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**CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH**

OA No.2439/2004

7h.
New Delhi this the 11 day of October, 2004.

HON'BLE MR. V.K. MAJOTRA, VICE-CHAIRMAN (A)
HON'BLE MR. SHANKER RAJU, MEMBER (J)

Gyanender Singh,
(Roll No.1262045),
R/o H-38, PS Lodhi Colony,
New Delhi-110 003.

-Applicant

(By Advocate Shri Anil Singhal)


-Versus-

1. Union of India through
its Secretary,
Ministry of Home Affairs,
North Block, New Delhi & Others

-Respondents

(By Advocate Shri S.M. Arif)

1. To be referred to the Reporters or ~~not~~? Yes
2. To be circulated to outlying Benches of the Tribunal
or ~~not~~? Yes.


(Shanker Raju)
Member (J)

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(By Advocate Shri Anil Singhal)

-Versus-

1. Union of India through
its Secretary,
Ministry of Home Affairs,
North Block, New Delhi.
2. Lt. Governor of Delhi,
Raj Niwas, Delhi.
3. Govt. of NCT of Delhi
through its Chief Secretary,
Delhi Secretariat,
IP Estate, New Delhi.
4. Commissioner of Police,
Police Head Quarter,
IP Estate, New Delhi.
5. Staff Selection Commission,
through its Chairman,
CGO Complex, Lodhi Road,
New Delhi-110 003.

-Respondents

(By Advocate Shri S.M. Arif)

O R D E R

Mr. Shanker Raju, Member (J):

Through this application applicant has sought
direction to respondents to treat him as an OBC candidate
for recruitment to the post of Sub Inspector (Executive)
through a combined Graduate Level Examination, 2003.

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2. By an order dated 6.10.2004, any final order after selection has been made subject to the final outcome of the OA.

3. Applicant belongs to Jat community. In Delhi as per Delhi List of OBC declared on 31.5.2000 he has been issued a certificate to that effect by the Deputy Commissioner on 4.6.2002.

4. In the Employment News on 17-23.4.2004 a total number of 439 posts had been advertised for the post of Sub Inspector (Executive) in Delhi Police. Applicant when presented his certificate before the authorities it was communicated that OBC of Delhi not being in the Central List cannot be allowed to take the benefit of the OBC. Accordingly, he filled up the form in general category.

5. Applicant was called for preliminary and main examinations and has qualified the same. Accordingly, he was called for the interview vide letter dated 1.4.2001 and appeared on 27.4.2004 where he has handed over an application along with a copy of the OBC certificate to consider him in the category of OBC to the Assistant Director (Examinations). As applicant had not qualified in the general category he was not brought in the merit list. This result was published in June, 2004, where it is shown that the result is subject to final outcome of OA-161/2004 in **Dr.**

Rajbir Singh v. Union of India, pending before the Principal

Bench of the Central Administrative Tribunal. Against this non-selection applicant has filed the present OA. 6

7. In OA-161/2004 Rakesh Rana and Rajbir Singh along with others responded to in respect of the same advertisement for combined level examination, forwarding their application in the OBC category. They has been appraised that they are not being considered as OBC candidates, as 'Jat' of Delhi are not covered under the central list of OBC. After evaluating their performance in the general category they were not considered.

8. The Tribunal vide order dated 23.9.2004 relying upon an undisputed letter issued by the Ministry of Home Affairs on 18.8.2004 where list notified for Group 'C' and 'D' posts in Delhi Police in OBC category and also of the Central Government it has been decided to provide reservation for appointment to OBC. This was a clarification to letter dated 2.5.2003.

9. Having regard to the above the Tribunal observed that letter dated 18.8.2004, which is clarification of letter dated 2.5.2003 in the light of the decision of the Apex Court in **S.S. Grewal v. State of Punjab**, 1993 SCC (L&S) 1098 would have retrospective effect from 2.5.2003 and resultantly applicants had been accorded benefit of the OBC category and their consideration on merit. h

10. In this backdrop learned counsel for applicant Sh. Anil Singhal contended that in the light of the decision of the Apex Court in **Ashwani Kumar v. State of Bihar**, 1997 SCC (L&S) 267 even if an employee who is similarly circumstanced and has not approached the Court and judgment is in rem should be accorded equal treatment by extending the benefit of the judgment.

11. Another Constitution Bench decision in **K.C. Sharma v. Union of India**, 1997 (6) SCC 721 has been relied upon to fortify the aforesaid plea.

12. Learned counsel for applicant in the above conspectus contended that there cannot be a distinction between the applicants in OA-161/1004 ibid and applicant before us, as applicant on 2.5.2003 was an OBC having regard to the retrospective effect of clarification, as such having the status of an OBC as he was not allowed to apply as an OBC candidate he was constrained to file his application for the post as a general candidate would not amount to waiver of his right as an OBC candidate, which, by virtue of Article 16 (4) of the Constitution of India a Fundamental Right, which cannot be waived off.

13. Learned counsel contends that no invidious discrimination can be meted out by creating a class within the class which would be an anti thesis to the principles of equality enshrined under Article 14 of the Constitution of India. Applicants in OA-161/2004 were applied standards of

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general candidate and had not been given the benefit of OBC, whereas applicant who applied as a general candidate and despite his being OBC has also been subjected to standards of general category.

14. On the other hand, Shri S.M. Arif, learned counsel appearing for respondent No.5 (Staff Selection Commission) accepted the notice and adduced his oral submissions. It is contended that the decision in OA-161/2004 is distinguishable as therein applicants had applied in the category of OBC, whereas applicant who has submitted his application as general candidate cannot be allowed to change his category under the guise of reservation in OBC. Having applied on the cut off date as a general candidate applicant is estopped from taking a contrary plea as he has already waived off his right of being OBC. It is also stated that when the entire process has been completed, applicant cannot be treated as an OBC and the decision of the Tribunal shall take its own course and would apply only to the individual cases and would not be a precedent, the benefit of which cannot be extended to applicant.

15. We have carefully considered the rival contentions of the parties and the elaborate arguments orally adduced before us by Shri Arif. We do not consider requirement of filing a reply which would be a reiteration of whatever has been stated by Sh. Arif in the Court.

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16. It is trite law that one who appears in the selection and remains unsuccessful is estopped from challenging the selection except on the ground of mala fides and procedural illegality.

17. It is no more res integra that under Article 16 (4) of the Constitution of India reservation to OBC to the tune of 27% has been recognized by the constitution Bench in **Indra Sawhney v. Union of India**, 1992 Supp. 3 SCC 217.

18. Another constitution Bench in **Dr. Preeti Srivastava v. State of M.P. & Ors.**, 1999 (7) SCC 120 in the matter of admission to the medical colleges re-iterated the aforesaid dictum.

19. In **Chandigarh Admn. v. Surinder Kumar**, 2004 SCC (L&S) 236 it has been held that OBCs are entitled to the benefits and their inclusion in a given case would depend upon the nature and extent of disadvantages and social hardship.

20. In **Indra Sawhney v. Union of India**, 2000 (1) SCC 168 the question regarding the creamy layer and application of Articles 14 and 16 (4) has been discussed.

21. In a matter of selection as regards date of eligibility the following ratio has been laid down by the Apex Court in **S.K. Mandal v. State of Bihar**, 2003 (9) SCC 519:

"Age – Cut-off date for determining – Date of appointment, date of advertisement or last date for receiving applications – Authorities directed to decide which of the criteria would be applicable to the facts of the case.

What happens when a cut-off date is fixed for fulfilling the prescribed qualification relating to age by a candidate for appointment and the effect of any non-prescription has been considered by the Supreme Court in several cases. The principles culled out from the decisions of the Supreme Court are as follows:

- (1) The cut-off date by reference to which the eligibility requirement must be satisfied by the candidate seeking a public employment is the date appointed by the relevant service rules.
- (2) If there is no cut-off date appointed by the rules then such date shall be as appointed for the purpose in the advertisement calling for applications.
- (3) If there is no such date appointed then the eligibility criteria shall be applied by reference to the last date appointed by which the applications were to be received by the competent authority.

It has to be decided by the authorities in the present case as to which of the three conditions indicated above was applicable to the facts of the case. In the absence of definite material, it is appropriate to direct the authorities to take a decision within a period of four months, as to whether the appellants or any of them was eligible by applying the tests indicated above.

In usual course stands taken before the Supreme Court would have been ignored in view of the settled position of law indicated above. But, in view of the fact that in the connected matter, directions have been given for consideration of the age aspect, it would be appropriate if similar consideration is made in respect of the appellants. The directions shall operate in respect of the present appellants also."

22. From the perusal of the orders passed in OA-61/2004

we find that the clarification issued on 18.8.2004 has

merged into the original letter dated 2.5.2003 and has been ordered to have retrospective effect. This brings Jats of Delhi as OBC in both the list w.e.f. 2.5.2003.

23. In so far as applicability of OA-161/2004 to the present case is concerned, applicants in OA-161/2004 have applied in pursuance of advertisement of 2003 and in their application had mentioned themselves as OBC candidates. As they had not been considered as OBC because Jat community of Delhi has not been brought in the central list their consideration despite their clearing preliminary and main examinations and after interview was not processed further. The relaxed standards of reservation were not provided to them. However, in the merit list issued by the respondents in so far as OBC candidates are concerned, the selections have been made subject to the final outcome of OA-161/2004, as directed by the Tribunal. Accordingly, their consideration was ordered in the OA, deeming them as OBC candidates on merits.

24. However, in the instant case applicant despite acquirement of an OBC certificate on 4.6.2002 and in the wake that Jat community of Delhi has not been treated as OBC taken a calculated risk on his own volition and has not disclosed this status in the application form and rather applied for the post as a general candidate. Though on the standards of general candidate he has qualified preliminary and written examinations and was also subjected to interview, yet as he could not qualify on the standards of

general candidate his name has not figured in the final list issued for the post.

25. In order to claim parity and equal treatment the sine qua non is establishment of equality at par with which it is claimed. Having failed to apply as a candidate in the OBC category applicant now cannot be allowed to take a plea that vide Tribunal's order the status of OBC has been conferred upon him w.e.f. 2.5.2003 and on the cut off date he was an OBC candidate and to be treated as such. The contention raised that on the date of interview on 27.4.2003 he has appraised the interview Board regarding his OBC status cannot be countenanced as it is only on 23.9.2004 that by virtue of Tribunal's order the retrospectivity of letter dated 18.8.2004 is deemed from 2.5.2004. Moreover, having, on his own volition, applied in the general category he is estopped from claiming the benefit status of OBC on the basis of the decision of the Tribunal, which is not to be treated as a precedent or judgment in rem but would be confined to those cases where despite applying ^{as} OBC the consideration has not been done accordingly. This would not apply to a case where a candidate applies in general category and then after the selection if he is found to be OBC before the cut off date. If such a plea is accepted this would amount to opening of a Pandora Box. Moreover, in a stance when an OBC candidate duly in possession of a valid OBC certificate does not avail its benefit no subsequent consideration on account of his status can be made.

26. We also find that reservation as an OBC is not a Fundamental Right. The right is only of consideration. As such the act of applicant amounts to waiver and he is estopped from claiming the aforesaid status.

27. As regards the interim direction regarding final outcome of OA-161/2004, the same would apply only to applicants in that case and is not for all the candidates at large.

28. Though we are bound by the ratio in **K.C. Sharma** (supra) but the condition precedent for application is that the contending party should be identically situated, which we failed to find in the present case. At this stage interference in the matter of selection would bring administrative chaos which should be avoided in all fairness.

29. Lastly, we must observe that even if a person is selected he has no indefeasible right to appointment.

30. However, on account of the decision of the Tribunal the applicant has now acquired the status of an OBC and is at liberty to apply on the basis of the certificate in any future selections.

31. In the result, OA is found bereft of merit and is accordingly dismissed. No costs.

32. Interim order is vacated.

S. Raju
(Shanker Raju)
Member (J)

V.K. Majotra
(V.K. Majotra) 11.10.09
Vice-Chairman (A)

'San.'