

(1979) 10 P&H CK 0034
In the Punjab And Haryana At Chandigarh
Case No : Civil Writ Petition No. 1577 of 1977

Rajinder Nath Malhotra

APPELLANT

Vs

The State of Punjab and others

RESPONDENT

Date of Decision : 09-10-1979

Acts Referred:

Citation : (1979) 10 P&H CK 0034

Hon'ble Judges : J.V. Gupta, J; Bhupinder Singh Dhillon, J

Bench : Division Bench

Advocate : Kuldip Singh and Mr. M.R. Agnihotri, for the Appellant; M.P.S. Gill, D.A.G. Punjab for Respondent Nos. 1 to 3, Mr. J.L. Gupta for the Respondent No. 4, H.L. Sibal for the Respondent No 6 to 8 and 10, Mr. R.S. Amol and Mr. C.M. Sharma for the Respondent No. 7, for the Respondent

Final Decision : Allowed

Judgement

Bhopinder Singh Dhillon, J.—The point of law which arises for determination in the present case is within narrow compass. Instructions contained In letter No. 4809-GII-57/ 21176(sic) dated October 23, 1957, issued by the Chief Secretary to all the Heads of Departments in the State of Punjab, requiring that before a person is promotee from the post of a clerk to the post of an Assistant, a departmental test should be provided for the purpose. The said instructions were impugned by one of the employees, namely, Shamsheer Jang Shukla, on the short ground that the service to which he belonged was governed by statutory rules and thus the executive instructions could not be issued contrary to the rules which governed the service to which he belonged. This plea was upheld by this Court and also by the Supreme Court. The said case is reported as The State of Haryana v. Shamsheer Jang Shukla Clerk, Haryana Civil Secretariat 1968 S. L. R. 162, and the said decision was affirmed by the Supreme Court in State of Haryana v. Shamsheer Jang Bahadur 1972 S. L. R. 441. However, there is another facet of the litigation arising out of the instruction of the Chief Secretary, referred to above One of the employees, namely Harnam Singh filed a Civil Suit in which

he, in addition to other grounds, also claimed that there was nothing on the record to show that the department to which he belonged did validly issue any such instructions for holding a qualifying test. In the case, the learned Sub Judge who tried the case came to the conclusion that there was nothing on the record to show that the Governor had delegated this authority to the Chief Secretary to the Punjab Government or to the Commissioner of the Division for issuing the said instructions, and that the department concerned had not issued any valid instructions providing for the departmental test. This litigation culminated into a decision by this Court in the case *The State of Punjab v. Harnam Singh R. S. A.* No. 892 of 1964, decided on September 18, 1964. With a view to implement the said two judicial decisions, the Chief Secretary to the Punjab Government issued instructions dated June 17, 1976, which are appended as Annexure P-2 with the writ petition, in these instructions, the Chief Secretary, with a view to get the above mentioned judgments implemented, directed the authorities concerned to redetermine the seniority of the various incumbents who happened to be affected by the said two decisions.

2. The Petitioner in the present case joined as a clerk in the Ayurvedic Department in 1958. He appeared in the departmental test in February, 1959 and was promoted to the post of Assistant on March 14, 1959. He was confirmed against the said post on October 13, 1966. He was promoted as Head Assistant on March 15, 1971, and as Superintendent on April 26, 1972. He was promoted as Administrative Officer-Sum-Establishment Officer on February 23, 1977. In view of his seniority, the Petitioner claimed that he was at No. 1 in the seniority list, but in view of the instructions of the Chief Secretary, copy of which is appended as Annexure P-2, the Deputy Secretary Health, Head of Ayurvedic department, Punjab, Respondent No. 3, re-fixed the seniority of the Petitioner and the final seniority list has been appended with the additional affidavit of the Petitioner, copy of which is Annexure P-11A. The Petitioner in this list has been shown at Sr. No. 7, though according to the earlier seniority determined, the Petitioner should have been at serial No. (sic)

3. As far as the legal position is concerned, the same appears to be very clear. It is well settled that wherever there are rules governing a particular service, the provisions of the rules must prevail and no executive instructions can over-ride the said rules, but in case where there are no rules or if there are rules and they do not cover a particular field, the executive instructions issued by a competent authority shall hold the field. *Shamsher Jung Shukla's case (supra)* was a case where the rules held the field and the rules nowhere provided for a departmental test for promotion from the post of clerk to the post of assistant and in that background it was finally decided by their Lordships of the Supreme Court, that the executive instructions could not override the rules which were applicable to the service. It is equally well settled and has been held by their Lordships of the Supreme Court in *Sant Ram Sharma v. State of Rajasthan* 1967 S.L. R. 906. that wherever the statutory rules do not cover the field, the executive instructions can be validly issued and they shall have the binding force. From what has been

stated above, it is obvious that in the departments of the Government wherever there were rules governing particular field of the service the said rules have to prevail, but in, the department where the rules do not cover a particular field or do not govern the service, in that case the statutory instruction issued by the competent authority shall hold field. Similar view was taken by a Division Bench of this Court in *Shri Amar Nath, Officiating Assistant v. The State of Haryana* L. P. A. No. of 1969 etc, L. P. A. No. 224 of 196 decided on September 3, 1971. In the present case it has been contended before us and it is not disputed that in 1959 when the departmental test was held, no rules governed the service of the Ayurvedic Department. It was in 1963 that the Punjab Ayurvedic Department (Class III Ministerial) Service Rules, 1963, were enforced. It may incidentally be mentioned that the said rules provide for a departmental test for promotion from the post of clerk to the post of Assistant, but percentage of promotion on seniority and on selection has been prescribed under the rules. In this view of the matter we are clearly of the opinion that the decision in *Shamsher Jang Shukla's case* (Supra) will not apply to the case of the parties in the present case.

4. Faced with this situation. Mr. J.L. Gupta, learned Counsel for Respondent No. 4, contends that in fact there were no validly issued departmental instructions in the Ayurvedic Department for holding a departmental test, which was held in 1959. We find that no such finding has been recorded by the competent authority who disturbed the seniority list and issued the impugned seniority list Annexure P-11A. On the other hand, we find that in the affidavit of Shri S. D. Khuller, Under Secretary to Government Punjab, Health and Family welfare Department, filed on behalf of Respondent No. 1 and 2, it has been categorically stated that in view of the decision of the their Lordships of the Supreme Court in *Shri Shukla's case* (Supra), there remains no legal basis for promotion of the Petitioner over and above the Respondents on the basis of the qualifying Assistant Grade examination. It is, therefore, obvious that the impugned seniority list, which has been issued in pursuance of the instructions of the Chief Secretary dated 17th June 1976 was reframed as the concerned authority was of the view that the judgment in *Shri Shukla's case* (Supra) is applicable to the case in hand which view is not sustainable in view of our finding recorded in the earlier part of the judgment. However, if the private Respondents are sure that there was no validly issued statutory instructions in existence providing for a departmental test it will be open to them to convince the appropriate authority and that on being so done, the appropriate authority will not be still entitled to record a finding to that effect in pursuance to the Instructions of the Chief Secretary, copy of which is Annexure P-2 with the writ petition.

5. For the reason recorded above, the writ petition is allowed and the impugned provisional seniority list copy of which is Annexure P-4 appended with the writ petition and the final seniority list, copy of which is Annexure P-IIA appended with the writ petition, are quashed and the original seniority of the Petitioner is restored. There will be no order as to costs

J.V. Gupta, J.

I agree