

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

Decided on: 13.10.2014

+ **W.P.(C) 7377/2013. C.M. NO.15839/2013**
TUSHAR KESHAORAO DESHMUKH Petitioner
Through: Sh. Rajan Mani, Advocate.

Versus

UNION OF INDIA AND ANR. Respondents
Through: Sh. Vikas Mahajan, CGSC with Sh.
Rohan Gupta, Sh. S.S. Rai and Ms. Ruchika
Mahajan, Advocates, for Resp. No.1.
Sh. Naresh Kaushik and Sh. Vardhman Kaushik,
Advocates, for Resp. No.2.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE VIPIN SANGHI

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. In these proceedings under Article 226 of the Constitution, an order of the CAT dated 19.07.2013 dismissing O.A. No.930/2013 has been challenged. The petitioner had sought for the quashing of an order of the second respondent – Union Public Service Commission (UPSC), cancelling his candidature for the Civil Services Examination-2012 (CSE-2012) on the ground that it was his eighth attempt and that he had exceeded the permissible number of attempts, i.e. seven, in the CSE, for the disabled candidates in the OBC category.

2. The petitioner is a hearing-impaired candidate suffering from hearing impairment and is a person with disability under the Persons with Disabilities (Equal Opportunities, Protection of

Rights and Full Participation) Act, 1995. He had applied for and appeared in the CSE-2012. The respondents allow open category candidates a maximum of four attempts in such examination and OBC candidates are permitted a maximum of seven attempts. From CSE-2007 onwards, the respondents increased the permissible attempts of open category disabled candidates from four to seven. However, the corresponding number of permissible attempts for disabled candidates in OBC category was not increased and they continued to be allowed only seven attempts. The petitioner had till 2008 applied for and appeared in Central civil services examinations. However, he could not appear for this examination. The petitioner had applied and attempted CSE-2012; on that occasion, the concerned notification issued by the UPSC on 04.02.2012, by clause 4 stated that eligible candidates would be permitted four attempts in the examination. The first proviso to clause 4 did not place any restriction on the number of attempts in the case of SC/ST candidates. However, in the case of OBC candidates, the number of permissible attempts was seven, and the third proviso stated as follows:

“Provided further that a physically handicapped will get as many attempts as are available to other non-physically handicapped candidates of his or her community, subject to the condition that a physically handicapped candidate belonging to the General Category shall be eligible for seven attempts.....”

3. The petitioner had applied as hearing impaired/OBC candidate for CSE-2012; he states that he wrote to the UPSC on 26.04.2012,

requesting that he be permitted two extra attempts, within an overall 10 attempts, in view of the judgment of the Madras High Court delivered in *M. Selvakumar v. CAT* [W.P.(C) 18705/2010, decided on 24.01.2012]. He, however, subsequently received a Show Cause Notice dated 05.02.2013 from the UPSC, alleging that he had made misstatement regarding the number of attempts, and asking him why he ought not be proceeded against under the rules. The petitioner replied to the allegations, contending that he had attempted the civil service examinations on seven occasions and that his candidature in CSE-2009 and CSE-2010 were cancelled on the ground that he had already exhausted seven attempts. Those attempts were not counted. It is stated, therefore, that according to UPSC records, the petitioner actually attempted the civil service examinations six times. He also relied upon the ruling of the Madras High Court in *M. Selvakumar (supra)* and stated that three further attempts could be permitted in its terms.

4. The UPSC, however, by its order dated 15.02.2013, decided to cancel the petitioner's candidature. This was challenged by him in O.A. No.930/2013. By an interim order dated 18.03.2013, the CAT directed that the petitioner may be provisionally permitted to appear in the interview pursuant to CSE-2012 and that his results may not be published. Consequently, on 26.04.2013, the petitioner was permitted to appear in the interview with the UPSC. On 03.05.2013, the second respondent issued a Press Note, containing the list of candidates recommended for appointment pursuant to CSE-2012 along with a Corrigendum.

5. The UPSC had *inter alia* contended that the petitioner was not entitled to relief for the reason that he had suppressed his having approached the Bombay High Court in W.P.(C) 5287/2010, which was dismissed on 07.09.2010. In that, he had claimed to have become handicapped after availing seven attempts as OBC candidate and that he was entitled to additional seven attempts. It was also contended in addition, that *M. Selvakumar (supra)* could not be applied universally.

6. The CAT, by its impugned order, dismissed the Petitioner's original application. The operative portion of its order reads as follows:

*“10. We have considered the rival submissions and pleadings and it is observed that the main ground taken by the applicant in this OA is with regard to extension of the benefit given by the Madras High Court in the case of **M. Selvakumar (supra)** to the petitioner therein. The other charges like mis-statement and suppression of information etc. emanates from the applicability of the judgment of the Madras High Court in **M. Selvakumar (supra)**. If this judgment is applied to this case, these changes would disappear for all practical purposes. A perusal of that order would show that the High Court has discussed in detail clause-3(iv) of the Notification for CSE, 2008 and specifically discussed the provision which states that physically handicapped will get as many attempts as are available to other non-physically handicapped candidates of his or her community, subject to the condition that physically handicapped candidates belonging to the general category shall be eligible for 07 attempts. The High Court has further observed that the number of attempts for the physically handicapped persons in the general category has been increased from four to seven. However, the same benefit has not been proportionately extended to the PH candidates in the OBC community. Considering this to be inconsistent with Articles 14 and 16 of the Constitution of India the petitioner*

was given relaxation in the number of attempts as had been granted to the PH candidates belonging to general category. Taking a restrictive interpretation it can neither be said that there is any specific direction of the High Court to quash clause-3 of the notification nor there is any direction to the respondents to make necessary changes in the Rules for future examinations. At the same time, going by the detailed discussion on clause-3(iv) of the notification for CSE, 2008 it is apparent that it is this clause which has not been found to be consistent with Articles 14 and 16 of the Constitution of India. Here the High Court has drawn parallel with the judgment of the same High Court in Writ Petition No.4881/2009 etc. dated 12.06.2009. In such a situation, it is possible to take a view that clause 3(iv) of the notification dated 29.12.2007 was also quashed by the High Court by implication, though there was no specific order to this effect. However, even if this interpretation is taken, quashing of this clause will not be automatically applicable to the Notification for CSE for the subsequent years unless similar changes are made in the rules notified by the DoPT, which are statutory in nature. In this connection we would refer to the decision of the Hon'ble Supreme Court relied upon by the learned counsel for the respondents in the case of **Vijay Singh & Others** (supra), where it has been observed, just to recall, "that the cases in which recruitment and conditions of service including seniority are regulated by the law enacted by the Parliament or the State Legislature or the Rules framed under Article 309 of the Constitution, the general proposition laid down in any judgment cannot be applied dehors the relevant statutory provisions and dispute relating to seniority has to be resolved keeping in view such provisions." We also agree with the other two arguments taken by the learned counsel for the respondents that applicant cannot challenge the Rules for CSE, 2012 in March, 2013 when he had already appeared in the Preliminary and Main Examinations in 2012 conducted under the same Rules. Also that the applicant is an intervenor in the SLP filed before the Hon'ble Supreme Court (CC-10974/2013) against the said judgment of the Madras High Court."

7. The petitioner contends that the CAT's reasoning distinguishing *M. Selvakumar (supra)*, (which had, declared that OBC candidates who were disabled were entitled to three extra attempts), was erroneous. It was submitted that the judgment binds the respondents, particularly, the UPSC. It is argued in this regard that the UPSC preferred SLP(C) 21587/2013 after the decision but the Supreme Court has not yet set aside the Madras High Court's view. Such being the case, the prevailing view on the entitlement of the disabled OBC candidates had to be respected by the UPSC which was a party to the proceedings in *M. Selvakumar (supra)*. So far as the question of suppression of facts etc. was concerned, learned counsel highlighted that the CAT itself did not accept the submission and did not premise the rejection of the petitioner's O.A. before it on that ground.

8. The petitioner also relied upon the averments made by the UPSC in its special leave petition (SLP) to the effect that *M. Selvakumar (supra)* has universal application. He also relied upon a Division Bench ruling in *Anmol Bhandari v. Delhi Technological University* (WP 4853/2012 decided on 12.09.2012) for the proposition that the level of backwardness of persons with disabilities is akin to socially disadvantaged candidates, such as, those belonging to SCs and STs.

9. The UPSC contends, through its counsel, that the judgment in *M. Selvakumar (supra)* has no universal application and, in fact, it amounts to a declaration *in personam*, i.e. none except M. Selvakumar could claim entitlement to more than seven attempts in the category of OBC disabled candidates. Till such time the Supreme Court affirms

the decision, no candidate has a right to claim entitlement of more than seven attempts. Learned counsel emphasized that the petitioner had exhausted the number of attempts permissible to him, i.e. seven and that in the absence of a challenge to the rules, he could not have unilaterally relied upon *M. Selvakumar (supra)* and assumed that he had a right to appear in CSE-2012 which, in effect, constituted his eighth attempt. Learned counsel for the UPSC, therefore, urged that the petition has to be dismissed.

Analysis & Conclusions

10. The CAT upheld UPSC's rejection of the petitioner's candidature in CSE-2012 on the ground that he had already appeared seven times in previous examinations. There is no dispute that till 2007, open merit disabled candidates were permitted only four attempts. This was increased later to seven attempts. The OBC candidates were entitled and continued to be entitled to seven attempts. However, the number of attempts in the case of those OBCs who are also persons with disabilities continued to be the same, i.e. seven. As far as the SC/ST candidates are concerned, there is no restriction on the number of attempts; that position exists for SC/ST candidates who are also disabled. In these circumstances, the question which arose before the Madras High Court in *M. Selvakumar (supra)* was whether the equation of OBC candidates with OBC disabled candidates who belong to OBC amounts to treating equals unequally. The Madras High Court, on that occasion, held that such OBC candidates who are also disabled would be entitled to an increase in the number of permissible attempts like in the case of general category

candidates who are entitled to a higher number of attempts, and declared that three additional attempts ought to be given. The relevant reasoning of the Madras High Court in this regard is as follows:

“6. A reading of clause 3(iv) of the Notification referred to above makes it very clear that the number of attempts for physically challenged candidates in the General Category has been increased from four to seven. However, the same benefit has not been proportionately extended to physically handicapped candidates in the Other Backward Class community. It is seen from the materials available on record that the petitioner made an attempt in the examination conducted during the year 2007 for the eighth time and also made an attempt in the examination conducted during the year 2008 for the ninth time and since his name did not appear in the list of candidates who cleared the preliminary examination for the year 2007, he made an application under the Right to Information Act to find out as to why his candidature was not considered. Thereafter, he was informed that, as he had already exhausted seven attempts, his candidature was not considered. When the number of attempts has been increased from four to seven in respect of physically challenged candidates in the General Category and when there is no restriction with regard to the number of attempts for physically handicapped candidates in SC/ST category, restricting the number of attempts to seven in respect of physically handicapped candidates in the Other Backward Class Community, is in violation of Article 14 of the Constitution of India. Therefore, we hold that the number of attempts of seven fixed for physically handicapped candidates in the Other Backward Class Community, is disproportionate to the number of attempts granted to physically handicapped candidates in the General Category.

7. In the case relied upon by the learned counsel appearing for the petitioner and referred to above, the Railway Board, while relaxing the upper age limit in respect of OC and BC candidates, failed to relax the upper age limit in respect of candidates belonging to SC/ST candidates. The

Division Bench comprising of one of us (Justice Eliphe Dharma Rao), held that, when the minimum age limit prescribed for the candidates belonging to OC and OBC candidates is relaxed, the same has to be extended to the candidates belonging to SC/ST, by virtue of which action, no benefit was extended to SC/ST candidates and on the other hand, it has only benefited OC and OBC candidates, which decision of the Railway Board is arbitrary and prejudicial to the interest of the candidates belonging to SC/ST community, thereby offending Articles 14 and 16 of the Constitution of India. In this case, admittedly, the number of attempts in respect of physically handicapped candidates in the General Category has been increased from four to seven. However, the number of attempts in respect of physically handicapped candidates belonging to Other Backward Class community has not been proportionately increased, which is arbitrary and prejudicial to the interest of the physically handicapped candidates belonging to the Other Backward community. The Tribunal, without going into the merits of the case, has dismissed the original application, by tagging the same along with the miscellaneous petition filed for condonation of delay. Therefore, the order under challenge is set aside and the writ petition is allowed. The petitioner is entitled to get relaxation in the number of attempts as has been granted to physically handicapped candidates belonging to the General category. No costs.”

10. It is evident from the above that facially the Madras High Court was not concerned only with the petitioner Selvakumar, but the policy of the respondents in permitting the same number of attempts to OBC candidates - regardless of whether they were labouring under any disability or not was at issue. This uniform application of that policy was held to be discriminatory. The UPSC's contention that it did not amount to declaration of law or *judgment in rem* is contradicted by its following averment in the SLP – a copy of which was made available to the Court during the hearing:

“.....whereby the High Court erroneously allowed writ petition holding that increasing the number of attempts in respect of physically handicapped candidates in the General Category from four to seven and not been extended to physical handicapped candidate belonging to other Backward Class community was arbitrary and prejudicial as they continue to enjoy only 7 attempts as ever before. High Court found that there ought to have been a corresponding increase of 3 more attempts for physically handicapped candidates belonging to OBC category.

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5. GROUNDS

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(C) *THAT, High Court erred in law in not appreciating the object and reason for an increase in the number of attempt from four to seven for the physically handicapped in the general category.*

(D) *THAT, High Court erred in law in holding that since the number of attempt for those physically handicapped category candidates belonging to General Category was increased from 4 to 7, correspondingly for OBC candidate with physical disability the same should also be increased by 3 attempts.*

(E) *THAT, High Court had erred in law in not appreciating that an increase in the number of attempt available to PH candidates belonging to general category would not automatically confer a right for increasing the number of attempts in the same manner by three times to the PH candidates belonging to category other than the general.”*

11. This Court is of the opinion that as long as the declaration of law in *M. Selvakumar (supra)* stands and is not set aside, the CAT ought to have followed it. No rule or decision contrary to *M. Selvakumar (supra)* was relied upon by the UPSC. This Court too does

not find any reason to differ from *M. Selvakumar (supra)*. In this context, the reasoning in *Anmol (supra)* that persons with disability labour under similar and identical disadvantages as reserved category (SC/ST) personnel is apt. In *Anmol (supra)*, the Court had extensively relied on and drawn on empirical data, such as studies and officially sponsored research papers, to hold that while granting concessions, the equation between persons with disabilities and SC/ST candidates would be justified and called for. In the present case, the equation which the petitioner sought was in the light of the respondents' decision of 2007 to increase the number of attempts for general category disabled candidates by three. The benefit of such relief, i.e. increase by three attempts in the case of disabled general candidates has resulted in a situation where OBC category disabled candidates are also limited to seven attempts. Further, general category candidates, who do not suffer from disabilities are permitted four attempts. In the case of SC/ST, there is no restriction in the number of attempts. However, in the case of the OBC candidates, the number of attempts permitted to both physically fit candidates and those with disability is seven. This equation, under the circumstances, was held to be discriminatory by *M. Selvakumar (supra)* which directed an increase by three attempts.

12. This Court holds that the reasoning in *M. Selvakumar (supra)* is justified having regard to the fact that OBCs are seen to be less disadvantaged than the general merit candidates. Once the disabled general merit candidates are afforded an increase in the number of attempts, similarly, increase in the number of attempts ought to be

permitted to OBC candidates who are also disabled. The State's recognition of that OBCs, as a class, suffer from disadvantages, and the concession of allowing OBC candidates seven attempts was meant for all able bodied candidates. The State's concern in granting additional accommodation to persons with disabilities is reflected by the increase in the number of permissible chances, to such disabled candidates, who do not belong to any reserved category by three. This equalized the disabled non-reserved candidates, with those who were able bodied OBC category candidates, and amounted to "reasonable accommodation" visualized by Article 2 of the Convention on Rights of Persons with Disabilities (CRPD) to which India is a signatory and which is the underlying impetus for enactment of the Persons with Disabilities (Prevention of Discrimination) Act, 1995. Reluctance to grant similar additional chances to OBC candidates with disabilities, in the opinion of the court, amounts to discrimination. In this context, this Court is mindful of the decision in *Deaf Employees Welfare Assn. v. Union of India* 2014 (3) SCC 173. The petitioner claimed grant equal transport allowance to its government employees suffering from hearing impairment as was being given to blind and other disabled government employees. The allowance given to the hearing impaired employees was significantly lower than the allowance granted to employees with other disabilities. The Supreme Court allowed the petition and directed the Respondents to grant transport allowance to speech and hearing impaired persons also on par with blind and orthopaedically disabled government employees. The court held that "*there cannot be further discrimination between a person with disability of 'blindness' and a person with disability of 'hearing*

impairment'. Such discrimination has not been envisaged under the Disabilities Act." The Court ruled that equality of law and equal protection of law afforded to all persons with disabilities while participating in government functions and the assumption that a hearing or speech impaired person is suffering less than a blind person is, in effect, marginalizing them; and as such, the same benefits must be given to them, as are awarded to blind citizens. Any move by the state to further this objective is rooted in principles enshrined in Articles 14. This case held that deaf should also be given transportation allowances on par with blind and orthopedically handicapped employees of the government. Thus, within the class of persons with disabilities, the rule of accommodation adopted by the Union government in the matter as regards chances to attempt the civil services examinations has to be identical, i.e three chances more than what is given to the class of candidates who are "normal" or "able-bodied" i.e not suffering from any disability.

13. So far as the question of suppression of material facts is concerned, the CAT itself was of the opinion that if the logic and ratio in *M. Selvakumar (supra)* were to prevail, the UPSC's objection on that score would be irrelevant. In view of the above reasoning – that *M. Selvakumar (supra)* has to prevail, this Court is of the opinion that the petitioner's claim for an eighth time was justified.

14. For the foregoing reasons, the impugned order is hereby set aside. O.A. No.930/2013 is allowed to the extent that a declaration is issued that the petitioner and other similarly situated OBC candidates who are disabled are entitled to a maximum of ten attempts instead of

seven attempts in terms of CSE-2012. The cancellation of petitioner's candidature is, therefore, set aside. The respondents are directed to declare the petitioner's result and in case he is deemed successful, process his claim for appointment to the concerned service and pass consequential orders in accordance with the applicable rules within eight weeks from today.

15. The writ petition is allowed in the above terms along with the pending application.

Order dasti.



S. RAVINDRA BHAT
(JUDGE)

VIPIN SANGHI
(JUDGE)

OCTOBER 13, 2014
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