
(2009) 04 SHI CK 0065
In the High Court Of Himachal Pradesh

Shri B.S. Pathania and Others

APPELLANT

Vs

State of H.P. and Others

RESPONDENT

Date of Decision : 02-04-2009

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Himachal Pradesh Deputy Forest Rangers and Forest Rangers Class -III (Executive Section) Recruitment, Promotion and Certain Conditions of Service Rules, 1978 — Rule 1(b)

Citation : (2009) 04 SHI CK 0065

Hon'ble Judges : Surjit Singh, J; R.B. Misra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Surjit Singh, Judge, J.—Petitioners, in the present writ petition, under Articles 226 and 227 of the Constitution, have sought judicial review of order dated 31st March, 2005 (Annexure P5) passed by the H.P. State Administrative Tribunal, Shimla (now abolished), with a prayer that after setting aside the said order, the provisional seniority lists, Annexures A-4, A-5 and A-6, annexed with the Original Application, filed before the State Administrative Tribunal may be quashed and the respondents be directed to re-draw the seniority of Deputy Forest Rangers by placing the petitioners above the Foresters, who were working as such before 5th March, 1979 and also to set aside the promotion of the Foresters on the basis of the aforesaid provisional seniority lists.

2. Facts which have given rise to the filing of the present petition as also Original Application before the H.P. State Administrative Tribunal (now defunct), may be noticed. On 15th November, 1978, Forest Department of H.P., issued a notification in the name of Governor of H.P., whereby Himachal Pradesh Deputy Forest Rangers and Forest Rangers Class -III (Executive Section) Recruitment, Promotion and Certain Conditions of Service Rules, 1978, were notified. The notification read that the rules had been framed by the Governor, in exercise of the powers conferred upon him by virtue of the powers conferred by the proviso

to Article 309 of the Constitution of India. Rule 1(b) of the Rules said that the rules will come into force from the date of notification in the official gazette. Rules were published in the official gazette on 5th March, 1979. These rules repealed the earlier rules issued vide notification dated 17th May, 1951, with respect to recruitment and promotions of Deputy Rangers, Foresters and Forest Guards, as amended from time to time, per Rule 15.

3. One of the changes brought about by these rules vis-?-vis Rules, 1951 repealed by Rule 15 was that earlier there used to be three cadres of Class-III Forest Service, namely, Deputy Forest Rangers, Foresters and Forest Guards. Under these rules, unified cadre of Deputy Forest Rangers came into being by merging the cadre of Foresters with Deputy Forest Rangers. Rule 11(i)(a) of the Rules provided for fixation of seniority of the unified grade of Deputy Forest Rangers. It said the existing Deputy Rangers shall rank en bloc senior to the Foresters, meaning thereby that those who were holding the posts of Deputy Forest Rangers, on the date of coming into force the Rules i.e. 5th March, 1979 were to rank senior to the Foresters who earlier formed a different grade/cadre and were merged in the cadre of Deputy Forest Rangers, by virtue of these rules.

4. In the month of November, 1978 after the issuance of the notification dated 15th November, 1978, process was started for filling up certain posts of Deputy Forest Rangers. Petitioners were amongst the persons who applied for such posts. They were selected and appointed sometime in the month of February, 1979, that is to say, prior to the coming into force of the rules notified on 15th November, 1978, but published in the State official gazette on 5th March, 1979 and hence effective from 5th March, 1979, as Rule 1(b) said that the Rules would come into force, on the date of notification in the official gazette.

5. Now, if the rules were to remain as such, the petitioners by virtue of the provisions of Rule 11(i)(a) had to be placed above all the Foresters appointed upto 5th March, 1979, the date of coming into force of the rules. But vide notification dated 18th January, 1980, Annexure R1, Rule 1(b) was amended and the date of enforcement of the rules was changed to 15th November, 1978, instead of the date of their notification in the official gazette i.e. 5th March, 1979. As a consequence of this amendment, benefit of Rule 11(1)(a) got restricted only to those Deputy Forest Rangers, who had been appointed prior to 15th November, 1978. Petitioners having been appointed after that date were placed below the Foresters, who were appointed upto 15th November, 1978.

6. Thereafter some provisional seniority lists were issued, in which the petitioners were shown below the Foresters appointed upto 15th November, 1978. Petitioners had been making representations against those provisional lists but the respondents took no decision. Some erstwhile Foresters shown in the unified grade of Deputy Forest Rangers above the petitioners, were then given promotion on the basis of the provisional seniority lists. Petitioners felt aggrieved by their promotions and filed Original Application seeking change in seniority and quashing the promotion order of such Foresters.

7. They pleaded that the notification dated 18th January, 1980 (Annexure R3) purporting to amend the rules was not an amendment but only an order issued by the Secretary (Forests) and hence did not have the effect of amending the rules. They also challenged another notification dated 18th July, 1983, Annexure R2, whereby all Foresters were re-designated as Deputy Forest Rangers w.e.f. 15th November, 1978 and given the pay scale of Deputy Forest Rangers from the said date. Petitioners alleged that this notification had been issued to legitimize the illegal act of placing the Foresters appointed prior to 15th November, 1978 above them in the seniority on the basis of notification dated 18th January, 1980, Annexure R 3.

8. Petitioners claimed the following reliefs:

- a) Provisional seniority lists, Annexures A-4, A5 & A6 be quashed and set aside;
- b) Respondent No. 2 be directed to fix the seniority of the Deputy Forest Rangers afresh and to place the petitioners above the Foresters who were working as such before 5th March, 1979;
- c) Respondents be directed to finalize the provisional seniority lists;
- d) Promotions of Foresters, impleaded as respondents 2 to 238 made on the basis of provisional seniority lists, be quashed and set aside; and
- e) Petitioners be promoted according to the revised final seniority list to be prepared, after quashing and setting aside the provisional seniority lists in accordance with the aforesaid prayer and they be given all monetary benefits arising out of such promotion.

9. Respondents No. 1 and 2 contested the Original Application. It was stated that the petitioners never raised any objection to the provisional seniority lists, Annexures A-4, A-5 and A-6 and, therefore, promotions had been made on the basis of those seniority lists. It was pleaded that the new rules were notified on 15th November, 1978, before the process for recruitment of Deputy Forest Rangers, in which process petitioners were ultimately selected and appointed in February, 1979, was initiated. It was stated that though initially Rule 1(b) provided that the rules would come into force from the date of the notification in the official gazette which date was 5th March, 1979, later-on it was felt that the rules having been issued on 15th November, 1978, that is to say prior to commencement of the process for recruitment of Deputy Forest Rangers, it was in the public interest, the rules were given effect from the date of their issue i.e. 15th November, 1978 and accordingly, amendment was carried out vide notification Annexure R-3. It was denied that the notification dated 18th January, 1980 was in the nature of executive order. Instead it was alleged that it was a notification amending the rules and had been issued by the Governor, in exercise of the powers conferred upon him by the proviso to Article 309 of the Constitution of India. The other notification dated 18th July, 1983 (Annexure R2) was alleged to have been issued in line with the new rules to give monetary

benefits to the Foresters who, by virtue of the merger of their cadre with that of the Deputy Forest Rangers, became entitled to higher pay and allowances.

10. Learned Tribunal dismissed the Original Application holding provisional seniority lists, Annexures A-4, A-5 and A-6, were issued in the years 1983, 1986 and 1989, respectively, and representations against those lists were invited from all concerned within one month from the date of circulation of such lists, but the petitioners did not raise any objection to those seniority lists and the representations which they claimed to have made were only against the orders of promotions of Deputy Forest Rangers to the next higher cadre. It was also observed that the Original Application too had been filed at a very late stage, i.e. in the year 1992.

11. We may state at the very outset that vires of the notification dated 18th January, 1980, Annexure R3, amending Rule 1(b) of the rules, notified in the official gazette on 5th March, 1979 has not been challenged, on the ground that amendment cannot be carried to give effect to the service rules, retrospectively or for that matter on the ground that it infringes any right of the petitioners. The ground on which the legality of the notification is challenged is that this is an executive order and hence, it cannot operate to bring about any change in the rules framed by the Governor, in exercise of powers under the proviso to Article 309 of the Constitution of India. A bare reading of notification dated 18th January, 1980 suggests that it is not an executive order, but an amendment notification issued by the Governor, in exercise of the powers vested in him by virtue of the proviso to Article 309 of the Constitution of India. Learned Counsel argued that the notification is signed by the Secretary to the Government. All notifications pertaining to service rules, including recruitment and promotion rules, are signed by the Secretaries of the concerned department and not by the Governor himself. Even the notification dated 15th November, 1978 which was notified in the gazette on 5th March, 1979, Annexure A3, is signed by the Secretary to the Government. Hence, the contention that the notification is simply an executive order cannot be accepted.

12. Learned Counsel representing the petitioners argued that even if it were assumed that the notification dated 18th January, 1980, is an amendment to the rules published in the gazette on 5th March, 1979, the same is ultra vires, because it affects the rightful place of the petitioners in the seniority and ultimately their right to be considered for promotion before the Foresters are considered. Submission cannot be accepted for numerous reasons. The first and the foremost is that vires of the notification as an amendment of the rules was not challenged in the Original Application before the H.P. State Administrative Tribunal, nor has it been challenged in the present writ petition. Another reason is that seniority is not a vested right and the legislature, which term includes the rules making authority also, can amend the rule of seniority with retrospective effect, in the public interest. In this view of the matter, we find support from a Constitution Bench of the Supreme Court of India in *Prafulla Kumar Das and*

Others Vs. State of Orissa and Others, . In para 33 of the report, the Hon''ble Supreme Court has observed as follows:

Under Article 309 of the Constitution of India, it is open to the Governor of the State to make rules regulating the recruitment, and the conditions of service of persons appointed to such services and posts until provision in that behalf is made by or under an Act of the legislature. As has been rightly pointed out by the Court in Nityananda Kar case, the legislature, or the Governor of the State, as the case may be, may, in its discretion, bestow or divest a right of seniority. This is essentially a matter of policy, and the question of a vested right would not arise, as the State may alter or deny any such ostensible right, even by way of retrospective effect, if it is so chooses (sic) in public interest.

13. Moreover, the change brought about by notification dated 18th January, 1980 in the date of enforcement of the rules does not suffer from the vice of arbitrariness or discrimination. As a matter of fact, the notification of new set of rules was issued on 15th November, 1978, that is to say, much before the start of the process for the recruitment of the petitioners. However, Rule 1(b) said that rules would come into operation from the date of their notification in the official gazette. Notification of the rules in the official gazette got delayed. The same were notified on 5th March, 1979. The rule making authority, after the notification of the rules in the gazette, took a policy decision to change the date of enforcement of the rules to the date of the issuance of the notification and consequently, it brought about the amendment, vide notification dated 15th January, 1980, Annexure R3. The rule making authority was competent to take such decision and to make the amendment. As regards second notification dated 18th July, 1983, Annexure R2, suffice it to say that this notification, which is in the nature of an administrative or executive order does not effect any change in the rules but only gives the benefit of the new rules to the Foresters whose cadre got merged with that of the Deputy Forest Rangers with the enforcement of new set of rules. For this purpose, no change in the rules was required and this could have been done only by an administrative or executive order. Therefore, no fault can be found even with this notification.

14. In view of the above stated position, we do not think there is scope for the review of the impugned order passed by the Tribunal. Consequently, the writ petition is dismissed.