
(1990) 09 P&H CK 0009
In the Punjab And Haryana At Chandigarh
Case No : Civil Writ Petition No. 899 of 1983

Sham Dass Balla

APPELLANT

Vs

The State of Punjab and Others

RESPONDENT

Date of Decision : 18-09-1990

Acts Referred:

Constitution of India, 1950 — Article 14, 16
Punjab Municipal Act, 1911 — Section 38(2)
Punjab Municipal Corporation Act, 1976 — Section 1, 40, 71(2)
Punjab Municipal Corporation Services (Recruitment and Conditions of Service) Rules, 1978 — Rule 10, 14

Citation : (1992) 1 ILR (P&H) 319

Hon'ble Judges : G.R. Majithia, J

Bench : Single Bench

Advocate : J.L. Gupta and T.S. Bagga, for the Appellant; S.K. Sayal, DAG, P.S. Patwalia and Anuj Raura, for the Respondent

Final Decision : Allowed

Judgement

G.R. Majithia, J.—The Petitioner has impugned the order of Respondent No. 1 dated January 20, 1983 fixing his seniority below Shri S.S. Bhalla, Respondent No. 3, as Corporation Engineer.

2. For appreciating the controversy which is to be resolved, a brief reference to the relevant facts is necessary:

The Petitioner was selected for the post of Municipal Engineer (Public Health) advertised by the Municipal Committee, Amritsar and,--vide order dated March 22, 1969, he was appointed for three months or till a substitute recommended by the Punjab Public Service Commission (hereinafter referred as the "Commission"), whichever was earlier. Petitioner's temporary appointment was extended from time to time with the approval of Respondent No. 1 and the Commission. The details of the approvals by the Commission as well as by the Punjab Government for each extension are given below:

Sr. Period No. Concurrence of the Commission Approval of Secretary, Local Government

1. 22-3-69 to 22-6-69 (Ch. 71EA(L)/393/ 69/8127, dt. 19-4-69 (Ch. 51) Nemo No. 1589-CI(ASOI) 69(7116, dt. 18-3-69
2. 23-6-69 to 22-9-69 (Ch. 87)-do-/13451, dt. 27-6-69 (Ch. 95) 8494-CI (ASO-I)-69/8034, dt., July/69
3. 23-9-69 to 22-12-69 (Ch. III)-do-/25684, dated 7-11-69 (Ch. 109)130057-CI (ASO-I)69/3&5, dated 7-11-69
4. 23-12-69 to 22-3-70 (Ch. 123)-do-4890, dt. 4-3-70 upto 28-2-70 (Ch. 143) 4073-CI (ASO-D-70, dated 20-4-70

The Petitioner was confirmed as Municipal Engineer (Public, Health) by the Municipal Committee, Amriisar with of feet from July 32, 1969,--vide resolution No. 749 dated October 19, 1930.

3. The Petitioner was selected as Municipal Engineer (Public Health) by the Commission and his selection was approved by Respondent No. 1,--vide orders dated May 4/6, 1970. He was appointed on regular basis. It was also stated in the order that the Governor of Punjab accorded approval to the extension in temporary appointment of the Petitioner as Municipal Engineer (Public Health) for a further period with effect from March 23, 1970 to the date of his appointment on regular basis.

4. Shri S.S. Bhalla, Respondent No. 3, was appointed as a Municipal Engineer in the Building and Roads Branch of Municipal Committee, Amritsar by an order dated January 21, 1970, by Respondent No. 1. He was confirmed with effect from January 29, 1970 by the Municipal Committee, Amritsar,--vide its Resolution No. 1380, dated March 29, 1971.

5. In 1976, Respondent No. 1 constituted the Municipal Service of Engineers. The Petitioner and Respondent No. 3 were found suitable for appointment to the Municipal Service. A tentative seniority list was issued by Respondent No. 2 on December 23, 1976. Petitioner's name appeared at serial No. 1 while that of Respondent No. 3 appeared at serial No. 2.

6. In 1977, Municipal Corporations of Amritsar, Jalandhar and Ludhiana were constituted. The Petitioner and Respondent No. 3 were considered to be the members of the Service of the Corporation. A tentative seniority list of the Corporation Engineers was issued by Respondent No. 1,--vide letter dated October 12, 1979. In this list, the Petitioner's name appeared at serial No. 1 and that of Respondent No. 3 at serial No. 2. The seniority was fixed after considering the representation moved by Respondent No. 3.

7. Respondent No. 3 again filed representation against the fixation of his seniority below the Petitioner. The representation was accepted by Respondent No. 1 and,--vide order dated January 20, 1903, the Petitioner was informed that

Respondent No. 3 had been declared senior to him. The representation of Respondent No. 3 was accepted principally on the ground that the period spent by the Petitioner on provisional appointment could not be counted towards his seniority in view of the provision of Rule 10 read with Rule 14 of the Punjab Municipal Corporation Services (Recruitment and Conditions of Service) Rules, 1978 (hereinafter referred to as the Rules). It is the validity of this order which has been challenged in this writ petition.

8. Separate written statements were filed on behalf of Respondents No. 1 and 2, and No. 3.

9. Respondents No. 1 and 2 defended the impugned order on the ground that the provisional appointments of the Petitioner for a period of three months each were made as stop-gap arrangement, which was never approved by the Commission and the State Government. Strictly speaking, Petitioner's appointment before May 4/6, 1970 was purely ad hoc and was formalised with the approval of the State Government to regularise the payment of salary etc. to him. He could not be given any benefit whatsoever for the period prior to his regular appointment. The service rendered in peace-meal cannot be counted towards determination of his seniority as per proviso to Rule 10 of the Rules. The action of the Municipal Committee in confirming the Petitioner against the post of Municipal Engineer (Public Health) was invalid since the Municipal Committee was not competent to confirm the Petitioner except with the prior approval of the State Government under the repealed Section 38(2) of the Punjab Municipal Act, 1911. Respondent No. 3 justified the fixation of his seniority above the Petitioner on the grounds stated by Respondents No. 1 and 2 in their written statement.

10. It is to be resolved in the first instance whether the continuous temporary appointment of the Petitioner by the Municipal Committee, Amritsar was made with the approval of the Commission and the State Government. It becomes necessary because Respondent No. 1 has denied this fact and I will reproduce the denial in the language of Respondent No. 1:

2. xxx xxx xxx The earlier provisional/contractual appointments of the Petitioner for a period of three months or less were made as a stop-gap arrangement which was never approved by the Public Service Commission and the State Government. Strictly speaking, appointment of the Petitioner before 4th/6th May, 1970 was purely ad hoc and was formalised with the approval of the State Government to regularise the payment of salary etc. to him. Hence, the Petitioner could not be given any benefit whatsoever for the period prior to his regular appointment approved and conveyed by the State Government on 4th/6th May, 1970.

11. These averments are suggestive of the fact that the continuous temporary appointment of the Petitioner as Municipal Engineer (Public Health) was neither approved by the Public Service Commission nor by the State Government. I summoned the record of the case through the Deputy Advocate-General for the

State of Punjab and the same was produced: A perusal of the same indicates that the above averments in the written statement are not vouchsafed by the record. All the temporary appointments of the Petitioners were duly approved by the Commission and the State Government. A detailed reference to the orders by which the temporary appointments of the Petitioner were approved by the Commission and Respondent No. 1 has been made in the earlier part of the judgment and these dates have been taken from the Government record produced at the Bar. It is unfortunate that Respondent No. 1 in its written statement has taken a stand which is falsified by the record. The conduct of Respondent No. 1 deserves to be condemned. It is expected of the State Government and its officers to act fairly, impartially and not capriciously. In the instant case, these expectations have been belied in ample measure. I do not want to say anything beyond this and leave the matter here. The State has to evolve preventive measures for avoiding similar occurrences in future.

12. As observed earlier, the Petitioner was appointed as Municipal Engineer (Public Health) on temporary basis by the Municipal Committee, Amritsar on March 22, 1969. His temporary appointment was extended from time to time by the Municipal Committee with the approval of the Commission and Respondent No. 1 till his regular appointment by Respondent No. 1 on May 4/6, 1970. Respondent No. 1 in addition also regularised his service with effect from March 23, 1970 till his appointment on regular Basis. The Rules came into force with effect from June 30, 1978. In the absence of the Rules, where the temporary appointment was followed by regularization of service the period spent on temporary appointment has to be counted towards determining fife seniority. The Petitioner was appointed by the Municipal Committee, Amritsar on the recommendation of the Directorate of Employment and his appointment was duly approved by the Commission and Respondent No. 1. It cannot be suggested that the appointment was made without considering the claim of other eligible and suitable persons. When the temporary appointment was made, after considering the claim of eligible candidates and such appointment continued uninterrupted till the regularization of the service by the State Government on the recommendations of the Commission, there is no reason to exclude such service for determining the seniority. Somewhat identical question came up for consideration before the apex Court in *The Direct Recruit Class-II Engineering Officers" Association and others Vs. State of Maharashtra and others*, and the Bench observed thus:

13. xxx xxx xxx The principle for deciding inter se seniority has to conform to the principles of equality spelt out by Articles 14 and 16. If an appointment is made by way of stop-gap arrangement, without considering the claims of all the eligible available persons and without following the rules of appointment, the experience on such appointment cannot be equated with the experience of a regular appointee, because of the qualitative difference in the appointment. To equate the two would be to treat two unequal as equal which would violate the equality clause. But if the appointment is made after considering the claims of all eligible

candidates and the appointee continues in the post uninterruptedly till the regularization of his service in accordance with the rules made for regular substantive appointments, there is no reason to exclude the officiating service for purpose of seniority. Same will be the position if the initial appointment itself is made in accordance with the rules applicable to substantive appointments as in the present case. To hold otherwise will be discriminatory and arbitrary. This principle has been followed in innumerable cases and has been further elaborated by this Court in several judgments including those in *Baleshwar Dass and Others Vs. State of Uttar Pradesh and Others*, and *Delhi Water Supply and Sewage Disposal Committee and Others Vs. R.K. Kashyap and Others*, with which we are in agreement.

13. Following the dictum of the apex Court *supra*, I hold that the period of temporary appointment ought to have been considered for fixing the seniority of the Petitioner.

14. The Petitioner was initially appointed on March 22, 1969 and continued till his appointment on regular basis on May 4/6, 1970. The continuous appointment of the Petitioner on temporary basis till the date his appointment on regular basis was approved by the Commission and the State Government. Respondent No. 3 was appointed on regular basis on January 21, 1970, much after the appointment of the Petitioner, i.e. March 22, 1969. Respondent No. 1 has correctly shown the Petitioner senior to Respondent No. 3 in the tentative seniority list circulated,--vide letters dated December 23, 1976 and October 12, 1979. The subsequent change in the seniority list was effected on the ground that the inter se seniority of the members of the Service has to be determined by the length of their continuous appointment on a post to that Service, but the appointment on purely provisional basis could not be counted towards continuous appointment on a post and reliance was placed on a footnote appearing under Rule 10 of the Rules. Respondent No. 1 has altered the seniority of the Petitioner principally on the basis of Rule 10 of the Rules. The approach of Respondent No. 1 is not sustainable in law. Rule 10 of the Rules reads thus:

10. Seniority of Members of Service.--The seniority inter se of the members of a Service shall be determined by the length of their continuous appointment on a post in that Service:

Provided that in the case of members appointed by direct recruitment, their inter se seniority shall be in the order of merit in which they have been placed by the Selection Committee:

Provided further that in the case of two or more members appointed on the same date, a member appointed by direct recruitment shall be senior to a member appointed otherwise.

Note.--This rule shall not apply to persons on purely provisional basis.

15. These rules were framed in exercise of the powers conferred by Sub-section

(2) of Section 71 of the Punjab Municipal Corporation Act, 1976 (for brevity, "the Act"). These Rules were published,--wide Notification No. G.S.R. 66/P.A. 42/76/s. 71/78, dated June 21, 1978 and Clause (2) of Rule 1 says that these Rules shall come into force at once. There is nothing in the language of Section 71 of the Act to empower the State Government either expressly or by necessary implication to make a rule retrospectively. Sovereign Legislature has power to enact laws with retrospective operation and the authority vested with the power of making subordinate legislation has to act within the limits of its power and cannot transgress the same. Reference can usefully be made to the following observations by their Lordships of the apex Court in *Hukam Chand etc. v. Union of India* and *Ors.* AIR 1079 S.C. 2427

Perusal of Section 40 shows that although the power of making rules to carry out the purposes of the Act has been conferred upon the Central Government, there is no provision in the section which may either expressly or by necessary implication show that the Central Government has been vested with the power to make rules with retrospective effect. As it is Section 40 of the Act which empowers the Central Government to make rules, the rules would have to conform to that section. The extent and amplitude of the rule making power would depend upon and be governed by the language of the section. If a particular rule were not to fall within the ambit and purview of the section, the Central Government in such an event would have no power to make that rule. Likewise, if there was nothing in the language of Section 40 to empower the Central Government either expressly or by necessary implication, to make a rule retrospectively, the Central Government would be acting in excess of its power if it gave retrospective effect to any rule. The underlying principle is that unlike Sovereign Legislature which has power to enact laws with retrospective operation, authority vested with the power of making subordinate legislation has to act within the limits of its power and cannot transgress the same. The initial difference between subordinate legislation and the statute laws lies in the fact that a subordinate law making body is bound by the terms of its delegated or derived authority and that Court of law, as a general rule, will not give effect to the rules, thus made, unless satisfied that all the conditions precedent to the validity of the rules have been fulfilled (see *Craies on Statute Law*, p. 297 Sixth Edition).

16. These Rules are not applicable to the instant case. Even. otherwise, Respondent No. 1 has misconstrued the footnote appearing under Rule 10 of the Rules. The note deals with purely, provisional appointments made as a stop-gap arrangement. It does not deal with ad hoc appointments made in conformity with rules followed by regular appointment. Period of ad hoc appointment followed by the apex Court in *The Direct Recruit Class II Engineering Officers Association case* (supra). The note has not to be interpreted to mean that it applies to ad hoc appointments also. If it is applied to service, it will be hit by the vice of arbitrariness and has to be struck down as violative of Article 14 of the Constitution. I will place a narrow construction on this rule to uphold its validity.

The apex Court has in several cases adopted the principle of reading down the provisions of the statute. The reading down of a provision of a statute puts into operation the principle that so far as it is reasonably possible to do so, the legislation should be construed as being within its power. The well settled rule in interpreting the provision of the statute is that the Court will presume that the legislation was intended to be intra vires and also reasonable. Reference may usefully be made to the following observations in *All Saints High School, Hyderabad and Others Vs. Government of Andhra Pradesh and Others*, .

112. It is a well settled rule that in interpreting the provisions of a statute the court will presume that the legislation was intended to be intra vires and also reasonable. The rule followed is that the section ought to be interpreted consistent with the presumption which imputes to the legislature an intention of limiting the direct operation of its enactment to the extent that is permissible. Maxwell on INTERPRETATION OF STATUTES, Twelfth Edition, p. 109 under the Caption : "Restriction of Operation" states:

Sometimes to keep the Act within the limits of its scope and not to disturb the existing law beyond what the object requires, it is construed as operative between certain persons, or in certain circumstances, or for certain purposes only, even though the language expresses no such circumscription of the field of operation.

17. If two views are possible, the one which is upholding the validity of the rule has to be preferred. The only conclusion deducible is that these Rules are inapplicable in the instant of case. These are prospective and. not retrospective. The ad hoc service followed by regular appointment has to be counted, for the, purr pose of seniority. Even otherwise, the footnote appealing under Rule 10 of the Rules applies to only purely provisional appointment and not temporary appointment followed by regular appointment. The action of Respondent No. 1 in fixing the seniority of Respondent No. 3 above the Petitioner cannot be sustained.

18. For the reasons aforesaid, the writ petition succeeds and is allowed. The order dated January 20, 1983 passed by Respondent No. 1 is quashed. The Petitioner will rank senior to Respondent No. 3 as Corporation Engineer. In the circumstances of this case, the parties are left to bear their own costs.