

(2015) 02 DEL CK 0369

In the Delhi High Court

Case No : Writ Petition (C) 182/2014, CM Appls. 317, 20375/2014, W.P. (C) 194/2014, CM Appls. 343, 4755/2014, W.P. (C) 323/2014, CM Appl. 623/2014 and W.P. (C) 552/2014, CM Appl. 1102/2014

Mukesh Rao and Others

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 20-02-2015

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2015) 02 DEL CK 0369

Hon'ble Judges : Najmi Waziri, J.; Kailash Gambhir, J.

Bench : Division Bench

Advocate : Sujeet Kumar Mishra, for the Appellant; Rajesh Gogna, CGSC and Arnab Naskar, Advocates for the Respondent

Final Decision : Allowed

Judgement

Najmi Waziri, J.—The petitioners appeared in the Limited Departmental Competitive Examination (for short "LDCE") for appointment to the post of Sub-Inspector (GD) in the year 2013-2014. In all, 1300 candidates appeared for the examination, of which 95 candidates qualified according to the fixed criteria but 23 candidates, who obtained 50% marks in aggregate but failed to obtain 45% marks in each part, have been given a grace of 0.5% marks so that they could also be brought under the category of qualified candidates, subject to the approval of their employer-respondent No. 2. A total of 128 candidates appeared in the PST and PET held on 22nd and 23rd August, 2013. However, subsequently, the grant of 0.5% marks to the 23 candidates was disallowed by the Selection Board concerned. Hence, these candidates were disqualified from the selection process. Subsequently, between 24th and 26th August, 2013, only those candidates who have strictly qualified the written and physical examination were called for Medical Examination Test (MET). At least 4 candidates, who did not qualify the PST and PET were given a second chance since the number of candidates were dwindling much below the number of vacancies. While these

candidates were anticipating appointment on the vacant posts as they had apparently qualified all the tests and met the requisite criteria, they were taken by surprise when the said examination was cancelled by an Internal Memo dated 17th December, 2013 issued by respondent No. 3 which was approved by respondent No. 2. The petitioners seek appointment/confirmation letter to the said posts as the same was arbitrary and without reason and infringes the petitioners' right to be appointed to a higher post without due process of law. The petitioners submit that their legitimate expectations have been unlawfully and wantonly quashed and despite repeated requests, the respondents had not assigned any reason for the said cancellation. They relied upon dicta of the Supreme Court in Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, which held that the employer is obligated to communicate the reasons. They submit that the respondents ought to conform to standards or norms which are not arbitrary, irrational or irrelevant.

2. The petitioners' case is that they were Constables (GD) in Sashastra Seema Bal -respondent No. 2. It is stated that this organization by the name of Special Service Bureau (SSB) was raised in the year 1963 and subsequently, came to be known as Sashastra Seema Bal in the year 2004 and is governed by eponymous Act of 2007. The petitioners are serving as Constables (GD). They were appointed through the General Competitive Examination and are serving in various battalions of the organization located throughout India. The aforesaid examination was notified on 3rd April, 2013. Their documents for appearing in the said examination were duly examined by the Selection Board comprising four senior officers and after verification of the requisite documents and testimonials; they were permitted to take the written examinations as aforesaid. However, for the sudden cancellation of the results of the entire examination and non-assignment of the reasons for the same in the Internal Memo dated 17.12.2013, they seek its quashing under Article 226 of the Constitution of India.

3. In the reply to the petition, the respondents have submitted that large number of complaints regarding illegality or irregularities in the conduct of the aforesaid examination were received by the Competent Authority who constituted a high level Board under the Chairmanship of IA(Admn.), FHQ. The Board gave its findings suggesting malpractices during the examination. The main findings were:-

"Fresh OMR sheets were given to 132 candidates who had wrongly filled up the details and cancelled OMR sheets and this action on the part of board of officers (BOO) created a sense of suspicion amongst other candidates.

Only 20 persons were engaged by BOO for distribution of question papers and at a given time, i.e. at 10:35 hrs only 8 personnel (invigilators) were noticed to cover the entire examination venue.

The requisition for detailment of invigilators was not made by LDCE board and the nominal roles of those personnel who were detailed for examination duties

were not produced.

The LDCE board failed to appreciate the requisite number of invigilators proportionate to the number of candidates appearing in LDCE and the situation of outdoor venue.

The inquiry board also observed that during the written test large number of mobile phones were visible on the ground near the candidates and surprisingly neither the board member nor the invigilators collected/frisked away the same.

Large number of mobile phones, carry bags/bags were lying close to candidates and some of the candidates were changing seats and crawling by one candidate to pick up an object thrown by someone else and those activities were found to be unnoticed by any of the invigilators. Call details of four candidates evidently established the fact of unfair means in the LDCE examination.

The candidates were receiving SMS messages during the examination. The possibility of mass scale use of phones as unfair means in solving the question was also considered by the Board.

Evaluation of OMR sheets were carried on the very next day and the result was displayed on next morning along with the names of the candidates who were awarded 0.5 grace marks.

MHA Scheme/FHQ instructions do not prescribe the provision of granting grace marks on the ground of wrong questions by the LDCE board awarded grace marks of 0.5 marks to make them qualify.

Moreover, the second chance granted in 100m/1600 m races was found to be in gross violation of the MHA Scheme for LDCE of SI(GD).

Even the anonymous complaints regarding malpractices and irregularities were authenticated by the inquiry committee."

4. The Board found that the Standard Operation Procedure (SOP) was not followed when the Physical Examination Test was conducted. Hence, the LDCE examination was re-conducted under the arrangement of the Frontier Headquarters, Lucknow between 2nd and 7th April, 2014 whereby petitioners had been allowed to appear instantly. It is also submitted that no fresh candidate was allowed to appear in the said re-examination. Reliance is placed upon the following judgments which held as under:

1. Union of India (UOI) and Others Vs. Tarun K. Singh and Others, held: 4. The question for consideration is whether the learned single Judge of Allahabad High Court was justified in interfering with an order of cancellation passed by the competent authority and direct that the process of selection should be completed. Needless to mention that subsequent to the order of cancellation, in view of the allegation of malpractice, the departmental authorities has held an enquiry into the matter and the result of that enquiry was revealed gross irregularities and illegalities as referred to in the judgment of the Division Bench

of Allahabad High Court. Consequently the process of selection which stands vitiated by adoption of large scale malpractice to a public office, cannot be permitted to be sustained by Court of Law. That apart, an individual applicant for any particular post does not get a right to be enforced by a Mandamus unless and until he is selected in the process of selection and gets the letter of appointment. In the case in hand, much before the so-called list of selection was approved by the Railway Board, the order of cancellation had emanated on the basis of the complaint received from so many quarters. In view of the subsequent findings of the enquiry committee which has gone into the matter, we have no hesitation in coming to the conclusions that the learned single Judge of Allahabad High Court was wholly in error in issuing the direction in question and, therefore, the Division Bench of Allahabad High Court was fully justified in interfering with the said order of learned single Judge of Allahabad High Court. The Division Bench of Calcutta High Court committed error in following the judgment of learned single judge of Allahabad High Court. The judgment of Division Bench of Calcutta High Court is set aside and the judgment of Division Bench of Allahabad High Court is upheld. In the circumstances, we allow the Union's appeals and dismiss the appeals filed on behalf of the individual candidates. The appeals are disposed of accordingly. Any other question of law remains open.

2. Secretary, DSSSB v. Neeraj Kumar and Ors. (LPA 1004/2004, decided on 21.03.2006) held: In our opinion in such cases where there are allegations of use of unfairness means in an examination, it is open to the authorities to cancel the entire examination if the authorities feel that the fairness and transparency in the examination could have been affected. This can be done even if there is no clinching evidence that cheating or use of unfair means was resorted to. There may be instances where the authorities get some information on the basis of which they have reasonable apprehension of use of unfairness means in the examination, but it may not be possible to find out to what extent that was done. In such cases it may not be possible to cancel the result of individual students as it may not be possible to know which particular student did cheating and which did not. Hence in such cases very often the authorities resort to cancellation of the whole examination, and this Court will not interfere in such administrative decisions as has been repeatedly held by the Supreme Court e.g. in Union of India and Ors. v. Tarun K. Singh and Ors.

There is a distinction between a case where an individual candidate has been proceeded against on allegations of use of unfairness means. In such cases, there must be given opportunity of hearing to the candidate before cancelling his examination. However, no opportunity of hearing need be given if it is sought to cancel the entire examination where there are malpractices, and it is not necessary that there must be clinching evidence for doing so. After all the very purpose of an examination is that meritorious students should be selected, and if there is reasonable apprehension that there was cheating in the examination, it is open to the authorities to cancel the entire examination and to hold a fresh

examination. This has been repeatedly held by the Supreme Court e.g. in *Samsudhhin Rahman v. Bihari Das J.T. 1996 (6) SC 511*, etc.

3. *Karan Jain v. Director, NSIT (W.P.(C) 6207/2006*, decided on 19.12.2006 held: 50. A lot of emphasis had been laid during the arguments on the non-recovery of mobile phones and non-linking between the petitioners with the candidates from who the mobile phones were recovered and absence of invigilators Page 3911 report. IT is apparent that the case of the petitioners is not of direct evidence. As a principle, it cannot be held that whenever there is no report from the Invigilator indicating adoption of unfair means in an y examination or till a link is established between the petitioners and those persons from who the mobile phones were recovered and who admitted receiving the answers to the questions in SMS, the respondents could not come to a conclusion about the adoption of unfair means by the petitioners. There is no bar for the Expert committee of the respondents to come to a definite conclusion about the adoption of use of unfair means in the examination in absence of recovery of mobile phones and a link between Somiya Aggarwal and Anshul Aggarwal and the petitioners. In *Union Public Service Commission (supra)*, the Supreme Court had held that where an expert body comes to a conclusion of a fact, the same should not be ordinarily interfered with by a court of law.

51. In another matter, *Guru Nanak Dev University and another (supra)*, the Apex Court had held that though the incriminating material was not recovered from the candidate, however, it was immaterial because the answers tallied with the answers found on the incriminating material which was also confirmed by subject expert on comparison. The definition of unfair means was held to be inclusive and not exhaustive and it was held that so long as the University had communicated the charges to the candidate in clear terms and given him an opportunity to defend himself, it cannot be held that he is not guilty simply because he is not covered specifically by any of the clauses of the Ordinance. A Full Bench of Allahabad High Court in *Triambakpati Tripathi (supra)* relying on, *Board of High School and Intermediate Education v. Bagleshwar Prashad* had observed that in the matter of adoption of unfair means, direct evidence may sometime be not available and in such cases the question will have to be considered in Page 3912 the light of probabilities and circumstantial evidence, however, such an order, which is passed by the expert bodies, the High court does not sit in appeal over the decisions and the jurisdiction is limited to see if the order in question is not supported by any evidence at all.

53. From this evidence which was before the EDC and the respondents, it is difficult to contend that the inference drawn by the EDC and the respondents are based on mere speculation or conjectures. There were material facts or circumstance son record from which the inference have been drawn and especially since the standard of proof is not of beyond reasonable doubt, but of preponderance of probabilities. Therefore the inferences drawn by the respondents that the petitioners have used unfair means in the examination

cannot be faulted in the facts and circumstances.

5. In response to the enquiry report of 21.11.2013, the petitioners submit that it has taken into consideration anonymous petitions and complaints which cannot form the basis of any report as per the notifications dated 29.6.1999 and 31.1.2002. The enquiry was vague, incomplete, erroneous and shabby and it would lead to injustice. It is submitted that the enquiry report, which is purportedly based upon viewing of DVDs and statements of witnesses, is actually based on surmises and conjectures because none of the statements of witnesses concerned has alluded any irregularity or malpractice. The witnesses have stated that the examination was conducted in the manner set down in the SOP, therefore, the conclusion of the enquiry report is wholly at variance with the evidence on record and its conclusions are perhaps guided by extraneous reasons. It is further submitted that there is incongruity in the conduct of the respondents as the said Court of Inquiry, under Rule 172 of SSB Rules, 2009, which after conducting a detailed enquiry has exonerated the Examination Board. In view of the exoneration, the accusation that the entire examination was conducted without following the SOP and that there was malpractice, is baseless and untrue. It is submitted that the reference to conduct of examination regarding four candidates is entirely wrong, misconceived and against the principle of natural justice; that the impugned order purporting to cancel the entire LDCE examination needs to be set aside because the respondents failed to disclose any reasons for the cancellation; that any such decision ought to be an informed decision and ought to be taken after due and proper application of mind.¹ If from out of the selectees, it was possible to weed out the beneficiaries of irregularities or illegalities, there was no justification to deny appointment to those selected candidates, whose selection was not vitiated in any manner. On facts, cancellation of the selection process in its entirety would be irrational.² The petitioners submit that none of the petitioners have been found guilty of any irregularity or illegality in the entire examination process, therefore, they cannot be punished; let alone for the wrong doing, if any, of any other candidate. The petitioners rely upon the judgment in *Inderpreet Singh Kahlon and Others Vs. State of Punjab and Others*, which held that the consequences of a mass cancellation would carry a big stigma, particularly on the cancellation of the selection process which took place because of serious charges or corruption. The petitioners submitted that it is imperative that the tainted or untainted candidate be segregated. They submitted that there is no evidence or data to show that any of the 95 candidates who reached the Physical Endurance Test have indulged in any unfair means or otherwise were beneficiaries of any illegality or irregularity. They submit that chaff must be segregated from the grain and the candidates whose appointments are not tainted or illegal ought to be given such appointment.³

6. The petitioners have also relied upon the dicta in *Rajesh Kumar and Others etc. Vs. State of Bihar and Others etc.*, and *Joginder Pal and Others etc. Vs. State of Punjab and Others*, .

7. This Court had viewed the DVDs during the course of hearing and found nothing which could be said to incriminate or lay a blame on the petitioners in particular and the other candidates in general. This Court noticed that a few mobile phones can be spotted lying on the grass near the candidates, however none of the examinees could be seen using or talking on their telephones. Apropos the proceedings of the day, i.e., 26.9.2013, the respondents have recorded that "Written test was conducted in Football ground of 41st Battalion Ranidanga on 20.8.2013 which commenced at 1030 hours and concluded at 1400 hours. There were 30 rows and 41 lines and candidate to candidate was 1.5 mtrs. During this Test 1128 Male and 100 Female candidates appeared. Fresh OMR Answer sheets to 132 candidates were issued to those who had wrongly filled up the details and cancelled OMR sheets were collected back (Statement of Witness No. 1). This action on the part of BOO created a state of suspicion amongst other candidates."

8. The conclusion regarding suspicion among other candidates is unfounded because all that seems to have happened is that the OMR sheets were collected back and fresh ones were issued because the candidates had filled up wrong details. In any case, it is not the respondents' case that any of these 132 candidates, other than the 95 candidates who were successful in the written examination, went through the physical entrance test. There is an allusion to four candidates, whose telephones were in operation at the time of the examination. However, neither were the call records of the said four candidates examined nor can it be said that because of the said four candidates, who incidentally did not qualify, the remaining 1228 candidates should suffer. This Court is of the view that as none of the candidates, who had qualified the written examination and reached the stage of PET had even been remotely accused of indulging in wrong doing or alluded to be the beneficiaries of irregularity and illegality during the LDCE examination, therefore they cannot be made to suffer of any alleged wrong doing. The enquiry report, forming the basis of cancellation of the examination is too general in nature and lacking in specifics to incriminate the candidates who qualified the written examination and appeared for the PET, to warrant the cancellation of the examination. Unless there is a clear reason or even a prima facie case showing use of unfair means in qualifying the competitive examinations, the selected candidates ought not to be disqualified. The cancellation of the entire selection process on a mere suspicion that 4 out of the 1228 candidates, who incidentally did not even qualify the written examination, could have used their mobile phones, is not a sufficient ground to cancel the entire selection process. It is stated that the cell phones of the said 4 candidates were used, but there is no material on record or call details to show that the user was for the benefit in their examination nor is there any Invigilator's report in this regard. In any case, the said 4 candidates did not qualify or reach the stage of PET. Therefore, the remaining 1224 candidates who took the written examination, of which 95 candidates qualified and reached the stage of PET cannot be made to suffer cancellation of the entire examination.

9. In the circumstances, this Court finds that the reasons for cancelling the LDCE examination are unfounded and arbitrary. The impugned order dated 17.12.2013 is hereby quashed. The respondents are directed to declare the results of the said LDCE examination within eight (8) weeks from today. The selected candidates shall enjoy all benefits of the selection.

10. The writ petitions are allowed in the above terms.

1East Coast Railway and Anr. v. Mahadev Appa Rao and Ors., (2010) SC Civil Appeal No. 4964/2010 2 Union of India (UOI) and Others Vs. Rajesh P.U., Puthuvalnikathu and Another, 3Binod Singh and Ors. v. Union of India and Ors. (DHC) WP(C) 4997/2011