

(2010) 11 SHI CK 0001
In the High Court Of Himachal Pradesh
Case No : C.W.P. (T) No. 5770 of 2008

ER. Relu Ram Vardhan

APPELLANT

Vs

State of Himachal Pradesh and Others

RESPONDENT

Date of Decision : 10-11-2010

Acts Referred:

Recruitment and Promotion Rules, 1973 — Rule 4

Citation : (2011) 1 ShimLC 372

Hon'ble Judges : V.K. Sharma, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

V.K. Sharma, J.—Since both these petitions involve somewhat similar facts and common questions of law, these are being disposed of by a single judgment.

2. Er. Relu Ram Vardhan, the petitioner in CWP (T) No. 5770 of 2008 while working as Junior Engineer was promoted as Assistant Engineer along with some other similarly situate Junior Engineers/Draughtsmen purely as a temporary measure for a period of six months or till the posts were filled on regular basis, whichever was earlier, vide notification dated 27.7.1978, Annexure A-1, wherein his name figured at serial No. 20.

3. Similarly, Shri Sada Nand Dhiman, the petitioner in CWP (T) No. 5858 of 2008, the then Junior Engineer, was also promoted as Assistant Engineer along with some other similarly situate Junior Engineers on ad hoc basis for a period of six months or till the posts were filled on regular basis, whichever was earlier, vide notification dated 25/26.2.1980, Annexure A-1, wherein his name figured at serial No. 5.

4. In the petition filed by petitioner, Er. Relu Ram Vardhan, the following reliefs are claimed, vide paras 7 (a), (b) and (c):-

7(a). The promotion of the applicant as Assistant Engineer vide notification dated

27.7.1978 (Annexure A/1) may kindly be treated to be regular for all intents and purposes and the respondent No. 1 may kindly be directed to consider the applicant for further promotion to the post of Executive Engineer from due date and prior to the date his juniors and respondents No. 2 to 5 were promoted as Executive Engineers;

(b) The seniority lists (Annexure A/2 and Annexure A-5) which do not show the name of the applicant at appropriate place may kindly be quashed and set aside; and

(c) The promotion of the respondents No. 2 to 5 ordered vide notification dated 7.1.1997 (Annexure A/10) and notification dated 13.1.99 (Annexure A/11) may kindly be quashed and set aside.

5. In the reply filed on behalf of the official respondents 1 (i) and (ii), the following stand has been taken vide paras 6 (2), (4), (7) and (8):-

6(2) In reply to this para it is submitted that mere fulfilling the requisites as per the R&P Rules to the post of Assistant Engineer do not confer any right upon the incumbent for promotion to the selection post of Assistant Engineer as it is filled up on regular basis after being considered and merit determined and assigned to the incumbents by the Departmental Promotion Committee subject to availability of vacancies on year-wise basis. Also, the post of Assistant Engineer is filled up on ad hoc/temporary basis on the basis of seniority subject to fitness. In the present case, the applicant was promoted purely on ad hoc/temporary basis for a period of six months or till the posts are filled up on regular basis, whichever is earlier, as is evident vide Annexure A-1 appended to the OA by the applicant. Further, it is submitted that since ad hoc/temporary promotion is no promotion, as such it does not give any right to the incumbents to claim any seniority and regular promotion on the basis of his ad hoc/temporary promotion.

6(4) That the contents of the first half of corresponding para under reply are admitted and rest denied because from 4.11.1981 onwards comprehensive guidelines/principles were issued for promotion to selection posts by the Government vide No. For (AP-II)-A (1)-1/80, dated 3/4.11.1981, as contained in Handbook on Personnel Matters Vol. I, in which it has been laid down that with reference to the number of clear regular vacancies proposed to be filled in a calendar year, the DPC shall restrict the field of consideration to three eligible persons for one post upto 20 posts and additional eligible person for one additional post and in case of S/C and S/T candidates are not available within the normal field of choice, the field of choice may be extended to five times the number of vacancies and the S/C and S/T candidate (and not any other) coming within the extended field of choice should also be considered against vacancies reserved for them subject to eligibility and such S/C and S/T candidates coming under the said extended zone shall be placed enbloc below the other officers selected from within the normal field of choice. A photo copy of these above said O.M. is appended as Annexure R-1 for kind perusal of this Hon'ble Court.

Whereas the applicant was promoted purely on ad hoc basis for 6 months against the posts meant for direct recruitment or till the nominees of the HPPSC become available (as is evident from Annexure A-1 annexed to the O.A. by the applicant). Since then the D.P.C. for making regular promotion was convened only in 1994 in which year-wise vacancy position was considered by the D.P.C. and the incumbents falling in the zone of consideration, as per the rules, were assigned merit on the basis of service record by the D.P.C., besides their respective V.C.C., Integrity Certificate etc. The applicant being a S/C incumbent, could not find place in the year-wise vacancy upto 27.4.1994 as the applicant being quite junior in the entry grade of JE (C) as his name appeared at Sr. No. 624 of the combined seniority list of the Junior Engineers of PWD & IPH or at Sr. No. 123 of the final seniority list of J.E. (C) Irrigation & Public Health Department as it stood on 27.4.1994 i.e., from the date the department was bifurcated into two wings/separate departments namely HPPWD & IPGH Deptts. Whereas the last official promoted as AE on regular basis viz Shri Manohar Lal Khandooja (Sr. No. 175) as per the seniority list of AEs dated 30.11.1995 as it stood on 16.3.1995 appeared as Sr. No. 450 of the seniority list of JE (C) as it stood on 30.9.1984 and the official belonging to S/C category namely Sh. S.L. Dhap appeared at Sr. No. 571 of the said seniority list of JE (C) as on 30.9.1984 which amply shows that the applicant is quite junior to the officials promoted on regular basis and as such the seniority list of AEs as it stood on 16.3.1995 and circulated vide letter dated 30.11.1995, is just, proper and in order. However, it is further submitted that the applicant was considered against the vacancies for the year 1995 for the post of AE on regular basis by the D.P.C. and was promoted as such vide Government Notification dated 3.10.1997. Hence, the averments made in the corresponding sub-para under reply are wrong and denied.

6(7) Amitted to the extent that the draughtsmen are promoted as AE against 5% quota but as soon as they are promoted as AE and are given seniority as AE, they are further considered from promotion to the post of Executive Engineer against the 30% quota meant for Diploma Holders because the Diploma in Engineering or Draughtsman is treated as Diploma only for further promotion to the post of Executive Engineer. Thus, the contentions of the applicant made in sub-para are wrong hence denied.

6(8) In reply to this sub-para it is submitted that Shri Subhash Chand Sharma is much senior to the applicant as Shri Subhash Chand Sharma appeared at Sr. No. 261 of the combined seniority list of JE (C) as stood on 30.9.1984 whereas the applicant appeared at Sr. No. 624 of the said seniority list. Though the applicant was promoted as Assistant Engineer in July, 1978 purely on temporary basis against jumped up promotion against SC quota but at the time of making regular promotion, the applicant did not fall in the zone of consideration being junior in entry grade whereas one Shri Subhash Chand Sharma being senior to the applicant in the entry grade of JE (Civil) was considered and promoted as Assistant Engineer on regular basis by the Government w.e.f. 16.3.1995. Hence,

the averments made by the applicant in the corresponding sub-para are wrong and denied.

6. The replies filed on behalf of the private respondents No. 2 to 5 are almost akin to that of the official respondents 1 (i) and (ii).

7. It may be noticed at the very outset that the post of Assistant Engineer is a selection post under the relevant rules known as, the Recruitment and Promotion Rules in respect of the posts of Assistant Engineers (Civil), Himachal Pradesh, PWD contained in Annexure-1 to the notification No. 1-16/69-PWD, dated 22.6.1972, brought on record by the learned Counsel for the petitioner at the time of hearing.

8. A bare perusal of notification dated 27.7.1978, Annexure A-1 would go to show that while making promotions as a purely temporary measure, there was no element of selection involved in the process carried out under the said notification. Strangely enough the measure, which was for a fixed period of six months, was allowed to continue for about 19 years albeit the recital in the notification that it may continue till the posts were filled on regular basis.

9. Further case of the petitioners is that later on they were regularly appointed as Assistant Engineers on 3.10.1997. Though the petitioners have not brought on record the order of their regular promotion as Assistant Engineers on and with effect from 3.10.1997, yet in the provisional seniority list of Assistant Engineers as on 31.10.1997, Annexure A-5, the date of regular appointment of the petitioners as Assistant Engineers is shown as 3.10.1997.

10. In essence the petitioners are claiming seniority from back date, that is, for the intervening period when they were initially appointed on temporary/ad hoc basis on 27.7.1978 and 25/26.2.1980, respectively, till their regular promotion on 3.10.1997. The intervening period comes to more than 19 years.

11. As already observed, the orders of regular appointment of the petitioners as Assistant Engineers have not been brought on record for scrutiny by this Court. Thus, it cannot be gathered as to what were the terms and conditions of their regular appointment. However, since the petitioners are claiming seniority from back date, it can be safely inferred that their regular appointment on and with effect from 3.10.1997 was prospective in nature.

12. In support of their contention for grant of seniority from back date, the petitioners have heavily relied upon instructions dated 30.6.2001 issued by the Government of Himachal Pradesh, Department of Personnel, Annexure A-13. The instruction contained at Sr. No. (i) being relevant is extracted below for ready reference:-

(i) Where the incumbent is eligible to be promoted in accordance with relevant Recruitment and Promotion Rules but initial promotion on ad hoc/temporary basis is made against existing vacancy by not following the procedure laid down in relevant rules for adjudging suitability of promotee for the post and the

promotee continued in the post uninterruptedly till regularization of his promotion in accordance with the rules, in that event his subsequent regularization after adjudging suitability shall relate back to the date of his initial promotion and entire ad hoc/temporary service shall be counted towards seniority.

13. The above instructions were also under consideration of this Court in Ramesh Chandra Chajta and others v. State of H.P. and others CWP (T) No. 1584 of 2008, decided on 29.7.2010, wherein this Court has held as under vide para 70 of the judgment:-

70. The private respondents are also not entitled for grant of benefit of seniority on the basis of instructions dated 30.6.2001, issued by the respondent-State captioned as "Counting of temporary/ad hoc service towards seniority-Instructions regarding", for the reasons that on the one hand these on the face of it, are against the provisions and spirit of 1973 Rules and on the other are also in derogation to the legal position enunciated by the Hon'ble Supreme Court in the case of Des Raj Sharma supra and other authoritative pronouncements of law on the subject, particularly in one of its latest judgments in the case of R.K. Mobisana Singh (supra). Same is the case with the instructions contained in Chapter 13 regarding seniority and Chapter 16 qua promotions and ad hoc appointments, of the Hand Book on Personnel Matters, Vol-I (Second Edition), relied upon on behalf of the contesting private respondents. It being so, the law laid down in the cases reported as (1) Sant Ram Sharma v. State of Rajasthan and others, supra; (2) Union of India and others v. Sh. Somasundaram Viswanath and others (para 6) supra and (3) Dhananjay Malik and others v. State of Uttaranchal and others, (paras 11 to 14) supra, would not go to advance the case of the private respondents.

14. The petitioners have also relied upon the judgments rendered by the Hon'ble Supreme Court reported as:

1. Ram Sarup v. State of Haryana and others, 1978 (2) SLR 836;
2. The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others, and
3. Shri L. Chandrakishore Singh Vs. State of Manipur and Others,

15. In so far as the case of Ram Sarup v. State of Haryana and others (supra) is concerned, the facts of that case are clearly distinguishable from that of the one in hand. In the case before the Hon'ble Apex Court, the rules were relating to that case and cannot be applied ipso facto to the facts and circumstances of the present case unless the same are shown to be *pari materia* to the rules applicable in this case. Para 3 of the judgment handed out by the Hon'ble Supreme Court is extracted below:-

The question then arises as to what was the effect of breach of clause (1) of Rule 4 of the Rules. Did it have the effect of rendering the appointment wholly void so

as to be completely ineffective or merely irregular, so that it could be regularized as and when the appellant acquired the necessary qualifications to hold the post of Labour-cum-Conciliation Officer. We are of the view that the appointment of the appellant was irregular since he did not possess one of the three requisite qualifications but as soon as he acquired the necessary qualification of five years' experience of the working of labour laws in any one of the three capacities mentioned in clause (1) of Rule 4 or in any higher capacity, his appointment must be regarded as having been regularized. The appellant worked as Labour-cum-Conciliation Officer from 1st January, 1968 and that being a post higher than that of Labour Inspector or Deputy Chief Inspector of Shops or Wage Inspector, the experience gained by him in the working of Labour Laws in the post of Labour-cum-Conciliation Officer must be regarded as sufficient to constitute fulfillment of the requirement of five years' experience provided in clause (1) of Rule 4. The appointment of the appellant to the post of Labour-cum-Conciliation Officer, therefore, became regular from the date when he completed five years after taking into account the period of about ten months during which he worked as Chief Inspector of Shops. Once his appointment became regular on the expiry of this period of five years on his fulfilling the requirements for appointment as Labour-cum-Conciliation Officer and becoming eligible for that purpose, he could not thereafter be reverted to the post of Statistical Officer. The order of reversion passed against the appellant, was therefore, clearly illegal and it must be set aside.

16. Now, while adverting to the case of Direct Recruit Class II Engineering Officers' Association (supra), suffice it to say that it was also considered by this Court in the case of Ramesh Chandra Chajta and others (supra) and it was observed that this judgment was further clarified by the Hon'ble Supreme Court in State of W.B. and Others Vs. Aghore Nath Dey and Others, vide paras 21 to 27 while dealing with conclusions (A) and (B) of the Constitution Bench in the case of Direct Recruit Class II Engineering Officers' Association (supra).

17. In this view of the matter, the petitioners cannot derive any benefit from the aforesaid conclusions (A) and (B) in the case of Direct Recruit Class II Engineering Officers' Association.

18. In L. Chandra Kishore Singh v. State of Manipur and others and connected appeals (supra) relied upon by the petitioners, it has been held as under vide para 15 of the judgment:-

15. It is now well settled that even in cases of probation or officiating appointments which are followed by a confirmation unless a contrary rule is shown, the service rendered as officiating appointment or on probation cannot be ignored for reckoning the length of continuous officiating service for determining the place in the seniority list. Where the first appointment is made by not following the prescribed procedure and such appointee is approved later on, the approval would mean his confirmation by the authority shall relate back to the date on which his appointment was made and the entire service will have to be

computed in reckoning the seniority according to the length of continuous officiation. In this regard we fortify our view by the judgment of this Court in G.P. Doval and Others Vs. Chief Secretary, Government of U.P. and Others,

19. On a plain reading of the above para of the judgment handed out by the Hon"ble Apex Court in L. Chandrakishore Singh v. State of Manipur and others and connected appeals (supra), it is apparent that the question for determination therein was relating to the services rendered as officiating appointment or on probation followed by approval of such service, which is not the position in the present case as the petitioner, Er. Relu Ram Vardhan was promoted as Assistant Engineer purely as a temporary measure for a period of six months or till the post(s) were filled on regular basis and petitioner, Shri Sada Nand Dhiman was similarly promoted as Assistant Engineer purely on ad hoc basis for a period of six months or till the post(s) were filled in on regular basis whichever was earlier. The alternative stipulation that though the promotion which was made for a fixed period of six months would continue for a period of 19 years cannot be said to be the intention of the appointing authority.

20. Furthermore, though the petitioners are claiming seniority from back date, yet they have not impleaded the persons who would be affected by the grant of such relief. It is for this reason as well that the prayer of the petitioners cannot be considered favourably in the absence of such persons, who cannot be condemned unheard.

21. In view of what has been stated hereinabove, I do not final any merit in either of the two petitions, which are accordingly dismissed with no order as to costs.