

Prohibition (Amendment) Act, 1986. Annexure R-3 clearly prohibits the awarding of facilities of 'B' Class to the persons convicted of bride killings for dowry. The petitioner has been convicted for murdering his wife, as such his prayer for grant of 'B' Class facilities was rightly rejected.

(9) For the reasons recorded above, I find no merit in this petition and dismiss the same.

J.S.T.

Before Hon'ble A. L. Bahri & N. K. Kapoor, JJ.

JOGINDER SINGH,—Petitioner.

*versus*

THE STATE OF PUNJAB AND OTHERS,—Respondents.

Civil Writ Petition No. 12972 of 1991.

December 8, 1993.

*Punjab Public Works Department (Public Health Circle)—State Service Class III Rules, 1983—Rule 8(3)—Executive Instructions issued on January 31, 1984—Paragraphs 2 and 3—Instruction issued by the Government—Such instructions contrary to statutory rules—Validity of the instructions.*

Held, that paragraphs 2 and 3 of the executive instructions, if minutely examined are to operate contrary to the principle of 'Seniority-Cum-Merit' as enshrined in Rule 8(3) of 1983 Rules. Para 2 of the executive instructions indicates that preferential treatment is to be given to the candidates, who had passed the Assistant Grade Examination within first five chances i.e. having passed the examination aforesaid within five chances are available to fill the number of posts available, on promotion, even if persons senior to them fulfilling the eligibility conditions are there, the seniors are to be ignored from consideration for promotion to the post of Assistants. Rule 8(3) of 1983 Rules does not provide for non-consideration of senior persons fulfilling all the eligibility criterion. Executive instructions contrary to the rules cannot take the place of rules, which have force of law.

(Para 8)

K. L. Arora, Advocate, for the Petitioners.

R. K. Joshi, Addl. A.G., Punjab for No. 1 and 2 Nos. 4, 8, 9, 10 and 12 to 15 Arun Jain, Advocate, for the Respondents.

JUDGMENT

A. L. Bahri, J.

(1) *Vide* this order three writ petitions (Nos. 12972, 13386 and 15815 of 1991) are being disposed of as the question involved therein is common. The main judgment is prepared in writ petition No. 12972 of 1991.

(2) These writ petitions relate to promotion to the post of Assistants and in consequence thereof determination of seniority on the posts of Assistants in the Department of (P.W.D.) Public Health, Punjab. Petitioner Joginder Singh and the private respondents were working in the aforesaid Department as Clerks. For promotion to the post of Assistant, they were required to possess certain qualifications and experience as prescribed under the Punjab Public Works Department (Public Health Circle) State Service Class III Rules, 1983. Rule 8(3) of these rules provides all appointments to the service by promotion to be made on the basis of seniority-cum-merit and no person shall be entitled to claim promotion on the basis of seniority alone. Appendix-B attached to these rules provides the educational qualifications and experience for promotion to the post of Assistant as Matriculate of a recognised University or its equivalent and experience of working on the post of Clerk/Senior Clerk/Ledger Clerk/Meter Clerk for a minimum period of eight years. In 1984 Punjab State Assistant Grade Examination Rules were framed. Rule 4 of these rules provides eligibility for promotion to the post of Assistant; apart from possessing the qualifications and experience prescribed for appointment by promotion to the post of Assistant that he should qualify the test. Rule 8 of these rules further provides that a person may avail of any number of chances to qualify the test. A person qualifying the test as provided under Rule 9, shall be eligible for promotion to the post of Assistant in the cadre of his service. Since these rules came into force on April 11, 1984, there were certain Assistants already promoted in the service, who had not qualified the test. Rule 10 of these rules allowed them initially two years time to pass the test, which was subsequently changed to four and five years respectively. Otherwise such Assistants, who had not passed the test were to be reverted. *Vide* order Annexure P-4, some of the private respondents were promoted as Assistants since they fulfilled the eligibility criteria, as provided under two sets of the rules aforesaid. *Vide* this order. (Annexure P-4), respondent Nos. 4 to 6 and 8 were promoted on August 22, 1989. Respondent No. 1 Duni Chand was promoted,—*vide* order Annexure

P-5 on January 25, 1990. Respondent Nos. 13 to 15 were promoted,—*vide* order Annexure P-6 dated September 6, 1990. While making these promotions the petitioners in these writ petitions, who were senior, were ignored. Hence in these petitions they claim *mandamus* directing the respondents to promote them to the posts of Assistants from the date persons juniors to them were promoted. Otherwise they claim that they are possessing the academic qualifications as well as fulfilling the conditions of experience and have also passed the Assistant Grade Examination.

(3) On notice of motion having been issued, the respondents have filed separate written statements contesting the petitions. The stand of the official respondents is that promotion to the post of Assistant was made amongst those officials who had qualified Assistant Grade Examination within first five chances, as per instructions issued on the subject. Hence, the claim of the petitioners was not considered. The correctness of the seniority list prepared of the Clerks was not disputed. The petitioner passed the Assistant Grade Examination later to the private respondents Nos. 3 to 15. Such instructions were circulated in July, 1989, whereas the Examination was conducted in October, 1989. In writ petition No. 392 of 1989, *Gurjant Singh and others v. State of Punjab*,—*vide* order dated March 16, 1989, operations of the instructions referred to above was stayed regarding promotion of those employees, who had passed the test in 5th, 6th and 7th chances. Reference was also made to another writ petition No. 5203 of 1988, filed by Ashok Kumar. It was stated that the decision of that case is not applicable as Ashok Kumar passed the examination in 7th chance whereas the petitioner passed the examination in 10th chance. Copy of the instructions issued on January 31, 1989 is produced as Annexure R-1. Private respondents also took up similar stand in their written statement.

(4) Paragraphs 2 and 3 of the instructions issued on January 31, 1989—Annexure R.1 are reproduced below :—

“2. There are two situations where interpretation of Assistant Grade Examination Rules, 1984, is involved. First situation is where a vacancy for promotion is available. In this situation a clerk who has passed the Assistant Grade Examination within the first five chances is promoted, his *inter se* seniority as Clerk will be maintained with the officials who have passed the Assistant Grade Examination within the first five chances. However, he will rank senior as Assistant to those Clerks who passed the examination in 6th, 7th, and 8th chance and are promoted lateron.”

“3. In the second situation, when there is no post available for promotion to the post of Assistant, but a group of Clerks are available who have passed the Assistant Grade Examination in the 5th, 6th, 7th or 8th chance. As and when a vacancy arises, next senior eligible person is to be promoted irrespective of the fact whether he passed the examination in the 5th, 6th, 7th or 8th chance. The only criteria to be adopted is that he should have passed the examination and is eligible for promotion. In this situation, the *inter se* seniority of Clerks will be maintained in the matter of promotion to the post of Assistant.

(5) Learned counsel for the petitioners has argued that the instructions Annexure R-1, reproduced above, could not be relied and acted upon, the same being contrary to the rules governing promotion to the post of Assistants. As already noticed above. Rules of 1983, in Rule 8(3), provide promotion to be made on the basis of ‘seniority-cum-merit’ and that no person shall be entitled to claim promotion on the basis of seniority alone. By issuing instructions. Annexure R-1, the element of consideration of seniority in the matter of promotion has all together been discarded.

(6) There are two principles of promotion based on seniority, i.e. ‘seniority-cum-merit’ and ‘merit-cum-seniority’. In the case of ‘seniority-cum-merit’, if the person senior most is fulfilling the conditions of eligibility of promotion and is otherwise not unsuitable for the post on the basis of record or otherwise he is to be promoted. In the case of ‘merit-cum-seniority’, the principle of selecting a person for promotion on the basis of merit applies. Such a person need not be senior most. In both these principles the question of suitability/unsuitability on the basis of record is inherent as promotion is selection and no body can claim it as of right. Rule 8(3) reads as under :—

“All appointments to the service by promotion shall be made on the basis of seniority-cum-merit and no person shall be entitled to claim promotion on the basis of seniority alone.”

The aforesaid rule reveals that the principle of promotion embedded therein is ‘Seniority-cum-merit’. Further provision that merely on the ground of seniority alone promotion cannot be claimed indicates that suitability or unsuitability on the basis of service record or otherwise is also to be taken into consideration. However, element of selecting most suitable person from service is not to be considered. Thus, the senior most person fulfilling all the conditions

of eligibility, including one having passed Assistant Grade Examination, would be selected if on the basis of service record he is not found to be unsuitable, though no person can claim promotion as of right merely on the basis of seniority. In this view of the matter, the instructions Annexure R-1 are to be taken into consideration as to whether they in fact infringe Rule 8(3) of 1983 Rules or not.

(7) Paragraphs 2 and 3 of the instructions Annexure R-1, as reproduced above, if minutely examined are to operate contrary to the principle of 'Seniority-cum-Merit', as enshrined in Rule 8(3) of 1983 Rules. Para 2 of Annexure R-2 indicates that preferential treatment is to be given to the candidates, who had passed the Assistant Grade Examination within first five chances. To elaborate, it may be observed that if persons i.e. having passed the examination aforesaid within five chances are available to fill the number of posts available, on promotion, even if persons senior to them fulfilling the eligibility conditions are there, the seniors are to be ignored from consideration for promotion to the post of Assistants. Rule 8(3) of 1983 Rules does not provide for non-consideration of senior persons fulfilling all the eligibility criterion. The only exception as per the rule aforesaid would be to reject their cases if they are otherwise found to be unsuitable. Likewise para 3 of the instructions Annexure R-1 is also contrary to the rule aforesaid. A senior most person may be available fulfilling the eligibility criterion and also having passed the examination, but may be on the 9th or 10th chance. Such a person is to be ignored from consideration for the purposes of promotion if persons, who had passed the test upto 8th chance are available in the service. Furthermore the aforesaid instruction being contrary to the rules of 1983, as discussed above, are again contrary to Rule 8 of 1984 Rules, which reads as under :—

*"Number of chances to sit in test.—A person may avail of any number of chances to qualify the test."*

The aforesaid rule does not limit passing of the examination to any number of chances to make one eligible for promotion. Rule 4 of 1984 Rules which provides eligibility for promotion to the post of Assistants that a person should possess the qualifications and experience, as prescribed and that he qualifies the test. Neither Rule 4 nor Rule 8 of 1984 Rules, nor any other rule contained therein or in 1983 Rules, does provide for elimination of the senior most person from consideration for promotion to the post of Assistant if he has failed to pass the test in any number of chances. Thus the instructions in para 3 of Annexure R-1 are also contrary to the rules.

(8) If Annexure R-1 is considered as a clarification of the existing rules, the clarification aforesaid is absolutely contrary to the interpretation of the rules of 1983 and 1984, as discussed above. If these are treated as instructions (paras 2 and 3 of Annexure R-1) to supplement the rules aforesaid, these being contrary to the rules cannot be acted upon. "Executive instructions contrary to the rules cannot take the place of rules, which have force of law".

(9) Having stated the position and interpretation of the rules on the subject, the facts of the cases may be referred to :

(10) In the present petition Joginder Singh petitioner claims that in the seniority list of the ministerial staff Annexure P-1, he is shown at serial No. 546 and all the private respondents, Harish Chander and others, have been shown junior to him. The first order of promotion was passed on August 22, 1989 (Annexure P-4) promoting Harish Chander and others as assistants. Joginder Singh petitioner took the examination on June 18, 1989, however, intimation of passing the examination was issued on October 11, 1989. When the order Annexure P-4 was passed on August 22, 1989, petitioner had not passed the test and thus he could not be treated eligible for consideration. Thus, the persons who were promoted on August 22, 1989, were rightly promoted and the petitioner cannot raise any grouse. *Vide* order Annexure P-5 dated January 25, 1990. Duni Chand respondent No. 11 was promoted and,—*vide* order Annexure P-6 dated September 6, 1990. Darshan Singh, Harmohinder Singh and Surinder Paul were promoted. When these orders were passed Joginder Singh petitioner, who had also passed the examination, was available for consideration. He is thus entitled to claim consideration of his name for promotion as on January 25, 1990, when Duni Chand respondent, person junior to him, was promoted. If on such consideration petitioner Joginder Singh is found suitable for promotion on the principle of 'Seniority-cum-Merit', as discussed above, he would be so promoted to rank senior to Duni Chand and other respondents. So directed.

(11) Civil Writ Petition No. 13386 of 1991 has been filed by Ramjit Basan, a senior Clerk, office of the Director, Land Records, Punjab. He challenges promotion of Suraj Parkash respondent No. 3 as Assistant, who was junior to him. The order of promotion of respondent No. 3 was passed on September 3, 1989. Before that the petitioner, Ramjit Basan, had challenged the instructions, as discussed above, in Civil Writ Petition No. 6911 of 1988, which is pending. A miscellaneous application was filed therein for restraining the official respondents from filling the posts of Assistants. The

aforesaid application was dismissed on August 18, 1989, with the observation that "promotion, if any, would be subject to the result of the writ petition." Copy of the order of the High Court is Annexure P-1. Suraj Parkash respondent No. 3 was promoted keeping in view the fact that he had passed the test in less number of chances than that of the petitioner. In this petition also a direction is required to be issued that the name of the petitioner be considered for promotion as on September 3, 1989, when respondent No. 3, person junior to him, was promoted and if the petitioner is found suitable, he should be so promoted, placing him senior to respondent No. 3. So directed.

(12) In Civil Writ Petition No. 15815 of 1991 Sudesh Kumari, a Junior Assistant in the office of Director, Land Records, Punjab, has challenged the promotion of Suraj Parkash respondent No. 3, a person junior to her as Assistant. She cleared the examination in 6th chance. Respondent No. 3 had infact cleared the examination before she cleared. It was on September 3, 1989, that respondent No. 3 was promoted as Assistant. During the pendency of Civil Writ Petition No. 6911 of 1988 filed by the petitioner, the promotion was to be subject to the decision of the writ petition. The vacancy for promotion of respondent No. 3 occurred on the death of Shri Dev Raj Sharma, which was during the pendency of the earlier writ petition aforesaid. Thus, as on September 3, 1989 (or at the time of death of Shri Dev Raj Sharma when the vacancy occurred), the petitioner, who was senior to respondent No. 3, was available for promotion fulfilling all the eligibility criteria. Her name was ignored. In this writ petition also a direction deserves to be issued to the respondents to consider the case of the petitioner as on September 3, 1989, and if she is found suitable, to promote her to rank senior to respondent No. 3 Suraj Parkash. So ordered.

(13) For the reasons recorded above, these three writ petitions are allowed with the direction to the respondents to consider the cases of the petitioners for promotion to the posts of Assistants as on the dates persons junior to them were promoted, as discussed above, and if they are found to be suitable for promotion, fulfilling the eligibility criteria, as stated above, they would be promoted to become senior to such of the respondents promoted, and further direct the official respondents to pass appropriate orders with respect to the private respondents according to law. There will be no order as to costs.

S.C.K.