



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

% Judgment reserved on : 23.08.2022

Judgment delivered on : 01.09.2022

+ W.P.(C) 6781/2021 & CM APPL. 21365/2021

RAKESH KUMAR AND ORS. Petitioners

versus

GOVERNMENT OF NCT OF DELHI
AND ORS.

..... Respondents

Advocates who appeared in this case:

For the Petitioners : Mr. Parkash Chandra, Advocate with Mr. Amit Kumar, Advocate.

For the Respondents : Mrs. Avnish Ahlawat, Standing Counsel, GNCTD (Services) with Mr. Nitesh Kumar Singh, Mrs. Tania Ahlawat, Mrs. Palak Rohmetra, Ms. Laavanya Kaushik and Ms. Aliza Alam, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

JUDGMENT

TUSHAR RAO GEDELA, J.

1. Petitioners challenge the order dated 17.02.2021 passed by the Central Administrative Tribunal, Principal Bench, New Delhi (hereinafter referred to as 'the Tribunal') in O.A. No.2579/2018



whereby the Original Application filed by the Petitioners was dismissed.

2. Respondent No.2/Delhi Subordinate Services Selection Board (hereinafter, referred to as 'DSSSB') herein issued an advertisement No.01/2014 dated 05.07.2014 inviting applications for various posts including Trained Graduate Teacher (Computer Science) [hereinafter, referred to as 'TGT(CS)'] having Post Code no.192/14. Petitioners had appeared in the written examination and were declared successful in the results, which were announced in September, 2017. Waiting list also appears to have been prepared by the DSSSB.

3. Petitioners claim to be named in the Wait List. The Petitioners further contend that though the User Departments had returned the dossiers of several candidates resulting in large number of vacancies, despite which DSSSB did not operate the Wait List and thereby depriving the Petitioners of an opportunity of being considered for appointment to the post of TGT (CS).

4. DSSSB filed a detailed counter affidavit before the Tribunal as well as this Court giving the minute details with regard to the number of posts available in each category which were originally advertised, along with the number of posts in each category which have been filled up from the original select list as well as the wait list which was actually operated, given the fact that certain dossiers were returned from the User Department.



5. After having examined the details mentioned by Respondent No.2/DSSSB in its counter affidavit, the Tribunal passed the impugned order, which is being assailed in the present writ petition.

6. Mr. Parkash Chandra, learned counsel appearing for the Petitioners submitted that the Respondent No.2/DSSSB admitted that it had maintained a wait list and that the candidates in the said wait list were indeed selected against the vacancies which arose due to the dossiers being returned by the User Department. He further submits that Respondent No.2/DSSSB has wrongly contended that the wait list was operated in time before it lapsed and submits that the wait list was operated even beyond the alleged date of lapse. Mr. Chandra also submits that inspite of having filled up the posts, there still exists a large number of vacancies, which can be filled by operating the Waiting List further and the Petitioners who belong to different categories can be appointed against the said vacancies.

7. Mr. Chandra relies upon the judgment rendered by the Supreme Court in *Dinesh Kumar Kashyap and Ors. Vs. South East Central Railways and Ors.* bearing *Civil Appeal Nos.11360-11363/2018*, decided on 27.11.2018. In particular, Mr. Chandra refers to para 6 of the said judgment which relies upon a judgment delivered by the Supreme Court in the matter of *R.S. Mittal vs. Union of India, (1995) Suppl. 2 SCC 230* wherein a portion of para 10 in *R.S. Mittal's* judgment was extracted :-

“10. It is no doubt correct that a person on the select panel has no vested right to be appointed to the post for



which he has been selected. He has a right to be considered for appointment. But at the same time, the appointing authority cannot ignore the select panel or decline to make the appointment on its whims. When a person has been selected by the Selection Board and there is a vacancy which can be offered to him, keeping in view his merit position, then, ordinarily, there is no justification to ignore him for appointment. There has to be a justifiable reason to decline to appoint a person who is on the select panel. In the present case, there has been a mere inaction on the part of the Government. No reason whatsoever, not to talk of a justifiable reason, was given as to why the appointments were not offered to the candidates expeditiously and in accordance with law. The appointment should have been offered to Mr Murgad within a reasonable time of availability of the vacancy and thereafter to the next candidate. The Central Government's approach in this case was wholly unjustified.”

8. Learned counsel further relies upon judgment of the learned Single Judge of the Jharkhand High Court in *Bijay Lakra vs. State of Jharkhand*, (2017) 2 AIR Jhar R 460 to submit that the persons in the wait list can be appointed against posts which are lying vacant and the plea of lapse of the wait list may not come in the way of such appointments.

9. *Per contra*, Ms. Ahlawat appearing for Respondent No.2/DSSSB submits that the posts have been filled up and many candidates from the Wait List also were appointed having regard to the fact that the User Department had returned some dossiers. However, she submits that, some of the candidates, listed in the Wait List and offered appointments, were those who had scored better and



were placed way above the present petitioners. Thus, Ms. Ahlawat submits that the Wait List was operated in a proper and lawful manner and the petitioners cannot have any grievance against that. She also relies upon the details stated in respect of the present petitioners as well as those who were the Applicants before the Tribunal as mentioned in the counter affidavit filed in response to the present writ petition.

10. Mr.Chandra, in rejoinder, while admitting that the petitioners had scored below the cut off marks as also that the present petitioners were placed low in merit in the Wait List, submits that inspite of this, the petitioners can be appointed against the large number of vacancies which are still alleged to be existing. However, Mr.Chandra was unable to show anything on record to substantiate this argument.

11. We have heard both the counsel at length and perused the records and are unable to agree with the contentions of the petitioners.

12. Respondent No.2/DSSSB has, in its counter affidavit dated 26/10/2021, given details of the present petitioners in respect of the category and marks they had obtained, the marks scored by the last candidate selected in all the categories in respect of TGT (CS) coupled with the status of the petitioners and other Applicants before the Tribunal. The relevant paragraphs of the counter affidavit are extracted hereunder for clarity:

“4. That out of the 1025 vacancies notified under UR/General category, 1014 vacancies have been filled and 11 vacancies have been kept reserved as per the



interim direction of the Hon'ble Tribunal in OA No.2579/2018.

Similarly, out of 547 vacancies notified under OBC category, only 429 vacancies could be filled up as no qualified candidate was available in the merit above the minimum qualified marks prescribed by the DSSSB. The minimum qualified marks were 68.6% (35% of 196 Maximum Marks).

Out of 302 vacancies notified under SC category, 301 vacancies have been filled up through provisional nomination and 01 vacancy has been kept reserved as per the interim directions of Hon'ble CAT in OA no.2579/2018. Against 151 vacancies under ST category, only 81 vacancies could be filled up as no qualified candidate was available in the merit above the minimum qualified marks prescribed by the DSSSB.

5. That all the notified vacancies under UR and SC category have been filled except 11 vacancies under UR category and 01 vacancy under SC category have been kept reserved as per the interim direction of Hon'ble CAT. Further, 118 vacancies under OBC category and 70 vacancies under ST category could not be filled up as no qualified candidate is available in the merit list.

6. That the marks of last provisionally selected candidate to the post of TGT (Computer Science), Post Code-192/14 are as under :-

<i>UR</i>	<i>OBC</i>	<i>SC</i>	<i>ST</i>
<i>98.25</i>	<i>68.75</i>	<i>75</i>	<i>59.25</i>

7. That the applicants (42 in total) filed OA No.2579/2018 in July, 2018 whereas mainly seeking relief to direct the respondents to fill up all the notified and resultant vacancies and further consider and



appoint the applicants to the post of TGT (Computer Science), Post Code-192/14.

8. That the status of applicants in OA 2579/2018 including petitioners in the above mentioned petitions as under :-

<i>S.No.</i>	<i>Roll No.</i>	<i>Name of candidate</i>	<i>Category</i>	<i>Marks scored</i>	<i>Status</i>
<i>1.</i>	<i>13834327</i>	<i>Gaurav Kumar</i>	<i>UR</i>	<i>97.50</i>	<i>Could not be considered for nomination for being lower in merit.</i>
<i>2.</i>	<i>13808174</i>	<i>Amit Kumar (Petitioner No.11) in the present writ petition</i>	<i>UR</i>	<i>90.00</i>	<i>Could not be considered for nomination for being lower in merit.</i>
<i>3.</i>	<i>13844722</i>	<i>Vinay</i>	<i>OBC</i>	<i>92.75</i>	<i>OBC (Outsider)/UR Not in consideration zone therefore, could not be considered for nomination for being lower in merit in UR.</i>
<i>4.</i>	<i>13806511</i>	<i>Deepak Saini (Petitioner No.02 in the instant writ petition)</i>	<i>OBC</i>	<i>90.25</i>	<i>OBC (Outsider)/UR not in consideration zone. Could not be considered for nomination for being lower in merit.</i>
<i>5.</i>	<i>13840853</i>	<i>Dhananjay Pratap Singh (Petitioner No.05 in the</i>	<i>UR</i>	<i>98.00</i>	<i>Could not be considered for nomination for being lower in merit.</i>



		<i>instant writ petition)</i>			
6.	13857173	<i>Atul Pratap Singh (Petitioner No.06 in the instant writ petition)</i>	<i>UR</i>	<i>98.00</i>	<i>Could not be considered for nomination for being lower in merit.</i>
7.	13816397	<i>Sumant Jain (Petitioner No.03 in the instant writ petition)</i>	<i>UR</i>	<i>98.00</i>	<i>Could not be considered for nomination for being lower in merit.</i>
8.	13817319	<i>Poonam</i>	<i>UR</i>	<i>98.25</i>	<i>Already nominated in lieu of returned dossiers vide Result Notice No.271 dated 26.07.2018.</i>
9.	13813101	<i>Rishabh</i>	<i>UR</i>	<i>94.50</i>	<i>Could not be considered for nomination for being lower in merit.</i>
10.	13809232	<i>Yogesh Kumar (Petitioner No.12 in the instant writ petition)</i>	<i>SC</i>	<i>74.25</i>	<i>Could not be considered for nomination for being lower in merit.</i>
11.	13839558	<i>Saurabh Talwar</i>	<i>UR</i>	<i>98.50</i>	<i>Already nominated in lieu of returned dossiers vide Result Notice No.271 dated 26.07.2018</i>
12.	13833450	<i>Pankaj Aggarwal</i>	<i>UR</i>	<i>98.00</i>	<i>Could not be considered for nomination for being lower in merit.</i>
13.	13846556	<i>Sanjay Singh</i>	<i>UR</i>	<i>98.25</i>	<i>Already nominated in lieu of returned dossiers vide</i>



					<i>Result No.271 dated 26.07.2018.</i>
14.	13842869	Anuradha	UR	98.50	<i>Already nominated in lieu of returned dossiers vide Result No.271 dated 26.07.2018.</i>
15.	13848162	Virender Singh Shekhawat	UR	98.50	<i>Already nominated in lieu of returned dossiers vide Result No.271 dated 26.07.2018.</i>
16.	13854275	Kamaljeet Singh	UR	98.25	<i>Already nominated in lieu of returned dossiers vide Result No.271 dated 26.07.2018.</i>
17.	13801738	Gaurav Singh	UR	96.25	<i>Could not be considered for nomination for being lower in merit.</i>
18.	13815416	Pradeep Kumar	SC	75.25	<i>Already nominated in lieu of returned dossiers vide Result No.271 dated 26.07.2018</i>
19.	13845169	Pooja	SC	74.00	<i>Could not be considered for nomination for being lower in merit.</i>
20.	13802922	Bhupender Kumar Rawat	UR	97.25	<i>Could not be considered for nomination for being lower in merit.</i>
21.	13814562	Sunita Devi Petitioner	UR	97.50	<i>Could not be considered for</i>



		<i>No.07 in the instant writ petition)</i>			<i>nomination for being lower in merit.</i>
22.	13820045	<i>Prayas Kaushik (Petitioner No.08 in the instant writ petition)</i>	<i>UR</i>	<i>97.75</i>	<i>Could not be considered for nomination for being lower in merit.</i>
23.	13832167	<i>Asif</i>	<i>UR</i>	<i>97.50</i>	<i>Could not be considered for nomination for being lower in merit.</i>
24.	13843275	<i>Rakesh Kumar (Petitioner No.1 in the instant writ petition)</i>	<i>SC</i>	<i>74.75</i>	<i>Could not be considered for nomination for being lower in merit.</i>
25.	13840579	<i>Amit Kumar</i>	<i>OBC(O)/UR</i>	<i>98.25</i>	<i>Already nominated in lieu of returned dossiers vide Result Notice No.271 dated 26.07.2018.</i>
26.	13841503	<i>Neelam (Petitioner No.09 in the instant writ petition)</i>	<i>SC</i>	<i>75.00</i>	<i>Could not be considered for nomination for being lower in merit.</i>
27.	13823419	<i>Ram Swaroop Bhairwa</i>	<i>SC</i>	<i>75.00</i>	<i>Already nominated in lieu of returned dossiers vide Result Notice No.271 dated 26.07.2018.</i>
28.	13817466	<i>Kulvinder Kaur</i>	<i>UR</i>	<i>97.75</i>	<i>Could not be considered for nomination for being lower in merit.</i>
29.	13851659	<i>Reetika Chawla</i>	<i>UR</i>	<i>97.25</i>	<i>Could not be considered for</i>



					<i>nomination for being lower in merit.</i>
30.	13804822	<i>Dharmendra Singh</i>	<i>UR</i>	98.25	<i>Already nominated in lieu of returned dossiers vide Result Notice No.271 dated 26.07.2018.</i>
31.	13806796	<i>Rambir</i>	<i>UR</i>	97.50	<i>Could not be considered for nomination for being lower in merit.</i>
32.	13847724	<i>Anurekh Kumar (Petitioner No.13 in the instant writ petition)</i>	<i>SC</i>	74.50	<i>Could not be considered for nomination for being lower in merit.</i>
33.	13817226	<i>Dayanand</i>	<i>UR</i>	97.50	<i>Could not be considered for nomination for being lower in merit.</i>
34.	13857372	<i>Vaibhav Panwar (Petitioner No.10 in the instant writ petition)</i>	<i>UR</i>	97.25	<i>Could not be considered for nomination for being lower in merit.</i>
35.	13828853	<i>Mukesh Kumar</i>	<i>UR</i>	96.75	<i>Could not be considered for nomination for being lower in merit.</i>
36.	13846449	<i>Divya Jain</i>	<i>UR</i>	95.75	<i>Could not be considered for nomination for being lower in merit.</i>
37.	13811161	<i>Sudhir Bahuguna</i>	<i>UR</i>	98.25	<i>Already nominated in lieu of returned dossiers vide</i>



					<i>Result Notice No.271 dated 26.07.2018.</i>
38.	13815994	Meenakshi Kaushik	UR	95.50	<i>Could not be considered for nomination for being lower in merit.</i>
39.	13826565	Kirti Mohan Gaur	UR	97.50	<i>Could not be considered for nomination for being lower in merit.</i>
40.	13840704	Ritu Kumari	UR	98.00	<i>Could not be considered for nomination for being lower in merit.</i>
41.	13810894	Dharmendra a Petitioner No.04 in the instant writ petition	UR	98.00	<i>Could not be considered for nomination for being lower in merit.</i>
42.	13836509	Kirti Gautam	UR	98.50	<i>Already nominated in lieu of returned dossiers vide Result Notice No.271 dated 26.07.2018.</i>

It is clear from the above that, in the interregnum, when the User Department had returned some dossiers of the selected candidates for one reason or the other, the Respondent No.2/DSSSB had, in fact, rightly operated the Wait List and sent the dossiers of those candidates who were part of the Wait List and comprising some of the applicants before the Tribunal.



13. Mr. Chandra had fairly conceded that the petitioners in the present case had scored lower than those candidates who were selected from the Wait List and this is also substantiated from the details in the counter affidavit.

14. Thus, in the facts of the present case, it is clear that the Wait List was indeed operated, coupled with the fact that the petitioners were below the marks obtained by the last selected candidate, no case is made out warranting interference under the writ jurisdiction.

15. It is trite that the jurisdiction vested in this Court, under Article 226 of the Constitution of India, of judicial review, is in respect of the decision making process and not the decision itself.

16. In the present case we are satisfied that Respondent no.2 had operated the Wait List and had indeed selected the candidates listed therein as per their merit and solely for the unestablished reason of existence of many vacancies, we cannot interfere in the present case. More so, in view of the fact that the petitioners, admittedly, had scored below the cut off.

17. The judgement rendered by the Supreme Court in *Dinesh Kumar Kashyap and Ors. (supra)* would not be applicable to the facts of the present case since in that case the Central Government had not operated the wait list at all and that part of the action of the Central Government was taken to be unfair and unjust. However, in the present case, Respondent No.2 has not only operated the Wait List but also has selected candidates who had scored marks which were



requisite for their selection. In the present case, none of the Petitioners scored more than the last selected candidate and hence, were rightly not considered. The table above clarifies this position.

18. Learned counsel further relies upon judgment of the learned Single Judge of the Jharkhand High Court in *Bijay Lakra (supra)* to submit that the persons in the Wait List can be appointed against posts which are lying vacant and the plea of lapse of the Wait List may not come in the way of such appointments.

19. In so far as the case of *Bijay Lakra (supra)* is concerned, there is no quarrel with the proposition that the Wait List, if maintained, may be considered to fill the vacancies as arose in the present case. However, the said ratio arising out of the facts obtaining in that case is applicable to the present case in as much as Respondent No.2/DSSSB has been able to demonstrate that no vacancies remained which needed to be filled from the Wait List coupled with the fact that it operated the Wait List against those vacancies which arose due to return of the dossiers from the User Department with the candidates in the Wait List who were way above the present petitioners. Thus, none of the judgments relied upon by the learned counsel for the Petitioners are applicable to the facts obtaining in the present case.

20. This Court also cannot countenance a situation where, under writ jurisdiction, a direction or mandamus may be issued to the respondent to fill up the vacancies with candidates who are lower in merit and to select persons with mediocre results. The substratum to



hold competitive examinations to select the best and meritorious candidates would be defeated.

21. It would be apposite to refer to the judgment rendered by the Supreme Court in the case of *Municipal Corporation of Delhi vs. Surender Singh and Ors.*, reported in 2019 (8) SCC 67, holding 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 Ashwani Kumar Singh v. U.P. Public Service Commission [Ashwani Kumar Singh v. U.P. Public Service Commission, (2003) 11 SCC 584 : 2004 SCC (L&S) 95] 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 mala fides. 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 mala fide.

x x x



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 cut-off 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 cut-off*



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 U.P. Jal Nigam [U.P. Jal Nigam v. Jaswant Singh, (2006) 11 SCC 464 : (2007) 1 SCC (L&S) 500] as done by the Division Bench would not be justified.”

The fact situation obtaining in the present case gets covered by this authoritative pronouncement of the Supreme Court.

22. In view of the above facts and circumstances of the case, we are, therefore, of the opinion that no case is made out by the Petitioners warranting interference by this Court and as such the present writ petition along with the application filed herewith is dismissed, with no orders as to costs.

TUSHAR RAO GEDELA, J

SANJEEV SACHDEVA, J

SEPTEMBER 01, 2022

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