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

Date of decision: 16th March, 2016

+ **W.P.(C) 10834/2005**

RAJAN KALA Petitioner
Through: Mr. R.K. Sharma, Advocate

versus

UOI & ORS. Respondents
Through: Mr. Vikas Mahajan, CGSC, with
Mr. S.S. Rai, Advocate for
respondent-UOI

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MR. JUSTICE SUNIL GAUR

HIMA KOHLI, J. (Oral)

1. The present petition has been filed by the petitioner praying *inter alia* for direction to the respondent-GREF to appoint him on the post of a Lower Division Clerk (LDC), pursuant to his selection, for filling up 44 vacancies advertised vide Advertisement No.1/2002 published in the Employment News in the month of July, 2002.

2. At the outset, learned counsel for the respondents points out that this is the second round of litigation initiated by the petitioner based on

the same cause of action. Prior to the filing of the present petition in the year 2005, along with his brother Sh.Ashutosh Kala, the petitioner had filed W.P.(C). 11115-16/2004 in this court, praying *inter alia* for issuance of a writ of mandamus to the respondents to appoint them on the subject post on their selection.

3. In the said petition, the plea that was taken by the petitioner herein and his brother was that both of them had been declared successful in the written test, type test and physical test and the selection list of candidates was posted on the notice board of the Recruitment Centre, Rishikesh (Uttaranchal). However, the petitioner's brother, Sh. Ashutosh Kala was given a final call/joining letter dated 2.5.2003, but no such letter was issued to him though he was also declared successful in the three tests prescribed by the respondents. Aggrieved by the aforesaid action of the respondents, the petitioner and his brother had filed the captioned writ petitions.

4. In the counter affidavit filed by the respondents to the said petitions, it was specifically stated in para No.2 of the preliminary objections as below: -

"It is pertinent to mention here that the petitioners did not come in merit against available vacancies allotted to Mobile Regional Recruiting Team Centre, Rishikesh in UR/Open category and hence there is no question for issuing joining letter for appointment to Sh. Ranjan Kala, hence the petition is liable to be dismissed."

5. A glance at the averments made by the respondents under the head

of “Statement of Facts” in para No.1 of the counter affidavit is relevant and are reproduced as under: -

*“On completion of trade test/interview, a merit list was prepared against clear 3 vacancies. Accordingly, 3 candidates were provisionally selected by Mobile Regional Recruitment Team, Rishikesh and result announced to the candidate with the direction that final call letter for appointment will be issued by Commander GREF centre, Pune after clearance medical fitness by competent medical Board. **Sh. Ashutosh Kala (1st petitioner)** was **second in the merit list of UR/Open category, whereas Sh. Ranjan Kala (2nd petitioner) did not come in the merit and hence he was not selected.** According to the procedure in vogue only selected candidates are called at GREF Centre, Pune after verification of original academic/technical qualification certificates. Final appointment order is issued after obtaining medical fitness report from the competent medical board.”*

6. Thus, the respondents had clearly stated that while the petitioner’s brother, Sh. Ashutosh Kala had been selected against three available vacancies, the petitioner’s name did not feature in the merit list at all and therefore, he was not selected. At that point in time, the petitioner had an option of either amending the earlier writ petition filed by him by laying a challenge to the procedure adopted by the respondents in filling up the vacancies or he could have withdrawn the said writ petition while reserving his right to file a fresh petition and take all the other pleas that

were available to him to challenge the procedure adopted by the respondents in dividing 44 vacancies into five regional centres and then selecting the candidates. However, the petitioner did not take any such steps.

7. The writ petition filed by the petitioner herein came to be dismissed by the Division Bench vide order dated 23rd November, 2004, holding *inter alia* that unlike his brother, he was unable to place on record any call letter that was issued to him. It was further noted that the respondents had stated that the petitioner had not been selected for the reason that he was lower down in the merit list. While the petition of Sh. Ashutosh Kala (petitioner No.1) was allowed and the respondents were directed to appoint him and permit him to join his place of posting, the petition filed by the petitioner herein (petitioner No.2 there) was dismissed with an observation that there was no merit in the said petition.

8. Even at that stage, the petitioner did not reserve his right to file a fresh petition to assail the procedure of selection adopted by the respondents. Instead, the present petition came to be filed in July, 2005. Learned counsel for the respondents argues that the present petition is hit by the principles of *constructive res judicata* or principles analogous thereto and to fortify the said submissions, he relies on the decisions in the case of Heena Kausar v. Competent Authority reported as (2008) 14 SCC 724 and Shankara Cooperative Housing Society Limited v. M. Prabhakar and Others reported as (2011) 5 SCC 607.

9. Learned counsel for the petitioner does not deny the fact that the petitioner herein had not reserved his right to file a fresh petition either after the counter affidavit came to be filed by the respondents in the

earlier petition where they had clarified the selection process adopted by them or even at the time of passing of the dismissal order dated 23rd November, 2004. Instead, he seeks to address arguments on merits by referring to the additional affidavit filed by the respondents in the present petition to contend that they have adopted a flawed method in undertaking the selection process, which has vitiated the entire process.

10. Pertinently, after the list was prepared by the respondents, 22 candidates were shortlisted in the general category for appointment to the post of LDC but for reasons best known to him, the petitioner has not opted to implead any of the selected candidates as respondents herein. In such circumstances, even if the petitioner was to be heard on merits as an additional affidavit has been filed by the respondents to clarify their stand, it would cause grave injustice to those who have been selected in terms of the selection process adopted by the respondents, that too, behind their back.

11. Coming back to the plea of *constructive res judicata* taken by learned counsel for the respondents to challenge the maintainability of the present petition, we are inclined to agree with him for the reason that without seeking any leave in the earlier petition filed by the petitioner, the subsequent petition filed by him i.e. the present petition based on the same cause of action, would not be maintainable. As was observed by the Supreme Court in the case of Devilal Modi v. States Tax Officer, Ratlam and Ors. reported as AIR 1965 SC 1150: -

“8.....the rule of *constructive res judicata* which is pleaded against him in the present appeal is in a sense a somewhat technical or artificial rule prescribed by the Code

of Civil Procedure. This rule postulates that if a plea could have been taken by a party in a proceeding between him and his opponent, he would not be permitted to take that plea against the same party in a subsequent proceeding which is based on the same cause of action; but basically, even this view is founded on the same considerations of public policy, because if the doctrine of constructive res judicata is not applied to writ proceedings, it would be open to the party to take one proceeding after another and urge new grounds every time; and that plainly is inconsistent with considerations of public policy...”

12. In taking the aforesaid view, the Supreme Court drew strength from its earlier decisions in the case of Daryao and Others v. State of U.P. and Others, reported as AIR 1961 SC 1457 and Hoshnak Singh v. Union of India and Others, reported as (1979) 3 SCC 135.

13. In the instant case, it is admitted position that the petitioner was a party in the earlier writ petition filed by him along with his brother and in the counter affidavit filed by the respondents therein, they had clarified the procedure adopted by them for selecting the candidates to the post of LDCs. However, the petitioner preferred not to amend the said petition and nor did he seek to withdraw the petition while reserving his right to file a fresh petition to question the method of selection. In this background, the petitioner cannot be permitted to raise different grounds to assail the very same action of the respondents when the cause of action remains the same. The ground sought to be taken now that the selection

process adopted by the respondents at the time of finalizing the merit list for filling up 44 vacancies to the subject post was not permissible or improper, was available to the petitioner even earlier, particularly, when the method adopted by them was explained by respondents in their counter affidavit but for reasons best known to the petitioner, he did not amend the earlier petition or seek liberty from the Court to file a fresh petition, for agitating the issue raised in the present petition. Having failed to do so, such an action would be hit by the principles of *constructive res judicata*.

14. The plea of the learned counsel for the respondents that the present petition is barred by the principles of *constructive res judicata* is therefore upheld and the present petition is dismissed on the ground that the doctrine of *res judicata* having come into play on the dismissal of the earlier writ petition filed by him, a second round of litigation could not have been initiated by the petitioner.

15. The present petition is accordingly dismissed with no orders as to costs.

HIMA KOHLI, J

SUNIL GAUR, J

MARCH 16, 2016

s/vn