

(2016) 09 P&H CK 0035
In the Punjab And Haryana At Chandigarh
Case No : CWP No. 3611 of 2013 (O&M)

Devender Singh

APPELLANT

Vs

State of Haryana

RESPONDENT

Date of Decision : 21-09-2016

Acts Referred:

Constitution of India, 1950 — Article 11, Article 14, Article 226

Citation : (2017) 1 SCT 635

Hon'ble Judges : Rajiv Narain Raina, J.

Bench : Single Bench

Advocate : J.S. Dahiya, Advocate, for the Petitioner; K.S. Sandhu, Advocate, for the Respondent Nos. 2, 3 and 5; Rajiv Atma Ram, Sr. Advocate with Arjun Pratap Atma Ram, Advocate, for the Respondent No. 4

Final Decision : Allowed

Judgement

Rajiv Narain Raina, J. - The dispute in this petition brought under Article 226 of the Constitution is regarding promotion to the post of Sub Divisional Engineer in the Maharishi Dayanand University, Rohtak. The petitioner lays challenge to the order dated December 28, 2012 promoting the 4th respondent-Jai Kishan as Sub Divisional Engineer (Civil-1) [for short "SDE (C)"]. The petitioner belongs to the Civil Engineering Wing of the University, while the 4th respondent to the Drawing Branch. The petitioner was appointed as a Junior Engineer on February 19, 1991 which the 4th respondent castigates was a back door entry on ad hoc basis without advertising the post. It is not disputed that the petitioner was appointed as a Junior Engineer on regular basis on October 28, 1993.

2. The 4th respondent's career graph is as follows:

He was appointed as a Draftsman (Civil) on regular basis on February 25, 1992. Promoted as Head Draftsman on October 22, 2002, he was given current duty charge of the post of SDE (C) on August 21, 2008 and continued as such till he was promoted on regular basis on December 28, 2012 vide order at Annex P-14,

which order the petitioner impugns in this petition claiming thereby he was wrongly and illegally ignored in the matter of promotion and for reasons elaborated below deserves to be invalidated by a writ of certiorari in the present proceeding brought under Article 226 of our Constitution.

3. Not only has the petitioner challenged the order of promotion dated December 28, 2012 but also the initial order dated September 27, 2008 giving current duty charge of the higher post of SDE to Jai Kishan in advance to keep, as they say, the post warm till actual promotion. The charge was given in addition to his duty as a Head Draftsman.

The case of the petitioner

4. The channel of promotion of Junior Engineers and Draftsman are different in their channels as prescribed by rules and conditions of service. The promotional post for Junior Engineer (Civil) is SDE (Civil). The channel of promotion for Draftsmen is to Head Draftsman, Circle Head Draftsman and Chief Draftsman, in that promotional order. As per University rules for promotion to the post of SDE only 75% of the Junior Engineers can be promoted to the post of SDE and the remaining posts can be filled up by way of direct recruitment.

5. The seeds of discontent were sown on March 17, 1994 when one Narender Kumar, Circle Head Draftsman belonging to the Drawing Branch made a request for promotion to the post of SDE. The matter was taken up in the meeting of the Executive Council of the University and vide Resolution No.21 dated March 17, 1994 the claim was rejected after considering the corresponding rules available in the Kurukshetra University, the Haryana Agricultural University, Hisar and the Haryana Government service rules as they have framed their own policies of promotions, while none existed in the respondent University. The decision taken is reproduced below:-

" (II) Draft Promotion Policy to examine the request of Sh. Narender Kumar, C.H.D. for promotion to the post of S.D.E.

In this regard the committee of the opinion that since the works being carried out in M.D. University are of highly specialised/as such, promotion from C.H.D. to the post of Sub-Divisional Engineer is not desirable and not in the interest of the University. However, the pay scale of the C.H.D. can be given as per time scale as has been fixed by the Haryana Govt. which should be done after due verification."

Further provisions was made in the Rules that:-

"i) 50% posts of Sub-Divisional Engineer should be filled up by promotion from the J.E. Of M.D. University.

50% posts should be filled up by direct recruitment."

6. In this way only a Junior Engineer was eligible for promotion to the post of SDE and not any other person. However, the University to make way passed

Resolution No.46 dated February 24, 2003 deciding that 75% of the sanctioned posts of SDE in the University may be filled up by promotion from JEs of the University and 25% posts by direct recruitment. This decision was however not without dissent by a member of the Executive Committee (Council) decrying in writing as follows:-

"To

Secretary, executive Council

M.D. University Rohtak

Subject: Note of dissent for the agenda item No.28 of E.C. Meeting dated 28.12.12.

Sir,

It is shocking for me that why the case of a head Draftsman put up before the EC. As from the University policy head Draftsman not at all can be considered for the post of SDE through promotion. As it is rightly pointed out by the committee constituted for this purpose in the past. By ignoring the right of 11 senior most J.E. for the promotion of SDE will be grave injustice to them. There is no rule for the promotion of head Draftsman to S.D.E, therefore, even E.C. is not competent to put the stamp on the promotion of head Draftsman to S.D.E. if this decision of the E.C. attract adverse legal action, I shall not be sharing for this. In light of above here my dissent is.

With Regards

SD/-

(Dr. Bhagat Singh)

Attested

Sd/-4/2/13

Assistant Registrar (Academic)

M.D. University Rohtak"

7. The petitioner laments that he is the senior most Junior Engineer in the civil wing and has stagnated on the lower post of JE for 25 years since February 19, 1991 without promotion. He has been awaiting his first promotion as SDE (Civil) at least since the last ten years prior to filing the petition. He has been ignored arbitrarily when Jai Kishan who belongs to a different branch and cadre has been promoted as SDE even though he is not entitled to be promoted to the post as per the existing Rules of the University. Resolution No.46/24.02.2003 passed by the Executive Council of MDU reads as follows:-

"46 Promotion quota for the post of S.D.E.

Considered the proposal that 75% of the sanctioned posts of S.D.E.s in the University may be filled up by promotion from J.E Of the University and 25% posts by direct recruitment instead of existing criteria of 50% by promotion and 50% by direct recruitment on the pattern of Ch. Charan Singh, Haryana Agricultural University, Hissar and other non-teaching posts above the rank of Superintendent in the University.

Resolved that the above proposal be approved."

8. Aggrieved by the promotion of Jai Kishan as SDE the petitioner made a representation through proper channel praying for grant of promotion as per existing promotion rules/policy from the date when the said official was promoted against regular vacancy but his name was not put up in the agenda placed before the Departmental Promotion Committee to make its recommendations. The 4th respondent-Jai Kishan was promoted on his representation made on October 19, 2012 to the authorities claiming promotion to the post of SDE which was accepted even without convening a DPC and the decision was got approved from the Executive Council directly by the 5th respondent being the Chairman of the Executive Council. Neither were the rules adhered to, nor was the dissenting note considered to figure out their weight in the scales of the applicable rules of service adverted in the note. The petitioner states that after the filing of the present petition when the respondents were put to notice, the case of the 4th respondent was remitted to a Promotion Committee for making recommendation but the Committee refused to recommend the case, the matter being sub judice before this Court and it was thought that in such course it would not be proper to make any recommendation regarding the substantive promotion of Jai Kishan at stage the question arose. While the writ stood pending the University sought the opinion of Mr. Anupam Gupta, Senior Advocate of this Court. His advice tendered to the University is at Annex A/60 Pages 252 to 253 to which I would advert later.

The case of the University and the 4th respondent.

9. The reasons which prevailed in the 232nd meeting of the Executive Council held on December 28, 2012 in accepting the request of Jai Kishan "Head Draftsman/SDE (Civil) (current duty charge)" for promotion to the post of SDE (C) was based on the Haryana Government policy in the PWD (B&R) "in vogue at present", his work experience and qualifications and in relaxation of the existing promotion policy adopted by the University it was observed that the same needs review in the light of the former. It was in this meeting that a resolution was passed in the following terms:-

"Resolved further that in addition to performing duties of the SDE (Civil) to be assigned to him by the University Executive Engineer from time to time, Sh. Jai Kishan will continue doing the work of Head Draftsman as hitherto as his Primary Duty.

[Dr. Bhagat Singh gave his note of Dissent.]"

10. It is this decision which in effect led to the ad hoc arrangement by which Jai Kishan was made to de facto occupy the post of Sub Divisional Engineer (Civil). It may be mentioned that the cadre of SDE (Civil) in the University consisted of three posts which required to be filled as against which two posts were required to be filled by promotion and one by direct recruitment. While the resolution was passed, the University was also conscious of the promotion policy/rules for internal promotion from JE to SDE to have continued in force which were duly approved by the Executive Council vide resolution No.21 of its meeting held on March 17, 1994 as recommended by the Committee constituted for the purpose.

11. As per this policy the following criteria was laid down for promotion from J.E of M.D., University to the coveted higher post:

a) The Junior Engineer who has attained the qualification of B.Sc. (Engineering), B.E, B.Tech, A.M.I.E or equivalent in required specialization should have acquired 10 years experience as J.E. before being promoted to Sub Divisional Engineer.

b) For a Junior Engineer of M.D. University who is having only diploma in required specialisation and has not been able to attain the degree qualification should have an experience of 15 years of Junior Engineer before being promoted to Sub Divisional Engineer."

12. The Committee constituted for the purpose also recommended that promotion from Circle Head Draftsman [CHD] to the post of SDE is not desirable nor is it in the interest of the University. However, the pay scale of CHD can be given as per time scale as was fixed by the Haryana Government which should be done after due verification. The Executive Council had approved the recommendations of the Committee in to. It was further decided that:-

"Further as per E.G. Reso. No.46 dated 24.02.2003 (Annexure A/29 page 218, already circulated) it has also been decided that 75% of the sanctioned posts of SDEs in the University may be filled up by promotion from J.E. of the University and 25% posts by direct recruitment. Out of three posts of SDEs, two have been filled by promotion and one post has been filled by direct requirement (Namely Sh. Satish Mittaf). Therefore as per prescribed ratio, nest post is meant for internal promotion."

13. It is not a disputed fact that the 1994 policy is extant and as far the prevailing rules of promotion are concerned an amendment has not been carried out thereto as per the University statutes altering the rules of promotion to the post of SDE.

14. Since there has been a debate at the Bar on the opinion tendered it would be necessary to advert to the fact that legal advice was called for by the Vice Chancellor of the respondent University from Sh. Anupam Gupta, Senior Advocate and retainer of the University for advice by his note dated April 04, 2013 which requires reproduction and reads as follows:-

"The Principal fault of legal notice in the Executive Council's decision dated

28/12/2012, promoting Sh. Jai Kishan to the post of SDE (Civil) is that the Executive Council cannot, in the same decision (or in the same breath, as it were) relax the pre-existing promotion policy of the University, adopt a new policy (whether of the State Government or otherwise) in supersession or modification of the pre-existing policy, and also promote an individual as per the relaxed/amended policy without advertising or circulating the relaxed/amended policy and/or giving a opportunity of consideration for promotion to all persons eligible under the relaxed/amended policy, all in one go. Such an omnibus decision/order by the Executive Council makes a mockery of the Rule and Law and substantiates systematic objective norms for sheer adhesion tailored to the interest of an individual. Both substantively and procedurally, it completely fails to suspire confidence, rather subverts confidence, and jettisons all pretence of institutionalization. In more familiar over platitudinous language it betrays favouritism.

The second part of the EC's resolution that Sh. Jai Kishan will "Continue doing the work of Head Draftsman as hitherto as his primary duty" strains common sense. How can someone be promoted and yet continue to perform the responsibilities of the feeder/lower post as his primary duty? This acts and adds tremendously & inexplicably to the arbitrariness of the main decision.

It is open to the EC to reconsider and/or refashion the policy whether of the State the promotion policy, to give up or modify its earlier policy and adopt a new policy (whether of the State Govt or otherwise) in an open and transparent manner, keeping in mind the objective needs and requirements of the posts in question (including academic qualification and/or experience). After debating upon this and taking a duly recorded decision, the same should be duly circulated within the University so that everyone concerned comes to know about the revised/new policy.

Thereafter, if any individual promotion are to be made as per the revised/new policy, a proper notice/advertisement should be given inviting applications so that all eligible persons can apply and can be considered. The best and most suitable person can be promoted/appointment from amongst the eligible persons who have applied, by the DPC (or whoever is the competent authority under the University rules or norms). In other words the University must act in a proper, unobjectionable manner.

Dated 10/5/13"

15. The advice has not translated into any concrete action but is noticed for an understanding of the point of view expressed on the subject matter by an independent and trained legal mind which may serve as a valuable input in the understanding of the case for its just resolution.

The legal framework and defense arguments

16. It may presently be noticed that there are in place service rules called the

MDU Non-Teaching Employees (Terms and Conditions of Service) Rules, 1980, the text of which is placed at Annex R-4/2. However, these rules do not provide feeder cadre for purpose of promotion to the post of SDE. As per these rules recruitment to any post in the service may be by direct recruitment or by promotion or by deputation from the Government departments and other institutions. Rule 45 provides for residuary conditions of service and prescribes that any case which does not fall within the purview of these rules may be decided in accordance with the rules framed by the Haryana Government for its own employees and in such a manner as the Vice Chancellor/Executive Council, as the case may be, may deem fit and proper in each case.

17. On these premises, Mr. Rajiv Atma Ram, learned Senior counsel appearing for Jai Kishan submits that Haryana Government rules apply to the case in hand. The post of SDE in Haryana is governed by rules called the Punjab Service of Engineers Class II PWD (B&R) Rules, 1965 which provide for promotion from the post of, inter alia, Draftsman and Tracer Service for promotion to the post of SDE. It is accordingly argued that the University Act, Statutes and Rules framed thereunder provide for promotion to the post of Draftsman and Tracer service to the post of SDE and, therefore, the promotion of Jai Kishan is legal and valid and should be judicially approved.

18. Moreover, Mr. Atma Ram submits that there is an earlier administrative precedent in the University in applying Haryana Government Rules for promoting one Sh. Satyawan Malik from the post of SDE to the post of Executive Engineer vide Annex R-4/6. In this way, the 1994 promotion policy stands superseded by necessary implication with the enactment of fresh Statute and its notification on October 12, 2010 and, therefore, the old promotion policy cannot be relied upon as prevailing law.

The main stay of the argument of the 4th respondent is based on Statute 46 framed under the MDU Act, 1975 under section 14 and Rule 45 which lays down the residuary conditions of service. However, while one is on the applicability of the Haryana Rules which provide promotion from Draftsman to SDE (C) the view of the University in its written statement becomes significant. In reply to para.6 the University states:-

"That the averments made in this Para are admitted to the extent that respondent No.4 was promoted to the post of Head Draftsman on the recommendations of the Departmental Promotion Committee w.e.f. 22.11.2002 instead of 22.10.2002 as stated in this para. As far as the contention made in this Para that next promotion of respondent No.4 would be on the post of Circle Head Draftsman (Civil) and not to the post of Sub Divisional Engineer, is concerned, it is stated that there is no sanctioned post of Circle Head Draftsman in the respondent University and hence the question of promotion of the respondent No.4 on the post of Circle Head Draftsman does not arise. The sub rule I and IV of Rule 9 of the Haryana Public Works Department (Building & Roads) Draftsman & Tracers (Group-C) Service Rules 1998 as stated in this para

are for Haryana Public Works Department (Building & Roads) Department which are not relevant in the present case but he has not mentioned the relevant Rules for promotion of Sub Divisional Engineer."

19. When the University disclaims the applicability of the PWD rules that I imagine should be the end of the matter on the point as the written statement has been filed after all the decisions have been taken into account to take a stand in court. The official and the non-official respondents delve on the powers of the Executive Council as contained in the University Calendar Volume 1 Page 35. The Executive Council is authorised to exercise powers enumerated therein including the one that is relied upon:-

"(d) to create, upgrade, downgrade, abolish and transfer the posts from one Unit/Section to another administrative, ministerial and other posts and to make appointments and/or promote thereto, in the manner prescribed by the statutes."

20. From this, it is argued that there is sufficient free play in the joints of the administration to decide upon the manner in which the post of SDE (C) is to be filled. Next comes Statute 46 as amended up to July 10, 2010 and deals with conditions of service of University employees. Statute 46 reads:-

"46. Conditions of service of University employees shall be those as may be prescribed in the Ordinance governing the Service & Conduct Rules for University Teachers and Non-Teaching employees."

21. The attention of the Court is then drawn to Rule/Ordinance 45 which deals with residuary conditions of service and lays down its terms as follows:-

"45. Any case which does not fall within the purview of these rules, may be decided in accordance with the rules framed by the Haryana Government employees or in such manner as the Vice-Chancellor/Executive Council, as the case may be, deem fit and proper in each case."

22. In Part-III of the Ordinance falls in the provision of savings and power to relax rules and reads:-

"24.2 Any matter relating to the condition of service of an employee for which no provision is made under these rules, shall be determined according to the Haryana state Government Rules on the subject."

23. It is stated in the reply that the Executive Council of the University vide resolution No.51 passed in its meeting held on June 22, 2012 adopted the State Government Policy of Haryana Public Works Department (Building & Roads) Branch while considering the proposal of promotion of Satyawan Malik from SDE to Executive Engineer.

24. This all may be very well but one has to still be confronted with the minutes of the 232nd meeting of the Executive Council held on December 28, 2012 with Dr. Bhagat Singh the lone voice dissenting from the minutes. One would have to return to the triple reasons assigned for promoting Jai Kishan not substantively

as SDE but with the additional duty while the primary duty to be discharged was still of a Head Draftsman. By this novel method adopted, respondent - Jai Kishan was made a Head Draftsman-cum-SDE (Civil) not wholly in terms of Government policies in PWD (B&R) but by relaxation of promotion policy adopted by the University and in force since 1994. The two reasons, to my mind, do not deserve to co-exist nor can be seen to. Therefore, I am inclined to think, that the unholy arrangement in assigning duties of SDE (Civil) to Jai Kishan along with the work of Head Draftsman is pure subjective discretion exercised by way of relaxation of Policy-1994. No provision regarding relaxation has been shown to the Court to justify action and it is only Rule/Statute 45 on which dependence has been placed i.e. on the residuary conditions of service and Statute 46 reproduced above.

25. Statute 46 refers to the conditions of service of University employees as prescribed in the Ordinance governing the service and conduct rules for teaching and non-teaching employees in the face of the Promotion Policy, 1994. Statute 45 cannot be invoked due to existence of the policy not rescinded or revoked by bringing into existence new rules governing promotion to the post of SDE (Civil) without prior notification to one and all. If the Executive Council applied the Haryana Public Works Department (Building & Roads) Branch rules which was only for Satyawan Malik to promote him from SDE to Executive Engineer then the procedure followed is case specific and not a general rule governing promotion from JE to SDE. In any case, in reply to para.6 the University has disclaimed relevance of these rules stating categorically that they are not relevant in the present case as against the relevant rules for promotion as SDE which are lucid and unambiguous and the entire decision making process appears convoluted to a pre-determined end to first hand over the charge of the post of SDE (C) to a Head Draftsman in 2008; make him occupy the post for years together and then promote Jai Kishan on regular basis as SDE on December 28, 2012 by the decision impugned. Service rules are designed to remove conflict and for all to know the manner in which promotion and appointment will take place and not promote obfuscation and haze. If there is fog which is incapable of settling down then the best test to be applied to a case is principles of justice, equity and good conscience. The promotion policy- 1994 leaves hardly any fog or misting.

26. In CWP No. 1694 of 2009, V.S. Siwach v. State of Haryana and others this Court after noticing judgments of the Division Bench of this Court and of the Supreme Court, was pleased to hold that rules cannot be understood to call for unfettered discretion in the state government or the appointing authority to appoint any person from outside to the exclusion of the person from the cadre unless it is found that the person concerned is not eligible and if eligible then not suitable.

27. In CWP No. 5634 of 2009, The National Hydro Electric Power Corporation Officers Association v. NHPC Limited and another, this Court held that any modification in promotion policy without conferring with the affected persons

would be an unfair approach.

28. I have considered the rival contentions of the parties and have gone through the record with their assistance and have formed the view as is expressed below.

The decision

29. By keeping in view the above discussion on the merits of the case and the original reasoning wherever provided in the preceding paragraphs this court is convinced that the petitioner was apparently wronged in August 2008 when the current duty charge of the post of SDE was handed over on a platter to Jai Kishan and the petitioner was unlawfully ignored on August 21, 2008. There is no evidence on record to suggest that the petitioner as a JE was not eligible or suitable in the year 2008 or at any time thereafter to be either given the CDC or the substantive promotion to the higher post in terms of the Policy-1994. Four years later from CDC the petitioner is equally aggrieved when the promotion order was issued in favour of Jai Kishan. There is no gainsaying that Head Draftsman can be promoted as Circle Head Draftsman and then Chief Draftsman in his own line. If the superior post of Circle Head Draftsman or Chief Draftsman are not sanctioned then the result can be achieved only by amending the law for them removing all doubts but this cannot be at the cost of the petitioner who appears to have a matured right of consideration for promotion as SDE (C) in 2008 and 2012. There was in hand an already approved promotion policy creating an exclusive channel from JE to SDE with no scheme therein for a Head Draftsman to crossover sharply demarcated lines of feeder category posts either side. The crossing over could not be countenanced by abuse of power and exercise of unjustified discretion. The fact that the promotion has been granted to Jai Kishan by relaxing the promotion policy is itself an admission of existence of lack of statutory authority and, therefore, I believe that extraordinary discretion could not have been exercised on the well settled principle that every executive action must have legislative action. In the main I hold that the granting the current duty charge to the 4th respondent on August 21, 2008 and the impugned order dated December 28, 2012 are acts of favouritism they can hold no water and are declared ab initio voidable, illegal and arbitrary. Arbitrariness strikes at the heart of administrative action and the rule of law. None of the provisions, other than the Policy-1994, cited by the parties are of any help to the official and nonofficial respondent especially in the face of the admission in paragraph 6 of the written statement put in by the respondent University, as discussed above. The petitioner and the 4th respondent belong to different cadres and crossing over is declared impermissible.

30. Therefore, the impugned decision of the Executive Council dated September 27, 2008 and granting approval of the current duty charge given on August 21, 2008 and the impugned order dated December 28, 2012 are invalidated as being illegal and arbitrary and the dissent expressed by Dr. Bhagat Singh is found legally sound and in accordance with the prevailing policy. The legal advice tendered to the Vice-Chancellor on May 10, 2013 at Annex A/60 and reproduced

above is maintained as an additional reason for the conclusions reached in this order. Accordingly, both the impugned orders are quashed by writ of certiorari.

31. The writ petition is allowed.

32. A mandamus is issued to the respondent University to consider expeditiously the case of the petitioner for promotion as SDE (C) from the date of occurrence of vacancy in the promotional quota and from the dates the 4th respondent was promoted albeit notionally from August 21, 2008 with pecuniary and non-pecuniary benefits as flow out of this order till December 28, 2012 and all consequential benefits thereafter in accordance with rules. No costs.