

Supreme Court, Division Bench

Honorable Justice Sapana Pradhan Malla

Honorable Justice Dr. Manoj Kumar Sharma

Order

Date of Order: 2079/3/15 (corresponding to 29 June, 2020)

078-WO-0311

Case: Certiorari et.al

Petitioner: Surendra Bahadur Rawal et.al., grandson of Jung Bahadur Rawal, son of Nar Bahadur Rawal resident of Doti District former Latamandu V.D.C. Ward No. 2 currently Shikar Municipality Ward No. 7 currently serving civil group under technical service of Kathmandu Valley Water Supply

Vs.

Respondent: Nepal Government, Prime Minister and Office of the Council of Ministers, Singha Durbar, Kathmandu

- It cannot be understood that the provision for special measures, made within the limits of the Constitution and law to ensure an inclusive state structure, is contrary to equality. The special measures introduced for inclusion should be seen not as being detrimental to the rights or interests of any particular class or individual, but as temporary measures aimed at addressing gaps created by social or geographical factors, such as gender, caste, language, religion, or region, in order to build a balanced society.
- The temporary special measures enacted through law to achieve the goal of equality cannot be regarded as discriminatory in favor of any particular group. Equality is not only a de jure but also a substantive right de facto that must be realized in practice. Such temporary special measures serve merely as a means or strategy to attain that goal and are applicable only until the designated target is achieved. Therefore, the provisions made to enable women, indigenous peoples, Madhesi, Dalits, persons with disabilities, and employees permanently residing in underdeveloped or geographically remote areas, who have historically been disadvantaged due to social or geographic factors to become eligible for promotion cannot be interpreted as repeatedly conferring undue advantage or benefit.

(Para No. 16)

On behalf of the petitioner: Learned Advocated Mr. Ganesh Giri, Mr. Trilok Bahadur Chand and Mr. Narayan Dutta Panth

On behalf of the Opponent: Learned Joint Government Attorney Mr. Sanjeev Raj Regmi, Senior Advocate Mr. Bachhu Singh Khadka

Precedents Cited:

Nepal Law Magazine 2075, Decision No. 9942

Nepal Law Magazine 2076, Decision No. 10207

Nepal Law Magazine 2078, Decision No. 10742

Nepal Law Magazine 2078, Decision No. 10756

Relevant Laws:

Constitution of Nepal

Bank and Financial Institution Act, 2073

Public Service Commission, Act, 2066

Civil Service Act, 2049

Order

Justice Sapana Pradhan Malla: The summary of facts and order issued against the writ petition filed under the extra-ordinary jurisdiction of this court pursuant to Article 46 and 133 (2) (3) of the Constitution of Nepal is as follows:

Summary of Facts

The contents of the writ petition submitted by the writ petitioners Surendra Bahadur Rawal et.al., are as follows: We, the petitioners, for the past three years, have been serving at the position of Engineer, Seventh Level, Technical Service, Civil Engineering Group at the Head Office of Kathmandu Valley Water Supply Limited, Tripureshwor. We were selected through open and competitive examination pursuant to Advertisement No. 30-43/073-074 published, in accordance with the Act and Rules, on the recommendation of the Public Service Commission. Under the said advertisement, vacancies were allocated as follows: Open—4, Women—1, Muslim—1, Madhesi—1, and Dalit—1. In the written examination held on 2074/01/01 (14 April 2017), only 16 out of 138 candidates were successful and qualified for the viva voce examination. Having been selected through open and competitive process, we have been continuously serving in the said post to date. During the period of our service, the concerned respondents, including the Kathmandu Valley Water Supply Board, the Staff Recruitment Committee, and the Human Resource Development Division, under the pretext of reservation, interpreted the then prevailing Acts, laws, rules, and regulations in a manner favorable to certain specific individuals and, accordingly, amended the earlier Acts, laws, rules, and regulations. In this process, the Employees' Administration Regulations, 2064 of Kathmandu Upatyaka Khanepani Limited were amended for the ninth time on 2076/01/24 (corresponding to). By altering the original provision of Regulation 23 to suit their convenience, an amended clause was inserted to the effect that: *"However, female, Indigenous/Nationalities, Madhesi, Dalit, persons with disabilities, and employees permanently residing in backward areas shall be considered eligible candidates for promotion even if they have one year less service within the prescribed service period."* On the basis of such amendment and the notice issued thereunder, we, the petitioners, were deprived of promotion. Consequently, our service period was effectively curtailed, which has adversely affected and continues to affect our future prospects relating to performance evaluation, seniority, academic qualifications, efficiency, and training opportunities as well. Despite the fact that the benefits under the inclusive principle had already been availed at the outset, repeated opportunities under the same reservation scheme were again provided. As a result, due to extreme inequality within the very notion of equality, merit was compromised by being reduced to minimum eligibility under the guise of diversity. This legislative framework has created a wide disparity among persons appointed at the same time, thereby depriving us of the right to equality before the law, the right to labour, and the right to employment.

In the name of implementing the principle of inclusion through reservation across all sectors of public service in Nepal, provided, the same individual is repeatedly provided opportunities ranging from appointment to promotion, transfer, and other benefits solely on the basis of reservation, then the right to social justice guaranteed by the Constitution of Nepal cannot from an economic, social, educational, or other perspectives of the general Nepali people amount to any meaningful fulfillment of the State's duties and obligations. The said amended clause is contrary to the concept of the rule of law guaranteed by the Preamble of the Constitution of Nepal. Through collusion among the respondents, reservation has been repeatedly and continuously granted without any competition and without participation in any service selection process to the same individual representing a particular caste, class, or gender, including women, Dalits, Madhesi, Indigenous/Nationalities, and other backward classes. As a result, competent and meritorious candidates are compelled to wait for years merely for promotion, thereby creating a situation that undermines and ultimately dismantles the very organizational structure as a whole. Therefore, the impugned notice is liable to be declared void as being inconsistent with the Preamble of the Constitution of Nepal and Articles 17(f) and 18.

Article 18 of the Constitution of Nepal provides for the right to equality. Sub-article (1) thereof stipulates that *"All Nepali citizens shall be equal before the law. No person shall be denied the equal protection of the laws."* The expression *"equal"* embodies the objective of treating all persons equally, ensuring equal respect and consideration. It clearly signifies that no individual in the eyes of the law, is entitled to special privileges requiring unequal treatment and that the law guarantees equal protection by being applied uniformly to all persons. Both of these expressions inherently embody the principle of non-discrimination. Neither the executive nor the legislature endorses arbitrariness. Equality before the law and equal protection of the law demands equality grounded in justice, reason, and rationality. Beyond formal equality, the principle of substantive equality must be adopted and internalized, for which identifiable and justifiable bases must exist. Such bases may include physical disability, ill health, pregnancy, and similar conditions. These constitute the minimum constitutional recognition; however, even such grounds cannot be applicable in matters relating to promotion. The concept of the inclusive principle cannot be applied to any individual throughout the entirety of his or her service career until retirement merely because it was applied at the time of initial appointment. Reservation cannot be treated as a special kind of perpetual social contract, nor can the provision of reservation be implemented repeatedly. Advancement must be based solely on knowledge, skills, competence, merit, and success in the prescribed assessments. If reservation criteria are applied even in matters of promotion, there exists a strong likelihood that it will undermine not only the efficiency of the administration but also erode the overall standards of the entire skill-based and technical sectors. It is observed that, in numerous jurisdictions across the world, reservation quotas have been regarded as socially detrimental. Accordingly, most countries, upon studying universally accepted principles of law, treaties, conventions, multilateral agreements, and various Geneva Conventions in relation to issues concerning reservation, have made special provisions and have interpreted matters related to reservation.

Contrary to the provision contained in Article 243 (4) of the Constitution of Nepal, the Public Service Commission was required only to provide consultation in relation to the amendment of the Regulations of the respondent Kathmandu Upatyaka Khanepani Limited. As per the said sub-article (4), it is expressly provided that *"the Public Service Commission shall be consulted on the laws relating to the conditions of service of the employees in the service of a body corporate and on the general principles to be followed in the course of making promotion to any position of such service and taking departmental action against any such employee"*. Thus, the Public Service Commission's role is limited to providing consultation, discussing, advising, deliberating, expressing opinions, or issuing suggestive conclusions on the general principles to be adopted; it

cannot act as the decision-making authority. Therefore, the petitioners, Therefore, where the promotion notice published on 2078/04/31 (corresponding to 15 August, 2021) is contrary to Articles 17 (f) and 18 of the Constitution of Nepal, the petition prays the court to issue an interim order and to grant priority to the case and also seeks the honorable court to issue an order of certiorari including an order of mandamus and any other appropriate order to be quashed.

An order had been set aside by the court on 2078/5/25 (corresponding to 10 September, 2021) which reads as follows: What has transpired in this matter? Why should an order sought by the petitioner not be issued? Provided, there are any reasons and grounds that an order should not be issued, the respondents' no. 1, 2, 3, 4, and 5 are hereby requested to submit their rejoinder within 15 days from the date of receipt of the summon excluding the period of travel through the Office of the Attorney General and for other respondents' they are hereby ordered to submit their rejoinder in person or through their representative and it is hereby ordered to execute a summon along with the copy of the order and the writ petition to the opponents and to submit the case upon receipt of the rejoinder or upon expiry of the limitation period.

Further, regarding the petitioners' request for interim order, and considering the nature and seriousness of the matter, it is deemed necessary to hear both the parties. Accordingly, pursuant to rule 49 of the Supreme Court Regulation, 2074, status-quo of all actions under the promotion notice dated 2078/04/31 (corresponding 15 August, 2021) of Kathmandu Upatyaka Khanepani Limited shall be maintained pending discussions and the respondents are hereby directed to appear for hearing on 2078/06/07 (23 September, 2021), and a summon is hereby issued in the name of the opponents and it is hereby directed to notify the Office of the Attorney General regarding the hearing and to submit the case upon their attendance or upon expiry of the limitation period. It is hereby ordered to provide notification of this order to the opponents and to do accordingly.

The rejoinder submitted by Uday Raj Sapkota, Secretary of the Ministry of Law, Justice and Parliamentary Affairs is as follows: Sub-article (1) of Article 18 of the Constitution of Nepal clearly provides that "All citizens shall be equal before law and no person shall be denied the equal protection of law." Sub-article (3) further ensures the right to equality by stipulating that "The State shall not discriminate citizens on the grounds of origin, religion, race, caste, tribe, sex, economic condition, language, region, ideology or on similar other grounds." The proviso of the said Article stipulates that provided that nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or development of the citizens including the socially or culturally backward women, Dalit, indigenous people, indigenous nationalities, Madhesi, Tharu, Muslim, oppressed class, Pichhada class, minorities, the marginalized, farmers, labours, youths, children, senior citizens, gender and sexual minorities, persons with disabilities, persons in pregnancy, incapacitated or helpless, backward region and indigent Khas Arya. The socially backward women, Dalit, indigenous people, indigenous nationalities, people with disabilities shall have the right to participate in the State bodies on the basis of inclusive principle. The Constitution of Nepal has likewise adopted the fundamental principle of inclusive democracy that was enshrined in the Interim Constitution of Nepal, 2063. On the basis of the fundamental principles of inclusive democracy, service-related laws have been amended to ensure the presence of all classes and communities within the State's services and organizational structures. The Constitution and laws of Nepal mandate that citizens from all classes and communities be mainstreamed into such structures or services, thereby fostering a sense of ownership and belonging.

Article 243 (2) of the Constitution of Nepal prescribes that the Public Service Commission shall conduct written examinations to be given for appointment to the offices of bodies of corporate and Sub-article (4) prescribes that the Public Service Commission shall be consulted on the laws relating to the conditions of service of the employees in the service of a body corporate and on the general principles to be followed in the course of making promotion to any position of such service

and taking departmental action against any such employee. Pursuant to the aforementioned constitutional provisions, a writ petition cannot be filed against this Ministry in relation to the matters on which the concerned Commission provided consultation or regarding the amendments made by Kathmandu Upatyaka Khanepani Limited to the Employees' Administration Regulations, 2064 and therefore, the writ petition should be quashed.

The contents of the different writ petitions having the same content submitted before this court by Rabindra Nath Shrestha, Secretary of Government of Nepal, Ministry of Physical Infrastructure and Transport and Dhanraj Gyawali, Secretary of Prime Minister and Office of the Council of Ministers are as follows: It is observed that Kathmandu Upatyaka Khanepani Limited, in accordance with the prevailing legal framework, is fully empowered to determine the eligibility for employee positions, issue advertisements, conduct examinations, carry out assessments, publish merit lists, recommend for appointment, make appointments, promote employees, impose penalties, grant rewards, and manage retirements. Moreover, pursuant to the Government of Nepal (Allocation of Business) Rules, 2074, the said institution does not fall under the jurisdiction of this Ministry. Therefore, the Ministry cannot be made a respondent with respect to actions undertaken by that body and therefore, the writ petition should be dismissed.

The rejoinder submitted by Pramila Devi Shakya Bajracharya, Secretary of the Ministry of Water Supply is as follows: With regard to the allegations that the amendment to Regulation 23 of the Employees' Administration Regulations, 2064 of Kathmandu Valley Water Supply (*Upatyaka Khanepani*) Limited was arbitrary and contrary to law, it is noted that the Regulations themselves empower Kathmandu Water Supply Limited to amend its Regulations and also prescribe the procedure for doing so. There is no dispute that Kathmandu Valley Water Supply pursuant to the prescribed procedure is entitled under law to amend its Regulations. Rule 23 of the Employees' Administration Regulations, 2064 of Kathmandu Valley Water Supply Limited originally provided that "To be eligible for promotion to a higher post from the current post, the employee must have completed a minimum of three (3) years of service in the case of subordinate-level positions and a minimum of four (4) years in the case of officer-level positions." This provision was amended by adding a restrictive clause stating that: "However, employees who are women, Indigenous/Nationalities, Madhesi, Dalit, persons with disabilities, or permanently residing in backward areas shall be considered eligible candidates for promotion even if they have one year less service within the prescribed service period." It was argued that this amendment violated the right to equality and the fundamental right that all are equal before the law. However, the proviso under Sub-article (3) of Article 18 of the Constitution of Nepal expressly provides that: "Provided that nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or development of the citizens including the socially or culturally backward women, Dalit, indigenous people, indigenous nationalities, Madhesi, Tharu, Muslim, oppressed class, Pichhada class, minorities, the marginalized, farmers, labours, youths, children, senior citizens, gender and sexual minorities, persons with disabilities, persons in pregnancy, incapacitated or helpless, backward region and indigent Khas Arya. Thus, the Constitution itself ensures that special provisions may be made by law for the protection, empowerment, or development of these groups. Sub-article (j) of Article 51 of the Constitution of Nepal provides that policies relating to social justice and inclusion may also make special provisions for the persons mentioned in the proviso clause of Sub-article (3) of Article 18. Accordingly, in line with the concept of inclusiveness, such provisions have been adopted and internalized in the service-related rules and regulations applicable to all employees. Sub-section (2) of Section 21 of the Civil Service Act, 2049 (1992), which is regarded as the parent legislation for employee administration, provides that: "Notwithstanding anything contained in Sub-section (1), civil servants who are women, Indigenous/Nationalities, Madhesi, Dalit, persons with disabilities, or permanently residing in backward areas shall be considered eligible candidates for promotion even if they have one year less service within the prescribed service period." Therefore, the proviso clause included by Kathmandu Valley Water Supply Limited in its Regulations does not infringe upon fundamental

rights, as alleged by the petitioners, but rather protects individual rights in accordance with the vision and provisions of the Constitution.

Kathmandu Valley Water Supply Limited was established as a company under the Company Act. and, a company being an autonomous and organized entity, all matters relating to staffing, amendment of its Regulations, and any associated actions are undertaken and executed solely by Kathmandu Valley Water Supply Limited. The Ministry of Water Supply merely functions as the contact Ministry. Merely being the contact Ministry does not entail any involvement in such matters. Therefore, the writ petition filed making this Ministry a respondent is baseless and is hereby requested that the writ petition be dismissed.

The contents of the rejoinder submitted by Milan Kumar Shakya, Chief Executive Officer and authorized representative of Kathmandu Valley Water Supply Limited Central Office, the Executive Committee, the Staff Recruitment Committee and the Human Resource Development Division of Kathmandu Valley Water Supply Limited are as follows; On 2078/04/01 (16 July 2021), a notice was published in the Gorkhapatra by the Staff Recruitment Committee of Kathmandu Valley Water Supply Limited regarding the filling of 20 out of 54 positions through promotion based on performance evaluation. The writ petitioners claimed in their petition that the additional clause in the Regulations would have a long-term impact even though they did not possess the requisite qualifications to apply for promotion from the position of Engineer to one level higher, i.e., Assistant Manager under Technical Service. However, it is acknowledged that the petitioners neither submitted promotion applications within the prescribed period under the said notice nor were they eligible as potential candidates for promotion. Furthermore, the petitioners have not claimed that they should have been considered eligible candidates or that the promotion process should have been carried forward in their favor. In the absence of any such claim, the writ petition filed by the petitioners is devoid of any cause of action. Therefore, the writ petitioners' do not have the locus-standi and it is contrary to Sections 10 and 86 of the National Civil Procedure Code, 2074, the writ petition should be quashed.

The concern and issue raised by the petitioners is that the addition of Regulation 23 of the Employees' Administration Regulations of Kathmandu Valley Water Supply Limited applies reservation criteria even in promotions, which, they argue, undermines the efficiency of administration and creates a disparity. They claim that this provision violates Articles 17 (f) and 18 of the Constitution. However, it is noted that all four petitioners are currently serving in the Limited as Technical Engineers at the Seventh Level. Among the petitioners, Surendra Bahadur Rawal was appointed and began serving on 2074/09/02 (17 December 2017) pursuant to the decision dated 2074/08/26 (12 December 2017), while the other petitioners, Rabin Khadka, Home Bahadur Budhathoki, and Hariram Rimal—were appointed and began serving on 2075/09/15 (30 December 2018) pursuant to the decision dated 2075/07/12 (29 October 2018). At the time of their initial appointments, Regulation 23 of the Employees' Administration Regulations, 2064, required that, to be eligible for promotion, an employee must have completed a minimum of three (3) years of service for subordinate-level positions and a minimum of four (4) years for officer-level positions. This provision remains unchanged to date. As of 2078/04/01 (16 July 2021), when the notice for promotion based on performance was published, Surendra Bahadur Rawal had only completed three and a half years of service, and the other three petitioners had completed only three years of service. Therefore, none of the petitioners' had fulfilled the minimum service requirement of four years under Regulation 23 to be eligible as potential candidates for promotion under the said notice. The petitioners have neither submitted promotion forms nor claimed any right to promotion. Similarly, they have not claimed that the provision added to Regulation 23 should be applied in their favor. Had the petitioners completed the minimum service period prescribed under Regulation 23, they would have been eligible to be candidates for the position of Assistant Manager at Level 8.

The criteria for promotion of employees in the Limited are not based solely on the duration of service in the current post. Rather, promotions based on merit are carried out by the Staff Recruitment Committee following the procedures prescribed under Regulation 25 (1) of the Employees' Administration Regulations. There is no provision in the Regulations that allows for, or has ever allowed, any discrimination among employees of any level or grade in the application of Regulation 25. The provisions of Regulation 25 regarding promotion apply equally to all employees of the Limited. Therefore, it is apparent that the petitioners, without disclosing the existing provisions of the Regulations governing merit-based promotion in the Limited, have deliberately sought to mislead this honorable court by exaggerating that the newly added clause in Regulation 23 constitutes a reservation system and by asserting, in an overstated manner, that the same individual cannot benefit from reservation repeatedly.

The writ petitioners' concerns, as stated in their petition, that the provisions of Regulation 23 would undermine administrative efficiency and the skill-based technical sector, repeatedly grant opportunities under reservation, create extreme inequality within the principle of equality, and have a long-term impact even though the petitioners themselves lack the qualifications for promotion, appear to be hypothetical in nature. It cannot be said that allowing employees who are women, Indigenous/Nationalities, Madhesi, Dalit, persons with disabilities, or permanently residing in backward areas to be considered eligible candidates for promotion one year earlier than the prescribed service period constitutes any significant inequality or discrimination. Reservation and discrimination could only be alleged if, during the promotion process, there had been bias in the evaluation under Regulation 25 or if separate quotas had been reserved specifically for these groups. Otherwise, promotions carried out based on merit do not amount to any discrimination. Merely allowing a one-year shorter service period to determine eligibility as potential candidates for promotion cannot be claimed to violate the constitutional rights of the petitioners. This provision represents only the minimum privilege granted by the State, through the Constitution and legislation enacted by the Legislature, to the backward classes.

On 2074/06/27 (13 October, 2017), the Staff Recruitment Committee of Kathmandu Valley Water Supply Limited published a notice for promotion to various levels. Prior to the addition of the restrictive clause in Regulation 23, female employees, Indigenous/Nationalities, and employees permanently residing in remote areas of the Limited claimed that even with one year less service, they should be considered eligible candidates for promotion and entitled to the protections provided under the proviso clause of Article 18 (3) of the Constitution. Accordingly, they submitted promotion forms and seventh grade employee Chapala Dhakal along with four others filed a writ petition (No. 074-WO-0431) in the Patan High Court, seeking to include this provision in the existing Regulations so as to ensure inclusivity in promotions. In that writ, the petitioners requested that, for the purpose of employee development within the organization, amendments be made to the Employees' Administration Regulations, 2064, reflecting the principles of inclusion under the Constitution and the Civil Service Act, 2049. The court issued an order of mandamus directing that employees eligible for promotion under the minimum service requirements, three (3) years for subordinate-level positions and four (4) years for officer-level positions under Regulation 23, be considered for promotion. Subsequently, Kathmandu Valley Water Supply Limited, on 2076/01/24 (7 May 2019), amended Regulation 23 for the ninth time in accordance with the purpose stated in the proviso clause of Article 18 (3) of the Constitution.

Similarly, the petitioners' have enunciated principles propounded in Hemraj Subedi vs. the Public Service Commission (075-WO-1071), Vinay Kumar Panjiar vs. the Prime Minister and Council of Ministers (077-WO-0237), and Punya Prasad Baral vs. the Public Service Commission (2076 BS, Case No. 10207) which are inconsistent and inapplicable to the facts of the present writ petition and therefore, the precedents and principles set out in those cases cannot be applicable in the present matter. The Supreme Court (Supreme Court Bulletin, Year 2, Unit 6) has propounded that a writ cannot be issued based on possible or hypothetical future consequences. It must be shown

that the petitioner's legal and constitutional rights have actually been violated, and it is not the duty of the court to address hypothetical or speculative issues and since the writ petition is contrary to the established principle, the writ petition should be quashed.

The rejoinder submitted by Mahendra Prasad Guragain, Secretary of Public Service Commission, Central Office, Kamal Pokhari is as follows: The Constitution of Nepal and the policies adopted by the State are fundamentally aimed at making public service inclusive, and the Civil Service Act and its Regulations also embrace this principle of inclusiveness. The provision allowing individuals belonging to inclusive groups to be considered eligible candidates for promotion even with less than one year of service falls within the framework of national policies on inclusiveness and therefore, the writ petition is liable to be dismissed. Moreover, the petitioners have failed to demonstrate how any action or decision of the Commission has violated their rights. Since the Commission has been made a respondent without any substantiated claim, it is hereby requested that the present writ petition be dismissed.

An order had been set aside by this court on 2079/01/11 (corresponding to 24 April, 2022) directing the submission of writ petition nos. 077-WO-0237 and 075-WO-1071 for reference from the record section decided by this court on the date of hearing. Furthermore, since the petitioners' advocate had submitted before the Bench that an opportunity had already been availed once in relation to the same subject matter, the petitioners are hereby directed to submit documentary evidence in that regard. It has been observed that pursuant to the order, that the documents submitted by the petitioner have been annexed with the case file.

Order of the Court

The present petition having being duly listed in the cause-list had been submitted before the Bench for decision. The petition along with the case file was examined and the following arguments were heard by the Bench:

Learned Advocates Mr. Ganesh Giri, Mr. Trilok Bahadur Chand, and Mr. Narayan Datt Pant on behalf of the petitioners, submitted that the petitioners have been appointed and have been serving for the past four years in the position of Engineer at the Seventh Grade of Kathmandu Valley Water Supply Limited. The institution in which they are employed made a ninth amendment to its employee-related Regulations on 2076/01/24, in a manner that adversely affected the petitioners' prospects for promotion. The petitioners were not informed of the said amendment to the Regulations. By amending Regulation 23 of the Employees' Administration Regulations, 2064, and inserting the clause providing that employees who are women, Indigenous/Nationalities, Madhesi, Dalit, persons with disabilities, and those permanently residing in backward areas shall be considered eligible candidates for promotion even with one year less service within the prescribed service period, has created a discrimination among employees who had entered the service concurrently. For that very reason, the writ petitioners were rendered ineligible to apply under the promotion advertisement published by the respondent Kathmandu Valley Water Supply Limited. The constitutional intent is not that a person who has once availed the benefit of reservation should be entitled to such benefit repeatedly. Precedents have been propounded that no individual should be granted the benefit of reservation repeatedly. Therefore, as the amended clause added to Regulation 23 of the Employees' Administration Regulations, 2064, by the respondent Kathmandu Valley Water Supply Khanepani Limited, and the promotion notice published pursuant thereto on 2078/04/31, are contrary to Articles 17 (f) and 18 of the Constitution of Nepal, the petitioners argued an interim order along with the priority for hearing should be issued and that the said amended clause and the notice should be quashed through an order of certiorari.

Likewise, on behalf of the respondent Kathmandu Valley Water Supply Limited, Learned Senior Advocate Mr. Bachchu Singh Khadka submitted that there is no dispute as to the fact that the writ petitioners are serving in the position of Engineer at Kathmandu Valley Water Supply Limited. However, considering the dates of their appointment, they were not eligible to submit applications pursuant to the promotion notice published by the Limited. Kathmandu Valley Water Supply Limited, being an autonomous institution established in accordance with prevailing law, is entitled to amend its Regulations so long as such amendments are not inconsistent with the Constitution and the law. By the amendment made to Regulation 23, only the service period required to be eligible to submit a promotion application has been reduced by one year. Merely prescribing a period for promotion does not tantamount to promotion, nor does it constitute reservation. Moreover, restriction has not been made to prevent all employees who have completed the requisite service period from participating in the promotion process. In the present petition, except for petitioner Surendra Bahadur Rawal, the other petitioners have defaulted to appear on the due dates prescribed by the court. The facts and subject matter of writ petition No. 075-WO-1071 cited by the petitioners does not correspond with the present petition. As the clause added by Kathmandu Valley Water Supply Limited to Regulation 23 of its Regulations, is in conformity with the proviso clause of Article 18 of the Constitution of Nepal, and has not adversely affected the petitioners, the writ should not be issued and prayed that the writ petition be quashed.

Likewise, on behalf of the other respondents, learned Joint Government Attorney Mr. Sanjeev Raj Regmi submitted that Kathmandu Valley Water Supply Limited, in which the Government of Nepal also holds ownership, is a Company established in accordance with prevailing law. On the basis of the Constitution of Nepal, existing Nepalese laws, and company law, Kathmandu Valley Water Supply Limited is empowered to frame the necessary Regulations relating to the terms and conditions of service of its employees and to amend such Regulations. The clause added to Regulation 23 of the Employees' Administration Regulations, 2064 of Kathmandu Valley Water Supply Limited embodies the principle of inclusiveness adopted by the Constitution of Nepal and is a matter already addressed by the Civil Service Act and its Regulations. As the said provision merely maintains the minimum service period required for promotion and appears to be consistent with the Constitution of Nepal and other prevailing laws, it does not warrant annulment. Regarding the claim that a single individual belonging to a particular caste, class, or gender, such as women, Dalit, Madhesi, Indigenous/Nationalities, or other disadvantaged groups has repeatedly been granted reservation without any competition, thereby forcing fully qualified and competent candidates to wait for years solely for promotion and resulting in the disruption of the entire organizational structure, is a matter that the Legislature may address in the future and therefore, since there are no grounds for issuing a writ, the writ petition should be quashed.

Upon hearing the deliberation and arguments, it is for this Bench to decide as to whether or not an order as sought by the petitioner should be issued.

2. We, the petitioners, have been continuously serving for the past three years as Engineers, Seventh Grade, Technical Service, Civil Group, in the post of Engineer at Kathmandu Valley Water Supply Limited. Kathmandu Valley Water Supply Limited, according to its own convenience, amended the Employee Administration Regulation, 2064 for the ninth time on 2076/01/24, and altered the core provision of Regulation 23, which required completion of a minimum service period of at least three (3) years for assistant-level employees and at least four (4) years for officer-level employees for eligibility for promotion, and added a proviso stating that **“female, indigenous nationalities, Janajati, Madhesi, Dalit, persons with disabilities, and employees permanently residing in backward areas shall be eligible candidates for promotion even if they have one year less service than the prescribed period of service.”** On the basis of the said notice, the petitioners were deprived of promotion, resulting in a reduction in their service period, which has adversely affected and will continue to adversely affect in the future with their performance evaluation, seniority, academic

qualifications, professional competence, and training opportunities. Despite the fact that the benefit of reservation under the principle of inclusion had already been availed for the first time, the repeated granting of the same reservation opportunities has deprived the petitioners of the right to equality, the right to labor, and the right to employment, thereby causing long-term adverse effects upon them. Furthermore, reservation in promotion is impermissible in the technical field. If reservation criteria are applied even in promotions, it carries a strong likelihood of undermining not only the efficiency of administration but also deteriorating the entire skill-based technical sector. As this would cause serious harm to Nepal's constitutional legal system, it appears that the notice published on 2078/04/31 is contrary to Articles 17(f) and 18 of the Constitution of Nepal. Furthermore, the proviso added to Clause 23 of the Employee Administration Regulation of Kathmandu Valley Water Supply Limited has adversely affected the rights of the petitioners guaranteed under Articles 17 (f), 18 (2), 33, and 34 of the Constitution. Accordingly, the petitioners' claimed for an issuance of an order of mandamus and any other appropriate orders in the name of the respondents, seeking the said added proviso to be quashed and directing the respondents to maintain the original clause in its existing form. It is not appropriate to characterize the provision allowing female, indigenous nationalities/Janajati, Madhesi, Dalit, persons with disabilities, and employees permanently residing in backward areas to become eligible candidates for promotion one year earlier than the prescribed period, based on the principle of inclusion in all organs and bodies of the State, does not constitute any serious inequality or discrimination. Promotion in the Limited is based on efficiency and performance, however, on the contrary the petitioners without highlighting this provisions prescribed in the prevailing Regulation, have focused solely on the provision added by the ninth amendment to Regulation 23 concerning the time limit for becoming an eligible candidate for promotion, and have portrayed it as a reservation provision. Their assertion that the same individual cannot repeatedly enjoy reservation benefits is clearly intended to mislead this honorable court. Accordingly, the respondent Kathmandu Valley Water Supply Limited requested that the writ petition be dismissed. Similarly, other respondents have submitted that in the absence of any clear grounds or reasons for making them respondents, they have prayed that the writ petition should be dismissed.

3. At the outset, upon examining the documents annexed to the case file, it is noted that Kathmandu Valley Water Supply Limited published a notice in the national daily Gorkhapatra on 2078/04/01 for promotion based on performance. The said notice states that, with the consent of the Public Service Commission dated 2078/03/31, the vacant positions listed below that had remained unfilled in the company up to the end of Poush 2077 would be filled by promotion on the basis of performance evaluation from the service group and post/level one level below, in accordance with Regulation 20(1) of the Employee Administration Regulations, 2064 (Ninth Amendment). Accordingly, pursuant to Regulation 12A(5) of the Regulations, eligible candidates who had completed the required minimum service period were invited, under Regulation 15 (1), to submit their promotion application forms in accordance with Regulation 24 (2) within 30 days from the date of publication of the notice. It appears that the said advertisement covered various positions ranging from Grade 5 Heavy Equipment Driver to Grade 11 Deputy Executive Officer. Among the positions advertised pursuant to that notice, except for four individuals, including the petitioner Surendra Bahadur Rawal, who is serving in the Grade 7 Engineer position, no other employees holding any other posts have filed any petitions concerning the amendment made to Regulation 23 of the Regulations. Even other engineers who were recommended and appointed through the open category along with them have not asserted any claims, and it is further observed that, from among the petitioners, except for Surendra Bahadur Rawal, the other three petitioners have defaulted and failed to appear on the due dates fixed by this court.
4. Similarly, according to the letter of Kathmandu Valley Water Supply Limited bearing reference no. 11/078/079 dated 2079/02/16 (corresponding to 30 May, 2022) it appears that,

pursuant to the notice dated 2074/08/14 (corresponding to 20 November, 2017) of the said Limited under Advertisement No. 39/073–074, under the open category, technical service, civil group, the petitioner Surendra Bahadur Rawal was recommended for the post of Engineer, and pursuant to ref. no. 155 dated 2074/09/02 (corresponding to 17 December, 2017) he received permanent appointment. It is further evident that pursuant to Advertisement No. 40/073–074 of the same date for the women category, Upama Acharya and Beena Maharjan were recommended; under Advertisement No. 42/073–074 for the Madhesi category, Krishna Kumar Sah was recommended; and under Advertisement No. 43/073–074 for the Dalit category, Anil Kumar Tikhatri was recommended. Similarly, in the subsequent year, pursuant to the notice dated 2075/05/25 (corresponding to 10 September, 2018) under Advertisement No. 40/074–075 for the open category, eight candidates, including the petitioners Rabin Khadka, Hem Bahadur Budhathoki, and Hariram Rimal were recommended. Under Advertisement No. 41/074–075 for the women category, Shalini Jha and Radha Dhakal; under Advertisement No. 42/074–075 for the Indigenous Nationalities category, Prakash Chaudhary and Kamal Pun; under Advertisement No. 43/074–075 for the Madhesi category, Sunil Kumar Sah; and under Advertisement No. 44/074–075 for the Dalit category, Vijay Bishwakarma were recommended. The writ petitioners Rabin Khadka, Hem Bahadur Budhathoki, and Hariram Rijal accordingly received permanent appointments through letters bearing ref. nos. 389/2075/07/14, 390/2075/07/14, and 391/2075/07/14 respectively.

5. Regulation 23 of the Kathmandu Valley Water Supply Limited Employee Administration Regulations, 2064 (Ninth Amendment, 2076) provides for the minimum service period required for promotion. According to the said provision, **“In order to be promoted from the post in which one is currently serving to a higher post, an employee must have completed at least three years of service in the case of the assistant level and at least four years of service in the case of the officer level in the post held. However, employees who are women, Indigenous Nationalities/Janajatis, Madhesis, Dalits, persons with disabilities, and those permanently residing in backward areas shall be considered eligible candidates for promotion even if they have completed one year less than the prescribed service period”**. When examined on the basis of the dates on which the petitioners were recommended and appointed, it appears that, as of the date of the promotion notice published by Kathmandu Valley Water Supply Limited on 2078/04/01, the petitioners had not completed the service period required under Regulation 23 of the Regulations of the said Limited. Owing to the failure to complete the prescribed service period as stipulated in the Regulations, it is further observed that they did not even submit application forms.
6. Likewise, Regulation 24 of the said Regulations sets out the procedures relating to promotion, while Regulation 25 prescribes the basis for promotion. Among the bases for promotion of an employee, it is provided that, while evaluating the work performance, marks shall be awarded as set out below:

a. In lieu of work performance maximum	50 marks
b. In lieu of seniority maximum	30 marks
c. In lieu of educational qualification maximum	15 marks
d. In lieu of training of 30 days or more maximum	5 marks

While evaluating the work performance, the total marks are calculated by considering the work performance, seniority, educational qualifications, and training. From among the candidates submitting the promotion forms, the one obtaining the highest marks is selected for promotion. Therefore, merely submitting a promotion form upon completing the period of service as

prescribed by the law should not be considered equivalent to having obtained promotion. In order to be promoted, a candidate must also complete all other procedures and requirements prescribed by law. The additional amendment to Regulation 23 does not guarantee that a candidate who is eligible to submit a promotion form will automatically receive promotion upon submission. Compared to others, it merely allows one year less for women, Indigenous Nationalities/Janajatis, Madhesis, Dalits, persons with disabilities, and employees permanently residing in backward areas. This provision appears to embody the spirit and intent of the proviso clause in Article 18 (3) under the right to equality enshrined in Article 18 of the Constitution. Regulation 4 of the Regulations provides that “The Committee may, after consulting the Commission, amend or modify this Regulation as deemed necessary. However, while making such amendments, no changes shall be made that would adversely affect the salaries, allowances, service, or benefits already enjoyed by the employees.” Similarly, Article 243 (4) of the Constitution of Nepal provides that “the Public Service Commission shall be consulted on the laws relating to the conditions of service of the employees in the service of a body corporate and on the general principles to be followed in the course of making promotion to any position of such service and taking departmental action against any such employee”.

7. In *Hem Raj Subedi vs. Public Service Commission, Central Office, Anamnagar*, writ no. 075-WO-1071, this court on 2077/08/17 had laid down that pursuant to the aforementioned constitutional provision, when a body corporate body seeks advice regarding matters such as amendments to the terms of service of its employees, the advice provided by the Public Service Commission is relevant. In the said writ petition, from among the respondents, the Rastriya Banijya Bank realizing the need to amend the Employee Service Regulation, 2070 (Fourth Amendment) had consulted the Public Service Commission. However, the Commission, while rewriting the Regulation, included age limits for permanent employees of the Bank, which was contrary to Article 243 (4) of the Constitution of Nepal, Section 133 of the Banks and Financial Institutions Act, 2073, Sections 17 and 43 of the Public Service Commission Act, 2066, and in a manner that adversely affected the rights and interests of permanent employees of the Bank. The process of drafting and issuing the disputed Regulations itself was therefore unlawful and defective and accordingly, the court issued an order of certiorari thereby nullifying the actions taken for filling positions under those Regulations.
8. Similarly, in a writ petition of certiorari filed by Binay Kumar Panjiyar against Ministry of Health and Population writ no. 077-WO-0237, the matter concerned the petitioner’s right to pursue higher education in medical studies, i.e., at the postgraduate level. It involved determining the number of available seats for study based on the principle of proportional inclusion and reservation quotas. In this context, the court examined and interpreted the right to equality under Article 18, right to social justice under Article 42 and other constitutional rights under the Constitution of Nepal. The court dismissed the writ petition and directed to conduct a comprehensive study and discussion on what kind of policy, legal and institutional arrangements would be appropriate from the perspective of equality, equity and participation without compromising the quality of education and accordingly the court issued a directive order in the name of the respondents on 2077/09/01 (corresponding to 16 December, 2020), directing the respondents to promptly formulate suitable policy, legal, and institutional measures in accordance with the letter, spirit, and intent of the Constitution.
9. In the above-mentioned cases, Writ No. 075-WO-1071 concerned the issue of age limits for permanent employees of the National Commercial Bank, in which the Public Service Commission had rewritten the Bank’s Employee Regulations, and Writ No. 077-WO-0237 dealt with the issue of reservation raised by the petitioners, interpreting and analyzing the formulation of rules and laws to make special arrangements under the principle of proportional inclusion. Since the facts and nature of the disputes in those writ petitions do not

correspond with the facts of the present petition, it appears that the principles articulated in those two writ petitions are not applicable to the present writ petition.

10. While considering the claim of the petitioner that the insertion of Regulation 23 through the ninth amendment to the Kathmandu Valley Water Supply Limited Employee Administration Regulations, 2064, on 2076/01/24, stating that “**employees who are women, Indigenous/Janajati, Madhesi, Dalit, persons with disabilities, or permanently residing in backward areas shall be considered eligible candidates for promotion even if they have completed one year less than the prescribed period of service**” has affected their career development and is contrary to Articles 17 (f) and 18 of the Constitution, and therefore that this added provision should be annulled, and therefore, it is deemed appropriate to analyze as to whether or not the amended proviso is contrary to the Constitution and the law.
11. In this regard, Article 17 (f) of the Constitution of Nepal provides “freedom to practice any profession, carry on any employment, and establish and operate any industry, trade and business in any part of Nepal.” Article 18 of the Constitution provides for the right to equality, which are as follows:
 - (1) All citizens shall be equal before law. No person shall be denied the equal protection of law
 - (2) No discrimination shall be made in the application of general laws on grounds of origin, religion, race, caste, tribe, sex, physical condition, condition of health, marital status, pregnancy, economic condition, language or region, ideology or on similar other grounds
 - (3) The State shall not discriminate citizens on grounds of origin, religion, race, caste, tribe, sex, economic condition, language, region, ideology or on similar other grounds.

Provided that nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or development of the citizens including the socially or culturally backward women, Dalit, indigenous people, indigenous nationalities, Madhesi, Tharu, Muslim, oppressed class, Pichhada class, minorities, the marginalized, farmers, labours, youths, children, senior citizens, gender and sexual minorities, persons with disabilities, persons in pregnancy, incapacitated or helpless, backward region and indigent Khas Arya.
12. Likewise, Article 42 (1) of the Constitution of Nepal prescribes that the economically, socially or academically backward women, Dalit, indigenous people, indigenous nationalities, Madhesi, Tharu, minorities, persons with disabilities, marginalized communities, Muslims, backward classes, gender and sexual minorities, youths, farmers, labourers, oppressed or citizens of backward regions and indigent Khas Arya shall have the right to participate in the State bodies on the basis of inclusive principle.
13. Section 21 (1) of the Civil Service Act, 2049, provides that, to be eligible as a candidate for promotion, an employee must have completed the educational qualifications prescribed for one level below the promotional post and the minimum period of service as follows:
 - (a) For a non-gazetted post a period of three years;
 - (b) For a gazetted post a period of five years.

Subsection (2) of the same Section 21 provides that, “Notwithstanding anything contained in Subsection (1), civil servants who are women, Indigenous/Janajati, Madhesi, Dalit, persons with disabilities, or permanently residing in backward areas shall be considered eligible candidates for promotion even if they have completed one year less than the prescribed period of service.” Therefore, in accordance with the spirit and intent of Articles 17(f) and 18 of the Constitution of Nepal, and the legal provisions of Section 21 of the Civil Service Act, 2049, which serves as the parent legislation for employees, it is observed that the additional provision in Regulation 23 of the Kathmandu Valley Water Supply Limited Employee Administration Regulations, 2064, was made in conformity with these legal requirements.

14. The Preamble of the Constitution of Nepal itself recognizes the country’s multi-ethnic, multi-linguistic, multi-religious, multi-cultural, and geographically diverse character, and emphasizes the preservation and promotion of unity in diversity, socio-cultural harmony, tolerance, and goodwill. It further aims to eliminate all forms of class, caste, regional, linguistic, religious, and gender discrimination, as well as all types of untouchability, and to ensure economic equality, prosperity, and social justice. This is to be achieved through the principles of proportional inclusion, participation, and equality, with the goal of building an egalitarian society. According to the aforementioned constitutional provisions, there is no prohibition on making special legal arrangements for the protection, empowerment, or development of citizens. Therefore, it appears that the Constitution itself ensures the authority to enact laws providing special provisions for such groups. Article 42 of the Constitution of Nepal ensures the right to social justice, Article 40 provides for special legal provisions for the empowerment, representation, and participation of the Dalit community, and under Article 38 (4), under Rights of Women, the Article prescribes that women shall have the right to participate in all bodies of the State on the basis of the principle of proportional inclusion. Article 18 of the Constitution provides for the right to equality as a fundamental right, and the proviso in Article 18 (3) allows for ensuring the inclusion of groups marginalized by law. In accordance with this constitutional provision, it appears that Kathmandu Valley Water Supply Limited, through the ninth amendment to its Employee Administration Regulations, can ensure proportional inclusion of citizens within specified classes and groups.
15. Similarly, Nepal is a Party to various international human rights treaties. Article 4 of the Convention on the Elimination of All Forms of Discrimination Against Women provides for the adoption of special measures to achieve substantive equality. Further, General Recommendation No. 25 states that “...the purpose of special measures is to effect the structural, social and cultural changes necessary to correct past and current forms and effects of discrimination,” meaning that the purpose of adopting special measures is to rectify past and present forms and impacts of discrimination through structural, social, and cultural changes.
16. Based on the above-mentioned international laws, the Constitution, and legal provisions, it cannot be said that special measures cannot be made. This amended provision merely allows a reduction in the required service period for promotion to make certain candidates eligible to compete for promotion. This does not mean that there is any compromise on the marks awarded in the evaluation of work performance. It does not imply any compromise in competition. Nor should it be understood to mean that it reduces administrative efficiency. It cannot be understood that the provision for special measures, made within the limits of the Constitution and law to ensure an inclusive state structure, is contrary to equality. The special measures introduced for inclusion should be seen not as being detrimental to the rights or interests of any particular class or individual, but as temporary measures aimed at addressing gaps created by social or geographical factors, such as gender, caste, language, religion, or region, in order to build a balanced society. In this regard, the court in Nepal Law Magazine 2075, Decision No. 9942, has propounded that “The State has the obligation to adopt various measures and provide special opportunities to ensure the representation of marginalized

groups, and diversity in recruitment is an immediate measure to ensure access for groups or communities that have not been included in the mainstream of the State until now. This arrangement is not intended to remain permanent forever.” Furthermore, in a case of certiorari writ no. 074-WO-0926, the court propounded that “The principle of inclusion under the Constitution of Nepal and other laws is not contrary to the right to equality; rather, it should be seen as a measure to make this fundamental right more meaningful by bringing groups that have not been able to access the mainstream of the State due to economic, social, educational, or geographical reasons into the mainstream. The principle of equality anticipates equal competition among equals. Making groups that have been excluded from the State’s mainstream competitive is ultimately the responsibility of the State.” Article 281 of the Constitution of Nepal provides that the Government of Nepal shall make appraisal and review of the implementation of special rights of the women and Dalit community and impacts thereof, on the basis of human development index, concurrently with a national census to be held in every ten years. The temporary special measures enacted through law to achieve the goal of equality cannot be regarded as discriminatory in favor of any particular group. Equality is not only a de jure but also a substantive right de facto that must be realized in practice. Such temporary special measures serve merely as a means or strategy to attain that goal and are applicable only until the designated target is achieved. Therefore, the provisions made to enable women, indigenous peoples, Madhesi, Dalits, persons with disabilities, and employees permanently residing in underdeveloped or geographically remote areas, who have historically been disadvantaged due to social or geographic factors to become eligible for promotion cannot be interpreted as repeatedly conferring undue advantage or benefit. Therefore, the amended Regulation 23 of the Kathmandu Valley Water Supply Limited Employee Administration Regulations, 2064, adopted to ensure inclusion in promotion eligibility, does not appear to be unfair or unjust in the case of the petitioners; rather, it appears to be fair and just in favor of disadvantaged and marginalized groups.

17. With regards to the petitioners’ contention that the principle published in Nepal Law Magazine 2076, Decision No. 10207 is inconsistent and contrary, the principle laid down in the said case was that no valid legal principle regarding rights and entitlements allows the State to enact and implement any law that would curtail the benefits and terms of service provided by the service law in effect at the time of entering the employment. In the present case, it cannot be said that the amended provision has curtailed the terms of service of the petitioners. Similarly, in Nepal Law Magazine 2078, Decision No. 10742 (075-WO-1071), it was laid down that the advice of the Public Service Commission cannot be considered as directive, controlling, or subordinate. As for the question of principle raised in Writ No. 077-WO-0237 (Nepal Law Magazine 2078, Decision No. 10756, in paragraph No. 87, it was observed that “The primary objective of equality enshrined in the Constitution of Nepal is to build an egalitarian society. By eliminating existing discriminatory conditions in society and ensuring the participation of various classes and communities, Article 18 (3) of the Constitution permits the implementation of positive programs through law.” Therefore, the amended Regulation 23 of the Kathmandu Valley Water Supply Limited Employee Administration Regulations, 2064, enacted to ensure inclusion, does not appear to be contrary to the cited precedents and the Constitution of Nepal.
18. Therefore, based on the aforementioned legal provisions, facts, and analysis, and in the context of building an egalitarian society through the principles of proportional inclusion, participation, and social justice, it appears that the amendment made by the respondent, Kathmandu Valley Water Supply Limited in consultation with the Public Service Commission to Regulation 23 of the Employee Administration Regulations, 2064, by adding the phrase, **“Employees who are women, Indigenous/Janajati, Madhesi, Dalit, persons with disabilities, or permanently residing in backward areas shall be considered eligible candidates for promotion even if they have completed one year less than the prescribed period of service”** is deemed to be in consonant with the legal provisions of Section 21 of the Civil Service Act, 2049, which serves

as the parent legislation for regulating and directing the majority of civil servants, and therefore, it cannot be deemed to adversely affect the service rights or benefits of the petitioners and therefore, this court does not find any reasonable ground to issue an order as sought by the petitioner and the writ petition is hereby quashed. It is hereby directed to remove the writ petition from the case registry and to enter the order in the electronic system and accordingly submit the case file to the record section.

Concurring with the above Opinion

Honorable Justice Dr. Manoj Kumar Sharma

Bench Officer (Under-Secretary): Indra Kumar Shrestha/Matina Shakya

Dated: Year 2079 of the Month of Ashar Date 15 Day 4

(Corresponding to Year 2020 of the Month June Date 29 Day 4)