

CASE NO.:
Appeal (civil) 2708 of 2002

PETITIONER:
JAGDISH KUMAR AND ORS.

RESPONDENT:
STATE OF H. P. AND ORS.

DATE OF JUDGMENT: 11/11/2005

BENCH:
ARIJIT PASAYAT & C.K. THAKKER

JUDGMENT:
JUDGMENT

ARIJIT PASAYAT, J.

In these appeals challenge is to the legality of the judgment rendered by a Division Bench of the Himachal Pradesh High Court holding that though the appellants were eligible for regular promotion as Assistant Draftsmen, their inter-se seniority was to be reckoned with effect from the date they qualified at the departmental examinations. The judgment of the Himachal Pradesh State Administrative Tribunal (in short the 'Tribunal') holding that they were not eligible for promotion was held to be not correct.

Background facts in a nutshell are as follows:

The appellants were recruited during the period 1974-76 as Tracer Draftsmen. Respondent nos. 3 to 18 were appointed on such posts during the period from 1976 to 1980. Rules governing appointments of Tracers are covered by Himachal Pradesh P.W.D. Subordinate Services Class III Draftsman and Tracers Recruitment and Promotion Rules, 1961 (in short 'Rules'). The educational and technical qualifications of the candidates for the posts of Tracers, Assistant Draftsmen and others are provided under Rule 6 of the Rules. Respondent nos. 3 to 18 possessed the qualification of Diploma in Draftsman course. According to Rule 6(i) the requisite qualification for the post of Tracers was that the candidate must have passed matriculation examination of a recognized University or above as well as passed the Draftsman Course from a recognized Institution or as a plan printing machine operator with an experience of four years. For the post of Assistant Draftsman the requisite qualification of matriculation as well as a Diploma of Draftsman Course from a recognized Institution with an experience of minimum three years was provided. Five footnotes are appended under Rule 6 and footnote No.5 which has significance in the present dispute related to the Government's power to relax any of the provisions of the Rules with respect to any class or category of persons or posts, if it was considered necessary or expedient to do so for reasons to be recorded in writing and in consultation with the Himachal Pradesh Public Service Commission. By order dated 31.10.1973 Government relaxed Rule 6 so far as it related to appointment of Tracers Draftsman. In place of Draftsman Course, training from Industrial Training Institute (in short the 'ITI') for three months after service for one year or such period as the Chief Engineer may decide after assessing performance of the candidate was provided. Under the relaxed conditions the appellants were appointed. A seniority list was circulated on 14.10.1977 showing position as on 31.10.1975. The names of the appellants were included in the seniority list. By that time the respondent nos. 3 to 18 had not been appointed. On 19.2.1980 the Chief Engineer provided for departmental examination for the unqualified Tracers Draftsman on the ground that ITI had refused to impart training. Therefore, a departmental examination was provided and it was substituted for the training by the ITI. The appellants appeared at such departmental examination and qualified in 1980. In the seniority list

circulated on 2.6.1980 the appellants were ranked seniors to the respondent nos. 3 to 18. On 19.8.1980 the appellants were promoted as Assistant Draftsmen. Writ petitions were filed by the respondent nos. 3 to 18 challenging the appellants' appointments as Tracers Draftsmen, placement in the seniority list above them and promotion as Assistant Draftsmen. On constitution of the Tribunal, the writ petitions were transferred for disposal by it. On 5.9.1981 the Rule 6(ii) which related to the posts of Assistant Draftsman was amended and the qualification of Diploma in Draftsman Course was substituted as follows:

"6(ii) Assistant Draftsman: He has passed the Matriculation examination of a recognized University or above as well as passed the Diploma of Draftsman course from a recognized institution with an experience of minimum three years; provided that the unqualified Tracer Draftsman working in the H.P. P.W.D. will also be eligible for promotion as ADM after passing the Departmental Examination and rendering 5 years continuous service in the Deptt. since the date of their joining the Deptt. as unqualified TDM and such promotees would be considered as qualified ADM for further promotion."

The appellants were promoted on regular basis to the posts of Assistant Draftsmen under the amended Rule 6(ii) on 2.11.1981. On 14.7.1994 the original applications filed by the respondent nos. 3 to 18 were allowed. The Tribunal held that the appointment of the appellants as Tracers Draftsmen was illegal as they were neither qualified Tracer Draftsman nor qualified Assistant Draftsman. However, on the ground of equity demotion was held to be not desirable. It quashed their inclusion in the seniority list dated 2.6.1980 and the promotions on 19.8.1980 to the higher posts of Assistant Draftsmen. It directed that the respondent nos. 3 to 18 were to be considered for promotion as Assistant Draftsmen with effect from 18.8.1980. Review Petition filed by the appellants before the Tribunal was dismissed. Writ Petitions were filed by the appellants before the High Court, which, by the impugned order gave directions as noted above and moulded the reliefs.

Learned counsel for the appellants submitted that after having held that the appellants were qualified and eligible to be appointed as Draftsman, the view regarding their placement in the seniority list expressed by the High Court is clearly untenable.

On the contrary, learned counsel for the respondent nos. 3 to 18 submitted that though they have not filed any appeal challenging the view of the High Court to the effect that the appellants were eligible to be appointed as Draftsmen yet while supporting the view regarding the placement in the seniority list, challenge to their eligibility for the appointment as Tracers Draftsmen is legally permissible. It is submitted that the Chief Engineer had no power to provide for departmental examination for the unqualified Tracers Draftsmen. Rule 14 could be traced as a source of power. It is for the Chief Engineer to exercise the power. But this will have no application to a case covered by Rule 6. Further more, for the promotion as Assistant Draftsman there was no relaxation in terms of Rule 6(i) and, therefore, the promotion itself could not have been given.

Learned counsel for the appellants submitted that the respondents having not questioned the correctness of the judgment rendered by the High Court are estopped from questioning the legality of promotion as decided by the High Court.

We shall first deal with the question as to whether a party before the High Court can support the judgment on the ground found against him by the High Court. In Ramanbhai Ashabhai Patel v. Dabhi Ajitkumar Fulsinji and Ors., [1965] 1 SCR 712 it was, inter alia, held as follows:

"Before Mr. Patel referred to the finding of the High Court regarding the validity of the second respondent's nomination paper Mr. S.T. Desai appearing for the appellant raised a preliminary objection to the effect

that the first respondent was not competent to challenge the correctness of the finding as he had not preferred an appeal therefrom. In support of the contention record upon the decision of this Court in Vashist Narain Sharma v. Dev Chandra and Ors., That also was an appeal arising out of an election matter. Learned counsel for the respondent had tried to support the decision of the Tribunal on grounds which had been found against the appellant by the Tribunal. This Court did not permit him to do so on the ground that the provisions of the Code of Civil Procedure have no application to appeals brought by special leave under Art. 136 of the Constitution and observed:

"We have no appeal before us on behalf of the respondents and we are unable to allow that question to be re-agitated."

That judgment was relied upon on behalf of the appellant in Sri Baru Ram v. Shrimati Prasanni & Ors., Mr. Doabia who appeared there for the respondents challenged the correctness of the earlier decision but this Court observed:

"Prima facie there appears to be some force in this contention; but we do not think it necessary to decide this point in the present appeal. Mr. Aggarwal's objection assumes that respondent 1 should have preferred a petition for special leave to appeal against the finding of the High Court on the issue in question; if that be so, the application made by her for leave to urge additional grounds can be converted into a petition for special leave to appeal against the said finding, and the delay made in filing the same can be condoned."

It is obvious that the Division Bench followed the earlier Division Bench only-because it has considered itself bound by it. It seems to us, with respect, that the earlier decision does not correctly represent the true legal position. For, as soon as special leave is granted there is an appeal before this Court and while dealing with such an appeal this Court exercises its civil jurisdiction. It is true that the rules framed by this Court in exercise of its rule making powers do not contain any provision analogous to Order XLI, Rule 22 of the Code of Civil Procedure which permits a party to support the judgment appealed against upon a ground which has been found against him in that judgment. The provision nearest to it is the one contained in O. XVIII, r. 3 of the Rules of this Court which requires parties to file statement of cases. Sub-rule (1) of that rule provides that Part 1 of the statement of the case shall also set out the contentions of the parties and the points of law and fact arising in the appeal. further provides that in Part II a party shall set out the propositions of law to be urged in support of the contentions of the party lodging the case and the authorities in support thereof. There is no reason to limit the provision of this rule only to those contentions which deal with the points found in favour of that party in the judgment appealed from. Apart from that we think that while dealing with the appeal before it this Court has the power to decide all the points arising from the judgment appealed against and even in the absence of an express provision like O. XLI, r. 22 of the Code of Civil Procedure it can devise the appropriate procedure to be adopted at the hearing. There could be no better way of supplying the deficiency than by drawn upon the provisions of a general law like the Code of Civil Procedure and adopting such of those provisions as are suitable. We cannot lose sight of the fact that normally a party in whose favour the judgment appealed from has been given will not be granted special leave to appeal from it. Considerations of Justice, therefore, require that this Court should in appropriate cases permit a party placed in such a position to support the judgment in his favour even upon grounds which were negatived in that judgment. We are, therefore, of the opinion that in Vasisht Narain Sharma's case too narrow a view was taken regarding the powers of this Court and we over-rule the preliminary objection of Mr. S. T. Desai."

(Underlined for emphasis)

The position was re-iterated in Management of Northern Railway Co-operative Society Ltd. v. Industrial Tribunal, Rajasthan, Jaipur and Anr., [1967] 2 SCR 476.

In Shri Thepfulo Nakhr Angani v. Smt. Ravaluei @ Rano M. Shaiza, [1971] 1 SCC 431 it was noted as follows:

"3. Mr. S.V. Gupte learned counsel for the appellant tried to distinguish that decision on two grounds, viz. (1) that the decision in question was rendered in an appeal to this Court by Special Leave and as such the jurisdiction of this Court was much wider than that conferred on this Court by Section 116 (A) of the Representation of the People Act, 1951 and (2) that the scope of an appeal under Section 116(A) before its amendment in 1966 was different than from its scope at present. We are unable to accept either of these two contentions. In the above decisions, it was ruled that this Court has power to decide all the points arising from the judgment appealed against and even in the absence of an expressed provision like Order XLI, Rule 22 of the Code of Civil Procedure, this Court can devise appropriate procedure to be adopted at the hearing and there could be no better way of supplying the deficiency than by drawing upon the provisions of a general law like the Code of Civil Procedure and adopting such of those provisions as are suitable. The decision of the Court did not rest either on the ground that the appeal before it was brought by special leave of this Court or on the interpretation of Section 116(A) as it then stood. The reasons behind the rule laid down by this Court are found at page 725 of the report. Therein it is observed:

It is true that the rules framed by this Court in exercise of its rule making powers do not contain any provision analogous to Order XLI, Rule 22 of the Code of Civil Procedure which permits a party to support the judgment appealed against upon a ground which has been found against him in that judgment. The provision nearest to it is the one contained in Order XVIII, rule 3 of the Rules of this Court which requires parties to file statement of cases. Sub-rule (1) of that Rule provides that Part-I of the statement of the case shall also set out the contentions of the parties and the points of law and fact arising in the appeal. It further provides that in Part-II a party shall set out the propositions of law to be urged in support of the contentions of the party lodging the case and the authorities in support thereof. There is no reason to limit the provision of this Rule only to those contentions which deal with the points found in favour of that party in the judgment appealed from. Apart from that we think that while dealing with the appeal before it, this Court has the power to decide all the points arising from the judgment appealed against and even in the absence of an express provision like Order XLI, Rule 22 of the Code of Civil Procedure it can devise the appropriate procedure to be adopted at the hearing. There could be no better way of supplying the deficiency than by drawing upon the provisions of a general law like the Code of Civil Procedure and adopting such of those provisions as are suitable. We cannot lose sight of the fact that normally a party in whose favour the judgment appealed from has been given will not be granted special leave to

appeal from it. Considerations of justice, therefore, require that this Court should in appropriate cases permit a party placed in such a position to support the judgment in his favour even upon grounds which were negatived in that judgment."

In J.K. Cotton Spinning and Weaving Mills Co. Ltd. v. Collector of Central Excise, [1998] 3 SCC 540 it was noted as follows:

"25. A three Judge Bench of this Court in Vashist Narain Sharma v. Dev Chandra, AIR (1954) SC 513 did not permit a respondent in an appeal filed by Special Leave under Article 136 to support the decision challenged in the appeal on a ground which had been found against him. The Court held that the corresponding provision in the Civil Procedure Code had no application to an appeal filed by special leave under Article 136.

26. The aforesaid decision was cited before another three-Judge Bench in the case of Baru Ram v. Prasanni, AIR (1959) SC 93 where it was not dissented from. But in the light of the decision of the Constitution Bench of this Court in Ramanbhai Ashabhai v. Dabhi Ajitkumar Fulsinji, AIR (1965) SC 669 the ratio adopted in the earlier mentioned two decisions is no more in vogue. The Constitution Bench held that this Court has power to decide all points arising from the impugned judgment and even in the absence of an express provision like Order 41, Rule 22 CPC, this Court can devise appropriate procedure to be adopted at the hearing. The observations of the Bench which are relevant now are the following:

"There could be no better way of supplying the deficiency than by drawing upon the provisions of a general law like the Code of Civil Procedure and adopting such of those provisions as are suitable. We cannot lose sight of the fact that normally a party in whose favour the judgment appealed from has been given will not be granted special leave to appeal from it. Consideration of justice, therefore, require that this Court shall in appropriate cases permit a party placed in such a position to support the judgment in his favour even upon grounds which were negatived in that judgment. We are therefore of the opinion that in Vashisht Narayan Sharma case, too narrow a view was taken regarding the powers of this Court... ..".

(underlined for emphasis)

27. We, therefore, concede that the respondents cannot be precluded in this appeal from canvassing for reversal of a finding contained in the impugned judgment despite its end result being in their favour."

Therefore, the stand of respondent nos. 3 to 18 that even though they have not filed an appeal, they can question correctness of the view adverse to them, on the facts of the present case, needs to be accepted. It is to be noted that in Ramanbhai's, case (supra) and Shri Thepfulo's, case (supra), it was held by this Court that in "appropriate cases" this Court can permit a non-appealing party to support the impugned judgment even upon grounds which were negatived in that judgment. The Court has to consider whether in the case before it the non-appealing party should be permitted to do so. On the factual background highlighted above, we consider this to be case where the respondent nos. 3 to 18 should be permitted to do so.

The two rules referred to by the learned counsel for the parties are Rules 6 and 14. They read as follows:

"6. Educational and Technical Qualifications of Candidates:-

No person shall be appointed to the service unless in the case of appointment to the post of:-

(i) Tracers: He has passed the matriculation examination of a recognized University or above as well as passed the Draftsman Course from a recognized Institution or as a plan printing machine operator with an experience of four years.

(ii) Assistant Draftsman: He has passed the matriculation examination of a recognized University or above as well as passed the diploma of Draftsman Course from a recognized Institution with an experience of minimum three years.

(iii) Junior Architectural Draftsman: He has passed the matriculation examination of a recognize University or above as well as passed the Diploma of Draftsman Course or passed second year of Architectural Course from recognized Institution.

(iv) Divisional Head Draftsman: He has passed the matriculation examination of a University or above as well as the Diploma of Draftsman Course from a recognized Institution with experience of minimum of 6 years or Diploma in Civil Engineering from a recognized Institution.

(v) Senior Architectural Draftsman:

xxxx xxxx xxx

(vi) Circle Head Draftsman: He has passed the matriculation examination of a recognised University or above as well as passed the Diploma of Draftsman Course from a recognized Institution with 10 years experience or diploma in Engineering from a recognized Institution with three years experience or degree in Engineering from recognized Institution.

(vii) Circle Draftsman in Chief Engineer's Office: He passed the matriculation examination of a recognized University or above as well as passed the Diploma of Draftsman Course from a recognized Institution with 12 years experience after qualifying or diploma in Civil Engineering from a recognized Institution with 5 years experience or Degree in Civil Engineering from a recognized Institution.

Note: In relation to posts of Senior Architectural Draftsman, Circle Head Draftsman and Circle Draftsman in Chief Engineer's Office, refer in Rule 6(v), 6(vi) and 6(vii).

1. Age and qualification in case of direct recruit will be relaxable as the discretion of the Commission in case of candidate otherwise well qualified.

2. Age limit for direct recruits will be reckoned from the last date fixed for receipt of application by the Commission.

3. Knowledge of customs, manners and dialects of Himachal Pradesh and suitability for appointment in the peculiar condition prevailing in the Himachal Pradesh shall be desirable qualifications.

4. Selection for appointment to these posts in case of direct recruits shall be made on the basis of viva voce test, if the Commission so consider necessary or expedient, by a written test, the standard/syllabus etc. of which will be determined by the Commission or a practical test.

5. Where the Government is of the opinion that it is necessary or expedient to do so, it may by order for reasons to be recorded in writing and in consultation with the Himachal Pradesh Public Service Commission relax any of the provisions of these rules with respect to any class or category of persons or posts.

Desirable Qualification:

The candidate should possess the knowledge of customs, manners and dialects of Himachal Pradesh and the suitability for appointment in the peculiar conditions prevailing in the Himachal Pradesh.

14. Passing of examinations: The members of the service shall have to qualify examinations or to undergo training as may be prescribed by the Chief Engineer from time to time for any class of posts in the service."

The Government relaxed the requirement of Rule 6 by order dated 31.10.1973. It reads as follows:

"I am directed to refer to your letter No.PWE-125-1/71-(RR) /ESI-12206 dated 29.5.1973, on the subject noted above and to convey the approval of the Government to the relaxation of the condition of qualification for the post of Tracer Draftsman prescribed in the H.P.PWD Subordinate Services Class III, Draftsman and Tracers, Recruitment and Promotion Rules, 1961 to the extent that candidates who have passed matriculation examination of the recognized institutions or equivalent examination with drawing as one of the elective subject may be recruited against the post of Tracer Draftsman. Such candidates shall be required to undergo training in one of the I.T.Is at least for a period of 3 months after completing one year service or as may be prescribed by the Chief Engineer after assessing the performance of such candidates. This relaxation has, however, been given as a special case keeping in view the non-availability of trained hands in the State.

Yours faithfully,

Sd/-

(B.D. Shaunak)

Under Secretary (PW)

To the Govt. of HP"

The Chief Engineer vide his office order dated 19.2.1980 noted as follows:

"With the approval of the Himachal Pradesh Government conveyed vide their letter No.1-159/71-PWD-A dated 31.10.1973 the certain posts of Tracer Draftsman were filled up in this Department by the unqualified candidates who had posted Matric with drawing as one of the elective subject.

It has now been decided to hold departmental examination on 14.4.1980 for such unqualified Tracer Draftsman/Draftsman working in this Department. There will be two papers in the said examination; one on the subject of construction of buildings and road. Etc. and the second for estimating etc. The syllabus will be as per enclosure attached and may be given vide circulation.

Sd/-

(I.D. Mirchandani)

Chief Engineer,

HP, PWD, Simla-I"

A combined reading of letter dated 31.10.1973 and the office order dated

19.2.1980 shows that the latter is not really relatable to Rule 14. On the contrary, it is in continuation of the earlier letter of the Government. That being so, the challenge of the respondent nos. 2 to 18 to the power of the Chief Engineer to provide for the departmental examination is without merit.

Further question is whether any relaxation was necessary while giving promotion as Assistant Draftsman. For being eligible to be considered for appointment as Assistant Draftsman, the requirements are indicated in Rule 6 (ii). Once the requirement of passing diploma of Draftsman Course is relaxed in terms of Rule 6(i) for appointment as Tracer, there is no necessity for again having relaxation for being considered as Assistant Draftsman. That contingency is already taken care of when relaxation is given for appointment as Tracer. Otherwise, a person who has been found eligible to be appointed as a Tracer will not be considered for promotion as Assistant Draftsman, even though there is no illegality attached to the appointment as Tracer. Such a view would go against the logic of relaxation for appointment as Tracer.

The only other question which needs to be adjudicated is the stand of the respondents that the appointment had become really effective on the date of passing the departmental examination. This plea is equally untenable on account of the fact that the appointment itself takes effect from the date of appointment and in the event of not passing the examination the consequences follow. But that cannot be a ground to hold that there was no appointment in the eye of law till examination is passed. The Government also recognized this position as is evident from declaration of the seniority list on 14.10.1977 wherein the appellants were included in the seniority list though they had not cleared the examination by that time as no examinations were held. In the eye of law the appointment of the appellants was from the date of their initial appointment which of course was conditioned with the requirement of passing the departmental examination. Undergoing any training with the ITI was subsequently substituted by the requirement of passing the departmental examination. A feeble attempt was made to show that at no point of time the authorities have adduced any material to show that the ITI had declined to impart training and, therefore, the substitution of ITI training by the requirement of passing the departmental examination is illegal. The stand is untenable. This plea is only to be noted to be rejected because of the High Court's finding in clear terms which is as follows:

"It is not in dispute that on the concerned Authorities of I.T.Is expressing their inability to provide three months training to the petitioners and other similarly situated persons, the Chief Engineer decided to hold departmental examination by prescribing syllabus for the said examination vide his office order dated 19.2.1980 (Annexure P-3), which the petitioners qualified as per Notification dated 24.5.1980 and in December, 1980."

Above being the position, the appellants are entitled to be placed in the seniority list from the date of their initial appointment and not from the date on which they passed the departmental examination. The appeals are allowed but with no order as to costs.