
(2012) 03 SHI CK 0200
In the High Court Of Himachal Pradesh
Case No : LPA No. 140 of 2008

High Court of Himachal Pradesh

APPELLANT

Vs

Narayan Singh

RESPONDENT

Date of Decision : 27-03-2012

Acts Referred:

Citation : (2012) 03 SHI CK 0200

Hon'ble Judges : V.K. Ahuja, J;Deepak Gupta, J

Bench : Division Bench

Advocate : Ajay Mohan Goel, for the Appellant; C.S. Thakur, Advocate for respondent No. 1 and Mr. Rajesh Mandhotra, D.A.G., for the Respondent

Final Decision : Allowed

Judgement

Deepak Gupta, J.—This appeal by High Court is directed against the judgment dated 25.9.2008, delivered by a learned Single Judge of this Court in CWP No. 84 of 2006, whereby he allowed the petition filed by the respondent (hereinafter referred to as the petitioner) and directed the present appellant to process the case of the petitioner for being placed against a post of Junior Assistant with all consequential benefits. Briefly stated, the facts of the case are that the petitioner was appointed as a Peon in Civil and Sessions Division, Solan in October 1990. He was appointed as a Clerk (Civil Ahlmad) w.e.f. 21.3.1995. The petitioner sought his transfer from Civil and Sessions Division, Solan to Civil and Sessions Division, Kullu and on his request he was transferred on 1st October, 1999 and relieved on 13th October, 1999. He joined his duties in Civil and Sessions Division, Kullu on 15th October, 1999. As per the Inter District Transfer Scheme when a person, on his own request, is transferred from one district to another he forgoes his seniority and joins at the bottom of the category in which he is joining in the transferee district.

2. The petitioner by means of writ petition claimed that he should be placed as a Junior Assistant after completing 5 years service as a Clerk and should be paid the scale of Junior Assistant. It is not disputed that as per the Rules applicable, a

Clerk on completion of five years service is to be placed as a Junior Assistant and is to get a salary of Junior Assistant. It is also not disputed that as per the existing Rules, the posts of Clerk have been divided 50% each for Clerk and Junior Assistant and every Clerk who has put in five years service can be placed as Junior Assistant if there is a vacancy available against the post of Junior Assistant. The case of the petitioner is that once he had completed five years service he should have been placed as Junior Assistant and there was a vacancy in Kullu District. The learned Single Judge allowed the petition.

3. The contention of Mr. Ajay Mohan Goel, Advocate is that the petitioner having forgone his seniority went at the bottom in the category of Clerks in Kullu District. He further submits that there are Clerks in Kullu District who are senior to the petitioner and who are waiting for their turn to be placed as Junior Assistant. He submits that till the persons who are now senior in Kullu District to the petitioner are placed as Junior Assistant, the petitioner could not be so placed. He, therefore, challenged the judgment of the learned Single Judge.

4. On the other hand, Mr. C.S. Thakur contends that his claim is not for grant of promotion but only for grant of higher scale on the basis of period of service rendered.

5. We have carefully examined the case from all angles. The contention of Mr. C.S. Thakur that he is merely asking for a higher scale, though attractive at first blush, cannot be accepted. The reason is that it is not that automatically on completion of five years service a person is automatically to be placed in the category of Junior Assistant. There must be a vacancy in the category. When a person seeks transfer under the Inter District Transfer Scheme, he for his own convenience wants to be transferred from one district to another and as per the condition of the Scheme he has to forgo his seniority in his parent district and join at the bottom of the rung in the transferee district. Therefore, when the petitioner joined at Kullu he had to be placed at the bottom in the category of Clerks. If, when he completes five years of total service including the service rendered in Solan, there was no person senior to him in Kullu and a vacancy was available, he would have been given the benefit of the past service and would have legitimate claim to be placed in the category of Junior Assistant. However, because of forgoing his seniority, there are persons senior to him in Kullu who have not completed the qualifying service of five years, he shall have to wait for them to first get their placement in the category of Junior Assistant and thereafter only can he be placed as a Junior Assistant subject to availability of vacancy. It is not as if his entire service gets wiped out but this is on account of the fact that he has forgone his seniority and if he is placed in the higher category of Junior Assistant naturally there will be discrimination against the persons in the transferee district who should have been considered higher in the seniority.

6. Similar issue came up before the Apex Court in *K.P. Sudhakaran and Another Vs. State of Kerala and Others*, wherein the Apex Court held as follows:-

11. In service jurisprudence, the general rule is that if a Government servant holding a particular post is transferred to the same post in the same cadre, the transfer will not wipe out his length of service in the post till the date of transfer and the period of service in the post before his transfer has to be taken into consideration in computing the seniority in the transferred post. But where a Government servant is so transferred on his own request, the transferred employee will have to forego his seniority till the date of transfer, and will be placed at the bottom below the junior-most employee in the category in the new cadre or department. This is because a government servant getting transferred to another unit or department for his personal considerations, cannot be permitted to disturb the seniority of the employees in the department to which he is transferred, by claiming that his service in the department from which he has been transferred, should be taken into account. This is also because a person appointed to a particular post in a cadre, should know the strength of the cadre and prospects of promotion on the basis of the seniority list prepared for the cadre and any addition from outside would disturb such prospects. The matter is, however, governed by the relevant service Rules.

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17. The transferred LDCs next submitted that the intention of making a provision that a person on an "own request" transfer will be ranked as the juniormost in the new district or new unit, is to ensure that the seniority of the existing employees in the category in the new unit or district is not affected by a senior person coming from outside by transfer. It is contended that where the promotion post is State-wise, the seniority of the existing employees in the district to which the outside employee is transferred, will not be affected and, therefore, where the promotion is to a state-wise post, proviso to Rule 27(a) which requires those who are transferred on "own request", to give up their seniority, will not apply. We cannot agree. The alleged intention behind a provision, cannot be used to defeat the express words of the provision. Once a statutory rule is made, without providing any exceptions, it is not possible to carve out exceptions to such rule, by judicial interpretation. Nor can an exemption from application of a clear and specific rule be claimed on the ground of hardship or similar reasons. The proviso to Rule 27(a) of the Rules is categorical and applies to all employees transferred on own request. It does not make distinction between employees whose promotion post is a State-wise post and those where the promotion posts are district-wise posts.

7. In Union of India (UOI) and Others Vs. Deo Narain and Others, the Apex Court drew a distinction between experience and seniority. Though for experience the past service rendered in the parent cadre may be taken into account but the rules will have to be read in such a manner that the seniority will not be overturned by giving the benefit to experience. It would be pertinent to refer to Paras 32 and 33 of the judgment which read as follows:

32. What was held in Ponnappan by this Court was that if an employee is

transferred from one Department to another Department on compassionate ground, he would be placed at the bottom of the seniority in the transferee Department. Hence, at the time of his transfer in the transferee Department, all employees in the same cadre who were very much serving at that time would be shown above such transferee employee and in such combined seniority list, the transferred employee would be shown as junior most. The only thing which this Court said and with respect, rightly is that such employee who had already worked in a particular cadre and gained experience, will not lose past service and experience for the purpose of considering eligibility when his case comes up for consideration for further promotion.

33. In our judgment, the ratio laid down by this Court in Ponnappan clearly lays down the principle formulated in the Government of India's letter dated May 20, 1980 as also in a subsequent communication, dated May 23, 1997 issued by the Ministry of Finance, Department of Revenue. Even otherwise, in our considered opinion, the two concepts, viz. (i) "eligibility" and

(ii) "seniority" are quite distinct, different and independent of each other. A person may be eligible, fit or qualified to be considered for promotion. It does not, however, necessarily mean that he must be treated as having requisite "seniority" for entry in the zone of consideration. Even if he fulfils the first requirement, but does not come within the zone of consideration in the light of his position and placement in "seniority" and the second condition is not fulfilled, he cannot claim consideration merely on the basis of his eligibility or qualification. It is only at the time when "seniority" cases of other employees similarly placed are considered that his case must also be considered. The CAT, in our view, therefore, was not right in applying Ponnappan and in granting relief to the applicants. There is no doubt in our mind that it says to the contrary.

In view of law laid down by the Apex Court, we are of the considered view that though the service rendered by the petitioner at Solan is not wiped out and can be taken into consideration while considering his eligibility for being granted the status of Junior Assistant he cannot jump over the persons who though may have joined later at Kullu but are senior on account of his own request and will have to wait for his turn and can be placed in the category of Junior Assistant only after those persons are so placed. Therefore, the appeal is allowed and the judgment of the learned Single Judge is set aside and it is directed that the petitioner shall be entitled to be placed in the rank of Junior Assistant as per our observations made hereinbefore. No costs.