

**(2023) 01 SHI CK 0086**

**In the High Court Of Himachal Pradesh**

**Case No : Latter Patent Appeals No. 13 Of 2023**

Neelam Sharma

APPELLANT

Vs

State Of Himachal Pradesh And Others

RESPONDENT

**Date of Decision : 27-01-2023**

**Acts Referred:**

**Citation : (2023) 01 SHI CK 0086**

**Hon'ble Judges : Jyotsna Rewal Dua, J;Virender Singh, J**

**Bench : Division Bench**

**Advocate : Bipin C. Negi, Senior Mr. Nitin Thakur, Y.P.S. Dhaulta, Ramesh Kaundal**

**Final Decision : Dismissed**

## Judgement

Jyotsna Rewal Dua, J

Caveat Pet. No.3 of 2023

Discharged. The caveat petition stands disposed of.

LPA No.13 of 2023

1. Notice. Mr. Y.P.S. Dhaulta, learned Additional Advocate General and Mr. Ramesh Kaundal, Advocate, appear and waive service of notice on behalf of respondents No.1 & 2 and respondent No.3, respectively.

With consent of learned counsel for the parties and in view of the urgency expressed by the appellant, the matter has been heard at this stage.

2. Sh. Puran Chand (present respondent No.3) had instituted the writ petition, wherein, Smt. Neelam Sharma (present appellant) was impleaded as respondent No.3. Sh. Puran Chand had raised grievances concerning grant of retrospective promotion to Smt. Neelam Sharma on the post of Inspector Grade-I and consequential assigning of seniority to her over him in that grade. Learned Single Judge found merit in writ petitioner's claims. The writ petition was allowed on

26.12.2022. Feeling aggrieved, Smt. Neelam Sharma (writ respondent No.3) has moved instant Letters Patent Appeal. The private parties are being referred to hereinafter according to the status enjoyed by them before the learned Writ Court.

3. Some relevant facts are being noticed hereinafter:-

3(i). Sh. Puran Chand (writ petitioner-present respondent No.3) and Smt. Neelam Sharma (writ respondent No.3-present appellant) were appointed as Sub-Inspectors in the year 1988 in the Department of Food, Civil Supplies and Consumer Affairs, Government of Himachal Pradesh. This post was subsequently re-designated as Inspector Grade-II. Smt. Neelam Sharma enjoyed higher rank in the seniority list of Inspector Grade-II over the writ petitioner-Sh. Puran Chand.

3(ii). Under the applicable Recruitment & Promotion Rules (Annexure P-3), two channels of promotion were available to the eligible incumbents of the post of Inspector Grade-II. An Inspector Grade- II could either opt for promotion to the post of Inspector Grade-I or to the post of Head Analyst.

3(ii)(a). Writ respondent No.3-Smt. Neelam Sharma on 18.07.2006 (Annexure P-4), specifically opted for promotion to the post of Head Analyst. She was accordingly promoted as Head Analyst on 30.08.2006 (Annexure P-5). In terms of this promotion order, Smt. Neelam Sharma was to remain on probation for a period of two years.

3(ii)(b). The writ petitioner-Sh. Puran Chand opted to be promoted on the post of Inspector Grade-I. He was accordingly promoted as Inspector Grade-I on 09.02.2007. Tentative seniority list of Inspector Grade-I was circulated on 12.07.2007 (Annexure P-8), reflecting the position as on 01.07.2007. Name of the petitioner-Sh. Puran Chand appeared in the said seniority list at Sr. No.51. Smt. Neelam Sharma did not figure in this seniority list as she stood promoted as per her option to the post of Head Analyst on 30.08.2006.

3(iii). After serving on the post of Head Analyst for more than a year, Smt. Neelam Sharma submitted a representation on 06.09.2007 (Annexure P-6) with a request to promote and post her as Inspector Grade-I. Her representation was favourably considered by the Department. The matter was forwarded to the Departmental Promotion Committee (DPC). On the basis of recommendations of the DPC, Smt. Neelam Sharma's request for reversion from the post of Head Analyst was accepted. Vide office order dated 09.04.2008 (Annexure P-7), she was given retrospective promotion to the post of Inspector Grade-I w.e.f. 10.01.2007. The order dated 09.04.2008 also assigned placement No.49 to Smt. Neelam Sharma in the tentative seniority list of Inspector Grade-I issued on 12.07.2007 (Annexure P-8), reflecting the position as on 01.07.2007. The final seniority list of Inspector Grade-I, reflecting the position as on 01.07.2007, was circulated on 30.12.2009 (Annexure P-9), wherein name of writ respondent No.3-Smt. Neelam Sharma figured at Sr. No.49, whereas the name of the writ

petitioner-Sh. Puran Chand was reflected at Sr. No.52.

3(iv). Aggrieved against assigning of higher seniority position to Smt. Neelam Sharma as Inspector Grade-I and her retrospective promotion to the post of Inspector Grade-I, Sh. Puran Chand filed CWP No.8077 of 2011. In this writ petition, besides seeking relief against assigning of higher seniority position to Smt. Neelam Sharma, Sh. Puran Chand had also claimed several other reliefs against certain other individuals on different cause of actions/grounds. This writ petition was transferred to the erstwhile H.P. Administrative Tribunal as T.A. No.4147 of 2015. On abolition of the Tribunal, the petition was again transferred to this Court and registered as CWPOA No.443 of 2019. Vide order dated 09.03.2021, the writ petitioner-Sh. Puran Chand was permitted to withdraw the said writ petition insofar as his claim against respondent No.5 therein (Smt. Neelam Sharma) was concerned. He was granted liberty to agitate his pleaded cause against respondent No.5 by filing a separate writ petition.

3(v). Sh. Puran Chand thereafter instituted CWP No.3198 of 2021 against Smt. Neelam Sharma, inter-alia, praying for quashing of seniority placement provided to her in the order dated 09.04.2008 (Annexure P-7). Challenge was also laid to the seniority list of Inspector Grade-I circulated in compliance and as a consequence to the order dated 09.04.2008. Prayer was also made for grant of consequential benefit to the writ petitioner after redrawing the seniority list of Inspector Grade-I by placing the writ respondent No.3 in the seniority list on the basis of her actual date of joining as Inspector Grade-I. This writ petition was allowed by the learned Single Judge vide judgment dated 26.12.2022, operative portion of which reads as under:-

"23. In light of the above discussion, the petition is allowed and order dated 09.04.2008, Annexure P-7 is held inoperative in so far as it has affected the seniority position of the petitioner as Inspector Grade-I. Accordingly, seniority list, Annexure P-9 is quashed and set aside to the extent it placed respondent No.3 above the petitioner. Respondents No.1 and 2 are directed to redraw the seniority list, Annexure P-9 by placing respondent No.3 at appropriate place on the basis of her promotion to the post of Inspector Grade-I w.e.f. 09.04.2008. Respondents No.1 and 2 are further directed to allow all consequential benefits to the petitioner as will be available to him by recasting the seniority list of Inspector Grade-I. Needful be done within eight weeks from the date of passing of this order. The petition is accordingly disposed of, so also, the pending applications, if any."

4. Writ respondent No.3-Smt. Neelam Sharma (present appellant) has assailed the judgment passed by the learned Single Judge primarily on following two counts: -

(i). The writ petition preferred by Sh. Puran Chand was barred by delay and laches; and

(ii). Even on merits, the writ petition deserved to be dismissed. Smt. Neelam

Sharma (writ respondent No.3) had lien on the feeder category post of Inspector Grade-II as she had not been confirmed against the promotional post of Head Analyst. She was on probation as a Head Analyst on 06.09.2007, when she submitted a written request seeking reversion to the post of Inspector Grade-II. In view of the lien enjoyed by her on the lower post of Inspector Grade -II, she had a right to seek reversion to this post during her probation period on the promotional post of Head Analyst. The action of the official respondents, reverting her to the post of Inspector Grade-II vide order dated 09.04.2008 and retrospectively promoting her to the post of Inspector Grade-I under the same order w.e.f. 10.01.2007, did not suffer from any infirmity or illegality. Hence, the writ petitioner had no justifiable cause of action. The writ petition instituted against assigning higher seniority position to Smt. Neelam Sharma on the basis of her retrospective promotion to the post of Inspector Grade-I w.e.f. 10.01.2007 ought to have been dismissed.

5. We have heard Mr. Bipin C. Negi, learned Senior Counsel for the appellant (writ respondent No.3), Mr. Y.P.S. Dhaulta, learned Additional Advocate General for respondents No.1 and 2-State and Mr. Ramesh Kaundal, learned counsel for respondent No.3-Sh. Puran Chand (original writ petitioner) on the above two points. Our observations are as under:-

5(i). Delay and laches:-

We do not find any substance in this ground. This is in view of the fact that name of Smt. Neelam Sharma had not been reflected in the tentative seniority list of Inspector Grade-I circulated on 12.07.2007 (depicting the position as on 01.07.2007). Rightly so, since she stood promoted to the post of Head Analyst on 30.08.2006 in light of her specific option. She was working as Head Analyst as on 01.07.2007 in view of her promotion on 30.08.2006. The final seniority list of Inspector Grade-I was issued by the respondent-Department on 30.12.2009, wherein name of Smt. Neelam Sharma, for the first time, figured as an Inspector Grade-I and that too over and above Sh. Puran Chand. The writ petitioner-Sh. Puran Chand can reasonably be assumed to have become aware of retrospective promotion of Smt. Neelam Sharma as Inspector Grade-I only on 30.12.2009, when the latter was assigned higher seniority position over the petitioner as Inspector Grade-I. Order dated 09.04.2008, vide which Smt. Neelam Sharma was actually promoted as Inspector Grade-I with retrospective seniority, was not communicated to the writ petitioner. Name of Smt. Neelam Sharma was not there in the tentative seniority list of Inspector Grade-I circulated on 12.07.2007. Petitioner had no occasion to furnish objections to assigning of retrospective promotion/seniority to Smt. Neelam Sharma as Inspector Grade-I. After circulation of the final seniority list of Inspector Grade-I on 30.12.2009, petitioner submitted his representation on 09.02.2010 (Annexure P-10) against the final seniority list of Inspector Grade-I. Hearing no response to the representation, the petitioner knocked the doors of this Court by instituting CWP No.8077 of 2011. Vide order dated 09.03.2021 passed in CWP No.8077 of 2011

(renumbered as CWPOA No.443 of 2019), the writ petitioner-Sh. Puran Chand was permitted to withdraw his writ petition against Smt. Neelam Sharma (respondent No.5 therein). Liberty was granted to him to agitate his grievances against Smt. Neelam Sharma by filing a fresh substantive writ petition. This was in lieu of misjoinder of causes of action in the said writ petition as the petitioner had apparently challenged seniority positions of several individuals on different grounds and cause of actions. Subsequently, petitioner preferred CWP No.3198 of 2021 on 03.06.2021 against Smt. Neelam Sharma, which was decided vide impugned judgment dated 26.12.2022. In the facts and circumstances of the case, it cannot be said that the grievances raised by the petitioner were hit by delay and laches.

5(ii). Merits of the matter:-

On merits of the matter also, we are not inclined to accept the submissions advanced on behalf of writ respondent No.3-Smt. Neelam Sharma (the appellant herein). This is for the following reasons:-

5(ii)(a). There were two channels of promotion available to the eligible holders of the post of Sub-Inspector (re-designated as Inspector Grade-II), i.e. either to the post of Inspector Grade-I or to the post of Head Analyst. Smt. Neelam Sharma specifically opted for promotion to the post of Head Analyst on 18.07.2006. She was accordingly promoted as Head Analyst on 30.08.2006 and was to remain on probation for a period of two years.

5(ii)(b). The argument raised on behalf of Smt. Neelam Sharma is that she, during her probation period on the promotional post of Head Analyst, enjoyed lien on the feeder category post of Inspector Grade-II, therefore, had a right to seek reversion to the lower post of Inspector Grade-II. She accordingly exercised this right to seek reversion to the post of Inspector Grade-II in order to further seek promotion to the other channel of promotion, that being of Inspector Grade-I. In support of such submissions, reliance was also placed upon (1976) 4 SCC 339, titled State of Punjab and others Versus Labhu Ram and others, (1997) 8 SCC 461, titled Life Insurance Corporation of India and another Versus Raghavendra Seshagiri Rao Kulkarni and (2003) 11 SCC 632, titled Ali M.K. and others Versus State of Kerala and others.

5(iii). There can be no quarrel with the settled legal position enunciated in the above pronouncements cited for the appellant that a person can be said to acquire a lien on a post only when he has been confirmed and made permanent on that post and not earlier. However, in service jurisprudence, an employee during his probation period on the promotional post does not enjoy any vested right to seek reversion to the feeder category post merely on the ground that till the time he was confirmed on the promotional post occupied by him, he had a lien on the feeder category post. It is the prerogative of the employer to revert an employee based upon his work, performance, act, conduct and all other attending factors. After having opted for promotion to a particular channel of

promotion, i.e. after having opted for promotion to the post of Head Analyst, it was not open for writ respondent No.3-Smt. Neelam Sharma to take a 'U' turn a year later and to seek reversion to the post of Inspector Grade-II in order to change her option for promotion to the other channel of promotion, i.e. to the post of Inspector Grade-I. In this regard, it would also be appropriate to refer to a judgment dated 26.7.2010, rendered in CWP(T) No.14932 of 2008, titled Neelam Kaushal Versus State of H.P. & others, wherein it was held that once an employee gives an option, he will not be permitted to change the option and further that once an employee opts to be promoted as Lecturer/Head Master (as applicable in that case), he cannot claim that he should be considered for the other post. In the judgment rendered in Neelam Kaushal's case, supra, on 26.07.2010, following instructions issued by the Government on 24.12.1981, providing for option from incumbent of posts having more than one avenue of promotion, were noticed:-

"6. Reference may now be made to the instructions issued by the Government vide department of personnel letter No. H.P. Govt. Deptt. Of Personnel letter No. Per(AP-II)A(3)-4/78 dated 24.12.1981 (Annexure-16.14), which reads as follows:

"Options from incumbents of posts having more than one avenue of promotion.

"Various complications arise in cases where according to the Recruitment and Promotion Rules as category of post has more than one channels of promotion in-as-much as an incumbent promoted to one category of post after observing all formalities indicates that he has preference for being promoted against the second channel of promotion. To prevent this from occurring, options should invariably be obtained from the persons concerned and kept in the record before he is considered for promotion against one of the channels provided in the rules."

After noticing the above instructions, the Court observed in the following para that once a preference is indicated, the same cannot be withdrawn or changed:-

"7. It is apparent that as per these instructions when there is more than one channel of promotion available for a particular category of post(s) then at the time of consideration of the candidates for such post(s), the candidate must indicate his/her preference and once preference is indicated the same cannot be withdrawn or changed. Pursuant to these instructions, a letter dated 23rd April, 1998 was issued by the Director of Education H.P, relevant portion of which reads as follows :

"As per the R & P Rules 50% of the posts of School cadre Lecturers are filled up from the TGT teachers who are MA/MSc qualified and have got their names entered in the PGT list for the purpose of promotion.

You should apprise all TGT teachers working under you that those of the TGT teachers who are promoted to the post of Lecturer shall not be promoted to the post of Headmaster. The TGTs shall either be promoted to the post of Lecturer or to the post of Headmaster.

Before sending cases to this Directorate for inclusion of names in the PGT list option may be obtained from the concerned teacher that he wants to be promoted to the post of Lecturer and not to the post of Headmaster. Hence, it may be ensured that the TGTs should get their names included in the list of PGT because once a person is promoted to the post of Lecturer he shall not be afforded opportunity to change the option."

After taking note of the instructions holding the field, it was held in the following para that once an option is exercised for a particular promotional category, then the same cannot be withdrawn notwithstanding retention of lien:-

"11. A perusal of the rules and instructions set out in detail above clearly show that what was envisaged in the rules and instructions was that when there are two avenues of promotion, the person in the feeder category must be asked to exercise his option as to for which promotional category he wants to be considered. Once such option is exercised then the same can not be withdrawn. If options are taken then even if lien is retained that will not help the employee. However, if no options are taken then the promoted employee would be justified in claiming that he can be considered against the other post."

The judgment in Neelam Kaushal's case, *supra*, was relied upon in CWP No.1545 of 2011 (Vinod Kumar and others Versus State of Himachal Pradesh and others), decided on 05.07.2012.

The instructions dated 24.12.1981 are part of writ record as Annexure P-11 and were in force at the relevant time. In view of these instructions, Smt. Neelam Sharma could not have been permitted to change her option for promotion especially when it had already been acted upon and implemented.

2022 (1) Scale 1 (Union of India & Ors. Versus Manju Arora & Anr.) was a case where the Hon'ble Apex Court held that if a regular promotion was offered, but refused by the employee before becoming entitled to financial upgradation, he shall not be entitled to financial upgradation only because he has suffered stagnation. Not because of this being a case of lack of promotion, but an employee opting to forfeit offered promotion. While declaring that the employees who had refused the offer of regular promotion are disentitled to the financial upgradation benefits envisaged in the circular in question, the Hon'ble Apex Court in following para held that "employees cannot be allowed to approbate and reprobate or to put it colloquially eat their cake and have it too":-

"18. In the above circumstances, we find merit in the submissions made on behalf of the appellants. Consequently, it is declared that the employees who have refused the offer of regular promotion are disentitled to the financial upgradation benefits envisaged under the O.M. dated 9.8.1999. In this situation, the Scottish doctrine of "Approbate and Reprobate" springs to mind. The English equivalent of the doctrine was explained in *Lissenden v. CAV Bosch Ltd.*<sup>1</sup> wherein Lord Atkin observed at page 429,

".....In cases where the doctrine does apply the person concerned has the choice of two rights, either of which he is at liberty to adopt, but not both. Where the doctrine does apply, if the person to whom the choice belongs irrevocably and with knowledge adopts the one he cannot afterwards assert the other....."

The above doctrine is attracted to the circumstances in this case. The concerned employees cannot therefore be allowed to simultaneously approbate and reprobate, or to put it colloquially, "eat their cake and have it too". It is declared accordingly for the respondents in the C.A. Nos.7027-28/2009."

5(iv). In the instant case, Smt. Neelam Sharma had specifically opted for promotion to a particular stream. She was accordingly promoted to that stream, where she had joined as such. Mere factum of her being on probation on the promotional post will not bestow any right upon her to seek reversion to the feeder category post just because she had a change of mind a year after serving on the promotional stream opted by her. Reversion of an employee during probation period can be resorted to by the employer based on several attending factors like performance, work, conduct etc. and not otherwise. Such fact situation did not exist in the instant case. Mere assertion that the writ respondent No.3 (Smt. Neelam Sharma) had a lien over the feeder category post, is not sufficient to seek reversion as a matter of right to the lower feeder post of Inspector Grade-II, more so, in the facts of the case, where she had herself opted for promotion to the post of Head Analyst, had been serving there for more than a year with no complaints from the employer.

5(v). Notwithstanding the above aspect, the respondent-Department favourably considered the representation of Smt. Neelam Sharma. The matter was placed before the DPC. A perusal of office order dated 09.04.2008 (impugned in the writ petition) gives an indication that the DPC recommended the case of Smt. Neelam Sharma for reversion from the post of Head Analyst for further promotion to the post of Inspector Grade-I. It appears from the record that Smt. Neelam Sharma was factually never reverted from the post of Head Analyst to the feeder category post of Inspector Grade-II. Had she been reverted to the post of Inspector Grade-II, then that order and fact situation would have come into being only on 09.04.2008, meaning thereby that Smt. Neelam Sharma would have been in a position to exercise her fresh option for promotion to the post of Inspector Grade-I only after 09.04.2008 and not prior to that. No order, reverting Smt. Neelam Sharma from the post of Head Analyst to the post of Inspector Grade-II, is available on record, yet she has been retrospectively promoted to the post of Inspector Grade-I w.e.f. 10.01.2007 vide impugned order issued on 09.04.2008.

5(vi). Even if it is to be considered as an implied case of reversion of Smt. Neelam Sharma to the feeder category post of Inspector Grade-II vide order dated 09.04.2008 as contended by learned Senior Counsel for the appellant, then also, she would have been entitled to exercise her fresh option for promotion to the post of Inspector Grade-I only after 09.04.2008 as Smt.

Neelam Sharma was actually serving on the promotional post of Head Analyst from 30.08.2006 to 08.04.2008 in view of her earlier option. In spite of all this, the official respondents had granted her retrospective promotion to the post of Inspector Grade-I w.e.f. 10.01.2007, which was not justified in the facts and circumstances of the case. We have been apprised that Smt. Neelam Sharma has been actually serving as Inspector Grade-I ever since 09.04.2008. Even if her promotion to the post of Inspector Grade-I is to be protected considering her long service on that post, the fact would remain that she could not be assigned seniority as Inspector Grade-I over and above the writ petitioner-Sh. Puran Chand, who was promoted to the post of Inspector Grade-I on 09.02.2007. Writ respondent No.3-Smt. Neelam Sharma ought to have been assigned seniority to the post of Inspector Grade-I by taking her date of promotion as Inspector Grade-I not earlier than 09.04.2008.

5(vii). Therefore, we conclude as under:-

5(vii)(a). After exercising her specific written option on 18.07.2006 for promotion to the post of Head Analyst; after accepting her promotion to the post of Head Analyst ordered on 30.08.2006; after serving on the promotional post of Head Analyst for more than a year, Smt. Neelam Sharma (present appellant & writ respondent No.3) could not have been allowed to change her option merely because she changed her mind later on and desired to be promoted as Inspector Grade-I, i.e. the other channel of promotion, which was initially not opted by her. Action of official respondents in entertaining Smt. Neelam Sharma's application dated 06.09.2007 for change of option and allowing her prayer vide order dated 09.04.2008 was not in order. However, considering the fact that Smt. Neelam Sharma had been working as Inspector Grade-I w.e.f. 09.04.2008, learned Single Judge correctly did not interfere with her promotion order dated 09.04.2008, even though this order was under challenge in the writ petition.

5(vii)(b). The appellant-writ respondent No.3 promoted as Head Analyst on the basis of her option, could not seek reversion to the feeder post of Inspector Grade-II for exercising fresh option merely on the assertion that she had lien on the lower post during her probation period on the promotional post. An employee during probation on the promotional post cannot seek reversion to the lower post as a matter of right. To revert an employee during the period of probation, is the prerogative of the employer that can be exercised after viewing all attending factors including work, act, conduct and performance etc. of the concerned employee.

5(vii)(c). Notwithstanding point No.(b) above, even if the appellant-writ respondent No.3 is construed to be reverted to the post of Inspector Grade-II as contended by her, then also, such reversion would not have been possible prior to passing of the order dated 09.04.2008, as she had been serving on the promotional post of Head Analyst w.e.f. 21

30.08.2006 to 08.04.2008. It was only after 08.04.2008 that the respondents

could have promoted the appellant as Inspector Grade-I. Despite the stand taken by the writ respondents including the appellant, the case record, however, does not show any order actually reverting the appellant to the post of Inspector Grade-II. The only order available is the one passed on 09.04.2008, which straightway promotes the appellant-the then holder of the post of Head Analyst, to the post of Inspector Grade-I. Such course was impermissible in law.

5(vii)(d). Viewing from any angle, under no circumstances, the appellant-Smt. Neelam Sharma could have been assigned retrospective seniority as Inspector Grade-I w.e.f. 10.01.2007. Even under the above noticed facts as they existed, at best, she could be assigned seniority as Inspector Grade-I only from 09.04.2008, i.e. the date when she started serving as Inspector Grade-I and not prior to that. She could not be placed senior to the writ petitioner in the seniority list of Inspector Grade-I as the writ petitioner had been promoted to the post of Inspector Grade-I on 09.02.2007.

In view of the above discussion, we do not find any merit in this appeal. The same fails and is accordingly dismissed alongwith pending miscellaneous application(s), if any.