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

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Date of Decision: September 22, 2023

+ **W.P.(C) 12475/2023 & CM APPL. 49183/2023**

UNION OF INDIA

..... Petitioner

Through: Mr.Nitinjay Chaudhary, Sr.Panel
Counsel with Ms.Vidhi Gupta, G.P.
and Mr.Rahul Maurya, Advocate.

versus

MANJESH PORWAL AND ORS.

..... Respondents

Through: Mr.Tushar Ranjan Mohanty, Ms.Payal
Mohanty, Ms.Soumya Punna and
Mr.Milind Jain, Advocates.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

V. KAMESWAR RAO (ORAL)

CM APPL. 49184/2023

1. Exemption allowed, subject to all just exceptions.
2. Application stands disposed of.

W.P.(C) 12475/2023 & CM APPL. 49183/2023

3. This writ petition has been filed by the petitioner/UOI challenging the order dated January 27, 2021 passed by the Central Administrative Tribunal, Principal Bench, New Delhi ('Tribunal', for short) in O.A. No.769/2020 whereby the Tribunal has allowed the OA filed by the respondents herein by stating in paragraph Nos.9 to 13 as under:



“9. We have thoroughly verified the advertisement as well as the relevant Recruitment Rules. There is no stipulation that a written test would be conducted as part of the selection process. For example, in case of Civil Services Examination, the written tests are held at two stages, namely, the preliminary and main. There is no stipulation of that nature for the post of Assistant Director (Cost). The test, which was held in respect of the applicant, was part of the short listing criteria. It is fairly well known that the UPSC reserves to itself, the right to take recourse to short listing criteria. This may include the one of taking into account, the higher qualifications or experience or conducting a written test. All this is only for the purpose of short listing.

10. For example, if the available posts are 5 and about 300 applications are received from candidates, who hold the prescribed qualifications. When no written test is prescribed for selection, it would be difficult for the selecting agency to interview all the eligible candidates. In such cases, the recourse can be taken to any of the short listing criteria. For instance, if the prescribed qualification is Post Graduation in a particular discipline, the possession of Ph.D can be taken into consideration. Similarly, if the prescribed experience is 3 years, the length of experience can be enhanced to 5 or 8 years. Another method is to conduct the test, for the exclusive purpose of short listing the candidates and not for assessing their merit in relation to the post in question. Time and again, the Courts have conceded this facility to the UPSC whenever the measures were challenged as constituting alteration of the qualifications or the selection process.

11. Once the online test was conducted only for the purpose of short listing the candidates and the marks obtained therein did not constitute the basis for assessing the relative merit, it cannot be said that the selection of the applicants was on the basis of a written test. A subtle distinction needs to be maintained between two situations. The first is where a written test is conducted as part of selection process. If it is followed by interview, the merit



of the candidates is decided on the basis of the aggregate of marks secured in the written test and interview. The second situation is where the written test is conducted as a measure of short listing criteria. In such cases, once the performance of the candidates is taken as the basis for short listing, the relevance of the examination, and equally, the marks secured therein, disappears. Those, who are shortlisted, would be subjected to interview. The marks, which were secured by them in the examination conducted for short listing, do not figure anywhere in the final selection process. In the instant case, the second process was adopted.

12. Another aspect is that if the written test is conducted as part of selection process, it is conducted irrespective of the number of applications, that are received. Conversely, in a given recruitment year, if the number of applications is almost proportionate to the number of vacancies, the necessity to conduct any written test for the purpose of short listing, may not arise. As observed earlier, no written test is prescribed as part of selection process for the post of Assistant Director (Cost). It was incidental that online test was conducted in the year 2014, exclusively for the purpose of short listing.

13. We find that the subtle distinction, referred to above, was not taken into account by the respondents. The impugned O.M. cannot be sustained in law. Further, the respondents did not issue any notice to the applicants before passing the impugned O.M.”

4. Issue which arose for consideration before the Tribunal was that the respondents who were working in various Public Sector Undertakings were appointed to the Indian Cost Accounts Service (‘ICAS’, in short) pursuant to an advertisement issued by UPSC for the post of Assistant Director (Cost). The selection process included a written examination and interview. The respondents sought ‘pay protection’ on their appointment in ICAS. The same



was denied to them, which resulted in the filing of the Original Application. The case of the petitioner before the Tribunal was that, the ‘pay protection’ is granted only to those employees who have been recruited through the process of interview only and not through the process of written examination and interview, the Tribunal negated the said stand of the petitioner by stating in paragraphs No.9 to 13, which have already been reproduced above. In fact, Mr.Tushar Ranjan Mohanty, Advocate appearing for the respondents states that the issue is no *res-integra*, as this Court in ***Sanjog Kapoor v. Union of India & Ors.***, W.P.(C) No.5518/2004 decided on April 20, 2007 has settled the issue. The judgment has been followed in ***Nagender Kumar Jha v. Union of India & Ors.***, W.P.(C) No.8660/2005 decided on January 06, 2016 and also in ***Union of India & Anr. v. Abhay Kumar***, W.P.(C) No.3338/2022 decided on February 23, 2022, wherein the courts have categorically held in favour of the Officers in those cases. In this regard, we may reproduce the relevant paragraphs of the latest judgment of this Court in ***Union of India & Anr. v. Abhay Kumar*** (supra) as under:

*“3.3. We may note that the aforementioned judgment delivered by the Division Bench of this court in **Sanjog Kapoor case**, was followed by another Division Bench judgment of this court in **Nagendra Kumar Jha v. Union of India & Anr.** This judgment is dated 06.01.2016 and the matter was registered as W.P.(C.) No.8660/2005.*

3.4. Mr Singh, however, relies upon a later circular dated 12.02.2001 to press his submission that the respondent cannot be accorded pay protection as he was selected through an open competitive examination. Mr. Singh contends that only, if the respondent had been recruited through an interview—would pay protection be accorded to him having moved from one public sector undertaking to another instrumentality of the state.



3.5. A careful perusal of the circular dated 12.02.2001, issued by the Government of India, Ministry of Railways (Railway Board), would show that it is founded on the aforementioned O.M. i.e., O.M. dated 10.07.1998.

3.6. As noticed above, two Division Benches of this court have rendered a view concerning the DoPT's O.M. dated 10.07.1998. Therefore, the submission advanced by Mr. Singh that the pay protection could have been accorded to the respondent only if he had been selected [i.e., had been recruited through an interview] cannot be accepted.

3.7. We may also note that it is Mr. Singh's submission that the circular dated 10.07.1998 does not apply to the Central Government.

3.7(a) We are unable to appreciate this submission for the reason that what the petitioners needed to follow was the ratio of the Division Bench judgments adverted to hereinabove. The judgments, unreservedly, hold that the distinction drawn for according pay protection to employees based on the manner of recruitment was both arbitrary and unfair. Therefore, this submission does not impress us.

4. Before we conclude, we may express our concern that the departments continue to file petitions and drag employees to court, even when there are rulings rendered by Court with regard to the issue at hand.

4.1. In this case, as noticed hereinabove, there were two judgments of two Division Benches concerning the DoPT's O.M. dated 10.07.1998. Therefore, the circular dated 12.02.2001 could not have furthered the cause of the petitioners and yet a petition was filed.

4.2. This is an aspect which the legal advisors of the petitioners should have taken into account before seeking to drag the respondent into the litigation arena.

4.3. We would have imposed heavy costs on the petitioners had the respondent joined the proceedings.



5. Mr. Singh would do well to place the judgment passed by us today before the officer who was concerned with sanctioning the institution of the present writ petition.”

5. Additionally, it is submitted by Mr. Chaudhary, that in the year 2022, the DoP&T had issued an Office Memorandum dated September 14, 2022, removing the distinction between an appointment made through interview or open competitive examination or combination of both for the purpose of pay protection.

6. If that be so, in view of the settled position of law which has also been accepted by petitioner herein by issuing the OM dated September 14, 2022, we find no reason to interfere with the order of the Tribunal. It is a fit case where cost should be imposed, however we refrain from doing so.

7. We expect that the petitioner shall circulate a copy of this order to all the Ministries for their information.

V. KAMESWAR RAO, J.

MANMEET PRITAM SINGH ARORA, J.

SEPTEMBER 22, 2023/v