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

+ **W.P. (C) 7980/2009**

% *Judgment reserved on: 07th May, 2012*
Judgment delivered on: 16th May, 2012

RAJENDRA WANCHOO Petitioner
Through: Ms. Padmini Gupta, Adv.

versus

CHIEF COMMISSIONER FOR
PERSONS WITH DISABILITIES & ORS. Respondents
Through: Ms. Anjana Gosain, & Ms.Perna
Shah Deo, Advs for R-3 with Sh.Rajesh
Chawla, Manager (HR) in person.

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

1. Vide instant petition, the petitioner has prayed as under:-

“(a) Issue a writ of Quo Warranto directing respondent Nos.3 & 4 to show by what authority to right has respondent No.3 appointed respondent No.4 to the position of Deputy General Manager (Personnel and Administration).

(b) To quash and set aside the appointment of respondent No.4.

(c) Direct respondent No.3 by issuance of the writ of Mandamus or any other appropriate writ to

consider the petition to the post of Deputy General Manager (Personnel & Administration) in terms of the undertaking dated 04.08.2004.

(d) To issue a writ of mandamus directing respondent No.3 to provide all consequential reliefs to the petitioner such as payment of retrospective benefits and dues starting from the date of unlawful appointment of respondent No.4.

(e) To direct respondent No.3 by the writ of Mandamus to consider the petitioner for speedy promotion in view of the fact that the petitioner has been deprived of rendering services to the respondent by virtue of the unlawful appointment of respondent No.4.

2. Vide order dated 22.07.2011, this Court passed following order:-

“1. The counsel for the respondent no.3 AAI states that the respondent no.3 AAI does not need to file an additional affidavit as directed on 2nd December, 2010, since the information sought is already contained in the counter affidavit.

2. The counsels have been heard.

3. The petitioner, a person with disability and employed with National Building Construction Corporation (NBCC) was on deputation with the respondent no.3 Airports Authority of India (AAI) from 16th July, 2002 to 15th July, 2004 During the said time the respondent no.3 AAI on 26th September, 2003 invited applications to the post of Deputy General Manager (Personnel and Administration) (DGM (P&A)). The petitioner claiming to be eligible applied for the said post.

4. *The counsel for the petitioner has with reference to the Notification dated 2nd July, 1999, issued by the Ministry of Social Justice and Empowerment in pursuance to Section 32 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 demonstrated that 3% of the posts of DGM were reserved for persons with disability. The petitioner claims that he ought to have been considered for appointment to the post of DGM(P&A) in the reserved category.*

5. *The respondent no.3 AAI on 15th May, 2004 notified another vacancy in the post of DGM (P&A). The petitioner again applied for the same.*

6. *The respondent no.3 AAI however in or about the year 2004 appointed respondent no.4, also working on deputation with AAI, to the said post of DGM(P&A). Upon the petitioner raising grievance before the Chief Commissioner for Persons with Disabilities, the respondent no.3 AAI contended that the respondent no.4 was on deputation at a higher grade than the petitioner and hence was so absorbed; it was further stated that the petitioner shall also be considered at the time of recruitment.*

7. *The respondent no.3 AAI yet again in 2006 invited applications for the same post and the petitioner again applied.*

8. *Upon the petitioner being not appointed, this petition has been filed impugning the appointment of respondent no.4 and seeking mandamus to consider the petitioner for appointment.*

9. *The petitioner has admittedly been not considered for appointment.*

10. The counsel for the respondent no.3 AAI clarifies that no steps for filling up the posts for which the applications were invited on 26th September, 2003 or on 15th May, 2004 or in 2006 were taken. It is stated that on account of repatriation of a large number of officers owing to privatization in the years 2005-2006, there is no requirement and hence no appointments have been made.

11. It has however been enquired as to why the petitioner was not considered for appointment in the year 2004, when respondent no.4 is stated to have been appointed to the said post. The stand taken, of there being no requirement could not also be applicable in 2003, since repatriation is stated to have been in the year 2006. The appointment of respondent no.4 who was also on deputation, cannot be said to be through the feeder route and has to be through direct recruitment, through which route the petitioner was claiming appointment. It has also not been disclosed whether the vacancies in the years 2003-2004 were in the unreserved category or in the category reserved for those with disability. If the vacancies were in both categories, there is no explanation as to why, even if the requirement was to fill up one vacancy only, it was filled up from the unreserved category and not from the reserved category. Without such explanation, the possibility of bias against those with disabilities, cannot be ruled out.

3. Learned counsel for respondent No.3/AAI had sought time to take instructions and at her request, this Court directed to file affidavit explaining the following points:-

(a) of the vacancies in 2003, how many were for persons with disabilities and how many in other categories;

(b) why the vacancies were not filled up in 2003-2004;

(c) why, at the time of appointment in 2004 of respondent no.4, the petitioner was not considered;

(d) if at the time of appointment of respondent no.4, there were vacancies in category reserved for persons with disabilities, why vacancy in such reserved category was not filled;

(e) what do the applicable Rules provide on aforesaid aspects;

(f) if no reservation for persons with disability was made in 2003-2004 inspite of Notification aforesaid of the year 1999, the reason therefore.

4. Consequent to the above direction, respondent No.3 AAI filed additional affidavit dated 08.09.2011 stating as under:-

(a) It is submitted that 05 posts of DGM (P&A) were vacant in the year 2003, which were circulated for filling up from departmental candidates. None of them was reserved for Personal with Disabilities (PWD) as they were to be filled by promotion. Copy of the Circular dated 26.09.2003 of the respondent AAI inviting applications for the post of DGM (P&A) through departmental selection is annexed herewith as AnnexureR-1.

(b) It is submitted that the above process of filling

up the posts of DGM (P&A) was suspended due to impending creation of Joint Venture Companies for privatization of airport and other administrative reasons. Further, in terms of the agreement (Operation Management Development Agreement), there is a clause that after serving three years, the AAI staff had the option of returning to its parent department. The Joint Venture Company was formed on 03.05.2006.

(c)&(d) It is submitted that no direct recruitment for the post of DGM (P&A) has been resorted to in AAI in the past in any category. However, persons were taken on deputation. Shri R.S. Maker, respondent No.4 had been working in AAI for the last five years on deputation was permanent absorbed at DGM level and not on the post claimed by the petitioner.

(e) That as per the Government Directives issued from time to time, 3% posts are reserved for Persons with Disabilities. Out of these 3% reserved posts, 1% each reserved for VH, HH, & OH. AAI is following the Government Directives issued from time to time.

However, no post of DGM (P&A) was notified as reserved for Persons with Disabilities in the year 2003-04. It is submitted that in the year 2006 one post of DGM (P&A) was identified for persons with disabilities for which corrigendum has already been issued which is on record. However, no selections were made to the post of DGM (P&A).

The respondent, AAI is now advertising some posts of DGM (P&A) shortly under Director Recruitment Quota in which one post of DGM (P&A) would be reserved for Persons with Disabilities.

If the petitioner is willing to apply for the said post, his candidature would be considered along with others subject to meeting the eligibility conditions. Copy of the Circular dated 20.12.2004 is annexed herewith as Annexure R-2. Copy of the guidelines mentioned in Swamy's – Establishment and Administration Manual is annexed herewith as Annexure R-3.

(f) It is submitted that AAI is a service organisation having 40 disciplines. Primarily the recruitments are made for operational cadres. Further, the provisions contained in 'Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 is being implemented with all earnestness in letter and spirit in AAI. However, no post of DGM (P&A) was notified as reserved for persons with disabilities in 2003-04.

5. I note, respondent No.3 filed additional affidavit by replying para-wise, the explanation sought by this Court.

6. Ms. Padmini Gupta, learned counsel appearing on behalf of petitioner submitted that Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996) came into force in the year 1996 and it had constituted expert committee on 02.07.1999 under the Chairmanship of Additional Secretary, Ministry of Social Justice and Empowerment. Accordingly, on 07.09.1999 as per Section 33 of the Act, three sub-committees comprising following members were constituted:-

(i) Subcommittee for Locomotor Disability or cerebral Palsy

- (ii) Subcommittee for Hearing Impairment*
- (iii) Subcommittee for persons with blindness of low vision.*

7. She further submitted that vide office order dated 02.07.1999, issued by the Ministry of Social Justice and Empowerment, at Sr. No.315, post of Deputy General Manager was identified.

8. Learned counsel further submitted that the report of the expert committee to identify/review the posts in Group A, B, C, & D to be reserved for persons with disabilities in different Ministries/Departments and Public Sector Undertakings after due consultations with various Ministries/Departments and made following recommendations:-

(c) The establishment covered under the Persons with Disabilities Act 1995 will have the discretion to identify post in addition to the posts already identified by the appropriate Government. However, no establishment on its own discretion can exclude any posts out of purview of identified posts for effecting reservation under Section 33 of the Act. In case any establishment feels that it required exemption from filling up a vacancy against an identified posts by the appropriate Government the establishment under Section 33 of the PWD Act, 1995 can approach the inter departmental committee constituted for the purpose to look into the matter regarding exemption from Section 33 of the PWD Act. Other than this no authority has the jurisdiction to accord exemption from filling up a vacancy against an identified post for persons with disabilities.

9. It is submitted that despite the aforementioned notification,

respondent No.3 did not identify the post.

10. She submitted that before going on deputation to respondent No.3, AAI, petitioner was working as Deputy General Manager (Personnel) in NBCC. Being a schedule 'B' company had accepted deputation to the post of Airport Manager in AAI, Civil Airport, Jaipur. Thereafter, on 16.07.2004, on being transferred, he joined at Delhi Airport and repatriated to his parent department i.e. NBCC.

11. Learned counsel further submitted that pursuant to the departmental circular dated 26.09.2003 for selection interview for the post of GM (P&A)/ DGM (P&A)/SM(P&A) proposed to fill up the following posts in Personnel and Administration discipline by a selection process from departmental candidates.

S.No.	Post	Station	No. Of vacancies
1	GM (Pers & Admn)	SR, Chennai	1
2	DGM (Pers & Admn)	CHQ/RCDU	5
		RHQ (NER)	1
3	SM (Pers & Admn)	NR-4/SR-1/ WR-1/ER-1	7

12. She has pointed out that in the said circular it has also been stated that application of willing and eligible executives should reach CHQ through proper channel in the prescribed format latest by 21.10.2003. It is further stated that the date of interview will be intimated later. In case of deputationist, they will be absorbed in AAI on selection. The *inter-se*

seniority will be fixed on the basis of Circular No.AAI/EDPA/2-33/2003 dated 25.03.2003.

13. The petitioner is a physically challenged person. Being aggrieved by the departmental circular, he approached to Office of the Chief Commissioner for Persons with Disabilities, Ministry of Social Justice & Empowerment, Government of India – a quasi judicial authority on 02.07.2004. Respondent No.3 filed their response dated 04.08.2004 before the Deputy Commissioner, Court of the Chief Commissioner for Persons with Disabilities wherein, inter-alia, it is stated as under:-

Since Shri Wanchoo was in the grade of Sr.Manager, the question of absorbing him as DGM which is a higher post, does not arise.

14. After considering their response, vide order dated 26.07.2007 directed the respondent No.3 as under:-

(i) to publish a corrigendum to the employment notice for either reserving one of the two vacancies of DGM (P&A) for persons with disabilities or cancelling it on or before 13th August, 2007.

15. Pursuant to above direction, respondent No.3, issued corrigendum dated 25-26.10.2007 as under:-

CORRIGENDUM

Advt. 4/2006

With reference to Adv. No.4/2006 appeared in the Employment News dated 25.11.2006, for recruitment to the Two posts of DGM (Pers) the following amendments regarding reservation of vacancies for persons with disabilities and

experience requirements may be noted

Name of the post – DGM (P&A)

Pay Scale – 17500-400-22300

Number of vacancies

02 (01 Gen, 1PH)*

One leg or one arm or both

*... The last date of submission of application is
24.10.2007.*

16. Learned counsel submitted that respondent has not given any effect to this corrigendum till date qua the vacancies mentioned in the circular dated 26.09.2003 and corrigendum which at 34 and 77 respectively, of the paper-book for the absorption in AAI on selection. However, respondent No.3 clandestinely absorbed respondent No.4, though the vacancy was identified for physically challenged person.

17. As per respondent No.3, four candidates were considered including the petitioner; however, Chairman of the respondent No.3 absorbed the candidate at Sr.No.1 i.e. Shri R.S.Maker, OSD (Personnel).

18. Mr.Rajesh Chawla, Manager, (HR) has produced original record in the Court.

19. I have perused the same.

20. The internal noting dated 03.11.2003 reads as under:-

*“PUC is a request from Shri R.S.Maker, OSD(P)
on deputation to AAI from Central Electronics
Limited, duly recommended by Chairman for
permanent absorption in AAI.*

In this connection, it is submitted that a succession plan been drawn for P & A Directorate. We have at present 5 (five) vacant posts of DGM (P).

In addition to Shri Maker's request, HR Cell has also forwarded applications received from the following deputationists for permanent absorption as DGM(P) in AAI:-

- | | |
|--|--|
| <i>1.Ms. T Chanda Banu,
OSD(P), CHQ</i> | <i>On deputation to AAI from
DRDO, MOD, since
27.6.2001.</i> |
| <i>2.Shri BSS Sastry
OSD(P), CHQ</i> | <i>On deputation from NBCC
since 15.07.2002.</i> |
| <i>3.Shri Rajendera Wanchoo,
Sr. Manager (P), Jaipur</i> | <i>On deputation from NBCC
since 16.7.2002</i> |

In view of the acute shortage of DGMs in P&A Directorate and to initiate steps towards succession plan, the case is submitted for consideration please.

*(RAJU DUREHA)
DGM(Pers.)
3.11.2003*

ED(P&A)

Based on a succession planning we have arrived at a conclusion that at the level of GM, Dy. GM and Senior Manager few vacancies existes which need to be filled up from external sources to avoid crucial unfilled posts. Accordingly, a proposal was sent and approved (page 4/N). It was decided to give an opportunity to Executives on deputation with us based on their length of

service/performance to have first chance for consideration of absorption. A Circular was accordingly issued. In response to the Circular officers mentioned at para 1 and 3 responded requesting for permanent absorption. They are :

1. Sh. R.S. Maker, OSD (Pers.) who is on deputation for a long period and his request was approved for consideration by the Chairman.

2. Mrs. T. Chandra Banu, OSD(Pers.) she is on deputation from DRDO, MoD and her performance is excellent and absorption of her will be in the better interest of the Organization.

3. Shri B.S.S. Sastry, OSD (Pers.) on deputation from NBCC. His performance is very good. His absorption could be very useful to the Organization but in NBCC the superannuation age is 58 years and therefore, he is due for superannuation in May 2004.

4. Shri Rajendra Wanchoo. He is on deputation from NBCC as Senior Manager (Pers.) at Jaipur. His performance is also very good. He can also be considered for permanent absorption.

The above cases are put up to the Chairman for consideration and approval of cases where decided so.

*(P. RAJENDRAN)
ED (P&A)
03.11.03*

Chairman

This was discussed in a meeting with

Association when it was clarified that since Sh.Maker has put in about 4 ½ years with AAI, we may consider his case only for absorption.

All other recruitment will be made based on advertisement of vacancies, wherever required, on all India basis and selection mode.

Pl process accordingly.

ED

OSD(P)

DGM(P) may process the case further.

*OSD (Pers)
10.11.03*

DGM(P)

21. I further note, the internal note dated 13.11.2011 records as under:-

“Shri R.S.Maker, OSD(P), on deputation to AAI from Central Electronics Limited (CEL) has put in an application for permanent absorption in AAI. Shri Maker has already put in approximately 4 ½ years of deputation service in AAI. Shri Maker’s application has been duly recommended by Chairman for absorption in AAI.

The case of Shri Maker was put on ‘Succession Plan’ plan alongwith applications of other deputationists for consideration of Chairman. While considering the case, the Chairman has remarked as given below:-

‘This was discussed in a meeting with Association when it was clarified that since Shri Maker has put in about 4 ½ years with AAI, we may consider his case

only for absorption.

All other recruitment will be made based on advertisement of vacancies, wherever required, on all India basis and selection mode.

Pl process accordingly.'

Shri Maker is at present in the pay scale of Rs.18500-450-23900/- which is equivalent to the scale of Addl. GM in AAI. However, since there is no permanent grade of Addl. GM in AAI, the present scale of pay i.e. Rs.18500-450-23900 held by him may be treated as 'personal' to him and he may be absorbed in the grade of Dy General Manager.

In view of the above, the case of permanent absorption of Shri R.S. Maker in AAI in the grade of Dy General Manager with effect from the date of assumes charge, is submitted for consideration and approval please.

(RAJU DUREHA)

DGM (Pers)

13.11.2003

ED(P&A)

For approval of A above plaintiff.

Chairman

ED(PA)

Pl issue an offer for absorption and get his acceptance as above.

DGM (P)''

22. On instructions, Ms.Anjana Gosain, learned counsel for respondent No.3, has stated that apartfrom Mr.R.S.Maker, Mrs.T.Chandra Banu and

Mr.Rajendra Wanchoo (petitioner herein) responded to the circular mentioned above . The forth one Mr.B.S.S.S.Sastry OSD(Personnel) did not request for the same as he was on the verge of superannuation, therefore, his name was not considered.

23. Accordingly, case of Mr.Maker was put on 'Succession Plan' and the file alongwith the application of other deputationists were put up for consideration of the Chairman. While considering the case, Chairman had remarked - as mentioned above. Accordingly, his proposal was submitted for consideration and approval before the Chairman.

24. Accordingly, vide order dated 13.11.2003, same was approved and the respondent No.4 was absorbed for the post of DGM.

25. Learned counsel for petitioner submitted that had respondent No.3, identified the post of DGM and kept reserved for the persons with disability. The petitioner was to be considered, in that eventuality, then this post would have been ultimately filled-up by the petitioner, instead of respondent No.4. Therefore, they clandestinely filled the post and ignored the Act and reservation. Despite, the cadre of DGM was identified way back in the year 1999 and also included in the list.

26. Ms.Anjana Gosain, learned counsel for respondent No.3 has submitted that the respondent No.3 did not give effect to the circular dated 26.09.2003 and the corrigendum dated 25-26.10.2007. However, the respondent No.4 was already working on the post of Additional DGM post in the scale of ₹ 18500/- and accepted the vacancy in question on the pay

scale of ₹ 17500/-; although, his pay-scale was protected.

27. She further submitted that in terms of the circular dated 26.09.2003, respondent No.4 was permanently absorbed on 09.01.2004 and at the time of his absorption, candidature of the petitioner was also considered. The total posts were six. Out of which five posts were for CHQ/RCDU and one post was for RHQ (NER). By the corrigendum dated 25-26.10.2007, number of the vacancies of DGM(P&A) came down only two. One post for general category, another one for physically handicapped (one leg or one arm or both). Because of the fact, the departmental circular dated 26.09.2003 was issued prior to the privatisation of the airports and the corrigendum was issued in terms of the Recruitment & Progression Rules, which came into operation from 01.02.2005, whereby the post of DGM was to be filled up in the ratio of 25% from direct recruits and 75% from departmental candidates. Therefore, in the corrigendum, out of the total six vacancies of DGM(P&A), two posts were shown in the category of 25% of the direct recruitments.

28. She has clarified that before the year 2005, the post of DGM(P&A) was 100% from the departmental interview/absorption and thereafter with effect from 01.02.2005, 25% of total posts are being considered for the direct recruits and 75% from the departmental candidates. Since, the above mentioned rules were not in existence therefore, respondent No.4 was taken against the old rules/system.

29. Further submitted that petitioner cannot be absorbed on the permanent basis for the post of DGM because of the fact that now department has issued new circular/advertisement for the post of DGM(P&A) on 01.04.2012

for seven posts wherein the reservation has been made for different categories such as – 04 posts for general candidate; 01 post for OBC; 01 post for SC; and 01 for PWD (OH).

30. In addition, learned counsel for respondent No.3 submitted that aforesaid arrangement is not for the internal candidate, but it is from the open competition for all; however, any internal candidate, if meeting the eligibility conditions; can also apply for the same. The petitioner presently working with his parent department, is also eligible, can apply but not being the internal candidate.

31. I have heard learned counsels appearing on behalf of parties.

32. Respondent No.3, AAI did not give complete effect to the department circular dated 26.09.2003 for filling up the post of DGM in question. However, considered the name of respondent No.4 only, accordingly, he was permanently absorbed with respondent No.3.

33. It is also not the case that the petitioner approached the Chief Commissioner for Persons with Disabilities and thereafter, respondent No.3 absorbed respondent No.4. The facts reveals from the above discussion, the departmental circular was issued on 26.09.2003 and thereafter, they started process immediately i.e. 03.11.2003 and finally on 13.11.2003 respondent No.4 was considered and absorbed permanently. This process does not show any malafide or cleverness on the part of respondent No.3.

34. But, the case of the petitioner herein is that the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full

Participation) Act, 1995 came into force way back in the year 1996 and posts of DGM was notified in the year 1999 despite this respondent No.3 did not identify the vacancy for physically challenged persons. Had they identified the same, then there was no point not to consider and absorb the petitioner by respondent No.3. Because of their arbitrary attitude, the petitioner is continue to suffer of not getting of his due career progression and due right.

35. It is also emerged from the above discussion that for the post of DGM there was six vacancies. The option with respondent was either to give the effect to the circular dated 26.09.2003 or would have waited till the final decision. This has not been done. The vacancies shown in the said circular dated 26.09.2003 were six for post of DGM (P&A). Therefore, against the total vacancies, there were only three eligible candidates and respondent had selected respondent No.4 only for the reasons best known to them.

36. Now, the main issue before this Court is that either the arbitrariness or the cleverness of the respondent, let go on because much water had already flown. The second option is that the proper message to go, if in this fashion and arbitrary method, if any department would act, its decision will be rolled back. In the present case, the selected candidate, i.e. respondent No.4 selected for the post of DGM and thereafter he superannuated from the respondent No.3. The said vacancy immediately arises on the date of his superannuation.

37. On the date of internal circular dated 26.09.2003, though prior to that, they were supposed to identify the post for physically challenged persons;

however, if they did not do so, then the petitioner should have been considered alongwith the respondent No.4. But, certainly, thereafter when the petitioner approached the Commissioner for Persons with Disabilities and the undertaking given by respondent No.3 before Deputy Commissioner for Persons with Disabilities and pursuant thereto, they issued the corrigendum dated 26.07.2007. Meanwhile, two new things happened. One, two major airports of India viz, Delhi and Mumbai were given in the hands of private persons and second, vacancies reduced to two from five.

38. There is no embargo, even in the year 2007 when the respondent No.3 identified the reserved post for physically challenged person, but they did not do so.

39. Recently, vide advertisement dated 01.04.2012, respondent No.3 published vacancy for the posts of DGM (P&A) numbering 07 posts. Out of which, four posts for general candidate; one post for OBC; and one post for SC; and one post for PWD(OH) – Person with Disabilities.

40. In the facts and circumstances of the present case, I am of the considered opinion, the claim of the petitioner persists since the post of DGM identified. Therefore, the respondent no. 3 is directed to appoint the petitioner against the vacancy of General Category or against person with disability (OH) w.e.f the vacancy arose due to the superannuation of respondent no. 4. He shall be given notional seniority from that date. No orders for back wages, since the petitioner has not worked on that post.

41. Accordingly, the respondent no. 3 shall issue Corrigendum in

pursuance of advertisement dated 01.04.2012, if required.

42. The instant petition is allowed on the above terms.

43. The original record pertaining to personal file of Mr. R.S. Maker be returned against acknowledgment.

44. No order as to costs.

SURESH KAIT, J

MAY 16, 2012

Mkl/jg