

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

Judgment Reserved on May 06, 2013
Judgment Delivered on May 10, 2013

+ **W.P.(C) 4008/2012**

SH. KAMARUDDIN

..... Petitioner

Represented by: Mr.R.K Shukla, Advocate

versus

UNION OF INDIA & ORS

..... Respondents

Represented by: Ms.Richa Kapoor, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

1. In this Writ Petition, the challenge is made to the Order dated January 27, 2012 passed in O.A No.3836/2010 and to the order dated March 14, 2012 passed in R.A No.73/2012 in O.A No.3836/2010, whereby the O.A and the R.A filed by the petitioner have been dismissed.

2. The brief facts are that the petitioner is working as Carpenter in CPWD w.e.f. July 25, 1989. The next promotion post is Works Assistant. The promotion is regulated in terms of the rules known as Central Public Work Development (supporting officers), Works Assistants and Road Inspectors Recruitment Rules 1970, framed under the powers conferred by

proviso to Article 309 of the Constitution of India. A relevant amendment was made to the rules in the year 1978, which, *inter-alia*, stipulates that for promotion to the post of Works Assistant, a separate competitive departmental test (theoretical and practical) will also be held. The person for appointment to the post will be selected from amongst the carpenters, mason, blacksmith, plumbers and painters, on the basis of merit in the test. The petitioner appeared in the departmental test in the year 2002 and was placed at serial no.71 on the basis of 56 marks obtained by him. Another test was held in the year 2003. A combined list/ panel was prepared, of the successful candidates who had appeared in the departmental test of 2002 & 2003. The petitioner was placed at serial no.50 of that particular list. From time to time, the promotions to the post of Works Assistant were being made from the panel.

3. It is the case of the petitioner before the Tribunal that persons with lesser marks have been promoted to the post of Works Assistant overlooking his claim. He also states that a seniority list dated April 26, 2010, wherein the name of the petitioner is at serial no.13 was duly summoned by the appointing authority and the entire period of the petitioner was produced before the selection committee but he has not been promoted. Instead they have conducted a fresh trade test. He relied upon a judgment passed by the Tribunal in the case of Balister vs. Union of India in O.A NO.411/2004, decided on November 16, 2004.

4. The respondents in their reply had taken a stand that as per the recruitment rules for the post of Works Assistant, the sole criteria for promotion shall be merit prepared on the basis of departmental test. Therefore, according to the respondents, the petitioner could be promoted as and when his turn comes. Candidates who got 57 marks have been promoted

till date. Since the petitioner had only 56 marks, he could not be promoted. In so far as the allegation that persons with lesser marks have been promoted, the stand of the respondents has been that upto the period of January 2008, the promotion was made on merit basis. Subsequently vide order dated February 18, 2008, it was decided to make the promotions in accordance with seniority position instead of merit. Persons above in seniority were promoted even though they have lesser marks. This position of rule existed till May 15, 2009, whereby O.M dated February 18, 2008 was withdrawn and the earlier system of promotion based on merit was restored. This explains as to why persons having lesser marks were promoted. It is also noted that the departmental tests are conducted annually. The name of the candidates from the list/ panel conducted annually is re-arranged in order of merit by the committee, which conducts the test.

5. During the arguments, it was brought to our notice that except the departmental test in the year 2002, the petitioner had not appeared in any departmental test conducted thereafter, because of which the petitioner could not better his marks or performance.

6. The Tribunal in its order dated January 27, 2012, while rejecting the O.A filed by the petitioner has held as under:-

“From the facts given in the affidavits filed by the respondents, it is clear that promotion to the post of Work Assistant was made in accordance with the policy applicable from time to time and that only for the period of about one year from 15.02.2008 to 14.05.2009, promotions were made on the basis of seniority but at all other times i.e. from 30.06.1978 to 14.02.2008 and again from 15.05.2009 till date, promotions were made on the basis of merit. Due to this change in policy for one year, certain persons having less marks than the applicant secured their promotions. But there is no remedy at this stage for this situation. If the

applicant is to gain his promotion by way of merit, every opportunity of appearing in trade tests held from time to time has to be availed of by him. Otherwise, he will have to wait endlessly for his turn to come if his merit remains static on 56 marks.”

7. Mr.R.K Shukla, learned counsel appearing for the petitioner has heavily relied upon office order dated April 26, 2010 (Annexure P-2 pages 29-31) and would submit that as the petitioner's name at serial no.13 of the panel, the C.R of the petitioner were duly summoned and the entire record was produced before the selection committee but still he was not promoted as the respondents were conducting trade test continuously.

8. On the other hand, Ms.Richa Kapoor, Advocate appearing for the respondents on the basis of counter-affidavit filed by them before this court, would submit that as per the agreement reached between the management of various unions representing workers for giving equal opportunity, the departmental test is to be conducted annually. According to her, a new panel had been circulated on the basis of trade test declared on September 21, 2010. She also relies upon para 17.13.1 of Government of India, DPAR OM No.22034/3/81-Estt.(D) dated October 1, 1981, wherein it is stated that the validity of the panel in normal circumstances shall be one year and it should cease to be in force on expiry of the period of one year. This submission of Ms.Richa Kapoor, Advocate on the strength of OM dated October 1, 1981 is a new submission which has not been taken before the Tribunal. We do not intend to consider the aforesaid stand of the respondents as the same was not there before the Tribunal.

9. Having considered the rival contentions and the stand of the parties before the Tribunal, we are of the opinion that the rule governing the terms of the post of Works Assistant, *inter-alia*, stipulates that the same has to be

made on the basis of merit to be prepared in terms of the marks obtained in the departmental test. Since the petitioner had got only 56 marks, he could not be promoted. Last candidate who was promoted had secured 57 marks. On this ground the action of the respondents cannot be faulted. Further, it is seen that the petitioner had never appeared in the departmental test after 2002, for the reasons best known to him. By sitting in the trade test, he could have bettered his performance. The merit cannot be ignored while making promotions. That is the mandate of the rule. The office order dated April 26, 2010, would lose its significance with the conduct of new test. We do not see any infirmity in the order dated January 27, 2012 in O.A No.3836/2010.

10. In so far as the Order dated March 14, 2012, in R.A No.73/2012 is concerned, the grounds on which the petitioner had sought review before the Tribunal are as under:

(i) The issue raised by the petitioner in terms of office memorandum dated April 26, 2010 has not been decided by the Tribunal.

(ii) In the additional affidavit filed by the respondents, the statement was made on behalf of respondents that Raj Bahadur as well as Ashok Kumar, who were batch-mates of the petitioner were promoted on the basis of seniority, who also secured less marks, and the Tribunal did not consider the same.

11. The grounds taken do not reflect any error apparent on the face of order dated January 27, 2012 in O.A No.3836/2010 of the Tribunal.

12. We agree with the conclusion of the Tribunal that the review was an attempt to get the entire matter re-heard. In any case, those two aspects which have been raised by the petitioner in this review application have been considered by us and we don't see any merit in so far as those two

contentions are concerned. Hence, we also do not find any infirmity in the order dated March 14,2012 passed by the Tribunal in R.A No.73/2013. The Writ Petition is, accordingly, dismissed.

13. No costs.

(V.KAMESWAR RAO)

JUDGE

(PRADEEP NANDRAJOG)

JUDGE

MAY 10, 2013

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