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

+ W.P.(C) 11739/2016

Date of Decision : 16th December, 2016

UNION OF INDIA Petitioner
Through Mr. Nawal Kishore Jha, Advocate

versus

SHREY BAJAJ AND ANR Respondents
Through Mr. Anil Singal, Advocate for R-1
Mr. Sumit K. Batra, Advocate for R-2

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J. (ORAL)

Caveat No. 1062/2016

1. Caveat will be heard when the stay application is taken up for hearing.
2. Caveat is accordingly disposed of.

CM No. 46236-37/2016

1. Exemptions allowed subject to all just exceptions.
2. The applications stand disposed of.

W.P.(C) 11739/2016 and CM No. 46235/2016

1. Staff Selection Commission vide advertisement published in the Employment News dated 16.03.2013 had invited applications for the posts of Sub Inspectors in Delhi Police and Central Armed Police Forces, Assistant Sub Inspectors in the Central Industrial Security

Force and Intelligence Officers in Narcotics Control Board. The eligibility requirement for all posts was identical i.e. graduation from a recognised University or its equivalent. The combined selection procedure comprised of a two-phased written examination, a physical endurance test, a medical examination and an interview/personality test.

2. Respondent No. 1-Shrey Bajaj, an Other Backward Class (OBC) candidate, having secured 260.5 marks, was selected and appointed as a Sub-Inspector in the Central Industrial Security Force.

3. The first respondent was not selected for the post of Sub-Inspector (Executive) in the Delhi Police as the cut off in the OBC category was 264 marks.

4. The first respondent had made an application under the Right to Information Act, 2005 and vide reply dated 09.01.2015 had learnt that 13 candidates had sought extensions of time and 11 candidates had not come forward to collect their appointment letters to the post of Sub Inspector (Executive) in Delhi Police.

5. The first respondent then learnt that the petitioner-Staff Selection Commission had failed to make a reserve panel or waiting list in case any candidate included in the first or initial list do not join. The select lists were restricted or limited to the number of post advertised and the merit cut off was accordingly fixed.

6. In the aforesaid circumstances, the first respondent had filed OA No.620/2015, which has been allowed vide order dated 05.05.2016.

7. We agree with the findings recorded by the Tribunal that the

Staff Selection Commission should have prepared a reserve panel/waiting list. The Tribunal was justified and correct in directing the Commissioner of Police to prepare a list of unfilled vacancies relating to the 2013 selection and forward the same to the Staff Selection Commission.

8. It is normal and obvious that some of the selected candidates may not join or need not be appointed. We do not see any reason or ground forthcoming to explain why the Staff Selection Commission had not prepared a waiting list or panel.

A similar issue has arisen in W.P. (C) No. 2552/2012, titled ***The Chairman, Delhi Subordinate Services Selection Board & Anr. Vs. Ms. Rajni & Ors.*** decided on 05.03.2013. The Division Bench of this court had observed:-

“7. Since every endeavour has to be made to fill up vacant posts and not filling vacant posts being an exception, to be justified on a reason, we quash the directive dated July 04,2008 and direct that henceforward the Delhi Subordinate Services Selection Board shall, apart from drawing a select panel would draw a reserve list with the life of the reserve panel being six months and within the said time, upon such empanelled candidates as per the select list who ultimately are either not issued letter offering appointment or do not accept the same, the candidates from the reserve list, in order of descending merit, would be issued letters offering appointment”.

9. In ***Shankarsan Dash v. Union Of India*** (1991) 3 SCC 47, it has been observed that successful candidates, even if there are vacancies, do not acquire any indefeasible right to appointment,

unless relevant recruitment rules, so mandate. They are only to be considered for appointment, but at the same time appointment cannot be denied arbitrarily and whimsically. In *State of Jammu & Kashmir v. Satpal* (2013) 11 SCC 737, a candidate on the waitlist was not appointed and was successful before the High Court. The Supreme Court observed that the waitlist was valid for a period of one year and the case in hand was an illustration of denial of a legitimate claim of an innocent citizen. The selected candidate higher up in the merit list had not joined despite the offer of appointment, and in such situation the respondent therein should be offered appointment against the post. It was elucidated that the waitlist would operate only after recruitment was completed for a specified post and when the offer of appointment has not been accepted, allowing room to the appointing authority to fill up the vacancy from the waitlist. The Supreme Court observed that this ratio or principle would apply when there was no administrative rule or instructions for filling up the vacancies from the waiting list. The said offer of appointment (to a 'waitlisted' candidate) could only be made if the candidate had obtained a rank which comes within the range of selection and not otherwise. Future vacancies which were not notified or included in the advertisement cannot be filled up by appointing candidates in the waitlist.

10. In *Manoj Manu & Anr. v. Union of India & Ors.* (2013) 12 SCC 171, the Supreme Court visualized two situations. Situation (A) was where candidates had initially joined but had subsequently resigned or had quit or were promoted, thus resulting in creation of vacancy again; and situation (B) arose where some of the

recommended candidates do not join at all. In situation (A) the recruiting authority may be justified in not forwarding the names from the reserved / supplementary list, as there is culmination of the recruitment process with exhaustion of notified vacancies, however, in situation (B) non-forwarding the names from the reserved or waiting list may not be justified, especially when there was a specific requisition from the appointing authority. The argument of the UPSC that there was culmination of the process with exhaustion of notified vacancies in situation (B) would not be acceptable. This Rule is subject to the right of the department concerned to ascertain and determine whether or not to fill up all or any vacancy, a discretion which can be challenged if it is irrational or arbitrary. A decision to not fill up posts or vacancies must be for valid reasons and based on sound, rational and conscious application of mind.

11. In *Manoj Manu* (supra), reference was made to *Sandeep Singh v. State of Haryana & Anr.* (2002) 10 SCC 549 and *Virender S. Hooda v. State of Haryana* (1999) 3 SCC 696, and it was observed:

“17. This Court in *Sandeep Singh v. State of Haryana & Anr.* (2002) 10 SCC 549 commended that the vacancies available should be filled up unless there is any statutory embargo for the same. In *Virender S. Hooda & Ors. v. State of Haryana & Anr.* AIR 1999 SC 1701, 12 posts for direct recruitment were available when the advertisement for recruitment was made which was held in the year 1991. Some of the selected candidates did not join in this batch almost similar to the present case, the Court held that the appellant’s case ought to have been considered when some of the candidates for reasons of the non- appointment of some of the candidates and they

ought to have been appointed if they come within the range of selection.”

Conscious of the problem that waiting lists of eligible and suitable candidates may not be maintained, and this results in delays in appointment etc., the Department of Personnel and Training has issued Memorandum No.41019/18/97-Estt.(B) dated 13th June, 2000. The Memorandum records that the UPSC, wherever possible, should maintain a reserve panel of candidates found suitable on the basis of selection made in the cases of direct recruit, etc. These candidates on the wait list would be recommended by the UPSC when the selected candidate does not join or in case he resigns or dies within six months of his joining. The Ministries/ Department were advised that whenever such a contingency arises, they should first approach the UPSC for nomination of a candidate from the reserve panel, if any, and only thereafter resort to an alternative method of recruitment. The OM also referred to the 5th Central Pay Commission's recommendation (in Paragraph 17.11 of its Report) to reduce delays in filling up of posts or vacancies in consultation with the UPSC. It was decided that whenever selection was made through the UPSC a request for nomination from the reserve list would be made in the event or occurrence of vacancy caused by non-joining or where a candidate joins but resigns or dies within one year from their date of joining. Such vacancy would not be treated as a fresh vacancy. Pertinently it was also observed that the same principle would apply when selections are made for the post through other recruiting agency such as Staff Selection Commission.

12. Candidates who appeared for selection do not have any right to claim appointment, but they must be considered for appointment in accordance with law. In the present case, the cut off merit list was restricted to the number of posts as advertised. This is obviously irrational and, therefore, would offend the OM and decisions quoted above, for no ground or reason is forthcoming not to have a panel or waiting list. The inaction and failure would be arbitrary and denies the first respondent's right of consideration. This is not fair and just to the candidates who had appeared in the selection, had qualified, and should have been appointed when the advertised vacancies were not filled but for no reserve/wait list.

13. On question being asked, learned counsel for the petitioner had submitted that they have not ascertained whether there were/are vacant posts of Sub-Inspectors (Executive) in Delhi Police. He was unable to furnish data or the number of selected candidates who had not joined as Sub-Inspectors (Executive) in the Delhi Police.

14. Learned counsel for respondent No. 1 has, on the other hand, drawn our attention to the letter dated 10.08.2016 written by the Office of the Deputy Commissioner of Police (Establishment), Delhi. This letter records that in compliance of the impugned order passed by the Tribunal dated 05.05.2016, details of cancelled candidates in 2013 examination had been intimated by them to the Staff Selection Commission.

15. Learned counsel for the petitioner submits that unfilled vacancies, which arose due to cancellation of candidature, non-appointment, etc. in 2013 recruitment, were cancelled and carried

forward to the recruitment/exam in 2016. Respondent No.2- the Commissioner of Police has not challenged the order of the Tribunal. We would not accept this contention to quash the impugned order. The petitioner was wrong in not making a reserve/waiting list/panel. The respondent No. 1 who had qualified, should not suffer for the said failure and default. Of course selection of the first respondent would depend upon the number of unfilled vacancies and number of candidates between the last selected candidate and the first respondent. The stand of the second respondent before the Tribunal was that the 2013 selection was to fill up 330 vacancies of Sub-Inspectors (Executive) in the Delhi Police through direct recruitment. The Delhi Police had issued offers of appointment to the candidates recommended by the Staff Selection Commission after completion of the selection process. In the present case the first respondent had not been recommended by the Staff Selection Commission. Furthermore, the Staff Selection Commission had not prepared the panel (waiting) list for selection against cancellation of candidature in the main list. It is in this context that the letter of the second respondent- Delhi Police dated 10.08.2016 is relevant and has been referred to. Thus, the second respondent- the Delhi Police, we believe, in principle does not have an objection.

16. With the aforesaid observation and directions, we dismiss the present writ petition. We clarify that the respondent No.1 would be eligible for consideration, if there were unfilled OBC category Sub-Inspector (Executive) posts in the Delhi Police and on the basis of marks obtained by him, as per merit, he was entitled to consideration.

The discretion whether or not to appoint, is with the Delhi Police, which we accept and believe would be exercised as per, and in accordance with, law.

17. The Staff Selection Commission must take into notice the ratio and directions of the Division Bench of the Delhi High Court in the case of *M. S. Rajni* (Supra), which are salutary and merited. Had due notice and consideration to the ratio been given, this controversy and litigation would have been avoided.

18. Copy of the order be given dasti under the signature of Court Master.

SANJIV KHANNA, J

CHANDER SHEKHAR, J

DECEMBER 16, 2016

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