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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **W.P.(C) 8433/2018 and CM APPL. 32364/2018 (stay)**

RAJESH KUMAR

..... Petitioner

Through: Ms. Deepali Gupta, Advocate.

versus

DELHI SUBORDINATE SERVICES SELECTION BOARD & ORS
..... Respondent

Through: Mrs. Avnish Ahlawat, Advocate.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE TALWANT SINGH

ORDER

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07.01.2020

1. The Petitioner has challenged the final order dated 11th April, 2018 of the Central Administrative Tribunal (CAT), Delhi in OA No.110/2017 by which the OA filed by the present Petitioner was dismissed. The Petitioner had made the following prayers in the OA:

“a. To consider the applicant in SC category for post Code No. 71/09, Asstt. Teacher with Directorate of Education after including his name as selected candidates in the SC category;

b. To keep one seat vacant for the applicant till the decision of the Original Application from this Hon’ble Tribunal;

- c. To declare fresh list of selected candidates after including the name of the Applicant in the SC category in lieu of any seat lying vacant;
- d. To pay the cost of the proceeding and by way of award in favour of applicant;
- e. Issue directions to the respondents to fill the SC posts and Appoint the Applicant herein for the said for any other vacant seat still lying vacant;
- f. Issue Directions to the Respondent No.2 to restrain from returning any vacant post to Respondent No.1 till the pendency of this Application;”

2. In brief, the case of the Petitioner is that an advertisement was issued by Respondent Delhi Subordinate Service Selection Board (‘DSSSB’) for the post of Assistant Teacher (Primary) in Directorate of Education having post code 71/09 in the year 2009. The Petitioner belongs to Scheduled Caste category and he applied for the said post and appeared in written examination on 25th August, 2013. The result was declared on 12th September, 2014. However, in view of the order of the Central Administrative Tribunal (‘CAT’) dated 26th September, 2014 in OA No. 1656/2014 (*Vinita v. GNCTD & Ors.*), a revised mark list dated 18th May, 2015 was published. The qualifying percentage for Scheduled Caste candidates was 30%, i.e. total of 60 marks out of 200. The Petitioner secured 73.50 marks and had successfully cleared the said exam, so he was eligible to be considered for appointment. This was the last chance for the Petitioner as he has become overage thereafter.

3. The Directorate of Education by its letter dated 17th June, 2015 had given

extension to one Inderjeet to join by 24th June, 2015 but the said candidate did not join and the seat was lying vacant. Hence, the Petitioner submitted his representation dated 17th August, 2015 offering his candidature for the said post. There were 36 vacancies and only 34 candidates had been selected. No response was received by the Petitioner to the said representation. No waiting list was prepared by DSSSB.

4. Being aggrieved by the inaction on the part of DSSSB, the Petitioner filed OA No.1585/2016. While disposing of the said OA on 3rd June, 2016, CAT directed Respondent No.1 to consider his representation dated 17th August, 2015 within 90 days. Respondent No. 2 informed the Petitioner that 36 dossiers of SC candidates were received under the post code 71/09 from DSSSB and out of these 36 candidates only 31 candidates were appointed. The representation of the Petitioner was considered but the same was rejected by order dated 5th September, 2016. The reason given was that marks of the Petitioner were lower than the cut-off marks arrived at for SC category.

5. Thereafter, the Petitioner filed OA No.110/2017 against rejection of his representation. However, by order dated 11th April, 2018, CAT dismissed the said OA holding that there was no substance in the contentions of the Petitioner herein.

6. By way of the present petition, the Petitioner has challenged the above order of the CAT on the grounds that the action of the Respondents was illegal and arbitrary; the Respondents have violated the principles of natural

justice; there were still two posts lying vacant for SC candidates; the Tribunal failed to appreciate that the Petitioner had cleared the written examination with 73.50 marks and he was eligible for appointment; due to delay in conducting examination, the Petitioner has become over age in the meantime; the Tribunal failed to appreciate that the Petitioner had obtained qualifying marks and a vacancy was available, so he was entitled to be appointed against the said vacancy and the act of the Respondents is highly prejudicial to the Applicant as he is deprived of his livelihood without any justifiable reason.

7. The Respondents have filed a counter affidavit mentioning therein that an advertisement was published in December, 2009 for selection and recruitment of Assistant Teachers (Primary). The written examination was conducted wherein qualifying marks were 30% for SC candidates. 34 SC candidates were recommended for appointment. One post of SC candidate remained unfilled due to non-availability of suitable physically handicapped candidate. The last candidate selected under SC category had scored 134.50 marks whereas the Petitioner had scored only 73.50 marks, which are far below the marks of the last selected candidate. The representation of the Petitioner dated 17th August, 2015 was rejected by passing a reasoned and speaking order dated 5th September, 2016. Four candidates were kept in the waiting panel in the order of merit and the last candidate so kept had secured 133.25 marks. The said waiting panel was prepared on 15th May, 2015 and it was valid for a period of one year, i.e. up to 14th May, 2016. The name of the Petitioner was not in the waiting panel because he had secured lower marks. There are hundreds of other candidates in SC category who had

secured more marks than the Petitioner but less marks than the last candidate recommended for appointment, so there was no question of Petitioner being selected for the post of Assistant Teacher. Merely getting the qualifying marks does not entitle a candidate for selection if there are candidates in the same category who have secured higher marks. The result is prepared based on the number of posts and the qualified candidates available in the order of merit. The unfilled vacancies have been already requisitioned and re-advertised in 2017 and recruitment to the post of Assistant Teacher vide post code 71/09 stands closed.

8. The Petitioner has filed a rejoinder where it is again stated that the panel was not prepared of the wait listed candidates. Other contents of the petition have been reiterated. It has been submitted that the Petitioner cannot be made to suffer for no fault on his part. As per the Petitioner, the panel of all successful candidates, who secured qualifying marks, should have been prepared and the panel should not be confined to only 10% of the vacancies.

9. We have heard the arguments. Learned counsel for the Petitioner has relied upon a judgment of this Court in the matter of ***Surender Singh & Anr. v. DSSSB & Ors.*** LPA No.65/2008 decided on 3rd November, 2008 in support of the arguments. In the said case, Division Bench of this Court had ordered for appointing the said Petitioner as Assistant Teacher (Primary) as a special case. On the other hand, learned counsel for the Respondent has relied upon the judgment of the Hon'ble Supreme Court in the matter of ***Municipal Corporation of Delhi v. Surender Singh***, civil appeal No.5588/2010, which was filed against the order of this Court in LPA No.65/2008 and connected appeals. The order of this Court was set aside by

the Hon'ble Supreme Court by observing as under:

“19. On noticing the manner of consideration made by the Division Bench, we are of the view that the Division Bench has exceeded the jurisdiction while exercising the power of judicial review in the matter of selection process by evolving its own criteria and substituting the same with the criteria adopted by recruiting agency. We are of the said view for the reason that the position of law is well established that the recruiting agency cannot be compelled to fill up all available posts even if the persons of the desired merit are not available. This Court in the case of *Ashwani Kumar Singh vs. U.P. Public Service Commission & Ors.* (2003) 11 SCC 584 relied upon by the learned counsel for the appellant had considered these aspects and held that it is not a rule of universal application that whenever vacancies exist persons who are in the merit list per force have to be appointed. It is held therein that if the employer fixes the cut-off position the same is not to be tinkered with unless it is totally irrational or tainted with malafides. It was further stated therein that the employer in its wisdom may consider the particular range of selection to be appropriate. The decision of the employer to appoint a particular number of candidates cannot be interfered with unless it is irrational or malafide.

20. In that background when the DSSSB and the appellant herein were concerned with the quality of teachers to be recruited and had fixed a merit bar to indicate that the persons obtaining the percentage of marks above such bar only would be selected, the employer cannot be forced to lower the bar and recruit teachers who do not possess the knowledge to the desired extent merely because certain posts had remained vacant which in any event would be carried over to the next recruitment.

21. In the instant facts the details were also available before the Division Bench that in between the percentage as obtained by the last selected candidate at 89.25 per cent and the percentage of marks obtained by the second private respondent herein at 87 per cent there were 273 candidates in all in the said range. Despite the availability of the persons who had obtained higher percentage of marks than the second private respondent herein, the Division Bench erred in issuing direction to select the private respondents herein. The learned counsel for the respondents no doubt sought to rely on the decision of this Court in the case of U.P. Jal Nigam & Anr. (supra) which was taken note by the Division Bench to contend that though there were other candidates who had obtained higher percentage of marks than the private respondents herein, the direction issued to select the private respondents herein would not affect the interest of the appellant MCD since at this juncture no other candidate can seek for relief, not having chosen to agitate their rights at an earlier point of time and in that circumstance the relief granted to the private respondents being an equitable relief does not call for interference.

22. In that regard we notice that the decision relied upon would not be of assistance to the private respondents herein. The consideration made therein was with regard to the employees who were entitled to continue in service till the age of 60 years. In that circumstance, such of those persons who approached the Court while they were in service without accepting or acquiescing to the retirement were granted the benefit while indicating that those who did not agitate their right will not be entitled to the benefit. In the instant case, the very issue is relating to the recruitment into service and the question is as to whether a candidate who does not obtain the minimum required marks can be directed to be selected while in the regular course he would not be entitled to, but a consideration is directed to be made only because certain

posts were still vacant. In such circumstance, the candidates who had not approached the Court had not acquiesced any right available to them but had not approached the Court only by realising the position that they do not possess the merit more than the last candidate whose percentage was taken as the cutoff percentage. Therefore in that circumstance irrespective of the fact whether the others would approach the Court or not, the private respondents herein could not have been given the benefit to be selected by lowering the bar, more so when it was evident that there were 40 candidates above the merit of Shri Rakesh Sharma and 263 candidates above the merit of Shri Surender Singh.

23. Any undue sympathy shown to the private respondents herein so as to direct their selection despite not possessing the desired merit would amount to interference with the right of the employer to have suitable candidates and would also cause injustice to the other candidates who had participated in the process and had secured a better percentage of marks than the private respondents herein but lower than the cutoff percentage and had accepted the legal position with regard to the employer's right in selection process. In such event providing the benefit to the private respondents herein by applying the principles laid in the case of U.P. Jal Nigam (supra) as done by the Division Bench would not be justified.

24. In that background the order dated 03.11.2008 passed by the Division Bench in L.P.A.No.65/2008 is not sustainable and the same is accordingly set aside.

25. The appeal therefore succeeds and is accordingly allowed with no order as to costs.”

10. As per the Hon'ble Supreme Court, the Division Bench of this Court

while exercising the powers of judicial review cannot come up with a new criterion. The recruiting agency has to maintain a certain standard of teachers to be recruited and a merit bar is to be fixed which cannot be lowered to appoint everybody who had qualified even if few vacancies are still available. It is to be noticed that in the said case before Hon'ble Supreme Court, the last candidate who was selected had obtained 89.25% marks and there were still 63 vacant posts and the two private Respondents had secured 88.7% and 87% marks respectively. But the Hon'ble Supreme Court was of the view that there were 273 candidates in between and the Division Bench of this Court had erred in allowing the petition filed by the private Respondents. It was also observed that the persons who were not possessing desired merit have no right to get appointed in the post advertised by the employer.

11. In the present case, as has been noticed above, the last selected Scheduled Caste candidate had obtained 134.50 marks and the present Petitioner has secured only 73.50 marks and there must have been hundreds of other Scheduled Caste candidates in between. Merely qualifying an exam by obtaining more than the qualifying marks of 30% does not entitle the Petitioner to get an appointment as a Primary Teacher. It is not a ground to pass an order for appointment of Petitioner as a teacher that after the said exam he has become over-age. No fault can be found with the impugned judgment of the Central Administrative Tribunal dated 11th April, 2018 in OA No.110/2017.

12. The writ petition without any merit is hereby dismissed. The pending

application is also disposed of.

S. MURALIDHAR, J.

TALWANT SINGH, J.

JANUARY 07, 2020
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