

been satisfied. The decision of this Court in the case of **Mohd. Shafi** (*supra*), therefore, in our opinion, is not an authority for the proposition that in each and every case the Court must wait till the cross-examination is over.”

(20) The contention of the counsel for the petitioner that the Court could not have exercised its powers under Section 319 Cr. P.C., before the cross-examination of the witness i.e. PW-1 Yadwinder Singh had been completed is, therefore, rejected.

(21) In view of the above, the present petition is allowed.

(22) The impugned order dated 4th June, 2008 (Annexure P-4) passed by the Chief Judicial Magistrate, Fatehgarh Sahib under Section 319 Cr. P.C. summoning the petitioner as an additional accused, is hereby quashed.

---

**R.N.R.**

*Before Satish Kumar Mittal, J.*

**GURMAIL SINGH—Petitioner**

*versus*

**PUNJAB STATE ELECTRICITY BOARD AND  
OTHERS—Respondents**

**C.W.P. No. 5113 of 2008**

20th October, 2009

*Constitution of India, 1950—Art. 226—Withdrawal of benefits of proficiency step up and time bound promotional scales after retirement of petitioner on ground petitioner failing to acknowledge promotion order duly communicated/forwarded and foregoing his promotion—No order of cancellation/withdrawal of benefits was passed during service period of petitioner, and same was passed much after his retirement even without issuing any notice and providing an opportunity of hearing to him—Order of recovery held to be illegal and void—Petition allowed.*

*Held*, that the stand taken by the respondents that the promotion order was duly communicated/forwarded to the petitioner and he refused to acknowledge the same and had foregone his promotion, does not inspire any confidence, particularly in view of the fact that no order of cancellation/withdrawal of the benefits was passed during the service period of the petitioner, and the same was passed much after his retirement, even without issuing any notice and providing an opportunity of hearing to him.

(Para 10)

*Further held*, that if an employee foregoes his promotion for a period of three years, only in that case, it is required to stop the grant of first and second time bound promotional pay scales. But in the instant case, even if it is assumed that the petitioner was deemed to have foregone his promotion on 19th September, 2003, then his proficiency step up as well as first and second time bound promotional scales could have been withdrawn, as he continuously did not forego his promotion for three years. The petitioner has retired on 28th February, 2006, before completion of three years of his promotion. Therefore, the aforesaid benefits granted to him could not have been withdrawn.

(Para 11)

Amit Aggarwal, Advocate, for the petitioner.

Ms. Puneet Kaur Sekhon, Advocate, for the respondents.

**SATISH KUMAR MITTAL, J.**

(1) The petitioner joined the services of the respondent Board as Sub Station Attendant on 1st July, 1973. On 31st July, 1978, in the direct recruitment, he was selected and appointed on the post of Junior Engineer. He remained on the said post till his retirement on 28th February, 2006, on attaining the age of superannuation.

(2) During his service, the petitioner was given the benefit of proficiency step up on completion of 8 years of service,—*vide* Office Order No. 9 dated 11th January, 1990. He was also given the first and second time bound promotional scales on completion of 9 and 16 years of service,—*vide* Office Orders No. 35 dated 4th February, 1992 and 192 dated 3rd September, 1996, respectively.

(3) After the retirement of the petitioner, his retrial benefits i.e. pension and gratuity etc. were not released. When the petitioner approached the respondents by making representation for releasing the same, respondent No. 3 issued order dated 18th July, 2007 (Annexure P-3) ordering that, *vide* order dated 19th September, 2003, the petitioner was promoted to the post of A.A.E., but since he had not joined the promotional post and retired from the respondent Board as J.E., on 28th February, 2006, therefore, it is deemed that the petitioner had foregone his promotion and thus, according to the instructions of the respondent Board, the benefits of proficiency step up as well as first and second time bound promotional scales, granted to the petitioner,—*vide* Office Orders No. 9, dated 11th January, 1990, 35 dated 4th February, 1992 and 192 dated 3rd September, 1996, respectively, have been cancelled/withdrawn. After issuance of the aforesaid order (Annexure P-3), the respondent Board deducted an amount of Rs. 3,41,059 from the gratuity and pension amount of the petitioner on account of the cancellation/withdrawal of the benefits of proficiency step up as well as first and second time bound promotional scales and thereafter, started giving pension to the petitioner.

(4) Against the above said action, the petitioner served a legal notice dated 18th December, 2007 (Annexure P-5) on the respondents, but when no action was taken on the same, he filed the instant petition, challenging the order dated 18th July, 2007 (Annexure P-3) as well as deduction of amount of Rs. 3,41,059 from his gratuity and pension.

(5) In the petition, it has been stated that the alleged promotion order dated 19th September, 2003 was not communicated to the petitioner and he got retired from the post of J.E. on 28th February, 2006. If the order of promotion would have been communicated to the petitioner, he would have joined the promotional post and would have retired as SDO, instead of JE. It is alleged that the respondents have illegally deducted the amount from the gratuity and pension amount of the petitioner, on account of cancellation/withdrawal of the benefits of proficiency step up as well as first and second time bound promotional scales. As per the instructions of the respondent Board, if any employee wants to forego his promotion, then he is required to submit his request to the competent authority within a period of one month, but the petitioner did not make any request to the respondent Board to forego his promotion. Since the order of promotion was not

communicated to the petitioner, therefore, he was not at fault. It has also been stated that if the petitioner would have foregone the promotion or it is deemed that he had foregone the promotion, then the respondents were required to recover the aforesaid amount immediately after foregoing promotion, but till the date of retirement of the petitioner, the respondents did not issue any recovery order against the petitioner ; and only after his retirement, they wrongly deducted the aforesaid amount from his retrial benefits, in an illegal and arbitrary manner.

(6) In the written statement, it has been stated by the respondents that the order of promotion dated 19th September, 2003 was communicated/ forwarded to the petitioner, however, he refused to acknowledge the same and did not join the promotional post. It has been further stated that in view of clause 7 of the promotion order, an employee, who has been promoted, is required to submit his request to the competent authority regarding foregoing the promotion, within a period of one month from the date of issuance of the promotion order. If an employee does not send the same within stipulated period, then it would be assumed that he foregoes his promotion and he will not be allowed to join on the promotional post. It is pleaded that in view of the said clause, it was assumed that the petitioner has foregone his promotion. Accordingly, in view of the instructions dated 4th October, 1989, the petitioner who had foregone his promotion was not entitled to any proficiency step up. Further, as per the instructions dated 22nd October, 1993, the petitioner, who is deemed to have foregone his promotion, was not entitled to the grant of time bound promotional scales. It is further pleaded that in view of the instructions dated 8th April, 2003, the respondent Board could recover the time bound promotional scales given to an employee, who has foregone his promotion and such recovery should be effected, even after his retirement, from his gratuity and pension, therefore, the impugned recovery was effected.

(7) I have heard counsel for the parties.

(8) Undisputedly, the petitioner was initially appointed as Sub Station Attendant on 1st July, 1973. Thereafter, in a direct recruitment, he was appointed on the post of Junior Engineer on 31st July, 1978. It is also admitted fact that,—*vide* Office Order No. 9, dated 11th January, 1990,

pay scale of the petitioner was revised by giving him the benefit of proficiency step up and,—*vide* Office Orders No. 35, dated 4th February, 1992 and 192, dated 3rd September, 1996, he was granted first and second time bound promotional scales, on completion of 9 and 19 years of service. It is further admitted position that the petitioner retired on 28th February, 2006 on attaining the age of superannuation. It is also admitted position that before his retirement, no order was ever passed or communicated to the petitioner that on account of foregoing his promotion to the post of A. A. E.,—*vide* order dated 19th September, 2003, the benefits of proficiency step as well as first and second time bound promotional scales, granted to the petitioner, were withdrawn or any recovery was to be effected from his salary. After his retirement, for the first time, on 18th July, 2007, respondent No. 3 issued a letter to the petitioner that due to his foregoing the promotion, the aforesaid benefits granted to him have been withdrawn. It is admitted position that before passing the said order, neither any show cause notice was issued to the petitioner, nor an opportunity of hearing was provided to him. It is further admitted position that on the basis of the said order, an amount of Rs. 3,41,059 was deducted from the gratuity and pension of the petitioner.

(9) The stand of the petitioner is that the promotion order dated 19th September, 2003 was never communicated to him or to the higher officer and at no point of time, he gave in writing to forego his promotion or refused to acknowledge the promotion or to join the promotional post. On the other hand, the stand of the respondents is that the order of promotion was forwarded to the petitioner and his senior officers, but the petitioner refused to acknowledge the same and did not join the promotional post. A stand has also been taken that in view of clause 7 of the promotion order, if an employee neither sends his request to forego the promotion nor joins the promotional post within one month from the date of issuance of promotion order, then it will be deemed that he has foregone his promotion. It has been argued that since the petitioner did not join on the promotional post, therefore, it was taken that he had foregone his promotion and consequently, in view of the various instructions of the respondent Board, the benefits of proficiency step up, first and second time bound promotional scales granted to the petitioner, were withdrawn and consequently, the recovery was effected.

(10) During the course of arguments, counsel for the respondents was specifically asked to produce the material to show that the petitioner had requested to forego his promotion or he had refused to acknowledge the promotion order and to join on the promotional post. No such document/material was produced or shown. Counsel for the respondents further could not explain why the benefits of proficiency step up as well as first and second time bound promotional scales, granted to the petitioner, were not withdrawn immediately after foregoing promotion by the petitioner, when he was in service, and why the order of withdrawal/cancellation of the aforesaid benefits was passed, after his retirement, without providing an opportunity of hearing to him. Counsel for the respondents could not explain the said situation. It has been simply stated that since the petitioner did not join his place of posting within one month from the date of promotion, therefore, it was deemed by the respondents that he had foregone his promotion and according to the instructions of the respondent Board, in that situation, he was not entitled for the grant of proficiency step up as well as first and second time bound promotional scales. In my opinion, the stand taken by the respondents that the promotion order was duly communicated/forwarded to the petitioner and he refused to acknowledge the same and had foregone his promotion, does not inspire any confidence, particularly in view of the fact that no order of cancellation/withdrawal of the aforesaid benefits was passed during the service period of the petitioner, and the same was passed much after his retirement, even without issuing any notice and providing an opportunity of hearing to him.

(11) Secondly, the instructions dated 22nd October, 1993 provide that an employee, who foregoes his promotion shall be eligible for reconsideration for promotion after being debarred for three years for promotion as well as for the grant of 9/16 years time bound promotional scales and if he still foregoes his promotion after three years it shall make him permanently ineligible for promotion as well as for the grant of 9/16 years time bound promotional/devised promotional scales. Subsequently, in continuation of these instructions dated 22nd October, 1993, a clarification was issued,—*vide* instructions dated 8th April, 2003 to the effect that in case any official foregoes his promotion for a period of 3 years, in that case, it is required to stop the grant of 1st/2nd time bound higher pay scale.

If the official again does not avail of the promotion after expiry of three years of foregoes the promotion period, and he obtains voluntary retirement or retires on attaining the age of 58 years, in that case, the first and second time bound promotional pay scales granted to him after 9/16 years of service are required to be withdrawn. Thus, from the above said clarification, it is clear that the employee, who had foregone his promotion for a period of three years, was not entitled for the time bound promotional pay scales. From the aforesaid instructions, it appears that if an employee foregoes his promotion for a period of three years, only in that case, it is required to stop the grant of first and second time bound promotional pay scales. But in the instant case, even if it is assumed that the petitioner was deemed to have foregone his promotion on 19th September, 2003, then his proficiency step up as well as first and second time bound promotional scales could have been withdrawn, as he continuously did not forego his promotion for three years. In the instant case, the petitioner has retired on 28th February, 2006, before completion of three years of his promotion. Therefore, the aforesaid benefits granted to him could not have been withdrawn.

(12) Thirdly, in the instant case, the respondents have recovered an amount of Rs. 3,41,059 on the ground that the same was wrongly paid to the petitioner and he was not entitled for the same, due to the foregoing of his promotion. It has been argued on behalf of the petitioner that in view of the principle laid down by the Hon'ble Supreme Court in the case of **Sahib Ram versus State of Haryana, (1)** and the Full Bench decision of this Court in the case of **Budh Ram and others versus State of Haryana and others, (2)** the said amount could not have been recovered from the petitioner, as he did not make any mis-representation or played any fraud for getting the aforesaid amount. Learned counsel for the petitioner also relied upon a Division Bench decision of this Court in the case of **Karnail Singh versus The Punjab State Electricity Board, Patiala and another, (CWP No. 6730 of 2006, decided on May 21, 2007)**, wherein the similar circumstances, while following the decision of the learned Single Judge of this Court in the case of **Punjab State Electricity Board, Patiala versus Miss Daljit Kaur, U.D.C. (RSA No. 858 of 2004, decided on**

---

(1) 1995 (1) S.C.T. 668

(2) 2009 (3) S.C.T. 333

2nd August, 2005), similar recovery was quashed. The learned Single Bench in **Miss Daljit Kaur's case** (*supra*) has observed as under :—

“Admittedly, the respondent was granted time bound promotional scales with effect from 1st January, 1986 and 7th October, 1989. It is also the admitted fact that offer for promotion as ARA was made to her.—*vide* order dated 20th August, 1991. Even it is an undisputed fact that her request to forego the promotion was accepted by the competent authority, i.e., the Director/Personnel, PSEB, Patiala,—*vide* office order dated 20th February, 1992. After the acceptance of her request, she continued to draw the time bound promotional scales which she had got on completion of 9/16 years of service. It is only owing to the issuance of circular dated 13th November, 1992 that the concerned authorities decided to withhold the time bound promotional scales and ordered for the recovery of the amount already paid to the plaintiff-respondent in this regard. It has also been admitted in the written statement filed on behalf of the appellant-Board that the respondent was not given an opportunity of hearing before withdrawing the scales of pay already granted to her and before passing the order for making recovery of the amount paid to her in this respect. In **Major M.P.S. Bhullar versus State of Punjab, 1995 (1) RSJ 526**, it was held that it was imperative for the authorities concerned to inform the petitioners therein with regard to their proposed action and to have given them a reasonable opportunity of making representation. In **Bharat Singh versus State of Haryana**, it was held that the respondent-State shall not recover from the petitioners the amount already paid to them on account of higher/upgraded pay scale. Similarly, in **Sahib Ram versus State of Haryana, 1995(1) STC 668**, it was held that the amount paid may not be recovered from the employee though he will not be entitled to draw the upgraded scale any further. In the case reported as **Union of India versus M. Ravi Verma and others, 1972 SLR 211**, it has been held that the administrative adverse orders cannot be given retrospective effect.



It is the undisputed position that even the circular dated 13th November, 1992 (Ex. P2), on the basis of which the defendant-Board has withheld or withdrawn the devised promotional scales of pay granted to the plaintiff-respondent, makes a mention in para No. 6 that relaxation could be ordered in the matter of granting devised promotional scale on completion of 9/16 years of service in favour of an employee, who had foregone promotion after getting approval from the competent Administrative Officer. It is admitted in the present case that the plaintiff-respondent had got the approval of the Director/Personnel of the Board, who allowed her to do so,—*vide* letter dated 20th February, 1992 and she continued to draw the devised promotional scale for almost nine months after the grant of such approval by the Director/Personnel of the Board. In view of this factual position of the present case, the case-law cited above is squarely applicable and the defendant-appellants cannot legally withdraw the benefits once allowed to the plaintiff-respondent. It has been held by a Division Bench of this Court in **Shashi Kiran and others versus State of Punjab and others, 2003(1) SCT 340**, that the denial of proficiency step up after completion of 8 years of service on the ground that the petitioners therein had foregone their promotion is not proper. This dictum of their Lordships of the Division Bench is applicable to the fact of the present case on all fours. Thus, I do not find any infirmity in the judgments and decrees passed by the trial as well as the lower appellate Court and I concur with the same. It is held that the plaintiff-respondent is entitled to the grant of devised promotional scales of pay on completion of 9/16 years of service as the said scales of pay were granted prior to the offer of promotion as ARA having been made to her and she had foregone her promotion with the approval of the competent authority.....”

(13) Fourthly, before cancelling/withdrawing the benefits of proficiency step up as well as first and second time bound promotional scales and effecting recovery, no opportunity of hearing was afforded to the petitioner. Thus, the impugned order is illegal and void, and no recovery can be effected on the basis of an illegal and void order.

(14) In view of the above, the instant writ petition is allowed and the impugned order dated 18th July, 2007 (Annexure P-3) is quashed. The order (Annexure P-4), whereby an amount of Rs. 3,41,059 has been deducted from the pension and gratuity of the petitioner is set aside, being illegal, and the respondents are directed to re-fix the pension of the petitioner and to pay the aforesaid amount to him within a period of three months from the date of receipt of a certified copy of this order.

---

**R.N.R.**

*Before Augustine George Masih, J.*

**MAJOR SINGH—Petitioner**

*versus*

**STATE OF PUNJAB AND OTHERS—Respondents**

**CrI. R. No. 1005 of 2008**

23rd November, 2009

*Code of Criminal Procedure, 1973—S. 321—Trial Court granting permission u/s 321 to withdraw an accused from prosecution—Withdrawal from prosecution—An executive function of Public Prosecutor—Decision to withdraw from prosecution has to be of Public prosecutor alone and that too by applying his mind as a free agent, independent of any influence or external and extraneous considerations—No one should dictate terms to him nor should he be governed by guidelines given by any person or Authority—Order passed by trial Court cannot be sustained on ground that while considering application u/s 321 Cr. P.C. and granting permission to withdraw from case—Reasons assigned by Court are on merits and based on merely an enquiry report and supplementary challan presented in Court—Reasoning given by Court is totally contrary to public policy and law amounts to giving benefit to a person who is a fugitive from law as accused declared as proclaimed offender—Hence, application u/s 321 Cr. P.C. for withdrawal from prosecution cannot be said to be bona fide or having been moved with due application of mind or in the interest of justice which can be said to meet the ends of justice in any manner.*