

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 17.01.2023

+ **W.P.(C) 167/2023 and CM Nos.598/2023 & 599/2023**

RABINDRA TIWARY Petitioner

versus

**LT. GOVERNOR, GOVT. OF NCT OF
DELHI & ANR.** Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Ajit Kumar Sinha, Senior Advocate
with Mr Niraj Kumar Mishra, Mr. Manoj
Jha and Ms Parul, Advocates.

For the Respondents: Mrs Avnish Ahlawat, SC for GNCTD
with Mr Nitesh Kumar Singh, Ms
Laavanya Kaushik & Ms. Aliza Alam,
Advocates for R-1.
Dr Amit George, Mr Rayadurgam
Bharati, Mr Arkaneil Bhaumik, Mr Amol
Acharya and Mr Piyo Harold Jaimon,
Advocates for R-2.

CORAM:

**HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MR. JUSTICE AMIT MAHAJAN**

JUDGMENT

VIBHU BAKHRU, J.

1. The petitioner has filed the present petition, *inter alia*, praying that he be appointed as a Judicial Officer at the Delhi Higher Judicial Service (hereafter 'DHJS') by creating a supernumerary vacancy. The petitioner further prays that directions be issued to the respondents to de-reserve the vacancies reserved for candidates belonging to Scheduled Castes and

Scheduled Tribes by amending the advertisement published on 24.02.2022 (hereafter '**the impugned advertisement**') issued for inviting applications for Delhi Higher Judicial Service Examination - 2022 (hereafter '**DHJS Exam-2022**'). The petitioner also prays that he be considered for appointment as a person belonging to the Economically Weaker Section (EWS). Alternatively, the petitioner prays that the impugned advertisement for DHJS Exam-2022 be set aside.

2. Respondent no.2 (hereafter '**the DHC**') had issued the impugned advertisement dated 23.02.2022, inviting online applications from eligible candidates for filling up 45 (forty-five) vacancies (43 existing vacancies and 02 anticipated vacancies) by way of a direct recruitment to the Delhi Higher Judicial Service (DHJS). The selection for the candidates involved three successive stages. In the first stage, the eligible candidates were required to appear and clear the Delhi Higher Judicial Service Preliminary Examination. The said examination entailed answering objective type questions with 25% negative marking. The candidates qualifying the said preliminary examination would be eligible to appear for the Delhi Higher Judicial Service Mains Examination (Written) (hereafter '**the DHJS Examination (Mains)**'), and those candidates, who qualified the said examination, were admitted for the *viva voce* test.

3. The break-up of the vacancies, as specified in the impugned notice, is set out below:

“The category wise breakup of vacancies to be filled is as under:-

Category	Break up of Vacancies		Total No. of vacancies
	Existing	Anticipated	
General	30	02	32
SC	07	00	07
ST	06	00	06
TOTAL	43	02	45

Note I: Out of the aforesaid 45 vacancies, the reservation for PwD candidates shall be as follows:

Category	Vacancies
PwD (Blind and Low Vision)	02
PwD (Specific Learning Disability) and PwD (Multiple Disabilities involving Blindness and low vision, one arm, one leg, both legs, leprosy cured, dwarfism and acid attack and specific learning)	01
Total	03

4. The petitioner qualified the Delhi Higher Judicial Service Preliminary Examination, which was held on 23.04.2022. He was admitted to the DHJS Examination (Mains).

5. The results of the DHJS Examination (Mains) were declared on 26.08.2022 and the petitioner cleared the said examination which was held on 14.05.2022 and 15.05.2022.

6. After the said results were declared, one of the unsuccessful candidates filed a writ petition [being W.P.(C) 739/2022 captioned **Anil Kumar v. High Court of Delhi**] before the Supreme Court, which was dismissed by an order dated 16.09.2022. Thereafter, the said petitioner

(Anil Kumar) filed a petition before this Court [being W.P.(C) 14252/2022] seeking enhancement/revaluation of the marks awarded in one of the papers of DHJS Examination (Mains). Some of the other candidates also filed petitions, *inter alia*, seeking revaluation of the marks awarded in DHJS Examination (Mains). These petitions were dismissed as well.

7. The unsuccessful candidates made a representation to the DHC, which were considered by the DHC and additional 1.5 marks (1 mark in Law Paper-III and 0.5 mark in General Knowledge and Language) were awarded to all the candidates who had appeared in DHJS Examination (Mains). In view of the additional marks awarded to all candidates, three candidates, who had not qualified earlier, also qualified for being admitted to *viva voce*.

8. The petitioner and the other qualified candidates appeared for the interview (*viva voce*). The final results of DJHS-Exam-2022 were declared on 10.11.2022. The petitioner was ranked at serial no.37 in the merit list. However, he is not entitled to be appointed to the Delhi Higher Judicial Service, as the selection was only for 32 vacancies (including anticipated vacancies) for general candidates. And, the petitioner does not belong to the reserved categories.

9. One of the candidates, who was unsuccessful in the DHJS Examination (Mains) but had qualified by virtue of the additional 1.5 marks being awarded to all candidates, was selected and is placed at serial no.21 in the order of merit. The other two unsuccessful candidates, who

had qualified to appear for *viva voce* test by virtue of award of additional marks, were not selected.

10. The petitioner is, essentially, aggrieved by not being selected to the Delhi Higher Judicial Service. He has raised several challenges to the process and the distribution of vacancies, for seeking an appointment in the said service. First, the petitioner claims that the unfilled vacancies reserved for Scheduled Castes and Scheduled Tribes category candidates should be de-reserved and added to the number of vacancies available for the General Category candidates. The petitioner contends that the vacancies reserved for Scheduled Tribes candidates has not been filled up for a long time and therefore are required to be de-reserved. Second, the petitioner also challenges the award of 1.5 marks to all candidates who appeared in the DHJS Examination (Mains). He also claimed that he belongs to the EWS category and therefore, ought to be appointed to the DHJS.

11. Mr. Sinha, learned senior counsel appearing for the petitioner, referred to the decision of the Co-ordinate Bench of this Court in ***Manish Sharma v. Lt. Governor and Ors.: W.P.(C) 747/2018, decided on 28.08.2019***, and on the strength of the said decision, contended that in the given cases, to meet the ends of justice, the Court could direct diversion of vacancies reserved for Scheduled Castes and Scheduled Tribes candidates. He also referred to the decision of the Himachal Pradesh High Court in ***Amardeep Singh v. State of H.P. and Ors.: CWP 1624/2008 and CWP 1122/2009, decided on 17.09.2009*** to contend that the unfilled

vacancies for reserved category candidates ought not to be carried forward for more than three years. In that case, the High Court had set aside a circular dated 26.07.1989, which had removed the time cap for de-reserving the vacancies, making it mandatory to carry over the vacancies in perpetuity. The Himachal Pradesh High Court was of the view that the vacancies reserved for Scheduled Castes and Scheduled Tribes, ought not to be carried over for more than three years.

12. In addition to the above, Mr. Sinha had also referred to the decision of the Co-ordinate Bench of this Court in *S.N. Aggarwal v. Union of India and Ors.: 45 (1991) DLT 609 (DB)*, whereby this Court had directed adjustment of candidates of general category against vacancies of unreserved category.

13. Lastly, he contended that the award of 1.5 marks to candidates is illegal as it is contrary to the impugned notification. The rounding of marks is impermissible and there was no ground to award any grace marks. He contended that the additional marks were awarded only to accommodate certain candidates that had failed to satisfy the qualifying criteria, albeit by a few marks.

14. Dr. Amit George, learned counsel appearing for the DHC countered the aforesaid submissions. He submitted that the petitioner had participated in the selection process against 32 (thirty-two) vacancies without any objection to the vacancies reserved for Schedule Castes/Schedule Tribes. In the circumstances, the petitioner is now precluded from challenging the notice after participating in the selection

process. He also referred to the decision of the Supreme Court in *Kulwinder Pal Singh and Anr. v. State of Punjab and Ors.: (2016) 6 SCC 532* and submitted that after insertion of Clause (4B) in Article 16 of the Constitution of India by the Eighty First (Amendment) Act, 2000, the unfilled vacancies for Scheduled Castes or Scheduled Tribes are required to be carried forward independent of the ceiling of reservation of 50%.

15. We have heard the learned counsel for the parties.

16. As noted above, the petitioner is ranked at serial no.37 and only one candidate, who had qualified to the DHJS Examination (Mains) by virtue of award of 1.5 additional marks, has been selected. Thus, even if the petitioner's challenge to the award of additional 1.5 marks to all candidates that had appeared in the DHJS Examination-2022 is accepted and the said candidate (who is ranked at serial no.21) is found to be disqualified, the petitioner cannot be appointed in his place. Although, the petitioner's position in the order of merit would improve from rank 37 to rank 36; the same would not result in the petitioner being included in the select list of 32 candidates.

17. The principal question to be addressed is whether the petitioner has any right to seek appointment to the Delhi Higher Judicial Services against unfilled vacancy reserved for Scheduled Castes and Scheduled Tribes candidates by insisting that the same be de-reserved and added to the vacancies for the general category candidates.

18. As stated above, the petitioner had participated in the selection process pursuant to the impugned notification without any reservation as to the allocation of vacancies. The petitioner cannot be permitted to challenge the notification dated 13.10.2022 after being unsuccessful in being selected. The Supreme Court in the case of ***Ramesh Chandra Shah and Ors. v. Anil Joshi and Ors.***: (2013) 11 SCC 309 held that the candidates, who had participated in the selection process but were unsuccessful, are disentitled to challenge the selection process and seek any relief under Article 226 of the Constitution of India. The court held that they were “*deemed to have waived their right to challenge the advertisement and the procedure of selection*”.

19. We are of the view that the petitioner cannot claim, as a matter of right, that the vacancies reserved for Scheduled Castes/Scheduled Tribes candidates be de-reserved. In the case of ***Kulwinder Pal Singh and Anr. v. State of Punjab and Ors.*** (*supra*), the Supreme Court considered the provisions of Section 7 of the Scheduled Castes and Backward Classes (Reservation in Services) Act, 2006. Sub-section (1) of Section 7 of the said Act expressly provided that there would be no de-reservation of any reserved category by any appointing authority in any establishment. However, Sub-section (2) of Section 7 of the said Act enabled the appointing authority to refer the vacancies to the Department of Welfare of Scheduled Castes and Backward Classes for de-reservation, if the appointing authority deemed it necessary in public interest to fill up the said vacancies. In the aforesaid context, the Supreme Court had held as under:-

“15. By perusal of Section 7, it appears that as a general rule there is a bar on dereservation of the post reserved for Scheduled Caste candidates. However, sub-clause (2) provides an exception to this general rule by laying down that in the public interest the authorities may by passing an order in writing dereserve the seats reserved for candidates belonging to Scheduled Castes category. After insertion of clause (4-B) in Article 16 of the Constitution vide Eighty First (Amendment) Act, 2000, dereservation could not have been done. Under Article 16(4-B) of the Constitution of India, unfilled vacancies reserved for Scheduled Castes or Scheduled Tribes candidates are to be carried forward independent of ceiling of reservation of fifty per cent. The seats reserved for Scheduled Castes and Scheduled Tribes categories are to be filled only by specified category. Therefore, High Court was right in finding fault with the dereservation of the seven posts which were filled by candidates belonging to general category and we do not find any reason warranting interference.”

20. The petitioner does not have any indefeasible right to be appointed to the Delhi Higher Judicial Service. We are unable to accept that any order or direction requires to be issued to the respondents for undertaking any exercise for de-reservation of vacancies reserved for candidates belonging to Scheduled Castes /Scheduled Tribes. In the event any such de-reservation of reserved vacancies is considered necessary by the respondents, on account of the same remaining unfilled over a long period of time, for want of the candidates meeting the qualifying criteria, the respondents may undertake the exercise for de-reserving such vacancies. In the event any such vacancies are de-reserved, the same would be available for being filled pursuant to the selection exercise conducted in the future. In any view, such vacancies cannot be made available for the

selection process that commenced pursuant to the impugned advertisement. The vacancies, as advertised by the impugned notification, cannot be increased by diverting vacancies earmarked for the reserved category.

21. The petitioner's contention that he is entitled to be considered for appointment as he belongs to the EWS is also unmerited. The impugned advertisement did not contain any such reservation for EWS category.

22. The petition is unmerited and, accordingly, dismissed. All pending applications are also disposed of.

VIBHU BAKHRU, J.

AMIT MAHAJAN, J.

JANUARY 17, 2023

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