
absolute right by virtue of the provisions of sub-section (1) of Section 14 of the Act. The argument of the learned counsel for the defendant-appellants that this case is covered by the provisions of sub-section (2) of section 14 of the Act, therefore, is without any force and repelled.

(11) For the aforesaid reasons, I do not find any merit in this appeal and the same is hereby dismissed.

S.C.K.

Before Jawahar Lal Gupta & V.M. Jain, JJ

BAHADUR SINGH,—*Petitioner*

versus

STATE OF PUNJAB & OTHERS,—*Respondents.*

C.W.P. No. 12982 of 1999

7th October, 1999

Punjab Small Industries and Export Corporation Employees Service Bye-laws—Bye-law 3—Sources of recruitment—One such source by promotion—No provision for passing examination for promotion in the bye-laws—Non-passing of such test—Effect of.

Held that, a perusal of the bye-laws shows that the promotion has to be made on the basis of merit-cum-seniority. In other words, it is only when the merit of two candidates is equal that the senior one has to be preferred. It is not disputed that in the Service Bye-laws, there is no provision for passing any departmental examination before a person becomes eligible for promotion from the post of Sub Divisional Engineer to that of Executive Engineer. Once a provision has been made regarding promotion in the bye-laws, the provisions of the rules governing the employees in other departments of the State Govt. cannot be invoked. It has been admitted on behalf of the Corporation that persons who have been promoted hither-to-fore were never rejected or denied promotion only on the ground that they had not passed the departmental professional or departmental revenue examination. In view of these facts, it appears to us that the bogey of test is only a camouflage for defending the indefensible. It cannot be said that the petitioners were ineligible to be considered for promotion merely because they had not passed the departmental examination.

(Paras 12 & 13)

Ravinder Chopra, Advocate,—*for the Petitioner.*

Ms. G. K. Mann, Advocate,—*for respondent No. 2.*

Inderjit Malhotra, Advocate,—*for respondent No. 3.*

Vishal Munjal, Advocate,—*for respondent No. 4.*

JUDGMENT

JAWAHAR LAL GUPTA, J (O)

(1) The petitioners in Civil Writ Petition Nos. 12982 and 9131 of 1999 have basically a common grievance. They complain that their claim for appointment to the posts of Executive Engineers has been arbitrarily over-looked and that respondent Nos. 3 and 4 *viz.* M/s N.K.Dhir and Parkash Singh have been wrongly appointed to the posts of Executive Engineers. The petitioners submits that they are eligible for promotion to the posts of Executive Engineers. Their claim has not been considered. Respondent No. 3 who is merely on deputation as a Sub Divisional Engineer has been given current duty charge of the post of Executive Engineer. The petitioner complain that the action is violative of the Service Bye-laws as also the provisions of Articles 14 and 16 of the Constitution.

(2) The facts of Bahadur Singh's case may be briefly noticed.

(3) The petitioner had initially joined service in Class III—On 7th March, 1984, he was promoted as a Sub Divisional Engineer. He continues to hold this post till today. He claims that he is the senior most Sub Divisional Engineer in the Punjab Small Industries and Export Corporation (Respondent No. 2). He has averred that the Sub Divisional Engineers are eligible for promotion to the posts of Executive Engineers. Out of the four available posts, only one has been filled-up by promotion. The remaining posts have been filled up by taking persons on deputation. So far as respondent No. 3 is concerned, he has been given current duty charge of two posts of Executive Engineers. The fourth post is held by Mr. Parkash Singh (respondent No. 4). He is on deputation from the Punjab Panchayati Raj Department. It has been further averred that respondent No. 3 is actually a member of the service in the Punjab Public Works Department, Public Health Branch. He was brought on deputation to the Corporation in the year 1996 for a period of two years. The said period of deputation was extended from 13th September, 1998 to 12th September, 1999. Despite expiry, the third respondent was not repatriated to his parent department. Instead,

he was given current duty charge of the two posts of Executive Engineers.

(4) Similarly, respondent No. 4 was taken on deputation and posted as Executive Engineer on 18th December, 1998. He continues to hold this post till today. The petitioner complains that despite representation, no action was taken by the Respondent-Corporation. Thus, he has approached this court on the ground that the action of the Respondent-Corporation in not considering his claim and in appointing respondent Nos. 3 and 4 by deputation or by giving current duty charge to an outsider is wholly arbitrary and untenable. The petitioner prays that a writ of mandamus be issued directing the Respondent-Corporation to consider his claim for promotion and that it be restrained from filling up the posts by way of deputation.

(5) Separate written statements have been filed on behalf of respondent Nos. 2, 3 and 4. In the reply filed on behalf of the Corporation, it has been averred that no right of the petitioner has been infringed. He has "no legal right to be considered for promotion....." A person is required to pass "the departmental examination as provided in Rule 6 (b) of the PWD B&R Class-I Rules, 1965 of Punjab Government". Since the petitioner has not passed the departmental examination, he is not eligible for promotion. Still further, it has been stated that the petitioner has no legal right to challenge the appointment of respondent Nos. 3 and 4 "specially when respondent No. 3 has been taken as Sub Divisional Engineer as per the norms of 50% quota. The Corporation is competent as per service bye-law 3.1 of the Corporation to choose the method of appointment to the service". Reference has been made to the provisions of Service bye-law 3.1 relating to the recruitment. On merits, it has been pointed out that the petitioner was assessed as 'average' in the year 1996-97 and adverse remarks had been conveyed to him.

(6) To a similar effect are the written statements filed on behalf of respondent Nos. 3 and 4.

(7) Counsel for the parties have been heard.

(8) On behalf of the petitioners, it has been contended that persons working in the Corporation are entitled to be considered for promotion on the basis of the Service bye-laws. Their claims had to be considered on the basis of "merit-cum-seniority" and it is only when it is found that no one working in the Corporation is suitable that an outsider can be brought by way of deputation. The counsel maintain that the action of the respondent-corporation is arbitrary and unfair. They also point out that there is no requirement of passing the

departmental examination. Till today, the Corporation has never insisted upon the passing of the departmental examination as a condition precedent. It has been categorically asserted that Mr. C.M. Sharma who was promoted in the year 1992 has not passed the departmental examination till today and that the condition of test was never imposed upon him. Thus, the counsel maintain that the action of the Respondent-Corporation in failing to consider their claim for promotion is violative of articles 14 and 16 of the Constitution.

(9) The claim made on behalf of the petitioners has been controverted by the counsel for the respondents. Ms. G. K. Mann, learned counsel appearing for the Corporation, has admitted that Mr. C.M. Sharma was promoted without qualifying the departmental examination. She states that she has made this statement on instructions from Mr. R.K. Goyal, Sectional Officer (Legal) of the Corporation. She further submits that the posts have to be filled up on the basis of Service bye-law 3.1 which authorises the Corporation to take persons on deputation. She submits that the action of the Respondent-Corporation in appointing respondent Nos. 3 and 4 is wholly legal and valid. Mr. Inderjit Malhotra, counsel for respondent No. 3 contends that the said respondents has an outstanding record and that he has been rightly given the current duty charge of the post of Executive Engineer. He also submits that the Corporation has to execute a building project on behalf of Mahatma Gandhi State Institute of Public Administration. The third respondent has been selected for this project. He maintains that the claims of both the petitioners had been considered before the third respondent was selected. Similarly, even the counsel for respondent No. 4 maintains that the action of the corporation is legal and valid.

(10) It is conceded on behalf of the Corporation and other respondents that in exercise of the powers conferred by Article 73 of the Articles of Association, the Respondent-Corporation has framed 'The Punjab Small Industries and Export Corporation Employees Service Bye-laws'. Bye-law 3.1 inter alia provides as under :

"3.1 Recruitment

- (a) Recruitment to the various posts under the Corporation shall be made by the Board by any one or more of the following methods :—
- (i) by direct appointment ; or
 - (ii) by deputation from Government or any other corporation ;

-
- (iii) by promotion of existing personnel or by transfer from one post to another.

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(c) (i) The Board/Appointing Authority may prescribe for various posts under the Corporation the qualifications, whether academic, technical or otherwise, or tests or physical standards or any experience that it may consider necessary and expedient for the efficient discharge of duties or conditions for confirmation, promotion or continuance in service."

(11) A perusal of the above extract of bye-law 3.1 would show that the posts in the Service can be filled up by direct appointment by deputation and by promotion of the existing personnel. It is also clear that the Board can prescribe the qualifications etc. for appointment to different posts. Still further, the provision regarding seniority and promotion has been made in bye-law 3.4. Clause (a) deals with seniority. Clause (b) provides for promotion in the following terms :—

"(b) Promotion

All promotions to posts under the corporation shall be made on the basis of merit-cum-seniority and no person shall have a right to be promoted to any post on the basis of seniority alone".

(12) A perusal of the above provision shows that the promotion has to be made on the basis of merit-cum-seniority. In other words, it is only when the merit of two candidates is equal that the senior one has to be preferred.

(13) It is not disputed that in the Service Bye-laws, 'there is no provision for passing any departmental examination before a person becomes eligible for promotion from the post of Sub Divisional Engineer to that of Executive Engineer.' Even in the written statement filed on behalf of the Respondent-Corporation, reference has been made to the provision contained in Rule 6 (b) to support the claim regarding test. In our view, the provisions of the Public Works Department in the Buildings and Roads Branch can't be attracted or applied to the promotions in the Corporation. Firstly, the provision regarding promotion exists in the bye-laws. Once a provision has been made regarding promotion in the bye-laws, the provisions of the rules governing the employees in the Buildings and Roads Branch of the State Government can't be invoked. Secondly, it appears that the Corporation has never insisted upon the passing of the test as a condition precedent. It has been admitted on behalf of the hither-to-fore were never rejected or

denied promotion only on the ground that they had not passed the departmental professional or departmental revenue examination.' It appears that this provision has been invoked only with the object of defeating the claim of the petitioners and not for the purpose of making out a bonafide reason for excluding them from consideration. Still further, the competent authority to lay down the qualifications etc. is the Board. No resolution of the Board has been produced to show that the Sub Divisional Engineers are required to possess a particular qualification or to pass any departmental examination before becoming eligible for promotion to the posts of Executive Engineers. In view of these facts, it appears to us that the bogey of test is only a camouflage for defending the indefensible. It cannot be said that the petitioners were ineligible to be considered for promotion merely because they had not passed the departmental examination.

(14) Irrespective of the above, the matter can be looked at from another angle. Let us assume that the provisions of Class-I Rules are applicable. Rule 6 to which reference has been made on behalf of the respondents provides as under :—

“Qualifications—No person shall be appointed to the service unless he :—

(a) xx xx xx xx xx xx

(b) in the case of an appointment by promotion from Class-II Service has 8 years completed service, in that class and has passed the departmental examination as provided in rule 15.”

(15) A perusal of the above provision would show that a member of the Class-II service is eligible for promotion to the Class-I service when he has completed eight years of service in that class. He is also required to pass the examination as provided in Rule 15. Class-I rules shall become applicable to the officer only when he has been promoted to Class-I. Rule 15 can be invoked only in case of a member of the Class-I service. Rule 15 of the Class-I Rules of 1965 is in the following terms :—

“Departmental Examination—(1) Officers appointed to the Service, unless they have already done so, shall pass such departmental examination and within such period as may be prescribed by Government :

Provided that Government in addition to such departmental examination may, from time to time, prescribe any other test

or examination to be passed before an officer can be considered eligible for promotion or appointment to any rank in the Service :

Provided further that Government may, for any sufficient cause, extend the period within which any member is required to pass the departmental examination ;

(2) If an officer fails to pass the departmental examination within the prescribed period or within the extended period, if any, he shall not earn his future grade increments till such time as he passes it when the increments shall be released retrospectively :

Provided that he shall not be entitled to get any arrears of the released grade increments for the period during which he could not pass the examination.”

(16) A perusal of the above provision would show that officers appointed to the service *viz.* Class I Service have to pass the examination “within such period as may be prescribed by Government”. The occasion for passing the examination would arise only after the person has been promoted. In any case, an officer cannot be denied promotion because he has not passed the departmental examination prescribed under Rule 19.

(17) Viewed from any angle, the contention that the petitioners are ineligible as they have not passed the departmental examination, cannot be sustained. It is, consequently, rejected.

(18) Besides the above, it has to be remembered that the petitioners have been working as Sub Divisional Engineers in one or the other Corporation for the last 15 years or more. They are facing complete stagnation. Respondent Nos. 3 and 4 are members of the Class-II Service in their parent departments. They are being given double benefit. They are maintaining their seniority in their parent cadre and usurping the posts in the Corporation. Officers working in the Corporation are being denied their legitimate due to be considered for promotion. This is patently arbitrary and grossly unfair. It is no body's case that the claims of the petitioners were considered by the Board and that they were found unsuitable. In fact, the written statement suggests that the petitioners have no right or claim to be considered for promotion. The suggestion on behalf of the Corporation is violative of Articles 14 and 16. It cannot be sustained.

(19) It is contended on behalf of respondent No. 3 that he has a consistently good record and that he has been rightly appointed by way of deputation. Is it so ?

(20) Admittedly, respondent No. 3 was taken on deputation as a Sub Divisional Engineer. There is no rule which permits the Corporation to promote a deputationist from one post to another. It has not been suggested on behalf of the Corporation that a deputationist can be promoted. In fact, on the Corporation's own showing, the third respondent has been given current duty charge of two posts of Executive Engineers. On behalf of the petitioners, it has been suggested that the Corporation has shown this generosity on account of the intervention of the Minister. Be that as it may, we shall only observe that the action of the Corporation in not considering the claims of its own officers and in giving the current duty charge to the third respondent was not fair. If the Corporation had found that the petitioners or others on its cadre were not suitable, it may have been justified in asking the Government to lend the services of a suitable Executive Engineer to man the post. However, without considering the claims of its own officers and without asking the Government to send a person on deputation as an Executive Engineer, the Corporation has chosen to give the current duty charge of two posts to one officer. In other words, the third respondent would now be holding the charge of three posts viz. the Sub Divisional Engineer and two posts of Executive Engineers. We are not satisfied that this was just and fair.

(21) Faced with this situation, Ms. Mann has tried to contend that the Corporation has not been able to finalise the seniority of its own officers. In fact, according to the counsel, a tentative seniority list of the Sub Divisional Engineers was issued on 15th July, 1999. Objections have been invited. Till the list is finalised, the officers working in the Corporation cannot be considered for promotion.

(22) The contention is patently misconceived. Firstly, it does not reflect well on the Corporation that it has not been able to finalise the seniority of its officers for the last 15 years or more. Admittedly, the petitioners have been working as Sub Divisional Engineers since the years 1982 and 1984. Secondly, even if a formal list has not been issued, there is a clear method laid down in the Service Bye-laws for the determination of seniority. It is a job which should not take more than half an hour. Thirdly, nothing stopped the Corporation from considering the claims and making promotions on the basis of tentative seniority list. These promotions could have been provisionally ordered subject to review on finalisation of the list. Apparently, the Corporation is trying to find lame excuses for justifying the unjustifiable.

(23) No other point has been raised.

(24) In view of the above, the writ petitions are allowed. The action of the Respondent-Corporation in giving current duty charge of the

posts of Executive Engineers to respondent No. 3 is set aside. It is, however, clarified that the Corporation may subject to rules etc., consider the claim of respondent No. 3 to continue on deputation as Sub Divisional Engineer. The appointment of respondent No. 4 by way of deputation as an Executive Engineer is also set aside. The Corporation is directed to consider the claim of the petitioners and others working as Sub Divisional Engineers in accordance with the Service-Bye-Laws. The needful shall be done within one month from the date of receipt of a certified copy of this order. In the circumstances, there will be no order as to costs.

S.C.K.