

FULL BENCH

Before P. C. Jain, A.C.J., Surinder Singh & I. S. Tiwana, JJ.

P. P. KAPOOR SUPERINTENDENT AND OTHERS,—*Petitioners.*

versus

STATE OF HARYANA AND OTHERS,—*Respondents.*

Civil Writ Petition No. 4848 of 1983

August 30, 1984.

Constitution of India 1950—Articles 16 & 309—Punjab Civil Secretariat (State Service Class III) Rules, 1952—Rule 6—Promotion of clerks to the posts of Assistants—Test prescribed for such promotion by executive instructions—Instructions declared invalid by Court—Government deciding to give benefit of seniority and consequential promotion only to the decree holders—Subsequent decision to extend the benefit even to employees who did not go to court—Whether valid—Reversion of those promoted on the basis of the test—Whether could be said to cause hardship.

Held, that when the judgment of the court declaring the instructions invalid had come, the State Government could have legally, rather should have given the benefit of that judgment to all the officials whose promotion had been adversely affected by the instructions. The State Government without applying its mind had issued instructions to give benefit of the judgment to only those who had gone to court of law and subsequently decided to reconsider the matter. There does not appear to be anything wrong or illegal on the part of the Government in deciding to re-consider the issue. The Government had not given any well considered conscious decision earlier for not implementing the judgment. If the Government had at that time applied its mind then certainly it would have decided to abide by the verdict of the Court and would not have bypassed it by limiting its applicability to those who had gone to the court. Even though the decision of the Court was rendered only in the case of some of the officials, yet the ratio of the judgment is that the instructions prescribing a test for promotion could not be legally issued. It is not understood as to how the application of that judgment could be limited only to the officials who had gone to court. At that time it was expected of the State Government to have implemented the judgment even in respect of those officials who had not gone to the court. However, the Government has issued subsequent instructions, and the courts should not allow the mistake already committed by the State Government to be perpetuated by striking down the subsequent instructions. It is also not understood as to how the officials who were promoted on the basis of the test can feel more aggrieved than the officials whose right of promotion was taken away as a result of the prescription of the test which was declared illegal by the court.

(Paras 10 & 11).

Writ Petition under Article 226 of the Constitution of India praying that the following reliefs be granted:—

- (a) *A Writ in the nature of certiorari be issued calling for the records of Respondents relating to the impugned instructions Annexure P. 4 and after perusal of the same the impugned instructions Annexure P. 4 be quashed.*
- (b) *Any other Writ, Order or Direction which this Hon'ble Court may deem fit under the circumstances of the case, be issued.*
- (c) *An ad-interim order be issued directing the Respondent not to take any further action in pursuance of the impugned instructions till the final decision of this Writ Petition.*
- (d) *The petitioner be exempted from giving prior notice to the Respondent.*
- (e) *The filing of the certified copies of Annexures P. 1 to P. 4 may be exempted as these are not readily available.*
- (f) *The cost of petition be awarded to the petitioners.*

Kuldip Singh, Sr. Advocate with G. C. Gupta, Advocate,—for Petitioners.

Harbhagwan Singh, A.G., Haryana, with Nirmal Yadav.

M. R. Agnihotri, Sr. Advocate, with T. S. Doabia, Advocate,—for the added A.A.G.H. Respondent.

JUDGMENT

Prem Chand Jain, A.C.J.

(1) This judgment of ours would dispose of this petition and Civil Writ Petitions No. 5238 and 5460 of 1983 and 140 of 1984 as common questions of law and fact arise in all these petitions.

(2) In order to appreciate the controversy, certain salient features of the petition may be narrated.

(3) The petitioners joined service as clerks in the composite Punjab Civil Secretariat between years 1945 and 1958. On the re-organisation of the State of Punjab they were allocated to the

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State of Haryana. Before the re-organisation, in Punjab, executive instructions were issued by the Government on 21st June, 1958, that all promotions of clerks to the posts of Assistant in Civil Secretariat will be made on the basis of the prescribed test. As a result of these instructions the clerks, who were unable to qualify the test, were not promoted as Assistants and those promoted provisionally were reverted on the ground of their failure to qualify the test. The petitioners had duly qualified in the test prescribed and were promoted as Assistants on the dates mentioned in the chart attached with the petition as Annexure P. 1, with the result that the clerks who were unable to qualify the test, whether senior or junior to the petitioners, in the cadre of clerks or who qualified the test later on, become junior to the petitioners in the cadre of Assistants.

(4) It is averred in the petition that some of the clerks who had become junior as a result of their not having passed the test, filed civil suits challenging the validity of the executive instructions. Those suits were ultimately decreed. The matter was taken up by the State of Haryana to the Supreme Court but without any success. In *State of Haryana and others v. Shamsheer Jang Shukla and others* (1), it was held that the Government could not amend or supersede the statutory rules by administrative instructions and as the impugned instructions amended rule 6 of the Punjab Civil Secretariat (State Service Clases III) Rules, 1952, the same were struck down. As a result of the decision in Shamsheer Jang Shukla's case (supra) a circular letter No. 5901-4-GS-II-73/23071, dated 11th September, 1973, was addressed to all the Heads of the Departments on the subject of selection of clerks for promotion to the posts of Assistant through a test saying:—

“The matter has been under consideration of the State Government as to how best to implement the judgments of the Supreme Court. It has now been decided that the benefit should be given only to those officials who went to the Courts and got decrees in their favour. Accordingly, they should be given due seniority as if there was no requirement of passing the test in their cases in pursuance of instructions issued by the Government in the year 1958”.

Feeling aggrieved from the aforesaid circular letter some Assistants in the Haryana Secretariat, Chandigarh, filed Civil Writ Petition

(1) A.I.R. 1972 S.C. 1546.

No. 3314 of 1973 challenging its legality. The State of Haryana contested the writ petition on merits as well as on the ground that the petition suffered from laches. That writ petition was dismissed by M. R. Sharma J. (as his Lordship then was) solely on the ground of laches on 17th November, 1975, and the Letters Patent Appeal against the judgment (L.P.A. No. 19 of 1976) was also dismissed.

(5) It is further averred that more than 11 years after the decision of the Supreme Court in *Shamsher Jang Shukla's case* (supra) and more than 4 years after the final dismissal of C.W.P. No. 3314 of 1973, the Chief Secretary to Government, Haryana, has issued new instructions dated 1st June, 1983, Annexure P. 4, wherein without giving any reasons for its decision, it has been stated that the Government has re-considered the whole matter thoroughly and has now decided that steps enumerated in the succeeding paragraphs may be taken by all the departments, wherever required. The steps enumerated included:

“4. The instructions, dated the 23rd October, 1957 and the 5th of September, 1958, referred to above and any subsequent instructions issued with a view of elaborating the policy with regard to promotion as Assistant including letter, dated the 11th September, 1973 referred to above should be deemed to have rescinded. Accordingly, the benefit is now to be given to all officials irrespective of the fact whether or not they went to the Court and got decrees in their favour”.

9. The following principles may be adopted in regard to adjustment of promotions:—

(i) Those who were ignored for promotion in the Assistant Grade on the date they would have been otherwise due for promotion, on the basis of seniority-cum-merit formula, enjoined in composite Punjab Government instructions No. 9129-C-56/3964, dated the 17th September, 1956, will have to be considered and if they are found fit on the basis of the said formula on that particular date and if they fulfil the condition of experience wherever prescribed, order of promotion be issued in their case treating them to have been promoted on the said date and their pay fixed accordingly.

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- (ii) Those who were promoted on the date they were due for promotion on the basis of their seniority without passing the Assistant Grade Examination but subject to the condition that they will have to pass the examination and on their failure to fulfil this condition were reverted, their reversions will have to be undone, subject of course, to their fitness on the relevant date (the date of promotion to be assigned to them on the basis of seniority) keeping in view their record of service and experience prescribed, if any, similar treatment will have to be given to those whose promotions were made in the rank of Assistants on *temporary/ad hoc* basis (due according to their seniority) although with no express condition of passing the Assistant Grade Examination irrespective of the fact whether they had to be reverted subsequently on the availability of persons qualified in this examination of the arrangement continued impliedly on the assumption/condition that they will stand reverted as soon as candidates qualified in this examination would be available.
- (iii) While making readjustments of promotions as outlined at items (i) and (ii) above, obviously the relevant dates of promotions will have to be calculated on the basis of the dates of promotions of officials who, regardless of their junior position in the respective seniority list were promoted on qualifying the examination, and the promotions will be adjusted according to the seniority and in the order in which vacancies became available, the junior persons going down in the list of promotees to the stage till his immediate senior (in the seniority list of Clerks) is adjusted and a vacancy is available for the former's promotion.
10. The condition of qualifying the said examination having become invalid and the supersession caused by junior qualified candidates being untenable the former would revert unless by virtue of their own seniority, they become entitled to promotion against available vacancies as Assistants in the meantime.

PROTECTION OF EMOLUMENTS:

11. Emoluments of those persons who have to revert in the above eventuality either as Clerk or of those who become too junior to hold a higher rank of Head Assistant, Deputy Superintendent, Superintendent etc., as the case may be will stand protected, if such emoluments are drawn in any of the following cases:—

- (i) promotions made in terms of instructions No. 4800-GII-57/21176, dated 23rd October, 1957 as in vogue till 22nd October, 1970 i.e. the date when the revised instructions were issued,—*vide* circular letter No. 8073-2GS-70, dated 27th October, 1970. Promotions made by way of any administrative arrangement (despite instructions, dated 27th October, 1980 referred above) till 10th April, 1972, i.e. the date on which the Supreme Court judgment was announced.

As a net result of the above, the emoluments drawn up to 19th April, 1972 will stand protected.

SENIORITY:

12. Adjustment of promotions on the above lines will obviously necessitate recasting of the seniority lists. Action may be taken as follows:—

- (i) Seniority of the officials in the cadre of Assistant, Head Assistants, Deputy Superintendent, Superintendents, etc., as the case may be should be recast by restoring the intense seniority as in the cadre of clerks subject of course to their suitability for the higher rank as explained in paragraph 9(i) above. This may be done without taking into consideration the effect of the instructions regarding Assistant Grade Examination now struck down by the High/Supreme Court. The protection in respect of emoluments in terms of para 11 above, if given will not, however, be of any advantage in the seniority, whatsoever.
- (ii) The *inter se* seniority of Stenographers and Steno-typists who were promoted to other ranks vis-a-vis promotees from clerical line, will continue to be such as in the

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ranks from which they were promoted because their promotions to senior ranks have not been struck down by the Court.

- (iii) The persons who were recruited as Assistants either by transfer or direct appointment, in accordance with the provisions of various service Rules, will not be affected in any manner in their seniority vis-a-vis promotees, which should normally as determined with reference to the date of continuous officiation. No supersession in their case should take place merely by recasting the seniority list. Thus the seniority list shall be recast firstly keeping in view the formula of one for one and secondly by bringing down to correct places the persons who were promoted by getting a jump in the seniority simply by passing the Assistant Grade Examination.
- (iv) The revised provisional lists in the promoted cadre(s) should be circulated by the Departments among the employees concerned and they should invite objections within a period of two months.
- (v) The Departments while inviting objections on the provisional seniority lists, should make it clear that the seniority lists, would be further subject to approval by the Government of India according to the States Reorganisation Act, wherever applicable, e.g. where the recasting of the seniority involves changes in those seniority lists which were framed in consultation with the Government of India in terms of the State Reorganisation Act, 1956. The reference to Government of India in this behalf should be made in a lucid manner giving complete background of the matter especially the Supreme Court Judgment.
- (vi) The operation of the revised provisional seniority list should, however, be commenced immediately and should not be deferred till the approval of the Government of India.

CONFIRMATION:

13. Confirmations too will have to be regulated in order to seniority as recast above, firstly keeping in view the

provisions existing in most of the Service Rules for determining seniority on the basis of the dates of confirmation and secondly because this is a major service benefit which should have accrued according to seniority. Of course, the successful performance of duties during the period of probation or officiation, as the case may be, according to the nature of post will be necessary. Consequently, those who become junior in the promoted rank shall have to be deconfirmed after giving them an opportunity if no substantive vacancy is available to shift their line, or in the alternative additional supernumerary posts will have to be created. Re-adjustment of confirmations and the need for additional posts should be assessed according to the position in each Department.

SUBSEQUENT PROMOTIONS TO HIGH RANKS:

14. Subsequent promotions may be made on the basis of seniority lists recast as above, subject, of course, to any rules *inter-alia*, those which might be framed for the purpose separately. Those promoted so far on the basis of seniority framed as a result of passing Assistant Grade Examination, shall vacate places in the higher ranks for the senior persons to step in and adjusted according to their turn only if vacancies are available." As the aforesaid instructions have adversely affected the interests of the petitioners, the present and the other connected writ petitions have been filed challenging the legality and validity of the instructions, dated 1st June, 1983, copy Annexure P. 4 to the petition, on the grounds stated in paragraph 14 of the petition. This writ petition came up for motion hearing on 14th October, 1983. After hearing the learned counsel for the petitioners, the Bench issued notice of motion to the Advocate-General, Haryana.

(6) The petitioners had only made the State as a party. As the decision of the writ petition was likely to affect some private persons also Civil Miscellaneous Application No. 2973 of 1983 was filed by Sarvshri J. R. Vohra, Tilak Raj Sharma, C. L. Anand, I. C. Kataria, K. B. Kapur, K. S. Bindra, and Mukht Behari Lal for getting themselves impleaded as respondents. That application was allowed and,—*vide* order, dated 15th December, 1983, the applicants were allowed to be impleaded as respondents. Separate written statements have been filed, one on behalf of the State and the other on

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behalf of the private respondents, in which the material allegations made in the petition have been controverted.

(7) In the written statement filed on behalf of the State, the principal stand taken is that the impugned instructions have been issued only to give effect to the Supreme Court judgment in *Shamsher Jang Shukla's case* (supra) and that the instructions are perfectly legal and valid. After the filing of the written statements, the Motion Bench finally heard the matter on 16th January, 1984. As the point involved in the petition was of some importance, the petition was admitted and was ordered to be heard by a Full Bench. The reversions which were likely to take place as a result of the impugned instructions were also stayed. This is how we are seized of the matter.

(8) Before I deal with the merits of the controversy, I propose to trace a little history as to how the impugned instructions have come into being. As has come in the earlier part of the judgment, the instructions dated 21st June, 1958, prescribing a test for promotions were finally quashed in *Shamsher Jang Shukla's case* which was decided on 19th April, 1971. On consideration of the matter in September, 1973, the State of Haryana decided not to give benefit of that decision to all the officials but to allow this benefit only to those officials who had gone to the Courts and had obtained a decree in their favour. These instructions of the State of Haryana again necessitated the filing of a petition by some of the aggrieved officials, but their writ petition failed solely on the ground of laches. Unlike the State of Haryana, the Punjab Government, after the decision of the Supreme Court had issued instructions in 1976 to give the benefit of seniority to all those officials whose seniority was affected as a result of introduction of Assistants' Grade Examination. It appears that many representations from aggrieved officials who had been superseded, were filed praying for the restoration of their original seniority. The matter was examined at the highest level. On 16th August, 1977, a desire was expressed by the then Chief Minister that a uniform pattern to implement the decision of the Supreme Court be adopted. It was also desired that the Chief Secretary, Haryana, should hold discussions with the Chief Secretary, Punjab, and find out as to how action could be taken by both the States on similar lines. In October, 1977 the Chief Secretary, Haryana, discussed the matter twice with the Chief Secretary, Punjab. It appears that no

decision could be taken between the two Chief Secretaries. On 22nd June, 1978, the then Chief Minister, Haryana, observed that the Punjab Government had issued instructions in January, 1976, and on the basis of those instructions a provisional seniority list of the Punjab Civil Secretariat employees had been circulated by the Punjab Government on 24th February, 1977, and as to why similar decision could not be taken by the Haryana Government. Later on, on 1st August, 1978, the Chief Secretary, Haryana, suggested that a Committee of officers be set up to examine the matter but the Chief Minister, Haryana, did not agree with the suggestion and desired that the matter should be examined keeping in view the decision taken by the Punjab Government. The matter was accordingly examined by the Haryana Government on the basis of the decision taken by the Punjab Government. On 8th November, 1978, the Chief Secretary, Haryana, again desired to know if the Punjab Government had taken a final decision in the matter and was informed that final decision to implement the orders of the Punjab Government issued in January, 1976, for restoring the seniority of the employees including the non-petitioners had not been taken till then and there was a possibility of giving a second thought to the matter by the Punjab Government. On 2nd December, 1978, the Chief Minister, Haryana, observed that in his opinion it was immaterial whether the Punjab Government had implemented the instructions issued in 1976 or not and that the Haryana Government should issue instructions on the lines of the Punjab Government after fulfilling the necessary formalities. However, on re-consideration and to meet the viewpoint of both the parties, it was decided that a Committee should be constituted to hear the representations of both the parties. This Committee practically took a period of four years and submitted its report in June, 1982, saying that it would be unfair if the seniority of those Assistants, who have since long been promoted as a result of the passing of Assistants' Grade examination, is disturbed at this late stage to their detriment and in favour of those who admittedly have no legal claim, albeit this may be only on account of the laches. While laches may not have stood in the way of granting relief to some individuals; its waiver, should it affect others, would not be justified. However, certain suggestions were made to mitigate partly the hardship caused to those who did not resort to legal remedy for themselves originally and were subsequently hit by limitation purely as an *ex gratia* measure. This recommendation of the Committee was examined by the Government and it was decided on 1st June, 1983, (impugned instructions) that the Government should fall in line with the Punjab Government in implementing the

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decision of the Supreme Court in restoring the seniority of the officials superseded as a result of introduction of Assistants' Grade examination. In other words, the State of Haryana through these instructions has decided to give the benefit of the judgment of the Supreme Court even to those officials who had not obtained any decree from the Court. This is how the impugned instructions have been issued by the State Government.

(9) The main attack of the learned counsel for the petitioners against the impugned instructions was that a conscious decision on consideration of all the relevant facts was taken as far back as in 1973 by the Government that the benefit of the decision of the Supreme Court should be given only to those who had obtained a decree in their favour and that such a decision could not legally be reviewed on the basis of the same reasoning which was not accepted at the time of issuance of the instructions in the year, 1973. It was sought to be projected that the seniority of the officials had been fixed after the decision of the Supreme Court and the consequential promotions too had been made and that it would cause grave hardship to the petitioners if the impugned instructions are sustained and on its basis a fresh seniority list is prepared. On the other hand, Shri Harbhagwan Singh, learned Advocate-General, Haryana, contended that the State of Haryana was doing nothing but to implement the decision of the Supreme Court; that earlier instructions issued in the year, 1973 could not be a bar in the way of the State Government to issue the impugned instructions; that the State Government was well within its right to review its earlier administrative instructions as the same had resulted in great hardship to those officials who had not been afforded benefit of the judgment of the Supreme Court and that the matter has been under the consideration of the State Government since the year, 1977 and there has been no unexplainable delay on the part of the Government in correcting its decision and in implementing the judgment of the Supreme Court. The learned Advocate-General also submitted that

the petitioners who were not entitled to the promotion but for the instructions issued in the year, 1958, cannot be permitted to retain that benefit which was illegally given to them. The learned Advocate-General buttressed his argument by contending that if the State Government was just implementing the decision of the Supreme Court, the question of delay should not be a hurdle nor should that fact be a ground for declaring the executive instructions to be illegal and invalid.

(10) After giving my thoughtful consideration to the entire matters in the circumstances of the case, I find that the petitioners have failed to make out any case for striking down the impugned instructions. Though some judicial decisions were cited at the Bar on either side but they are hardly, in the circumstances of the case, relevant for deciding the controversy. There can be no gainsaying that when the judgment of the Supreme Court in *Shamsher Jang Shukla's case* (supra) had come, the State Government could have legally, rather should have given the benefit of that judgment to all the officials whose promotion had been adversely affected by the instructions issued in the year, 1958. The State Government for the reasons best known to it, though to me it appears that it was a case of non-applicability of mind, had issued instructions in the year, 1973 to give benefit of the judgment to only those who had gone to Court of law; but finding that the Punjab Government had issued instructions to give benefit of seniority to all those officials whose seniority was affected, the State of Haryana decided to re-consider the matter. In my view, there does not appear to be anything wrong or illegal on the part of the Government in deciding to re-consider the issue especially when the State of Punjab had issued instructions for the implementation of the judgment. Again, it is most unfortunate that the desire of the then Chief Minister remained unfulfilled as a result of red-tapism in the Secretariat. A high-powered Committee though appointed in 1978 took full four years to submit its report, least realising that the delay would result in great hardship to the poor officials who were all the time praying for the

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implementation of the judgment of the Supreme Court. It is correct that the Committee did not recommend any change in the instructions but I find that no plausible reason has been given by the Committee and only the question of delay has weighed with the Committee for sticking to the instructions issued in 1973. I do not agree with the learned counsel for the petitioners that any well considered, conscious decision was taken in the year, 1973 for not implementing the judgment in *Shamsher Jang Shukla's case* (supra). Rather the fact appears to be that casually and without applicability of mind, instructions were issued to implement the decision only with regard to officials who had gone to Court of law. If the Government had at that time applied its mind, then certainly it would have decided to abide by the verdict of the highest Court of the country and would not have bypassed it by limiting its applicability to those who had gone to the Court of law. It is correct that the decision of the Supreme Court was rendered only in the case of some of the officials but the ratio of that judgment is that the impugned instructions in the year, 1958 prescribing a test for promotion could not legally be issued. I fail to understand as to how could the application of that judgment be limited to only those officials who had gone to the Court of law. At that time it was expected of the State Government to have implemented the judgment even in respect of those officials who had not gone to the Court of law. However, as better sense has prevailed upon the Government now, the Courts should not allow the mistake already committed by the State Government to be perpetuated by striking down the instructions. It is in the fitness of things to see that the State Governments abide by the judicial decisions and are not permitted to give a go by on one or the other technical pretext.

(11) So far as the question of injustice is concerned, I again fail to understand as to how the petitioners are more aggrieved than those officials whose right of promotion was taken away as a result of the prescription of a test which was declared illegal by the Supreme

Court. If that test had not been prescribed, the private respondents and other persons similarly situated would have been admittedly senior to the petitioners. The petitioners should not grumble if they are deprived of their chance of future promotions in preference to the private respondents as a result of the impugned instructions which are only giving effect to the Supreme Court judgment. In this view of the matter, I hold that the impugned instructions are valid and do not suffer from any legal infirmity.

(12) Having opined on the validity of the impugned instructions, the case will now go before Single Bench for disposal on merits.

Surinder Singh, J.—I agree.

N.K.S.