

"CR"

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE V.G.ARUN

MONDAY, THE 6TH DAY OF JUNE 2022 / 16TH JYAISHTA, 1944

WP(C) NO. 30638 OF 2021

PETITIONER/S:

AISHWARYA MOHAN
AGED 25 YEARS
D/O RAMMOHAN P P,
RESIDING AT FLAT NO.6B,
VISHRAAM PAISE GRANDE, KANATTUKARA, THRISSUR-
680011.
BY ADV MAITREYI SACHIDANANDA HEGDE

RESPONDENT/S:

- 1 UNION OF INDIA
REPRESENTED BY SECRETARY, MINISTRY OF POWER,
SHRAM SHAKTI BHAWAN, RAFI MARG, NEW DELHI-1.
- 2 NATIONAL THERMAL POWER CORPORATION LIMITED
REPRESENTED BY CHAIRMAN AND MANAGING DIRECTOR,
NTPC BHAWAN, SCOPE COMPLEX-7, INSTITUTIONAL
AREA, LODHI ROAD, NEW DELHI-110003.
- 3 CHAIRMAN AND MANAGING DIRECTOR
NATIONAL THERMAL POWER CORPORATION LIMITED, NTPC
BHAWAN, SCOPE COMPLEX 7, INSTITUTIONAL AREA,
LODHI ROAD, NEW DELHI-110003.
- 4 GENERAL MANAGER (HR)
NATIONAL THERMAL POWER CORPORATION LIMITED, NTPC
BHAWAN, SCOPE COMPLEX, 7, INSTITUTIONAL AREA,
LODHI ROAD, NEW DELHI-110003.
- 5 DEPUTY GENERAL MANAGER (HR),
NATIONAL THERMAL POWER CORPORATION LIMITED, NTPC
BHAWAN, SCOPE COMPLEX, 7, INSTITUTIONAL AREA,
LODHI ROAD, NEW DELHI-110003.

6 MANAGER (HR) ,
 NATIONAL THERMAL POWER CORPORATION LIMITED, NTPC
 BHAWAN, SCOPE COMPLEX, 7, INSTITUTIONAL AREA,
 LODHI ROAD, NEW DELHI-110003.

BY ADVS.
MANU S., ASG OF INDIA
N.S.DAYA SINDHU SHREE HARI

OTHER PRESENT:

ADV. TUSHAR MEHTA SOLICITOR GENERAL OF INDIA
ASSISTED BY ADV. ADARSH TRIPATHI FOR R2-6

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 5.4.2022, THE COURT ON 06.06.2022 DELIVERED THE
FOLLOWING:

'CR'

JUDGMENT

Dated this the 6th day of June, 2022

The petitioner is a Law Graduate, pursuing her post graduate studies (LLM) at Cochin University of Science and Technology. She completed her LL.B (Hons) from Government Law College, Thrissur with an average of 70%. In December 2021, the second respondent (NTPC Ltd), published Ext.P3 notification inviting applications for appointment to the post of Assistant Law Officer. The qualification prescribed for the post is Bachelor Degree in Law (LL.B or equivalent-full time degree from a recognised Indian University/Institute) with minimum 60% marks. The candidate should also be registered with the Bar Council. As per the notification, the selection is confined to only those candidates who have appeared for CLAT-2021

(Common Law Admission Test-2021) Post Graduate programme conducted by the Consortium of National Law Universities. Based on their performance in the test, the candidates will be shortlisted for document verification. The petitioner being a law graduate with the requisite minimum marks is desirous of applying for the notified vacancy, but is prevented from doing so, as she had not appeared for the CLAT-2021 PG programme. The petitioner therefore assails the selection process on the ground that it is discriminatory and violates Article 16 of the Constitution of India. Finding *prima facie* merit in the challenge, an interim order was passed, directing the competent among respondents to accept the petitioner's application, subject to the final outcome of the writ petition.

2. Aggrieved by the interim order, respondents 2 to 6 went in appeal, which the

Division Bench disposed of, directing a final decision to be taken in the writ petition.

3. Heard Advocate Maitreyi S.Hegde for the petitioner, Senior Advocate Tushar Mehta, learned Solicitor General of India, assisted by Advocate Adarsh Tripathi, for respondents 2 to 6 and Assistant Solicitor General Advocate S.Manu, for the first respondent.

4. Adv.Maitreyi S.Hegde, learned Counsel appearing for the petitioner contended that the clause in Ext.P2 notification, imposing a precondition that the candidates should have appeared for CLAT 2021 PG programme and that selection will be based on the marks secured in CLAT 2021, militates against the fundamental right to equality of opportunity in public employment guaranteed under Article 16. In elaboration, it is submitted that the offensive clause defeated the chance of majority of the

aspirants, since only very few law graduates pursue post graduate course in National Law Universities, the fees in those institutions being much higher than in other Law Colleges. Even the fee for participating in the CLAT-2021 PG programme is much higher than the fee for admission tests conducted by other law colleges. By the offensive clause, the zone of eligible applicants is reduced to a small fraction, from among the multitude of law graduates aspiring for public employment. The offensive clause therefore discriminates between those having the financial capacity for pursuing their higher studies in National Law Universities and others like the petitioner, who opt to join law colleges with lesser fees. The selection process is hence liable to be interfered with and opened up for all candidates with requisite qualification. The decision **Lt.Col.Nitisha and others v Union of**

India and others [(2021) SCC OnLine SC 261] is pressed into service to contend that the inclusion of a restrictive selection process amounts to indirect discrimination which the Apex Court has held to be a ground for interference.

5. Learned Counsel pointed out that earlier, the public sector undertakings like NTPC had resorted to campus interview as a mode of selection. The challenge against that process was upheld by the High Court of Bombay, through a detailed and well considered judgment in **Sonali Pramod Dhawade and others v Central Bank of India and another [(2013) SCC OnLine Bom 525]**, Campus selection of candidates from few chosen Colleges was held to be against the constitutional guarantee and the concept of constitutional morality. By resorting to the selection process in Ext.P3 notification, the NTPC is adopting the same methodology, but in a different manner. The

illegality is manifest from the fact that Ext.P3 Notification was published in December, 2021, while CLAT-2021 PG programme was conducted much prior to that, in June 2021. The petitioner and scores of other aspirants cannot be expected to participate in an examination on the hope and expectation that some public sector undertaking may, on a future date, make participation in the CLAT 2021 PG programme its criterion for selecting candidates.

6. The clause is assailed also on the ground that it has no rational nexus with the objective sought to be achieved, viz; selection of the most competent from among the law graduates. In this regard, it is submitted that the admission test for PG course conducted by the National Law University is an academically oriented test and candidates who have secured higher marks in that test cannot be termed the most suited for the

post of Law Officer.

7. Finally, it is contended that the Consortium of National Law Universities, which conducts the CLAT PG programme every year, is a Society registered under the Karnataka Societies Registration Act, 1960. Selection and appointment to a Public Sector Undertaking cannot be based on the test conducted by such a Society, that too, for the purpose of admission to the Post Graduate courses conducted by its member institutions.

8. In reply, the learned Solicitor General put forth the following contentions;

The additional criterion that eligible candidates must have appeared for CLAT-2021 PG programme was incorporated in the notification, finding CLAT to be the most suitable method for assessing the skill set required of candidates to be appointed as Assistant Law Officers. The procedure and criteria for recruitment included

in Ext.P3 is the most widely accepted norm adopted by other PSUs like IOCL, ONGC, Power Grid Corporation etc. In fact, the previous recruitment of Law Officers in the NTPC was also conducted in the same manner. Further, the notified posts being only 10, conducting a pan India selection test will be a cumbersome and time consuming process.

9. Learned Solicitor General assertively argued that it is the prerogative of the employer to fix the eligibility criteria and that which right cannot be interfered with lightly. In Exhibit P3 notification, qualification of LL.B or equivalent is prescribed as a cut off level, whereas participation and performance in CLAT-2021 PG programme is essential for assessing the knowledge and skill of the candidates. Reliance is placed on the decisions in **Surinder Singh v Union of India [(2007) 11 SCC 599]**, **State of**

Gujarat and others v Arvindkumar T.Tiwari and another [(2012) 9 SCC 545] and the judgment in **Nisha A.B v State of Kerala [WPC 21794 of 2020]** to buttress the argument with respect to the employers prerogative in fixing eligibility criteria and the limited scope for judicial interference.

10. No doubt, the precedents cited by the learned Solicitor General lays down the position that, fixing the eligibility of a particular post is within the domain of the employer and cannot be the subject matter of judicial review, unless found to be arbitrary, unreasonable or having no rational nexus to the objective sought to be achieved. The essential difference between the facts involved in the cited precedents and the case at hand is that, here the challenge is not against qualification or eligibility, but focused on the selection process. The challenge is mainly

on the ground that, incorporation of the restrictive selection criteria is nothing but indirect discrimination. In **Lt.Col.Nitisha** (supra), the Apex Court has explained the meaning of the term 'indirect discrimination' in the following words;

"61. We must clarify here that the use of the term 'indirect discrimination' is not to refer to discrimination which is remote, but is, instead, as real as any other form of discrimination. Indirect discrimination is caused by facially neutral criteria by not taking into consideration the underlying effects of a provision, practice or a criterion.

62. The facts of this case present an opportune moment for evaluating the practices of the respondents in evaluation for the grant of PC. In this segment of the judgment, we will first outline the theoretical foundations of the doctrine of indirect discrimination. We will then survey comparative jurisprudence concerning the doctrine, with a view to understand its key constituents and the legal questions surrounding its application, namely the

evidentiary burden to be discharged to invoke the doctrine and the standards of justification to be applied. We will then offer a roadmap for understanding and operationalizing indirect discrimination in Indian antidiscrimination law.

63. In evaluating direct and indirect discrimination, it is important to underscore that these tests, when applied in strict disjunction from one another, may end up producing narrow conceptions of equality which may not account for systemic flaws that embody discrimination. Therefore, we will conclude this section with an understanding of a systemic frame of analysis, in order to adequately redress the full extent of harm that certain groups suffer, merely on account of them possessing characteristics that are prohibited axes of discrimination.

Theoretical Foundations of Indirect Discrimination

64. Hugh Collins and Tarunabh Khaitan explain the concept of indirect discrimination using Aesop's fable of the fox and the stork. They note:

"Aesop's fable of the fox and the stork invokes the idea of indirect

discrimination. The story tells how the fox invited the stork for a meal. For a mean joke, the fox served soup in a shallow dish, which the fox could lap up easily, but the stork could only wet the end of her long bill on the plate and departed still hungry. The stork invited the fox for a return visit and served soup in a long-necked jar with a narrow mouth, into which the fox could not insert his snout. Whilst several moral lessons might be drawn from this tale, it is often regarded as supporting the principle that one should have regard to the needs of others, so that everyone may be given fair opportunities in life. Though formally giving each animal an equal opportunity to enjoy the dinner, in practice the vessels for the serving of the soup inevitably excluded the guest on account of their particular characteristics."

65. Another excellent formulation of the doctrine can be found in the opinion of Advocate General Maduro of the Court of Justice of the European Union (CJEU). He notes that the distinctive attribute of direct discrimination is that the discriminator explicitly relies on a

suspect classification (prohibited ground of discrimination) to act in a certain way. Such classification serves as an essential premise of the discriminator's reasoning. On the other hand, in indirect discrimination, the intention of the discriminator, and the reasons for his actions are irrelevant. He pertinently observes:

"In fact, this is the whole point of the prohibition of indirect discrimination : even neutral, innocent or good faith measures and policies adopted with no discriminatory intent whatsoever will be caught if their impact on persons who have a particular characteristic is greater than their impact on other persons."

66. Thus, as long as a court's focus is on the mental state underlying the impugned action that is allegedly discriminatory, we are in the territory of direct discrimination. However, when the focus switches to the effects of the concerned action, we enter the territory of indirect discrimination. An enquiry as to indirect discrimination looks, not at the form of the impugned conduct, but at its consequences. In a case of direct

discrimination, the judicial enquiry is confined to the act or conduct at issue, abstracted from the social setting or background fact-situation in which the act or conduct takes place. In indirect discrimination, on the other hand, the subject matter of the enquiry is the institutional or societal framework within which the impugned conduct occurs. The doctrine seeks to broaden the scope of antidiscrimination law to equip the law to remedy patterns of discrimination that are not as easily discernible."

It is pertinent to note that, from out of the 1721 law colleges in India, only 23 are members of the Consortium of National Law Universities. The argument that, apart from law graduates passing out from NLUs, graduates from other law colleges would also have appeared for the CLAT-2021 PG programme, cannot also be countenanced, since such candidates would only be a minuscule minority among the law graduates. Added to this is the fact that the selection is based on a test conducted much prior to the issuance of Exhibit

P3 notification. As rightly contended, law graduates aspiring for appointment in public sector undertakings cannot be expected to appear for an admission test, hoping that in future that test will be made the criterion for selection and appointment to PSUs. Yet another crucial aspect is that, consideration for selection is confined to candidates who had appeared for CLAT-2021 PG programme alone. Even candidates who had appeared for the previous year's CLAT PG programme and performed well are kept out of the zone of consideration. As such, the notification, confining the selection process in Ext.P3 notification only to candidates who had appeared for the CLAT-2021 PG programme amounts to indirect discrimination.

11. The justification offered is that the selection process adopted was found to be the most suitable filtering mechanism for assessing

the skill set required for the candidates. In this context, it may be apposite to read Clause 1.1.3 in the Bye-laws of the Consortium of National Law Universities;

"1.1.3. "CLAT" means all India Common Law Admission Test conducted for students seeking admission to the undergraduate or postgraduate degree programme offered by various member institutions."

The focus of the test therefore is on academics and not assessment of the skill set expected of future Law Officers. Hence, there is merit in the contention that the selection process has no rational nexus with the objective. In fact, similar contention was urged by the PSUs in their attempt to justify campus selections. The contention was repelled by the Bombay High Court. The following exposition in **Sonali Pramod Dhawade** (*supra*) assumes relevance:

"24. The argument of administrative expediency or departure

of the norm in the name of enhancing professionalism and value addition, by making appointments through campus recruitment, is not available to the State. Those factors are and ought to be subservient to the fundamental rights of equality guaranteed to all the citizens similarly placed and more particularly possessing requisite qualification and eligibility for being considered in the matter of public employment. That guarantee is far superior and intended to do justice-social, economic and political and also to provide equality of opportunity. This right, as enshrined in Article 16, negates the argument of expediency and business compulsion even if the stated activities of the State or Instrumentalities of the State are commercial ventures. The professionalism in business does not come only by appointing "freshers" from premier selected institutes, by resorting to campus recruitment. There is no guarantee that all high ranking students from such institutions would do better in practice, albeit in relative terms. They may have initial

advantage of wide exposure to the latest gadgets and techniques of business. Those skills and techniques, however, can be acquired even by others in due course after being appointed in the public posts by undertaking refresher courses suited to the need of the business activities to be handled by them. Further, there is also no guarantee that the students of premier institutions would not end up in leaving the organisation sooner or later on finding better pastures elsewhere. The attrition rate at senior managerial positions is certainly high in private sector, which is a well known fact."

I am in respectful agreement with the reasoning and the findings above. Even if the argument that students graduating from NLUs acquire more skill and knowledge than their less fortunate brethren is accepted, that is no reason to deny a level playing field to the others. There is no logical basis for the assumption that professionalism and competence is the fiefdom of only those passing

from elite institutions. The process now adopted is more like a walkover to the finals for a chosen few, without competing in the preliminaries.

12. The argument that it is inexpedient to conduct selection test across India for filling up ten posts also fails, when tested on the touchstone of Article 16. As long as the Constitution guarantees equality of opportunity to the citizens, the State and its instrumentalities have a corresponding duty to ensure such opportunity to all.

13. The above discussion leads me to the only conclusion that Ext.P3 notification insofar as it confines the selection process to only candidates who had participated in the CLAT-2021 PG programme, violates Article 16 of the Constitution of India. Having held so, rather than upsetting the whole selection process, I

deem it more appropriate to direct the second respondent to accept the petitioner's application and conduct a selection test or interview for testing her eligibility for appointment to the notified post. Further action with respect to the appointment shall be taken depending on the outcome of such selection test/interview. The above direction shall be given effect to within one month of receipt of a copy of this judgment.

The writ petition is disposed of accordingly.

sd/-

**V . G . ARUN
JUDGE**

scl/vgs

APPENDIX OF WP (C) 30638/2021

PETITIONER EXHIBITS

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| Exhibit P1 | TRUE COPY OF THE MARK SHEET OF THE PETITIONER FOR LLB. |
| Exhibit P2 | TRUE COPY OF THE DEGREE CERTIFICATE OF THE PETITIONER. |
| Exhibit P3 | TRUE COPY OF THE NOTIFICATION WITH RESPECT TO THE APPLICATION FOR THE POST OF ASSISTANT LAW OFFICER AT E0 LEVEL FOR ITS VARIOUS PROJECTS/ STATIONS. |

RESPONDENT'S EXHIBITS

- | | |
|-----------------|---|
| ANNEXURE R2 (A) | A TRUE COPY OF THE NTPC ADVERTISEMENT FOR THE YEAR 2016 |
| ANNEXURE R2 (B) | A TRUE COPY OF THE ADVERTISEMENT BY THE INDIAN OIL CORPORATION RELYING ON CLAT-2019 |
| ANNEXURE R2 (C) | A TRUE COPY OF THE ADVERTISEMENT BY THE OIL AND NATURAL GAS CORPORATION LTD RELYING ON CLAT-2019. |