

C.W.P No. 6003 of 1999

(1)

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

C.W.P No. 6003 of 1999

DATE OF DECISION: 21.9.2016

Pradeep Gupta and another

.....Petitioners

Versus

State of Punjab and others

.....Respondents

BEFORE:- HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present:- Mr. Rajiv Atma Ram, Senior Advocate with
Mr. Ranjit S. Kalra, Advocate
for the petitioners.

Mr. L.S. Virk, Addl. A.G., Punjab
for respondent No.1-State.

Ms. Rita Kohli, Sr. Advocate with
Mr. Manik Bhandari, Advocate for
respondent No.2.

Mr. D.S. Patwalia, Senior Advocate with
Mr. Sehajbir Singh, Advocate
for respondent No.3.

DAYA CHAUDHARY, J.

The prayer in the present petition is for issuance of a writ in the nature of certiorari for quashing of final seniority list dated 29.12.1997 (Annexure P-5). A further prayer has also been made for issuing directions to the respondents to issue fresh seniority list by placing the petitioners senior to respondent No.3 and for grant of all consequential benefits.

Briefly, the facts of the case, as made out in the present petition are that an advertisement was issued by respondent-Department on 25.5.1988 for filling up the posts of Assistant Environmental Engineers. In response to aforesaid advertisement, the petitioners as well as respondent No.3 applied for the said post. Thereafter, the petitioners as well as respondent No.3 appeared in the written test and qualified the same. Then they all appeared in the interview conducted by the respondent-Department and were selected and appointed as Assistant Environmental Engineers. Respondent No.3 was placed below the petitioners in the merit list prepared by the Selection Committee. A tentative seniority list of Assistant Environmental Engineers was circulated on 15.12.1995. As per said seniority list, respondent No. 3 was shown at Sr. No.17, whereas, petitioners No.1 and 2 were shown at Sr. No. 19 and 18, respectively. The petitioners filed objections against the aforesaid tentative seniority list but the same were rejected by the respondent-Department and a final seniority list was issued on 29.12.1997, which is subject matter of challenge in the present petition.

Mr. Rajiv Atma Ram, learned senior counsel for the petitioners contends that respondent No.3 had wrongly applied in the category of Ex-serviceman, whereas, he was ward of an Ex-serviceman. As per instructions dated 8.4.1982 in case the reserved vacancy remains unfilled on account of non-availability of a suitable Ex-serviceman, the vacancy may be temporarily filled up from any other source but the certificate of non-availability of Ex-serviceman is required to be obtained from the Department of Defence Services Welfare, Punjab. Learned senior counsel further submits that there was no reservation for Ex-serviceman and as such

no benefit of military service could be granted to the candidate towards seniority. As per Regulation 12 of the Employees Service Rules (Regulations), 1980 (hereinafter referred to as 'the Rules, 1980'), the seniority is to be determined by the date of substantive appointment. The petitioners were appointed on 8.2.1989 and 9.2.1989, whereas, respondent No.3 was appointed on 9.2.1989. Petitioner No.1 joined services on 10.2.1989 and petitioner No.2 on 14.2.1989, whereas, respondent No.3 joined on 17.2.1989. Learned senior counsel also submits that both the petitioners were higher in order of merit and were senior to respondent No.3. It is also the argument of learned senior counsel that the period of limitation required for filing of civil suit cannot be considered while filing petition under Article 226 of the Constitution of India. The roster point promotion does not confer any right of seniority as the seniority is to be fixed from the date of appointment or continuous length of service. At the end, learned senior counsel submits that the action of respondent-Department in considering respondent No.3 senior to petitioners is not only arbitrary but contrary to law as well specially when no reason whatsoever has been mentioned while rejecting the claim of the petitioner. Learned senior counsel has also relied upon the judgments of Hon'ble the Apex Court in the case of **State of M.P. Vs. Bhailal Bhai** 1964 AIR (SC) 1006, **Ajit Singh Vs. State of Punjab** 1999 AIR (SC) 3471, **Bimlesh Tanwar Vs. State of Haryana and others** 2003 (2) S.C.T. 361, **Haryana Public Service Commission Vs. Harinder Singh** 1999 (2) S.C.T. 298, of this Court in **Jai Bhagwan Vs. Deputy Director, Sheep Production, Animal Husbandry Department, Hisar** 2003 (6) SLR 614, **M/s Shiv Shakti Foods Vs. State of Haryana and others** 2012 (2) PLR 169, **R.L. Bhagat**

Vs. State of Punjab and others 2009 (3) S.C.T. 511, **N.S. Chauhan Vs. Punjab State Electricity Board** 2003 (1) S.C.T. 518, **Zile Singh Mehra and others Vs. State of Haryana and another** 1995 (2) AIJ 606 and **Jatinder Kumar Vs. State of Haryana and another** 2016 (2) S.C.T. 87, in support of his contentions.

Ms. Rita Kohli, learned senior counsel for respondent No.2 opposes the submissions made by learned senior counsel for the petitioners. She submits that the present petition is liable to be dismissed on the ground of delay and laches as the petitioners have challenged the eligibility of respondent No.3 after delay of more than ten years. He was selected/appointed in the category of Ex-serviceman in the year 1989 and this fact was in the knowledge of the petitioners from the date of appointment but the petitioners remained silent for years together. Even a civil suit seeking declaration is barred by limitation and the present petition is liable to be dismissed being highly belated. Learned counsel further submits that the representation of the petitioners was rejected on 29.12.1997 and the present petition has been filed in the month of May, 1999 i.e. after a period of more than one year. The selection/appointment should normally be challenged within a period of six months and at the most within one year.

Learned State counsel also submits that respondent No.3 was given roster point No.14, which was reserved for ex-serviceman and the petitioners were given roster point No. 15 and 16 as maintained by respondent-Board. Even in the seniority list, it was specifically mentioned that respondent No.3 was selected in the category of Ex-serviceman and was placed above the petitioners in the roster register maintained by respondent-Department.

Similarly, learned counsel for respondent No.3 submits that the present petition is liable to be dismissed on the ground of delay and laches as the seniority list dated 29.12.1997 was challenged after a delay of more than one year as the writ petition was filed on 4.5.1999. Learned counsel further submits that roster point was accorded to respondent No.3 during his recruitment in the year 1989 in the category of Ex-serviceman but his appointment was challenged after a period of ten years by the petitioners. The petitioners as well as respondent No.3 were appointed as Assistant Environmental Engineers together and subsequently promoted also. Even the subsequent promotions, which were made during pendency of the writ petition were in the knowledge of the petitioners but the same was not challenged. Learned counsel for respondent No.3 has also relied upon the judgment of Hon'ble the Apex Court rendered in the case of **Yashbir Singh and others Vs. Union of India and others** 1987 (4) SCC 345 and **Dilwan Singh Vs. State of Haryana** 1996 (2) SCT 637, in support of his contentions.

Heard the arguments advanced by learned counsel for the petitioners and have also gone through the orders available on the file.

Admittedly, an advertisement was issued in Daily Newspaper on 25.5.1988 for filling up the posts of Assistant Environmental Engineers. The petitioners applied in General Category and respondent No.3 applied in the category of Ex-serviceman. The selection was made on the basis of written test and interview. In total 13 General Category candidates, 9 Scheduled Castes candidates and 4 Ex-serviceman candidates appeared for the interview, out of which, three General Category candidates, one candidate of Scheduled Caste and one of Ex-serviceman were appointed in

the same list. The petitioners joined services on 10.2.1989 and 14.2.1989, whereas, respondent No.3 joined on 17.2.1989. A tentative seniority list was issued by the respondent-Department on 15.12.1995, wherein, name of respondent no.3 was reflected at Sr. No. 17 and petitioners No.1 and 2 were at Sr. No. 19 and 18, respectively. As per case of the petitioners, they raised objections to the seniority list but the same were rejected vide order dated 29.12.1997 finalising the seniority list. During pendency of the present petition, the petitioners as well as respondent No.3 were promoted to the post of Senior Environmental Engineers and thereafter respondent No.3 was also promoted to the post of Chief Environmental Engineer vide order dated 3.6.2014. The seniority of respondent No.3 has been challenged only on the ground that he was ward of Ex-serviceman, whereas, the appointment was made as Ex-serviceman candidate.

Undisputedly, the objections raised by the petitioners were rejected on 29.12.1997 and final seniority list was also issued on the same day. The petitioners are not claiming seniority because of the roster point but are claiming their seniority on the basis of total length of service. It is an argument of learned senior counsel for the petitioners that respondent No.3 was appointed in the category of dependent of Ex-serviceman, whereas, the post was reserved for Ex-serviceman but nowhere it has come on record as to whether any candidate belonging to Ex-serviceman category was available or not. Respondent No.3 has been appointed against category of dependent of Ex-serviceman as per Regulation 12 of Rules, 1980, vide which, the inter se seniority of the persons appointed to the posts in the same cadre is to be determined from the date of their substantive appointment to such posts with the proviso that in case two or more persons

are appointed to such posts on the same date, their seniority is to be determined by considering the seniority in age and other facts as provided under Regulation 12. The petitioners were appointed vide letters dated 8.2.1989 and 9.2.1989, respectively, whereas, respondent No.3 was appointed vide letter dated 9.2.1989. Petitioner No.1 joined on 10.2.1989, petitioner No.2 on 14.2.1989 and respondent No.3 on 17.2.1989. The Punjab Recruitment of Ex-serviceman Rules, 1982 creates a reservation in favour of Ex-serviceman/Ward of Ex-serviceman and the promotion cannot be over and above the other persons who are higher in merit. It cannot be said that there was delay in filing of the petition as tentative seniority list was issued in the year 1995 and the petitioners filed objections thereto. Thereafter final seniority list was circulated vide letter dated 29.12.1997 and the present petition was filed in the year 1999, wherein, notice of motion was issued on 6.5.1999. It is a settled proposition of law that this Court has power for enforcement of statutory rights to give consequential relief as has been held by Hon'ble the Apex Court in larger Bench judgment in **Bhailal Bhai's (case) supra**. The relevant portion of the aforesaid judgment as mentioned in para 17 is reproduced as under:-

“At the same time we cannot lose sight of the fact that the special remedy provided in Art. 226 is not intended to supersede completely the modes of obtaining relief by an action in a civil court or to deny defences legitimately open in such actions. It has been made clear more than once that the power to give relief under Art. 226 is a discretionary power. This is specially true in the case of power to issue writs in the nature of mandamus. Among the several matters which the High Courts

rightly take into consideration in the exercise of that discretion is the delay made by the aggrieved party in seeking this special remedy and what excuse there is for it. Another is the nature of controversy of facts and law that may have to be decided as regards the availability of consequential relief. Thus, where, as in these cases, a person comes to the Court for relief under Art. 226 on the allegation that he has been assessed to tax under a void legislation and having paid it under a mistake is entitled to get it back, the court, if it finds that the assessment was void, being made under a void provision of law, and the payment was made by mistake, is still not bound to exercise its discretion directing repayment. Whether repayment should be ordered in the exercise of this discretion will depend in each case on its own facts and circumstances. It is not easy nor is it desirable to lay down any rule for universal application. It may however be stated as a general rule that if there has been unreasonable delay the court ought not ordinarily to lend its aid to a party by this extraordinary remedy of mandamus. Again, where even if there is no such delay the Government or the statutory authority against whom the consequential relief is prayed for raises a prima facie triable issue as regards the availability of such relief on the merits on grounds like limitation, the Court should ordinarily refuse to issue the writ of mandamus for such payment. In both these kinds of cases it will be sound use of discretion to leave the party to seek his remedy by the ordinary mode of action in a civil court and to refuse to exercise in his

favour the extraordinary remedy under Art. 226 of the Constitution.”

In the aforesaid judgment, it was also held that the maximum period fixed by the legislature for filing the suit is three years and if the same is taken into consideration then delay of three years in seeking remedy under Article 226 can be allowed. This view was also taken by Division Bench judgment of this Court in **Naveen Mehra's case (supra)**. The issue of seniority of roster point was before Hon'ble the Apex in **Ajit Singh's case (supra)**, wherein, it was held that roster point promotion will not confer a right of seniority as seniority is to be granted from the date of promotion in terms of promotion rule of selection. In case of promotion by considering roster point catch up rule is to be applied. The general candidates from the lower level will be allowed to catch up those promoted earlier against reserved points and seniority has to be redetermined after placing them again senior in the promotion levels. Same view was taken by this Court in **R.L. Bhagat's** as well as **N.S. Chauhan's case (supra)**.

It has also come on record that during pendency of this writ petition, petitioners as well as respondent No.3 were promoted to the post of Environmental Engineer in the month of 1996. Thereafter the petitioners as well as respondent No.3 were promoted to the post of Senior Environmental Engineers. Respondent No.3 was then promoted to the post of Chief Environmental Engineer on 3.6.2014. For determination of seniority, it is not necessary to challenge the selection or promotion. The respondent-authorities have promoted the petitioners as well as respondent No.3 without determination of the seniority of petitioners viz-a-viz respondent

No.3. The present petition is pending since the year 1999 and nothing has been conveyed to the petitioners as to how the seniority of the petitioners and respondent No.3 was fixed. The objections raised by the petitioners were rejected and final seniority list was circulated without conveying anything to the petitioners. The petitioners have a right at least to know as to how their seniority has been determined. It cannot be said that with the lapse of time, the petitioners have lost their right to seniority.

In view of the facts as well as law position explained above, the present petition is disposed of with a direction to respondent-authorities to consider the case of seniority of the petitioners viz-a-viz respondent No.3 as per rules applicable and the settled proposition of law as discussed above within a period of six months from the date of receipt of copy of the order. In case other affected persons are necessary to be heard, an opportunity of hearing be also given to them. The respondents are also directed to pass speaking and well reasoned order in accordance with law.

21.9.2016
pooja

(DAYA CHAUDHARY)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes
Yes