

PETITIONER:
SH. MADAN GOPAL GARG

Vs.

RESPONDENT:
STATE OF PUNJAB & ORS.

DATE OF JUDGMENT 11/07/1995

BENCH:
AGRAWAL, S.C. (J)
BENCH:
AGRAWAL, S.C. (J)
MANOHAR SUJATA V. (J)

CITATION:
1995 SCC Supl. (3) 366 JT 1995 (6) 188
1995 SCALE (4) 361

ACT:

HEADNOTE:

JUDGMENT:

THE 11TH DAY OF JULY, 1995

Present:

Hon'ble Mr. Justice S. C. Agarwal
Hon'ble Ms. Justice Sujata V. Manohar

Mr.R.Venkataramani, and Mr.Satya Mitra Garg, Advs. for the
appellant.

Mr. Gobinda Mukhoty, Sr. Adv. Mr. Raj Kumar Gupta,
Mr. Rajesh, Advs. with him for the Respondent No.2
Mr. Ranbir Yadav, Mr. Sanjay Bansal and Mr.G.K.Bansal, Advs.
for the State of Punjab.

J U D G M E N T

The following Judgment of the Court was delivered:

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO.710 OF 1987

Shri Madan Gopal Garg

Versus

State of Punjab & Ors.

JUDGMENT

S.C.AGRAWAL.J. :

This appeal involves the question regarding inter se seniority of promotees and direct recruits. The posts in question are of District Food & Supplies Controller [for short "Controller"] and the deputy Director, Food & Supplies [for short "Deputy Director"] in the State of Punjab, governed by the Punjab Food & supplies Department (state Service Class-II) Rules, 1966 (hereinafter referred to as the Rules). Rules 6(1)(g) of the Rules provides for appointment on the post of Controller - (i) by promotion of District Food and Supplies, Officer or Superintendent in the Department, (ii) by transfer of Administrative officer, Food and Supplies, and (iii) by direct appointment. It further provides that 33% vacancies shall be filled by direct appointment. The appointment for the post of Deputy Director is governed by Rule 6(1)(a) The said appointment is made (i)

by promotion of the Assistant Director, Food and Supplies/District Food and Supplies Controllers/Administrative Officer, or Officer on Special Duty, (ii) by promotion of Account Officer, Food and Supplies or Assistant Controller of Food Accounts, and (iii) by transfer of an officer already in the service of Government of India or of a State Government. Seniority is governed by Rule 10 which prescribes that for the purpose of seniority service shall be divided into four groups. One of those groups is that of Deputy Directors and District Organisers, Food and Supplies and another group is of Assistant Directors, Food and Supplies and Controllers. As per Sub-Rule (2) of Rule 10 the seniority inter se of members of each group has to be determined by the dates of their continuous appointments in the service.

The appellant and respondent no.3 are promotees having been first promoted as Controller and later as Deputy Director. The appellant was promoted as Controller by order dated April 21, 1973 while respondent no.3 was so promoted by order dated August 17, 1972. Subsequently, the promotion of the appellant to the post of Controller was made effective from December 6, 1972. The appellant was promoted as Deputy Director by order dated December 29, 1981/January 1, 1982 while respondent No.3 was so promoted by an order dated February 17, 1981. Respondent no.2 was directly appointed as Controller after being selected by the State Public Service Commission, by order dated April 9, 1974. He was promoted as Deputy Director by order dated November 10, 1982. The tentative seniority list of Controllers was circulated by memo dated January 6, 1981 wherein respondent no.2 (placed at S.No. 44) was shown as junior to the appellant (placed at S.No. 35) and respondent no.3 (placed at S.No.33). Subsequently, in view of the decision of the Division Bench of the High Court of Punjab and Haryana in Shri S.B.S.Virk and Another Vs. Shri J.S.Bagga and Ors., 1982 (2) S.L.R. 720, the said seniority was revised vide Memo dated March 7, 1983 and respondent no.2 was placed at serial no.34 while respondent no.3 and the appellant were placed at serial nos. 35 and 37 respectively and respondent no.2 was thus shown as senior to the appellant and respondent no.3. By order dated September 22, 1983 respondent no.2 was appointed as Joint Director, Food and Supplies. Feeling aggrieved by the aforesaid revision of their seniority in the cadre of Controllers and appointment of respondent no.2 as Joint Director, the appellant and respondent no.3 filed a Writ Petition (Civil Writ Petition No.4495 of 1983) in the High Court of Punjab and Haryana wherein they sought a declaration that they are senior to respondent no.2 as Deputy Directors and prayed for quashing of the order dated September 22, 1983 appointing respondent no.2 as Joint Director. The said Writ Petition was contested by respondents nos.1 and 2. The said Writ Petition was allowed by a learned Single Judge of the High Court by Judgment dated August 2, 1985. It was held that the factual averment of the writ petitioners, namely the appellant and respondent no.3, that they had been appointed as Controllers within the quota meant for promotees had not been controverted by the respondents and it was also not disputed that they were so appointed earlier to the recruitment of respondent no.2 on the post of Controller and that they were appointed earlier than respondent no.2 as Deputy Director and, therefore, they were senior to respondent no.2 both in the cadre of Controllers as well as Deputy Directors. The learned Single Judge, therefore, held that the appointment of respondent no.2 as Joint Director which was made solely

on the basis of higher seniority in the cadre of Controllers/Assistant Director and Deputy Directors was invalid. The order dated September 22, 1983 regarding appointment of respondent no.2 as Joint Director was therefore, set aside. Respondent no.2 filed an Appeal (Letters Patent Appeal No.958 of 1985) against the said judgment of the learned Single Judge. The said appeal was allowed by a Division Bench of the High Court by the impugned judgment dated August 6, 1986. Before the Division Bench of the High Court the following two questions were agitated :

- i) Whether the promotion of the Writ Petitioners in 1972 as Controllers was within their quota?
- ii) Whether quota rule governing appointment on the vacancies in the post of Controller had broken down in view of the promotions in excess of the quota made during the period 1966 to 1974?

While considering the first question regarding the promotion of the Writ Petitioners being made within their quota, the Division Bench of the High Court found that the pleadings on this aspect of the case were not clear and were not happily worded and, therefore, the High Court by order dated January 7, 1976 directed the learned Advocate General to obtain an affidavit from the Secretary/Additional Secretary/Deputy Secretary in the Food and Supplies Department specifically mentioning as to whether the writ petitioners were holding the posts within the quota of promotees or not. It was also directed that the concerned officer should give the details of the strength of the cadre and of promotions and direct appointments made from 1966 to 1974. In compliance with the said order, the affidavit dated January 17, 1986, of Shri C.L.Bains, Special Secretary to Government of Punjab in the Department of Food and Supplies was filed wherein it was stated that the writ petitioners were not holding the post of Controller/Assistant Director/Additional District Food and Supplies Controller, within the quota or promotees and, in fact, at the time of their promotion, there was no post available in promotees' quota and that they were promoted against posts meant for direct records and temporary vacancies caused on account of proceeding on foreign service by certain officers. In the said affidavit it was stated that during the years 1966 to 1963, the cadre strength of the Controllers/Assistant Directors/Additional District Food and Supplies Controllers was 13 which was raised to 15 from the year 1968-69 and to 16 in 1969-70 and to 21 in 1970-71 and that the cadre strength continued to be 21 till March 31, 1974. It was also stated that three officers were on foreign service and there was one leave vacancy and that against the cadre strength of 21 posts, 25 persons were holding the posts of Controller/Assistant Director/Additional District Food and Supplies Controller in March, 1974 out of which only two were direct recruits. It was further stated that a requisition for making direct recruitment was sent to the Public Service Commission in June, 1972, and at that time the writ petitioners were holding the lower cadre posts of District Food and Supplies Officers. Alongwith the said affidavit a statement containing details of promotions of Controllers/Assistant Directors/Additional District Food and Supplies Controllers from 1966 to March 31, 1974 was filed as Annexure R/2 and a statement containing details of officers holding the posts of Controllers/Assistant Directors/Additional District Food and Supplies Controllers in March, 1974 was filed as Annexure R/3. Rejoinder to the said affidavit of Shri Bains were filed by the appellant but

the High Court found that he had not given any material to show that the factual picture given in the affidavit of Shri Bains was, in any way, distorted. The High Court, therefore, accepted the averments made in the affidavit of Shri Bains.

Proceeding on the basis that the strength of the cadre at the relevant time was 21, the division Bench of the High Court has held that 14 posts could be manned by promotees or officers brought on transfer and 7 posts fell to the quota of direct recruits and that according to Annexure R/2 both the writ petitioners were not in the 14 posts meant for promotees or officers brought on transfer but were lower down at S.No. 16 and 22 and were promoted against the posts meant for direct recruits and they had to make room for the direct recruits whenever they were selected and posted on these posts and therefore, they could not claim seniority under Rule 10 on the basis of continuous appointment on the post of Controller and they have been rightly shown as junior to respondent no.2 in the cadre of Controllers/Assistant Directors/Additional controllers. The learned Judges on the Division Bench have also held that the quota rule had not broken down as a result of promotions in excess of the quota being made during the period from 1966 to 1974. It was held that after the framing of the Rules in 1966 no appointments were made in 1967 and in 1968 no direct recruitment was made but the process for appointment of direct recruits must have commenced in 1969, because Shri S.B.S.Virk, a direct recruit, was appointed as Controller on January 21, 1970, on the recommendations of the State Public Service Commission and that in 1971 Shri A.S.Brar was appointed as Controller by direct recruitment and in June 1972 a requisition for making direct appointment was sent to the public Service Commission which showed that the State Government had been consistently and persistently making efforts to fill in the posts meant for direct recruits and the said posts could not be filled at the proper time only because of the cumbersome procedure of selection of direct recruits and that there was no inaction or inertia on the part of the Government and that there had been no deviation in implementing the rule and therefore, it could not be said that the quota rule had broken down.

Out of the two writ petitioners the appellant alone has filed the appeal. We will, therefore, confine ourselves to the case of the appellant alone.

Shri R. Venkataramani, the learned counsel appearing for the appellant, has assailed the correctness of the High Court judgment on both the grounds. He has urged that the High Court was in error in holding that the promotion of the appellant as Controller was in excess of the quota prescribed for promotees under the Rules and that having regard to the number of vacancies that had occurred during the period from 1966 till the date of promotion of the appellant on the said post, the said appointment has been made within the quota prescribed for promotees under the Rules. Shri Venkataramani has also submitted that in any event, the quota rule had broken down in view of the fact that only two persons had been directly recruited for appointment on the post of Controller during the period from 1966 till March 31, 1974 and therefore, the promotion of the appellant to the post of Controller could not be held to be irregular and the appellant is entitled to have his seniority in the cadre of Controllers fixed on the basis of the dated of his appointment on the said post, i.e., with effect from December 6, 1972 under Rule 10(2) of the Rules.

We will first take up the question whether the appointment of the appellant on the post of Controller with

effect from December 6, 1972 was within the quota prescribed for promotees under the Rules. The relevant provisions in this regard are contained in Rule 6 which reads as under :

"Method of appointment:

(1) Appointment to the post in the service shall be made as under :

(a) In the case of Deputy Director, Food & Supplies :

(i) by promotion of an Assistant Director, Food and Supplies/District Food and Supplies Controllers/Administrative Officer or Officer on Special Duty, having an experience of working on any of these posts for a minimum period of two years; (ii) by promotion of Accounts Officer, Food and Supplies or Assistant Controller of Food Accounts, having an experience of working on any of these posts for a minimum period of three years; or

(iii) by transfer of an officer already in the service of Government of India or of a State Government;

(b) In the case of Assistant Director, Food and Supplies:

(i) by promotion of a Superintendent in the Department or District Food and Supplies Officer in the District having an experience of working on any of these posts for a minimum period of two years; or

(ii) by transfer of Administrative Officer, Food and Supplies; or

(iii) by transfer of an officer already in the service of Government of India or of a State Government; or

(iv) by direct appointment;

Provided that 33 per cent posts shall be by the method prescribed in sub-clause(iv);

(c) to (f) xxx xxx xxx (omitted)

(g) In the case of District Food and Supplies Controller:

(i) by promotion of District Food and Supplies Officer or Superintendent in the Department having an experience of working of any of these posts for a minimum period of two years; or

(ii) by transfer of Administrative Officer, Food and Supplies; or

(iii) by direct appointment;

Provided that 33 per cent vacancies shall be filled by the method prescribed in sub-clause (iii).

(h) xxx xxx xxx (omitted)

(2) When any vacancy occurs or is about to occur in the service, the appointing authority shall determine the manner in which the vacancy is to be filled.

(3) All appointments by promotion shall be made by selection, on the basis of seniority cum-merit and no person shall have any claim to any post in the service merely on the ground of

seniority."

The seniority is governed by Rule 10 which provides as follows:

"10. Seniority of members of service:

(1) For purposes of seniority service shall be divided into the following groups :

(i) Deputy Directors, Food and Supplies and District Organisers, Food and Supplies.

(ii) Assistant Directors, Food and Supplies and District Food and Supplies Controllers.

(iii) Accounts Officer, Food and Supplies and Assistant Controller of Food Accounts.

(iv) District Food and Supplies Officers.

(2) The seniority inter se of members of the Service under each group shall be determined by the dates of their continuous appointments in the service:"

The main part of Clause(g) indicates that there are three sources from which appointment can be made on the post of Controller namely, (i) by promotion, (ii) by transfer, (iii) by direct appointment. The proviso to clause(g) requires that 33% vacancies shall be filled by the method prescribed in sub-clause (iii), i.e., by direct appointment.

In the proviso to clause (b) the expression "posts" has been used while in the proviso to clause (g) the expression "vacancies" is used. The High Court has held that both the expressions are used in the same sense to mean posts in the cadre. We do not consider it necessary to go into this question because even if the expression "vacancies" is construed to mean the vacancies in the cadre occurring after the coming into force of the Rules, the appellant cannot succeed.

The submission of Shri Venkataramani is that since the actual number of vacancies which occurred during the period from 1966 till March 31, 1974 has not been indicated by the State, the only basis for applying the quota rule can be to take into account the total number of appointments that have been made during that period. Shri Venkataramani has furnished a list indicating that during the period from July 4, 1966 to April 9, 1974, 29 persons have been appointed on the post of Controller and that out of them four are direct recruits and the rest are promotees. Shri Venkataramani has submitted that applying the quota rule 9 vacancies could be available for direct recruits out of these 29 appointments and 20 vacancies were available for promotees and that as per seniority, the appellant is placed at serial no. 19 amongst the promotees and therefore, the appointment of the appellant is within the quota. It is no doubt true that in the absence of any material which gives the actual vacancies in a year, it may be reasonable to accept the figure of appointment in that year as substantially representing the actual vacancies (See : B.S.Gupta v. Union of India, 1975 Suppl.SCR 491, at p.506). We cannot however, apply the said criterion in the present case, because a number of persons after appointment on the post of Controller have been sent on deputation and the appointments were made against temporary vacancies resulting from such officers being sent on deputation. This would be evident from Annexure R/3 to the affidavit of Shri Bains filed in the High Court which shows that in March, 1974 three officers viz., Shanti Swarup Suri, O.P.Gupta and B.N.Madhok were on deputation. We also find that by order dated 22nd March, 1974, Lakhbir Singh, G.S.Chawla and respondent no.3 were sent on deputation with the State Civil Supplies Corporation Ltd.and by another order of the same date, the appellant and Niranjana Singh were sent on deputation to the State Civil Supplies

Corporation. It has been stated in the counter affidavit filed by Shri T.R.Bhatia on behalf of the State in this Court that the appellant and respondent no.3 were sent on deputation in order to make room for the direct recruits viz., Surjit Singh and respondent no.2. We cannot, therefore, proceed on the basis that the number of vacancies during the period from 1966 to April 9, 1974 were the same as the number of persons who were appointed as Controllers during that period. Even according to the list of appointments submitted by Shri Venkataramani 23 appointments were made on the post of Controller during the period from July 7, 1966 to December 6, 1972 out of which two were direct recruits and the rest 21 were promotees or officers appointed by transfer. On the basis of the quota rule 8 posts were for direct recruits and 15 posts were available for promotees and officers appointed by transfer which would mean that an appointment made in excess of 15 posts was not within the quota fixed for promotees under the Rules. In the list submitted by Shri Venkataramani, the appellant is placed at S.No.18 in the list of promotees. His appointment on December 6, 1972, was, therefore, in excess of the quota fixed for promotees. The fact that before the appointment of direct recruits viz. Surjit Singh and respondent no.2 in March and April, 1974 the appellant and other officers had to be sent on deputation to make room for the direct recruits would show that till then no regular vacancy within the quota was available against which the appellant could be absorbed. It must, therefore, be held that the appointment of the appellant as Controller was in excess of the quota and it continued to be so till respondent no.3 was appointed by direct recruitment.

Once it is held that the appointment of the appellant was in excess of the quota fixed for promotees and officers appointed by transfer, the said appointment has to be treated as an invalid appointment and it can be treated as a regular appointment only when a vacancy is available against the promotion quota against which the said appointment can be regularised. In other words, any such appointment in excess of the quota has to be pushed down to a later year when it can be regularised as per the quota and such an appointment prior to regularisation cannot confer any right as against a person who is directly appointed within the quota prescribed for direct recruits [See : N.K. Chauhan v. State of Gujarat (1977) 1 SCR 1053 at pp. 1053 and 1058]. Since at the time of the appointment of respondent no.2, the appellant was holding the post of Controller in excess of the quota fixed for promotees, he cannot claim seniority over respondent no. 2 on the basis of such appointment and he has to make way for respondent no.2. He has, therefore, been rightly placed junior to respondent no.2 in the cadre of Controllers. In view of Rule 6(3) promotion from the post of Controller to the post of Deputy Director had to be made on the basis of seniority-cum-merit. Respondent no.2, by virtue of his being senior to the appellant in the cadre of Controllers, was entitled to be promoted as Deputy Director earlier than the appellant but he was denied such promotion in view of the earlier seniority list of January 6, 1981 wherein he was shown as junior to the appellant. But after the seniority list of March 7, 1983 wherein he is shown as senior to the appellant, respondent no. 2 is entitled to claim seniority over the appellant in the cadre of Deputy Directors also and he was rightly treated as senior to the appellant in the said cadre and on that basis he was promoted as Joint Director by order dated September 1983. We do not find any infirmity in the said order.

We are also unable to accept the contention of Shri Venkataramani that the quota Rule had broken down on account of promotions in excess of the quota having been made during the period from 1966 to 1974. As pointed out by the High Court, after the reorganisation of the State of Punjab on November 1, 1966, no appointments were made in 1967 and in 1968 no direct recruitment was made but the process for appointment of direct recruits had commenced in 1969 in view of the fact that Shri S.B.S. Virk, a direct recruit had been appointed as Controller on January 21, 1970 on the recommendations of the Punjab Public Service Commission and in 1971 Shri A.S. Brar was appointed as Controller by way of direct recruitment and in June, 1972 a requisition for selection of proper candidates for direct appointment was sent to the Punjab Public Service Commission and on the basis of the said selection Shri Surjit Singh was appointed by way of direct recruitment by order dated March 29, 1974 and respondent no.2 was so appointed by order dated April 9, 1974. The High Court has held that the State Government had been consistently and persistently making efforts to fill in the posts meant for direct recruits and that the posts meant for direct recruits could not be filled at the proper time only because of the cumbersome procedure of selection of direct recruits and that from the pleadings and facts and circumstances of the case, it was patent that there was no inaction or inertia on the part of the Government and that there had been no deviation in the implementation of the Rules. We are in agreement with the said view of the High Court. The decisions of this Court in G.S.Lamba & Ors. v. Union of India (1986) 3 SCR 431 and Narender Chadha & Ors. v. Union of India (1986) 2 SCC 157 on which reliance has been placed by Shri Venkataramani, have, in our opinion, no application to the facts of the present case.

For the reasons aforementioned, we do not find any merit in this appeal and the same is accordingly dismissed but without any order as to costs.