

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

% *Judgment Reserved on: July 18, 2013*
Judgment Pronounced on: August 14, 2013

+ **WP(C) NO. 323/2012**

GOVT.OF NCT OF DELHI & ORS Petitioners

Represented by: Dr.Ashwani Bhardwaj, Advocate

versus

NARESH KUMAR Respondent

Represented by: Mr.Sourabh Ahuja, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR.JUSTICE V.KAMESWAR RAO

PRADEEP NANDRAJOG, J.

1. On February 20, 2009 the Commissioner of Police issued an advertisement inviting applications from eligible candidates to fill up 6141 vacant posts of Constable (Executive) Male; indicating therein that 3101 posts were unreserved, 1658, 921 and 461 posts were reserved for OBC, SC and ST candidates respectively. It was further indicated that in each category 10% posts would be reserved for ex-servicemen.

2. The respondent applied for the above post in the OBC category. Being found eligible, he appeared for the written test conducted on August 02, 2009 and cleared the same. He successfully cleared the interview held in the month of October, 2009 and vide letter dated November 11, 2009 was called for medical examination at Guru Gobind Singh Hospital, Delhi. The Commissioner of Police thereafter issued a

final select list dated December 25, 2009 in which the name of the respondent was not to be found.

3. When the selection process which had commenced pursuant to the advertisement dated February 20, 2009 was on, another advertisement was issued by the Commissioner of Police inviting applications from eligible candidates to fill up 6032 vacancies of Constable (Executive) Male on November 07, 2009. In other words, the second stage of selection commenced on November 07, 2009 pertaining to the vacancies which were notified to be filled up after the selection process had commenced for the first stage on February 20, 2009; meaning thereby should any notified vacancy of the first stage remained unfilled, the same obviously could not be said to have been carry forwarded to the second stage selection process.

4. The respondent sought information under the Right to Information Act, 2005, as to why his name was not found in the select list to which he received the information vide letter dated August 02, 2010 informing that in the OBC category the cut off marks being 66 of the last empanelled candidate notwithstanding respondent also having 66 marks was not empanelled because if two or more candidates had the same marks the one who was elder was placed above the younger in order of merit. The respondent had also sought information whether all notified vacancies in the OBC category were filled up and whether all empanelled candidates had joined, and he was informed that 18 candidates in the OBC category had not joined because their candidature was cancelled on being found involved in criminal cases and that 7 candidates had not joined. In other words information given was that 25 of the 1658 posts reserved for OBC candidates were unfilled.

5. The respondent sought an appointment letter to be issued to him by drawing attention of the Department that notified vacancies had not been filled up and there was no justification to draw up the select panel restricting the same to the number of the notified vacancies because it could be reasonably estimated that some candidates may not join and some may be found ineligible. Indeed, this had happened. 7 empanelled candidates had not joined and 18 were found unsuitable after character and antecedents verification. The Department did not pay heed.

6. Aggrieved, on December 23, 2010 the respondent approached the Central Administrative Tribunal by filing OA No.4418/2010 seeking appointment to the post of Constable (Executive) Male with all consequential benefits, pleading that he had a right to be appointed because there were 25 unfilled vacancies. Respondent also placed reliance upon a DOPT memorandum dated January 18, 1990 as per which vacancies arising within 6 months of the panel being drawn up were required to be filled up from a reserved panel and the said vacancies were not be carry forwarded to the next recruitment.

7. The respondent also sought interim relief that direction be issued to the petitioners to keep one post of Constable (Executive) Male in OBC category vacant for him pending adjudication of the OA, and vide order dated December 31, 2010, said direction was issued by the Tribunal.

8. Before the Tribunal, the Commissioner of Police took the stand that in accordance with the instructions in para 17 of the Standing Order 212/2008 (Revised), a list of 6331 candidates had been prepared and published on November 07, 2009 and said list included the names of candidates 5% over and above the number of vacancies advertised. It was pleaded that as per said instructions, the inclusion of the name in said

list was not to give any legal claim or right for final appointment; the basic purpose being to ensure that in a large recruitment drive it was desirable that such an exercise be undertaken so that vacancies did not go abegging. With respect to the cut-off marks obtained by the respondent, the Commissioner of Police stated that 234 candidates in the OBC category had secured same cut-off marks i.e. 66 and thus age was taken to be the criteria to place them as per merit position. It was however not denied that after exhausting the select list (which included 5% extra candidates shortlisted) 25 vacancies in the OBC category remain unfilled.

9. Vide impugned order dated September 27, 2011 the Tribunal has noted that 25 vacancies in the OBC category remained unfilled and the same had not been carry forwarded to the second stage recruitment process, which we note had commenced in the month of November, 2009 when the selection process of the first stage had yet to reach its destination and thus the question of said 25 unfilled vacancies being carry forwarded to the second stage selection process would not even arise.

10. The Tribunal accordingly opined that all vacancies had to be filled up from those who had qualified and as per their merit position. The contention that of the 234 candidates who had obtained same i.e. 66 marks, 71 candidates were yet to be issued letters offering appointment and most of them were elder to the respondent and hence if at all any direction could be issued the same had to be to fill up the vacancies by offering appointment to 25 candidates in order of their age i.e. those who were older to be issued the letters offering appointment has been dealt with by the Tribunal observing that those who had not approached the Tribunal had to be ignored. Accordingly, direction has been issued to

offer appointment to the respondent subject to his clearing the medical examination and police verification.

11. Aggrieved, petitioners have filed the instant writ petition.

12. A similar issue had cropped up before a Division Bench of this Court of which one of us, Pradeep Nandrajog, J. was a Member of in W.P.(C) No.477/2012. The writ petition filed by the unsuccessful candidate, Praveen Kumar was dismissed on April 03, 2013 relying upon the decisions of the Supreme Court reported as (2007) 5 SCC 572 State of U.P. & Anr. Vs. Nidhi Khanna & Anr. and (2010) 6 SCALE 126 State of Orissa & Anr. Vs. Raj Kishore Nanda. The decision reads as under:-

1. On February 20, 2009 the Commissioner of Police, Delhi got issued an advertisement inviting applications to fill up 6141 posts of Male Constables in Delhi indicating that 3101 posts were unreserved, 1658, 921 and 461 posts were reserved for OBC, SC and ST candidates respectively. It was further indicated that in each category 10% posts would be reserved for ex-servicemen.

2. As per Standing Order No.212/2008 merit list had to include names of candidates 20% over and above the number of vacancies notified, but select list prepared was of 6331 candidates.

3. 5811 candidates were appointed and the remaining vacant posts went a begging.

4. At this stage we find a calculation error in paragraph 2 of the order passed by the Tribunal wherein number of vacancies unfilled have been noted as 220; a figure which is patently wrong. The reason being : $6141 - 5811 = 330$.

5. Be that as it may, this factual error hardly matters, but is being noted lest there is a confusion with respect to the exact figure.

6. *In the same year, the next recruitment process, which has been called by the Tribunal as 'Recruitment 2009 (Phase-2)' commenced and the unfilled vacancies got carry forwarded to the second phase.*

7. *After the second phase recruitment was completed and appointments made, the writ petitioner and many others filed Original Applications before the Tribunal pointing out that their names were included in the 6331 candidates shortlisted. They raised a grievance of 330 posts being vacant. They sought a direction of being appointed to the said posts.*

8. *Petitioner's Original Application was No.2008/2010.*

9. *Of the various contentions urged by the respondents, one was that once a selection process was completed and notwithstanding posts remaining vacant, if the next selection process commenced and was completed, the previous select list expires and a belated grievance pertaining to not being offered appointment cannot be entertained.*

10. *For record we may note that on facts the respondent pleaded that pertaining to Phase-2, advertisements were issued inviting applications to fill up 6032 vacancies on November 07, 2009.*

11. *The said defence projected by the respondents has been accepted by the Tribunal as per the impugned decision dated May 04, 2011, and we find that of the 11 applicants before the Tribunal, only one – the petitioner litigates further.*

12. *We concur with the view taken by the Tribunal which finds support from, if not more, two decisions of the Supreme Court. The first is reported as (2007) 5 SCC 572 State of U.P. & Anr. v. Nidhi Khanna & Anr. Nidhi Khanna was at serial No.1 of the wait list and had an issue of one post of Lecturer in Geography, for which she had applied being vacant. By the time she raised the grievance the next phase selection process*

had commenced and another merit list prepared. The Supreme Court held that once the second stage recruitment commences, the earlier panels lapse notwithstanding vacancies available pertaining to the year of empanelment of the previous list being unfilled. The second is the decision reported as (2010) 6 SCALE 126 State of Orissa & Anr. v. Rajkishore Nanda wherein it was held that once a selection process was over and the select list had expired, vacancies carry forwarded to the next year, no relief could be granted at a belated stage.

13. Accordingly, the writ petition is dismissed but without any order as to costs.

13. It is rather unfortunate that facts noted hereinabove pertaining to the instant matter were not brought to the notice of the court earlier. There being a lack of specific averments in said regard, no light was thrown on the issue.

14. The aforesaid decision of the Division Bench of this Court was premised on the fact that the vacancies pertaining to the advertisement dated February 20, 2009 had been carry forwarded to the second stage recruitment process which commenced when advertisement inviting applications was issued on November 07, 2009.

15. The Original Application was filed by the respondent on December 23, 2010. A perusal of the counter affidavit filed on March 21, 2011 to the Original Application would reveal that on said date 25 vacancies under OBC category were unfilled and were proposed to be taken forward in the next recruitment cycle. This pleading of the petitioners would further strengthen the fact that the vacancies had not been carry forwarded.

16. In the decisions reported as 1984 (Supp) SCC 687 Prem Prakash v. Union of India & Ors., 1996 (8) SCC 637 Pilla Sitaram Patrudu & Ors. Vs. Union of India & Ors., 1998 (5) SCC 246 Surender Narain Singh Vs.

State of Bihar and 2008 (7) SCC 728 Balwant Singh Narwal & Ors. Vs. Union of India, the law declared was unless there was a valid reason not to fill up notified vacancies, all notified vacancies had to be filled up if suitable candidates were empanelled.

17. Thus, as we understand the law, unless unfilled vacancies are carry forwarded at the next selection process and in said context the vacancies lapse, all posts notified as vacant have to be filled up so long as eligible candidates are available pursuant to a selection process.

18. Accordingly, we dispose of the writ petition modifying the directions issued by the Tribunal that letter offering appointment be issued to the respondent. We direct the petitioners to fill up the 25 vacancies of Constable (Executive) Male in the OBC category by issuing letter offering appointment to the empanelled candidates who had obtained 66 marks (being the cut-off marks) strictly in order of their age, with the older one being issued the letter offering appointment and so on till the posts are filled up. Needful would be done within 12 weeks. The appointed candidates would be entitled to their seniority as per the merit position-cum-age but would not be entitled to any back wages or benefit of notional service; however they would be entitled to the benefit of stepping up of pay when they joined with reference to the pay received by their juniors.

19. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(V.KAMESWAR RAO)
JUDGE

AUGUST 14, 2013/mamta