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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: 7th August, 2023

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W.P.(C) 15768/2022 & C.M. APPL. 49044/2022, 18600/2023

GEETA SHARMA

..... Petitioner

Through: Mr. Joby P. Varghese and
Mr. Upmanyu Sharma, Advocates.

versus

PUBLIC ENTERPRISES SELECTION BOARD

& ORS.

..... Respondents

Through: Ms. Manisha Agrawal Narain,
Central Government Standing Counsel
with Mr. Sandeep Singh Somaria and
Ms. Rakshita Goyal, Advocates for R-1 and
R-3.

Mr. Sandeep Sethi, Senior Advocate with
Mr. Sanjay Kapur, Mr. Devesh Dubey,
Ms. Megha Karnwal and Mr. Surya Prakash,
Advocates for R-2 and R-5.

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W.P.(C) 15784/2022 & C.M. APPL. 49156/2022, 8491/2023

GEETA SHARMA

..... Petitioner

Through: Mr. Joby P. Varghese and
Mr. Upmanyu Sharma, Advocates.

versus

PUBLIC ENTERPRISES SELECTION BOARD

& ORS.

..... Respondents

Through: Ms. Manisha Agrawal Narain,
Central Government Standing Counsel with
Mr. Sandeep Singh Somaria and
Ms. Rakshita Goyal, Advocates for R-1 and
R-3.

Mr. Ravi Sikri, Senior Advocate with
Mr. Amit Meharia, Mr. Abinash Agarwal,
Ms. Poonam Shekhawat, Mr. Deepak



Yadav, Mr. Abhishek Sandhilya and
Ms. Kanak Grover, Advocates for R-2.
Ms. Meenakshi Midha, Mr. Kapil Midha and
Mr. Garv Singh, Advocates for R-5.

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J.

1. W.P.(C) 15768/2022 has been filed by the Petitioner praying for setting aside the list of shortlisted candidates and the selection/recommendation list dated 22.07.2022 issued by Respondent No.1/ Public Enterprises Selection Board ('PESB') recommending the name of Sh. S. Damodar Bhattad/Respondent No.5 for the post of Director (Finance), Bharat Electronics Limited ('BEL')/Respondent No.2 herein. Writ of *mandamus* is also sought directing PESB to redraw the list of shortlisted candidates and include the name of the Petitioner for interview for the said post.

2. W.P.(C) 15784/2022 has been filed by the Petitioner seeking quashing of list of shortlisted candidates and the selection list dated 19.09.2022 issued by PESB recommending the name of Sh. Surajit Mandol for the post of Director (Finance), Telecommunications Consultants (India) Ltd. ('TCIL')/Respondent No.2 herein with consequential writ of *mandamus* to redraw the list of shortlisted candidates including the name of the Petitioner for interview for the said post. Due to similitude of the legal issues, both writ petitions were heard together and are being decided by this common judgment.

W.P.(C) 15768/2022:

3. Relevant facts, shorn of unnecessary details captured in the writ petition are that Petitioner is currently working as Director (Finance)



at HLL Lifecare Limited, a Public Sector Undertaking ('PSU'), engaged in business of manufacture and sale of healthcare products and services. Petitioner joined the said post in 2018 after being released from Steel Authority of India Ltd. ('SAIL') as Deputy General Manager w.e.f. 20.08.2018 having worked in SAIL since 03.08.1991. Upon being released from SAIL, Petitioner is on Lien for a period of 5 years in her substantive scale and post in SAIL till attaining the age of superannuation or for the duration of such appointment or for 5 years whichever was earlier, i.e. w.e.f. 21.08.2018 till 20.08.2023.

4. PESB is a Selection Board which follows a procedure for appointment of Board Level appointees in Central Public Sector Enterprises ('CPSE') as prescribed in its Guidelines dated 29.08.2017. The procedure involves advertising the vacancy, finalizing/modifying job description/qualification/experience/age/eligibility conditions. PESB conducts interviews of the applicants who apply and after considering various parameters such as performance in the interview, qualities of managerial capability, leadership, broad vision, experience, service record and inputs provided by those assisting the Board, sends the recommended name to the Ministry for its consideration. The name recommended by PESB is considered by the administrative Ministry after obtaining vigilance clearance and proposal is then submitted for obtaining approval of the Appointments Committee of the Cabinet ('ACC').

5. BEL is a Schedule-A Navratna (Category-1) CPSE under the administrative control of the Department of Defence Production, Ministry of Defence and is primarily a R&D focused organization



with R&D facilities in 9 units across India with core competency in areas of Radars and Weapon systems, Sonars, Communications etc.

6. Applications were invited by PESB from eligible candidates for selection to the post of Director (Finance) in BEL, vide Advertisement No.11 of 2022 dated 20.01.2022, pursuant to which Petitioner applied on 24.03.2022. As per the Advertisement, the eligibility criteria with respect to age, employment status, qualification, experience and pay scale was as follows:-

“III. ELIGIBILITY

1. AGE : On the date of occurrence of vacancy (DOV)

Age of superannuation 60 years			
Internal		Others	
Minimum	Maximum	Minimum	Maximum
45	2 years residual service as on the date of vacancy w.r.t. the date of superannuation.	45	3 years residual service as on the date of vacancy w.r.t. the date of superannuation.

2. EMPLOYMENT STATUS:

The applicant must, on the date of application, as well as on the date of interview, be employed in a regular capacity – and not in a contractual/ad-hoc capacity – In one of the followings :-

(a) Central Public Sector Enterprise (CPSE) (including a full-time functional Director in the Board of a CPSE);

(b) Central Government including the Armed Forces of the Union and All India Services;

*(c) State Public Sector Enterprise (SPSE) where the annual turnover is *Rs 5,000 crore or more;*

*(d) Private Sector in company where the annual turnover is *Rs 5,000 crore or more.*

Preference would be given to candidates from listed companies.



(* The average audited annual turnover of three financial years preceding the calendar year in which the post is advertised shall be considered for applying the approved limits)

3. QUALIFICATION:

(i) The applicant should be a Chartered Accountant or Cost Accountant or a full time MBA/PGDM course with specialization in Finance with good academic record from a recognized University/Institution. **Preference would be given to Chartered Accountant.**

(ii) Officers of Organized Group 'A' Accounts Services [i.e. Indian Audit and Accounts Service, Indian Defence Accounts Service, Indian Railway Accounts Service, Indian Civil Accounts Service, Indian P&T Accounts & Finance Service and Indian Cost Accounts Service] working in the appropriate level are exempted from these educational qualifications.

(iii) Further, applicants from the Central Govt./Armed Forces of the Union/All India Services, will also be exempted from the educational qualifications as per (i) above provided the applicants have 'the relevant experience' as mentioned in Para 4(iii) below.

In respect of applicants from Organized Group 'A' Accounts Services/Central Government/Armed Forces of the Union/All India Services, Chartered Accountant/Cost Accountant/MBA/PGDM will be a desirable educational qualification.

4. EXPERIENCE:

(i) The applicant should have at least five years of cumulative experience at a senior level during the last ten years in the area of Corporate Financial Management/ Corporate Accounts in an organization of repute.

(ii) Applicants from Organized Group 'A' Accounts Services should have at least five years cumulative experience at a senior level during the last ten years in the area of Corporate Financial Management/ Corporate Accounts.

(iii) 'The relevant experience' in respect of applicants from Central Government/Armed Forces of the Union/All India Services would include at least seven years of cumulative experience at a senior level during the last ten years in the area of Corporate Financial Management/ Corporate Accounts.

5. PAY SCALE:

(a) Central Public Sector Enterprises-

Eligible Scale of Pay

(i) Rs. 7250-8250 (IDA) Pre 01/01/1992

(ii) Rs. 9500-11500 (IDA) Post 01/01/1992



(iii) Rs. 20500-26500 (IDA) Post 01/01/1997

(iv) Rs. 51300-73000 (IDA) Post 01/01/2007

(v) Rs. 120000-280000 (IDA) Post 01.01.2017

(vi) Rs. 18400-22400 (CDA) Pre-revised post 01.01.1996

(vii) Rs. 37400-67000 + GP 10000 (CDA) post 01.01.2006

(viii) Rs. 144200-218200 (Level 14) CDA post 01.01.2016

The minimum length of service required in the eligible scale will be one year for internal candidates, and two years for others as on the date of vacancy.

(b)

(i) Applicants from Central Government / All India Services should be holding a post of the level of Joint Secretary in Government of India or carrying equivalent scale of pay on the date of application.

(ii) Applicants from the Armed forces of the Union should be holding a post of the level of Major General in the Army or equivalent rank in Navy/Air Force on the date of application.

(c)

Applicants from State Public Sector Enterprises/ Private Sector should be working at Board level position or at least a post of the level immediately below the Board level on the date of application.

6. CONDITION OF IMMEDIATE ABSORPTION FOR CENTRAL GOVERNMENT OFFICERS

Central Government Officers, including those of the Armed Forces of the Union and the All India Services, will be eligible for consideration only on immediate absorption basis.”

7. Petitioner was not shortlisted for interview by the Selection Committee scheduled on 22.07.2022, though according to her she was eligible on all counts and learnt of the non-inclusion from the recommendation list published on the website of PESB. She also learnt that candidates junior to her from other PSEs had been shortlisted in external category in violation of PESB Guidelines. This led to the Petitioner filing an RTI application on 23.07.2022 with



PESB seeking information *inter alia* about the total number of candidates who had applied for the post, complete list of shortlisted candidates and reason for not shortlisting the Petitioner despite being a Director in Schedule-B Company. Information was, however, not furnished to the Petitioner in view of the bar under Section 8(1)(i) of Right to Information Act, 2005 ('RTI Act') since the selection process was not complete and the matter was under consideration before the ACC. In the First Appeal disposed of on 14.10.2022, limited information was provided that 23 candidates had applied for the post of Director (Finance), BEL.

8. In the meantime, pursuant to an Advertisement No. 6 of 2022 dated 17.01.2022 issued by PESB for selection to the post of Member (Finance), Airports Authority of India ('AAI'), Petitioner submitted her application on 24.03.2022. However, Petitioner learnt that another external candidate had been called for the interview scheduled on 30.08.2022 against Petitioner's candidature, despite her having superior pay scale, seniority, more experience and Board Level position. Being aggrieved, Petitioner approached this Court in W.P.(C) 12516/2022 seeking quashing of the list of shortlisted candidates and for re-issuing the same in accordance with PESB Guidelines. In the said writ petition, vide order dated 30.08.2022, Court permitted PESB to proceed with the interviews of the shortlisted candidates, but restrained the finalization of the result, till the next date. Writ petition was allowed vide judgment dated 31.10.2022 and the list of shortlisted candidates was quashed with a direction to PESB to issue a fresh list of candidates for interviews. In the said judgment reported as *Geeta Sharma v. Public Enterprises Selection Board &*



Anr., 2022 SCC OnLine Del 3600, Court has held that Petitioner was entitled to preference not only by virtue of her higher pay scale but also her Board Level position since August, 2018. Post the pronouncement of the judgment, present writ petition was filed by the Petitioner.

9. When this writ petition was listed for admission on 16.11.2022, Court declined to stay the impugned list of shortlisted candidates and/or selection pursuant thereto on the ground that considerable time had elapsed since the issuance of the impugned list, which was always within the knowledge of the Petitioner. It was, however, directed that appointment, if any, made to the post of Director (Finance) in BEL will be subject to the outcome of the present petition. In the meantime, vide communication dated 11.01.2023, BEL was informed of the approval granted by the Competent Authority to the proposal of appointment of Respondent No.5 as Director (Finance), BEL from the date of his assumption of charge of the post till the date of his superannuation i.e. 31.12.2026 or until further orders, whichever is earlier.

W.P.(C) 15784/2022:

10. Advertisement No.16/2022 dated 27.01.2022 was issued by PESB for filling up the post of Director (Finance) in TCIL. The eligibility conditions were the same as in Advertisement No.11/2022 referred to above, save and except, the difference in the annual turnover required, as stipulated in para III(2)(c) and (d), which is extracted hereunder for ready reference:-

“III. ELIGIBILITY

2. EMPLOYMENT STATUS:

....



(c) State Public Sector Enterprise (SPSE) where the annual turnover is *Rs 2,000 crore or more;

(d) Private Sector in company where the annual turnover is *Rs 2000 crore or more.

.....”

11. Petitioner’s grievance is that she has not been shortlisted while Sh. Surajit Mandol/ Respondent No.5 herein has been shortlisted despite the fact that he was working in a lower pay scale of Rs.62000-80000/- in comparison to the Petitioner, who is in the pre-revised pay scale of Rs.65000-75000/-. The additional disqualification that Respondent No.5 suffers is that he is not holding Board Level position and even on this score, Petitioner should have been shortlisted ahead of him. Petitioner asserts that she learnt of her exclusion and selection of Respondent No.5 only on 19.09.2022 when PESB published the final select list. The selection and appointment was made during the pendency of writ petition W.P.(C) No. 12516/2022 wherein the matter of inter-se seniority was *sub judice*. Petitioner assails the impugned action of her non-inclusion from the list of shortlisted candidates as well as selection/appointment of Respondent No.5.

COMMON CONTENTIONS ON BEHALF OF THE PETITIONER IN BOTH THE WRIT PETITIONS:

12. PESB is an independent and autonomous Selection Board tasked with the public function of advising the Central Government in selecting eligible and qualified candidates for Board Level appointments in CPSEs and is expected to be an unbiased and professional body of experts in conducting the selection processes. In the present case, PESB had acted in a *malafide* manner deliberately excluding the Petitioner from the list of shortlisted candidates and



instead chose to recommend those who are junior to her in gross violation and contravention of PESB Guidelines.

13. For shortlisting the candidates, they are bifurcated in four categories: (i) internal (ii) sectoral (iii) external and (iv) Central Government/Private Sector/State PSEs. After the applications are invited, inter-se seniority of the applicants for the purpose of shortlisting of Executives holding the same pay scales in the Sectoral, External category is prepared in accordance with the 'Revision of Policy of Determination of Inter-se Seniority amongst Candidates of Sectoral and External Category of CPSE' (hereinafter referred to as "Seniority Guidelines"). As per the said Seniority Guidelines, preference will be given to applicants holding a higher pay scale. Where the pay scales of the applicants are the same, Board Level applicants will be given preference over applicants who are below the Board Level. If two Board Level applicants hold the same pay scale, then Chairman/ CMD/MD would get preference over the Director. Impugned action of shortlisting totally contravenes the Seniority Guidelines as despite the Petitioner being in a higher pay scale and holding Board Level position, has been excluded from the shortlist.

14. Petitioner is a highly qualified and experienced professional having a superior pay scale of Rs.160000-290000/- (pre-revised Rs.65000-75000/-) w.e.f. 20.08.2018 and possesses Board Level experience from 20.08.2018 as also a superior educational qualification of Ph.D. As per Seniority Guidelines, Petitioner's higher pay scale is by itself a key factor in including her in the shortlist for further selection process. Additionally, with her Board Level position, Petitioner ought to have been shortlisted ahead of juniors who were



holding positions of Chief General Manager, General Manager, Senior General Manager etc. with lower pay scales. Petitioner's non-inclusion in the shortlist is on account of *malafide* and bias since she took recourse to legal remedies to ventilate her grievances pertaining to earlier selections.

15. It is no doubt settled that no candidate has a vested right to claim appointment, however, an eligible and qualified candidate has a right to fair consideration in a selection process. Ousting a candidate at the stage of shortlisting despite fulfilling eligibility conditions and being higher on all other parameters, amounts to violation of fundamental rights under Articles 14, 21 and 19(1)(g) of the Constitution of India. Since Petitioner was unaware of the applicants shortlisted, prior to the final selection list published by PESB, she did not approach the Court at an earlier stage and this factor should not come in her way of seeking justice.

16. Case of the Petitioner is squarely covered by the judgment of the Co-ordinate Bench in *Geeta Sharma (supra)*, where the list of shortlisted candidates for selection to the post of Member (Finance), AAI was quashed and PESB was directed to prepare a fresh list for interview. Interpreting the Seniority Guidelines, Court observed that preference has to be given to the Petitioner by virtue of her higher pay scale and Board Level position and the expression 'preference would be given to Chartered Accountant' under the educational qualifications could not be read in a manner so as to ignore the higher pay scale and Board Level position and question of giving preference to Chartered Accountants would arise only if the applicants were otherwise equally placed.



17. In W.P. (C) 15784/2022, an additional ground has been taken by the Petitioner stating that Sh. Surajit Mandol/Respondent No.5 despite being in lower pay scale and holding lower position was selected during the pendency of W.P. (C) 12516/2022 overlooking and deliberately ignoring that the issue of inter-se seniority was *sub judice* before the Court.

COMMON CONTENTIONS ON BEHALF OF RESPONDENTS NO.1 AND 3 IN BOTH THE WRIT PETITIONS:

18. Petitioner has attempted to create a smokescreen that PESB had excluded her from the list of shortlisted candidates. It is not for the PESB to exclude candidates as it is a Body which selects candidates from a list of eligible candidates based on Guidelines incorporated in Internal Meeting ('I.M') decisions, meetings, guidelines and extant practice. Functions of the PESB include selection and placement of personnel in the posts of Chairman, Managing Director, Chairman-cum-Managing Director and Functional Directors in PSEs and other posts specified by the Government.

19. To evolve a sound managerial personnel policy for PSEs, Government of India constituted PESB by a Resolution dated 30.08.1974. A comprehensive selection policy is envisaged in the DoPT Resolution No. 27(210-EO/(CC)-PSE dated 03.03.1987 which is as follows:

“7.2 The policy of the Government is to appoint, through a fair and objective selection procedure, outstanding professional managers to Level-I and Level-II posts and posts at any other level as may be decided by the Government from time to time. Government have also recognized the need to develop a cadre of professional managers within the public sector. Hence unless markedly better candidates are available from outside, internal candidates, employed in the public sector enterprises, will be preferred for appointment to Board level posts. If internal candidates are not available, preference will be given to



candidates working in other public sector enterprises, either in the same area of business or in other areas. Mobility of managerial personnel among public sector enterprises within the same sector or group, failing which mobility within the public sector as a whole will be encouraged, subject to certain limitations. In special cases, recruitment may be made from the organized services under the Central Government. Such cases would be where, because of special circumstances, it is necessary to place a member of an organized service in a public sector enterprises or where, because of the nature of the enterprises of its poor health, it would be difficult to attract good professional managers on a tenure basis.”

20. PESB approved the revised educational qualifications for the post of Director (Finance) vide Minutes of I.M dated 19.08.2021 by virtue of which preference is to be given to applicants having Chartered Accountancy as educational qualification and the decision was to be applied uniformly across all CPSEs. This decision was intimated to all CMDs/MDs of CPSEs *albeit* shortlisting of applicants from Central Government category was to be done in accordance with ACC’s communication dated 01.11.2018.

21. Based on this decision, post of Director (Finance) was separately advertised in BEL on 20.01.2022 being Advt. No.11/2022 and in TCIL on 27.01.2022 being Advt. No.16/2022, after finalisation of Job Description including eligibility criteria in consultation with Ministry of Communication. It was clearly stipulated in both the Advertisements under the heading ‘Qualification’ that ‘preference would be given to Chartered Accountant’. As per DoPT Guidelines, applicants are placed in four categories viz. (i) internal, (ii) sectoral, (iii) external and (iv) Central Government/Private Sector/State/PSEs. This categorisation is in consonance with Para (B) (8) of Chapter 2 of Guidelines dated 29.08.2017, which are in the public domain. Relevant part of the said



Guidelines is as follows:-

The applications are considered and shortlisted with reference to the job description and eligibility criteria in the following manner:

(a)	<i>Internal (from the same CPSE or its subsidiary)</i>	<i>06</i>
(b)	<i>Sectoral (from CPSEs of the same cognate group as defined by DPE)</i>	<i>02</i>
(c)	<i>External (from any other CPSE)</i>	<i>02</i>
(d)	<i>Central Government / Private Sector / State PSEs</i>	<i>02*</i>
	<i>Total</i>	<i>12</i>

**If eligible applications are received for any particular post from the applicants of all the three categories namely Central Government, Private Sector and State PSEs, the allotted slot of 02 may be exceeded by 01 making a total of 03 slots (i.e. one for each category) as an exception."*

22. Petitioner was aware of the Guidelines at the time of submitting the applications as the Form clearly advised as *"Please refer to the Job Description for the post and the Guidelines for processing cases of Board Level appointments in Central Public Sector Enterprises at PESB website (www.pesb.gov.in)"*. After the applications were received against both the Advertisements, applicants were arranged in the respective four categories and following the Seniority Guidelines, they were interpolated as per pay scales and/or Board Level positions etc. for the purpose of shortlisting. Candidates were thereafter shortlisted based on mandatory qualifications and experience, giving



preference to those who were Chartered Accountants in the applicable category, in consonance with I.M dated 19.08.2021 and stipulation to that effect in the Advertisements in the requisite educational qualifications. This system is followed across all selections in PSEs to achieve uniformity in shortlisting and consequent selection. Since Petitioner did not possess the qualification of Chartered Accountancy, she was not included in the list of shortlisted candidates and preference was given to Respondents No.5 respectively in both the writ petitions, being Chartered Accountants.

CONTENTIONS ON BEHALF OF RESPONDENT NO.5 IN W.P. (C) 15768/2022:

23. Contention of the Petitioner that preference was required to be given to the higher pay scales and Board Level positions is misconceived as Seniority Guidelines are only for the purpose of determining inter-se seniority of the applicants and it is nowhere mentioned in the Advertisement that preference would be given to seniority. Respondent No.5 is an internal candidate and his shortlisting has no bearing on the shortlisting of the Petitioner who is an external candidate. It was stipulated in the Advertisement that preference will be given to Chartered Accountant and since the answering Respondent fulfilled all the other eligibility conditions prescribed for the post, he was rightly shortlisted, invoking the preference clause. Petitioner was not shortlisted as she did not meet the preferential criteria in her category of external candidates and shortlisting in one category has no bearing on the other. Seniority Guidelines cannot override preferential educational qualifications provided for the post in question keeping in mind the nature of the post and the requirement of the job. Petitioner has conveniently ignored that she even fails on yet another parameter



in the Advertisement wherein it was stipulated that preference would be given to those working in Listed Companies. All four shortlisted candidates were working in Listed Companies while Petitioner was not.

24. Answering Respondent has various achievements to his credit including a significant role in the growth of BEL in terms of Revenue at a Compound Annual Growth Rate of 13% over the last 5 years; achieving highest Trade Receivable Collection of Rs.18,000 crores in 2020-21 etc. as detailed in the counter-affidavit. Minimum pay scale of Rs.120000-280000/- (IDA) w.e.f. 01.01.2017 was the eligibility condition in the Advertisement and Respondent No.5 has been in the said scale since 01.08.2021.

25. It is settled law that it is for the employer to lay down the qualifications, eligibility conditions and other norms of selection depending upon the nature of the post to which the appointment is to be made and Courts cannot in a judicial review substitute or vary these norms or criteria. Reliance was placed on the judgment in *Union Public Service Commission v. M. Sathiya Priya, (2018) 15 SCC 796*. It is equally settled that recommendations of Selection Committees cannot be challenged except on the ground of *malafides* or serious violations of statutory Rules and are not subject to appeals before the Court as an Appellate Body, as held by the Supreme Court in *M.V. Thimmaiah and Others v. Union Public Service Commission and Others, (2008) 2 SCC 119*.

CONTENTIONS ON BEHALF OF RESPONDENT NO.5 IN W.P. (C) 15784/2022:

26. Answering Respondent is a Sectoral candidate unlike the Petitioner and no comparison can be drawn between them for the



purpose of shortlisting. The Seniority Guidelines on which much emphasis is laid by the Petitioner are only for determination of inter-se seniority amongst candidates of sectoral and external categories of CPSEs and are applicable only qua applicants holding the same scale of pay and are thus inapplicable in the present case.

27. Answering Respondent is currently in the pay scale of Rs.62000-80000/- which is subject to revision in the pay scale of Rs.150000-300000/- as and when his employer i.e. BSNL adopts the said scale. However, a comparison of pay scales by the Petitioner is completely misconceived since pay scales are not the yardstick for shortlisting. The Advertisement clearly provides that preference will be given to a Chartered Accountant and this exclusive qualification clause cannot be overridden by pay scales, which are only relevant for the purpose of determination of inter-se seniority under the Seniority Guidelines. Shortlisting on the basis of educational qualification is based on the requirement of the employer in view of the job description and was a conscious decision of PESB. The argument of the Petitioner, if accepted, would render the educational qualifications redundant and meaningless. Emphasis on pay scales cannot be laid by the Petitioner also for the reason that different organizations adopt an implement pay revisions at different points in time. Reckoning of pay scales for the purpose of shortlisting is also inconceivable as from the very Advertisement, it is clear that pay scales are only postulated as an eligibility condition and once Respondent No.5 crosses the threshold of being in the minimum pay scale, his further shortlisting has to be predicated on the preference clause under the educational qualification in the Advertisement. For the sake of record, though Petitioner falls in



the pay scale of Rs.65000-75000/- (pre-revised) which qualifies her to apply for Director (Finance) in Schedule-A, CMD in Schedule-B CPSEs etc., she is not eligible to apply for CMD position in a Schedule-A CPSE, which the answering Respondent is.

28. Procedure for selection to Board Level posts in CPSEs is governed by DoPT O.M. dated 31.03.2011 and PESB Guidelines dated 08.02.2017 and 10.02.2017 which prescribe the eligibility conditions, qualifications, categorization of applicants etc. The superior qualification of the Petitioner i.e. Ph.D. has no relevance to the present selection as there is no provision in these Guidelines or the Advertisement giving additional weightage to the said qualification. Insofar as reliance on the judgment of the Co-ordinate Bench on this aspect in *Geeta Sharma (supra)* is concerned, the judgment does not deal with I.M dated 19.08.2021 which preceded the Advertisements, wherein it was decided that for shortlisting the applications across CPSEs, top three internal candidates will be shortlisted based on seniority and the experience, provided they fulfill the mandatory experience. For the next lot of applicants, preference will be given for shortlisting to those with qualification of Chartered Accountant, save and except, for shortlisting of applicants for Central Government category. The judgment has been challenged by AAI and the appeal is pending before the Division Bench *albeit* there is no stay.

ANALYSIS AND FINDING:

29. These writ petitions concern appointments to the post of Director (Finance) in TCIL and BEL respectively and this Court is called upon to decide the interplay between Seniority Guidelines, formulated vide I.M dated 31.01.2018 and a 'preference' clause



incorporated in the Advertisements as part of educational 'Qualification' prescribed as eligibility condition to apply for the post of Director (Finance). Petitioner contends that her non-inclusion in the list of shortlisted candidates is erroneous and illegal as preference ought to have been given to her higher pay scale and Board Level position based on the Seniority Guidelines, while Respondents plead and urge that these Guidelines are meant only for fixing/interpolating inter-se seniority amongst applicants from different CPSEs based on pay scales/Board Level or below Board Level positions, but once the interpolation is complete in the respective categories, shortlisting is done based on mandatory qualifications and experience giving preference to applicants having Chartered Accountancy, wherever applicable.

30. The question that first posits is: Can pay scales/Board Level positions be placed on a higher pedestal than educational qualifications, given the backdrop of the nature of the post in question; a conscious decision of PESB to prefer Chartered Accountants taken prior to the Advertisements; a stipulation to that effect in the Advertisements and absence of preference clause pertaining to pay scales/Board Level positions held in the Advertisements? In order to resolve the conundrum, it will be both pertinent and relevant to understand the procedure followed for appointment of Director (Finance), the post which is subject matter of both these writ petitions. It is a common ground between the parties that the Guidelines which govern the present appointments are PESB Guidelines dated 29.08.2017 called 'Guidelines Regarding Board Level Appointments in Central Public Sector Enterprises'. In order to evolve a uniform and



sound managerial personnel policy for all PSEs and to advise the Government on appointments to the top Management posts, Government of India constituted the PESB in 1974 and the selection policy can be gauged from the DoPT O.M. dated 03.03.1987, referred to and extracted above. The Guidelines dated 29.08.2017 detail the complete procedure, starting from finalising the qualifications/ eligibility conditions etc. prior to issue of advertisement for filling up the vacancies to shortlisting and thereafter for conducting the interviews by PESB to a final approval by ACC. This involves an elaborate procedure, where the concerned Ministry or Department, prior to release of the vacancies finalises or modifies the Job Description/qualifications/eligibility conditions and communicates to PESB. Where there is a delay, PESB finalises the same and in case of disagreement, the matter is referred to ACC for final orders. Relevant Guidelines are extracted hereunder:-

3. For appointment of Non-official Director–cum-Part-time Chairperson, on the Board of a CPSE, Search Committee procedure of DPE prescribed for appointment of Non-official part-time Directors is to be followed (DPE has clarified this in the case of CCIC, M/o Textiles vide *Para 3 of OM No.9(35)/2011-GM dated 12.12.2011*).

(B) Procedure

{Auth: [DoPT's OM No.28\(30\)EO/2010\(ACC\) dated 31.03.2011](#) and as per PESB guidelines communicated vide PESB's OM No.5/3/2017-PESB dated 08.02.2017 and OM of even number dated 10.02.2017 or as specifically indicated}

1. The advertisement for a vacancy should be released by the PESB one year before the expiry of the tenure of the incumbent.
2. The Ministry/Department concerned shall finalise/modify the job description/qualifications/eligibility conditions and communicate the same to the PESB, three months in advance of the stipulated period of one year.
3. In the event of such a job description/qualifications/eligibility conditions not being received by the stipulated time, the PESB shall finalise the same so that the schedule for advertising vacancies is adhered to strictly.



4. In case of any disagreement or dispute between PESB and the administrative Ministry/Department in relation to finalisation of eligibility conditions, educational qualifications, experience, etc., the matter should be referred to the ACC for final orders. Once the recruitment norms are finalised, such norms should have validity for a minimum period of five years.

(Auth: [DPE's OM No. 18\(21\)/2005-GM dated 18.09.2008](#))

5. The recommendation of the PESB shall be sent to the Ministry concerned six months before the notified date of vacancy.

6. In case of unforeseen vacancies, the PESB shall give 45 days' time for receipt of duly forwarded applications in PESB and select and recommend a candidate within four months from the date of vacancy.

(Auth: [DPE's OM No. 18\(21\)/2005-GM dated 18.09.2008](#))

7. The advertisement is issued and the vacancy is circulated among all CPSEs, Ministries and the State Governments and also uploaded on the PESB website. Applications eligible as per the criteria prescribed in the vacancy circular should not be withheld by the CPSEs or the administrative Ministry/Department/State Govt.

(Auth: [DoPT's OM No. 2\(43\)EO/2014\(ACC\) dated 14.08.2015](#))

8. **Shortlisting of candidates:**

(Auth: As per PESB guidelines communicated for incorporation in Compendium vide PESB's OM No. 5/3/2017-PESB dated 08.02.2017 and OM of even number dated 10.02.2017, amendment in [PESB Resolution dated 10.06.2016](#) and [DoPT's OM No.271/2017-EO\(ACC\) dated 03.02.2017](#))

The applications are considered and shortlisted with reference to the job description and eligibility criteria in the following manner:

(a)	Internal <i>(from the same CPSE or its subsidiary)</i>	06
(b)	Sectoral <i>(from CPSEs of the same cognate group as defined by DPE)</i>	02
(c)	External <i>(from any other CPSE)</i>	02
(d)	Central Government / Private Sector / State PSEs	02
Total		12

- (i) If eligible applications are received for any particular post from the applicants of all the three categories namely Central Government, Private Sector and State PSEs, the allotted slot of 02 may be exceeded by 01 making a total of 03 slots (i.e. one for each category) as an exception.

- (ii) **Internal candidate** is one who is an employee of the same CPSE or its subsidiary and has put in a minimum of two years of continuous service in it immediately preceding the date of vacancy, and who does not hold a lien in any other PSE/Government. An employee who holds a lien on a post in a



CPSE can also be considered as an internal candidate of that enterprise, provided he/she has put in a minimum of two years of continuous service in that enterprise, on the date of acquiring lien and the period for which he/she is away from the enterprise is not more than 5 years.

[Auth: DPE's OM No.18(2)/96-GM-GL-81 dated 16.05.2007]

Further, in case of formation of a new company consequent upon merger of companies/carving out from the old company, a candidate from the erstwhile company/companies will also be treated as internal candidate subject to his/her fulfilling the eligibility norms.

- (iii) **Sectoral candidate** is one who is an employee of those CPSEs which fall in the same cognate group as per DPE guidelines issued from time to time (List as on 31.03.2015).
- (iv) **External candidate** is one who is an employee of a CPSE and is other than an Internal or a Sectoral candidate.
- (v) Candidates from Central Government will also inter alia include Armed Forces of the Union and All India Services.
- (vi) **SPSE candidate** is a candidate working in State Public Sector Enterprise (SPSE) where annual turnover is as per the Table below.
- (vii) **Private Sector candidate** is a candidate working in Private Sector in a company whose annual turnover is as per the Table below.

Category of CPSE	Sub Category	Annual Turnover requirement for consideration of a candidate from SPSEs or Private Company
Schedule A	Maharatna	Rs.10,000 crore or more
	Navratna	Rs.5,000 crore or more
	Miniratna	Rs.2,000 crore or more
	Others	Rs.1,500 crore or more
Schedule B	Miniratna	Rs.1,000 crore or more
	Others	Rs.750 crore or more
Schedule C		Rs.500 crore or more
Schedule D		Rs.250 crore or more

*The average audited annual turnover of three financial years preceding the calendar year in which the post is advertised shall be considered for applying the approved limits.

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16. **Age criteria** for selection of CMD/MD/Director on the Board of CPSEs is as under:

[Auth: (i) PESB's internal guidelines and DPE OM No. 18(6)/98-GM-GL-72 dated 20.10.2005; (ii) DePT's communication No.27/2/2017-EO(ACC) dated 22.02.2017]

On the date of occurrence of vacancy				
Post in CPSE	Internal		External	
	Min.	Max.	Min.	Max.
<i>Age of superannuation 60 years</i>				
CMD Schedule A or Schedule B Director Schedule A	45	2 years of residual service as on the date of vacancy w.r.t the date of superannuation	45	3 years of residual service as on the date of vacancy w.r.t the date of superannuation
Director Schedule B or Schedule C CMD Schedule C or Schedule D	40		40	
<i>Age of superannuation 58 years</i>				
CMD Schedule A or Schedule B Director Schedule A	45	2 years of residual service as on the date of vacancy w.r.t the date of superannuation	45	3 years of residual service as on the date of vacancy w.r.t the date of superannuation
Director Schedule B or Schedule C CMD Schedule C or Schedule D	40		40	

17. A candidate may apply any number of times in a calendar year, but he would be allowed to appear for a maximum of four times in selection meetings in a calendar year, including the occasions on which he/she is shortlisted but remains absent in the selection meeting.

[Auth: PESB's OM No.5/3/2017-PESB dated 08.02.2017 and dated 10.02.2017]



18. The PESB conducts interview of the applicants and after considering the performance, qualifications, qualities of managerial capability, leadership, broad vision, experience, service record and the inputs provided by those assisting the Board, the PESB sends only one name to the Ministry for its consideration. A reserve name is kept in a sealed cover with the PESB and is disclosed only upon orders of the ACC.

(Auth: DoPT's OM No. 28(30)EQ/2010(ACC) dated 31.03.2011)

19. A candidate recommended at No. 1 in the panel for a Board level post is not considered for another Board level post for a period of six months from the date of selection interview or till the approval of the concerned panel, whichever is earlier.

(Auth: Internal guidelines of PESB)

20. The details of all the candidates interviewed and recommended by the PESB for each vacancy shall be placed on the website of the PESB, the same day the interviews are concluded.

(Auth: DoPT's OM No. 28(30)EQ/2010(ACC) dated 31.03.2011)

21. The PESB shall send its recommendation to the Ministry/Department concerned and a copy to the CVC and to the Establishment Officer of DoPT as advance information.

*(Auth: (i) DoPT's OM No. 28(30)EQ/2010(ACC) dated 31.03.2011;
(ii) PESB's OM No. 5/3/2017-PESB dated 08.02.2017 and 10.02.2017)*

22. The name recommended by PESB is considered by the administrative Ministry after obtaining vigilance clearance from the CVC. Thereafter, the administrative Ministry with the approval of the Minister-in-charge shall submit a proposal to the Office of the Establishment Officer for obtaining the approval of the ACC.

*(Auth: (i) DoPT's OM No. 27(12)EQ/94(ACC) dated 30.07.1999;
(ii) DoPT's OM No. 27(4)EQ/2014(ACC) dated 22.10.2014)*

23. Proposals requiring approval of the ACC are required to be submitted as per the ACC approved revised timelines issued vide DoPT's OM dated 22.10.2014. In case of anticipated vacancies, proposals should be submitted two months prior to the date of vacancy and in case of unanticipated vacancies, within 10 days of date of receipt of CVC clearance.

*(Auth: (i) DoPT's OM No. 28(43)EQ/2013(ACC) dated 31.07.2014;
(ii) DoPT's OM No. 27(4)EQ/2014(ACC) dated 22.10.2014)*

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25. The recommendations of the Public Enterprises Selection Board in respect of appointments to posts of Central Public Sector Enterprises specified in the Annexure to the First Schedule to the Government of India (Transaction of Business) Rules, 1961, will have to be necessarily referred to the Appointments Committee of the Cabinet by the Minister concerned after setting out his views thereon.

(Auth: DoPT's DO No. 27(8)-EQ/87(ACC) dated 25.01.1988)

26. While forwarding proposals, it shall be ensured that the proposals, complete in all respects, are duly signed/certified by an officer not below the rank of Joint Secretary of the administrative Ministry/Department. To facilitate submission of proposals for consideration of the ACC, a checklist indicating information/documents required to be furnished alongwith the said proposals has been circulated vide DoPT's OM No. 28(43)EQ/2013(ACC) dated 31.07.2014. To avoid delay in filling up of the Board level posts, the said checklist should be scrupulously followed.

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28. The Board level appointments in Schedules 'A' & 'B' CPSEs are done with the approval of ACC.

31. Respondents No.1 and 3 have categorically stated that the revised educational qualifications for the post of Director (Finance) were approved vide I.M dated 19.08.2021, wherein it was decided that preference should be given to Chartered Accountants and this should be mentioned in the Job Description. It was also decided that, save and except, the top three internal candidates who will be shortlisted based on seniority and experience, for the next lot of applicants, preference will be given, while shortlisting, to those who possess the qualification of Chartered Accountant. Relevant part of I.M dated 19.08.2021 is as under:-

“(i) Director (Finance) posts:-

With reference to all the Director (Finance) posts across CPSEs, the Board was of the view that under Qualification, preference should be given to Chartered Accountant and should also be mentioned in the JD. It was also decided that while examining the applications for shortlisting for Director (Fin) posts across CPSEs, the top 3 Internal candidates will be shortlisted based on seniority and experience provided they fulfill the mandatory experience. For the next lot of applicants' preference will be given for shortlisting to those with qualification of Chartered Accountant. Preference will be given to applicants with Chartered Accountancy in respect of Sectoral/External/SPSE/Private Sector candidates. The shortlisting of applicants from Central Government category will be governed by ACC communication dated 1/11/2018.”

32. Pursuant to the said decision, the Job Description and the eligibility criteria were finalised in consultation with Ministry of Communication, laying down the following educational qualifications, as brought forth in the counter-affidavit filed by Respondents No.1 and 3:-

“(i) *The applicant should be a Chartered Accountant or Cost Accountant or a full time MBA/PGDM course having specialization in Finance with good academic record from a recognized*



University/Institution. Preference would be given to Chartered Accountant. (ii) Officers of Organized Group 'A' Accounts Services [i.e. Indian Audit and Accounts Service, Indian Defence Accounts Service, Indian Railway Accounts Service, Indian Civil Accounts Service, Indian P&T Accounts & Finance Service and Indian Cost Accounts Service} working in the appropriate level are exempted from these educational qualifications. (iii) Further, applicants from the Central Govt./Armed Forces of the Union/All India Services, will also be exempted from the educational qualifications as per (i) above provided the applicants have 'the relevant experience' as mentioned in Para 4(iii) below. In respect of applicants from Organized Group 'A' Accounts Services/Central Government/Armed Forces of the Union/All India Services, Chartered Accountant/Cost Accountant/MBA/PGDM will be a desirable educational qualification."

33. It is this decision of giving preference to Chartered Accountants which finds reflection in the Advertisements, incorporated as a part of the eligibility conditions under the heading 'Qualification' and is extracted again hereunder for ready reference:-

"3. QUALIFICATION:

(i) The applicant should be a Chartered Accountant or Cost Accountant or a full time MBA/PGDM course with specialization in finance with good academic record from a recognized University/Institution. Preference would be given to Chartered Accountant.

(ii) Officers of Organized Group 'A' Accounts Services [i.e. Indian Audit and Accounts Service, Indian Defence Accounts Service, Indian Railway Accounts Service, Indian Civil Accounts Service, Indian P&T Accounts & Finance Service and Indian Cost Accounts Service] working in the appropriate level are exempted from these educational qualifications.

(iii) Further, applicants from the Central Govt./Armed Forces of the Union/All India Services, will also be exempted from the educational qualifications as per (i) above provided the applicants have 'the relevant experience' as mentioned in Para 4(iii) below.

In respect of applicants from Organized Group 'A' Accounts Services/Central Government/Armed Forces of the Union/All India Services, Chartered Accountant/Cost Accountant/MBA/PGDM will be a desirable educational qualification."

34. Respondents No.1 and 3 have also averred and argued that the application format advised the candidates to refer to the Job



Description of the post and the Guidelines for processing the Board Level appointments in CPSEs, which were available on the website and this position is uncontroverted. After the applications were received, indisputably the applicants were segregated into four categories, viz. internal, sectoral, external and Central Government/Private Sector/State PSEs in accordance with para (B)(8) of Chapter 2 of Guidelines dated 29.08.2017. It needs a mention at this stage that candidates were considered for shortlisting in their respective categories, in which they were placed, independent of the other categories. Therefore, at the stage of shortlisting, none of the applicants in one category were at cross-roads with those in the other category and shortlisting of one had no bearing on the other. It was only after the candidates were shortlisted that they came together on a single platform for the purpose of interview and selection. These writ petitions concern the shortlisting stage *albeit* it cannot be questioned that the shortlisting process led to and determined which candidate would proceed to the next stage of interview and thus there is a challenge to the shortlisting and appointment of Respondents No. 5 in both the writ petitions.

35. From a conjoint reading of the DoPT O.M. dated 03.03.1987, Guidelines dated 29.08.2017, PESB I.M dated 19.08.2021 and the requisite educational qualifications stipulated in the Advertisements, there is no room for doubt that a conscious decision was taken by PESB to prefer Chartered Accountants, wherever applicable and this fact was well known to the Petitioner as it was clearly stipulated in the Advertisements. There was an advisory in the application form to see the Job Description and the Guidelines before applying. Respondents



have highlighted and emphasised that the decision in I.M dated 19.08.2021 is uniformly applicable to all PSEs, to prevent any dichotomy and evolve a sound system of selection across all PSEs. The fulcrum and heart of the dispute therefore lies in the question whether the preference to a Chartered Accountant as a part of the educational qualification can be sacrificed or overlooked by inter-se seniority premised on higher pay scale/Board Level position and the answer, in my view, is an emphatic 'No'.

36. Before proceeding further, it is uncontrovertibly comprehensible to look at the principles that guide the scope of judicial review to interfere in matters related to selection processes, which would include the stage of shortlisting. In *M. Sathiya Priya (supra)*, the Supreme Court held that the question as to how the Selection Committee assesses the gradings on merits or what norms are applied in making the assessment is exclusively to be determined by the Selection Committee. In *Mehmood Alam Tariq and Others v. State of Rajasthan and Others, (1988) 3 SCC 241*, the Supreme Court succinctly brought out the ratio in *Lila Dhar v. State of Rajasthan and Others, (1981) 4 SCC 159*, where the Supreme Court had observed that it is not for the Courts to enter into an arena of minimum qualifications/ages, etc. prescribed for selection as these are matters of policy decisions and beyond the pale of interference of the Courts. It was held in *Mehmood Alam Tariq (supra)* that in matters which reflect questions of policy, judicial wisdom is judicial restraint and generally, matters of policy have little adjudicative disposition.

37. Reference may also be made to the judgment of the Supreme Court in *The Chancellor and Another v. Dr. Bijayananda Kar and*



Others, (1994) 1 SCC 169, where the Supreme Court held as follows:-

“9. This Court has repeatedly held that the decisions of the academic authorities should not ordinarily be interfered with by the courts. Whether a candidate fulfils the requisite qualifications or not is a matter which should be entirely left to be decided by the academic bodies and the concerned selection committees which invariably consist of experts on the subjects relevant to the selection. In the present case Dr Kar in his representation before the Chancellor specifically raised the issue that Dr Mohapatra did not possess the specialisation in the ‘Philosophical Analysis of Values’ as one of the qualifications. The representation was rejected by the Chancellor. We have no doubt that the Chancellor must have looked into the question of eligibility of Dr Mohapatra and got the same examined from the experts before rejecting the representation of Dr Kar.”

38. From a reading of the judgments, the inexorable conclusion that is drawn is that it is not within the domain of the Courts, in a judicial review, to adjudicate on selection processes, subject ofcourse to a caveat where it is a case of proven allegations of *malafides* or violation of Statutory Rules. It is not the decision but the decision making process which is open to judicial scrutiny by the Courts. It has been time and again reiterated in judgments that Courts are not appellate authorities over selection processes and have to show deference and consideration to the recommendations and decisions of expert bodies comprising of experts in the field. These principles will equally apply to the threshold stage of shortlisting and going by the binding dictum of the Supreme Court, judicial restraint applies with a greater vigour in interfering with norms, procedures and guidelines formulated and framed for carrying out the shortlisting/selection and/or the eligibility conditions etc. prescribed in the advertisements, which to my mind is purely the domain of the employer.



39. With this in the backdrop, this Court would now examine if the Seniority Guidelines incorporated in I.M dated 31.01.2018 can override the preference clause, independently set out under the educational ‘Qualification’ heading in the Advertisements. The Advertisements show that preferences are provided only on two counts: (a) educational qualifications by virtue of which a Chartered Accountant is to be preferred; and (b) those working in Listed Companies. There is nothing in the Advertisements which contemplates or provides for preference to a candidate based on higher pay scales and/or Board Level positions. Shortlisting on the basis of educational qualification and giving preference to a Chartered Accountant is independent of the Seniority Guidelines and is not hedged or circumscribed by any riders, caveats or pre-conditions. Emphasis on the qualification of Chartered Accountancy is writ large and luminously clear not only from the Advertisements but also from the decision in I.M dated 19.08.2021 which preceded the Advertisements. It is obvious that the educational qualifications postulated as one of the eligibility conditions were tailor made to align with the nature of the post and its functional requirements. Moreover, it is purely the prerogative and domain of an employer to decide what qualifications are to be prescribed or preferred, as perspicuously addressed and canvassed on behalf of the Respondents and it is not for the Court to examine what parameters must be preferred over the others and there is no reason why this Court should whittle down the ‘preference’ clause requiring a Chartered Accountant for the post of Director (Finance).



40. It is no longer *res integra* that prescription of qualifications for a post is a matter of recruitment policy and the employer is entitled to prescribe qualifications as a condition of eligibility. It was held by the Supreme Court in ***Zahoor Ahmad Rather and Others v., Sheikh Imtiyaz Ahmad and Others, (2019) 2 SCC 404***, that it is no part of the role or function of judicial review to expand upon the ambit of prescribed qualifications. While prescribing the qualifications for a post, the State as an employer may legitimately bear in mind several features including the nature of the job, the aptitudes requisite for the efficient discharge of duties, functionality of a qualification and the content of the course of studies which leads upto the acquisition of a qualification. All these are essentially matters of policy and judicial review must tread warily.

41. In the present case, the post in question is of Director (Finance) and PESB, tasked with the onerous duty and function of carrying out selections to the top management posts of Board Level Officers has consciously taken a decision while finalizing the Job Description to include a clause giving preference to Chartered Accountants. It needs no reiteration that the preference clause has been included keeping in mind the nature of the post, the job requirement and the functionality of the post in question and is uniformly applicable to all CPSEs. In the scope of judicial review under Article 226 of the Constitution of India, it is neither open nor appropriate for this Court to question the wisdom of PESB in taking the said decision.

42. It is equally settled that for any recruitment or selection process, the power to prescribe qualifications includes the power to prescribe additional or desirable qualifications or even stipulate a preferential



educational qualification to suit the nature of posts required to be filled. In *Surinder Singh v. Union of India and others, (2007) 11 SCC 599*, the Supreme Court held that in service jurisprudence, prescription of preferential qualification not only refers to numeric superiority but is also essentially related to better mental capacity ability and maturity to shoulder the responsibilities entrusted to the candidates after selection to a particular post and is important for efficient and effective administration. The basic object of prescribing a minimum qualification is to put a cut-off level for a particular job in accordance with the minimum competency required for the performance of that job. The object of prescribing 'preferential qualification' is to select the best amongst the better candidates who possess more competence than the others. In the said case, prescription of preferential qualification was upheld as being a more effective and efficient way of selection, with a clear assumption that a candidate possessing the same was best suited for the post in question. The Supreme Court has in the context of the word 'preference' observed that it is capable of different shades of meaning taking colour from the context, purpose and object of its use under the scheme of things envisaged.

43. Seen and examined in the context and backdrop of the posts of Director (Finance) in the present cases as well as the conscious decision of PESB to give preference to Chartered Accountant, in my view, the preference clause in the education qualification cannot be overshadowed by factors such as a higher pay scale or Board Level position, which parameters were in any case devised for a different purpose, which aspect I shall advert to hereinafter. I may also pen



down that the appointments have been made after approval by the ACC and preference to educational qualifications over pay scales/Board Level positions held by a candidate has been tested and approved.

44. The next issue requiring examination is the purpose and import of Seniority Guidelines, which is the backbone of the case of the Petitioner and relevant part of I.M dated 31.01.2018 is as follows:-

“Minutes of the I.M. dated 31.01.2018

Subject: *Determination of inter-se seniority amongst candidates of sectoral and external category of CPSE – Revision of IM decision dated 31.05.2017 regarding*

The policy of determination of inter-se seniority amongst candidates of sectoral and external category of CPSE for the purpose of shortlisting was reviewed in the Internal Meeting No. 01/18 dated 23.01.2018. In the I.M. No. 01/18, it was decided to seek comments on the proposed formulation from the stakeholders. The following formulation was uploaded for the comments on the policy regarding the subject mentioned above:

- a. *Preference will be given to applicants holding a higher pay-scale.*
- b. *If pay scale of the applicants is same then –*
 - (i) *Board level applicants will be given preference over applicants who are below the Board level.*
 - (ii) *If two Board level applicants are holding the same pay scale then*
Chairman/CMD/MD would get preference over the Director. The inter-se seniority between two or more Chairman/CMD/MD or two or more Directors will be determined with respect to date of holding the same pay scale.
- c. *The inter-se seniority of below the Board level executive holding same pay scale would continue to be determined with respect to date of holding the same pay scale. If date of holding pay scale is same, then the inter-se seniority will be determined w.r.t. date of birth i.e. older getting preference over the younger applicant.*

No comments were received within the stipulated time.



Decision:

2. *In view of above, it was decided that the inter-se seniority of the applicants for the purpose of shortlisting of executives holding the same pay scale in the sectoral/external category would hereafter be reckoned as under:-*

a. *Preference will be given to applicants holding a higher pay-scale.*

b. *If pay scale of the applicants is same then-*

(i) *Board level applicants will be given preference over applicants who are below the Board level.*

(ii) *If two Board level applicants are holding the same pay scale then Chairman/CMD/MD would get preference over the Director. The inter-se seniority between two or more Chairman/CMD/MD or two or more Directors will be determined with respect to date of holding the same pay scale.*

c. *The inter-se seniority of below the Board level executive holding same pay scale would continue to be determined with respect to date of holding the same pay scale. If date of holding pay scale is same, then the inter-se seniority will be determined w.r.t. date of birth i.e. older getting preference over the younger applicant.”*

45. From a bare perusal of the ‘subject’ of the I.M dated 31.01.2018, it is clear that it provides for determination of inter-se seniority amongst candidates of sectoral and external category of CPSEs. The decision taken in the I.M is reflected in para 2 thereof and fortifies that the purpose of the decision is fixation of inter-se seniority of applicants for purpose of shortlisting of executives holding the same pay scales in the sectoral/external category and it is in this context that Clauses (a) and (b) come in for the purpose of fixing the order of preference. It is provided that preference will be given to applicants holding a higher pay scale and where the pay scale is the same, Board Level applicants will be given preference over those who are below Board Level and so on. To this Court, there is nothing in this I.M which even remotely suggests that the pay scales/Board Level positions would regulate the shortlisting over and above the



educational qualifications prescribed in the Advertisements or that the preference clause of Chartered Accountant will be subservient to the pay scales and/or will come into the picture only when applicants have the same pay scale/position. In fact, the Advertisements while stipulating preference to Chartered Accountants or those working in the Listed companies is conspicuously silent on any preference on account of pay scales/employment status of the applicants. The only purpose and objective of the Seniority Guidelines is to interpolate the applicants in the order of seniority with the same pay scale in sectoral/external categories and in this exercise, those with higher pay scales will be placed higher in the seniority. These Guidelines cannot be stretched to override the preference clause of Chartered Accountant, which was provided to suit the requirement of the post in question. On a reading of para 2 of the I.M dated 31.01.2018 it appears that the inter-se seniority may become relevant either in a situation where in a given category of sectoral/external candidates, there is no Chartered Accountant or where there are more than one Chartered Accountant and in either of the situations, the pay scales or the Board Level positions may determine the shortlisting. It cannot, however, be held that despite the availability of an eligible Chartered Accountant, a candidate with higher pay scale will be shortlisted overlooking the preference clause in the Advertisement.

46. Therefore, this Court cannot subscribe to the argument of the Petitioner that her higher pay scale or Board Level position was a factor enough to overlook a Chartered Accountant in her category much less to question the shortlisting of candidates outside her category. This interpretation does not fall in sync with the



Advertisements or even the Seniority Guidelines as none of them envisage preference based on pay scale or posts or Board Level positions held by the applicants. Applicants are required to fulfill the criterion of having minimum pay scales and be placed in seniority on that basis but thereafter shortlisting can only be on the basis of educational qualifications and experience, as rightly canvassed by the Respondents. Emphasis on qualification of Chartered Accountancy is a thread which runs from the start of the process even before the Advertisements were issued and cannot be whittled down by this Court by giving preference to pay scales/employment status, which the Petitioner urges this Court to do.

47. There are added reasons why this Court cannot hold in favour of the Petitioner. The fact that preference will be given to a candidate possessing the qualification of Chartered Accountant was well known to the Petitioner before even applying for the posts and the applications were made with eyes open. The application format clearly advised the applicants to see the Job Description and the Guidelines dated 29.08.2017. It is thus not open to the Petitioner to now turn around and question the shortlisting process in view of the binding dictum of the Supreme Court in *Union of India and Others v. S. Vinodh Kumar and Others*, (2007) 8 SCC 100, that having participated in a selection process, a candidate cannot question the same. It also cannot be overlooked that the Petitioner neither approached the Court at the stage of shortlisting nor immediately upon the final list being published and the position that obtains today is that the selection process has gone past the shortlisting stage to a stage beyond the interview and selection stage and



selected candidates are holding the posts, after due approval from ACC.

48. Having carefully examined the stand of the Respondents with respect to the allegations of *malafide* levelled by the Petitioner, this Court is unable to agree with the Petitioner. It is stated in the counter-affidavit by Respondents No.1 and 3 that I.M decision dated 19.08.2021 precedes the filing of O.A. No.2556/2021 by the Petitioner and it is pursuant to the said decision that the clause of preference of a Chartered Accountant was incorporated in the Advertisements. The Court also finds that there are only vague allegations of *malafide* which are unsubstantiated. There are no pleadings which indicate that Petitioner has levelled allegations against any particular person in PESB who was biased against her or was favourably disposed to the selected candidates. No person has been impleaded as a party against whom allegations have been levelled pertaining to the selection process. It is trite that where *malafides* are alleged, a mere assertion or a vague statement is insufficient. Vague allegations that certain acts were done by a person in position with ulterior motive cannot be accepted without proper pleadings and sufficient proof, both of which are conspicuously absent in the writ petitions. It was held in ***Ratnagiri Gas and Power Private Limited v. RDS Projects Limited, (2013) 1 SCC 524***, that a judicial pronouncement declaring an action to be *malafide* is a serious indictment of the person concerned and can lead to adverse civil consequences against him. Courts have to be therefore slow in drawing conclusions on the allegations of *malafide* and only where there is material placed before the Court or facts are admitted leading to inevitable inferences supporting



the charge of *malafide* that the Court should record a finding to that effect.

49. Having said so, this Court is mindful of the judgment of the Coordinate Bench in *Geeta Sharma (supra)*, where the Court was persuaded to hold that Seniority Guidelines will have an overriding effect on the preferential clause of Chartered Accountant and only when two candidates are otherwise equally placed i.e. with the same pay scales and/or Board Level positions, the preference clause of shortlisting the Chartered Accountant can be invoked. I may add here that this Court was apprised during the course of hearing of these writ petitions that the judgment was challenged by AAI and is pending consideration before the Division Bench in LPA No.752/2022 *albeit* there is no stay. With all due respect to the learned Judge, I am unable to subscribe to the same view, for the reasons stated above and therefore, it would be in the interest of justice that this issue is authoritatively decided by a Larger Bench.

50. It is, however, made clear that since the writ petitions are *sub judice*, the expiry of lien of the Petitioner on 20.08.2023 will not come in her way in case she finally succeeds.

51. The following issues are framed for consideration of Hon'ble the Chief Justice, if these are to be referred for determination by a Larger Bench:-

ISSUES:-

- a) Whether preference can be given to a candidate based on higher pay scales and/or Board Level position for shortlisting the candidates for selection to the post of Director (Finance) in the absence of any such preferential



clause in the Advertisements or even in the I.M dated 31.01.2018?

- b) Can I.M dated 31.01.2018 dealing with interpolation of applicants as per their inter-se seniority premised on pay scales/Board Level positions override an exclusive clause in the Advertisement under the 'Qualification', giving preference to Chartered Accountants which finds genesis in Guidelines dated 29.08.2017 and PESB decision dated 19.08.2021 and is tailor made to suit the Job Description of the post in question?
- c) Does the conjoint reading of the preference clause pertaining to Chartered Accountant and the Seniority Guidelines lead to an interpretation that only when applicants have the same pay scales and/or Board Level positions, it is permissible to give preference to one based on his/her qualification of Chartered Accountancy?

52. The Registry is directed to place the matters before Hon'ble the Chief Justice for appropriate directions, at the earliest.

JYOTI SINGH, J

AUGUST 7th, 2023/CK/ka