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

+ **W.P.(C) 3320/2014**

NARENDER KUMAR

..... Petitioner

Through: Mr. Shanker Raju and Mr. Nilansh Gaur, Advocates.

versus

**THE SECRETARY, MINISTRY OF HEALTH AND FAMILY
WELFARE AND ORS**

..... Respondents

Through: Mr. Bhagvan Swaroop Shukla, CGSC
with Mr. Sanan Kumar Shukla,
Advocate.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE TALWANT SINGH

ORDER

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04.12.2019

1. By way of this writ petition, the Petitioner has challenged an order dated 14th November, 2013 passed in OA No.740/2009 by Central Administrative Tribunal (CAT), Principal Bench, New Delhi. Vide impugned order, the CAT had rejected the OA filed by the present Petitioner for his promotion as Senior Radiographer in reserved category of Scheduled Caste. A review application No.39/2014 was also rejected by CAT vide order dated 18th March, 2014.

2. In brief, the case of the Petitioner is that he was appointed as Dark Room Assistant with effect from 9th December, 1994 and later on he was selected as Radiographer with effect from 14th November, 1995 through direct recruitment. He was regularised in the said post on 25th September, 1996.

The selection of the Petitioner was made in Scheduled Caste reserved category. The Petitioner became eligible for promotional post of Senior Radiographer with effect from 25th September, 2001 as five years' experience as Radiographer was required for being in consideration zone. A seniority list published by the Respondents in the grade of Radiographers dated 20th June, 2006 was objected to by the Petitioner, who wanted that vacancy-based roster be implemented in which the Petitioner stands at point No.1. The stand of the Respondents is that the roster was lost and no efforts were made to reconstruct it. The representation of the Petitioner against seniority was turned down on 14th December, 2006 which was challenged by him by filing OA No.1736/2007 before CAT. Vide order dated 19th August, 2008 the matter was remitted back to Respondents for re-examination regarding claim of the Petitioner. However, the said claim was rejected on 18th December, 2008.

3. The Petitioner filed OA No.740/2009 raising the plea that the reserved candidates before 2005 were promoted on their own merit and they were adjusted against unreserved vacancies. In 2005, the Respondents had promoted four unreserved candidates as Senior Radiographers but one post of SC category in the cadre of Senior Radiographer was available but the Petitioner was not granted promotion. In the reply filed in the said OA, the stand of the Respondent is that out of 11 sanctioned posts of Senior Radiographers, 7 were already filled up, which included 2 Scheduled Caste candidates. Hence, the remaining 4 vacancies were filled up from general candidates in 2005. Moreover, the promoted Radiographers were seniors to the Petitioner. CAT disposed of the OA 740/2009 vide order dated 27th

November, 2009 quashing the order fixing seniority and issued directions to fix seniority afresh by treating the reserved post separately. In the seniority list issued in 2010, the Petitioner was shown senior. However, the affected parties, i.e. private Respondents filed Writ Petition (Civil) 568/2011 before this Court and as a result order dated 27th November, 2009 in OA 740/2009 was set aside and matter was remitted back to CAT for allowing the private Respondents to be impleaded in the OA and decide the matter after afresh.

4. The case of the government and private Respondents before CAT was that the seniority had been correctly fixed. The Petitioner filed the rejoinders. The matter was finally heard by CAT. The CAT erroneously dismissed the OA vide order dated 14th November, 2013. Hence, a review application was filed and as per directions of the CAT, another review application No.39/2014 was filed but this application was also dismissed on 18th March, 2014. Thereafter, the Respondents convened a DPC and promoted the Petitioner as Senior Radiographer with effect from 4th April, 2014 and adjusted the Petitioner against unreserved vacancy.

5. The roster was filed by the Respondents during the course of pendency of OA and the Petitioner also got the same through RTI. Out of a small roster of 13 points, point No.7 is a post meant for SC category as per directions of DoPT. However, the roster maintained by Respondents in the grade of Senior Radiographer, the total cadre strength is 11 posts. 2 SC candidates, namely, Shri Ram Prasad and Shri Naresh Kumar occupies point No.3 and 6 against unreserved category. No exchange of posts is possible. Point No.7 meant for SC is occupied by an unreserved category candidate. It means that both Shri Ram Prasad and Shri Naresh Kumar have been promoted on their

own merit in non-selection method, without availing the benefit of reservation as SC category candidates. As per OM dated 11th July, 2002 the SC/ST candidates appointed by promotion on their own merit are to be adjusted against unreserved posts but OM dated 31st January, 2005 clarified that the concept of own merit will not apply to non-selection method of promotion. However, DoPT OM dated 31st January, 2005 was further clarified vide OM dated 10th August, 2010, which is effective from 2nd July, 1997 mentioning therein that the concept of merit promotion for reserved category candidates shall be applicable to non-selection method also. As per the Petitioner, the CAT did not consider this aspect. Hence, it has been prayed that the impugned orders be set aside and Petitioner be given antedated promotion to the post of Senior Radiographer with effect from 29th April, 2005 with all consequential benefits.

6. Counter affidavit was filed on behalf of government Respondents. It has been mentioned that in the year 1996, 120-point roster effective from 8th September, 1993 was applicable for the post of Radiographer. The said roster is not traceable but it shows that the Petitioner was appointed against an SC vacancy on item No.7 with effect from 25th September, 1996. After 1996, the 40-point roster was applicable. However, the same again is not traceable. The 13-point roster was applicable from 2nd September, 1997 and the incumbents in the post of Radiographers were plotted against the said roster again showing the Petitioner at No.7. The seniority list was issued on 15th May, 2006 wherein the Applicant Shri Narender Kumar was placed at serial No.8. As far as the post of Senior Radiographer is concerned, the sanctioned strength is 11. The recruitment rules were notified on 25th September, 1996. No roster position is mentioned in the file or DPC

performa as the same was being filled earlier on ad-hoc basis. The amended recruitment rules for the post of Senior Radiographer after implementing recommendations of 6th Central Pay Commission were notified on 19th June, 2013. Earlier, 40-point roster with effect from 25th September, 1996 was applicable as the post of Senior Radiographer was being filled 100% by promotion. In the mean time, the post-based roster became applicable with effect from 2nd July, 1997 to fill the posts. It was recommended that 6 Senior Radiographers already working on ad-hoc basis to be promoted on regular basis with effect from 25th September, 1996. That 40-point roster is not traceable. However, on the basis of incumbent promoted, the same is drawn and it shows that on the first vacancy, Shri Ram Prasad, SC is working against a vacancy reserved for SC and vacancy at point No.8 reserved for SC was lying vacant. Consequent upon implementation of post-based roster with effect from 2nd July, 1997, Shri Ram Prasad was plotted at No.6 out of the 6 incumbents who were regularised as per the new roster.

7. It is further case of the Respondents that in the year 2005, there were 7 vacancies in the grade of Senior Radiographer. The DPC met on 23rd March, 2005 and recommended names of 4 general candidates in clear cut vacancies. Consequent to filling up of 7 vacant posts in the year 2005 including the 2 posts on ad-hoc basis and 1 filled upon ad-hoc basis on account of sealed cover procedure, the net result is that Shri Ram Prasad, SC was holding an unreserved vacancy at No.6 and Shri Naresh Kumar, SC was holding an unreserved vacancy at No.9. But Mr. N. K. Popli, a general category candidate was holding an SC vacancy at No.7. As per 13-point post-based roster, the 11 posts in the grade of Senior Radiographer were to

be filled up by 10 unreserved candidates and 1 SC candidate. Two SC candidates, namely Shri Ram Prasad and Shri Naresh Kumar were already promoted. Hence, the remaining 4 vacancies in the grade of Senior Radiographer were to be filled up by promotion by unreserved candidates.

8. A DPC was held on 6th February, 2007 which recommended 4 senior-most Radiographers from unreserved category to the post of Senior Radiographer with effect from 6th December, 2007. As per the Respondents, the roster is only a method to assess whether reservation status has been maintained or not and this is not to determine any seniority. Prior to 19th June, 2013, the mode of recruitment to this post was the non-selection method but with effect from 19th June, 2013 it is a selection post. The total sanctioned strength has been now gone to 14, out of which 9 posts were filled up by promotion as per earlier roster as it was 100% promotion and the 5 vacancies were to be filled up by amended recruitment rules providing for 50% and 50% from both sources, i.e. 3 posts were to be filled by promotion and 2 posts by direct recruitment. The 11 incumbents were re-plotted again with the 13-point based roster for promotion. The last 3 posts were available for unreserved category but the senior most Radiographers, including the Petitioner, were promoted with effect from 14th April, 2014. One post was left vacant as some complaint was pending against the candidate. On these bases, it has been prayed that the present writ petition be dismissed as the Respondents have followed the amended recruitment rules, OM's and directions of the Government from time to time.

9. We have heard the arguments. The dispute is in a very narrow compass as to whether the promotion of the present Petitioner should relate back to 29th

April, 2005 or it should relate to the date when he was actually promoted on 14th April, 2014 when he was actually promoted. This matter also relates to the interpretation of 3 Office Memorandums, i.e. OM dated 11th July, 2002, OM dated 31st January, 2005 and OM dated 10th August, 2010. All the three OMs deal with reservation in promotion in respect of SC/ST candidates. The first OM dated 11th July, 2002 is reproduced here under:

“G.I. Dept. Of Per & Trg., O.M. No.36028/17/2001-Estt. (Res.), dated 11-7-2002

Subject:- Reservation in Promotion – Treatment of SC/ST candidates promoted on their own merit

The undersigned is directed to say that this Department has been receiving reference from various Ministries, etc. regarding adjustment of SC/ST candidates promoted on their own merit in the reservation rosters introduced vide DoP&T's O.M. No.36012/2/96-Estt.(Res.), dated 2-7-1997. While it is clear from the OM dated 2-7-1997 that the SC/ST/OBC candidates appointed by direct recruitment on their own merit and not owing to reservation will be adjusted against unreserved points of the reservation roster, doubts have been raised about SC/ST candidates promoted on their own merit. It is hereby clarified that:

(i) The SC/ST candidates appointed by promotion on their own merit and not owing to reservation or relaxation of qualifications will not be adjusted against the reserved points of the reservation roster. They will be adjusted against unreserved points.

(ii) If an unreserved vacancy arises in a cadre and there are any SC/ST candidates within the normal zone of consideration in the feeder grade, such SC/ST candidate cannot be denied promotion on

the plea that the post is not reserved. Such a candidate will be considered for promotion along with other candidates treating him as if he belongs to general category. In case he is selected, he will be appointed to the post and will be adjusted against the unreserved point.

(iii) SC/ST candidates appointed on their own merit (by direct recruitment or promotion) and adjusted unreserved points will retain their status of SC/ST and will be eligible to get benefit of reservation if future/further promotions, if any.

(iv) All Ministries/Departments are requested to bring the contents of this O.M. to the notice of all authorities under them for information and compliance.”

10. The second OM dated 31st January, 2005 is reproduced here under:

“No.36028/17/2011-Estt.(Res.)
Government of India
Ministry of Personnel, Public Grievances and Pensions
Department of Personnel and Training

New Delhi, dated the 31st January, 2005.

OFFICE MEMORANDUM

Subject: Reservation in promotion – Treatment of SC/ST candidates promoted on their own merit.

The undersigned is directed to refer to this Department’s O.M. No.36028/17/2001-Estt.(Res), dated 11th July, 2002 whereby it was clarified that the Scheduled Caste and Scheduled Tribe candidates appointed by promotion on their own merit and not owing to reservation or relaxation of qualifications will be

adjusted against unreserved points. References have been received seeking clarification on the following points:

(i) The date of effect of the O.M. No.36028/17/2001-Estt.(Res.), dated 11.7.2002; and

(ii) Whether the orders will apply in case of promotions made by non-selection method.

2. It is clarified that the O.M. No.36028/17/2001-Estt.(Res.), dated 11.7.2002 takes effect from the date of its issue i.e. with effect from 11.7.2002. However, the cases where SC/ST candidates promoted on their own merit before 11.7.2002 have been adjusted against unreserved points need not be re-opened.

3. It is also clarified that since in the case of promotions by non-selection, promotions are made on the basis of seniority-cum-fitness and the concept of merit is not involved in such promotions, the O.M. dated 11.7.2002 does not apply to the promotions made by non-selection method.”

11. The third OM dated 10th August, 2010 is reproduced here under:

“
SR.No.1(R)
No.36012/45/2005-Estt.(Res.)
Government of India
Ministry of Personnel, Public Grievances and Pensions
Department of Personnel and Training

North Block
New Delhi-110001
Dated the 10th August, 2010.

OFFICE MEMORANDUM

Subject: Reservation in promotion – Treatment of SC/ST candidates promoted on their own merit.

The undersigned is directed to refer to this Department's O.M. No.36028/17/2001-Estt. (Res.) dated 11th July, 2002 which clarified that SC/ST candidates appointed by promotion on their own merit and not owing to reservation or relaxation of qualifications will be adjusted against un-reserved points of the reservation roster and not against reserved points. It was subsequently clarified by this Department's O.M. No.36028/17/2001-Estt. (Res.) dated 31.1.2005 that the above referred O.M. took effect from 11.7.2002 and that concept of own merit did not apply to the promotions made by non-selection method.

2. Central Administration Tribunal, Madras Bench in O.A. No.900/2005 [S. Kalugasalamoorthy v/s. Union of India & Others] has set aside the O.M. No.36028/17/2001-Estt. (Res.) dated 31.1.2005 and held that when a person is selected on the basis of his own seniority, the scope of considering and counting him against quota reserved for SCs does not arise. The High Court of Judicature at Madras in the matter of UOI v/s. S. Kalugasalamoorthy [WP No.15926/2007] has upheld the decision of the Central Administrative Tribunal.

3. The matter has been examined in the light of the above judgments and it has been decided to withdraw O.M. No.36028/17/2001-Estt. (Res.) dated 31.1.2005 referred to above. It is clarified that SC/ST candidates appointed by promotion on their own merit and seniority and not owing to reservation or relaxation of qualifications will be adjusted against unreserved points of reservation roster, irrespective of the fact whether the promotion is made by selection method or non-selection method. These orders will take effect from 2.7.1997, the date on which post based reservation was introduced.

4. These instructions may be brought to the notice of all concerned."

12. We have to keep in mind that initially the post of Senior Radiographer

was a non-selection post. The OM dated 11th July, 2002 clarifies that the SC/ST candidates who were promoted on their own merit will be adjusted against unreserved points of the reservation roster. This is in clarification to the earlier OM dated 2nd July, 1997. It further clarifies that if an unreserved vacancy arises in a cadre, then promotion to SC/ST candidate cannot be denied on the ground that it is not a reserved post if the said candidate falls within normal zone of consideration then he will be considered along with other general category candidates. They will still retain their SC/ST character but they will be adjusted against the unreserved vacancy.

13. The second OM dated 31st January, 2005 clarifies that where promotions are done by non-selection method, i.e. only on the basis of seniority cum fitness and there is no element of merit in the said promotion, then OM dated 11th July, 2002 shall not apply to such non-selection promotions. It means that SC candidates will be considered and promoted only against reserved vacancy for SC. As and when the SC candidate is selected, he will not be adjusted against an unreserved post. However, where the selection is on the basis of the merits, a Scheduled Caste candidate falling in the zone of consideration selected on his own merits will be adjusted against an unreserved vacancy. The net effect of OM dated 31st January, 2005 is that the facility extended to SC candidates to get adjusted against unreserved posts in case of non-selection method of promotion was taken away.

14. Now comes the third OM dated 10th August, 2010 which considered the order of the CAT Madras Bench in OA No.900/2005 in which the learned CAT was pleased to set aside the OM dated 31st January, 2005 (Second OM) and held that where a person is selected on the basis of his own seniority the

scope of considering and counting him against quota reserved for SCs does not arise. This decision was upheld by High Court of Madras in W.P. (C) No.15926/2007. As a consequence, the Government of India has withdrawn the OM dated 31st January, 2005 and it has been clarified that the SC/ST candidates appointed by promotion on their own merit and seniority will be adjusted against unreserved points of reservation roster without considering the fact as to whether promotion was made by selection method or by non-selection method. Another important point to be noted here is that the OM dated 10th August, 2010 is retrospective and is to be effective from 2nd July, 1997 when post based reservation was introduced.

15. The problem in hand is to be viewed keeping into consideration the retrospective applicability of OM dated 10th August, 2010. It is the common case of the Petitioner and the Respondents that against the SC vacancy, which is shown at No.7 in most of the rosters, no SC candidate was promoted as Senior Radiographer. However, two other SC candidates namely, Shri Ram Prasad and Shri Naresh Kumar were promoted on their own turn and they were plotted against unreserved vacancies which fluctuated from roster to roster on the basis as to whether the 40-point roster is followed or 13-point roster is followed.

16. It is clear that no Scheduled Caste candidate was promoted against the SC vacancy and the said vacancy is lying vacant. No unreserved candidate can have any claim to the said vacancy and swapping of vacancies is not permissible. The Petitioner, who belongs to Scheduled Caste and was part of the cadre of Radiographer at relevant time in 2005, he has a right to the said vacancy with effect from 29th April, 2005 as he fulfilled all the pre-

conditions for being appointed as Senior Radiographer from the said date irrespective of the fact that it was a non-selection post at that time in view of the OM dated 10th August, 2010. The Petitioner had a rightful claim to get promoted against the said vacancy reserved for Scheduled Caste and he being fulfilling all the necessary qualifications and criteria for the said post should have been accordingly promoted.

17. As a result of the above discussion, the order of the CAT dated 14th November, 2013 in OA No.740/2009 and order dated 18th March, 2014 in RA No.39/2014 are hereby set aside. The Petitioner be treated as promoted with effect from 29th April, 2005 as Senior Radiographer and his seniority be fixed accordingly. However, since he has not worked on the post of Senior Radiographer till he was regularly promoted on 14th April, 2014, he shall not be entitled to the pay or other fringe benefits for the said period on the basis of principle of 'no work for no pay'.

18. The writ petition is disposed of accordingly.

S. MURALIDHAR, J

TALWANT SINGH, J

DECEMBER 04, 2019

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