

IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

116+256

CWP-3638-2023
Date of decision: 24.04.2024

JASDEEP SINGH AULAKHPETITIONER

Vs.

STATE OF PUNJAB AND OTHERS ...RESPONDENTS

CORAM: HON'BLE MR. JUSTICE JAGMOHAN BANSAL

Present: Mr. Rajiv Atma Ram, Senior Advocate with
Mr. Brijesh Khosla, Advocate and
Ms. Shreya Kaushik, Advocate
for the petitioner.

Mr. Pawan Kumar, DAG, Punjab.

JAGMOHAN BANSAL, J (ORAL)

1. The petitioner through instant petition under Articles 226/227 of the Constitution of India is seeking setting aside of order dated 31.01.2023 (Annexure P-17) whereby respondent has rejected claim of the petitioner seeking counting of service rendered from 13.06.1996 to 30.06.2004 with Punjab State Electricity Board (for short 'PSEB') as Assistant Engineer (Electrical).
2. The petitioner on 13.06.1996 joined Punjab State Electricity Board as Assistant Engineer (Electrical). The respondent-State advertised posts of Civil Servants (Executive Branch). The petitioner applied for the post and came to be selected in PCS (Executive Branch). He made multiple representations to respondents to the effect that his service period with PSEB may be counted for pensionary benefits. The respondent by order dated 31.01.2023 (Annexure P-17) has rejected his claim. It is apt to mention here that respondent did not pass a reasoned order. For the ready reference, the said order is reproduced as below:-

*“Subject: Grant of benefit of Old Pension Scheme after
counting service rendered in the Punjab State Electricity Board*

With reference to your Representations dated 15.07.2022, 16.08.2022 and 17.11.2022 on the subject cited above.

After considering your Representations submitted under reference for covering the service rendered by you in the Punjab State Electricity Board under Old Pension Scheme, the same have been filed in the Office at the level of the Competent Authority.”

3. Mr. Rajiv Atma Ram, Senior Advocate submits that petitioner submitted technical resignation and it was duly accepted by Competent Authority. He vide communication dated 29.06.2004 (Annexure P-3) was permitted to join Punjab Civil Services (Executive Branch). The respondent has rejected his claim without adverting with Rule 3.17-A of Punjab Civil Services Rules, Volume-II, Chapter-3 as well Rule 7.5(2) of Volume-I Part-I of Punjab Civil Services Rules (for short ‘PCS Rules’). The respondent is relying upon instructions dated 18.04.2016 and 25.04.2017 which are inapplicable to petitioner because instructions cannot override rules and further instructions were issued post joining of petitioner as PCS Officer. The respondent has counted service of similarly situated employees for the purpose of qualifying service.

4. Per contra, Mr. Pawan Kumar, DAG, Punjab submits that instructions of 2016 and 2017 are very much clear. Service rendered in a PSU may be counted for qualifying service if an employee has joined government service on account of winding up of PSU or absorption in government department. The petitioner voluntarily resigned from his parent department and thereafter joined PCS (Executive Branch) after cracking direct recruitment test.

He concedes that benefit of counting of previous service period has been extended to other officers. He further concedes that pay of the petitioner has been protected.

5. I have heard the arguments of learned counsel for the parties and perused the record.

6. The conceded position emerging from the record is that the petitioner from 1996 to 2004 worked as Assistant Engineer with PSEB. He participated in the direct recruitment process of PCS (Executive Branch). He came to be selected in 2004 and joined PCS (Executive Branch). He submitted resignation to his parent department i.e. PSEB which accepted his resignation. The respondent has protected pay of the petitioner and granted claimed benefit to identically placed officers.

7. As per respondent, the service rendered by petitioner with PSEB cannot be counted because of instructions dated 18.04.2016 and 25.04.2017. The petitioner is relying upon Rules which have been framed by Governor in exercise of power conferred by proviso to Article 309 of the Constitution of India. It is a settled proposition of law that Rules framed by Governor in exercise of power conferred by Article 309 are plenary in nature. These rules are not a piece of delegated legislation. The Supreme Court time and again has reminded that circular/instructions/notifications cannot flow contrary to river of legislative provisions either plenary or delegated.

8. Rule 3.17-A of Punjab Civil Services Rules provides for counting of service rendered in an establishment. It clearly provides that service rendered in an establishment would be counted as qualifying service if the employee has submitted resignation for taking up another appointment and said resignation has been accepted. The Rule 3.17-A is reproduced as below:-

“Rule 3.17-A. *(1) Subject to the provisions of rule 4.23 and other rules and except in the cases mentioned below, all service rendered on establishment, interrupted or continuous, shall count as qualifying service:-*

(i) Omitted.

(ii) Omitted.

- (iii) *Casual or daily rated service.*
- (iv) *Suspension adjudged as a specific penalty.*

Note.— In cases where an officer dies or is permitted to retire while under suspension will not be treated as an interruption.

- (v) *Service preceding resignation except where such resignation is allowed to be withdrawn in public interest by the appointing authority as provided in the relevant rules or where such resignation has been submitted to take up, with proper permission, another appointment whether temporary or permanent under the Government where service qualifies for pension.*
- (vi) *Joining time for which no allowances are admissible under rules 9.1 and 9.15 of C.S.R., Volume I, Part I.*
- (vii) *If any unauthorised leave of absence occurs in continuation of authorized leave of absence and if the post of the absentee has been substantively filled up, the past service of the absentee is forfeited.*
- (viii) *Transfer to a non-qualifying service in an establishment not under Government control or if such transfer is not made by the competent authority and transfer to service in a grant-inaid school.*
(A Government employee, who voluntarily resigns qualifying service, cannot claim the benefit under this clause.)
- (ix) *Removal from public service for misconduct, insolvency, inefficiency not due to age, or failure to pass an examination will entail forfeiture of the past service.*
- (x) *Service rendered beyond the date of retirement on superannuation in terms of rule 3.26 of Punjab Civil Services Rules, Volume I, Part I.*

(2) *An interruption in the service of a Government employee caused by wilful absence from duty or unathorised absence without leave, shall entail forfeiture of the past service.*

(3) *Wilful abstinence from performing duties by a Government employee by resort to pen down strike shall be deemed to be wilful absence from duty and shall also entail forfeiture of the past service.*

Note.— *In the case of a Central Government employee who is permanently transferred to the Punjab Government and becomes subject to these rules, the pensionary benefits admissible for service under Central Government would be that admissible under the Government of India rules and the liability for such benefits shall be allocated in accordance with the prevalent orders.*

Clarification (1).—Even after the introduction of rule 3.17(A) and deletion of rule 4.21 the following cases do not entail forfeiture of past service:—

(a) authorised leave of absence;

(b) abolition of post or loss of appointment owing to reduction in establishment.

(“Post” or “appointment” means a post or appointment service in which qualifies for pension).

(2) While counting such qualifying service for working out aggregate service, the period of break in service shall be omitted.”.”

[Emphasis Supplied]

9. Sub-Rule (2) of Rule 7.5 of PCS Rules provides that resignation submitted for taking up another appointment with Government, shall not entail forfeiture of past service, if there is permission by Competent Authority. Sub-Rule (2) of Rule 7.5 of PCS Rules is reproduced as below:-

“A resignation shall not entail forfeiture of past service if it has been submitted to take up, with proper permission, another appointment, whether temporary or permanent, under the Government where service qualifies for pension.”

10. From the perusal of above quoted Rules 3.17-A and 7.5 (2) of PCS Rules, it is quite evident that service rendered with an establishment is counted for qualifying service if an employee resigns with the permission of Competent Authority and for the purpose of taking up employment with Government. The respondent has failed to controvert applicability of aforesaid Rule to petitioner except pleading that instructions do not provide for counting previous service.

11. It is settled proposition of law that instructions can supplement statutory provisions but cannot supplant the statutory provisions. The instructions cannot be contrary to mandate of Rules. The said instructions are not under challenge, however, being contrary to statutory provisions as well as intent of beneficial scheme cannot detain this Court.

12. The Supreme Court in ***Shree Bhagwati Steel Rolling Mills v. Commissioner of Central Excise and another, (2016) 3 SCC 643***, has observed that Rules or Regulations which are ultra vires though not challenged may be ignored. The relevant extracts of the judgment read as:

“28. Shri Aggarwal in order to buttress his submission that he ought to be allowed to raise a pure question of law going to the very jurisdiction to levy interest, cited before us the judgment in Bharathidasan University v. All-India Council for Technical Education [Bharathidasan University v. All-India Council for Technical Education, (2001) 8 SCC 676 : 1 SCEC 924] and in particular para 14 thereof which reads as follow: (SCC pp. 688-89)

“14. The fact that the Regulations may have the force of law or when made have to be laid down before the legislature concerned does not confer any more sanctity or immunity as though they are statutory provisions themselves. Consequently, when the power to make Regulations is confined to certain limits and made to flow in a well-defined canal within stipulated banks, those actually made or shown and found to be not made within its confines but outside them, the courts are bound to ignore them when the question of their enforcement arises and the mere fact that there was no specific relief sought for to strike down or declare them ultra vires, particularly when the party in sufferance is a respondent to the lis or proceedings cannot confer any further sanctity or authority and validity which it is shown and found to obviously and patently lack. It would, therefore, be a myth to state that the Regulations made under Section 23 of the Act have ‘constitutional’ and legal status, even unmindful of the fact that any one or more of them are found to be not consistent with specific provisions of the Act itself. Thus, the Regulations in question, which AICTE could not have made so as to bind universities/UGC within the confines of the powers conferred upon it, cannot be enforced

against or bind a university in the matter of any necessity to seek prior approval to commence a new department or course and programme in technical education in any university or any of its departments and constituent institutions.”

29. *It would be seen that Shri Aggarwal is on firm ground because this Court has specifically stated that rules or regulations which are in the nature of subordinate legislation which are ultra vires are bound to be ignored by the courts when the question of their enforcement arises and the mere fact that there is no specific relief sought for to strike down or declare them ultra vires would not stand in the court's way of not enforcing them. We also feel that since this is a question of the very jurisdiction to levy interest and is otherwise covered by a Constitution Bench decision of this Court, it would be a travesty of justice if we would not allow Shri Aggarwal to make this submission.”*

13. A three Judge Bench of Supreme Court in ***State of Haryana Vs. Shamsher Jang Bahadur, 1972(2) SCC 188***, while relying upon Constitution Bench judgment in ***Sant Ram Sharma Vs. State of Rajasthan and another, AIR 1967 Supreme Court 1910*** has held that Government is not Competent to alter the Rules framed under Article 309 by means of administrative instructions. The relevant extracts of the judgment reads as:

“7. It may be noted that herein we are dealing only with those who were promoted from the cadre of clerks in the Secretariat. The first question arising for decision is whether the Government was competent to add by means of administrative instructions to the qualifications prescribed under the Rules framed under Article 309. The High Court and the courts below have come to the conclusion that the Government was incompetent to do so. This Court has ruled in Sant Ram Shama v. State of Rajasthan [(1968) 1 SCR 111] that while the Government cannot amend or supersede the statutory rules by administrative instructions, if the rules are silent on any

particular point, the Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed. Hence we have to see whether the instructions with which we are concerned, so far as relate to the clerks in the Secretariat amend or they alter the conditions of service prescribed by the rules framed under Article 309. Undoubtedly the instructions issued by the Government add to those qualifications. By adding to the qualifications already prescribed by the rules, the Government has really altered the existing conditions of service. The instructions issued by the Government undoubtedly affects the promotion of concerned officials and therefore they relate to their conditions of service. The Government is not competent to alter the rules framed under Article 309 by means of administrative instructions. We are unable to agree with the contention of the State that by issuing the instructions in question, the Government had merely filled up a gap in the rules. The rules can be implemented without any difficulty. We see no gap in the rules.”

14. A rule cannot operate contrary to a statutory provision whereunder said rule has been made. Rules cannot be contrary to statutory provisions. Similarly, neither instructions can be contrary to statutory provisions nor rules. The instructions cannot override or flow beyond the banks of river of rules. The instructions, which are contrary to Rules, need to be ignored.

15. In the case in hand, the case of petitioner is squarely covered by afore-stated Rules, however, his claim has been rejected on account of instructions which are contrary to Rules framed under proviso to Article 309 of the Constitution. In view of afore-stated legal position, the instructions need to be ignored. It is apt to notice here that respondent has granted similar benefit to identically placed other employees.

16. In the wake of above discussion and findings, the present petition deserves to be allowed and accordingly allowed. The impugned order dated 31.01.2023 (Annexure P-17) is hereby quashed.

24.04.2024
manoj

[JAGMOHAN BANSAL]
JUDGE

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