

(1974) 11 SHI CK 0007

In the High Court Of Himachal Pradesh

Case No : Civil Writ Petition No. 211 of 1973

Devi Singh

APPELLANT

Vs

The State of Himachal Pradesh etc.

RESPONDENT

Date of Decision : 27-11-1974

Acts Referred:

Constitution of India, 1950 — Article 309
Punjab Civil Services Rules — Rule 3.26

Citation : (1975) 4 ILR HP 70

Hon'ble Judges : C.R. Thakur, J

Bench : Single Bench

Advocate : S. Malhotra, for the Appellant; B. Sita Ram, General, for the Respondent

Judgement

Chet Ram Thakur, J.—The date of birth of the Petitioner is 1-3-1915. He joined service in the then princely State of Patiala as a clerk on 1-1-1935. He was confirmed as such on 17-7-1935. On 15-8-1948, Patiala and the other Punjab princely States formed a Union known as Patiala and East Punjab States Union (shortly known as PEPSU), and then the Petitioner became an employee of PEPSU. Again, on 1-11-1956, by virtue of the reorganisation of the States, PEPSU became a part of the State of Punjab, and, therefore the Petitioner became an employee of the State of Punjab and was posted at Kandaghat. On 1-11-1966, because of the reorganisation of the erstwhile State of Punjab, Kandaghat was tagged on to the Union territory of Himachal Pradesh (now the State of Himachal Pradesh) and the Petitioner was also allocated to Himachal Pradesh.

2. It is admitted that the Petitioner was governed by the Fundamental Rules, whereunder a 1938 pre-entrant into service in a ministerial post was entitled to continue in service till he attained the age of 60. On 17-1-1972, the Governor of Himachal Pradesh in exercise of the powers under Article 309 of the Constitution issued a notification in which it was mentioned that he was pleased to enforce in

Himachal Pradesh the Punjab Civil Service Rules, Volumes I, II and III with effect from 1-1-1972. A copy of the notification is Annexure F. Para 2 of this notification provided that persons who were serving on 1-1-1972 shall be eligible to exercise their option either for existing Rules or for the new Rules within six months, i.e. up to 30-6-1972. It is stated that the Petitioner had not exercised any option for being governed by the Punjab Civil Service Rules detailed in Volumes I and II, upto 30-6-1972. By means of administrative orders, the date of exercising option was extended by 31-3-1973 and then to 31-3-1974, vide Annexures G and H respectively. The Deputy Commissioner, Solan (Respondent No. 3) passed an order on 15-2-1973 (Annexure L) whereby the request of the Petitioner for retaining him beyond the age of 58 years was rejected and he was informed that he shall stand retired from Government service with effect from 1-3-1973 (forenoon) on his attaining the age of superannuation. The Petitioner, it appears, filed an appeal against this order to the Divisional Commissioner, who vide his order, dated 18-9-1972 (Annexure M) dismissed the same.

3. The Petitioner contends that the orders, detailed in Annexures G and H, are mere instructions and have not been issued by the Governor in exercise of his powers under Article 309 of the Constitution and, secondly, those orders extending the period of option are non est. The Petitioner, therefore, prayed for quashing the orders, Annexures L and M. He also prayed for a declaration to the effect that he was a Government servant entitled to be retained in Govt service till he attained the age of 60.

4. The Respondents submitted that the Petitioner had opted to elect with effect from 1-1-1972 to the Punjab Civil Service Rules, Volumes I, II and III and, therefore, according to Rule 3.26 of the Punjab Civil Service Rules, Volume 1, the rule opted to by him, he had to retired on attaining the age of 58 years. The orders issued for extending the period for exercising option were perfectly valid and legal. The orders extending the period of option were authenticated by the Finance Secretary, and they also emanated from the Governor of the State over the signatures of the authorised persons.

5. The sole point in this case requiring decision is, whether it is open to the Government to amend the rules under administrative instructions? It is a common case between the parties that formerly the Petitioner was governed by the Fundamental Rules, Supplementary Rules and the Central Civil Services (Classification, Control and Appeal) Rules, 1965. It is also admitted that a person, who entered in a ministerial post on or before 31-3-1938 and held on that date a lien on permanent post or a suspended lien on a permanent post in a substantive capacity and continued to hold the same post without interruption until he was confirmed in that post shall be retained in service till he attained the age of 60 years. It is also a common case that the Governor in exercise of the powers conferred by proviso to Article 309 enforced in Himachal Pradesh the Punjab Civil Service Rules, Volumes I, II and III, with effect from 1-1-1972. The employees, who were working on 31-12-1971 were eligible to exercise their

option either for the existing" rules or for the new rules within six months i.e., upto 30-6-1972. The Petitioner exercised his option on 27-1-1973. Now his contention is that this option of his exercised after 30-6-1972 is no option in the eye of law, because it was exercised by him after the time specified under the rules and notified by the Governor, vide Annexure F. It is also a common case between the parties that the period for exercising this option to elect to be governed by either the Punjab Civil Service Rules or to retain the Central Civil Services Rules was extended by Annexure H, dated 29-9-1973, upto 31-3-1974. The Respondents submit that this order had emanated from the Governor and it was authenticated by the Finance Secretary. It was not an administrative order rather it was a rule made by the Governor in exercise of his powers under Article 309. But this submission appears to be wholly barren of substance. It is apparent from Annexure P.F. that this date 30-6-1972 for exercise of option was fixed by the Governor in exercise of the powers conferred by proviso to Article 309, and, therefore, it amounted to a rule, whereas the order, Annexure H, whereby the period stands extended for exercise of option is clearly an executive order. It does not purport to have been framed under Article 309, and I am of the opinion that a rule cannot be amended: by an executive instruction. If it was the intention of the Government to extend the period then an amendment to the rules had to be made by the Governor.

6. It is clear from *State of Haryana and Ors. v. Shamsher Jang Bahadur and Ors.* 1972 S.L.R. (S.C.) 441 that the Government cannot amend or supersede the statutory rules by administrative instructions. However, if the rules are silent on any particular point the Government can fill the gaps and supplement the rules. Here there was a clear provision in the Rules issued by the notification, Annexure F, in exercise of the powers" under proviso to Article 309 for exercising option and, therefore, there was no gap which could be filled in by issuing the administrative instructions to extend the period. The period of option, therefore, expired on 30-6-1972 and it could not be extended under the administrative instructions or executive orders. Therefore, the orders issued by the Government extending the period for option are really nonest and any option exercised by the Petitioner after 30-6-1972 is not valid.

7. Consequently, I am of the view that the Petitioner did not exercise any option as required till the time fixed under the rules, Annexure F, and any option exercised thereafter is invalid and not binding. The Petitioner, therefore, is still governed under the Central Civil Services (Classification, Control and Appeal) Rules and the Fundamental Rules, Rule 56(c) entitles the Petitioner to continue till the age of 60, because he is a ministerial Government servant and had put in continuous and uninterrupted service even prior to 31-3-1938. The petition, therefore, succeeds and the orders, Annexures L and M are quashed and the Petitioner is declared to be a Government servant entitled to be retained in Government servant till the age of 60 years. The Petitioner shall also be entitled to all the consequential benefits arising from the continuation of his service.

No order as to costs.