Municipal Corporation Of Delhi vs Surender Singh . on 1 August, 2019

Equivalent citations: (2019) 3 SCT 809, AIRONLINE 2019 SC 741, (2019) 10 SCALE 252, (2019) 3 SERVLJ 31, (2019) 5 ALL WC 5076, (2019) 6 SERVLR 532, 2019 (8) SCC 67, 2020 (138) ALR SOC 48 (SC), 2020 (205) AIC (SOC) 21 (SC)

Author: A.S. Bopanna

Bench: A.S. Bopanna, R. Banumathi

NON_REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5588 OF 2010

Municipal Corporation of Delhi .…Appellant(s)

Versus

Surender Singh & Ors. ….Respondent(s)

JUDGMENT

A.S. Bopanna,J.

1. The respondent No.2 in the writ petition before the learned Single Judge, who was also respondent No.1 in L.P.A.No.65/2008 and connected appeals before the Division Bench of the High Court of Delhi is before this Court in this appeal assailing the order dated 03.11.2008 passed in the said L.P.A.No.65/2008 and connected appeals. Through the said order dated 03.11.2008 the Division Bench has allowed the appeals in terms of the directions issued therein. In that regard the order dated 29.11.2007 passed by the learned Single Judge in W.P. (C) Nos.16126□130/2006 was interfered and the Division Bench has directed the appellant herein to appoint Shri Surender Singh and Shri Rakesh Sharma the private respondents herein to the post of Assistant Teacher (Primary) in the appellant Municipal Corporation. The appellant, therefore, is aggrieved by the same.

2. The factual matrix herein is that the Delhi Subordinate Services Selection Board ("DSSSB" for short) had issued an Advertisement bearing No.1/2006 for appointment of Assistant Teacher (Primary) in the schools of the appellant herein, namely, the Municipal Corporation of Delhi ("MCD" for short). The number of vacancies advertised was at the first instance at 3348 which were under the different categories, namely, Unreserved, Scheduled Caste, Scheduled Tribes, Other Backward Classes which included Ex-Servicemen and Physically/ Visually Challenged. Through the corrigendum dated 14.05.2006 the number of vacancies was modified to 2348 under the said different categories. The candidates selected through the said process was to be sent to the appellant-MCD on getting the request from them through the Competent Authority. The DSSSB had also the right to fix the period for which the panel would be valid.

3. In the Mode of Selection indicated in the Advertisement No.1/2006, a discretion was provided to the DSSSB to fix the minimum qualifying marks for selection for each category in order to achieve qualitative selection and to pick up the best talent available. The same was contained in Clause 25, while Clause 26 provided that the marks obtained by the candidates in a written examination will not be disclosed in any case. The written examination was accordingly conducted on 02.07.2006. The Advertisement no doubt did not specify any cut-off qualifying marks in the said examination. On completion of the process of the written examination, the merit list was published but neither the private respondents herein nor the other petitioners/appellants before the High Court had qualified. It is in that light the private respondents herein filed the Writ Petitions bearing Nos.16126-130/2006. Certain other candidates who did not qualify had also filed similar writ petitions. Hence all these writ petitions were clubbed and considered together.

4. The prayer in the writ petition was to quash Clause Nos.25 and 26 contained in the Mode of Selection in Advertisement No.1/2006 which provided for fixing the minimum qualifying marks for selection. The contention in the writ petition was that the same was violative of the directions contained in the judgment dated 18.02.2005 passed in W.P.(C) Nos.5650-51/2004 titled Kuldeep Singh and Ors. vs. DSSSB & Anr. In that light direction was sought to the DSSSB, both to consider the case of the writ petitioners against the remaining vacancies without fixing minimum qualifying marks for selection and to publish the results of all the vacancies and to fill up the same. In view of the cut-off mark being introduced, the result of 1638 posts was declared out of the total posts advertised. The writ petitioners contended that at such stage when they contacted the DSSSB and the appellant herein regarding non-publishing of the select list for all the posts advertised they were informed that they had fixed certain minimum marks as per their discretion contained in the Advertisement and that they had found only 1638 candidates achieving the said minimum marks and therefore the results of only 1638 candidates were declared.

5. The writ petitioners, therefore, contended that the process adopted by the DSSSB is contrary to the directions issued in the case of Kuldeep Singh (supra). The writ petitioners had also assailed the action of the DSSSB in refusing to give any details about the minimum qualifying marks which had been fixed unilaterally, by contending that the same is arbitrary and discriminatory. It was contended on behalf of the writ petitioners that the action of the DSSSB to limit the number of candidates by introducing the cut-off marks has affected their right and, therefore, sought for direction to be issued in exercise of the writ jurisdiction to fill up all the posts and provide

employment to the writ petitioners. It was contended therein that the DSSSB has to follow the requisition given by MCD for undertaking selection process and as such the DSSSB being merely an agency to conduct the interviews/tests and prepare the panel cannot lay down its own criteria for scrutinizing the eligible candidates by fixing minimum qualifying marks. The decisions in support of the contentions put forth on behalf of the writ petitioners was also relied.

6. The DSSSB and the appellant herein who were the respondents in the said writ petitions had refuted the contentions put forth and had contended that there was no illegal and arbitrary exercise of power on the part of the DSSSB for fixing the cut□off marks. It was contended that there is no legally enforceable right and the writ petition was not maintainable. The appellant herein had contended that the method of recruitment laying down the eligibility criteria etc. are all matters relating to the executive policy decisions and in the absence of any statutory rules/laws, the executive decisions remain sustainable. It was contended by the appellant herein that the allegations of discrimination was not sustainable inasmuch as the petitioners had not demonstrated as to how the criteria adopted by the DSSSB in fixing the cut□off percentage was arbitrary when it was uniformly applied to all the candidates who had appeared for the examination and had not differentiated or discriminated anybody selectively. The decision in the case of Kuldeep Singh (supra) was sought to be distinguished. In that regard it was contended that the said judgment did not debar the DSSSB from introducing certain methods for achieving the objective of selecting the best talent available and maintaining the high educational standard so as to achieve good results of the students to whom such selected teachers would be teaching. The decision in the case of State of Haryana vs. Subhash Chandra Marwah & Ors. AIR 1973 SC 2216 was relied upon to contend that it is open to the Government to fix a score which is higher than the one required for eligibility for the post with a view to maintain the high standard of competition. It was pointed out that the DSSSB has now started publishing the minimum percentage of marks and in the instant case also furnished the same in the proceedings.

7. The learned Single Judge while taking note of the rival contentions has at the outset taken into consideration the decision in the case of Kuldeep Singh (supra) on which extensive reliance was placed on behalf of the writ petitioners. It was noticed that in the said case in respect of the Advertisement of the year 2002 for 421 vacancies, the Advertisement did not contain any stipulation pertaining to minimum qualifying marks that should be obtained. The learned Single Judge noticed that in the said case the DSSSB and the MCD were at variance and each one had taken a different stand and the controversy was sought to be put at rest by indicating as to how the vacancies should be dealt with by the DSSSB as well as the User Department, namely, MCD. In that light the option available to the DSSSB to carry forward the vacancies which had occurred was referred to. The directions issued was extensively quoted and in that background it was noted, pursuant to the said judgment and order dated 21.04.2006 passed in C.C.P.No.370/2003 wherein the Court took notice of the writ petition filed by the petitioner therein pointing out that the quality of education being imparted in the schools run by the MCD and the Government of NCT of Delhi was not up to the mark and thus a Public Interest Litigation bearing W.P.(C)No.1611/2001 was filed to state that the children studying in the said schools were not well equipped for future. What was considered therein was also the chronic shortage of teachers in MCD schools and that the recruitment process was not being initiated within time and wherever initiated would be involved in procedural

formalities. In that view the MCD and Government of NCT of Delhi were directed to complete the exercise identifying the number of vacant posts and notifying the same to DSSSB, the recruiting agency by the first week of April of each year.

8. In the background of implementation of the order in the contempt proceedings the functions of the DSSSB was also taken into consideration and it was held that the legal status of the DSSSB was that of an agency to conduct interviews/tests and prepare a select panel and forward the same to the User Department. The time frame that had been set for completing the process was also taken note of. It was in that regard taken note by the learned Single Judge that pursuant to such directions the requisition was sent to the DSSSB, who in turn issued the Advertisement No.1/2006 indicating the posts advertised at 2348 (actual) and 1000 (panel) vacancies. The said Advertisement in Clause 25 also indicated that DSSSB had full discretion to fix the minimum qualifying marks for selection of different categories of posts and pick up the best talent available. The learned Single Judge was of the view that when the MCD i.e., the User Department had no objection to the method adopted by the DSSSB to fix the minimum qualifying marks the same would be sustainable.

9. In that fact situation, the learned Single Judge on referring to the various decisions cited and on analysing the same had taken note that the Courts have observed that even if the criteria fixed is defective, the Courts are ordinarily not required to interfere as long as the same standard/yardstick has been applied to all the candidates and did not prejudice any particular candidate. In that light, the learned Single Judge had taken note that the DSSSB had been specially created by the executive for the purpose of selecting the appropriate candidates to fill up the vacancies in the User Department and the DSSSB had to discharge its obligation by fixing the criteria for declaring the successful candidates. In that process when the cut□off percentage was fixed, all candidates obtaining marks above the percentage were indicated in the select list and when the results were declared on 27.07.2006 the MCD which is the User Department did not ask for further list from the DSSSB due to which the panel for the remaining vacancies was not operative. Since the DSSSB is the Selection Board, the laying down of the process for short listing the candidates cannot be faulted merely because the User Department, namely, the MCD did not prescribe the minimum qualifying marks.

10. The learned Single Judge had also taken note that when the writ petitioners had appeared for the examination, they were fully aware of Clause 25 in the Advertisement which has provided the discretion to the DSSSB to fix the minimum qualifying marks but they had not chosen to challenge the said Clause. In that view, it was noted that they had participated in the process by appearing for the examination and only when they had not qualified in the examination a grievance was raised. Hence it was held that such grievance does not merit consideration. In that circumstance, the learned Single Judge was of the opinion that the prayer made in the writ petition is not liable to be considered. While arriving at such conclusion the learned Single Judge had also kept in view the interest of the students who were the ultimate stakeholders and any interference with the recruitment process for selection of the Assistant Teachers undertaken by the DSSSB for the benefit of the appellant herein would ultimately affect the interest of the students. In that view the learned Single Judge had dismissed the writ petitions.

11. The writ petitioners were, therefore, before the Division Bench in L.P.A.No.65/2008 and connected appeals. The Division Bench during the course of its proceedings on 18.08.2002 had recorded the factual position relating the number of vacancies and the manner in which the candidates from the panel was to be sent to the MCD. The contention that had been put forth before the learned Single Judge to assail Clause 25 in the general instructions of the Advertisement was taken note and the Division Bench in any event did not find fault with the consideration made by the learned Single Judge relating to the minimum qualifying marks being fixed. However, the Division Bench had observed that there are only eight appellants before the Court in the different appeals that were filed before it as against the number of unfilled vacancies which was much more. It was also taken note that subsequent examinations had been held in April, 2008 to fill up the unfilled vacancies of 2006 as well as newly created vacancies. It was also noted that there are several changes in the new examination and Clause 6 of the general instructions for April, 2008 examination provided the minimum qualifying marks in the manner as extracted by the Division Bench in its order.

12. In that background the Division Bench had taken note that in respect of the selections held in 2006, 63 out of 1079 vacancies remained to be filled and the appellants could be considered for appointment against those vacancies. In that regard, it was noticed that the appellant Nos.1 and 2 (Shri Surender Singh and Shri Rakesh Sharma) in L.P.A.No.65/2008 and appellant No.1 in L.P.A.No.172/2008 (Poonam Bala) belonged to unreserved category and had obtained 87, 88.75 and 88.25 per cent respectively out of 200 marks. In that background it was noticed that in the unreserved category the marks obtained by the last selected candidate, namely, Praveen Kumar was on his obtaining 89.25 per cent. Hence it was observed that the difference in marks scored by the named three appellants and the last selected candidate was extremely narrow. The Division Bench was, therefore, of the view that as there were 63 vacancies which were unfilled, the appellant herein and the DSSSB were obliged to go down in the merit list in which case three of the appellants would qualify to be appointed. To arrive at such conclusion the Division Bench was of the view that the DSSSB had not taken a conscious decision to fix the cut□off marks for examination held in 2006. In that background the Division Bench on taking note of the minimum marks fixed during 2008 has adopted the same yardstick for the year 2006 and directed the appellants herein to select and appoint Shri Surender Singh and Shri Rakesh Sharma.

13. The learned counsel for the appellant herein while assailing the order passed by the Division Bench sought to contend that in order to maintain the standard of education the cut□off was required to be fixed more than the bare minimum that is required for qualifying and in that light when a definite cut□off had been fixed and a similar yardstick had been applied in respect of all the persons securing more than the said marks to be selected and when all persons who obtained below the fixed qualifying marks had not been included in the list, there is no discrimination or arbitrariness so as to call for interference by the Division Bench in the process of judicial review. It is contended that the Clause 25 contained in the Advertisement had provided for fixing the minimum qualifying marks and the appellant as the User Agency did not find fault with the criteria adopted by the DSSSB. The Division Bench was not justified in arriving at the conclusion that there was no conscious decision taken.

14. It is further contended that when the Division Bench had accepted the criteria of prescribing minimum marks in the selection process held in the year 2008, the interference made in the present manner by fixing its own criteria for selection would not be justified. It is contended that it is not for the Courts to fix the minimum standard required for selection of a candidate and more particularly in the instant case when the teachers were to be selected, if they do not satisfy the minimum qualifying criteria the ultimate sufferers would be the students. The learned counsel has taken us through the reasoning adopted by the learned Single Judge and in that background has pointed out that the Division Bench did not find fault with the same but was only carried away by the fact that all the posts which were advertised had not been filled up. Though 63 posts were available the direction to accommodate some of the candidates who did not qualify would not be justified.

15. The learned counsel for the private respondents seeks to sustain the order passed by the Division Bench. In that regard it is pointed out that the Division Bench on the earlier occasion in the same proceedings while considering the matter had observed all these aspects on 18.08.2008 and the same being taken note ultimately while disposing of the appeal on 03.11.2008 has arrived at the conclusion that the private respondents can be accommodated and in that view by not making it as a precedent for others had granted the benefit. The learned counsel would also point out that the Division Bench had taken note of the decision in the case of U.P. Jal Nigam and Anr. Vs. Jaswant Singh & Anr. (2006) 11 SCC 464 to indicate that even if the others who had participated in the process of selection and were not selected approaches the Court at this point in view of the relief granted to the private respondents herein, they would not be entitled to claim and as such the benefit granted to the private respondents herein does not call for interference.

16. The position noticed above would indicate that the entire grievance with which the petitioners had approached the High Court was on claiming to be aggrieved by Clause Nos.25 and 26 contained in the Advertisement No.1/2006 issued for recruitment of Assistant Teacher (Primary) for the benefit of the appellant MCD. In order to appreciate the same in its correct perspective, it would be appropriate to take note of the impugned Clause Nos.25 and 26 which read as hereunder:

> "25. The Board has full discretion to fix minimum qualifying marks for selection for each category i.e. SC/ST etc. of post in order to achieve qualitative selection and to pick up the best talent available.
>
> 26. The marks obtained by the candidate in written examination will not be disclosed in any case." From a perusal of the said Clause it is noticed that though under the very Clause there is no cut□off marks specified, Clause 25 would, however, provide the full discretion to the DSSSB to fix the minimum qualifying marks for selection. In the instant case, keeping in view that the recruitment was for the post of Assistant Teacher (Primary) and also taking note of the orders passed by the High Court in an earlier petition requiring the maintenance of minimum standards, the DSSSB while preparing the select list had stopped the selection at a point which was indicated as the cut□off percentage. In a circumstance where Clause 25 was depicted in the Advertisement No.1/2006, when the private respondents herein and the other petitioners before the High Court were responding to the said Advertisement, if at all

> they had a grievance that the Clause is arbitrary and might affect their right ultimately since no minimum marks that is to be obtained has been indicated therein, they were required to assail the same at that stage. On the other hand, despite being aware of the Clause providing discretion to DSSSB to fix the minimum qualifying marks, they have participated in the selection process by appearing for the qualifying examination without raising any protest. In that circumstance, the principle of approbate and reprobate would apply and the private respondents herein or any other candidate who participated in the process cannot be heard to complain in that regard.

17. It is no doubt true that the select list was concluded at the particular cut□off point wherein the last selected candidate under the unreserved category had obtained 89.25 per cent. The said decision had been taken by the DSSSB to ensure the minimum standard of the teachers that would be recruited and the appellant herein being the recruiting agency in any event, did not have objection. In any event, it is not the case of the petitioners that they had obtained higher marks than the candidate who was shown as the last candidate in the merit list. If that was the position and when it is noticed that the appellant and the other writ petitioners had secured lesser percentage of marks than the last candidate included in the merit list, there could not have been any further consideration whatsoever in the course of judicial review. To that extent, the learned Single Judge, from the observations as noticed above has kept in view all aspects of the matter and in that light had arrived at the conclusion that no error was committed either by the DSSSB or the appellant herein. 18. Having taken note of this aspect we further take note that the consideration as made by the Division Bench would indicate that even though no fault was found with the impugned Clause contained in the Advertisement, what has weighed in the mind of the Division Bench is only that even after selecting the last candidate who had obtained 89.25 per cent out of the two papers for the total marks of 200, there still remained vacant 63 posts out of the total notified vacancies and the dossiers of the selected candidates were returned to the appellant herein leaving the said 63 posts unfilled. It is in that circumstance, the Division Bench undertook the exercise of making the further consideration by securing details from the appellant. In that regard the position was clear that the private respondents regarding whom the directions had been issued had secured 88.75 per cent and 87 per cent out of 200 marks respectively and the other candidate, namely, Poonam Bala who had ultimately not pressed the writ appeal had obtained 86.25 per cent out of 200 marks. Based on their percentage, the private respondents herein were at the merit position of 1224 and 1447 respectively. Since they were marginally below the last candidate in the select list the Division Bench has proceeded to direct their selection.

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 the case of Ashwani Kumar Singh vs. U.P. Public Service Commission & Ors. (2003) 11 SCC 584 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 malafides. 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 malafide.

20. In that background when the DSSSB and the appellant herein were concerned with the quality of teachers to be recruited and had fixed a merit bar to indicate that the persons obtaining the percentage of marks above such bar only would be selected, the employer cannot be forced to lower the bar and recruit teachers who do not possesses the knowledge to the desired extent merely because certain posts had remained vacant which in any event would be carried over to the next recruitment.

21. In the instant facts the details were also available before the Division Bench that in between the percentage as obtained by the last selected candidate at 89.25 per cent and the percentage of marks obtained by the second private respondent herein at 87 per cent there were 273 candidates in all in the said range. Despite the availability of the persons who had obtained higher percentage of marks than the second private respondent herein, the Division Bench erred in issuing direction to select the private respondents herein. The learned counsel for the respondents no doubt sought to rely on the decision of this Court in the case of U.P. Jal Nigam & Anr. (supra) which was taken note by the Division Bench to contend that though there were other candidates who had obtained higher percentage of marks than the private respondents herein, the direction issued to select the private respondents herein would not affect the interest of the appellant MCD since at this juncture no other candidate can seek for relief, not having chosen to agitate their rights at an earlier point of time and in that circumstance the relief granted to the private respondents being an equitable relief does not call for interference.

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 the case of U.P. Jal Nigam (supra) as done by the Division Bench would not be justified.

24. In that background the order dated 03.11.2008 passed by the Division Bench in L.P.A.No.65/2008 is not sustainable and the same is accordingly set aside.

25. The appeal therefore succeeds and is accordingly allowed with no order as to costs.

.....J. (R. BANUMATHI) .....J. (A.S. BOPANNA) New Delhi, August 01, 2019