

(1992) 06 SHI CK 0003
In the High Court Of Himachal Pradesh
Case No : Civil W.P. No. 693 of 1991

George

APPELLANT

Vs

A.C. Thalwal and Others

RESPONDENT

Date of Decision : 10-06-1992

Acts Referred:

Constitution of India, 1950 — Article 102(1), 14, 16, 234, 309
Demobilized Indian Armed Forces (Reservation of vacancies in the Himachal Pradesh Judicial Service) Rules, 1975 — Rule 2, 3, 4(1), 5, 5(1)
Punjab Government, National Emergency (Concession) Haryana Amendment Rules, 1979 — Rule 4A

Citation : (1994) ShimLC 118 Supp

Hon'ble Judges : V.K. Mehrotra, J; Lokeshwar Singh Panta, J

Bench : Division Bench

Advocate : D.D. Sood, for the Appellant; K.D. Sood, for Respondent No. 1, K.S. Patyal, A.A.G., assisted by, H.L. Karwa, Assistant A.G. for Respondent No. 2 and H.M. Sharma, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Mehrotra, J.—Petitioner Shri George appeared in the competitive examination for the H.P. Judicial Service in the year 1981 and was, thereafter, appointed to the said service through an order dated 19th October, 1982. He was appointed on probation but discharged before his confirmation. Later, however, he was reinstated in the year 1989/90. At the time of the filing of the writ petition he was posted as Senior Sub-Judge-cum-Chief Judicial Magistrate at Bilaspur.

2. The first Respondent, Shri A.C. Thalwal, joined the Indian Air Force on 11th November, 1965. He was released from the Air Force on 1st December, 1980. From February, 1981 to January, 1984 he worked in the Punjab National Bank, New Delhi, as Cashier. He appeared in the H.P. Judicial Service Examination held in August/September, 1983 against the vacancies reserved for the released Indian Armed Forces personnel and was selected. He joined service as a Sub-

Judge-cum-Judicial Magistrate on 1st February, 1984.

3. A representation was made by the first Respondent to the High Court seeking the benefit of his approved Military Service under the Demobilized Indian Armed Forces (Reservation of Vacancies in the Himachal Pradesh Judicial Service) Rules, 1975, in the matter of fixation of his pay and seniority under Rule 4(1) which provided that:

4(1) The period of approved military service rendered after attaining the minimum age prescribed for appointment to the Himachal Pradesh Judicial Service by the candidates appointed against reserved vacancies under Rule 2 above, shall count towards fixation of pay and seniority in the service.

Rule 5 provided that:

5. The provisions of these rules shall have effect notwithstanding anything to the contrary contained in any other rules.

The benefit of pay fixation was given to the first Respondent through an order of 31st August, 1989 by granting to him eleven increments having regard to eleven years approved military service put in by him. His representation, after due notice to the officers likely to be affected by the decision in the matter, was accepted by the High Court in part by order of 19/20th November, 1991. Seniority was granted to the first Respondent in the H.P. Judicial Service at the bottom of the batch of 1974. The claim of the first Respondent was that he should be given seniority with effect from 1st February, 1973.

4. Prior to the acceptance of the representation of the first Respondent, seniority position of the members of the H.P. Judicial Service is mentioned in the seniority list issued in December, 1990 (Annexure PE). The Petitioner was at serial No. 24 while the first Respondent was at serial No. 43. The effect of the partial acceptance of the representation of the first Respondent would be that he would come to be placed in the seniority list at Serial No. 13, much above the Petitioner. This brought the Petitioner for redress to this Court through the present writ petition which was instituted on 20th November, 1991. The petition was admitted to fuller hearing on 22nd November, 1991 but the Bench felt that it should be disposed of finally at a very early date. The implementation of the decision of the High Court to grant seniority to the first Respondent above the Petitioner and some other judicial officers was stayed by an order of the same date. The first Respondent as well as the State of Himachal Pradesh (Respondent No. 2) and the High Court (Respondent No. 3) have filed Returns and the Petitioner has filed his affidavits-in-rejoinder. A surrejoinder has also been filed by the first Respondent.

5. On 30th March, 1992, after the petition had been heard in part on 25th March, 1992, an application for amendment of the petition was filed by the Petitioner to which a reply was filed by the first Respondent, the next day. The hearing of the petition commenced on 25th March, 1992 and after intermittent hearings on

various dates orders were reserved in it on 21st May, 1992.

6. Various grounds have been taken in the petition for assailing the decision to grant benefit of approved military service in the matter of seniority to the first Respondent. Also, assailing the initial appointment of the first Respondent in the H.P. Judicial Service, in a vacancy reserved for Ex-servicemen, by seeking amendment of the petition through the amendment application filed on 30th March, 1992. Yet, at the time of hearing of the petition only the submissions noticed hereafter were made before us.

RE : INITIAL APPOINTMENT OF THE FIRST RESPONDENT:

7. Benefit of appointment against a vacancy reserved for Ex-servicemen under the Ex-servicemen (Reservation of Vacancies in the H.P. Judicial Service) Rules, 1981 (under which Rules alone the first Respondent was treated as eligible for a reserved vacancy) could not be taken by the first Respondent as he had obtained employment as a cashier with the Punjab National Bank, New Delhi, and was in its employment from February, 1981 to June, 1984 after his release from the Indian Armed Forces on 1st December, 1980. He had availed the benefit of his status as an Ex-servicemen for regularisation of his age limit for entry into the first civil employment on his discharge from Armed Forces. The advantage was not available to him a second time to enable him to seek the benefit of reservation for Ex-servicemen in the Himachal Pradesh Judicial Service when he appeared at the competitive examination in the year 1983.

8. The aforesaid Rules of the year 1981 are contained in Annexure R-I/33 appended with the sub-rejoinder of the first Respondent. These Rules were framed by the Governor of Himachal Pradesh in consultation with the High Court and the Public Service Commission in exercise of powers under the proviso to Article 309 read with Article 234 of the Constitution. Rule 3(1) provides for reservation of vacancies in the H.P. Judicial Service in the posts to be filled through direct recruitment for "the Ex-serviceman who joined Military Service or was commissioned on or after the first day of November, 1962 or released at any time thereafter". The note below this Rule says that:

Note.--For the purpose of this Rule an ex-serviceman shall cease to be so, as soon as he joins the first civil employment under any State/Central Government....

It is common ground that this note stands deleted with effect from 16th December, 1987 under H.P. Government Notification No. Home-B (A)-1-2/87-Judicial dated 16th December, 1987.

Rule 5(1) says that:

5(1). The period of approved military service after attaining the minimum age prescribed for appointment of the H.P. Judicial Service by the candidates appointed against reserved vacancies under Rule 3 above, shall count towards fixation of pay and seniority in that service.

And, Rule 6 provides that:

The provisions of these rules shall have effect notwithstanding anything to the contrary contained in any other rules.

9. The validity of these Rules was assailed in this Court. It was upheld by a Full Bench in Mohinder Kumar Sood Vs. H.P. Public Service Commission and Others, In doing so the learned Judges constituting the Full Bench also noticed the decision of a Full Bench of the Punjab and Haryana High Court in Jagdish Rai and Others Vs. State of Haryana and Others, in which the challenge to the validity of reservation of posts in favour of Ex-servicemen was negated by holding that such reservation was not violative of Article 14 and 16 of the constitution.

10. The contents of the note under Rule 3(1) of the 1981 and under Rule 2(1) of the 1975 Rule were substantially like those of Rule 3(iii)(cc)(ii)(b) of the Demobilised Armed Forces personnel (Reservation of vacancies) in the Punjab Civil Service (Judicial Branch)(First Amendment) Rule 1976 A Full Bench of five Judges of the Punjab and Haryana High Court considered that Rule in Harbhajan Singh, Advocate v. The State of Punjab and Anr. 1977 (2) SLR 180. The Bench felt that rule appeared to it to be unreasonable. It said:

...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

11. Following these observations a Division Bench of the Punjab and Haryana High Court in Raj Kumar Verma, H.C.S. v. The State of Haryana 1981 (3) SLR 436, struck down Rule 4-A of the Punjab Government, National Emergency (Concession) Haryana Amendment Rule 1979 which confined the benefit of Military service towards increment and seniority only to the first appointment under the Government as violative of articles 14 and 16 of the constitution. Similarly, in an earlier decision in Dr. Jagmohan Singh and Anr. v. The State of Punjab and Ors. 1980 (3) SLR 400, the provision contained in Rule 2(d)(ii)(b) of the Demobilized Armed Forces Personnel (Reservation of Vacancies in the Punjab State Non-Technical Services)(First Amendment) Rule, 1977 which excluded from the category of released Indian Armed Forces Personnel those who had joined a civil post under the Union or the State after release from the Armed Forces of the Union was declared to be unconstitutional by a Division Bench.

12. That apart, the Note provided for exclusion of an Ex-servicemen from that category was soon as he joins the first civil employment under any State/Central Government. (Underlining our)

13. The question is whether employment of the first Respondent in the Punjab National Bank could be treated as civil employment under any Government. Counsel for the Petitioner says that it is so. He relies upon C.V. Raman Vs.

Management of Bank of India and Another, . He relies, in particular, upon the observation contained in paragraph 12, namely:

12. If the criteria laid down above is applied to the facts of the instant cases it is obvious that even though the State Bank of India and the nationalized banks may not be owned as such by the employees of the Central Government they certainly will fall within the purview of the expression "under the Central control of the Central Government" in view of the existence of deep and pervasive control of the Central Government over these banks.

The criteria referred to in the above observation were those extracted in the previous paragraph of the judgment from the decision of Supreme Court in *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, , and were these:

...It is undoubtedly true that the corporation is a distinct juristic entity with a corporate structure of its own and it carries on its functions on business principles with a certain amount of autonomy which is necessary as well as useful from the point of view of effective business management, but behind the formal ownership which is cast in the corporate mould, the reality is very much the deeply pervasive presence of the Government. It is really the Government which acts through the instrumentality or agency of the corporation and the juristic veil of corporate personality worn for the purpose of convenience of management and administration cannot be allowed to obliterate the true nature of the reality behind which is the Government....

14. In *C.V. Raman*, the Appellant was an employee in the Bank of India which is a nationalised Bank. He was dismissed from service upon certain charges. He filed an appeal u/s 41(2) of the Tamil Nadu Shops and Establishments Act, 1947. A preliminary objection was taken on behalf of the Bank of India that the said Act was not applicable to the Bank on account of Section 4(1)(c) which exempted, amongst others, an establishment under, the Central Government from the purview of that Act. The Madras High Court upheld the objection. That decision was assailed before the Supreme Court in an appeal. The Supreme Court formulated the question to be determined by it in the case, which was being heard with several similar cases, (in paragraph 7) thus:

What has to be considered is as to whether the State Bank of India and the nationalised banks can be said to be establishments under the Central Government as contemplated by Clause (c) aforesaid. What does the word "under" in the said clause mean in the context in which it appears? That is the crucial question which arises for consideration in these cases...

The Supreme Court, after noticing that the word "under" had not been defined in the concerned Act and also the dictionary meaning of the word "under" in several dictionaries, proceeded to examine the composition and constitution of the State Bank of India and the nationalized banks and concluded thereafter (in paragraph 10) that:

A conspectus of the provisions of Act No. 23 of 1955 and Act No. 5 of 1970 read with the meanings of the term "under" referred to above leaves no manner of doubt that the State Bank of India and the nationalised banks are clearly establishments under the Central Government.

15. It is obvious that due to the existence of pervasive control of the Central Government over the State Bank and the nationalised banks, the Supreme Court came to the conclusion that they would fall within the purview of the expression "under the Central Government. The Banks having been found to be establishments under the Central Government were treated to be exempt from, the operation of the Tamil Nadu Shops and Establishments Act. The decision must be confined to its own facts and cannot be held to lay down that a person employed in the Bank would be in "a civil employment under the Central Government.

16. A civil employment under a State or the Central Government envisages an employment distinct from one in defence services. It also envisages an employment wherein the incidents of the relationship of a master and servant between the Government and the employee are found present. The Government should have pervasive control in the matter of appointment and dismissal, the day-to-day functioning and control, payment of remuneration and the like in respect of the employee. This is the concept known to the service jurisprudence as has evolved in this country. All these incidents need not co-exist yet the existence of mere indirect control would not suffice. Besides, there should be some duty which the employee is to perform in connection with the affairs of the State as distinct from the duty towards the affairs of a commercial organization-like a nationalised bank. We may refer to some decisions touching this aspect.

17. A Constitution Bench was examining the concept of "office of profit under the Government" within the meaning of Article 102(1)(a) in *Gurugobinda Basu Vs. Sankari Prasad Ghosal and Others*, . It said (in paragraph 12) that:

...In the case before us the appointment of the Appellant as also his continuance in office rests solely with the Government of India....His remuneration is also fixed by Government. We assume for the purpose of this appeal that the two companies are statutory bodies distinct from Government but we must remember ...that they are Government companies within the meaning of the Indian Companies Act, 1956 and 100% of the shares are held by the Government. We must also remember that in the performance of his functions the Appellant is controlled by the Comptroller and Auditor General who himself is undoubtedly holder of an office of profit under the Government....Therefore if we look at the matter from the point of view of substance rather than of form, it appears to us that the Appellant as the holder of an office of profit in the two Government Companies, the Durgapur Projects Ltd. and the Hindustan Steel Ltd, is really under the Government of India; he is appointed by the Government of India, he is removable from office by the Government of India, he performs functions for two Government Companies under the control of the Comptroller

and Auditor-General who himself is appointed by the President and whose administrative powers may be controlled by rules made by the President...

And, (in paragraph 14) that:

...We cannot accede to the submission...that the several factors which enter into the determination of this question...must all co-exist and each must show subordination to Government and that it must necessarily follow that if one of the elements is absent, the test of a person holding an office under the Government, Central or State, is not satisfied....As we have said earlier whether stress will be laid on one factor or the other will depend on the facts of each case. However, we have no hesitation in saying that where the several elements, the power to appoint, the power to dismiss, the power to control and give directions as to the manner in which the duties of the office are to be performed, and the power to determine the question of remuneration are all present in a given case, then the officer in question holds the office under the authority so empowered...

18. In the State of Assam and Others Vs. Shri Kanak Chandra Dutta, it was emphasised (in paragraph 10) that:

...A post under the State is an office or a position to which duties in connection with the affairs of the State are attached, an office or a position to which a person is appointed and which may exist apart from and independently of the holder of the post...

19. In D.R. Gurushantappa Vs. Abdul Khuddus Anwar and Others, again, was a case where the question was about the candidate holding office of profit in an election under the Representation of the People Act, 1951. The Supreme Court said (in paragraph 10) that:

We are unable to accept the proposition that the mere fact that the Government had control over the Managing Director and other Directors as well as the power of issuing directions relating to the working of the company can lead to the inference that every employee of Company is under the control of the Government, The power of appointment and dismissal of Respondent No. 1, vested in the Managing Director of the Company and not in the Government. Even the directions for the day-to-day work to be performed by Respondent No. 1 could only be issued by the Managing Director of the Company and not by the Government. The indirect control of the Government which might arise because of the power of the Government to appoint the Managing Director and to issue directions to the Company in its general working does not bring Respondent No. 1 directly under the control of the Government....We are unable to agree that, in these circumstances, the indirect control exercisable by the Government...can be held to make the post of Superintendent, Safety Engineering Department, an office of profit under the Government.

This decision, which related to an employee of a factory run by the Mysore Iron

and Steel Works Ltd., makes it clear beyond doubt that it is the direct control of the Government which is contemplated for making an employee answer the description of holding an employment under the Government.

20. The same idea is to be found in a later decision of the Supreme Court in Kona Prabhakara Rao Vs. M. Seshagiri Rao and Another, also dealing with the question of the holder of office of profit under the Government, where the Supreme Court reiterated (in paragraph 11) that:

...It is absolutely clear that as the Appellant was neither appointed nor was removable by Government and even his compensatory allowances were paid from the funds of the Corporation and not from the coffers of the Government, he cannot be said to be a person holding any office of profit under the Government...

21. In the present case the service rendered by Respondent Thalwal in the Punjab National Bank would not make him a person who had joined civil employment under any State/Central Government, for existence of the basic factors which would make him such a person are not found established to our satisfaction on the record of the present writ petition.

22. In the view that we have taken about the service rendered by Respondent Thalwal in the Punjab National Bank, it is unnecessary to consider the further question whether the Petitioner should be permitted to assail his appointment in the H.P. Judicial Service in the vacancy reserved for Ex-servicemen now after lapse of several years. We may mention that Shri D.D. Sood, appearing for Petitioner George, was candid in his statement before us on 29th April, 1992, while arguing in reply to the submissions made on behalf of the Respondents, that in the present petition he, was not assailing the recruitment of Ex-servicemen as such in a vacancy reserved for them under the Rules but was only canvassing that no further advantage--like seniority--could be given to them on that account.

That brings us to the QUESTION OF SENIORITY:

23. As a part of his submissions on this aspect Shri Sood emphatically relied upon the decision of the Central Administrative Tribunal, Bangalore in G.K. Shenava and Ors. v. Union of India and Ors. reported in 1989 (1) SLJ 1 (CAT Section). The view taken by the Central Administrative Tribunal was that extending the benefit of "approved service" to an Ex-serviceman was violative of Articles 14 and 16 of the Constitution. We are relieved of the necessity of examining this line of submission in any detail on account of the decision of the Supreme Court on an appeal taken from that decision of the Central Administrative Tribunal before it. The decision of the Supreme Court is reported as Union of India and Others Vs. Dr. S. Krishna Murthy and Others, We may only read some observations from the judgment which would answer the plea put forward before us on behalf of Petitioner George.

24. The appeal before the Supreme Court was by special leave and had been preferred by the Union of India and some former Emergency Commissioned Officers and Short Service Commissioned Officers. The Rules which had been struck down by the Tribunal gave weightage to them of past service rendered by them in the Emergency Commission Service in the matter of seniority. What the Supreme Court said (in paragraph 12) is:

It has been already noticed that the Tribunal has struck down the impugned rules as ultra vires the provisions of Articles 14 and 16 of the Constitution. According to the Tribunal, the impugned rules are discriminatory in nature without any reasonable justification therefor....It has not been disputed before the Tribunal and also before us, that the ECOs and SSCOs formed a definite class, distinct from the Respondents....In other words, it is the admitted position that the classification of ECOs and SSCOs is founded on an intelligible differentia which distinguishes them from the Respondents and other officers of Indian Police Service and Indian Forest Service. It has, however, been strenuously urged that the differentia on which the classification is founded is lacking in rational relation to the object sought to be achieved by the impugned rules...

The Supreme Court said in the subsequent paragraph 13 that:

We are unable to accept the contention. The impugned rules have been framed with a view to giving weightage to the ECOs and SSCOs in recognition of their past services in the army during the period of emergency....The classification has been made only for the purpose of compensating the ECOs and SSCOs for their lost opportunity because of their joining the army service and the impugned rules best subserve the purpose. Accordingly, we do not think that there is any merit in the finding of the Tribunal and also in the contention of the Respondents that the impugned rules are violative of the provisions of Articles 14 and 16 of the Constitution.

These observations are opposite in the present case.

25. Another facet of the submission on behalf of the Petitioner was that the Judiciary is a class separate from the Executive as held in All India Judges' Association Vs. Union of India and others, As such, any service rendered by Respondent Thalwal in the Indian Air Force or as a Cashier in the Punjab National Bank, both executive in character, could not reasonably be counted for according seniority to him over officers of the Judicial Service who were inducted into it earlier than him. This submission may be of no assistance to the Petitioner in view of the object with which the rules were framed. To borrow the words of the Supreme Court, once again:

...The classification has been made only for the purpose of compensating the ECOs and SSCOs for their lost opportunity because of their joining the army service and the impugned rules best subserve the purpose...

This clearly rules out acceptance of the submission put forward before us.

26. The plea on behalf of the Petitioner that after Respondent Thalwal had joined the H.P. Judicial Service, no distinction could be made between him and the other members of that service on account of the source of his recruitment, founded upon the observations of the Supreme Court in *Col. A.S. Iyer and Ors. v. V. Balasubramanyam and Ors.* 1980 I SCC 634 , is of no assistance to the Petitioner. The case before the Supreme Court related to inter se dispute regarding seniority between officers drawn from the Armed Forces and civilian wings, both engineers, in the Survey of India. The Supreme Court dealt with the matter in detail and said (in paragraph 45) that equals were to be treated as equals and after fusion or integration into one common service the members thereof had to be treated alike and no distinction could be made in the matter of salary, seniority, promotion or otherwise, based on the source of recruitment. There is no difficulty in accepting or appreciating this principle But it has hardly any application to the problem in the present case. The question here is of the reasonableness of the classification and the object with which the rules enabling the grant of the benefit of approved Military Service were framed. The object of the rules with which we are concerned was only to compensate the former defence personnel for their lost opportunity because of their joining the Armed Forces. Such rules are valid and not violative of Articles 14 and 16 of the Constitution That is now beyond the pale of controversy *Union of India and Others Vs. Dr. S. Krishna Murthy and Others*, Such a problem was not to be considered by the Supreme Court in *Col. A.S. Iyer*.

27. The decision in *Ex. Capt. K. Balasubramanian and Others Vs. State of Tamil Nadu and Another*, also is distinguishable. There, relying upon the decision in *Union of India v. Dr. S. Krishna Murthy and Ors.* it was urged that ECOs/SSRCOs who had joined the Medical and Engineering Services of the Government of Tamil Nadu had been given benefit of their service in the Army in the matter of fixation of seniority whereas similar benefit had not been extended to the Petitioners. The Supreme Court felt that their cases were not alike. Also, that to those ECOs/SSRCOs the benefit of seniority was being denied on the basis of executive instructions which were inconsistent with the statutory rules which provided for fixation of seniority on the basis of the date of appointment. By the executive instructions it was sought to be fixed on the basis of a different criterion treating them as pertaining to the year in which they would have been appointed to the post in their first possible attempt after the date of joining military duty.

28. The plea that in service jurisprudence the concept of seniority envisaged actual service put in a particular cadre or grade and that the seniority could only be reckoned with reference to the actual length of service put in that grade based upon the decision of the Karnataka High Court in *Vijayadevraj Urs. D. v. G.V. Rao and Anr.* 1983 (1) SLR 292 , and the observations of the Supreme Court (in paragraph 44(A) of its decision) in *The Direct Recruit Class-II Engineering Officers" Association and others Vs. State of Maharashtra and others*, saying that:

Once an incumbent is appointed to a post according to rule, his seniority has to

be counted from the date of his appointment and not according to the date of his confirmation, The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority...

Can be of no assistance to the Petitioner in the present case. Those were decisions where the question was entirely different. They were not cases where there was any question regarding the grant of benefit to Ex-servicemen of any period of approved service put in by them in the Armed Forces under a rule giving weightage in the matter of seniority, which was framed only for the purpose of compensating...them...for their lost opportunity because of their joining the Armed Forces.

29. These being the only submissions made before us on behalf of the Petitioner, and in which we find no merit, we are of opinion that the Petitioner has not made out a case for interposing relief in his favour. The petition is dismissed but the parties are left to bear their own costs.