

## MISCELLANEOUS CIVIL.

Before Bal Raj Tuli, J.

GIAN CHAND TANGRI.—Petitioner.

versus.

THE STATE OF PUNJAB ETC.—Respondents.

C. W. No. 53 of 1971.

February 11, 1971.

*Punjab Civil Secretariat (State Service Class II) (1st Amendment) Rules (1966)—Rule 8(1)—Recruitment to promoted rank from different sources—"Officer next below" in such case—Whether means the officer entitled to promotion after another officer is given proforma promotion—Assistant Section Officer on deputation granted pro-forma promotion—Such officer not actually occupying the post—Promoted rank—Whether deemed to have been filled from amongst the Assistant Section Officers.*

*Held*, that where there is only one source of recruitment to the promoted rank, 'officer next below' means the officer next in seniority to whom pro-forma promotion is granted. Where, however, promotion to a higher rank is made from different sources and that, too, by rotation, the 'officer next below' in such a case means the officer entitled to promotion immediately after the officer to whom pro-forma promotion is granted. (Para 1.).

*Held*, that where an Assistant Section Officer on deputation is granted pro-forma promotion but does not actually hold the higher post, the promoted rank is deemed to have been filled from amongst the Assistant Section Officers. (Para 2.).

*Petition under Articles 226/227 of the Constitution of India praying that a writ in the nature of Certiorari, Mandamus or any other Writ, Order or Direction be issued quashing the order dated 4th January, 1971 issued by Respondent No. 1 promoting illegally respondent No. 2 as Superintendent in the Punjab Civil Secretariat and directing the respondent No. 1 to refrain from granting the benefit under 'Next below rule, to respondent No. 3 without first promoting the petitioner as Superintendent.*

R. L. BATA, ADVOCATE,—for the petitioner.

M. R. SHARMA, SENIOR DEPUTY ADVOCATE GENERAL (PUNJAB),—for the respondents.

## JUDGMENT

TULI, J.—(1) The petitioner holds the post of substantive permanent Assistant Section Officer in the Punjab Civil Secretariat and his seniority is at serial No. 10 in the cadre of Assistant Section Officers. Respondent 3, Balbir Singh Bhowar, is also a substantive permanent Assistant Section Officer of the Punjab Civil Secretariat and his seniority is at No. 9, so that for the appointment of Superintendent from the Assistant Section Officers, respondent 3 has a prior right as compared to the petitioner. This fact is not disputed by the petitioner but his plea is that respondent 3 is serving outside the department as Deputy Director, Lotteries, and, therefore,

the petitioner should be appointed as Superintendent in the vacancy which was to go to respondent 3. Instead that vacancy has been given to Balbir Singh Sondhi, respondent 2, who is a Deputy Superintendent, for whom this post was not meant. It is the common case of the parties that promotion to the post of Superintendent is to be made from amongst Assistant Section Officers, Deputy Superintendents, Assistants-in-Charge and Assistants as is mentioned in rule 8(1) of the Punjab Civil Secretariat (State Service Class II) (1st Amendment) Rules, 1966. At the Bar it was admitted that the vacancy now existing was of the quota of Assistant Section Officers after which three posts will go to Deputy Superintendents and others and the fifth post will again go to an Assistant Section Officer by rotation. What has happened is that respondent 2 has been appointed Superintendent, while respondent 3 has been given *pro forma* promotion as Superintendent under the 'next below' rule. The petitioner's case is that *pro forma* promotion can be granted to an officer only if the officer next below him has been given the promotion on the ground that the officer to whom the *pro forma* promotion is given is serving outside his department. It is, therefore, submitted that *pro forma* promotion could be granted to respondent 3 only if the petitioner had been promoted as Superintendent as he is immediately next to respondent 3 on the seniority list. It is, therefore, maintained that respondent 2 had no right to be appointed by giving respondent 3 *pro forma* promotion. The learned counsel for the petitioner has referred to *The State of Mysore v. M. H. Bellary* (1), and *Ram Lal Aggarwal v. The State of Punjab and others* (2), for pointing out the meaning of *pro forma* promotion and next below rule. There is no quarrel with that rule, but the matter requiring consideration in this case is as to the meaning of the 'officer next below', that is, whether it means the officer entitled to the promotion immediately after the officer to whom *pro forma* promotion is granted or the officer who is immediately below in seniority to him. For the application of this rule in a case, where there is only one source of recruitment to the promoted rank, there is no difficulty in the determination of the 'officer next below'. In that case, the officer next in seniority will be the person entitled to promotion. The difficulty is experienced in this case because the promotion to the rank of Superintendent is from four different sources and that, too, by rotation. In the ins-

(1) A.I.R. 1965 S.C. 869 (para 6).

(2) 1968 S.L.R. 800 (at page 802).

case, there is no dispute that the vacancy now sought to be filled pertains to Assistant Section Officer and the next vacancy of a Superintendent, whenever occurs, will be filled from amongst the Deputy Superintendents, so that if respondent 3 had been serving in the department at present, he would have undoubtedly got the present vacancy and, if any vacancy occurred thereafter, it would have gone to respondent 2, thus keeping the proportion according to the rules. Thus, by giving *pro forma* promotion to respondent 3, the vacancy has gone to an Assistant Section Officer and, therefore, the quota of that service is complete. Since he is on deputation as Deputy Director, Lotteries, somebody has to work in his place and the only person that can be given officiating promotion for that purpose is the person who would be entitled to promotion after respondent 3 and that person admittedly is respondent 2. For this reason, respondent 2 has been rightly promoted as Superintendent and by virtue of his promotion, *pro forma* promotion has been rightly allowed to respondent 3, because after respondent 3, respondent 2 would have had the right to be promoted as Superintendent. It is not correct to say, as has been urged by the petitioner, that in case respondent 3 is not available because of his deputation outside the department, he should be given the post. Normally, in the presence of respondent 3, the petitioner will have the right to be promoted as Superintendent after three other persons from other sources have been promoted. By officiating promotion now he will rank senior to those three officers and their rights will be prejudiced. Moreover, the Assistant Section Officers will get two posts now instead of one, that is, one by promotion of the petitioner and second by *pro forma* promotion of respondent 3, which will be contrary to the rotation rule. I am, therefore, of the firm view that in this case respondent 2 has been rightly promoted as Superintendent and the *pro forma* promotion allowed to respondent 3 as a consequence thereof is also in order. The petitioner cannot claim any right to the post which has fallen vacant now.

(2) The learned counsel for the petitioner submits that the vacancy has to be filled by a member belonging to the category of Assistant Section Officers and if no Assistant Section Officer actually occupies that post, it cannot be said to have been filled by an official belonging to that category. I regret I cannot agree to this submission. In any list of Superintendents, respondent 3 will figure as Superintendent against the vacancy which has been filled up now. The only thing is that against his name it will be shown that he is on deputation to another department. Respondent 2 will be shown amongst

the officiating Superintendents below respondent 3 and if and when respondent 3 returns to his parent department, he will occupy the post of Superintendent and respondent 2 will revert. If during his deputation some other officer is also promoted as Superintendent, then on the return of respondent 3 from deputation the juniormost officiating Superintendent, from whichever source recruited, will be reverted to his substantive rank. It cannot, therefore, be said that the present vacancy has not been filled by an Assistant Section Officer.

(3) I posed a question to the learned counsel for the petitioner to the effect that supposing before respondent 3 returns from deputation, three other persons are appointed as Superintendents in addition to the petitioner, if the present vacancy is given to him, who will revert in case of respondent 3's return from deputation? His reply was that in spite of the fact that there would be three junior officiating Superintendents working, the petitioner will have to revert to his substantive post to make room for respondent 3 and not the juniormost officiating Superintendent because by officiating promotion now obtained, he will be working against the post of Superintendent meant for Assistant Section Officers which had been given to respondent 3 by *proforma* promotion. I do not think that this is the correct position in law with reference to Article 16 of the Constitution of India. The observations of their Lordships of the Supreme Court, in para 8 of the judgment, in *Mervyn Continho and others v. The Collector of Customs, Bombay, and others* (3), can be usefully relied upon in support of this conclusion. In that case, there were two sources of recruitment as Appraisers, one by direct recruitment and the other by promotion from the subordinates in the customs department in the 50:50 ratio. From Appraisers so recruited, Principal Appraisers were to be appointed. The seniority in the cadre of Appraisers was determined by the system of rotation, that is, the list was arranged in such a way that there was one person from the direct recruits and one from the promotees alternately. The contention of the petitioners was that this system had resulted in discriminatory treatment against them with the result that promotees of much longer service in the cadre of Appraisers were put in the seniority list below direct recruits with much shorter service. According to the petitioners, this system

offended against equality of opportunity guaranteed under Article 16(1) of the Constitution. The other grievance of the petitioners was that in the cadre of Principal Appraisers, who were all promoted from Appraisers, there was again discrimination and violation of equality of opportunity inasmuch as the same method was followed in the matter of fixation of seniority of Principal Appraisers though in that case there was only one source of recruitment, that is, by promotion from the cadre of Appraisers. Their Lordships observed as under:—

“This brings us to the question of Principal Appraisers. We are of opinion that the petitioners have a legitimate grievance in this respect. The source of recruitment of Principal Appraisers is one, namely, from the grade of appraisers. There is, therefore, no question of any quota being reserved from two sources in their cases. The rotational system cannot, therefore, apply when there is only one source of recruitment and not two sources of recruitment. In a case, therefore, where there is only one source of recruitment, the normal rule will apply, namely, that a person promoted to a higher grade gets his seniority in that grade according to the date of promotion subject always to his being found fit and being confirmed in the higher grade after the period of probation is over. In such a case it is continuous appointment in the higher grade which determines seniority for the source of recruitment is one. There is no question in such a case of reflecting in the higher grade the seniority of the grade from which promotion is made to the higher grade. In so far, therefore, as the respondent is doing what it called restoration of seniority of direct recruits in Appraisers' grade, when they are promoted to the Principal Appraisers' grade, it is clearly denying equality of opportunity to Appraisers which is the only source of recruitment to the Principal Appraisers' grade. There is only one source from which the Principal Appraisers are drawn, namely, Appraisers, the promotion being by selection and five years' experience as Appraiser is the minimum qualification. Subject to the above all Appraisers selected for the post of Principal Appraisers must be treated equally. That means they will rank in seniority from the date of their continuous acting in the Principal Appraisers' grade subject of course to the right of

Government to revert any of them who have not been found fit during the period of probation. But if they are found fit after the period of probation, they rank in seniority from the date they have acted continuously as Principal Appraisers whether they are promotees or direct recruits. The present method by which the respondent puts a direct recruit from the grade of Appraisers, though he is promoted later, above a promotee who is promoted to the grade of Principal Appraisers on an earlier date clearly denies equality of opportunity where the grade of Principal Appraisers has only one source of recruitment; namely, from the grade of Appraisers. In such a case the seniority in the grade of Principal Appraisers must be determined according to the date of continuous appointment in that grade irrespective of whether the person promoted to that grade from the Appraisers' grade is a direct recruit or a promotee. This will, as we have already said, be subject to the Government's right to revert any one promoted as a Principal Appraiser if he is not found fit for the post during the period of probation. The petition, therefore, will have to be allowed with respect to the method by which seniority is fixed in the grade of Principal Appraisers. That method denies equality of opportunity of employment to the Appraisers, who are the only source of recruitment to the grade of Principal Appraisers. What the impugned method seeks to do is to introduce a kind of reservation in respect of the two categories of Appraisers from which the promotions are made, and that cannot be done when the source of promotion is one."

It is thus clear that in the question posed by me to the learned counsel for the petitioner, the officiating Superintendent to revert would be the juniormost from whatever source promoted, and not the petitioner if he is given the officiating promotion in the post which has now fallen vacant.

(4) For the reasons given above, I am of the opinion that the grievance of the petitioner is misconceived and there is no merit in his pleas raised in the petition. The petition is accordingly dismissed but without any order as to costs.

N . K. S.