

Before D. V. Sehgal, J.

I. S. CHAHAL AND OTHERS,—*Petitioners.*

versus

STATE OF PUNJAB AND OTHERS,—*Respondents.*

Amended Civil Writ Petition No. 4636 of 1984

May 10, 1988.

Punjab Excise and Taxation Department (State Service Class II) Rules, 1956—Rls. 5(c)(iii) and 6—Constitution of India, 1950—Art. 226—Promotee officiating for number of years against post reserved for direct recruit—Promotee—Whether has right of appointment to said post.

Held, that the process of selection and the selection for the purpose of recruitment against anticipated vacancies does not create a right to be appointed to the post which can be enforced by a writ of *mandamus*.

(Para 7)

Held, that the claim made by the Assistant Excise and Taxation Officers for appointment to the post of Excise and Taxation Officers nine years after the appointment cannot be maintained. Acceptance of such a claim would disturb the seniority of number of officers who are promoted or recruited as E.T.Os. from time to time.

(Para 8)

Held, that when it is mandatory to fill in a particular per centage of vacancies occurring in a service from time to time by direct recruitment these have to be set apart and filled in by direct recruitment. In case by way of an interim arrangement the posts meant for direct recruits are filled in by promotion, the promotees have to make place for the direct recruits. They have to be pushed down below the direct recruits in case more posts are available. Otherwise they have to revert to their substantive ranks.

(Para 11)

Petition under Article 226 of the Constitution of India praying that a Writ of Certiorari, Mandamus or any other suitable Writ, Direction or Order be issued, directing the respondents:

- (i) to produce the complete records^r of the case;
- (ii) the orders at Annexures P-8 and P-9 appended with the writ petition be quashed;

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- (iii) directing the respondent-State to treat the petitioners senior to the private respondents;
- (iv) a writ of quo-warranto be issued against Respondents Nos. 2 to 4 calling upon them to show as to how they are competent to hold the posts held by them without the approval of the Punjab Public Service Commission;
- (v) the continuance of the respondents-officers especially Respondents Nos. 2 to 4 as Excise and Taxation Officers be declared null and void;
- (vi) a writ of mandamus be issued directing the respondents to grant the petitioners all the consequential reliefs in the nature of arrears of salary, seniority etc.;
- (vii) the filing of the originals of annexures may also be dispensed with;
- (viii) this Hon'ble High Court may also pass any other order which it may deem just and fit in the circumstances of the case;
- (ix) the serving of the notice of the writ petition on the respondents be dispensed with;
- (x) it is further prayed that pending the disposal of the writ petition, promotions to the rank of Assistant Commissioners (Excise and Taxation) be stayed;
- (xi) the costs of this writ petition may also be awarded to the petitioners.

CIVIL MISC. No. 4310 of 1988.

Application under Order I Rule 10 read with S. 151 C.P.C. praying that the petitioners-applicants be allowed to get the names of the above-mentioned unserved officers deleted from the array of respondents so that the case is finally decided as per the orders of the Motion Bench in the interest of justice.

J. L. Gupta, Sr. Advocate with Subhash Ahuja, Advocate and

Mrs. Narinderjit Kaur, Advocate, for the Petitioner.

S. K. Sharma, A.A.G., with Himinder Lal, Advocate for the
Respondents.

JUDGMENT

D. V. Sehgal, J.

(1) This judgment shall dispose of Civil Writ Petition Nos. 4636 and 4692 of 1984 and Civil Writ Petition No. 8241 of 1987. The petitioners in all these petitions were directly appointed to the posts of Assistant Excise and Taxation Officers (for short the 'A.E.T.Os') in the State of Punjab. The main dispute is with regard to their seniority vis-a-vis the promotees. These petitions involve interpretation of the service rules which are common to all of them.

(2) The petitioners in Civil Writ Petition No. 8241 of 1987 appeared in a competitive examination held by the Punjab Public Service Commission (for short the 'Commission') in the year 1973 for recruitment to the Punjab Civil Service (Executive Branch) and other Allied Services. They qualified the written examination. After they were interviewed their final result was declared in the year 1974. They were offered appointments as A.E.T.Os.

(3) The petitioners in Civil Writ Petition Nos. 4636 and 4692 of 1984 appeared in similar competitive examination held by the Commission in the year 1974. After qualifying the written examination they appeared for interview. Their final result was declared in April, 1975. They were offered appointments as A.E.T.Os. and they joined service as such in November, 1975. Petitioner No. 2 in Civil Writ Petition No. 4692 of 1984 has since died. His counsel, therefore, stated at the bar that his claim contained in the petition has consequently become infructuous and need not be adjudicated upon. Petitioner Nos. 4 and 5 were Ex-military personnel. They were, therefore, given benefit of their Army service and their deemed date of appointment was fixed as 10th June, 1974.

(4) I shall first take up the claim made by the petitioners in Civil Writ Petition Nos. 4636 and 4692 of 1984 to the effect that they ought to have been appointed to the posts of Excise and Taxation Officers (for short the 'E.T.Os'). There were as many as 10 vacancies of E.T.Os available in the year 1974. The respondents, however, notified only one vacancy to the Commission. Their case is that had all the 10 vacancies of E.T.Os been notified, they in accordance with their merit in the competitive examination, would have been appointed to the said posts. They complain that by not notifying the remaining 9 vacancies of E.T.Os the respondents have tried to

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favour the promotees who are working as officiating E.T.Os in spite of the fact that these posts were required to be manned by direct recruits. The conditions of service of the posts of E.T.Os are governed by the Punjab Excise and Taxation Department (State Service Class II) Rules, 1956 (for short 'Class II Rules'). Rules 5 and 6 provide for the method of recruitment and appointment to this service and these are to the following effect:—

"5. *Method of recruitment:*

Members of Service shall be appointed in the following manner:

(a) In the case of Deputy Excise and Taxation Commissioner:

(c) In the case of Excise and Taxation Officer:

(i) by promotion of Assistant Excise and Taxation Officer having an experience of working on that post for a minimum period of three years; or

(ii) by competitive examination, the syllabus for which shall be the same as in the case of competitive examination conducted by the Commission for recruitment to the Punjab Civil Service (Executive Branch) and Allied Services.

(iii) by transfer or deputation of an official already in the service of Government of India or of a State Government.

6. *Appointment to the Service of Excise and Taxation Officers:*

50 per cent of vacancies of Excise and Taxation Officers shall be filled by promotion from amongst the Assistant Excise and Taxation Officers and 50 per cent by direct appointment.

Note : Recruitment to the post of Excise and Taxation Officer by transfer or deputation will be counted towards vacancies reserved for direct recruitment. The seniority will,

however, be determined according to the provisions of Rule 12 of the said rules."

The competitive examination held by the Commission is for Punjab Civil Service (Executive Branch) and other Allied Services. These allied services in the order of priority, *inter alia*, are:

"E.T.Os, Tehsildars and A.E.T.Os."

The petitioners, therefore, contend that it is as a direct result of in action on the part of the respondents in not notifying the vacancies of E.T.Os for being filled up by direct recruitment by the Commission that in the order of merit they could not get appointments as E.T.Os. They, therefore, seek a direction from this Court to the respondents to appoint the petitioners as E.T.Os from the date of their joining as A.E.T.Os in the year 1975 and their seniority as E.T.Os vis-a-vis the promotees should be determined accordingly.

(5) This claim has been opposed by the respondents. It is stated, *inter alia*, that according to the calculations arrived at in the year 1972-73 which were made keeping in view the future vacancies, 10 vacancies for direct recruitment as E.T.Os were notified on the Commission i.e. 9 vacancies in the year 1972 and one vacancy in the year 1973. Later, on the recommendation of the Commission 9 E.T.Os were appointed in the year 1974 and one in the year 1975. No other post for direct appointment was available. It is further stated that some more posts did become available for direct recruitment. Out of them 5 were proposed to be manned by the P.C.S. officers on transfer/deputation under Rule 5(c)(iii) of Class II Rules and the remaining posts were purely of temporary nature. These were sanctioned for a period of six months initially. Therefore, the same were not notified on the Commission.

(6) It is interesting to note that the above factual position explained by the respondents in the written statement has not been countered by the petitioners in either of the two writ petitions. The same is, therefore, to be taken as having been accepted. In view of the provision of Rule 5(c)(iii) read with the foot note to Rule 6, it is clear that the appointing authority could recruit P.C.S. officers by transfer or deputation as E.T.Os and such recruitment was to be counted towards vacancies reserved for direct recruitment. Therefore, no exception can be taken to the proposal of the respondents at that time to man 5 posts meant for the quota of direct recruits by

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transfer or deputation of P.C.S. Officers. As regards the remaining posts the explanation of the respondents that these were purely temporary and two of them had been sanctioned for six months only provides valid justification for not notifying these posts for direct recruitment through the Commission. The provisions of Punjab Public Service Commission (Limitation of Functions) Regulations, provide that where a post is not likely to continue beyond six months the same can be filled in by *ad hoc* arrangement without the approval of the Commission.

(7) The matter can be looked at from another angle. It is by now well settled that the process of selection and selection for the purpose of recruitment against anticipated vacancy does not create a right to be appointed to the post which can be enforced by a writ of *Mandamus*. I find support for this view from *Roshan Lal Tandon vs. Union of India and others* (1) and *State of Haryana vs. Subhash Chander Marwaha and others* (2). The petitioners have, however, strongly relied on *Neelima Shangla vs. State of Haryana* (3), and it is contended that a legal right comes to vest in a person who is selected for recruitment to a post to secure appointment to the same. A close study of *Neelima Shangla's case* (supra) makes it clear that the Final Court was giving its verdict with reference to the peculiar facts of the case. Their Lordships did not deviate from the law laid down in *Roshan Lal Tandon* and *Subhash Chander Marwaha's case* (supra). Rather these cases have been noticed, discussed and relied on. In *Neelima Shangla's case* main reliance was placed by the Final Court on Rule 8 (Part D) of the Haryana Civil Service (Judicial Branch) Rules which provides that there is no limit to the number of names borne on the High Court register but ordinarily no more names will be included than are estimated to be sufficient for the filling of vacancies which are anticipated to be likely to occur within two years from the date of selection of candidates as a result of an examination. No corresponding provision exists in the Class II Rules with which we are concerned. Hence reliance by the learned counsel for the petitioners on *Neelima Shangla's case* is misplaced.

(8) Otherwise also I am of the considered view that the claim made by these petitioners for appointment to the posts of E.T.Os 9

(1) 1967 S.L.R. 832.

(2) 1973(2) S.L.R. 137.

(3) 1986(3) S.L.R. 389.

years after their appointment as A.E.T.Os cannot be maintained. Acceptance of such a claim would disturb the seniority of a number of officers who are promoted or recruited as E.T.Os from time to time. Another aspect which requires consideration is that after the posts of P.C.S. (Executive Branch) the posts for which the candidates have to give their preference for appointment in the order of priority are those of E.T.Os, Tehsildars and A.E.T.Os among others. It was stated at the bar that two candidates who appeared in the competitive examination along with the petitioners were appointed as Tehsildars. In the normal course these candidates must have been placed higher in merit than the petitioners. It is not possible to overlook the claim of these two candidates and direct appointment of the petitioners as E.T.Os. Again the aforesaid posts to which reference in *extenso* has been made in the written statement of the respondents had become available in the year 1974, by the time the petitioners in Civil Writ Petition No. 8241 of 1987 along with other candidates of their batch were appointed as A.E.T.Os. They belong to a batch earlier to the one of the petitioners in these two writ petitions. The petitioners naturally cannot be placed above them. They are content with their appointment as A.E.T.Os and have not staked any similar claim. I, therefore, find no merit in this claim of the petitioners in C.W.P. Nos. 4636 and 4692 of 1984.

(9) Before I take up the second claim which is common in all the three writ petitions it requires to be noticed that C.M. No. 4310 of 1988 was filed by the Petitioners in Civil Writ Petition No. 4636 of 1984 stating that as many as 45 officers who are shown senior to them mentioned in Annexure 'E' to this application have either retired or resigned from service. As many as of 7 of them have since died. It is thus explained by the petitioners that the rights of respondents so mentioned in Annexure 'B' are not going to be affected in case the writ petition is decided in favour of the petitioners. Consequently, a prayer has been made that the names of these respondents should be deleted from the array of parties. This prayer has not been opposed by the learned Assistant Advocate General. I, therefore, allow this C.M. Another fact which requires to be noticed is that the respondents have not chosen to file any written statement to Civil Writ Petition No. 8241 of 1987. Therefore, at least with regard to the factual position explained therein the same has to be accepted and reference to it shall be made in detail later.

(10) It is necessary to notice here the relevant provisions of the Punjab Excise and Taxation Department (State Service Class

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III-A) Rules, 1956 (for short 'the Rules'). The Rules governed the service conditions of the A.E.T.Os till these posts were upgraded with effect from 18th May, 1977 as already noticed above. Rules 5 and 6 provide for the method of recruitment and appointment and are to the following effect:—

- “5. *Method of recruitment* : Members of the Service shall be recruited in the following manner:
- (a) By promotion from the cadres of Excise Inspectors and Taxation Inspectors (who have served as such for a period of at least 3 years).
 - (b) by transfer of members of the ministerial establishment of the Excise and Taxation Department, Punjab; and
 - 2(c) by competitive examination the syllabus for which shall be the same as in the case of competitive examination conducted by the Commission for recruitment to the Punjab Civil Service (Executive Branch) and Allied Services.
3. The candidates who wish to appear in the competitive examination shall have to pay the fees as prescribed in the Punjab Civil Service (Executive Branch) Rules, 1930.
6. “*Appointment to the Service* : When any vacancy occurs, or is about to occur, in the service, Government shall determine in what manner it shall be filled.
- (Provided that 50 per cent of the vacancies shall be filled by direct appointment, 25 per cent by promotion of Taxation Inspectors, 12½ per cent by promotion of Excise Inspectors and 12½ per cent by transfer of members of the ministerial establishment of the Excise and Taxation Department).

Note : Proviso substituted by Punjab Government Notification No. 3788-ET-(V)-61/3306, dated the 19th June, 1961.”

(11) Rule 13 of the Rules makes the provisions for determination of seniority of A.E.T.Os and, *inter alia*, provides thus:—

- “13. *Seniority* : The seniority *inter se* of members of the Service in each cadre shall be determined by the length of continuous service on a post in that cadre of the service.

Provided that in case of members appointed directly the order of merit determined by the Commission shall not be disturbed in fixing the seniority and persons appointed as a result of an earlier selection shall be senior to those appointed as a result of subsequent selection :

Provided further that in the case of two or more members appointed on the same date, their seniority shall be determined as follows:

- (a) a member recruited by direct appointment shall be senior to a member recruited otherwise.
- (b)
- (c)
- (d)

The grievance of the petitioners is that the respondents have been filling in all the vacancies which occurred from time to time by way of promotions by disregarding the fact that the proviso to Rule 6 *ibid* makes a mandatory provision that 50 per cent of the vacancies shall be filled by direct appointment. In para 15 of Civil Writ Petition No. 4636 of 1984 the vacancies which occurred in the service of A.E.T.Os from time to time and the sources from which these were filled in have been set out thus:—

Year	Total No. of vacancies.	Promotees	Direct recruits
1967:	12	12	—
1968:	35	35	—
1970:	12	11	1
1971:	16	16	—
1972:	11	11	—
1973:	31	31	—
1974:	26	1	25
1975:	24	11	13
Total:	167	128	39

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In the written statement these detailed figures of vacancies and the manner these were filled in have not been disputed. It is by now well settled that when it is mandatory to fill in a particular percentage of vacancies occurring in a service from time to time by direct recruitment these have to be set apart and filled in by direct recruitment. In case by way of an interim arrangement the posts meant for direct recruits are filled in by promotion, the promotees have to make place for the direct recruits. They have to be pushed down below the direct recruits in case more posts are available. Otherwise they have to revert to their substantive ranks. The case law on the point is abundant which need not be set out here. The principle has been aptly culled out by Division Bench of this Court in *S. B. S. Virk and others v. Sh. J. S. Bagga and another* (4), thus:—

“If the writ-petitioners had not occupied the posts out of the quota of direct recruits, then certainly the seniority assigned to them could be justified, but the promotees (writ petitioners) cannot steal a march over the appellants and have double benefit by first occupying the posts belonging to the quota of direct recruits and then claiming seniority over and above them, on the plea that they would rank senior as their period of continuous appointment in service is more than that of the appellants. As earlier observed the writ-petitioners occupied the posts out of the quota of the direct recruits, in an officiating capacity and that period cannot legally be counted towards the period of their continuous appointment.”

We have thus to apply the above principle and work out the correct position by the date the appointments of the petitioners took place. In 1967, 12 vacancies of A.E.T.Os occurred. All the 12 of them were manned by promotees. It shall be taken that 6 of them got regular promotion against the posts meant for the promotees while the remaining 6 were simply promoted to officiate against the posts meant for direct recruits. In 1968, 35 vacancies occurred. All of them were manned by promotees. The promotees could get regular promotions against 18 vacancies only. Thus 6 promotees who are already officiating against the posts of direct recruits besides 12 promotees next to them shall be treated to have been appointed on regular basis against the posts meant for their quota. Thus as many

(4) 1982(2) S.L.R. 720.

as 23 promotees came to work against the posts of direct recruits as an improvised measure. Again in the year 1970, against the 12 vacancies which occurred 11 appointments were made by promotion and 1 by direct recruitment. The promotees were in fact entitled to regular appointments against 6 posts only. Therefore, the senior most out of the 23 promotees who were working against the posts of direct recruits ought to get appointments against these 6 posts. Thus as many as 28 promotees started working against the posts meant for direct recruits. In the year 1971, against 16 vacancies which occurred 16 promotees were appointed. The promotees could get appointment only against 8 posts out of them. Thus the senior most 8 promotees out of 28 who were already officiating against the posts of direct recruits get regular appointments. Thus as many as 36 promotees happened to work temporarily against the posts meant for direct recruits. In the year 1972, 11 vacancies occurred. All of them were manned by promotees. They were, however, entitled to regular appointments against 5 posts only. Therefore, the senior most 5 persons out of 36 already working temporarily against the posts meant for direct recruits shall man these 5 posts. The remaining 42 are to be taken to have continued officiating against the posts meant for direct recruits. Again in the year 1973, against 31 vacancies which occurred, 31 promotees were appointed. Promotees could, however, get regular appointments against 16 posts only. Thus 16 senior most out of 42 promotees who are temporarily officiating against the posts already meant for direct recruits shall stand appointed against these posts. The remaining 58 promotees shall be treated to be working against the posts meant for direct recruits. In the year 1974, 26 vacancies occurred. Out of them 13 were to be manned by promotees but only one promotee was appointed. 25 direct recruits were appointed. Some of them are the petitioners in C.W.P. No. 8241 of 1987. These 13 promotees who are to get regular appointments are to be those who were the senior most out of 58 promotees already working against the posts of direct recruits. They shall be taken to have been appointed on regular basis as and when the first 13 vacancies out of 26 became available. Thus when the petitioners in Civil Writ Petition No. 8241 of 1987 along with their batchmates who in all are 25 in number were appointed as A.E.T.Os they were to be placed above as many as 45 promotees who remained working against the posts of direct recruits. Thus 45 promotees besides the one who was promoted in the year 1974 have to be pushed down to make place for 25 direct recruits. Lastly, in the year 1975, 24

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vacancies occurred. 12 out of them were meant for promotees. Therefore 12 senior most officers out of 46 who are already working against the posts of direct recruits shall get regular appointment as and when the first 12 vacancies became available in the year 1975. Thereafter 13 direct recruits including the petitioners in Civil Writ Petition Nos. 4636 and 4692 of 1984 are to be placed. They shall displace the remaining 34 promotees besides 11 officers who are promoted in the year 1975. All these 45 promotees are to rank junior to 13 direct recruits appointed in the year 1975.

(12) It is, however, made clear that if in the years 1974 and 1975, less than 13 and 12 posts respectively had become available by the date 25 and 13 direct recruits in these years were appointed, the promotees corresponding to the actual number of the vacancies alone shall get regular appointments and the remaining promotees have to be pushed down. They shall get appointments against the regular posts for their quota only after the appointment of direct recruits.

(13) Another aspect which has been vividly brought out by the petitioners in Civil Writ Petition No. 8241 of 1987 is set out in detail in para 6 thereof. It is that after the petitioners were appointed in the year 1974 as many as 30 promotees who were working as A.E.T.Os. vacated their posts subsequent to their appointment but before 18th May, 1977 when the posts of A.E.T.Os were upgraded as E.T.Os. They vacated the posts either on account of their retirement from service or promotion or on account of their death. As already mentioned since no written statement has been filed on behalf of the respondents this factual position mentioned by the petitioners stand undisputed. The petitioners complain that while preparing the seniority list of A.E.T.Os as on 18th May, 1977 all these 30 persons have been excluded from the list as if they were not the members of the service when the petitioners were appointed as A.E.T.Os. By doing so the respondents have distorted the entire picture. Thus as many as 30 promotees who ought to have been ranked junior to them have been shown senior by making them to man the posts vacated by the above 30 officers who ceased to be members of the service before 18th May, 1977. I am of the considered view that this patent error in the impugned seniority list renders it invalid. The petitioners are required to first prepare the seniority list on the date the petitioners in Civil Writ Petition No. 8241 of 1987 were appointed in the year 1974. The retirements, promotions and deaths

of officers which took place subsequent thereto should be accounted for and revised seniority list prepared on the date the petitioners in Civil Writ Petition Nos. 4636 and 4692 of 1984 were appointed in the year 1975. Then again the subsequent events by which some of the A.E.T.Os ceased to be members of the service should be accounted for and the seniority list as on 18th May, 1977 should be prepared.

(14) The seniority list of A.E.T.Os as on 18th May, 1977 this prepared by complying with the directions given above should then be reflected in the combined seniority list of E.T.Os. There is yet another fact which requires to be noted here. A number of A.E.T.Os were promoted on *ad hoc* basis as E.T.Os. in anticipation of the sanction of the Public Service Commission. Some of these promotion orders have been appended with Civil Writ Petition Nos. 4636 and 4692 of 1984. The learned counsel for the petitioners pointed out that at no time did the Public Service Commission approve the promotion of these officers as E.T.Os. However, while preparing the seniority list of E.T.Os these officers have been shown senior to the petitioners. Their date of appointment as E.T.Os has been taken to be the date of their *ad hoc* promotion as such. This is clearly wrong and renders illegal the seniority list of E.T.Os as on 18th May, 1977 prepared by the respondents. All these officers shall be taken to have been regularly appointed to the posts of E.T.Os with effect from 18th May, 1977. When the posts of A.E.T.Os were upgraded as E.T.Os because from that date onwards it was no longer necessary to get the approval of the Punjab Public Service Commission to the promotion of these officers as E.T.Os. It could not be disputed before me that upto now the Commission has not approved the promotion of such officers as E.T.Os. from the date of their *ad hoc* appointment as such. Therefore, their date of appointment as E.T.Os can only be 18th May, 1977 and should be accordingly reflected in the seniority list of E.T.Os.

(15) It has also been brought out that on the basis of some sort of tentative seniority list or gradation list wherein the correct seniority of the petitioners vis-a-vis the respondents was not reflected, many of the respondents have been promoted to the higher posts of Assistant Excise and Taxation Commissioner etc. from different dates. If on finalisation of the seniority list, in accordance with the above directions, such officers are placed junior to the petitioners and other direct recruits the latter shall be considered for promotion to such higher posts from the date the former were so promoted and in case they are considered fit and are promoted from the said dates

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they shall be entitled to all the benefits of salary, allowances, seniority etc. of the higher posts to which they are promoted. They shall also get interest @ 12 per cent per annum on salary and allowances which thus become due to them. In view of what has been discussed above these writ petitions are allowed with costs. The seniority list of A.E.T.Os and E.T.Os as on 18th May, 1977 finalised by respondent No. 1 are quashed. Fresh seniority lists of A.E.T.Os should be finalised in accordance with the directions made above and consequential benefits as directed above should be afforded to the petitioners within three months from today. The costs in each of these three writ petitions are assessed at Rs. 500.

R.N.R.