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

427

**CWP-20369-2003 (O&M).
Date of Decision: 21.02.2025.**

RAJESH KUMAR AND OTHERS

... Petitioners

Versus

STATE OF HARYANA AND ANOTHER

... Respondent(s)

CORAM: HON'BLE MR. JUSTICE VINOD S. BHARDWAJ.

Present: Mr. R.K. Malik, Sr. Advocate, with
Mr. Sandeep Dhull, Advocate,
for the petitioner.

Ms. Tanisha Peshawaria, DAG, Haryana.

VINOD S. BHARDWAJ, J. (ORAL)

Challenge in present writ petition is to the order dated 18.11.2003 (Annexure P-3) issued by the Deputy Director, Women and Child Department, Haryana, whereby the representation submitted by the petitioners for defending the ACP granted to them was rejected and orders were issued for withdrawal of the Assured Career Progression (ACP) granted vide office letter No.35202-06 dated 22.01.2002.

2 Learned Senior counsel appearing for the petitioners contends that the petitioners were appointed as Clerks on regular basis in the

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Department of Women and Child Development, Haryana, during the period October 1991 to December 1992. He submits that the Haryana Government issued ACP rules vide notification dated 07.01.1998 called "Haryana Civil Service (Assured Career Progression) Rules, 1998." The same prescribed that all employees would be entitled to the grant of First ACP after rendering 10 years' service and Second ACP after rendering 20 years' service. The time scale for the post of Clerk was Rs.3050-4590 and the First ACP i.e. Rs.4000-6000 was admissible after rendering 10 years' service and Second ACP of Rs.5000-7850 after rendering 20 years' service. The relevant Rule 5 (3) of the Haryana Civil Service (Assured Career Progression) Rules, 1998 is extracted as under:-

“5 (3). For determining the eligibility of grant of ACP scale, following conditions must also be fulfilled by the Government Servant: -

(a) After completing the respective prescribed period for eligibility for the grant of ACP scales the Government servant should be fit to be promoted to the next higher post in the functional hierarchy in his cadre, but could not be functionally promoted due to lack of Vacancy in the promotional post in the hierarchy to which he is eligible to be promoted.”

(emphasis supplied)

3 Learned Senior counsel contends that the essential qualification for promotion to the next higher post of Assistant in the hierarchy and the service conditions are governed by statutory rules called the Haryana Women

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& Child Development Department (Group-C) Service Rules, 1997 which prescribe five years' experience as Steno Typist or Clerk-cum-Store Keeper-cum-Accounts Clerk-cum-Junior Auditor (In Clerical Grade). The said essential qualifications prescribing for promotion as an Assistant is as under:

-

"By Promotion:-

(1) Two years' experience as Junior Scale Stenographer or Assistant Librarian

OR

(ii) Five years' experience as Steno Typist or Clerk-cum-Store Keeper-cum-Accounts Clerk-cum-Junior Auditor (In Clerk Grade).

Note: - If Steno-typist or Junior Scale Stenographer opts for promotion to the post of Assistant-cum-Accountant-cum-Cashier-cum-Junior Auditor (In Assistant Grade). He will have no lien in his original cadre."

4 He contends that as there was no condition prescribed for clearing the type test before being promoted to the post of Assistant under the Statutory rules, hence, the petitioners became eligible for promotion to the post of Assistant but on account of the failure of the respondent-Department to promote the petitioners to the next post, the benefit of ACP was granted to the petitioners with effect from the following dates:-

NAME

*DATE FROM WHICH THE 1ST ACP
WAS GRANTED.*

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<i>Petitioner No.1</i>	<i>1.11.2001</i>
<i>Petitioner No.2</i>	<i>1.7.2002</i>
<i>Petitioner No.3</i>	<i>1.1.2002</i>
<i>Petitioner No.4</i>	<i>1.1.2002</i>
<i>Petitioner No.5</i>	<i>1.1.2001</i>
<i>Petitioner No.6</i>	<i>1.1.2002</i>
<i>Petitioner No.7</i>	<i>1.11.2001</i>
<i>Petitioner No.8</i>	<i>1.8.2002</i>
<i>Petitioner No.9</i>	<i>1.1.2002</i>
<i>Petitioner No.10</i>	<i>1.12.2001</i>
<i>Petitioner No.11</i>	<i>1.7.2001</i>
<i>Petitioner No.12</i>	<i>1.6.2001”</i>

5 The petitioners were however issued a show cause notice bearing Memo No.21974/EA-4/WCD dated 15.09.2003 to withdraw the ACP sanctioned and to refix the pay in the appropriate scale to rectify the mistake and also to recover the dues paid in excess. The reasons cited by the respondents for the said show cause notice was that the petitioner had not passed the departmental type test, which was an essential qualification prescribed for a clerk in the Departmental Service Rules as well as in the instructions issued by the Chief Secretary, Haryana from time to time. The ACP Rules which were notified by the Government of Haryana on 07.01.1998 prescribed under Rule 3 (b) as under: -

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“If such promotion involves test of any departmental post or other test etc. such condition should also be fulfilled by such Government servant.”

6 It was thus accordingly conveyed that the petitioners were not entitled to the grant of ACP in accordance with the provisions of the said rules/instructions and that a mistake has been committed by the respondents in sanctioning the ACP and fixing the pay at Rs.4,000/- in pay scale of Rs.4,000-6,000. The show cause notice was accordingly issued as to why the benefits extended to the petitioners may be recovered and pay be fixed in the scale of Rs.3,050-4590 as admissible to the petitioners for the post of Clerks.

7 A detailed reply to the show cause notice was submitted by the petitioners, wherein it was stated that the benefit already granted could not be withdrawn and that there was no provision for clearing the type test for being promoted to the post of Assistant. However, notwithstanding the said reply, a communication was sent vide Memo No.39479/CD-IV/WCD/2003 dated 18.11.2003 rejecting the said reply and also withdrawing the orders granting ACP vide letter dated 22.01.2002. He further submits that the respondents had issued executive instructions on 22.10.1997 on the subject of passing of type test for promotion to the higher post. The operative of the said letter reads thus: -

“Sub: Passing of type test for promotion to the higher posts.

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Sir, I am directed to refer to the subject noted above and to say that instances have come to the notice of Govt. that Clerks who were promoted as Assistants or on some other higher posts without passing the prescribed departmental type test which is an essential qualification for the post of clerk, in terms of service rules applicable to them or Government Instruction No. 1411-265-U-74/6961 dated 27.3.71 as the case may be, create inefficiency in the office work. Over the years, there has been utter laxity in the observance of rules regarding promotion to higher posts from the post of clerk. The essential pre-requisite of passing a test in type writing has been given a go by. This has resulted in creeping inefficiency and delay in disposal of work.

2. The matter has been carefully considered by the Government and it has been decided that in future no clerk who has not passed type test be promoted to higher posts.

However, such officials who were promoted without passing type test should be given an opportunity of passing the said test within a period of three months from the date of issue of these instructions failing which they will be reverted to the posts of Clerks. However, in the case of those Assistants or other officials who are holding their higher positions substantively without passing the prescribed type test, they will be reverted to posts of Clerks after observing the deconfirmation process.

However, in the case of such Assistants who were appointed by transfer from other departments, they will be repatriated to their parent departmental and further action with regard to their deconfirmation and reversion etc. will be taken by the said departments.

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3. *You are requested to take necessary follow up action to implement these orders immediately.*

4. *These instructions may also be brought to the notice of all concerned for strict compliance.”*

8 He submits that the respondents have withdrawn the benefit of ACP granted to the petitioners in 2002 on the strength of the said executive instructions, notwithstanding that there was no such provision which mandated passing of a type test for a clerk to be considered for promotion to the next higher post and that by virtue of executive instructions any condition for promotion which has not specifically been prescribed under the Rules cannot be imposed. He submits that if the reasons of the respondents are accepted, the statutory rules i.e. the Haryana Women & Child Development Department (Group-C) Service Rules, 1997, governing promotion to the post of Assistant would mandate an additional eligibility condition for being promoted to the post of Assistant and to reads as “Five years’ experience as Steno Typist or Clerk-cum-Store Keeper-cum-Accounts Clerk-cum-Junior Auditor (In Clerical Grade) and having passed the type test.” Said executive instructions would thus amount to an amendment in the service rules and that in the absence of any corresponding amendment, the respondents cannot impose an additional condition for determining the eligibility for promotion. He further contends that the benefit of ACP once granted cannot be withdrawn.

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9 Learned State counsel, on the other hand, contends that the petitioners were not entitled to the benefit of First ACP, since they did not possess the required essential qualification. A clerk can claim an increment only when he has passed the type test and since the petitioners did not clear the type test, they are not eligible to be promoted. It is submitted that the eligibility criteria prescribed under Rule 3 (b) clearly provide that if any promotion involves test of any departmental post or other test etc. such condition should also be fulfilled by such Government servant. Since the petitioners had not passed type test, hence, they were wrongly granted the benefit of first ACP and the same has rightly been withdrawn by the Department at the time of re-examination of the cases. He submits that since the petitioners do not possess the essential requirement for holding the post of Clerk, hence, they cannot claim themselves to be eligible for promotion to the next higher post and that till such time that an employee is fit for promotion to the next post, the benefit of ACP under the Rules of 1998 cannot be given to them as a matter of right.

10 He, however, does not dispute the fact that position in law is well settled to the effect that benefit once granted cannot be recovered. He further places reliance on the ACP Rules of 1998 to contend that the grant of ACP can be subject to restrictions as may be prescribed by the competent Authority from time to time. Learned State counsel, on instructions, submits that subsequently the petitioners have cleared the type test and the benefit of ACP has also been granted.

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11 He thus submits that the additional eligibility condition having been determined by the respondent-State, any person seeking benefit of the ACP is required to fulfill the same.

12 I have heard the learned counsel appearing on behalf of the respective parties and have gone through the documents appended along with the present petition as also the statutory provisions relied upon by the respective parties.

13 Undisputedly, the petitioners were appointed as clerks with the respective departments as per the service rules. For being appointed to the post of Clerk, apart from the qualifications prescribed, a person is required to pass Hindi typing at a speed of 25 words per minute and English typing at a speed of 30 words per minute within period of one year from the date of appointment, by qualifying departmental test as per Government instructions issued from time to time. In the event of a clerk not clearing the departmental type test, the subsequent financial increments would not be disbursed to him, hence, the consequences thereof had been prescribed only to the said extent. It is also not in dispute that there are no other consequences prescribed on account of failure to clear the type test by a clerk in the specified time period. The subsequent instruction even though contemplate reversion of a person working as clerk, however, in the present case the reversion could not have been done since the petitioners were directly recruited on the said post. They were also confirmed on the post of clerk and no other action was ever initiated.

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14 Now, advertent to the requirements as prescribed for the grant of ACP, a plain reading of Rule 5 (3) and Rule 5 (4) of the ACP Rules of 1998, relied upon by the respondents, demonstrate that the eligibility for grant of ACP prescribe that the Government servant should be fit for promotion to the next higher post in the functional hierarchy of his cadre but could not be promoted due to lack of vacancy. The condition prescribed for being promoted was 05 years' experience as Steno Typist or Clerk-cum-Store Keeper-cum-Accounts Clerk-cum-Junior Auditor (In Clerical Grade). There was no such pre-condition of eligibility for promotion amongst the clerks having the require number of experience and having passed a type test. Thus, the requirement of clearing of a type test for getting promoted to the post of Assistant is not incorporated as an essential pre-condition. In case Rule 5 (4) of the ACP Rules of 1998 is also taken into consideration, the same empowers the Government to prescribe any further eligibility condition for the grant of ACP scale from time to time including the restrictions on number of Government servants to be granted the respective ACP scale. Apparently, the said clause would not be applicable in the present case, since the instructions of 1997 have not been issued invoking the ACP Rules of 1998. The condition for the grant of ACP has to be notified by the respondent-State in exercise of the powers so conferred upon it under Rule 5 (4) of the ACP Rules of 1998. Hence, the instructions issued prior in time cannot be held to be issued under the subsequent rules. Even otherwise, the instructions of 1997 are not in the nature of any amendment in the service rules that prescribe the essential conditions for a person to be promoted to the post of Assistant amongst the

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cadre of Clerks. Thus, the requirement of clearing a type test, in order to be fit for claiming ACP, as a pre-requisite for being promoted to the post of Assistant, is in the nature of an executive instructions on the basis whereof the rules cannot be superseded.

15 Hon'ble Supreme Court in the matter of Union of India v. Somasundaram Viswanath reported as (1989) 1 SCC 175, has held that executive instructions cannot override statutory rules framed under Article 309 of the Constitution of India. The observations of the Hon'ble Apex Court are as under: -

“6. It is well-settled that the norms regarding recruitment and promotion of officers belonging to the Civil Services can be laid down either by a law made by the appropriate legislature or by rules made under the proviso to Article 309 of the Constitution of India or by means of executive instructions issued under Article 73 of the Constitution of India in the case of Civil Services under the Union of India and under Article 162 of the Constitution of India in the case of Civil Services under the State Governments. If there is a conflict between the executive instructions and the rules made under the proviso to Article 309 of the Constitution of India, the rules made under proviso to Article 309 of the Constitution of India prevail, and if there is a conflict between the rules made under the proviso to Article 309 of the Constitution of India and the law made by the appropriate legislature the law made by the appropriate legislature prevails.

(emphasis supplied)

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16 The Group 'C' Service Rules of 1997 were notified on 12.06.1997 while the instructions were issued on 22.10.1997. Eventually, the ACP Rules were notified in the year 1998.

17 The State never made any effort to carry out an appropriate amendment in the Service Rules for the Promotional Posts from Clerks. Consequently, passing of the departmental test by a Clerk was never an essentiality for being promoted as an Assistant and the requirement for availing ACP was eligibility for being promoted to the next higher post. The respondent officials have chosen to read the instructions of 1997 as an amendment to the Service Rules of 1997 and then to hold that the petitioner not being eligible under the ACP Rules of 1998, the benefit cannot be given. It needs to be kept in mind that accrual or denial of service benefits are by a manner prescribed in law. Once a benefit has been extended on fulfilment of certain conditions, it can be denied only once it is established by the respondents that they can legally withdraw the same.

18 The vesting or withdrawing of the benefits is not to be determined from the intent alone but flows from the statutory enforceability of the decision taken by the authorities. In a legislative hierarchy, sub delegated executed instructions do not over-ride statutory rules. This aspect is assumed to be well within the knowledge of State and if it has chosen not to do an act required to be done in a prescribed manner by law, it cannot bulldoze the legislation solely on a claim of its good intent.

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19 The respondents were also required to make necessary amendment in the service rules in case they intended to make such a provision mandatory. Having not done so, there is a contradiction within the instruction of 1997 as well as the Service Rules of 1997 as notified by the respondent-State. Hence, I am of the opinion that the respondents have given precedent to the instructions notwithstanding the impact of a conflict between a rule and an instruction. Thus, the respondents have erred in law.

20 The present writ petition is accordingly allowed. The impugned communication dated 18.11.2003 (Annexure P-3) issued by the Deputy Director, Women and Child Department, Haryana, is hereby set aside and the benefits of ACP are ordered to be restored to the petitioners for the intervening period.

February 21, 2025.
raj arora

(VINOD S. BHARDWAJ)
JUDGE

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