

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 7th November, 2019

Decided on: 27th November, 2019

W.P.(C) 7367/2009

GOVT. OF NCT OF DELHI & ORS.

.... Petitioners

Through: Mr. Nitesh Kumar Singh, Advocate
for Mrs. Avnish Ahlawant, Standing
Counsel for GNCTD.

versus

CHANDER MUKH GAUBA

.... Respondent

Through: Mr. Vaibhav Kalra and Mr. Varun
Kalra, Advocate.

AND

W.P.(C) 7372/2009

GOVT OF NCT OF DELHI & ORS

..... Petitioners

Through: Mr. Nitesh Kumar Singh, Advocate
for Mrs. Avnish Ahlawant, Standing
Counsel for GNCTD.

versus

GIRISH CHANDRA SHARMA

.... Respondent

Through: Through: Mr. Vaibhav Kalra and
Mr. Varun Kalra, Advocates.

**CORAM: JUSTICE S. MURALIDHAR
JUSTICE TALWANT SINGH**

J U D G M E N T

Dr. S. Muralidhar, J.:

1. The Government of NCT of Delhi has filed both these petitions

challenging a common order dated 29th September, 2008 passed by the Central Administrative Tribunal (CAT). While WP(C) No. 7367/2009 is directed against the order passed by the CAT in OA No. 2625/2006, WP(C) No. 7372/2009 is directed against the order passed by the CAT in OA No. 371/2008.

2. Both the said applications were filed by the corresponding Respondents in each of the writ petitions before the CAT praying *inter-alia* for directions to the Petitioners herein to implement Rule 7(1)(b) of the Recruitment Rules (RRs) for the post of Post Graduate Teacher notified by the Petitioners. The prayer in OA 2625 of 2006 was for a direction to the Petitioners herein to create a post or reserving the post for Orthopaedic Physically Handicapped person and consider the case of the Applicant i.e. Shri Chander Mukh Gauba and to promote him to post of Post Graduate Teacher (PGT) for Classes IX and X immediately. The prayer in OA No.371/2008 complained of the 12 Applicants therein not being promoted as PGTs despite 26 years of service and possessing Post Graduate qualification. A challenge was also made to the relevant RRs as amended from time to time making Graduates and Post Graduates ineligible for the post of PGT.

3. It requires to be noticed at the outset that Rule 7(1) prescribes the qualification required for appointment as PGT which is “Master’s Degree in drawing and painting with the recognised diploma/certificate of minimum one year’s duration”. 25 % of the posts of PGT (Drawing and Geometry and Mechanical Drawing) were to be filled by direct recruitment and 75% by promotion. In case of recruitment by promotion/deputation/transfer, the

requisite qualification was “Senior Drawing Teacher in the scale of Rs.250-550 possessing qualifications prescribed for direct recruitment with regular service of five years in the grade”.

4. An amendment was carried out to the RRs in 1983 and again by a notification dated 2nd February, 1985. For the post of PGT in Painting, Commercial Art, Graphic, Sculpture and Engineering Drawing for classes IX and X, the pre-requisite qualification included M.A. in Drawing and Painting/Fine Arts from a recognised university.

5. The Respondent Shri Chander Mukh Gauba is Orthopaedically Handicapped and working as a Trained Graduate Teacher (TGT) in the schools run by the Petitioners herein. He has both a Bachelor's degree and Master's degree in Drawing and Painting. He was selected as a Drawing Teacher with effect from 8th January, 1982. He was granted the senior scale with effect from 8th January, 1994.

6. Shri Gauba submitted a request in March, 1993 for inclusion of his name in the eligibility list for promotion as PGT. This however did not receive any response. He thereafter filed OA No. 157/1996 which came to be disposed of by the CAT by the following order dated 10th March, 1997:

"The petitioner is a handicapped person with 40% physical handicap and is holding the post of TGT (Drawing) for the last 15 years in the Department. The Id. Counsel for the respondent says that he is not eligible for the post of PGT since he does not have the Post Graduate Diploma though he has the Post Graduate Degree in the subject. The petitioner has made representation and a legal notice and no reply has been given by the respondents. We would direct the petitioner may

give a fresh representation and within two months of the receipt of the same, the respondents shall dispose of the representation with a speaking order and communicate within one week thereafter to the petitioner by Registered Post.

2. While disposing of the representation, respondents shall bear in mind the 15 years of service the petitioner has as well as that he is a physically handicapped person. It goes without saying that his being a decade for PHYSICALLY HANDICAPPED declared by the United Nations, the respondents have a duty to consider the applicant's case sympathetically. It is also our view that the Recruitment Rules in this regard give a Discretionary power to relax any of the qualifications prescribed in deserving cases. We may be constrained to read a discretionary power given to respondents coupled with duty to be a MANDATORY PROVISION. The respondents shall consider the case of the petitioner in the light of the above observations."

7. On 2nd April, 1997 Shri Gauba made a representation in which *inter-alia* he claimed that he was qualified for the post of PGT in terms of the amended rules for the post of PGT (Painting). The said representation was rejected on 29th April, 1997. Shri Gauba made another representation dated 13th May, 1997 which was also rejected. He again approached the CAT in OA No. 805/1998. This was rejected by the CAT by observing that as soon as the post of PGT (Painting) for Classes IX and X become available "Respondents should consider Applicant's case for promotion to the said post in accordance with Rules and Instructions." A review petition filed by Shri Gauba thereafter was rejected by the CAT by an order dated 23rd October, 2000.

8. Shri Gauba then filed WP(C) No.1848/2000 in this Court. While

disposing of the said petition by its judgment dated 13th January, 2006 this Court observed as under:

"We have considered the aforesaid pleas raised by the counsel appearing for the respondent. We are of the considered opinion that the petitioner having worked as TGT and he having the eligibility for being appointed as Drawing teacher for Classes XI and XII as per the recruitment rules and even fulfilling the qualifications partly for being appointed as PGT (Drawing) for classes XI and XII, the case of the petitioner should have been considered by the respondent for being appointed against a suitable post. A direction of almost nature was issued by the Tribunal as against which the respondent had not preferred any petition in this court. The petitioner has put in almost 15 years of service as TGT and therefore, naturally an aspirant for promotion to avoid stagnation. The petitioner is also an orthopaedically handicapped teacher to the extent of 40% for which he is also entitled to some sympathetic consideration from the respondents by way of consideration against reserved vacancy or relaxation. Similar observations made by the Tribunal in its order dated 10th March 1997 has become final and binding as no other writ petition was filed by the respondents against the said order."

9. The following directions were issued by this Court:

"Considering the facts and circumstances of the case and the fact that the petitioner is stagnating in the post of TGT, *necessary direction is given to the respondent to consider the case of the petitioner for such promotion as against a suitable post of PGT. The case of the petitioner shall now be considered by the respondent within a period of three months from today.*" (emphasis supplied)

10. The matter again travelled to this Court as detailed above. It has been contended on behalf of Shri Gauba that 141 posts have been mentioned in the RRs, a number which did not change by virtue of the Amendments in 1983 and 1985. Accordingly, the contention of the Petitioners herein that there were no sanctioned posts against which Shri Gauba could be

accommodated was contested. It was further pointed out that the stand of the Petitioners in relation to the response of the Respondent was inconsistent. It was pointed out that:

“In the communication dated 29.04,1997, in pursuance of the direction of the Tribunal in OA Number 1957/1996 in order dated 10.03.1997, which has been quoted in the preceding paragraph, the reply has been evasive as regards educational qualification.”

11. In relation to the above contention, the Petitioners in their reply contended as under:

"4.4 That the contents of Para 4.4 are admitted to the extent that the applicant was granted senior scale vide office order No. EO/None (s)-19/DS/94/DDE(S)/2449-52 dated 27.09.1994 w.e.f. 08.01.2004. The senior Scale was granted to the applicant in lieu of promotion as he did not possess the essential qualifications for **PGT (Drawing)** Classes IX & X and moreover, there exists no provision in the Recruitment Rules to relax the essential minimum qualifications for the persons belonging to physically handicapped category." (emphasis supplied)

12. It is further stated as under:

"4.10 That in reply to the contents of Para 4.10, it is submitted that assuming nor admitting that there is a provision created for PGT (Painting) for class IX & X, the applicant cannot be promoted as PGT (Painting) for class IX & X as there is no sanction post of PGT (Painting) for class IX & X as painting is not a subject taught to class IX & X as per the school syllabus."

13. Para 4.12 of the counter affidavit states as under:

"4.12 That the contents of Para 4.12 are based on - summarizes (*sic* surmises) and conjectures and thus cannot be sustained. It is wrong & denied that the very existence of rule pre-supposes the existence of sanctioned post.

Admittedly there exists no sanctioned post of PGT (Painting) for class IX & X and even otherwise the applicant cannot be promoted to the said post not possessing the minimum essential qualification required for the said post."

14. The CAT held in the impugned order in OA 2625 of 2006 that the Respondents have not produced any documents to show the distribution of 141 posts of PGT for various specialities, including for painting and sculpture. It was further noted that the argument that painting was not a subject in Classes IX and X was not raised by the Petitioners herein earlier. As far as the companion OA No. 371/2008 was concerned, the CAT noted that the arguments were more or less similar. In the second impugned order in OA No. 371/2008, it was held that the main question was whether the Respondents were entitled to the post of PGT from the date of the judgment of this Court i.e. 13th January, 2006 or even earlier. It was held that the Petitioners were bound to follow the Rules that had been in existence for over 23 years. The operative portion of the impugned order of the CAT reads as under:

"19. On the basis of the above, both the OAs succeed. We direct that the Applicants should be considered for promotion to the post of PGT (Painting) for classes IX and X by the Screening Committee, which should be convened for this purpose on the basis of their record and keeping our observations in the preceding paragraphs in view. They will be eligible for promotion, if found fit on the basis of their record, from the date of the judgement and order of the Honourable Delhi High Court i.e. 13.01.2006. They will not be eligible for back wages. These directions shall be complied with within four months of receipt of a certified copy of this order. The Respondents will also pay cost of Rs. 10000/- (Rupees Ten Thousand only) to the Applicant in OA

2625/2006. However, there will be no orders as to costs in OA 371/2008.”

15. A short question arises for determination in these petitions, namely, whether the CAT could have directed the Petitioners to promote the Respondents as PGT (Painting) for Classes IX and X, although none of them possessed of one of the essential qualifications, viz. two-years diploma in Drawing and Painting.

16. There are certain facts which are not in dispute. TGTs are required to teach Classes VI to X, whereas PGTs teach from Class IX onwards. While there are PGT (Painting) posts in Classes XI and XII, and promotions are made to this post from the feeder cadre of a Drawing teacher, there are no posts of PGT (Painting) in Classes IX and X.

17. As regards the qualifications of a PGT (Painting) for Classes XI and XII, the relevant clause in the Recruitment Rules (‘RRs’) required the candidate to hold a Master’s Degree in Fine Arts/Drawing and Painting, with a minimum two years (Full Time Diploma) from a recognized institute/university. The second aspect of the matter, as far as Shri Chander Mukh Gauba is concerned, is that although he is a physically handicapped person, the post of PGT carrying a pay scale of Rs.6500-10500 has been categorized as Group-B post. With the implementation of the recommendations of the 5th Central Pay Commission (‘CPC’), in terms of the instructions issued by the Department of Personnel and Training (‘DoPT’), Government of India, no reservation for physically handicapped is available in promotion to Group-B posts.

18. What should be the essential qualification for the post, is not a matter for determination by the Court. At the highest, the Court can examine if any requirement is so unreasonable or arbitrary so as to call for interference.

19. In the present case, for promotion as PGT (Painting) for Classes XI and XII, the requirement of a two-year diploma, apart from the Master's degree, cannot be said to be unreasonable. The fact of the matter is that none of the Respondents herein possessed a two-year diploma from a recognized institute/university in Fine Arts /Drawing and Painting.

20. As far as PGT (Painting) for Classes IX and X is concerned, there is no such post at all in the first place. It is not possible for this Court to direct the creation of such a post. Merely because this was not an aspect highlighted in the first round of litigation, would not permit the Court to overlook this crucial aspect.

21. It has been time and again pointed out before the CAT, and this Court by the Petitioners, that there is no post of PGT (Painting). The other aspect is the requisite qualification, assuming such posts exists. Here again, the CAT appears to have overlooked the fact that the requirement of a two-year diploma in that field is not fulfilled by any of the Respondents.

22. The approach of the CAT has been to overlook certain crucial aspects. Merely because the Respondents had been teaching for a number of years will not exempt them from satisfying the minimum qualification for promotion as PGTs (Painting) for classes XI and XII. It is not understood how the CAT came to the conclusion that the degree of Bachelor in Fine

Arts ('BFA') is "sufficient qualification, on its own" for eligibility for the PGT (Painting). There are no reasons given for this assumption. Further, the Respondents are unable to dispute that they were teaching 'Drawing' and not 'Painting'. The mandamus issued by the CAT in the impugned order would make it appear that the post of PGT (Painting) and PGT (Drawing) are one and the same.

23. In this context, the Court would like to make a reference to decision in *Amarnath v. Lt. Governor of Delhi 2002 (2) ILR (Del.) 347* in relation to the scale of pay for TGT (Drawing). There the CAT had allowed the prayer of certain Applicants. This Court in the course of that judgment noticed that some of the TGTs had wrongly been promoted as PGT (Drawing) without fulfilling the basic qualifications required for such post. Apparently, certain directions were given by this Court in CW 1479/1973 filed by one M. L. Sharma. The Court, however, did not accept the plea of M. L. Sharma that by virtue of his already teaching classes XI and XII, he should be promoted as PGT and direction be issued of grant of higher scale of pay. Apparently, there were certain other petitions filed before the CAT by Janak Singh and Takar Dass Sapra. In purported compliance of those judgments they were promoted as PGT (Drawing). Noticing these facts this Court in *Amarnath* observed in para 14 as under:

"Despite the fact that only 141 posts were created under the Recruitment Rules and no post of PGT (Drawing) could be given to those who did not have the requisite qualification, the benefit of the scale of pay of PGT (Drawing) was given to all on a wrong interpretation of the orders passed by this Court in *M. L. Sharma* (supra) as also the orders of the Central Administrative Tribunal following the same by an Office Order dated 26th April, 1988."

24. Later when several similar petitions were pending trial before the CAT and the implementation was sought, Joint Directorate (Education) realised that the judgments in *M. L. Sharma* and *Janak Singh* and *Takar Dass Sapra* had been wrongly implemented and it had a cascading effect in terms thereof all senior grade teachers will be promoted to PGT (Drawing). In 1988 when there were only 5 posts of PGT (Drawing) more than 40 had been promoted as such.

25. In *Amarnath* (*supra*), this Court then discussed the minimum educational qualification required to be fulfilled. It then observed in para 41 as under:

“41. In law, there is no dispute as regards the proposition that the persons similarly situated are to be treated alike. Article 14 of the Constitution of India, however, is a positive concept. Equality clause in Article 14 can be invoked in respect of an order which has been legally passed. Equality cannot be claimed in relation to an illegality. Equality before law would mean when an order has been passed in favour of a person in accordance with law. Illegality, as is well known, cannot be perpetuated nor two wrongs make one order right.”

26. This Court in *Amarnath* (*supra*) also referred to the decision dated 27th August, 2002 of the Full Bench of this Court in CW 7568/2001 (*Chander Pal v. NCT of Delhi*) and further observed as under:

“It is really a matter of great concern that the petitioners herein had not only been promoted to the PGT scale of pay although they were not qualified therefore but in the name of giving effect to the order passed by the Tribunal, even the posts which had to be filled up by other stream of teachers had been taken into consideration therefore. Those teachers who had been serving in other disciplines and were entitled to be considered for promotion to the said scale of pay, had been deprived therefrom despite the fact that they possessed the requisite qualifications.”

27. Clearly therefore this Court in *Amarnath* (*supra*), did not approve of promoting persons as PGT when either there were no posts available or when they were not fulfilling the essential qualifications.

28. This was later reiterated by another Division Bench in a judgment dated 28th November, 2008 in LPA No. 584/2004 (*Rajender Singh v. Director of Education*). It was noticed that the case of Rajender Singh was similar to the case in *Amarnath* and it was held as under:

“In the present case also, the position is the same. Firstly, there was no sanctioned post of PGT (Mechanical Drawing) in the school. Secondly, according to the management of the school, the petitioner did not fulfil the requisite qualifications for the post. There being no post, the question of petitioner to be placed in PGT scale did not arise. A person can get PGT scale only when he is promoted as PGT. The claim that everybody who was working as a Drawing Teacher and teaching Class XI automatically get PGT scale and promotion has been rejected by the Division Bench.”

29. It must also be noticed that one other aspect came up for consideration of this Court during the pendency of the petition, namely, the grant of the MACP benefits to the Respondents. Affidavits have been filed by the Petitioners clarifying that the first financial upgradation i.e. senior scale has been granted to all Respondents after 12 years of this service from the respective dates of initial appointment. Further the 2nd and 3rd MACP was granted to them as per their entitlement except those who refused to accept them. It is made clear that it will be open to those Respondents who refused to accept the 3rd MACP to again write to the Petitioners within eight weeks from today seeking the grant of such MACP. If such request is made within eight weeks, it will be considered on its merits and appropriate orders will

be passed by the Petitioners in that regard not later than four weeks thereafter.

30. Barring the above limited relief, the Court finds that the impugned order of the CAT's order dated 29th September, 2008 is unsustainable in law for the reasons already mentioned. It is accordingly hereby set aside.

31. As a result both petitions are allowed but in the circumstances no order as to costs. The pending applications are also disposed of.

NOVEMBER 27, 2019
mw/rd

S. MURALIDHAR, J.

TALWANT SINGH, J.