

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

+ **W.P.(C) No.7169/2011**

% **16th January, 2017**

SHAIENDRA PATHAK Petitioner

Through: Mr. Rajan Mani, Advocate.

versus

UNION OF INDIA AND ORS. Respondents

Through: Mr. Dev P. Bhardwaj, CGSC for
respondent No.1.

Mr. Mohinder J.S. Rupal, Advocate
for respondent No.2.

Mr. M.A. Niyazi, Advocate for
respondent Nos.3 and 5.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

1. By this writ petition under Article 226 of the Constitution of India, the petitioner/Sh. Shailendra Pathak seeks appointment to the post of Assistant Registrar with the respondent no.2/University of Delhi. Petitioner seeks appointment to the post of Assistant Registrar with the respondent no.2/University of Delhi under the Persons with Disabilities (PWD) quota. Also, it is not that the petitioner seeks appointment to the post under the PWD quota on the ground that he has been wrongly not selected, because

petitioner admits that the respondent no.5/Sh. Pradeep Kumar who has been appointed in the PWD quota has received more marks i.e 276 marks whereas the petitioner has obtained 268 marks, but what the petitioner pleads and argues is that the respondent no.5/Sh. Pradeep Kumar though he only applied for the post of Assistant Registrar in the PWD category, and was selected in the PWD category, respondent no.5/Sh. Pradeep Kumar was also otherwise an OBC person, and though respondent no.5/Sh. Pradeep Kumar did not apply as an OBC candidate, yet respondent no.5/Sh. Pradeep Kumar should be selected to the post of Assistant Registrar not in the PWD category but in the OBC category inasmuch as the person selected in the OBC category namely respondent no.4/Sh. Prashant Nagar received more marks than the General category candidate who got selected and accordingly once respondent no.4/Sh. Prashant Nagar is appointed as a General category candidate, the OBC post to which respondent no.4/Sh. Prashant Nagar is appointed will get vacated for the appointment of respondent no.5/Sh. Pradeep Kumar who has been selected in the PWD category, and therefore, since a post gets vacant in the PWD category on vacation of the same by respondent no.5/Sh. Pradeep Kumar, the petitioner hence should be appointed to the post of PWD category of Assistant Registrar with the respondent no.2/University of Delhi. I would like to simplify the aforesaid issue raised by the petitioner by simply stating that

the petitioner states that respondent no.4/Sh. Prashant Nagar who applied for and is selected in the OBC category should be taken as selected in the General category because respondent no.4/Sh. Prashant Nagar has received more marks than the selected candidate in the General category, and that simultaneously what then should happen is that respondent no.5/Sh. Pradeep Kumar who is the selected candidate in the PWD category (and though he only had applied as PWD category and not as OBC category) is also an OBC person, respondent no.5/Sh. Pradeep Kumar should be shifted to the post of Assistant Registrar to the OBC category which respondent no.4/Sh. Prashant Nagar will vacate on being appointed as a General category candidate, and therefore, petitioner is entitled to the post of Assistant Registrar in the PWD category because the post of PWD category which has been given to respondent no.5/Sh. Pradeep Kumar will fall vacant.

2. Learned counsel for the petitioner in support of his arguments states that since there has been a common selection process i.e common written test and interview on the same date taking place of all the three posts of Assistant Registrar with the respondent no.2/University of Delhi in the three categories of PWD, OBC and General, hence, merger and automatic shifting from the post of OBC to General and PWD to OBC must take place. I may clarify that two advertisements were issued with the first

advertisement which was issued on 30.9.2009 was only for one post of Assistant Registrar under the PWD category and the second advertisement dated 13.4.2010 was for two posts of Assistant Registrar under the OBC category and the General category i.e there was a separate advertisement for the two posts of Assistant Registrar dated 13.4.2010 for General and OBC category and another earlier advertisement dated 30.9.2009 for the post of Assistant Registrar in PWD category, but the written test took place together of all the three posts as also interview process for all the three posts of the Assistant Registrars was conducted on the same date.

3. Learned counsel for the petitioner in support of his arguments places reliance upon the observations of the Supreme Court made in para 4 of the judgment in the case of ***R.K. Sabharwal and Others Vs. State of Punjab and Others (1995) 2 SCC 745*** along with Rule 17 of the Gazette notification dated 23.5.2015 of the Ministry of Personnel, and it is accordingly argued that there has to be automatic shifting i.e thus the appointment of the selected candidate in the post of OBC category should take place in the General category and there is no option in respondent no.4 /Sh. Prashant Nagar deciding/having an option whether or not to continue his appointment in the OBC category to which he had applied and was selected, and that respondent no.4/Sh. Prashant Nagar must automatically

shift for appointment to the General category as he has received more marks than the candidate selected in the General category. Learned counsel for the petitioner in support of the argument with respect to the result of all three posts of Assistant Registrars having to be common and lateral shifting to take place between such posts once there is a common admission test and common selection process, relies upon the Division Bench judgment of this Court in the case of *Amit Singhal & Ors. Vs. The Chairman, DSSSB & Anr.* in W.P.(C) No.3603/2010 decided on 26.5.2010.

4. In my opinion, the only issue to be decided in this case is that can there be an automatic shifting of a candidate who has applied for a post in OBC category to be selected in the General category post on the ground that the candidate who has applied in the OBC category post has received higher marks so as to be appointed and selected in the General category post and also that there should be automatic shifting of the PWD candidate (who incidentally is an OBC person) to the OBC category although the PWD candidate has not applied in the OBC category and is also not interested to shift to the OBC category post. In other words, can a candidate who has made a conscious decision to apply for the post of Assistant Registrar as an OBC candidate for the OBC category post, can be asked to automatically shift to the General category post with the concomitant issue as to whether a

person (i.e respondent no.5/Sh. Pradeep Kumar) who has not applied in the OBC category should be asked to shift to the OBC category simply because he incidentally is an OBC person although he has not applied under the OBC category and has only applied and is selected as a PWD candidate. Putting it yet in other words, can a candidate who has specifically applied under the reserved category of OBC be asked to shift to an unreserved category and whether a person who has applied specifically under one reserved category of PWD should be asked in spite of his opposition to automatically shift to another reserved category post of an OBC category.

5. Let me at this stage reproduce para 4 of the judgment in the case of *R.K. Sabharwal (supra)* and this para 4 reads as under:-

“4. When a percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the posts shown at the reserve points are to be filled from amongst the members of reserve categories and the candidates belonging to the general category are not entitled to be considered for the reserve posts. On the other hand the reserve category candidates can compete for the non-reserve posts and in the event of their appointment to the said posts their number cannot be added and taken into consideration for working out the percentage of reservation. Article 16(4) of the Constitution of India permits the State Government to make any provision for the reservation of appointments or posts in favour of any Backward Class of citizens which, in the opinion of the State is not adequately represented in the Services under the State. It is, therefore, incumbent on the State Government to reach a conclusion that the Backward Class/Classes for which the reservation is made is not adequately represented in the State Services. While doing so the State Government may take the total population of a particular Backward Class and its representation in the State Services. When the State Government after doing the necessary exercise makes the reservation and provides the extent of percentage of posts to be reserved for the said Backward Class then the percentage has **to be followed strictly. The prescribed percentage cannot be varied or charged simply because some**

of the members of the Backward Class have already been appointed/promoted against the general seats. As mentioned above the roster point which is reserved for a Backward Class has to be filled by way of appointment/promotion of the member of the said class. No general category candidate can be appointed against a slot in the roster which is reserved for the Backward Class. The fact that considerable number of members of a Backward Class have been appointed/promoted against general seats in the State Services may be a relevant factor for the State Government to review the question of continuing reservation for the said class but so long as the instructions/rules providing certain percentage of reservations for the Backward Classes are operative the same have to be followed. Despite any number of appointees/promotees belonging to the Backward Classes against the general category posts the given percentage has to be provided in addition. We, therefore, see no force in the first contention raised by the learned Counsel and reject the same.” (emphasis added)

6. No doubt, Supreme Court in the case of *R.K. Sabharwal* (*supra*) has held that a person who is a reserved category candidate can compete and seek appointment to a General category post, and that there cannot be the position that a General category candidate can seek appointment in the reserved category post, but, the Supreme Court in this very para has specified that reservation percentage in the post has to be strictly followed and the prescribed percentage cannot be varied and changed. These observations have been rightly made by the Supreme Court because if the persons under the reserved categories such as OBC, SC/ST or PWD candidates are asked to shift to unreserved posts in General category, the roster system which specifies different vacancies for General posts, SC/ST posts, OBC posts, PWD posts etc will be in a totally confused state of affairs each time thereafter so far as promotion to the higher posts is

concerned and as will be elaborated hereinafter. No doubt, the Gazette notification dated 23.5.2015 talks of automatic appointment of the PWD candidates and for increase of the posts of PWD candidates, if the person who applied in the PWD posts, gets selected in the General post, however, this very Rule 17 yet further specifies of recommendations having been made and amendments to be carried out in the Rules in due course i.e Rules will have to be amended and notified of how the roster system will change whether in the same number of posts as existing or by increase of the sanctioned posts, and thereafter apportioning them under the unreserved and the reserved category posts by their respective number.

7. I would also like to note for completion of narration that the Gazette notification dated 23.5.2015 of the Ministry of Personnel will *mutatis mutandis* apply to appointments in the respondent no.2/University of Delhi by virtue of the notification dated 26.9.2013, and copy of which has been placed on record of this Court on behalf of the petitioner during the arguments. I would also, at this stage, reproduce Rule 17 of the Gazette notification of the Ministry of Personnel dated 23.5.2015 which has been referred to above, and which Rule 17 reads as under:-

“17. The minimum qualifying marks as specified under rules 15 and 16 may be relaxable at the discretion of the Commission in favour of physically handicapped candidates in order to fill up the vacancies reserved for them:

Provided that where a physically handicapped candidate obtains the minimum qualifying marks in his own merit in the requisite number for General, or the Scheduled Caste or the Scheduled Tribe or other Backward Class category candidates, then, the extra physically handicapped candidates, i.e., more than the number of vacancies reserved for them shall be recommended by the Commission on the relaxed standards and consequential amendments in the rules will be notified in due course.”

8. Therefore, the observations of the Supreme Court in the case of ***R.K. Sabharwal (supra)*** and Rule 17 of the Gazette notification dated 23.5.2015 have to be read in an appropriate manner whereby such observations in the case of ***R.K. Sabharwal (supra)*** when read with Rule 17 of the Gazette notification dated 23.5.2015 will apply on either additional posts being created for the appointments in a particular post, i.e more posts of Assistant Registrar in this case, otherwise the percentage which has to be followed strictly among reserved and unreserved candidates including *inter-se* reserved candidates will automatically stand changed and varied, and which is not permissible as per the observations of the Supreme Court itself in para 4 of the judgment in the case of ***R.K. Sabharwal (supra)***. I therefore cannot agree to the argument urged on behalf of the petitioner of automatic increase of posts of PWD candidates merely because the OBC candidate in this case obtained marks by which such OBC candidate could be selected in the General category post, and this will be all the more so because the PWD category candidate namely the respondent no.5/Sh. Pradeep Kumar opposes his shifting from the PWD category to the OBC category inasmuch as

respondent no.5/Sh. Pradeep Kumar not only never applied for being selected only as OBC category candidate, and that even today counsel for the respondent no.5/Sh. Pradeep Kumar states that respondent no.5/Sh. Pradeep Kumar does not want to shift from the PWD category post to an OBC category post and which will affect his future career graph which ought to be only in the PWD category. Related with this aspect is also that though respondent no.4/Sh. Prashant Nagar has not appeared before this Court, this Court will also have to consider as to why at all respondent no.4/Sh. Prashant Nagar should be forced to automatically shift from the OBC category post, to which only he had applied for, to a General category post and which cannot be done for the reasons given hereinafter.

9. On the aspect of the respondent nos. 4 and 5 being not shifted against their wishes to a General category post and an OBC category post respectively, firstly it is seen that in para 4 of the judgment in the case of ***R.K. Sabharwal (supra)*** the expression used is “may compete” i.e a person has to take a conscious decision for being appointed in a General category post by competing for such post. The issue is that even assuming there is automatic increase of posts as argued on behalf of the petitioner with reference to Rule 17 of the Gazette notification dated 23.5.2015, can a reserved category candidate be forced to become a General category

candidate although he has not applied for being appointed in the General category. This aspect will have relevance because I have put it not only to the counsel for the petitioner but also to the counsels for the respondents that what would be the consequence of a reserved category/OBC category candidate being shifted to a General category candidate so far his further and future career graph of promotions to higher posts in the employer organization is concerned. In other words, suppose there are about four to five promotion posts after the post of Assistant Registrar, whether respondent no.4/Sh. Prashant Nagar who applied as an OBC category candidate and has to be shifted to a General category candidate as per the arguments of the petitioner, then so far as future promotions to the higher posts are concerned, will respondent no.4/Sh. Prashant Nagar be considered as a General category candidate or as a reserved category OBC candidate for the higher posts. Learned counsel for the petitioner in this regard argues that this Court is not called upon to decide this question, however, I cannot agree, inasmuch as, even the arguments urged on behalf of the petitioner, and as conceded on behalf of the petitioner would be that an OBC category candidate when applied as an OBC category candidate is selected as an OBC category candidate but is to be automatically shifted to a General category post on account of having higher marks than the General category candidate, can and will such person be entitled during his service career at

his choice/option for appointment to the higher posts both either for General posts or for reserved category posts? If this argument of the petitioner is accepted it would mean enlarging the pool of candidates for General category posts by adding those persons who though got appointed as a General category candidate, but since is a reserved category person, such candidate at his option for each of the higher posts and for each of the promotion processes for the higher posts can as per his convenience decide whether to apply for promotion as a General category candidate for the General category post or as an OBC candidate for the reserved category post. This will have an unhealthy effect of reducing the chances of the General category candidates for the higher/promotion General category posts as to the pool of General category posts, pool of the OBC category posts will be added. In fact, if what is argued on behalf of the petitioner is accepted, then, possibly in many cases the legally set boundary of 50% of reserved posts may also be crossed on various occasions because counsel for the petitioner argues that the logic with respect to interchangeability in appointments would also be extended even for the promotion posts. In my opinion, not only this argument will fall foul of the law with respect to entitlement of the candidate only to continue in his selected category during his career with an employer but the same will also result in uncertain fluidity of the roster point system because there will be complete uncertainty

at all points of time with respect to not only number of posts but also with respect to the persons who would be eligible for being appointed to different posts in an organization, be the reserved category posts or unreserved category posts. To put it in other words, and to finally state briefly what is discussed above, is that an OBC category candidate who is automatically appointed to a General category post cannot at his option during his entire service career for promotion to different higher/promotion posts in different promotion processes of different years can at his option keep on jumping for being either in the pool of a General category candidate for appointment to a General category post or to be a reserved category candidate for appointment to a reserved category post. No such judgment to this affect is pointed out to this Court which results in the aforesaid legal position that an OBC category or a reserved category candidate although he is appointed in a General category post but since he had applied for and so appointed originally against a reserved category post but was shifted to a General category post on account of having higher marks than the General category candidate in his future service and appointment to higher/promotion General category posts can keep on asking for appointment by promotions to the higher posts both as in the General category pool as also in the reserved category pool simply because the candidate was originally selected to the reserved category post.

10. Learned counsel for the respondents have also rightly argued that respondent no.5/Sh. Pradeep Kumar who has been selected in the PWD category cannot be forced to take the OBC category post inasmuch as reservation of posts *inter-se* the promotion posts above the Assistant Registrar would be different in number for the OBC posts and the PWD posts and which is to be taken with the aspect that the respondent no.5/Sh. Pradeep Kumar feels he has a better chance of promotion and career prospects as a PWD candidate and not as an OBC category candidate, and as so argued before this Court. In fact, this logic will also apply on account of reasons given above that respondent no.4/Sh. Prashant Nagar cannot be forced to abandon his reserved category post and for his career graph for higher promotions only in the limited reserved category posts which would be lesser in number than the unreserved posts. Respondent no.4/Sh. Prashant Nagar as also stated above cannot exercise the option as a General category candidate so far as future promotions are concerned i.e respondent no.4/Sh. Prashant Nagar cannot at his option either to be in General pool of candidates for being appointed and then at his sweet will and option seek appointment in reserved category for being appointed to the higher reserved category posts in OBC category.

11. In view of the above, in my opinion, the petitioner cannot be granted the reliefs because the petitioner cannot claim that respondent no.4/Sh. Prashant Nagar who has applied and is selected as an OBC category candidate should be automatically shifted to a General category post with all its consequences even in the future and more particularly that respondent no.5/Sh. Pradeep Kumar who has appeared and contested this petition, and who has been selected in the PWD category post cannot against his will be asked to be shifted from PWD category post of Assistant Registrar to which he has applied and is selected to the OBC category post of Assistant Registrar and to which action there is vehement opposition on behalf of the respondent no.5/Sh. Pradeep Kumar. Once there cannot be shifting of respondent no.5/Sh. Pradeep Kumar to the post of Assistant Registrar under OBC category of respondent no.4/Sh. Prashant Nagar and also that there cannot be shifting of respondent no.4/Sh. Prashant Nagar, an OBC category candidate, automatically to the General category, hence there would therefore not arise any vacancy in the PWD category post of Assistant Registrar with the respondent no.2/University of Delhi in terms of the subject selection process, and once there is no vacancy in the said PWD category post, petitioner thus cannot be granted appointment to the PWD category post, taking note of the fact that petitioner in fact was unsuccessful otherwise in the selection process for appointment to the post of Assistant

Registrar in the PWD category and to which post respondent no.5/Sh. Pradeep Kumar was selected on account of receiving higher marks than the petitioner.

12. For the sake of completion of narration I state that right at the commencement of the arguments, counsel for the petitioner gave up the relief/prayer (a) in the writ petition.

13. Writ petition is accordingly dismissed, leaving the parties to bear their own costs.

JANUARY 16, 2017
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VALMIKI J. MEHTA, J