

SUPREME COURT OF INDIA

K.P.Joseph & Ors.

Vs.

Union of India & Ors.

C.A.No.1750 of 2008

(A.K.Mathur and Altamas Kabir,JJ.)

04.03.2008

ORDER

(Arising out of SLP(C) No.10423 of 2007)

1. We have heard learned counsels for the parties. In both the petitions a similar question of law is involved. Therefore, they are being disposed of by a common order. For the convenient disposal of these petitions the facts given in the case of SLP(C) No.10423 are taken into consideration. Leave granted in SLP(C) No. 10423 of 2007.

2. This appeal by special leave is directed against the judgment and order dated 13th March, 2007 passed by the High Court of Judicature at Bombay, Bench at Nagpur in Writ Petition No.901 of 2006. The appellants herein were not party in the proceedings either before the High Court or before the Tribunal. The appellants in this appeal are challenging the order passed by the Division Bench of the High Court of Judicature at Bombay, Bench at Nagpur in Writ Petition No.901 of 2006 dated 13th March, 2007 whereby the High Court has partly allowed the writ petition and directed that all the candidates who were selected on 2nd May, 2005 in a written test should be asked to reappear in the examination on 2nd May, 2005 and the appointment of all these appellants i.e. 23 persons was set aside and the Railway Administration was directed to reconvene the examination by setting a written test with 40% objective type questions. (We are informed that in pursuance of the order passed by the Division Bench the examinations were again conducted and in that examination 23 persons, out of 24 persons, who have been selected on the basis of the test conducted on 2nd May, 2005 have failed but their appointment has not been revoked by the Railway Administration so far). The examinations were conducted by the Railway Administration. 37 posts of such drivers were to be filled up from Nagpur Division out of the drivers who were operating the goods trains. The written tests were held on 27th April, 2005; 29th April, 2005; 2nd May, 2005; 4th May, 2005; 6th May, 2005; and 12th May, 2005. The Railway Board has issued a circular that the objective type questions will be put to the extent of 45% to 55% in the questions papers. The appellants were subjected to test on various dates and in that it is found that in some tests, 40% objective type questions were put but in the 2nd May, 2005 test, 60% of the objective type questions were put in. Therefore, this created a dis-similarity in

conducting all the examinations. All the examinations were conducted and results were announced in which the appellants before us, though they were not a party either before the Tribunal or before the High Court, were selected. Those persons who have not been selected challenged this selection by filing an original application before the Central Administrative Tribunal, Nagpur and prayed that this kind of discrimination has resulted in great injustice because the objective type questions should have been put from 45% to 55%, but on 2nd May, 2005 60% objective type questions were put as a result of which all the appellants before us were selected. The Tribunal considered the matter and declined to interfere with the selection made by the Railway Administration.

3. Aggrieved against the order passed by the Central Administrative Tribunal, the Writ Petition was filed by the unsuccessful candidates before the High Court. The High Court after considering the matter found that the tests held on other dates objective type questions vary from 45%-55%. But, the test which was held on 2nd May, 2005 where 60% objective type questions were put which became easier to qualify and it resulted into discrimination. Therefore, selection and appointment of these persons was set aside and a fresh test with 40% objective type questions was directed. That test was undertaken and we are informed that all of them have failed. Aggrieved against the order passed by the High Court on 13th March, 2007 the present SLP was filed by the petitioners. At the same time another SLP was also filed on the same order by one Ahsad Ullah Khan & Ors. who were the writ petitioners before the High Court as well as before the Tribunal challenging the same very order and prayed that the order of the High Court should be set aside and the entire selection process should have been quashed. We have heard learned counsel for the parties and perused the record. It is true that the selection which was undertaken on the various dates, the objective type questions should have been framed 45% to 55% as per the Railway Board circular dated 7th August, 2003. Normally, the objective type questions should have been varied from 45% to 55% and according to the order passed by the Division Bench it appears that by and large, this percentage of objective type questions was maintained but only on 2nd May, 2005 it appears that 60% objective type questions were set in the papers. This was found by the High Court to be not warranted as per the circular of the Railway Board dated 7th August, 2003. It is a very fine exercise that sometimes there can be an error of 5% in upper side or it can be on lower side. Therefore, it is very difficult to maintain a strict balance that, in no case, it should exceed 55%. It appears that in the present case only it has exceeded by 5% in the test held on 2nd May, 2005 but it is not mala fide on the part of any person. It may be a bona fide error on the part of the person who prepared the question paper on 2nd May, 2005 where he has exceeded in setting objective type questions by 5% only. This is a too minor error which should not result in dislodging the whole selection. The Courts are not sitting in Court of Appeal and Court should not interfere in such small minor deviations in conduct of the examination. This kind of bona fide errors can happen and that should not cause such a serious inconvenience that the persons who have already been selected should be put back to square No.1.

4. Another very interesting feature in this case is that those 23 selected candidates out of 24 candidates were not a party either before the Tribunal or before the High Court. But the High Court has proceeded to set aside the selection and appointments of all 23 candidates and

directed to reconvene the tests keeping 40% of objective type questions held on 2nd May, 2005 only. Learned counsel for the respondent has strongly urged before us that he has prayed for quashing of the whole selection because it was not held as per policy of Railway Board circular and therefore, it was not necessary for him to implead all the selected candidates as a party. We cannot agree with the proposition of learned counsel for the respondent. These 23 persons who have been identified and who have been selected and have been appointed now, their appointment is said to be set aside and this is going to result in serious civil consequences to these selected candidates. Therefore, they ought to have been impleaded as party but they were not impleaded as party which has resulted in setting aside their selection and they were forced to appear in a fresh test conducted by the Railway Administration. In our opinion these persons ought to have been impleaded as part because they were the beneficiaries and they were the persons identified and not impleading them as a party resulted in great injustice to these three appellants and others. In this view of the matter, we agree that the view taken by the High Court cannot be sustained and we accordingly, set aside the order of the High Court dated 13th March, 2007 and allow this appeal and also set aside the fresh selection held in pursuance of the order of the High Court. The appointment of all the 23 persons who have been selected on 2nd May, 2005 stand confirmed by us and they will continue to be on their posts and they will not be reverted back because of the failure in passing the examination in pursuance of the directions given by the Division Bench on 13th March, 2007.

5. Since we have set aside the order dated 13th March, 2007 passed by the High Court, therefore, there was no necessity for undertaking this fresh test and since fresh test has been undertaken in pursuance of the order of the High Court dated 13th March, 2007 that is also set aside. The appointments of these three appellants before us and all the remaining persons who are not a party before us who were appeared on 2nd May, 2005 is upheld. They will not be reverted back. Consequently, this appeal is allowed. SLP (C) No.22595 of 2007 In view of the orders passed in Civil Appeal No. 1750 of 2008 arising out of SLP(C) No.10423 of 2007, this SLP is dismissed.

6. No order as to costs.

7. We have been told that now the system has already been discontinued and now the selection is made by way of viva voice only.

8. However, before parting with the case we feel that the administration has not taken proper care while preparing the test papers which ought to have been taken. They must be more careful in future.