
(2010) 08 J&K CK 0002
In the Jammu And Kashmir High Court
Case No : SWP. No. 907 of 2005

Rajni Gupta

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 26-08-2010

Acts Referred:

Citation : (2010) 4 JKJ 790

Hon'ble Judges : Sunil Hali, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Sunil Hali, Judge

1. Restoration of seniority of respondent no.4 as Ophthalmic Assistant with effect from 26.04.1988 as also his promotion as Senior Refractionist

with effect from 07.09.1994 is the subject matter of challenge in this writ petition.

2. The petitioner and respondent no.4 are locked in a litigative process for more than one and a half decade. One trying to unsettle the position of

the other. In order to understand the controversy involved in this petition, certain facts are required to be noted:-

3. Petitioner came to be appointed as a Refractionist in Government Medical College Jammu on adhoc basis in the year 1989. Said appointment

was regularized with effect from 11.09.1989. Respondent no.4 was appointed as Ophthalmic Assistant in the year 1988 in the Health Department.

The appointment of the petitioner was challenged by respondent no.4 in SWP no. 441/1990 on the ground that she was not eligible to be

appointed as a Refractionist. It seems that respondent no.4 withdrew the said

writ petition on the assurance of the State that he would be considered for appointment in the Medical Education Department. The services of respondent no.4 came to be transferred from the Health Department to Medical Education Department in the year 1989. It seems that this order was subsequently canceled by the administrative department, resulting in filing of another writ petition by respondent no.4. It is contended that on the pain of contempt, the order issued by the Court was implemented and vide order dated 11.08.1991 respondent no.4 was ordered to be transferred to Medical Education Department as an Ophthalmic Assistant.

4. Petitioner was confirmed as a Refractionist in the year 1993 and was promoted as Senior Refractionist vide order dated 30.11.1994 with effect from 07.09.1994 for a period of two years. Her appointment was confirmed in the year 1999.

5. After his transfer from the Health Department to Medical Education Department, respondent no.4 filed a writ petition in this Court for restoration of his seniority with effect from the date he was appointed in the Health Department i.e. from 26.04.1988. Said writ petition, bearing SWP no. 1078/1992 was allowed by this Court on 16.08.2000 with directions to the State to consider the claim of the petitioner in the light of observations made therein within a period of three months. On the pain of contempt petition, official respondents vide government order No. 257-HME of 2005 dated 01.04.2005 restored the seniority of the respondent no.4 as Ophthalmic Assistant in Medical Education Department with effect from 26.04.1988.. After restoration of his seniority, respondent no.4 was adjusted as Senior Refractionist with effect from 07.09.1994.

6. It is important to mention here that the order appointing the petitioner as Senior Refractionist substantively from the year 1999 was questioned by one Bihari Lal Sharma in SWP no. 3/2000 and by respondent no.4 through SWP no. 345/2000. The grievance of the respondent no.4 in the said writ petition was that he was substantively appointed as Ophthalmic Assistant on 26.04.1988 and at the time of promotion of petitioner as Senior Refractionist, he was working in the Medical Education Department and was, therefore, required to be promoted as Senior Refractionist under rules. The learned Single Judge allowed his writ petition and held that

respondent no.4 was senior to the petitioner and directed the official respondents to consider his claim. In the alternative it was directed that in case no order is passed then the respondent no.4 would be entitled to receive the same benefits as had been given to the petitioner herein.

7. A Letters Patent Appeal stands filed against the judgment of learned Single Judge. The grounds taken in the appeal are that; both the petitioner and respondent no.4 belong to different streams i.e. Refractionist and Ophthalmic Assistant, as such, declaring the respondent no.4 as senior to the petitioner, without directing the State government, who alone could do so, to settle the issue of seniority is bad. The direction that private respondent would rank senior to the petitioner has been passed without quashing the appointment of the petitioner as Senior Refractionist. It is stated that the appeal is still pending in this Court.

8. While acting upon the directions of this Court passed in SWP no. 1078/1992 dated 16.08.2000, official respondents have restored the seniority of the private respondent with effect from 26.04.1988 as Ophthalmic Assistant and consequently by order dated 31.05.2005 he was adjusted as Senior Refractionist with effect from 07.09.1994. These orders are subject matter of challenge in this writ petition.

9. The contention of the petitioner is that providing for restoration of seniority of the private respondent as Senior Refractionist with effect from 07.09.1994 is in violation of the rules and cannot be made in view of the fact that vested rights of the petitioner are disturbed. While restoring the seniority of respondent no.4 same has to take effect from 1991 when he was actually transferred in the Medical Education Department in the cadre of Ophthalmic Assistants. It is further contended that orders impugned have been issued in gross violation of the stay order dated 16.12.2002 passed by the Division Bench of this Court in LPA no. 479/2002. The order of restoration of seniority of respondent no.4 with effect from 26.04.1988 in view of the directions issued by this Court did not envisage his promotion as Senior Refractionist with effect from 07.09.1994, as admittedly, he did not possess the requisite qualification for promotion as Senior Refractionist. This, in essence is the case of the petitioner. The stand of the respondent-State is as under:-

(a) Restoration of seniority of respondent no.4 was in terms of the judgment

passed by this Court in SWP no. 1078/1992 dated 16.08.2000. The

said judgment had assumed finality as same was not challenged by the aggrieved parties;

(b) After his transfer from the Health Department to the Medical Education Department, the time spent by respondent no.4 in the Health

Department was reckoned towards his seniority in the transferee department. It is admitted case of the parties that transfer of cadre of respondent

no.4 was on the asking of the government and, as such, his seniority was required to be determined from the date he stood appointed in the Health

Department;

(c) The promotion of respondent no.4 to the post of Senior Refractionist was made on the basis of draft rules, which provided that a person having

qualification of Bachelor of Science and Diploma in Refractionist / Ophthalmic Assistant's Course, was eligible for promotion to the post of Senior

Refractionist;

(d) The issues involved in the Letters Patent Appeal filed by the petitioner was with respect to the declaration given by the learned Single Judge

that respondent no.4 was senior to the petitioner, which had nothing to do with the directions given by learned Single Judge in SWP no.

1078/1992 dated 16.08.2000, which had directed the official respondents to restore the seniority of the private respondent as Ophthalmic

Assistant. It was in compliance to that judgment that seniority of respondent no.4 was restored and he was given the benefit of such seniority;

(e) The grant of retrospective promotion was as a result of restoration of respondent no. 4's seniority with effect from 26.04.1988 in terms of the

judgment of this Court passed in SWP no. 1078/1992 dated 16.08.2000, as such, it does not dislodge the vested right of the petitioner, because

on facts, respondent no.4 admittedly was appointed in the year 1988 whereas the petitioner was appointed in the year 1989.

10. I have heard the learned counsel for the parties.

11. The following controversy is involved in this writ petition.

(a) Whether the restoration of the seniority of respondent no.4 in terms of the judgment and his consequent promotion from the year 1994 as

Senior Refractionist has violated the vested rights of the petitioner;

(b) whether the change of cadre of respondent no.4, on the asking of the state government, would entitle him to the benefit of his services rendered

in Health Department for purposes of determining his seniority in the Medical Education Department.

(c) Whether the pendency of the Letters Patent Appeal debars the official respondents from restoring the seniority of the private respondent, even

though restoration of seniority was done in pursuance of the judgment passed in SWP no. 1078/1992, which was not the subject matter of

challenge in the letters patent appeal.

12. Coming to the first question, it be seen that the power to grant retrospective operation while exercising powers under the Statutes or in terms

of executive fiat has to conform to the extent that it does not disturb the vested right of third party. The State is well within its rights to make

operation of rules or administrative orders retrospectively, however, the affect of the rule or an order must ensure that it does not disturb the vested

right of third party. In such a situation the procedural safeguard is required to be observed is to give a notice to the affected person to make such

representation against the proposed retrospective operation of the order or rules. This, in essence, is the only requirement in such a situation. I say

so because the State is well within its rights to make any rule or order retrospective in its operation.

13. Now coming to the case in hand, it be seen that the impugned orders dated 01.04.2005 and 31.05.2005 were passed in pursuance to a

judgment passed by this Court in SWP no. 1078/1992 dated 16.08.2000, which directed the official respondents to date back the seniority of the

private respondent from 26.04.1988. Consequent to the said restoration of his seniority, private respondent has been promoted. Petitioner's

grievance that retrospective operation was not permissible has to be understood in the facts and circumstances of this case.

14. It is not in dispute that respondent no.4 was appointed as Ophthalmic Assistant on 26.04.1988 whereas the petitioner was appointed in the

year 1989 as a Refractionist. Petitioner also did not possess the requisite qualification for becoming a Refractionist and so was the case with the

private respondent.

15. The appointment/ promotion to the post of Senior Refractionist in terms of

the draft rules was to be made from the category of Refractionist/

Ophthalmic Assistant. Admittedly seniority would play a role in making such promotion.

16. It is not in dispute that petitioner stood promoted as a Senior Refractionist in the year 1994 and confirmed as such in the year 1999, much

before the respondent no.4 was promoted. She acquired a right to continue on the said post. Her promotion has not been disturbed by the

impugned orders. Her only right, which she could claim to have been disturbed is by granting retrospective promotion to the respondent no.4 with

effect from 07.09.1994, which dates back to the date of promotion of the petitioner. So it is only her seniority which has been affected.

17. As already stated herein above, official respondents have restored the seniority of respondent no.4 in terms of the Court orders, which has

directed them to restore the seniority of respondent no.4 with effect from 26.04.1988. It is also admitted that State was well within its rights to

restore the seniority and grant promotion retrospectively, with only one rider that any person affected by such restoration of seniority was required

to be heard. However, in the present case, it was not by taking recourse to any rule or an administrative order that seniority of respondent no.4

was restored. It was restored because of the directions issued by this Court. Petitioner could challenge the order of the Court in which she was not

made a party by the private respondent. The remedy available was to question this order before the Division Bench, which has not been done.

Once the judgment assumes finality, there was no requirement to hear the petitioner before restoring the seniority and granting promotion to the

respondent no.4.

18. I, accordingly, hold that the orders impugned have been passed strictly in consonance with law.

19. Coming to the second contention, it be seen that while ordering change of the cadre at the option of the employee his seniority has to be

reckoned at the bottom of the seniority in the transferee department. But if the change is at the behest of the government, than the employee is

entitled to seniority on account of the services rendered by him in his parent department. This issue is no longer res integra. Applying this principle

to the present case, it be seen that respondent no.4 was transferred from the

Health Department to Medical Education Department initially in the year 1989, however, that order was rescinded but on the directions of the Court same was restored in the year 1991. It is no body's case that

respondent no.4 had opted the Medical Education Department on his own but he was transferred on the request of the government.

20. The issue with regard to absorption of respondent no.4 with effect from 26.04.1988, i.e. His date of appointment, as questioned by the

petitioner, cannot be accepted because the transfer was made at the behest of the Government and as such, while changing the cadre of

respondent no.4, he was required to be given the benefit of seniority also.

21. The last contention raised by the petitioner is that impugned orders could not have been passed in view of the fact that Letters Patent Appeal is

pending in this Court wherein stay order has also been issued.

22. In order to appreciate this controversy, it is necessary to indicate the controversy involved in the letters patent appeal.

23. Promotion of petitioner as Senior Refractionist was questioned by the private respondent in SWP no. 345/2000. The Court found that

respondent no.4 was senior to the petitioner on the basis that he was appointed in the year 1988 while as petitioner was appointed in the year

1989. The contention of the petitioner in her Letters Patent Appeal is that her appointment as Senior Refractionist has not been set aside by the

learned Single Judge and the issue regarding the seniority was required to be determined by the official respondents and not by the Court.

24. The impugned orders have been issued while implementing the directions dated 16.08.2000, passed in SWP no. 1078/1992, on the premise

that respondent no.4 was appointed in the year 1988. The issue involved in that writ petition was that on his transfer to the Medical Education

Department, respondent no.4 was not given the benefit of his previous service rendered by him in the Health Department. The Court directed the

official respondents that seniority of respondent no.4 would date back from the date he was given the substantive appointment in the Health

Department. It was by virtue of this order that seniority of respondent no.4 was determined retrospectively. This issue does not, in any way, affect

the rights of the petitioner. As such the plea raised by the petitioner that pendency of the Letters Patent Appeal was a bar for issuing the impugned

orders cannot sustain.

25. For all what has been said above, the writ petition is found to be without any merit and is, accordingly, dismissed.