

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

CWP-6143-2020 (O&M)
Date of decision : 25.01.2021

Nitin Sharma

...Petitioner

Versus

State of Haryana and others

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL.

Present: Mr. Nilesh Bhardwaj, Advocate for the petitioner.

Mr. Samarth Sagar, Addl. A.G Haryana.

ANIL KSHETARPAL, J.

Through this writ petition filed under Article 226/227 of the Constitution of India, the petitioner prays for issuance of a writ in the nature of mandamus directing the respondents to consider his claim for promotion to the post of Sub-Assistant Superintendent under 25% quota of Clerk-cum-Warder as per Rule 7(3)(iii) of The Punjab Jails Department, Class III (Executive Staff) Rules, 1963 (hereinafter to be referred as “the 1963 Rules”).

In the considered view of this Court, the question which arises for consideration is “If as per the Service Rules, the promotion to a post is provided from multiple feeder cadres with a fixed quota from each feeder cadre, whether an employee of one of the feeder cadre can seek a writ of mandamus to promote him, even after the Government has taken a conscious decision to abolish the avenues of promotion from that specific feeder cadre, particularly when he is not the senior most employee in that

Some facts are required to be noticed. The petitioner joined as Jail Warder on 12.09.2003. He was selected and consequently promoted as Clerk on 11.02.2010, against the quota meant for direct recruitment. Subsequently, the petitioner was reverted, however, the Government took a decision to regularize the promotion of the petitioner as Clerk w.e.f. 24.09.2015. The petitioner now prays for direction to consider his case for further promotion to the post of Sub-Assistant Superintendent.

“Ministerial (Clerical) Cadre:
Superintendent (Office)

$\uparrow$
Deputy Superintendent (Office)
 $\uparrow$
 $\uparrow$
 $\uparrow$
Assistant Accountant
 $\uparrow$
 $\uparrow$
 $\uparrow$
Clerk $\leftarrow \leftarrow \leftarrow \leftarrow \leftarrow \leftarrow \leftarrow \leftarrow$

Executive Cadre:
Superintendent Ja

↑
Deputy Superintendent Jail
↑
Assistant Superintendent Jail
↑
Sub Assistant Superintendent Jail
↑
Head Warder
↑
← ← ← ← ← ← ← ← *Warder''*

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Chandigarh

Rules, 1962 (hereinafter to be referred as “the 1962 Rules”). It may be noted here that the pay-scales of the posts of Warder and Clerk is the same. However, there is a provision for Warders to be promoted to the post of Clerk in Clerical Cadre under Sub-Rule (d) of Rule 9(2) Part-B of the Rules, which is extracted as under:-

“(i) by promotion from amongst Warders and Class-IV employees who are matriculates and have five years experience; provided that such promotions do not exceed 20 percent.”

To govern the service conditions of the employee of executive cadre, 'the 1963 Rules' have been notified. Rule 7 thereof, reads as under:-

“7. Method of appointment-appointments to the posts in the Service shall be made as under:-

(3)- In the case of Sub Assistant Superintendent:-

(i) by promotion from amongst the Assistant Probation Officers, Head Warders and Warders who have an experience of working on the Warder staff for a minimum period of three years and who have passed the Matriculation or Higher Secondary or any other equivalent examination from a recognized university, or

(ii) by promotion from amongst clerks of the Department having an experience of working on the post of clerk for a minimum period of five years.

(iii) by promotion from Clerks/Warders of the Department who have combined experience for a minimum period of five years in the clerical and Warders line (including not less than two years in the Warders line)'

Provided that not less than 50 percent of the posts will be filled in the manner specified in sub-clause (i) and 25 percent each in the manner specified in sub-clause (ii)

and (iii). ”

On careful reading of Rule 7, it is apparent that for promotion to the post of Sub-Assistant Superintendent Jail, there are three feeder cadres. The first feeder cadre is amongst Assistant Probation Officers, Head Warders and Warders having experience for a minimum period of three years with Matriculation or Higher Secondary or any other equivalent examination from a recognized University. The second feeder cadre is from amongst the Clerks of the Department having an experience of working on a post of Clerk for a minimum period of 5 years. The last feeder cadres is from the Clerks/Warders of the Department who have combined experience for a minimum period of five years in the clerical and the Warders Line including not less than two years in the Warder Line. There is a fixed quota amongst different feeder cadres. 50% of the post would be filled from Sub-Clause (i) whereas 25% each is required to be filled in from Sub-Clause (ii) and (iii).

The Government noticed that the Warders rather than remaining in executive cadre and waiting for their turn, adopt a shortcut route by first getting promoted as Clerk and thereafter directly as Sub-Assistant Superintendent Jail. It was further noticed that the officials of the Executive Cadre which entails supervisory duty for watch and ward of the prisoners are imparted specialized training whereas the officials of the Ministerial Cadre discharge duties which are of civil nature and their duty pertains to processing and maintaining the files and records etc. in the office. The clerical staff cannot deal with prisoners and handle them efficiently as there is no fixed physical standard as in the case of Warder

Staff. Further, the clerical staff has no experience in watch and ward duty. It was also noticed that normally a Warder gets promotion to the post of Head Warder and then Sub-Assistant Superintendent Jail in about 25 years whereas Warders take a shortcut to firstly become clerk and then from Clerk to Sub-Assistant Superintendent within 10 to 12 years period. Taking note of this fact, the Government took a conscious decision not to promote Sub-Assistant Superintendents Jail from the cadre of clerks and submitted the draft 'Haryana Jails Department State Service (Class-III) Executive Rules' for amending the existing 1963 Rules. The same is under active consideration of the Government and the Haryana Staff Selection Commission on being consulted, has granted its approval.

It is also not in dispute that the petitioner is not the senior most clerk eligible for being considered for promotion as Sub-Assistant Superintendent Jail. The petitioner has pleaded that his chances of promotion are getting severely prejudiced.

In these facts, the question as noticed in the foregoing part of the judgment arises.

This Court has heard learned counsel for the parties and with their able assistance perused the paper book.

Learned counsel for the petitioner contends that since the Service Rules, as they exist today, do provide for a channel of promotion from the post of clerk to the post of Sub-Assistant Superintendent Jail, therefore, the decision of the respondents is not correct particularly when the promotions from other feeder cadre under Clause (i) are being made. In support thereof, he relies upon a judgment of the Division Bench in

Gulshan Nanda Vs. State of Haryana, 1997(4) SCT 459.

Learned counsel has further submitted that in fact, the High Court while deciding the case of **Sanjay Kumar Vs. State of Haryana and others, CWP-25609-2012 on 01.04.2014** has already directed the State to promote and operate quota as prescribed under Rule 7(3)(iii) of the 1963 Rules.

Per contra, learned counsel appearing for the State has submitted that once the Government has taken a conscious decision, the Court should not compel the employer to order promotion from the post of Clerks or Clerks-cum-Warders. He submits that admittedly, the petitioner is not the senior most and therefore, the petitioner cannot espouse the cause of other employees. He submits that the writ petition is not a Public Interest Litigation. He, in support of his arguments, relies upon a judgment of the Supreme Court in **Dr. K. Ramulu Vs. Dr. S. Suryaprakash Rao, (1997) 3 SCC 59**. Learned counsel submits that in view of the aforesaid, the petitioner is not entitled to the issuance of a writ as prayed for.

This Court has carefully analyzed the arguments of learned counsel for the parties.

As a matter of fact, it is not in dispute that the petitioner is not the senior most Clerk eligible to be considered for promotion to the post of Sub-Assistant Superintendent Jail. The petitioner has not placed on record the material to show as to how many vacancies to the quota under Rule 7(3)(iii) of 1963 Rules are available. Further, a conscious decision of the Government is not being disputed.

Still further, the judgment in Gulshan Nanda (Supra) is entirely

on different facts. In the aforesaid case, the draft Rules were framed but there was no conscious decision to treat such draft Rules as executive instructions. In these circumstances, the Court held that the employee is entitled to promotion. Hence, the aforesaid judgment does not support the case of the petitioner.

Now let us examine the judgment of the Hon'ble Single Judge in Sanjay Kumar (Supra). In the aforesaid case, the petitioner filed a writ petition claiming that the quota as prescribed under Rule 7(3)(iii) of the 1963 Rules is not being adhered to, while making promotion to the post of Assistant Superintendent Jail. The petitioner, in the aforesaid writ petition, was promoted to the post of Sub-Assistant Superintendent Jail vide order dated 04.11.2008 but claimed that he was eligible to be promoted since the year 2004. In those facts, the Court issued directions for re-consideration. Still further, at that time, there was no decision of the Government, not to fill the post of Sub-Assistant Superintendent Jail from the feeder cadre of clerks. In such circumstances, the judgment in Sanjay Kumar (Supra) also does not help the petitioner.

Now let us examine the judgment passed by the Hon'ble Supreme Court in Dr. K. Ramulu (Supra). A Veterinary Assistant Surgeon was entitled to be considered for promotion to the post of Assistant Director. The Rule provided for preparation of a panel each year. The previous Rules i.e. A.P. Animal Husbandry Service Special Rules, 1977, were substituted by A.P. Animal Husbandry Service Rules, 1996. An employee filed OA seeking direction for preparation of a panel of candidates for promotion to the posts of Assistant Director which was

allowed. The Tribunal directed the Government to prepare and operate the panel for the years 1995-96 for promotion to the post of Assistant Director. Hon'ble the Supreme Court while taking into note the conscious decision of the Government, held that the employee has no right to get a writ of mandamus issued. The relevant discussion is in para 8 and 9, which are extracted as under:-

“8. In the light of the above factual matrix and the legal setting, the question is: whether the Tribunal was right in directing the Government to prepare and operate the panel in accordance with its directions? The Constitution Bench of this Court in [Shankarsan Dash v. Union of India](#) 1991 (2) SCT 555 (SC): JT 1991(2) SC 380; (1991) 3 SCC 47, had considered the question in an analogous situation. Therein, pursuant to the selection made by the UPSC for appointment to the Civil Services, a list of I.P.S. officers was prepared and the appellant was one of the candidates in the waiting list. The Government of India had taken a decision not to fill up the vacancies except to the extent of the Scheduled Tribe candidates who were selected and were in the waiting list. The appellant therein filed O.A. which was dismissed by the Tribunal. On appeal, this Court held thus:

"It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all

or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this court, and we do not find any discordant note in the decisions in [State of Haryana v. Subhash Chander Marwaha](#), [Neelima Shangla v. State of Haryana](#), or [Jatendra Kumar v. State of Punjab](#)".

9. In paragraph 8, this Court considered the ratio in *State of Haryana V/s. Subhash Chander Marwaha* (1974) 3 SCC 220, wherein though the vacancies were existing and select list candidates were available, pursuant to the recommendation made by the High Court not to appoint any candidate who had secured less than 55% marks, the Government acted upon it and did not appoint the candidates in the waiting list. When they claimed their right to appointment, and the order was issued by the High Court for filling up all the vacancies from persons in the waiting list, this Court had laid that though the candidates were waiting in the list, they had no right to be appointed. It was held that the plea of arbitrariness does not arise since the Government have taken a decision not to appoint any of the persons who secured less than 55% of the marks. This Court also has pointed out in *Shankarsan Dash* case that when the Government have taken a conscious policy decision not to fill up the vacancies, the decision must be reasonable and not arbitrary. Since it was a policy decision it could not be interfered with. It was held that the vacancies for the

Scheduled Tribe candidates were being filled up for the reason that vacancies reserved for them were not being filled up due to non-availability of the select candidates. The decision to fill up the vacancies reserved for Scheduled Tribe candidates was justified on the ground that non-filling up of the vacancies belonging to the general candidates cannot be characterized as arbitrary decision. It was observed that "the fact that it was not for the Public Service Commission to take a decision in this regard was emphasised in this judgment. None of these decisions, therefore, supports the appellant". Thus it could be seen that it the decision of the Government is supported by valid reasons, it cannot be stated that the decision taken by the Government as arbitrary."

The Supreme Court also noted that the employee has no right to compel the employer to grant promotion. In this judgment, the Hon'ble Supreme Court also considered the judgment in **Y.V. Rangaiah and others Vs. J. Sreenivasa Rao and others, (1983) 3 SCC 2849**. The Three Judge Bench reversed the judgment of the Tribunal and held that the employee is not entitled to get a direction against the Government to prepare and operate the panel of promotion to the post of Assistant Directors.

Keeping in view the aforesaid position, this Court is of the considered view that the writ petition filed by the petitioner is liable to be dismissed particularly when the petitioner is not the senior most in the cadre of clerks/warders and the petitioner has not placed on record any material to establish that as to how many post of Sub-Assistant Superintendent Jail from the quota of the clerks are available.

It is clarified that this Court has refrained from expressing any

final opinion on the question whether the vacancies arising under the feeder cadre category of Rule 7(3)(iii) of the 1963 Rules before the proposed amendment would be required to be filled in by the existing Rules or not.

Still further, this case can be examined from another perspective. Here is a case where the Government has taken a conscious decision at the highest level. Even Subordinate Staff Selection Commission has endorsed the view of the Government. Question which arises is “Whether the decision taken by the Government is arbitrary or illegal so as to enable the Court to interfere in exercise of power of judicial review”. In the facts and circumstances of the case and particularly the stand taken by the Government, this Court does not find that the decision of the Government either suffers from any illegality or is arbitrary. The employer, in this case, the State has the liberty to amend the Service Rules. The Court cannot sit in appeal on each and every decision of the Government unless it is found to be within the scope of judicial review.

With these observations, the writ petition is dismissed.

All the pending miscellaneous applications, if any, are disposed of, in view of the abovesaid judgment.

25.01.2021

Pawan

**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No