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

+ **W.P. (C) 3520/2017**

RAJINDRA SINGH

..... Petitioner

Through: Mr. Yashpal Rangi, Advocate.

versus

COMMISSIONER OF POLICE & ORS.

..... Respondents

Through: Mr. Satyakam, ASC for GNCTD.

+ **W.P.(C) 8447/2017**

COMMISSIONER OF POLICE & ORS.

..... Petitioners

Through: Mr. Satyakam, ASC for GNCTD.

versus

SUNIL KUMAR YADAV

..... Respondent

Through: Mr. Sachin Chauhan, Advocate.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE TALWANT SINGH

ORDER

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12.02.2020

Dr. S. Muralidhar, J.:

1. As both these petitions involve identical issues, they are being disposed of by this common order.

2. W.P.(C) 3520/2017 by Rajindra Singh challenges an order dated 12th September, 2016 passed by the Central Administrative Tribunal, Principal Bench, New Delhi ('CAT') dismissing O.A. No. 834/2016. The

Respondents in this writ petition are the Commissioner of Police ('CoP'), the Deputy Commissioner of Police (Establishment) ['DCP (E)'] and the DCP (Recruitment Cell) of the Delhi Police.

3. W.P.(C) 8447/2017, on the other hand, has been filed by the Delhi Police, through its CoP and DCPs, against Sunil Kumar Yadav and is directed against an order dated 7th February, 2017 passed by the CAT, allowing O.A. No. 1505/2015 filed by the Respondent Sunil Kumar Yadav.

4. The background facts, which are common to the petitions, are that applications were invited by the Delhi Police in June, 2012, for recruitment of Constables (Driver). Both Rajindra Singh and Sunil Yadav applied for the said post. A total of 752 vacancies were notified. In the final result, a total of 733 candidates qualified. 19 vacancies, reserved for ex-servicemen, could not be filled up due to non-availability of suitable candidates.

5. One of the candidates, Surendra Kumar, who obtained 72 marks and was at serial number 213 of the merit list, gathered information under the Right to Information Act, 2005 ('RTI Act') in respect of the selection of OBC candidates, to which category he belonged. He found that his answer to Question No. 3 in the 'A' Series question paper had not been correctly evaluated. As a result, he had been deprived of one mark. Had he secured 73 marks, which were the marks obtained by the last selected candidate in the OBC category, he would have made the cut. Since he was older in age than all the selected candidates who had secured 73 marks, he contended that he would certainly have been selected and appointed.

6. Accordingly, Surendra Kumar made a representation to the Delhi Police on 22nd March, 2014, praying for the rectification of the mistake in the evaluation. When the Delhi Police did not respond to his representation, he filed O.A. No. 1961/2014 before the CAT.

7. In reply to the aforesaid O.A. No. 1961/2014, the Delhi Police filed two replies, admitting that the mistakes in the answer key, as pointed out by Surendra Kumar, did exist. As a result, the answer sheets of all candidates who had initially been declared qualified in the Trade Test were re-evaluated with reference to the correct answer. As a result of such re-evaluation, 45 applicants, who had been selected in the previous result, were now out of the merit list, and 45 new candidates were found to be eligible for selection.

8. The Delhi Police decided to select the 45 freshly qualified candidates. The 45 candidates, who had been selected in the previous list but were now being ousted, were retained on the basis of the judgment of the Supreme Court in ***Rajesh Kumar v. State of Bihar (2013) 4 SCC 690***.

9. Specific to Surendra Kumar, it was submitted by the Delhi Police that after re-evaluation on the basis of the corrected answer key, the minimum qualifying marks for the OBC category rose to 74. Surendra Kumar still did not make the cut since after one more mark was added to his result for his correct answer, he still got 73 marks. It was submitted that there was a list of 20 candidates junior in age to Surendra Kumar, who were, after re-evaluation, out of the merit list. Out of these 26 candidates, 6 had secured only 73 marks earlier, which stood reduced to 72 after re-evaluation. However, since they had already joined service, they could not be removed

in view of the judgment of the Supreme Court in *Rajesh Kumar v. State of Bihar* (*supra*).

10. Relying on the decisions in *Neelima Shangla, Ph. D. Candidate v. State of Haryana* (1986) 4 SCC 268 and *Manoj Manu v. Union of India* (2013) 12 SCC 171, Surendra Kumar submitted that since posts were still lying vacant due to the fact that selected candidates had not joined service, he should be appointed as Constable (Driver). Reliance was also placed on the decision of this Court dated 30th July, 2013 in W.P.(C) 6505/2013 (*Union of India v. Kuldeep Kumar*).

11. Resisting the above pleas, the CoP pointed out to the CAT that in the first result, 188 candidates belonging to the OBC category were declared qualified. After the cancellation of some candidatures for various reasons, and the re-evaluation, 19 more OBC candidates were declared qualified. As on the date of the arguments in Surendra Kumar's case before the CAT, 194 candidates belonging to the OBC category had been selected/qualified against 181 vacancies. Thus, there were no vacancies in the OBC category available to be filled up.

12. In its order dated 6th November 2015, the CAT allowed the application filed by Surendra Kumar (hereafter *Surendra Kumar's case*), holding that the Delhi Police was wrong in following the decision of the Supreme Court in *Rajesh Kumar v. State of Bihar* (*supra*), which was delivered *in personam*. Instead, the CAT observed:

“The respondents are rather bound by the judgment of the

Supreme Court dated 12.08.2013 in ***Manoj Manu v. Union of India*** (*supra*), and in case persons selected have not joined, and the vacancies, have not been consumed, they are bound to consider the case of the applicant, and perhaps that of Rinku Rana also, who is stated to be even higher in the merit list of the non-selected candidates, by applying the ratio of the Supreme Court judgment in ***Neelima Shangla, Ph. D. Candidate v. State of Haryana*** (*supra*) also and in view of the judgment of the Delhi High Court in the case of ***Union of India v. Kuldeep Kumar*** (*supra*).”

13. On the strength of the decision of the CAT in ***Surendra Kumar’s case*** (*supra*), Rajindra Singh (the Petitioner in W.P.(C) 3520/2017) filed O.A. No. 834/2016 in the CAT. According to Rajindra Singh, who belongs to the general category, he got 76 marks, while the last selected candidate got 77 marks. According to him, the answer to Question No. 53 was incorrectly mentioned in the answer key. He made a representation dated 27th January, 2014 to the Delhi Police for correction of the mistake. He, however, did not receive any reply. Through an RTI application, he got to know that the candidature of 23 candidates in general category had been cancelled and the selection process in respect of 6 candidates was still pending. In the revised result, 146 candidates had been selected and the Petitioner was at Sl. No. 160 in the revised list. According to Rajindra Singh, if 23 more candidates from the general category had been considered for appointment, he would certainly have found place in the list of selected candidates. He claimed to be squarely covered by the decision of the CAT in ***Surendra Kumar’s case***.

14. The Delhi Police resisted the plea of Rajindra Singh, by again relying on the decision in ***Rajesh Kumar v. State of Bihar*** (*supra*), and contented that those candidates who had been selected earlier on the basis of the first list

but had not found place in the revised list could not be ousted from service, but would figure at the bottom of the list. This time, by the impugned order dated 12th September, 2016, the CAT dismissed the O.A. No. 834/2016 of Rajindra Singh. Here again, it was noted that the cut-off marks for the general category rose to 78 upon the rectification of the answer key, whereas Rajindra Singh only obtained 77 marks upon re-evaluation. The CAT observed that ***Surendra Kumar's case*** “did not address the issue of cut-off marks at all.” Secondly, it was held that the question whether the decision in ***Rajesh Kumar v. State of Bihar (supra)*** would apply could not be considered since those who had been retained by the Delhi Police in light of the said decision were not parties to Rajindra Singh's O.A. The CAT in Rajindra Singh's case now held that its decision in ***Surendra Kumar's case*** was *per incuriam*, as it overlooked the “important question of cut-off marks.”

15. The CAT, however, again did a *volte-face* when it dealt with a third O.A. No. 1505/2015, filed by Sunil Kumar Yadav. He had applied for the post of Constable (Driver) in the same exam as an OBC candidate. He obtained 72 marks, whereas the cut-off for candidates in the OBC category was 73. Upon re-evaluation, his marks increased to 73. However, the cut-off marks also increased to 74 and, therefore, he did not make the cut. This time, the CAT held that the decision in Rajindra Singh's O.A. would not act as a precedent since in that decision the CAT had not specifically examined paragraph 19 (2) of the decision in ***Rajesh Kumar v. State of Bihar (supra)***. The CAT now held:

“Therefore, the only solution seems to be that the respondents

prepare a revised merit list based on re-evaluated marks and then fill up the vacancies according to this merit list and, if the applicant qualifies in this merit list for appointment, he should be appointed. After the vacancies are filled up, if there are some candidates left out of 45 candidates whom the respondents decided to retain, then the department would have to create supernumerary posts for that purpose till such time vacancies arise in future.”

16. Aggrieved by the dismissal of his O.A., Rajindra Singh has filed W.P.(C) 3520/2017, whereas aggrieved by the subsequent decision of the CAT in Sunil Kumar Yadav’s O.A., the CoP has filed W.P.(C) 8447/2017.

17. It must be noted at the outset that while directing notice to issue in W.P.(C) 8447/2017 on 21st September, 2017, this Court stayed contempt proceedings against the CoP.

18. This Court has heard the submissions of Mr. Satyakam, learned ASC on behalf of Delhi Police and Mr. Yashpal Rangi, learned counsel appearing for Rajindra Singh and Mr. Sachin Chauhan, learned counsel appearing for Sunil Kumar Yadav.

19. It requires to be noticed that the directions issued by the Supreme Court in ***Rajesh Kumar v. State of Bihar*** (*supra*) were in exercise of its powers under Article 142 of the Constitution, as observed by the CAT in ***Surendra Kumar’s case***, which is evident from the nature of those directions, which read as under:

“19. In the result, we allow these appeals, set aside the order passed by the High Court and direct that –

(1) answer scripts of candidates appearing in ‘A’ series of

competition examination held pursuant to advertisement No. 1406 of 2006 shall be got re-evaluated on the basis of a correct key prepared on the basis of the report of Dr. (Prof.) CN Sinha and Prof. KSP Singh and the observations made in the body of this order and a fresh merit list drawn up on that basis.

(2) Candidates who figure in the merit list but have not been appointed shall be offered appointments in their favour. Such candidates would earn their seniority from the date the appellants were first appointed in accordance with their merit position but without any back wages or other benefit whatsoever.

(3) In case writ petitioners-respondent nos. 6 to 18 also figure in the merit list after re-evaluation of the answer scripts, their appointments shall relate back to the date when the appellants were first appointed with continuity of service to them for purpose of seniority but without any back wages or other incidental benefits.

(4) Such of the appellants as do not make the grade after re-evaluation shall not be ousted from service, but shall figure at the bottom of the list of selected candidates based on the first selection in terms of advertisement No.1406 of 2006 and the second selection held pursuant to advertisement No.1906 of 2006.

(5) Needful shall be done by the respondents – State and the Staff Selection Commission expeditiously but not later than three months from the date a copy of this order is made available to them.”

20. There is always the issue of availability of vacancies, and this was perhaps not gone into in *Rajesh Kumar v. State of Bihar* (*supra*). However, the Supreme Court, in its subsequent judgment in *Manoj Manu v Union of India* (*supra*), dealt with the issue of vacancies by observing as under:

“9. It can be clearly inferred from the reading of the aforesaid that it is not the case where any of these persons initially joined as Section Officer and thereafter resigned/left/promoted etc. thereby creating the vacancies again. Had that been the situation viz. after the vacancy had been filled up, and caused again because of some subsequent event, position would have been different. In that eventuality the UPSC would be right in not forwarding the names from the list as there is culmination of the process with the exhaustion of the notified vacancies and vacancies arising thereafter have to be filled up by fresh examination. However, in the instant case, out of 184 persons recommended, six persons did not join at all. In these circumstances when the candidates in reserved list on the basis of examination already held, were available and DoP&T had approached UPSC “within a reasonable time” to send the names, we do not see any reason or justification on the part of the UPSC not to send the names.”

21. In other words, where there are no vacancies, it will not be possible for the CAT or for this Court to issue directions to accommodate persons who are left out as a result of the revaluation exercise. In the cases before this Court, a categorical statement has been made by Mr. Satyakam on behalf of the CoP that there are no vacancies available against which any of the applicants before the CAT could be accommodated. While the CAT appears to have engaged in a flip-flop on this issue in disposing of the three O.A.s discussed hereinbefore, the fact remains that there was no vested right created in any of the candidates to insist on being appointed.

22. The decision in ***Rajesh Kumar v. State of Bihar*** (*supra*) would, in any event, not apply to either Rajindra Singh or Sunil Kumar Yadav because ***Rajesh Kumar v. State of Bihar*** (*supra*) was concerned with those who had initially made the cut, but fell out of the merit list after re-evaluation. Neither

Rajindra Singh nor Sunil Kumar Yadav made the cut in the first place. They continued not to make the cut even after re-evaluation, because as a result of the said re-evaluation, the cut-off marks also increased by one. This aspect of the matter appears to have been overlooked by the CAT in allowing Sunil Kumar Yadav's O.A. In fact, it was justified in dismissing Rajindra Singh's O.A. on this very ground.

23. For all of the aforementioned reasons, this Court affirms the order dated 12th September, 2016 passed by the CAT, dismissing Rajindra Singh's O.A. No. 834/2016, as well as the subsequent order dated 30th January, 2017, dismissing his R.A. No. 10/2017. The Court also sets aside the order dated 7th February, 2017 passed by the CAT, allowing Sunil Kumar Yadav's O.A. No. 1505/2015.

24. W.P.(C) 8447/2017 is accordingly allowed and W.P.(C) 3520/2017 is dismissed. No costs.

S. MURALIDHAR, J.

TALWANT SINGH, J.

FEBRUARY 12, 2020
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