

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.19359 of 2010 (O&M)

Date of Decision: 14.03.2016

Akbar

... Petitioner

Versus

The State of Punjab and others

... Respondents

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

Present: Mr. O.P. Gabba, Advocate,
for the petitioner.

Mr. Inqulab Nagpal, AAG, Punjab.

Mr. Arun Kaundal, Advocate,
for respondent No.4.

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

RAJIV NARAIN RAINA, J.

1. Akbar joined service of the Punjab Water Supply & Sewerage Board at Ferozepur in July 1996. The employees of the Sewerage Board were transferred to Municipal Councils by a diktat of the State Government issued and given effect on August 01, 2005. Akbar was one of those who were transferred to Municipal Council, Ferozepur City. The Council did not take work involving sewerage from Akbar as he possessed a valid licence for driving heavy vehicles and was thus put on duty from day one as a Driver since there was no incumbent driver in the Municipal Council. He was issued an identity card in December 2005 designating him as a car driver.

2. In August 2007 the Director, Local Government, Punjab issued a Memo to Regional Deputy Directors in various districts of Punjab suggesting that they should try and fill up vacancies of drivers from amongst the employees already working in the Municipal Councils who are otherwise eligible for direct recruitment as Drivers.

3. The events that make up the case are briefly this: Akbar applied in September 2007 for appointment to the post. The Regional Deputy Director, Ferozepur wrote to the Executive Officer, Municipal Council, Ferozepur calling upon him to consider the case of Akbar for appointment as driver by relying on the executive instructions of the Punjab Government dated August 14, 2007 allowing such course to be adopted authorizing employers to appoint eligible in service candidates against existing vacancies except those who are not age-barred and opt for being considered for the post. Akbar accepted the offer and he was assigned duties as Driver. Thereafter, he continued to serve as a driver. He has placed sufficient supporting evidence on record throughout the relevant period to show that he has worked as a de facto driver even serving on election duty by orders of the Administrator of the Municipal Council recorded in writing deputing him for election work as a Driver. Ultimately, the Director, Local Government, Punjab addressed a letter dated June 03, 2009 to the Executive Officer of the Municipal Council seeking clarification as to the status of the petitioner.

4. Akbar's case was taken up by the Municipal Council and vide resolution No.22 dated February 18, 2009 Annex P-8 he was approved to work as driver of the official vehicle make Maruti Gypsy belonging to the

Council. The resolution was sent to the Government for approval. Upon this request, the Director, Local Government sent a letter dated June 03, 2009 to the Executive Officer of the Municipal Committee seeking clarification as to under what instructions the petitioner's cadre was changed to that of driver from Sewerman in his parent department before deployment in the services of the Council. A clarification was issued citing Government letter dated August 14, 2007 where freedom was given to Councils to appoint in service candidates as are eligible for the posts lying unfilled. The Municipal Council, Ferozepur informed the Director, Local Government, Punjab that there was shortage of driver as there was dearth of drivers in the Fire Brigade services attached to the Council. Admittedly, there were four approved posts of drivers in the Fire Brigade lying vacant. Two Fire Tenders were on rolls of the Council but are without drivers. It was certified that Akbar fulfilled all the essential requirements of the post of driver and it would be in the fitness of things that permission to change cadre be given. Akbar could be adjusted against a vacant post in the Fire Brigade. But the Director, Local Government insisted on a clarification from the Council regarding change of cadre and whether it was permissible under the rules. The Municipal Council referred to its resolution No.22 dated February 18, 2009 alluding to the fact that Akbar was appointed as a driver in the office to ply the standing vehicle for office use. The fleet of cars in the Municipal Council was limited to an Ambassador car and Gypsy Jeep. There were two vehicles with the Council with only one *de facto* driver available, the petitioner. As against four posts there was only Akbar; which I would say is a sorry state of affairs which can potentially jeopardize the fire safety norms

within the limits of the Council the matter evidently of an urgent nature to man vehicles in public interest. However, the Director, Local Government, Punjab has refused permission saying that the resolution No.22 is against the instructions/rules of the Government.

5. The Director, Local Government has exercised his power under section 236 of the Punjab Municipal Act, 1911 (for short "1911 Act") by the order dated October 08, 2009 to nullify the resolution which action has been impugned in this petition. Resolution No.22 appointed Akbar as a car driver but not a driver in the Fire Brigade though *de facto* Akbar was driving the official Jeep and performing the duties of a driver in the Fire Brigade as well for about a year before the resolution was rescinded by the Director, Local Government, Punjab. Therefore, the rejection relates to the post of car driver. The trouble was that Akbar possessed a driving licence for heavy vehicles. It is another matter that he was driving a light vehicle under permissions granted and directions issued by his superiors and, therefore, he was under lawful command for none of his fault. Permission having been denied Akbar instead gave an option for appointment as a driver in the Fire Brigade. He requested that his option should be sent to the Deputy Director, Local Government, Ferozepur for onward consideration even though his case has been rejected and the resolution nullified, the Executive Officer, MC Ferozepur deputed Akbar by office order dated May 13, 2010 to drive the official car of the President, Municipal Council, Ferozepur. From this, I would infer as most certainly true that Akbar was a good driver to whom President of the Municipal Council, Ferozepur could trust his life.

6. It is in this factual background that Akbar has approached this

Court for a direction to set aside the impugned order dated October 08, 2009 (Annex) P-13 cancelling resolution No.22 dated February 18, 2009. Besides, quashing of the impugned order Akbar prays that he has a preferential right over and above everyone else to be employed as Driver and even his order as driver issued vide Annex P-8 is still in force and further still on principles of *quantum meruit* as explained in Mrs. P. Grover v. State of Haryana, AIR 1983 SC 1060 and Selvaraj v. Lt. Governor of Island, Port Blair and others, (1998) 4 SCC 291. Akbar asserts that he is entitled to the higher pay scale for discharging the full duties and responsibilities of the post of Driver and he may accordingly be paid the difference of arrears of pay and allowances together with interest for the period worked which is still in currency.

7. The respondents have entered appearance and filed their respective written statements contesting the claim. One, on behalf of the Municipal Council and other on behalf of the Department of Local Government, Punjab. Resolution No.22 dated February 18, 2009 is admitted but is explained as only a recommendation subject to approval of Government and when the necessary sanction is obtained only then can Akbar be appointed on the post of driver and draw salary of the post. The admitted position is that the Municipal Council, Ferozepur has taken work from Akbar as a full fledged driver and not as a Sewerman. It is also admitted that Akbar was driving the Fire Engines due to ban imposed on direct recruitments by the Punjab Government. It is obvious that the Municipal Council is helpless in the face of exercise of authority under section 235 of the 1911 Act. In short, on paper, Akbar is a *de jure*

Sewerman but a *de facto* driver.

8. The State Government in its reply has taken preliminary submissions reciting section 237 of the 1911 Act that gives overriding power to the State Government to reverse or modify the order of any officer of the State Government passed or purporting to have been passed under the Act, if it considers it not to be in accordance with the Act or the rules or for any reason inexpedient and generally for carrying out the purposes of the Act the State Government shall exercise over its officers all powers of superintendence, direction and control.

9. Next cited is section 30 which deals with record and publication of proceedings. The provision prescribes that conduct of the proceedings of each meeting of the Committee has to be recorded in a book signed by the Chairman of the meeting and is open to inspection by any inhabitant. A copy of every resolution passed at any meeting of a Committee shall, within three days from the date of meeting, be forwarded to be Deputy Commissioner. A statutory duty lies in the Municipal Council in this regard. The decision of the Director, Local Government, Punjab is supported as a legal and valid one in rescinding the resolution since there is no provision in the Act or the rules to change the cadre of any employee of Municipal Council from one to the other. The State in its reply states that if work was taken out as a driver there was no sanctioned post of car driver in the Municipal Council and accordingly, the resolution was passed in violation of service rules which action had to be corrected in exercise of supervisory powers under the Act to annul it. It is stated that Akbar cannot be said to be aggrieved by the impugned order sufficient to approach Court

and it is only the Municipal Council, Ferozepur that would have *locus standi* to challenge the order dated October 08, 2009 and hence the writ petition is liable to be dismissed on this ground alone. Above all, no sanctioned post of driver was available in Municipal Council and on availability of post; it could be filled up by promotion from feeder cadre employees by following the cardinal principle of seniority-cum-merit or by direct recruitment.

10. The State does not appear to be correct when it tries to dispute that there was no post of car driver and that stand seems to be incorrect in the face of document placed on the file coming from the Municipal Council acknowledging that one post of car driver stands sanctioned in Municipal Council, Ferozepur. They referred to resolution No.22 to say that the post stands filled by Subhash s/o Farzad who was working as a driver. The resolution being referred to is mentioned in the resolution (P-8) to be the resolution dated June 04, 2004 whereby Subhash son of Farzad was posted from tractor driver to car driver and State Government put no hindrance on this resolution. The case of Subhash appears in resolution No.22 to have acted as an administrative precedent to be foundation of the resolution posting Akbar to drive the Maruti Gypsy.

11. This Court passed interim orders on August 17, 2015 calling upon the State to place on record the rules/standing orders governing the appointment of drivers in the Fire Brigade of the Municipal Councils as also drivers appointed in the Municipal Councils other than in the Fire Brigade, upon which an additional affidavit has been filed by the Additional Secretary to Government of Punjab in the Department of Local Government.

The rules/standing orders governing appointment of drivers in the Fire Brigade have been attached. The Court is informed that the department has issued letter dated December 19, 2014 amending qualifications of drivers/operators [R/2 (T)]. The qualifications fixed in the recruitment of Fire Brigade staff for the post of drivers/operators is minimum middle standard pass and candidate holding of a valid licence for driving heavy vehicles issued five years prior to the date of recruitment in fire service. The 3rd condition expected is that candidate must have experience of carrying out running repairs of vehicles and other fire service appliances. The qualifications have been enhanced vide memo dated December 19, 2014 making 10+2 as the minimum qualification. The other terms are not material to this case. The Punjab Local Government (Group-C) Service Rules, 2001 have been placed on record as Annex R-3. Appointments are to be made in the manner specified in Appendix-'B'. The Punjab Civil Services (General & Common Conditions of Service) Rules, 1994 in respect of matters which are not specifically provided in the rules as amended from time to time are applicable. The post of driver is listed in Appendix-'B' to be filled in the ratio of 20% by promotion and 80% by direct appointment. Drivers can be promoted from Group-D employees working under the control of the Director, Local Government, Punjab and who have an experience of working as such on either or more of these posts for a minimum period of 3 years and should possess licence for driving a car or jeep. Direct recruitment demands middle pass with Punjabi language and a licence for driving car or jeep with a minimum experience of 5 years and should qualify driving test to be held by the Board or the appointing authority as the case may be. The

Executive Officer, Municipal Council, Ferozepur has filed a separate affidavit. It is sworn that the Municipal Council maintains two tractors of Mahindra make and one Ambassador Car brand. The Municipal Council has only one driver namely Subhash son of Farjand who is working since July 11, 1997.

12. The petitioner has not filed any counter affidavit to the written statement or to the additional affidavits and would rest his case on the existing pleadings. The question is whether the Director, Local Government had no legal option except to annul resolution No.22 which posted Akbar as a driver. When the Director, Local Government annulled the resolution on the ground that there were neither instructions nor rules permitting change of cadre then the resolution No.22 could not be accepted when it adjusted Akbar from Sewerman as driver. The Director, Local Government, Punjab referred to notification/corrigendum dated May 19, 2009 of the Punjab Government and of the powers conferred therein as would make it shy from passing any other order than the one passed. These instructions have not seen the light of day in this case. This is the position in the entire paper-book. Since the State has not found it necessary to place the same on record, whatever be their worth, I would not take them as adverse to interest of Akbar in case the Court contemplates an order favourable to him.

13. I think the case of Akbar mostly lies banking on instructions issued by the Directorate, Local Government, Punjab, Chandigarh in the Trust Service Cell circulated to all the Executive Officers of Municipal Councils in Punjab where Fire Brigades are in place and all other Executive Officers of Municipal Council for Punjab State for other than the

department of Fire Brigade, there is a direction issued to the Regional Deputy Directors and accordingly the Municipal Councils that they should try to fill up vacancies from amongst the employees who are working in Municipal Councils and who are eligible for direct appointment as drivers (except the bar of age limit) and are desirable for appointment on the post of Driver, to do so within a period of 15 days prescribed in the instructions. If during this period such employees are not available then the department be informed. It was under these instructions that Akbar applied expressing his willingness to serve in the Fire Brigade as a Driver stating that he was already driving the official car of the Municipal Council from his date of deployment from Punjab Sewarage Board to Municipal Council in the year 2005. This is how the Executive Officer, Municipal Council, Ferozepur forwarded the case of Akbar to the Deputy Director, Local Government, Ferozepur citing the clearance decision dated August 14, 2007 (P-3) which cleared the decks for appointment/posting. This is what gave birth to resolution No.22 recording that there is one post of car driver lying vacant created in 2004 recommending Akbar's case to Director, Local Government, Punjab. When the resolution was received the the Director, Local Government, Punjab started searching for instructions on change of cadre to refuse sanction of the Resolution 22, which to my mind was a hyper technical approach and an unnecessary legalistic view taken of a simple matter. A very high sounding service law principle was picked up to apply to Akbar in the Municipal Council of change of cadre. Since no rule was found to justify change of cadre the case was rejected.

14. Akbar appears to be too small a man for whom the gigantic

wheels of the Government can be made to roll. The common ground is that Akbar has been driving a vehicle since his transition from the Punjab Sewerage Board to the Council in 2005. His services have long been exploited. He appears to be a proficient driver of a light vehicle although he holds a driving licence for heavy vehicles. He has been deputed to work by orders of his superiors including the President of the Municipal Council, Ferozepur with whom he deputed as chauffeur to drive the official vehicle of the Council. He has shouldered the full duties and responsibilities of the higher post of driver for many years. Even if he is not to be a driver he would surely be entitled to difference of arrears of salary and allowances of the two posts i.e. Sewerman and Driver from his date of engagement in 2005 till today as there is nothing on record to suggest that after initiating the present litigation in 2010 he has been discontinued to be deputed as a driver. He may also have a right to be held entitled to interest on the arrears. This would be in abiding by the law stated in *Smt.. P. Grover* and *Selvaraj cases (supra)* recognising the principles of 'equal pay for equal work and *quantum meruit* as applicable in such type of cases.

15. A few words need to be said on the term cadre since the resolution has been disapproved on the ground that cadre cannot be changed. The cadre is defined as the sanctioned strength of service or a unit of service. Basically it means how many people are required to do all the tasks that an employer requires to be done to run his business with the minimum manpower. Admittedly, there are four vehicles with Municipal Council, Ferozepur but no drivers available all these years because of ban on recruitment imposed by the State Government. If there is ban on

recruitment that does not mean integral posts should be left unmanned for want of skilled persons. In the present case, the situation is an alarming one since in Municipal Council, Ferozepur there are fire engines, fire tenders but sans drivers. The disastrous result of which leaves not much to imagination. This means that there are no fire safety norms in Ferozepur City and the citizens would be living in peril everyday in case fire breaks out. It is not a fair thing to do after exploiting a man for years together by making him work as a driver on lawful orders working to the full satisfaction of the authorities in the Municipal Council to invoke irrationally the provisions of the 1911 Act to rescind the resolution myopically. The resolution is a fair deal to meet the exigencies of administration and public interest and therefore I would not like to uphold the impugned order which wreaks mostly injustice in search of instructions and rules to answer the question of change of cadre against the petitioner. If there are no rules or instructions then the law has to be kept behind and hold that the man comes in keeping with dire needs of the day in the foreground. The man has to be put before the law even if this Court has to do unconventional justice and restore to Akbar his fruit of resolution No.22 passed by the Municipal Council, Ferozepur in his favour which is neither illegal nor irregular and is largely tailored to meet the expedient and extraordinary situation arising from blanket ban on appointments imposed by the Punjab Government across board. It cannot be gainsaid that extraordinary situations require extraordinary measures. In Jagdev Sharma v. State of Punjab, 2015 (2) PLR 570 I applied the principles of *ex aequo et bono* to do unconventional justice in a case recruitment in the disabled category in the following

manner by invoking principles of equity, justice and good conscience in writ jurisdiction:-

“12. The relief provided by article 226 of the Constitution is a discretionary one. A writ may neither issue nor an order made merely because it is lawful to do so. The writ court sits in equity where the rules of prudence preside and occupy the field of vision when known legal principles may not come to the rescue or be of any intrinsic help to cull out the relief or to deny it. Equity in its brightest and the most sublime form is a jealous mistress which may not want to share its bed and be betrayed by pedestrian rules, shackled by plebeian legal principles which may be found insufficient whilst venturing to do unconventional justice in a case. It is often said that a case to be decided ex aequo et bono, overrides the strict rule of law and requires instead a decision based on what is fair and just, given the circumstances. Life and its vicissitudes are larger than the law.”

16. Too much of a legalistic or technical approach should not be adopted in the case of the present kind with no clear cut legal position available on the file except that State Government had power to overturn the resolution. Every power has to be exercised reasonably and within the margins of statute law which confers such wide power. All the same the decision must be a sound one based on relevant considerations and different fact situations as may arise in the present and the future. Why can a Sewerman not be converted into a driver by the Municipal Council who are the best judges of the need for their work at the ground level. If a man is good enough as a driver and is trusted by his employer then strict legal principles do not hold much water especially when none of them have been brought to the notice of this Court to decline relief. Akbar merrily drives both car and fire brigade engines in the Fire Brigade service interchangeably

and to the satisfaction of the employer. He can be fitted either way provided he acquires a LMV driving licence in addition to possessing one for driving heavy vehicles. Even otherwise he can easily be posted as a driver in the Fire Brigade municipal services where posts are available and cannot be filled because of ban on recruitment. Experience of a decade is itself a valuable qualification.

17. In the facts and circumstances, I believe Akbar has made out a case for interference in writ jurisdiction. This Court can exercise equity in his favour which is not against the express law which does not occupy the field against the petitioner. It cannot be said that resolution No.22 is illegal or *void ab initio*. It has legal flavour and colour by virtue of resolution duly passed by the competent body, which unfortunately has been annulled only because there is neither rule nor are there instructions justifying change of cadre. If they are none in sight, the administrator could have created one and not have depended on judicial precedent alone. There is also an instance in the Municipal Council, Ferozepur where one Subhash was converted from tractor driver to car driver as noticed in moot resolution No.22. Nobody has argued before me that the case of Subhash is distinguishable as one transforming him from tractor driver to car driver which too amounts to change of cadre. Subhash continues working as a car driver then where does one stand if not on terra firma. There is sufficient causal parity in the cases of Subhash and Akbar to tilt the case in favour of the latter.

18. I see nothing per se illegal in making a Sewerman a Driver if the employer is willing and reposes trust and faith in Akbar's driving skills in discharge of his official duties from the beginning of the tenure. The

Municipal Council did not help Akbar as much as it helped itself in the predicament it faced which was unshackled by the freedom granted to make in house recruitment from eligible candidates. If change of cadre was permitted in case of Subhash it could well conversely be in this case by deductive logic.

19. The factum of discharging the duties and responsibilities as a Driver in all the requisite degrees being an admitted position on file even by the employer-the respondent Municipality the petitioner then [de hors the main prayer] is entitled to the difference of pay and allowances of the pay of Sewerman and Driver. After all the Municipal Council, Ferozepur remains the best judge of its requirements and needs in administration; so long as its resolution 22 was not tainted by bias, favouritism, arbitrariness, illegality or any perversity which might vitiate the decision making process and the result. Nor was the resolution passed in flagrant violation of the law or outside the strait jacket of rules of service or any of the provisions of the Punjab Civil Service Service Rules, 1970. Moreover, rules are not inflexible and can be relaxed to meet special contingencies provided posts are sanctioned and available but recruitment on them stands barred by Government by a general order across board and lifting of the bar is not in sight or may take far too long to be counter-productive to become disservice to the pressing and felt need of the time. Still further, no third party rights are involved in this case and in case the prayer is accepted no other person will be adversely affected there being no claimant in competition.

20. Therefore, for the above reasons recorded this writ is allowed.

The impugned order of the State Government is quashed upon certiorari

issued. Resolution No.22 is upheld as permissible exercise of discretion and authority and a direction is issued to the respondents/State of Punjab to consider acceptance and sanction of the resolution as an equitable exception. As a result, the respondent Municipality will consider offering appointment to the petitioner either as a driver of a light vehicle or a heavy one in the Fire Brigade services of the municipality, as the case may be. The petitioner is also held entitled to arrears of difference of salary and allowances of the post of Sewerman and Driver from 2005 onwards on the principle of *quantum meruit*. However, claim for interest on arrears is inequitable and unfounded and is thus rejected in view of the nature of the order passed *ex aequo et bono* or what appears fair and just.

21. The consideration in terms of this order is directed to be completed in 4 weeks of supply of the order. Order dasti.

(RAJIV NARAIN RAINA)
JUDGE

14.03.2016
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