

(2025) 01 DEL CK 1746
In the Delhi High Court
Case No : Writ Petition (C) No. 9899 Of 2019

Kalu Ram Saini

APPELLANT

Vs

Union Of India And Ors

RESPONDENT

Date of Decision : 07-01-2025

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 315, 320

Citation : (2025) 01 DEL CK 1746

Hon'ble Judges : Navin Chawla, J;Shalinder Kaur, J

Bench : Division Bench

Advocate : Ashish Nischal, Arti Bansal, Kamal Digpaul, Naresh Kaushik, Shantanu Shukla, Anand Singh, Ravinder Agarwal, Manish Kumar Singh, Ankita Patnaik

Final Decision : Allowed

Judgement

Navin Chawla, J

1. This petition has been filed by the petitioner praying for the following reliefs: -

"i. Writ of Mandamus be issued to Quash and set aside the answer key qua question no. 42 and 84, under series to the CISF AC (Executive) LDCE 2019;

ii. Writ of Mandamus be issued to the respondents to consider and appointment the petitioner as Assistant Commandant (Executive), CISF, under CISF AC (Executive) LDCE 2019 with all consequential benefits;

iii. Writ of Mandamus be issued to prepare the reserve/waiting list for the post of Assistant Commandant, CISF for CISF AC (Executive) LDCE 2019."

Case of the Petitioner:

2. It is the case of the petitioner that the petitioner, who is working as a Sub-Inspector (Executive) in the Central Industrial Security Force (in short, 'CISF'), applied for the post of Assistant Commandant (Executive) in the CISF through

the Limited Competitive Examination-2019 (in short, 'LDCE') notified by the respondent no.3, the Union Public Service Commission (in short, 'UPSC').

3. By way of the above Notification, a total of 10 posts of Assistant Commandant (Exe) were notified by the UPSC, out of which six posts were in the unreserved category, three posts were reserved for the Scheduled Tribe category, and one post was reserved for the Scheduled Caste category. The petitioner had applied under the unreserved category.

4. The selection process consisted of three stages, that is, the written examination (Paper-I, objective, and Paper-II, subjective), the physical endurance test and the medical examination, and lastly, the interview/personality test.

5. It is not disputed that the petitioner secured 369 marks in Paper-I, Paper-II, and the interview/personality test, all taken together. The breakdown of his marks is as follows: -

"4. The petitioner is set in the said selection and secured the following marks: -

Paper – I 198/300

Paper – II 39/100 (Paper I+II)=237

Interview/

Personality

Test 132/200

Total 369/600"

6. The petitioner also cleared his Physical Endurance Test and the Medical Examination.

7. The petitioner is aggrieved by the fact that, though the last recommended candidate, that is, the respondent no.4 herein-Mr. Avnish Kumar also secured 369 marks, but the petitioner was not selected.

8. The petitioner claimed that the impugned notification did not prescribe any manner by which the impasse created by two candidates securing the same marks shall be resolved, that is, a tie-breaker formula to be applied. He, in fact, claimed that where the two candidates secure the same marks, both should be given the offer of an appointment, or otherwise, the marks secured during the interview/personality test should be used as the determining factor. This plea, however, was not pressed by the learned counsel for the petitioner during the course of oral submissions.

9. The petitioner further claimed that he was appointed as a Sub-Inspector through direct recruitment in the 2012 batch, while the respondent no.4 was appointed to the said post, again as a direct recruit, in the 2014 batch. The

petitioner is 33 years of age, while the respondent no.4 is 28 years of age. The petitioner would have only one more attempt for promotion, whereas the respondent no.4 would have two more attempts. He, therefore, claimed that he should have been given priority over the respondent no.4, even if a tie-breaking formula was to be applied.

10. We must herein note that the petitioner also claimed that the answer key for two questions issued by the respondent no.3 was incorrect and that the respondents should also have operated a reserved/waiting list. This plea, however, was not pressed before us by the learned counsel for the petitioner during his submission and was expressly given up.

11. The only challenge, therefore, of the petitioner is that where two or more candidates secure the same marks in the final selection, the age of the candidates should be the determining factor to resolve the impasse/tie-breaker.

12. The learned counsel for the petitioner, in support of his submission, places reliance on the Judgment of this Court in *Amresh Shukla v. Directorate General, CISF & Anr.*, 2022 SCC OnLine Del 3154. He submits that the said Judgment was also approved by the Supreme Court by dismissing the Special Leave Petition, being SLP (Civil) Diary No. 3898/2023, vide an Order dated 05.04.2023.

Submissions of the learned counsel for the Respondents:

13. On the other hand, the learned senior counsel appearing for the respondent no.3 (UPSC) submits that the UPSC follows a formula wherein, in the case of a tie-breaker, preference is given to the marks obtained in the written examination. If they are equal, then to the marks obtained in Paper-I, and if these are also equal, only then is the candidate senior in age ranked higher. In the counter-affidavit, the scheme followed by the respondent no.3 is described as follows: -

"a) If the marks in aggregate are equal, candidate getting more marks in written total may be ranked higher;

b) If the marks in written total are equal, candidate getting more marks in Paper-I (General Ability & intelligence and Professional Skills) may be ranked higher; and

c) if the marks in Paper-I (General Ability & intelligence and Professional Skills) are also equal, the candidate senior in age may be ranked higher."

14. He submits that, as the petitioner and the respondent no. 4 obtained same marks, the marks obtained by them in Paper I, the marks obtained by them in Paper II were compared. The petitioner had obtained only 39 marks while the respondent no.4 obtained 43 marks in Paper-II, therefore, the respondent no.4 was placed/ranked higher than the petitioner and, being the last candidate, was given the offer of an appointment in preference to the petitioner. He submits that the above formula is consistently followed by the respondent no.3.

15. He further submits that the Judgment of this Court in Amresh Shukla (supra) does not lay down the correct law inasmuch as it proceeds on the basis that the UPSC has conducted the examination as an "agent" of the CISF. He submits that the UPSC conducts the examination in discharge of its constitutional duties under Article 315 read with Article 320 of the Constitution of India; it, therefore, does not act as an agent of the department in which the candidate is to be appointed. The rules laid down by the UPSC, therefore, prevail over any rule to the contrary that may be made or be operating for the CISF.

16. The learned counsels for the respondent nos.1 and 2 as well as the respondent no.4 support the submissions made by the learned senior counsel for the respondent no.3.

Analysis and Findings:

17. We have considered the submissions made by the learned counsels for the parties.

18. The entire controversy in the present petition revolves around the manner by which the tie-breaker is to be resolved where two or more candidates secure the same marks in the selection process. The scheme of examination in the present case involved the following: -

- Paper-I comprising 300 marks on general ability, intelligence, and professional skills;
- Paper-II comprising 100 marks for essay, precis writing and comprehension.
- Thereafter, the selected candidates were required to undergo the physical and medical examinations, and once they qualify the same,
- They were to appear for an interview/personality test, which was to carry 200 marks.

19. The above scheme of the examination can be best described from the following clauses of the Rules notified for the said examination: -

"Scheme and Syllabus of the Written Examination for the Limited Departmental Competitive Examination for the post of Assistant Commandants in Central Industrial Security Force

(I) Scheme of Written Examination:

The written examination to be conducted by Union Public Service Commission will comprise two papers as follows:

Paper-1 General ability and Intelligence and Professional Skill, (300 marks) (150 questions) (2 ½ hours)

This paper will be of Objective Type (Multiple Choice Questions) in which the questions will be set in English as well as Hindi. The paper will comprise

two parts as follows:-

Part-A : General Ability and Intelligence - 150 Marks

(75 Questions)

Part-B : Professional Skill - 150 Marks (75 Questions)

Paper II: Essay, Precis Writing and Comprehension - 100 Marks (2 hours)

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NOTE-4: The Commission will declare a list of candidates qualified in the written Exam. The CISF will conduct Physical Efficiency Test first and thereafter the Medical Efficiency Test of only those candidates will be conducted who are declared qualified in the Physical Efficiency Test.

NOTE-5: The candidates who qualify in the Medical Examination and Physical Efficiency Test shall be required to appear for Personality Test/Interview to be conducted by the Commission.

On completion of above process, a final merit list of candidates shall be prepared and be sent to the CISF authority for taking further course of action."

19. In the present case, the petitioner and the respondent no.4 secured the following marks in the written examination and interview: -

Category

Petitioner (UR)

Avnish Kumar (last recommended candidate)-UR

Paper-1

(300)

198

198

Paper-2

(100)

39

43

Interview

(200)

132

128

Total

(600)

369

369

20. As would be evident from the above, while the petitioner secured equal marks to the respondent no.4 in Paper-I, he secured lesser marks in Paper-II, and more marks in the interview, as compared to the respondent no.4. The UPSC has applied the tie-breaker by taking the marks of Paper-II.

21. The learned counsel for the respondents does not dispute that the notification for the examination itself does not provide any formula for resolving an impasse in the case of a tie-breaker. Clause 14(1) of the Notification in this regard reads as follows:

"14. (1) After the Interview, candidates will be arranged by the Commission in order of merit as disclosed by the aggregate marks finally awarded to each candidate and in that order so many candidates as are found by the Commission to be qualified at the examination shall be recommended for appointment up to the number of unreserved vacancies decided to be filled on the results of the examination."

22. This Court, in *Amresh Shukla (Supra)*, considering the question of the formula to be applied for breaking the tie-breaker in the selection for the same post of Assistant Commandant (Exe) in the CISF though for the LDCE of 2010 and 2011, held as follows: -

"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 LDCE2010-2011 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. xxxxxx 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 LDCE2010-2011 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."

23. The Special Leave Petition challenging the said Judgment was dismissed by the Supreme Court, vide its Order dated 05.04.2023.

24. The submission of the learned senior counsel for the respondent no.3 that the said Judgment is per incuriam as it fails to appreciate the constitutional status of the respondent no.3 and the functions with which it has been entrusted under Article 320 of the Constitution of India, does not impress us. While the UPSC has been bestowed with the function of conducting the examinations for appointments to the service of the Union, the Rules for such examinations may be governed either by what is notified in the advertisement, by the rules of the authority for which the selection is being made, or by the general rules of the UPSC, or otherwise by general principles of law. In the present case, although the UPSC follows the principle of giving preference to a candidate who has secured more marks in the written examination, this Court, in *Amresh Shukla* (Supra), considering the Rules prevalent in the CISF, has held that it is the age of the candidate that should be given preference. We do not find any reason to revisit the said issue.

Conclusion:

25. In view of the above, since the petitioner and the respondent no.4 had secured the same marks in the examination and the interview, taken together, the petitioner, being senior in age, should have been offered the appointment to the post of Assistant Commandant (Exe).

Relief:

26. Having held the above, we shall now determine the relief that can be granted to the petitioner or a direction that deserves to be passed in the facts of the present case.

27. The final result of the LDCE examination was declared on 13.08.2019, that is, more than five years ago. The respondent no. 4 has been continuously working in the post in question.

28. In these peculiar facts, where it is not the case of even the petitioner that the respondent no.4 obtained the appointment by some concealment or fraud, we do not consider it to be a case where the appointment of the respondent no.4 should be cancelled. At the same time, the petitioner, having succeeded in his challenge in the present petition, also cannot be deprived of his promotion.

29. We, therefore, direct as follows: -

a) The UPSC/CISF shall declare the petitioner as finally selected for the recruitment to the post of Assistant Commandant (Exe) through the LDCE-2019, and issue him an offer of appointment for the said post within a period of four

weeks.

b) The petitioner shall be entitled to and shall be granted retrospective seniority just above the respondent no.4 and other consequential benefits, along with his batchmates; however, he shall not be entitled to any pay or allowances for the period he has not worked as an Assistant Commandant (Exe).

c) The appointment of the respondent no.4 shall also not be disturbed due to appointment of the petitioner.

30. With the above direction, the Writ Petition is allowed.

31. There shall be no order as to costs.