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

+ **W.P.(C) 7200/2018 & CM No. 27422/2018**

COL ANIL KUMAR SHARMA (RETD) AND
ORS.

..... Petitioners

Through: Mr Vaibhav Agnihotri and Mr Rahul
Malik, Advocates.

versus

UNION OF INDIA AND ORS.

..... Respondents

Through: Mr Ashim Sood, CGSC with Mr
Aditya Kumar, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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25.07.2018

1. The petitioners have filed the present petition, *inter alia*, praying as under:-

“B. Issue a Writ of Certiorari quashing the communication dated 16.05.2018 restraining the Respondent No. 2 from retrospective application of policy change to the NOC dated 13.08.2014 by considering it as "first chance" thereby restoring the Petitioners in the list of seniority.”

2. The petitioners are Ex-Servicemen (ESM), who have superannuated from the Indian Armed Forces. They are empanelled with the Directorate General of Resettlement (hereafter ‘DGR’) for being sponsored to carry on the work of coal transportation for Subsidiaries of Coal India Limited (hereafter ‘Coal Subsidiaries’) through incorporated companies (hereafter ‘ESM Companies’). The petitioners are essentially aggrieved by the action

of the respondents in treating their preference for sponsorship to particular Coal Subsidiary as their refusal to take up sponsorship.

3. In the year 2014, the petitioners were called upon to submit their priorities for taking up sponsorship with South Eastern Coalfields Limited (hereafter 'SECL') and Mahanadi Coalfields Limited (hereafter 'MCL'). They expressed their willingness to be sponsored and indicated their order of preference: they chose SECL as their first priority and MCL as the second. Since the sponsorship to SECL was not materializing, the petitioners were called upon to reconsider their order of preference. They elected to stand by their choice and await their turn for a sponsorship with SECL. This action of the petitioners is now being construed as an expression of their unwillingness/refusal to take up sponsorship with MCL.

4. In terms of the 'Guidelines on Formation and Running of Ex-Servicemen Coal Transport Companies', Ex-Servicemen (ESM), who have opted to form of coal transport companies (ESM Companies) and take up sponsorship for carrying out the work of coal transportation, are given two chances to take the sponsorship. An empanelled ESM is entitled to decline the sponsorship offered by DGR once and the second refusal results in the removal of their name from the list of seniority. The relevant extract of paragraph 3 of the aforesaid Guidelines is set out below:-

"Formation of ESM Company

3. On receipt of a demand from Coal Subsidiary for a Coal Transport Company, the DGR will initiate steps to select eligible retired officers as per the seniority, which are willing to

undertake the work after completion of mandatory documentation, to form an ESM Coal Company. The related terms and conditions are as under:-

(a) On receipt of request from the Coal Subsidiary, the DGR will take following action:-

(i) In case demand is for more than one ESM Company, the DGR will seek willingness of ESM (O) from the seniority roster of prospective Directors maintained by DGR. The willingness will be sought in multiple of five for the number of companies to be sponsored as each ESM Company will have five ESM (O) Directors. The willing Directors falling in seniority within that number will be allowed to form the ESM Company with five directors in each.

(ii) In case of demand of only one company the DGR will seek willingness of five ESM (O)s as per the seniority roster of prospective Directors maintained by DGR. In case any ESM (O), whose turn has come up for sponsorship is unwilling to join in a company with others in that seniority, he will be provided with one more opportunity for sponsorship when next demand of ESM Company is received from the Coal Subsidiary. If the ESM (O) is still unwilling his name will be struck off from the seniority roster of this scheme. In case of any ESM (O) is unwilling the next ESM (O) in seniority roster will be asked to join to form the ESM Company.

* * * * *

(d) An ESM(O) who withdraws voluntarily from the scheme or is removed from the scheme in case of unwillingness to be sponsored as a director and has not been debarred from participating in the scheme by DGR could, in case he so desires, register himself in any other scheme of the DGR in case fulfilling the scheme criteria. His seniority in that scheme will count from the date of such new registration.”

5. On 13.06.2014, the petitioners were called upon to indicate whether they were willing to take up sponsorship for a contract with SECL and MCL. They were subsequently asked to indicate their order of preference for sponsorship to the aforesaid Coal Subsidiaries.

6. The letter dated 13.06.2014 is set out below:-

“Tele 26192355

BY REGISTERED POST

Government of India

Ministry of Defence

Dte Gen Resettlement

West Block-IV RK Puram

New Delhi - 110066

1784/DGR/SE-2/Coal/Gen/Sponsor(ship)

13 Jun 2014

All Addresses as per attached list

**SPONSORSHIP OF COAL LOADING AND
TRANSPORTATION COMPANIES IN COAL
SUBSIDIARIES**

1. As per your seniority you are likely to be sponsored as Dir of ESM Company. You are requested to forward the willingness to be a Dir of the ESM Company. DGR has got adequate number of ESM Companies to be sponsored for both to MCL and SECL. In case you are unwilling to become a Dir of ESM Company you will be deregistered from this scheme. On being de-registered you will be permitted to take part in any other scheme of DGR as per the eligibility condition of that particular scheme.

2. The copy of willingness letter is enclosed herewith. YOU ARE REQUESTED TO CLEARLY MENTION PRIORITY ONE AND PRIORITY TWO FOR SECL AND MCL COMPANIES. PLEASE DO NOT WRITE 'BOTH' AS PRIORITY ONE. You are requested to send the willingness letter through fax No. 011-26171456 followed by post. Your reply should reach this office by 07 Jul 2014. Non receipt of confirmation by due will be considered as you are not interested in the scheme and your name will be removed from the seniority list.

(HS Cheema)
Col
Director (SE)
for DG (R)''

7. The petitioners responded to the said letter and indicated their first priority as SECL and second priority as MCL.

8. Thereafter, on 13.08.2014, DGR informed the petitioners that the

sponsorship with SECL is taking sometime as at the material time SECL had a requirement of only one ESM Company and further requirement would probably fructify after six months. The petitioners as well as other ESMs, who had indicated sponsorship with SECL as their first priority were given an option to reconsider the same failing which their option would be considered as final.

9. Apparently, the petitioners decided to stand by their order of preference.

10. It is stated that no further requirements were received from SECL and the petitioners continued to await the same. This resulted in two separate waiting/seniority lists; one constituted by ESMs that had opted for sponsorship of SECL and the other constituted by the remaining ESMs. The DGR decided to do away with the dual list and on 17.04.2018, sent another letter which reads as under:-

“Tele: 26192355/56

By email

E.mail- diredgr@desw.gov.in

Government of India
Ministry of Defence
Dte. Gen. of Resettlement
R. K. Puran, West Block-IV
New Delhi-11006

1784/DGR/SE-2/Coal/WCL/SP

17 Apr. 2018

ESM(O)

In Coal Seniority Scheme

**SPONSORSHIP OF COAL LOADING AND
TRANSPORTATION COMPANY IN WCL COAL
SUBSIDIARY**

1. Refer our letter No.1784/DGR/SE-2/Coal/WCL dated 05 Mar 2018 addressed to 77 ESM(O) in seniority list of Coal Loading & Transportation Scheme regarding an offer of 03 companies to be sponsored to WCL.
2. DGR is mandated to provide resettlement opportunities to ESM at the earliest. The current waiting duration for this scheme has become pretty long hence in order to shorten the waiting list following measures have been adopted:-
 - (a) An ESM(O) in waiting list will be two chances as per the current guidelines as per seniority. An ESM(O) in waiting cannot say NO to a particular subsidiary and wait for another one purely for profiteering.
 - (b) In 2014 ESM(O) whose coal seniority Nos. are 1182, 1228, 1232, 1234, 1245, 1263, 1269, 1273, 1278, 1281, 1301, 1307, 1308, 1313, 1319, 1320, 1323, 1324, and 1346 were asked a choice between MCL and SECL when DGR had received offers from both these coal subsidiaries simultaneously. These ESM(O) had opted for SECL and hence continued to wait for SECL despite the fact that SECL has not given any fresh demand since last 03 years thereby creating a specific waitlist for SECL which is not as per MoU & Guidelines. These ESM(O) will be given their two chances as per seniority and in case they do not accept the offers their names will be deleted.
3. In view of the above our letter under reference at Para 1 above is hereby cancelled, responses given by ESM(O) are being discarded without any prejudice. Fresh call up is now being extended to ESM officers in the seniority list.

4. In view of the above, you are requested to forward your willingness/unwillingness as per the performa att by 25 Apr 2018 positively by email only.

(K.S. Kalsi)

Col.

Dir.(SE)”

11. As is apparent from paragraph 2(b) of the aforesaid letter dated 17.04.2018, DGR reiterated that all ESMs would be given two chances as per their seniority and if they do not accept the offers for sponsorship, their names will be deleted. Paragraph 2(b) of the aforesaid letter also refers to the seniority numbers of ESMs, who had opted for sponsorship with SECL and hence had continued to wait despite the fact that SCECL had not invited any ESM Company for three years. As noticed above, the same had resulted in a separate waiting list for sponsorship with SCECL. In view of the above, DGR decided to cancel their option for sponsorship with SECL and include them in the main seniority list. However, it was expressly indicated that the same was “without any prejudice” and fresh calls would now be made to ESM officers in their seniority list.

12. Petitioner no.1 being unsure of the import of the letter dated 17.04.2018, sent an email dated 20.04.2018 seeking a confirmation that his option to stand by his choice for sponsorship with SECL, which was made in the year 2014, would not be considered as exhaustion of his first chance. The email dated 20.04.2018 is set out below:-

“Thank you for the mail above.

I am at Seniority Number 1273 and was waitlisted for SECL. In view of the Para 2(b) of your letter, we are to be given “two chances as per seniority”. Kindly clarify and confirm that “two fresh chances hereafter are being given” before deletion of names from seniority list.”

13. In response to the aforesaid email, respondent no.4 (Col. K. S. Kalsi) from DGR expressly clarified that the option communicated by the petitioner no.1 in 2014 was a one of chance and would not be considered as the petitioners declining any offer made by DGR. This was communicated to petitioner no.1 by an email sent on 24.04.2018. The said e-mail reads as under:

“1. Reference your mail below.

2. It is clarified that the 19 offrs u/r at para 2 (b) of our letter under reference did not decline any offer made by DGR. It was purely a one off chance when two subsidiaries had approach DGR and DGR sought a preference from wait listed officers.

3. The aim of our letter dated 17 Apr 18 needs no explanation as the same is intended to iron out the wait list.

4. No unfair action is being taken against any ESM (O), chances will counted as per seniority of responses obtained.

5. No change from DGR MoU and Guidelines is being initiated.

6. You are requested to submit your response accordingly.”

14. Immediately on receipt of the said e-mail, petitioner no.1 expressed his unwillingness to act as a Director of an ESM Company for sponsorship with Western Coalfield Limited (hereafter ‘WCL’). Other petitioners also did the same.

15. Thereafter, DGR issued a letter dated 16.05.2018, now stating that the decision of the petitioners not to change their priority pursuant to the offer made on 13.08.2014 would be considered, as the petitioners declined to take up sponsorship with MCL and, therefore, would be construed as the petitioners having exhausted their chance of first refusal. Since the petitioners had also refused to participate in ESM Company for sponsorship with WCL in April, 2018, the same was now construed as petitioners having exhausted their second chance as well. Consequently, their names were removed from the seniority list.

16. Mr Sood, the learned counsel appearing for the respondents submitted that there is no dispute as to the DGR's policy and each of the empanelled ESMs are entitled to two chances. It is only on the officers refusing sponsorship twice, that their names are required to be removed from the seniority list.

17. In view of the above, the short question that falls for consideration of this Court is whether the priority indicated by the petitioners pursuant to the letter dated 13.06.2014 can be construed as the petitioners expressing their unwillingness to take up sponsorship to participate in an ESM Company for sponsorship to a Coal Subsidiary. Mr Sood contended that even if the first response of the petitioners indicating their preference for sponsorship with SECL is not considered as their expression of willingness for sponsorship with MCL, their subsequent decision to continue with the said priority and not take up sponsorship with MCL has to be considered as their refusal to take the sponsorship. He also drew the attention of this Court to a letter dated 13.08.2014, whereby the petitioners were informed that if they did not

change their option given earlier, the same would be treated as final and they could have no objection if the persons placed lower in their seniority list would be sponsored to MCL.

18. This Court is not persuaded to accept the aforesaid contention. There is no ambiguity in the language of paragraph 3(a)(ii) of 'the Guidelines on Formation and Running of Ex-Servicemen Coal Transport Companies'. A plain reading of the same indicates that the DGR will seek willingness of ESMs as per the seniority roaster. In case any ESM, whose turn has come up for sponsorship, is unwilling to join in an ESM company, he will be provided with second opportunity for sponsorship as and when a requirement is received from the Coal Subsidiary. If the ESM is still unwilling, his name would be deleted from the seniority list. It has also been clarified that such ESM Officer would not be precluded in joining any other rehabilitation scheme of the DGR.

19. The petitioners had been called upon to indicate their priority for sponsorship with SECL and MCL. They responded clearly indicating that SECL would be the first priority and MCL would be their second priority. Plainly, this cannot be considered as expression "unwillingness" to take up sponsorship.

20. Much reliance is placed by the respondents on the letter dated 13.08.2014 and it would be necessary to refer to the same for its meaning and import. The said letter is set out below:-

"Tele: 011-26192354
Fax: 011-26171456

Government of India
Ministry of Defence

Dte. Gen. Resettlement
West Block-IV, RK Puram
New Delhi-110066

1784/DGR/SE-2/Coal/Gen/Sponsorship 13 Aug 2014

Prospective Directive (list att)

SPONSORSHIP OF NEW ESM COMPANIES

1. Refer to this office letter No.1784/DGR/SE-2/Coal/Genl/Sponsorship dated 13 Jun 14.
2. It is intimated that you have opted for SECL Coal Subsidiary as priority one. However, it has now been informed by SECL that their requirement is only for one ESM Company at the moment the rest of ESM Companies may be required after six months or so. In view of the above you are hereby informed that you may reconsider your option if you desire so. The option considered will be treated as final and no change will be permitted.
3. You are requested to reply by 22 Aug 14 though e-mail. Non receipt of reply will be construed as that you are not interested to change your option and you have no objection to any ESM(O) junior to you in seniority roster being sponsored to MCL Coal Subsidiary before you are sponsored to any Coal Subsidiary.

(H. S. Cheema)
Dir
For DG (R)”

21. It is at once clear that the above letter dated 13.08.2014 cannot be understood in the manner as contended by the DGR. A plain reading of the

said letter indicates that the petitioners were called upon to “*reconsider*” their option. This was because the sponsorship with SECL was likely to take some time. Plainly, the DGR had the option at that stage to clearly state that sponsorship with SECL would not be forthcoming and, therefore, the waiting list for sponsorship for the said company was being abandoned. The DGR did not do so. It merely asked the petitioners to indicate whether they wanted to continue with their option to wait for a sponsorship with SECL. The petitioners and all ESMs that had opted for sponsorship with SECL as their first priority were duly put to notice that the consequence of their standing by their choice would be that persons lower in the order of seniority would be offered sponsorship with MCL and other Coal Subsidiaries. This was in order to obviate any challenge to grant sponsorship to ESMs lower in the order of seniority. Plainly, this cannot be considered as intimation to the petitioners that they were exhausting their chance and their decision to stand by their option would be construed as their expression of unwillingness to take up sponsorship.

22. The DGR took the decision to do away with the waiting list for sponsorship with SECL. This was communicated by the letter dated 17.04.2018. A plain reading of this letter also indicates that the DGR did not construe the option exercised by the petitioners in 2014 as they have exhausted their first chance for sponsorship.

23. Any possible doubt (however, remote that may be) was put to rest by the e-mail dated 24.04.2018 sent by respondent no.4 (Col Kalsi of the DGR). He clearly stated that the option given in 2014 was purely a one of chance when two subsidiaries had approached DGR and DGR sought a

preference from the waiting list officers. This was in response to the clarification sought by petitioner no.1. It is also important to note that petitioner no.1 had sought this clarification in the context of the DGR's offer of sponsorship with WCL. Petitioner no. 1 considered such clarification necessary for considering his response to the offer of sponsorship with WCL. In view of the clarification furnished by respondent no. 4, petitioner no.1 sent an email dated 24.04.2018 stating that he was unwilling to be sponsored as a Director of ESM Company for sponsorship with WCL. This was on a clear understanding that such refusal would be his first refusal and he would have yet one more chance to join in ESM Company for sponsorship with another Coal Subsidiary.

24. It is stated that other petitioners have also expressed their unwillingness to join as Directors of ESM Company(ies) for sponsorship with WCL.

25. After the petitioners had refused the sponsorship with WCL, the DGR sprung the letter dated 16.05.2018 now for the first time stating that the option exercised by the petitioners in 2014 would be considered as the expression of unwillingness resulting in the petitioners exhausting their first chance. This is completely contrary to the DGR's stand as communicated by respondent no.4 in the email dated 24.04.2018.

26. This Court is at a loss to understand as to what prompted this volte face. However, it is clear that the petitioner cannot be bound by the same.

27. The learned counsel appearing for the respondents earnestly

contended that the e-mail sent by respondent no. 4 or other letters issued by DGR cannot be construed as amending the Guidelines. This contention also misses the point. The Guidelines are not in question; the question whether the petitioners have expressed their unwillingness to take up sponsorship twice, is in issue.

28. Before concluding, this Court must also consider the challenge laid by the petitioners to the letter dated 17.04.2018. Mr Agnihotri, the learned counsel appearing for the petitioners had further contended that the expression of unwillingness must be reckoned with respect of one particular Coal Subsidiary and, therefore, the letter dated 17.04.2018 brought about a material change in the manner in which the Guidelines were being implemented. He submitted that prior to 17.04.2018, separate seniority list was required to be maintained in respect of each Coal Subsidiary and two chances of refusal were to be reckoned for each Coal subsidiary. The aforesaid contention is unmerited. A plain reading of the Guidelines do not indicate that any separate seniority list is required to be maintained in respect of each Coal Subsidiary. On the contrary, a plain reading of the Guidelines indicates that only one seniority list is required to be maintained. It does appear that – as is also evident from respondent no.4's email dated 24.04.2018 – that priority was offered to ESM as one of chance. There was no requirement to call upon the ESMs to indicate their preference. The DGR is required to proceed strictly in order of the seniority list and call upon the ESMs to indicate their unwillingness for joining/promoting an ESM Company for being sponsored to the Coal Subsidiary who has placed its requirement with the DGR. This Court finds no infirmity with the letter

dated 17.04.2018 or with the decision of the DGR in doing away with separate seniority list.

29. In view of the above, the present petition is allowed. The name of the petitioners would be placed in the seniority list as per their own seniority. The DGR shall consider the refusal of the petitioners to join an ESM Company to take up sponsorship with WCL as their first refusal.

30. It is also clarified that the DGR will not sponsor any ESM Company without considering the petitioners seniority as restored by this order.

31. The pending application stands disposed of.

JULY 25, 2018
MK

VIBHU BAKHRU, J

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