

IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

Civil Writ Petition No. 6978 of 2016(O&M)
Date of Decision : 22.11.2019

Surender Singh Taxak

... Petitioner

versus

Union of India & Ors.

... Respondents

CORAM:-HON'BLE MR. JUSTICE ARUN MONGA

Argued by: Mr. Tribhuvan Dahiya, Advocate
for the petitioner.

Mr. K.K. Gupta, Advocate
for respondents No.2 and 3.

ARUN MONGA, J

1. Tug of the petitioner herein is to seek promotion to the post of Deputy General Manager, as per his original seniority in the feeder cadre of Assistant General Manager. Conflict, however, is whether petitioner is entitled to regain his original seniority as per Department of Personnel and Training's(DoPT) instructions dated 02.02.2010(Annexure P-10) or his case for promotion is to be considered in accordance with an earlier DoPT office memorandum dated 14.09.1992(Annexure P-13).

2. Before adumbrating with the factual narrative, it would be apposite to reproduce the relevant instructions and office memorandum, *ibid*, hereinbelow:-

“Notification dated 02.02.2010-

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2. In the Central Civil Services (Classification, Control and Appeal) Rules, 1965, in rule 11, for clause (vi), the following clause shall be substituted, namely:-

“(vi) reduction to lower time scale of pay, grade, post or

Service for a period to be specified in the order of penalty, which shall be a bar to the promotion of the Government servant during such specified period to the time scale of pay, grade, post or service from which he was reduced, with direction as to whether or not, on promotion on the expiry of the said specified period-

a) The period of reduction to time scale of pay, grade, post or service shall operate to postpone future increments of his pay, and if so, to what

(b) The Government servant shall regain his original seniority in the higher time scale of pay, grade, post or service.”

Likewise relevant of Office memorandum dated 14.09.1992 reads as under:-

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3. On the conclusion of the disciplinary case/criminal prosecution which results in dropping of allegations against the Government servant, the sealed cover of covers shall be opened. In case the Government servant is completely exonerated the due date of his promotion will be determined with reference to the position assigned to him in the findings kept in the sealed cover/covers and with reference to the date of promotion of his next junior on the basis of such position. The Government servant may be promoted, if necessary, by reverting the junior most officiating person. He may be promoted notionally with reference to the date of promotion of his junior. However, whether the officer concerned will be entitled to any arrears of pay for the period of notional promotion preceding the date of actual promotion and if so to what extent, will be decided by the appointing authority by taking into consideration all the facts and circumstances of the disciplinary proceedings/criminal prosecution. Where the authority denies arrears of salary or part of it, it will record its reasons for doing so. It is not possible to anticipate and enunciate exhaustively all the circumstances under which such

denials of arrears of salary or part of it may become necessary. However, there may be cases where the proceedings, whether disciplinary or criminal, are, for example delayed at the instance of the employee or the clearance in the disciplinary proceedings or acquittal in the criminal proceedings is with benefit of doubt or on account of non-availability of evidence due to the acts attributable to the employee etc. These are only some of the circumstances where such denial can be justified.

3.1 If any penalty is imposed on the Government servant as a result of the disciplinary proceedings or if he is found guilty in the criminal prosecution against him, the findings of the sealed cover/covers shall not be acted upon. His case for promotion may be considered by the next DPC in the normal course and having regard to the penalty imposed on him.”

2. The controversy is essentially pivoted around the stand of the respondent No.2 Food Corporation of India(FCI) that instructions dated 02.02.2010 relied upon by the petitioner are not applicable as the same were neither adopted by it nor even otherwise are applicable in view of the Food Corporation of India(Staff) Regulations, 1971(for brevity, Regulations, 1971). It is contended that Government of India rules *per se* are not applicable to FCI unless the same are expressly adopted by it. Reliance has been placed on DoPT instructions dated 11.11.2010 which envisage that seniority of the Officers working in the Public Sector Undertakings/ organizations/ Banks etc. are to be governed by regulations/ instructions issued by the concerned administrative departments/ PSU/ Banks etc.

3. Thus, it is only in absence of any specific rules/ regulations framed by the respondent FCI that instructions issued by the Government are followed by FCI. Wherever FCIs rules/ regulations/ instructions are clear, there is no need to follow the Government rules/ regulations to that

effect. Per FCI, the seniority of the petitioner is governed under Regulation 16 of the 1971 Regulations, *ibid*, as there is clear-cut provision qua the same. The reliance placed by the petitioner on Central Government Rules, therefore, is totally misplaced. Regulation 16(supra) is reproduced hereinbelow:-

“16. Seniority:

Seniority of employees appointed shall be determined as follows:

(1) Direct recruits:

The relative seniority of all direct recruits will be determined by the order of merit in which they are selected for such appointment by the selecting authority; persons appointed as a result of an earlier selection being senior to those appointed as a result of subsequent selection.

(2) Promotees:

(a) The relative seniority of persons promoted to various grades will be determined in the order in which their names appear in the panel drawn up in accordance with Regulation 10.”

Provided that seniority of an employee who refuses to accept promotion, may be altered in accordance with the administrative instructions issued by the Corporation from time to time.”

4. All the provisions reproduced above are to be interpreted in the backdrop of the ratio enunciated by Hon'ble the Supreme Court of India in **Union of India Vs. K.V. Jankiraman 1991(3) SCT 317**, particularly para No.29 thereof which too, for better appreciation of the controversy involved herein, is extracted hereinbelow:-

“29. According to us, the Tribunal has erred in holding that when an officer is found guilty in the discharge of his duties, an imposition of penalty is all that is necessary to improve his conduct and to enforce discipline and ensure purity in the

administration. In the first instance, the penalty short of dismissal will vary from reduction in rank to censure. We are sure that the Tribunal has not intended that the promotion should be given to the officer from the original date even when the penalty imparted is of reduction in rank. On principle, for the same reasons, the officer cannot be rewarded by promotion as a matter of course even if the penalty is other than that of the reduction in rank. An employee has no right to promotion. He has only a right to be considered for promotion. The promotion to a post and more so, to a selection post, depends upon several circumstances. To qualify for promotion, the least that is expected of an employee is to have an unblemished record. That is the minimum expected to ensure a clean and efficient administration and to protect the public interests. An employee found guilty of a misconduct cannot be placed on par with the other employees and his case has to be treated differently. There is, therefore, no discrimination when in the matter of promotion, he is treated differently. The least that is expected of any administration is that it does not reward an employee with promotion retrospectively from a date when for his conduct before that date he is penalised in praesenti. When an employee is held guilty and penalised and is, therefore, not promoted at least till the date on which he is penalised, he cannot be said to have been subjected to a further penalty on that account. A denial of promotion in such circumstances is not a penalty but a necessary consequence of his conduct. In fact, while considering an employee for promotion his whole record has to be taken into consideration and if a promotion committee takes the penalties imposed upon the employee into consideration and denies him the promotion, such denial is not illegal and unjustified. If, further, the promoting authority can take into consideration the penalty or penalties awarded to an employee in the past while considering his promotion and deny him promotion on that ground, it will be irrational to hold that it cannot take the penalty into consideration when it is

imposed at a later date because of the pendency of the proceedings, although it is for conduct prior to the date the authority considers the promotion. For these reasons, we are of the view that the Tribunal is not right in striking down the said portion of the second sub- paragraph after clause (iii) of paragraph 3 of the said Memorandum. We, therefore, set aside the said findings of the Tribunal.”

5. Adverting now to the facts of the case, succinctly though. The petitioner was appointed as Assistant General manager with the respondent Food Corporation of India. During service, the petitioner was charge-sheeted on 24.02.2009. On account of pendency of charge-sheet, the petitioner was not given promotion as Deputy General Manager, whereas the private respondents, who though were his junior were promoted. On 04.08.2011 punishment was awarded to the petitioner by the disciplinary authority, which was challenged through statutory appeal. The appeal was partially accepted on 14.12.2012 and punishment awarded to petitioner was lowered down to reduction in pay by three stages in his present scale of pay for a period of two years, with stipulation, that during currency of period of penalty, he would not earn any increment and penalty would operate to postpone future increments of pay. It is stated that CWP No. 16907 of 2013 challenging the order of appellate authority is pending adjudication before this Court. It is averred that the petitioner was promoted on the post of Deputy General Manager(General) on 11.09.2013 and was allotted the panel year 2012 and in the seniority list of Deputy General Manager, the petitioner has been slotted below the private respondents, who were junior to him in the cadre of Assistant General Managers. The petitioner submitted representations questioning his placement below the private respondents in the seniority list of Deputy General Managers, but the same did not find

favour with the respondent-Corporation. It is claim of the petitioner that once he has been promoted to the next higher post, he has to regain his original seniority in the higher service, grade or post. Accordingly, his seniority has to be restored/ re-fixed over and above the private respondents who were junior to him.

6. I have heard the rival contentions of learned counsel appearing for the parties and perused the pleadings along with relevant record appended thereto.

7. The question that arises foremost is, whether the impugned orders/ communications dated 07.08.2014, 16.10.2014 and 22.12.2015 (Annexures P-6, P-7 and P-9 respectively) are to be tested on the touchstone of Fundamental Rule 29(2) as notified by DoPT vide circular dated 02.02.2010(Annexure P-10) or Regulation 16(2)(a) of the Regulations, 1971?

8. The preliminary argument of Mr. K.K. Gupta, learned counsel for respondent FCI is that petitioner has since not challenged his promotion order dated 11.09.2013(Annexure P-2) and chosen only the consequent framing of the seniority list dated 16.01.2014(Annexure P-3), whereby he was assigned the seniority with effect from 2012 as a panel year, in which he was considered for promotion and, therefore, he acquiesced to his promotion and challenge the subsequent seniority list. The argument is devoid of any merit as grievance of the petitioner is not qua his promotion, but qua assigning of the year of promotion and the same was done for the first time when the seniority was framed vide list dated 16.01.2014 (Annexure P-3). The petitioner represented to the competent authority for correction in assigning the year of promotion to him, but his representations

were rejected vide impugned orders, Annexures P-6, P-7 and P-9 and, therefore, the writ petition.

9. Adverting now to his argument that the reliance placed on Fundamental Rule 29 is totally misplaced as the same is kicked in only if there is lack of specific instructions/ regulations by the FCI or FCI specifically adopts the circular/ instructions issued by the Government. He has contended the Regulation 16(2)(a) of the Regulations 1971 has been specifically framed to deal with the situation in hand. He argued that petitioner was punished with following major penalty by the Appellate Authority vide order dated 14.10.2012(Annexure P-1):-

“Reduction in pay by three stages in his present scale of pay for a period of two years with stipulation that during the currency of period of penalty he would not earn any increment and penalty would operate to postpone future increment of pay.”

He contended that in view of the aforesaid major penalty, the sealed cover of the petitioner was, therefore, not opened and in any case during subsistence of the above major penalty, the sealed cover became redundant. On culmination of the effect of penalty, the petitioner's case was placed before the Senior Promotion Committee for consideration for promotion to the post of DGM(General) against the panel year 2012. As per recommendations of the Committee duly accepted by the Competent Authority, the panel year of 2012 has been rightly assigned to the petitioner in the impugned seniority list in accordance with Regulations 16(2), *ibid* read with Para 3.1 of the DoPT instructions dated 14.09.1992(Annexure R-2) which were adopted by FCI vide circular dated 17.12.1992(Annexure R-1.

10. He argued that the case of the petitioner has to be dealt with

these regulations/ circulars alone and no other instructions of the DoPT which are to the contrary, have been adopted by the FCI. He submitted that these regulations/ instructions are in perfect harmony with the law laid down in Janki Raman's case (*supra*), particularly para No.29 thereof.

11. He strenuously opposed the applicability of Central Service Rules (Amended) Notification (Annexures P-10 to P-12) and pointed that the petitioner has not produced any FCI circular adopting the said notification. He buttressed his argument relying on clarificatory instructions dated 11.12.2010(Annexure R-3) to contend that amended notification (Annexure P-10) has no applicability to the Public Sector Undertakings (PSUs)/ autonomous bodies/ banks which include FCI also. He contended that FCI being PSU has its own autonomous character and its employees are governed by its own Service Rules viz. Regulations, 1971 and only those government instructions would apply which are specifically adopted by FCI by instructions/ circulars. He submitted that same is fortified by the fact that circular/ instructions Annexure R-1 and R-2 were specifically adopted by the FCI and in absence of amended notification(*supra*) having not been adopted, there is no ambiguity on the applicability of Regulations, 1971 read with circulars (Annexures R-1 and R-2) and, therefore, the answer to the question to be adjudicated necessarily is that Fundamental Rule 29(2) is not applicable to the case of petitioner.

12. *Per contra*, learned counsel for the petitioner argued that cause of action to the petitioner to file the writ petition arose only when his representations (Annexures P-4 and P-5) were rejected vide impugned orders, Annexures P-6, P-7 and P-9. He submitted that only reason cited for their rejection was that DoPT circular dated 10.12.2013(Annexure P-12)

notifying Fundamental Rule 29(2) which mandated that government servant shall regain his original seniority in the higher grade or post on his restoration to the grade or post from which he was reduced, had not been adopted by the Corporation. He argued that at the same time, impugned order (Annexure P-7) stated that FCI had issued circular dated 22.09.1986 (Annexure P-14) which envisaged the applicability of Central Government Rules and Regulations in the absence of any specific provisions in the FCI Act/ Rules or Regulations.

13. He further argued that no specific rule dealing with the issue of either regaining or losing of original seniority list in higher service by an employee on his restoration to the grade or post has been cited by the respondents in the impugned order. Yet the DoPT instructions dated 10.12.2013(Annexure P-12) have not been followed even though the same were adopted by virtue of circular dated 22.09.1986(Annexure P-14). The impugned orders, therefore, do not stand the scrutiny of DoPT instructions, as applicable to the petitioner and are liable to be set aside with consequential restoration of the seniority to the petitioner with effect from the year of his entitlement.

14. He also argued that respondent cannot be permitted to take a different stand in the written statement contrary to the one contained in the impugned order/ letter dated 16.10.2014(Annexure P-7). He submitted that it is settled position in law that impugned order should speak for itself and the case cannot be improved by way of pleadings by adding words in the order under challenge. He further argued that Regulation 16 relied upon by the respondent does not deal with the issue at hand. It is only a general rule of seniority to decide seniority of promotees in the order in which their

names appear in the panel. In no manner, it prescribes how the seniority of an employee is to be restored/ determined in the grade from which he was reduced for a particular period. Impugned seniority list, downgrading the petitioner's seniority, amounts to punishing him twice for the same misconduct. Firstly, the petitioner was punished by the disciplinary/ appellate authority by reducing his pay by three stages for a period of two years; secondly, for the same misconduct, the petitioner has once again been punished by downgrading his seniority below the private respondents. He argued that the same is patently illegal and unconstitutional.

15. Having given my careful thought to the rival contentions read with law as enunciated by Hon'ble the Apex Court, I am of the opinion that concededly the petitioner was not awarded punishment of downgrading or lowering his seniority. Penalty awarded to him was only the downgrading of pay by way of reduction of pay by three stages for a period of two years with a stipulation that he would not earn any increment and penalty would operate to postpone future increments of pay. Downgrading of pay and lowering of seniority are two separate and distinct punishments. By necessary corollary, therefore, additional penalty of lowering of seniority cannot be imposed on an employee by implication or illusion. There has to be specific order of imposition of penalty qua the same.

16. As regards the position in law, it is settled settled that punishment of reduction of pay does not have any effect on the seniority of an employee. Reference may be had to judgments rendered by Hon'ble the Apex Court in **Md Habibula Haque Vs. Union of India & Ors. 1995 (Supp2) SCC 140** and **Union of India & Anr. Vs. S.C. Parashar, 2006(3) SCC 167.**

17. In Habibula's case(supra), it has been held as follows:-

“4. It is seen that in the decision taken by the Department on June 6, 1968 reorganising the preventive officers cadre and sanction of posts, it was specifically stated that the creation of the usual scale of pay of the allowances of 245 earmarked posts of Preventive Officers-Grade I and consequent abolition of 245 posts of Preventive Officers-Grade II would indicate that the officers holding the posts of Preventive Officer Grade-II as on that date are entitled to be considered for fitment as and when the vacancies would arise. But for the removal of the appellant from service, he would have been entitled to be considered for fitment in the grade of Preventive Officers, Grade I when his junior most officer, namely, Sarup Kumar Ghosh was considered and promoted w.e.f. February 29, 1968. The High Court fell in error in considering that there was a punishment imposed upon the appellant in the order dated August 9, 1973. It is seen that the punishment imposed was only reduction of scale of pay for one year with cumulative effect. That does not have the effect of reducing his seniority nor would it be a punishment of reduction of seniority of any placement which the appellant would be entitled to hold in the order of seniority. Under those circumstances, we are of the view that the appellant is entitled to be adjusted in the cadre of Preventive Officers, Grade I w.e.f. February 29, 1968, the date on which his immediate junior was considered and was given fitment as Preventive Officer, Grade-I.”

18. In the case of S.C. Parashar(supra), the Hon'ble Apex Court held as under:-

“11. However, there cannot be any doubt whatsoever that the Disciplinary Authority never intended to impose a minor penalty. The concession of the learned counsel appearing for the appellant before the High Court was apparently erroneous. It is now well-settled that wrong concession made by a counsel before the court cannot bind the parties when statutory

provisions clearly provide otherwise. [See Union of India and Others v. Mohanlal Likumal Punjabi and Others- (2004) 3 SCC 628]. The penalty imposed upon the respondent, in our considered view, therefore, should be kept confined to the reduction to the minimum of the time-scale of pay for a period of three years with cumulative effect. The effect of such a penalty has been considered by this Court in Shiv Kumar Sharma v. Haryana State Electricity Board, Chandigarh & Ors. [AIR 1988 SC 1673] in the following terms :

"We are unable to accept the above contention. The penalty was imposed on April 15, 1968, and, as a result of which, he was deprived of the monetary benefit of one increment for one year only. The penalty by way of stoppage of one increment for one year was without any future effect. In other words, the appellant's increment for one was stopped and such stoppage of increment will have no effect whatsoever on his seniority. Accordingly, the Board acted illegally and most arbitrarily in placing the juniors of the appellant above him in the seniority list and/or confirming the appellant in the post with effect from Dec.1, 1969, that is, long after the date of confirmation of the said respondents Nos.2 to 19. The question of seniority has nothing to do with the penalty that was imposed upon the appellant. It is apparent that for the same act of misconduct, the appellant has been punished twice, that is, first, by the stoppage of one increment for one year and, second, by placing him below his juniors in the seniority list."

The ratio of the said decision is applicable to the fact of the present case also.

12. In this view of the matter, indisputably, the respondent was entitled to be considered for promotion after a period of three years. We have, however, been informed that he has since been promoted to the rank of Commandant."

As regards reliance place by learned counsel for respondent-

FCI on Janki Raman's case (supra), the same is not applicable to the facts and circumstances of the petitioner. The issue of regaining seniority on restoration to the grade was not before Hon'ble the Supreme Court for adjudication in Janki Raman's case(supra). In fact a careful perusal thereof would reveal that the said issue is not even remotely discussed therein. Para No.8 thereof enumerates the issue involved, which is reproduced hereinbelow:-

Concisely stated, the questions are:--(1) what is the date from which it can be said that disciplinary/criminal proceedings are pending against an employee? (2) What is the course to be, adopted when the employee is held guilty in such proceedings if the guilt merits punishment other than that of dismissal? (3) To what benefits an employee who is completely or partially exonerated is entitled to and from which date?'

20. In Para 28, the Hon'ble Apex Court took into consideration the view of the Tribunal, as below:-

"28. The Tribunal has also struck down the 'following portion in the second sub-paragraph after clause (iii) of paragraph 3 which reads as follows: "If any penalty is imposed on the officer as a result of the disciplinary proceedings or if he is found guilty in the court proceedings against him, the findings in the sealed cover/covers shall not be acted upon" and has directed that if the proceedings result in a penalty, the person concerned should be considered for promotion in a Review DPC as on the original date in the light of the results of the sealed cover as also the imposition of penalty and his claim for promotion cannot be deferred for the subsequent DPCs as provided in the instructions."

21. The Hon'ble Apex Court disapproved the view of the Tribunal while making observations in para No.29 of Jankiraman judgment in 1991

(3) SCT 317 (supra), as reproduced above. A bare perusal of observations

made in said para No.29 makes it apparent that it has nothing to do with the issue of regaining seniority on restoration to the grade from which an employee was reduced. The Apex Court further held that in case an employee has been punished and consequently not promoted during the currency of punishment, it would not amount to double punishment because denial of promotion during the period of penalty is a necessary consequence nor he can be promoted from retrospective date. Regaining of seniority on restoration to the grade does not in any manner amount to retrospective promotion. In the case of petitioner also he has been promoted after undergoing the punishment in 2013 although his juniors were promoted in 2009. In regaining seniority over his juniors, the petitioner does not get promoted from any date prior to 11.09.2013 nor does any other benefit of promotion prior to his date would accrue to him on regaining seniority.

22. In view of the aforesaid discussion and reasons contained therein, the writ petition is allowed. Impugned orders dated 07.08.2014 (Annexure P-6), dated 16.10.2014(Annexure P-7) and 22.12.2015(Annexure P-9) are set aside. The respondents are directed to revise the seniority of the petitioner in the cadre of Deputy General Manager in terms of his entitlement, as per his seniority in the feeder cadre.

23. Let the needful be done within a period of three months from the date of receipt of certified copy of this judgment.

22.11.2019

Jiten

**(ARUN MONGA)
JUDGE**

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| 1. | Whether speaking/ reasoned: | Yes/ No |
| 2. | Whether reportable: | Yes/ No |