosed as Annexure P-9 to the writ petition, in the Special Drive conducted for recruiting Trainee Pilots, the unfilled seats in the category of SC candidates were nil, those under the ST category were 4; in the Open Drive, the unfilled posts under the SC category were 4 and those under the ST category were 2. It was thus sought to be urged that as there were sufficient vacancies available under the ST category and no candidate was found fit for selection, the petitioner being a SC candidate, ought to have been selected for appointment under the said category. Lastly, Mr.Bbyan had argued that the petitioner being a SC candidate, the respondent company ought to have extended preferential treatment to him and the norms for clearing the SFP Test ought to have been relaxed for him.

7. On the other hand, Ms.Meenakshi Sood, learned counsel for the respondent company opposed the present petition on the ground that the same is barred by delay and laches as the petitioner has approached the court after the passage of two years from the date of issuance of the impugned communication. The second ground taken to challenge the maintainability of the petition was that no part of cause of action has arisen in Delhi as the advertisement inviting applications for filling up the post of Trainee Pilots had clearly indicated that the written test and the personal interview for the said posts were to be conducted at Mumbai. Further, the advertisement stipulated that in case of any dispute, the

jurisdiction would vest in courts situated in Mumbai. She submitted that as the entire process of selecting the Trainee Pilots had taken place at Mumbai, this court is not vested with the territorial jurisdiction to entertain the present petition and simply because the respondent company has an office in Delhi, cannot be treated as sufficient ground for the petitioner to have approached this court for the relief as prayed for.

8. On merits, learned counsel for the respondent company submitted that although the petitioner had cleared the written test, the psychometric test and the personal interview, he had failed to qualify in the SFP Test and therefore, he could not have been offered the post of a Trainee Pilot. She explained that in the selection procedure prescribed for Trainee Pilots, the most important stage is the SFP Test and merely because the petitioner is a SC candidate, would not be a ground to extend him special protection when it comes to clearing the said Test. She refuted the contention of the other side that the respondent/company had discriminated against the petitioner and clarified that none of the candidates in any of the categories were provided relaxation for clearing the SFP Test for the reason that the said test is crucial in determining a candidate's flying ability. Learned counsel further submitted that though in-house training is imparted to the candidates to hone their skills, acclimatize them and prepare them for the job, only those candidates are given training who are finally selected and the petitioner having failed to

qualify in the SFP Test, can not claim any vested right to the subject post merely by virtue of being a SC candidate. It was vehemently denied by the learned counsel that the respondent company had not followed the reservation policy as alleged by the other side. She asserted that the reservation policy was strictly adhered to, but the petitioner having failed to clear the prescribed recruitment procedure, the respondent company cannot be blamed for not offering the post of a Trainee Pilot to him.

9. So as to examine the submission made on behalf of the petitioner that the information furnished by the respondent company in para 10 of the counter affidavit with regard to the number of vacancies reserved for the SC and ST candidates in the Open Drive runs contrary to the contents of the reply dated 27.8.2009 furnished by the respondent company under the RTI Act, learned counsel for the respondent company was directed to obtain necessary clarifications and produce the relevant records for the perusal of the court. Pursuant thereto, an affidavit was filed by the respondent wherein it was averred that the exercise of selection was combined for the posts of Trainee Pilots that were notified in the Open Advertisement, the Special Drive for SC/ST/OBC and the Staff Notice and all the vacancies pertaining to SC category were filled up with respect to the 2007 advertisement. It was also clarified that after issuance of the advertisement for the post of Trainee Pilot in December 2007, another advertisement was issued by the respondent company, inviting

applications for the same post and the recruitment exercise was undertaken in April 2009 in respect of 40 vacancies(SC:6, ST:3, OBC:10, General:21), which were duly filled up as per the applicable norms.

10. This court has heard Mr.Zile Singh Bbyan, attorney of the petitioner and the learned counsel for the respondent company and carefully considered their submissions in the light of the averments made in the writ petition, the documents filed and the records produced.

11. Dealing first with the legal objections raised by learned counsel for the respondent company as to the maintainability of the present petition, the said objections are two-fold. Firstly, it was argued that the present petition is barred by delay and laches as the petitioner has approached the court for relief after two years from the date of receiving the impugned communication dated 8.12.2008.

12. This court is not persuaded by the first objection taken by the respondent company to non-suit the petitioner as the delay in this case is not found to be so fatal that his claim can be treated as stale for the petition to be dismissed outright on this count. The petitioner has approached this court within a reasonable time from the date of accrual of the cause of action and is therefore, entitled to be heard on merits.

13. As for the second objection taken by the learned counsel for the respondent company with regard to lack of territorial jurisdiction of courts

in Delhi to entertain the present petition, had the matter been at the stage of admission, then this court may have been inclined to reject the petition with liberty granted to the petitioner to approach the appropriate court vested with the territorial jurisdiction, in accordance with the terms of the conditions stipulated in the subject advertisement and also on account of the fact that a large part of the cause of action had arisen at Mumbai, including the fact that the entire selection process for the subject post had taken place there. However, having regard to various factors including the fact that the present petition has remained pending in this court for the past four years and the same was admitted for regular hearing on 11.4.2013 and further, looking at the financially weak background of the petitioner who apparently does not have sufficient funds to engage an Advocate and has relied upon his father to argue the present case, this court is of the opinion that it would cause him immense hardship if the present petition is rejected at this belated stage on the ground of lack of territorial jurisdiction. Therefore, given the peculiar facts of the present case and the circumstances mentioned above, the court is not inclined to reject the petition on the aforesaid ground. However, the issue of territorial jurisdiction is left open for a decision in an appropriate case, as and when the respondent company takes the said plea in circumstances that may be akin to this case.

14. Coming to the merits of the present case, the main plank of the argument advanced by Mr. Bbyan, attorney of the petitioner is that the petitioner having qualified in the written test, psychometric test and the personal interview for the post of Trainee Pilot, the respondent company could not have turned down his candidature simply because he did not clear the final test, i.e. the SFP Test and that the results of all the earlier tests undertaken by him should have been taken into consideration for purposes of selection and not the final test alone.

15. In the case of Debashis Mukherjee Vs. Competition Commission of India, **W.P.(C) 7312/2012**, decided by this court on 29.10.2014, it was observed that when an employer invites applications for appointment to a particular job, it is his prerogative to stipulate the educational qualifications and other criteria for selection to the said post, including seeking documents to establish the work experience, etc., gained by a candidate. The said view was sought to be buttressed by referring to the following observations made by the Supreme Court in the case of UOI vs. Pushpa Rani & Ors. reported as **(2008) 9 SCC 242** :

"37. Before parting with this aspect of the case, we consider it necessary to reiterate the settled legal position that matters relating to creation and abolition of posts, formation and structuring/restructuring of cadres, prescribing the source/mode of recruitment and qualifications, criteria of selection, evaluation of service records of the employees fall within the exclusive domain of the employer. What steps should be taken for improving efficiency of the administration is also the preserve of the

employer. **The power of judicial review can be exercised in such matters only if it is shown that the action of the employer is contrary to any constitutional or statutory provision or is patently arbitrary or is vitiated due to mala fides. The Court cannot sit in appeal over the judgment of the employer and ordain that a particular post be filled by direct recruitment or promotion or by transfer. The Court has no role in determining the methodology of recruitment or laying down the criteria of selection. It is also not open the Court to make comparative evaluation of the merit of the candidates.** The Court cannot suggest the manner in which the employer should structure or restructure the cadres for the purpose of improving efficiency of administration.” (emphasis added)

16. In the case in hand, when the petitioner had applied for the subject post, he was well aware of the terms and conditions stipulated by the respondent company in the advertisement. Thus he knew that the selection procedure was segregated into four parts, starting with a written test, then a psychometric test, followed by a personal interview and only such of the candidates who would qualify in the aforesaid three tests, would have been eligible for undertaking the final test, i.e. the SFP test.

17. It is also not in dispute that the respondent company had provided relaxation for SC/ST candidates for the subject post, not only in respect of their age, but also in respect of qualifying marks obtained by them in the written test and personal interview, vis-à-vis general candidates.

18. Coming to the SFP test which is the main bone of contention here, no doubt the said test is a crucial test for any candidate who applies for

selection to the post of a Trainee Pilot as it determines the ability of a candidate to fly an aircraft. Having failed to clear this most vital test, the petitioner cannot insist that the respondent company ought to have selected him for the subject post on the strength of having passed in the first three tests. In their wisdom, the respondent company had structured a methodology for recruitment to the subject post by dividing the qualifying tests into four stages. All the four tests have their own significance and were to be undertaken by the candidates in a sequential manner. Relaxation was granted by the respondent company to SC/ST candidates when it came to the written test and the personal interview. However, having regard to the prime importance of the SPF Test, the respondent company decided not to extend relaxation to any of the candidates when undergoing the SFP test.

19. A lot of time and expenditure is incurred by an employer in training a pilot and even after his selection as a trainee pilot, the respondent company is required to make substantial investments in honing his technical skills, in imparting special training and enhancing his abilities to make him competent in all respects to undertake the task of flying an aircraft. In other words, the selection of a Trainee Pilot is a step in the direction of recruiting a full-fledged pilot who has the onerous task of flying an aircraft which itself is a very valuable property, over and above the fact that he has to shoulder the responsibility of securing the precious

lives of the passengers who fly in it. In such circumstances, this court is not inclined to accept the submission made by Mr.Bbyan, attorney of the petitioner that even if the petitioner had not cleared the SFP Test, he ought to have been selected by the respondent company as a Trainee Pilot as he had qualified in the first three tests, or that the norms for clearing the final test ought to have been relaxed for him. The methodology applied by the employer for screening the candidates is a matter that is purely within the domain of the respondent company who is the employer and the court ought to refrain from exercising its power of judicial review to tweak the prescribed norms of selection and/or, modify/amend/alter the said norms in any manner only to serve the interests of an unsuccessful candidate.

20. It is not out of place to mention here that in the course of arguments, the court had the occasion to peruse the results of the SFP Test undertaken on 20.2.2008 by the candidates who had qualified in the first three tests, including the petitioner herein. It transpires from the tabulated statement of the results declared by the respondent/company(enclosed at page 29 of the paper book) that in the column under the head, "Average Marks Reduced to 15", the petitioner whose name featured at Sr.No.81, had scored "8.78 marks" and was declared as having "failed". Two other candidates, namely, Mr.Himanshu Chopra at Sr.No.77 who had scored "9.75 marks" and Ms.Sonawane

Akanksha Sudhakar at Sr.no.84, who had scored 10.28 marks were also declared as "failed". In other words, two candidates who had scored much higher marks than the petitioner herein, were not selected by the respondent company as they had failed to have cleared the SFP Test.

21. As it was not clear from the tabulated statement as to the pass marks that were prescribed by the respondent company for clearing the SFP Test, learned counsel for the respondent company was directed to obtain clarifications in this regard, which were duly obtained by her and the court was informed that a total of 200 marks were assigned for the SFP Test and the pass marks were fixed at 70%, i.e., 10.50 marks out of 15 marks, as mentioned in the results of the SFP Test. A perusal of the tabulated statement reveals that the candidates were assessed by three members out of whom one was an independent observer. In the given circumstance, there is no reason for the court to believe that there was any irregularity committed by the respondent/company in declaring the results of the SFP Test or that the petitioner had been discriminated against merely because he was a SC candidate.

22. Just like the other candidates who had cleared the first three stages of the selection process, the petitioner was also expected to undergo the rigours of the SFP Test and clear the same. Having failed to qualify in the said test, it cannot be urged on behalf of the petitioner that the norms for the said test ought to have been relaxed for him or that the demand of

the reservation policy is that the respondent company ought to have selected the petitioner to the post of a Trainee Pilot by virtue of his being a SC candidate and thereby give a complete go by to merit. In fact, the law on this aspect is to the contrary.

23. It will be useful to refer to the decision of the Supreme Court in the case of K.C. Vasanth Kumar and Anr. Vs. State of Karnataka reported as **1985 (Supp) SCC 714**, wherein five Judges of the Supreme Court including the then Chief Justice of India had undertaken an unusual exercise of expressing their respective opinions on the issue of reservations to serve as a guideline to a Commission, which the Government of Karnataka had proposed to appoint, for affording better employment and educational opportunities to Scheduled Castes, Scheduled Tribes and Other Backward Classes. While expressing his view, A.P. Sen, J, had observed as under:

"88. I wish to add that the doctrine of protective discrimination embodied in Article 15(4) and 16(4) and the mandate of Article 29(2) cannot be stretched beyond a particular limit. The State exists to serve its people. There are some services where expertise and skill are of the essence. For example, a hospital run by the State serves the ailing members of the public who need medical aid. Medical services directly affect and deal with the health and life of the populace. **Professional expertise, born of knowledge and experience, of a high degree of technical knowledge and operational skill is required of pilots and aviation engineers. The lives of citizens depend on such persons.** There are other similar fields of governmental activity where professional, technological, scientific or other special skill is

called for. **In such services or posts under the Union or States, we think there can be no room for reservation of posts; merit alone must be the sole and decisive consideration for appointments.**" (emphasis added)

24. The aforesaid view found resonance in the case of Indra Sawhney Vs. Union of India and Ors. reported as **1992 Supp (3) SCC 217**, decided by the Constitution Bench of nine Judges of the Supreme Court wherein the opinion expressed was that it was desirable to exclude some posts from the zone of reservation on account of the nature of duties attached to them. The following observation made on this aspect are apposite:

"838. While on Article 335, we are of the opinion that there are certain services and positions where either on account of the nature of duties attached to them or the level (in the hierarchy) at which they obtain, merit as explained hereinabove, alone counts. In such situations, it may not be advisable to provide for reservations. For example, technical posts in research and development organizations/departments/ institutions, in specialties and super-specialties, in medicine, engineering and other such courses in physical sciences and mathematics, in defence services and in the establishments connected therewith. **Similarly, in the case of posts at the higher echelons e.g., Professors (in Education), Pilots in Indian Airlines and Air India, Scientists and Technicians in nuclear and space application, provision for reservation would not be advisable.**" (emphasis added)

25. Guided by the view expressed by the Supreme Court that specialized services where high standards of expertise and technical skills are of prime importance, ought to be kept out of reservation, this Court is of the opinion that the respondent company is justified in taking a stand that it was imperative for the petitioner to have qualified in the SFP Test and prove his abilities in the last limb of the recruitment procedure prescribed for selection to the post of a Trainee Pilot and having failed to do so, he cannot claim a discount on his competence and invoke a vested right for being selected by virtue of being a SC candidate. The bottomline is that for selection to the subject post, at the final stage of the process of elimination, merit and merit alone should have been the barometer, as was rightly adopted by the respondent company.

26. Given the facts of the present case, this court does not find any arbitrariness, illegality, or irregularity on the part of the respondent company in either structuring the selection procedure for recruiting Trainee Pilots pursuant to the advertisement issued in December 2007 or in making the selections. Resultantly, the writ petition fails and is dismissed accordingly, while leaving the parties to bear their own costs.

NOVEMBER 07, 2014
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(HIMA KOHLI)
JUDGE