
(2015) 09 CAL CK 0037
In the Calcutta High Court
Case No : Writ Petition 6133(W) of 2013

Ambuj Mohanti

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 23-09-2015

Acts Referred:

Citation : (2015) 4 CALLT 298

Hon'ble Judges : Subrata Talukdar, J

Bench : Single Bench

Advocate : K.K. Moitra, Senior Advocate, A.K. Lahiri, T.K. Barman and B. Ghosh, for the Appellant; Kaushik Chanda and Ashima Roy Chowdhury, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Subrata Talukdar, J—The short point of challenge in this writ petition in respect of which exhaustive oral arguments have been advanced before this Court by Shri Kashi Kanta Moitra, Ld. Senior Counsel is to the selection of an incumbent to the post of Director of the Indian Institute of Management, Kolkata (for short IIM-C). Sri Moitra primarily argues the following points.

2. That whether proper procedure was followed for the selection to the post of Director, IIM-C which was advertised in the year 2012. Sri Moitra points out that in terms of a website advertisement dated 6th September, 2012 the petitioner, who himself is a Professor for long at the IIM-C applied. The said website advertisement dated 6th September, 2012 reads as follows:--

"The applicant should be a person with eminent academic credentials in the field of management. He should also be an able administrator, a good manager with leadership qualities, and should be a visionary."

3. The age requirement in terms of the said advertisement was as follows:--

"Preferably not more than 60 years of age."

4. After the petitioner had applied in terms of the website advertisement dated 6th September, 2012 (*supra*), the petitioner was surprised to notice that a second advertisement had been published in the newspapers "The Telegraph" and the "The Hindustan Times" on 6th October, 2012 for the same post of Director, IIM-C.

5. The second advertisement reads as follows:--

"The applicant should be a person with eminent academic credentials in the field of management. He/she must have proven experience in academic administration and institution building and the capability of providing leadership to build IIM-C's strong foundation and track record and take it to the next level in line with a mission and vision."

6. The condition with regard to age however remained the same.

7. Arguing that the second advertisement could not be allowed to operate since the same has the effect of changing the nature and tenor of the first advertisement, Sri Moitra urges the point that the second advertisement was intended to disqualify the petitioner from participating in the selection. Although both the advertisements bear the same reference number, Sri Moitra argues that the second advertisement could not be resorted to by the Authority to supplant the requirements of the first advertisement. *Ld. Senior Counsel* therefore makes the point that the second advertisement was issued only to accommodate some additional candidates by seeking to add to or reinterpret the eligibility criteria already specified by way of the first advertisement.

8. Sri Moitra further points out that the second advertisement, although claiming to be a continuation of the first advertisement describes certain requirements to the post which are not found in the first advertisement. Introduction of descriptive criteria such as leadership qualities have imparted a level of discretion to vested interests with the intention of ousting meritorious candidates, such as the writ petitioner, from the zone of consideration. In fact, according to Sri Moitra, although the petitioner was a shortlisted candidate for the same post in the year 2007, he was not shortlisted during the round of selection 5 years later in the year 2012 although, in the intervening period, the petitioner had gathered more in terms of academic and administrative experience.

9. Drawing the attention of this Court to the pleadings in the writ petition Sri Moitra argues that the emphasis in the writ petition at the time of filing was on the point of the preferable age of not more than 60 years referred to in both the advertisements which can be used as a lever to disqualify the petitioner who, at the time of applying was admittedly 60 years and 5 months of age. Therefore, in the writ petition reference has been made to similar advertisements for the post of Director, IIM-Ahmedabad (for short IIM-A) and IIM-Bangalore (for short IIM-B) where, instead of the preference being expressed for the age to be not above 60 years, the specification provided is that the term of office will be for a period

of 5 years or, till the attainment of 65 years (whichever is earlier).

10. Therefore, Sri Moitra argues that the preference with regard to age was deliberately inserted in the two advertisements under the scanner in this litigation with an intention to oust the petitioner on the ground of having crossed 60 years of age. Based on such reasonable apprehension the present writ petition became necessary. According to Ld. Senior Counsel, age cannot be a determining criterion in the selection to a tenure post.

11. Another limb of Sri Moitra's submission is that the Search and Selection Committee (for short SCSC) which was appointed to shortlist and ultimately finalise the fittest candidate, prepared its own eligibility norms which were over and beyond the terms of the advertisement. The proceedings of the SCSC were shrouded in an enigma and, going by the final selection were inconsistent to what was advertised.

12. Sri Moitra points out that out of four members of the SCSC only two signed the final proceedings and two members did not sign. Therefore, the selection of the new incumbent was not a majority decision and could not be given effect to. Furthermore, out of five SCSC members, one did not participate. Thereafter since out of four, two did not sign thereby rendering the entire selection to be based on the decision of only two members ipso facto void.

13. Next, Sri Moitra submits that although the selection is controlled by the Ministry of Human Resources Development, Government of India (for short HRD), it was incumbent on the HRD to consult the State Government since the State Government is also a stakeholder in IIM-C. However, from the records of selection which were produced pursuant to the order of an Hon"ble Single Bench it does not transpire that such consultation took place thereby also rendering the said selection ineffective.

14. On the point of non-joinder of a necessary party, being the present incumbent to the post of the Director, IIM-C, Sri Moitra argues that in the writ petition only declaratory reliefs have been prayed for and no order of cancellation of the appointment of the present incumbent has been claimed. In view of the nature of the declaratory relief claimed in the writ petition, according to Sri Moitra, there is no requirement to implead the present incumbent as a necessary party.

15. Finally, answering the charge of canvassing levelled against the writ petitioner through several political leaders, Sri Moitra argues that such expressions of recommendation by Members of Parliament were not taken into notice at all by the HRD during the selection process and therefore, no canvassing can be alleged.

16. In support of his submissions Sri Moitra relies upon the following decisions:--

Dr. Krushna Chandra Sahu and others Vs. State of Orissa and others, AIR 1996 SC 352 : AIR 1995 SC 352 : (1996) 82 CLT 141 : (1995) 7 JT 137 : (1996)

LabIC 53 : (1996) 1 LLJ 919 : (1995) 5 SCALE 329 : (1995) 6 SCC 1 : (1995) 3 SCR 419 Supp : (1996) 1 SLJ 117 ; AIR 1983 SC 1351; AIR 2008 SC 1657; AIR 1990 SC 434; AIR 1996 SC 352; AIR 2007 SC 254; AIR 2001 SC 151; 2008 (7) Supreme 92 and State of U.P. and Another Vs. Om Prakash and Others, AIR 2006 SC 3080 : (2006) 6 JT 452 : (2006) 7 SCALE 280 : (2006) 6 SCC 474 : (2006) SCC(L&S) 1418 : (2006) 4 SCR 793 Supp : (2007) 1 SLJ 252 : (2006) AIRSCW 4281 : (2006) 5 Supreme 851 ."

17. Replying to the arguments of Sri Moitra (*supra*) Sri Kaushik Chanda, Ld. Additional Solicitor General (for short Ld. ASG) appearing on behalf of the respondent No. 1, the Union of India (for short UOI) submits that it is inaccurate on the part of the petitioner to argue that he was completely eliminated from the zone of consideration. Ld. ASG points out that the SCSC considered around 20 applications and upon scrutiny shortlisted 5 candidates for the interview. Therefore, it is utterly untrue to argue that the petitioner was disqualified on the ground of age. The SCSC considered the application of the petitioner along with the other applicants and decided that five should be called for the final interview.

18. Next, arguing that the second advertisement did not contradict the first, Ld. ASG points out that the essential criteria were as follows:--

"(1) Academic credential in the field of management; (2) Able administrator; (3) A good manager; (4) Leadership qualities; and (5) Visionary."

19. Now taking this Court to the second advertisement Ld. ASG submits that similar essential criteria have been prescribed namely:--(1) Academic credentials in the field of management; (2) Proven experience in academic administration; (3) Institution building; (4) Capability of providing leadership to build on IIM-C's foundation and track record; and (5) To take IIM-C to the next level in line with its mission and vision. Therefore, Ld. ASG strongly submits that the petitioner has tried to create a smokescreen of inconsistency between the two advertisements when, in reality, both the advertisements express the same substance and intent, albeit in different forms.

20. Ld. ASG further argues that IIM-C finalises the norms and criteria for selection with the concurrence of HRD. The SCSC is constituted upon approval of the Department of Personnel and Training, Government of India (for short DOPT) and to recommend the panel of candidates for appointment to the post. The SCSC is mandated to select a panel on application of norms for consideration by the HRD and to shortlist the candidates for invitation to a personal discussion/interview.

21. Ld. ASG clarifies that the SCSC is created for rendering assistance in the selection to the HRD and its life span is coterminous with each selection process.

22. Ld. ASG strongly argues that it is not the case of the petitioner in the writ petition that the SCSC was improperly constituted or acted with mala fides against the writ petitioner. The writ petition is bereft of any details with regard to

any mala fides by the SCSC or details of any impropriety in the appointment of its members. The only apprehension in the writ petition is with regard to the exclusion of the petitioner on the ground of age and other arguments are sought to be expanded at the Bar.

23. Answering the point that the State Government was not consulted in the selection, Ld. ASG points out that both the Principal Secretary, Higher Education Department along with Members of Parliament are appointed as representatives of the State Government in the Board of Governors (for short BOG) of IIM-C. The recommendation of the HRD has been duly ratified by the BOG and therefore there has been a deemed consultation with the State Government.

24. Further answering the point that two members of the SCSC did not sign, Ld. ASG points out from the records that upon completion of the minutes of the meeting of the final selection held on 4th December, 2012 which was attended by all four members of the SCSC, two members had to leave. Therefore, the signature of the available two members were obtained on 4th December, 2012 itself and, in respect of the two members who had to leave after completion of the proceedings, their signatures were obtained subsequently through email. Proof of adoption of such procedure is evident from both the affidavit-in-opposition (for short A/O) of the respondent No. 1-UOI as well as from the original records produced by Ld. ASG. Therefore, delayed signature of the remaining two members was merely a matter of procedure and did not substantially affect the content of the proceedings leading to the final decision. The fact that the two members subsequently put their signature on the proceedings through e-mail confirms their affirmation of the final selection held on 4th December, 2012.

25. Further arguing that by the order of an Hon'ble Single Bench dated 1st March, 2013 in the present writ petition at the time of admission the Bench, although expressing its disinclination to restrain the respondents from proceeding further with the selection process, however made the final selection subject to the outcome of the writ petition and the same was directed to be incorporated in the letter of appointment to the appointee indicating that such appointment will not create any equity in favour of the new incumbent.

26. Having regard to the order of the Hon'ble Single Bench dated 1st March, 2013 (supra), Ld. ASG submits that the new incumbent therefore took up the job of Director, IIM-C with a rider that such appointment is subject to the result of this writ petition and without a claim for equity in the appointment in his favour.

27. Ld. ASG therefore points out that it was strictly necessary for the writ petitioner to have impleaded the present incumbent as a party respondent in this writ petition since any order in favour of the writ petitioner shall have adverse consequences on the new appointee. The steady refusal by the writ petitioner to join the new appointee as a party respondent on the pretext of claiming declaratory reliefs alone in this writ petition is not sustainable. Therefore, Ld.

ASG submits that on the ground of non-joinder the writ petition should fail.

28. Recounting the sequence of events associated with the selection process, Ld. ASG submits that each of the SCSC members were proven experts in their field and after analysing the detailed applications the candidates found 5 to be qualified for the interview. The panel of 5 names was submitted on 8th January, 2013 to HRD. With due approval HRD submitted the panel on 22nd January, 2013 to the Appointment Committee of the Cabinet (for short ACC), Government of India for further approval. Thereafter, candidates were interviewed by SCSC and ranked by merit. The new incumbent being ranked at the top of the panel was approved in the appointment by the ACC on 26th February, 2013. Upon such approval by ACC the BOG of IIM-C was requested by HRD on 1st March, 2013 to issue the offer of appointment which was ultimately done by the Chairman, BOG on 16th March, 2013. Therefore, due process was faithfully followed in the selection.

29. Ld. ASG submits that the petitioner's attempt to influence the selection through letters in his favour by Members of Parliament is in violation of Rule 20 of the Central Civil Service (Conduct Rules, 1964) and such Rules have been adopted by IIM-C as per Chapter 13 of its own Service Rules.

30. In support of the two propositions of law namely, first on the point of non-joinder, Arun Tewari and Others Vs. Zila Mansavi Shikshak Sangh and Others, AIR 1998 SC 331 : (1997) 9 JT 593 : (1997) 7 SCALE 461 : (1998) 2 SCC 332 : (1998) SCC(L&S) 541 : (1997) 5 SCR 604 Supp ; second on the limited role of Dr. Basavaiah Vs. Dr. H.L. Ramesh and Others, (2010) 127 FLR 888 : (2010) 7 JT 558 : (2010) 7 SCALE 529 : (2010) 8 SCC 372 : (2010) 9 SCR 227 : (2011) 1 SLJ 170 : (2010) 5 SLR 105 : (2010) AIRSCW 5907 : (2010) 6 Supreme 18 .

31. Arguing on behalf of the respondent Nos. 2 and 3, i.e. IIM-C, Sri L.K. Gupta, Ld. Senior Counsel submits that the IIM-C is a society registered under the Societies Registration Act, 1960 and governed by its own rules as frame in the Memorandum of Association (for short MOA). The BOG of the Society, being the IIM-C, is constituted of several nominees both of the Central Government and the State Government as well as other institutions. Rule 12 (ix) of the MOA provides for appointment to the post of Director by the BOG with the approval of the Central Government on such terms and conditions as decided by the Central Government. The procedure for selection through a SCSC is not under challenge in this writ petition and the petitioner has not contested the integrity and sovereignty of the procedure which is reposed in the SCSC.

32. Sri Gupta argues that the criterion of age provided in the respective advertisements were not the same in respect of the three IIMs-A, B and C - because of the fact that in respect of the first two IIMs recommendations were received by the HRD for suitable amendment to the age as advertised. However, in respect of IIM-C no such amendment was proposed and therefore both the advertisements specified a common criterion in respect of age.

33. Be that as it may, according to Sri Gupta, the petitioner was not shortlisted not on the ground of age but on consideration of the respective merits of the candidates by the SCSC.

34. Sri Gupta reiterates the point taken by Ld. ASG that the petitioner is in breach of his service rules by canvassing his candidature and the writ petition is liable to fail on the ground of nonjoinder.

35. Having heard the parties and considering the materials on record this Court is of the opinion that the writ petition is primarily filed on the apprehension that the writ petitioner is likely to be excluded on the ground of the criterion of age as specified in the two advertisements. This Court cannot be also unmindful of the fact that the post in question is a selection post and the selection procedure involves institutions at the highest level with experts of the finest calibre.

36. However, on perusal of the records of selection and the A/O of the respondent No. 1-UOI, this Court notices that the applications of the candidates were placed before the SCSC at its first meeting on 04.12.2012 in two parts - Sections I and II. While Section I contained the profiles of 14 candidates, in Section II there were the profiles of five candidates. Section I exclusively groups the candidates in the "Age Group 45 Years to 60 Years", while Section II candidates are described as "Age Group Above 60 Years".

37. Interestingly, at its meeting dated 04.12.12 the SCSC claimed to have shortlisted five candidates solely on the basis of:-- i) Academic Qualifications; ii) Professional Experience; iii) Administrative Experience. The pithy suffix which is the only available reason expressed in the minutes of the meeting dated 04.12.12 goes as follows:--

"Going by the above parameters the following five candidates were shortlisted from the available applications..... "

38. This Court cannot help but notice that all the five shortlisted candidates belonged to Section I meaning thereby were in the Age Group 45 Years-60 Years. No candidate appears in the shortlist from Section II, i.e. Above 60 years of Age which, includes the writ petitioner.

39. Therefore, this Court is minded to observe that the arguments of the respondents that the SCSC acted on assessment of comparative merits of the candidates and not on preference of age is not in sync with the records of the selection. On the other hand, this Court is also minded to find substance in the pleadings of the writ petition that age may be used as a disqualifying factor at the threshold. This Court is further minded to express surprise that although the writ petitioner made it to the shortlist in 2007, with more academic and administrative experience in the year 2012, he deserved a more accurate consideration by the SCSC on merits.

40. In *The Secretary, Andhra Pradesh Public Service Commission Vs. Y.V.V.R. Srinivasulu and Others*, AIR 2003 SC 3961 : (2003) 2 CTC 752 : (2003) 97 FLR

792 : (2003) 4 JT 208 : (2003) 4 SCALE 166 : (2003) 5 SCC 341 : (2003) SCC(L&S) 681 : (2003) 3 SCR 742 : (2003) 2 SLJ 321 : (2003) AIRSCW 2858 : (2003) 3 Supreme 556 the Hon"ble Apex Court noticed the legal foundations attached to the word "preference" as applicable to appointments/recruitments. At Paras 10 and 11 the Hon"ble Apex Court held as follows:--

"10. Both on account of the scheme of selection and the various stages disclosed as necessary to be undergone by every candidate and the manner of actual selection for the appointment in question, the candidates were required to be selected finally for appointment on the basis of the ranks obtained by them in terms of the inter se ranking based on the merit of their respective performance. There is no escape for anyone from this ordeal and claim for any en bloc favoured treatment merely because, anyone of them happened to possess an additional qualification than the relevant basic/general qualification essential for even applying to the post. The word "preference" in our view is capable of different shades of meaning taking colour from the context, purpose and object of its use under the scheme of things envisaged. Hence, it is to be construed not in an isolated or detached manner, ascribing a meaning of universal import, for all contingencies capable of an invariable application. The procedure for selection in the case involve, a qualifying test, a written examination and oral test or interview and the final list of selection has to be on the basis of the marks obtained in them. The suitability and all round merit, if had to be adjudged in that manner only what justification could there be for overriding all these merely because, a particular candidate is in possession of an additional qualification on the basis of which, a preference has also been envisaged. The rules do not provide for separate classification of those candidates or apply different norms of selection for them. The "preference" envisaged in the rules, in our view, under the scheme of things and contextually also cannot mean, an absolute en bloc preference akin to reservation or separate and distinct method of selection for them alone. A mere rule of preference meant to give weightage to the additional qualification cannot be enforced as a rule of reservation or rule of complete precedence. Such a construction would not only undermine the scheme of selection envisaged through Public Service Commission, on the basis of merit performance but also would work great hardship and injustice to those who possess the required minimum educational qualification with which they are entitled to compete with those possessing additional qualification too, and demonstrate their superiority, merit wise and their suitability for the post. It is not to be viewed as a preferential right conferred even for taking up their claims for consideration. On the other hand, the preference envisaged has to be given only when the claims of all candidates who are eligible are taken for consideration and when anyone or more of them are found equally positioned, by using the additional qualification as a tilting factor, in their favour vis-a-vis others in the matter of actual selection.

11. Whenever, a selection is to be made on the basis of merit performance involving competition, and possession of any additional qualification or factor is

also envisaged to accord preference, it cannot be for the purpose of putting them as a whole lot ahead of others, dehors their intrinsic worth or proven inter se merit and suitability, duly assessed by the competent authority. Preference, in the context of all such competitive scheme of selection would only mean that other things being qualitatively and quantitatively equal, those with the additional qualification have to be preferred. There is no question of eliminating all others preventing thereby even an effective and comparative consideration on merits, by according en bloc precedence in favour of those in possession of additional qualification irrespective of the respective merits and demerits of all candidates to be considered. If it is to be viewed they way the High Court and Tribunal have chosen to, it would amount to first exhausting in the matter of selection all those, dehors their inter se merit performance, only those in possession of additional qualification and take only thereafter separately those with ordinary degree and who does not possess the additional qualification. Assuming for consideration without even accepting the same to be right or correct view to be taken, at least among the class or category of those possessing the additional qualification, inter se merit performance should be the decisive factor for actual selection for appointment and relief could not have been granted to respondents for the mere asking only on the basis of the interpretation of the provision to some one who came to court, ignoring the fact that those before the court at any rate in spite of the view taken do not come up to the level of selection considered in the context of numerous others with higher ranks of merit performance, in addition to they being also in possession of the additional qualification, as those before the court. That apart, the old rule relating to the post of ACTO, which has become obsolete having been superseded, or even the advertisement if it has stated on the basis of the obsolete rule, that preference will be given first to candidates who possess a degree in Commerce and degree in Law, secondly to those who possess a degree in Commerce and thirdly to those who possess a degree in Law, cannot either support the claim of the respondents No. 1 to 3 nor in any manner lend credence to the interpretation placed by the High Court and the Tribunal. The word "first" has to be construed in the context of even giving preference only in the order and manner indicated therein, inter se among more than one holding such different class of degrees in addition and not to be interpreted vis-a-vis others who do not possess such additional qualification, to completely exclude them, en bloc."

41. It is apparent to this Court on examination of the minutes of the meeting of the SCSC dated 04.12.12 that the above noted salutary legal exercise qua the use of "preference" in the present appointment appears not to have been followed by the SCSC by shortlisting candidates en masse from a particular age group notwithstanding the law as pointed out by Dr. Basavaiah Vs. Dr. H.L. Ramesh and Others, (2010) 127 FLR 888 : (2010) 7 JT 558 : (2010) 7 SCALE 529 : (2010) 8 SCC 372 : (2010) 9 SCR 227 : (2011) 1 SLJ 170 : (2010) 5 SLR 105 : (2010) AIRSCW 5907 : (2010) 6 Supreme 18 underscoring the sovereignty

of an academic selection process undertaken by experts.

42. This Court hopes and expects that SCSC shall demonstrate deeper application of mind in the minutes of its selection meetings in future.

43. However, with regard to the point raised by Sri Moitra that the two advertisements were divergent in their requirements, this Court is persuaded to accept the submissions of Ld. ASG that the advertisements were ad idem in expression of their fundamental content and intent.

44. This Court also notices that in view of the order dated 1st March, 2013 it was incumbent upon the writ petitioner to add the present appointee as a party respondent since his fate hung on the ultimate outcome of the writ petition. Such non-joinder makes the present writ petition unsustainable and this Court restrains itself from interfering with the appointment of the present incumbent and his continuance in the post of Director, IIM-C.

45. In this connection this Court is also required to notice the observations of the Hon'ble Apex Court in *Buddhi Nath Chaudhary and Others Etc. Vs. Abahi Kumar and Others*, AIR 2001 SC 1176 : (2001) 2 SCALE 145 : (2001) 3 SCC 328 : (2001) SCC(L&S) 589 : (2001) 2 SCR 18 : (2001) AIRSCW 1025 : (2001) 2 Supreme 138 which is as follows:--

"6. The selected candidates, who have been appointed, are now in employment as Motor Vehicle Inspectors for over a decade. Now that they have worked in such posts for a long time, necessarily they would have acquired the requisite experience. Lack of experience, if any, at the time of recruitment is made good now. Therefore, the new exercise ordered by the High Court will only lead to anomalous results. Since we are disposing of these matters on equitable consideration, the learned counsel for the contesting respondents submitted that their cases for appointment should also be considered. It is not clear whether there is any vacancy for the post of Motor Vehicle Inspectors. If that is so, unless any one or more of the selected candidates are displaced, the cases of the contesting respondents cannot be considered. We think that such adjustment is not feasible for practical reasons. We have extended equitable consideration to such selected candidates who have worked in the post for a long period, but the contesting respondents do not come in that class. The effect of our conclusion is that appointments made long back pursuant to a selection need not be disturbed. Such a view can be derived from several decisions of this Court including the decisions in *Ram Sarup v. State of Haryana*; *District Collector & Chairman, Vizianagaram Social Welfare Residential School Society v. M. Tripura Sundari Devi* and *H.C. Puttaswamy v. Hon'ble Chief Justice of Karnataka High Court, Bangalore*. Therefore, we must let the matters lie where they are."

46. Before parting with this case this Court is required to notice the brazen defence of the writ petitioner in respect of the allegation of canvassing his candidature. While this Court is inclined to agree with the submissions of the respondent Nos. 1, 2 and 3 that such canvassing attracts the mischief of

violation of the service rules by the writ petitioner, keeping in mind the long academic career of the writ petitioner this Court also restrains itself from passing any mandatory direction on the issue hoping that good sense shall prevail on the writ petitioner in future.

47. WP 6133(W) of 2013 stands accordingly disposed of.

48. Urgent certified photocopies of this judgement, if applied for, be given to the learned advocates for the parties upon compliance of all formalities.