

**(2008) 09 SHI CK 0008**  
**In the High Court Of Himachal Pradesh**

Akshaya Sood and Others etc.

APPELLANT

Vs

State of H.P. and Others etc.

RESPONDENT

**Date of Decision :** 22-09-2008

**Acts Referred:**

Constitution of India, 1950 — Article 14  
Demobilized Indian Armed Forces (Reservation of Vacancies in the Himachal Pradesh Administrative Service) Rules, 1974 — Rule 4(1)(c)

**Citation :** (2008) 3 ShimLC 388

**Hon'ble Judges :** V.K. Ahuja, J;Deepak Gupta, J

**Bench :** Division Bench

**Final Decision :** Dismissed

## Judgement

Deepak Gupta, J.—These three petitions are being disposed of by a common judgment. Two of the petitions, i.e. CWP No. 154 of 2004 and CWP 252 of 2004 are directed against the same order of the learned Tribunal dated 25.11.2003 passed in O.A. No. 1705 of 1993. CWP No. 339 of 1998 is directed against the order of the learned Tribunal dated 30.12.1997 passed in O.A. No. 422 of t992 whereby the original application filed by Shri Kulwant Rai was rejected.

CWP No. 252/2004 and CWP No. 154/2004

2. The facts relating to these two petitions are that Shri Madan Lal Chauhan joined army service as a Short Service Commission Officer on 29.8.1981. He was discharged from the army on 8.7.1988. On his release from the army he appeared in the Himachal Pradesh Administrative Service and Allied Services Examination in the year 1988. He was selected as Excise and Taxation Officer (Class-II Gazetted) in October 1989 and joined the said post against a vacancy reserved for ex-serviceman, Shri Madan Lal Chauhan again appeared in the Himachal Pradesh Administrative Service Examination in the year 1991. This time he was selected to the H.P. Administrative Service (Class-I Gazetted) post. He joined the H.P. Administrative Service on 29.10.1992 against a vacancy reserved for ex-serviceman.

3. Shri Madan Lal Chauhan thereafter approached the department for counting his approved military service for fixation of his pay and seniority under the provisions of the Demobilized Indian Armed Forces (Reservation of Vacancies in the Himachal Pradesh Administrative Service) Rules, 1974, (here-in-after called the Rules). Rule 4 of the Rules reads as follows:

4. Fixation of pay, seniority and retirement benefits.-(1) Only the period of approved military service rendered after attaining the minimum age prescribed for appointment to the service concerned by the candidates appointed against reserved vacancies under the rules shall count towards fixation of pay and seniority in the said service subject to the condition that:

(a) the inter-se-seniority of the military personnel determined by the Himachal Pradesh Public Service Commission shall not be disturbed;

(b) a military personnel appointed as a result of any earlier selection shall be senior to a military personnel appointed by direct recruitment in the year to which the former candidates are allotted, and

(c) a military personnel already appointed in civil employment against a reserved post under any State/Central Government, on his subsequent appointment to the Himachal Pradesh Administrative Service on the basis of competitive examination shall not be eligible for the benefit of fixation of pay and seniority in the service (Himachal Pradesh Administrative Service) under Sub-rule (1) of Rule 4.1.

(2) The period of military service rendered after attaining the minimum age mentioned in Sub-rule (1) shall also count, towards pension, subject to the following conditions:

(a) The persons concerned should not have earned pension under the rules applicable to such service except disability pensions; and

(b) Any bonus or gratuity received from the military authorities in respect of military service shall have to be refunded to the State Government.

4. The State Government rejected the representation of Shri Madan Lal Chauhan on the ground that he had previously been appointed in civil appointment as Excise and Taxation Officer, Grade-II and therefore, in terms of Rule 4(1)(c) he was not entitled to any benefit of adding his military service for fixation of pay and seniority. Shri Madan Lal Chauhan thereafter filed O.A. No. 1705 of 1993 challenging the constitutional validity of Rule 4(1)(c) of the Rules. This petition was originally allowed by the learned Tribunal on 30th May, 1997. However, this order was challenged in a writ petition before this Court by some of the affected officers including the petitioner in CWP No. 392 of 1997 and finally vide judgment dated 23rd September, 2003 the order of the learned Tribunal dated 30th May, 1997 was set-aside and the matter remanded to the learned Tribunal to rehear the same.

5. Thereafter, the learned Tribunal heard the parties and decided the original

application on 25th November, 2003. Rule 4(1)(c) of the Rules was held to be ultra vires and accordingly quashed. The learned Tribunal held that the Rule 4(1)(c) inserted in the Rules w.e.f. 1st August, 1985 was in substance similar to the amendment made in the Punjab and Haryana Rules. Following the judgment of the Punjab and Haryana High Court in Raj Kumar v. State of Haryana 1981 (3) SLR 436(HC), the Tribunal held that the provisions of Rule 4(1)(c) are ultra vires and violative of the Article of the Constitution of India. This order is under challenge in these two writ petitions.

6. We have heard Shri Rakesh Jawal, Advocate, Shri P.P. Chauhan, Advocate and Mr. Rajesh Mandhotra, learned Deputy Advocate General for the parties.

7. Mr. Rakesh Jaswal, learned Counsel has submitted that the Punjab and Haryana High Court in Raj Kumar Verma's has followed a earlier Full Bench in Harbhajan Singh v. The State of Punjab and Anr. 1977 (2) SLR 180(PC), but according to him the facts involved in that case were totally different and in fact in Raj Kumar Verma's case no reasons have been given by the Punjab and Haryana High Court and this decision lays down no law which can be followed by this Court. It is also urged that one Shri Ripu Daman Singh Rana had filed an original application before the learned Tribunal on similar grounds. This petition was rejected on 24th May, 1990. Thereafter, Shri Ripu Daman Singh Rana had assailed the order by filing a Civil Appeal No. 4480 of 1992 before the Hon'ble Supreme Court. According to him, the Apex Court dismissed the appeal and therefore, it should be presumed that the validity of the Rules has been upheld.

8. As far as the second contention of Shri Jaswal is concerned, we are unable to agree with the same. In Ripu Daman Singh Rana's case there was no challenge laid to the validity of the Rules. The order of the learned Tribunal has been placed on record and perusal of this order does not show that the validity of the Rule 4(1)(c) was ever challenged before the learned Tribunal. It is, however, true that in the SLP filed before the Apex Court there are averments that even if the rule is held to be applicable the same should be struck down being unconstitutional and ultra vires. But here again we find that the Apex Court has not given any decision on the matter. All that the Apex Court said is that "The ruling of this Court in State of Punjab and another Vs. Charanji Lal Goel, , covers the issue raised in these appeals. In view of the above decision, the appeals are dismissed. No costs." No findings were given by the Apex Court. We, therefore, hold that there was no decision of the Apex Court, which was binding on the Tribunal.

9. Coming to the merits of the case and to understand the controversy between the parties, it would be appropriate to analyse Rule 4(1)(c). This sub-rule provides that if a military personnel has been appointed in civil appointment against a reserved post (obviously reserved for ex-serviceman) and he is subsequently appointed to the Himachal Pradesh Administrative Service, he is not eligible for benefit of pay and seniority in Himachal Pradesh Administrative Service. It is important to note that the rule does not prohibit the ex-serviceman from seeking second appointment in the Himachal Pradesh Administrative

Service under the ex-serviceman quota. Therefore, an ex-serviceman, who may have obtained civil appointment earlier but wants to improve his career prospects, can apply and be appointed in the Himachal Pradesh Administrative Service. What this Rule prohibits is only that if his appointment in the Himachal Pradesh Administrative Service against the post reserved for ex-serviceman is his second appointment in civil service then he shall not be entitled to the benefit of counting his past military service for fixation of pay and seniority.

10. Since great reliance has been placed by the learned Tribunal as well as Shri P.P. Chauhan, learned Counsel for Shri Madan Lal Chauhan, on the judgment of the Full Bench of the Punjab and Haryana High Court in Harbhajan Singh v. The State of Punjab and Anr. 1977 (2) SLR 180(HC), we may make detailed reference to this judgement. In that case, the petitioner who was a practicing Advocate had joined the Indian Army during the emergency in 1963. He was released from the Army on 1.8.1966. He again started practicing as an Advocate. He was thereafter selected as Assistant District Attorney in the year 1970. In December, 1973 he appeared in a competitive examination held by the Punjab Public Service Commission for recruitment to the Punjab Civil Services (Judicial Branch). Two vacancies had been reserved for released personnel of the armed forces. The result of the examination was published in May, 1974. The petitioner was at Sr. No. 3 in the category of released Armed Forces Personnel. Thereafter, the total number of posts were increased and even the vacancies falling to the quota of released Armed Forces Personnel were increased. The stand of the State was that it had amended the Rules in 1974 and any released Indian Armed Forces Personnel who had already joined civil services under those Rules or any civil services of the Union of India or of a State would not fall within the category of the released Indian Armed Forces Personnel. It is in this context that the Full Bench observed as follows:

5. Now, the Rule making authority must have been aware that a competitive examination for appointment to the Service had been held under the old rules and appointment were yet in the offing. Surely, the rule making authority did not intend to exclude from appointment candidates who were eligible under the old rules but became ineligible by reason of an amendment of the rules made after the process of selection had almost reach a final stage. The amendment did not in any manner touch the qualifications of the candidates. Had the amended rule been in force from the beginning, persons in the position of the petitioner might not have accepted any employment and preferred to wait for selection and appointment to the Punjab Civil Service (Judicial Branch). Are they to be penalized by barring their entry into the Punjab Civil Service (Judicial Branch) because they accepted employment at a time when acceptance of such employment was not a bar to appointment to the service. We do not think that we will be justified in attributing such an unreasonable intention to the Rule-making authority. In our view, the only reasonable interpretation of the amended rule, consistent with the prevailing situation, is to hold that only those persons who having joined the service of the Union or the State or a post under the

Union or the State previously continued to hold the post on the date of the coming into force of the rules, or who joined a post after the coming into force of the rules, are excluded from appointment to the Punjab Civil Service (Judicial Branch). The expression "joined or joins" must be given a reasonable interpretation in the context of the situation and we think that our interpretation does not strain the language or attributes unreasonableness to the Rule making authority. In that view the petitioner cannot be said to be ineligible for appointment.

6. In the view that we have taken, it is necessary for us to go into the question of the vires of Rule 3(iii) (cc), (ii) (b). We would, however, like to add that the rule does appear to our mind to be unreasonable. These rules prescribing a quota of reservation for released Armed Forces Personnel are in force for a limited period only. If during that period a person is otherwise eligible for appointment, we see no justice in excluding him from appointment on the ground that he accepted some other employment in the meanwhile. It looks as if a person belonging to the category of released Armed Forces Personnel accepts an inferior post he does so on pain of losing eligibility to a superior post. If no superior post is readily available "immediately on his released from the Armed Forces he must wait till such post become available and it may. never become available. In the meanwhile, he is precluded from accepting an inferior post even to keep his body and soul together. Surely, that is not how we repay our debt to those that readily shed their blood for us.

11. The learned Tribunal has relied on the observations made in para 6 without going into the observation of the Full Bench in para 5. In para 5, the Full Bench clearly held that the only reasonable interpretation to the amended rule was to hold that those persons who had joined the service of the Union or the State after coming into force of the amended rules were excluded from the appointment in Punjab Civil Services. True it is that in para 6 the Full Bench also went on to hold that the rule appears to be unreasonable. But we must understand the observations in the context in which they were made. Under the rules being considered by the Full Bench a person could not even seek second appointment as an ex-serviceman. He could not improve his career prospects and it was in this context the Court held that a person could not be expected to accept an inferior post to keep his body and soul together and then be prohibited from applying for a higher post.

12. In Raj Kumar Verma's case the Court was dealing with an amendment made by the State of Haryana, which was similar to Rule 4(1)(c) herein-above. But here again the facts of the case may have to be seen. The petitioner Raj Kumar joined as an Emergency Commissioned Officer during the Chinese war. He also participated in the Indo-Pakistan War. He was released in the year 1969. The Punjab Government. National Emergency (Concession) Rules, 1965 were promulgated by the Governor of Punjab. These rules granted certain benefits of increments, seniority and pension to persons relieved from military service and

employed in civil service. The benefit of increments was, however, restricted to the first appointment. Raj Kumar was denied the benefit of seniority on the ground that since his appointment in the particular service was the second appointment he could not be granted the benefit of seniority. Thereafter, he filed CWP No. 3642 of 1978, which was allowed by holding that as per the rules the restriction of the benefit being available on first appointment was only applicable in case of increments and no such restriction had been placed in respect of seniority. Thereafter, the Haryana Government amended the rules whereby benefit of seniority as well as increments would be admissible only on the first appointment. It is thus obvious that the State of Haryana was trying to withdraw the benefit of counting the past military service for purpose of seniority from Shri Raj Kumar even though the Punjab and Haryana High Court had decided the matter in his favour. This action was obviously illegal. The amendment obviously was being given retrospective effect. The Division Bench of the Punjab and Haryana High Court only quoted the observations in para 6 in Harbhajan case supra and held that the aforesaid provisions fully apply to Rule 4(a) and struck down the Rule. No other reasoning was given. The Punjab and Haryana High Court has followed the judgement in Raj Kumar Verma's case and in a number of other cases but no other reasoning has been given in all these cases.

13. In our considered view the decision of the Full Bench has no applicability to the facts of the present case. As already observed above, under Rule 4(1)(c) ex-servicemen are not deprived of their right to seek betterment of their career by applying for a higher post on the second or third or fourth occasion. They can repeatedly compete for a post reserved for ex-serviceman. What has been prohibited is that they shall not be entitled to count their past military service for the benefit of fixation of pay and seniority in the Himachal Pradesh Administrative Service in case this is not their first appointment after release from the army. The H.P. Administrative Service is the highest, service within the State. People join it with certain aspirations. Persons who have left the army and have already taken civil appointment against a post reserved for ex-serviceman can compete again for the H.P. Administrative Service. They are not debarred from doing so. However, they cannot now on the subsequent occasion again claim the benefit of counting their past military service for fixation of pay and seniority.

14. It must be remembered that no person has a right to claim that he is entitled to reservation or counting of past military service for the purpose of fixation of pay and seniority. This is a concession granted to the ex-serviceman. The ex-serviceman cannot claim this concession as a matter of right. It is for the policy makers to decide what concession has to be given in what service and in what manner. The State in its wisdom has decided that ex-servicemen released from the army who have already accepted civil appointment against a reserved post, in their subsequent appointment in the H.P. Administrative Service cannot claim the benefit of military service for fixation of pay and seniority. Repeatedly, it has been urged that this provision is ultra-vires. However, no reasons have been

given to show why the rule is ultra-vires. The persons who are given first appointment after discharge from the army stand on a totally different footing. On the first appointment in a civil service the ex-serviceman is entitled to the benefit of counting his military service towards pay and seniority. He may work in this post for one year or many years. The purpose of the rules is to rehabilitate the ex-serviceman. Once he has been rehabilitated and he applied for another post to improve his career he cannot claim, as a matter of right, that in the second appointment too he should be given the benefit of past military service. There is a valid, reasonable and intelligible classification between the ex-serviceman appointed on the first instance and those who get subsequent appointments to improve their career. Therefore, we cannot accept the reasoning of the learned Tribunal that this Rule has no nexus with the object sought to be achieved.

15. We would like to mention that Shri P.P. Chauhan, learned Counsel, has cited a large number of judgments before us. Except for the judgments cited here-in-above, the other judgments have no relevance to the facts of the present case and therefore the same have not been noted. In fact, we are constrained to observe that much time of the Court was wasted in going through totally irrelevant judgments cited by Shri Chauhan.

16. As noted here-in-above, the Apex Court while deciding the Ripu Daman Singh Rana's case (supra) relied upon an earlier judgment in State of Punjab and another Vs. Charanji Lal Goel, It would be important to note the observations of the Apex Court made in paras 7 and 8:

7. This Court had held that this concession was, however, admissible for first appointment. Only Rule 5 provides that the military service shall count for seniority, promotion, increment and pension in the service or post held by him immediately before he joined the military service. Thus the petitioners herein became entitled to have seniority first according to the above rules on the post of Assistant Sub-Inspector.

8. Since he has already availed of all the benefits of seniority as Taxation Inspector and got tagged to his services rendered in the military services between 26.10.1963 to 19.9.1969 as Taxation Inspector, the same period cannot be availed of in his subsequent appointment though in a higher cadre, namely, the Gazetted cadre Assistant Excise and Taxation Officer.

17. These observations leave no manner of doubt that the Apex Court has held that the concession is only admissible to the first appointment. Shri Chauhan urges that this judgment is not applicable since the vires of the rules were not challenged in that case. Once the Apex Court makes certain observation neither this Court nor any other Court except the Supreme Court has any right to go behind the judgment of the Apex Court on the ground that a particular question was raised before the Apex Court or not. Judicial discipline requires that we must follow the judgments of the Apex Court. We are, in fact, constrained to note that

though the judgment in Ripu Daman Singh Rana's case was placed before the learned Tribunal and the Apex Court had decided the matter on the basis of the judgment rendered by it in Charanji Lal Goel's case, the learned Tribunal, for reasons best known to it, did not deem it necessary to refer to this judgment.

18. Shri P.P. Chauhan, learned Counsel has strenuously urged that the petitioner was not granted any benefit of pay and seniority in his first appointment as Excise and Taxation Officer (Grade-II) and therefore is entitled to this benefit in the Himachal Pradesh Administrative Service. It is not disputed that the process of granting him those benefits was going on before the benefits could actually be granted the petitioner was selected to the administrative service and joined as such. While interpreting the Rules, we cannot look into factual aspects of each case separately. Shri Madan Lal Chauhan was selected as ETO in October 1989 and he joined the administrative service on 29.10.1992. He had, therefore, served for only three years as ETO. The process of calculating the benefits of military service which has to be verified, takes some time. The rule prohibits the granting of such benefits when a person who has already been appointed to civil appointment against a reserved post is subsequently appointed to another post. In such a situation, whether the benefit was actually granted to him or not in the first post becomes meaningless. Shri Madan Lal Chauhan is entitled to and can claim the benefit of fixation of pay as ETO even now.

19. It would also be pertinent to mention that the rules were amended in the year 1988 though w.e.f. 1985. In the year 1989-90 when Shri Chauhan joined as ETO he was very well aware that in case he takes up any other appointment, at a later stage, he shall not be entitled to claim the benefit of military service for fixation of pay and seniority in the subsequent appointments. The petitioner applied for the higher post in the year 1991 and joined in the year 1992 with open eyes. He is, therefore, disentitled from challenging the validity of the rules at this stage.

20. In view of the above discussion, we allow the writ petitions, set-aside the order of the learned Tribunal in O.A. No. 1705 of 1993 and the original application filed by Shri Madan Lal Chauhan shall be deemed to be dismissed. He would not be entitled for counting his military service for the purpose of fixation of his pay and seniority in the H.P. Administrative Service.

CWP No. 339 of 1998

21. In this case, the petitioner, Kulwant Rai had filed O.A. No. 422 of 1992 before the learned Tribunal. The petitioner was, on his release from the Army, appointed as Lecturer in English (School Cadre) which job he joined on 23rd December, 1986. He also appeared for the Himachal Pradesh Administrative and Allied Services Written Examination and appeared for the interview on 22nd August, 1987. He was selected to the Himachal Pradesh Police Services. He claimed benefit of pay and seniority by tagging on his military service which was rejected in view of the Rule 4(1)(c) of the Demobilized Rules referred to here-in-above.

The original application filed by the learned Tribunal was rejected. In view of the discussion above, wherein we have upheld validity of the rules, the claimant cannot claim benefit of military service in his second appointment against a reserved post. The petition is accordingly dismissed.