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

+ W.P.(C) 9370/2015

% ***Judgment dated 15.02.2016***

MAHIPAL

..... Petitioner

Through : Mr.S.K. Rungta, Sr. Adv. with
Mr.Prashant Singh, Ms.Kirti Kumar and
Ms.Pratiti Rungta, Advs.

versus

HIGH COURT OF DELHI THROUGH
REGISTRAR GENERAL & ANR

..... Respondents

Through : Mr.Rajiv Bansal and Ms.Arпита, Advs. for
respondent no.1.
Mr.Vikramaditya, Adv. for Mr.Sanjay
Ghose, Adv. for respondent no.2.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI J, (ORAL)

1. Present petition has been filed by the petitioner under Article 226 of the Constitution of India seeking the following directions:

“A. *Allow this petition;*

B. Issue a writ of certiorari or any other appropriate writ order or direction thereby calling for the records relating to the selection for Delhi High Judicial Service Examination 2013 against advertisement dt. 30.12.13 notifying 14 vacancies for appointment to the said service out of which 10 vacancies were for general category candidates, examine the same and declare that petitioner is entitled to be appointed against one of the 10 vacancies notified for general category candidates on the basis of his rank no.10 in general category merit list and also being a general category candidate.

C. Issue a writ of prohibition or any other appropriate writ order or direction thereby restraining the respondents from withholding the appointment of the petitioner to one of the 10 vacancies notified for general category candidates to Delhi Higher Judicial Service Examination 2013 against the said advertisement under the garb of judgment and order of their lordship dt. 25.3.2014 passed in W.P.(C) 983/2014 and instead directing the respondent to notify 3 vacancies as reserved for physically handicapped out of 5 admitted vacancies lying vacant in the said service and not to take away the 10th vacancy notified in the advertisement in question for filling up the reservation quota of persons with disabilities.

D. Issue a writ of mandamus or any other appropriate writ order or direction thereby directing the respondents to appoint the petitioner against one of the ten (10) vacancies notified in the advertisement in question for general category candidates on the basis of his rank ten (10) in the general category candidates.”

2. The necessary facts, to be noticed for disposal of the present writ petition, are that pursuant to an advertisement published by respondent no.1 on 30.12.2013 for filling up of 14 posts of Delhi Higher Judicial Service (10 posts for General category candidate, 01 post for Scheduled Caste candidate and 03 posts for Scheduled Tribes candidate, the petitioner submitted his candidature for the aforestated post in the General category. The petitioner appeared in the preliminary written test. Upon being declared successful in the preliminary written test vide notice dated 30.5.2014, the petitioner was provisionally admitted for the Main examination. The petitioner thereafter appeared in the Main examination. Petitioner was declared successful and short listed for viva voce vide notice dated 19.12.2014. The petitioner was also called for interview vide Memorandum dated 2.5.2015. The result of the interview was declared on 20.7.2015, wherein the petitioner attained tenth rank in the General

Category.

3. Meanwhile, a person with a locomotor disability filed a writ petition being W.P.(C) 983/2014, titled as *Nishant S. Diwan v. High Court of Delhi Through: Registrar General and Anr.* in the Delhi High Court against respondent no.1 challenging the said aforestated advertisement on the ground that it did not provide reservation to the persons with disabilities in terms of Section 33 of the Persons with Disabilities Act, 1995. W.P.(C) 983/2014 was disposed of by an order dated 25.3.2014 wherein respondent no.1 was directed to earmark one of the advertised posts for disabled candidates in terms of 3% quota under the Disabilities Act and not to fill it up in the present recruitment process. The Office Memorandum dated 29.12.2005, whereby the Government of India issued consolidated instructions for implementation of scheme of reservation for persons with disabilities, was amended on 6.1.2015. After declaration of final result vide notice dated 20.7.2015, the respondents had issued letter of offer of appointment to only nine candidates in General Category, as ten posts in General Category was reduced to nine posts in pursuance to the directions passed in *Nishant S. Diwan* (supra).
4. Mr.Rungta, learned senior counsel appearing on behalf of the petitioner, submits that on 30.12.2013 when the advertisement for the aforestated 14 posts was published by respondent no.1 no candidate with locomotor disability was available and, thus, the tenth seat should have been filled up. Senior counsel further submits that in the next year's recruitment process the directions contained in the judgment of the Division Bench can well be complied with and the quota for disability candidate can be filled up and the petitioner should not be deprived of the tenth vacancy, which is still available.
5. Mr.Bansal, learned counsel for respondent no.1, submits that the present

writ petition is not maintainable as under the directions of the Division Bench in the case of *Nishant S. Diwan* (supra) the tenth vacancy was taken away and it was notified that only nine vacancies would be available for General Category candidates. Since the number of vacancies was reduced at a subsequent stage, the relief so sought cannot be granted. Mr.Bansal further submits that notification for the subsequent year for Delhi High Judicial Service Examination-2015 has already been issued on 18.12.2015 and published on 22.12.2015, a copy whereof has been handed over in Court today. It is contended by Mr.Bansal that once the notification for the following year has already been published, the present petition should not be entertained as all the existing vacancies have now been carried forward in the next year.

6. We have heard learned counsel for the parties and considered their rival submissions. The undisputed facts of this case are that in the year 2013 a total number of 14 vacancies for the posts in Delhi Higher Judicial Service were advertised by respondent no.1, out of which ten vacancies were with respect to General Category candidates, three vacancies were for the Scheduled Tribe candidates and one vacancy for the Scheduled Caste candidates. It is not in dispute that the petitioner stood at 10th position after clearing Preliminary written test, Main examination and interview. But no letter of offer of appointment was issued to the petitioner in view of the fact that the number of vacancies in the General Category were decreased from 10 to 9 as per the subsequent notification issued by the Delhi High Court, which was issued in compliance of the directions passed by this Court in *Nishant S. Diwan* (supra). It will be useful to reproduce the observations made in the case of *Nishant S. Diwan* (supra):

“21. In these circumstances, this Court is of the opinion that the most appropriate method of proceeding with this exercise is to direct the respondents to earmark one of the advertised posts for disabled candidates in terms of the 3% quota under the Disabilities Act and not fill it up in the present recruitment process. Once the recruitment process is completed and the appointments are made, depending upon the further number of vacancies which may exist at the stage of declaration of results, the respondents should carry-out a review of the balance number of vacancies that can be appropriately earmarked for those with disabilities, club them with the post directed to be kept apart and proceed with the next recruitment process, clearly indicating the total number of vacancies earmarked under the 3% quota. In the event the respondents are not in a position to advertise all the vacancies, it shall endeavour to at least carry-out a special recruitment procedure in respect of only the earmarked vacancies falling to the share of those entitled to be considered under the 3% quota under the Disabilities Act, within one year of the date of declaration of results in the current recruitment process. A direction is accordingly issued to the respondents to carry-out the exercise and complete the special recruitment drive after following the steps indicated above.”

7. Vide notice dated 30.05.2014, respondent no.1 informed the candidates that the 10 vacancies for General Category stood reduced to 9 in view of the judgment of the Division Bench titled *Nishant S. Diwan v. High Court of Delhi*. The Note 3 issued, reads as under:

“3. Although, in the advertisement issued for the aforesaid examination, 10 vacancies for General category have been notified, however, in view of the judgment of a Division Bench of Delhi High Court passed in WP(C).983/2014 titled ‘Nishant S. Diwan Vs. High Court of Delhi’, the final selection would be made for 09 candidates only for General category.”

8. We may note that the matter was adjourned at the request of the petitioner to enable the petitioner to seek clarification from the Division Bench which has passed the order in the case of *Nishant S. Diwan* (supra). The

clarification application was dismissed by the Division Bench with the following order:

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The clarification sought is in respect of barely interpretation of the judgment in the manner the vacancies are to be worked out. In the opinion of the Court not only does this amount to review but in a sense agitating an independent cause of action, which this Bench is not competent to deal with. It is also seen that the present applicant was not the party in the original writ petition. The application is consequently dismissed.”

9. Reading of the directions contained in the case of *Nishant S. Diwan* (supra) would show that the Court was of the opinion to direct the respondent to earmark the advertised post for disabled candidates in terms of the 3% quota under the Disabilities Act and not to fill it up under the present recruitment process. In view of this clear-cut direction that one post was not to be filled up, the High Court by notice dated 30.05.2014 informed the candidates that the final selection would be made for 9 candidates only for General Category. Once the number of vacancies in the General Category stood reduced from 10 to 9, the prayer made in this writ petition cannot be entertained as admittedly, the petitioner stood at 10th rank and since the number of vacancies in the General Category stood reduced from 10 to 9, irrespective of the fact whether the 10 vacancy was filled up, the petitioner could not be considered for appointment under the General Category. The Division Bench has further clarified that once the recruitment process is completed and the appointments have been made and upon further number of vacancies which may exist at the stage of declaration of results, the respondent should carry out a review of the balance number of vacancies that can be appropriately earmarked for those with disabilities and club them with the

post to be kept apart and proceed with the next recruitment process. Based on these directions, the post kept vacant under the disabilities quota has been carried forward in the next recruitment year.

10. In the case of *Mukul Saikia & Ors. v. State of Assam & Ors.*, reported at AIR 2009 SC 747, this Court has held as under:

"13.if the requisition and advertisement was only for 27 posts, the State cannot appoint more than the number of posts advertised". The Select List "got exhausted when all the 27 posts were filled". Thereafter, the candidates below the 27 appointed candidates have no right to claim appointment to any vacancy in regard to which selection was not held. The "currency of Select List had expired as soon as the number of posts advertised are filled up, therefore, the appointments beyond the number of posts advertised would amount to filling up future vacancies" and said course is impermissible in law.

14. In view of above, the law can be summarised to the effect that any appointment made beyond the number of vacancies advertised is without jurisdiction, being violative of Articles 14 and 16(1) of the Constitution of India, thus, a nullity, inexecutable and unenforceable in law. In case the vacancies notified stand filled up, process of selection comes to an end. Waiting list etc. cannot be used as a reservoir, to fill up the vacancy which comes into existence after the issuance of notification/advertisement. The unexhausted select list/waiting list becomes meaningless and cannot be pressed in service any more.

15. In the instant case, as 13 vacancies of the General Category had been advertised and filled up, the selection process so far as the General Category candidates is concerned, stood exhausted and the unexhausted select list is meant only to be consigned to record room."

11. We are of the view that no relief can be granted to the petitioner for the reasons, firstly, that in terms of the directions passed in the case of *Nishant S. Diwan* (supra), the posts under the General Category was reduced from 10 to 9; secondly, the judgment rendered in the case of

Nishant S. Diwan (supra) was not assailed, (although according to the petitioner, he has not assailed the said judgment as he was not a party, but his rights were directly affected) which attained finality; thirdly, if the vacancies stood reduced from 10 to 09 under General Category then even if the petitioner is eligible he could not have been a successful candidate, as the first nine candidates stood at a better position than the petitioner; fourthly, the Division Bench held that in case even after the reduction and keeping one vacancy for the disabled, the vacancy not filled up, it is to be kept apart and was to be included in the next recruitment process; and lastly, the next recruitment process has already commenced and an advertisement has been published during the pendency of the writ petition.

12. Resultantly, the present writ petition is dismissed.

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13. In view of the judgment passed in the present petition, the application stands dismissed.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

FEBRUARY 15, 2016

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