

Central Administrative Tribunal Principal Bench, New Delhi

O.A. No.4074/2012

Order reserved on 15th February 2017

Order pronounced on 20th July 2017

**Hon'ble Mr. Justice Permod Kohli, Chairman
Hon'ble Mr. K.N. Shrivastava, Member (A)**

Baljeet Singh s/o Mr. Surat Singh
r/o VPO Manesar
Distt. Gurgaon,
Haryana – 122 050

(Mr. Pankaj Sinha, Advocate)

..Applicant

Versus

1. Union Public Service Commission
Through its Secretary
Dhaulpur House, Shahjahan Road
New Delhi – 110 069
2. Secretary,
Department of Personnel & Training
North Block, New Delhi

..Respondents

(Mr. Naresh Kaushik, Advocate for respondent No.1 &
Mr. R N Singh and Mr. Amit Sinha, Advocates for respondent No.2)

ORDRE

Justice Permod Kohli:

Union Public Service Commission (UPSC) issued Advertisement dated 19.02.2011 inviting applications for the Civil Services Examination (CSE), 2011. The applicant, who belongs to physically handicapped (PH) (visually impaired) category, applied for his consideration against the quota reserved for PH category. Vide the aforesaid Advertisement, under Note II,

Services, as identified suitable for physically disabled categories along with respective functional classification and physical requirements, were also notified. As many as 6 Services were notified under this category. For visually impaired (VI) category, 5 vacancies with their functional classification and physical requirements were notified. The total number of vacancies were 1001. The applicant appeared in the Preliminary Examination held on 12.06.2011 and successfully cleared the same. He again appeared for Mains from 29.10.2011 to 05.11.2011. On being declared successful, he was called for interview on 13.04.2012 and also for medical examination. Final result was declared on 04.05.2012, but his name did not figure in the select list. It is stated that since there is 3% quota for candidates with disability and 1% each visually handicapped, orthopedically handicapped and hearing impairment category, there should have been at least 10 vacancies for visually handicapped category out of total 1001 vacancies, but only 5 posts were earmarked for visually impaired category candidates. It is also mentioned that one Gagandeep Singh secured 25th rank in open merit list. He belongs to VI category. Instead of selecting him in the general category on the basis of his higher merit, he has been selected against the vacancy meant for VI category candidates. The last selectee under VI category secured 1047 marks and in general category, it was 1090 marks. The applicant secured 1043 marks in VI category. Since the merit of the last selected candidate was not available, the applicant applied under Right to Information Act, 2005 to UPSC, seeking certain information, which was supplied to him vide letter dated 05.06.2012 (Annexure A-7). It has been revealed that in the CSE, 2011, total 1001 vacancies were

advertised, out of which 5% posts were reserved for VI category candidates and 5 persons have been selected under this category. It was also informed that in CSE, 2011 the last selectee in VI category secured 1047 marks and general category 1090 marks. The applicant was further informed that since the reserved category vacancies under PH categories were communicated by the cadre controlling departments, the UPSC has no information about the number of vacancies under such categories. It is further stated that no merit list has been prepared for the non-selected candidates in CSE, 2011. He was further informed that for PH category, it is horizontal reservation and there is no separate reservation for this category. The applicant, being not satisfied, filed another application under Right to Information Act, 2005 seeking some more information. He received the reply vide letter dated 31.07.2012 (Annexure A-9 (colly.)) whereby he was informed that no separate list for general/SC/ST/PH candidates is available, hence cannot be provided. However, a copy of the merit order list of recommended candidates of CSE, 2011 with roll numbers, total marks and category can be provided on payment. The applicant was, however, furnished information regarding the marks obtained by the last selected candidate in the CSE, 2011, which reads as under:-

“Point 2 The marks obtained by the last recommended candidates in the C.S. Exam, 2011 were General : 1090, OBC : 1059, SC : 1023 & ST : 1023, PH-1 (Ortho) : 1008, PH-2 (Visually Impaired) : 1047 & PH-3 (Hearing Impaired) : 911.”

The applicant was further informed that reservation in the PH category is horizontal.

2. The case of the applicant is that under Section 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short “Disability Act, 1995”), 3% reservation has to be provided to the PH category and 1% minimum to each category, i.e., (a) blindness or low vision, (b) hearing impairment; and (c) locomotor disability or cerebral palsy.
3. The applicant has also relied upon the O.M. dated 29.12.2005, which has been reproduced in the O.A. and reads as under:-

“7. ADJUSTMENT OF CANDIDATES SELECTED ON THEIR OWN MERIT :

Persons with disabilities selected on their own merit without relaxed standards alongwith other candidates, will not be adjusted against the reserved share of vacancies. The reserved vacancies will be filled up separately from amongst the eligible candidates with disabilities which will thus comprise physically handicapped candidates who are lower in merit than the last candidate in merit list but otherwise found suitable for appointment, if necessary, by relaxed standards. It will apply in case of direct recruitment as well as promotion, wherever reservation for persons with disabilities is admissible.”

4. Based upon the aforesaid O.M., it is stated that a disabled candidate selected on own merit without relaxed standards is not to be adjusted against the reserved share of vacancies and the reserved vacancies will be filled up separately from amongst the eligible candidates with disabilities, which will thus comprise PH candidates, who are lower in merit than the last selected candidate in merit list but otherwise found suitable for

appointment, if necessary, by relaxed standards. In the light of the aforesaid O.M. issued by the Department of Personnel & Training (DoPT), it is sought to be impressed upon the Tribunal that Gagandeep Singh, who secured 25th rank in open merit list, is required to be adjusted against the general category vacancy and resultant vacancy in the VI category is required to be filled up by the next candidate in the said category from the merit list.

5. The applicant has accordingly made following prayers:-

- “a) Direct the Respondent to prepare a separate list of candidates with disabilities who are lower in the merit list from the last selected candidate in general category.
- b) Place the candidate with disabilities who have passed the examination on their own merit in the general list and not adjust them against the disability quota.
- c) Directing the Respondent to appoint the Applicant in disability quota with retrospective effect with all consequential benefits such as seniority etc effective from the date when his batch mates have been inducted in to service and sent for training.”

6. UPSC, in its separate counter affidavit while indicating its constitutional role in making selections to the public services under Articles 315 to 323 of the Constitution, has stated that the Commission holds CSE for recruitment to the IAS, IFS, IPS and other various Central Services in Groups ‘A’ and ‘B’. The examination is held in accordance with the Rules framed and notified by the DoPT. Under the Scheme of Rules, the CSE comprises (i) Civil Services (Preliminary) Examination (for selection of candidates for Civil Services (Main) Examination), and (ii) Civil Services (Main) Examination (written and interview/personality test) for selection

of candidates for appointment to various Services/posts. It is also pleaded that the CSE is a multi-services examination and the vacancies are indented to the Commission by various cadre controlling authorities based on the reservation rosters maintained by respective cadre controlling authorities and number of reserved vacancies are determined in terms of the roster points relevant to that cadre in a particular year along with backlog vacancies, if any. The UPSC recommends candidates to the Government (DoPT) in order of merit as per Rules of the examination. It is vehemently denied that adjustment of candidate with disabilities against reserved quota (disabled quota) despite his having qualified the same on his own merit is violative of any of the provisions of DoPT O.M. dated 29.12.2005 or for that matter, the provisions of Disability Act, 1995.

7. Regarding the allotment of only 5 seats for VI category candidates, it is stated that the UPSC has no role in identification or allocation or reservation of 3% of vacancies for various categories of the physically disabled candidates. The UPSC has referred to the CSE, 2011 laying down the procedure for the examination, which, *inter alia*, includes the manner and method of preparing the lists for purposes of recommending the candidates against reserved and un-reserved vacancies on the basis of marks secured by the candidates in the selection process. The relevant extract of the Rules is noticed hereunder:-

“16 (1) After interview, the candidates will be arranged by the Commission in the order of merit as disclosed by the aggregate marks finally awarded to each candidate in the Main Examination. Thereafter, the Commission shall, for the purpose of recommending candidates against unreserved vacancies, fix a qualifying mark (hereinafter referred to as general qualifying standard) with reference

to the number of unreserved vacancies to be filled up on the basis of the Main Examination. For the purpose of recommending reserved category candidates belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes against reserved vacancies, the Commission may relax the general qualifying standard with reference to number of reserved vacancies to be filled up in each of these categories on the basis of the Main Examination.:

Provided that the candidates belonging to the Scheduled Castes, Scheduled Tribes and the Other Backward Classes who have not availed themselves of any of the concessions or relaxations in the eligibility or the selection criteria, at any stage of the examination and who after taking into account the general qualifying standards are found fit for recommendation by the Commission shall not be recommended against the vacancies reserved for Scheduled Castes, Scheduled Tribes and the Other Backwards Classes.

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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. Referring to the aforesaid Rules, it is stated that the recommendations made on the basis of the aggregated marks finally awarded to each candidate in the Main Examination, the Commission fixed a qualifying mark with reference to the number of unreserved vacancies to be filled up on the basis of the Main Examination and for purposes of recommending reserved category candidates, belonging to SC, ST and OBC against reserved vacancies, the Commission may relax the general qualifying standard with reference to number of reserved vacancies to be

filled up in each of these categories on the basis of the Main Examination. Under the proviso to Rule 16, the candidates, belonging to SC, ST and OBC, who have not availed themselves of any of the concessions or relaxations in the eligibility or the selection criteria, at any stage of the examination and who after taking into account the general qualifying standards are found fit for recommendation by the Commission, shall not be recommended against the vacancies reserved for SC, ST and OBC, meaning thereby that the only such candidates, who do not avail benefit of any relaxed criteria during the process of examination and belong to the reserved categories, alone are entitled to the selection against general category vacancies and even such candidates are entitled to benefit of allocation of Service of higher choice by treating them as reserved category candidates, and to provide them such benefit, they are adjusted against reserved vacancies.

9. Regarding the PH category, Rule 17 deals with the same. For PH category, the Commission, in its discretion, may relax the qualifying marks in favour of PH category candidates in order to fill up the vacancies reserved for them. The proviso to Rule 17 further qualifies that where a physically handicapped candidate obtains the minimum qualifying marks on his own merit in the requisite number for general category or other categories, i.e., SC, ST and OBC, then the extra PH 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 have to be notified. It is accordingly stated that in presence of Rule 17, even if a PH category candidate secures higher marks for selection under the general category or in all the reserved categories on

his/her own merits, the next candidate with relaxed standard can only be considered or recommended if the Rules are so amended/framed. It is accordingly stated that there has been no amendment in Rule 17. Thus, a PH category candidate, if secures more marks on his/her own merit in the general category or any of the reserved categories, he/she will have to be adjusted only against reserved category vacancy.

10. Respondent No.2 – DOPT – in its separate counter affidavit firstly sought a dismissal of the O.A. for non-joinder of necessary parties. It is stated that in event the prayer of the applicant is accepted, the right of another candidate is likely to adversely affected. No such candidate has been impleaded as a party respondent whose right is likely to be affected by the outcome of this O.A. and thus the O.A. is liable to be dismissed on non-joinder of necessary parties.

11. Apart from the above plea, it is also pleaded that on the basis of the judgment of the Hon'ble High Court of Delhi, as upheld by the Hon'ble Supreme Court in **Govt. of India through Secretary & another v. Ravi Prakash Gupta & another**, (2010) 7 SCC 626, the backlog vacancies were worked out from CSE, 1996 to CSE 2009 and filled up accordingly. The directions issued in **Ravi Prakash Gupta's** case (supra) are as under:-

“17. While it cannot be denied that unless posts are identified for the purposes of Section 33 of the aforesaid Act, no appointments from the reserved categories contained therein can be made, and that to such extent the provisions of Section 33 are dependent on Section 32 of the Act, as submitted by the learned ASG, but the extent of such dependence would be for the purpose of making appointments and not for the purpose of making reservation. In other words,

reservation under Section 33 of the Act is not dependent on identification, as urged on behalf of the Union of India, though a duty has been cast upon the appropriate Government to make appointments in the number of posts reserved for the three categories mentioned in Section 33 of the Act in respect of persons suffering from the disabilities spelt out therein. In fact, a situation has also been noticed where on account of non-availability of candidates some of the reserved posts could remain vacant in a given year. For meeting such eventualities, provision was made to carry forward such vacancies for two years after which they would lapse. Since in the instant case such a situation did not arise and posts were not reserved under Section 33 of the Disabilities Act, 1995, the question of carrying forward of vacancies or lapse thereof, does not arise.”

12. Respondent No.2 has also referred to various other judgments on the question of backlog vacancies under PH category, however, such judgments are not relevant for purposes of short controversy involved in the present O.A. It is, however, stated that for CSE, 2011, 5 vacancies for VI category were available as communicated to the UPSC, for which recommendation has been made by the Commission.

13. We have heard the learned counsel for the parties at length and considered the pleadings.

14. It is admitted case of the parties that only 5 vacancies were advertised for VI category for CSE, 2011. The applicant, though cleared Preliminary and Main Examinations but was not selected. His only claim is that one candidate Gagandeep Singh had secured higher marks and ranked 25 in the general category but has been adjusted against the reserved vacancy of VI category, and if Gagandeep Singh is shifted to general category, the applicant, who secured 1043 marks, may make it to the select list. It is argued on behalf of the applicant that the relief claimed by him is against the official respondents and thus non-joinder of any person would be of no

consequence. The applicant, in support of his claim, relied upon the following judgments of Hon'ble Apex Court:

- i) **State of Himachal Pradesh & another v. Kailash Chand Mahajan & others**, 1992 AIR 1277,
- ii) **General Manager, South Central Railway Secundrabad & another v. A.V.R. Siddhanti & others**, 1974 AIR 1755
- iii) **A. Janardhana v. Union of India & others**, 1983 AIR 769
- iv) **Deputy Commissioner, Hardoi v. Rama Krishna Narain & others**, 1953 AIR 521

15. We have carefully perused the above judgments relied upon by the applicant. We find that all these judgments relate to settlement of seniority. It is held by the Courts that persons whose seniority will not be affected may not be a necessary party and thus the judgments, referred to above, will have no application to the facts and circumstances of the present case. Here is a case, where the affected candidate may be out of the selection and consequently, the service to which he has been appointed. In the event the claim of the applicant is accepted and Gagandeep Singh is shifted to general category, the last selectee in the general category will have to make way for Gagandeep Singh. Without shifting Gagandeep Singh to the general category, no vacancy can be created in the VI category or PH category. Thus, it is not a case simplicitor settlement of selectee but a substantial and valuable right of a person, who is likely to be affected by the outcome of this O.A. He/she may be out of the select list and may lose the job. A substantive right of the person is affected in such an eventuality. Thus, at least the last

selectee in the general category is necessary party and his/her non-impeachment is fatal to this petition.

16. It is settled law that no order can be passed to the detriment of person without according him/her an opportunity of being heard. It violates principles of natural justice. In case of settlement of seniority, a person may be affected temporarily or not at all, but in the present scenario a person would be necessarily affected to the extent of even losing the job. The O.A. is liable to be dismissed on this ground alone.

17. Apart from that, the merit of the candidates (non-recommended) under the VI category is not known. Even in reply to an application under Right to Information Act, 2005, the UPSC has categorically stated that no merit list is prepared, except of the recommendees. The last selectee in VI category secured 1047 marks whereas the applicant secured 1043 marks. We do not know whether there is any other candidate between the applicant and the last selectee, who may have better right than the applicant. Be that as it may, the only contention of the applicant is that Gagandeep Singh, who secured higher marks, needs to be shifted to general category. The UPSC has categorically referred to Rules 16 & 17. Under Rule 16, only such reserved category candidates, who have secured higher marks than the last selectee in the general category, can be adjusted against general category, provided he has not availed any concession or relaxation meant for the reserved category candidates in the examination in question. Nothing has been revealed whether Gagandeep Singh has secured any benefit as a reserved category candidate by relaxation in the qualifying

marks or at any stage in the process of selection. In any case, Rule 17 clearly provides that where the reserved category candidate having secured higher marks is to be adjusted in general category, rules need to be formulated for this purpose. No Rule has been framed. The O.M. dated 29.12.2005 is of no consequence in presence of the rules framed by the DoPT laying down the process of selection. In any case, it is settled law that where the field is governed by statutory rules or enactment of law, any instruction of the Government contrary to that, would be inoperative.

18. In the totality of the scenario, we do not find any merit in this O.A., which is accordingly dismissed with no order as to costs.

(K.N. Shrivastava)
Member (A)

(Justice Permod Kohli)
Chairman

/sunil/