

(Mehinder Singh Sullar, J.)

*Before Mehinder Singh Sullar, J.*

**BALBIR SINGH ANALYST, OFFICE OF HARYANA  
ANALYST, HARYANA—Petitioner**

*versus*

**STATE OF HARYANA AND OTHERS—Respondents**

**CWP No. 15603 of 1991**

21th April; 2011

***Constitution of India—Art. 14, 16, 226 and 309—Petitioner appointed as Analyst—Petitioner claimed that respondent promoted arbitrarily as Analyst from the back date—Declared the respondent Senior to the petitioner—Quashed retrospective promotion order—Petition accepted.***

*Held*, that once, the official respondents have utterly failed to prove by cogent evidence that any post of promotional quota in the cadre of Analyst was vacant since 1982, but categorically admitted in written statement that no post in promotional quota in the cadre of Analyst was available till 1985, in that eventuality, it cannot be said and the official respondents cannot possible be heard to say that respondent No. 3 was rightly granted retrospective promotion with effect from 30th October, 1984 in this respect.

(Para No. 23)

*Further held*, that the conclusion is inescapable that the official respondents slipped into deep legal error in granting retrospective promotion *ex parte* to respondent No 3, rendering the petitioner junior to him, without issuing any notice to him inculcating and perpetuating the great injustice to the petitioner in this behalf. Meaning thereby, the impugned promotional order is not only arbitrary, illegal but against the principle of natural justice as well, which cannot legally be maintained in the obtaining circumstances of the case.

(Para No. 29)

R.K. Malik, Senior Advocate with Krishan Kumar Chahal, Advocate  
*for the petitioner.*

Kirti Singh, Deputy Advocate General, Haryana *for respondent Nos.*  
*1 and 2.*

C.M. Chopra, Advocate *for respondent No. 3*

**MEHINDER SINGH SULLAR, J. (ORAL)**

The conspectus of the facts, which requires to be noticed for the limited purpose of deciding the core controversy, involved in the instant writ petition and emanating from the record, is that in the wake of advertisement and on the recommendation of the Subordinate Services Selection Board, Haryana (for brevity "Board"), the petitioner was appointed on the post of Analyst, by the Director General Health Services, Haryana-respondent No. 2 (for short "Director"), by virtue of appointment letter dated 29th April, 1986 (Annexure P1). In pursuance of the appointment letter, the petitioner joined his service as Analyst on 6th May, 1986. Subsequently, Kusum Kumar-respondent No. 3, who was earlier working on a junior post as Senior Analytical Assistant, was also promoted/adjusted to the post of Analyst, by way of order dated 17th December, 1986 (Annexure P2). Thus, respondent No. 3 worked as junior to the petitioner on the post of Analyst.

(2) The petitioner claimed that suddenly in the month of September, 1988, respondent No. 3 was arbitrarily promoted as Analyst from the back date with effect from 30th October, 1984, by means of another office order dated 16th September, 1988 (Annexure P3). The Director issued another letter dated 13th December, 1988 (Annexure P4), informing the Public Analyst that respondent No. 3 will be below Ashok Kumar and above petitioner Balbir Singh in the seniority list of Analysts.

(3) Therefore, dissatisfied with the retrospective promotion of respondent No. 3 by the Director (respondent No. 2), the petitioner moved representations (Annexures P5 and P6), which were rejected by the Commissioner and Secretary to Government of Haryana, Health Department (respondent No. 1), through the medium of letter dated 5th June, 1991 (Annexure P7) (conveyed on 7th June, 1991). The petitioner again moved the representation (Annexure P8) and also personally explained his case to the competent authority in this regard, but in vain.

(4) Sequel, the petitioner did not feel satisfied and preferred the present writ petition, challenging the impugned order (Annexure P3), granting retrospective promotion to respondent No. 3 on the post of Analyst, invoking the provisions of Article 226 of the Constitution of India.

(5) The case set up by the petitioner, in brief in so far so far as relevant, was that he was appointed as Analyst by direct recruitment through the Board and joined as such on 6th May, 1986, whereas respondent No. 3 was working on lower post of Senior Analytical Assistant. About seven months thereafter, he (respondent No. 3) was also promoted as Analyst. Thus, he was junior to him in the cadre of Analyst. It was claimed that although there was no post, the Director has illegally granted him the retrospective promotion with effect from 30th October, 1984 at his back and was made senior to the petitioner, that too, without issuing any notice or providing opportunity of being heard to him, by virtue of *ex parte* order (Annexure P3), which was stated to be violative of Articles 14 and 16 of the Constitution of India. No statutory rules were stated to have been framed by the respondents for the post in question, except the issuance of executive instructions dated 13th November, 1967 (Annexure P9), wherein it was mentioned that 75% of the posts of Analyst were to be filled by way of direct recruitment and remaining 25% posts were to be filled through promotion in the cadre of Analyst.

(6) According to the petitioner, the draft rules made by the Director in the years 1976, 1978, 1983 and 1984, which were never approved by the Government, cannot be made applicable to the post in the indicated cadre in any manner. It was claimed that advertisement of the posts of Analysts, in which the petitioner had applied, was challenged by Bharat Bhushan Goel and another, through the medium of CWP No. 4286 of 1985. In that petition, the State Government/respondents filed a detailed written statement (Annexure P10) to the effect that no post of promotee quota was available upto October, 1985 in the cadre of Analyst.

(7) Levelling a variety of allegations and narrating the sequence of events, in all, according to the petitioner that the impugned order (Annexure P3) granting retrospective promotion to respondent No. 3 was not only arbitrary, illegal but against the rules of natural justice as well. On the basis of aforesaid grounds the petitioner sought to challenge the impugned order (Annexure P3) in the manner indicated hereinabove.

(8) The respondents contested the claim of the petitioner and filed their respective written statements, *inter-alia* admitting the factum of appointment/joining of the petitioner by way of direct recruitment as Analyst

on 6th May, 1986 and the initial promotion of respondent No. 3 on the post of Analyst on 17th December, 1986. However, it was pleaded that since respondent No. 3 was eligible for promotion to the post of Analyst in the year 1982, which was lying vacant at the relevant time, so, he was promoted with effect from 30th October, 1984,—*vide* impugned order (Annexure P3) in the wake of representations made by him. The pleaded case of the official respondents was that as no prejudice was caused to the petitioner, therefore, there was no requirement of issuance of any notice. The representations submitted by the petitioner were stated to have rightly been rejected and respondent No. 3 was stated to have been promoted retrospectively, in view of the orders (Annexures R2 to R4) of the competent authority in this direction.

(9) The case of the respondents further proceeds that the instructions (Annexure P9) were further amended by the executive instructions dated 28th February, 1969 (Annexure R3/5). Thereafter the draft rules (Annexure R6) and executive instructions of 1978 were stated to be applicable, which provided that 50% of the post of analyst were to be filled by way of direct recruitment and the remaining 50% through promotion. The written statement (Annexure P10) filed in CWP No. 4286 of 1985, wherein, it was mentioned that there was no vacant post in promotee quota till 1985, was stated to be the result of negligence of dealing assistant of the department.

(10) Instead of reproducing the entire contents of written statement and in order to avoid the repetition, suffice it to say that private respondent No. 3 toed the same lines of defence/pleadings as contained in the written statement of official respondent Nos. 1 and 2. However, it will not be out of place to mention here that all the respondents have stoutly denied all other allegations contained in the writ petition and prayed for its dismissal. That is how I am seized of the matter.

(11) Assailing the impugned order (Annexure P3), the learned counsel for the petitioner has contended with some amount of vehemence that since the petitioner had joined as Analyst on 6th May, 1986, by means of direct recruitment, while respondent No. 3, who was working as Senior Analytical Assistant, was subsequently promoted to the post of Analyst on 17th December, 1986 and he was junior to the petitioner in the cadre of

(Mehinder Singh Sullar, J.)

Analyst. The argument is that abruptly promoting respondent No. 3 retrospectively, by virtue of *ex parte* impugned order (Annexure P3), rendering the petitioner junior to him, is nonest arbitrary, illegal and violative of Articles 14 and 16 of the Constitution of India, which was passed without issuing any notice or affording opportunity of being heard to him. The submission is that the respondents cannot apply the alleged draft rules, which were never approved by the Government, in order to defeat the right of seniority of the petitioner. In support of the contention, he has placed reliance on the judgment of Hon'ble Supreme court in Case **State of Bihar and others versus Akhouri Sachindra Nath and others, (1)**.

(12) On the contrary and hailing the impugned order, learned counsel for the respondents urged that since the post in promotee quota was vacant since 1982, so respondent No. 3 was rightly promoted retrospectively w.e.f. 1984, in view of instructions of 1978 and draft rules (Annexure R6) and no interference is warranted in this regard. They have also placed reliance on the judgments of this court in cases **B.K. Balla, Government College, Gurdaspur and others versus The State of Punjab and others, (2)** ; **Leela Ram Saluja versus Bal Krishan Soni and others, (3)** and **Jagrup Singh versus The State of Haryana and others, (4)** this regard.

(13) Having heard the learned counsel for the parties, having gone through the record, relevant law with their valuable help and after bestowal of thoughts over the entire matter, to my mind, the instant petition deserves to be accepted in this context.

(14) At the very outset, as is clear that in B.K. Bhalla's case (*supra*) on the peculiar facts and in the circumstances of that case, it was noticed that the Government servants cannot be made to suffer on account of delay caused by the Government in dealing with their cases expeditiously. If the Government redresses the grievance of its servants because of delays in dealing with their cases, the order cannot be held to be bad.

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(1) 1991 SCC (L&S) 1070

(2) 1983 (1) SLR 636

(3) 1983 (2) SLR 753

(4) 1996 (2) SLR 881

(15) Sequelly, in Leela Ram Saluja's case (*supra*), it was observed that it is for the State Government to consider the facts of the case to decide promotion of an employee with retrospective effect unless barred by any rules.

(16) Likewise, in Jagrup Singh's case (*supra*), it was held (Para 5) as under :—

“It is true that the conditions of service governing the employees of the State Government can be prescribed under an Act of Legislature or the rules framed under Article 309 of the Constitution. However, in a case where statutory rules have not been promulgated, the competent authority is not precluded from either laying down conditions, by way of executive instructions or on the basis of Draft Service Regulations. Such Draft Service Regulations may not be statutory. As such, they may not be legally enforceable. However, if the appointing authority frames certain regulations and uses them as guidelines till such time as the statutory regulations are framed by the competent authority, it cannot be said that its action is illegal or violative of any statutory provision of law. In the present case, it is the admitted position that no statutory rules have so far been framed by the State Government. At least none have been notified. In fact, even though, the Draft Rules were framed in 1985, these have not attained a statutory character so far. In such a situation, if the appointing authority has considered it appropriate to regulate the conditions of service of the employees in terms of the draft rules prepared by it, the action is just and fair. It only places a curb on the appointing authority. It restricts the discretion of the appointing authority, it does not violate any provision of law. This is all the more so in view the fact that no instructions to the contrary are shown to have been issued by any one. The matter could have been different if any instructions had been issued to the contrary by the State Government or any other authority superior to the appointing authority. There is not even a suggestion to that affect in the present case. In this situation, the Director of Industries cannot be blamed for having relied on the Draft Service Rules for regulating the service conditions of the employees working in the Department.

(Mehinder Singh Sullar, J.)

(17) Possibly, no one can dispute with regard to the aforesaid observations, but to me, the same would not come to the rescue of the respondents in the instant controversy.

(18) As is evident from the record, that petitioner had joined on the post of Analyst on 6th May, 1986 by way of direct recruitment. The private respondent No. 3, who was working on the junior post as Senior Analytical Assistant, was subsequently promoted to the post of Analyst on 17th December, 1986,—*vide* order (Annexure P2). He remained junior to the petitioner till the conditional impugned order (Annexure P3) was passed on 16th September, 1988, granting retrospective promotion to him, which is as under :—

“Sh. Kusum Kumar, Senior Analytical Assistant who was promoted to the post of Analyst,—*vide* this office order No. 11/9-PM-Lab-86/2463-66, dated 18th December, 1986 is now hereby promoted as Analyst w.e.f. 30th October, 1984 in compliance of Haryana Government Memo No. 12/59/87-2HBII/1679, dated 14th September, 1988 with the condition that he can only be given the benefit of the seniority and increment w.e.f. 30th October, 1986 to 17th December 1986, but the arrear of the increment cannot be given to him as he has not actually worked on this post for this period.”

(19) Such thus being the position in record, now the short and significant question, though important, that arises for determination in this petition, is as to whether respondent No. 3, who admittedly was junior to the petitioner in the cadre of Analyst, could be promoted retrospectively rendering him (petitioner) junior to him, by way of impugned order (Annexure P3), that too, without issuing any show cause notice or affording opportunity of being heard to him in this behalf?

(20) Having regard to the rival contentions of the learned counsel for the parties, to me, the answer must obviously be in the negative.

(21) What is not disputed here is that respondent No. 3 has already retired from service on 18th February, 2010 on attaining the age of superannuation from further promotional post of Assistant Public Analyst. There was no statutory service rule applicable to the indicated cadre at the

relevant time. The petitioner claimed that as per the executive instructions (Annexure P9), 75% of posts in the indicated cadre were to be filled from direct recruits, whereas remaining 25% by way of promotion from lower posts. There was no post of Analyst in promotee quota till 1985 as admitted by the official respondents in their written statement (Annexure P10) filed in CWP No. 4286 of 1985. On the other hand, according to the respondents, the post was lying vacant since 1982 in the promotional quota of Analyst. The official respondents have miserably failed to prove their stand that the post in the promotional quota of the Analyst cadre was lying vacant in the year 1982. In the absence of the same, a Coordinate Bench of this Court (J.S. Khchar J, as his Lordship then was) directed respondent Nos. 1 and 2 to file an affidavit, by means of order dated 3rd November, 2004, the operative part of which is as under :—

“I have gone through the amended written statement. The same belies the aforesaid assertion of the learned counsel for the respondents. In order to ascertain the clear and unambiguous factual position, learned counsel for respondent Nos. 1 and 2 is directed to file an affidavit depicting the manner in which 18 cadre posts in the joint cadre of Analyst/Junior Scientific Officer were filled up as on 30th October, 1984 and 6th May, 1986. The respondents are directed to depict the exact cadre strength of the aforesaid joint cadre in the aforesaid dates.

List again in 17th November, 2004.

Copy of this order by furnished to the learned counsel for respondent Nos. 1 and 2 under the signature of the Court secretary attached to this Court.”

(22) In pursuance thereof, Dr. Abha Kulshrestha, Deputy Director (Nutrition) office of the Director (respondent No. 2) filed an affidavit dated 22nd December, 2004, depicting therein that during the period from 30th October, 1984 to 6th May, 1986, 8 posts of Analyst, 6 posts of J.S.O. were filled up through direct recruitment and by promotion and four posts on the cadre were lying vacant, out of which, three posts were meant for Analyst and one post was meant for J.S.O. She has revealed less but



concealed more. Instead of clearing the vacancy position of direct recruitment or promotional quota, she has tried to deeply confuse the things by intermingling the posts of Analyst and J.S.O., which are entirely different post in different cadres as per appendix-D attached to the Haryana Health Department Analyst Staff Rules.

(23) Not only that, no other cogent evidence/material is forthcoming on record even to suggest remotely that any post of promotional quota in the cadre of Analyst was vacant in the year 1982, on which (post) respondent No. 3 was promoted with effect from 30th October, 1984. Moreover, it remained an unfolded mystery that if the post in promotional quota in the cadre of Analyst was vacant with effect from 1982, then no cogent explanation is forthcoming on record as to why respondent No. 3 was not promoted with effect from 1982 and why he was subsequently promoted with effect from 30th October, 1984. This fact corroborates the case of the petitioner that although respondent No. 3 was rightly promoted,— *vide* order (Annexure P2) on 17th December, 1986, but subsequently, he was retrospectively promoted with effect from 30th October, 1984, by way of impugned order (Annexure P3) in an illegal and arbitrary manner. Once, the official respondents have utterly failed to prove by cogent evidence that any post of promotional quota in the cadre of Analyst was vacant since 1982, but categorically admitted in written statement (Annexure P 10) that no post in promotional quota in the cadre of analyst was available till 1985. In that eventuality, it cannot be said and the official respondents cannot possibly be heard to say that respondent No. 3 was rightly granted retrospective promotion with effect from 30th October, 1984 in this respect.

(24) This is not the end of the matter. The perusal of impugned order (Annexure P3) would reveal that respondent No. 3, who was earlier promoted as Analyst in 17th December, 1986 was below the petitioner and was abruptly promoted with effect from 30th October, 1984. It is nowhere depicted in the impugned order that respondent No. 3 was promoted against the vacancy in his quota lying vacant since 1982. Moreover, this promotional order is a conditional order. Thus, respondent No. 3 cannot

legally by granted retrospective promotion over and above the petitioner, who had joined by way of direct recruitment in the post of Analyst on 6th May, 1986, when respondent No. 3 was not even born in the indicated cadre. This matter is not *res integra* and is well settled.

(25) An identical question came to be decided by the Hon'ble Apex Court in State of Bihar's case (*supra*). Having considered the concept of seniority and promotion *vis-a-vis* direct recruits and appointment by promotion, it was ruled (para 12) as under :—

*"In the instant case, the promotee respondents 6 to 23 were not born in the cadre of Assistant Engineer in the Bihar Engineering Service, Class II at the time when respondents 1 to 5 were directly recruited to the post of Assistant Engineer and as such they cannot be given seniority in the service of Assistant Engineers over respondents 1 to 5. It is well settled that no person can be promoted with retrospective effect from a date when he was not born in the cadre so as to adversely affect others. It is well settled by several decisions of this Court that amongst members of the same grade seniority is reckoned from the date of their initial entry into the service. In other words, seniority inter se amongst the Assistant Engineers in Bihar Engineering Service, Class II will be considered from the date of the length of service rendered as Assistant Engineers. This being the position in law respondents 6 to 23 cannot be made senior to respondents 1 to 5 by the impugned government orders as they entered into the said service by promotion after respondents 1 to 5 were directly recruited in the quoa of direct recruits. The judgment of the High Court quashing the impugned government orders made in Annexures 8, 9 and 10 is unexceptionable."*

(26) Therefore, the argument of learned counsel for the petitioner that the impugned order (Annexure P3) is arbitrary and illegal, has considerable force. On the other hand, the contrary contentions of learned counsel for

respondents "stricto sensu" deserve to be and are hereby repelled under the present set of circumstances, as the ratio of law laid down by Hon'ble Supreme Court in State of Bihar's case (*supra*) "mutatis mutandis" is applicable to the fact of this case and is the complete answer to the problem in hand.

(27) There is another aspect of the matter, which can be viewed from a different angle. As indicated earlier, it is not a matter of dispute that petitioner joined on the post of analyst, by way of direct recruitment on 6th May, 1986 when respondent No. 3 was not even born in the cadre of Analyst. He was working on junior post of Senior Analytical Assistant and was only promoted on 17th December, 1986, by means of order (Annexure P2). He remained junior to the petitioner. One fine morning, the official respondents have suddenly gave retrospective promotion with effect from 30th October, 1984 to respondent No. 3, rendering the petitioner junior to him, that too, without issuing any notice or providing opportunity of being heard to him (petitioner). That means, the official respondents have completely violated the doctrine of *audi alteram partem* and rules of natural justice.

(28) A similar matter came for consideration before the Hon'ble Apex Court in case **Indu Bhushan Dwivedi versus State of Jharkhand and another, (5)** and it was ruled as under :—

“One of the basic canons of justice is that no one can be condemned unheard and no order prejudicially affecting any person can be passed by a public authority without affording him a reasonable opportunity to defeat himself or represent his cause. As a general rule, an authority entrusted with the task of deciding his between the parties or empowered to make an order which prejudicially affects rights of any individual or visits him with civil consequences is duty-bound to act in consonance with basic rules of natural justice including the one that material ought to be used against the person concerned must be disclosed to him and he should be given an opportunity to explain his position.

This unwritten right of hearing is fundamental to a just decision, which forms an integral part of concept of rule of law. This right has its roots in notion of fair procedure. It draws attention of authority concerned to imperative necessity of not overlooking cause which may be shown by the other side before coming to its decision.

The employer is not only required to make the employee aware of specific imputations of misconduct but also to disclose material sought to be used against him and give him a reasonable opportunity of explaining his position or defending himself. If the employer uses some material adverse to the employee about which the latter is not given notice, final decision gets vitiated on the ground of violation of rule of *audi alteram partem*. Even if there are no statutory rules which regulate holding of disciplinary enquiry against a delinquent employee, employer is duty-bound to act in consonance with rules of natural justice.”

(29) Thus seen from any angle and if the totality of the facts, circumstances and the legal position as discussed hereinabove, are put together, then, to me, the conclusion is inescapable that the official respondents slipped into deep legal error in granting retrospective promotion *ex parte* to respondent No. 3, rendering the petitioner junior to him, without issuing any notice to him inculcating and perpetuating the great injustice to the petitioner in this behalf. Meaning thereby, the impugned promotional order (Annexure P3) is not only arbitrary, illegal but against the principle of natural justice as well, which cannot legally be maintained in the obtaining circumstances of the case.

(30) No other legal point, worth consideration, has either been urged or pressed by the learned counsel for the parties.

(31) In the light of aforesaid reasons, the instant petition is accepted with costs. Consequently, the impugned order (Annexure P3) is hereby set aside.

(32) Needless to mention that the natural consequences and compliance will follow accordingly.