

(5) It is apparent from the above proviso that notice is to be issued within six months of the alleged unauthorised construction, the starting point being as to when the alleged construction had begun or completed as the case may be. That being the position in law, no notice could have been issued to the writ petitioner for demolition after six months of the construction. The learned Single Judge has correctly held that the demolition on the basis of such a notice was illegal. The learned Single Judge in his judgment has observed "that by lapse of time, the construction stood impliedly compounded and legalised". We may make it clear that this does not mean that the writ petitioner is not to pay any compounding fee for the unauthorised construction. The department will be entitled to charge the compounding fee as if the construction had been made in the year 1982.

(6) Subject to the observations made above, this appeal fails and is dismissed, with no order as to costs.

P.C.G.

Before J. V. Gupta, C.J. & R. S. Mongia, J.

H. C. AGGARWAL AND OTHERS,—Appellants.

versus

STATE OF PUNJAB AND OTHERS,—Respondents.

Letters Patent Appeal No. 402 of 1985.

3rd October, 1990.

*Constitution of India, 1950—Art. 226—Punjab Industries Service (State Service Class II) Rules, 1965—Rls. 4 & 9 (b)—Seniority—Government according sanction for creation of new posts in 1972—Such ex-cadre posts included in the common cadre posts—Posts of Technical Specialists encadred in 1981—Respondents appointed to these posts and shown senior to petitioners—Service rendered on ex-cadre posts which later on encadred—Seniority should be reckoned from the date of appointment on the cadre posts and not retrospectively.*

**Held:** that mere creation of the posts does not bring the posts in the cadre and encadring of the posts is necessary by an order of the competent Authority. The encadring of the posts of Technical Specialists encadred in 1981 cannot be considered for reckoning their seniority in the cadre of Assistant Director/District Industries Officer as the service rendered on ex-cadre post cannot be counted for seniority.

(Paras 8 & 9)

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*Letters Patent Appeal under Clause X of the Letters Patent against the judgment delivered by Hon'ble Mr. Justice S. S. Kang in the above noted case on 19th December 1984.*

Anuj Raura, Advocate, for the Appellants.

H. S. Riar, Addl. A.G. Punjab, J. L. Gupta, Sr. Advocate with Sumant Batra, Advocate, for the Respondents.

#### JUDGMENT

R. S. Mongia, J.

(1) It would be necessary to re-capitulate the facts of the case in little detail, under which the present Letters Patent Appeal was filed in this Court. The writ-petitioners, who were 11 in number and are now the appellants in this L.P.A. had filed a writ petition in this Court, challenging the validity and legality of ranking given to Respondents Nos. 3 to 6, namely, Sarvashri Jaspal Singh Grewal, Pritam Singh, Gurbachan Singh Raju and Jagjit Singh Mehal, respectively, in the seniority list of the officers of the cadre of Assistant Directors/Assistant Controllers of Stores/District Industries Officers, etc. in the Punjab Industries Department (State Service Class II). Appellant No. 1, Shri H. C. Aggarwal, was appointed as Assistant District Industries Officer in the Department of Industries, Punjab, and was promoted as Assistant Director on 14th August, 1978. The other appellants, i.e. Appellants Nos. 2 to 11 were appointed as Assistant Directors by way of direct recruitment on 26th September, 1979. The conditions of service of the appellants are governed by the statutory Rules known as the Punjab Industries Service (State Service Class II) Rules, 1965 (hereinafter referred to as the Rules). The Service constitutes of various classes of posts included in Appendix 'A' to the Rules. According to sub-rule (b) of Rule 9 of the Rules, the posts of Assistant Directors, Assistant Controller of Stores, District Industries Officers, Stores Inspection Officer, Purchase Officer (Emporia Organisation), Textile Officer (Marketing) and Textile Officer (Development) form one cadre. The appointment to this cadre is made by direct recruitment and by promotion from amongst various categories of posts, having at least five years experience. One of the posts from which the promotion is made is Planning-cum-Survey Officer. It may be mentioned that

the posts of Assistant District Industries Officers/Planning-cum-Survey Officers are included in a lower cadre. Initially their pay-scale of the cadre of Assistant Directors, and Assistant Controller of Stores, etc. was Rs. 250—750; whereas the pay-scale of the Officers in the lower cadre of the Assistant District Industries Officers/Planning-cum-Survey Officers was Rs. 200—500. The pay-scale of the cadre of Assistant Directors, etc. was revised to Rs. 350—950 and later on to Rs. 825—1500.

(2) In order to give fillip to Rural Industrialization, 49 Rural Industries Projects were set up in the country. In 1971, it was decided by the Government of India that the area of operation of these existing 49 Rural Industries Projects be extended to cover the entire districts in which the projects were set up. For this purpose, the Ministry of Industrial Development, Government of India recommended,—*vide* its letter dated 7th May, 1971 that it was necessary to put the entire staff, as mentioned in the annexure to the said letter, in position immediately. It was further suggested that the officers thus appointed should have the requisite qualification and experience so that they are in a better position to shoulder the responsibility, attached with each project. It was *inter alia* suggested that the Planning-cum-Survey Officer should be given the position and status of an Assistant Director of Industries in the State (though the Planning-cum-Survey Officer was in the lower cadre and in the lower pay-scale as compared to Assistant Director of Industries). Appointment of Technical Specialists was also recommended. The Punjab Government,—*vide* its letter dated 26th April, 1972, accorded sanction to the implementation of the above-mentioned Scheme recommended by the Government of India, with effect from 1st April, 1972 and for creating various posts, which included the posts of Planning-cum-Survey Officers in the pay-scale of Rs. 350—900, as also posts of Technical Specialists in the same scale of pay. It would be relevant to mention here that the posts of Planning-cum-Survey Officer in the scale of Rs. 350—900 and the post of Technical Specialist were not in the cadre of Assistant Directors etc. as mentioned in Appendix 'A' to the Rules. As mentioned above, the post of Planning-cum-Survey Officer in the pay-scale of Rs. 200—500 (revised Rs. 300—600) was initially in the lower cadre than that of Assistant Director of Industries, etc.

(3) Shri Jaspal Singh, respondent No. 3 and Shri Pritam Singh, respondent No. 4, were appointed as Technical Specialists in 1976 in the pay-scale of Rs. 350—900 against the ex-cadre which were

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created in 1972. Similarly, Shri Gurbachan Singh Raju, respondent No. 5 and Shri Jagjit Singh Mehal, respondent No. 6, were appointed as Planning-cum-Survey Officers in 1978 in the grade of Rs. 350—900, against the ex-cadre posts created in 1972, under the Centrally Sponsored Scheme.

(4) It would be relevant to mention here that,—*vide* order dated 2nd November, 1972 (Annexure R-5), the Secretary to Government, Punjab, Industries Department, included the two posts of Planning-cum-Survey Officers in the common cadre of Assistant Directors/District Industries Officer. The order reads as under :—

“The Governor of Punjab is pleased to include the two posts of Planning-cum-Survey Officers at Malerkotla and Hoshiarpur Projects in the common cadre of District Industries Officers/Assistant Directors of Industries etc. with effect from the 3rd August, 1972.”

(5) In the tentative seniority list of the officers of the Service, which was issued some time in the year 1980, Respondents Nos. 5 and 6 were shown at Serial Nos. 25 and 26; whereas the appellants were shown at Serial Nos. 27 to 36. In other words, Respondents Nos. 5 and 6 were shown senior to the writ-petitioners. This was on the basis that the posts of Planning-cum-Survey Officers had been brought in the cadre,—*vide* order dated 2nd November, 1972, referred to above, and Respondents Nos. 5 and 6 had been appointed to the said posts in the year 1978. As far as Respondents Nos. 3 and 4 were concerned, they were considered to be manning the ex-cadre posts of Technical Specialists, which had not been included in the cadre. The writ-petitioners made representation against the tentative seniority list challenging the inclusion of the names of Respondents Nos. 5 and 6 in the seniority list and placing them over and above the writ-petitioners. It was at this stage that the State Government,—*vide* order dated 19th March, 1981 (Annexure P-4) included the posts of Technical Specialists in the common cadre of Assistant Directors/District Industries Officer retrospectively and the two incumbents i.e. Respondents Nos. 3 and 4 Sarvshri Jaspal Singh Grewal and Pritam Singh were ordered to be given seniority in the said cadre from the date of their appointment against the posts of Technical Specialists. It may be noted here that at the time the order dated 19th March, 1981 encadring the post of Technical Specialist was passed Sarvshri Jaspal Singh Grewal and Pritam

Singh were then working as Functional Managers, which posts are not in the cadre of Assistant Director etc. Though the Director of Industries had recommended to the Government that since Respondents Nos. 3 to 6 were appointed to ex-cadre posts, they were not entitled to be included in the seniority list and the previous decision should be reconsidered, yet his recommendations and the representation of the writ-petitioners were rejected by the State Government,—*vide* letter dated 26th March, 1982, and the result was that Respondents Nos. 3 to 6 were shown senior to the writ-petitioners. It was the order dated 19th March, 1981 (Annexure P-3) as well as the order dated 26th March, 1982 (Annexure P-6) making Respondents Nos. 3 to 6 senior to the petitioners. that was challenged by way of writ petition in this Court. The learned Single Judge dismissed the writ petition. Dissatisfied with the judgment of the learned Single Judge, the writ-petitioners filed the present Letters Patent Appeal.

(6) To appreciate the arguments of the learned counsel for the parties, it would be apposite to reproduce Rule 4 of the Rules :—

*“R. 4 Number and Character of Posts :—The Service shall comprise the posts shown in Appendix ‘A’ to these Rules:*

*Provided that nothing in these rules shall effect the inherent right of Government to add to or reduce the number of such posts or create new posts with different designations and scales of pay, whether permanently or temporarily.”*

(7) The learned counsel for the appellants reiterated the same arguments which were made before the learned Single Judge to the effect that the posts in the cadre could be created, increased or decreased only by an amendment of the Rules and not just by an executive order. This argument was rightly rejected by the learned Single Judge in view of the clear mandate of Rule 4 quoted above. It would be seen from the perusal of Rule 4 that a right has been given to the Government to add or reduce the number of posts or create new posts with different designations and scales of pay. The very Rule gives the power to the State Government to create, add or reduce posts by an executive fiat. The amendment to the rule is not necessary, otherwise the very purpose of Rule 4 would become meaningless.

(8) The next question that arises is that when the posts are created by the Government under Rule 4, are these automatically

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included in the cadre or an order encadring the posts is necessary? If the answer is that an order encadring the posts, which have been created, is necessary then the next question is whether the service rendered on an ex-cadre post which is later on encadred can be taken into consideration or not. Our answer to this question is that mere creation of the posts does not bring the posts in the cadre and encadring of the posts is necessary by an order of the competent Authority. Factually also in the present case,—*vide* order dated 2nd November, 1972, quoted above, two posts of Planning-cum-Survey Officers were encadred with effect from 3rd August, 1972. So with effect from 2nd November, 1972, the posts of Planning-cum-Survey Officers were within the Cadre of Assistant Director/District Industries Officer, and respondents Nos. 5 and 6 having been appointed in the year 1978 to the said posts, were rightly shown senior to the writ-petitioners who were appointed as Assistant Directors on 14th August, 1978 and 26th September, 1979, respectively, i.e., after the appointment of respondents Nos. 5 and 6. The service rendered by respondents Nos. 5 and 6 from the date of their appointment on the cadre posts had to be reckoned for the purpose of seniority.

(9) As far as the posts of Technical Specialists are concerned, the same were encadred,—*vide* order dated 19th March, 1981 (Annexure P-4) with retrospective effect. The learned counsel for the appellants has argued rightly that no executive order can be passed with retrospective effect. *Vide* order dated 19th March, 1981, the Government sought to encadre the posts of Technical Specialists with retrospective effect i.e. from 1972. This cannot be permitted. This Court in *K. D. Vasudeva and others v. The Union of India and others* (1), held that no executive order can be passed with retrospective effect unless there is specific power for doing so. The learned Judge in that case relying on a Supreme Court judgment in *The Income-tax Officer, Alleppey v. I.M.C. Ponnoose and others* (2), held as under :—

“Retrospective legislation can be made only by the sovereign legislature, that is, by Parliament for the whole country in respect of the field of its legislation, and by the State legislature in respect of the subject within its jurisdiction

(1) 1971 (2) S.L.R. 487.

(2) A.I.R. 1970 S.C. 385.

for the State. Service rules having retrospective effect can also be made by the President of India and the Governor of a State in exercise of the "powers under the proviso to Article 309 of the Constitution, which is a legislative power, but no subordinate or delegated authority can frame rules or regulations having retrospective effect. Unless there is power in any statute or statutory rules entitling the Executive Government or any of its agencies to pass orders with retrospective effect it is not open to those authorities to pass such an order."

We are in respectful agreement with the said dictum. Consequently, we hold that the posts of Technical Specialists were encadred with effect from 19th March, 1981 and any service rendered by respondents Nos. 3 and 4 i.e. Jaspal Singh Grewal and Pritam Singh prior to the encadring of these posts cannot be considered for reckoning their seniority in the cadre of Assistant Director/District Industries Officer as the service rendered on ex-cadre post cannot be counted for seniority. For this view we find support from the judgment of the Apex Court in *Baleshwar Dass and others v. State of U.P. and others* (3), in which it was held that seniority of employees holding ex-cadre posts vis-a-vis employees holding cadre posts is to be determined from the date the posts are included in the cadre and that employees holding cadre posts would be senior to the employees holding ex-cadre posts on inclusion of ex-cadre posts in the cadre. Consequently, respondents Nos. 3 and 4 would be deemed to have been appointed in the cadre from 19th March, 1981, and, therefore, they would rank junior to the writ-petitioners. Order Annexure P-4 is held to be bad and quashed to the extent it gives seniority to respondents Nos. 3 and 4 prior to 19th March, 1981. To this extent, order Annexure P-6 is also held to be bad.

(10) The argument of the learned counsel for respondents Nos. 3 and 4 which prevailed before the learned Single Judge may also be noticed. An advertisement had been issued for filling the posts of Technical Specialists in the year 1976 and in the advertisement it was mentioned that the post of Technical Specialist belonged to Class II. The learned Single Judge held that since in the advertisement it was mentioned that the Technical Specialists' posts were in P.I.S. Class II and were in the same pay scale as that of Assistant Director/District Industries Officer, it was just formalisation of an

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existing fact that an order, dated 19th March, 1981 was issued encadering the posts of Technical Specialists in the cadre of Assistant Directors with retrospective effect. With respect to the learned Single Judge, we do not agree with his findings. Merely mentioning in the advertisement that the posts are in Class II, would not amount to encadering the posts unless there is a specific order to that effect. In fact, a specific order was issued on 19th March, 1981. If the posts were already in the cadre, the question of issuing any order to that effect did not arise. Since the Government had always been of the view, as is clear from Annexure P-2, that the said posts were not in the cadre, that is why an order encadering them was necessitated. We have held above that the posts of Technical Specialist would be deemed to be encadered only with effect from 19th March, 1981 and respondents Nos. 3 and 4 would be entitled to reckon their seniority in the cadre from the said date.

(11) Another point which the learned counsel for the appellant also raised was to the effect that in fact from the reading of the Appendix attached to Annexure R-2, it is clear that only one post of Planning-cum-Survey Officer was created and not two, and, therefore,—*vide* order, dated 2nd November, 1972 only one post could be encadered and not two. The learned counsel for the States has shown us the original record from which it is clear that in fact two posts of Planning-cum-Survey Officers were created i.e. one for Malerkotla and the other for Hoshiarpur. That being the position, there is nothing wrong in encadering the two posts of Planning-cum-Survey Officers,—*vide* order dated 2nd November, 1972.

(12) For the reasons recorded above, we partly allow this appeal and hold that respondents Nos. 5 and 6 have been rightly shown senior to the petitioners in the cadre of Assistant Director/District Industries Officer; whereas respondents Nos. 3 and 4 have been wrongly shown senior to the petitioners in the said cadre. The service of respondents Nos. 3 and 4 in the cadre would be reckoned only with effect from 19th March, 1981 when the order encadering the posts of Technical Specialists was issued. There will be no order as to costs.

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