

LETTERS PATENT APPEAL

Before D. Fulshaw, C.J. and Harbans Singh, J.

K. L. NANDA,—Appellant

Versus

THE SECRETARY TO THE STATE OF PUNJAB IN
ADMINISTRATIVE DEPARTMENT OF P.W.D.,—

Respondent

Letters Patent Appeal No. 274 of 1962.

1963
Dec., 12th.

Punjab Service of Engineers, Class I, P.W.D. (Buildings and Roads Branch) Rules, 1960—Rule 8—Whether ultra vires article 320 of the Constitution—Public Service Commission—Functions of—Whether advisory—Government—Whether can agree to accept its selections—Matters of seniority and promotion—Whether justiciable.

Held, that the exhaustive provisions of rule 8 of Punjab Service of Engineers, Class I, P.W.D. (Buildings and Roads Branch) Rules, 1960, regarding the method of promotion of Class II P.W.D. Officers to Class I are intended to be a complete code concerning this particular matter, and the method of selection chosen is evidently one which is intended to inspire confidence in the officers serving in Class II, particularly as regards the provisions that if any such officers eligible on the ground of seniority are proposed by the Committee to be omitted, or in other words superseded, their cases nevertheless are to be placed before the Public Service Commission with the Committee's reasons for proposing to supersede them. The rule, which undoubtedly has just as much force as if it were a statute, goes on to provide that the Government will accept not only the names selected by the Commission, but also the order of seniority fixed by it. The word "shall" in sub-rule (11) of rule 8 in the phrase "Appointments to the service shall be made by the Government from this list" is intended to be mandatory as otherwise the whole of the provisions of the rule become meaningless and the rule loses its whole point.

Held, that although undoubtedly the functions of the Public Service Commission are generally advisable and the

Government can even take decisions in service matters without even consulting the Commission, the Government can, in any particular matter, agree to accept the selections of the Commission and the order of seniority determined by it as final, as the Government has in this case by its own rules bound itself to do and for this reason the rule as it stands is not *ultra vires*.

Held, that the matters of seniority may not be justiciable, but the denial of promotion which is due to an officer under a rule having the force of a statute is certainly justiciable.

Letters Patent Appeal under Clause X of the Letters Patent of the Punjab High Court against the judgment of the Hon'ble Mr. Justice Shamsher Bahadur, passed in Civil Writ No. 410 of 1961, decided on 4th May, 1962.

H. L. SIBBAL AND RAM RANG, ADVOCATES, for Appellant.

M. S. PANNU, ADVOCATE, for the Respondent.

JUDGMENT

FALSHAW, C.J.—This is an appeal filed under clause 10 of the Letters Patent by K. L. Nanda against the order of Shamsher Bahadur J., dismissing a petition filed by him under Article 226 of the Constitution. Falshaw, C.J.

The petitioner is serving as a Sub-Divisional Officer in the P.W.D. (Buildings and Roads Branch), i.e., as an officer in Class II of the Punjab Service of Engineers. His case in a nutshell is that under the rules he is entitled to promotion to Class I of the Service.

A set of rules governing the Buildings and Roads and Public Health Branches of the P.W.D. dated the 8th of March, 1960, appeared in the Punjab Government Gazette of the 18th of March, 1960. These rules were expressly framed by the Governor in exercise of the powers conferred by the proviso to Article 309 of the

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 Constitution. The relevant words of this proviso read—
 “Provided that it shall be competent for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State to make rules regulating the recruitment and the conditions of service of persons appointed to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this Article, and any rules so made shall have effect subject to the provisions of any such Act.”

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Rule 5 deals with the recruitment to service as follows:—

- “(1) Recruitment to the service shall be made by Government by any one or more of the following methods —
- (a) by direct appointment;
 - (b) by transfer of an officer already in the service of a State Government, or of the Union;
 - (c) by promotion from Class II service.
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Clause (c) relating to appointment by promotion is dealt with by rule 8 as follows:—

- “(1) A committee consisting of the Chairman of the Public Service Commission or where the Chairman is unable to attend, any other member of the Commission representing it, the Secretary, P.W.D. (Buildings and Roads Branch), and the Chief Engineers, Punjab P.W.D., Buildings and Roads Branch, shall be constituted.

- (2) The Chairman or the Member of the Commission, as the case may be, shall preside over the meetings of the Committee.
- (3) The Committee shall meet at intervals, ordinarily not exceeding one year, and consider the cases of all eligible officers for promotion to the senior scale of the Service, as on the first day of January of that year.
- (4) The Committee shall prepare a list of officers suitable for promotion to the senior scale of the Service. The selection for inclusion in such list shall be based on merits and suitability in all respects with due regard to seniority.
- (5) The names of the officers included in this list shall be arranged in order of seniority in Class II Service:
- Provided that any junior officer who in the opinion of the Committee is of exceptional merit and suitability may be assigned a place in the list higher than that of officers senior to him.
- (6) The list so prepared shall be revised every year.
- (7) If in the process of preparing the list or its revision, it is proposed to supersede any eligible candidate, the Committee shall draw up a list of such officers and may record its reasons for the proposed supersession.
- (8) The list prepared or revised in accordance with sub-rule (4), (5) and (6) shall then be forwarded to the Commission by Government along with—
- (i) the records of all officers included in the list;

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- (ii) the records of all officers proposed to be superseded as a result of the recommendations made by the Committee;
 - (iii) the reasons, if any, recorded by the Committee for the proposed supersession of any officer;
 - (iv) the observations, if any, of the State Government on the recommendations of the Committee.
- (9) The Commission shall consider the list prepared by the Committee along with other documents received from the State Government and, unless it considers any change necessary, approve the list.
- (10) If the Commission considers it necessary to make any changes in the list received from Government, the Commission shall make the changes it proposes and forward the list it considers suitable to the State Government.
- (11) Appointments to the Service shall be made by Government from this list in the order in which names have been placed by the Commission.
- (12) Appointment by promotion may be made to an ex-cadre post, or to any post in the cadre in an officiating capacity from the list prepared under this rule."

It is not in dispute that after the publication of these rules a Committee constituted under Rule 8(1) prepared a list of Class II Candidates considered fit for promotion, and that the name of the petitioner, who by seniority was eligible, was not included in the list. The documents have not been produced in this Court, but it is to be presumed that the procedure laid down in the rules was followed, and that in accordance with

sub-rule (7) the proposal of the Committee to supersede him was intimated and its reasons for this also recorded. It is also not disputed that when the Public Service Commission considered the case it made changes in the recommendations of the Committee and included the petitioner's name at a certain place in the list of persons suitable for promotion prepared under sub-rule (10) and forwarded to the Government, but the Government nevertheless did not select him for promotion at his turn in accordance with the provisions of sub-rule (11).

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The petitioner filed a petition in this Court under Article 226 of the Constitution which came up before Tek Chand and Gosain JJ., on the 10th of February, 1961. This petition was dismissed *in limine* as premature and the petitioner was advised to make a demand to the State Government to comply with the provisions of the rule, and then approach this Court if he was refused. The petitioner followed this advice and receiving no response, filed the present petition in April, 1961.

The position adopted by the Government was that the petitioner was not considered suitable for promotion and that the Government is not bound to promote him in spite of the provisions of rule 8 and particularly sub-rule (11). It was plainly stated in the written statement submitted by Mr. B. B. Vohra, Secretary to Government, Punjab, P.W.D. (B. & R.) and Public Health Branches, that the Council of Ministers had considered the list submitted by the Public Service Commission and did not agree with it, at any rate, in respect of the present petitioner.

In the course of arguments before the learned Single Judge and before us reliance was placed on the provisions of Article 320 of the Constitution, which sets out the functions of the Union and State Public

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Service Commissions, and there is no doubt that from these provisions the duties of these Commissions in respect of appointments, promotions and disciplinary action are only advisory. It was pointed out that in the *State of U.P. v. Manbodhan Lal Srivastava* (1), it was held that it was not even a mandatory requirement of Article 320(3) that the Commission should be consulted, and in any event it was clear that the requirement of the consultation with the Commission did not extend to making the advice of the Commission on those matters binding on the Government.

The argument which chiefly prevailed with the learned Single Judge was that rule 8 appeared to be *ultra vires* in the light of the provisions of Article 320 of the Constitution.

There does not appear to be any doubt that the exhaustive provisions of rule 8 regarding the method of promotion of Class II P.W.D. officers to Class I are intended to be a complete code concerning this particular matter, and the method of selection chosen is evidently one which is intended to inspire confidence in the officers serving in Class II, particularly as regards the provisions that if any such officers eligible on the ground of seniority are proposed by the Committee to be omitted, or in other words superseded, their cases nevertheless are to be placed before the Public Service Commission with the Committee's reasons for proposing to supersede them. The rule, which undoubtedly has just as much force as if it were a statute goes on to provide that the Government will accept not only the names selected by the Commission but also the order of seniority fixed by it. The learned counsel for the State contended to argue that in sub-rule (11) the word 'shall' in the phrase "Appointments to the

(1) A.I.R. 1957 S.C. 912

list" only means 'may', but in my opinion this argument is untenable, and the word is intended to be mandatory. Otherwise, the whole of the provisions of the rule become meaningless and the rule loses its whole point.

Although undoubtedly the functions of Public Service Commissions are generally advisory, and the Government can even take decisions in service matters without even consulting the Commission. I cannot see any reason why a Government cannot, in any particular matter such as this, agree to accept the selections of the Commission and the order of seniority determined by it as final, as the Government has in this case by its own rules bound itself to do, and in my opinion the rule as it stands is not *ultra vires*. If the Government finds that compliance with the rule involves inconvenient results, all it has to do is to alter the terms of the rule, but as long as the rule exists in this form and has the force of a statute, it has to be followed.

The learned counsel for the state argued that matters of seniority and promotion are not justiciable. This, however, is not merely a matter of seniority, and I am certainly of the opinion that the denial of promotion which is due to an officer under a rule having the force of a statute is certainly justiciable.

I am, therefore, of the opinion that the present appeal must succeed and that a direction must be issued to the Government to follow the provisions of the rule in the case of the petitioner, and I would order accordingly, with costs. Counsel's fee Rs. 100.

HARBANS SINGH, J.—I agree.

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