

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

(1) CWP No. 19399 of 2011 (O&M)
Date of decision: 23.01.2018

Er. Harinder Singh and others

...Petitioner(s)

Versus

State of Punjab and others

...Respondent(s)

(2) CWP No. 11815 of 2012 (O&M)
Date of decision: 23.01.2018

Er. Harinder Singh and others

...Petitioner(s)

Versus

State of Punjab and others

...Respondent(s)

CORAM: HON'BLE MR.JUSTICE JITENDRA CHAUHAN

Present:- Mr. D.S. Patwalia, Sr. Advocate with
Mr. Kannan Malik, Advocate for the petitioner(s)
in CWP-19399-2011.

Mr. Animesh Sharma, Advocate for the petitioner(s)
in CWP-11815-2012.

Ms. Sudeepti Sharma, Addl. A.G., Punjab.

Mr. Rajiv Atma Ram, Sr. Advocate with
Mr. Abhishek Arora, Advocate
for respondent No.5 in CWP-19399-2011.

Jitendra Chauhan, J. (Oral)

The aforementioned two petitions are being decided by way
of common order, as common questions of law and facts are involved in

the matter.

By way of instant writ petitions, under Articles 226/227 of the Constitution of India, the petitioner(s) seek(s) issuance of a writ in the nature of certiorari for quashing the agenda note as circulated by covering letter dated 10.10.2011 (Annexure P-8) vide which the respondents proposed to consider to fill up the vacant post of Executive Engineer reserved for the physically handicapped person by completely misreading the provisions of the instructions dated 02.05.1997 (Annexure P-4) and the judgment dated 06.09.2010 by this Court in CWP-11467-2010.

Learned senior counsel for the petitioner(s) has argued that petitioner No.1 belongs to physically handicapped category, whereas, petitioner Nos. 2 to 8 belong to general category. The petitioners were working as Sub Divisional Engineer at the time of filing the present petition. He refers to Annexure P-3, the seniority list dated 29.11.2006 to contend that the promotion has to be made on the basis of seniority of Sub Divisional Engineer and as per the seniority list, respondent No.5-Paramjoti Arora is junior to the petitioners. He further states that the vacancy given to respondent No.5 was the first vacancy available after the promulgation of instructions creating roster for persons with physical disabilities and as such only the 11th roster point could be given to a person with disability.

It is further submitted that if the reservation has to be provided as per the instructions issued from time to time, even then

petitioner No.1, who belongs to the physically handicapped category (Orhtopaedic) is senior to respondent No.5 and as 3% reservation provided for promotion, the same will go to petitioner No.1 as per the seniority. Learned counsel refers to Rule 6 (3) of the Punjab Service of Engineers (Civil Wing), Department of Public Works (B and R Branch) Group 'A' Service Rules, 2005, governing the promotion to the post of Executive Engineer to contend that the promotions are to be based upon seniority-cum-merit and seniority alone does not confer any right for promotion. He further refers to the instructions dated 02.05.1997 (Annexure P-4) to submit that earlier 3% reservation was provided only for the direct recruitment in Class-I to IV services and there was no reservation in promotion for the disabled categories. It was also provided in the instructions that the reservation should be implemented by means of 100 point roster and vacancies at roster point No.11,40 and 71 are reserved for the disabled categories. Reliance has also been placed by learned senior counsel for the petitioner(s) to the order dated 06.09.2010 (Annexure P-5), passed by a Division Bench of this Court wherein the direction has been issued to the State of Punjab to keep 3% posts reserved for promotion for the disabled in Group 'A' and 'B' posts and it is argued that such reservation can be calculated only prospectively from the date of judgment and not from the date of implementation of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short 'the Act').

Per contra, learned State counsel as well as learned senior

counsel for respondent No.5 has argued on the point of maintainability of the present petition that the challenge in the present petition is limited to the Agenda Note prepared for promotion to the post of Executive Engineer and respondent No.5 stands promoted as an Executive Engineer vide order dated 28.10.2011 (Annexure R-1) and the promotion order dated 28.10.2011 has not been challenged, therefore, the present petition is not maintainable. He has further submitted that the present petition was filed in the year 2011 but no effort was made to amend the petition to lay challenge to the validity of the promotion order dated 28.10.2011. In support of her assertion, learned State counsel refers to **Piare Lal Vs. Union of India and others**, 1975(4) SCC 76, wherein it was held that in the absence of challenge to the impugned order the validity of the same order cannot be examined and no one could be permitted to amend the petition after a long lapse of time.

Learned senior counsel has further contended that during the pendency of instant petition, respondent No.5 has been further promoted as Superintending Engineer, by virtue of order dated 30.11.2016, vide Annexure R-5/14, which also has not been challenged. He further states that some other employees and colleagues of the petitioners have filed CWP-20318-2016 whereby challenge has been laid to the recommendations of the DPC in favour of respondent No.5 for promotion to the post of Superintending Engineer, which stands dismissed, vide order dated 04.10.2016. Learned counsel has referred to Section 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and

Full Participation) Act, 1995 which mandates that every appropriate Government shall appoint in every establishment such percentage of vacancies not less than 3 % for the persons or class of persons with disability of which one per cent each shall be reserved for persons suffering from i. blindness or low vision, ii. Hearing impairment and iii. Locomotor disability or cerebral palsy, in the post identified for each disability, meaning thereby the reservation for each disability has also been provided in the Act. Learned counsel has further referred to the Instructions dated 23.09.2011 (Annexure P-6) to assert that the specific roster point was provided vide instructions dated 23.09.2011 and it has been decided by the authorities to provide roster point Nos. 10,40, and 70 for the disabled candidates belonging to Group 'C' and 'D' services and roster point Nos. 11,40 and 71 for the disabled candidates belonging to Group 'A' and 'B' services. It has also been provided in the instructions that the criteria which has been fixed for the grant of reservation to the physically handicapped persons in case of direct recruitment, vide letter No.10/26/95-5SS/1252 dated 02.05.1997 (Annexure P-4) will also be implemented in case of promotion. In Clause No.3 of the instructions dated 02.05.1997, the breakup of the reservation is provided wherein 1% is reserved for the blindness or low vision, 1% is reserved for the hearing impairment and 1% is reserved for the locomotor disability. Further in Clause 5 it has been clarified that the above percentage of reservation should be implemented by means of a 100 point roster and vacancies falling at point Nos.11,40 and 71 be reserved for the above three

categories respectively. Therefore, learned counsel contends that the reservation has to be implemented as per the preference provided in the instructions dated 02.05.1997. Hence the first post of Executive Engineer has to go to respondent No.5 (blindness of low vision category).

He has further referred to the order dated 23.03.2012 (Anenxure R-5/13) passed in COCP No.941 of 2011 wherein the clarificatory direction was issued by this Court to the effect that the Department concerned shall now proceed to identify the posts to be filled in by promotion from amongst the specially challenged persons and consider their claim for promotion against such identified posts from the due date in terms of the judgments passed by this Court from time to time. Learned counsel argued that till the year 2011 when respondent No.5 was promoted as Executive Engineer, 182 vacancies had been filled up and accordingly 6 vacancies fell to the share of persons with disabilities under the Persons with Disabilities (Equal Opportunities Protection of Rights and Full Participation) Act, 1995, therefore, he states that this was not the first vacancy meant for persons with disabilities, rather 6 vacancies had arisen and it is for the first time the reservation was given effect to.

In support of his contentions, learned senior counsel for respondent No.5 cites **Paramjit Goyal and others Vs. State of Punjab and others** in CWP-20318-2016, decided on 04.10.2016, **Piare Lal Vs. Union of India and others**, 1975(4) SCC 76, **Union of India and another Vs. National Federation of the Blind and others**, 2013(4) SCT

807, Lily Thomas Vs. Union of India, 2000(3) RCR (Civil) 252, Dalbir Singh Bagga Vs. State of Punjab, 1999(4) SCT 540 and Amit Ganeriwala Vs. State of Haryana, 2009(4) SCT 834.

I have heard the rival contentions of learned counsel for the parties.

In the instant petition, the challenge has been laid to the promotion of respondent No.5 who held the post of Executive Engineer at the time of filing the petition and now has been promoted as Superintending Engineer, vide order dated 30.11.2016 (Annexure R5/14). The argument of learned counsel for the petitioners that the post of Executive Engineer which has been filled up by way of promotion of the private respondent had to be filled up on the basis of seniority-cum-merit as required by the Rules is not tenable as it is the conceded position that the Act was notified w.e.f. 07.02.1996 and as per said Act, 3% vacancies are to be filled up (1% each) from amongst persons suffering from (i) blindness or low vision, (ii) hearing impairment and (iii) locomotor disability or cerebral palsy. Therefore, 3% of the total number of vacancies filled up since promulgation of the Act have to persons with disabilities. It is an admitted fact that till 2011, 182 vacancies had been filled in and six vacancies had fallen to the share of persons with disabilities, therefore, on account of said reservation, respondent No.5 was the first person with disability to be promoted as Executive Engineer. From the above, it is amply clear that the persons with disabilities are a separate class. The classification has been done by an Act of Parliament

which has not been assailed, therefore, the Court feels that the petitioners cannot claim promotion against a vacancy meant for a person with disability on the basis of their seniority.

Further, the argument of learned counsel for the petitioners that the roster had been created for the first time by virtue of instructions dated 23.09.2011, (Annexure P-6) and the vacancy given to the private respondent has to be treated as first vacancy instead of 11th vacancy is refuted, keeping in view the ratio of law laid down by Hon'ble the apex Court in Lily Thomas Vs. Union of India, 2000(6) SCC 224, wherein it has been observed as under:-

“59. We are not impressed by the arguments to accept the contention that the law declared in Sarla Mudgal's case cannot be applied to persons who have solemnised marriages in violation of the mandate of law prior to the date of judgment. This Court had not laid down any new law but only interpreted the existing law which was in force.. It is settled principle that the interpretation of a provision of law relates back to the date of the law itself and cannot be prospective from the date of the judgment because concededly the Court does not legislate but only give an interpretation to an existing law. We do not agree with the arguments that the second marriage by a convert male muslim has been made offence only by judicial pronouncement. The judgment has only interpreted the existing law after taking into consideration various aspects argued at length before the Bench which pronounced the judgment. The review petition alleging violation of Article 20(1) of the Constitution is without any substance and is liable to be dismissed on this ground alone.”

Thus, in view of the above, the reservation of 3% as per the

provisions of the Act has to be given effect w.e.f. 07.02.1996, the date on which the Act came into force meaning thereby 11, 40 and 71 vacancies have to be given to persons with physically disabilities. Therefore, the argument that persons with disabilities have to wait for the 11th vacancy is not sustainable. In the instant case, reservation came into being with the promulgation of the Act; the roster is only to give effect to that as held in Lily Thomas's case (supra).

As regards to the assertion raised that petitioner No.1, who is Orthopaedically handicapped and being senior to private respondent, had a right to be considered prior to her against the vacancies meant for persons with disabilities, is an admitted fact, however as per Section 33 of the Act and as discussed earlier, there is 3% reservation (1% each) and as per instructions dated 23.09.2011 (Annexure P-6) it has been specifically mentioned that in group A and B services, roster point Nos. 11,40 and 71 for the physically handicapped persons will be reserved. Apart from this, the criteria has been fixed for grant of reservation to the physically handicapped persons in case of direct recruitment. In the case in hand, the competent authority has given the said vacancy as per reservation, to a person with disability of blindness or low vision. Therefore, this Court finds no fault in the impugned orders and accordingly, the present petition(s) are dismissed.

23.01.2018
sumit.k

(JITENDRA CHAUHAN)
JUDGE

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