

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

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RSA-4301-2013 (O&M)
Date of Decision :06.02.2023

Dakshin Haryana Bijli Vitran Nigam Limited
and others

...Appellants

Versus

Azad Ali

...Respondent

CORAM: HON'BLE MR. JUSTICE HARSIMRAN SINGH SETHI

Present: Mr. Pardeep Singh Poonia, Advocate for the appellants.

Mr. Pankaj Maini, Advocate for the respondent.

* * *

Harsimran Singh Sethi, J. (Oral)

The present regular second appeal has been filled by the appellants-defendants challenging the order dated 23.03.2013 passed by the Lower Appellate Court by which, the judgment and decree dated 21.12.2011 passed by the trial Court has been set aside and the suit filed by the respondent-plaintiff was allowed to the effect that the respondent-plaintiff will be entitled for the grant of 1st ACP from 01.04.2002 instead of 01.01.2010 and he will also be entitled for promotion to the post of Commercial Assistant with retrospective effect from 28.02.2006 i.e. the date when his juniors were promoted with all consequential benefits of arrears and interest.

Certain facts needs to be mentioned so as to appreciate the controversy in the correct perspective.

Respondent-plaintiff joined Haryana State Electricity Board as

Upper Division Clerk on 18.03.1992. As per the Finance Circular dated 27.02.1998, the employees working in the respondent-Board were held entitled for the benefit of higher pay scale under the Assured Career Progression Scheme on completion of 10 years of services in a particular cadre. The petitioner claimed the benefit of 1st ACP on completion of 10 years of service w.e.f. 01.04.2002 but it was actually granted to him w.e.f. 01.01.2010. Even the promotion to the post of Commercial Assistant was denied to the respondent-plaintiff whereas, his colleagues, who were working as Upper Division Clerk were promoted on 28.02.2006 including the employees, who were even junior to the respondent-plaintiff. As the said reliefs were not being granted, the respondent/plaintiff filed civil suit no.90-2010 seeking declaration with consequential relief of Mandatory injunction that respondent/plaintiff is entitled for the grant benefit of 1st ACP w.e.f. 01.04.2002 instead of 01.01.2010 and also for promotion to the post of Commercial Assistant from the date, his juniors were promoted along with consequential benefits of arrears and interest.

The notice in the civil suit was issued to the respondents and the respondents filed written statement controverting the claim of the respondent/plaintiff that as per the rules governing the service an Upper Division Clerk, who has been directly recruited will not be appointed substantively unless and until the said employee passes the departmental examination of paper-I to paper-IV within a period of 05 years of his appointment and in case of failure to clear the said departmental examination even within the period of five years, the said failure will entail stoppage of increments till the passing of the said examination and the grant of increments will not be with retrospective effect even upon passing

of the said departmental examination subsequent to the period of five years hence, as the respondent-plaintiff passed the departmental examination in the year 2009, he cannot be treated as substantive Upper Division Clerk so as to claim the benefit of ACP w.e.f 2002 which benefit was only available to an employee, who was fully eligible for promotion but could not get the said promotion due to the unavailability of promotional avenue.

The trial Court considered the claim of the respondent/plaintiff and after appreciating the evidence which had come on record dismissed the suit vide order dated 21.12.2011 qua the claim of promotion to the post of Commercial Assistant w.e.f. 28.02.2006 and also for the grant of 1st ACP on completion of 10 years w.e.f 01.04.2002 but granted the relief with regard to the recovery of Rs.5071/-, which was done by the department from the respondent-plaintiff alongwith 12% interest per annum.

Aggrieved against the said order of dismissal of suit dated 21.12.2011, the respondent/plaintiff filed an appeal and the Lower Appellate Court vide order dated 23.03.2013 set aside the decree and judgment of trial Court dated 21.12.2011 and held that upon passing of departmental examination by the respondent-plaintiff in the year 2009, the same has to be given retrospective effect and the respondent/plaintiff was held entitled for the grant of 1st ACP on completion on 10 years on service w.e.f 01.04.2002 and also for promotion to the post of Commercial Assistant w.e.f 28.02.2006 i.e. the date when the employees junior to him were promoted . The said judgment and decree dated 23.03.2013 of the Lower Appellate Court is under challenge in the present regular second appeal.

Learned counsel for the appellants argues that in the present

case, without appreciating the rules governing the service and the evidence which has come on record, the Lower Appellate Court held that respondent/plaintiff is entitled for 1st ACP on completion of 10 years w.e.f. 01.04.2002 even though, he was not substantive Upper Division Clerk on the said date having not passed the departmental examination.

Learned counsel for the appellants further argues that the benefit of promotion has been extended to the respondent/plaintiff by the Lower Appellate Court despite the fact that on the said date i.e. 28.02.2006 the respondent/plaintiff having failed to clear the departmental examination was not substantive Upper Division Clerk so that he could be considered for promotion to the post of Commercial Assistant. Hence, the judgment of the Lower Appellate Court dated 23.03.2013 is contrary to the rules governing the service and a perversity has been crept into the findings of the Lower Appellate Court so as to allow the suit filed by the respondent/plaintiff hence, the said judgment of the lower Appellate Court is liable to be set aside.

Learned counsel for the respondent-plaintiff argues that though, it is a conceded position that an Upper Division Clerk working in the department was required to pass the departmental examination and once he/she passes the said departmental examination same will relate back to the date of initial appointment hence, the judgment and decree of the Lower Appellate Court, granting the benefit of 1st ACP from 01.04.2002 and also the benefit of promotion from the date his juniors were promoted i.e 28.02.2006 to the respondent/plaintiff by considering him eligible for the said benefits is liable to be upheld.

I have heard learned counsel for the parties and have gone

through the record with their able assistance.

The rules governing the service have been reproduced by the trial Court in para-9 of the judgment dated 21.12.2011. The same are reproduced as under for ready reference:-

“An Upper Division Clerk, if he has been directly recruited as such, will not be appointed in a substantive capacity in his post unless he has passed the Examination in Papers I to IV. If he fails to pass the Examination in Papers I to IV within 5 years of his first appointment in the Board, his increments falling due after the first 4 increments from his first appointment will be with-held until he passes the Examination and will not be granted with retrospective effect on his passing the Examination. On passing the Examination he will, with effect from the date following that on which, the Examination ended, be entitled to the rate of pay which would have been admissible to him, had his increment not been withheld for his failure to pass the examination. The failure of an Upper Division Clerk to pass the Examination in 10 successive Examination held immediately after the expiry of six months from the date of his first appointment in the Board may involve the loss of his appointment and in case if he fails to pass the Examination within the probationary period of two years, the probationary period will be deemed to have been extended till he passes the examination within the above stipulated chances.”

A bare perusal of the said rules would show that unless and until the departmental examination is passed, the Upper Division Clerk, who has been directly recruited, he/she cannot be treated as substantive

appointee in the said cadre. In the present case, it is a conceded position that the respondent/plaintiff has passed the departmental examination in the month of December, 2009 and it is only in December, 2009 that the respondent/plaintiff was given substantive appointment in the cadre of Upper Division Clerk. That being so, the question which now arises is whether an Upper Division Clerk, who has not been substantively appointed can claim benefit of ACP on completion of 10 years of service, which benefit is only admissible to a substantive appointee, who is eligible for promotion to the next higher rank but has not been granted the said promotion due to the non-availability of promotional avenue. Further question which arises is whether an employee, who is not substantive appointee in feeder cadre can claim promotion to the higher rank. The rules which have been reproduced hereinbefore are very clear. No rule or law has been brought to the notice of this Court by the respondent/plaintiff that even an appointee, who is yet to be appointed substantively in the feeder cadre, can be granted the benefit of promotion to the next higher post of Commercial Assistant.

Further, the rules, which govern the service are very clear that even an increment of an Upper Division Clerk, who has been appointed directly but has failed to pass the departmental examination within a period of 05 years, will be stopped and though stopped increments will also not to be restored retrospectively on passing of the said departmental examination by the said employee subsequent to the period of five years. That being so, an employee, who is yet to gain substantive appointment in the feeder cadre and is not being allowed the increments in service dispensed wrongly, cannot claim promotion as a matter of right. The denial of promotion to the

respondent/plaintiff in the year 2006 when the other colleagues of the respondent/plaintiff, who had cleared the departmental examination were promoted, was perfectly valid and legal and the Lower Appellate Court has failed to appreciate that in order to get the promotion, an employee has to be substantively appointed in the feeder cadre. Once the respondent/plaintiff was not substantively appointed in the feeder cadre of UDC on 28.02.2006, he could not have claimed promotion as a matter of right hence, a perversity has occurred in the judgment dated 23.03.2013 of the Lower Appellate Court while recording the finding that once the respondent/plaintiff has cleared the departmental examination in December, 2009 he will be entitled for the grant of benefit of promotion to the post of Commercial Assistant retrospectively even from the date prior to the passing of the departmental examination by the respondent/plaintiff which finding is contrary to the rules governing the service and cannot be upheld.

With regard to the grant of benefit of ACP on completion of 10 years of service w.e.f 01.04.2002, the same has also not been dealt by the Lower Appellate Court in a correct perspective. The benefit of ACP is only available to an employee, who is a substantive appointee in the feeder cadre and is eligible for promotion to the next higher rank but due to the non-availability of promotional avenue, the employee is stagnating in the feeder cadre.

In the present case, it is a conceded position that keeping in view the facts recorded hereinbefore, as per the rules governing the service, the respondent/plaintiff was not even substantive appointee in the cadre of Upper Division Clerk when he completed 10 years in service having not passed the departmental examination required to be passed as per rules

governing the service. Once, the respondent/plaintiff was not eligible for promotion to the post of Commercial Assistant in the year 2002 though, he might have completed 10 years of service but non-eligibility of the respondent/plaintiff to claim the promotion is the factor which was required to be seen by the Lower Appellate Court, which the Lower Appellate Court missed while directing the department to give the benefit of 1st ACP to the respondent/plaintiff w.e.f. 01.04.2002. An unsubstantive appointee in the cadre of Upper Divisional Clerk is not eligible to claim promotion to the next higher post of Commercial Assistant even if he/she has 10 years of service to his/her credit. Eligibility for promotion is the factor which is to be seen coupled with the number of years served in the feeder cadre, which fact the Lower Appellate Court has failed to appreciate while passing the order dated 23.03.2013.

Learned counsel for the respondent/plaintiff argues that keeping in view the judgment of a Coordinate Bench of this Court in **CWP-9342-1988** titled as **Jagdish Singh vs. Haryana State Electricity Board and others**, the petitioner was to gain seniority by clearing the departmental examination. The said judgment is being misread by the learned counsel for the respondent/plaintiff as the same relates to the seniority position and does not relate to the clearing of the examination by the Upper Division Clerk, which issue is involved in the present case.

Even otherwise, the said judgment in Jagdish Singh (supra) has already been upset by the Division Bench of this Court while deciding **LPA No.192-1993** titled as **Jagdish Singh vs. Haryana State Electricity Board and others** on 24.02.1998. Relevant paragraphs of the judgment is as

under:-

“In view of the above, we answer the question posed at the output in the negative. We hold that a member of the ministerial establishment cannot be confirmed prior to the date of his passing the departmental examination. This interpretation of the rule excludes discretion and ensures a uniform method for determination of the seniority of the employees.”

Learned counsel for the respondent/plaintiff further relies upon the judgment of the Division bench of this Court in CWP-3528-2005 titled as **Ramesh Dahiya vs. Uttar Haryana Bijli Vitran Nigam Limited** decided on 04.04.2008.

The said judgment cannot be made applicable in the facts and circumstances of the present case as concededly, the respondent/plaintiff was not eligible even to hold the post of Upper Division Clerk in substantive capacity from the date when the relief of 1st ACP as well as promotion is being claimed and has been granted by the lower Appellate Court vide impugned judgment.

Keeping in view the above, once it has been held that prior to the passing of the departmental examination, an Upper Division Clerk cannot be treated as confirmed, the question for the grant of promotion to an unconfirmed employee and also the grant of benefit of 1st ACP on completion of 10 years of service to the said unconfirmed employee does not arise.

Keeping in view the above, judgment and decree of the Lower Appellate Court dated 23.03.2013 is set aside being perverse to the facts and rules governing the service and judgment and decree of the trial Court dated 21.12.2011 is restored and the present regular appeal is accordingly

allowed.

CM-11652-C-2013

Application is also allowed.

February 06, 2023
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(HARSIMRAN SINGH SETHI)
JUDGE

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