

C.W.P No. 20423 of 2012 (O&M) (1)

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

C.W.P No. 20423 of 2012 (O&M)

DATE OF DECISION:30.11.2016

Rajpal SinghPetitioner

Versus

State of Punjab and othersRespondents

BEFORE:- HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present:- Mr. Deepak Gupta, Advocate
for the petitioner.

Mr. L.S. Virk, Addl. A.G., Punjab.

Mr. A.K. Chopra, Senior Advocate with
Mr. Akshit Chaudhary, Advocate
for respondent No.4.

DAYA CHAUDHARY, J.

The prayer in the present petition is for issuance of a writ in the nature of certiorari for quashing of orders dated 21.9.2011 (Annexure P-10) and dated 23.8.2012 (Annexure P-13) passed by respondent No.2, whereby, a direction has been given to respondent No.3 to change the seniority of the petitioner. A further prayer has also been made for issuance of a writ in the nature of mandamus directing the respondents to reconsider promotion on the basis of seniority given to the petitioner.

Briefly, the facts of the case as made out in the present petition are that in the year 1996 a new Division i.e. Faridkot Division was created out of Ferozepur Division. No permanent staff was appointed by the

Government of Punjab as at the initial stage staff was deputed from other offices. The petitioner was also working as Clerk in Deputy Commissioner's Office, Mansa since 24.3.1998. In the year 2007, he was working as Junior Assistant in Sub Tehsil Jhunir, District Mansa. On 9.4.2007, he was deputed to work in the office of Commissioner, Faridkot Division by Commissioner, Faridkot. He joined there on 11.4.2007. On 7.9.2007, the State Government with the approval of Governor transferred 14 posts to office of Commissioner, Faridkot Division, Faridkot from the offices of Ferozepur Division, Ferozepur, Deputy Commissioner, Bathinda, Faridkot and Mansa. All these posts were also ordered to be abolished from their parent Department. On 14.11.2007, the Financial Commissioner (Revenue) and Principal Secretary, Punjab Government ordered the appointment of the petitioner on regular basis against the post vacated by one Sh. Mahinder Singh, Junior Assistant, whose post was transferred to the office of Commissioner, Faridkot Division, Faridkot vide order dated 7.9.2007 as he had taken voluntary retirement on 31.5.2007. On 2.9.2008, a tentative seniority list of employees of Commissioner Office, Faridkot Division, Faridkot was prepared and objections were invited. Respondent No.4- Surinder Pal Singh, Junior Assistant had also filed objections to the seniority of the petitioner and after considering the objections, a final seniority list was prepared on 19.3.2010. In the final seniority list, the petitioner was shown senior from one Surinder Pal Singh, Junior Assistant but it was never challenged by him. On the basis of final seniority list dated 19.3.2010, the petitioner was promoted from Junior Assistant to Senior Assistant on 22.3.2010. On 15.9.2010, respondent No.4 (Surinder Pal Singh) without challenging the seniority list dated 19.3.2010 filed

representation before Financial Commissioner (Revenue)-cum-Secretary and challenged the promotion order of the petitioner dated 22.3.2010, who vide order dated 21.9.2011 directed to reconsider the promotion of the petitioner. The petitioner challenged the aforesaid order before this Court by way of filing C.W.P. No. 19467 of 2011, which was disposed on 10.5.2012 with a direction to respondent No.2 to decide the representation after hearing both the parties. In compliance of order passed by this Court on 10.5.2012, the petitioner moved representation to respondent No.2 to decide the matter afresh but after hearing the petitioner, respondent No.2 vide its order dated 23.8.2012 rejected the claim of the petitioner and ordered that there is no need to review or revise order passed by the Financial Commissioner on 21.9.2011. Orders dated 21.9.2011 and 23.8.2012 are subject matter of challenge in the present petition.

Learned counsel for the petitioner contends that in the final seniority list of the employees of Commissioner Office, Faridkot Division, Faridkot, the petitioner was senior to respondent No.4. The seniority list was finalized after considering the objections filed by the employees including respondent No.4. The petitioner was also promoted on the basis of said final seniority list. Neither the seniority list nor promotion order of petitioner was challenged by respondent No.4. Learned counsel further submits that respondent No.4 has no right to challenge the order of promotion of the petitioner subsequently as the seniority was fixed after considering the objections filed by the employees including respondent No.4. Learned counsel also contends that vide order dated 7.9.2007, all the employees were transferred along with their posts and their posts in parent departments were abolished. No where it was mentioned that these

employees will leave their seniority in previous offices. It is also the argument of learned counsel for the petitioner that while passing the impugned order, the past service of the petitioner has not been considered, whereas, he was transferred with post and cannot be compared with other employees, who were only transferred from one department to other department with their acceptance. The impugned order passed by the Financial Commissioner is also violative of principles of natural justice and against Punjab Civil Services (General and Common Condition of Service) Rules, 1994, which are having overriding effect on all the departments.

Learned counsel for respondent-State submits that a speaking and well reasoned order was passed by respondent No.2 after hearing both the parties and considering their view point, in compliance of order passed by this Court in C.W.P. No. 19467 of 2012. The Faridkot Division, Faridkot came into existence in the year 1996 and posts were sanctioned on 22.8.1996. Till then the work was being looked after by deputing the staff, as stop-gap arrangements from Ferozepur Division, Ferozepur. After sanction of the posts, respondent No.4 was appointed to the post of Clerk/Junior Assistant on 7.9.2007 and the petitioner was appointed in that cadre on 14.11.2007. Learned State counsel further submits that the seniority finalised by the Commissioner, Faridkot Division, Faridkot was not in accordance with relevant rules and as such the impugned order was passed after considering all these aspects. Learned State counsel also submits that respondent No.4 challenged the order of promotion of the petitioner as well as the seniority list, which was wrongly determined.

Learned counsel appearing for respondent No.4 has opposed the submissions made by learned counsel for the petitioner. He submits that

as per order dated 7.9.2007 the posts held by incumbents of the posts including respondent No. 4 were temporarily deputed to the newly created Faridkot Division. It was subject to the condition that after transfer of the posts to the office of Commissioner, Faridkot Division, Faridkot, the posts were to be abolished from their concerned offices/departments and after transfer of the post, the salary of the transferred employee was to be drawn from newly created office of Commissioner, Faridkot Division, Faridkot. The name of the petitioner was not in order dated 7.9.2007 and he continued to draw his pay and allowances from parent office and never became the member of the cadre of the Clerks of the office of respondent No.3. At the end, learned counsel for respondent No.4 submits that the seniority of the petitioner was reconsidered from the date of joining the cadre i.e. from the date of joining office of Commissioner, Faridkot Division, Faridkot as per provisions of Service Rules. The petitioner was wrongly promoted on 22.3.2010 after counting the period which he was not entitled to towards his seniority.

Heard the arguments advanced by learned counsel for the parties and have also gone through the impugned orders and other documents available on the file.

The fact relating to creation of new Division, Faridkot out of Ferozepur is not disputed. It is also not disputed that at that time, no permanent staff was appointed and initially the staff was deputed from Ferozepur Division and Deputy Commissioner's office of other Districts. The petitioner was initially appointed as Clerk in Deputy Commissioner's office, Mansa and thereafter he was working as Junior Assistant in District Mansa. He was then deputed to work in the office of Commissioner,

Faridkot Division, Faridkot on 9.4.2007 and he joined there on 11.4.2007. For the first time, on 7.9.2007 vide memo No. 5/28/06-RE-2(2)/9939, total 14 posts were transferred in Faridkot Division from offices of Ferozepur Division, Ferozepur, Deputy Commissioner, Bathinda, Faridkot and Mansa. All these posts were also ordered to be abolished from their parent Departments. The petitioner was working in the office of Commissioner, Ferozepur Division, Ferozepur and was ordered to be regularized on the post, which was vacated by one Mohinder Singh, Junior Assistant and the service conditions of Mohinder Singh were made applicable in case of the petitioner. Said Mohinder Singh, Junior Assistant was also transferred to the office of Commissioner, Faridkot Division vide order dated 7.9.2007 but he had taken voluntary retirement on 31.5.2007 i.e. before passing of order dated 7.9.2007. It is also not disputed that seniority list of the employees of the Commissioner Office, Faridkot Division, Faridkot was prepared on 2.9.2008 and objections were invited. Respondent No.4-Surender Pal Singh filed objections on the seniority of the petitioner, which were considered and thereafter final seniority list was prepared on 19.3.2010. In the said seniority list, the petitioner was shown to be senior from respondent No.4. It is also matter of fact that said seniority list was never challenged by respondent No.4. By considering the seniority of the petitioner in final seniority list dated 19.3.2010, the petitioner was promoted from Junior Assistant to Senior Assistant on 22.3.2010. Respondent No.4 without challenging the seniority list dated 19.3.2010 made representation before the Financial Commissioner (Revenue)-cum-Secretary and challenged the promotion order of the petitioner dated 22.3.2010, who vide its order dated 21.9.2011 directed to reconsider the promotion of the petitioner and that too

without giving any notice to the petitioner. Order dated 21.9.2011 was challenged by the petitioner by way of filing C.W.P. No. 19467 of 2011, which was disposed on 10.5.2012 by passing the following order:-

“The grievance raised by the petitioner is that a representation made by respondent No.4 against the seniority and promotion of the petitioner was decided by respondent No.2 without hearing the petitioner.

Even though no reply has been filed yet this fact has been accepted by learned DAG.

In my opinion it would serve the interest of justice if the impugned order be set aside and respondent No.2 directed to take a fresh decision in the matter after hearing both the parties.

Let the necessary action be taken within a period of three months.

Disposed of.”

In compliance of order passed by this Court on 10.5.2012, the petitioner had given representation to respondent No.2 to decide the matter fresh but after hearing the petitioner, respondent No.2 vide its order dated 23.8.2012 rejected the claim of the petitioner and ordered that there is no need to review or revise order passed by the Financial Commissioner on 21.9.2011. Orders dated 21.9.2011 and 23.8.2012 are subject matter of challenge in the present petition.

As per the arguments advanced by learned counsel for the petitioner, the seniority of the petitioner was fixed after considering the objections filed by all the employees including the objection filed by respondent No.4. Thereafter on the basis of said seniority number, the

petitioner was also promoted, which was never challenged.

Now the question for consideration before this Court is as to whether the services rendered by the petitioner in the earlier department are to be considered towards seniority and for promotional avenue or not.

Initially all the employees were sent on deputation from Ferozepur Division office and from the offices of Deputy Commissioner of other Districts. In order dated 9.4.2007 passed by Commissioner, Faridkot Division, Faridkot, it was mentioned that due to paucity of the Class-III employees in the office coupled with the fact that Sh. Mohinder Singh, Junior Assistant was going to retire, the petitioner, who was working as Junior Assistant and was posted in Sub Tehsil, Jhunir, District Mansa, was deputed to work in this office till further orders. It was also mentioned that he will join his duty forthwith after he is relieved but will not claim any deputation allowance and his salary was to be drawn and disbursed from the office of Deputy Commissioner, Mansa. Vide order dated 7.9.2007, total 14 employees were transferred with the condition that after transfer of these posts to Faridkot Division, the posts would be abolished from their concerned Department. The name of the petitioner was not in that list but name of one Mohinder Singh, Junior Assistant was there. Thereafter vide order 14.11.2007 passed by Financial Commissioner (Revenue), it was ordered that since Mohinder Singh, Junior Assistant, who was transferred with post to the office of Commissioner, Faridkot Division had taken voluntary retirement on 31.5.2007, therefore, one post of Clerk fell vacant in the office of Faridkot Division, Faridkot, the petitioner who was already working was regularized against the post vacated by Mohinder Singh, Junior Assistant. The petitioner was also promoted to the post of Senior

Assistant vide order dated 22.3.2010. Subsequently, on representation moved by respondent No.4, the promotion order of the petitioner was cancelled without giving any opportunity of hearing, whereas, the same was necessary as there was no misrepresentation or concealment on his part. There was specific condition in order dated 7.9.2007 that all the employees were transferred along with the posts meaning thereby that their past service in the earlier department was to be considered. Said Mohinder Singh was also transferred and the petitioner was appointed regularly in his place due to voluntary retirement by Mohinder Singh on the same terms and conditions. While passing impugned orders dated 21.9.2011 and dated 23.8.2012 by the Financial Commissioner (Revenue), the provisions of Rules, 1994, which are having overriding effect on all the departments have not been followed. Clause 8 is regarding seniority, which reads as under:-

“8. Seniority- The seniority inter se of persons appointed posts in each cadre of a service shall be determined by the length of continuous service on such post in that cadre of the service.

Provided that in the case of persons recruited by direct appointment who join within the period specified in the order of appointment or within such period as may be extended from time to time by the appointing authority subject to a maximum of four months from the date of order of appointment, the order of merit determined by the commission or the Board, as the case may be, shall not be disturbed.

Provided further that in case a person is permitted to join the post after expiry of the said period of four months in consultation with the commissioner or the Board, as the case

may be, his seniority shall be determined from the date he joins the post.

Provided further that in case any person of the next selection has joined a post in the cadre of the concerned service before the person referred to in the preceding provision joins, the person so referred shall be placed below all the persons of the next selection, who join within the time specified in the first provision:

Provided further that in the case of two or more persons appointed on the same date, their seniority shall be determined as follows:-

- (a) A person appointed by direct appointment shall be senior to a person appointed otherwise.
- (b) A person appointed by promotion shall be senior to a person appointed by transfer:
- (c) In the case of persons appointed by promotion or transfer, the seniority shall be determined according to the seniority of such persons in the appointments from which they were promoted or transferred: and
- (d) In the case of persons appointed by transfer from different cadre, their seniority shall be determined according to pay preference being given to a person who was drawing a higher rate of pay in his previous appointment award if the rates of pay drawn are also the same then by their length of service in these appointments and if the length of service is also the same, an older person shall be senior to a younger person.

Note: Seniority of person appointed on purely provisional basis or on ad-hoc basis shall be determined as and when they are regularly appointed keeping in view the dates of such regular appointment.”

It is clear from the Rule reproduced herein above that seniority is to be fixed from the date of joining the regular service in the cadre. In the present case, the petitioner was appointed on 24.3.1998 and respondent No.4 was appointed on 30.4.1998. Accordingly, the petitioner is senior from respondent No.4 but this fact has not been considered while passing the impugned orders. Moreover, the petitioner was promoted on 22.3.2010 from Junior Assistant to Senior Assistant and since then he has been working on the said post. The order of promotion was cancelled without giving any opportunity of hearing and that too only on the basis of representation moved by respondent No.4. Said order of promotion was passed on the basis of final seniority list, which has attained finality and the same was never challenged by respondent No.4 or any other employee. It has been held by Hon'ble the Apex Court in case **K. Anjaiah Vs. K. Chandraiah** 1998 (2) SCT 86 that while determining the inter se seniority of the persons being absorbed in permanent service, who were on deputation from different sources, their pre-existing length of service has to be counted for determining their seniority in the new service. In another judgment of Hon'ble the Apex Court in **M. Ramchandran Vs. Gobind Ballabh** 1999 (4) S.C.T. 263, it was held that inter se seniority of the deputationists has to be determined on the basis of their length of service including the service rendered by them on the similar/equivalent posts in their parent department. Moreover, any order passed in violation of natural justice is also bad in law

as neither any show cause notice was issued to the petitioner nor he was heard before passing of impugned orders. It is well settled that before passing adverse order an opportunity should be given but in the present case no such opportunity was granted. The rule of 'audi alteram partem' has been treated as fundamental to the system established by the rule of law and any action taken or order passed without complying with any rule is liable to be declared void as has been held in judgment of Hon'ble the Apex Court in case of **State of Orissa Vs. Dr (Misa) Bnapani Dei and others** AIR 1967 SC 1269.

In view of the facts and law position as explained above, the present petition is allowed and impugned orders dated 21.9.2011 (Annexure P-10) and dated 23.8.2012 (Annexure P-13) are set aside.

30.11.2016
pooja

(DAYA CHAUDHARY)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes
Yes

