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**(2015) 03 DEL CK 0142**

**In the Delhi High Court**

**Case No :** Writ Petition (C) 2254, 2258 and 3070/2014

Sunita Devi and Others

APPELLANT

Vs

Union of India and Others

RESPONDENT

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**Date of Decision :** 11-03-2015

**Acts Referred:**

**Citation :** (2015) 219 DLT 681

**Hon'ble Judges :** Pratibha Rani, J.;Pradeep Nandrajog, J.

**Bench :** Division Bench

**Advocate :** N.L. Bareja, for the Appellant; Barkha Babbar, Advocates for the Respondent

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## **Judgement**

Pradeep Nandrajog, J.—The three captioned writ petitions are a sequitur to a decision December 05, 2012, passed by a Division Bench of this Court in W.P.(C) No. 6703/2012; and thus we begin our journey transposing ourselves back to the facts which led to the decision dated December 05, 2012.

2. It concerned appointment to the post of a Head Constable (GD) in the Central Reserved Police Force (CRPF) through a Limited Departmental Competitive Examination held in the year 2011.

3. On May 31, 2011, CRPF invited applications from eligible constables to be appointed as Head Constables through a Limited Departmental Competitive Examination. 335 vacancies for males and 2 for females were notified to be filled up. 90 posts of males and 1 post of female in the OBC category were shown as reserved, to be filled up from amongst members of Other Backward Communities.

4. The writ petitioners of W.P.(C) No. 6703/2012 pointed out that appointment through a Limited Departmental Competitive Examination was a case of promotion and not direct recruitment and thus no post could be filled up through reservation in favour of OBC candidates.

5. Agreeing with the legal stand taken by the petitioner of W.P.(C) No.

6703/2012, the writ petition was disposed of on December 05, 2012, holding that there could be no reservation for OBC candidates. A direction was issued to redraw the merit list after removing the benefit of reservation for OBC candidates.

6. Conscious of the fact that the decision dated December 05, 2012 may entail reversion of persons wrongly promoted, the Court left it to the discretion of the CRPF authorities not to revert anyone and create supernumerary posts; with further direction that if CRPF took said view, for purpose of seniority all such candidates who were promoted by giving benefit of reservation but would be accommodated on supernumerary posts being created and would be dove-tailed at the bottom of those who earned promotion on merits.

7. Writ petitioner of W.P.(C) No. 2254/2014 Sunita Devi, earned a promotion in the said Limited Departmental Competitive Examination in the quota of a female OBC candidate. The writ petitioners of the other two writ petitions, W.P.(C) No. 2258/2014 and W.P.(C) No. 3070/2014, earned promotion on the strength of reservation for male OBC candidates.

8. In view of the decision dated December 05, 2012, all writ petitioners were given promotions in the year 2012 but sought to be reverted to the post of Head Constable two years later because their merit position did not entitle them to be promoted as Head Constable. They filed the three captioned petitions on the plea that the Cadre Controlling Ministry : the Ministry of Home Affairs has not accorded approval to the petitioners being retained as Head Constables, notwithstanding the Ministry agreeing in principle that it would be unjust to revert the petitioners, because the Ministry of Finance took the view that creating supernumerary posts would entail huge financial implications inasmuch as the supernumerary posts would need to be created/operated till 2025; further recognizing that its decision may not necessarily result in litigation, specifically observing that further litigation was only a possibility.

9. Pithily put, the case of the petitioners is that the decision taken by the Ministry of Finance overlooks that the supernumerary posts which would be required to be created would not operate till the year 2025, because in the years 2014 and onwards, vacancies to the post of Head Constable in the 10% LDCE quota would arise and the supernumerary posts created could be till the duration when vacancies would arise in the future and these futuristic vacancies could adjust the supernumerary posts created for the petitioners, by reducing the number of Head Constables to be appointed through the LDCE. For example, if 30 posts of Head Constables became vacant in the 10% quota to be filled up through LDCE in the year 2014, 30 supernumerary posts could be sanctioned till the year 2014. No appointment could be made in the year 2014. These supernumerary posts, being 30 in number, would be adjusted against the 30 posts which fell vacant in the year 2014. The petitioners also highlight that they did not take the Limited Departmental Competitive Examination conducted in the years 2012 and the year 2013 because they were declared successful at the LDCE-2011 Examination. They also highlight that now they have become overage and are ineligible to take

the LDCE any further.

10. Per contra, the respondents urge that no vested right of the writ petitioners has been taken away. They urge that a wrong promotion effected in favour of the petitioners is being taken away under orders of the Division Bench of this Court. Recognizing that the petitioners have lost two chances to take the LDCE conducted in the year 2012 and the year 2013, respondents state that notwithstanding the petitioners being over age they would be allowed to take two chances at the LDCE which may be held in future.

11. It is not unusual for Courts to be confronted with situations where justice competes with the letter of the law. The letter of the law proclaims that a person appointed erroneously on a post must not be allowed to reap the benefit of the wrongful appointment jeopardizing the interests of the meritorious and the worthy candidates. The letter of the law also proclaims that right to be promoted is not a vested right; the only right is to be given a fair and equal opportunity to be promoted. The spirit of justice which dwells in the body of service law proclaims that if a candidate has not obtained employment by fraud, mischief, misrepresentation or as a result of a mala-fide exercise of power by some body, such factors which enhance equity must be factored and relief molded to further the cause of justice.

12. In the decision reported as *Rajesh Kumar and Others etc. Vs. State of Bihar and Others etc.*, the Supreme Court observed that the power of the Court to mold the relief, according to the demand of the situation was never the subject matter of any dispute because said power is well-recognized and is available to a writ Court to do complete justice between the parties. In said case recruitment to the post of Junior Engineer (Civil) was found to be tainted on account of wrong answers entered in the key as correct. The learned Single Judge of the High Court quashed the entire selection process. The Division Bench upset the decision of the learned Single Judge directing that corrective action be taken by rectifying the defects. The effect of the decision of the Division Bench was that though the selection process was saved, the candidates who were appointed on the basis of the result declared with a few incorrect answers being treated as correct lost the jobs, because after correcting the answer keys when the results were redrawn up, the merit position got changed. The Supreme Court modified the relief by upholding the decision of the Division Bench that after correcting the keys the merit list be redrawn up; by directing that such candidates who were appointed on the basis of the result declared with some wrong answers treated as correct would retain the appointment and would not be ousted from service, but would be placed at the bottom of the list of selected candidates who would be as per their merit position in the final merit list prepared after correcting the key. A similar view was taken by the Supreme Court in the decision reported as *Vikas Pratap Singh and Others Vs. State of Chhattisgarh and Others*, Errors committed by the Board in matter of evaluation of answer scripts being not attributed to the appellants, noting that they had successfully undergone

training, the direction issued was to retain those who were offered appointment, albeit wrongly, with reference to the erroneous evaluation of answer scripts but to place them at the bottom of the revised merit list.

13. The facts of the instant case would certainly attract the principle of law declared by the Supreme Court in the aforementioned two decisions, in which we find that probably for the reason the respondents never pleaded, as they have done in the instant case, that supernumerary post would have to be created to adjust the excess number of candidates who would not have to be given appointment. We would be failing therefore not to deal with said argument because it has been raised before us.

14. At the LDCE-2011, of the 335 vacancies for males and 2 for females, 90 for males and 1 for female were shown as reserved for OBC candidates, and neither party informs us as to how many of the 90 males who were offered appointment on the strength of OBC reservation retained their position in the merit list after it was redrawn by removing benefit of OBC reservation. As regards the sole post for a female, we find that at the redrawn list, Sunita Devi has lost the benefit of the appointment given to her and she is under the threat of reversion.

15. Assuming that all 90 male OBC candidates offered appointment would be reverted, at best the number of persons who would require to be accommodated would be 91.

16. The decision taken by the respondents is influenced by the reason that creating supernumerary post would entail a financial burden till the year 2025; because the holders of these posts would superannuate in said year.

17. It is trite that where a discretionary power is exercised on a wrong assumption or a wrong principle of law, it would be corrected by a Court.

18. The word "supernumerary" is an adjective which means "exceeding the usual number". When used as a noun the word means "a temporary employee, an additional society member, extra manpower". As a noun it is normally used in a function which has a temporary contract.

19. The website of the DoPT as also its handbook for officers 2013, concerning creation of posts in para 1.3.2 guides us as under:-

"1.3.2 The power conferred on a subordinate authority to create a permanent post may be exercised in creating similar supernumerary post for the purpose of accommodating the lien of a Government servant who, though entitled to hold a lien against regular permanent post, cannot be so accommodated because of non-availability of such a post. The supernumerary post shall be created only if another vacant permanent post is not available to provide lien for the Government servant concerned and it shall remain operative only until he is absorbed in a regular permanent post.

Government of India's decision (5): The following principles should be observed

while creating supernumerary posts under Rule 11(2) of DFP Rules, 1978-

(i) The supernumerary post is a shadow post i.e., no duties are attached to such a post. The officer whose lien is maintained against such a post performs duties in some other vacant post and accordingly it should not be created in circumstances which at the time of the creation of the post or thereafter, would lead to an excess of the working strength.

(ii) As a supernumerary post is a post created for accommodating a permanent officer till he is absorbed substantively in a regular permanent post, it should not be created for an indefinite period as other permanent posts are, but should be created for a definite and fixed period sufficient for the purpose in view.

(iii) It is personal to the officer for whom it is created and no other officer can be appointed against such a post. It stands abolished as soon as the officer, for whom it was created, vacates it on account of retirement or confirmation in another permanent post or for any other reason. In other words, no officiating arrangements can be made against such a post. Since a supernumerary post is not a working post, the number of working posts in a cadre will continue to be so regulated that, if a permanent incumbent of one of the regular Posts returns to the cadre and all the posts are manned, one of the officers of the cadre will have to make room for him. He should not be shown against a supernumerary post.

(iv) No extra financial commitment is involved in the creation of such posts in the shape of increased pay and allowances, pensionary benefits etc.

(v) Administrative authorities should maintain a record of the supernumerary posts. The particulars of the individuals who hold liens against them and the progressive abolition of such posts as and when the holders of the posts retire or are absorbed in regular permanent posts, for the purpose of verification of service for pension.

Min. of Finance OM No. F.84(4)-EG.I/61, dated 15-3-1961."

20. The decision taken by the Ministry of Finance has not understood that a supernumerary post is created to accommodate a person till he is absorbed substantially against a regular permanent post, and this would mean that as and when post of Head Constable in CRPF would fall vacant, the supernumerary post could be adjusted against the regular permanent vacancies in the 10% LDCE quota. This means that the petitioners and other persons who would be accommodated without a reversion would not hold supernumerary post till they would superannuate from service. As and when a permanent vacancy would accrue, the supernumerary post would be adjusted.

21. Accordingly, we dispose of the writ petitions directing the respondents not to revert the petitioners as also similarly situated persons who were offered appointment as Head Constable (GD) pursuant to the LDCE-2011 giving them benefit of reservation in the OBC category. They would be adjusted by creating supernumerary post which would be adjusted against permanent vacancies as

and when they arise in the future. For purposes of seniority all of them would be placed below the redrawn up merit list pursuant to the order dated December 05, 2012 passed in WP(C) 6703/2012.

22. No costs.