

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

Date of hearing and order: 08th April 2015

+ W.P.(C) 4874/2014 & CM APPL. No. 9725/2014

D.S.S.S.B. & ANR.

..... Petitioners

Through

Ms. Sana Ansari, Advocate for Ms.
Zubeda Begum, Standing Counsel
for the Govt. of NCT of Delhi

versus

RAJENDRA YADAV & ANR.

..... Respondents

Through

Mr. Sitabh Ali Choudhary,
Advocate for R-1

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

HON'BLE MR. JUSTICE I.S.MEHTA

ORDER

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08.04.2015

KAILASH GAMBHIR, J. (ORAL)

1. By this Writ Petition filed under Article 226 of the Constitution of India, the petitioners seek to challenge the impugned order dated 26.09.2013 passed by the learned Central Administrative Tribunal, Principal Bench, New Delhi (*hereinafter referred to as the 'learned Tribunal'*) thereby allowing the Original Application (*in short 'OA'*) No.781/2012 preferred by respondent No.1 and directing the petitioners to consider the case of the respondent in the light of the judgment of the Hon'ble Apex Court in the case of *MCD v. Veena, AIR 2001 SC 2749*, as per his merit under the unreserved category and to appoint him to the post

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of TGT (English)-(Male) with all consequential benefits, except back wages.

2. Ms. Sana Ansari, the learned proxy counsel appearing for Ms. Zubeda Begum, the learned Standing Counsel for the Govt. of NCT of Delhi submits that the learned Tribunal failed to appreciate the fact that respondent No.1 has failed to attach the requisite caste certificate issued by the Government of NCT of Delhi alongwith his application form, therefore, his candidature could not have been considered under the reserved quota for OBC category. She also submits that the Tribunal also failed to appreciate the fact that the petitioners had considered the candidature of respondent No.1 for evaluation of his Part-II Examination under OBC category considering the fact that he was short-listed in Part-I after he was allowed the benefit of reserved category of OBC. She further submits that the candidature of respondent No.1 could not have been considered under the General category in the Part-I Examination as he had scored lesser marks than the cut off laid down for qualifying Part-I Examination under the unreserved category which was 81/200.

3. She also submits that the learned Tribunal did not appreciate the fact that relevant advertisement issued by the petitioners clearly stated that benefits of reservation will be extended to the candidates in

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accordance with the instructions, orders or circulars issued from time to time by the Competent/ Notified Authority and in the present case, respondent No.1 failed to annex the requisite caste certificate alongwith his form and after having taken the benefit of OBC category in Part-I Examination, respondent No.1 wanted to avail the benefit of unreserved category in his Part-II Examination, to which he is not entitled. Based on the above submission, she submits that the order passed by the learned Tribunal is wholly illegal and perverse and the same is liable to be set aside. The learned counsel also submits that in the facts of the present case, the decision of the Supreme Court in the case of ***MCD vs. Veena (supra)*** , would not be applicable. In support of his submissions, the learned counsel for the petitioners placed reliance on the judgment of this court in the matter of ***Deepak Kumar vs. District and Session Judge & Ors. Decided on 12th September 2012 being W.P (C) No. 5390/2012.***

4. Refuting the said submissions of the learned counsel for the petitioners, Mr. Sitabh Ali Choudhary, the learned counsel for respondent No.1 submits that the candidature of respondent No.1 should have been considered by the petitioners under the unreserved category at the stage of Part-I Examination, as Part-I was just a qualifying examination to appear in the main Examination and indisputably in that Examination,

respondent No.1 had scored higher marks than last selected candidates in the Unreserved category. The learned counsel also submits that selection of the candidates is based on the main descriptive Examination and not on Part-I Examination. The learned counsel in support of his submissions, placed reliance on the following judgments:

- i. MCD v. Veena, AIR 2001 (SC) 2740;*
- ii. Tej Pal Yadav v. Union of India, AIR 2011 Delhi 159; and*
- iii. Jyoti Yadav. Vs. GNCT, 2012 VI AD (Delhi) 669*

5. We have heard the submissions of the learned counsel for the parties and gone through the impugned order passed by the learned Tribunal.

6. The petitioner No.1 - DSSB had invited applications to fill up the post of TGT (English) Male and the total number of vacancies which were advertised for the said posts were 124 out of which 34 vacancies were reserved for Other Backward Classes (OBC). These 124 posts were later on increased to 290. The respondent No. 1 was one of the candidates, who had applied for the said post under the OBC category.

7. The respondent No. 1 was allotted Roll No.00118812 and was issued an admit Card to appear in the examination under the OBC category. As far as the instructions contained in the advertisement are

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concerned, the OBC candidates seeking benefit of reservation were required to submit the OBC certificate issued by the Competent Authority of Government of NCT of Delhi. A format was also annexed with the advertisement in the Form of declaration/undertaking, which was required to be submitted by OBC candidate. The selection process involved two separate examinations. Part I examination was of objective type for the purpose of short listing the candidates and Part II examination referred to as the descriptive examination, was for the purpose of final selection of candidates. The cut off marks for Part I examination under the unreserved category was 81/200 and under the OBC category, it was 72/100. The respondent No. 1 obtained 75 marks out of 200 marks in Part I examination and since he had scored more than 72 marks, which were the cut off marks under the OBC category, his name was shortlisted under the OBC category for the post Code 01/10. The respondent No. 1 thereafter appeared in Part II (descriptive examination) for his final selection and in this examination he had scored 113/200 marks and was shortlisted under the OBC category. The marks obtained by the last selected candidate in Part II examination in the unreserved category were 90/200 marks but since the respondent No. 1 applied under the OBC category, his candidature was scrutinised in the

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OBC category therefore, his case was considered as an OBC candidate throughout. Despite being selected after qualifying Part I and II examinations, the name of the respondent No. 1 did not appear in the final selection list and feeling aggrieved by his non selection for appointment to the said post, petitioner approached the learned Tribunal vide O.A.No. 781/2012.

8. In the counter affidavit filed by the petitioners before the learned Tribunal the petitioners disclosed that the reasons for non selection of the respondent No.1 was that he had not filed the requisite OBC certificate issued by the Competent Authority of Government of NCT of Delhi in terms of the instructions notified through the advertisement.

9. The learned Tribunal after placing reliance on the decision of the Apex Court in the case of *MCD vs. Veena (supra)*, allowed his Original Application and directed the petitioners to consider his case in the light of the said judgment of the Apex Court in *Veena's case (supra)* as per his merit under the unreserved category and then to appoint him on the post of TGT (English) (Male) with all consequential benefits.

10. The learned Tribunal premised its reasoning on the limited fact that the respondent No. 1 had scored more marks than the last selected candidate under the unreserved category and was not claiming any right

under the OBC category, therefore the respondent No. 1 deserved to be appointed to the said post.

11. The reasoning given by the Apex Court in the case of ***MCD v. Veena (supra)*** concerns those OBC candidates, who had applied as OBC candidates but did not file the requisite OBC certificates issued in their favour from the authority competent to issue the same. Such cases were to be treated in the General category and if found meritorious in the general category, such candidates should be appointed.

12. In ***Tej Pal Yadav (supra)***, the Supreme Court reiterated the same view and held that if an OBC candidate appears in the preliminary examination as an OBC category candidate and performs extremely well in the main examination, then his claim 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. Relevant para of the judgment in the case of ***Tejpal Yadav (supra)*** 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.”

13. The ratio of the various decisions of the Supreme Court and the philosophy behind them is that if an OBC candidate is found more meritorious than the candidates in the unreserved category, then he should not be denied appointment on the mere fact that he failed to file the requisite certificate issued in his favour by the Competent Authority or failed to fulfil any requirement to satisfy the recruiting authority of his being an OBC category candidate. Due regard for merit was held to be the sole test for determining whether a candidate belongs to the reserved category or unreserved category. There cannot be any dispute with regard to the said legal principles but in the facts of the present case we are confronted with a different situation. Here as per the laid down criteria for the purpose of short listing the candidates, the candidates were first required to appear in the Part I objective type examination. The cut off marks laid down for the unreserved category were 81/200 and for the OBC were; 72/100. Respondent No. 1 had scored 75 marks and since his

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case was being considered in the OBC category and he had scored more marks than the cut of marks, therefore his name was shortlisted to appear in the Part II (descriptive examination). Now, if his candidature in Part I examination is to be treated under the unreserved category, he should have obtained marks equal to or more than the cut off marks in the unreserved category. In the present case his marks are much lower than the cut off marks fixed in the unreserved category. In such a scenario we cannot hold that the respondent No. 1 is more meritorious than the candidates selected in the unreserved category in part I examination. The selection criterion is not under challenge in the present case. Once this criterion of short listing candidates was laid down under the Recruitment Rules and is adhered to, for the candidates to appear in Part I examination and Part II examination, the same cannot be ignored. The claim of the respondent No. 1 that so far as the Part I examination is concerned his case should be considered under the OBC category since under this category his marks were higher than the cut of marks fixed under the category, while in the Part II examination, his candidature should be treated under the unreserved category, as he had scored more marks in the unreserved category cannot be sustained. Certainly, the position would have been different, had the respondent No. 1 scored more marks in the

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Part I examination as laid down under the unreserved category but in the facts of the present case, the respondent No. 1 having not scored more marks in the Part I examination to compete with the candidates of the unreserved category, he cannot be given merit over the candidates of unreserved category having scored much lower marks than the cut off marks laid down under the said category.

14. In view of the aforesaid discussion, we find merit in the contentions raised by the petitioners and we are inclined to allow the present petition. Accordingly, the present petition filed by the petitioners is allowed and the impugned order dated 26.09.2013 passed by the learned Central Administrative Tribunal, Principal Bench, New Delhi is set aside.

15. No costs.

KAILASH GAMBHIR, J.

I.S.MEHTA, J.

APRIL 08, 2015
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