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

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Date of Judgment : 6th September, 2019

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W.P.(C) 9355/2019

DR UMAR FAROOQ

..... Petitioner

Through

Mr. N.U. Ahmed and Mr. Shahnwaz
Alam, Advocates

versus

GOVT OF NCT DELHI & ORS

..... Respondents

Through

Mrs. Avnish Ahlawat, Standing
Counsel GNCTD with Mr. Nitesh
Kumar Singh and Ms. Laveena Arora,
Advocates.

Mr. Vibhuti Tyagi and Mr. Tapasvi
Rai, Advocates proxy counsel for Mr.
Naresh Kaushik, Advocate for
respondent no.3/UPSC.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

G.S. SISTANI, J. (ORAL)

CM APPL 38594/2019 (Exemption)

1. Exemption is allowed, subject to all just exceptions.
2. The application stands disposed of.

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3. The present petition has been filed by the petitioner being aggrieved by decision dated 16.05.2019 rendered by the Central Administrative Tribunal (hereinafter referred to as the 'Tribunal').
4. With the consent of the parties, the writ petition is set down for final hearing and disposal at the admission stage itself.

5. The petitioner seeks mandamus or any other directions to the respondent/department to consider his case for employment in the category of OBC for the post of General Duty Medical Officer in the Department of Health and Family Welfare, Govt. of NCT of Delhi. It is also prayed in the writ petition that the action of the respondents denying employment to the petitioner is arbitrary, discriminatory, illegal and against the principles of natural justice.
6. The petitioner had approached the learned Tribunal by filing an O.A. laying challenge to advertisement dated 19.07.2013 issued by the Union Public Service Commission (UPSC) on behalf of the Department of Health and Family Welfare, Government of NCT of Delhi inviting applications for selection/appointment of General Duty Medical Officers for 679 vacancies out of which 247 posts were reserved for OBC candidates.
7. The bone of contention is Note (e) of the said advertisement which inter alia provided the following :

“... In respect of cases belonging to Govt. of National Capital Territory of Delhi, OBCs included in the Central list and list Notified by Govt. of National Capital Territory of Delhi are eligible.
8. The petitioner, who belongs to the community BADHAI, which is recognised as a backward class by the Govt. of NCT of Delhi, holds a Certificate dated 24.01.2011 to that effect issued by the Government of Delhi.
9. The petitioner participated in the selection process and claimed the social status of OBC. The petitioner could not make it to the final selection for the reason that the advertisement indicated that OBCs

mentioned in the Central List as also in the list notified by the GNCTD would be eligible to apply; and, the petitioner complains that for this reason, the name of the petitioner did not find mention in the selection list prepared by the respondents.

10. None of the selected candidates were made party to the O.A. filed by the petitioner.
11. Having participated in the selection process however, and having failed to qualify, the petitioner filed the O.A. on 21.10.2014, which was also subsequently amended, challenging the eligibility condition whereby persons holding OBC certificates from Delhi as well as from outside Delhi were eligible to participate. One of the contentions raised in the present petition is that the respondents have followed self-contradictory policies inasmuch as, while offering ad-hoc appointments till the joining of regular appointees the respondents have restricted the eligibility condition to caste certificates issued by the competent authority of the Govt. of NCT of Delhi, whereas for the regular appointments, the eligibility extends to candidates holding caste certificate issued by the Govt. of NCT of Delhi as well as by other States. It is the petitioner's contention that by reason of the foregoing eligibility condition, the petitioner has effectively been denied reservation as an OBC candidate from Delhi.
12. It is the case of the petitioner that depriving the petitioner of the said post is illegal, perverse and uncalled for, as according to the petitioner, the posts are exclusively for Delhi and there is no basis for enabling OBCs mentioned in the Central List to participate in the selection process. Hence, the petitioner has challenged the very advertisement

and sought a declaration to the effect that the selection process is arbitrary and unconstitutional.

13. The Tribunal has been pleased to dismiss the O.A. principally on the following reasoning :

“7. According to the applicant, the posts are of GNCT of Delhi, and there was no basis for enabling the OBCs mentioned in the Central List. This plea is too difficult to be accepted. The reason is that Delhi is the National Capital, and every citizen has a right to seek employment therein. Obviously for that reason, Delhi is not conferred with an independent Statehood on par with other States. We, however, do not intend to make any pronouncement on this aspect.

8. A serious flaw arises in the case of the applicant. If he was aggrieved by the clause mentioned above, he was expected to file O.A. challenging the same, much before his participation. However, he took chance and only when he did not get selected, he filed the instant O.A. This is impermissible in law. The principles of acquiescence and estoppel operate against him. The Hon’ble Supreme Court in *Ramesh Chandra Shah & others v. Anil Joshi & others* (2013) 11 SCC 309 held that such a course is not permissible in law.

9. Secondly, by the time the O.A. was filed, the select list was already there and quite a large number of OBC candidates were selected and appointed. Some of them are from the Central List. Any adjudication undertaken in this O.A. would affect their rights. The applicant did not make any endeavor to implead such candidates.”

14. Learned counsel for the petitioner submits that the Tribunal has completely overlooked the effect of the policy granting reservation to OBCs having certificates of States other than Delhi for vacancies under the State Government is not only arbitrary but also deprives the

petitioner and other similarly situate persons the benefits of reservation. Learned counsel submits that the Tribunal has erred in rejecting the O.A. on the ground that a large number of OBC candidates, who stand selected and appointed, could be affected by the O.A. Counsel further submits that the learned Tribunal has erred by taking the view that the selected candidates should have been made parties to the O.A. It is also contended that the Tribunal has erred by taking a view that once the petitioner had participated in the selection process, the petitioner is estopped from challenging that very process after he is not selected. No other ground has been urged.

15. We have heard learned counsels for the parties.

16. Mrs. Avnish Ahlawat, learned counsel appearing for the respondent/GNCTD contends that the advertisement with respect to 679 vacancies was published as far back as in July, 2013 and the petitioner did not deem it appropriate to challenge the same at that time. She further submits that the examination was conducted on 05.01.2014. The petitioner qualified for the examination and was selected for the interview, which was conducted on 27.03.2014. The results were declared between July and September of 2014. It is contended that the O.A. was filed in the month of October, 2014 and much water has flown under the bridge between the year 2014 and 2019. She submits that there is no infirmity in the view taken by the Tribunal that the selected candidates ought to have been impleaded as parties to the O.A. as their rights would be directly affected. Counsel further submits that the Tribunal has rightly held that once the petitioner had participated in

the selection process, he cannot subsequently challenge the same after being unsuccessful.

17. In the case of *Ashok Kumar v. State of Bihar*, (2017) 4 SCC 357 the Apex Court has held that a person who participates in the selection process cannot lay challenge to the same after being unsuccessful. The relevant paragraphs read as under :

“13. The law on the subject has been crystallised in several decisions of this Court. In *Chandra Prakash Tiwari v. Shakuntala Shukla* [*Chandra Prakash Tiwari v. Shakuntala Shukla*, (2002) 6 SCC 127 : 2002 SCC (L&S) 830] , this Court laid down the principle that when a candidate appears at an examination without objection and is subsequently found to be not successful, a challenge to the process is precluded. The question of entertaining a petition challenging an examination would not arise where a candidate has appeared and participated. He or she cannot subsequently turn around and contend that the process was unfair or that there was a lacuna therein, merely because the result is not palatable. In *Union of India v. S. Vinodh Kumar* [*Union of India v. S. Vinodh Kumar*, (2007) 8 SCC 100 : (2007) 2 SCC (L&S) 792] , this Court held that: (SCC p. 107, para 18)

“18. It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same. (See *Munindra Kumar v. Rajiv Govil* [*Munindra Kumar v. Rajiv Govil*, (1991) 3 SCC 368 : 1991 SCC (L&S) 1052] and *Rashmi Mishra v. M.P. Public Service Commission* [*Rashmi Mishra v. M.P. Public Service Commission*, (2006) 12 SCC 724 : (2007) 2 SCC (L&S) 345] .)”

18. In *Chandigarh Admn. v. Jasmine Kaur* [*Chandigarh Admn. v. Jasmine Kaur*, (2014) 10 SCC 521 : 6 SCEC 745], it was held that a candidate who takes a calculated risk or chance by subjecting himself or herself to the selection process cannot turn around and complain that the process of selection was unfair after knowing of his or her non-selection. In *Pradeep Kumar Rai v. Dinesh Kumar Pandey* [*Pradeep Kumar Rai v. Dinesh Kumar Pandey*, (2015) 11 SCC 493 : (2015) 3 SCC (L&S) 274] , this Court held that: (SCC p. 500, para 17)

“17. Moreover, we would concur with the Division Bench on one more point that the appellants had participated in the process of interview and not challenged it till the results were declared. There was a gap of almost four months between the interview and declaration of result. However, the appellants did not challenge it at that time. This, it appears that only when the appellants found themselves to be unsuccessful, they challenged the interview. This cannot be allowed. The candidates cannot approbate and reprobate at the same time. Either the candidates should not have participated in the interview and challenged the procedure or they should have challenged immediately after the interviews were conducted.”

This principle has been reiterated in a recent judgment in *Madras Institute of Development Studies v. K. Sivasubramaniyan* [*Madras Institute of Development Studies v. K. Sivasubramaniyan*, (2016) 1 SCC 454 : (2016) 1 SCC (L&S) 164 : 7 SCEC 462].”

18. It is well-settled law that where the relief sought is likely to affect the selected candidates, such candidates should be impleaded as

parties. The Supreme Court of India in the case of *Poonam v. State of U.P.*, (2016) 2 SCC 779 has held as under :

“22. In *J.S. Yadav v. State of U.P.* [*J.S. Yadav v. State of U.P.*, (2011) 6 SCC 570 : (2011) 2 SCC (L&S) 140] in para 31 it has been held thus: (SCC p. 583)

“31. No order can be passed behind the back of a person adversely affecting him and such an order if passed, is liable to be ignored being not binding on such a party as the same has been passed in violation of the principles of natural justice. The principles enshrined in the proviso to Order 1 Rule 9 of the Code of Civil Procedure, 1908 provide that impleadment of a necessary party is mandatory and in case of non-joinder of necessary party, the petitioner-plaintiff may not be entitled for the relief sought by him. The litigant has to ensure that the necessary party is before the court, be it a plaintiff or a defendant, otherwise the proceedings will have to fail. In service jurisprudence if an unsuccessful candidate challenges the selection process, he is bound to implead at least some of the successful candidates in representative capacity. In case the services of a person are terminated and another person is appointed at his place, in order to get relief, the person appointed at his place is the necessary party for the reason that even if the petitioner-plaintiff succeeds, it may not be possible for the Court to issue direction to accommodate the petitioner without removing the person who filled up the post manned by the petitioner- plaintiff. (Vide *Prabodh Verma v. State of U.P.* [*Prabodh Verma v. State of U.P.*, (1984) 4 SCC 251 : 1984 SCC (L&S) 704] , *Ishwar Singh v. Kuldip Singh* [*Ishwar Singh v. Kuldip Singh*, 1995 Supp (1) SCC 179 : 1995 SCC (L&S) 373 : (1995) 29 ATC 144] , *Tridip Kumar Dingal v. State of W.B.* [*Tridip Kumar Dingal v. State of W.B.*, (2009) 1 SCC 768 : (2009) 2 SCC (L&S) 119] , *State of Assam v. Union*

of India [State of Assam v. Union of India, (2010) 10 SCC 408 : (2010) 4 SCC (Civ) 187 : (2010) 2 SCC (L&S) 812] and *Public Service Commission v. Mamta Bisht* [Public Service Commission v. Mamta Bisht, (2010) 12 SCC 204 : (2011) 1 SCC (L&S) 208] .) More so, the public exchequer cannot be burdened with the liability to pay the salary of two persons against one sanctioned post.””

19. Applying the law to the facts of the present case and having examined the order dated 16.05.2019 passed by the learned Tribunal, we find no infirmity in the same. The petitioner had participated in the selection process with open eyes with the terms of the advertisement well-known to him. For the reasons best known to him, he did not challenge the advertisement. Knowing fully well that the relief sought in the O.A. would affect the selected candidates, the petitioner chose not to implead them.
20. Since we find no infirmity in the order passed by the learned Tribunal, this writ petition is without any merit. The same is accordingly dismissed.

G.S. SISTANI, J

ANUP JAIRAM BHAMBHANI, J

SEPTEMBER 06, 2019

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