

Gurbax Singh
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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**CWP No. 20098 of 2016
Date of decision: 27.09.2016**

Manjit Kaur

.....Petitioner

Vs.

Union of India and others

.....Respondents

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE RAMENDRA JAIN**

Present: Mr. K.K. Gupta, Advocate and Mr. Vaibhav Gupta, Advocate
for the petitioner.

Ajay Kumar Mittal,J.

1. The petitioner through the present petition under Articles 226/227 of the Constitution of India prays for quashing the order dated 01.08.2016, Annexure P.7 passed by the Central Administrative Tribunal, Chandigarh Bench, Chandigarh (in short, "the Tribunal"); order dated 03.02.2012, Annexure A.10, read with order dated 02.11.2015, Annexure A.22, whereby his representation was rejected by respondents No.3 & 4 respectively; and order dated 28.10.2003, Annexure A.3, coupled with instructions dated 13.07.1998, Annexure A.4 to the extent the seniority was ordered to be fixed at

the bottom. Direction has also been sought to respondents No.2 to 4 to count the length of service of the petitioner from the date of initial date of joining i.e. 05.07.1983 instead of 02.12.2003 with all consequential benefits including promotion and arrears of salary with interest at the rate of 12 per cent per annum from the date of accrual till its payment.

2. A few facts relevant for the decision of the controversy involved as narrated in the petition may be noticed. The petitioner joined on 05.07.1983 as Lecturer in English in the regular cadre of Department of Higher Education, Union Territory, Chandigarh, on her selection and appointment to the said post. The petitioner was married in the year 1986. Her child got medical complications after birth leading to her treatment in the P.G.I., Chandigarh, Children Hospital Birmingham (U.K.) and Tata Memorial Hospital, Mumbai. In Mumbai, the petitioner also got ill. Initially, the petitioner was granted leave but later on, the same was refused by the Department. The petitioner was even charge-sheeted vide Memorandum dated 06.08.1998 compelling her to submit her resignation from the service on 16.04.1999 which was accepted vide order dated 08.06.1999. The period of absence from 12.03.1998 to 08.06.1999 was also sanctioned as leave of the kind due. Thereafter, the petitioner submitted representation dated 26.03.2001 for withdrawal of her resignation but the same was not decided. The petitioner filed original application before respondent No.7 which was disposed of vide order dated 29.08.2001, Annexure A.1, with the direction to the petitioner to submit a comprehensive representation. Respondent No.3 rejected the said representation vide order dated 01.02.2002, Annexure A.2. The petitioner then filed appeal before respondent No.2 for reconsideration of the matter, in the light of the relevant Instructions/Rules and Regulations. Respondent No.2 passed order dated 28.10.2003, Annexure A.3 whereby the petitioner was ordered to be taken back in service as Lecturer in

English i.e. the post she was holding on the date of her resignation. The period for which the petitioner remained out of service was ordered to be treated as Extra-ordinary leave under Rule 8.121 of the Punjab Civil Service Rules, Volume I, Part I (in short, “the Rules”) (as applicable to U.T. Employees). It was also mentioned in the said order that the petitioner would be placed below all the employees in the cadre for the purpose of her seniority. Accordingly, the petitioner re-joined the service on 02.12.2003. According to the petitioner, as the service conditions of the employees of the Union Territory of Chandigarh are governed by the Rules, Regulations, Instructions etc. applicable to the employees of State of Punjab by virtue of the notification of the Government of India dated 13.01.1992, her seniority of the petitioner ought to have been decided in terms of Rules 8 of the Punjab Civil Services (General and Common Conditions of the service) Rules, 1994 (in short,” the 1994 Rules”) wherein it had been provided that seniority inter-se of the persons appointed to the posts in each cadre of the service shall be determined by the length of continuous service on such post in that cadre of service. As the intervening period i.e. period from 09.06.1999 to 01.12.2003 was regularized by treating the same as extra ordinary leave under Rule 8.121 of the Rules was not treated as Dies Non period, the length of service of the petitioner ought to have been counted from the date of her initial appointment. In any case, respondents No.2 to 4 at their own treated the petitioner in service from the date of her initial appointment i.e. 05.07.1983 in the seniority list and granted Senior Scale as well as Selection Grade by counting the service of the petitioner from 11.03.2010, Annexure A.7. The petitioner was also issued experience certificate dated 13.06.2013, Annexure A.13, for the purpose of applying for the post of Principal, from the date of her initial appointment. She was also granted two advance increments on account of having Ph.D Degree vide order

dated 04.07.2013, Annexure A.14. The petitioner was even, promoted as Associate Professor vide order dated 01.01.2006. It was only on 11.02.2008 when respondents No. 3 and 4 issued the draft seniority list of the cadre and invited the objections wherein the petitioner was shown to have joined the service on 2.12.2003. The petitioner submitted representation dated 19.02.2008, Annexure A.6. Neither the said draft seniority list was finalized nor the representation of the petitioner was decided. Instead, another draft seniority list was issued vide Memo dated 02.06.2012, Annexure A.8 whereby fresh objections were invited from all concerned. The petitioner submitted representation dated Nil, Annexure A.9 and sought correction of the date of her initial appointment as 05.07.1983 instead of 02.12.2003. Vide order dated 03.2.2012, Annexure A.10, the representation of the petitioner was rejected by respondent No.3. The petitioner submitted another representation dated Nil, Annexure A.11 to respondent No.3 seeking opportunity of personal hearing to explain the entire position. Respondent No.3 granted opportunity of personal hearing to the petitioner vide letter dated 01.07.2013, Annexure A.12 on 12.07.2013 but no decision was taken thereby compelling the petitioner to file original application before respondent No.7. During the pendency of the said original application, respondent No.4 passed order dated 02.11.2015, Annexure A.22 rejecting the representation of the petitioner which was placed on record. According to the petitioner, although her appointing authority was respondent No.3 and opportunity of hearing was also granted by the said respondent, yet her representation was rejected by respondent No.4. The Tribunal rejected the claim of the petitioner vide order dated 01.08.2016, Annexure P.7 mainly on the ground of limitation. Hence the instant petition by the petitioner.

3. We have heard the learned counsel for the petitioner.

4. Learned counsel for the petitioner inter alia submitted that no condition regarding seniority could be laid in view of service Rules 8 and 8.121 of the Rules. It was further submitted that the instructions dated 31.07.1998, Annexure A.4 are bad being contrary to the service rules. Reliance was placed on judgments in *State of Punjab and others Vs. Anita and others, 2015 (2) SCC 170, Harakchand Ratanchand Banthia and other etc Vs. Union of India and others, 1969(2) SCC 166, R.M.D. Chamarbaugwalla and another Vs. Union of India and another, AIR 1957 Supreme Court 628, A.Sagayanathan and others Vs. Divisional Personal Officer, S.B.C Division, Southern Railway, Banglore, AIR 1991 Supreme Court 424, Radhila Bahl Vs. Union of India and another, 2012(1) SLB 687, Pradipbhal Vitthalbhai Tadvhi Vs. State of Gujarat and anothers, 2012 LIC 3073, A.K. Jain Vs. Union of India and others, 2007(3) SLR 823.*

5. The relevant extract of the instructions dated 31.07.1998, Annexure A.4 issued by the Chandigarh Administration, Department of personnel read thus :

“1. Rejoining of Government service within ten years from tendering resignation.

Those women employees, who had tendered their resignation after their marriage due to family problems, can rejoin their service within ten years after tendering their resignation; if any vacancy is available. The period of the Government service shall be treated as extra ordinary leave under rule 8.121 of the Punjab Civil Services Rule, Volume I, Part I and ***she will be placed below all the employees in the cadre for the purpose of her seniority.*** This benefit will be admissible provided she was not in gainful employment and had completed her probation period successfully before tendering her resignation from the Government service and the period of ten years will be limited to the child bearing age (maximum up two children).”

6. Rules 8 and 8.121 of the Rules *ibid* read as under :-

“ Rule 8 Seniority- The seniority inter se of persons appointed to 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 the expiry of the said period of four months in consultation with the Commission or the Board, as the case may be, his seniority shall be determined from the date he joins the post:

Provided further that in the case of two or more persons appointed on the same date, their seniority shall 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 person in the appointment from which they were promoted or transferred; and
- (d) In the case of persons appointed to transfer from different cadres 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; and 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.”

“Rule 8.121 (1) Extraordinary leave may be granted to any Government employee in special circumstances:-

- (a) When no other leave is admissible; or
- (b) When other leave is admissible, but the Government employee concerned applies in writing for the grant of extra-ordinary leave.

(2) The authority empowered to grant leave may commute retrospectively:-

- (a) Periods of absence without leave into extraordinary leave.
- (b) Extraordinary leave granted into leave of a different kind if the latter type of leave was admissible at the time extraordinary leave was granted.”

7. A perusal of the above instructions clearly shows that those women employees, who had tendered their resignation after their marriage due to the family problems, could rejoin their service within ten years thereafter if any vacancy was available. The period of the Government employee during which she remained out of service was to be treated as extraordinary leave under Rule 8.121 of the 1994 Rules. It was specifically mentioned in these instructions that such employee shall be placed below all the employees in the cadre for the purpose of seniority. Further, Rule 8 of the Rules prescribed that the seniority inter se of persons appointed to the posts in each cadre of a service shall be determined by the length of continuous service on such post. Rule 8.121 of 1994 Rules provided that extraordinary leave may be granted to any Government employee in certain special circumstances i.e. when no other leave was admissible and when other leave was admissible but the Government employee applied for the grant of extraordinary leave.

8. In the present case, undisputedly, the petitioner joined as Lecturer in English with the respondent Education Department on 05.07.1983. Due to her family circumstances, she tendered her resignation on 16.04.1999, which was accepted on 08.06.1999. The period from 12.03.1998 to 08.06.1999 was treated as extraordinary leave. She submitted representation dated 26.03.2001 for withdrawal of resignation and for rejoining the job which was permissible under the Rules and Instructions. Having got no response, she filed original application before the Tribunal which was disposed of vide order dated 29.08.2001, Annexure A.1 with the direction to the petitioner to file comprehensive representation. Pursuant thereto, the petitioner submitted detailed representation dated 10.09.2001 which was rejected vide order dated 1.02.2002, Annexure A.2 by the Education Secretary. The petitioner filed review petition against that order before the Administrator. Vide order dated 28.10.2003, Annexure A.3, the Administrator allowed the petitioner to rejoin the service subject to the condition that the period for which she remained out of service shall be treated as extraordinary leave under Rule 8.121 of the 1994 Rules and that she will be placed below all the employees in the cadre for the purposes of her seniority. Grievance of the petitioner is that she could not be placed at the bottom of all the employees in the cadre for the purpose of seniority when the break in service had been regularized by treating the said period as extraordinary leave. She claimed that she was entitled to seniority with effect from the date of her initial date of appointment i.e. 05.07.1983 instead of 2.12.2003. It has been categorically recorded by the Tribunal in its order dated 01.08.2016, Annexure P.7 that the petitioner herself had given representation for rejoining the service as per the instructions dated 31.07.1998, Annexure A.4. Still further, the impugned order dated 28.10.2003, Annexure A.3 could be challenged within one year thereof i.e. up to

28.10.2004 or at best up to 2.12.2004 taking one year limitation from the date of rejoining on 2.12.2003. However, the said application had been filed on 01.07.2014 after delay of more than nine and a half years. The condition of seniority in the order dated 28.10.2003, Annexure A.3 had been incorporated strictly according to the instructions dated 31.07.1998, Annexure A.4. Thus, the condition of seniority had been imposed in view of the instructions dated 31.07.1998 while giving benefit of rejoining within after ten years of tendering resignation to the women employees. The petitioner on the basis of these instructions had submitted her application. The condition of seniority to the effect that she will be placed below all the employees in the cadre for the purposes of her seniority was part of these instructions. Thus, the contention of the petitioner that no condition regarding seniority could be laid cannot be accepted. Equally, the petitioner having availed benefit of instructions dated 31.7.1998 on the basis of which she had rejoined on 02.12.2003, it could not be pleaded that the said instructions were contrary to the Rules. Even otherwise, a plain reading of the instructions dated 31.7.1998 and Rules 8 and 8.121 of the Rules clearly shows that the instructions are in no way contrary to the said Rules whereas infact the instructions govern the situation where women employees seek to rejoin service within ten years of resignation in certain eventualities. The contentions of learned counsel for the petitioner are devoid of any substance and thus rejected. The Tribunal had also rightly declined the claim of the petitioner. The relevant findings recorded by the Tribunal in its order dated 01.08.2016, Annexure P.7, read as under :-

“We have carefully considered the matter. We find considerable merit in the contentions raised by counsel for respondents and find no substance in the contentions raised by counsel for applicant. Order (Annexure A.3) dated 28.10.2003 could be challenged by filing O.A within one year thereof i.e. up to 28.10.2004 or at best

up to 2.12.2004 taking one year limitation period from the date of rejoining of the applicant on 2.12.2003 pursuant to order (Annexure A.3). However, the instant O.A has been filed on 3.07.2014 i.e. after delay of more than nine and half years after excluding the period of limitation of one year. Even no application for condoning the said long and inordinate delay in filing the O.A has been filed nor there is any ground whatsoever to condone the said delay. The O.A is thus hopelessly barred by limitation and deserves to be dismissed on this ground.

11. In addition to the aforesaid, instructions dated 31.07.1998 (Annexure A.4) have not been challenged in the O.A. The condition of seniority in order (Annexure A.3) has been incorporated strictly according to instructions (Annexure A.4). Consequently, so long there is no challenge to instructions (Annexure A.4), the applicant also cannot challenge the aforesaid condition regarding her seniority incorporated in impugned order (Annexure A.3).

12. The applicant is also estopped from claiming the relief sought by her. The applicant herself claimed relief of rejoining the service on the basis of instructions dated 31.07.1998 (Annexure A.4) . Consequently, she cannot turn around to repudiate the said instructions qua the condition of seniority. Moreover, the said condition was incorporated in impugned order (Annexure A.3). Accepting the said order including the said condition, the applicant rejoined the service and never repudiated the said condition for more than 10 years till filing the instant O.A. Even otherwise, counsel for the applicant could not refer to any provision in the service rules which could permit the applicant to rejoin service after her resignation had been accepted and implemented. She could be and was permitted to rejoin service only on the basis of instructions dated 31.07.1998. She was entitled to this relief only subject to the conditions stipulated in the said instructions. Consequently, she cannot take benefit of the said instructions for rejoining the service and also repudiate the said instructions qua condition of seniority. These instructions are

a composite package for rejoining of service after acceptance of resignation subject to the conditions stipulated in the said instructions. The said package has to be taken as a whole.

13. It is thus apparent, that the applicant is being given seniority as per condition stipulated in instructions (Annexure A.4) and order (Annexure A.3), benefit whereof she has availed. Consequently, there is no infirmity much less illegality in the impugned action of the respondents.

14. Contention of counsel for applicant that condition regarding seniority in instructions (Annexure A.4) is bad being contrary to service rules cannot be accepted because provision in the said instructions to permit the women employees to rejoin service after acceptance of resignation is also contrary to service rules and therefore, the very rejoining of the applicant in service would be bad. Moreover, condition in instructions (Annexure A.4) regarding seniority is not contrary to the service rules. The instructions say that women employees can rejoin their service if any vacancy is available and she will be placed below all the employees in the cadre for the purpose of seniority. Thus for the purpose of seniority, it is fresh appointment subject to availability of vacancy. However, benefit of past service is given for the purpose of protection of pay, pension, experience etc. For the same reason, documents (Annexures A.13 to A.16), relied on by counsel for the applicant to show that her date of appointment is depicted to be 05.07.1983, do not help the applicant in any manner because for the purpose of experience, pay protection etc, her date of initial appointment shall remain valid, but for the purpose of seniority, her date of rejoining the service has to be taken into consideration.

15. Judgments cited by the counsel for the applicant are not applicable to the facts of the instant case. In the case of **Anita & others** (*Supra*), Hon'ble Supreme Court has held that Govt. instructions contrary to statutory rules cannot be relied on. However, in the instant case, the applicant herself relied on

instructions dated 31.07.1998 (Annexure A.4) for rejoining the service. She cannot be permitted to approbate and reprobate to contend that condition in the said instructions regarding seniority is bad. On the other hand, provision in the said instructions whereby the applicant was permitted to rejoin the service would also be bad being contrary to service rules and therefore, the very rejoining of the applicant in service would become bad in law. In the case of **Pradipnhai Vitthalbhai Tadv**i (Supra), there was break of only 5 days which was condoned by the authorities. However, in the instant case, the applicant remained out of service since 09.06.1999 till 1.12.2003 and the said period was treated as EOL subject to the condition that on rejoining service, she shall be placed below all the employees in the cadre. Consequently, grant of EOL for the said break period was subject to the aforesaid condition and was not unconditional. In the case of **Radhika Bahl** (Supra), the petitioner prayed for withdrawing her resignation within the period permissible under the service rules. It was noticed that her seniority had to be restored from the original date because there was no provision in the service rules for loss of seniority on withdrawal of resignation within the period stipulated in the rules. In the instant case, however, the applicant was permitted to rejoin service, not under the service rules, but under instructions dated 31.07.1998 (Annexure A.4) and the said instructions stipulate that on rejoining, the employees shall be placed below all the employees in the cadre. Thus the judgments cited by counsel for the applicant are of no help to the applicant.”

9. Adverting to the judgments relied upon by the learned counsel for the petitioner, it may be noticed that in **Anita's case** (supra), it was held by the Apex Court that no reliance could be placed on the Government instructions issued contrary to the statutory rules. The Government instructions in violation of statutory rules are nullity in law. There is no quarrel with the propositions. In the present case, the instructions have not been shown to be contrary to the

service rules. In ***Harakchand Ratanchand Banthia's case*** (supra), it was observed by the Apex Court that what is left of the impugned Act would survive if invalid provisions do not affect the validity of the Act as a whole. In ***R.M.D Chamarbaugwall's case*** (supra), it was held by the Apex Court that in determining whether the valid parts of a statutory are separable from the invalid parts thereof, it is the intention of the Legislature that is the determining factor. The test to be applied is whether the Legislature would have enacted the valid part of it had known that the rest of the statute was invalid. If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety. In a ***Sagayanathan's case*** (supra), it was recorded by the Supreme Court that despite delay, the matter required re-consideration. Therefore, the Tribunal was directed to re-hear the parties. In ***Radhika Bhal's case*** (supra), it was recorded by the Delhi High Court that even if there was break in service, it was not that the petitioner had been re-inducted as a fresh appointee. Her past service cannot be washed away in its entirety. The petitioner was held to be entitled to have her seniority reckoned from the date she was initially appointed. In ***Pradipbhai Vitthalbhai Tadvi's case*** (supra), it was held by the Gujarat High Court that the order excluding seniority while condoning break in service for all other purposes including leave, salary and pension was not held to be proper. In ***A.K. Jain's case*** (supra), it was observed by the Calcutta High Court that in case of dispute as regards promotion or seniority, such dispute financially affects a person every month when he gets the salary and thus the case of action is a recurring one and the provision of limitation contained in the Act does not stand in the way of the applicant in filing an application under Section 19 of the Act. Suffice it to notice that each case has to be decided on its own facts. The

factual position in all these cases being different, the petitioner cannot derive any advantage from the said decisions.

10. In the present case, the petitioner herself claimed the benefit of rejoining after tendering her resignation within ten years as per instructions, Annexure A.4 dated 31.07.1998, wherein specifically a condition was laid that she will be placed at the bottom of all the employees in the seniority list. This was the benefit given by the Government to the women employees subject to the condition regarding seniority. As noticed hereinbefore, learned counsel for the petitioner has not been able to show that the said condition is illegal or arbitrary. He has also not been able to substantiate the claim that the instructions issued by the Government are contrary to the service rules. Consequently, finding no merit in the petition, the same is hereby dismissed.

(Ajay Kumar Mittal)
Judge

September 27, 2016
‘gs’

(Ramendra Jain)
Judge

Whether speaking/reasoned

Yes/No

Whether reportable

Yes