
Before Arun B. Saharya, C.J. & V.K. Bali, J
STATE OF PUNJAB & ANOTHER—Appellants

versus

BHARAT BHUSHAN SHARMA—Respondent

L.P.A. No. 959 of 1992

16th February, 2001

Constitution of India, 1950—Art. 226—Punjab Municipal Services (Recruitment and Conditions of Service) Rules, 1975—Rl. 5(2) (ii)—Punjab Trust Services (Recruitment and Conditions of Service) Rules, 1978—Appointment of an employee by way of transfer to a promotional post—Different cadre under a different department governed by different statute & statutory rules made thereunder—Rl. 5(2) (ii) of the 1975 Rules provides that it is only in case when no suitable candidate is available either through direct recruitment or by promotion that a resort to appointment by way of transfer can be made—Neither any effort made to fill up the post by advertising the same for direct recruitment nor any procedure followed to fill it up by promotion—Petitioner neither eligible nor entitled for appointment to the promotional post—Appointment of the petitioner in violation of the rules—Order of learned Single Judge upholding the appointment of the petitioner set aside.

Held, that there may be no prohibition in bringing an employee by way of transfer on a promotional post, but the same cannot be resorted to in violation of the Rule that may also in turn be violative of constitutional guarantee and rule of fairness. The rule in terms provides that it is only in case when no suitable candidate is available from either of the two categories i.e. direct recruitment and promotion that a resort to appointment by transfer can be made. Not even an effort was made to find out a suitable candidate from the aforesaid two categories. Petitioner did not have the requisite qualifications he it provided for direct recruitment or promotion and in the context of the language employed in proviso to sub-rule (2) of Rule 5, suitability of a candidate to be brought by way of transfer would inherently involve his having the requisite qualifications for either of the two methods provided in the rules.

(Para 13)

S.C. Sibal, Addl. A.G. with P.S. Chhina Senior Deputy
Advocate General, Punjab *for the Appellants.*

Surya Kant, Advocate and Dheeraj Chawla, Advocate *for
the respondent.*

JUDGMENT

V.K. Bali, J,

(1) Even though qualified Draftsman, Bharat Bhushan Sharma (here-in-after referred to as 'petitioner) came to be appointed by way of transfer as Sectional Officer from his parent department of Improvement Trust to Municipal Corporation,—*vide* orders dated 2nd December, 1988, Annexure P-5. The Directorate, Local Government, Punjab, Chandigarh, through its Director, after show cause notice was issued to the petitioner, observed that "transfer of petitioner to the constituted Municipal Service of Sectional Officer from the constituted Trust Service of Draftsman was irregular and illegal as a Draftsman could not be appointed by transfer as Sectional Officer. On receipt of reply to the show cause notice and after hearing the petitioner, order dated 8th February, 1991 came to be passed, rescinding orders dated 2nd December, 1988, Annexure P-5. This order was successfully challenged by petitioner in Civil Writ Petition No. 2252 of 1991 as same was allowed by learned Single Judge,—*vide* orders dated 19th November, 1991. It is against this order of learned Single Judge that State of Punjab, being aggrieved of same, has filed this appeal under Clause X of the Letters Patent. The facts insofar as the same are relevant for deciding the controversy in issue, need a necessary mention.

(2) Petitioner was appointed as Draftsman in the Improvement Trust, Ropar,—*vide* order dated 27th April, 1976. He continued to serve as a Draftsman in the Trust Service of Draftsman till January, 1983 when on 31st January, 1983, he was given the additional charge of Sectional Officer in the Improvement Trust, Ropar. *Vide* order dated 27th June, 1986, petitioner was transferred from the post of Sectional Officer, Improvement Trust, Ropar to the post of Sectional Officer of the Notified Area Committee, Nangal Township. This post of Sectional Officer was a post of Punjab Municipal Services and is governed by the provisions of the Punjab Municipal Services (Recruitment and Conditions of Service) Rules, 1975 (here-in-after referred to as the

Rules of 1975). Order of transfer, Annexure P-4 was passed by Government of Punjab, Department of Local Government, Chandigarh. It has been the case of petitioner that when he was working as Sectional Officer in the Municipal Committees since 1983, he applied to the respondents that he should be absorbed as Sectional Officer in the Municipal Services. Accordingly, his case was processed by the respondents at great length and after duly considering his case, ultimately the Director, Local Government, Punjab-respondent No. 2 passed an order dated 2nd December, 1988 by which he was absorbed by transfer to the Punjab Municipal Service of Sectional Officer under the first proviso to Rule 5(2)(ii) of the Rules of 1975 and his pay was also ordered to be protected. He was, however, not to get his seniority for his past service. Petitioner was, however, issued show cause notice on 22nd June, 1990 by which respondent No. 2 informed him that his appointment by transfer was wrong and the same was to be rescinded. He was given an opportunity to show cause against the said order. Reply was submitted by the petitioner, with the result, as already indicated above. The impugned order, Annexure P-9 was challenged on variety of grounds, but, before the same are taken into consideration along with reasons given by learned Single Judge, in upholding the contention of petitioner with regard to invalidity of the same, it shall be useful to see the pleadings, on the basis of which, cause of petitioner was opposed by the respondents.

(3) In the written statement filed on behalf of respondents 1 and 2, it has, *inter-alia*, been pleaded that order, Annexure P-9 only seeks to rectify an illegality committed and error that crept into the order of appointment of the petitioner from the post of Draftsman in Improvement Trust Service to Municipal Service of Sectional Officer on wrong and mis-interpretation of provisions of statutory rules by former Director, Local Government, Punjab. Order, Annexure P-9 is self-explanatory and based on proper appraisal of facts and law and is perfectly legal and valid. Petitioner wants to cling to a promotional post of Sectional Officer when he is actually a qualified Draftsman, not eligible or entitled for appointment to the post of Sectional Officer on transfer from the constituted Trust Service of Draftsman to the Cadre of constituted Municipal Service of Sectional Officers in contravention of the Rules of 1975. With regard to averments of the petitioner that he was asked to look after the work of Sectional Officer in Municipal Committee, Ropar, it has been averred in the written

statement that since there was no Sectional Officer to look after and oversee the work in the Municipal Committee, Ropar in the year 1983, he was asked to look after the work of said Municipal Committee which was an interim stop gap arrangement and was an additional charge till further orders. Petitioner was, however, transferred to Notified Area Committee, Nangal Township while he remained a Draftsman in the provincialised service of Trust Draftsman and instead of being relieved of his additional charge, he somehow managed his transfer to the Notified Area Committee, Nangal Township. He never requested to be sent to his original cadre and relieved of the additional charge but with ulterior motive continued to cling to the post of Sectional Officer which was only an *interim* arrangement and wilfully dodged time with a view to establish his right to the post of Sectional Officer in the cadre of provincialised Municipal service. Making of an application by petitioner on 28th July, 1988 for being permanently absorbed in the provincialised municipal service as Sectional Officer from the Trust service cadre by transfer has been admitted. It is, however, pleaded that petitioner hobnobbed with the then Director, Local Government, Punjab, Mr. J.S. Kesar, IAS and the Director, in order to cause wrongful gain to petitioner, who had not played the role of guardian of rules and regulations but in utter disregard, sheer negligence and wilful distortion and misconstruction of Rules of 1975 as also erroneous interpretation of law and rules, passed an order of appointment of petitioner on the promotional post of provincialised Municipal Sectional Officer. The said order was wrong, irregular, illegal and untenable on the grounds that "(a) the basic fact had been ignored that the petitioner was appointed and absorbed as mere Draftsman in the constituted service of Trust Draftsman which is governed under different Act, i.e., Punjab Town Improvement Act, 1922 read with different set of rules called the Punjab Trust Services (Recruitment and Conditions of Service) Rules, 1978. The petitioner, thus, belonged to a different cadre under a different service and could not be promoted and appointed as Municipal Sectional Officer which is higher and altogether distinct and different post governed by different statute and statutory rules thereunder ; (b) order, Annexure P-5 could not be passed under first proviso to rule 5 (2) (ii) of the Rules of 1975 because appointment in municipal service under the said rules could only be made by transfer if no suitable candidate was available for appointment by direct recruitment or by promotion. In this case, this

provision was wilfully over looked by the then Director inasmuch as neither any effort had been made to fill up this post by advertising the same for direct recruitment nor any procedure had been followed to fill it by promotion but in utter disregard and total violation of Rule 5 of Rules of 1975, the petitioner was absorbed in altogether different promotional post by transfer ; (c) petitioner, who was a Trust Draftsman, could only be appointed by transfer, if at all, he could be, as a Draftsman, but not as Sectional Officer; (d) the petitioner holds a diploma in Draftsmanship and for the post of Sectional Officer Diploma in Civil Engineering is the requisite qualification and as such he was not even eligible for being considered to the post of Sectional Officer". When the appointing authority was of the view that order, Annexure P-5 was patently illegal, erroneous, wrong, based on misconstruction of provisions of the Rule 5(2) (ii) of the Rules of 1975 and void *ab-initio*, the questions of probation, eligibility for promotion as Assistant Engineer/Municipal Engineer Grade II, Pay protection etc. would pale into insignificance and become irrelevant and rendered redundant as an order passed erroneously or on misinterpretation of provisions of Rules could be rescinded or revoked at any time so as to rectify the error or mistake and straighten the matter. This is precisely what has been done by passing order, Annexure P-9. Insofar as same pay scale for the two posts is concerned, it has been admitted and in that context it has been pleaded that there is no injustice caused to the petitioner in ordering his reversion from Municipal Sectional Officer to Trust Draftsman.

(4) Learned Single Judge, in view of the pleadings of the parties, as reflected above and on the contentions raised by learned counsel for the petitioner, came to the conclusion that "as per Rule 5(2) of the Rules of 1975 a vacancy in the service could be filled up by direct recruitment and by promotion. In case, no suitable candidate was available for appointment by direct recruitment or by promotion, the vacancy could be filled up by transfer or by way of deputation. Transfer or appointment on deputation has not to be within the service". It was further observed that "a person could be appointed by transfer from a different department a different service and even from a different State as the rule did not envisaged any appointment from within the service. It also did not envisaged any transfer from a particular departmental service only and it permits the authority to fill up the post by transfer from anywhere. Just as a person could

be brought on deputation from a different department, similarly, appointment by transfer could be from any service. That being the position, the plea that a member of the Punjab Trust Draftsman could not be appointed by transfer to the Municipal service of Sectional Officer as they were different posts borne on different cadres could not be sustained". The finding in the impugned order that appointment of petitioner by way of transfer was beyond jurisdiction, without authority and void ab-initio was also held to be without any merit inasmuch as order, appointing the petitioner by transfer was passed by the appointing authority as per Appendix 'C', where appointing authority of Sectional Officer is indicated to be Director, Local Government. The four grounds (a to d), as mentioned above, were then separately taken into consideration reiterating the observations earlier made. With regard to ground (a), it was further observed by the learned Single Judge that "the power to appoint by transfer authorises the competent authority to appoint any body in accordance with law and its choice was not confined to the members of Municipal service alone. With regard to grounds (b), learned Single Judge observed that "firstly, the fact that the competent authority had passed the order of the petitioner's appointment by transfer is itself an indication of its having formed the opinion that there was no person who could be appointed by promotion or by direct recruitment. Secondly, even in the impugned order as also in the written statement no finding has been recorded or otherwise suggested that in fact persons were available for appointment by direct recruitment or by promotion. The respondents have not improved upon the position that existed at the time of passing of the order at Annexure P-5. If it had been found that certain persons suitable for appointment by promotion were available and their names were wrongly ignored or that even persons selected for appointment by direct recruitment were available but they were wilfully kept out, probably the action of the then Director who passed the order, Annexure P-5, could have been successfully assailed. However, in the absence of any finding to that effect or even an averment in that behalf, I am unable to sustain the plea that the order was violative of the provisions contained in the proviso to Rule 5(2). It has further been observed that the petitioner could only be appointed by transfer as a Draftsman, but not a Sectional Officer. I find no basis for this averment either in the rules or otherwise in principle. No rule has been brought to my notice to show that transfer can be only on the same post. In fact,

such a suggestion has already been negated by a Division Bench of this Court in *Roshan Lal Anand & Ors. v. State of Punjab & Ors.*, (1) wherein, while upholding the appointment by transfer of the Prosecuting Inspectors in the Police Department to the post of Assistant District Attorneys, it was observed that "the use of the word 'transfer' occurring in sub-clause (ii) of clause (c) does not prohibit an appointment which may also operate as a promotion". With regard to point (c), i.e., qualifications for the post of Draftsman and Sectional Officer, it was observed by the learned Single Judge that "perusal of Appendix 'B' shows that only qualifications for direct recruitment have been prescribed and the same have not been prescribed for appointment by transfer or promotion". With regard to Mr. J.S. Kesar, Former Director, Local Government, Punjab, who passed order, Annexure P-5 giving undue advantage to the petitioner, it was observed by learned Single Judge that "in the absence of a positive finding in the order regarding the personal bonafides of Mr. J.S. Kesar, it does not appear to be appropriate for the officer to aver that the order had been passed wilfully or to cause wrongful gain to the petitioner".

(5) Mr. Chhinna, learned Deputy Advocate General, Punjab, on the basis of Rules of 1975, having bearing upon the controversy involved in this case, vehemently contends that appointment of petitioner by way of transfer from one department to entirely another one, governed by different statutory rules, and that too on a post for which the petitioner could not even be considered, was wholly illegal and the said order was rightly rescinded by the competent authority. "The findings of the learned Single Judge to the contrary can not sustain. Naturally, this contention of learned counsel is sought to be repelled with equal vehemence on the other side. Before, we may, however, determine the core issue involved in this case, and as projected above, it will be useful to examine the relevant provisions of the Rules of 1975.

(6) The Rules of 1975 apply to all the posts in the services specified in Appendix 'A' and as per clause (b) of Rule 2 'Appendix' means an Appendix to the rules. Sub-rule (ee) of Rule 2 defines 'direct recruitment' to mean an appointment made by selection otherwise than by promotion or by transfer of an official already in the service of a Municipal Committee. Sub-rule (k) of Rule 2 defines 'member'

to mean a member of Service detailed in Appendix 'A'. Sub-rule (m) of Rule 2 defines 'Services' to mean a Municipal service constituted by the Government under Section 38(1) of the Punjab Municipal Act, 1911, in the manner prescribed in the rules and 'vacancy' as per sub-rule (n) of Rule 2 means a vacancy of a post in a service when there is no incumbent actually working against it whether due to transfer, leave, suspension or any other reason if the post is already in existence or if no incumbent has been appointed in a newly created post. Qualifications necessary for direct recruitment and for promotion to the posts in a service have been detailed in Appendix 'B' against that service as per rule 4 of Rules of 1975. Method of recruitment is provided in Rule 5 which reads as follows :—

“5 Method of recruitment :—(1) Recruitment to various categories of posts in a Service at the time of its initial consideration shall be made by the appointing authority by absorption of persons already in the service of a Municipal Committee in a corresponding post in appropriate category at the time of the constitution of the Service : provided that they are found fit by an Authority appointed by the Government in this behalf for becoming member of the Service after taking into consideration their qualifications and service record.

(2) After filling in the vacancies under sub-rule (1) the remaining vacancies and the vacancies which may occur thereafter shall be filled up in the following manner :—

- (i) fifty per cent by direct recruitment ; and
- (ii) fifty per cent by promotion on seniority-cum-merit basis :

Provided that if no suitable candidates is available for appointment by direct recruitment or by promotion, the vacancy may be filled up by transfer or on deputation :

Provided further that if no qualifications have been specified in the Appendix 'B' for the purposes of filling up the same by promotion, that post shall be filled up by the direct recruitment.

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- (3) the recruitment under sub-rule (2) (i) shall be made by the appointing authority on the recommendation of a selection Committee constituted under Rule (4).
- (4) The Government may, from time to time, by notification, constitute Selection Committee, consisting of at least three officers of the Government and two non-officials who have sufficient experience in the functioning of Urban Local Bopdies and different Selection Committee may be constituted for different categories of posts in the Service :

Provided that atleast one of the members of a Selection Committee shall belong to the Scheduled Caste.

- (5) The Selection Committee referred to in sub rule (4) may associate any person or persons not exceeding two, who are specialists or experienced professionals of eminence keeping in view the nature and duties of the post required to be filled. The specialists to be associated shall not be less than the rank of the Superintending Engineer in the case of selection to the cadre of Engineers and not below the rank of a Joint Director of Health Service in the case of selection of medical staff.
- (6) While making a recruitmentn uner sub-rule (2) the policy of the Government regarding reservation of appointments of posts for members of the Scheduled Caste and Scheduled Tribes and Backward Classes and for any other category in relation to the Services under it shall be applicable to the Serivces”.

(7) Appendix 'A' which is part of Rules, in view of Rules 1(iii), 2(k), 7(2) and 11, at Sr. No. 20 refers to Punjab Municipal Service of Draftsman whereas Punjab Municipal Service of Sectional Officers stands mentioned against Sr. No. 21. The two are different categories of posts, albeit, the pay sacle of both these posts is same. Appendix 'B', which is again part of Rules by virtue of Rule 4 and sub-rule (2) of Rule 5, deals with qualifications for direct recruitment and promotion. Sectional Officer, as per Item No. 5, has to have such qualifications as are prescribed by the Government from time to time for direct

appointment to the Punjab Public Works Department (Buildings and Roads Branch) Sectional Officers (Engineering) Service Class-III, if he has to be appointed by way of direct recruitment and he has to be a Surveyor Work Mistry in the Municipal Committee, who has passed the National Certificate (Theoretical) Courses of Sectional Officers or who has an experience of working on either of the aforesaid posts for a minimum period of twelve years, if he has to be appointed to the post of Sectional Officer by way of promotion. Qualifications necessary for direct appointment to the post of Sectional Officer under the Punjab Public Works Department (Buildings and Roads Branch) Sectional Officers (Engineering) Service (Class-III Rules, 1975 have been provided in Rule 6 to the effect that no person shall be appointed to the Service unless he, in the case of Civil or Mechanical Sectional Officer, to be recruited by direct appointment or by transfer or by promotion under rule 5(1)(c)(i) has passed three years National Certificate (Theoretical Courses in the respective branch of Sectional Officers conducted by the State Board or has qualified the same from any other recognised institution. Qualifications for Draftsman have been dealt in Item No.18 of Appendix 'B'. One has to have a Diploma in Civil Engineering or Certificates in Civil Draftsman awarded by the State Board for Technical Education or by any other recognised institution whereas for promotion to the post of Draftsman one should be an Assistant Draftsman or Tracer in the Municipal Committee possessing qualifications specified for direct appointment to the post of Draftsman or who has an experience of working on either of the aforesaid posts for a minimum period of five years.

(8) A perusal of the Rules and definition of 'service' in clause (m) of Rule 2 would reveal that same means a Municipal Service constituted by the Government under Section 38(1) of the Punjab Municipal Act, 1911, in the manner prescribed in the Rules of 1975. Section 38(1) of the Punjab Municipal Act, 1911, in turn, vests the Government with the power to constitute, in the prescribed manner, all or any of the Municipal Services inclusive of any such Municipal Service as the State Government may decide vide clause (vi) of the said Section. The Punjab Municipal (Recruitment and Conditions of Service) Rules, 1975, thus, came into being by virtue of a notification dated 24th November, 1975. It apperas, before issuance of notification aforesaid, Municipalities located in the State of Punjab, were recruiting employees as per norms that might have been set by the said

Committees and it is only after notification that came into being in 1975 that recruitment of employees pertaining to all Municipal Committees located in the State of Punjab, came to be governed by the Rules of 1975. Sub-rule (1) of Rule 5 deals with recruitment to various categories of posts in a Service at the time of its initial consideration, which has to be made by the appointing authority by absorption of persons already in the Service of a Municipal Committee in a corresponding post in appropriate category at the time of the constitution of Service. At the time of constitution of service, thus, those who are already employed in one or the other Municipal Committee in the State of Punjab, were to be absorbed in a corresponding post provided they were found fit by the authority appointed by the Government in this behalf for becoming member of the Service after taking into consideration their qualifications and service record. If, by the method, referred to above, there were still to be some vacancies, same had to be filled up in the ratio of 50% by direct recruitment and promotion, as would be clear from sub-rule (2) of Rule 5. It is only in a case if there were still vacancies, i.e., vacancies existed even after exhausting the method of direct recruitment and promotion that the method of transfer and deputation could be adopted by virtue of proviso to sub-rule (2) of Rule 5 and that too if no suitable candidate was available for appointment by direct recruitment or promotion.

(9) Examined in the context of relevant rules, there appears to be considerable merit in the contention of learned Deputy Advocate General, appearing on behalf of the State of Punjab that appointment of petitioner invoking proviso to rule 5(2) of the Rules of 1975 was neither justified nor legal and, therefore, there was nothing wrong with the Government in rescinding the same after issuing a proper show cause notice to the petitioner. A reading of Rule 5 would manifest that first resort to fill the vacancies was to be made from the employees, who were already in Municipal service in one or the other Municipal Committees located in the State of Punjab. It is significant to mention that even those, who were earlier in the employment of various Municipalities, could be absorbed in the corresponding post and that too if they were found fit by the authority appointed in this behalf by the Government for becoming member of the Service after taking into consideration their qualifications and service record. What really and pertinently emerges from sub-rule (1) of Rule 5 is that the

employees, earlier in service could be adjusted on the corresponding post, i.e., on the post on which they were already employed. The appointing authority had to certify that they were fit to become members of the service and while doing so, their qualifications and service record had to be taken into consideration. There was no concession even made for the employees already in service either with regard to their fitness or qualifications and, as mentioned above, they could be adjusted only against the corresponding post, i.e. the one they were already holding. After filling in the vacancies, in the manner referred to above, if there were to be still vacancies, the same could be filled by way of direct recruitment and promotion in the ratio of 50%. A different mode of appointment has been provided for direct recruitment and promotion. Insofar as direct recruitment is concerned, same has to be made by the Appointing Authority on the recommendations of the Selection Committee constituted under Rule 4 and method of promotion can be resorted on the basis of seniority-cum-merit. In both, direct recruitment and promotion, there are definite qualifications provided in Appendix, attached to the rules. In this background, can the proviso be interpreted to mean that any one from any service and on whatever post that he might be holding as also whatever qualifications he might have, can be appointed by way of transfer and that too without making any resort to direct recruitment or promotion ? In our considered view, the answer to the question posed above can only be in negative. The proviso shall operate only if no suitable candidate is available by direct recruitment or promotion. That being so, without first resorting to the two methods of appointment, i.e., direct recruitment and promotion, no one could be brought on any post by way of transfer. In deed, this is the finding of learned Single Judge as well but this contention has been negated on the grounds that the fact that the competent authority had passed the order of the petitioner's appointment by transfer was itself an indication of its having formed the opinion that there was no person, who could be appointed by promotion or by direct recruitment and secondly, even in the impugned order as also in the written statement no finding had been recorded or otherwise suggested that in fact persons were available for appointment by direct recruitment or by promotion. The two fold reasons given by learned Single Judge, as mentioned above, with respect, in our view, can not possibly sustain. Mere passing of an order

by the appointing authority resorting to method of transfer can not by itself be an indication that there was no person, who could be appointed by promotion or direct recruitment. This opinion, in our view, had to be expressed before resorting to appointment by way of transfer. The facts of this case clearly reveal that the petitioner had made an application requesting his transfer from one service to entirely another service. It is this application of petitioner which came up for consideration before the Competent Authority and was allowed. It is not even the case of petitioner that before making his appointment by way of transfer to the post of Sectional Officer, any attempt whatsoever was made to find out if a person could be appointed by way of direct recruitment or from amongst those, who were already in service, i.e., by promotion. The manner in which order appointing the petitioner by way of transfer came to be passed, was in itself indicative of the fact that no resort was made to find out a suitable person by way of direct recruitment or promotion and, indeed it has been specifically pleaded in the written statement filed on behalf of the respondents that order, Annexure P-5 could not be passed under first proviso to rule 5(2)(ii) of the Rules of 1975, because appointment in Municipal Service under the said Rules could only be made by transfer if no suitable candidate was available for appointment by direct recruitment or promotion and in this case, this provision was wilfully overlooked by the then Director inasmuch as *neither any effort had been made to fill up this post by advertising the same for direct recruitment nor any procedure had been followed to fill it by promotion.....* (Emphasis supplied). There could, thus, be no occasion for the respondents to have pleaded that no suitable candidate from either of the two categories, mentioned above, was found in the context of the pleadings, as referred to above, that no effort at all was made to find out any suitable candidate for the post under contention. Further, finding of learned Single Judge that any one from any service and from whatever post and with whatever qualification could be brought by way of transfer, we may say with respect, does not appear to be correct as well. Proviso shall operate only if no suitable person is available for appointment by direct recruitment or promotion. This in itself suggests that the one who has to be brought by transfer, has to be suitable. If a non-suitable person without having even the qualifications of the post in question, could be appointed, then, in that case, there was no

necessity at all to make the proviso, as such persons would have been available for promotion. Suitability of a candidate to be appointed by way of transfer would have embedded in it, atleast the qualifications meant for the post as mentioned in the Rules either for direct recruitment or promotion. Admittedly, petitioner does not have the qualifications for the post provided either for direct recruitment or promotion. No doubt, true, that for making appointment by way of transfer, rules do not clearly stipulate qualifications but at the same time, as mentioned above, suitability would have inherently embedded into it atleast the qualifications meant for the post, even though prescribed for appointment by way of direct recruitment or promotion. Any other interpretation to the proviso to sub-rule (2) of Rule 5 can result into anomalous situations and can also lead to discriminate appointments under the power of making the same by way of transfer.

(10) The observations made, on the plea of the learned Deputy Advocate General, as noted above, apart, it appears to us that proviso to sub-rule (2) of Rule 5 can be invoked by resorting to appointment to a post by way of transfer from another post in the same category. 'Service' as per clause (m) of Rule 2 means a Municipal Service constituted by the Government under Section 38(1) of the Punjab Municipal Act, 1911, in the manner prescribed in the Rules of 1975. 'Member' of service has been defined under clause (k) of rule 2 to mean a member of service detailed in Appendix 'A', Rule 5, dealing with the mode of appointment, in terms, talks of recruitment to various *categories* of posts in a service. If there is a vacancy, it is only against a particular post and all the posts in the service have categories, as spelt out from either Appendix 'A', or 'B'. If there was to be no suitable candidate for appointment by direct recruitment or promotion, there was certainly a vacancy in that post and if resort to transfer was to be made, a person in the same category could be brought and not the one, who may be working against a post in another category. Transfer is normally resorted to in the same category or cadre, as the case may be. If, however, it may yet be permissible to transfer a person in a different and higher cadre, by virtue of a service rule, the same can not be violative of constitutional guarantee and rule of fairness. Appointing a person by way of transfer, who is on a lower post and does not even hold qualifications for a higher post, does not sound to be reasonable and fair.

(11) What we have said above, would find support from two decisions of the Supreme Court in *S.S. Sodhi v State of Punjab & Ors.*, (2) and *N. Narayana & Ors. v. State of Karanataka & Ors.* (3) In *S.S. Sodhi's* case (supra), the Apex Court was dealing with Rule 8(1) of the Punjab State Agricultural Marketing Board (Class-I) Service Rules, 1988, which reads as follows :—

“(8) Method of Recruitment and qualifications :—

- (1) Subject to the provisions of sub-rule (4) appointment to service shall be made in the manner specified in Appendix 'B'.

Provided that if no suitable candidate is available for appointment by promotion to a post in the service, such post shall be filled in by direct appointment or by transfer, as the appointing authority may decide in this behalf”.

(12) While interpreting the proviso to sub-rule (1) of Rule 8, it has been observed that “the proviso to sub-rule (1) of Rule 8 stipulates that in the matter of appointment to a post governed by the Rules the appointing authority will first consider the candidates who are eligible for such appointment and if no suitable candidate is available for such appointment by promotion, then the post may be filled in by direct appointment or by transfer as the appointing authority may decide in this behalf.....We are, therefore, unable to agree with the view of the High Court that in spite of the proviso to sub-rule (1) of Rule 8 it was open to the appointing authority to fill up the post of Manager Marketing by any of three methods of recruitment, viz; (i) by direct appointment; (ii) by promotion or (iii) by transfer and that it was not necessary for the appointing authority to first consider the claim of the departmental candidates for promotion and go to other modes of recruitment only when such departmental candidate for promotion was not available”. In *K. Narayana's* case (supra), while dealing with appointment by way of transfer, it has been observed that “Article 309 of the Constitution empowers appropriate legislature to frame rules to regulate recruitment to public services and the post. Recruitment according to dictionary means enlist’. It is comprehensive term and includes any method provided

(2) AIR 1990 SC 1064

(3) 1993 (5)SLR 290

for inducting a person in public service. Appointment, selection, promotion, deputation are all well known methods of recruitment. Even appointment by transfer is not known. But any rule framed is subject to other provisions of the Constitution. Therefore, it has to be tested on rule of equality. Transfer is normally resorted in same cadre. But when it is made in a different and higher cadre it must not be violative of constitutional guarantee and the rule of fairness. Providing for appointment of a diploma holder from the cadre of Junior Engineer to Assistant Engineer from back date without any test or selection on eligibility only does not sound reasonable and fair". Recalling or reiteration of the facts of this case would reveal that petitioner came to be appointed by way of transfer on a post higher than that he was holding from entirely a different service and without having even requisite qualifications, even though prescribed in the rules specifically for making recruitment by either of the two methods, i.e., direct recruitment or promotion.

(13) Learned Single Judge, while holding that a person could be appointed by way of transfer even on a promotional post, relied upon a Division Bench judgment of this Court in *Roshan Lal Anand & Ors. v. The State of Punjab & Ors.* (supra) and indeed, learned counsel for the petitioner pleads that the said judgment is fully applicable to the facts of this case. The facts, giving rise to Roshan Lal Anand's case (supra) would reveal that in the year 1960 the Governor of Punjab promulgated the Punjab District Attorneys Service Rules, 1960 which related to the recruitment and conditions of service of district Attorneys and Assistant District Attorneys to be employed by the Government of Punjab. Petitioners in the said case were appointed to the posts of Assistant District Attorneys by the Government in the years 1970 and 1971 and each one of them was continuing to hold one of those posts. On 28th March, 1974, respondents 3 to 49, who were serving as Prosecuting Inspectors were also appointed Assistant District Attorneys with a direction that they would be governed by the Rules. In the first quarter of the year 1975 the Government proceeded to promote some of respondents 3 to 49 to the posts of District Attorneys without considering therefor the claims of the petitioners on the plea that such respondents had been serving the Government in the prosecution Branch for long periods and that their

claim for promotion at the fag end of their career was, therefore, preferable to that of the petitioners. Since this stand of the Government was not acceptable to the petitioners, they challenged the same on the ground that such appointment was not a transfer within the meaning of sub-clause (ii) of clause (c) of sub-rule (2) of Rule 5, but amounted to promotion which was not envisaged by the said clause (c). The prayer made by the petitioners, therefore, was that the appointment of respondents 3 to 49 as Assistant District Attorney be quashed. The contention of petitioners, referred to above, was repelled by the Bench considering the matter by observing that "the use of the word "transfer" occurring in sub-clause (ii) of clause (c) does not prohibit and appointment which may also operate as a promotion. If a lower category officer is transferred to higher post in another department, he would no doubt get a promotion but then it can not be said that his appointment to the higher post is not by way of transfer, so long as the appointment satisfies the requirement that it amounts to transfer, it would fall within the ambit of sub-clause (c), even though it may also partake the character of promotion or may have other characteristics". We are of the considered view that judgment of Division Bench in *Roshan Lal Anand's case (supra)* is not on the precise point that is involved in the present case. There may be no prohibition in bringing an employee by way of transfer on a promotional post, but the same can not be resorted to in violation of the Rule that may also in turn be violative of constitutional guarantee and rule of fairness. The rule in terms provide that it is only in case when no suitable candidate is available from either of the two categories that as a resort to appointment by transfer can be made. In the present case, not even an effort was made to find out a suitable candidate from the aforesaid two categories. That part, there was no impediment in the way of respondents 3 to 49, in the said case, for appointment to the post of Assistant District Attorneys pertaining to their qualifications. In the present case, as mentioned above, petitioner did not have the requisite qualifications, be it provided for direct recruitment or promotion and we have already held that in the context of the language employed in proviso to sub-rule (2) of Rule 5, suitability of a candidate to be brought by way of transfer would inherently involve his having the requisite qualifications for either of the two methods provided in the rules, i.e., direct recruitment and promotion.

(14) Inasmuch as the answer to the core issue involved in the case needs to be adjudicated in favour of the appellant-State, other questions that came to be debated before the learned Single Judge need not be answered. What we have said above is also promoted in view of the findings of learned Single Judge that if it had been found that certain persons suitable for appointment by promotion were available and their names were wrongly ignored or that even persons selected for appointment by direct recruitment were available but they were wilfully kept out, probably the action of the then Director who passed the order, Annexure P-5, could have been successfully assailed. However, in the absence of any finding to that effect or even an averment in that behalf, I am unable to sustain the plea that the order was violative of the provisions contained in the proviso to Rule 5(2). All that we might add to the observations of learned Single Judge, quoted above and, as mentioned above as well, that in the present case no effort at all was made to find out a suitable person from either of the two sources.

(15) In view of the discussion made above, we allow this appeal. Resultantly, order passed by the learned single judge dated 19th November, 1991 is set aside and writ petition is dismissed. In view of the fluctuating fate of the parties, they are, however, left to bear their own Costs.

R.N.R.

Before M.M. Kumar, J

BHIM SINGH—*Petitioner*

versus

SMT. MAMO & OTHERS—*Respondents*

C.R. No. 1732 of 1996

20th August, 2001

*Code of Civil Procedure, 1908—O. XX Rl. 14(1) & S. 148—
Haryana (Amendment) Act, 1995—S. 15—Decree in pre-emption suit—
Deficiency in deposit of pre-emption amount—No, wilful default or*