IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Date of decision: 12.01.2017

RSA No.3012 of 2012

Haryana State Agricultural Marketing Board ...Appellant

Vs.

Rana Balbir Singh ...Respondent

CORAM: HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. Punit Malik, Advocate, for
Mr. Partap Singh, Advocate, for the appellant.

Mr. N.C.Kinra, Advocate, for the respondent.

RAJIV NARAIN RAINA, J.

The Board is in second appeal against the judgment and decree passed by the Courts below decreeing the suit of the plaintiff holding that he is entitled to be promoted to the post of Mandi Supervisor -cum- Fee Collector w.e.f. 14.09.1970 i.e. the date when Nasib Singh – defendant No.2 was promoted with all consequential benefits.

The plaintiff-respondent (for short-'plaintiff') and Nasib Singh belonged to different parent offices. The service career of the plaintiff is like this. He was appointed as a Vigilance Supervisor by the Haryana State Agricultural Marketing Board (HSAMB)-defendant/appellant on 17.03.1970. Later on, the Vigilance Cell was abolished and the plaintiff was absorbed as Clerk vide order dated 25.02.1974 and posted to Market Committee, Hisar. Nasib Singh, against whom parity was claimed for the purpose of promotion, was appointed as Care Taker in Market Committee, Kaithal on 16.04.1970 in the pay scale of Care Taker/Auction

Recorders/Clerks in the services of HSAMB. Nasib Singh was promoted as Mandi supervisor/Fee Collector on 14.09.1970, whereas the plaintiff was promoted as Mandi Supervisor / Fee Collector on 31.08.1984. Feeling dissatisfied, the plaintiff submitted representation on 08.09.2005 and also served notice dated 28.11.2005 under Section 31 of the Punjab Agricultural Produce Markets Act, 1961, which did not evoke any response. Hence, the suit was brought for declaration and mandatory injunction against the Board to promote the plaintiff from the date the private defendant was promoted with consequential benefits.

On notice, defendant HSAMB appeared and put in its written statement. They refuted right in plaintiff for promotion on par with Nasib Singh. The first seniority list of AR/Clerks etc. was published as the position stood on 01.01.1976, the name of Nasib Singh did not figure in the list since he held the post of Mandi Supervisor. Nasib Singh had been promoted by the Market Committee, Kaithal and not by HSAMB. The Board took over the services of the employees of the Market Committees and, therefore, the plaintiff was not entitled for promotion on par with Nasib Singh, who belonged to a different Market Committee. There was, therefore, no question of inter se between two belonging to two different Market Committees i.e. one at Hisar and other at Kaithal.

On evidence produced, it was revealed that employees of different Market Committees in the State were transferred from one Market Committee to the other. There was a joint cadre and the seniority of the employees to a particular post was to be considered on the basis of joint seniority list. Admittedly, the plaintiff had joined the post of Vigilance Supervisor on 17.03.1970, whereas defendant No.2 (Nasib Singh) had been appointed as Care Taker, a post equivalent to the post of Auction Recorder on 16.04.1970. The trial Court found no reasonable explanation as to why there was delay in promotion of the plaintiff to the post of Mandi Supervisor. The suit was instituted on 08.02.2006. Admittedly, Nasib Singh was promoted as Mandi Supervisor on 14.09.1970 and the plaintiff was promoted as Mandi Supervisor on 31.08.1984 i.e. after about 14 years. The cause of action and the right to sue accrued to the plaintiff on 14.09.1970, when Nasib Singh was promoted as Mandi Supervisor. The plaintiff waited for about 14 years till he was promoted and even thereafter raised the dispute for the first time by a representation submitted on 08.09.2005 and followed by legal notice on 28.11.2005 claiming promotion from the date the junior namely Nasib Singh was promoted. Even the previous posts held by both were different in nature and duties.

When the Vigilance Cell was abolished, the plaintiff faced the threat of retrenchment, but the official defendant was kind to him and absorbed him as Clerk on 25.02.1974 posting him to Market Committee, Hisar. Nasib Singh was appointed as Care Taker in Market Committee, Kaithal on 16.04.1970 and was promoted as Mandi Supervisor/Fee Collector on 14.09.1970. If the petitioner felt genuinely aggrieved and he had a case, he should have approached the Court in 1970 or within the prescribed period of limitation claiming promotion from that date even assuming that seniority lists were common. The fact that the seniority list was common, as asserted by the plaintiff is true, then even more vigorously would issues of limitation expiring from the cause of action; delay & laches apply to his case to have resorted to his legal remedies in reasonable time. If the seniority lists were not common then the delay might not have come in the way and it was argued on the strength of service rules that seniority list ought to have been common and thereby the right to sue subsists, but this is not the case.

If the plaintiff was retrenched staff employed by HSAMB, as Vigilance Supervisor, then his deployment in Market Committee, Hisar by way of absorption may have led to him being placed at the bottom of the seniority list so as not to affect the rights of the incumbents already working in the Market Committee he was deployed.

Issue No.3 framed was; whether the plaintiff is stopped by his own act and conduct to file the present suit. The question of limitation goes to the root of jurisdiction and becomes the duty of the Court to examine at the time of institution of the suit, whether the suit suffers from bar of limitation or the vice of delay & laches on the facts pleaded in the plaint. It is well known that in matters of promotion, the Court should be approached within reasonable time. The law in P.S.Sadasivaswamy Vs. State of Tamil Nadu, AIR 1975 SC 2271 may be read, wherein the Supreme Court guided that matters of promotion and seniority should be agitated within six months or at least one year from the date of accrual of the cause of action. However, the trial Court has ignored this vital aspect and granted relief to the plaintiff of retrospective promotion w.e.f. 14.09.1970 with all consequential benefits and has thereby decreed the suit on 22.04.2008.

Aggrieved by the judgment and decree of the trial Court, the HSAMB appealed before the learned District Judge, Panchkula under Section 96 of the Code of Civil Procedure. The lower Appellate Court noticed a crucial aspect which was not noticed by the trial Court that the Board has taken a policy decision that the period of service rendered by Vigilance Supervisors shall be counted for all benefits on their new posts vide order dated 15.06.1974. Indeed, this would grant to the plaintiff the right to accrued seniority as Vigilance Supervisor and his seniority has to be reckoned accordingly. This Court agrees with this proposition but this is not all to be said and done. More follows in the discussion.

The lower Appellate Court noticed that in 1973, the Haryana Act of 1973 came into operation and the Punjab Agricultural Produce Markets Act, 1961 was substituted and all Class-III employees of the Market Committees were deemed to be appointed by the Board by virtue of Section 20(1) of the Act. The parties were in Class-III service. The plaintiff has asserted that in August, 2005, he came to know that Nasib Singh, who was appointed as Care Taker on 16.04.1970 in the Market Committee, Kaithal, had become the member of the Board by virtue of Haryana Act of 1973 and he had been promoted as Mandi Supervisor on 14.09.1970.

Prior to 1973, there was a separate cadre for each Market Committee and promotions were regulated by the Market Committees concerned and Nasib Singh had been promoted by the Committee in 1970 and was, therefore, senior to the plaintiff, as argued by the defendants, when the services of all Class-III employees were taken over by HSAMB. Since Nasib Singh had been promoted on 14.09.1970 before the Act came into operation in Haryana, the question of seniority or being junior was incorrect view of the case. The plaintiff was promoted on 31.08.1984 on the basis of seniority-cum-merit. The services of the plaintiff were terminated on 28.02.1974 and was appointed as Clerk w.e.f. 01.03.1974, when Nasib Singh was already appointed about four years before that. The HSAMB had raised the issue of bar of limitation. The Board referred to the case of one Hardeep Singh, who had filed an appeal before the Government to promote him and bring him on par with Balwant Rai, who was an employee of Market Committee, Ladwa, and his claim was accepted in 1995 and was promoted with effect from the date his junior was promoted. It was pleaded that the plaintiff and Nasib Singh were appointed by separate Market Committees. It was pleaded that Kali Ram raised objection and filed representation, which was rejected as he was employee of a separate Market Committee and Kali Ram filed an administrative appeal before the Government, which was rejected. He filed a suit challenging the decision, which was decreed in his favour. The Board went in SLP and the appeal was disposed of on account of a concession given by the employee that he would not claim arrears and the question of law was left open by the Supreme Court while disposing of the matter. Those proceedings will be of no avail to the plaintiff, who has to stand on his own legs.

The lower Appellate Court has discarded the plea of the defendant on delay and limitation for the reason that defendants have failed to prove when the seniority list was officially published and circulated. There was no evidence that objections were invited. Both the plaintiff and Nasib Singh had been working in different Market Committees and the plaintiff could not have come to know of the seniority positions. The learned District Judge noticed a large number of judgments to conclude that in the matter of seniority, delay should not come into way. These decisions are: (i) Rameshwar Dass Vs. State of Haryana, 2005 (4) SCT 618; Haryana State & another Vs. D.K.Jain, 2000 (2) RSJ 608; J.C.Aggarwal Vs. Haryana State Federation of Cooperative Ltd. 2011 (1) SCT 511; K.T.Veerappa & others Vs. State of Karnataka & others, 2006 (2) RSJ 773; State of Kerala & others Vs. E.K.Bhaskaran Pillai, 2007 (2) SCT 757 & Zile Singh Vs. The Haryana State Agricultural Marketing Board & others, 1997 (3) RSJ 114. The lower Appellate Court has held that there was a consistent line of authorities where it has been held that if an employee has been discriminated and the department has promoted the official and given arrears to them, then the others cannot be denied the relief. Accordingly, the appeal has been dismissed and the suit decreed.

Before this Court, the crucial question which arises is; whether the assertion of the Board in the written statement filed before the trial Court depicts the correct position that prior to 1973 the cadre of each Market Committee was separate and the services as well as promotions of employees were being governed by the Market Committee concerned. There is no assertion in the plaint that the cadre of Class-III employees in different Market Committees was the same. The plaintiff filed a replication to the written statement and asserted as follows:

> "10. That Para No.10 of w/s as stated is wrong, hence denied. Para No.10 of the plaint is reaffirmed to be correct. The contention urged by the defendant is misconceived and untenable. The submissions made by defendant in this para No.10 are inconsistent with the reply of Para No.8. It stand admitted by defendant vide Para No.8 that Shri Nasib Singh had become the member of the service of the Board w.e.f. 16.04.1970 by virtue of statutory provisions of Haryana Act No.21 of 1973. Hence, it would be wrong to say that Shri Nasib Singh was senior to plaintiff. Plaintiff has the right for being treated equal amongst equals and given the promotion which had been allowed to his junior by applying the provisions of equality before law laid down under Art.14 & 16 of the Constitution of India."

There is no specific rebuttal to the stand in the written statement in Para.10. If the cadre was separate, then the plaintiff can have no case since defendant No.2 Nasib Singh was promoted before the Punjab Act was amended in 1973. Ordinarily, what is not pleaded cannot be proved by evidence. However, one is dealing with the service law matter coming from a suit. There must, therefore, be an order in writing or evidence on the official record of the Board and the Market Committees to establish the issue as a fact. No amount of oral evidence can be let in on the contents of a public or private document and if there is none, then Court would not draw an assumption by creating non-existing facts on presumptions and surmises. There was also no issue struck; whether there was one or separate cadre of Class-III employees of the categories of the plaintiff and defendant No.2 and hence this question cannot be settled without a specific issue raised or documents produced by the Board establishing these facts in regular second appeal.

In order to enter upon a debate on the issue, one would need to hold in hand and read authentic papers representing tentative or final seniority lists issued prior to 1973 together with contemporaneous record. The burden is on the plaintiff to prima facie show that the cadre was joint and seniority list was common. Even giving him such an allowance would be misplaced as he did not plead in the suit this case nor introduced it by an amendment or claim an issue. The position that will obtain after 1973 cannot be disputed.

On record, there was evidence by way of affidavit of Rajinder Kumar Sharma, Clerk, HSAMB, Sector-6, Panchkula as Ex.DW-1/A deposing to the effect that prior to 31.03.1973 all the Market Committees were independent autonomous bodies. All appointments/promotions were made by the respective Committees, as they are autonomous bodies, seniority of their staff was maintained by the respective Committees and not by the Board. The witness was cross-examined by the plaintiff and the relevant deposition in transliteration is reproduced:

> "*...Yeh sahi hai ki Clerk/Care Taker/Auction Recorder ki agli promotion bataur Mandi Supervisor-cum-Fee Collector hoti hai. Aaj khud kaha ki iska naam seniority list mein isliye nahi aaya ki iski padonati Market Committee dwara ki gayi thi naa ki Board dwara.*

> *…Yeh sahi hai ki Hon'ble High Court ne (Pb. & Hry. High Court) RSA No.1762/2002 titled HSAMB Vs. Kali Ram Naidu ki case mein yeh decide kiya hai ki vaastav mein Haryana 1973 se pahle bhi ek he Cadre tha. Jise Board ne bhi savikaar kiya he. Aaj khud kaha ki Board ne staff, fir kaha Market Committee kaa staff 31.03.1973 ko apne adhin liya jo seniority Market Committee mein pahle thi usi ke aadhar par seniority fixed ki gayi.*"

In order to examine this issue in the wider perspective, one would have to differentiate between what right the plaintiff had under the Rules while serving in a different Market Committee than Nasib Singh prior to 1973. The other issue is a case of discrimination set up by the plaintiff vis-à-vis Nasib Singh.

Admittedly, the plaintiff was appointed as Clerk w.e.f. 01.03.1974 after his services were terminated on 28.02.1974. This appointment was accorded after Haryana Act of 1973. Nasib Singh was promoted by the Market Committee, Kaithal and not by the Board because the Board had not even taken over the Market Committee by then and, therefore, defendant HSAMB is right in contending that the plaintiff and Nasib Singh were un-equals. In arguendo, if the cadre was one and seniority list was same and a seniority list was published, then the plaintiff would have knowledge of his existence in such seniority list, which would have been the best evidence to produce to prove prejudiced caused to him. If that was so, then I fail to see as to how the plaintiff could plead with such flourish that he came to know of Nasib Singh's promotion only in the year 2005 except to overcome bar of limitation. This is expecting too much. Both the Courts below have not referred to any joint seniority list prior to 1973 and have, therefore, proceeded to decide the case on conjectures and surmises. This is how the question of limitation arises to predominate the action brought which remedy long expired, if not the right, and which core issue has not been dealt with articulately or in proper perspective by the learned lower Appellate Court. After all the plaintiff had challenged the seniority list after 20 years and had not even served any representation in this regard before the authorities. The suit was barred by time. Therefore, the judgment in appeal cannot survive and deserves to be set aside in exercise of jurisdiction under Section 41 of the Punjab Courts Act, 1918.

While we are on this judgment, it may be noticed that in RSA No.1762 of 2002 titled 'Haryana State Agricultural Marketing Board, Panchkula Vs. Kali Ram Naidu & another' decided on 30.04.2002 (Ex.P11), this Court passed the following order:

> "Heard counsel for the appellant at length.
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> Both the courts below have given concurrent findings of fact which are based on due appreciation of evidence. Learned counsel for the appellant submits that both the courts below have wrongly held that there was a joint cadre even prior to 1973. Having perused the judgment of the lower appellate court, I find that the conclusion reached that there was a joint cadre in reality, even prior to 1973, is based on due appreciation of the evidence. The same cannot be said to be unreasonable. No substantial question of law arises.
>
> Dismissed."

In the light of this, reference would need to be made to the question; whether the seniority was joint list or not, but that issue was left open by the Supreme Court in the case of *Kali Ram Naidu* (supra) and the decision was based on a concession given by the respondent employee in HSAMB's SLP that he would not claim arrears, if relief of past seniority alone is granted. If there were frequent transfers within the Market Committees, then the plaintiff should have been more vigilant to guard his seniority, but he let time pass by satisfied with his lot only to wake up one fine morning to bring the suit for a declaratory decree with mandatory injunction. Even if the Board had decided after taking over the Market Committees that Vigilance Supervisors would get the period of service in that capacity counted towards their leave and seniority would not give a right to the plaintiff to march over Nasib Singh-defendant No.2 over whom seniority is claimed, and, therefore the case could not be treated as binding precedent.

Merely because others have got the benefit of past seniority would not give the plaintiff a positive right to claim seniority and right to retrospective promotion to conveniently tide over delay, laches and limitation. A mere bald statement of the plaintiff in the plaint that he came to know of his grievance only in 2005 is to tide over delay. The plaintiff did not produce before the Courts his orders of transition after termination from closed unit or orders from the post of Market Supervisor to that of Clerk in Market Committee, Hisar. A perusal of the paper-book and the lower Courts record do not bring out a clear picture in favour of the plaintiff, which is indisputable and it would be highly unsafe to grant relief to the plaintiff based on many imponderables and ambiguities and lack of direct documentary evidence. The plea of discrimination has to be proved to the hilt by a valid comparison to the case set up of those who were advantaged and disadvantaged to apply Article 14 of the Constitution. Therefore, the judgments relied upon by the lower Appellate Court cannot be applied blindly to the facts of this case or their inadequacy, even though the propositions of law laid down in those judgments (supra) is sacrosanct and binding.

The service law is by character dependent on documents and no amount of oral evidence can be led on the contents of the documents. The documents speak for themselves and service jurisprudence is built on those foundations raised from public record. An admission here or a denial there in oral testimonies of witnesses is hardly of any consequence because what the Courts below in this case were called upon to do is what the High Court does, in issuing writs of certiorari and mandamus. The writ of certiorari goes to record. The same is the case of declarations and injunctions sought from the civil court in a service matter. A declaration sought from the civil court is confined to the law applicable to writs of certiorari and mandamus though the nomenclature is different.

It is well settled that absence of clarity and one fact can alter a decision before saddling the official defendant with liability to pay arrears of difference of salary spanning 14 years. The suit was barred by limitation. I would, therefore, accept this appeal and set aside the judgments and decrees of the Courts below and dismiss the suit with costs. The interim stay granted vide order dated 21.09.2012 is made absolute.

12.01.2017 **[RAJIV NARAIN RAINA]**
Vimal **JUDGE**

Whether speaking/reasoned: *Yes*
Whether Reportable: *No*