

(2022) 09 DEL CK 0191
In the Delhi High Court
Case No : Civil Writ Petition No. 979 Of 2012

Amresh Shukla

APPELLANT

Vs

Directorate General, C.I.S.F. And Anr

RESPONDENT

Date of Decision : 28-09-2022

Acts Referred:

Constitution Of India, 1950 — Article 14, 16

Citation : (2022) 09 DEL CK 0191

Hon'ble Judges : Suresh Kumar Kait, J;Saurabh Banerjee, J

Bench : Division Bench

Advocate : Ankur Chhibber, Anshuman Mehrotra, Amrita Prakash, Shohit Chaudhary, Siddhant K. Singh

Final Decision : Disposed Of

Judgement

Saurabh Banerjee, J

1. The petitioner had applied for the post of Assistant Commandant [hereinafter referred to as 'AC?'] (EXE) in the Central Industrial Security Force [hereinafter referred to as 'CISF?'] Limited Departmental Competitive Examination [hereinafter referred to as 'LDCE?'] -2010 and 2011 under 'General' category for the year 2010 pursuant to applications invited for the recruitment for the years 2010 and 2011 vide Ministry of Home Affairs [hereinafter referred as 'MHA?'] Notification on 16.04.2011.

2. It is the case of the petitioner that though his name appeared in the list of successful candidates for the year 2010 in order of merit published by the Union Public Service Commission [hereinafter referred to as 'UPSC?'] and also in the list of recruitment to the post of AC(EXE) through LDCE 2010-2011 issued by the Director General [hereinafter referred to as 'DG'], CISF, both dated 21.11.2011, but unfortunately, based on revised scrutiny and certification by DG, CISF, the UPSC recast the said list of candidates in order of merit in supersession of the said list of 21.11.2011. The same resulted in deletion of the name of petitioner

from the recasted list of successful candidates for the year 2010. Subsequently, the DG, CISF adopted and affirmed the recast list and published it on 10.02.2012.

3. The petitioner attributes the above to discrepancies and apprehends that the officials of CISF and UPSC are responsible for this. The petitioner is aggrieved, firstly as the maximum age limit for the said post of AC(EXE) in the CISF as per the Notification dated 16.04.2011 was 35 years and he would be barred by age if not selected and thus be disqualified after 2010 and secondly as the last candidate in the list of successful candidates for the year 2010 and the petitioner both secured same marks, i.e., there was a tie break inter-se them, but as there was no 'tie breaker principle' in the Notification dated 16.04.2011, the name of the petitioner was deleted from the list of candidates. As per petitioner, his name was not reckoned by CISF as the CISF wrongly followed the then prevalent principle of UPSC whereby UPSC reckoned 'marks' in the written paper rather than 'age'/date of birth as the basis for selection of a candidate to the post of AC(EXE) in the case of a tie-break. The petitioner submits this was contrary to the usual practice of selecting a candidate on the basis of 'age'/date of birth. To be noted that amongst the various grounds taken by petitioner, learned counsel has restricted the arguments only qua the second grievance enumerated hereinbefore. The same are being dealt in the foregoing paragraphs below.

4. The petitioner has filed the present petition seeking the following reliefs:

"a) To issue a writ of Certiorari for quashing the FAX/E-MAIL Message No. E-32015(4)1/AC-LDCE-2010-2011/PERS.I/509 dated 10.02.2012 issued by Director General, CISF;

b) Issue a writ of Certiorari for quashing the list of finally qualified candidate for the post of CISF, Asst. Commandant LDCE-2010-2011 as published by respondent no. 2 though press note dated 31.01.2012;

c) issue writ of mandamus or such other appropriate directions & orders to the Respondent no. 2 to Respondent no. 1, thereby directing the Respondent no. 1 to restore/revive and adopt the list of successful candidates for recruitment to the post of Asst. Commandant (exe) through ace, Idce-2010-2011 published vide Fax/ E-mail message No. e-32015(4)1/ac-ldce-2010-2011/pers.i/1967 dated 21.11.2011;

d) issue writ of mandamus or such other appropriate directions & orders to the Respondent no. 1 to restore/revive and adopt the list of successful candidates published vide press note dated 21.11.2011

e) to issue writ of mandamus or such other appropriate directions & orders to the Respondent no. 1, thereby directing the respondent no. 1 to declare Petitioner as finally being selected for the recruitment to the recruitment to the post of Asst. Commandant (EXE) through AC(LDCE-2010-2011);

f) to issue writ of mandamus or such other appropriate directions & orders to the Respondent no. 1 to issue offer of appointment to the Petitioner for the post of

Asst. Commandant (EXE) through AC (LDCE-2010-2011)”

5. To put forth his case, learned counsel for petitioner contends that when two or more candidates secure the same marks and there is no ‘tie breaker principle’ then in such a scenario ‘age’/date of birth is the determining factor of seniority to be reckoned. Thus, the petitioner herein should have been selected over and above the last candidate in the list of successful candidates for the year 2010 as it was the prevalent practice in vogue. Learned counsel for petitioner also contends that the CISF should have relied upon an earlier Office Memorandum [hereinafter referred to as ‘OM’] dated 21.08.2000 issued by MHA which introduced the system of LDCE for the promotion of AC(GD) and the Standard Operating Procedure [hereinafter referred to as ‘SOP’] dated 17.08.2005 issued by MHA even though they were both silent on the said issue.

6. Learned counsel for petitioner relied upon (i) the Relegation Policy for AC(GD), CISF dated 09.07.2012 notified by MHA, which provided that the inter-se-seniority of candidates of AC(GD) through LDCE and Sub- Inspector(GD) through LDCE shall be arranged in order of merit which shall be determined by adding together the marks obtained by them, thereafter, if two or more candidates secure equal number of marks in the aggregate then their order of merit shall be in order of their seniority in ‘age’/ date of birth and (ii) the examination conducted immediately after the CISF LDCE-2010-2011, which also provided for ‘tie breaker principle’ on the basis of ‘age’/date of birth and further upon (iii) the latest recommendation issued subsequently, details and cut off marks for CISF LDCE-2021 which prescribes the ‘tie breaker principle’ on the basis of seniority in ‘age’/ date of birth. Based thereon, learned counsel for petitioner contends that as the provisional seniority list of CISF officers shows that the name of the petitioner is much before/ above the last candidate in the list of successful candidates for the year 2010, the petitioner is senior in service and he should have been selected over and above the said last candidate.

7. Learned counsel for petitioner further contends that the CISF has wrongly adopted a ‘tie breaker principle’ followed by the UPSC according to which the candidates were selected based on ‘marks’; that LDCE is merely a mode of promotion in a situation where the rules for conducting the examination are silent; it is not open to the CISF and/ or the UPSC to later on change the rules and apply a principle that is applicable in the cases of Direct Recruitment; that the directions and OMs of the Department of Personnel and Training [hereinafter referred to as ‘DoPT’] would be applicable, which prescribe that in case of a tie break, seniority by age has to be taken into consideration; and lastly even otherwise the conduct of CISF and UPSC while conducting subsequent examinations and setting up the ‘tie breaker principle’ by making seniority by ‘age’/date of birth criteria for selection of the candidates is reflective of the general principles in this regard.

8. In support of his contention, learned counsel for petitioner relies upon D.P. Das vs. Union of India (2011) 8 SCC 115 wherein it has been held that in

absence of a rule governing seniority, the age of the candidate will be the determining factor for seniority and similarly upon *Vikas vs. State of Maharashtra* (2015) SCC OnLine Bom 3387 wherein also it has been held that a candidate who is more in age is to be appointed.

9. In response, CISF contends that UPSC conducted the LDCE examination for the post of AC(EXE) in CISF for two years i.e., 2010 and 2011 and after re-examining the documents, the UPSC recast the result to their satisfaction and two new fresh candidates were included by the UPSC. Relying upon para 10 of MHA notification dated 16.04.2011, CISF contends that the admission of the candidates after all the stages of examination was purely provisional in nature subject to satisfaction of prescribed eligibility conditions and since the petitioner was eligible for the vacancy of year 2010 only, he could not get placed in the recast merit list published by UPSC on 31.01.2012 as others scored more marks than him.

10. Similar to that, in response UPSC also contends that the examination for LDCE-2010-2011 was conducted by it and not by the CISF and after approval from the CISF it adopted the first of three principles, i.e. 'if the marks in aggregate are equal the candidate getting more marks in the written total may be ranked higher' as enunciated on the UPSC website under frequently asked questions for the examination in question and since the petitioner scored lower marks than the last candidate in the list of successful candidates for the year 2010 he was not selected. Further, contended that the 'tie breaker principle' is also available on the Commission's Website and the UPSC further states that in none of the examinations conducted by it, the 'age'/date of birth is reckoned as the first criteria for selection under the 'tie breaker principle'. Further, for determining the eligibility of a candidate for inclusion in the recommended list UPSC had acted strictly as per the Rules of CISF LDCE-2010-2011 and effected the revision of the already recommended list due to discrepancies arising out of erroneous scrutiny of the eligibility of the candidates by the CISF.

11. After hearing learned counsel for the parties and going through all the documents before us alongwith other relevant documents, in the present case the petitioner had applied for the post of AC(EXE) in CISF through LDCE-2010-2011 for the years 2010 and 2011 pursuant to the Notification dated 16.04.2011 issued by the MHA, but was not selected as the last candidate in the list of successful candidates for the year 2010 and the petitioner both secured same marks, i.e., there was a tie break inter-se them and as there was no 'tie breaker principle' in the Notification dated 16.04.2011. Further, based thereupon the name of the petitioner was deleted from the list of candidates and that the UPSC was only instrumental in conducting the examination thereof, i.e., it was merely acting for and on behalf of the CISF as per instructions of the CISF. Thus, UPSC had a very limited role to play as far as setting up the criterias, rule and regulations. In such a situation, when the UPSC was acting as per instructions of the CISF and there was no 'tie breaker principle', it was prudent for the CISF to

have found a solution to resolve the deadlock on its own rather than adopting something which was followed by the UPSC as CISF was the 'Principal' and UPSC was the 'Agent'. Thus, the decision to reckon 'marks' rather than 'age'/date of birth as the basis for consideration and selection of a candidate to the post of AC(EXE) by the CISF was improper as what was followed by the 'Agent' UPSC cannot be allowed to overshadow what was followed by the 'Principal' CISF.

12. More so, as it was not open to the CISF and/ or the UPSC to later on change the rules from what they were at the time of Notification dated 16.04.2011 and apply an alien principle followed by the UPSC not applicable in similar cases of LDCE appointments by the CISF.

13. Interestingly, while choosing between 'marks' and 'age'/date of birth in the present case, we find that the OM dated 21.08.2000 and the SOP dated 17.08.2005 issued by the MHA for filling up the post of AC(GD) through LDCE-2005-06 conducted by the same UPSC and the MHA, like the Notification dated 16.04.2011 involved in the present petition, was also silent about the 'tie breaker principle' however the Relegation Policy for AC(GD) in CISF notified by MHA on 09.07.2012 and the Recommendation Details and Cut-off Marks in the CISF AC(EXE) for the LDCE-2021 specifically mention that in case of a tie break between two or more candidates the governing factor would be 'seniority in age' in the same LDCE post. In such a scenario the CISF ought to have taken recourse to the tie break followed by it in its usual course under similar circumstances for reckoning 'age'/date of birth rather than 'marks' as the basis for consideration and selection of a candidate to the post of AC(EXE).

14. Having said so, no doubt the post of AC(GD) is different from that of the AC(EXE) involved in the present petition but there was an already existing policy framed by the CISF and further both AC(GD) and AC(EXE) are selected by the CISF following similar procedures; they are both performing/ discharging similar duties and they are both working on similar posts. In effect, they are both part of the similar level playing field. There is thus no reason that the candidates who are AC(EXE) in the CISF should not be given parity with the candidates who are AC(GD) in the CISF, especially when the LDCE is a mode of promotion employed for both the said posts and they are two sides of the same coin. There is nothing discriminatory in adopting the similar provisions from the AC(GD) in case any provisions are missing in the case of AC(EXE). Thus, we hold that they have to be governed by the same rules when applying the 'tie breaker principle' and the sole determining factor to be reckoned for considering and selecting seniority of candidate has to be 'age'/ date of birth of the candidate who was born earlier and not 'marks'

15. In support of the above we rely upon D.P. Das (supra), cited by the learned counsel for petitioner, which though was a case pertaining to determination of inter-se seniority of candidates joining on the same day, but the ratio is applicable to the facts of the present petition, wherein it has been held as under:

"18. The law is clear that seniority is an incidence of service and where the service rules prescribe the method of its computation, it is squarely governed by such rules. In the absence of a provision ordinarily the length of service is taken into account. The Supreme Court in *M.B. Joshi & others. V. Satish Kumar Pandey & Ors.*, AIR 1993 SC 267 has laid down that it is the well settled principle of service jurisprudence then in the absence of any specific rule the seniority amongst persons holding similar posts in the same cadre has to be determined on the basis of the length of the service and not on any other fortuitous circumstances.

19. Determination of seniority is a vital aspect in the service career of an employee. His future promotion is dependent on this. Therefore, the determination of seniority must be based on some principles, which are just and fair. This is the mandate of Articles 14 and 16.

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23. The appellant argued that the date of interview would have to be considered as a guide for determination of seniority. This cannot be accepted as such a date is wholly fortuitous. Accepting as guideline, something which is absolutely fortuitous and based on chance, is inherently unfair and unjust. As in this case there is no rule prescribed for the determination of seniority, this Court is left with only the guideline flowing from the executive instruction of 1946, in order to evolve a just policy, for determination of seniority.

24. From the analysis of the executive instructions referred to hereinabove, it is clear that the 1946 instruction has not been superseded and the same refers to the acceptance of the age of the candidate as the determining factor for seniority. Such a basis is not fortuitous and is otherwise just and reasonable.

25. In the premises aforesaid the seniority of the officers who were recommended on the same date must be decided by their respective age. The contrary view taken by the High Court of fixing seniority on the basis of date of interview, being wholly fortuitous, cannot be accepted.

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27. For the reasons aforesaid this Court holds that for determination of seniority of the officers who were recommended on the same date, age is the only valid and fair basis as such their seniority should be decided on the basis of age of the candidates who have been recommended."

16. As such the 'age'/ date of birth, i.e., seniority of a candidate has to be taken into reckoning for considering and selecting suitable candidates for the post of AC(EXE) in CISF when the 'tie breaker principle' is missing and more so, whence the CISF has itself been adopting and applying the said principle lately for the said post of AC(EXE) in CISF through LDCE subsequent to LDCE-2010-2011 and also as the CISF was already adopting and applying the said principle for the post of AC(GD).

17. This will hopefully bring an overall closure to the 'tie breaker principle' once and for all, especially whence it is not mentioned in the advertisements issued for the post of LDCE for the benefit of everybody including all the candidates applying for the said post from time to time. We further hold, to avoid any kind of confusion, that in such a situation when the 'tie breaker principle' is missing, the CISF and other forces like the CISF should consider 'age'/ date of birth to determine the seniority when applying the 'tie breaker principle' for a timely solution.

18. As such the arguments addressed by the learned counsels for CISF and UPSC do not appeal to us for the reasons detailed above.

19. We are conscious that the present petition was filed in the year 2012 and that thereafter, much water has flown. Thus, if we direct the CISF to offer appointment to petitioner with effect from 16.04.2011 i.e., the date of Notification, then it would affect large number of officers who have been selected subsequently and are not a party before us.

20. Accordingly, we direct CISF to declare petitioner as finally selected in the recruitment to the post of Assistant Commandant (EXE) through LDCE-2010-2011 and issue him an offer of appointment for the said post within a period of four weeks. The service of the petitioner shall be reckoned from the date of his joining to the post of Assistant Commandant (EXE) in CISF.

21. Needless to say, the said appointment of petitioner shall not have a retrospective effect as the position qua the 'tie breaker principle' was unclear; and also as it would not be prudent to disturb the existing position. Further, the appointment of petitioner shall not, in any manner, affect the continuing service of the last candidate in the list of successful candidates for the year 2010 who has been preferred above the petitioner on the basis of securing more marks than him and all those appointed subsequent to the Notification dated 16.04.2011 till date.

22. With aforesaid directions, the present petition is accordingly disposed off.