

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

+ **W.P.(C) No.7439/2010**

% **Date of Decision: 18.04.2011**

Delhi Jal Board Petitioner

Through Mr.U.N.Singh, Advocate.

Versus

Sh.Sharad Kumar Respondent

Through Mr.Amit Dubey, Advocate.

CORAM:

HON'BLE MR.JUSTICE ANIL KUMAR

HON'BLE MR.JUSTICE SUDERSHAN KUMAR MISRA

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | NO |
| 3. | Whether the judgment should be reported in the Digest? | NO |

ANIL KUMAR, J.

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1. The petitioner, Delhi Jal Board, has challenged the order dated 18th May, 2010 passed by Central Administrative Tribunal, Principal Bench, New Delhi in T.A No.727/2009 titled "Sh.Sharad Kumar v. Chief Executive Officer, Delhi Jal Board & Anr." directing the petitioner to consider the claim of respondent for the post of Chief Water Analyst under 20% carved out quota from the feeder cadre of Bacteriologist within three months from the date of receipt of the copy of the order.

2. Brief facts to comprehend the controversy are that the respondent filed a writ petition being W.P(C) No.3276/2007 praying inter-alia to issue a writ in the nature of certiorari for quashing/setting aside proceedings/result dated 17th April, 2007 of DPC held on 15th March, 2007 qua Sh.Vinod Kumar and for issue of a writ in the nature of mandamus directing the petitioner to consider the respondent for regular promotion as Assistant Chief Water Analyst (hereinafter referred to as “ACWA”). The respondent had impleaded Sh.Vinod Kumar as respondent No.2 in the said writ petition filed before the High Court which was later on transferred to Central Administrative Tribunal and was registered as TA No.727/2009 titled as “Sh.Sharad Kumar v. Chief Executive Officer and Anr.”

3. The respondent had contended that he and his colleague namely Mr.Rakesh Chandra Bahukhandi had been working as Bacteriologist. According to him Chemist and Bacteriologist are feeder cadre to the post of Assistant Chief Water Analyst, ACWA. The respondent contended that he and his colleague were seniors in the combined list of Chemist and Bacteriologist on the basis of old Recruitment Rules of 1982, however, the petitioner issued amended recruitment rules in 1997 which are under challenge. The respondent also disclosed that he has filed another writ petition along with other employees of Delhi Jal Board being W.P(C) No.4321/1997 titled as “Sh.Rakesh Chandra

Bahukhandi & Ors v. Delhi Jal Board” where the reliefs sought were a writ of certiorari for quashing the notification of amended recruitment rules to the post of ACWA dated 22nd September, 1997 and to promote the respondent with other petitioners in the said writ petition No.4321/1997 to the post of ACWA with retrospective effect and for a direction to the petitioner to remove the disparity, if any, existing in the promotion to the post of ACWA.

4. The respondent had contended that the amended recruitment rules dated 22nd September, 1997, where the ratio of 80:20 was fixed for promotion to the post of ACWA from the combined cadre of Chemist and Bacteriologist, were challenged by the respondent and other employees of Delhi Jal Board. According to the respondent, the Court in W.P(C) No.4321/1997 had stayed the operation of the amended recruitment rules to the extent that the petitioner was permitted to fill up the post of ACWAs on the basis of amended recruitment rules, however, the promotion was to be subject to the outcome of the said writ petition.

5. The grievance of the respondent as pleaded in the writ petition No.3276/2007 was that the petitioner had promoted four junior Chemists to the post of ACWA on the basis of ratio of 80:20 though the respondent and Sh.Rakesh Chandra Bahukhandi were senior most in

the combined seniority of both cadres of Chemist and Bacteriologist. The respondent's plea was that he was promoted as ACWA on adhoc basis on 29th October, 2004 subject to the outcome of writ petition No.4321/1997 and since then he has been working as ACWA on adhoc basis. The respondent asserted that in the combined seniority list his name is at serial No.8.

6. The other plea of the respondent in the writ petition was that Sh.Vinod Kumar was shown at serial No.9 in the seniority list of ACWAs, however, he was promoted on current duty charge with effect from 28th November, 2005, i.e., much after the respondent. According to respondent since he was working as ACWA on adhoc basis since 29th October, 2004, he was entitled to be considered for regular promotion to the post of ACWA earlier to the said Sh.Vinod Kumar. It was contended that in promoting Vinod Kumar prior to respondent, petitioner has acted illegally and has considered the junior candidate Sh.Vinod Kumar in the DPC held on 15th March, 2007 without any rhyme and reason for regularization of his promotion to the post of ACWA and thus the respondent has been denied even consideration contrary to rules and illegally and in an arbitrary manner.

7. The respondent alleged that he filed an application to the petitioner which was received on 22nd March, 2007 and also got a legal

notice issued to the petitioner on 2nd April, 2007 as no response to his application was received from the petitioner regarding not regularizing his promotion to the post of ACWA. The respondent had alleged that the DPC held on 15th March, 2007 whose result was declared on 17th April, 2007 where respondent was denied regular promotion whereas Sh.Vinod Kumar who was junior to the respondent had been illegally considered and thus the respondent prayed for quashing and setting aside the DPC held on 15th March, 2007 and its result declared on 17th April, 2007.

8. The petitioner contested the petition and contended inter-alia that the recruitment rules to the post of ACWA were amended and notified on 22nd September, 1997. The amendments were carried out primarily to reconcile the conflicting interest of both the feeding grades for the said post ACWA, namely Chemist and Bacteriologist. The petitioner disclosed that there existed 12 sanctioned posts of ACWA which are to be filled from Assistant Chemists and Assistant Bacteriologist. Sanctioned post of Assistant Chemist and Chemist are 67 and 20 respectively whereas the sanctioned post of Assistant Bacteriologist and Bacteriologist are 13 and 18 respectively. It was also asserted that the earlier recruitment rules which were notified on 4th January, 1982 had contemplated promotion to the post of ACWA from the Chemists and Bacteriologists with five years regular service in respective grades

possessing at least a degree of Chemistry/Bio-chemistry/Biology. According to the petitioner promotional avenues of Assistant Bacteriologist to the post of Bacteriologist was considerably high as compared to that of Assistant Chemist to Chemist, as there were only 13 posts of Assistant Bacteriologist constituting the feeder cadre for promotion to 8 posts of Bacteriologist as against 67 Assistant Chemist constituting the feeder cadre for promotion to 20 posts of Chemist. In the circumstances, it was pleaded that promotional avenues of Assistant Chemist to that of Chemist was 30% and promotional avenues of Assistant Bacteriologist to the post of Bacteriologist was 90%, therefore, to bring parity in promotional prospects in both the categories, the recruitment rules were amended providing 80% of the posts of ACWA to be filled up by the Chemist and 20% from amongst Bacteriologist by promotion.

9. The stand of the petitioner in the counter affidavit filed in reply to the writ petition being W.P(C) No.3276/2007 was that resolution No.696 for the proposed amendment was passed on 15th October, 1985 which was approved by the Corporation and the mandatory approval sought from Union Public Service Commission was given on 7th March, 1997 and the amended recruitment rules were notified on 22nd September, 1997. The petitioner denied the combined seniority list which was produced by the respondent along with the writ petition contending that

no combined seniority list of ACWA had been issued by the petitioner. The petitioner asserted that the respondent himself had prepared the said combined seniority list of ACWA without taking into consideration other factors such as categories to which the candidates belong and the same could not be relied on or referred to.

10. Regarding respondent, the petitioner disclosed that respondent is working on adhoc basis as ACWA since 29th October, 2004 and as there is no regular vacancy for the cadre of Bacteriologist as per post based roster, therefore, he could not be regularized.

11. After the writ petition No.3276/2007 was transferred to the Central Administrative Tribunal, Principal Bench and was registered as T.A No.727/2009 the same was allowed by order dated 18th May, 2010. The petitioner contends that while allowing the petition of the respondent, the Tribunal did not notice the order dated 23rd November, 2009 passed by the Tribunal in another T.A No.1051/2009 titled as “Sh.Rakesh Chandra Bahukhandi and Ors. v. Delhi Jal Board & Ors.” which was a writ petition filed by the respondent and other employees of Delhi Jal Board being W.P(C) No.4321/1997 where the Tribunal had upheld the amended recruitment rules notified on 22nd September, 1997. While passing the impugned order dated 18th May, 2010 in T.A No.727/2009 the Tribunal relied on the statement made by the

respondent that out of 2 posts carved out as 20% quota of Bacteriologist only one Sh.Rakesh Chandra Bahukhandi has been working on regular basis whereas the petitioner has been keeping a post for the last six years functioning as ACWA and, therefore, the contention of the petitioner that the regular vacancy is not available cannot be countenanced and there is a presumption of it being of permanent nature which cannot be refuted by the petitioner and, therefore, disposed of the petition with direction to the petitioner to consider the claim of the respondent for the post of Chief Water Analyst under 20% carved out quota being the feeder category of Bacteriologist.

12. The said order of the Tribunal dated 18th May, 2010 in T.A No.727/2009 is challenged by the petitioner inter-alia on the ground that there is no regular vacancy for the post of Chief Water Analyst reserved for Bacteriologist quota. The petitioner has asserted that the order dated 18th May, 2010 passed in T.A No.727/2009 is in conflict and contrary to order passed by the Tribunal dated 23rd November, 2009 in T.A No.1051/2009 which has not been followed while passing the impugned order by the same bench. The petitioner has also impugned the order on the ground that there are two posts carved out as 20% quota being the feeder category of Bacteriologist and Sh.Rakesh Chandra Bahukhandi was working on regular basis under the quota of Bacteriologist and Sh.Ram Kishan, who is a regular ACWA from the

category of Bacteriologist is holding the post of CWA on adhoc basis. The case of regular promotion of Sh.Ram Kishan to the post of CWA is under process and has to be approved by UPSC as per the recruitment rules. The petitioner pleaded that the name of the respondent against the resultant vacancy of Sh.Ram Kishan will be considered for regular promotion only on availability of regular vacancy for the post of ACWA reserved for Bacteriologist category quota. As there are only two regular posts of ACWA reserved for Bacteriologist, therefore, the name of the respondent cannot be considered till the vacancy occurs on account of approval of Sh.Ram Kishan's posting on regular basis to the post of CWA. The petitioner also contended that promotion of the respondent as ACWA on adhoc basis was subject to the outcome of writ petition No.4321/1997 which was later registered as TA No.1051/2009 and since the said writ petition has already been dismissed, the respondent could not claim the rights as alleged by him.

13. The petitioner also contended that promotion of Sh.Vinod Kumar was as per rules and regulations and as per the seniority list as Sh.Vinod Kumar belongs to reserved SC/ST category and, therefore, his seniority could not be the basis for promotion claimed by the respondent. In any case there has not been violation of the amended recruitment rules which amendments to the rules have been upheld by the Tribunal in TA No.1051/2009 titled as "Sh.Rakesh Chandra

Bahukhandi & Ors. v. Delhi Jal Board & Ors.”. The petitioner pleaded that the impugned order would have the likelihood of disturbing the ratio of cadre strength in the amended recruitment rules and, therefore, the impugned order is not sustainable.

14. This Court has heard the learned counsel for the parties in detail and have perused the record of the Tribunal produced along with the present writ petition. This is not disputed and cannot be disputed that the recruitment rules to the post of ACWA were amended in 1997. The schedule to the recruitment rules regarding Assistant Chief Water Analyst for recruitment by promotion contemplates as under:-

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| <p>“12. In case of rectt.by promotion deputation/transfer, grades from which promotion/ deputation/transfer to be made</p> | <p>Promotion</p> <p>i) 80% from Chemist with 3 yrs regular service in the grade and possessing at least a degree with Chemistry/ Bio-chemistry/Biology from a recognized university or equivalent.</p>
<p>ii) 20% from ii) Bacteriologist with 3 years regular service in the grade and possessing at least a degree with chemistry/ bio-chemistry/ biology from a recognized University equivalent.</p> |
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NOTE: Where juniors who have completed their qualifying/eligibility service are being considered for promotion, their seniors would also be considered provided they are not short of the requisite qualifying/eligibility service by more than half of such qualifying/eligibility service or have successfully completed their probation period for promotion to the next higher grade along with their juniors who have already completed such qualifying/eligibility service.

15. The said amendment was challenged by the respondent along with other employees of Delhi Jal Board in W.P(C) No.4321/1997 which on transfer to Central Administrative Tribunal was registered as T.A No.1051/2009 which was dismissed by order dated 23rd November, 2009 upholding the amendment in the rules for the post of ACWA. While dismissing the petition challenging the amendment to the recruitment rules it was held that fixing of ratio between Bacteriologist and Chemist which was not malafide or against the Constitution and was based on policy decision could not be termed and treated as irrational or arbitrary. The Tribunal in T.A No.1051/2009 had held as under:-

“On careful consideration of the rival contentions of the parties we are of the considered view that chances of promotion are not the right guaranteed to a person. It is only a right to be considered on fair and equitable basis, which is a right guaranteed as a fundamental right under the Constitution of India to a government servant. Moreover, as a policy decision, amendment of recruitment regulations, when right of consideration for promotion to applicants has not been affected, the claim of the applicant cannot be countenanced in law as they were considered on promotion later on. Mere fixing the ratio when not established to be either mala fide or against the

Constitution, the policy decision cannot be treated as irrational, arbitrary or against the Constitution of India. We have persistently pointed to the learned counsel for the applicant as to whether before the amendment being effective either from 22.09.1997 or 1985, was there any vacancy available, the counsel has neither taken such a pleading in the TA nor established before us. In such view of the matter, the challenge of the applicants to the recruitment regulations is misconceived.

In the result for the foregoing reasons, TA being bereft of merit is dismissed.”

16. The DPC held on 15th March, 2007 had considered the promotion of Bacteriologist and Chemist in terms of amended recruitment rules and recommended regular promotion to the post of ACWA in the pay scale of Rs.6500-10500/- of the following persons:-

1. Sh.R.C.Bahukhandi bacteriologist
(working as ACWA as ad-hoc basis)
2. Sh.Mahesh Chand (SC) Chemist
(working as ACWA on ad-hoc basis) on his own turn against UR)
3. Sh.B.L.Sharma Chemist (working as ACWA on ad-hoc basis)
4. Sh.Vinod Kumar (SC) Chemist
(working as ACWA on ad-hoc basis) on his own turn against UR

17. The Tribunal has held that there are two posts of Bacteriologist on the basis of 20% quota, however, it assumed that one post on which

the respondent is working is being kept vacant for past six years without regularizing the respondent. No such facts can be culled from the pleadings of the parties that the petitioner has been keeping one post of ACWA vacant and not filling it up.

18. In the petition filed by the respondent though Sh.Vinod Kumar was impleaded as respondent No.2 as it was alleged that he is junior to the respondent yet he has been promoted, however, the Tribunal has not even considered the plea raised by the petitioner in respect of Sh.Vinod Kumar that Sh.Vinod Kumar belongs to the reserved/SC/ST category who was the senior most in that category from Chemist cadre and, therefore, on the basis that he has been promoted pursuant to the DPC held on 15th March, 2007, the claim of the respondent for promotion could not be considered nor the respondent becomes entitled for promotion who is Bacteriologist on the basis of promotion given to a Chemist in accordance with recruitment rules.

19. The learned counsel for the respondent is also unable to show as to how the respondent can claim promotion or consideration for promotion to the post of ACWA on the basis of the cadre of Chemist when the respondent belongs to the cadre of Bacteriologist. The respondent is not entitled for consideration for promotion on the ground that Sh. Vinod Kumar is junior to the respondent as he was given even

current duty charge after respondent had been appointed on ad-hoc basis as ACWA. The cadre of respondent and Shri Vinod Kumar are different and amended recruitment rules have been upheld by the Tribunal. There is no combined seniority list of Chemist and Bacteriologists. Shri Vinod Kumar also belongs to reserved SC/ST category and his seniority cannot be the basis for consideration of respondent for promotion.

20. This cannot be disputed in the facts and circumstances on the basis of pleading of the parties that there are only two posts for ACWA for Bacteriologist. On one post Shri R.C.Bahukhandi had been appointed and on the other post Shri Ram Kishan was appointed who has been further appointed on ad hoc basis to the post of CWA. Till the appointment of Shri Ram Kishan to the post of CWA is not regularized, it cannot be held that the other post of ACWA is available for consideration of respondent for promotion. The petitioner has asserted and categorically pleaded in the writ petition that the name of the respondent against the resultant vacancy of Shri Ram Kishan will be considered for regular promotion only on availability of regular vacancy for the post of the ACWA.

21. The learned counsel for the respondent has not been able to make out any ground as to how the respondent is entitled for consideration

for promotion when no post for promotion as ACWA is available in the cadre of Bacteriologist. The order of the Tribunal impugned by the petitioner cannot be sustained as the respondent had sought quashing of the DPC dated 15th March, 2007 and its result declared on 17th April, 2007. DPC had considered the candidates for promotion in accordance with the amended recruitment rules which have been upheld by the Tribunal. In the circumstances there are no grounds to set aside the DPC held on 15th March, 2007 as had been prayed by the respondent. The respondent had also sought consideration for promotion to the post of ACWA and not to the post of CWA. In the circumstances direction by the Tribunal to consider the claim of the respondent for the post of CWA is not sustainable and is contrary to the plea of the respondent. It is also pertinent to notice that there is no regular vacancy for the post of CWA reserved for Bacteriologist. In the circumstances the order of the Tribunal dated 18th May, 2010 passed in TA No. 727 of 2009 impugned by the petitioner is not sustainable and is liable to be set aside.

22. Therefore for the foregoing reasons the writ petition filed by the petitioner against the impugned order dated 18th May, 2010 passed in TA No. 727 of 2009 is allowed and the said impugned order is set aside. The petition of the respondent being TA No. 727 of 2009 titled as “Shri. Sharad Kumar Vs Chief Executive Officer, Delhi Jal Board & Anr.” seeking quashing of DPC dated 15th March, 2007 and direction to the

petitioner to consider the respondent for regular promotion to the post of CWA is dismissed. Considering the facts and circumstances, the parties are however, left to bear their own costs.

ANIL KUMAR, J.

April 18, 2011
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SUDERSHAN KUMAR MISRA, J.