
(2014) 04 RAJ CK 0106

In the Rajasthan High Court

Case No : Civil Writ Petition No. 4495 of 1998 and Stay Application No. 3701/1998

Chandra Pal Gupta

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 04-04-2014

Acts Referred:

Constitution of India, 1950 — Article 309

Citation : (2014) 4 CDR 2040 : (2015) 1 RLW 817

Hon'ble Judges : Mohammad Rafiq, J

Bench : Single Bench

Advocate : Sachin Mehta, Counsel, Advocate for the Appellant; Sanjay Kumar Sharma, Government Counsel, Advocate for the Respondent

Judgement

Mohammad Rafiq, J.—This writ petition has been filed by Chandra Pal Gupta, who is since dead and is represented by his son Kavindra Gupta. Petitioner has assailed the orders dated 04.12.1996, 19.06.1998 and 24.07.1998 and has prayed that they may be declared illegal, arbitrary and irrational and unconstitutional. He has further prayed that if any order prejudicial to the interest of the petitioner is passed during pendency of the writ petition, the same may also be quashed and set aside. Facts of the case are that petitioner was appointed as Assistant Teacher vide order dated 12.12.1963. He joined as such on 24.12.1963. According to the petitioner, his appointment was made against permanent and clear vacancy on recommendation of the selection committee in regular pay scale of Rs. 75-160. Petitioner was later on confirmed on the said post as Assistant Teacher vide order dated 31.01.1969 with effect from 01.04.1968. Petitioner was provided benefit of opening/acquiring efficiency bar in the pay scale as well as benefit of revised pay scale as and when revision of pay scales took place. He was provided benefit of selection grade on completion of 15 years of services and was also provided benefit of selection grade in lieu of promotion pursuant to the government circular dated 25.01.1992, which provides for grant of selection grades in lieu of promotions to those employees,

who could not get promotion after putting in number of years of service, in that first, second and third selection grades are provided in lieu of first, second and third promotion on completion of 9, 18 and 27 years of service.

2. Petitioner completed his 27 years of service in the year 1990. Since petitioner was not granted any promotion upto mid of 1990, he was provided benefit of first, second and third selection grades From the date of initial appointment, the petitioner completed 9 years of service in the year 1972, 18 years of service in the year 1981 and 27 years of service in the year 1990. As per the circular dated 25.01.1992, petitioner was allowed the benefit of first selection grade in the pay scale of 1400-2600, second selection grade in the pay scale of 2000-32000 and third selection grade in the pay scale of 2000-3500, vide order dated 14/15.01.1994.

3. It is contended that the petitioner was provided first promotion of his career vide order dated 07.08.1990 as Teacher Gr.II in the pay scale of 1400-2600 and posted at Government Secondary School, Veer, vide order dated 26.09.1990. Petitioner submitted representation on 11.10.1990 stating therein his inability to materialize the promotion accorded to him on the ground that his wife is suffering from mental disorder for a long time and she is under regular treatment at Jawahar Lal Nehru Hospital, Ajmer and that there is no one to look after her and to take her to the doctor for advice, prescription and precaution to be taken for treatment. The Head Master of the Government Secondary School, Gulab Badi, forwarded his representation to the Joint Director, Education (Boys), Ajmer Circle, Jaipur. Thereafter vide order dated 23.11.1992 the petitioner was again promoted on the post of Teacher Gr.II and posted at Government Secondary School, Nalu (Kishangarh). Petitioner then submitted representation on 05.12.1992 requesting his posting in Ajmer city on the aforesaid grounds. However, the department did not press the petitioner to materialize his promotion. Thereafter petitioner was promoted vide order dated 07.08.1993 and posted at Government Secondary School, Khajpura, Kishangarh. He submitted representation dated 13.08.1993 pointing out his aforesaid grievance, which was forwarded to the higher authorities recommending that looking to the mental ailment of the wife of the petitioner, he may be posted in Ajmer city on promotion. The recommendation were sent vide letter dated 17.08.1993. Petitioner again provided promotion vide order dated 15.12.1994 and posted at Government Secondary School, Karkedi. Petitioner yet again submitted representation on 26.12.1994 followed by another representation dated 03.01.1995 opting to forgo the promotion. It was again not pressed upon to materialize his transfer. It is contended that all the time the petitioner's request to forgo the promotion was acceded by the respondents.

4. Learned counsel for the petitioner invited attention of the Court towards the prescriptions/documents to substantiate the ailment of the wife of the petitioner that she is suffering from mental disorder and was undergoing treatment at Ajmer. It is contended that the petitioner completed 27 years of service by 1990

and was not provided a single promotion by that time or if provided, he was permitted to forgo or waive the same on account of his family circumstances.

5. Thereafter vide order dated 27.02.1997 the petitioner was promoted on the post of Teacher Gr.II and posted at Government Higher Secondary School, Srinagar. This time again, petitioner submitted a representation expressing his inability to materialize the same and opt to forgo the same, which was permitted. It was thereafter that the revision of pay scales took place in the year 1998. Petitioner was fixed at Rs. 7900/- in the pay scale of Rs. 6500-10500 with effect from 01.09.1996, allowing him the benefit of revision of pay scale. On 19.06.1998, the respondent No. 2 issued an order whereby pay of the petitioner was revised and he was fixed at Rs. 7100/- in the pay scale of 5000-8000 instead of 6500-10500. The second and third selection grades provided to the petitioner earlier in the year 1994 were withdrawn on account of his foregoing the promotion made on 27.02.1997, which was done on the basis of order dated 04.12.1996 issued by the Department of Finance. Petitioner submitted representation to respondents on 07.07.1998 stating therein that he had not foregone the promotion out of his own. He had to forgo the promotion due to compelling family circumstances, in that his wife was suffering from mental disorder, which requires his constant presence at Ajmer, where she was undergoing treatment. It was thereafter that vide order dated 24.07.1998 pay of the petitioner was fixed in the pay scale of 6500-10500 and fixed at Rs. 7900/- with effect from 01.09.1996 and at Rs. 8100/- with effect from 23.09.1996, which was allowed to petitioner upto 05.03.1997. Simultaneous, another order dated 24.07.1998 was issued by respondent No. 2, by which pay scale of the petitioner has been revised and he was shown to have been fixed at Rs. 7100/- with effect from 01.09.1996, at Rs. 7250/- with effect from 23.09.1996 and at Rs. 7400/- with effect from 23.09.1997. Consequential order was passed on 24.07.1998 on account of the fact that the petitioner had foregone the promotion granted to him vide his application dated 06.03.1997. Petitioner again submitted representation on 01.08.1998 pointing out the loss caused to him by aforesaid revision of pay, which followed by yet another representation dated 08.08.1998. Petitioner thereby demanded copy of the order dated 04.12.1996 but the same was never supplied to him. It is in this background that the present writ petition has been filed by the petitioner aggrieved by aforesaid orders.

6. Learned counsel for the petitioner argued that the benefit of first, second and third selection grades was conferred upon the petitioner in the scheme of the Government in pursuance of the Circular dated 25.01.1992, which could not be unilaterally withdrawn without any notice or opportunity of hearing to the petitioner. The effect of the order dated 19.06.1998 and 24.07.1998 is that the petitioner's pay has been reduced substantially and such an adverse order could not be passed without providing him opportunity of hearing.

7. It is argued that the petitioner did not deliberately forgo the promotion. He was compelled to forgo the promotion by family circumstances. Wife of the

petitioner was suffering from mental disorder and was undergoing treatment at Jawahar Lal Nehru Hospital, Ajmer and he time and again requested the respondents for his promotion and posting at Ajmer city. The order dated 04.12.1996 has been issued without any basis and is an illegal action of the respondents, whereby the petitioner, who is highly qualified, will be getting lower pay scale, whereas some other persons, who are simple matriculate, will continue to get higher pay in higher pay scale.

8. Learned counsel for petitioner has argued that promotions were offered to the petitioner under the Rajasthan Education Subordinate Service Rules, 1971. In the scheme of these Rules, the concerned person, who is provided promotion, is vested with right to forgo the same. There is no such condition in the Rules that if the employee concerned forgoes the promotion, he would be put to disadvantageous position. The order passed by the Finance Department dated 04.12.1996 is conflict with the Rules of 1971. No executive order can override or dilute the provisions of the Rules framed under the proviso to Article 309 of the Constitution.

Learned counsel for petitioner, in support of his argument, relied on the single bench judgments of this Court in Gyan Chand Mathur vs. State of Rajasthan & Ors., 2010 (2) WLC (Raj.) 795, Murari Lal Gupta vs. State of Rajasthan & Ors., 2010 (4) WLC (Raj.) 583 and a division bench judgment of this Court in State of Rajasthan & Ors. vs. Lal Chand Taili, Special Appeal (Writ) No. 05684/2009, decided vide judgment dated 22.11.2010.

9. Per contra, Shri Sanjay Kumar Sharma, learned Government Counsel appearing for the respondents, submitted that benefit of selection scale is granted in lieu of promotion with a view to ensure that a government servant does not face stagnation for a long period. As per the scheme of circular dated 25.01.1992, the benefit of selection grade is granted at every interval of nine years, but that benefit is extendable only for an employee who has been granted opportunity of promotion. Learned Government Counsel submitted that in the present case, the petitioner was offered but declined the promotion on as many as five occasions. He was offered the promotion at most of the times prior to the year 1994. It is argued that the Government of Rajasthan in its Finance Department has issued an order dated 04.12.1996, which postulates that if a government servant, who is drawing pay in second or third selection grade, on his actual promotion to second/third promotion post, forgoes the promotion, the benefit of second/third selection grade, as the case may be, shall be withdrawn from the date he forgoes the promotion. It further provides that where government servant, who had forgone the second/third promotion before issuance of the order dated 04.12.1996 and is drawing pay either in second or third selection grade, the benefit of second/third selection grade, as the case may be, shall not be withdrawn, and in case such a government servant is again offered promotion after issue of this order, the benefit of second/third selection grade shall be withdrawn from the date he refuses to accept the promotion. It is

argued that the petitioner was not willing to move out of Ajmer and thus avoid promotions on false pretext. Learned Government Counsel has in this behalf cited the order of the Government dated 18.10.1993, in which this question that has been dealt.

10. I have given my anxious consideration to rival submissions and perused the material on record and respectfully studied the cited case law.

11. Question involved in this case was dealt with in the order of the Government dated 18.10.1993 as to whether the employees, who are promoted to next higher post after grant of second and third selection grade and if he declines to accept the chance of promotion, would he continue to draw the pay in second and third selection grade or not? The Finance Department answered the reference directing that the government servants, who are promoted to the next higher post after grant of third selection grade and who forgo the chance of promotion, would continue to draw pay in that selection grade. It was further provided that government servants, who are promoted to the next higher post after grant of second selection grade and who forgo the chance of promotion would continue to draw pay in that second selection grade but such employees would not be eligible for third selection grade. But this order was substituted by order dated 04.12.1996 of the Government, which has provided that the government servant, who had forgone the second or third promotion before issuance of the order dated 04.12.1996, and is drawing pay either in the second or third selection grade, the benefit of second and/third selection grade, as the case may be, shall not be withdrawn and in case such a government servant is again offered promotion after issue of this order, the benefit of second and/third selection grade shall be withdrawn from the date he refuses to accept the promotion. The pay of such an employee shall be re-fixed either in pay scale of the first promotion post or in the first selection grade or in pay scale of the second promotion post, at the stage he would have drawn had he not been granted second and/third selection grade, as the case may be.

12. In Lal Chand Teli vs. State of Rajasthan, S.B. Civil Writ Petition No. 34/2004, decided on 18.12.2008, the second and third selection grades granted to the employee with effect from 25.01.1992 were withdrawn by order dated 15.09.1999 on the premise that employee had forgone the promotion granted to him on the post of Senior Teacher vide order dated 17.02.1997. Therein, reliance was placed on the judgment of Ramdhan Arun vs. The State of Rajasthan, S.B. Civil Writ Petition No. 4572/2000, decided on 19.09.2001, in which it was held that refusal to accept promotion at the fag end of his career after second/third selection grades have already been granted, cannot be the basis to withdraw such selection grade on the basis of a cause anterior to such date and not the cause subsequent to the date.

13. Aforesaid single bench judgment in Ramdhan Arun, was upheld by a division bench vide its judgment dated 24.10.2002 in Special Appeal (Writ) No. 991/2001, holding that merely because a government servant forgoes his

promotions he would not get the benefit of selection scales also, is not at all tenable. It is thus settled by the single bench as well as division bench in *Lal Chand Teli, supra*, that forgoing promotion subsequent to grant of second and third selection grades, cannot be made basis for withdrawal of selection grades already granted anterior to the date on which the employee concerned forgoes the promotion.

14. In *Gyan Chand Mathur vs. State of Rajasthan & Ors., supra*, petitioner was offered promotion three months after availing benefit of third selection grade. That was an ad hoc/temporary promotion. Petitioner refused to go on such promotion. It was held that benefit of selection grade can be withdrawn only on refusal of regular promotion. In that case, the reference was made to the latest circular of the government dated 31.12.2009.

15. It would be relevant to quote para 3 of the Circular dated 18.10.1993, which provides as under:--

"The matter has been considered and the Governor is pleased to order that Government servants who are promoted on the next higher post after grant of third selection grade and who forgo the chance of promotion would continue to draw pay in that Selection Grade. Government servants who are promoted to the next higher post after grant of second selection grade and who forgo the chance of promotion would continue to draw pay in that second selection grade but such employees would not be eligible for third selection grade."

Para 3 of the Circular dated 04.12.1996 reads as under:-

"The Governor is further pleased to order that the Government servant who had forgone the second or third promotion before issue of this order and is drawing pay either in the second or third selection grade, the benefit of second and/third selection grade, as the case may be, shall not be withdrawn, and in case such a Government servant is again offered promotion after issue of this order, the benefit of second and/third selection grade shall be withdrawn from the date he refused to accept the promotion. The pay of such an employee shall be retired either in pay scale of the first promotion post or in the first selection grade or in pay scale of the second promotion post, at the stage he would have drawn had he not been granted second and/third selection grade(s) as the case may be."

The last Circular dated 31.12.2009 in its para 18 provides as under:-

"18. If a regular promotion has been offered but was refused by the employee before becoming entitled to a financial upgradation, no financial upgradation shall be allowed as such an employee has not been stagnated due to lack of opportunities. If, however, financial upgradation has been allowed due to stagnation and the employee, subsequently refuses the promotion, it shall not be a ground to withdraw the financial upgradation. He shall, however, not be eligible to be considered for further financial upgradation till he agrees to be considered for promotion again and the second the next financial upgradation shall not be

deferred to the extent of period of debarment due to refusal."

16. While interpreting these Circulars, especially para 3 of the Circular dated 04.12.1996, it was held that if the government servant forgoes second or third selection scale before issue of the said Circular dated 04.12.1996, second selection grade already granted shall not be liable to be withdrawn. However, if such government servant is again offered promotion after issuance of such Circular and if somewhat he refuse to accept benefit of second or third selection grades, same shall be withdrawn from the date of refusal. In the aforementioned case, petitioner was appointed as Lower Division Clerk on 12.02.1969. He was promoted on the post of Upper Division Clerk. Under the Circular dated 25.01.1992, he was later granted benefit of second selection grade by order dated 19.09.1992 with effect from 25.01.1992 on completion of 18 years of service. Subsequently, when he was not able to get third promotion, the respondents by order dated 24.04.1996 granted him benefit of third selection grade with effect from 13.02.1996. He was then offered ad hoc promotion by order dated 18.11.1996 on ad hoc basis subject to review/revision, for a period of six months, which he declined by application dated 12.12.1996. Subsequently, he was promoted on regular basis on the post of Office Assistant vide order dated 21.03.1998. In those facts, it was held by this Court as under:--

"Firstly, promotion that was granted to the petitioner was not on regular basis, but it was on ad hoc basis subject to review and revision and therefore unless and until the word "promotion" which is referred to in various government Circulars in relation to the scheme of selection grade or the withdrawal thereof, has to be construed as regular promotion. In the present case, regular promotion was not granted to the petitioner, therefore, he did not accept as it was on ad hoc basis and that too for a period of six months. Regular promotion was granted to the petitioner on 21.3.1998 and he accepted the same. The earlier Circular of the government dated 18.10.1993 was in vogue when the promotion was granted to the petitioner on ad hoc basis. Para 3 of that Circular provides that if a government servant who was promoted to the next higher post after grant of third selection scale forgoes that chance of promotion, would continue to draw the pay in that selection grade. If that was the executive instruction governing the field on the date when the petitioner was granted promotion on 18.10.1993, he could not be treated differently because all those promoted after that Circular and who had forgone promotion, having availed the benefit of third selection scale, were dealt with accordingly. The petitioner also when he was offered promotion for the period of three months, received the benefit of third selection scale. Such benefit could not be withdrawn from the petitioner acting by the circular dated 4.12.1996 either. It is not evident whether this Circular can reopen the past cases, which have been settled pursuant to the earlier Circular dated 18.10.1993, whereas persons who declined to accept the promotion after grant of third selection scale were allowed to get those benefits and exception was only made for those government servants, who are promoted to the next higher post after grant of second selection grade and who had forgone the chance of

promotion and it was provided that they would continue to draw the pay in that selection scale. But such employees would not be eligible for third selection scale as the instructions contained in Circular dated 18.10.1993. Subsequently, departure was made by the Circular dated 4.12.1996 to say that if a government servant had forgone second and third selection scale before issue of such circular, benefit of second and third selection scale as the case may be shall not be withdrawn and in case such a government servant had forgone the promotion after issue of such order, benefit of second and third selection scale shall be withdrawn from the date he refuses to accept the promotion. Admittedly when the promotion was granted on 18.11.1996, it was on ad hoc basis and that too subject to review and revision, therefore, he cannot be deemed to have refused a regular promotion and moreover when promotion was offered to him after issue of this Circular dated 4.12.1996, he rightly accepted the same on 21.03.1998. The government in its recent Circular dated 31.12.2009 appears to have taken a more logical and reasonable approach by providing that if a regular promotion has been offered but was refused by the employee before becoming entitled to a financial upgradation, no financial upgradation shall be allowed as such an employee has not been stagnated due to lack of opportunities. If, however, financial upgradation has been allowed due to stagnation and the employee subsequently refuses the promotion, it shall not be a ground to withdraw the financial upgradation. He shall, however, not be eligible to be considered for further financial upgradation till he agrees to be considered for promotion again and the second the next financial upgradation shall also be deferred to the extent of period of debarment due to the refusal." In the first place, the petitioner was not offered a regular promotion and even after he declined to accept same, the respondents passed the order dated 23.12.1996 cancelling the promotion. They provided for a period of one year as the period for reconsideration of his promotion and regular promotion thereafter as granted to him. Secondly, he had already availed of the three selection grades and therefore there was no question of not allowing him any financial upgradation as per the last instructions of the government in Circular dated 31.12.2009. Such financial upgradation is sought to be denied to an employee if he had already declined to accept the regular promotion prior to such date when the financial upgradation becomes payable to him. If however such financial upgradation has already been allowed due to promotion and employee accepts the promotion, it is provided that this would not be a ground to withdraw the financial upgradation. He shall however not be eligible to be considered for further financial upgradation till he agrees to be considered for promotion again and second/next financial upgradation shall also be deferred to the extent of period of debarment due to refusal. Now in the Circular if the respondent-State has propounded that if an employee has already availed the benefit of the annual grade increments, in other words, was offered financial upgradation and thereafter he refused to avail of the promotion, it shall not be a ground to withdraw the financial upgradation. This has thus clearly clarified the situation that the government itself has deviated from this earlier Circular dated 4.12.1996. In any case, the government

has agreed that the financial upgradation if already granted before and if promotion is offered thereafter, refusal thereof would not be a ground to withdraw the benefit of financial upgradation. Examining from this angle also, respondents would not be justified in withdrawing the benefit of second and third selection grade granted to the petitioner. Even otherwise, the respondents when they are seeking to confer upon its employees in the subordinate service, benefit of first, second and third selection grade, as the case may be, in the terms of the Circular promulgated by it on 25.1.1992, cannot treat its employees in dissimilar manner by extending more favourable benefits to another employee and refusing such benefits to petitioner."

17. In the facts of the present case also, the petitioner was granted benefit of second and third selection grades in the year 1990 and 1994. Thus according to para 3 of the Circular dated 04.12.1996, when the petitioner was granted promotion vide orders dated 07.08.1990, 23.11.1992, 07.08.1993 and 15.12.1994, each time he had forgone the same, even if he had been granted benefit of selection grades, the same could not be withdrawn. Petitioner was however granted benefit of second selection grade some time in the year 1994, which was prior to 15.12.1994, when he was fourth time offered promotion, which he again declined. According to para 3 of the Circular dated 18.10.1993, which was in vogue at the relevant time, petitioner having declined to accept promotion, would not be eligible for third selection grade. The Government servant, who was promoted on next higher post after grant of third selection grade and who forgoes the chance of promotion, would continue to draw pay in that selection grade and the government servant who was promoted to next higher post after grant of third selection grade and who forgoes the chance of promotion, would continue to draw pay in that selection grade. In other words, petitioner having been granted both, second and third, selection grades in 1994, his refusal to accept the promotion offered to him on 15.12.1994 notwithstanding, he continued to draw the pay in such third selection grade. It was thereafter that the Circular of the government dated 04.12.1996 occupied the field. In that Circular departure was made to say that a government servant has foregone second and third promotion before issue of the Circular dated 04.12.1996, and drawing pay either in second or third selection grade, the benefit of second or third selection grade, as the case may be, shall not be withdrawn. In other words by virtue of this clause, refusal of the petitioner to accept promotions on the dates earlier than the date of Circular dated 04.12.1996, could not be made basis for withdrawing the benefit of second and third selection grades. The subsequent part of para 3 of the Circular dated 04.12.1996, however, is crucial for the present purpose, which provides that in case such a government servant is again offered promotion after issue of this order, the benefit of second and/third selection grade shall be withdrawn from the date he refuses to accept the promotion, and the pay of such an employee shall be refixed either in pay scale of the first promotion post or in the first selection grade or in the pay scale of the second promotion post, at the stage he

would have drawn, had he not been granted second and/third selection grade(s), as the case may be. In the present case, after issuance of the Circular dated 04.12.1996, petitioner was again offered promotion vide order dated 27.02.1997, which he declined to accept but such refusal to accept such promotion taken place prior to issuance of last Circular dated 31.12.2009, the case of the petitioner would be governed by the Circular dated 04.12.1996. If the petitioner declined to accept the promotion, the respondents were, therefore, right in withdrawing the third selection grade at-least with effect from 27.02.1997, the date when petitioner was fifth time offered promotion. This exactly was the situation in *Murari Lal Gupta*, supra, in which case also the petitioner was offered promotion on 15.01.1995 after he had already been granted second and third selection grades and that refusal was also made subsequent to issuance of Circular dated 04.12.1996. The Government withdrew the benefit of second as well as third selection grade granted to the petitioner. In these facts, it was held by this Court that only third selection grade could be withdrawn and not the second selection grade.

18. In view of above, writ petition deserves to partly succeed. The order dated 19.06.1998 (Annexure-14) passed by the respondents to the extent of withdrawing the third selection grade is held valid. But, so far it relates to withdrawing second selection grade is concerned, the same is quashed and petitioner shall be entitled to the same from the date it was granted to him. Writ petition accordingly stands disposed of. This also disposes of stay application.