

2023:PHHC:164384
CWP-5598-2016 (O&M)
Reserved on : 16.11.2023.
Date of Pronouncement: 21.12.2023

Excise and Taxation Inspectors Association ...Petitioner

Vs.

State of Punjab and others ... Respondents

CORAM: HON'BLE MR. JUSTICE SANJEEV PRAKASH SHARMA

Present Mr. Puneet Bali, Sr. Advocate with
Mr. Vaibhav Jain, Advocate for the petitioner.

Mr. Vikas Mohan Gupta, Addl. AG, Punjab.

SANJEEV PRAKASH SHARMA, J.

1. The petitioner-association by way of this writ petition seeks quashing of the order dated 02.12.2015, whereby the respondents rejected the representation submitted by the petitioner-association for restoring the quota of promotion to the post of Excise and Taxation Officers (hereinafter referred to as ‘the ETOs’) as was available to them prior to March, 2010.

2. The brief facts which need to be adverted to for disposal of the writ petition are that in terms of the Punjab Excise and Taxation Department (State Service Class-II) Rules, 1956 (hereafter referred to as 'the rules of 1956'), 50% posts of ETOs have to be filled by way of promotion from Assistant Excise and Taxation Officer (for short 'the AETOs') while 50% have to be filled by direct recruitment, as laid down under Rule 6 of the rules of 1956.

3. On behalf of association, learned counsel for the petitioner submits that although the rules prescribe 50:50 ratio between promotees and direct recruits but in fact the same was never followed. It is submitted that from initial stage when the Rules of 1956 were notified, the total cadre strength of ETOs was '34', out of which, '24' posts were manned by promotee officers while '10' posts by direct recruits. The ratio, therefore, as on 11.10.1956 was not equal. It is submitted that in 1977, the post of AETO was merged with that of ETO and in all '167' posts were added. At the said stage, '98' posts were occupied by promotees while '69' by direct recruits.

4. On 07.09.1994, the government fixed the quota for promotees on '265' posts of ETOs, out of which, '155' posts of ETOs were for promotees while '110' posts were for direct recruits. It was specifically stated that henceforth newly created posts shall be filled in the ratio of 50:50.

5. In 2002, '50' additional posts of ETOs were created but the State Government also directed the same to be exclusively filled up from promotee quota and also said that amendment in Rule 6 of the Rules of 1956, would be made accordingly. Later on the Cabinet decided to relax Rule 6 of the Rules of 1956 and filled all the '50' posts by promotion by exercising the power under Rule 18 of the Rules of 1956.

6. On 12.11.2009, an agenda was sent to the Personnel Department informing that the total cadre strength of '324', 209 posts were for promotees and '115' were for direct recruits and the Department of Personnel objected to such discrepancy in the ratio of promotee vis-à-vis direct recruitee.

7. It is submitted that instead of maintaining the quota at that stage also, it was recommended that '53' posts out of '162' posts of direct recruits

may be filled by promoting officers from the lower post by granting relaxation under Rule 18 of the Rules 1956 and an agenda was prepared on 04.03.2010, relaxing the rigors of Rule 6 of the Rules of 1956 by exercising power under Rule 18 of the said Act. It is to be seen that '53' posts were, therefore, directed to be filled up by promotion, although '161' were already manned by the promotee officers. Thus, it is submitted that the quota has been broken all throughout and, therefore, there can be no turn around now and filling of 50% by way of direct recruitment and 50% by promotion and the ratio which was existing earlier should continue to remain as it is without disturbing the excess promotion quota. It was stated that, therefore, the advertisement for filling up '52' posts by direct recruitment issued on 06.12.2013, was unjustified as it would result in exceeding the quota strength of '120' and affect the chances of promotion of Inspectors. It is stated that as per the present strength of '334', the direct recruitee/promotees were entitled to '120/240' posts while the department wants to fill '167' posts by direct recruitment and '167' to keep reserve for promotees, which would result in wrongful calculation hampering the prospects of members of the petitioners' association as their quota would be reduced from '214' to '167'. It is stated that in another advertisement dated 10.09.2015, '23' further posts of direct recruitment were advertised mentioning that number of posts may increase or decrease.

8. The submission is, therefore, that quota has remained '214/120' between promotee and direct recruits merely because of the Rules of 1956 coming into operation on 11.10.1956 without retrospective effect, the conversion of '167' posts of AETOs to ETOs in 1997 and creation of '50'

addition posts of ETOs in 2002 for promotees alone. Learned counsel for the petitioner-association relies upon the decision of the Hon'ble Supreme Court Direct Recruit Class-II Engineering Officers' Association vs. State of Maharashtra and others, 1990 (2) SCC 715, wherein, the Hon'ble Supreme Court has held as under:-

(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.

The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.

(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularization of his service in accordance with the rules, the period of officiating service will be counted.

(C) When appointments are made from more than one source, it is permissible to fix the ratio for recruitment from the different sources, and if rules are framed in this regard they must ordinarily be followed strictly.

(D) If it becomes impossible to adhere to the existing quota rule, it should be substituted by an appropriate rule to meet the needs of the situation. In case, however, the quota rule is not followed continuously for a number of years because it was impossible to do so the inference is irresistible that the quota rule had broken down.

(E) Where the quota rule has broken down and the appointments are made from one source in excess of the quota, but are made after following the procedure prescribed by the rules for the appointment, the appointees should not be pushed down below the appointees from the other source inducted in the service at a later date.

(F) Where the rules permit the authorities to relax the provisions relating to the quota, ordinarily a presumption should be raised that there was such relaxation when there is a deviation from the quota rule.

(G) The quota for recruitment from the different sources may be prescribed by executive instructions, if the rules are silent on the subject.

(H) If the quota rule is prescribed by an executive instruction, and is not followed continuously for a number of years, the inference is that the executive instruction has ceased to remain operative.

(I) The posts held by the permanent Deputy Engineers as well as the officiating Deputy Engineers under the State of Maharashtra belonged to the single cadre of Deputy Engineers.

(J) The decision dealing with important questions concerning a particular service given after careful consideration should be respected rather than scrutinized for finding out any possible error. It is not in the interest of Service to unsettle a settled position.

With respect to Writ Petition No. 1327 of 1982, we further hold:

(K) That a dispute raised by an application under article 32 of the Constitution must be held to be barred by principles of res-judicata including the rule of constructive res-judicata if the same has been earlier decided by a competent court by a judgment which became final.

In view of the above and the other findings recorded earlier, we do not find any merit in any of the civil appeals, writ petitions and special leave petitions which are accordingly dismissed. There will be, however, no order as to costs.

9. Per contra, the State has filed written statement and it is stated that before promulgation of Rules of 1956 as notified on 11.10.1956, there were '34' posts of ETOs. As per Rule 6 of the Rules of 1956, 2/3rd of the vacancies were to be filled by promotion and 1/3rd by direct recruitment. From 01.11.1956 to 07.02.1965, eight more posts were created. In 1965, the ratio was amended to 50:50 amongst promotees and direct recruits. On 17.05.1971, there were '42' posts of ETOs. Additionally '167' posts of AETOs were merged into ETOs bringing total strength to '209'. At that

stage, out of '167' AETOs, '82' posts of AETOs were direct recruits while '127' were promotees. Thus the ratio as in 1977 was higher of promotees than that of direct recruits. From 18.05.1977 to 31.03.1990, further '45' posts were created and then '11' further posts were created between 01.04.1990 to 07.09.1994. At both the stages, the posts were distributed equally between promotees and direct recruits. In 2002, '50' new posts of ETOs were sanctioned although they were filled from promotees as no direct recruitment could be done during the period and for that purpose relaxation was granted under Rule 18 of the Rules of 1956. Thus, the total strength of promotees increased from '155' to '205' posts. It is stated that as on today '395' posts of ETOs are existing out of which '198' posts are meant for direct recruitment and '197' are meant for promotees, whereas on the ground there are only '83' persons working as direct recruits while '183' posts were filled up by promotees and, therefore, to maintain the quota '115' have to be filled up by direct recruitment and '14' by promotees. Learned counsel for the respondents submit that the rules are sacrosanct and if due to circumstances the quota rule has been disturbed, it is the duty of the State Authorities to restore the quota. The respondents cannot claim quota higher than that provided under the rules. The rule is not under challenge before this Court. It is further submitted that on account of interim order passed by this Court further process of direct recruitment could not be done which is hampering the state activities.

10. On the basis of various submissions, the following points arise for consideration:-

- (i) Whether the directions issued by the State Government while creating the posts on 23.09.2002 and 04.12.2002 to fill up the 50 created posts from promotion quota only would amount to relaxing Rule 6 of the Rules of 1956 and whether such relaxation could be permissible under Rule 18 of the Rules of 1956 and whether decision to fill '53' posts by promotion by the Cabinet vide memo dated 04.03.2010 would amount to breaking down of quota rule?
- (ii) Whether action of the respondents now in filling up the posts by way of direct recruitment by maintaining 50:50 quota of the total cadre strength can be said to be unjustified?

11. Before dealing with these points, it would be apposite to notice the language of the Rule of 1956. Rule 6 and 18 of the Rules of 1956 read as under:-

RULE 6: Appointment to the Service of Excise and Taxation Officer; 50% of the vacancies of Excise and Taxation Officers shall be filled by promotion from amongst the Assistant Excise and Taxation Officers and 50% by direct recruitment.

Note: Recruitment to the post of Excise and Taxation Officer by transfer or deputation will be counted towards vacancies reserved for direct recruitment. The seniority will, however, be determined according to the provisions of Rule 12 of the said Rules."

RULE 18:POWER TO RELAXATION:

Where the government is of the opinion that it is necessary or expedient so to do, it may order, for reasons to be recorded in writing, relax any of the provision of these rules with respect to any class or category of person."

12. It would also be apposite to quote the memo dated 23.09.2002 and 04.12.2002 as under:-

Memo dated: 23.09.2022:

The Governor of Punjab is pleased to accord sanction to the creation of 50 posts of Excise and Taxation Officers in the scale of Rs.7000-220-8100-275-10380-340-10980 along with supporting staff in their respective scales. Those posts of Excise and Taxation Officers will be exclusively for the promotion quota and to that effect rule 6 of the Punjab Excise and Taxation Department (State Service Class-II) Rules, 1956, will be amended.

The 50 posts of Excise and Taxation Officers will be filled up by promotion from the cadre of Inspectors. The posts of Inspectors consequently failing vacant will be filled up from amongst the ministerial cadre/redeployment cell and the residual posts so fallen vacant will be filled up from the surplus pool. The supporting staff for newly created posts of Excise and Taxation Officers will also be filled up from the surplus pool. This sanction issues with the concurrence of the Finance Department conveyed vide their I.D. No.11/2/2002-FE-V/2381 dated 10.09.2002. The ex post fact approval of the Council of Ministers shall be taken separately.

Memo dated 04.12.2002:

In continuation of this department memo No.18/44/2002-ETI(4) 7046-49 dated 23.09.2002, the Governor of Punjab is pleased to accord ex-post facto sanction to the creation of 50 posts of Excise and Taxation Officers in the scale of Rs.7000-220-8100-275-10380-340-10980 along with supporting staff as detailed below:-

Sr. No.	Designation of Posts	Number	Pay Scale
1.	Excise and Taxation Officer	50	5480-8952
2.	Stenographers	50	3330-6200
3.	Record Keepers	50	3120-5160
4.	Process Servers	50	2520-4140
5.	Peons	50	2520-4140

The Governor of Punjab is further pleased to earmark 5 posts of these newly sanctioned posts to the ministerial staff cadre as a one time

measure. Further, in pursuance of government policy letter No.2/33/88-ETI(1) 3808 dated 07.09.1994, a back log of 3 posts of Excise and Taxation Officer prior to 27.01.1992, when the quota of ministerial staff ceased to operate, is also allowed to be filled up from amongst the said category who are eligible for the said posts as on that date by giving them relaxation in age limit.

The newly created posts of the Excise and Taxation Officers will be exclusively for the promotion quota in relaxation of provision of rule 6 of the Punjab Excise and Taxation Department (State Service Class-II) Rules, 1956 by virtue of powers given to the government vide rule 18 of the rules, *ibid*.

The posts of Excise and Taxation Inspectors along with posts of ministerial staff namely Stenographers, record keepers, process servers, peons will be filled up from surplus pool through the re-development cell.

This sanction issues with the concurrence of the Council of Ministers conveyed by the Department of General Administration (Cabinet Affairs Branch) vide their ID NO.1/162/2002-Cabinet/3577 dated 18.11.2002.

Memo dated: 04.03.2010:

In connection with the letter under reference on the aforesaid subject, vide letter No.1/49/2020-1-Cabinet/601 dated 24.02.2010 of the General Administration Department (Cabinet Affairs Branch), as informed with regard to approval of the proposal given in para '2' of the Cabinet Memorandum, 53 posts of direct recruitment, which are to be filled by promotion, out of them first 5 posts shall be given to the ministerial staff, whose agenda will be sent separately. Due to 48 posts of the direct recruitment and one post of promotion quota being vacant, in order to promote out of the Taxation/Excise Inspectors against total 49 posts, agenda, integrity certificate and detail with regard to pending proceedings is sent to the government for further necessary action.

It is also apposite to reproduce substituted rules 6 and 18:-

“6. Appointment to the posts of Excise and Taxation Officers:- 50 percent of the vacancies of the Excise and Taxation Officers shall be filled by

promotion from amongst the Assistant Excise and Taxation Officers and 50 percent by direct recruitment.

Note: Recruitment of the post of Excise and Taxation Officer by transfer or deputation will be counted and vacancies reserves for direct recruitment. The seniority will however be determined according to the provisions of rule 2 of the said rules.

18. The power of relaxation: Where the government is of the opinion that it is necessary on expenditure so to do, it may, by order, for reasons to be recorded in writing, relax any of the provision in these rules with respect of any class or category of persons.”

POINT No.1

13. On the strength of the aforesaid memos issued by the Excise and Taxation Department, the petitioner-association submits that the posts created by the Government would remain in promotion quota and cannot be filled up by direct recruitment. However, this Court finds upon reading of the aforesaid rule that while the government has the power to determine the manner as to how any vacancy (now post) which occurs or about to occur, shall be filled. The proviso to Rule 6 of the Rules of 1956 restrains the government not to disturb the quota. It is settled law that a proviso carves out an exception to the main rule, thus, it binds the main rule with regard to maintaining of quota. As per the rules, initially it was 2/3rd and 1/3rd between promotees and direct recruits which was later on modified to 50:50 vide notification dated 08.02.1965. It may be noticed that Rule 6 as it was existing earlier with the proviso, has been amended from 1965 onwards and the discretion given to the government to direct filling up any post in a particular manner which was existing in the original rule, was no more available. Rule 18 was also amended as above.

14. The order passed by the State Government dated 23.09.2002, 04.12.2002 and 04.03.2010 will have to be examined in light of the aforesaid

provisions. While exercising power under Rule 18 of the Rules of 1956, no reason is coming forward for relaxing the recruitment rules of promotion and direct recruitment. Power under Rule 18 of the Rules of 1956, can be exercised by recording reasons in writing with respect to any class or category of persons. However, upon creating of number of posts in the department and earmarking them for promotion alone, is an exercise, resulting in disturbing the very basic rule of proportioning the posts between direct recruitment and promotee quota as 50:50. It need not be stressed that while persons in the department would always seen avenues for promotions, candidates who are educated and aspirants also seek employment.

15. In Keshav Chandra Joshi vs. Union of India 1992 Supplementary (1) SCC 272, the Hon'ble Supreme Court held relaxation of the rule as unjustified holding that the rule was mandatory.

In Syed Khalid Rizvi vs. Union of India 1993 Supplementary (3) SCC 575, three Judges Bench of the Hon'ble Supreme Court has drawn distinction between the conditions of recruitment and conditions of service and held that the conditions of recruitment cannot be relaxed while conditions of service may be relaxed.

“Rule 3 of the Residuary Rules provides the power to relax rules and regulations in certain cases - Where the Central Govt. is satisfied that the operation of - (i) any rule made or deemed to have been made under the Act, or (ii) any regulation made under any such rule, regulating the conditions of service of persons appointed to an All India Service "causes undue hardship in any particular case", it may, by order, dispense with or relax the requirements of that rule or regulation, as the case may be, to such an extent and subject to such exceptions and conditions as

it may consider necessary for dealing with the case in a "just and equitable manner". Rule 3 empowers the Central Govt. to relieve undue hardship occurred due to unforeseen or unmerited circumstances. The Central Govt. must be satisfied that the operation of the rule or regulation brought about undue hardship to an officer. The condition precedent, therefore, is that there should be an appointment to the service in accordance with rules and by operation of the rule, undue hardship has been caused, that too in an individual case, the Central Govt. on its satisfaction of those conditions, have been empowered to relieve such undue hardship by exercising the power to relax the condition. It is already held that conditions of recruitment and conditions of service are distinct and the latter is preceded by an appointment according to Rules. The former cannot be relaxed. The latter too must be in writing that too with the consultation of U.P.S.C. In Mahapatra and Khanna cases this Court held that approval by the Central Govt. and U.P.S.C. are mandatory. In A.K. Cnauthary's case it was held that requirement of Rule 3(3)(b) of Seniority Rules is mandatory. In Amrik Singh's case an express order in writing under Rule 3 of Residuary rule is mandatory. In this case neither any representation to relax the rules was made nor any order in writing in this behalf was expressly passed by the Central Govt. The fiction of deeming relaxation would emasculate the operation of the Rules and Regulations and be fraught with grave imbalances and chain reaction. It is, therefore, difficult to accept the contention that there would be deemed relaxation of the Rules and Regulations."

In State of Orissa vs. Sukanti Mahapatra (1993) 2 SCC 486, the question arose relating to the words used in the relaxation rule and it was held that the rule of direct recruitment could not be permitted to be relaxed.

In Dr. M.A. Haque vs. Union of India (1993) 2 SCC 212, it was held that relaxation of rules relating to direct recruitment could not be relaxed by the authorities.

In Ashok Kumar Uppal vs. State of J & K (1998) 4 SCC 179, the Hon'ble Supreme Court held that the power of relaxation could not be arbitrarily exercised and the same has to be based on cogent reasons.

In Suraj Kumar Gupta vs. State of J & K (2000) (7) SCC 561, it was held that the power can be only exercised on the ground of hardship to an individual case. However, this aid power cannot be exercised for relaxing the recruitment rule.

In a somewhat similar case of M.S. Sandhu vs. State of Punjab, Civil Appeal Nos.5397-5406/2014, decided on 07.05.2014, where number of promotions were made in excess of the quota, the Hon'ble Supreme Court has observed as under:-

“37. The operation of the Rules may result in harsh consequences as far as appellants are concerned. But on the vagaries of such outcomes, the Court cannot keep on interpreting a rule differently. It is more especially when the promotees being in excess of their quota have enjoyed the fortuitous appointment beyond their quota of vacancies.

38. Likewise, argument of the appellants that the quota rule had broken down would not cut much ice. First of all, such an argument was not even raised/pleaded, nor any material was placed on record which shows that the adherence to the quota rule as possible leading to break down of the quota. Private respondents have made fervent plea that as a matter of record whenever State Government had endeavoured to make direct recruitments, vacancies had been duly filled with adequate number of candidates. Therefore, for want of any material no definite findings can be recorded on this aspect, more so, such a

case was not pleaded before the High Court. May be, because of such situation recurring time and again either in favour of the promotees or in favour of the direct recruits, the Government has remedied the situation by amending the rules thereby bringing the rule of continuous length of service for determining the seniority. It is always open to the Government to take such steps for the benefit of all in the service and to ensure that the result is equitable. However, in the instant case, we do not find fault with the judgment of the High Court.”

16. As noticed, it is now settled that once the rule making authority provides a particular quota to be filled up by a particular method, the same cannot be ignored or bypassed. The promotees and direct recruits have their own rights for consideration of appointment which are limited to the number of posts available in their respective quota. If it is found that the promotions have been made excess of their quota, the excess promotions shall have to be treated as *ad hoc* and thereafter to be lowered down. The post meant for direct recruitment has to be filled from direct recruitment alone.

17. In the light of the above, this Court having noticed the judgments (*supra*), holds that the directions issued by the State Government will have to be understood to only allow promotions temporarily and it would also have to be understood for filling up the post for urgent need. Such promotions which were made by the government directions, would not in any manner take away the quota of direct recruitment. Thus, if 50 posts have been created, half of the said posts would remain intact for the quota of direct recruitment while half can be filled permanently from promotees. However, if at that particular time i.e. 2002 and 2010, promotions have been made on all the posts, instead of resorting to direct recruitment, equal number

of posts which are created in future or fell vacant will have to be kept available for filling up from the direct recruitment. This Court, therefore, agrees with the exercise conducted by the State Government and holds that the relaxation power said to have been exercised in the years 2002 and 2010 would only be allowed for the posts to be filled temporarily from promotees and the quota rule for direct recruitment and promotees could not be relaxed. Power under Rule 18 cannot be exercised for the said purpose. Hence, the order passed by the State Government would, therefore, accordingly be understood.

18. The State Government has already taken steps to ensure that the quota is maintained, merely because earlier number of promotions were made based on a decision in relaxing the quota rules, which this Court has already held to be unjustified and as the power under Rule 18 could not have been exercised to relax the quota rules, the contention of learned counsel for the petitioner-association that the quota rule has broken down, cannot be accepted.

POINT No.2:

19. The affidavit filed by the State dated 20.01.2023, reflects that while upto 13.04.2006, out of total sanctioned strength of '324' posts, '115' posts were being shown under the direct recruitment quota and '209' posts were being shown in the quota of promotees, which was corrected on 05.10.2012, keeping '162' posts for direct recruitment and '162' posts for promotees. The same was followed on 05.10.2012, when the cadre strength was increased to '334' keeping '167' posts for direct recruitment and '167' for promotees. On 24.02.2021, the cadre strength increased to '395' and,

therefore, '197' posts have been kept as quota of direct recruitment and '198' have been kept for promotees.

20. In view of above, this Court finds that although earlier from 1977 to 2006, the promotees continued to hold posts over and above their quota, the State Government has rightly bifurcated the same thereafter and the advertisement issued to fill up direct recruitment posts cannot be objected to.

So far as the judgment passed by the Hon'ble Supreme Court in Direct Recruit Class-II Engineering Officers' Association (supra) is concerned, the issue involved therein was with regard to collapsing of the quota while the Hon'ble Supreme Court saved the persons who were promoted in excess of their quota for future and the quota cannot be said to be collapsed in the present case.

In the present case, there is no action taken by the State Government to revert the promotees. It is on the available posts that the State Government is conducting exercise of direct recruitment so that the quota may be maintained. However, in this case as noted above, power of Rule 18 of the Rules of 1956 to relax the provision relating to the quota are not available. It is also not a case where the promotees are not pushed down. Thus, the decision of the Hon'ble Supreme Court is on different facts and would not apply to the present case.

21. From 2009, this Court finds that the quota has been maintained as is apparent from the affidavit filed by the State. In 2023, the promotees working strength is '183' while direct recruitment working strength is only '83'. In terms of the total sanctioned strength, '14' posts would be available

for promotion and '115' posts would have to be filled up by way of direct recruitment. The petitioner-association would have no claim against said '115' posts and the contention raised by the petitioner-association to allow them to fill up the posts by promotion and thereby disturbing the quota is not sustainable in the eyes of law.

22. The writ petition, therefore, fails and is accordingly dismissed. The interim orders passed by this Court from time to time shall now stand vacated and the respondents shall be free to proceed further with the direct recruitment and fill up the posts expeditiously.

23. No costs.

24. All pending misc. application(s) also stand disposed of.

(SANJEEV PRAKASH SHARMA)
JUDGE

21.12.2023

rajesh

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