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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(C) 338/2016

JAGDISH KUMAR & ANR

..... Petitioners

Through: Mr.Sudarshan Rajan, Mr.Arjun
Gaahoke, Mr.Archit Arora, Advs.

versus

UNION OF INDIA & ANR

..... Respondents

Through: Mr.Ashok Singh, Adv. for R-2
Mr.Rajeshwar Singh, Adv. for R-1

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

ORDER

% **25.04.2017**

1. The present petition has been filed with the following prayers:-

“In the above mentioned facts and circumstances, it is most respectfully prayed that this Hon’ble Court may be graciously pleased to:

- a. issue an appropriate writ directing the respondents to accord relaxations to Schedule Caste and Schedule Tribe candidate in their evaluation for appointment to various posts in the respondent No.2 organization in the selection to the posts of Senior Manager (MPLS) and Deputy Manager (MPLS) in the selection for the said posts as per the advertisement notified through file No. RCIL/2013/P&A/44/19;*
- b. Direct the respondents to make appropriate changes in the selection process and rules including the Rail Tel Induction Seniority*

and promotion Rules, 2012 whereby appropriate provisions are made for according appropriate relaxations in standards of evaluation of reserved candidates strictly in consonance with Article 16(4) and 335 of the Constitution of India r/w various administrative instructions issued by the Govt. of India from time to time;

c. In consonance to prayer (a) direct the respondent to reconsider the case of the applicant and all other reserve candidates for appointments to various pots under the advertisement annexed to the present petition and thereafter, pass fresh orders/issue fresh selection list on the basis of such changed standards of selection.

d. Pass such other or further order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

2. Some of the facts relevant to decide the writ petition are, the petition has been filed by two petitioners. It is their case that the Government of India created an Autonomous Body called Rail Tel Corporation of India Ltd. (respondent No.2 herein) under the Ministry of Railways. The respondent No.2 Organization primarily follows the Rules and Regulations, as applicable to the Government of India for the purpose of recruitment. The respondent No.2 herein advertised for appointment to various Executive Posts including the posts of Senior Manager (MPLS) and Deputy Manager (MPLS). Out of two posts of Senior Manager advertised, one was reserved for Scheduled Tribe candidate. Similarly, out of eight posts of Deputy

Manager advertised, two posts were earmarked and reserved for Scheduled Tribe candidates. It is averred in the writ petition that the advertisement provided for relaxation of age for such reserved candidates but the same did not provide for any kind of relaxation in the marks required to be obtained by reserved candidates as compared to General candidates.

3. The petitioner No.1 applied for appointment to the post of Senior Manager (MPLS) and was duly called for written examination. Similarly, petitioner No.2 also applied for appointment to the post of Deputy Manager (MPLS) and was also called for the written examination. The petitioners were called for interview on December 11, 2014 and December 13, 2014 respectively. It is their case that no candidate was selected for appointment to the post of Senior Manager (MPLS). Similarly, against eight vacancies of Deputy Manager only two persons were selected for appointment. It is averred that the petitioner No.1 filed a RTI application, wherein he was informed that 60 marks in cumulative in written examination and interview was the qualifying criteria for empanelment. It is also stated that the Rail Tel norms prescribing qualifying marks for final selection does not prescribe relaxation in qualifying marks for SC/ST/OBC.

4. It is contended by Mr. Sudershan Rajan, learned counsel for the

petitioners that the constitutional commitment of prescribed percentage of reservation for Scheduled Caste and Scheduled Tribe has been totally ignored while filling up the posts by the respondents. He states, though the requisite number of vacancies were earmarked by rigid evaluation and without relaxation, none of the candidates have been selected against the reserved posts thereby stultifying the Rule, Intent and Purpose of reservation and relaxation thereof. He states, that the petitioners have secured 58 marks, which is two marks less than the prescribed for the General candidates. According to him, this is contrary to the mandate of Article 16(4-A) read with Article 335 of the Constitution of India. He states that the proviso to Article 335 specifically provides for relaxation in qualifying marks for Scheduled Caste and Scheduled Tribe candidates. As long as this proviso continues to be in the Constitution, every Government organization including the respondent No.2 is duty bound to keep in view the aforesaid provisions of the Constitution and ensure adequate representation of reserved candidates. He also draws my attention to the instructions issued to the Ministry of Home Affairs dated July 25, 1970, which provided that in case adequate number of SC/ST candidates are not available, even after the selection process, adequate steps could be taken in order to relax the

standards of qualification and thereby ensuring adequate representation of SC/ST candidates in Government service without compromising the efficiency standards as provided under Article 335 of the Constitution of India. He would also refer to OM dated December 23, 1970 to contend that it was clarified that the concession would not only apply to the direct recruitments but also to promotion and confirmation. He states, a similar OM was also issued on October 17, 1986, which also emphasised the importance of adequate representation of SC/STs in the Government service. According to him, the petitioners made representations dated July 7, 2015, July 9, 2015 to the respondents to consider relaxation in evaluation of marks obtained by them as provided for in the relevant Rules but the request has not been acceded to.

5. It is also his submission, by drawing my attention to pages 36 and 44 that when the respondent No.2 has granted relaxation in upper age limit for SC/ST/OBC/PWD, there is no reason why the provisions of lower qualifying marks should not be implemented in favour of the petitioners. In support of his contention, he would rely upon the judgments of the Supreme Court reported as *(1986) 2 SCC 679 Comptroller and Auditor General of India, Gian Prakash, New Delhi and another v. K.S. Jagannathan and*

another; (1997) 9 SCC 199 Superintending Engineer, Public Health U.T. Chandigarh and others v. Kuldeep Singh and others; (2014) 8 SCC 872 Rohtas Bhankhar and others v. Union of India and another.

6. On the other hand, it is the case of the respondent No.2 that the petitioners having applied to the posts in question pursuant to the advertisement issued by the respondent No.2 and taking part in the recruitment process, are estopped from challenging the process of selection. It is also stated that Article 16(4) is not a mandatory but only an enabling provision and no Organization/Department/State can be forced to implement the said provision. In other words, no writ of mandamus can be issued directing the respondent No.2 to make provisions for reservation. It is also stated that the respondent No.2 is a Public Sector Undertaking in the field of Telecom Infrastructure with huge network of Optical Fibre Cable spread across the length and breadth of the Country. The activity of the respondent No.2 is highly technical and cannot afford to make any compromise on merit and therefore the relaxation in marks for recruitment has not been provided.

7. A plea of non-joinder of necessary parties has been taken, inasmuch as the candidates, who are likely to be affected by the outcome of the present writ petition, have not been impleaded as parties. It is also stated that

Article 335 of the Constitution states that efficiency has to be ensured. That apart, it is stated that OM dated July 25, 1970 itself says that the Authority has the discretion to select the candidates having lower position provided that the minimum standard of maintenance in efficiency has been reached. Similar is the submission with regard to OM dated October 17, 1986. It is the stand of the respondent No.2 that the petitioners had no objection to the Rules when they appeared in the examination. They are estopped from challenging the same, being unsuccessful. In other words, it is their case that the respondent No.2 has its own Rules and Regulations. The advertisement did not provide for relaxation in marks. The petitioners have not challenged the said advertisement on the ground that it did not provide the relaxed standards.

8. Mr. Ashok Singh, learned counsel for the respondent No.2 would reiterate the stand taken by the respondent No.2 in its counter-affidavit. He would, in support of his submission, states that this Court would not direct the respondents to provide relaxed standards/lower qualifying marks to the petitioners in the selection process, in which they have participated. He would rely upon the judgments of the Supreme Court reported as **(2010) 1 SCC 477 Gulshan Prakash (Dr.) and others v. State of Haryana and**

others; (2009) 5 SCC 545 Nair Service Society v. Dr. T. Beermasthan and others and (2009) 5 SCC 1 Andhra Pradesh Public Service Commission v. Baloji Badhavath and others, in support of his submissions.

9. Having heard the learned counsel for the parties, the only question, which arises for consideration is whether the petitioners are entitled to the relief as prayed for in the petition, inasmuch as, for a direction to the respondents to accord relaxation to SC/ST candidates in their evaluation for appointment to the post of Senior Manager (MPLS) and Deputy Manager (MPLS) in respondent No.2 Organization. There is no denial to the fact, the advertisement issued by the respondent No.2 contemplated relaxation in upper age limit to be given to SC/ST/OBC/PWD candidates. There is also a provision for granting reservation to SC/ST/OBC/PWD candidates but there is no provision in the advertisement that there would be lower qualifying marks for SC/ST candidates. The petitioners admittedly have not challenged the advertisement on that ground. That apart, the stand of the respondent No.2 that Policy / Recruitment Rules provided that the qualifying marks for written test and interview as 60%. In other words, the Policy / Recruitment Rules of respondent No.2 does not prescribe lower qualifying marks shall be provided for SC/ST candidates and the reason for providing such a criteria,

as per respondent No.2, is that the respondent No.2 being in the field of Telecom Infrastructure with huge network of Optical Fibre Cable spread across the length and breadth of the Country and the activity of the respondent No.2 is highly technical and cannot afford to make any compromise on merits and therefore the relaxation in marks for recruitment has not been provided, is appealing.

10. The plea of Mr. Rajan, relying upon the judgment of the Supreme Court in the case of *Comptroller and Auditor General of India (supra)* by referring to paras 21, 22, 37, 39 and 40, that relaxed or lower qualifying standards must be fixed and made known to the candidates before examination and the Supreme Court had actually granted relaxation of 25 marks is concerned, I refer to the relevant paras 39 and 40 as under:

“39. In the result, this Appeal must fail. The Division Bench of the Madras High Court has, however, contented itself with issuing directions to the Appellants to consider the case of the Respondents and grant suitable relaxation to them within two months from the date of its judgment as to whether they had qualified in Part II Examination of the SAS held in December 1980 and while granting such relaxation to bear in mind the observations made in its judgment as also the criteria envisaged in the said Office Memorandum dated January 21, 1977. The Division Bench did so because it felt that it could not straightaway declare the Respondents as having passed the said examination. The judgment of the Division Bench of the Madras High Court was given on January 12, 1984. More than two years have elapsed since then. In the meantime the Appellants have approached this Court by obtaining Special Leave to Appeal and have

obtained interim stay of the execution of the order of the Division Bench. This interim stay has now obviously come to an end. Further examinations, however, must have been held in the mean time. In view of the order of interim stay, they must have been held on the same basis as the December 1980 Examination. The Respondents had appeared in Part II of the SAS Examination in December 1980 and, therefore, to give the same or similar directions as were given by the Division Bench of the Madras High Court would result in further delay and would perhaps result in a fresh writ petition. Further, such directions cannot be given only with respect to the Respondents because there may be other candidates belonging to the Scheduled Castes and the Scheduled Tribes who are similarly situated nor can such directions be confined merely to the December 1980 examination. They also should not jeopardize those who have already been promoted for none of them are parties to this Appeal. It is, therefore, necessary that in order to do complete justice to all concerned as required by Article 142 of the Constitution, the matter should not be left to the Comptroller and Auditor-General of India but all requisite directions should be given by this Court.

40. For the reasons given above, we dismiss this Appeal and confirm the judgment of the Division Bench of the Madras High Court in Writ Appeal No. 409 of 1982, but we substitute the following Order for the order passed by it in the said Writ Appeal :

For Part II examination of the Subordinate Accounts Service Examination (Ordinary) and all subsequent Part II examinations of the Subordinate Accounts Service Examination (Ordinary) held thereafter until today there will be a relaxation of 25 marks in all for candidates belonging to the Scheduled Castes and the Scheduled Tribes, that is, this relaxation will cover not only the pass marks to be given in the aggregate but will be inclusive of the pass marks to be given in each individual paper so that the total number of marks covered by such relaxation will not exceed 25. The Respondents and all other candidates belonging to the Scheduled Castes and the Scheduled Tribes who will pass the said examinations as a result of the above relaxation are declared to have passed such examinations and to have been promoted to the Subordinate Accounts Service in the vacancies

reserved for the members of the Scheduled Castes and the Scheduled Tribes with effect from the date when the final declaration of the results of each such examination was made and will be paid such salary and shall be entitled to all other benefits on the basis of such promotion with effect from the said date. So far as seniority is concerned, however, they will not rank above those who have already passed and have been promoted but will be placed in the seniority list after all those who have passed in Part II of the Subordinate Accounts Service Examination (Ordinary) held so far, ranking inter se according to the rules relating to seniority set out in paragraph 184 of Volume I of the Comptroller and Auditor General's Manual of Standing Orders (Administrative).

In respect of all subsequent examinations to be held for the Subordinate Accounts Service, the Comptroller and Auditor-General of India will fix a relaxed or lower standard in advance and notify it to the candidates who are going to appear for such examination. In fixing such standard, he will bear in mind the observations made in this Judgment and what has been held therein.”

11. Suffice to state, the direction of the Supreme Court in ***Comptroller and Auditor General of India v. Kuldeep Singh (Supra)*** was in exercise of its power under Article 142 of Constitution of India. Further the Supreme Court in its judgment reported as ***(2003) 9 SCC 294 Union of India v. R. Rajeshwaran***, wherein a direction was sought for to apply the Rule of reservation to Scheduled Castes and Scheduled Tribes in respect of those seats, which are set apart for All India Pool in MBBS/BDS list, the Supreme Court in paras 9 and 10, has held as under:-

*“9. In **Ajit Singh (II) v. State of Punjab**, this Court held that Article 16(4) of the Constitution confers a discretion and does not create any constitutional duty and obligation. Language of Article 15(4) is identical and the view in **Comptroller and Auditor General of India, Gian Prakash v. K.S. Jagannathan** , and **Superintending Engineer, Public Health v. Kuldeep Singh**, (1999) 9 SCC 199, 1997 SCC (L & S) 1044 that a mandamus can be issued either to provide for reservation or for relaxation is not correct and runs counter to judgments of earlier Constitution Benches and, therefore, these two judgments cannot be held to be laying down the correct law. In these circumstances, neither the respondent in the present case could have sought for a direction nor the High Court could have granted the same.*

10. Hence we allow the writ appeal transferred to this Court and set aside order made in the writ petition. The appeal also shall stand disposed of accordingly.”

12. The aforesaid reveals, the Supreme Court in ***Union of India v. R. Rajeshwaran***, referring to ***Ajit Singh (II) v. State of Punjab*** (1999) 7 SCC 209 held that the view of the Supreme Court in ***Comptroller and Auditor General of India (supra)*** that a mandamus can be issued either to provide for reservation or relaxation is not correct and runs counter to judgments of earlier Constitution Benches and therefore these two judgments cannot be held to be laying a correct law.

13. That apart, the reliance placed by Mr. Rajan on the judgment of the Supreme Court in *Superintending Engineer, Public Health U.T. Chandigarh and others vs. Kuldeep Singh (supra)* is concerned, there the Supreme Court was concerned with the facts wherein the respondent belonged to Scheduled Caste and was eligible for promotion as Head Draftsman. For promotion to the said post, the petitioners therein had appointed one Mr. Ravinder Kumar Sood on March 30, 1988 and Mr. Dharam Nand on March 14, 1989. The respondent had challenged their promotion and non-consideration of his case claiming that he was eligible to be considered for the post as a reserved candidate though the post was meant for Scheduled Tribe. By order of the Government of India, the posts are inter-changeable between Scheduled Caste and the Scheduled Tribe and if the candidate belonging to Scheduled Tribe is not available, the eligible candidate belonging to Scheduled Caste is entitled to be considered for promotion to the post reserved for Scheduled Tribe Candidate. The Central Administrative Tribunal accepted the contention of the respondent and allowed the petition. The Supreme Court considering the aforesaid facts and referring to its judgment in *Comptroller and Auditor General of India (supra)* has upheld the judgment of the Tribunal. The Supreme Court held

that the appointment to an office or post under the State is one of the policies of the State to accord socio- economic justice as part of social justice for integration of Scheduled Castes and Scheduled Tribes in the social mainstream and also dignity of person and equality of status. It would be an opportunity to improve excellence, a fundamental duty. In the light of Article 16(4A) introduced by the Constitution, the claims of the Scheduled Castes and the Scheduled Tribes for promotion shall be taken into consideration in making appointment or giving promotion. It is the constitutional duty coupled with power of the authorities implementing the rules of recruitment including promotion. Suffice to state, the Supreme Court in *Superintending Engineer, Public Health U.T. Chandigarh and others vs. Kuldeep Singh (supra)* was concerned with an issue, when orders of the Government of India relating to interchangeability between Scheduled Castes and Scheduled Tribes, the same need to be given effect to.

14. It is the submission of Mr. Rajan that the Constitution Bench of the Supreme Court in *Rohtas Bhankhar and others (supra)* has upheld the ratio of its judgment in the case of *Superintending Engineer, Public Health U.T. Chandigarh and others v. Kuldeep Singh (supra)*, which in turn has relied upon and upheld the judgment in the case of *Comptroller and Auditor*

General of India (supra). In other words, it is his submission that the judgment of the Supreme Court in *Comptroller and Auditor General of India (supra)*, still holds the field and a direction/mandamus can be issued to provide reservation or for relaxation. This submission of Mr. Rajan is on a misreading of the judgments referred to by him, as noted above.

15. Suffice to state, the Constitution Bench of the Supreme Court in *Rohtas Bhankhar and others (supra)*, in paras 8 and 9 has held as under:-

“8. We do not think, it is necessary for us to deal with the width and scope of Article 16(4A) any further. Insofar as Kuldeep Singh is concerned, we find that the matter was decided by this Court having regard to the constitutional provision contained in Article 16(4A). The view taken by this Court in Kuldeep Singh is in accord with constitutional scheme articulated in Article 16(4A). On the other hand, in S. Vinod Kumar, the Court failed to consider Article 16(4A). As a matter of fact, Article 16(4A) was inserted in the Constitution to undo the observations in Indra Sawhney that there can not be dilution of standards in matters of promotion.

9. We are in respectful agreement with the decision in Kuldeep Singh and approve the same. Ordinarily, we would have sent the matter to the Regular Bench for disposal of the matter but having regard to the nature of controversy and the fact that the Central Administrative Tribunal, Delhi (for short “the Tribunal”) has followed S. Vinod Kumar¹ which is not a good law and resultantly 1997 O.M. is also

illegal, in our view, the agony of the appellants need not be prolonged as they are entitled to the reliefs.”

16. The Supreme Court in ***Rohtas Bhankhar and others (supra)*** was not concerned with an issue as to whether a direction/mandamus can be issued to provide for reservation or relaxation of the qualifying marks for reserved category candidates but was concerned with the legality of OM dated July 22, 1997 whereby the instructions contained in the OM dated December 23, 1970 were withdrawn. The Supreme Court declared 1997 OM as illegal. It was in the context of Article 16 (4-A), the Supreme Court in ***Rohtas Bhankhar (supra)*** has agreed with the view taken by it in ***Superintending Engineer Public Health v. Kuldeep Singh (Supra)***. This I say so, because in ***Superintending Engineer Public Health v. Kuldeep Singh (Supra)*** the Supreme Court was concerned with an issue where the petitioners therein violated their own order of inter-changeability between the Schedule Castes and Scheduled Tribes. In other words, despite providing inter-changeability they have not followed the same. It is not such a case in this petition, as the Respondent No.2 has not provided relaxation of marks in their Policy / Recruitment Rules. If that be so, the ratio of the judgment in ***Gulshan Prakash (Dr.) and others (supra)***, wherein the Supreme Court in paras 22, 29 and 30 held as under, shall be applicable:-

“22. In Ajit Singh and Others (II) vs. State of Punjab and Others, (1999) 7 SCC 209, Constitution Bench of this Court in paragraph 28 has held that Article 16(4) is only an enabling provision which reads as under:

"On the face of it, the above language in each of Articles 16(4) and 16(4-A) is in the nature of an enabling provision and it has been so held in judgments rendered by Constitution Benches and in other cases right from 1963."

29. Inasmuch as the Government of Haryana has not prescribed any reservation for the Post- Graduate Courses, neither the University nor any other authority be blamed for approving and publishing the prospectus which does not contain reservation for Post- Graduate Courses. The clarificatory order of this Court in Abhay Nath (supra), is applicable for the Institutes managed/run by the Central Government and unless the State Government takes any decision for granting reservation in MD/MS/PG Diploma and MDS Courses, it cannot be made applicable. As the State Government is competent to make the reservation to a particular class or category, until it is decided by the State, as being a Policy matter, there cannot be any direction to provide reservation at the PG level. The State of Haryana has explained that reservation in under-Graduate Medical Courses is being provided strictly as per their policy. The Post-Graduate Degree/Diploma in medical education is governed by Medical Council. Even, the Medical Council of

India has not followed strict adherence to the rule of reservation policy in admission for SC/ST category at the Post-Graduate level.

30. *As stated earlier, Article 15(4) is an enabling provision and the State Government is the best judge to grant reservation for SC/ST/Backward Class categories at Post-Graduate level in admission and the decision of the State of Haryana not to make any provision for reservation at the Post-Graduate level suffers no infirmity. In our view, every State can take its own decision with regard to reservation depending on various factors. Since the Government of Haryana has decided to grant reservation for SC/ST categories/Backward Class candidates in admission at MBBS level i.e. under graduate level, then it does not mean that it is bound to grant reservation at the Post-Graduate level also.”*

17. I may state here in ***Andhra Pradesh Public Service Commission (supra)***, the Supreme Court in para 18 has held as under:-

“18. The Constitution of India lays down provisions both for protective discrimination as also affirmative action. Reservation of posts for the disadvantaged class of people as also seats in educational institutions are provided for by reason of Articles 15 and 16 of the Constitution of India. Reservation made for the members of the Scheduled Castes, Scheduled Tribes and other Backward Classes would, however, be subject to Article 335 of the Constitution of India. Concededly, no citizen of India can claim reservation as a matter of right. The provisions contained

in Articles 15 and 16 of the Constitution of India are merely enabling provisions. No writ of or in the nature of mandamus, thus, could be issued. [See C.A. Rajendran v. Union of India & Others, (1968) 1 SCR 721 at 731-733, Indra Sawhney and Others v. Union of India and Others [1992 Supp (3) SCC 217, para 165 to 169, 428 to 432, 741 and 742, Ajit Singh and Others (II) v. State of Punjab and Others (1999) 7 SCC 209, para 32 to 39, State of Punjab and Others v. Manjit Singh and Others (2003) 11 SCC 559, para 7 and 12].”

18. In view of the aforesaid position of law, I am afraid the direction sought in the writ petition cannot be granted. The writ petition is without any merit. The same is dismissed.

V. KAMESWAR RAO, J

APRIL 25, 2017/ak