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Court : Delhi

Decided On : Aug-11-2005

Reported in : 123(2005)DLT308; 2005(84)DRJ220

Judge : S. Ravindra Bhat, J.

Acts : Slums Act; Delhi Slum Clearance Act; Public Service Commission Procedure Rules - Rule 3; Delhi Development Authority Regulations; Constitution of India - Article 226; Service Law

Appeal No. : WP(C) No. 242/2003

Appellant : Ashok Kumar

Respondent : Slum and Jj Deptt., Mcd and ors.

Advocate for Def. : D.S. Chauhan, Adv.

Advocate for Pet/Ap. : Apurab Lal, Adv

Judgement :

S. Ravindra Bhat, J.

1. The petitioner in these proceedings under Article 226 of the Constitution questions his non-appointment to the post of Head clerk and the selection and appointment of respondents 3 to 14.

2. The petitioner joined services of the Slum and JJ Wing which was a part of the Delhi Development Authority (DDA) in December, 1983 as a Lower Division Clerk (LDC); he was promoted as Upper Division Clerk (UDC), on 6.6.1988. The Slum and JJ Wing was originally a part of the DDA; it was transferred to, and came under administrative control of the Municipal Corporation of Delhi (MCD).

3. On 18.4.2001, the MCD issued a circular calling for applications from amongst eligible UDC for filing up post of Head Clerk in the pay scale of Rs. 5500-9000/-. The circular stated that a departmental examination would be held that for the purpose. The petitioner applied in response to the circular. His candidature was provisionally accepted on 11.8.2001. He appeared in the examination. A select list was prepared on 10.7.2001, consisting of 11 persons who were appointed to the post of Head Clerk. The petitioner's name did not figure in that list. He thereforee, represented to MCD raising a grievance that even though he had passed in all four test papers and was at Sl. No. 11, at least four persons who had not cleared and secured minimum marks in each paper had been nevertheless included in the select list and appointment. One Sh. Ravinder Kumar, respondent No. 14, in these proceedings was also appointed. It is averred that he was at sl. No. 16, but was nevertheless granted promotion.

4. The petitioner's grievance is that as per the rules/ norms applicable to the selection process, a candidate had to obtain 40% marks in each paper and 45% marks in the aggregate, as a qualifying condition. He avers that at least four persons did not fulfill that condition since they got less than 33%. The petitioner secured 38% in one paper and was placed in a better situation. The denial of appointment is questioned as arbitrary and discriminatory.

5. The respondent in its reply has denied the allegation that the petitioner's exclusion for non-appointment was arbitrary. It is averred that

'It is not disputed that a candidate was required to obtain 40% marks in each paper and 45% in aggregate. It is, however, further submitted that the Departmental Promotion Examination Committee prepared panel for merit by adopting criteria of merit on the basis of agree gate marks obtained in all the subjects which was a real reflection of over all merit in all the subjects. It is submitted that the said

criteriabeing the most fair and reasonable is not, liable to impeached on any ground whatsoever.'

It has also been averred that appointment letters were issued to the first 11 candidates and that respondent No. 14 Sh. Ravinder Kumar was later appointed against the reserved post earmarked for SC candidates.

6. The norms of recruitment applicable for promotion to the post, had been formulated by the DDA, by regulations. As per the regulations, the method of recruitment was, in the first instance by promotion. For promotion a 50% quota had been earmarked from eligible UDCs who had put in five years of regular service and were graduates.

7. The Court had issued notice to all the respondents. All the private respondents, namely, respondents 3 to 14, were served during the course of the proceedings; respondent No. 4 was proceeded ex-parte by order dated 11.11.2003; The other respondents, namely, 5 to 14 had indicated on various dates that they would not be filing any reply.

8. When the matter was heard on 14.7.2005, the merit/ select list was produced in Court. It contained the marks given to the various candidates. The Court directed production of the original file. The original file was accordingly made available to the Court on 27.7.2005, when the matter was heard finally.

9. The original records show that the MCD apparently had not formulated any fresh norms when the departmental examination was held. This is evident from a note prepared by the Asstt. Director (RECTT) dated 29.6.2001 that note states as follows:-

'Generally in the departmental examinations, minimum qualifying marks/ aggregate marks are fixed while preparing results. While going through this result, it has not been mentioned anywhere that how many candidates have been declared successfully.

Further, I came to know that in DDA, 40% marks are fixed as qualifying marks and 45% the aggregate in each paper. In the merit list placed at page 1/c to 3/c, it has

been observed that one candidate (at sl No. 8) to secure 16% marks in paper 'of Slums Act has been placed above, the candidate who had secured 40% and above marks in each paper only on the basis of his higher percentage in paper IV of GK. This issue needs clarification. Before the result is made public and promotion orders are issued.'

10. The noting went on to propose that promotion orders be issued to only first six candidates who secured 50 and more than 50% marks in each subject and that as far as obtaining qualifying marks were concerned Director (T & AR) to clarify the stage, the appropriate position by the DDA.

11. The Director appears to have given an opinion for the over all aggregate marks are to be taken into consideration and merits should be based on total number of marks secured by an individual in all the papers. It was also stated that

'The individual paper marks is not relevance in the mark list prepared. The UPSC also follow the same system of total marks obtained by a candidate and not the marks obtained in separate notices.'

This view was concurred later on 2.7.2001, by the Superintendent Engineer (QC) who stated that there was no need to follow the DDA system and that it was necessary to follow the system intimated:

'which we have intimated directly or indirectly to the candidate. More over the marking is comparative, there can be a case due to some reasons of the candidates may fail to obtain the minimum qualifying marks, thereforee, the mark list made by the Committee based on aggregate marks was in order.'

On the basis of this decision, the select list was prepared and appointments were made.

12. The select list also indicates that in respect of paper No. (I), candidates placed up-to Sl. No. 6 scored more than 40% marks; however, candidates between sl. No. 7 and sl. No. 15 scored less than 40% marks. The first paper, No. I is the Slum Act; the petitioner scored 38 marks in that paper and respondents 3 to 14 scored 66, 66, 60, 50, 55, 52, 32, 16, 34-1/2, 35, 30-1/2, 40, respectively. Respondent No.

10 Sh. Chander Prakash scored an aggregate of 237-1/2 marks but in the first paper (Slum Act) he scored lowest, namely, 16 marks. There were others too who had scored less than 20 marks in that paper, but who had secured more than 50% in the aggregate. They were, however, not appointed.

13. Mr. Apurab Lal, learned counsel for the petitioner submits that the MCD has acted in an arbitrary manner in not following the norms which had been followed in all previous selections, as far as the application of the criteria of minimum qualifying marks was concerned, while making appointments. He submitted that even though the recruitment rules do not expressly spell out this requirement, nevertheless the pattern of indicating minimum qualifying marks for each subject and over all minimum aggregate percentage, was consistently followed by the DDA. The recruitment was resorted to by MCD, which had adopted the DDA pattern in so far as the quota and departmental examination as well as content of departmental examinations were concerned. Hence, it was also bound to follow existing norms, which required consideration of 40% marks as a qualifying percentage for each paper. The MCD admitted that such a norm existed and had to be followed. Yet it violated that principle. Hence, the selection and appointment of some of the respondents cannot be sustained in law.

14. Learned counsel submitted that though the petitioner had secured 38 marks in paper No. I (Slum Act), as per the existing norms, he was entitled to an addition of grace marks which would result in his securing 40% in that paper thus resulting his inclusion in the select list in any case, he submits that if the performance in individual papers are to be considered, the petitioner had performed far better those who had selected between sl. Nos. 7 to 11 from among the merit list. Learned counsel also attacked the action of the respondent MCD in changing the norms of selection, midstream, during course of the selection process, which is impermissible and illegal in law.

15. Mr. Chauhan, learned counsel for the respondent/MCD submits that there is no infirmity in the selection process. The circular inviting applications for the post of Head Clerks did not spell out the minimum percentage required as qualifying marks in every paper. Moreover, the pattern of minimum qualifying marks was

being followed by the DDA; upon transfer of the activities to the MCD the latter was no longer under obligation to follow such pattern and practice, in entirety. The Selection Committee in its discretion and wisdom felt that over all merit having regard to the aggregate merits/ percentage was a proper indicator of merit rather than instance of minimum qualifying marks in each paper. Such being a policy matter, the respondent could not faulted. At any rate, neither the selection process, nor the appointments are arbitrary.

16. Learned counsel for the respondent also submitted that the petitioner himself secured less than 40%, hence, even if for some reasons, the recruitment process is termed irregular no benefit or advantage, can be secured by the petitioner. He submitted that the writ petition required dismissal for this reason itself.

17. The pleadings and materials show that the recruitment to the post of Head Clerk was undertaken, as per the methodology under the DDA Regulations; the posts in question were sought to be filled on the basis of the quota, and other conditions spelt out in those regulations. The regulations, however, were silent about the criteria to be adopted. There is also no denial about two vital facts; viz, that the DDA used to follow the policy of insisting that candidates score at least 40% in each paper, and at least 45% in the aggregate, to qualify in the written test. Apparently, the DDA pattern, in so far as the eligibility conditions, etc prescribed in the regulations, were deemed appropriate, when MCD initiated the process of selection. The selection committee, however did not indicate which of the candidates qualified or did not qualify. It merely compiled the results, and prepared a 'rank' or 'merit' list according to the total marks scored. This omission was noticed, at the tail end of the selection process, when the actual select list had to be prepared. The thinking, and the existence of the policy at that stage, is crucial to a decision in this case. The note of the Assistant Director noticed the past pattern or methodology in prescribing qualifying percentages for each paper, and a minimum qualifying percentage in aggregate. That was on the basis of the records. However, the final decision was on the basis, or an assumption that such individual qualifying marks are not relevant, and that the aggregate marks are determinative. The UPSC pattern or norm was cited in support of this view. No provision, rule, or circular, however, appears in support of this view, which is

based upon an impression of the concerned official.

18. The above facts clearly reveal that the existing norm, or practice at the time when selection commenced, was that a candidate should score a minimum of 40% marks in each paper. That is underscored by the note of the Assistant Director, as indeed the affidavit of the MCD in these proceedings. However, the competent authority decided to deviate from the norm, at the stage of finalization of selection. The issue thereforee, is whether such a course of action was valid and justified.

19. The Supreme Court, in its judgment reported as A.P. Public Service Commission v. B. Sarat Chandra, : (1990)IILLJ135SC , while dealing with the concept of 'selection' in service law, stated that:

'it consists of various steps like inviting applications, scrutiny of applications, rejection of defective applications or elimination of ineligible candidates, conducting examinations, calling for interview or viva voce and preparation of list of successful candidates for appointment. Rule 3 of the Rules of Procedure of the Public Service Commission is also indicative of all these steps. When such are the different steps in the process of selection, the minimum or maximum age for suitability of a candidate for appointment cannot be allowed to depend upon any fluctuating or uncertain date. If the final stage of selection is delayed and more often it happens for various reasons, the candidates who are eligible on the date of application may find themselves eliminated at the final stage for no fault of theirs. The date to attain the minimum or maximum age must, thereforee, be specific, and determinate as on a particular date for candidates to apply and for recruiting agency to scrutinise applications. It would be, thereforee, unreasonable to construe the word selection only as the factum of preparation of the select list. Nothing so bad would have been intended by the rule making authority'.

20. It has been laid down in several judgments (Ref State of Uttaranchal v. Sidharth Srivastava, : AIR 2003 SC4062 Mahendran v. State of Karnataka : AIR 1990 SC405 and N.T. Devin Katti v. Karnataka Public Service Commission : (1990)IILLJ456SC , Secretary A.P. Public Services Commission v. B. Swapna and Ors. : (2005)4SCC154) that selection or appointment has to be made in accordance with the rules or norms in force at the time of initiation of the selection

process. Recently, in a somewhat similar fact situation, the Supreme Court held, in Maharashtra SRTC v. Rajendra Bhimrao Mandve, : (2002)ILLJ819SC that:

'It has been repeatedly held by this Court that the rules of the game, meaning thereby, that the criteria for selection cannot be altered by the authorities concerned in the middle or after the process of selection has commenced.'

In the present case, precisely what has been frowned upon happened. The norm which existed, in the form of a practice, was the requirement of candidates having to qualify with 40% in each paper. The MCD did not formulate its own norm. The decision to deviate, without formulation of a fresh policy or norm, was taken at the fag end of the process, when the select list had to be drawn up. The rationale for that decision is an assumption, viz that UPSC follows such a pattern, and that the total marks are relevant. These in my considered opinion, betray both arbitrariness, as well as non-application of mind. Arbitrariness, because the existing norm in the form of a practice was never changed; a decision was taken to discard it at the end of the process. That is opposed to well settled law that the norm governing selections are rules or norms prevailing at the commencement of the recruitment process. Non-application of mind, since the competent authority nowhere discloses the source of the impression that UPSC follows the pattern of qualifying on the basis of aggregate marks, without insisting upon minimum marks in each paper. It would also be useful to see whether aggregate marks are a better indicator for adjudging individual candidates' performance. In this context, the Supreme Cout, in its judgment reported as Director-General, Telecommunication v. T.N. Peethambaram, : (1987)ILLJ438SC , held as follows:

'The Tribunal has taken the view that the department was wrong in so interpreting the Rule and has formed the opinion that on a true interpretation, the requirement as regards securing minimum pass marks in the examination by the candidates concerned is referable to 'aggregate' marks and not to each of the four subjects or items of the examination. It has been overlooked by the Tribunal that the 'rule' does not employ the expression 'aggregate', and that it is impossible to inject the said word in the Rule in the disguise of interpretation, as it would lead to absurd results. An illustration will make the 'obvious' point 'more obvious'. The illustration

might be viewed in the scenario of a medical degree examination. Can one who secures zero, say in surgery, but secures high marks in the other papers, so that the minimum aggregate standard is attained, be declared to have passed the examination? Such an interpretation would result in havoc and have catastrophic consequences. Examining the examination rule in the present context, the nihilist result is equally conspicuous. Say, a candidate secures zero in the first paper of Advanced Technology (General), or second paper of Advanced Technology (Special), but secures full marks in the rest of the subjects (or items). He would be securing (0 plus 100 plus 50 plus 75) or (100 plus 0 plus 50 plus 75) (equal to 225 i.e. 56.25 per cent) minimum passing marks and would be entitled to be declared as having passed and having become entitled to the out flowingpreferential treatment. Similar would be the outcome also in a case where a candidate's Confidential Record is bad and he earns no point in that item. Such an interpretation would thus be self-defeating and lead to absurd results, and accordingly, would be contrary to well established can one of construction, not to speak of a common-sense-oriented approach.'

21. The pitfalls and palpable absurdity of a mechanical assumption that aggregate marks in a recruitment process is a preferable method of selection, as opposed to a norm where minimum marks in individual papers, and minimum aggregate marks, have been exemplified in the above observations. The facts of this case reveal that such observations are not groundless; at least one candidate secured only 16 marks in Paper no 1, which relates to the Delhi Slum Clearance Act. The department in question for which MCD held the examination is the Slum wing; the candidates were all existing employees, with some knowledge of the enactment. Hence, the rationale, of the respondent MCD, that the aggregate marks was preferable, and individual paper marks were not relevant, is also unsupported by law.

22. In view of the foregoing discussion, I am of the view that the selection and appointment of candidates who did not score at least 40% in each paper, in the departmental examination, cannot be upheld.

23. The question that immediately arises is what relief should be granted in these proceedings. Admittedly, the petitioner too did not secure 40% marks in the paper in question. To that extent, he is placed similarly to other candidates who secured less than 40%; they were however, appointed to the post. It is well settled that the Court, in proceedings under Article 226 of the Constitution of India, can appropriately mould the relief, in favor of a litigant. The issue is whether the present case would warrant such a course of action.

24. In these proceedings, the complaint of the petitioner was that candidates who had not qualified were appointed. To that extent, he has succeeded in establishing his case. However, would that circumstance alone entitle him to relief. The answer, in my considered opinion, has to be in the negative. The discussion in the preceding portions of the judgment hinged on the regularity and legality of the process, change of norms at the time of compiling of the select list, and the correctness of the view that aggregate marks are relevant. In other words, the principal issue raised by the parties was the correctness of appointments of persons securing less than 40% marks in one or the other paper. Having concluded that such a course is improper, the court ought not to, in the guise of moulding the relief, either sanction the continuance of such persons, or direct the authorities to consider the petitioner. Either, or both steps, would amount to a mandate to perpetrate an established illegality; something which cannot be countenanced. Similarly, the court cannot reject the petition, merely on the ground that the petitioner did not qualify, and secured less than 40% in one paper. Such a course of action is untenable, because the petitioner was never told his results; the marks were not published. More importantly, the court would be reduced to the role of a mere bye stander, who can only observe illegality, but has to stay away from meaningful intervention, on the face of arbitrary action.

25. In view of the foregoing discussion a direction is issued, quashing the selection and appointment of respondents 9 to 13, to the post of Head Clerk. The petition is, accordingly, partly allowed. No costs.