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

+ W.P.(C)No.3082/2020 & CM No.10716/2020

NISHANT KHATRI

....Petitioner

Through : Petitioner-in-person.

versus

UNION OF INDIA & ANR.

....Respondents

Through : Mr. H.V. Shankar, CGSC with Ms.
Aakanksha Kaul, Adv. for R-1.
Ms.Monika Arora, Standing Counsel
for R-2/JNU.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

ORDER

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08.06.2020

[Court hearing convened *via* video-conferencing on account of COVID-19]

CM No.10716/2020

1. Allowed, subject to the petitioner curing the deficiencies referred to in the captioned application within five days of the lockdown being lifted.

W.P.(C)No.3082/2020

2. In a nutshell, the issue which the petitioner, who is present in person, has raised for consideration before this court is: as to whether there should be reservation to the extent of 27% for Other Backward Classes [in short "OBC"] *qua* admission in postgraduate courses in central educational institutions?

3. The petitioner says that there should be no reservation of this kind and, in support of his arguments, he has placed reliance on the judgment of the Supreme Court rendered in *Ashoka Kumar Thakur vs. Union of India and Others*, (2008) 6 SCC 1.

5. The petitioner has specifically referred to paragraphs 344, 345, 358 and 626 of the aforesaid judgement. Based on the observations contained in these paragraphs, the petitioner submits that the reservation for OBC can only be provided, at the most, at the graduate level.

6. It is in this context that the petitioner seeks quashing of the Office Memorandum dated 20.04.2008, issued by the Government of India, Ministry of Human Resources and Development bearing No. No.1-1/2005-U.1.A/847 [hereafter referred to as the “subject OM”].

6.1 The petitioner also seeks a declaration that the provision for reservation to the extent of 27% *qua* OBCs in postgraduate courses in respondent No.2 university i.e. Jawaharlal Nehru University [in short “JNU”] for the academic year 2020-2021 be declared unconstitutional.

7. I have heard the petitioner and also Ms. Monika Arora, who appears on behalf of JNU as well as Mr. H.V. Shankar and Ms. Aakanksha Kaul, who appear on behalf of respondent No.1/Union of India.

8. Learned counsel for the respondents contend that the subject OM is also the subject matter of adjudication before the Supreme Court in Transfer Case (C)No. 54/2013, titled *Sayan Guha vs. Indian Institute of Management, Calcutta & Ors.*

8.1 It is the submission of learned counsel for the respondents that other petitions challenging the subject OM, filed in the Bombay High Court, and the High Court of Delhi, New Delhi, have also been transferred to the Supreme Court.

8.2 In sum, learned counsel for the respondents submit that since the matter is being adjudicated upon by the Supreme Court, and the order of the Calcutta High Court dated 14.05.2008, passed in W.P. (C) 8872/2008, has been stayed by the Supreme Court *vide* order dated 16.05.2008, the instant writ petition should await the decision of the Supreme Court in the aforementioned matters.

8.3 Furthermore, learned counsel for the respondents submit that the issue raised in the instant petition, to which I have made a reference above, was not a subject matter of the judgment passed by the Supreme Court in ***Ashoka Kumar Thakur***(*supra*).

9. To be noted, in the captioned writ petition, no interlocutory application has been filed by the petitioner.

9.1 The petitioner is, in fact, an advocate enrolled with the Bar Council of Delhi.

10. It is not in dispute that the subject OM is in issue before the Supreme Court.

10.1 Since the subject OM, *inter alia*, adverts to reservations in postgraduate courses offered in central educational institutions and the matter is pending before the Supreme Court pertaining to admissions in IIMs, it appears, that the issues raised in the present writ petition and before the Supreme Court are the same.

10.2 Learned counsel for the respondents say that they will ascertain as to whether this is actually correct or not.

11. Be that as it may, I may only indicate that the Supreme Court in *Ashoka Kumar Thakur*(*supra*)has indicated as to what is the ratio of that judgement.

11.1 This aspect emerges upon a perusal of paragraphs 668 to 672 of the aforementioned judgment. For the sake of convenience, the same are extracted hereafter:

“Order of the Court

[This Order has been signed by all the five Hon'ble Judges constituting the Constitution Bench.]

668. *The Constitution (Ninety-third Amendment) Act, 2005, is valid and does not violate the “basic structure” of the Constitution so far as it relates to the State-maintained institutions and aided educational institutions. Question whether the Constitution (Ninety-third Amendment) Act, 2005 would be constitutionally valid or not so far as “private unaided” educational institutions are concerned, is not considered and left open to be decided in an appropriate case. Bhandari, J. in his opinion, has, however, considered the issue and has held that the Constitution (Ninety-third Amendment) Act, 2005 is not constitutionally valid so far as private unaided educational institutions are concerned.*

669. *Act 5 of 2007 is constitutionally valid subject to the definition of “Other Backward Classes” in Section 2(g) of Act 5 of 2007 being clarified as follows: If the determination of “Other Backward Classes” by the Central Government is with reference to a caste, it shall exclude the “creamy layer” among such caste.*

670. Quantum of reservation of 27% of seats to Other Backward Classes in the educational institutions provided in the Act is not illegal.

671. Act 5 of 2007 is not invalid for the reason that there is no time-limit prescribed for its operation but majority of the Judges are of the view that the review should be made as to the need for continuance of reservation at the end of 5 years.

672. The writ petitions are disposed of in the light of majority judgment. However, in Contempt Petition No. 112 of 2007 in WP (C) No. 265 of 2006, no orders are required.”

12. Furthermore, it is relevant to point out that one of the judges who was part of the bench which rendered the decision in ***Ashoka Kumar Thakur***(*supra*) has reiterated this aspect in the judgment of the Supreme Court rendered in ***P.V. Inderasan (2) vs. Union of India***, (2011) 8 SCC 441.

12.1 Hon’ble Mr. Justice R.V. Raveendran, who was a part of the bench which heard and decided ***Ashoka Kumar Thakur***(*supra*)as well as ***P.V. Inderasan (2)***(*supra*)makes that very clear in the latter judgement i.e. ***P.V. Inderasan (2)***(*supra*) [See paragraphs 32-39].

13. Therefore, *prima facie*, to my mind, the reliance placed by the petitioner on certain observations of judges in ***Ashoka Kumar Thakur***(*supra*) is not suggestive of the fact that the ratio of the judgment is what the petitioner contends before me.

14. In any event, to my mind, the matter requires further consideration.

15. Accordingly, the captioned writ petition is admitted.

15.1 Since, formally, notice has not been issued in the matter, notice shall issue to the respondents. Respondent No. 1 will file a counter-affidavit in the matter within the next 4 weeks *dehors* the fact that it has already filed its written submissions.

15.2 Liberty is given to the petitioner to file a rejoinder to the same.

15.3 In the meanwhile, JNU will bring on record, its counter-affidavit.

16. Renotify the matter for hearing on 07.09.2020.

RAJIV SHAKDHER, J

JUNE08, 2020

Aj/KK

Click here to check corrigendum, if any