

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

1. CWP No.15767 of 1995

Hari Kishan ... Petitioner

Versus

State of Haryana and others ... Respondents

2. CWP No.15599 of 1995

Duli Chand ... Petitioner

Versus

State of Haryana and others ... Respondents

Date of Decision: 01.08.2016

CORAM:- HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mrs. Abha Rathore, Advocate,
for the petitioner.

Ms. Shruti Jain Goel, AAG, Haryana.

RAJIV NARAIN RAINA, J.

1. This order will dispose of CWP No.15767 of 1995 titled *Hari Kishan v. State of Haryana and others* & CWP No.15599 of 1995 titled *Duli Chand v. State of Haryana and others*. The facts are taken from CWP No.15767 of 1995.

2. At the time of filing of the petition, the petitioner was working as an Assistant Fitter in Haryana Roadways Depot at Faridabad. The

seniority list of Assistant Fitters was circulated on February 28, 1995, copy of which is at Annex P-1. The name of the petitioner is at Sr. No.11. There were five posts of Fitter lying vacant since two to three years of filing of the petition in 1995. The rules governing service are called the Haryana Transport Department (Group-C) Haryana Roadways Service Rules, 1995 which were published in the Gazette and came into force on January 31, 1995. According to these rules, filling the post of Fitter in the depot was made either by promotion from Assistant Fitter or by direct recruitment or by transfer. The qualifications prescribed for the post by promotion according to the rules is Middle pass with Hindi subject and three years experience on the post of Assistant Fitter. Thirteen Assistant Fitters were promoted as Fitters vide office order dated July 28, 1995. Of these 13, 5 were junior to the petitioner falling at Sr. Nos.12, 13, 14, 19 and 27 of the seniority list. The petitioner was ignored for promotion on account of the fact that he was rendered disqualified promotion lacking educational qualifications required by the Rules since he was not 8th Class pass. Though, prior to the rules the petitioner was eligible for consideration for promotion It may be noted that there is no challenge to the new rules.

3. The case of the petitioner is that for purposes of promotion the qualifications existing at the time when the post fell vacant are to be considered and the rules cannot take away his pre-existing right to promotion on the ground that old vacancies are required to be filled by the old rules and, therefore, he is entitled to be promoted with effect from the date the juniors were promoted on July 28, 1995 even when the new rules came into force. A direction is sought for quashing the promotion of the 3rd

respondent and/or to consider his case for promotion to the promotional post of Fitter by treating him as eligible for the post from the date juniors were promoted.

4. On notice issued, the General Manager Haryana Roadways, Faridabad filed a written statement on behalf of the official respondents to contest the case. It is maintained that the petitioner is a totally illiterate person according to service book and bio-data record. He is not qualified for the promotional post as per the new rules. It is not disputed that five persons junior to the petitioner were promoted since they possessed educational qualifications and experience required by the rules. It is denied that post of Fitter was lying vacant in Faridabad depot since two or three years prior to the filing of the petition. Accordingly, the petitioner has no legal right to promotion and the petition deserves to be dismissed. The case was admitted on April 29, 1996. An additional affidavit has been filed by the General Manager Haryana Roadways, Faridabad dated April 24, 1996 which is prior to the admission of the matter. The affidavit clarifies that in para.9 of the written statement it was averred:-

*“That para No.9 of the CWP is wrong and hence is denied.
It is submitted that no post of fitter was lying vacant in
Faridabad Depot since 2/3 years.”*

5. On due reflection, the statement made did not reflect the correct position. The statement was made erroneously. The true position has been set out in para.3 of the additional affidavit retracting from the earlier averments which reads as follows:-

*“3. That now it has been made to realise that by writing
“No post of fitter was lying vacant in Faridabad Depot for*

the last 2/3 years” would mean that there was no vacancy for this post during the last preceding 2 to 3 years. It is humbly clarified that this averment was made with the purpose of denying the assertion of the petitioner that posts of fitters were lying vacant for such a long time. Whereas in fact as on 31/01/95 (on the date of Gazette Notification of Haryana Transport Department Rules), 9 vacancies of fitter existed in Faridabad Depot. Out of these vacancies, 5 had fallen vacant on 1/01/95 due to promotion of 5 fitters as Mechanics, and 4 had fallen vacant in the last few months. The complete details of these posts are attached at Annexure R-1. It is also submitted that as on 31/01/95, the petitioner stood at Sr. No.11 on the seniority list of Asst. Fitters In Haryana Roadways Faridabad. The seniority list is attached at Annexure R-2.”

6. The factual position was that 9 vacancies of Fitter existed in Faridabad Depot, 5 of which had fallen vacant on January 01, 1995 due to promotion of 5 Fitters as Mechanics and 4 has fallen vacant prior to the new rules. The omission was highly regretted. The prevalent vacancy position is reflected in Annex R-1. The seniority positions are not disputed that in the lower post the petitioner was senior to the non-official respondents. By a subsequent order, the affidavit was allowed subject to just exceptions and was taken on record to be treated as additional affidavit.

7. The accompanying writ petition i.e. CWP No.15599 of 1995 filed by Duli Chand pleading similar grievance as in the other case. In the petition, it is stated that prior to the rules no educational qualifications were prescribed and persons who were not even Middle Pass could be promoted as Mechanic. Many such persons were promoted, namely, Chottu Ram, Inderjeet, Jagdish, Jagdish-II and Dal Chand. The petitioner Duli Chand also stood promoted as Fitter in Haryana Roadways Depot in Faridabad.

Therefore, at the time of filing of the petition Hari Kishan was Assistant Fitter and Duli Chand was Fitter claiming further promotions to the higher post of Fitter and Mechanic respectively.

8. I have heard the learned counsel for the parties and perused the record with their assistance and given my thoughtful consideration to the claims of either side.

9. The question falling for consideration is whether the rules prevalent at the time of consideration for promotion would be applicable or the position is governed by the law stated by the SCI in Y.V. Rangaiah and others v. J. Sreenivasa Rao and others, AIR 1983 SC 852 that vacancies occurring prior to coming into force of the new rules would be governed by old rules. In short, what is the temporal effect of the amended rules.

10. In State of Punjab v. Arun Kumar Aggarwal, (2007) 10 SCC 402 SCI considered a case where the petitioner pressed for antedated rights for promotion urging that vacancies prior to promulgation of new rules would be governed by old rules and one of the principles applied was whether a conscious decision not to fill the vacancies under the old rules was taken which would be determinative of rights.

11. In BSNL v. Mishri Lal, (2011) 14 SCC 739 the SCI dealing with similar issue held:

15. No doubt in some decisions it was held that a vested right cannot be taken away by amendment of the rules. But what does this really mean? Since a rule under the proviso to Article 309 is legislative in character vide Raj Kumar v. Union of India (supra) the rule can be amended, even with retrospective effect, just as a legislation can be amended with retrospective effect.

16. In our opinion the expression 'vested right' could only mean a vested Constitutional right, since a Constitutional right cannot be taken away by amendment of the rules. This is evident from the Constitution Bench decision of this Court in Chairman, **Railway Board v. C.R. Rangadhamaiah**, 1997(3) S.C.T. 722 : (1997) 6 SCC 623. It was held therein that pension is no longer treated as a bounty but was a valuable Constitutional right under Articles 19(1)(f) and 31(1) of the Constitution, which were available on 1.1.1973 and 1.4.1974 (that is before the 44th Constitution Amendment). Since this was a Constitutional right it could not be taken away by amendment of the rules. The Constitution is the supreme law of the land, and hence a Constitutional right can only be taken away by amending the Constitution, not by amending the rules or even by amending the statute.

17. Hence in view of the aforesaid Constitution Bench decision the other decisions of this Court of smaller benches must be understood to mean that a vested Constitutional right cannot be taken away by amendment of the rules. It follows that if the vested right is not a Constitutional right it can be taken away by retrospective amendment of the rules. A legislative act can destroy existing rights, (unless it is a Constitutional right). Thus, even a taxing statute can be made retrospectively, and this usually affects existing rights vide **Union of India v. Madangopal**, AIR 1954 SC 158, **Jawaharlal v. State of Rajasthan**, AIR 1966 SC 764(770), **Tata Iron & Steel Co. Ltd. v. State of Bihar**, AIR 1958 SC 452, **D.G. Ghouse & Co. v. State of Kerala**, AIR 1980 SC 271 (para 16), **Shetkari Sahkari Sakhar Karkhana Ltd. v. Collector**, AIR 1979 SC 1972 (para 6-7), etc.

18. A rule made under the proviso to Article 309 is a legislative act (though made by the executive). It is not a piece of delegated legislation like a rule made under a statute. Hence it can be amended retrospectively.

(emphasis added)

12. Right to promotion is not recognized in service law as a constitutional right by Courts unless junior is promoted and senior ignored for the wrong reasons and in contravention of rules. Mere chances of promotion and prospects of promotion is a future event in normal circumstances.

13. The petitioners place strong reliance on *Y.V. Rangaiah* and by a subsequent decision SCI speaking in Deepak Aggarwal and another v. State of UP and others, (2011) 6 SCC 725 has considered the very issue in detail after noticing *Rangaiah* and has have in cases of promotion held that rules prevalent at the time of consideration would be applicable. Though rights go back to occurrence of vacancies but legislature can take it away while promulgating new rules and enhancing qualifications in public interest for filling up the promotional post.

14. In a case involving amendment to rules bringing about a sea change in criterion creating new rights for promotion with enhanced qualifications, a Division Bench of this Court in Vinod Kumar and others v. State of Punjab and others, 2012 (4) SCT 545: 2013 (2) SLR 175 : 2013 (1) RSJ 556 [of which I was author member] explained *Y.V. Rangaiah's* case in the following terms:-

“We also do not think that the ratio of law laid down in Y.V.Rangaiah case, supra would apply to the facts of this case as suggested and pressed by the learned counsel. In Y.V.Rangaiah, the statutory service rules considered were Rule 4 (a) (1) (i), Rule 34 and amended Rule 5 of the Andhra Pradesh Registration and Subordinate Service Rules, which required drawing up a list of approved candidates for promotion and such list was to be prepared in the month of September every year so as to remain in

force until the list of approved candidates for the succeeding year was prepared. The purpose of preparing the said list was to satisfy claims of promotion of as many eligible candidates as such authority considered necessary during the currency of the list. The rules examined in that case further enjoined that the list of approved candidates would be drawn in such number as are approximately equal to the number of vacancies expected to arise during the currency of that list. This legitimate expectation based on approved list formed the basis of the direction issued that in the circumstances old rules would govern old vacancies and the amendment could not take away those rights. We, however, find no such rule in this case which gives an accrued right to the petitioners by way of a panel position or select list involving some process of selection which cannot be taken away by amendment and that too before filling in the existing vacancies. In the present case, we repeat, no panel or select list has been prepared in which names of the petitioners find mention after screening before they can be heard to urge that they have an accrued or vested right to promotion against old vacancies. Y.V.Rangaiah case is, therefore, clearly distinguishable on facts and would not help the petitioners to stop the onward march of the new group as their cadre mates. Besides, no factual foundation has been laid in the petition to raise the argument with respect to vacancies existing prior to the amendment of the rules.”

15. It follows sequitur that it is not in every case where rule is amended taking away prior rights by policy of recruitment, appointment and promotion one can blindly apply the principle in *Rangaiah* which turns on its own facts and that ruling will have to be constricted and read down in the light of subsequent case law developed by the Constitutional Courts, the SCI and the High Courts with special reference to the important case direct in point rendered by the SCI in *Deepak Aggarwal* (Supra) and the decision

in *Vinod Kumar* (supra) while dealing with rules unlike the Andhra Pradesh Rules which were considered in *Rangaiah* which enjoined the department to draw promotional panels in advance of the vacancies occurring year-wise and offer promotions to the empanelled candidates as they arise during the year ahead. The panel was made in advance of occurrence of vacancies for convenience and ease of not having to hold many DPC meetings during the year. There is no such prescription in the rules in question in the instant case and also there is no administrative precedent in the respondent department brought on record existing before the coming into force of the rules or thereafter since such a situation did not arise before the new rules were brought into force since they were no rules. Thus, one would have to go, in my considered opinion, by the date of consideration and not by the old vacancy position when cases of promotion were not convened for filling up the vacancies and the process of making promotions had not been initiated prior to the rules and rights to promotion had not matured when no person junior to the petitioners had been promoted before the rules came into force. The juniors were promoted in accordance with the rules and on the date of their promotion the petitioners were rendered ineligible for consideration for promotion being uneducated, not having passed the Middle (8th standard) examination. The co-relation of qualifications and job content is a matter of policy made by experts to tailor the need of the hour. This is not a court but a management function since court possesses no tools to apply except standards set in the constitutional scheme relating to service law.

16. If sympathy alone were to hold sway to favour the petitioners, who would be lost chances of promotion by new rules, it may appear to be a

hardship, for the law is hard, but it is the law and if the petitioners are promoted on the principle of vested rights accruing against old vacancies the very object of the amendment would be frustrated to have higher qualified persons in promotional posts to adjust to changing times. The constitutional courts have been given the flexibility to create the law within the law and not just apply existing law. This is plain enough for the beneficial growth of the law in the felt necessities of the fast changing times and responsive governance. If policy makers in the tool rule room have designed and refashioned the law in service rules on method of recruitment or appointment by promotion under Article 309 for the future, the Court ought not to be an impediment to injunct them to carry past baggage to the detriment of the public interest, for the offices of Government are run for public purpose, and private interest must always yield to public interest. Change of mode of recruitment is a policy matter. "Government is not under any restriction not to change rules under Art. 309 proviso before a particular period": See *Mishri Lal supra*). Promotion is not a constitutional right. Promotion carries with it a right to seniority for further promotion. And seniority is not a constitutional right or a constitutional issue or of any constitutional value in Article 16 of the Constitution, See M. Nagaraj v. Union of India, (2006) 8 SCC 212. Though, right to be considered for promotion is a valuable right. Stagnation too has to be dealt with for suitable avenues for the efficiency in administration. But these concepts go back to rule room, debate and informed reason each playing their part. Equity when invoked can only supplement law and not supplant it. It cannot malign it. I would thus not overemphasize the law in *Rangaiah* and force its

ratio in this case, when the case is clearly distinguishable in the face of rules. In fact the dicta in *Deepak Aggarwal* case are a case in point explaining *Rangaiah* and distinguishing it.

17. In support of the contention that the new rules would apply even to unfilled old vacancies prior to coming into force of the rules, Ms. Shruti Jain Goel, Ld. AAG, Haryana ably relies on the following decisions contending that it is the rules in force which will prevail and have primacy over all other considerations even if the vacancies have occurred prior thereto to meet new challenges in governance in a modern age to deliver effectively public service.

18. She then cites dicta in Darshan Singh and another v. State of Punjab and others, 2013 LIC 236 to contend that the rules would have primacy in promotion from the date of consideration for promotion against existing vacancies which remained unfilled due to any reason. The Hon'ble Chief Justice sitting in Single Bench (A.K.Sikri, CJ. as his Lordship then was) was faced with a case in which a challenge was brought by a Beldar appointed when there was no qualification prescribed as per the erstwhile Punjab Subordinate Agriculture Service Rules, 1933 and all that was required for promotion to the post of Mukaddam/Agriculture Sub Inspector was that the incumbent should be experienced literate Beldar in the inferior service of the department. No specific educational qualification was provided. The challenge brought was on the ground that when the petitioner was appointed as a Beldar there was no qualification prescribed in the rules, and therefore the amended qualifications introduced in the Punjab

Agriculture Department (Field Office) Group-C Service Rules, 2010

repealing the old rules of 1933 cannot be made applicable to impose such a pre-condition on consideration which would disqualify the petitioner for further promotion. The argument advanced was repelled on the principle “that there is no absolute or universal proposition of law that the vacancies arising on a particular date are to be filled invariably by the law existing on that day”. The Court relied on *Deepak Aggarwal* case to reach the conclusion. There is sufficient merit in the contention of the learned law officer that *Rangaiah* case has no application to the rule in the present case, the rules being built differently and on the other hand, the law has been restated in a new perspective that confines *Rangaiah* to the Andhra Pradesh rules considered by the Supreme Court therein and the legal position in fact traces its roots to earlier dicta of the Supreme Court handed down in Dr. K. Ramulu and Another v. Dr. S. Suryaprakash Rao and Others, (1997) 3 SCC 59 against the compulsion on the department to promote employees rendered ineligible for promotion and promote them against old vacancies existing before the new rules came to be notified and made operational. The State has the prerogative to put on hold promotions when draft rules are in the forge and the draftsman's workshop in the process of being given the final touches before promulgation by the Governor of the State under the Proviso to Article 309 of the Constitution.

19. Therefore this Court finds no legal justification or warrant in issuing a certiorari quashing the promotions of the 3rd respondent or those who were promoted with them to the higher posts and would decline to issue a writ of mandamus commanding the respondents to promote the petitioners to the respective higher posts from the date their alleged juniors

were promoted since the issue of junior and senior was no longer a triable issue in view of the rule position.

20. Accordingly, the petitions are dismissed for want of substance.

(RAJIV NARAIN RAINA)
JUDGE

01.08.2016
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Whether speaking/reasoned	Yes
Whether reportable	Yes