

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

% Order Reserved on: **31st May, 2011**
Order Pronounced on: **3rd June, 2011**

+ **CM NO. 366/2011 IN LPA No. 21/2011**

UNIVERSITY OF DELHI & ORS. Appellants
Through: Mr. M.J.S. Rupal, Mr. Arvind
Verma, Advs.

Versus

TANVI YADAV & ORS. Respondents
Through: Mr. Naushad Ahmed Khan, Mr. Rajesh
Kumar Verma, Advs. for R-1& R-2
Mr. Sandeep Bajaj, Mr. Khalid Arshad,
Advs. for Respondent No.3.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

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| 1 | Whether reporters of the local papers be allowed to see the judgment? | Yes |
| 2 | To be referred to the Reporter or not? | No |
| 3 | Whether the judgment should be reported in the Digest? | No |

DIPAK MISRA, CJ

This is an application at the instance of the University of Delhi and others for stay of the order dated 16th December, 2010 passed by the learned Single Judge in WP(C) Nos. 6776/2010 and 6895/2010.

2. We have heard Mr. M.J.S. Rupal along with Mr.Arvind Verma, learned counsel for the appellant-University, Mr.Naushad Ahmed Khan, learned counsel for respondent Nos. 1 and 2 and Mr.Sandeep Bajaj, learned counsel for respondent No.3.

3. The learned Single Judge in the two writ petitions was dealing with the issue of admission in University of Delhi in LL.B and M.Sc. (Chemistry) courses respectively for the academic year 2010-2011. The case of the petitioners therein was that they could not be admitted because of the admission policy of the respondent-University qua OBC candidates. The learned Single Judge referred to his decision rendered on 7th December, 2010 in WP(C) No.4857/2007 (*Apurva v. Union of India*) wherein he had held the admission policy of the University to be erroneous, otherwise, the petitioner therein would have been entitled to admission.

4. Be it noted, before the learned Single Judge, the University, placing reliance on the decision in *Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1* and the provisions of the Central Educational Institutions (Reservation in Admission) Act, 2006, had contended that there is a distinction between the qualifying marks and cut-off marks and the University has been religiously following the cut-off mark as per the law laid down in *Ashoka Kumar Thakur* (supra) and the clarification given in *P.V. Indiresan v. Union of India, (2009) 7*

SCC 300 and, hence, there was no illegality in the process of admitting students. On behalf of the writ petitioner, it was contended that the interpretation placed by the University on the cut-off mark is incorrect and contrary to the decisions rendered in *Ashoka Kumar Thakur* (supra) and *P.V. Indiresan* (supra). Reliance was also placed on the decision in *Harminder Kaur & Ors. v. Union of India & Ors.*, JT 2009 (13) SC 550. The learned Single Judge, while dealing with the said facet, has held thus:

“7. I have considered the contentions aforesaid of the counsel for the respondent University. The same do not persuade me to take a view different from that already taken in *Apurva*. In *Apurva*, it has been held that 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 may lead to lowering the standard of excellence of the educational Institutions and the country, the observations relied on by the Government and the respondent University using the expression “cut off” came to be made. It was further held that none of the opinions in *Ashoka Kumar Thakur* upheld the reservation for OBCs for the reason of making the same subject to the OBCs being within the bandwidth of 10% of the last candidate admitted in the Unreserved Category. It was thus held that the observations in the opinion of Arijit Pasayat, J. & Dalveer Bhandari J. are in the form of recommendation to the Government. More importantly, it was held in *Apurva* that if only such of the OBC candidates who secure marks within the 10% bandwidth of the cut off in the Unreserved Category are held entitled to admission, the same would lead to making the Reserved Category candidates compete with the Unreserved Category candidates and which

is not permissible. It was further held that there is nothing in the Act to the said effect and if the reservation is implemented as was being done by the JNU, that would defeat the very purpose of constitutional amendment and the Act.”

5. It is worth noting, in *Apurva & Another* (supra), the learned Single Judge has held thus:

“11. xxx xxx xxx xxx

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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. Baloji 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.”

6. The fulcrum of the matter rests on the interpretation of the term “cut-off marks”. In the case of *Ashoka Kumar Thakur* (supra), Pasayat, J. speaking for C.K. Thakker, J. and himself has opined thus:

324. “Equality” and “excellence” are two conflicting claims difficult to be reconciled. The Constitution, in order to ensure true equality provides for special treatment to socially and educationally backward classes of citizens which is obviously desirable for providing social justice, though at the cost of merit. However, the Constitution does not provide at all for “institutional reservation”. Therefore, its constitutionality is to be judged on the touchstone of Article 14. A large number of cases cropped up in this area concerning the institutional preference for admission into postgraduate medical education and superspecialities. The judiciary came forward and laid down detailed principles covering the need of such preference and to limit the extent of such reservation in view of the importance of merit in the context of national interest and international importance of universal excellence in superspecialities.

325. It is to be noted that the foundation for fixing 27% appears to be the view that 52% of the population belong to OBC. There is no supportable data for this proposition. In fact, different commissions at different points of time have different figures. It is the stand of the respondents that no commission has fixed the percentage below 52% and, therefore, there is nothing wrong in fixing the percentage at 27%. This is not the correct approach. It may be that in no case the percentage of persons belonging to OBC is less than 27% but supposing in a given case considering the fact that the actual percentage is 40% a figure less than 27% should have been fixed. The Commission set out pursuant to the directions of this Court seems to have acted somewhat on the petitions filed by the people claiming exclusion or inclusion. That was not the real purpose of this Court's decision to direct appointment of Commission. The very purpose was to identify the classes. This was the exercise which was to be

undertaken apart from considering the applications for inclusion or exclusion as the case may be. As has been conceded at the beginning of the case affirmative action is not under challenge. Affirmative action is nothing but a crucial component of social justice in the constitutional dispensation but at the same time it has to be kept in view that the same does not infringe the principles of equality of which it is a part and/or unreasonably restraint or restrict other fundamental freedoms and that it does not violate the basic structure of the Constitution.”

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345. There is substance in this plea. It is not merely the existence of schemes but the effective implementation of the schemes that is important. It is to be noted that financial constraint cannot be a ground to deny fundamental rights and the provision for the schemes and the utilization of the funds are also relevant factors. It appears that better coordination between the funds provider and the utiliser is necessary. It is suggested that putting stress on cut-off limit by shifting from matriculation to Class XII level education as a benchmark of gauging educational backwardness will be a step in the right direction. Though as rightly contended by Mr. P.P. Rao that in several decisions, for example, M.R. Balaji case, AIR 1963 SC 649 : 1963 Supp (1) SCR 439, Balram case (1972) 1 SCC 660 and K.S. Jayasree case (1976) 3 SCC 730 the secondary education was taken to be the benchmark, ground reality cannot be lost sight of that with the limited availability of jobs and the spiralling increase in population, secondary or matriculation examination can no longer be considered to be an appropriate benchmark. It has to be at the most graduation. But the question arises whether technical education can be included while considering educational backwardness. A delicate balancing has to be done in this regard. While technical education cannot be the sole criterion for gauging educational backwardness it definitely will form part of 50% norms fixed by this Court. Slightly variable plus or minus would be the appropriate standard to gauge educational backwardness.”

Dalveer Bhandari, J., in his opinion, stated thus:

535. First, once the State tells them whom to teach, standards of excellence will suffer. This is because those institutions will no longer be able to admit the highest-scoring students. As good as some of our institutions are, they do not teach blank slates. The best universities are the best, in part, because they attract the best students. The same can be said for almost any organisation. In the case of higher education, the universities that admit the best will likely churn out the best. The precise extent to which the university made the best so good cannot be qualified. The point is that universities alone cannot produce qualified job candidates. Forced to admit students with lower marks, the university's final product will not be as strong. Once the creamy is excluded, cut-off marks would likely drop considerably in order to fill the 27% quota for non-creamy layer OBCs. When the creamy layer is *not* removed, as in the case of Tamil Nadu, the difference in cut-off marks for the general and backward categories may be insignificant. [See para 408 of *Sawhney*, 1992 Supp. (3) SCC 217]. Of course, the extent to which standards of excellence would suffer would vary by institution. As I mention below, I urge the Government to set OBC cut-off marks no lower than 10 marks below that of the general category. This is only a recommendation.

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627. Balaji, AIR 1963 SC 649 : 1963 Supp. (1) SCR 439, concluded that reservation must be reasonable. The Oversight Committee has made a recommendation that will ensure the same. At p.34 of Vol.I of its Report, the Oversight Committee recommended that institutions of excellence set their own cut-off marks such that quality is not completely compromised. Cut-offs or admission thresholds as suggested by the Oversight Committee are reproduced:

“4.4.2 The Committee recognises that those institutions of higher learning which have established a global reputation (e.g. IITs, IIMs, IISc, AIIMS and other such

exceptional quality institutions), can only maintain that if the highest quality in both faculty and students is ensured. Therefore, the Committee recommends that the threshold for admission should be determined by the respective institutions alone, as is done today, so that the level of its excellence is not compromised at all.

4.4.3 As regards 'cut-offs' in institutions other than those mentioned in Para 7, these may be placed somewhere midway between those for SC/ST and the unreserved category, carefully calibrated so that the principles of both equity and excellence can be maintained.

4.4.4 The Committee strongly feels that the students who currently tend to get excluded must be given every single opportunity to raise their own levels of attainment, so that they can reach their true potential. The Government should invest heavily in creating powerful, well designed and executed remedial preparatory measures to achieve this objective fully."

628. Standards of excellence however should not be limited to the best aided institutions. The nation requires that its citizens have access to quality education. Society as a whole stands to benefit from a rational reservation scheme.

629. Finding 68% reservation in educational institutions excessive, *Balaji* at SCC pp.470-471 (AIR p.663, para 34) admonished States that reservation must be reasonable and balanced against other societal interests. States have

"To take reasonable and even generous steps to help the advancement of weaker elements; the extent of the problem must be weighted, the requirements of the community at large must be borne in mind and a formula must be evolved which would strike a reasonable balance between the several relevant considerations."

To strike such a balance, *Balaji* (supra) slashed the impugned reservation from 68% to less than 50%. *Balaji* (supra) thus serves as an example in which this Court sought to ensure that reservation would remain reasonable. We heed this example. There should be no case in which the gap of cut-off marks between OBC and general category students is too large. To preclude such a situation, cut-off marks for OBCs should be set no lower than 10 marks below the general category. To this end, the Government shall set up a committee to look into the question of setting the OBC cut-off at not more than 10 marks below that of the general category. Under such a scheme, whenever the non-creamy layer OBCs fail to fill the 27% reservation, the remaining seats would revert to general category students.

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645. It is reasonable to balance reservation with other societal interests. To maintain standards of excellence, cut-off marks for OBCs should be set not more than 10 marks out of 100 below that of the general category.

7. Thereafter, a clarificatory application was filed and their Lordships clarified the position in *P.V. Indiresan* (supra) as follows:

“A question had been raised in this application as to what should be the extent of cut-off marks for admission of students of OBCs in the Central educational institutions. Having heard the learned Solicitor General of India and learned Senior Counsel on both the sides and also having regard to the observations made in the judgments pronounced by this Court, we make it clear that the maximum cut-off marks for OBCs be 10% below the cut-off marks of general category candidates.”

[Emphasis added]

8. From the aforesaid, it is vivid that the maximum cut-off marks for OBCs are to be 10% below the cut-off marks of the general category candidates. It is submitted by Mr. Rupal that when the total marks are 100%, if a general category candidate gets 70%, an OBC candidate is required to secure 60% marks. The learned counsel for the petitioner would contend that if the OBC candidate meets the eligibility criteria, that is, 40%, he has to be qualified as the eligibility criteria has to be the test. The learned counsel for the petitioner has placed reliance on the decisions in *Dr. Preeti Srivastava & Anr. v. State of M.P. & Ors.*, (1999) 7 SCC 120 and *Indra Sawhney & Ors. v. Union of India & Ors.*, 1992 Supp. (3) SCC 217.

9. Having heard the learned counsel for the parties, we are of the *prima facie* view that there is a distinction between eligibility criteria and the cut-off marks. As advised at present, we are disposed to think that a candidate belonging to OBC category is required to obtain/secure 10% marks below the cut-off marks of general category candidate and the cut-off marks would contextually mean and convey that if the last general category candidate secures 70% marks, the OBC category candidate, to be considered in his category, has to secure 60% marks. We may clarify that the 10% marks has to be computed taking into consideration the total marks in the subject.

11. In view of the aforesaid analysis, we are inclined to direct that there shall be stay of operation of the order dated 16th December, 2010 passed by the learned Single Judge in WP(C) Nos.6776/2010 and 6895/2010 subject to the final adjudication of the appeal. The application for stay is accordingly disposed of.

12. Let the appeal be listed for final disposal under the heading "After Notice Misc. Matters' on 19th July, 2011.

CHIEF JUSTICE

SANJIV KHANNA, J.

JUNE 03, 2011
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