

**Central Administrative Tribunal
Principal Bench**

OA No. 3906/2015
and
OA No. 1975/2015

Order reserved on: 06.05.2016
Order pronounced on: 17.05.2016

Hon'ble Mr. V. N. Gaur, Member (A)
Hon'ble Mr. Raj Vir Sharma, Member (J)

OA No.3906/2015

Jai Bhagwan (Appointment)
Aged about 26 years
S/o Sh. Partap Singh,
R/o VPO Peepli Khera,
Distt. Sonapat,
Haryana.

- Applicant

(By Advocate: Sh. M.K.Bhardwaj)

Versus

The Commissioner of Delhi Police & ors.through

1. Commissioner of Police
Police HQ,
IP Estate,
New Delhi.
2. The Dy. Commissioner (Rectt.),
Delhi Police,
Kingsway Camp,
New Delhi.

- Respondents

(By Advocate: Ms. Sumedha Sharma)

OA No.1975/2015

Amit Malik (Appointment)
Aged about 24 years

S/o Sh. Ishwar Singh,
R/o VPO Atail, Tehsil Sampla,
Distt.Rohtak, Haryana.

- Applicant

(By Advocate: Sh. M.K.Bhardwaj)

Versus

The Commissioner of Delhi Police & ors.through

1. Commissioner of Police
Police HQ,
IP Estate,
New Delhi.
2. The Dy. Commissioner (Rectt.),
Delhi Police,
Kingsway Camp,
New Delhi.

- Respondents

(By Advocate: Sh. Vijay Pandita)

ORDER

Hon'ble Mr. V.N.Gaur, Member (A)

OA Nos. 3906/2015 and 1975/2015 were taken up together for disposal as the learned counsels in the two cases were unanimous that the facts and the law points involved were identical. OA No. 3906/2015 was taken up as the lead case.

2. The applicant applied for the post of Constable Driver in response to the advertisement issued in May 2012 for 752 vacancies under respondent no.1. He qualified in the written test held on 11.11.2012 and trade test held on 05.06.2013 to

12.07.2013 securing 77 marks. The results declared in September 2013 show that the last selected candidate in the general category secured 77 marks, in OBC category 73 marks and in SC category 45 marks. In an OA filed before this Tribunal by some other candidates who participated in the same selection process, the respondents were directed to correct the answer key to one of the questions and revise the marks allotted to the candidates in the written test and revise the result. The applicant also got the benefit of that order but he still was not in the list of selected candidates. Later, through RTI (Page 23 of the paper book) he came to know that six candidates with 77 marks had been allowed to join as Constable Driver from the same selection in which the applicant had secured 78 marks after the revision of the result. It was further stated that while revising the result there were several candidates whose marks were enhanced by one but there are certain others whose marks were reduced by one. Seven candidates of general category whose marks were reduced from 78 to 77 continue to be in service as they had already joined. According to the applicant, not only candidates with 77 marks but candidates with 76 marks were also appointed as Constable Driver in general category but applicant who secured 78 marks was left out. When he represented, the respondents declined to accept his request on the ground that persons who had already

been appointed could not be reverted in terms of the order of the Tribunal. Since all the vacancies have been filled up, applicant's case could not be considered.

3. According to the learned counsel for the applicant, once the respondents had implemented the decision of the Tribunal and revised the marks, it was incumbent on them to appoint the applicant also along with Sh. Vimal Chand Meena and others who were applicants in OA No.2926/2014. He also referred to the decision of this Tribunal in **OA No.1961/2014** decided on 06.11.2015 wherein in similar circumstances and after taking note of Hon'ble Supreme Court in **Rajesh Kumar and others vs. State of Bihar**, 2013 (4) SCC 690, the Tribunal had allowed the OA.

4. Learned counsel for the respondents, on the other hand, submitted that while the facts of the case were not disputed, the respondents had already given appointment to six candidates who had secured 77 marks and had already joined the department prior to re-evaluation of the result as the minimum qualifying marks for general category were 77. After re-evaluation when the merit list increased to 78 marks, no candidate having 77 marks has been issued offer of appointment. Learned counsel also referred to Annexure R-2 where the list of 75 candidates, who were selected in the previous list, joined the department and now

out of merit candidates could not be ousted from Delhi Police in view of the judgment passed by the Hon'ble Supreme Court in **Rajesh Kumar**. The respondents have though listed 3 Annexures with the counter reply but have annexed none. In the counter reply the extract from **Rajesh Kumar** has been quoted stating that *"the candidate who do not make the grade after re-evaluation shall not be ousted from service but shall figure at the bottom of the list of selected candidates based on the first selection in terms of the advertisement"*. Learned counsel submitted that earlier the applicant, though secured minimum qualifying marks of 77, was not selected being younger in age. After the re-evaluation of result, the applicant secured 78 marks but again he could not be selected being younger in age as the minimum qualifying marks for general category also increased to 78 and he did not come in the selection zone due to being younger in age. Learned counsel further submitted that now it is not possible to consider the request of the applicant as all the vacancies have been filled up.

5. We have heard the learned counsels and perused the record. The short point to be addressed in this case is whether the applicant who after the revision of the result has secured 78 marks has a right to be selected when certain candidates who had secured 77 marks and 76 marks after re-evaluation have been allowed to continue in the post of Constable Driver because they

had joined the department earlier. It is observed that in **Rajesh Kumar** the Hon'ble Supreme Court had directed that those, who did not make grade after re-evaluation, shall not be ousted from service but shall figure at the bottom of the list of selected candidates. However, the Hon'ble Supreme Court has not put any restriction on the respondents to consider those candidates for appointment who secured higher marks on re-evaluation and applicant falls in the latter category. It is an admitted fact that the qualifying marks for the general category rose to 78 and applicant is again stated to be out of the list of selected candidates because of his being younger in age. When there is a tie at the cut off mark, the date of birth is used to draw a line above which the candidates older in age shall be selected due to the constraint of vacancies. That is to say, the applicant was eligible in all respects for selection but for the availability of vacancies. In reply to para 4.10 of the OA, the respondents in their counter have stated as follows:

“That in reply to the contents of corresponding para it is submitted that there are only 03 candidates whose marks were 77 marks before re-evaluation of result and after re-evaluation their marks came to 76 marks. Out of 03 candidates, the candidature of 01 candidates, namely, Hitesh Kumar (Roll No.809454) has been cancelled and the remaining 02 have already joined the department before re-evaluation of result. Further, there are 07 more candidates whose marks were reduced to 77 marks from 78 marks. Out of the 07 candidates, the candidature of 01 candidate, namely, Vinay Shankar (Roll No.800741) has been cancelled and the remaining 06 candidates have joined the department and they cannot be ousted from Delhi Police in view of the judgment/directions passed by the Hon'ble Supreme Court of India in Civil Appeal No.2515-2516/2013 (arising out of SLP (Civil) No.5752-53

of 2008) in which the Hon'ble Apex Court held that "the candidate who do not make the grade after re-evaluation shall not be ousted from service but shall figure at the bottom of the list of selected candidates based on the first selection in terms of the advertisement"(Annexure-R/3). In view of above, the action taken by the respondents is legal and justified."

6. Thus, it is an admitted fact that the candidature of at least two candidates had been cancelled as they did not join before the re-evaluation of result. We do not find any reason as to why the applicants in these two OAs should not be considered for appointment against these two vacancies once they have not only secured qualifying marks but have secured more marks than some other candidates who had already joined the department before re-evaluation.

7. We also take note of the order passed by this Tribunal in OA No.1961/2014 on 06.11.2015 in similar circumstances allowing the OA. The Coordinate Bench in that case has taken a view that the order of the Hon'ble Supreme Court directing the respondent not to oust the candidates who were given the offer of appointment but whose marks came below the cut off marks after re-evaluation, was an order *in personem* and it did not lay down any ratio.

8. In the light of the foregoing, the respondents are directed to consider the appointment of the applicant in OA Nos.3906/2015 and 1975/2015 on the post of Constable Driver against the

existing vacancies. This exercise shall be completed within a period of four weeks from the date of receipt of a copy of this order. OA is allowed. No costs.

(Raj Vir Sharma)
Member (J)

(V.N. Gaur)
Member (A)

‘sd’