

Before Ajay Tewari, J.

SHASHI BALA AND OTHERS—Petitioners

versus

STATE OF PUNJAB AND OTHERS—Respondents

CWP No. 12085 of 2008

July 12, 2012

Constitution of India, 1950 - Art. 226 & 227 - Punjab State Assistant Grade Examination Rules, 1984 - Rl. 4 - Punjab Civil Secretariat (State Service Class III) Rules, 1976 - Rl. 10(2) - Seniority - Principle of catch up - Rules amended retrospectively - Amended Rule provided seniority in accordance with his seniority in the appointment from which he has been promoted as Assistant, if person qualifies test within first two chances available to him after appointment to such post - Amendment also provided that if person who qualifies fails to qualify within the aforesaid two chances, he would be assigned seniority from the day he is promoted as such - Subsequently number of chances increased - More persons qualified and promoted as Assistants - Petitioners were granted seniority from the date of promotion but subsequently assigned lower seniority on the premise that private respondents would catch up with the petitioners - Challenge on the ground that persons who had been promoted consequent to the first two tests would remain immune from any catch up, as on the date when they were promoted, the other

senior persons were not eligible - Principle of catch up could only be applied among eligible candidates - Amendment of Rl. 10 w.e.f. the date of the original Rules came into operation, held to be valid - Private respondents had cleared the test in five chances, as specified by the Full Bench - To be assigned a specific place in a seniority list is not a vested right - Government has a right to amend the Rule regarding seniority with retrospective effect.

Held, that in view of the judgments mentioned above, the following position emerges in law:-

1. To be assigned a specific place in a seniority list is not a vested right.
2. The Government has a right to amend the rule regarding seniority with retrospective effect.

Thus, it has to be held that the amendment of Rule 10 of 1976 Rules by the addition of sub clause (ii) w.e.f. the date the original Rules came into operation i.e. 12.04.1984, is valid. Of course, the position would have been different had the private respondents cleared the test in more than five chances in terms of Baldev Raj's case (supra) but the same protection cannot be granted to the petitioners in the present case because the private respondents cleared the test in the five chances mentioned above. Resultantly once the private respondents cleared the test and were appointed as Assistants they would have to be assigned seniority as per their position in the list of Clerks.

(Paras 15 & 16)

Akshay Bhan, Advocate with Monica Goel and Alok Mittal,
Advocates, *for the petitioners.*

Suvir Sehgal, Addl. A.G Punjab for respondents No. 1 and 2.

Vivek Sethi, Advocate for the private respondents.

AJAY TEWARI, J.

(1) The issue which arises in this case is the interplay of rule 4 of the Punjab State Assistant Grade Examination Rules, 1984 (for short '1984 Rules') with rule 10 of the Punjab Civil Secretariat (State Service Class III) Rules, 1976 (for short '1976 Rules').

(2) The 1984 Rules provide for promotion to the post of Assistant on provisional basis by qualifying written examination conducted by the Subordinate Service Selection Board in the Punjab District Service Class III and came into force w.e.f 12.4.1984. Rule 4 whereof reads as under :-

“4. Eligibility for promotion to the post of Assistant.- (1) No person shall be eligible for appointment by promotion to the post of Assistant unless in addition to fulfilling the qualifications and experience prescribed for appointment by promotion to the post of Assistant, he qualifies the test:

Provided that a person who has already qualified the Assistant Grade Examination inter-alia in terms of Punjab Government circular No.4809-GII-57/2176, dated the 23rd October, 1957, or who was holding on regular basis the post of Assistant on the 23rd October, 1957, shall not be required to qualify the test :

Provided further that if a person holding the post of Assistant or a higher post, on provisional basis, on the commencement of these rules is of the age of fifty years or more; he shall also not be required to qualify the test:

Provided further that a person who has been appointed by promotion to the post of Assistant or to any higher post on provisional basis before the commencement of these rules, shall be required to qualify the test within a period of three years from such commencement and failure to qualify the test within the specified period shall result in reversion of such person to the post of Clerk or to the post, by whatever designation called, from which he was appointed by promotion to the post of Assistant on provisional basis.

(2) Notwithstanding anything contained in sub-rule (1), where no person, who has qualified the test, is available for promotion to the post of Assistant in a Service, the appointing authority may appoint a person by promotion to the post of Assistant on provisional basis till a person who has so qualified the test becomes available in that Service.”

(3) The 1976 Rules provide for recruitment and conditions of service of persons appointed to the Punjab Civil Secretariat (State Service Class III). The seniority of Assistants is governed by these Rules which came into force w.e.f 10.8.1976. Rule 10 whereof reads as under :-

“10. Members of the service shall be entitled to such scales of pay including special pay, as may be sanctioned by Government from time to time. The scales of pay and special pay at present, in force, in respect of specified posts are given in appendix ‘A’.

Provided that notwithstanding anything to the contrary contained in rule 7, a clerk shall not be allowed to draw his annual increment for so long as he does not pass the departmental test in Punjabi/Hindi or English typewriting at a speed of 30 words per minute. However, on his passing the test he will be allowed to draw his annual increment from due date but he will not be paid arrears for the period from the date on which the increment fell due to the date of the test in which he qualifies.”

(4) The result of the first Assistant Grade Examination held under 1984 Rules was declared on 21.7.1984. Petitioners No.1 and 2 having cleared the test were promoted on 8.10.1984 and 10.10.1984 respectively. On 5.12.1984, rule 10 of 1976 Rules was amended and sub-rule (2) was appended thereto which is as follows :-

“(2) Notwithstanding anything contained in these rules, if a person holding the post of a clerk or any other post by whatever designation called from which he could be appointed by promotion to the post of Assistant qualifies the test within the first two chances available to him after his appointment to such post, he shall, on his promotion to the post of an Assistant, be assigned seniority in the cadre of Assistants in accordance with his seniority in the appointment from which he has been promoted to the post of Assistant :

Provided that if such a person fails to qualify the test within the aforesaid two chances, he shall, on his promotion to the post of Assistant, be assigned seniority in the cadre of Assistants from the day he is promoted as such.”

(5) The amendment further stipulated that the same would be deemed to have come into force w.e.f. 12th day of April, 1984.

(6) Pursuant to rule 4 of 1984 Rules, second test was conducted and its result was declared on 31.8.1985 but before this second test, petitioners No.3, 4 and 5 who had also cleared the test on the first chance were promoted on 13.3.1985. Petitioner No.6, who had also cleared the test on the first chance, was promoted on 2.9.1985. Pursuant to the second test, the result of which as mentioned above, was declared on 31.8.1985, petitioners No. 7 to 11 having cleared the test were promoted in second attempt on 2.12.1985, 2.12.1985, 2.12.1985, 2.12.1985 and 15.1.1986 respectively. After the declaration of the result of the second test, rule 10 of 1976 Rules was further amended by notification dated 16.9.1985 and in subrule (2), the words 'first two chances' were substituted with the words 'first four chances'. Pursuant to this amendment, third test was conducted and its result was declared on 1.2.1986. Thereafter, rule 10 of 1976 Rules was further amended, vide notification dated 10.10.1986 and in sub-rule (2) the words 'first four chances' were substituted with the words 'first five chances'.

(7) The dispute is whether the persons who were otherwise senior as Clerks but were able to pass the test after the second such test was conducted as mentioned above, would catch up with the petitioners.

(8) Counsel for the petitioners has argued that originally the petitioners were granted seniority as Assistant from the date of their promotion but in the year 2007, the seniority list was re-worked and the petitioners were assigned seniority below the private respondents on the premise that the private respondents having been promoted in the interregnum would catch up with the petitioners. It has been further argued that the persons who had been promoted consequent to the first two tests would remain immune from any catch up because on the date when they were promoted, the other senior Clerks were not eligible. As per the learned counsel, the principle of catch up could only be applied among eligible candidates.

(9) Counsel for the respondents, on the other hand, have argued that under 1976 Rules, promotion has to be made on the basis of senioritycum-merit and once senior persons became eligible and were promoted, they would necessarily catch up with their erstwhile juniors.

(10) The direct case in point is CWP No.16859 of 1994, Baldev Raj and others vs State of Punjab and others, decided on 17.9.1996 wherein a Full Bench of this Court held as follows :-

“In view of the observations made above, we conclude as under :-

(i) That for the promotion to the post of Assistant, qualifying the test is a sine quo-non.

(ii) There is no limit fixed on the number of chances a person in the feeder cadre for promotion to the post of Assistant can take to qualify the test.

(iii) The ones who qualify the eligibility test in 5 chances will carry their seniority of the cadre from which they were promoted to the post of Assistant, while in case of candidates who pass the eligibility test in more than 5 chances, date of promotion will be considered the terminus-quo for fixation of seniority in the cadre. (emphasis supplied)

(iv) The eligibility of a person for consideration for promotion has to be considered on the date on which a post falls vacant and all those who are eligible having passed the test are to be considered on the basis of seniority-cum-merit irrespective of number of chances availed to pass the test. Ordinarily one will not be promoted solely on the basis of seniority and further providing chance for qualifying the eligibility test, as suggested on the basis of interpretation of rule for promotion, of seniority-cum-merit i.e. a senior would be promoted first, and to him particular number of chances would be provided for qualifying the test in spite of eligible candidates being already available. This course if permitted would render the rule of merit redundant, which is against the basic tenet of the rule of interpretation that by interpretation no words of the legislation or rules can be rendered etiose.

(v) As a necessary corollary, persons who pass the test in 5 chances and those who pass it in more than 5 chances are to be put at par. At the time of filling vacancies by promotion

persons junior though having passed the test in lesser number of chances cannot steal a march over their senior colleagues. No such statutory privilege or right has been conferred on them either expressly or impliedly. Similarly exemptees will come at par with the eligible persons on the date of exemption is granted. All the three categories of persons i.e the ones who have passed the examination in 5 chances those who pass in 6th or more chances as well as the exemptees will form one class of eligible candidates for promotion on the basis of seniority-cum-merit. One cannot be permitted to steal march over the other.

(vi) It is only in the promoted cadre that while determining seniority application of Rule 10 arises, which provides protection of seniority of the feeder cadre to those who passed the test in first five chances i.e the candidates who have qualified the test in 5 chances would carry their seniority of the feeder cadre while in case of the ones who have passed the test in 6th or more than 6 chances and the exemptees, the seniority will be fixed from the date of promotion according to the length of service in the promoted cadre. Thus it can be inferred that persons having passed the test in five chances, ones who passed in more than 5 chances and exemptees if promoted on the same date would obviously carry their seniority of the feeder cadre.

(vii) Rules empower the State to promote an in-eligible person provisionally subject to his qualifying the eligibility test later and also fix the time period for doing so. We have no doubt that ordinarily this power would be invoked only where either the eligible persons are not available or exigencies of service so demand, of course subject to judicial scrutiny for substantive reasons.”

The Full Bench further held as under :-

(i) In case a person is promoted because of nonavailability of eligible candidate on the date the vacancy arises, his promotion to the post is protected along with his seniority, in case he qualifies the test in 5 chances. Otherwise, it would be the actual date of promotion i.e date of qualifying the eligibility test would be the deemed date of promotion for fixing seniority.

(ii) Persons who passed the test within first five chances shall not have preference over the ones who passed the test in more than 5 chances in case the latter are available or all are available on the date the vacancy arises.

(iii) Rendering of 18 years service under the State irrespective of the fact whether rendered in Secretariat or in any other department of the State will entitle the person for exemption from passing the eligibility test. It is the total service in the feeder cadre which would be counted for exemption.

(iv) The exemptees from eligibility test having rendered 18 years service would be at par with the candidates who passed the test in less than or more than 5 chances on the date the vacancy arises and a necessary corollary as a resultant effect promotion would be effected on the basis of seniority and cum-merit by adhering to the principle of promotion being on the basis of seniority-cum-merit.

(v) The vacancies shall be filled in accordance with the date on which these became available from amongst the persons eligible on that date for consideration for promotion on the principle of seniority-cum-merit irrespective of the fact whether they passed the test in five chances or more or whether one is exemptee as all are to be treated at par.

(vi) Seniority on the promoted post shall be fixed by taking into consideration all the eligible persons as referred to above at par.

(vii) The seniority amongst the candidates appointed having passed the test in 5 chances would be fixed according to their seniority in the cadre from which they are being promoted i.e they carry with them their seniority inter se. It may be made clear that in case out of the eligible candidates as referred to above forming one class if senior person for any reason i.e having passed the examination in 6 chances or more or exempted from passing the test is promoted along with the person who passed the test in 5 chances then the seniority would not be given afresh to the candidate fixing the date of promotion for granting seniority. It would as a necessary corollary if he is senior to the candidate who qualified the test in 5 chances or the exemptee he will still be treated senior to them and his seniority will not be affected by the rules.

(viii) The rule regarding carrying their seniority by those who have passed the test in 5 chances shall carry its implication only when the candidates from no other category are available on the date the vacancy arises.

(ix) Rule 10(2) is the rule regarding fixation of seniority by protecting the same and not a rule providing for eligibility or qualification for promotion. It determines the seniority inter se the candidates who have passed the test in 5 chances and were eligible on the date the post fell vacant. It operates in fixed filed of seniority and is not contrary to any other rule nor is it eclipsed by any other provisions of the rules.”

(11) Learned counsel for the petitioners has relied upon **Saroj Rani and another v. State of Punjab and others**, Civil Appeal No. 11660 of 1995. In this case the dispute raised was by a group of Clerks working in the various departments of the Govt. of Punjab. There were two sets of contests, one inter se between the group who had passed the examination under the Punjab State Assistant Grade Examination Rules, 1984 (hereinafter referred to as ‘the 1984 Rules’) within five chances and the others who had passed in more than five chances. The other contest was between the group who passed the examination irrespective of number of chances and the group who were granted exemption from appearing in the examination under Rule 12. Prior to the aforesaid Rule of 1984 promotion from the post of Clerk to the post of Assistant was made purely on the basis of seniority cum- merit having requisite period of experience and qualification.

(12) The questions raised in the said appeal were as follows:-

(a) Whether Rule 12 of the 1984 Rule is invalid?

(b) Whether the notification/order dated 21st January, 1991 is valid?

(c) Whether in terms of the Full Bench decision in *Surenderjit Singh (supra)* on the facts and circumstances of this case, are the exemptees going to fill up to cent per cent vacancies of Assistant in case yet, is it not necessary for the State Government to come out with some policy or guideline to redress the grievance of those who passed the examination prior to 21st January, 1991?

(d) What meaning is to be given to the Full Bench decision in *Surenderjit Singh* (supra) according to which the exemptees have been placed at par with those who qualified in the examination?

(e) Whether a person who has passed the test in first five chances has preference over the persons passing the test in more than five chances?

(f)

(g)

(13) In answer to question No. (e) Hon'ble Supreme Court held that "so far question No. (e) regarding the preference *inter se* between the candidates who passed the test within first five chances and the other who passed in more than five chances, we find the reasons given by the High Court in the impugned judgments including the Full Bench, Baldev Raj (supra) to be well considered, which does not call for any interference."

(14) Counsel for the respondents have argued that the amendments were specifically made applicable with effect from the date of coming into force of the rules and by the interpretation sought to be given by the petitioners the retrospectivity attached to them would be taken away which would be impermissible. In this connection they have relied upon *S.S. Bola and others v. B.D. Sardana and others (1)*, wherein it was held as follows:-

"201. Thus to have a particular position in the seniority list within a cadre can neither be said to be accrued or vested right of a Government servant and losing some places in the seniority list within the cadre does no amount to reduction in rank even though the future chances of promotion gets delayed thereby. It was argued by Mr. Sachar and Mr. Mahabir Singh appearing for the direct recruits that the effect of redetermination of the seniority in accordance with the provisions of the Act is that not only the direct recruits lost a few places of seniority in the rank of Executive Engineer but their future chances of promotion are greatly jeopardised and that right having been taken away the Act must be held to be invalid. It is difficult to accept this contention since chances of promotion of Government

servant are not a condition of service. In the case of State of Maharashtra v. Chanderkant Anant Kulkarni, (1981) 4 SCC 130: (AIR 1981 SC 1990), this Court held para 16 of AIR.):

“Mere chances of promotion are not conditions of service and the fact that there was reduction in the chances of promotion did not tantamount to a change in the conditions of service. A right to be considered for promotion is a term of service, but mere chances of promotion are not.....

206. In the aforesaid premises, it must be held that the direct recruits did not have a vested right nor any right had accrued in their favour in the matter of getting a particular position in the seniority list of Executive Engineers under the pre-amended Rules which is said to have been taken away by the Act since such a right is neither a vested right of an employee nor can it be said to be an accrued right. Thus there is no bar for the legislature to amend the law in consequence of which the inter se position in rank of Executive Engineer might get altered.”

(15) In view of the judgments mentioned above, the following position emerges in law:-

1. To be assigned a specific place in a seniority list is not a vested right.
2. The Government has a right to amend the rule regarding seniority with retrospective effect.

(16) Thus, it has to be held that the amendment of Rule 10 of 1976 Rules by the addition of sub clause (ii) w.e.f. the date the original Rules came into operation i.e. 12.04.1984, is valid. Of course, the position would have been different had the private respondents cleared the test in more than five chances in terms of Baldev Raj's case (*supra*) but the same protection cannot be granted to the petitioners in the present case because the private respondents cleared the test in the five chances mentioned above. Resultantly once the private respondents cleared the test and were appointed as Assistants they would have to be assigned seniority as per their position in the list of Clerks.

(17) Consequently the petition is dismissed. No costs.