



2025:DHC:1189-DB



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

+ **W.P.(C) 13658/2018**

SARIKA

.....Petitioner

Through: Mr. Manoj Pathy and Mr.
Neeraj Anand, Advs.

versus

**DELHI SUBORDINATE SERVICES SELECTION BOARD &
ORS**

.....Respondents

Through: Mrs. Avnish Ahlawat, SC with
Mr. N.K. Singh, Ms. Laavanya Kaushik, Ms.
Aliza Alam and Mr. Mohnish Sehrawat,
Advs.

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

HON'BLE MR. JUSTICE AJAY DIGPAUL

JUDGMENT (ORAL)

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21.02.2025

C. HARI SHANKAR, J.

1. An advertisement dated 22 July 2008, inviting applications for persons who aspired to the post of Teacher (Primary) in the Municipal Corporation of Delhi¹ was issued by the Delhi Subordinate Services Selection Board² in 2008-2009. Clause 9 of the advertisement, with its various sub-clauses, read thus:

“(9) **MODE OF SELECTION**

¹ “MCD”, hereinafter

² “DSSSB”, hereinafter



(i) The selection shall be made by the Board by way of written examination(s), the dates of which will be notified subsequently. The examinations will be held at various centers in Delhi only.

(ii) Wherever Combined Part-I (Objective type) and Part-II (Descriptive type) are held, Part-I (objective type) examination will be of qualifying nature for short listing the candidates. The part-II question-cum-answer booklets (descriptive type) of only those candidates who have been qualified in part-I, will be evaluated. Final merit list of candidates will be prepared on the basis of performance of candidates (marks secured) in the Part-II (descriptive type) Examination only.

(iii) The Board has full discretion to fix minimum qualifying marks for selection of posts in different categories i.e. UR/SC/OBC/PH/Ex-S.M in order to achieve qualitative selection and to recruit the best talent available.

(iv) There will be separate selection list for all the posts wherever applicable.

(v) The Board makes provisional selection of the candidates on the basis of information and documents/certificates provided by the candidate in his/her application and recommend the same to the indenting department. Further the Appointing Authority i.e. the indenting department verifies and satisfies itself about the authenticity of documents/certificates and eligibility as per the Recruitment Rules before finally appointing the candidate(s). Therefore, the provisional selection of a candidate confers him/her no right of appointment unless the Appointing Authority is satisfied after such inquiry as may be considered necessary that the candidate is suitable in all respect for appointment to the post.

2. The petitioner, who is a candidate belonging to the Scheduled Tribes³, applied for appointment as Teacher (Primary) in response to the aforesaid advertisement. She was issued an admit card and appeared in the examination.

³ “ST”, hereinafter



3. The examination consisted of two parts, Part-I and Part-II. A consolidated merit list of the candidates who had undertaken Part-I and Part-II of the examination was released by the respondents on 29 May 2013. The petitioner's name figured in the said merit list at Serial No. 175.

4. Despite her name figuring in the merit list, the name of the petitioner was ultimately not forwarded by the DSSSB to the MCD, recommending her case for selection as Teacher (Primary).

5. Aggrieved thereby, the petitioner approached the Central Administrative Tribunal⁴ by way of OA 4400/2014, seeking a direction to the MCD to appoint her as Teacher (Primary) following the aforesaid advertisement and examination undertaken by her.

6. Before the Tribunal, the MCD contended that it had fixed a qualifying marks of 30% in Part-I and 35% in Part-II for candidates belonging to reserved categories including ST. The qualifying marks for Part-I, therefore, worked out to 60% and in Part-II worked out to 70%. The petitioner, admittedly, scored 77 marks in Part-I and 68 marks in Part-II. The DSSSB contended, therefore, before the Tribunal, that as the petitioner had not scored the qualifying marks in Part-II examination, she could not be selected.

7. Accepting this contention of the MCD, the Tribunal, by

⁴ "the Tribunal", hereinafter



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judgment dated 14 September 2018, dismissed the petitioner's OA.

8. Aggrieved thereby, the petitioner has approached this Court under Article 226 of the Constitution of India by way of present writ petition.

9. We have heard Mr. Manoj Pathy, learned Counsel for the petitioner and Mr. N.K. Singh, learned Counsel for respondents at length.

Rival Contentions

10. Mr. N. K. Singh points out that, in terms of the latitude available with the DSSSB, to fix qualifying mark, by Clause (9) (iii) of the advertisement, for selection, in order to recruit the best available merit candidates, the DSSSB had fixed 30% as qualifying marks for Part-I (Preliminary) Examination and 35% as the qualifying marks for the Part-II (Mains) Examination for candidates to be eligible for consideration for appointment.

11. This, Mr. N.K. Singh submits, was made known by examination notification dated 20 December 2008, which was much prior to the holding of the examination on 15 February 2009. He has drawn our attention to Instruction 5 of the General Instructions for candidates contained in the examination notification dated 20 December 2008, which reads thus:

“The minimum qualifying marks for Preliminary Exam is – 40% for General and 30% for OBC/SC/ST candidates and for Main



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Exam is-45% for General, 35% for OBC/SC/ST subject to maximum of 10 (Ten) times the number of vacancies.”

12. Mr. Singh submits that the petitioner qualified in the preliminary examination, as she secured over 30%, but could not qualify in the Part-II (Mains) Examination as she failed to secure 35% marks.

13. Thus, Mr. Singh submits that there is no error in the judgment of the Tribunal as would warrant interference by this Court.

14. Mr. Pathy, learned Counsel for the petitioner, relies, *per contra*, on the following order dated 30 March 2007 issued by the DSSSB:

“Office Order No. 01

Date 30.03.07

ORDER

Sub: Policy regarding minimum standard of marks of selection:

It has been decided that the minimum standard of marks for short-listing the candidates in Part I examination will be 40% for unreserved category and 30% for reserved categories, subject to a maximum of ten times the number of vacancies.

The minimum standard of marks for final selection of candidates after adding the marks obtained in Part I and Part II examinations will be 45% for unreserved category and 35% for reserved categories.

Sd/- 29.03.2007

(D.M. Spolia)
Chairman”

15. Mr. Pathy’s contention is that the DSSSB was bound by the aforesaid order and that the aforesaid order only envisaged a minimum



standard of shortlisting marks in Part-I of 30% for reserved category candidates and in Part-I and Part-II combined of 35% for reserved category candidates. He submits that the petitioner has qualified as per both these standards and, therefore, could not be regarded as an unqualified candidate.

16. He further submits that if there is conflict between the aforesaid order dated 30 March 2007 and the advertisement governing the examination, the conditions in the order have to prevail. He placed reliance on para 62 and 65.5 of the judgment of the judgment of the Supreme Court in *Tej Prakash Pathak v Rajasthan High Court*⁵.

Analysis

17. We are not in agreement with Mr. Pathy that the order dated 30 March 2007 of the DSSSB can be elevated to the status of a statutory rule.

18. Having heard learned Counsel for the parties, we may straightway note that neither para 62 nor para 65.5 of *Tej Prakash Pathak* applies in the present case. These paragraphs reiterate the well known principle that administrative instructions cannot supplant statutory rules, though they may supplement them. They read thus:

“62. There can therefore be no doubt that where there are no rules or the rules are silent on the subject, administrative instructions may be issued to supplement and fill in the gaps in the rules. In that event administrative instructions would govern the

⁵ (2025) 2 SCC 1



field provided they are not ultra vires the provisions of the rules or the statute or the Constitution. But where the rules expressly or impliedly cover the field, the recruiting body would have to abide by the rules.

65.5. Extant Rules having statutory force are binding on the recruiting body both in terms of procedure and eligibility. However, where the rules are non-existent, or silent, administrative instructions may fill in the gaps;”

19. There can be no cavil with this proposition, authority for which dates back to *Mohinder Singh Gill v Chief Election Commissioner*⁶.

20. We do not have, before us, any statutory rules to which any administrative instructions can be said to be in conflict. As such, para 62 and 65.5 of *Tej Prakash Pathak*, on their face, do not apply.

21. Even otherwise, there is no conflict between the DSSSB order dated 30 March 2007 and the provisions of the advertisement. The DSSSB order dated 30 March 2007 merely sets out the minimum qualifying marks which could be fixed by DSSSB for the Part-I Examination as well as the minimum qualifying combined marks which could be fixed for Part-I and Part-II Examination. The order does not proscribe the DSSSB in any way from fixing qualifying marks individually for the Part-II Examination.

22. Besides, Clause 9 (iii) of the examination notification is clear. It clearly confers full discretion on the DSSSB to fix minimum qualifying marks “for selection of post for different categories i.e.

⁶ (1978) 1 SCC 405



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UR/SC/ST/OBC/PH/Ex-SM in order to achieve qualitative selection and to recruit the best talent available”.

23. The discretion granted to the DSSSB by Clause 9(iii), inasmuch as it pertains to fixing of qualifying marks for selection to recruit the best talent available, is obviously relatable to the Mains (Part-II) Examination, and not to the Part-I Examination.

24. In exercise of this power, the DSSSB issued the examination notification dated 20 December 2008. Instruction 5 in the General Instructions for candidates, as contained in the said examination notification, is clear. It fixes 35% as the minimum qualification marks for the Mains (Part-II) Examination.

25. This notification was issued much prior to the holding of the examination on 15 February 2009. Though Mr. Pathy sought to invoke the principle that the rule of the game could not be changed after the game has begun, now sanctified in the *Tej Prakash Pathak* decision, that principle has no application in the present case. The rules of the examination have to be understood from the advertisement dated 22 July 2008, read with the examination notification dated 20 December 2008. As such, all candidates were made aware, much before the examination commenced on 15 February 2009, that the qualifying marks for reserved category candidates in the Mains examinations would be 35%.

26. The petitioner, therefore, undertook the examination in full



awareness of this position. She never chose to challenge the examination notification dated 20 December 2008. Having not chosen to do so, she is bound by its terms.

27. We may refer to the recent decision of the Supreme Court in *Tajvir Singh Sodhi v State (UT of J&K)*⁷ in which it was held that, having participated in selection process without demur, a candidate, on finding that he or she does not figure in the final list of selected candidates, cannot seek to challenge the selection criteria. The maximum that the candidate can challenge at this stage can only be the actual manner in which the selection was conducted did not conform to the procedure stipulated in that regard. The criteria which govern selection, as set out in the examination notification read with the advertisement, therefore, are challenged at this stage. Para 69 of *Tajvir Singh Sodhi* elucidates the principle thus:

“69. It is therefore trite that candidates, having taken part in the selection process without any demur or protest, cannot challenge the same after having been declared unsuccessful. The candidates cannot approbate and reprobate at the same time. In other words, simply because the result of the selection process is not palatable to a candidate, he cannot allege that the process of interview was unfair or that there was some lacuna in the process. Therefore, we find that the writ petitioners in these cases, could not have questioned before a Court of law, the rationale behind recasting the selection criteria, as they willingly took part in the selection process even after the criteria had been so recast. Their candidature was not withdrawn in light of the amended criteria. A challenge was thrown against the same only after they had been declared unsuccessful in the selection process, at which stage, the challenge ought not to have been entertained in light of the principle of waiver and acquiescence.”

⁷ AIR 2023 SC 2014



28. Even otherwise, we do not find any illegality in the prescription, by the DSSSB, of 35% for reserved category candidates as the minimum qualifying marks in the Part-II Examination. As Clause 9 (iii) clarifies, the power vested with the DSSSB in this regard is to ensure that the best talent is recruited. The minimum qualifying marks which should be fixed in order to ensure that the best talent is recruited is a matter exclusively within the subjective jurisdiction of the DSSSB. This Court cannot, in any manner of speaking, sit in appeal over the discretion exercised by the DSSSB in that regard.

29. There is no dispute about the fact that the petitioner did not score 35% in the Part-II (Mains) Examination. There is, therefore, no error in the DSSSB not forwarding her name to the MCD as one of the candidates who had been selected in the examination.

30. Mr. Pathy also sought to contend that there were four candidates whose names did not figure in the merit list released on 29 May 2013 and who, nonetheless, were appointed as Teachers (Primary). None of the candidates have been impleaded, either before the Tribunal or before this Court.

31. We, therefore, are not inclined to go into that aspect of the matter. Besides, Article 14 does not guarantee negative equality. The Supreme Court has held in *State of Haryana v Ram Kumar Mann*⁸, that a petitioner before the Court has to establish his right, and cannot seek to piggyback on benefits which may have been given to others.

⁸ (1997) 3 SCC 321



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32. Viewed any which way, therefore, we do not find any illegality in the decision of the Tribunal.

33. The writ petition is accordingly dismissed, with no order as to costs.

C. HARI SHANKAR, J.

AJAY DIGPAUL, J.

FEBRUARY 21, 2025

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Click here to check corrigendum, if any