IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Date of decision: 08.04.2016

CWP No.10005 of 1997

Baljit Singh ...Petitioner

Vs.

Punjab Small Industries & Export Corporation Ltd. & another ...Respondents

CORAM: HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. B.S.Patwalia, Advocate, for the petitioner.

Mr. Indresh Goel, Advocate, for respondent No.1.

None for respondent No.2.

1. *To be referred to the Reporters or not?*
2. *Whether the judgment should be reported in the Digest?*

RAJIV NARAIN RAINA, J. (ORAL)

1. This is an old case of 1997 shown in the regular cause list to be taken up for final disposal being amongst the longest pending cases on my board of the present roster which is sufficient notice of appearance for the respective parties to attend to the case. Since no one appears for respondent No.2, this Court is not compelled to await appearance of each and every counsel engaged who would have deemed notice of the proceeding that the matter would be heard on merits and no frivolous adjournment would be granted. Hence the said respondent is ordered to be proceeded against ex parte. Heard the learned counsel present and who are prepared with their respective cases and ready for advancing arguments.

2. The issue before the Court is as to whether the Punjab Small Industries & Export Corporation Ltd. (for short 'the Corporation') could have abdicated its powers under Article 73 of the Articles of Association of the Corporation in favour of the Finance Department of the Government of Punjab and the Bureau of Public Enterprises, Punjab, to render the amendment made in the Punjab Small Industries & Export Corporation Employees Service Bye-Laws, 1965 (for short 'the Bye Laws') otiose and unenforceable which amendment enhanced the minimum qualifications for promotion to the post of Section Officer from non-graduate to graduate degree as essential for eligibility. The post of Senior Assistant is the feeder category for promotion to the post of Section Officer. The office order promoting the petitioner as Section Officer was made subject to "concurrence" of the Bureau of Public Enterprises (Cell) in the Government of Punjab and further a rider was put in the office order that it will be subject to "approval" from the Government.

3. After the amendment was carried out in the Bye Laws, the petitioner was promoted as Section Officer by office order dated 28.02.1994/ 01.03.1994 (Annex P-2) i.e. the date on which amendment was introduced in Bye-Law 3.1 of the Bye Laws. The admitted position is that neither the concurrence nor the awaited approval came from the quarters concerned. In other words, the amendment to the Bye Laws has been rendered infructuous only on account of non-receipt of concurrence/approval.

4. The brief history of the case may be noticed to understand the case. After the petitioner was promoted as Section Officer from the reserved category of Scheduled Castes, one Jagjiwan Singh, who was senior to the petitioner in the feeder cadre of Senior Assistants, challenged the promotion of the petitioner by way of filing CWP No.3144 of 1994 titled 'Jagjiwan Singh Vs. The Punjab State Small Industries & Export Corporation Ltd. & another'.

Jagjiwan Singh also belonged to the reserved category (SC). The initial stand of the Corporation before this Court in that case was in support of the petitioner, who was arrayed as respondent No.2 in the said petition. In the written statement dated 11.07.1994 (Annex P-5), the stand of the Corporation was that Jagjiwan Singh was ignored for promotion because he did not fulfill the minimum essential qualifications as prescribed under the service Bye Laws of the Corporation. Jagjiwan Singh unlike the petitioner was not a graduate which degree the amendment required for eligibility. However, during the pendency of the petition, the Corporation filed an application under Order 6 Rule 7 read with Section 151 CPC praying that it may be granted leave to amend the written statement. In the application presented, it was averred that the Board of Directors of the Corporation in its meeting held on 08.09.1993 had approved and adopted the moot amendment and this was done due to an oversight because it could not be gainsaid that the rules though were approved by the Board of Directors yet it was a conditional approval subject to the approval of Finance Department and the Bureau of Public Enterprises & Disinvestment, Punjab. The case was forwarded to the authorities for approval, but no formal approval was forthcoming.

5. While promoting the petitioner as a Section Officer, the Corporation had acted in the bona fide belief and since the new recruitment rules had been approved by the Board of Directors and had become applicable according to the respondents. The conditional approval, it is said in para.2 of the application, unfortunately escaped notice of the respondent Corporation, when the written statement to the writ petition was filed. It was only during the exercise carried out in April, 1997, when cases were taken up for filling vacancies by promotion that the whole position was re-visited and it came to light that the approval of the Finance Department/Bureau of Public Enterprises

(Cell) had not been received and that being so the rules could not be said to have become operative in the absence of the approval granted. Promotion to the post of Section Officer by the time when the petitioner was promoted had to be regulated by the rules in vogue prior to the decision of the Board of Directors when it carried out the amendment. On these premises, the amendment was sought.

6. This Court issued notice to the Corporation and in the presence of their counsel not only allowed the amendment, but took up the main case for final disposal and upheld the stand of the Department and allowed the writ petition in favour of Jagjiwan Singh.

7. The principal grievance of the petitioner at that stage was that he was not heard when the amendment was permitted in the pleadings and the writ petition allowed although he was a party contesting the cause. Sadly, with the disposal of the writ petition the Corporation reverted the petitioner and promoted Jagjiwan Singh instead on the premise that he was senior in the lower cadre and graduation degree was no longer required as a condition precedent to promotion. Faced with the reversion order, the petitioner appealed under Clause X of the Letters Patent, 1919. In the meanwhile, the petitioner also filed the present writ petition challenging the reversion order dated 07.07.1997 (Annex P-17). Thus, the Appellate Bench did not interfere in the matter and relegated the petitioner to file review application before the learned Single Judge. The review application filed in terms of the order passed in the intra court appeal was disposed of citing reason that the present writ is pending adjudication and the petitioner was free to ventilate his grievances in the pending matter.

8. It is the contention of Mr. B. S. Patwalia that the Board of Directors was within its jurisdiction and authority to amend the Bye Laws and

to introduce a new principle of promotion by enhancing the minimum qualification to graduate degree. If the promotion order was made subject to concurrence and approval, then the Board would not have acted under its own Articles and Memorandum of Association to regulate the conduct of its business and its officers and servants, which Article 73 authorized. Article 73 also authorized the Board of Directors to vary and repeal any of the Bye Laws made under Article 73. If neither concurrence nor approval came, then it would mean that outside agencies did not dissent from the amendment carried out by the Board. As a matter of fact, the nature and character of the amendment was such that it could have no financial implications on the Board. Neither was any created nor was the cadre being diminished. The amendment was aimed at enhancing the educational qualification for the promotional posts in the felt needs of the Corporation, which activity was within the power and authority of the Board and the Board alone. The introduction of the word 'approval' in the office order, which promoted the petitioner as Section Officer appears to have been used beyond the scope of the term 'concurrence'. There is vast difference in the legal lexicon between the terms 'concurrence' and 'approval'. Approval is a positive act while concurrence is only to seek affirmation or a view of what has been done by the competent authority and nothing more so that the records of the Bureau of Public Enterprises Cell in the Finance Department is maintained true to the record of the Corporation over which it exercises jurisdiction. It does not mean that the amendment will come into force only when it is assented to or approved, ratified, accepted and agreed to bring about a new state of things. In any case, if after many years concurrence and approval did not come and promotion was made w.e.f. 28.02.1994 (Annex P-2) then there would be deemed concurrence or approval. The terms 'concurrence' and 'approval' have not been defined, used or employed in the office order promoting the petitioner and therefore, the reversion order is an overreach of the explicit terms and conditions of the promotion order (Annex P-2). Besides, there is nothing in the Bye Laws of the Corporation and in its Articles of Association that speak of concurrence or approval much less required to be recorded in writing. Therefore, it could be tacit. If no action is taken for a sufficiently long lapse of time, it would appear to be a silent nod in favour of the amendment. Besides, the joint promotion order put the petitioner and three other promoted officials from the general category on a period of probation. It was only in case the work and conduct was found unsatisfactory during the probation period that the petitioner could have been reverted to the original post and for no other reason in sight.

9. The Bye-Laws, as they originally stood without the disputed amendment, lay down the procedure for recruitment in Bye-Law 3.1, which reads as follows:

> *"***3.1 RECRUITMENT**
>
> *(a) Recruitment to the various posts under the Corporation shall be made by the Board by any one or more of the following methods:*
>
> *(i) by direct recruitment; or*
>
> *(ii) by deputation from Government or any other corporation;*
>
> *(iii) by promotion of existing personnel or by transfer from one post to another;*
>
> *(b) (i) Managing Director can make appointments to all posts carrying pay upto Rs.3700/- specified in Schedule 'A' and 'B' of the service bye-laws.*
>
> *(ii) Appointments to all posts under the Corporation shall be made by the Board of Directors subject to delegation of powers to the Managing Director or any other subordinate authority;*
>
> *(c) (i) The Board/Appointing Authority may prescribe for various posts under the Corporation the*

qualifications, whether academic, technical or otherwise, or tests or physical standards or any experience that it may consider necessary and expedient for the efficient discharge of duties or conditions for confirmation, promotion or continuance in service;

(ii) Managing Director can prescribe for various posts carrying pay upto Rs.3700/- or less and with the approval of Chairman for other posts under the Corporation, the qualification, whether academic, technical or otherwise or tests or physical standards, or any experience that he may consider necessary and expedient."

10. The amended qualifications for direct recruitment and promotion to the coveted post are as follows:

> *8. That under the 1993 Rules, the minimum qualification for direct recruitment as well as for promotion to the post of Section Officer was prescribed as under:-*

For Director Recruits	*By Promotion*
M.B.A./Post Graduate Degree from a recognized University/SAS/Inter CA with 10 years experience with the Corporation	*Graduate with five years experience as Senior Assistant/Assistant Manager with satisfactory record.*

11. Mr. Patwalia points out from Bye-Law 3.1 (b) (ii) that appointments to all posts under the Corporation shall be made by the Board of Directors subject to delegation of powers to the Managing Director or any other subordinate authority. In the case of the petitioner, the promotion came from the Managing Director. Bye-Law 3.1(c) (i) (supra) makes it manifest that all powers reside in the Board/Appointing Authority with respect to the qualifications, whether academic, technical or otherwise. The position in the Bye-Laws is clearly to the mind of the court leaning in favour of the petitioner

and the impugned reversion order appears not to be sustainable in the eyes of law, as it proceeds on a contingency which never occurred nor has. The promotion order was not contingent nor was dependent on any "concurrence" or "approval" and the review exercise done by the Corporation only to discover that because of lack of concurrence or approval, the amendment portion had not come into force is fallacious, which deserves to be set right in this petition.

12. Per contra, the contention of Mr. Goel appearing for the Corporation is that no person was promoted as a Section Officer under the amended Bye-Laws and therefore, the petitioner has no right to retain promotion and for want of concurrence or approval, the Managing Director was within his jurisdiction to withdraw the promotion order.

13. I have no reason to accept this argument as a controlling one as it is cyclic and would return a reasonable mind again to the meaning of the terms 'concurrence' and 'approval' introduced for the first time in the reversion order, which words did not exist in the promotion order nor did in the Bye-Laws of the Corporation, pre or post amendment. The interdependence between the Bureau of Public Enterprises/Finance Department and the Corporation has not been delineated or explained in any of the pleadings or documents filed by the respondents in *Jagjiwan Singh's* writ petition or in the present one. If the inter-connectivity remains in darkness or is not made known to the court, then it would be difficult to return a finding that concurrence would mean approval and if approval was not granted, the amendment to the Bye Laws never came into force. I am therefore inclined to think that intervention in the instant case is warranted to undo a wrong committed by reading passivity of the government as not a positive act of refusal to allow the amendment only enhancing the essential qualifications for promotion to the post of Section Officer. The abdication of authority was a weak act of the

Corporation which cannot be approved on the material presented and was done only to benefit unduly the private respondent. If there is any other material which has a bearing on the case, it has not been produced before this court to take a different view on jurisdiction exercised by the Finance Department/ BPE over the resolutions and amendments made in exercise of power conferred by Article 73 of the Bye Laws of the respondent Corporation. The Bye Laws do not predicate prior sanction before amendment is made as essential to the survival of the amendment. Concurrence and/or approval can only stem from the law enacted, be it the Bye Laws. If there is no such legal requirement it cannot be read in the Bye Laws. Moreover, the terms and conditions of the promotion order are the operating contract of employment in the higher post achieved by promotion granted without any riders or qualifications. Besides, the petitioner was not heard when the case of Jagjiwan Singh was decided without hearing the party petitioner and he is thus not bound by those orders passed on his back and he had a case to argue. When it comes to the review application, it was frustrated by the fiat accompli created by the impugned reversion order pending appeal which forced the petitioner to file the present petition and knock the doors of this Court when his doors were shut in appeal and review which brought the present litigation.

14. For the manifold reasons recorded above, I find this petition has sufficient substance warranting interference. Consequently, the petition is accepted. A writ of certiorari is issued quashing the impugned reversion order as illegal, arbitrary and void. The petitioner would be entitled to retain his promotion as Section Officer from the date of the office order (Annex P-2) with all consequential benefits flowing from such declaration which would be both monetary and non-monetary as a result of mandamus issued to this effect to the respondents by the present order. The amounts due are directed to be

paid within 8 weeks of supply of this order. However, the parties will bear their own costs of litigation.

08.04.2016 **[RAJIV NARAIN RAINA]**
Vimal **JUDGE**