

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

CWP-11245-2009 (O&M)

Date of Decision: 24.04.2018

Sunil Kumar Khullar and others

... Petitioners

Vs.

Union of India and others

... Respondents

CORAM : HON'BLE MR. JUSTICE P.B. BAJANTHRI

Present : Mr. Ashish K. Gupta, Advocate and
Mr. Alankar Narula, Advocate
for the petitioner (s).

Mr. B.S. Kanwar, Advocate
for UOI.

Mr. Rohit Kapoor, Advocate
for respondents No.1 and 2.

Mr. Sumeet Mahajan, Sr. Advocate with
Mr. Anil Sharma, Advocate
for respondent No.3.

Mr. Karmander Singh, Advocate
for respondents No.4 and 5.

P.B. BAJANTHRI J. (Oral)

In the instant petition, petitioners have challenged the validity of the promotion order dated 19.05.2009 (Annexure P-3) passed by respondent No.5 while promoting respondents No.6 to 10 to the post of Reader Grade-I and respondents No.11 and 12 to the post of Reader Grade-II and further sought to consider the case of the petitioners and other Stenographers Grade-I for promotion as Reader's Grade I and II and to promote them to the said post in view of the recommendation of the Shetty Commission.

2. On 18.4.2018, following order was passed:

“Despite giving sufficient time, counsel for the High Court as

well as District and Sessions Judge, District Court, Chandigarh are not in a position to apprise this Court in respect of creation of the post of Reader Grade-I/Grade-II. Learned counsel for the High Court pointed out from the Rules called "The Chandigarh Union Territory Subordinate Courts Establishment (Recruitment and General Conditions of Service) Rules, 1997" (for short 'the 1997 Rules') notified on 25.11.1999 do not contain the post of Reader Grade-I or Grade-II. Therefore, for the first time, the Reader post is stated to have been filled up by means of promotion in the month of May, 2009 with reference to decision of the Supreme Court read with the Government letter, Chandigarh Administration letter and this Court's letter dated 22.07.2005, 31.01.2006, 10.08.2006 and 17.04.2009. In the absence of creation of Reader Grade-I or Grade-II post so also amendment to the Rules, 1997, District and Sessions Judge seems to have proceeded to promote various post holders like Translator, Reader, Senior Assistant, Librarian, English Clerk, Record Keeper, Assistant, Judgment Writer (Senior Grade) and so on to the post of Reader Grade-I. For the purpose of filling up of particular post, competent authority is required to create a post by means of executive order. In the absence of rules of recruitment or bringing necessary amendment to the existing rules of recruitment while incorporating particular post. Further method of recruitment is required to be stipulated like direct recruitment or promotion/deputation. Further criteria for promotion so also quota ear-marked for the source cadre. In the absence of the creation of the post of Reader Grade-I or Grade-II by means of executive order or rules or recruitment, the District and Sessions Judge, Chandigarh seems to have directly promoted persons' whose names are reflected in Annexure P-3 irrespective of different cadre would be arbitrary and illegal so also in the absence of creation of Reader Grade-I or Grade-II post and its cadre strength. In this regard, if there is no assistance on the next date of hearing,

matter would be decided with the available records on the fixed date.

List this matter on 24.04.2018 at 2:00 p.m.

A copy of this order be given to the learned counsel for the High Court under the signatures of the Bench Secretary.”

3. Pursuant to the order dated 18.04.2018, official respondents were not in a position to apprise this Court relating to implementation of Shetty Commission in respect of filling up of the post of Reader Grade-I and Reader Grade-II by means of executive order or amendment of Rules called “The Chandigarh Union Territory Subordinate Courts Establishment (Recruitment and General Conditions of Service) Rules, 1997” (for short 'the 1997 Rules').

4. Today what has been placed on record by the learned counsel for respondents No.4 and 5 is it is an internal communication between the Hon'ble High Court and various authorities. Merely making communication between two offices does not give the shape of selection to the post of Reader Grade-I and Reader Grade-II. Any new post is required to be created in an organization like public office/s, it is bounden duty of the competent authority to create a post by means of executive order or making necessary amendment to the existing Statutory Act/Rules.

5. Chandigarh Union Territory Subordinate Courts Establishment (Recruitment and General Conditions of Service) Rules, 1997 (for short “Rules, 1997”) framed by the High Court of Punjab and Haryana with the approval of Government of India under Article 309 of the Constitution. Rule 2 of Rules, 1997 reads as under:-

*“2. **Definitions** – In these rules, unless the context otherwise requires, -*

*(a) “**Appointing Authority**” for the posts in the service other*

than Superintendent means the District and Sessions Judge of the District(s).

*b) “**Cadre**” means the strength of a service or a part of a service as a separate unit and includes permanent and temporary post which has remained in existence for the last one year.*

*(c) “**District Establishment**” means the employees working in the Sessions Division.*

*(d) “**Direct Appointment**” means an appointment made otherwise than by promotion, transfer or by deputation.*

*e) “**Government**” means the Government of India.*

*(f) “**Ministerial servant**” means a member of service whose duties are entirely clerical and any other class of service specially defined as such by general or special order by the High Court and shall include members of Class II and III service other than Process Servers and Class IV employees.*

*(g) “**Recognised University or Institution**” means:-*

(i) any university or institution incorporated by law in any of the State of India; or

(ii) any other university or institution which is declared by the Government to be a recognised university or institute.

*(h) “**Service**” means members of Class II, Class III and Class IV as detailed in schedule I to these rules.*

*(i) “**Union Territory**” means Union Territory of Chandigarh.”*

Definition of “Cadre” reveals that strength of a service and includes permanent and temporary posts. “Direct Appointment” means an appointment made otherwise than by promotion, transfer or by deputation. Rule 3 relates to service shall comprise the posts as shown in Schedule I to the Rules. Rule 7 relates to mode of appointment and qualifications to the posts like Superintendent (Class-II), Judgment Writer (Senior Grade), Superintendent Grade-II, Judgment Writer Junior Grade/Stenographer, Assistant, Steno-typists, Clerks, Bailiffs, Driver (Class-III) and Process

Servers, Daftri, Usher, Record Lifter and Peon (Class-IV). Reader Grade-I and Grade-II posts have not been created pursuant to Shetty Commission's report. By means of amendment of Rules, 1997 or in the alternative if the official respondents are creating new cadre or post, in that event they should have resorted to create Reader Grade-I and Grade-II posts by means of amendment of Rules, 1997 or in the alternative they could have issued executive orders since for the first time post of Reader Grade-I and Grade-II is being identified with reference to Shetty Commission' report. Article 309 of Constitution relate to recruitment and conditions of service of persons serving the Union or a State. Rules, 1997 has been framed under Article 309 of Constitution. Therefore, recruitment and any service condition were required to be made under Article 309 of Constitution read with Rules, 1997 like creation of Reader Grade-I and Grade-II posts, cadre strength, mode of recruitment (direct/promotion/transfer/deputation). If it is by promotion, in that event, which is the source cadre. If it is more than one source cadre, in that event, combined seniority list of those source cadres was required to be prepared and notified. In the present case, District & Sessions Judge, Union Territory, Chandigarh proceeded to promote contesting respondents and others directly in the absence of creation of Reader Grade-I and Grade-II posts under Rules, 1997 or by issuing an executive order in creating post and method of recruitment. Further, without identifying source cadre(s) and so also without preparation of seniority list of source cadre(s). Therefore, impugned promotion order is in violation of 1997 Rules, Articles 14 and 16 of Constitution.

6. Rules of recruitment would be in terms of the constitution, pattern, nomenclature of posts, cadres, categories, prescription of

qualifications and conditions of service including avenues of promotion, subject to the limitations and restrictions envisaged in the Constitution. Competent authority is permitted to frame different rules for different classes of employees. This would include the power to constitute a new cadre or by merging certain existing cadres. The power of the State Government to frame service rules is not an independent power; it is power delegated by the State Legislature. Once the State Legislature enacts a statute to regulate service conditions, to that extent the rules framed by the executive under Article 309 stand superseded. In the present case, 1997 Rules have been framed under Article 309 of the Constitution, therefore, the the purpose of incorporating Reader Grade-I and Grade-II necessary amendment to 1997 Rules is required or in the alternative in view of the fact that posts are new to the rules of recruitment. Therefore, executive order could be passed under Article 73 of the Constitution by the Central Government or Article 162 of the Constitution by the State Government. These can be issued even where rules have been made but are silent on a particular subject or point in issue. The exigencies of administration at times require immediate creation of service or posts. It is not obligatory to make rules of recruitment before a service is constituted or post is created or filled up. An executive order can create a post, prescribe the requisite qualification and fill up the same. When a new service is to be constituted, the Government can decide the sources from which personnel will be recruited for manning the service.

7. Promotion could be ordered only in terms of the rules or executive order holding the field. In the case of *Paras Kumar vs. Ram Charan*, reported in (2004) 6 SCC 88, it was held that several police

officials were granted ad hoc promotion on the ground of bravery or achievement in sports. However, the Punjab Police Rules did not contain any provision for grant of such promotion. The Supreme Court suggested that the Punjab Government should regularize these promotions. This was accordingly done. But the decision emphasised the point that a promotion can only be in accordance with prescribed rules. In one of the cases in the same judgment, a police official was promoted as a Head Constable in the Dog Squad. But there was no such post. His reversion was upheld. If there was no post, the Government should have created such a post with retrospective effect by amending the relevant rules in exercise of its executive power under Article 162. The State Government is obliged to make appointments only in fulfillment of its constitutional obligation as laid down in Articles 14, 15 and 16 of Constitution. Further, it is also permissible that in the absence of any act or rule framed under Article 309, the State Government have always the power to lay down the principles or issue executive instructions in all matters relating to service, including principles to be followed in promotions, subject, of course, to the requirement of Article 320 wherever necessary.

8. Therefore, contentions of the officials respondents to the extent that Union Territory Chandigarh has accepted the Shetty Commission report and thereafter correspondence has been made to this Court as well as District and Sessions Court of UT does not give the status of the selection to the post of Reader Grade-I and Reader Grade-II. That apart while implementing the Shetty Commission report, necessary amendment to the 1997 Rules is required since each and every post in the U.T. Chandigarh subordinate Courts provides for method of recruitment in the 1997 Rules.

Therefore, necessary amendment to 1997 Rules is required while incorporating the post of Reader Grade-I and Reader Grade-II, cadre strength and further prescription of rules of recruitment, direct recruitment, promotion, stipulation of criteria and source cadre for the purpose of promotion. In the absence of aforesaid criteria, Annexure P-3 is not in accordance with law. In other words, merely acceptance of Shetty Commission by the U.T. Chandigarh and further making correspondence with the High Court and District and Sessions Judge does not empower the competent authority to fill up the post of Reader Grade-I and Reader Grade-II in the form of promotion by pick and choose method. Accordingly, Annexure P-3 dated 19.05.2009 is set aside. Petition stands allowed. Concerned respondent/competent authority is directed to implement the Shetty Commission while amending 1997 Rules to the extent of incorporating the post of Reader Grade-I and Reader Grade-II. Such a decision shall be taken by the competent authority within a period of three months from today in accordance with law. Thereafter, competent authority is at liberty to fill up the post of Reader Grade-I and Reader Grade-II.

9. At this stage, learned counsel for the High Court submitted that amendment to 1997 Rules or by passing of executive order may not arise in view of the fact that U.T. Chandigarh has accepted the Shetty Commission report and communicated the same to the High Court and District and Sessions Judge. The said argument is not tenable for the reasons that in the service jurisprudence if any post is required to be filled up, first thing is that the post should be created by means of executive order or by any amendment to the existing Rules and it is to be incorporated as a new cadre like in the present case like Reader Grade-I and Reader Grade-II. Therefore,

merely acceptance of Shetty Commission Report by the U.T. Chandigarh does not give the shape of selection to the post of Reader Grade-I and Reader Grade-II so as to defend the promotion order. Moreover, selection of post and method of recruitment or criteria is not made known to the employees. In fact competent authority was required to issue draft Rules or draft executive order inviting objections from the likely to be affected persons and thereafter proceeded to incorporate the post of Reader Grade-I and Reader Grade-II in the rules of recruitment. Further source cadre seniority list is required to be prepared and finalized. It is evident that promotion to the post of Reader Grade-I and Reader Grade-II is being filled up among the various post like Translator, Reader, Senior Assistant, Librarian, English Clerk, Record Keeper, Assistant, Judgment Writer (Senior Grade). It is not even the case of High Court before promoting or before passing order of promotion vide Annexure P-3 that they have prepared combined seniority list of aforesaid cadres so as to maintain seniority among the aforesaid cadres. Therefore, aforesaid contention is hereby rejected. Respondents have not made out a case to affirm impugned promotion orders.

24.04.2018
rajeev

(P.B. Bajanthri)
Judge

Whether speaking/reasoned **Yes/No**

Whether reportable **Yes/No**