

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

CWP-11699-2020

Date of Decision: 13.08.2020

Charanjit Kaur

...Petitioner

Versus

State of Punjab and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE HARNARESH SINGH GILL

Present: Mr. Amit Jhanji, Advocate, for the petitioner.

Mr. Aditya Sharda, AAG, Punjab.

HARNARESH SINGH GILL, J.

Case is taken up for hearing through video conferencing.

Challenge in the present writ petition is to the order dated 24.07.2020 (Annexure P-18) passed by respondent No.2-Commissioner, Rupnagar Division, Rupnagar, vide which, the appeal filed by the petitioner against the order dated 09.06.2020 (Annexure P-13), passed by the Deputy Commissioner, SAS Nagar, was rejected.

The petitioner was promoted to the post of Senior Assistant, vide order dated 07.09.2017, under PWD Category (Ortho). The said order was challenged by respondent No.5, who too belongs to PWD category (Visually Handicapped), by way of CWP-22341-2017. Vide order dated 28.01.2020, the said writ petition was allowed by this Court and a direction was issued to the Deputy Commissioner, SAS Nagar, to reconsider the claim of the respondent No.5 for promotion to the post of Senior Assistant, as per law, within the period of six weeks.

In compliance thereof, respondent No.3, Deputy Commissioner, SAS Nagar, Mohali, vide order dated 09.06.2020, while considering the representations given by the petitioner and respondent No.5, cancelled the earlier order of promotion of the petitioner and promoted respondent No.5 being an employee of VH Category.

Against the said order, the petitioner filed appeal dated 15.06.2020 (Annexure P-15) before respondent No.2, Commissioner Rupnagar Division, Rupnagar. When neither the appeal was decided nor any hearing was afforded to the petitioner, she approached this Court by way of CWP-9181-2020. The said writ petition was disposed of by this Court vide order dated 16.07.2020, with a direction to the Commissioner, Rupnagar Division, Rupnagar, to dispose of the appeal within a period of three weeks.

Thus, vide impugned order dated 24.07.2020 (Annexure P-18), after giving personal hearing to the petitioner, respondent No.2 dismissed the appeal by observing that visually impaired officers are performing duties on the post of Indian Administrative Services viz. Deputy Commissioner, Sub Divisional Magistrate which are more responsible as compared to the post of Senior Assistant and as per the office record, work of respondent No.5 is satisfactory and his educational qualification is higher secondary and, thus, he fulfills the mandatory qualification for the post of Clerk also.

Learned counsel for the petitioner has argued that the case of the petitioner had been rejected without taking into consideration the provisions of Rule 15 of the Punjab Civil Services (General and Common Conditions of Service) Rules, 1994. The petitioner is more than 50% handicapped since the time of her birth

and was appointed as Clerk after passing the typing test of English and Punjabi.

Learned counsel for the petitioner has further pointed out that as per Rule 8 of the Punjab District Service (Class-III) Rules, 1976, the qualification of matriculation was mandatory for the appointment to the post of Clerk. In 1994, the State of Punjab, incorporated Punjab Civil Services (General and Common Conditions of Service) Rules, 1994. As per Rule 15 of the said Rules, the requisite qualification for appointment to the post of Clerk, was matriculate in Second Division or Senior Secondary, Part-II, Examination from a recognized University or Institution. In terms of Clause (2) of the said Rule, a person so appointed as Clerk in terms of sub-rule (1), shall have to qualify a test in Punjabi typewriting. It is contended that since respondent No.5 did not pass such typing test, he was not eligible for appointment to the post of Clerk. It is further contended that no relaxation had been granted by the competent authority to respondent No.5 exempting him from passing the typing test.

Still further, learned counsel has argued that as per Circular dated 24.08.1983 (Annexure P-6A), proficiency in typewriting of prescribed minimum standard has been made as essential qualification for direct recruitment to the post of Clerk in all the Departments. Even as per the Instructions dated 06.12.2016 issued by the State of Punjab, Point No.11 is reserved for visually handicapped persons and as per the seniority list dated 09.03.2007, the petitioner was placed at Sr. No.42, whereas respondent No.5 was placed at Sr. No.54. Since the petitioner is senior to respondent No.5, she was accordingly promoted to the post of Senior Assistant on 07.09.2017. However, vide the impugned order, without affording her an opportunity of hearing, the promotion order of petitioner was

cancelled by respondent No.3 and respondent No.5 was promoted to the post of the Senior Assistant. It is, thus, contended that the reversion being a major punishment, the impugned order could not have been passed without adhering to the Rules.

In support of his contentions, the learned counsel for the petitioner has relied upon the judgments of the Hon'ble Supreme Court in State of Orissa and Anr. Vs. Mamata Mohanty, (2011)3 SCC 436, and Bhupendra Nath Hazarika and another Vs. State of Assam and others, 2012(12) SCR 587.

I have considered the submissions made by the learned counsel for the petitioner and with his assistance, have gone through the record of the case.

The petitioner is an orthopedically handicapped to the extent of 50% vis-a-vis respondent No.5, who is visually handicapped to the extent of 85%. While promoting respondent No.5 to the post of Senior Assistant, respondent No.3, Deputy Commissioner, considered the instructions dated 24.06.2015 issued by the Department of Social Security and Women and Child Development, Government of Punjab, and another letter dated 06.12.2016 regarding reservation i.e.:-

- “1. Point No.11 - for blind (VH).
2. Point No.40 - for learning impaired (HH).
3. Point No.7 - for Ortho (OH).”

As per the instructions dated 24.06.2015, the discretion vests with the Head of the establishment and while exercising the discretionary power, respondent No. 5 has been promoted against point No.11 of Blind Category.

This Court while deciding CWP-22341-2017 filed by respondent No.5 had directed the Deputy Commissioner-respondent No. 3 to reconsider the claim of respondent No. 5 for the post of

Senior Assistant. The relevant extracts from the order dated 28.1.2020, would read as under:-

“7. It is an admitted position that none of the handicapped category employees is working on the post of Senior Assistant in the office of the Deputy Commissioner, S.A.S. Nagar, Mohali. The said aspect, therefore, is not relevant for the purpose of the present case. The other consideration as provided in the instructions is the nature of the post and obviously the suitability thereon. Not a word has been said in the impugned order with regard to such aspect i.e. the nature of the post and the work required to be performed and the reason why the petitioner, who is visually handicapped person, would not be able to perform the work of such a post i.e. Senior Assistant. In the light of this aspect being absent in the impugned order dated 07.09.2017 (Annexure P-6), the impugned order cannot be said to be fulfilling the requirement of the instructions, which are applicable to the case in hand and on which the competent authority has placed reliance upon.

8. The impugned order, thus, cannot sustain and deserves to be set aside.

9. In view of the above, the present writ petition is allowed and the impugned order dated 07.09.2017 (Annexure P-6) is hereby quashed.

10. Direction is issued to the Deputy Commissioner, Mohali, to reconsider the claim of the petitioner for promotion to the post of Senior Assistant as per law within a period of six weeks from today.”

Pursuant to and in compliance of the said directions, after taking into consideration the letter of Department of Social Security and Woman and Child Development dated 24.06.2015 that point No. 11 is meant for the Visually Handicapped category and seniority is not the only factor for promotion in this case, respondent No. 5 was promoted as Senior Assistant, vide order dated 09.06.2020 (Annexure P-13), impugned in the present writ petition.

It is not disputed that as per point No. 11, this post of promotion is to be given to the candidate(s) belonging to Visually Handicapped-II Category and only respondent No. 5, who is 85% blind is available in the promotional cadre of Visually Handicapped.

Even as per Section 47(2) of Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short 'the Act'), no promotion shall be denied to a person merely on the ground of his disability. The said provision would read as under:-

“47. Non-discrimination in Government Employment.-

(1) xx xx xx

(2) *No promotion shall be denied to a person merely on the ground of his disability: Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.”*

No decision taken by the Government to the effect that a handicapped person, who is incapable of doing typing work cannot be promoted to the post of Senior Assistant in view of Section 47 (2) of the Act, has been placed on record by the learned counsel for the petitioner.

It goes without saying that if a notification in this regard is issued by the appropriate Government, the same shall be operative in respect of the establishment, which is specifically exempted from operation of the provisions of Section 47(2) of the Act. That is not the position so far as the present case is concerned, meaning thereby, the proviso of sub-Section (2) shall be fully operative in the present case.

In this regard, reliance may be placed on the judgment of the Hon'ble Supreme Court in Union of India Vs. Sanjay Kumar Jain (2004) 6 SCC 708, wherein it was held as under:-

“9. Sub-Section (1) of Section 47 in clear terms provides that there cannot be any discrimination in government employments and no establishment shall dispense with or reduce in rank an employee whatsoever during his service. Sub-section (2) is relevant for our purpose. It, in crystal clear terms, provides that no promotion shall be denied to a person merely on the ground of his disability. Obviously, in the instant case, the respondent was not considered for promotion on the ground of as he was considered to be visually handicapped. Much stress was laid by Mr. Krishmani on the proviso to sub-Section (2) of Section 47. The same is not in any way helpful to further the case of the appellant. In fact it only permits the appropriate Government to specify by notification any establishment which may be exempted from the provisions of Section 47. It does not give unbridled power to exclude any establishment from the purview of Section 47. the exclusion can be only done under certain specified circumstances. They are:

(i) issuance of a notification.

(ii) prescription of requisite conditions in the notification.

10. The notification can be issued when the appropriate Government, having regard to the type of work carried on in any establishment thinks it appropriate to exempt such establishment from the provisions of Section 47. The proviso to sub-Section (2) thereof does not operate in the absence of the notification.”

In Union of India Vs. Devender Kumar Pant, (2009) 14 SCC 546, while considering the provisions of Section 47(2) of the Act, it was held by the Hon'ble Supreme Court as under:-

“19. Therefore we are of the view that the section 47(2) only provides that a person who is otherwise eligible for promotion shall not be denied promotion merely on the ground that he suffers from disability. The use of the words ‘merely on the ground’ shows that the section does not provide that if the disability comes in the way of performing the higher duties and functions associated with the promotional post, promotion shall not be denied. In other words promotion shall not be denied to a person on the ground of his disability only if the disability does not affect his capacity to discharge the higher functions of a promotional post.”

This Court, in Laxmi Devi Vs. State of Haryana and Others, 2014(2) PLR 806, has held as under:-

“9. This stand of the respondents cannot be accepted. A perusal of the instructions dated 20.1.1998 would show that the said instructions were issued in the then prevalent situation, which was with regard to the appointments made to the posts of Clerks of the candidates, who belonged to handicapped category. The tenor of the instructions clearly indicate that the same are only applicable to direct recruitment and is not in any manner attracted to promotions. No decision has been placed on record by the respondents, specifically dealing with a decision taken by the Government to the effect that a handicapped person who is incapable of doing type work cannot be promoted to the post of Clerk. In the light of the provisions as contained in 1995 Act, a specific decision is to be taken by the authority concerned for exemption from filling up a particular post by a particular category of handicap otherwise the same would be deemed to be open for all handicapped category employees. It would not be out of way to mention here that now 3% posts are reserved for the handicapped category in promotion as per the 1995 Act. This position has further been fortified and explained by the Hon'ble Supreme Court in Civil Appeal No.9096 of 2013 (Union of India and another Vs. National Federation of Blinds and others), decided on 8.10.2013.”

The judgments relied by the learned counsel for the petitioner are regarding the appointment at initial stage and not the promotional cadre. Therefore, the said judgments are of no help to the petitioner.

As far as the challenge of the petitioner to the appointment of respondent No.5 to the post Clerk-cum-Telephone Attendant on 01.01.2001 is concerned, suffice it to say that there is no condition that respondent No. 5 will pass a typing test as required under Punjab Civil Services (General and Common Conditions of Service) Rules 1994.

This Court is not inclined to entertain the prayer of the petitioner regarding the challenge being laid to the initial appointment of respondent No.5 in the year 2001. The said indulgence is liable to be rejected out-rightly for the reason that the petitioner has approached this Court after a lapse of 18 years and that too when an order has been passed by an authority in compliance with the direction issued by this Court. Reliance in this regard may be placed on the judgment of the Hon'ble Supreme Court in State of Uttaranchal and another Vs. Sri Shiv Charan Singh Bhandari and others, (2013) 12 SCC 179, wherein while considering the aspect of delay and laches in challenging the public appointments, it was held by the Hon'ble Supreme Court as under:-

“14. In Union of India and others v. M.K. Sarkar, (2010) 2 SCC 59, this Court, after referring to C. Jacob (supra) has ruled that when a belated representation in regard to a “stale” or “dead” issue/dispute is considered and decided, in compliance with a direction by the court/tribunal to do so, the date of such decision cannot be considered as furnishing a fresh cause of action for reviving the “dead” issue or time-barred dispute. The issue of limitation or delay and laches should be considered with reference to the original

cause of action and not with reference to the date on which an order is passed in compliance with a court's direction. Neither a court's direction to consider a representation issued without examining the merits, nor a decision given in compliance with such direction, will extend the limitation, or erase the delay and laches."

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21. Presently, sitting in a time machine, we may refer to a two-Judge Bench decision in P.S. Sadasivasway v. State of Tamil Nadu, (1975) 1 SCC 152, wherein it has been laid down that a person aggrieved by an order of promoting a junior over his head should approach the Court at least within six months or at the most a year of such promotion. It is not that there is any period of limitation for the Courts to exercise their powers under Article 226 nor is it that there can never be a case where the Courts cannot interfere in a matter after the passage of a certain length of time, but it would be a sound and wise exercise of discretion for the Courts to refuse to exercise their extraordinary powers under Article 226 in the case of persons who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the Court to put forward stale claims and try to unsettle settled matters.

22. We are absolutely conscious that in the case at hand the seniority has not been disturbed in the promotional cadre and no promotions may be unsettled. There may not be unsettlement of the settled position but, a pregnant one, the respondents chose to sleep like Rip Van Winkle and got up from their slumber at their own leisure, for some reason which is fathomable to them only. But such fathoming of reasons by oneself is not countenanced in law. Anyone who sleeps over his right is bound to suffer....."

Thus, the petitioner cannot be allowed to challenge the very appointment of respondent No.5 at this belated stage on the ground of delay, laches and acquiescence.

Sub-Section 2 of Section 47 of the Act stipulates a clear mandate that unless a notification was issued by the appropriate Government, exempting the establishment from the provisions of Section 47, having regard to the type of work carried in any establishment, an establishment cannot be exempted the operation of Section 47(2) bars disability *per se* being made a disqualification for promotion and it must be remembered that a person does not acquire or suffer disability by choice. Moreover, the Act is to give effect to the proclamation on the Full Participation and Equality to the persons with disabilities.

In view of the above, I do not find any merit in the present writ petition. The same is consequently, dismissed.

(HARNARESH SINGH GILL)
JUDGE

13.08.2020
Praveen Kumar/ds

Whether reasoned/speaking? Yes/No

Whether reportable? Yes/No