

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 7th September, 2010.

+ **W.P.(C) No.4857/2010**

%

APURVA & ANR.

..... Petitioners

Through: Mr. Mariarputtam, Sr. Advocate
with Mr. Anil Nauaria & Mr. A.T.
Rao, Advocates

Versus

UNION OF INDIA & ANR.

..... Respondents

Through: Mr. Atul Nanda with Ms.
Sugandha, Advocate for R-1/UOI.
Mr. Mohinder J.S. Rupal & Ms. Preeti
Maniktalya, Advocates for R-2.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may
be allowed to see the judgment? Yes.
2. To be referred to the reporter or not? Yes.
3. Whether the judgment should be reported
in the Digest? Yes.

RAJIV SAHAI ENDLAW, J.

1. The petition raises a vital issue relating to 27% reservation for Other Backward Classes (OBCs) in Central Educational Institutions, introduced by the Central Educational Institutions (Reservation in Admission) Act, 2006. The question which falls for consideration is of the eligibility for admission under such reservation. The respondents Union of India (UOI) and Jawaharlal Nehru University (JNU) have taken a stand

that for an OBC candidate to be eligible for admission in the 27% reserved seats, he / she must secure marks within the bandwidth of 10% lower than the marks of the last candidate admitted in the General (Unreserved) category i.e. even if the eligibility for admission in the General (Unreserved) category is of 50% marks in the qualifying examination and for Reserved category is say 40%, but the last candidate admitted in the General (Unreserved) category has 90% marks, the OBC candidates even if meeting the eligibility criteria of above 40% marks, are not entitled to admission unless they secure above 80% marks. If any of the OBC candidates fail to secure above 80% marks, the extra seats added to the Institution pursuant to Section 5(1) of the Act would be available to the General (Unreserved) category students. For contending so, reliance is placed on *Ashoka Kumar Thakur Vs. Union of India* (2008) 6 SCC 1. The petitioners belonging to the OBC category contend otherwise. They say that their admission to the seats reserved for them cannot be made dependent on the marks of the last candidate admitted in the General (Unreserved) category.

2. The factual matrix leading to the present petition is as under:-

- (i) The petitioner no.1 seeks admission to respondent no. 2 JNU in B.A. (Hons.) – Spanish, German, Korean and the petitioner no.2 seeks admission to the respondent no. 2 JNU

in M. Phil – Theatre and Performance Studies. Both of them have been denied admission for not securing marks within the bandwidth of 10% of the last student admitted in the General (Unreserved) category. The petitioner no.2 seeking admission to M. Phil – Theatre and Performance Studies also urges additional ground of the procedure prescribed for admission being defective for the reason of allocating more than 15% of the total marks for oral interview.

- (ii) The undisputed position is that respondent no.2 JNU in the Deans Committee Meeting held on 17th June, 2010 provided relaxation in qualifying marks for OBC candidates of 10% below the eligibility marks prescribed for General (Unreserved) category candidates. The said position was in favour of the petitioners and on the basis thereof the petitioners are entitled to admission.
- (iii) However, the respondent no.2 JNU on 12th July, 2010, on the basis of legal opinion obtained, restored the system prevailing in the earlier two years of admitting only those OBC candidates securing marks within the 10% bandwidth of the last candidate admitted in the General (Unreserved)

category. On the basis of said position, the petitioners are not entitled to admission.

3. The question being of general importance, notice of the petition was issued. Since the petitioners were seeking the relief of admission in the current academic year, the matter was taken up for hearing after a short adjournment. The counsel for the respondent no.2 JNU stated that no counter affidavit would be necessary, though post hearing has filed a synopsis of submissions. The respondent no.1 UOI inspite of the general importance of the issue involved chose not to file the counter affidavit and the counsel for the respondent no. 1 UOI during the hearing only handed over in the Court a communication of the Director (HE), Department of Higher Education, Ministry of Human Resource Development of Government of India. However, the contentions of the counsel for the respondent no.1 UOI and the respondent no.2 JNU were recorded in open Court to obviate any misunderstanding.

4. It is the contention of the respondents that the expression “cut off marks” used in *Ashoka Kumar Thakur* (supra) is not equivalent to “eligibility”; the expression “cut-off marks” refer to marks secured by the last candidate admitted in the General (Unreserved) category and only such candidates in the OBC category would be

entitled to admission who secure marks maximum 10% below the cut-off in the General (Unreserved) category; the respondent no.1 UOI does not accept the contention that reservation for OBC category candidates has to be on the basis of eligibility being lower than the eligibility prescribed for the General (Unreserved) category.

5. Since the judgment was being reserved, the application for interim relief was also considered. The petitioners were seeking a stay of reversion to the General (Unreserved) category students the vacant seats out of the 27% seats reserved for OBCs on the ground that if General (Unreserved) category students are admitted against the vacant OBCs seats, the petitioners even if succeeding in the petition would not get any relief. The counsel for the respondent no.2 JNU however stated that since the admission process was underway and a large number of students were expected to visit from outside Delhi, such reversion need not be interfered with; it was assured that in the event of the petitioners succeeding; the petitioners or candidates in the OBC category who ought to have been admitted would be admitted, if need be by increasing the number of seats in the courses concerned in the writ petition. The University was ordered to be bound by the said statement.

6. The reservation for OBCs has had a tumultuous history. Upon the Mandal Commission making a report for reservation for OBCs, the students community all over the country and particularly in Delhi was put into turmoil. It was felt by the students belonging to the General (unreserved) category that the reservation for OBCs in addition to the then existing reservation for SCs/STs would eat into their share of the seats. The Parliament ultimately vide The Constitution (Ninety-Third Amendment) Act, 2005 inserted Clause 5 to Article 15 of the Constitution permitting reservation for socially and economically backward classes and enacted the CEI Act aforesaid. Section 3 of the said Act provides for reservation in Central Educational Institutions out of their annual permitted strength in each branch of study or faculty, of 15% for Scheduled Castes (SC), 7.5% for Scheduled Tribes (ST) and 27% for OBCs. Section 4 of the Act enables the Parliament to exempt the Institutions specified therein from application of the Act. Section 5 requires all such Institutions to increase the number of seats in each branch of study so that the number of seats excluding those reserved for SC/ST/OBC is not less than the number of seats available for the academic session immediately before the date of coming into force of the Act. It will thus be seen that the political turmoil owing to the reservation for OBCs was sought to be assuaged by, while making reservation for the OBCs not making it at the expense of the General (Unreserved) category.

7. The Constitutional amendment aforesaid as well as the Act were challenged before the Supreme Court. The Supreme Court vide Judgment in *Ashoka Kumar Thakur* upheld both.

8. Thus the Act has to be given full effect and as per which 27% seats in every Educational Institution are to be reserved for OBCs. However, the said reservation is sought to be made illusory by the respondent no.1 UOI and respondent no.2 JNU by taking a stand that under the said reservation, only those OBCs are entitled to admission who in their merit are not 10% below the last candidate admitted in the General (Unreserved) category. It is contended that the OBCs who are not as meritorious (i.e. not within the 10% bandwidth) are not entitled to the benefit of the reservation in pursuance to the Constitutional amendment and the Act aforesaid. Support in this regard is sought to be drawn from certain passages in *Ashoka Kumar Thakur*.

9. *Ashoka Kumar Thakur* was not concerned with the aforesaid question. The challenge to the reservation for OBCs in *Ashoka Kumar Thakur* was primarily on the premise of the reservation on the basis of caste / class being antithesis to the goal of the Constitution of a casteless / classless society. The said challenge was negated by the Supreme Court. However, since to justify the challenge it was also urged that such large scale reservation i.e. to the extent of 50% of the permitted strength

may lead to lowering the standard of excellence of the educational Institutions and the country, in the judgment of Arijit Pasayat, J., (for himself & C.K. Thakker, J.) & by Dalveer Bhandari J. the observations relied on came to be made. The said observations use the expression “cut-off” which is argued to be different from “eligibility”. The judgment of Chief Justice K.G. Balakrishnan in this regard is quiet. I may however add that none of the Hon’ble Judges in *Ashoka Kumar Thakur* upheld the reservation for OBCs for the reason of making the same subject to the OBCs being within the bandwidth aforesaid of 10% or for the reason of the seats remaining vacant on OBCs failing to meet the said criteria falling to the General (unreserved) category. The observations as aforesaid in the judgments of Arijit Pasayat, J. & Dalveer Bhandari J clearly provide that the same are in the form of recommendations to the Government.

10. The question which arises is whether the stand of the respondent no.1 UOI is correct.

11. I am unable to agree with the stand of the respondent no.1 UOI and respondent no.2 JNU for the following reasons:-

- A. Reservation by its very nature implies a separate quota which is reserved for a special category of persons – within that category admissions to the reserved seats may be made in the

order of merit. The category for whose benefit reservation is provided is not required to compete with the open category. Their selection to reserved seats is independently, on their *inter se* merit and not as compared with the merit of candidates in the General (Unreserved) category. The very purpose of reservation is to protect the weak category against competition from the open category candidates. (See *Govt. of Andhra Pradesh v. P.B. Vijaykumar* (1995) 4 SCC 520).

- B. The Supreme Court in *Indra Sawhney Vs. Union of India* 1992 Supp (3) SCC 217 also held in para 836 that the very idea of reservation implies selection of a less meritorious person. It was held that this much cost has to be paid if the Constitutional promise of social justice is to be redeemed. It is the lack of opportunity which has led to social backwardness and reservation is one of the Constitutionally recognized methods of overcoming this type of backwardness.
- C. The Constitution Bench of the Supreme Court in *Dr. Preeti Srivastava Vs. State of M.P.* (1999) 7 SCC 120 while dealing with the reservation for Post Graduate courses in Medicine, overruled the earlier judgment in *Post Graduate Institute of*

Medical Education & Research Vs. K.L. Narasimhan

(1997) 6 SCC 283 and in para 115 (per Majmudar J., partly dissenting) reiterated:

“It is axiomatic that the reserved category candidates competing for being selected to the seats reserved for them..... have to compete *inter se* with their own colleagues from the same categories and not necessarily have to compete with general category candidates who form an entirely different class. Once such classification is countenanced, as a necessary concomitant, separate provision for the reserved category of candidates forming a separate class for which reservation of seats is permitted cannot be faulted and hence the dilution of minimum qualifying marks for the reserved category of candidates cannot by itself be treated to be unauthorised or illegal from any view point. Otherwise the very purpose of reserving seats for such class of candidates..... would be denuded of its real content and the purpose of reservation would fail. The seats reserved for such category of persons would go unfilled and will swell the admission of the general category of candidates for whom these seats are not at all meant to be made available, once the scheme of reservation of seats under Article 15(4) is held applicable.”

- D. The question/issue formulated by the Constitution Bench in ***Dr. Preeti Srivastava*** (supra) also was relating to prescribing “different minimum qualifying marks” and not “cut-off marks”. The Supreme Court in para 39 of the judgment explains that “eligibility” connotes the “minimum criteria for selection that may be laid down by the University Act or any Central statute”. The Constitution Bench directly concerned with the issue and while holding that there cannot be a wide disparity and dilution of standards, approved only

the difference in minimum qualifying marks and not cut-off marks. Infact in “cut-off” there can be no “minimum”.

- E. Requiring the OBC candidates to secure marks within 10% bandwidth of the last candidate admitted in the General (Unreserved) category amounts to requiring the OBC candidates to compete with the General (Unreserved) category candidates and which is contrary to the concept of reservation.
- F. It tantamounts to saying that the difference in opportunity is not more than 10%, and the same has no basis.
- G. It is common knowledge that even where the eligibility for admission for General (Unreserved) category candidates is 50%, at least in the city of Delhi (and I presume in other metropolitan cities also), the last candidate admitted in the General (Unreserved) category in the premium courses have a percentage of over 85%. To say that an OBC candidate to be entitled to avail of the reservation ought to in such cases secure over 75% marks is to make the reservation illusory. Though instances in the recent past of some of the reserved category candidates securing marks better than the last

candidate admitted in the General (Unreserved) category are not unknown and which has led to the Courts holding that such reserved candidates who have got admitted on their own merits in the General (Unreserved) category would not block or be counted in a reserved seat but such Reserved category candidates are a class apart and in creamy layer (in terms of marks) of their own. When the seats in Educational Institutions secured by the Reserved category students have not been held to deplete the seats reserved for that category, the same also implies that the reservation is meant for those who are unable to so compete with the General (Unreserved) category candidates.

- H. If the aforesaid were to be accepted, the General (Unreserved) category students who as aforesaid had protested against the reservation, can defeat in toto the reservation; by securing very high marks they can ensure that the seats added in the Educational Institutions under Section 5(1) of the Act fall to the General (Unreserved) category students and not to the benefit of OBCs.
- I. The aforesaid in my view would defeat the very purpose of the Constitutional amendment and the Act.

J. I have recently had the occasion (in *Ashhar Musharib Firdausi Vs. University of Delhi* W.P.(C) No.4378/2010 decided on 11th August, 2010) to consider the effect of the failure of the Institutions to increase the seats under Section 5(1) of the Act. It was the contention of the Institutions in that case that till the seats are so increased, the reservation is not to come into effect. The said contention was negated. While doing so reference was made to the speech of Martin Luther King Jr., which was applied to the matter in controversy therein and which can be applied with benefit in the present situation also. The cheque of reservation of 27% issued by the legislature to the OBCs in accordance with the Constitution of the country cannot be made to bounce; when the architects of our Republic wrote the magnificent words of the Constitution, they were signing a promissory note to which every Indian was to fall heir. This note was a promise for advancement of socially and educationally backward classes of citizens. India cannot be made to default on this promissory note in so far as its socially and educationally backward citizens are concerned. The sacred obligation of advancement of such classes cannot be allowed to be dishonoured. The cheque of reservation given to these classes by enacting the CEI Act cannot be permitted to be called a

bad cheque, a cheque which has come back marked “insufficient funds” or “no admission because you have failed to secure marks 10% lower than the last candidate admitted in the General category”. The socially and educationally backward classes in need of advancement who come to encash the cheque of reservation cannot be returned empty handed – they cannot be told that the great vaults of opportunity of this nation are bankrupt – that they are not entitled to reservation because they are not close to 10% as good as the General (Unreserved) category.

- K. The CEI Act does not lay down any such criteria of the reservation being subject to the candidate in the Reserved category falling within the 10% bandwidth. The legislative intent has to be given full impact and cannot be whittled down by Executive decisions. The policy adopted by the respondents UOI & JNU amounts to the Executive taking away what the legislature has given to the OBCs. The same cannot be permitted to happen. The Act cannot be permitted to be used as a mode of making more seats available to the General (Unreserved) category than before; that was not the intent of the Act. The Act was to provide for reservation in admission for the students belonging *inter alia* to Other

Backward Classes in certain Educational Institutions set up/established, maintained or aided by the Central Government and not to indirectly add the seats in such Institutions for the General (Unreserved) category students.

L. The concept of reservation as understood in this country has never been understood in the manner now sought to be applied to OBCs. The SC/ST candidates for whom reservation has been in existence since before were never required, to avail of reservation, to secure marks within 10% bandwidth of the last category admitted to the General (Unreserved) category. The said criteria even now is not being applied vis-à-vis reservation for SC/ST and is sought to be applied vis-à-vis reservation for OBCs only. Had the legislature intended reservation for OBCs to be subject to their securing marks within the 10% bandwidth as contended, the Legislature would have provided for the same. The same has not been done. The Executive and the Universities cannot impose any such conditions on reservation.

M. When the Act does not make any difference in Section 3 thereof between reservation for SC/ST and that for OBCs, in implementation thereof, no such distinction can be made.

N. With all humility at my command, I am unable to read the judgment in *Ashoka Kumar Thakur* also as contended. As aforesaid, the Constitution Bench was not faced with the question directly and was only meeting the challenge to reservation on the ground of reservations resulting in lowering the standards of excellence. The expression “cut-off marks” has been used interchangeably with the expression “eligibility condition”. In the absence of any clarity in this regard (also not in *P.V. Indiresan Vs. Union of India* (2009) 7 SCC 300), I am unable to hold that Constitution Bench even while making the recommendation was contemplating a situation different from as prevalent in the past i.e. difference in minimum eligibility criteria only. The senior counsel for the petitioners in this regard has referred to para 32 of *A.P. Public Service Commission Vs. Balaji Badhavath* (2009) 5 SCC 1 to contend that the differential for the disadvantaged (Reserved category) has always been in the basic minimum criteria laid down and not in comparison to the last candidate admitted / appointed in the General category. Moreover, the Bench in *Ashoka Kumar Thakur* has not indicated that they were differing in any manner from the earlier judgment in *Dr. Preeti Srivastava* which as aforesaid is clearly with respect to minimum eligibility marks and

not with respect to cut-off of the last candidate admitted in the General (Unreserved) category.

12. The counsel for the University has relied on the writ petition and the counter affidavit of the Union of India in the Public Interest Litigation being W.P. (C) No.11147/2009 titled *D.U.R.E.C. Vs. UOI* pending before the Division Bench of this Court and the interim order dated 26th August, 2009 therein. The issue in the said writ petition is also similar i.e. of shifting cut off for the OBC category owing to the shifting cut off for the General (Unreserved) category. The Division Bench by the interim order has directed the cut-off for the OBCs to vary with the cut off in the General (Unreserved) category. On the basis of the same, it is contended that the Division Bench has also considered the cut off for OBCs in comparison to the last candidate admitted in the General (Unreserved) category and not the minimum eligibility criteria. However, the Division Bench is still seized of the matter and the interim order even of the Division Bench would have no precedentiary value. The counsel for the respondent no.2 JNU has also referred to the prospectus of the Delhi University but again merely because another University is following the same criteria as the respondent no.2 JNU would not make the procedure for admission in Reserved category in respondent no.2 JNU correct. The senior counsel for the respondent no.2 JNU has also relied on the judgment dated 30th May, 2003 of the Division Bench of this Court in

LPA No.214/2003 titled *Pawan Kumar Vs. Jawahar Lal Nehru University* to meet the contention of the petitioners of the provision of more than 15% marks for interview as bad. However, the petitioner having succeeded on the first point and being entitled to admission, need is not felt to deal with the said aspect of the matter.

13. Procedure followed by the respondent no.2 JNU and the stand of the respondent no.1 UOI regarding reservation for OBCs is thus declared to be bad. It is declared that the respondent no.1 UOI / Universities are entitled to only fix minimum eligibility criteria for admission in the reserved category at maximum 10% below the minimum eligibility criteria fixed for the General (Unreserved) category. The OBC candidates to avail of reservation provided for them in the CEI Act are not required to, in admission test or in the eligibility exam secure marks within the bandwidth of 10% below the cut-off marks of the last candidate admitted in the General (Unreserved) category.

14. The petition is allowed. The respondent no. 2 University in accordance with the statement recorded on 27th July, 2010 to admit the petitioners within one week of petitioners complying with requisite formalities. No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

7th SEPTEMBER, 2010/gsr