

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

Judgment delivered on: February 11, 2015.

+ W.P.(C) 2125/2014

NAVEEN DAHIYA Petitioner

Through: Mr. Sourabh Ahuja, Advocate

versus

GNCT OF DELHI & ORS. Respondents

Through: Ms. Zubeda Begum, Standing
Counsel for GNCTD with Ms.
Sana Ansari, Advocate for Delhi
Police

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

HON'BLE MR. JUSTICE I.S.MEHTA

JUDGMENT

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KAILASH GAMBHIR, J. (ORAL)

1. Challenge in the present petition filed under Article 226 of the Constitution of India is to the order dated 06.02.2014 whereby the learned Central Administrative Tribunal, Principal Bench, New Delhi has dismissed the O.A. No. 1063/2013 preferred by the petitioner.

2. Facts essential to decide the present writ petition are that the petitioner in pursuance of an advertisement issued by the respondent – Delhi Police in the year 2010, had applied for the post of Head Constable

(Ministerial) under the OBC category. There were 499 vacancies in total, out of which 255 vacancies were earmarked for unreserved category; 142 for OBC category; 66 for SC category; and 36 for ST category. As per the petitioner, he sought no relaxation or concession available to candidates under the OBC category from the respondent.

3. The mode of recruitment for the appointment of Head Constable (Ministerial), as notified in the advertisement, was direct recruitment by holding various examinations and it was to be governed by Standing Order No.324/2009. As per the extant rules and instructions on the subject, every candidate had to undergo physical measurement and endurance test (qualifying test) for being eligible to appear for the written test. It was also laid down that the candidate securing less than 40% in the written test, (irrespective of their category) shall not be eligible for typing and computer formatting test (25 marks). The final merit list was to be prepared by the respondents by summing up the marks secured by the candidates in written and typing test.

4. The petitioner after having qualified the physical measurement and endurance test appeared in the written examination. The result of the written test was declared in June 2012 but the Roll number of the

petitioner did not figure in the list of selected candidates. The petitioner was thus not called for typing and computer formatting test and his name was also not found in the final merit list, which was prepared by the respondents by summing up the marks obtained by the candidates in the written as well as typing and computer formatting test. Between the period of 7-11.3.2013, the respondents published/uploaded three lists being the list of candidates who appeared in the written test along with their marks and lowest marks of the last selected candidates category wise for appearing in typing test; the list of provisionally qualified candidates, roll number wise and the list of candidates qualified in computer formatting test alongwith the marks obtained in written test and typing test. After having perused the result of the written examination, the petitioner was surprised to find that even after securing 72 marks he was not called for typing test, as the lowest marks of last selected candidate in OBC category were 73 marks. So far as the last selected candidate under unreserved category was concerned, the candidate had secured 71 marks, thus the petitioner had secured higher marks than the last selected candidate under the unreserved category. In this background of facts, the grievance raised by the petitioner in his OA filed before the learned CAT

was that the respondent failed to follow the mandate of the constitution envisaged under Article 16(4) of the Constitution of India by not accommodating/adjusting his candidature against the unreserved category despite the fact that he was more meritorious and secured higher marks than the last selected candidate in the unreserved category.

5. Mr. Sourabh Ahuja, Advocate representing the petitioner vehemently contended that it is a settled legal position that all the candidates irrespective of their categories will first contest for a post under unreserved category and the candidates (belonging to SC, ST, OBC) who were selected on their own merit without relaxed standards will not be adjusted against the reserved share of vacancies. So far as the reserved vacancies are concerned, the counsel contended that the same will be filled up separately from amongst the candidates belonging to reserved categories, who could not compete on their own merit from general list.

6. Counsel also contended that the policy of reservation has to be adopted/ followed at every stage of selection process and not merely at the end of the selection process as has been done by the respondents in this case. He also contended that the written examination, undertaken by

the petitioner alongwith other candidates, was not of qualifying nature as the marks secured in the written test were determinative in nature. The learned counsel for the petitioner also argued that the learned Tribunal has not appreciated the settled legal position and infact gave precedence to the Standing Order No.324/09 dated 10.12.2009 over all judicial precedents. The learned counsel for the petitioner also submitted that the learned Tribunal has ignored the mandate of the judgment in the case of ***M. Sankar v. Bharat Heavy Electricals Limited*** decided on **27.10.2006** by taking a contrary view that the 'own merit' criteria can be adopted only once in a process of selection i.e., at the end of the whole process, which the respondents have rightly adopted in this case and applying 'own merit' criteria on every stage of process of selection would create a chaos and utter confusion, which would render the next stages of the process nearly impossible (from CAT order). The learned counsel for the petitioner further submitted that even after taking this view, the learned Tribunal had directed the respondents to consider the amendment of the Standing Order No. 324/09 in the light of the judicial pronouncement in the case of ***M. Sankar (Supra)***.

7. Based on the above arguments, the learned counsel for the

petitioner submitted that the reasoning given by the learned Tribunal is not only unfounded but fallacious and against the spirit and mandate of Article 16(4) of the Constitution of India and the various judicial precedents on the subject. In support of his arguments, the learned counsel for the petitioner has placed reliance on the judgment of the Apex Court in the case of *Jitender Kumar Singh v. State of U.P. 2010(1) SCALE 358* and in the case of *M. Sankar v. Bharat Heavy Electricals Limited* by Madurai bench.

8. Ms. Zubeda Begum, learned Standing Counsel appearing on behalf of the respondents supported the reasoning given by the learned Tribunal and as per the counsel, the same deserves to be upheld by this court. She argued that the respondents have carried out the selection process strictly in compliance with the instructions contained in the Standing Order No. 324/09 and as per the process of recruitment duly notified in the public advertisement. She also argued that the criteria of 'own merit' selection has been correctly applied by them at the end of the whole selection process, when out of 230 vacancies for unreserved category, 81 had gone to OBC candidates and 10 had gone to the SC candidates, who made the grade on their own merits against the candidates in unreserved category.

She urged that the 'own merit' criteria could not be applied at every stage separately. The learned counsel for the respondent also argued that as per the laid down criteria, candidates coming within the range of merit in the written test equivalent to 5 times of the number of vacancies in any category, whether unreserved, OBC, SC, ST or Ex. Servicemen, were to be treated as qualified for appearing in the typing and computer formatting test. The petitioner who had secured 72 marks in the OBC category could compete with the last selected candidate in the OBC category. The last select candidates in OBC category had secured 73 marks and therefore, he was rightly not detailed for typing and computer formatting test. In support of her arguments, reliance was placed by the learned counsel for the respondent on the judgment of the Apex Court in *Andhra Pradesh Public Service Commission vs. Balaji Badhavath and Others reported (2009) 5 SCC 1* and the decision of the Allahabad High Court in the case of *Dhananjay Singh vs. State of U.P. and another in Civil Miscellaneous Writ Petition No. 21607 of 2009*.

9. We have heard the learned counsels for both the parties on considerable length and given our anxious consideration to the arguments advanced by them. We have also perused the material placed on record

and the judgment relied upon by the parties.

10. The aim of any civilized society should be to secure dignity to every individual. There cannot be dignity without equality of status and opportunity. The absence of equal opportunities in any walk of social life is a denial of equal status and equal participation in the affairs of the society and, therefore, of its equal membership. In the landmark case of *Indira Sawhney vs. Union of India reported in 1992 Supp (3) SCC 217*, it was held by the Hon'ble Supreme Court that the dignity of the individual is denied in direct proportion to his deprivation of the equal access to social means. The democratic foundations are missing when equal opportunity to grow, govern, and give one's best to the society is denied to a sizeable section of the society. The deprivation of the opportunities may be direct or indirect. Nevertheless, the consequences are as potent. Inequality ill-favours fraternity and unity remains a dream without fraternity. The goal enumerated in the Preamble of the Constitution, of fraternity assuring the dignity of the individual and the unity and integrity of the nation must, therefore, remain unattainable so long as the equality of opportunity is not ensured to all. The trinity of the goals of the Constitution, viz., socialism, secularism and democracy

cannot be realized unless all sections of the society participate in the State power equally, irrespective of their caste, community, race, religion and sex and all discriminations in the sharing of the State power made on those grounds are eliminated by positive measures.

11. In the present case, the parties are not at variance with regard to the basic facts of the case. The diverse stand taken by the counsels revolves around the legal principle with regard to the stage of application of “own merit” criteria. According to the counsel representing the petitioner, the principle of ‘own merit’ has to be adopted/followed at every stage of selection process as per the mandate of law whereas according to the counsel representing the respondent ‘own merit’ criteria could not have been applied by them at every stage of selection process but only at the final stage of selection.

12. The learned Tribunal found merit in the pleas advanced on behalf of the respondents and held that the ‘own merit’ can be adopted only once in a process of selection i.e. at the end of whole process and the respondent has rightly applied the same. The learned Tribunal also observed that application of ‘own merit’ criteria at every stage of selection process would perhaps create havoc and utter confusion, which

would render the selection nearly impossible. The learned Tribunal also found that the judgment of the Hon'ble Supreme Court in the matter of ***Jitender Kumar Singh (Supra)*** shall not apply to the facts of the present case and in so far as the decision in the matter of ***M. Sankar (Supra)*** is concerned, it shall not be binding in present case as standing Order No.324/09 dated 10.12.2009 was not built on the principles laid down in the said judgment. The Tribunal also gave direction to the respondents to consider amendment of the said Standing Order in the light of the judicial pronouncement in the case of ***M. Sankar (Supra)***.

13. We find a basic fallacy in the reasoning given by learned Tribunal while taking a view that it is only at the final stage of selection process that the 'own merit' criteria can be adopted. Such an interpretation taken by the learned Tribunal would defeat the very spirit and objective of the constitutional mandate envisaged under Article 16(4) of the Constitution of India.

14. Article 16(4) of the Constitution of India permits the state government to make any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the state is not adequately represented in the services in the state. The

very purpose for granting this reservation is to provide representation to those who are not adequately represented. By providing these reservations, the state extends some benefit to the candidates in reserved categories in so far as that if a candidate from a reserved category is not able to compete on his own merit from the general category, then in that event he may be given a chance to compete from the reserved category. It is thus a well settled law that every candidate will first compete on their own merit from the candidates of general category, irrespective of their own categories, however if a candidate in the reserved category is not able to make his grade in the general category then he may contest with the reserved category. Thus, the candidates of the reserved category, who are able to get selected in the general category on their own merit, shall not be counted against the quota reserved for reserved category candidates. In this context we may refer with profit to the authoritative pronouncement of the Apex Court in the land mark judgment of ***Indra Sawhney Etc. v. Union of India & Ors. (Supra)*** wherein it was held as under:

“In this connection it is well to remember that the reservations under Article 16(4) do not operate like a communal reservation. It may well happen that some members belonging to, say, Scheduled Castes get selected in the open competition field on the basis of their own merit; they will not be counted

against the quota reserved for Scheduled Castes; they will be treated as open competition candidates.”

15. In the matter of ***Ritesh R. Sah v. Dr. Y.L. Yamul & Ors., (1996) 3 SCC 253***, the question that emerged for consideration before the Apex Court was whether a candidate who belonged to the Scheduled Caste or any other reserved category could be counted against the quota meant for the reserved category even if he was entitled for selection for admission in open competition on the basis of his own merit or would he be treated as an open competition candidate. The Hon’ble Supreme court in paragraph 13 of the said decision expressed the view as under:

“13. There cannot be any dispute with the proposition that if a candidate is entitled to be admitted on the basis of his own merit then such admission should not be counted against the quota reserved for Scheduled Caste or Scheduled Tribe or any other reserved category since that will be against the Constitutional mandate enshrined in Article 16(4).”

16. In ***Jitendra Kumar Singh (Supra)***, where the matter related to the appointment on the posts of Sub-Inspector in Civil Police and Platoon Commandant in PAC through direct recruitment, the chief issue which came up for consideration before the Apex Court pertained to the extent of selection of a reserved category candidate against unreserved seat and in what circumstances a reserved category candidate can be considered

against unreserved vacancies besides reserved seat and also where a candidate of reserved category has availed relaxation meant for reserved category candidate namely fee and age, whether he will be deprived and outsourced from competing against an unreserved seat in open competition with general candidates. Upholding the view taken by the Division Bench of the High Court in the said case, the Supreme Court observed that relaxation in age and concession in fee are provisions pertaining to the eligibility of a candidate to find out as to whether he can appear in competitive test or not and the same by itself do not provide any indicia of open competition. After referring to the legal principles settled in *Indra Sawhney (Supra)*, the Court held that the reservations are a mode to achieve equality of opportunity guaranteed under Article 16(1) of the Constitution of India. Concession and relaxation in fee and age provided to the reserved category candidates are with a view to enable them to compete and seek the benefit of reservation and thus the same is merely an aid to reservation. It was further held that these concession and relaxations place a candidate at par with the general category candidate and it is only thereafter that the merit of the candidate is to be determined without any further concession in favour of the reserved category

candidate. The Court went on to add that such relaxation cannot deprive a reserved category candidate of his right to be considered as a general category candidate on the basis of own merit in the competitive examination.

17. The ratio of the said judgment of the Apex Court in ***Jitendra Kumar Singh (supra)*** fully attracts the facts of the present case, in fact the case of petitioner in the present case stands on a higher pedestal as he never availed any kind of relaxation either in age or in the fee. We are at a total loss to understand how the learned Tribunal took a view that the said judgment of the Apex Court would not attract to the facts of the present case.

18. We may also usefully refer to a judgment of the Division Bench of this Court in the case of ***Tej Pal Yadav v. Union of India & Ors., LPA 611/2010 decided on 29th November, 2010*** concerning All India Pre-Medical/Pre-Dental Entrance Examination conducted by the Central Board of Secondary Education (*in short 'CBSE'*), the grievance raised by the appellant was that he belongs to the OBC category but since he had secured 72.3% marks in the final examination, he was entitled to be considered in the general category and not in the OBC. Placing reliance

on the various judgments of the Apex Court, the Division Bench of this Court authoritatively held that where a candidate appeared as an OBC category candidate but performed extremely well, his claim should not be scuttled or smothered solely on the ground that he had taken the initial examination as an OBC category candidate because if this is allowed to be done, a general category candidate who really could not compete with OBC category candidate in the main examination would steal a march over a candidate from the OBC category. The Court further observed that the denial of right to a reserved category candidate would neither be in the public interest nor in accordance with the law laid down in the cases: ***Indra Sawhney Etc. v. Union of India & Ors., 1992 Supp (3) SCC 217, Ritesh R. Sah v. Dr. Y.L. Yamul & Ors., (1996) 3 SCC 253, R.K. Sabharwal v. State of Punjab, (1995) 2 SCC 745 and Dr. Preeti Shrivastava v. State of Madhya Pradesh, AIR 1999 SC 2894.*** Relevant para 19 of the said judgment is reproduced as under:

“19. Coming to the case at hand, a student may appear in the preliminary examination declaring that he belongs to OBC category and may qualify or may not qualify. If he does not qualify, that is the end of the road. If he qualifies, he appears in the main examination. If he does not qualify in the said examination, his right to get admission becomes totally extinct. If he qualifies within the OBC category, he may put forth his claim in that category but if he gets more marks than the general candidates, he would be justified to say that he can be

considered in the general category. As has been held in the case of **Dr. Preeti Shrivastava** (*supra*), the public interest cannot be undermined and public good cannot be sacrificed. The necessity of maintaining efficiency is also paramount. If the whole concept of reservation is understood in a holistic manner, it becomes amply clear that a candidate's appearing in the OBC category in the preliminary examination is basically at the entry level. We are inclined to think that though both the preliminary and main examinations, at a first glance, may look to be totally interconnected, yet on a deeper scrutiny, one is disposed to think that despite being apparent interconnectivity there is a subtle distinctive separation. This being the position, we are of the considered opinion that if an OBC candidate appears in the preliminary examination as an OBC category candidate and performs extremely well in the main examination, his claims should not be scuttled or smothered solely on the ground that he had taken the initial examination as an OBC category candidate. In case it is allowed to be so done, a general category candidate who really could not compete with the OBC candidate in the main examination would steal a march over him. That would not be in the public interest and also not in accord with the law laid down in the cases of **Indra Sawhney** (*supra*), **Ritesh R. Sah** (*supra*), **R.K. Sabharwal** (*supra*) and **Dr. Preeti Shrivastava** (*supra*). Further, if we allow ourselves to say so, the constitutional philosophy as well as the law laid down by the Apex Court from time to time in relation to the conceptual essentiality of reservation in medical admission, a test of trinity, namely, due regard for merit when a reserved category candidate is able to compete with a general category candidate, interest of public efficiency and public good in certain courses, and bestowing of special care to the said category so that they would come up in educational sphere are to be kept in view. Therefore, we conclude and hold that the analysis made by the learned Single Judge in this regard is not defensible."

19. Further, the Division Bench of the Madras High Court (Madurai Bench) in the case of **M. Sankar** (*Supra*) also laid down that the matter relating to employment would include every stage of the selection process

and it cannot be said that only at the time of final selection such candidate belonging to reserved category would be considered to be adjusted against the general category notwithstanding the fact that he is otherwise eligible and is not required to avail of any of the relaxations contemplated for a candidate belonging to the reserved category. Relevant paras of the said judgment are reproduced as under:

“28.It is obvious that the matter relating to employment would include every stage of the selection process and it cannot be said that only at the time of final selection such candidate belonging to reserved category would be considered to be adjusted against general category notwithstanding the fact that he is otherwise eligible and he is not required to avail of any of the relaxation contemplated for a candidate belonging to the reserved category.

29. What the BHEL should have done is to first find out whether a candidate belonging to reserved category is eligible by virtue of any relaxation applicable to reserved category. If such candidate is found to be eligible only because he has availed of some relaxation applicable only to reserved category, his application is to be considered against the reserved vacancy within the proportion of 1:18 meant for reserved category. On the other hand, if a candidate belonging to reserved category is otherwise eligible and does not require any relaxation either relating to age or relating to qualification, such a candidate is first required to be considered in the selection process relating to the general vacancy within the proportion prescribed for general category. However, if he fails to make the cut relating to general category, his candidature is still required to be considered as against the proportion of 1:18 meant for particular reserved category.”

20. In the light of the aforesaid legal principles, the ratio which we draw is that in any examination, there may be different stages. One stage

may be of Preliminary examination in the nature of qualifying examination which may comprise of some preliminary test or physical test prerequisite to enter the main competitive examination and the other of Main Competitive Test. The marks obtained in the Preliminary Examination and the Physical Test are usually not to be included for determination of Final merit. It is only when a candidate qualifies in the Preliminary Examination and the Physical Test, he become eligible to appear in the Main Competitive Test. Thus in the Preliminary Examination and the Physical Test, all the candidates will be treated with equality i.e. irrespective of their category, reserved or unreserved, and at this stage the candidates have to qualify this stage for being eligible to appear in the Main Competitive Test. After qualifying Preliminary Examination or any Physical Test, the stage is set for an open competition between the candidates belonging to all the categories, reserved or unreserved. To say that after entering the stage of Main Competitive Examination, the candidates of reserved category will compete only with the candidates of their own category would be a clear negation of rights of the reserved category candidates guaranteed under Article 16(4) of the Constitution of India. It is thus not only at the time of final selection that

the criteria of 'own merit' will be adhered to but it has to be followed at every stage of which the marks obtained by the candidate will be counted at the time of final Merit, as non-adherence of the same may result into elimination of a meritorious candidate of reserved category at the intermediate stage in comparison to the candidate of unreserved category. Thus the selection at any qualifying stage may not be category wise but once the said stage is over then certainly a candidate belonging to the reserved category cannot be debarred from competing with the candidates of unreserved category and if found more meritorious than the last candidate under the unreserved category, he must find his place in the merit list of unreserved category.

21. Adverting back to the facts of the present case. In the present case also as per the extant rules and instructions on the subject, every candidate had to undergo physical measurement and endurance test (qualifying test) for being eligible to appear for the written test. The candidate securing less than 40% in the written test, (irrespective of their category) shall not be eligible for typing and computer formatting test (25 marks). The candidates who qualify the physical measurement and endurance test shall be eligible to appear for typing and computer

formatting test (25 marks). The final merit list was to be prepared by the respondents by summing up the marks secured by the candidates in written and typing test. The petitioner in the present case was an OBC category candidate. After having qualified the physical measurement and endurance test, he appeared in the written examination. In the written examination, he scored 72 marks. The lowest marks of last selected candidate in general category were 71 marks and that of the candidate in OBC category were 73 marks. However the petitioner was not called for the typing and computer formatting test on the ground that the lowest marks of last selected candidate in OBC category were 73 marks and since he is an OBC category candidate he can contest only with OBC category candidates in the intermediary stage and the criteria of 'own merit' selection will be applied only at the end of the whole selection process and not before.

22. As has been discussed above, once the qualifying stage is over, the criteria of own merit has to be followed at every stage and not just at the final stage. In the light of the law discussed above, the order passed by the Ld. CAT dated 06.02.2014 is set aside. The Respondents are directed to let the petitioner appear for the typing and computer formatting test

and in case he is selected and has to be appointed, consequent directions are issued to the respondent to accommodate him against the next available vacancy. We also direct that the petitioner shall be given notional seniority alongwith his batchmates and his pay shall also be fixed notionally. However, the petitioner shall be entitled to pay and allowance only from the date he actually joins as a Head Constable (Ministerial) in Delhi Police.

In view of the aforesaid discussion the present writ petition and all the pending applications are disposed off.

(KAILASH GAMBHIR)
JUDGE

(I.S.MEHTA)
JUDGE

FEBRUARY 11, 2015
Pkb/v