

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

% Reserved on :17.10.2008
Date of decision:31.10.2008

+ **LPA 302/1998**

KHEM CHAND & ORS.Appellants

Versus

M.C.D & ANR.Respondents

+ **LPA 318/1998**

KHEM CHANDAppellants

Versus

M.C.D & ANR.Respondents

Present: Mr. Servesch Bisaria, adv. for the appellants
Ms. Avnish Ahlawat, adv. for the respondents

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE MOOL CHAND GARG

1. Whether the Reporters of local papers may be allowed to see the judgment? yes
2. To be referred to Reporter or not? yes
3. Whether the judgment should be reported in the Digest? yes

MOOL CHAND GARG, J.

1. This common judgment shall dispose of the aforesaid two LPAs which arise out of two separate judgments dated 15.05.1998 passed by Dr. M.K. Sharma, J (as his lordship then was) dismissing Writ Petition (Civil) 1789/1991 filed by Khem Chand and others and Writ Petition (Civil) 4824/1993 filed by Khem Chand alone.

2. Appellants in LPA No. 302/1998 had filed Writ Petition (Civil)

1789/1991 seeking directions for their promotion as Senior Pharmacist in respect of reserved vacancies for SC/ST candidates from the post of Junior Pharmacist in accordance with 40 point roster system, which writ petition was, however, dismissed by the learned Single Judge by way of the impugned judgment dated 15.05.1998 on the ground that the first three appellants were promoted to the post of Senior Pharmacist during the pendency of the writ petition as and when they became eligible for those posts while expressing hope that the other two appellants would also be selected when their turn will come.

3. In LPA No. 318/1998 the appellant, Khem Chand, who was promoted as Senior Pharmacist, had filed Writ Petition (Civil) NO. 4824/1993 seeking direction for his further promotion to the post of Head Pharmacist from Senior Pharmacist but the same was dismissed because the appellant had already been promoted to the post of Head Pharmacist on the basis of draft recruitment rules once he became qualified for such appointment.

4. The grievance of the appellants before us is that the promotion made by the respondents to the post of Senior Pharmacist was not in accordance with the roster point system and that the criterion for selection by insisting on five years regular service in the grade was fallacious. In support of this plea, it was submitted that an agreement was entered into between them and DESU Scheduled Castes/Scheduled Tribes Workers Association whereby it had been agreed that the backlog of vacancies of SC/ST would be worked out in all categories of posts, including the promotional post by relaxing the eligibility criteria. In this regard, it was also agreed that the respondents would prepare a separate list of SC/ST candidates which agreement had not been adhered to by the respondents and therefore, the appellants claim ante dated promotion.

5. We have heard the learned counsel for the parties. We have also gone through the agreement relied upon by the respondents. One of the clauses of the aforesaid agreement is that if an eligible candidate was not likely to be promoted within a period of one year or more, then efforts would be made to relax the qualification of general as well as SC candidates from 5 years to 3 years or from 3 years to 2 years, as the case may be. It was submitted by the appellants that on account of the aforesaid agreement the criteria of 5 years of service in the grade for further promotion was reduced to 3 years and 2 years respectively. It was also the case of the appellants before the learned Single Judge that out of 20 persons who were appointed as Senior Pharmacist none belonged to SC/ST category at the time of filing of the writ petition although according to 40 point roster system, the post at points No. 1,8,14,22 and 28 were reserved for SC candidates and vacancies at points No. 4 and 17 were reserved for ST candidates. It was submitted that even though the vacancies did arise from time to time but they were not filled up under the 40 point roster system.

6. The respondents while refuting the allegations of the appellants relied upon the Recruitment Rules and contended that the post of Senior Pharmacist is a selection post to be filled up only from amongst the eligible candidates who would have spent at least 5 years service in the grade on regular basis. The promotion was to take place only by a duly constituted departmental promotional committee on the basis of service record of the eligible candidates who were within the zone of consideration. Relying upon various circulars issued by the Central Government which were placed on record, it was submitted that promotion to a selection post is made from amongst the candidates who were within the zone of consideration which could at the most be five times of the vacancy/vacancies even on extended basis and if a

Scheduled Caste/Scheduled Tribe candidate was not available within the zone of consideration, the vacancy although reserved cannot be filled up and such reserved post has to be de-reserved. In this regard it was also submitted that since the selection was from Group 'C' to Group 'B', within Group 'B' and from Group 'B' to the lowest rung of Group 'A', the post cannot be carried forward as envisaged and therefore there could not have been any carry forward of reservations in the post of Senior Pharmacist.

7. It is a matter of record that during the pendency of the writ petition, petitioners No. 1, 2 and 3 were promoted to the post of Senior Pharmacist w.e.f. 17.06.1994, 29.08.1994 and 29.08.1995 respectively. The learned Single Judge after going through the record as produced before him came to the conclusion that if eligible SC candidates were not available within the zone of consideration which earlier used to be 3 times of number of vacancies and which could be extended up to 5 times only and not beyond, the petitioners who as Junior Pharmacists were at serial No. 57, 58, 59, 63 & 72 were not eligible for promotion. It is only when 14 new vacancies arose after upgradation of the post of Junior Pharmacist on 07.01.1982 as per the roster, 2 of them had to go to SC and 2 to the ST. Taking into consideration the eligible candidates, out of the 14 vacancies, 13 were filled up by General Category i.e. 10 on regular basis and 3 on ad hoc basis and one by SC against a SC vacancy. The appellants, at the relevant time, did not fulfill the eligibility criteria as they did not complete 5 years of service in the post of Junior Pharmacist. Out of the selected candidates, on 29.4.1982 four candidates refused promotion and another person who was promoted to the post of Senior Pharmacist retired and, therefore, six vacancies again became available for promotion. Steps were taken to fill up those six posts and

a Departmental Promotion Committee was constituted for that purpose and 18 candidates in terms of the Recruitment Rules were found eligible and called for selection. The petitioners, at that stage, could not even come within the extended zone of consideration for the said six posts inasmuch as the zone of consideration could have been extended only to candidates upto Serial No. 48 in terms of the seniority list while the petitioner were placed at Serial No. 58 onwards in the said seniority list.

8. The learned Single Judge had taken note of various circulars regarding the scheme of reservation for candidates belonging to SC & ST categories for promotion which are reproduced hereunder for the sake of reference:

“13. The scheme of reservation for candidates belonging to Scheduled Castes and Scheduled Tribes in promotion by selection have been laid down in the circular issued by the Department of Personnel and Administrative Reforms dated 20th July, 1974. In the said circular certain instructions have been laid down which were made applicable to the filling up of vacancies reserved for Scheduled Castes and Scheduled Tribes would be made only from among those Scheduled Castes/Scheduled Tribes candidates who are within the normal zone of consideration. It was also provided that for determining the number of vacancies to be reserved for Scheduled Castes and Scheduled Tribes in a Select List, a separate roster on the lines of the roster providing points 1,8,14,22,28 and 36 reserved for Scheduled Caste and points 4, 17, and 31 for Scheduled Tribes should be followed. It was also laid down that if owing to non-availability of suitable candidates belonging to Scheduled Castes or Scheduled Tribes, as the case may be, it would be necessary to de-reserve a reserved vacancy and a reference for de-reservation should be made to the Department where claims for Scheduled Caste/Scheduled Tribe candidates eligible for promotion in reserve vacancies have been considered in the manner indicated in the office Memorandum. The instruction further lays down that there would, however, be no carry forward of reservations from year to year in the event of an adequate number of Scheduled Caste/Scheduled Tribe candidates not being available in any particular year.”

9. Taking into consideration the factual matrix of this case and the

seniority of the appellants who were placed at serial no.58 onwards, it was observed that once the appellants were not within the normal zone of consideration when the matter for filling up the posts of Senior Pharmacists arose, there was no error committed by the respondents in not promoting the appellants earlier to 1994 when they were promoted. Since appellants No. 4 and 5 were placed much below in the seniority list, there was no occasion for their promotion who, it was hoped, would be considered in accordance with the prevailing policy and law applicable in view of the decision in *R.K. Sabharwal and Ors. Vs. State of Punjab and Ors.*, 1995 (2) SCC 745. Accordingly, the writ was dismissed.

10. In the connected LPA (No. 318/1998) the grievance of the appellant was that having been promoted to the post of Senior Pharmacist, he should have also been promoted for the next post i.e. the post of Head Pharmacist. In this regard learned Single Judge while dismissing the matter has made the following observations:

“3. By my judgment and ordered delivered today, I have dismissed the writ petition filed by the present petitioner seeking his promotion to the post of Senior Pharmacist with retrospective date registered as C.W.P. No. 1784/1991.

4. As of today, the respondents have not notified the final Recruitment Rules governing policy of promotion to the post of Head Pharmacist. However, pending finalization of the Recruitment Rules, the respondents decided to fill up the posts of Head Pharmacist on ad hoc basis as four posts of Senior Pharmacist were upgraded to Head Pharmacist on 04.08.1993.

5. As per the draft Recruitment Rules, the post of Head Pharmacist is to be filled up through the mode of selection of 100% by promotion from Senior Pharmacist with three years service in the grade. The petitioner satisfied the criteria only in the year 1997 as he was promoted to the post of Senior Pharmacist in the year 1994. He was, therefore, considered and promoted to the said post on 01.04.1998.

6. The respondents have also clarified that

according to the new roster for promotion issued by the Government of India and applicable from July, 1997, roster point vacancy for the Scheduled Caste candidate would be only at the 7th Post. **However, the case of the petitioner for promotion was considered and he was promoted as the Board decided to extend the benefit to the petitioner as his case was under consideration.**

7. Thus, there could be no further grievance of the petitioner in respect of his promotion to the post of Head Pharmacist and the writ petition stands dismissed as such, but, without cost."

11. The learned counsel appearing for the appellants have assailed the judgments delivered by the learned Single Judge, inter alia, on the following grounds:

i) That SC/ST candidates ought to have been considered by the authorities in accordance with the agreement entered into by Delhi Vidyut Board & DESU Scheduled Castes/Scheduled Tribes Workers Associations by which the eligibility for the next promotion was reduced to 3 years instead of 5 years.

ii) As per the Government instructions the zone of consideration for the eligibility of the SC/ST candidates had to be up to 5 times of the normal zone of consideration and therefore the normal zone of consideration was not applicable in this case.

iii) A separate list of the eligible candidates ought to have been made by the respondents who should have been considered separately instead of being clubbed with the General category candidates. It has been submitted that had these principles been followed then the petitioners would have been promoted much earlier and, therefore, their claim for ante dated seniority was justified.

12. Insofar as the extension of the zone of consideration for SC/ST candidates is concerned, the respondents have not disputed that the zone can be extended in their case even up to 5 times and in this

regard there can be no dispute that the zone of consideration in the case of SC/ST would be as under:

“III. Filling up posts by promotion

A.(i) Through limited departmental competitive examination in Groups ‘B’, ‘C’ and ‘D’.

(ii) By selection in Groups ‘C’ and ‘D’.

(1) Selection against vacancies reserved for SCs and STs will be made only from among the SC/ST officials who are within the normal zone of consideration.

(2) Where adequate number of SC/ST candidates are not available within the normal field of choice, it may be extended to five times the number of vacancies and the SC/ST candidates (and not any other) coming within the extended field of choice should also be considered against the vacancies reserved for them.

The normal zone and the extended zone will be as follows:-

<u>No. of Vacancies</u>	<u>Normal Zone</u>	<u>Extended Zone</u>
1	5	5
2	8	10
3	10	15
4	12	20
5 and above	twice number of vacancies plus 4	five times the no. of vacancies

(3) SC and ST officers who are within the normal zone of consideration should be considered for promotion along with others and adjudged on the same basis as others.”

13. Learned counsel for the appellants also relied upon a judgment delivered by the Hon’ble Supreme Court in Civil Appeal No. 4926/1988 titled as *U.P. Rajya Vidyut Parishad SC/ST Karamchari Kalyan Sangh Vs. U.P. State Electricity Board and Ors.* It has been submitted that the aforesaid is a judgment delivered by the Apex Court whereas a perusal of the aforesaid judgment goes to show that no principle of law has been laid down. However, in another judgment delivered in the case of *C.D. Bhatia & Ors. Vs. Union of India and Ors.* delivered in Civil Appeal No. 14568-69/1995 decided on 20.10.1995 it has been held:

“We have heard learned counsel for the parties. Learned counsel for the petitioners has raised only one contention to the effect that there has to be separate zone for consideration so far as SC/ST candidates are concerned. According to him, clubbing the schedule caste with the general category in the same zone of consideration would defeat the very purpose of reservation. He relies of this Court’s Judgment in U.P. Rajya Vidyut Parishad SC/ST Karamchari Kalyan Sangh Vs. U.P. State Electricity Board and Ors. (C.A. No.4026/88) decided on November 23, 1994. This precise point was not raised before the Tribunal. The point was sought to be raised in a review petition but the Tribunal did not permit the same to be raised at that Stage. We see no ground to interfere with.

We are, however, of the view that the law laid down by this court in U.P. Rajya Vidyut Parishad’s Case is binding on all the authorities including the Union of India. The petitioners may, if so advised, approach the Government seeking enforcement of the law laid by this Court. Special leave petitions are disposed of.”

14. In view of the aforesaid judgment, there can be no dispute that a separate zone of consideration should be prepared by the authorities without clubbing the SC/ST candidates along with the General Category candidates for the purpose of the zone of consideration.

15. In this case having analyzed the facts of the case, we do not find that the appellant were entitled to their promotion at the time of filing of the writ petition even by extending the zone. The appellants became eligible only when they completed 5 years of the eligibility criteria in the grade as Junior Pharmacist and could not have been considered prior thereto, yet appellants No. 1 to 3 were considered and promoted even before that to take care of the backlog.

16. Nothing has been pointed out to show as to how the appellants are entitled to a back dated seniority. Merely because the vacancies could not be filled up earlier on account of there being no suitable candidate, the appellants cannot be granted seniority from the date of arising of the vacancies.

17. In LPA No.318/1998 the situation is more precarious inasmuch as the appellant acquired the requisite qualification for being promoted to the next post of Head Pharmacist only after completing one year as Senior Pharmacist and thereafter he was promoted. Thus, there is no occasion for making any grievance by him.

18. The submission made by learned counsel for the appellants that the agreement entered into between the Delhi Vidyut Board and DESU Scheduled Castes/Scheduled Tribes Workers Association thereby reducing the eligibility criteria for promotion as provided for by the recruitment rules also cannot be accepted because the recruitment rules cannot be amended by a mutual agreement between the parties, the respondent being a statutory authority. Reliance may be made to the judgment of the Apex Court in Secretary, State of Karnataka Vs. Umadevi, AIR 2006 SC 1806. The relevant paragraph of the aforesaid judgment is reproduced hereunder for the sake of reference:

“34.

The rule of law constitutes the core of our Constitution of India and it is the essence of the rule of law that the exercise of the power by the State whether it be the Legislature or the Executive or any other authority should be within the constitutional limitations and if any practice is adopted by the Executive which is in flagrant and systematic violation of its constitutional limitations, petitioner No. 1 as a member of the public would have sufficient interest to challenge such practice by filing a writ petition and it would be the constitutional duty of this Court to entertain the writ petition and adjudicate upon the validity of such practice.

Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public

employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. High Courts acting under Article 226 of the Constitution of India, should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because, an employee had continued under cover of an order of Court, which we have described as 'litigious employment' in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is Page 1945 found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates."

19. Taking into consideration the above facts in this case, we find no

reason to interfere with the orders passed by the learned Single Judge in W.P.(C) 4824/1993 & W.P.(C)1789/1991. Accordingly, both the Letters Patent Appeals bearing No 302/1998 and 318/1998 are dismissed with no orders as to costs.

MOOL CHAND GARG, J.

OCTOBER 31, 2008
anb/sv

SANJAY KISHAN KAUL, J.