

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

(1)

**CWP NO.16002 OF 2018
DATE OF DECISION:16.09.2019**

Dilbagh Singh

...Petitioner

Vs.

State of Punjab & Ors.

..Respondents

(2)

CWP NO. 16014 OF 2018

Pal Singh

...Petitioner

Vs.

State of Punjab and others

... Respondents

CORAM: HON'BLE MR. JUSTICE HARSIMRAN SINGH SETHI

Present: Mr. Amit Kaith, Advocate for the petitioner

Ms. Sunint Kaur, AAG Punjab.

HARSIMRAN SINGH SETHI,J. (ORAL)

By this common order, the above mentioned two writ petitions, which involve the same question of law and similar facts are being decided. For the purpose of this order, the facts from CWP No. 16002 of 2018 are being taken.

In this writ petition, the grievance of the petitioner is that vide order dated 10.07.2017 (Annexure P-1), the respondents have decided that the post of the Packer will be treated as a Group 'C' post and the employees

working on the said post will retire at the age of 58 years and the Packers, who have already attained the age of 58 years at the time of issuance of the letter dated 10.07.2017 will be considered retired w.e.f. from the date of their attaining age of 58 years with retrospective effect and the portion of their service which they have rendered beyond 58 years of age, will be treated as extension period. By the said letter, the pay and pensionary benefits of the petitioner have been revised and the recoveries are being done. The facts leading to the filing of the present writ petition are as under:-

The petitioner was appointed as a Mazdoor on 10.10.1974 and thereafter, promoted as a Peon and then Packer on 05.07.1996. The post of Packer is governed by the Rules called Punjab State (Class IV) Rules, 1963. According to the said Rules, the post of Packer is a class IV post (Group 'D'). As per the Punjab Civil Services Rules, class IV employees retire on completing 60 years of age whereas, class I, II & III employees retire on attaining the age of 58 years.

The Packers working in the respondent-department filed a writ petition being CWP No.4829 of 1986 in which they claimed that the Packers, who are working in the Public Relation Department, were getting higher pay scale w.e.f. 01.01.1978 and therefore, the same pay scale should be extended to the Packers in the Printing and Stationery Department as well. The said writ petition was allowed by this Court on 30.11.1988 along with another CWP No.7 of 1985 and packers working in the Printing and Stationery Department were also given the higher pay scale of Rs.950-1800, which was granted to the Packers in the Public Relation Department. Against the said judgment dated 30.11.2018, the State of Punjab filed a Letters Patent Appeal, being LPA No.416 of 1989, which was also dismissed on 03.02.1998. Since 1998, the

the same pay scale as being granted to the Packers working in the Public Relation Department and the petitioner also continued to get the same pay scale till he superannuated on attaining the age of superannuation on 28.02.2014 and thereafter upto 28.02.2016 as petitioner, he was granted extension for 02 years which ended on 28.02.2016.

After the retirement, the pensionary benefits of the petitioner were fixed and the petitioner was getting pension according to the last pay drawn. After more than 1½ years of retirement of the petitioner, the respondents passed an order on 10.07.2017 wherein, it was mentioned that as the pay scale which is being given to the post of Packer, is an equivalent pay scale being given to class III post, therefore, the Packers are to be treated as class III employees instead of class IV and are to be retired on attaining the age of superannuation at the age of 58 years instead of 60 years as being done in the case of class IV employees. By the implementation of the said order, the Packers were being treated as class III employees instead of class IV by the respondents.

The grievance of the petitioner is that the letter dated 10.07.2017 has been made operative retrospectively upon the petitioner who had already retired by the date when the letter dated 10.07.2017 was issued and the two increments of the petitioner, which he got while serving from 58 to 60 years have been withdrawn and the pay of the petitioner has been refixed and consequently pension has been reduced, which is illegal and arbitrary.

Learned counsel for the petitioner argues that the letter dated 10.07.2017 cannot be made operative retrospectively upon the employees who had already retired and further, the letter dated 10.07.2017 is contrary to the 1963 Rules, which govern the service, according to 1963 Rules, Packer is a

letter dated 10.07.2017 with regard to the status of the post of Packers and therefore, the action of the respondents in withdrawing the two increments from the petitioner after his retirement and re-fixing his salary and reducing his pension by treating the post of packer as Class III-post with retrospective effect is totally arbitrary, illegal hence liable to be set aside.

Upon notice of motion, respondents have filed the reply and in the reply, the respondents have stated that once the petitioner was getting the pay scale which is equivalent to that of a class III post, the post of Packer cannot be treated as class IV post and as all class III employees retire at the age of 58 years, the Packers will also retire at the age of 58 years. In the reply, nothing has been stated as to how, the letter dated 10.07.2017, can be made operative retrospectively upon the employees, who had already retired on attaining the age of 60 years before the issuance of the said letter.

I have heard learned counsel for the parties and have gone through the record with their able assistance.

Three questions, which arise before this Court for determination are:-

i. Whether, the letter dated 10.07.2017 treating the post of Packer as a class III post instead of class IV, can have retrospective operation or not?

ii. Whether, once the post of the Packer is governed by the 1963 Rules as amended from time to time, which governs the service and under those Rules, Packer is a class IV post, status of the said post can be treated to have been changed from Class IV to Class III only on the basis of Pay Scale granted to the said post, without amending the 1963 Rules ?

iii. Whether, the letter dated 10.07.2017 can amend 1963 Rules or

not?

It is a settled principle of law that no instructions or a letter can have a retrospective operation. Even the instructions, which supplement the Rules, have a prospective operation. In the present case, the respondents have refixed the salary of the petitioner after his retirement on the basis of letter dated 10.07.2017 by operating the said letter retrospectively. No power is available with the respondents to reassess or review the cases of employees, who had already retired and were getting pension prior to the issuance of letter dated 10.07.2017 by treating them class III employees instead of class IV employees.

A Division Bench of this Court while deciding LPA No.84 of 2009 decided on 27.02.2012 titled as **Dharampal Vs. State of Haryana and others**, 2012(2) RSJ 549 categorically held that the instructions which are issued by the department cannot have retrospective effect and can be applied prospectively only. The relevant para 13 of the judgment is as under:

“13. Under the alternate qualification prescribed by Clause (b) of the 1996 Rules extracted above, the experience required has to be in a University and not in a Government department. Therefore, the question of taking into account the experience gathered by the appellant/respondent No.4 in the department in the field of soil conservation cannot be taken into account even if we are to hold that such experience in soil conservation is equivalent to experience in soil testing. In so far as the respondent No.5 is concerned there is no denying the fact that on the last date of submission of the application he had not acquired the Ph.D. Degree and though the said Degree was acquired by him shortly thereafter, the benefit thereof cannot strictly be granted to the respondent No.5. However, the respondent No.5 had placed on record a certificate from the Head of the department where he was undergoing the doctoral programme to show that from March, 2000 to August, 2003, he was engaged in research work in soil analysis.

The Head of the department was the competent authority to issue such a certificate on the date when the same was issued i.e. 19.09.2003. **The contrary instructions were issued only on 19.12.2003 and, therefore, the learned Single Judge was right in holding that the said instructions cannot have any retrospective effect but must be prospectively applied.** If that be so, we cannot find infirmity in the conclusion of the learned Single Judge that the respondent No.5 was eligible for being selected and appointed in the post in question.”

Once again, a Coordinate bench of this Court again while deciding CWP No.6866 of 1991 decided on 10.09.1993, titled as **Gurmail Singh Vs. State of Punjab** held that the instructions can only be applied prospectively and not retrospectively. The relevant paras 8 and 9 of the said judgment are as under:

“8. Having heard counsel for the parties at length, I am of the opinion that the petition deserves to succeed. It is not disputed that the State Government in its circular letter dated April 17, 1984 had laid down three conditions which have been reproduced above for placement as senior clerks and that the petitioners fulfilled those conditions. Not only this, the Board as per its order dated 1.1.1991 (Annexure P-7) had designated the petitioners as senior clerks with effect from the dates mentioned against their names in the said order. It is common case of the parties that the dates with effect from which the petitioners were designated as senior clerks were prior to February 20, 1991 on which date the impinged circular letter altering those conditions and dividing pay scale of clerks into three categories as referred to earlier. In fact, Harbhajan Kaur, one of the petitioners was designated as a senior clerk w.e.f. 1.4.1990 and all the other petitioners had been designated w.e.f. an earlier date. The impugned circular letter dated February 20, 1991 even if applicable to the Board employees would operate only prospectively and cover these employees who would be designated as senior clerks after the issuance of the said letter. Petitioners having been designated with effect from a date prior thereto would

not be governed by the impugned circular letter, and, therefore, the auditors were not justified in raising objections which they did.

9. It was then urged on behalf of the petitioners that the impugned circular letter took away their vested right and altered terms and conditions of their employment to their prejudice and that the same was in contravention of the statutory service rules which had by then come into force. It was submitted that posts of Junior Assistants created by the impugned letter did not find mention in Appendix 'A' to the service rules referred to above. Since I am holding that the impugned letter operated prospectively and did to apply to the case of the petitioner who had been designated as senior clerks prior to its issuance, it is not necessary for me to go into the other submissions made by counsel for the petitioner.”

Therefore, keeping in view the settled principles of law noticed above, the letter dated 10.07.2017 cannot be made operative retrospectively and the action of the respondents in implementing this letter upon the petitioner, who had already retired on 28.02.2016 i.e. before issuance of letter dated 10.07.2017, is beyond the jurisdiction of the respondents and such action of the respondents is accordingly set aside.

Further, once the post of Packer is governed by the 1963 Rules duly framed as per law, the same has to be made applicable upon the employees unless and until the Rules are amended. In 1963 Rules, as amended from time to time, the post of Packer is being treated as a class IV post. 1963 Rules have been attached by the respondents as Annexure R-4 with their reply. In the 1963 Rules, the post of the Packer is duly covered. 1963 Rules were amended in the year 1976 and the relevant portion of the Rules is as under:-

Office Order

No. 6483/LA/Admn/Pb. Dated 09.12.76
The appointments to Punjab State (Class-IV)
Service are to be governed by the Punjab State
(Class-IV) Services Rules 1963 as notified by

the Punjab Government vide Notification No. G.S. R. 123/Const/Art309/6 dated 23.05.1963 (copy enclosed) within the provisions of these rules, the method of appointment and promotion to class-IV posts both in the Ministerial and Industrial order of the Printing & Stationery Department shall be governed as under:

Sr. No.	Name of the post with Scale	Promotion of appointment (ii) Promotion	(iii) Direct appointment	Method of Recruitment qualification and Experience for promotion	Qualification and Experience for direct recruitment
1.	Packer/ Officer Daftari Counter	75%	25 %	By selection amongst Peon, Mazdoor, Chowkidar, Ward Servant, Mali and Sweeper etc on the basis of a pooled Seniority to be determined by continuous date of appointment in the service.	Matric with Punjabi
2.	Peon, Mazdoor, Chowkidar, Ward Servant, Mali, Sweeper etc.	---	100%	---	Preferably primary Pass with knowledge of Punjabi language

Chandigarh
09.12.76

Pawittar Singh Walia
Controller,
Printing and Stationery
Department,Punjab,
Chandigarh.

A bare perusal of the above would show that the post of Packer is a

The 1963 Rules were further amended in 1979 wherein again, the post of Packer has been treated as class IV post. Again, even in the amendment, done on 06.11.1985, the post of Packer has been treated as a class IV post. That being so, once the 1963 Rules as amended from time to time, governing the services, declare the post of packer as a class IV post the same cannot be treated as a class III post merely on account of grant of same pay scale, which might have been extended to a class III post. The categorization of the post depends upon the Rules governing service and not upon the pay scale attached to the Rules. The option was available to the department that in case, they felt that a class IV post has been granted a higher scale, which is admissible to class III, the respondents could have amended the 1963 Rules accordingly to bring the post of Packer into a class III post but without amendment of 1963 Rules, merely on account of grant of higher pay scale, the post automatically does not become a class III post.

In the present case, it has been admitted by the learned counsel appearing on behalf of the respondents that there is no amendment carried out to the 1963 Rules by which, the said post has been treated as a class III post instead of class IV post. There is only letter dated 10.07.2017, which has been issued by the department wherein, it has been stated that keeping in view the pay scale given to the post of Packer, the same is to be treated as a class III post instead of class IV.

It is a settled principle of law that if there is a conflict between the rules governing the service and the instructions, the rules will prevail over the instructions. Hon'ble Supreme Court of India while deciding Civil Appeal No.3605 of 2009, titled as **General Manager, Uttaranchal Jal Sansthan Vs. Laxmi Devi and others**, decided on 15.05.2009 held as under:

Uttanchal Public Works Department dated 21st March, 2002, assuming that the same can be taken into consideration, is in our opinion wholly irrelevant. Apart from the fact that such a contention had not been raised by the respondents before the High Court, we fail to understand how a mere circular letter which has no force of law shall prevail over the statutory Rules. Respondents themselves have relied upon the decision of this Court in **DDA Vs. Joginder S. Monga** {(2004)2 SCC 297}, wherein it was held that executive instructions cannot run contrary to the statutory provisions.”

A Division Bench of this Court also while deciding CWP No.15288 of 2006, decided on 14.12.2006, titled as **Dharambir and another Vs. State of Haryana** again reiterated that the State Government through executive instructions cannot have the power to act in violations of the provisions of the Act. The instructions which are in conflict with the Rules or the Act, cannot be given preference as the Act has a superiority over the instructions. The relevant paras 8 and 9 of the judgment are as under:

“8. After hearing the learned counsel for the parties and taking into consideration the pleas raised by them, we find that the grievance made by the petitioner is wholly justified. The appointment of the Cattle Fund as per the guide-lines Annexure P3 is clearly in conflict with the substantive provisions of Section 16 of the Act (as noticed above).

9. The State Government through executive instructions cannot have any powers to act in violations of the provisions of the Act.”

In the present case by the letter dated 10.07.2017, 1963 Rules governing the service are being amended so as to treat the post of Packer which is a Class IV post according to the 1963 Rules, to be treated as a Class III post, which is contrary to the settled principles of law. Hence, 1963 Rules, as amended from time to time, will prevail over the letter dated 10.07.2017 as the

Keeping in view the above, the action of the respondents in treating the post of Packer as a class III post is not at all sustainable, especially in case of the employees, who had already retired prior to the issuance of the letter dated 10.07.2017, by retrospective operation of the said letter. Therefore, the refixation of the salary of the petitioner by withdrawing two increments by the respondents is held to be bad. The petitioner is entitled for fixation of his pay, which he was drawing actually on the date of his retirement as well as pensionary benefits which were fixed when the petitioner actually retired on 28.02.2016, after serving for extension period and the same needs to be restored and respondents are directed to restore the same.

Counsel for the petitioner argues that upon refixation, the respondents have already effected recovery by refixing the salary. Counsel for the respondents is unable to explain as to how, the recovery has been ordered from a retired employee in the year 2017 especially in view of the fact that Hon'ble Supreme Court of India has laid down the parameters as to under which circumstances the recovery can be done from the employee. As per the judgment of the Supreme Court of India in **State of Punjab and Others Vs. Rafiq Masih, 2015 (4) SCC 334**, no recovery could have been effected from a retired employee keeping in view the guidelines given in paragraph 12 of the said judgment which are as under:-

“It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

- (ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.
- (iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.
- (iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.
- (v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover.”

Keeping in view the above, even the recovery which has been done by the respondents upon refixation was beyond their jurisdiction and the same is also consequently set aside. The respondents are directed to refund the amount, if any, recovered from the petitioner within a period of two months from the date of receipt of the certified copy of this order.

The writ petitions stands allowed in above terms.

16.09.2019
renubala/jt

(HARSIMRAN SINGH SETHI)
JUDGE

Whether speaking/reasoned: Yes/No
Whether reportable: Yes/No