

(2009) 07 P&H CK 0249

High Court Of Punjab And Haryana At Chandigarh

Case No: C.W.P. No. 15950 of 1993

Sunita Gupta and Others

APPELLANT

Vs

State of Haryana and Others

RESPONDENT

Date of Decision: July 22, 2009

Acts Referred:

- Constitution of India, 1950 - Article 14, 16
- Industrial Disputes (Punjab) Rules, 1958 - Rule 12, 75, 76, 77
- Industrial Disputes Act, 1947 - Section 25F, 25H
- Punjab Agricultural Produce Markets Act, 1961 - Section 43

Citation: (2009) 2 ILR (P&H) 1083 : (2009) 7 SLR 217

Hon'ble Judges: K. Kantian, J

Bench: Single Bench

Advocate: Vinod S. Bhardwaj and K.K. Gupta, in Civil Petition No. 16473 of 1993, for the Appellant; D.S. Nalwa, A.A.G., Kamal Sharma, Raja Sharma for Respondent No. 2, B.R. Mahajan, V.K. Kaushal for Respondent No. 32, Namit Kumar, for Respondent Nos. 22, 23, 29, 31 and 42, D.S. Patwalia and O.P. Babla, in Civil Petition No. 16473 of 1993, for the Respondent

Final Decision: Allowed

Judgement

K. Kannan, J.

I. Scope of Challenge in the writ petitions

1. The two writ petitions direct attention to grievance that is common to two sets of workmen in Haryana State Agricultural Marketing Board (hereinafter called "the board"), who complained that their seniority had been upset by the impugned order that finalized the seniority list and cast the contesting private Respondents above the seniority of the writ Petitioners.

2. The grievance of the Petitioners was grounded on essentially two sets of circumstances: one, all the contesting private Respondents, who had been ranked as seniors above them had admittedly been recruited subsequently and hence they could not be assigned higher in the order of seniority. Two, the Petitioners and the contesting Respondents belonged to two different cadres and they could not be bunched together and ranked above them. Facts require a dilation to greater details to come to grips with their grievance.

II. Nature of entry of private Respondents and how re-employment was assured

3. The private Respondents had worked in the board as Clerks-cum-Auction Recorders as field staff. Their entry followed recruitment done in the year 1979 pursuant to an advertisement for 15 posts, when actually 266 persons including the contesting Respondents were recruited by the board, during the months of April to June, 1979. Since the advertisement had been issued for less number of persons namely for 15, the additional recruitment of 251 persons were terminated by an order dated 4th September, 1979. The persons who were recruited but who were later terminated, challenged the orders of termination by filing writ petitions in the High Court and by order dated 31st March, 1980, the terminations were upheld by this Hon"ble Court. However, on representation made on behalf of the board, the High Court passed the following orders:

During the course of arguments, Shri Kuldip Singh, learned Counsel for the Respondents, even gave an assurance that though at the moment there is no proposal of any sort to make a fresh recruitment to these posts, yet as and when such recruitment is to be made, the cases of the Petitioners would be duly considered for such employment. In view of this, I also do not find any merit in the allegation of mala fide levelled by the Petitioners. As has been held earlier that the Petitioners are the junior most persons according to the merit list prepared at the time of the interview, their services have been rightly terminated in preference to those who have been allowed to continue.

4. The board again on 17th May, 1980 advertised 102 posts of Clerks-cum-Auction Recorders and invited applications from the eligible candidates. The persons, who had been parties in the writ petitions and who had been assured on behalf of the board that when such recruitment was made, they had a cause for complaint that the case of Petitioners would be duly considered for such employment. The board did not reply to the representations and they therefore approached this Court again in a batch of writ petitions that came to be decided before a Division Bench of this Hon"ble Court in the case titled *Rajbir Singh and Ors. v. State of Haryana and Ors.* 1983(1) SLR 38. Adverting to the statutory rights as given u/s 25H of the Industrial Disputes Act, the Division Bench held that if the employer proposed to take into his employ any person, then retrenched workman was bound to be given an opportunity for re-employment. Consequently, the Bench directed the board to comply with the provisions of Section 25H and give re-employment to the

retrenched workmen. The Division Bench also upheld the contention raised on behalf of the workmen and rejected the contentions of the board that it was non an "industry" and held that the provisions of Industrial Disputes Act, were applicable.

5. On a crucial issue as to how the claim of the retrenched workmen for re-employment was to be addressed, the Division Bench in *Rajbir Singh and Ors. v. State of Haryana and Ors.* (supra) adverted to its own earlier short order made on 27th May, 1982, that directed as follows:

I. That the Petitioners and their like whose services had been terminated from the posts of Clerk-cum-Auction Recorders to be workmen and Respondent Marketing Board to be industrial establishment in terms of the Industrial Disputes Act;

2. That the requisite averments in order to judge whether the provisions of Section 25H of the Industrial Disputes Act can be invoked have been sufficiently pleaded;

3. That operation of Rule 75 of Industrial Disputes (Punjab) Rules 1958, which provides that workmen mentioned in Rule 75 shall also be deemed to be workmen mentioned in Rule 76 and 77 is ultra vires the provisions of Section 25H of the Industrial Disputes Act inasmuch as Section 25H of the Act had required the prescription of the manner in which the opportunity was to be given to the retrenched workmen and not to provide as to whom the opportunity was to be given.

4. That the Petitioners and their like whose services were terminated fall in the category of reternched workmen and the provisions of Section 25H of the Act were required to be complied with in regard to them by preferring them over all others including those who are even entitled to reservation of vacancies.

III. Rule relating to cadre structure and effect of common gradation list

6. It is the contention of the Petitioners that when the writ Petitioners had been promoted and appointed as Clerks in the head office, the Respondents had not even been borne on the cadre and therefore, they were not entitled to any seniority. Indeed, the cadre of Clerks in the head office was distinct from the cadres of Clerks-cum-A"uction Recorders in the field staff and the persons who came on promotion as Clerks in the head office, could not be displaced in the seniority by the new recruits. They would point out that all the newly re-employment persons had been already shown lower in rank to the Petitioners.

7. The learned Counsel for Petitioners relied on the rules framed u/s 43 of the Punjab Agricultural Produce Markets Act, 1961, published through notification in GSR 80/PA23/61/S/43/74, dated 14th June, 1974 (hereinafter called "the rules"), and particularly, Rule 12 of the said rule was shown to provide as under:

Seniority, inter se of members of the Service shall be determined by the length of their continuous service on a post in the Service;

Provided that where there are different cadres in the Service, the seniority shall be determined separately for each cadre;

Provided further that in the case of members appointed by direct recruitment, the order of merit determined by the appointing authority mentioned in these rules shall not be disturbed infixing the seniority;

Provided further that in the case of two members appointed on the same date, their seniority shall be determined as follows:

(a) a member appointed by direct recruitment shall be senior to member appointed by promotion or transfer;

(b) a member appointed by promotion shall be senior to a member appointed by transfer;

(c) in the case of members appointed by promotion or by transfer, seniority shall be determined according to the seniority of such members in the appointments from which they were promoted or transferred; and

(d) in the case of members appointed by transfer form different cadres, their seniority shall be determined according to pay, preference being given to a meber who was drawing in higher rate of pay in his previous appointment and if the rates of pay drawn are also the same, then by their length of service in those appointments and if the length of such service in those appointment and if the length of such service is also the same, an older member shall be senior to a younger member.

Appendix "B" attached to the rules sets out a tabulation containing designation to the posts, qualification, the eligibility for appointment and the method of recruitment. Clerks in the head office have been set forth in serial No. 20, as under:

Attestation
of
Post
of
Recruitment
of
Clerks
20

And for Clerks/Auction Recorder Care-Taker of the Market Commitee, at serial No. 41, as under:

Attestation
of
Post
of
Recruitment
of
Clerks
41.

It is, therefore, contended that the qualifications mentioned for appointment of Clerks were different; the mode of recruitment which for the Clerks could be either by direct appointment or by transfer or by deputation while for the Clerks-cum-Auction Recorders as field staff, it was partly by direct recruitment and partly by promotion. It is also urged that the promotion channels for the Clerks in the head office and for the Clerk-cum-Auction Recorders in the field staff, were altogether different. Two channels of promotions were possible for Clerks in the head office who could either go in the hierarchy and reach the post of administrative officer or in the other channel that would lead them to be personal assistants. The promotional channel for Clerks-cum-Auction Recorders in the field staff would take them at the highest level either to the selection grade Secretary, Marketing Committee or Marketing Inspectors. The other distinction between the two cadres as revealed by reference to rules was that under Rule 15, the punishing authority competent to pass orders was the Chief Administrator of the board, while for Clerk-cum-Auction Recorders of the Market Committee, there were two classes of persons; (i) the Administrator of the Market Committee or Chairman of impose minor penalties and for other penalties, it was the Chief Administrator. The Appellate Authority is constituted for considering the punishment were also distinct.

8. However, when re-employment orders were made pursuant to directions of the Division Bench in CWP No. 756 of 1982 and batch of cases, instead of appointing them as Clerks-cum-Auction Recorders as field staff, the board chose to appoint them as Clerks in the head office cadre. Although the appointment letters issued to them were to the posts of Clerks-cum-Auction Recorders, they were absorbed as Clerks this was on account of lack of adequate vacancies of Clerk-cum-Auction Recorders with the board in the Market Committee. The Petitioners made references to certain letters issued to the newly recruited persons that though had been appointed as Clerk-cum-Auction Recorders, they were asked to join in head office as Clerks.

9. When the seniority list had been prepared in the head office and circulated on 4th November 1982 and still later the provisional seniority list made on 15th December, 1986, the Petitioners had been shown as seniors while the contesting Respondents had been shown as juniors. 34 out of 49 private Respondents chose not to file any representation whatsoever regarding the provisional seniority and only 15 private Respondents represented against the provisional seniority. The representation had been rejected on 6th May, 1987 and some of them who had made the representation against the provisional seniority chose to file CWP. No. 8658 of 1991, titled "Shashi Bala and Ors. v. State of Haryana and Ors." claiming the relief of seniority over and above the present Petitioners. The writ petition had been dismissed on 8th June, 1991 without entering into merits but stating that it was belated. The Petitioners had in the meanwhile also obtained selection grade and some of them also promoted to the post of SDC/ Auditor/Accounts Clerks etc. At the time the writ petitions were presented, all the Petitioners had actually been working

in the promotional posts from the posts of Clerks in the head office.

10. It so happened that when the private Respondents were re-employed, all of them were considered as Clerks-cum-Auction Recorders while some of them were adjusted as Clerks in the head office and these appointments were accepted in December 1982 and January 1983 respectively and the persons that had been posted in the head office as Clerks on re-employment had been placed below the Petitioners in the cadre of Clerks in the head office. According to the Petitioners, they had been working as Clerks in the head office much prior to the date of re-employment of the Petitioners, and therefore, the seniority cannot be disturbed at all.

11. The private Respondents led the contest, while the Government and the board through the respective counsel supported their stand. Adverting to the issue that there were two different cadres, the learned Counsel would submit that the Petitioners, as well as the private Respondents had been put in the same gradation list and so long as the Petitioners had been treated as seniors in the gradation list, they had not complained and only when through the impugned order there had been modification in the seniority position, the objections have come about that they belonged to another cadre. This, according to the learned Counsel Shri Patwalia, betrayed the duplicity of the contentions on behalf of the Petitioners.

12. The board, in its impugned order itself has stated that the posting of Clerks in the head office and the field staff was a matter of administrative convenience and the minor variations in their nomenclature notwithstanding, they belong, to the same cadre. The rules stipulate different promotional avenues, different officers as punishing authorities and contain also different quotas for promotion and direct recruitment but having regard to the fact that the issue of cadre structuring itself is not the subject of challenge, except that they lend strength to the point canvassed by the Petitioners that the entry of the contesting Respondents could not be in any position other than as clerks cum auction recorders in field staff and they could not upset their seniority positions as clerks, which they have come to occupy in the head office. The extent of judicial review on cadre restructuring itself is very limited (see *Union of India v. Pushpa Rani* (2008) 9 S.C.C. 242 and the Petitioners will have their remedy elsewhere. For the present, it has to be seen, if they should be treated as belonging to the same cadre, although having different nomenclatures and other differences that the rules delineate, the answer to the grievance could be arrived only by examining the nature of appointment of persons who have been re-employed.

IV. Persons who were re-employed were persons who were wrongfully employed initially--

13. In the narration of facts, it has already been brought out that the persons that had been originally appointed in the year 1979 were subsequently terminated only

by the fact that they had been appointed in contravention of the vacancy position notified and how the advertisement had been made. In [Mukul Saikia and Others Vs. State of Assam and Others](#), the Hon"ble Supreme Court held that such appointments beyond advertised vacancies would be treated as in violation of Articles 14 and 16 of the Constitution and even if a select list had been prepared in excess of advertised posts, such persons shall have no right for the reason that the panel would stand exhausted when all the advertised posts were filled up. The Hon"ble Supreme Court also ruled that mere inclusion of the Appellants in that case in the select list of direct appointees did not confer any right on them to be appointed against vacancies reserved for promotees and they would have no right to complain against regularization made in reserved posts for promotees. In this case, when the contesting Respondents secured re-employment, it was not strictly by a situation that Section 25 H of ID Act contemplated. It was the concession made on behalf of the Board that gave the Respondents a straw to clutch and it was the imprimatur of the Division Bench through its judgment that gave the private Respondents a right to offer themselves for re-employment. The continuance in employment from 1979 would have been illegal, but for the intervention of the judgment of the Bench of this Court.

V. Status of persons re-employed u/s 25 H of the ID Act--

14. Another way of addressing the problem would be to take the issue even without characterizing the initial appointment of the contesting employments to be illegal as examined in the preceding para and take the situation as a case of lawful employment of persons who were required to be retrenched and who were re-employed u/s 25 H of ID Act. The fundamental distinction between reinstatement and re-employment is too well defined to miss the difference (see for instance Jaswinder Singh Passi and Ors. v. The Registrar, Co-operative Societies, Punjab Udyog Buildings, Chandigarh and Anr. 1992 LIC 549. The Hon"ble Supreme Court has held in [State Bank of Bikaner and Jaipur Vs. Om Prakash Sharma](#), that non-maintaining or production of seniority list as required by Rule 77 (that is, among retrenched workmen) may make the employer liable to penalty under Rule 78, but will not mean the employee whose retrenchment was not otherwise violative of Section 25F will not be entitled to reinstatement. In Delta Wires Private Ltd. v. General Labour Union (Regd. Flag 1995 (3) S.C.T. 565, the Bombay High Court had ruled that Section 25H only gives a right to a worker to have preference in the matter of re-employment on his previous terms and conditions of service and the word, "reemployment" does not necessarily connote employment on the same terms as before.

15. The learned Counsel Mr. Patwalia would state that although re-employment u/s 25H would normally to be treated as fresh appointment and therefore would not effect the seniority position in any establishment, this case was exceptional and the decision of the High Court in terms of which re-employment was made must be read

as expressing the state of affairs when the Government and the board had given specific undertakings that in case of future vacancies, they would consider the claims of retrenched workmen and the observations of the Court while recording the undertaking that the retrenched workmen were entitled to be preferred over all others (emphasis supplied) including those who were even entitled to reservation of vacancies. The learned Counsel would state that this meant that re-employment was to be understood as an employment which the board had perforce to give in preference to even promotees, if there was a scope for re-employment.

16. In my view, no new meaning could be given to the expression found in the judgment of the Division Bench that the Petitioners would be preferred over all others. This expression is but a replication of what is found in the statute u/s 25 H itself. It must also be remembered that it was not merely the enactment of Section 25 H that gave the retrenched workmen a right of re-employment in given situations. Even before it was brought in statute, it was employed in industrial jurisprudence on the principle of fair play and justice (Please see [The Cawnpore Tannery Ltd., Kanpur Vs. S. Guha and Others](#), . Therefore, it ought not be understood that the right to a special status to the retrenched workmen had been admitted by the Bench decision. The understanding to the section could therefore be given only the same meaning as it is always assigned to it. It is not even a case that the Petitioners have in any way occupied more than the quota of their promotions by the recruitments not happening in time and rules of quota and rota are broken. Even in such situations, courts have always examined the over all situation to decide on what shall determine seniority than merely going by how the rules stipulate. In [B.S. Mathur and Another Vs. Union of India \(UOI\) and Others](#), the Supreme Court dealt with a situation when there had been a break down of rota and quota rule for promotees and direct recruits in Subordinate Judicial Service. If the seniority list drawn by the principle of rota-quota as laid down under the relevant rules was followed, it seemed that it would have resulted in a serious injustice to the promotee officers, inasmuch as the direct recruits who would not have yet entered the service would rank as seniors to the officers promoted in their quota way back before direct recruits entered the cadre. The Court said that if that was allowed to happen, it would not only be unreasonable but would create a great heart-burning amongst the officers appointed from the two sources. That is precisely what would happen in this case, when the private Respondents who had not even borne on the cadre when the Petitioners had all been actually promoted and occupied their posts in their respective quota for promotees.

17. There is not even a complaint by the private Respondents that rota-quota rule was broken but what they are urging is that the day when the vacancy arose must also be taken as the right of entry into service. Shri Mahajan, learned Counsel appearing for some of the private Respondents referred to a decision of Division Bench of this Court in *Gulab Singh v. Barara Cooperative Marketing and Processing Society Limited, Barara, District Ambala and Anr.* 2004(4) RSJ 521 which dealt with

the issue of the claim of a person who was seeking for re-employment. The Division Bench of this Court had laid down that when retrenchment of the workmen was found to be illegal but relief of retrenchment was denied on account of poor financial condition of the management, that itself would not deny the benefit of Section 25H to the workman at the time of making fresh appointment to the same post. He shall be deemed to be appointed from the date fresh appointment was to be made with all benefits. This judgment was not delivered in the context of any inter se rivalry between the persons who had been re-employment and persons who had come to occupy the posts on promotions from lower rank. The Bench was considering a case that went through the Labour Court that answered a reference of the action of the management in terminating the services of a Clerk in a Society, against the mandatory provisions of Section 25H. The Labour Court had found the termination to be bad, but accepted the contention of the management that the financial condition was poor and therefore, allowed for only certain compensation and still provided for benefit of reemployment for a future vacancy u/s 25H. Question of re-engagement arose again when management appointed a fresh hand as a Clerk. The person, who had been previously retrenched, raised the dispute seeking re-engagement and faulting the appointment afforded to a fresh hand. The High Court upheld the contention of the person who was seeking for re-employment and directed him to be appointed against the post of Clerk. It is not seen that the Division Bench was ever addressing the issue of seniority but it should be noted as a matter of fact from the judgment that the new hand Pardeep Kumar had been appointed as a Clerk with effect from 1st October, 1992 and the Bench was referring to re-employment of the person seeking the re-appointment to be effective from the date when a demand notice was made that was to be effective from 20th January, 1997. Evidently, the Bench was not considering the person who was seeking re-employment to be actually employed from the date when Pardeep Kumar had been appointed to the post as a Clerk.

18. The Division Bench in *Rajbir Singh and Ors.* (supra) nowhere states that the persons who would be considered for reemployment u/s 25H must be taken to be re-employed even from the date when the vacancies were notified and some persons were posted to the promotion posts. If that was the decision which the private Respondents were canvassing for, such a relief should have been pressed and taken from the order of the High Court itself, if tenable at all. A claim for re-employment is a special privilege dictated by principles of justice and fair play and affirmed by statute and a person that is reemployed gets the right only from the date of such re-employment and not from the assumed date that as soon as the vacancy arose, he should be treated as having been employed from that date. A lofty principle aimed at justice to secure to retrenched workmen cannot be worked to skew the process of normal seniority rule of the length of service and actual entry into service. It cannot also be used as an oppressive tool against persons who have actually occupied the posts lawfully. There could be instances where management

keeps the vacant posts for some time before considering persons for re-employment u/s 25H. If the logic as propounded by the private Respondents were to be accepted, the persons who had to be considered for re-employment, must be taken as employees even when the vacancies arose and even before the management decided to actually re-employ them. This position is absurd and would mean rewriting management's power to recruit at the most opportune time which might have a bearing to umpteen other relevant considerations including management planning for timing their increased cadre strength and the financial exigencies that such a decision brings about. There will be no justice in according seniority to the private Respondents whose insitial appointment in 1979 was illegal. The posts did not exist; at any rate, there were no sanctioned posts to which they could be said to have been placed. In *Jeyachan M. Sebastian v. The Director General J.T.* 1996 (1) SC 538, the Hon"ble Supreme Court has laid down in a slightly different situation of the effect of abolition of posts, but instead of retrenchment, the workmen had been accommodated to some other posts. The Court said that such appointment has to treated as fresh appointment, and the employee would not be treated to claim seniority from his initial appointment on the post which stood abolished.

19. It must be noted that the claim to seniority for the benefit of private Respondents over the promotees had been rightly rejected by the board at the first time. A challenge to the seniority was dismissed by the Hon"ble Court on the ground of laches but again the issue was brought about through a representation to the Government which passed the order impugned in this writ petition. The decision of the High Court dismissing the writ petition on the ground of laches will not itself constitute a bar of res judicata, since the judgment had not been rendered on merits, as held in [Pujari Bai Vs. Madan Gopal](#), . The fresh decision had been taken by the Government but it is clearly untenable for all the reasons adverted above.

VI. Conclusion

20. The senioritsy position shall be retained as found in the provisional list before and finalized as such and the impugned order of the 1st Respondent dated 15th December, 1993 is set aside. The writ petitions are allowed. No costs.