

CASE NO.:
Appeal (civil) 2336 of 2007

PETITIONER:
State of Punjab & Ors

RESPONDENT:
Arun Kumar Aggarwal & Ors

DATE OF JUDGMENT: 04/05/2007

BENCH:
H.K. SEMA & V.S. SIRPURKAR

JUDGMENT:
J U D G M E N T

CIVIL APPEAL NOS. 2336 OF 2007
(Arising out of S.L.P. (C) Nos.25592-25601 of 2005)
WITH
CIVIL APPEAL NO. 2337 and 2338 OF 2007
(Arising out of S.L.P.(C) Nos. 26872 of 2005 and 2685 of 2006)

H.K.SEMA, J.

1. Leave granted.
2. All the aforesaid appeals are directed against the judgment and order dated 18.10.2005 passed by the High Court of Punjab and Haryana in several writ petitions. The High Court by its impugned order disposed of all the writ petitions by a common order.
3. Although the hearing of these appeals has engaged our attention for a considerable length of time and spread over for many days' arguments, the dispute to be resolved is ensconced in a narrow compass.
4. We have heard the parties at length.
5. The core questions that arise for determination are these:-

(1) Whether any indefeasible right has been accrued to the diploma-holder (outstanding categories) for promotion to the post of SDO by virtue of being given current duty charge by an order dated 21.6.2001 and whether any cause of action arose by withdrawing the same by an order dated 22.6.2005.

(2) Whether old 1941 Rules or new 2004 Rules which became effective from 9.7.2004 will be applied for filling up the vacancies which arose during 2000-01 under old 1941 Rules for promotion to the post of SDO (Irrigation Department) in the State of Punjab.

Whether any indefeasible right has been accrued to the diploma-holder (outstanding categories) for promotion to the post of SDO by virtue of being given current duty charge by an order dated 21.6.2001 and whether any

cause of action arose by withdrawing the same by an order dated 22.6.2005.

6. The respondents were diploma-holder Junior Engineers. By an order dated 21.6.2001, 20 Junior Engineers Diploma-holders (outstanding category) were given current duty charge to look after the charge of SDOs. The current duty charge were given under proviso to Rule 5 of 1941 Rules, who otherwise did not possess the qualifications specified under Rule 3 of the said Rules. The power was exercised by the Government conferred under Rule 19 of 1941 Rules.

7. The CDC/look after charge was given subject to the following conditions:-

(A) This CDC/Look After charge shall be on the basis of approval to be granted as per instructions issued by the Personnel Department, Punjab, vide letter No. 4/2/2001- 3PP.1/3318 dated 15th March, 2001.

(B) This charge is temporary in the existing pay scale of official and can be withdrawn without any prior notice and the officer cannot claim seniority etc. on the basis thereof.

(C) The official on the basis of this CDC/ Look after charge cannot raise any claim for promotion under the provisions of Rule 3(1)(c) of the P.E.S. Class 2 Rules, 1941.

(D) This CDC/Look after charge shall be subject to the decision in different cases to be given by different Courts.

8. The CDC was subsequently withdrawn by an order dated 22.6.2005 which was impugned by the diploma holders (outstanding category) by filing various writ petitions. Many grounds were recited supporting the decision to withdraw the CDC. One shocking ground which we are tempted to quote is as under:-

"Whereas regular enquiry No.28/2002 was registered by the Vigilance Bureau Punjab for tempering/stage-managing outstanding reports by the Junior Engineers for getting Current Duty Charge of the post of S.D.O. by Junior Engineer and the same is still under investigation."

9. At this stage, we may point out one of the arguments of Mr. Nageswara Rao, learned senior counsel, appearing for diploma-holders (non outstanding category) that the diploma-holders represented by him are senior to those who obtained outstanding certificates. They are also more meritorious but outstanding certificate was not granted to them. In the back drop of the reasons recited, which we have

noticed above, the contention of Mr. Rao appears to hold some water.

10. The other ground recited in the order dated 22.6.2005 supporting withdrawal of CDC which in our view would be relevant to resolve the present controversy is in the following terms:-

"Whereas, Govt. has notified Punjab Irrigation Department (Group-A) Service Rules, 2004 on 30.4.2004 and it has been decided to fill up the vacant posts of S.D.Os on regular basis from amongst Junior Engineers by holding D.P.C. under the Provisions of new Rules, 2004 ibid.

Now, therefore, in view of position explained above when new Departmental Service Rules, 2004 have been notified and Govt. has issued fresh guidelines on 19.04.2005 for granting Current Duty Charge and it has also been decided to fill up the Vacant posts of S.D.Os. on regular basis by holding D.P.C. the continuity of holding Current Duty Charge of the post of S.D.O. by the above mentioned 20 Junior Engineers is not in public interest, the Government of Punjab is pleased to withdraw the Current Duty Charge of the post of S.D.Os. from these above mentioned 20 Junior Engineers with immediate effect and these 20 junior engineers shall continue to work as Junior Engineers against their original posts."

(emphasis supplied)

11. It will be pertinent to mention that the respondents/writ petitioners also challenged the vires of 2004 Rules but given up. The High Court was of the view that since vacancies arose under 1941 Rules, it should be filled up on the basis of 1941 Rules. The High Court quashed the order dated 22.6.2005 and directed the Government to fill up posts under the Government instructions issued on 1.10.1999, 29.12.2000 and 25.9.2003. The High Court further held that the vacancies fallen prior to 31.3.2001 shall be filled up by following the criteria indicated by instructions dated 1.10.1999 and 29.12.2000 for determination of outstanding merit in terms of 1941 Rules.

12. The High Court, in our view, completely ignored the settled law enunciated by this Court on the subject.

13. To avoid multiplicity, this Court in the case of Ramakant Shripad Sinai Advalpalkar vs. Union of India, 1991 Supp.(2) SCC 733, held in paragraph 5 as under:-

"The arrangements contemplated by this order plainly do not amount to a promotion of the appellant to the post of Treasurer. The distinction between a situation where a government servant is promoted to a higher post and one where he is merely asked to discharge the duties of the higher post is too clear to require any reiteration. Asking an officer who substantively holds a lower post merely to discharge the duties of a higher post cannot be treated as a promotion. In such a

case he does not get the salary of the higher post; but gets only what in service parlance is called a "charge allowance". Such situations are contemplated where exigencies of public service necessitate such arrangements and even consideration of seniority do not enter into it. The person continues to hold his substantive lower post and only discharges the duties of the higher post essentially as a stop-gap arrangement"

14. In the case of State of Haryana vs. S.M. Sharma, 1993 Supp.(3) SCC 252, while considering the identical question this Court held in paragraphs 11 and 12 as under:-

"11. Sharma was given the current duty charge of the post of Executive Engineer under the orders of the Chief Administrator and the said charge was also withdrawn by the same authority. We have already reproduced above Rule 4(2) of the General Rules and Rule 13 of the Service Rules. We are of the view that the Chief Administrator, in the facts and circumstances of this case, was within his powers to issue the two orders dated June 13, 1991 and January 6, 1992.

12. We are constrained to say that the High Court extended its extraordinary jurisdiction under Article 226 of the Constitution of India to a frivolity. No one has a right to ask for or stick to a current duty charge. The impugned order did not cause any financial loss or prejudice of any kind to Sharma. He had no cause of action whatsoever to invoke the writ jurisdiction of the High Court. It was a patent misuse of the process of the court."

15. We, accordingly, hold no such right much less indefeasible right has been accrued to the diploma-holder junior engineers (outstanding category) by virtue of giving CDC to the post of S.D.O. for regularization in the post. It was purely a stopgap arrangement, neither based on seniority nor efficiency and no cause of action arises by withdrawing the same by the order dated 22.6.2005.

16. Though by now, it has become an academic question, because, in view of our interim order no one is holding the current duty charge and also in view of the fact that the new Rules namely 2004 Rules have now become operative and there is no provision under new Rules for outstanding category. Be that as it may, we are not persuaded to accept the view taken by the High Court and the order of the High Court quashing the order dated 22.6.2005 is set aside.

Whether old 1941 Rules or new 2004 Rules which became effective from 9.7.2004 will be applied for filling up the vacancies which arose during 2000-01 under old 1941 Rules for promotion to the posts of SDO (Irrigation Department) in the State of Punjab.

17. 1941 Rules were repealed by 2004 Rules. The reason why 1941 Rules were repealed by the new Rules appear to be that there was no channel of promotion for diploma-

holders under old Rules. The only provision on which diploma-holders could be accommodated was proviso to Rule 5, which deals with the relaxation of the Rules. Proviso to Rule 5 reads:-

"Provided that this rule may be relaxed by Government on the recommendations of Chief Engineer in order to admit the promotion of a member of the Oversees Engineering Service or Irrigation Branch, Punjab or Irrigation Branch (Provincial Draftsman and Tracers) Service of 'outstanding merit' who may not possess the qualifications specified in Rule 3."

(emphasis supplied)

Now under 2004 Rules the diploma-holders are entitled to 25% out of 40% promotional quota. The criteria of outstanding merits are also done away with by the new 2004 Rules and now the criteria applicable for promotion is seniority- cum- merit. Mr. Rao learned senior counsel contended that in view of the aforesaid background the Government has brought out the new 2004 Rules, which have become effective from 9.7.2004. He further contended that 1941 Rules were not amended but were repealed by 2004 Rules and therefore the executive instructions issued under 1941 Rules do not survive. He has invited our pointed attention to Rule 10 of 2004 Rules, which deals with Repeal and saving. Rule 10 is reproduced in extenso:-

10. Repeal and saving. The Punjab Service of Engineers Class-II, (Irrigation Branch) Rules, 1941 and the Punjab Services of Engineers Class-I, P.W.D. (Irrigation Branch Rules, 1964, are hereby repealed:

Provided that any order issued or any action taken under the rules, so repealed, shall be deemed to have been issued or taken under the corresponding provisions of these rules."

He, accordingly, contended that 1941 Rules are not in existence and the instructions issued under 1941 Rules are extinct along with the Rules. He further contended that 2004 Rules created new posts and those posts need to be filled up in accordance with 2004 Rules. He further argued that the conscious decision has been taken by the Government to fill up the vacancies under the new Rules and, therefore, the High Court was wrong in directing to fill up the vacancies under 1941 Rules, which were not in existence.

18. Per contra Dr. Dhawan contended that the vacancies arose during 2000-01 under 1941 Rules and, therefore, these should be filled up under the 1941 Rules. He further contended that the vacancies so arisen under 1941 Rules be filled up according to the instructions issued on 1.10.1999, 29.12.2000 and 25.9.2003. He further contended that there was no conscious decision arrived at by the Government. According to him, such conscious decision, if any, must be based on deliberations. According to him, there was no such deliberation. He further contended that the conscious decision of the Government, if any, cannot unsettle the Rules.

WHETHER THERE WAS ANY CONSCIOUS DECISION BY
THE GOVERNMENT TO FILL UP THE VACANCIES UNDER
THE NEW RULES?

19. We have already noticed that in 1941 Rules there was no provision for promotion quota for diploma holders. Instead, under proviso to Rule 5 relaxation of the Rules provided to the extent of outstanding merit for diploma holders. The outstanding merit category has been done away with by new 2004 Rules. In 2004 Rules, the diploma holders are entitled to 25% out of 40% promotional quota.

20. While it is true that there appears to be no definite decision arrived at based on deliberations, the intendment of the authorities can be gathered from various background and circumstances.

21. As already noted in the withdrawal order of 22.6.2005 one of the reasons recited for withdrawal of CDC was, at the risk of repetition runs as under:

"Whereas, Govt. has notified Punjab Irrigation Department (Group-A) Service Rules, 2004 on 30.4.2004 and it has been decided to fill up the vacant posts of S.D.Os on regular basis from amongst Junior Engineers by holding D.P.C. under the Provisions of new Rules, 2004 *ibid*.

22. Civil Writ Petition No. 11644 of 1999 was filed by Satbir Singh (AMIE Holder) praying for a mandamus to allot 31% of the promotional quota to their category. The counter affidavit was filed by one Mr. Samir Kumar IAS on 31.5.2000 before the High Court in Civil Misc. No.10810 of 2000 in C.W.P.No.11644 of 1999. It is stated in paragraphs 1 to 3 as under:

1. That the Government is considering to amend the PSE Class II Rules 1941 and Committee of 3 Chief Engineers namely Shri P.K. Singla, Chief Engineer, Canals IW, Punjab, Shri Sarup Singh, Chief Engineer National Highways, Patiala and Shri Jatinder Singh, Chief Engineer/Public Health, Patiala has been constituted for making recommendations with regard to fixing the quota for different categories and its due incorporation in the PSE Class 1 rules by amending the same.

2. The regular promotion on the posts of SDO's will be considered after finalization/amendment of the Departmental Service Rules as explained in para 3 of the Preliminary objection.

3. The regular promotions of SDOs cannot be considered at this stage because the Government is considering the amendment/finalization of departmental service rules as explained in preliminary objections."

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23. From the record it appears that the Government also constituted DPC for category of outstanding merit candidates on various dates namely March, 2001, 30th April, 2001, 8th

November, 2001, 21st November 2001, 9th January 2002 and 29th May, 2002. On all these days although the date was fixed but no DPC was conducted. This would also indicate that the Government was keeping in its mind the impending new Rules of 2004.

24. Mr. Rao, therefore, contended that the conscious decision was taken by the Government not to fill up the posts under the 1941 Rules. In view of the conscious decision taken by the Government, the Government, therefore, did not conduct any DPC for promotion to the post of SDO. To substantiate his contention he has invited our attention to the decision of this Court in *Dr. K. Ramulu vs. Dr. S. Suryaprakash Rao*, (1997) 3 SCC 59. The three Judge Bench of this Court after referring to various decisions of this Court upheld the conscious decision of the Government not to fill up the post in view of the impending new rules. This Court finally held in paragraph 15 at scc p.67 as under:-

"15. Thus, we hold that the first respondent has not acquired any vested right for being considered for promotion in accordance with the repealed Rules in view of the policy decision taken by the Government which we find is justifiable on the material available from the record placed before us. We hold that the Tribunal was not right and correct in directing the Government to prepare and operate the panel for promotion to the post of Assistant Directors of Animal Husbandry Department in accordance with the repealed Rules and to operate the same."

25. Dr. Dhawan contended that outstanding merit is a valid criteria. In this connection, he has referred to *Subash Chander Sharma vs. State of Punjab*, (1999) 5 SCC 171 at para 7:

"\005Both the aforesaid decisions were not directly concerned with the rules with which we are concerned in these appeals. Rule 5, as it is worded, leaves no doubt that the rule-making authority intended by enacting the second proviso that a Temporary Engineer/Overseer referred to therein should also satisfy other conditions before he can be promoted to Class II service\005.The last proviso could not have been intended to enable the Government to relax the other conditions mentioned in the second proviso in the case of the class of persons referred to in the last proviso. Outstanding merit of a member of the Overseers Engineering Service or Draftsmen and Tracers Service obviously could not have been ascertained unless he had completed at least two years' continuous service. Similarly a person having outstanding merit could have been easily declared by the Commission on the report of the Chief Engineer to be fit for service and, therefore, there was hardly any point in making a special provision for relaxation of such conditions. It is also not possible to believe that the said proviso was enacted for dispensing with the requirement of age. It would not have been difficult for a person having outstanding merit to have passed a

departmental test and, therefore, it is not possible to believe that the last proviso was enacted with a view to dispense with the requirement of that condition\005"

26. He has also referred to J.N. Goel v. Union of India (1997) 2 SCC 440 at para 14:

"We may now come to the proviso to Rule 21(3) which was inserted in 1972. As noticed earlier, the proviso permits relaxation in the matter of educational qualifications for promotion of Assistant Engineers to the cadre of Executive Engineers and an Assistant Engineer though not a graduate could be promoted provided he had "outstanding ability and record". The said criterion of "outstanding ability and record" prescribed by the proviso cannot be regarded as vague or arbitrary. In service jurisprudence "outstanding merit" is a well-recognised concept for promotion to a selection post on the basis of merit. Such assessment of outstanding merit is made by the DPC on the basis of the record of performance of the employee. It cannot, therefore, be said that the proviso to Rule 21(3) which enabled a diploma-holder Assistant Engineer to be promoted as Executive Engineer if he had "outstanding ability and record" suffers from the vice of arbitrariness\005"

27. In our view, the decisions of this Court, referred to by Dr. Dhawan are not at all applicable in the facts and circumstances of the case at hand.

28. We are gravely concerned with the manner in which the certificates of outstanding merit categories were obtained by diploma-holders (respondents herein). It is disclosed in the impugned order of 22nd June, 2005 that the certificates of outstanding merit categories were obtained by tempering/stage managing and manipulation by diploma-holders Junior Engineers for getting CDC of the post of S.D.O. This has casted a serious doubt of the credibility of their outstanding merit categories. It is also disclosed that enquiry No. 28/2002 was also registered by Vigilance Bureau, Punjab. We found ourselves extremely difficult to sift the grain from the chaff. This is one of the reasons that persuaded the appropriate authority for taking conscious decision not to fill up the post under 1941 Rules.

29. Dr. Dhawan also contended that the vacancies are to be filled up in accordance with the contemporary Rules. In this connection he has referred to Y.V. Rangaiah v J.Sreenivasa Rao, (1983) 3 SCC 284 at para 9:

"\005Under the old rules a panel had to be prepared every year in September. Accordingly, a panel should have been prepared in the year 1976 and transfer or promotion to the post of Sub-Registrar Grade II should have been made out of that panel. In that event the petitioners in the two representation petitions who ranked higher than Respondents 3 to 15 would not have been deprived of their right of being considered for promotion. The vacancies which occurred prior to the amended rules would be governed

by the old rules and not by the amended rules. It is admitted by counsel for both the parties that henceforth promotion to the post of Sub-Registrar Grade II will be according to the new rules on the zonal basis and not on the State-wise basis and, therefore, there was no question of challenging the new rules. But the question is of filling the vacancies that occurred prior to the amended rules. We have not the slightest doubt that the posts which fell vacant prior to the amended rules would be governed by the old rules and not by the new rules."

30. There is no quarrel over the proposition of law that normal Rule is that the vacancy prior to new Rules would be governed by the old Rules and not by the new Rules. However, in the present case, we have already held that the Government has taken conscious decision not to fill the vacancy under the old Rules and that such decision has been validly taken keeping in view the facts and circumstances of the case.

31. Dr.Dhawan has also referred to P.Ganeshwar Rao vs. State of A.P. (1988) Supp. SCC 740 at para 11: "In view of the foregoing we are of the view that the observations made by the Tribunal to the following effect, namely:

In this case the Rules for recruitment have been changed on April 28, 1980. Hence, prima facie it would not be legal to make direct recruitment against temporary vacancies, even if the vacancies were at an earlier date earmarked for direct recruits\005. In these circumstances, there is, in my opinion, no scope for direct recruitment against temporary vacancies after April 28, 1980 i.e. the date on which the Rules were amended as stated above.

are unsustainable. We hold that the amendment made on April 28, 1980 does not apply to the vacancies which had arisen prior to the date of the amendment."

32. He has also referred to B.L. Gupta vs M.C.D., (1988) 9 SCC 223 at para 9:

"When the statutory rules had been framed in 1978, the vacancies had to be filled only according to the said Rules. The Rules of 1995 have been held to be prospective by the High Court and in our opinion this was the correct conclusion. This being so, the question which arises is whether the vacancies which had arisen earlier than 1995 can be filled as per the 1995 Rules. Our attention has been drawn by Mr.Mehta to a decision of this Court in the case of N.T. Devin Katti v. Karnataka Public Service Commission. In that case after referring to the earlier decisions in the cases of Y.V. Rangaiah v. J.Sreenivasa Rao, P. Ganeshwar Rao v. State of A.P. and A.A. Calton v. Director of Education it was held by

this Court that the vacancies which had occurred prior to the amendment of the Rules would be governed by the old Rules and not by the amended Rules. Though the High Court has referred to these judgments, but for the reasons which are not easily decipherable its applicability was only restricted to 79 and not 171 vacancies, which admittedly existed\005"

33. He further submitted that rights of candidates that are eligible under the unamended Rules cannot be taken away by subsequent amendment. In this connection, he referred to *P. Mahendran vs. State of Karnataka*, (1990) 1 SCC 411 at para 5.

"\005Since the amending Rules were not retrospective, it could not adversely affect the right of those candidates who were qualified for selection and appointment on the date they applied for the post, moreover as the process of selection had already commenced when the amending Rules came into force, the amended Rules could not affect the existing rights of those candidates who were being considered for selection as they possessed the requisite qualifications prescribed by the Rules before its amendment moreover construction of amending Rules should be made in a reasonable manner to avoid unnecessary hardship to those who have no control over the subject matter."

34. He further contended that the power of appointing authority for the post amendment cases confined to those cases. Reference is made to *AA Calton vs. Director of Education*, (1983) 3 SCC 33 at para 5:

"\005Although the Director in the present case exercised that power subsequent to August 18, 1975 on which date the amendment came into force, it cannot be said that the selection made by him was illegal since the amending law had no retrospective effect. It did not have any effect on the proceedings which had commenced prior to August 18, 1975. Such proceedings had to be continued in accordance with the law as it stood at the commencement of the said proceedings. We do not, therefore, find any substance in the contention of the learned counsel for the appellant that the law as amended by the U.P. Act 26 of 1975 should have been followed in the present case."

35. All the decisions referred to above are relating to amendment of the Rules. We have already held that 1941 Rules were repealed by 2004 Rules. The facts of those cases are, therefore, not applicable to the facts of the present case.

36. Dr. Dhawan further argued that the diploma-holders outstanding merit candidates have vested rights under 1941 Rules and that rights under new Rules are saved and not repealed by 2004 Rules. Reference is made to *N.T. Devin Katti vs. KPSC*, (1990) 3 SCC 157 at para 11: "\005.Lest there be any confusion, we would like to make it clear that a candidate on making application for a post pursuant to an advertisement does not acquire any vested right of selection, but if he is eligible and is

otherwise qualified in accordance with the relevant rules and the terms contained in the advertisement, he does acquire a vested right of being considered for selection in accordance with the rules as they existed on the date of advertisement. He cannot be deprived of that limited right on the amendment of rules during the pendency of selection unless the amended rules are retrospective in nature."

(emphasis supplied)

37. These decisions are of no assistance to the diploma-holders outstanding category, in the view that we have taken.

38. We hold the Government has taken conscious decision not to fill up the posts under the old 1941 Rules. The impugned order of the High Court is set aside. We may at this stage point out that the problem seems to have been compounded by the inaction/casual approach of the Government detrimental to public interest. The State Government shall now fill up the vacant posts in accordance with the 2004 Rules within a period of three months from today. All the eligible candidates who satisfy the criteria laid down under 2004 Rules shall be considered. The entire process of recommendation and appointment shall be completed within three months from today.

39. The impugned order of the High Court is set aside. The appeals are disposed of in terms of the above directions. No costs.