

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

LPASW no. 2/2010

Date of order: 30.01.2013

Pushpjeet Singh and ors v. State of J&K and ors.

Coram:

**Hon’ble Mr. Justice M. M. Kumar, Chief Justice.
Hon’ble Mr. Justice Hasnain Massodi, Judge.**

Appearing counsel:

For the Appellant(s) : Mr. Abhinav Sharma, Advocate.
For the respondent(s) : Mr. Gagan Basotra, AAG.

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| i) | Whether to be reported in
Press, Journal/Media | : | Yes |
| ii/ | Whether to be reported in
Digest/ Journal | : | Yes |

M. M. Kumar, CJ

1. The instant appeal under Clause 12 of the Letters Patent is directed against judgment and order dated 12.10.2009 rendered by the learned Single Judge of this Court, rejecting the claim made by the appellants for grant of relief in respect of anti-dating their dates of initial appointment i.e. date of joining on the post of Sub Inspector in the Executive and Armed Wings of the Jammu and Kashmir Police. The basic reason for rejection of the claim made by the appellants is that the appellants had earlier filed SWP no. 195/1994 and 1629/1994 and both the petitions were disposed of keeping in view the earlier judgment of this Court in Rakesh Bamba v. Mr. M. N. Sabharwal and anr (SWP no. 1362/1993 and COA (SW) no. 53-B/1995 decided on 09.07.1996) . In the aforesaid judgment rendered in Rakesh Bamba’s case it has been specifically

observed that the appointment of Rakesh Bamba as Sub Inspector would be effective from the date of joining.

2. Few facts would be necessary to put the controversy in its proper perspective. The respondent-State issued an advertisement on 28.08.1991 inviting applications from permanent residents of Jammu and Kashmir State for the post of Sub Inspectors in the Executive and Armed Wings of J&K Police. It has remained undisputed that eventually a select list of 87 candidates was issued along with a wait list of 26 candidates. It is a matter of coincidence that 8 candidates, figuring at serial nos. 80 to 87 of the select list and 26 candidates figuring in the wait list have secured 180 marks. The names of the appellant-petitioners figured in the wait list at serial nos. 8, 9, 20, 12, 24 and 25 respectively. Rakesh Bamba, a wait list candidate figuring at serial no. 18, who had secured 180 marks, filed SWP no. 1368/1993 for issuance of directions to the official respondents to appoint him as Sub Inspector because there were 8 candidates in the select list who had secured marks equivalent to him i.e. 180 marks. All those 8 candidates were appointed whereas he was denied the appointment. The official respondents took a categorical stand that 8 candidates in the select list and 26 candidates in the wait list had secured equal marks i.e. 180 marks which resulted in following a criteria to set their order of merit by treating the

older in age superior in merit then the one who is younger in age. However, before the Writ Court the stand could not be substantiated and justified. As a consequence in Contempt petition COA (SW) no. 53-B of 1995 the aforesaid Rakesh Bamba was given the relief by order dated 09.07.1996. Accordingly his writ petition along with the contempt petition was disposed of. Thus the proceedings culminated in appointing the aforesaid Rakesh Bamba as Sub Inspector.

3. The appellants-petitioner have also filed two writ petitions, namely, SSWP no. 195/1994 in the Jammu Wing and 1629/1994 in the Srinagar Wing of this Court. As the matter in both the writ petitions was covered by the order passed in Rakesh Bamba's case (supra), both these writ petitions were also decided, directing the official respondents to accord similar treatment to the appellants also which was accorded to Shri Rakesh Bamba. It is pertinent to mention that in the order passed in Rakesh Bamba's case it was specifically mentioned that his appointment would be effective from the date he joins his duty. Consequently the appellants were also appointed as Sub Inspectors in the year 1996 and 1997.

4. It would also be appropriate to notice the facts in respect of another candidate, namely, Sunmati Gupta. His name figured at serial no. 18 of the main select list of 87 candidates. He was denied the appointment by the official respondents on the

ground that he did not produce the required No Objection Certificate from his erstwhile employer which was necessary for an in-service candidate like him. He filed SSWP no. 251/1993 with a prayer for issuance of directions to the official respondents to pass the order of his appointment. Accordingly a direction was issued. On his request he was permitted to make a representation to the competent authority to grant him the benefit of fictional seniority. The official respondents were also directed to pass appropriate order on his representation after granting opportunity of hearing to all affected parties. Accordingly, Sunmati Gupta was appointed as Sub Inspector later than the appointment of the appellants-petitioner.

5. The appellants have claimed that they joined Police Training course at Sher-i-Kashmir Police Academy at Udhampur. They secured more marks than Shri Sunmati Gupta-respondent no. 23. Their names figured over and above his name which was consistent with Rule 111 of the J&K Police Rules, keeping in view the merit secured by a Sub Inspector in the Police Training Course. However, in accordance with the directions issued by this Court, the representation made by Shri Sunmati Gupta was accepted and vide Order no. 23 dated 19.10.2002 he was given appointment with a retrospective effect on the basis of merit secured by him in the Police Training course. Accordingly, he was brought over and above

the appellants-petitioner in the subsequent seniority list by anti-dating his date of appointment to 28.12.1992 instead of 28.06.1997.

6. The appellants-petitioner also filed a representation to the official respondents claiming that they were also entitled for anti-dating of their date of appointment. It was highlighted that Shri Sunmati Gupta-respondent no. 23 was also appointed subsequent to the appellants in the year 1997 and had secured less marks than the appellants-petitioner nos. 3, 5 and 6 in the basic police training course. It was further pointed out that he was given anti-dated appointment with effect from 1992 and the same relief deserved to be granted to the appellant also. The official respondents did not take cognizance of the representation made by the appellants. Accordingly they filed SWP no. 797/2006, relatable to this appeal with a prayer for grant of following relief:-

“Mandamus, commanding and directing the respondent no. 3 to 5 to reckon and fix the seniority of the petitioners as Sub-Inspectors of J&K Police (Executive) on the basis of the merit obtained by the petitioners in their training course in Sher-i-Kashmir Police Academy, Udhampur in the year 1997-98 Batch along with their co-selectees of 1992 batch i.e. respondents no. 6 to 99;

Mandamus, commanding and directing the respondents to promote the petitioners to the post of Inspectors of Police (Executive) in J&K Police w.e.f the date the respondent No. 23 was promoted i.e. w.e.f. 19.07.2005;

Mandamus, commanding and directing the respondents not to make further promotions to the post of Inspector (Executive) in J&K Police from and amongst the juniors of the petitioners i.e. any

candidate who has secured less marks than the petitioners in the 1992 batch and any other candidate from 1993 batch onwards;

7. The learned Single Judge has dismissed the writ petition vide judgment dated 12.10.2009 by observing as under:-

“The writ petition of petitioners (SWP 195/94) came to be allowed vide judgment (supra) with a direction to the respondents to give same treatment which was given to Rakesh Bamba. Thus their appointments came to be made in pursuance of the judgment passed by this Court in Rakesh Bamba’s case (supra) and, thus, their appointments are also *effective from the date of joining*. The words “*effective from the date of joining*” mean that an appointment is effective from the date of joining and not prior to any other date. The petitioners have not challenged the said judgment, but have accepted it, came to be appointed in terms of the said directions and also joined. Thus they are caught by the Law of Estoppel.

According to the petitioners, Respondent No. 23-Sunmati Gupta stands granted the seniority as per the merit list, thus they are also entitled to the same. But, the fact of the matter is that this Court directed the respondents to pass the appointment order in his favour on the basis of selection while keeping in view his placement in the merit list. Further he was permitted to make representation for grant of fictional seniority benefit to him alongside his co-selectees figuring after Sr. No.18 of the merit list. It is also worthwhile to mention that he was appointed but could not join for want of documents. It is not his case that he was not appointed, while as the case of writ petitioners is that they were not appointed. Thus the case of petitioners is also different from that of Respondent No. 23 - Sunmati Gupta, for the reason that their appointments have been given effect from the date of their joining, whereas Respondent No. 23 - Sunmati Gupta came to be allowed to join in terms of the select list and respondents were also directed to consider his representation for grant fictional seniority benefit in his favour along with the co-selectees.

8. Mr. Abhinav Sharma, learned counsel for the appellants, has vehemently argued that the principle of estoppel adopted by the learned Single Judge to non-suit the appellants would not be applicable because there was no issue concerning the

seniority of the appellants-petitioner before the Court when the earlier writ petitions filed by the appellants, namely, SWP no. 195 and 1629 of 1994 were decided. According to the learned counsel once there was no issue concerning the seniority of the appellants-petitioner either raised or determined by the learned Single Judge while deciding SWP nos. 195 and 1629 of 1994, the question of applying the principle of estoppel would not arise. Mr. Sharma has maintained that such an issue could not have ever been raised by the appellants-petitioner before becoming the member of the service. Another submission made by Mr. Sharma is that Sunmati Gupta-respondent no. 23 has been granted retrospective appointment and consequently seniority with effect from 1992 despite the fact that in the judgment delivered by the Writ Court in Sunmati Gupta's case no such direction was ever issued although he was simply permitted to make a representation and the official respondents were directed to decide the representation by passing the appropriate order. Mr. Sharma has also argued that the appellants did not commit any lapse and in fact it was on account of illegal and unconstitutional acts of the official respondents that they were denied the appointment for a period of 5 years. According to the learned counsel the appellants suffered by virtue of non-appointment and now again they are suffering because of assigning the date of appointment which

actually should be 1992 by keeping in view the merit secured by them at Police Training Course and the selection of 1992 on the basis of the merit secured by them. Mr. Sharma has also emphasised that it is discriminatory to treat the appellants unequally with Shri Sunmati Gupta-respondent no. 23 when they are in the same position. It has been pointed out that Sunmati Gupta- respondent no. 23 was actually appointed after the appellants and on account of securing the relief of anti dating his appointment he now ranks senior to them.

8. Mr. Gagan Basotra, learned Sr. AAG, has, however, argued that the judgment and order passed by this Court specifically state that SWP nos. 195 and 1629 of 1994 were allowed with a direction to the official respondents to accord similar treatment to the appellants-petitioner by appointing them to the post of Sub Inspector, which was given to Shri Rakesh Bamba in SWP no. 1368/1993. According to the learned counsel, in Rakesh Bamba's case the communication sent by the Police Headquarters specifically mentioned that he was given appointment as Sub Inspector which was to be effective from the date of his joining. As a consequence, the appellants were also given appointment which was to be effective from the date of their joining. Mr. Basotra has maintained that the issue cannot now be reopened and settled position of seniority on the basis of date of appointment cannot be un-settled. The date of

appointment in case of the appellants was settled in the years 1996 or 1997 and the present writ petition for anti dating their date of appointment was filed in the year 2006. Therefore, Mr. Basotra has urged that once the controversy stand settled by the judgment and order dated 22.08.1996 rendered in SWP no. 195 of 1994 and order dated 11.04.1997 rendered in SWP no. 1629/1994, it cannot now be permitted to be re-opened, particularly when the order stand implemented by complying with the directions issued and assigning the appellants-petitioner their date of joining as date of their appointment. He has also submitted that the case of Sunmati Gupta was entirely different as he was an in-service candidate but did not submit his No Objection Certificate of his employer. There was no controversy in his case with regard to securing identical marks like a wait list candidate with those who have secured same marks and was figuring in the main select list.

9. Having heard learned counsel for the parties and perusing the record with their able assistance, we are of the considered view that the instant appeal does not merit acceptance.

10. The appellants have themselves sought the relief in their respective writ petitions, namely, SWP no. 195 of 1994 decided on 22.08.1996 and SWP no. 1629/1994 decided on 11.04.1997 that they should be given same relief as has been given to one

Rakesh Bamba in SWP no. 1368/1993. Therefore, it would be pertinent to read the order dated 09.07.1996 passed in Rakesh Bamba's case supra, which reads as under:-

"Mr. Kapoor has submitted a communication received by him from the Police Headquarters informing that the petitioner was being appointed as Sub Inspector and that his appointment would be effective from the date of joining. Now that the petitioner's grievance stands redressed. Mr. Kohli does not want to press this contempt petition which is accordingly dismissed.

This shall also dispose of SWP No.1362/93 with a direction to the respondents to pass appointment order of the petitioner within one month from today. The communication submitted by Mr. Kapoor is taken on record."

11. A perusal of the aforesaid order would show that a communication was sent by the Police Headquarters, intimating the concerned authority that Shri Rakesh Bamba was being appointed as Sub Inspector and that his appointment was to be effective from the date of his joining. Accordingly, the contempt proceedings as well as the writ petition were disposed of. In the case of the appellants-petitioner two separate orders have been passed disposing of their writ petitions, namely, SWP 195/1994 and 1629/1994. In both the orders the direction issued is that they should be treated on the same footings as Shri Rakesh Bamba was treated for giving them appointment to the post of Sub Inspector. The order in both the cases dated 22.08.1996 and 11.04.1997 respectively would read as under:-

"SWP No.195/94

"Therefore, given regard to the fact that the writ petitioners' case squarely falls within the bracket of the case of Rakesh Bamba, writ petitioner in SWP No.1368/93 and, that, they are similarly situated, I dispose of this writ petition

with a direction to the official respondents to accord similar treatment to the writ petitioners for their appointment to the post of Sub-Inspector as given to Sh. Rakesh Bamba, writ petitioner in SWP No.1368/93. They shall do so and pass appropriate orders within two months from today as prayed for by l/c for respondents Mr. Pant.”

SWP No.1629/94

“For these reasons therefore, I see no cause to disallow the writ petition. The writ petition is allowed and the respondents are directed to give the same treatment to the petitioner which was given to Rakesh Bamba in writ petition No.1368/93 and to the petitioners in writ petition No.SSWP No.195/94 and appoint him within a period of two months from the date of receipt of this order against the post of Sub Inspector of Police.”

12. A perusal of the aforesaid orders would show that the date of joining of the appellants would be the date of their appointment. Any subsequent writ petition raising the same issue and seeking anti-dated appointment would result in reviewing the judgment and orders dated 22.08.1996 and 11.04.1997. If such a course is allowed then it would amount to allowing the claim to be litigated twice on the same cause of action which is wholly impermissible in law. It would also result in reviewing the earlier order which cannot be allowed. A Nine-Judge Bench of Hon'ble the Supreme Court in case of **Naresh Shridhar Mirajkar v. State of Maharashtra and another, AIR 1967 SC 1**, has categorically laid down that a direction issued in one petition cannot be challenged by filing another writ petition on the ground that the earlier direction was against the provisions of law or the directions contravened fundamental rights enshrined in Chapter III of the Constitution. We are, therefore, of the view that the matter stand settled by virtue of direction

issued in SWP no. 195/1994 and SWP no. 1629/1994 in the years 1996 and 1997 respectively. Accordingly, the date of joining of the appellants-petitioner has to be treated as their date of appointment. It follows that their seniority as Sub Inspectors would be reckoned from the aforesaid date.

13. There is no possibility of accepting the argument that the question of seniority was never agitated before the Writ Court in the earlier round of litigation when SWP nos. 195 and 1629 of 1994 were disposed of. Such an argument fall flat on its face when it is remembered that the date of appointment is the crucial fact to determine the seniority, which was issued in the earlier proceedings. Therefore, it is no argument to suggest that since question of seniority was not an issue in the earlier proceedings the second writ petition would not be barred.

14. The case of Sunmati Gupta- respondent no. 23 is entirely on different footings. He was an in-service candidate and in the order of merit in the select list his name figured at serial no. 18. He could not be appointed because being an in-service candidate, No Objection Certificate was not secured by him from his employer. When he filed his petition, apart from the relief of appointment he also sought the relief of disposal of his representation which raised the issue of the date of appointment. Eventually his representation was ordered to be decided by issuance of directions by the Writ Court on

29.11.1996. However, there was no second petition filed by Shri Sunmati Gupta which might be barred on account of principles of *res judicata*. In any case, the principles governing the constructive *res judicata* would also apply as enshrined in explanation IV to CPC or Order 2 Rule 2. Moreover Mr. Gupta figured at serial no. 18 of the select list in order of merit. He would, in any case, rank senior to the appellants-petitioner as he had superior place in order of merit. It is settled position in law that order of merit determined by the Selection Board would constitute the basis for seniority in the basic cadre.

15. Accordingly, we are of the view that the learned Single Judge did not commit any jurisdictional error or error of any other kind which are required to be corrected in the appellate jurisdiction. We concur with the view taken by the learned Single Judge and find that the appeal is wholly without merit.

16. For the reasons aforementioned this appeal fails and the same is dismissed.

17. No order as to costs.

(Hasnain Massodi)
Judge

(M. M. Kumar)
Chief Justice

Jammu,
30.01.2013
Anil Raina, Secy.

