

ORDER SHEET
West Bengal Administrative Tribunal

Present, -
The Hon'ble
&
The Hon'ble

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Case No. O.A-1480 of 2012

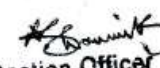
Ashis Sarkar and Another-----Versus-----The State of West Bengal & Others.

Serial No. and date of order 1	Order of the Tribunal with signature 2	Office action with date and dated signature of parties when necessary 3
<u>09</u> 26.09.2014	For Applicants : Mr. A. K. Jha. Ld. Adv. For Respondent Nos. 1-4 : Mr. S. Ghosh. Ld. Adv. For Respondent No. 5 : Mrs. C. Chowdhury. Ld. Adv. Judgment delivered in the open eflash in separate sheets. Let the same be kept with the record. The application is dismissed without cost. Urgent Plain copy of the judgment be given to both the parties.	

Sd/- SAMAR GHOSH
MEMBER (A)

Sd/- S. K. CHAKRABARTI
CHAIRMAN-IN-CHARGE

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Section Officer
West Bengal Administrative Tribunal

**IN THE WEST BENGAL ADMINISTRATIVE TRIBUNAL
BIKASH BHAVAN, SALT LAKE CITY
K O L K A T A – 7 0 0 0 9 1**

Present :-

**The Hon'ble Mr. Justice Syamal Kanti Chakrabarti
CHAIRMAN-IN-CHARGE**

-AND-

**The Hon'ble Mr. Samar Ghosh
MEMBER (A)**

J U D G M E N T

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-of-

Case No O.A. 1480 of 2012

Ashis Sarkar & Another Applicants.

-Versus-

State of West Bengal & others....Respondents.

For the Applicant :-

Mr. S. Roy,
Mr. A.K. Jha,
Ld. Advocates.

For State Respondent Nos. 1 to 4 :-

Mr. S. Ghosh,
Ld. Advocate.

For State Respondent No. 5 :-

Mr. A. Chatterjee,
Mrs. C. Choudhury,
Ld. Advocates.



• Judgment delivered on : 26/09/2014.

The Judgment of the Tribunal was delivered by :-

Hon'ble Mr. Samar Ghosh, Member (A)

J U D G M E N T

This matter has been taken up for adjudication on merit in pursuance of order dated 08.05.13 of the Hon'ble High Court in WPST No. 155 of 2013.

The petitioners of this application have challenged the promotion/transfer orders issued by the Department of Agriculture following the publication of Notification No.2224-Estab(Dte) dated 29.06.2009 relating to the constitution and recruitment rules of the integrated West Bengal Agricultural Service (Administration) on the ground that such transfers have been made without following the provisions of the West Bengal Scheduled Castes & Scheduled Tribes (Reservation of Vacancies in Services & Posts) Act, 1976 and the rules framed thereunder thereby depriving the petitioners from the opportunity of promotion to higher posts. The petitioners have sought for a direction upon the respondent authorities to cancel/withdraw all such orders and to consider the promotion of the petitioners in the light of the Reservation Rules of the Government of West Bengal with retrospective effect.

2. By issuing Notification No. 2224-Estab (Dte.) dated 29.06.2009 in exercise of the power conferred under the proviso to Article 309 of the Constitution of India, the posts in the erstwhile Agricultural Service (Administrative Wing), the West Bengal Higher Agricultural Service (Administrative Wing), Grades I & II and ex-cadre post of Additional Directors and Project Coordinator & Ex-Officio Additional Director (Administrative Wing) under the Department of Agriculture have been integrated into a common service called the West Bengal Agricultural Service (Administration). It has been provided in the said rules that posts at various levels other than the entry level (i.e., the post of Assistant Director of Agriculture) would be filled up by transfer from the posts at the immediately lower level. Thus, the method of recruitment to the posts of

Deputy Director of Agriculture, Joint Director of Agriculture, Additional Director of Agriculture and Project Coordinator & Ex-Officio Additional Director of Agriculture are as follows :

Deputy Director : By transfer from the confirmed officers holding the posts of Assistant Director of Agriculture.

Joint Director : By transfer from the confirmed officers holding the posts of Deputy Director of Agriculture.

Additional Director
of Agriculture &

Ex-Officio Additional

Director of Agriculture : By transfer from the confirmed officers holding the posts of Joint Director of Agriculture.

3. The West Bengal Agricultural Service (Administration) Rules, 2009 were challenged before the Tribunal in O.A. No. 1111 of 2009 (filed by Amit Kr. Sen and others) on the ground that there is no provision for reservation of SCs/STs candidates in the said rules. There is no provision for movement to higher posts with higher responsibilities by promotion although the aforesaid posts are borne on different scales of pay and movement from one post to another involves assumption of higher responsibilities and placement in higher scales of pay which should be treated as promotion. According to the West Bengal Scheduled Castes & Scheduled Tribes (Reservation of Vacancies in Services & Posts) Act, 1976, as amended, reservation is applicable to all posts carrying grade pay up to Rs.8700/-, i.e., up to the rank of Additional Director of Agriculture. All four categories of posts mentioned in the Notification dated 29.06.2009 carry grade pay less than or equal to Rs.8700/- and, therefore, reservation policies should apply.

4. The Tribunal by order dated 17.02.2011 dismissed the original application being no. OA 1111 of 2009 upholding the validity of the recruitment rules published under Notification dated 29.06.2009. While dismissing the application, the Tribunal observed as follows :

"It is true that in the recruitment rule there is no mention about provision of reservation, but, it would suffice to mention that following the statutory provision for reservation, every authority is legally bound to follow the reservation policy where the same is applicable both in the case of initial appointment and also promotion and when the rule incorporated the provision of seniority, it can be taken for granted that the question of inter-se seniority shall always be subject to the provision of reservation.

There is no dispute of the factual position that the recruitment rule was published in Gazette on 3.7.09 and the effect was already given on 29.6.09, but, unless there is clear case of causing of any prejudice or discrimination to any party, implementation of the rule before formal publication cannot be considered to be a major lapse and from the decision referred to by Mr. Chatterjee we notice that such decision required publication of the rule and in this case such publication was made.

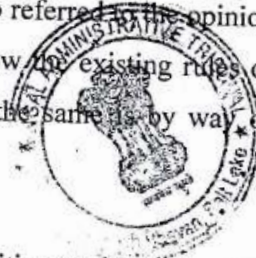
Thus, after considering the submission of Ld. Adv. of the respective parties including the submission of the representation of Advocate General and on meticulous examination of all the averments of the application including the grounds of challenge thrown against the rule and order, we conclude that petitioners have miserably failed to establish any point on the basis of which we can hold that rule and the order ultra vires.

5. Being aggrieved by the order of the Tribunal, the petitioners moved an application under Article 226 of the Constitution of India before the Hon'ble High Court which was registered as WPST 306 of 2011. The said WPST was disposed of by the Hon'ble High Court by order dated 07.02.2012 holding inter alia that –

"The judgment and order of the Tribunal is apt and does not deserve any interference at our end. We only clarify that the said decision of the Tribunal may not prejudice right of the petitioners, if any, either to approach the Hon'ble Chief Justice in Public Interest Litigation or the Tribunal with fresh materials and with a definite case made out indicating their actual and personal grievance."

This instant application has been filed in pursuance of the said order of the Hon'ble High Court and the petitioners have tried to make out a definite case.

6. The present case of the petitioners is that a series of orders have been issued following the publication of Notification dated 29.06.2009 transferring officers of the West Bengal Agricultural Service (Administration) from lower posts to higher posts in the hierarchy (Annexure 'H' series). According to the petitioners, these orders are actually orders of promotion but they have been issued in the garb of transfer in order to deprive the petitioners who belong to Scheduled Castes of their rightful claim to promotion in accordance with the provision of West Bengal Scheduled Castes & Scheduled Tribes (Reservation of Vacancies in Services & Posts) Act, 1976 and the rules framed thereunder. In order to substantiate their claim that transfer to a post at a higher level is effectively a promotion, the petitioners have referred to the order No. 406-Estab (Dte.) dated 08.02.2010 by which the benefit of pay-fixation as in the case of promotion has been allowed in such cases. The petitioners made representations to higher authorities on different dates stating that if the 50 point roster had been followed, the petitioners would have got promotion to higher posts in the service. The petitioners have also referred to the opinion of the Ld. L.R who advised the department to follow the existing rules of reservation also at the time of promotion, even if the same is by way of transfer.



7. By filing a supplementary affidavit, the petitioners have annexed Memo No. 661-BCW/dated 18.02.2004 from the Principal Secretary to the Government of West Bengal, Backward Classes Welfare Department addressed to the Secretary, Department of Agriculture advising the Agriculture Department to amend the provisions of the West Bengal Agricultural Services (Administration) Rules, 2009 to incorporate the provision of promotion in the said rules when movement to higher scales with higher responsibilities is involved. They have also annexed a copy of Memo No. 1567-BCW dated 05.05.2004 from the Assistant Commissioner for Reservation and Ex-Officio Assistant Secretary to the Government of West Bengal, Backward Classes Welfare Department addressed to the Principal Secretary, Department of Agriculture drawing his attention to the Memo No. 661-BCW dated 19.02.2004 and asking for opinion of the Department in the matter. In addition, the petitioners have annexed copy of another Notification being No. 3363 Estab (Dte.) dated 08.02.2010.

the appointment of three officers holding the post of Joint Director of Agriculture to the post of Additional Director of Agriculture in the West Bengal Agricultural Services (Administration).

8. The State respondents have filed a belated reply in which they have stated that since the integration of the erstwhile services under the West Bengal Agriculture Service (Administration), the officers of this service are being transferred to higher posts with higher responsibility and higher financial benefits by virtue of their inter-se seniority in the service in a consistent manner. As the appointments to higher level posts are being made by way of transfer from one post to another, SC/ST Reservation Rules are not applicable. The respondents have at the same time submitted that it has been stated in Agriculture Department's letter no. 261/1M-79/2012 dated 21.01.2013 addressed to the petitioner no. 1 in his capacity as General Secretary, SAAHT, WB that it has been decided that henceforth rank-wise upward movement of the officers of the Directorate of Agriculture would be in accordance with the provision of general rules of reservation applicable as per provision of West Bengal Scheduled Caste and Scheduled Tribes (Reservation of Vacancies in Services & Posts) Act, 1976 and that for implementation of the provision of this act and the rules framed thereunder, necessary amendments pertaining to the West Bengal Agricultural Service (Administration) Rules is under process. They have also referred to the opinion of the Ld. L.R in this regard as already mentioned.

9. Respondent no. 5, i.e., The State Agricultural Technologists Service Association, West Bengal has also filed a reply. Their main contention is that the present application has been filed with the same facts, on the same grounds and for the same reliefs as in the earlier OA 1111/2009 and WPST 306 of 2011 and hence the applications are barred by the principle of res judicata and not maintainable in law. They have further contended that the principles of reservation have no application in respect of transfer within the integrated set-up. This view has been repeatedly affirmed by the Government when transfer orders within the integrated set up were issued by the Department from time to time since 2009. Transfer from one post to another in the integrated set up cannot be said to be a promotion as per policy decision of the Government.

10. In the rejoinder to the reply of respondent no. 5, the petitioners have reiterated the points taken by them in the original application and tried to demonstrate how the petitioners have been affected by not following the principle of reservation in the matter of transfer from one post to another post at a higher level within the West Bengal Agricultural Service (Administration) although in effect such transfer is a promotion.

11. We have heard submissions of the Ld. Advocates of both the parties and perused the application, the reply filed by the State respondents as well as respondent no. 5 and also the rejoinder thereon filed by the petitioners. The basic point that emerges from the submission of the Ld. Advocates for the parties and the documents filed is whether the transfer made by the Department of Agriculture from one level to a higher level within the West Bengal Agricultural Service (Administration) attracts the rules of reservation and whether the transfer orders issued subsequent to the integration of the Agricultural Services are invalid as the rules of reservation have not been followed. We notice that the stand of the State Government in this regard as reflected in the reply and the various documents furnished is not very clear and specific. As far as the present rules which have been framed under the proviso to Article 309 of the Constitution of India are concerned, there is provision for recruitment to higher level post from lower level post by way of transfer. It has been stated by the State respondents in their reply that such transfers are made on the basis of inter-se seniority. We would like to observe that appointments to higher level posts within the same service can be made by transfer of officers of appropriate seniority and it is also common to have different grades and different levels of posts within the same service. The transfer used in the recruitment rules cannot, therefore, be taken as transfer in the usual sense but transfer of persons with appropriate seniority. It is a settled position that in case of transfer of a person of appropriate seniority within the same service, the rule of reservation does not apply. All the posts belong to the same integrated service and the different posts are manned by officers with different levels of seniority. We, therefore, hold that according to the recruitment rules published under Notification dated 29.06.2009 which have been held to be valid by the judgment dated 17.02.2011 of the Tribunal in OA 1111/2009

(the said judgment not being reversed by any higher forum), the transfer orders issued subsequent to the integration of the services without following the 50 point roster cannot be said to be invalid. Therefore, we do not want to interfere with such transfer orders. However, we find from the reply furnished by the State respondents that the State respondents have decided to amend the recruitment rules and fill up the posts at different levels by promotion from lower levels. On this issue, we do not like to make any comment as this a policy matter. We only observe that as long the recruitment rules which have been framed under the proviso Article 309 of the Constitution exist in their present form, there is no irregularity or infirmity in filling up the posts at different levels (other than the entry level) by transfer of officers holding posts at lower level but appropriate seniority without following the 50-point roster applicable in the case of promotion. The word "appoint" used in the notification dated 18.07.2014 (annexed to the supplementary affidavit) does not make any difference, because as per recruitment rules, such appointment has to be treated as appointment by way of transfer.

12. In view of our findings in the preceding paragraph, we hold that there is no merit in this application. The application is accordingly dismissed.

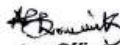
13. There will be no order as to cost.

14. Plain copy of the judgment be given to both the parties.

Sd/- S. K. CHAKRABARTI
CHAIRMAN-IN-CHARGE

Sd/- SAMAR GHOSH
MEMBER (A)

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Section Officer
West Bengal Administrative Tribunal