

(2014) 12 AHC CK 0213
In the Allahabad High Court

Case No : Service Single Nos. 6041, 6411, 6298, 6538 and 6632 of 2014

Ashutosh Prakash Singh

APPELLANT

Vs

District Magistrate Ambedkar Nagar
Ved Prakash Vs
State of U.P.

RESPONDENT

Date of Decision : 03-12-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (2015) 1 ADJ 227 : (2015) 1 ALJ 669 : (2015) 1 ESC 568

Hon'ble Judges : Manoj Kumar Gupta, J

Bench : Single Bench

Advocate : Prabhakar Tiwari, Ram Kumar Maurya and Kapish Srivastava,
Advocate for the Appellant; Neeraj Chaurasiya, Advocate for the Respondent

Judgement

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Manoj Kumar Gupta, J.—These writ petitions raise common questions of fact and law and are being decided by this common judgment.

2. The petitioners in these writ petitions have applied for selection on the post of Prerak (Motivator) under different Gram Panchayats of district Ambedkar Nagar, pursuant to advertisement dated 3.12.2011. Their case is that they have past experience of working in various literacy programmes of the Government as Prerak/Social worker/Master trainer, in view of which, they are entitled to be selected on the post of Prerak. In some of the writ petitions, the petitioners have challenged the notification dated 19.9.2014 by the District Basic Education Officer, Ambedkar Nagar notifying the directions issued by Zila Lok Shiksha Samiti, which, inter alia, provides for award of quality point marks for higher educational qualification and past experience. It is contended that under the original advertisement dated 3.12.2011, they were entitled for appointment against the post of Prerak on priority (Prathamikta) basis, while the directives issued by Zila Lok Shiksha Samiti for award of quality point marks, for such experience, is contrary to the stipulation in the advertisement. It is contended

that after the last date for accepting the applications under the advertisement i.e. 15.12.2011, the respondents were not empowered to issue the impugned notification dated 19.9.2014, as it amounts to modifying the terms and conditions, on which selection is to be made. A press notification dated 22.10.2014 issued by the office of District Basic Education Officer, Ambedkar Nagar, notifying that the word "Prathmikta" in the advertisement dated 3.12.2011 be read as "Variyata", is also under challenge, in one of the writ petitions. In some cases, another notification issued by the office of District Basic Education Officer, Ambedkar Nagar dated 20.10.2014 in sequel to earlier notification dated 19.9.2014, is also under challenge.

3. In essence, the contention of the petitioners is that they having past experience of working in the literacy programmes of the Government, form a separate class in themselves, are entitled for en bloc preference, akin to reservation and not mere additional marks by way of weightage. Consequently, the directives issued by the office of District Basic Education Officer, Ambedkar Nagar on 19.9.2014 providing for award of quality point marks for past experience, amounts to alteration in the conditions on which selection was to be held. The petitioners have accordingly prayed for certiorari quashing the notifications issued by the office of District Basic Education Officer, Ambedkar Nagar dated 19.9.2014, 20.10.2014 and 22.10.2014 and for mandamus directing the respondents to appoint them on the post of Prerak, in view of their past experience.

4. In one of the writ petitions, a short counter affidavit has been filed on behalf of District Basic Education Officer, Ambedkar Nagar, appending thereto the notification dated 19.9.2014 issued by the office of District Basic Education Officer, Ambedkar Nagar. It is contended by learned counsel appearing on behalf of the State respondents and District Basic Education Officer that the selection on the post of Prerak is being made on basis of Government Order dated 6.5.2010, which provides for grant of preference to those having past experience of working in literacy programmes of the Government, but it does not mean that the candidates having such experience are to be selected en bloc, defeating the claim of those, who are more meritorious. It is contended that applicants with higher education have also to be given preference under Government Order dated 6.5.2010. It is further submitted that the Government Order dated 6.5.2010 is silent as regards the manner in which inter-se claim of the applicants possessing higher educational qualifications, vis-?-vis those having past experience, is to be adjudged. Consequently, the Zila Lok Shiksha Samiti was fully justified in issuing the notification dated 19.9.2014. It neither amounts to amending or varying the stipulations in the advertisement, nor takes away any vested right of the petitioners. It is further contended that the word "Prathmikta" and "Variyata" conveys the same meaning but in order to remove any confusion, notification dated 22.10.2014 was issued. It is further submitted that in case any other interpretation is given to the word "Prathmikta", it would be contrary to the Government Order dated 6.5.2010, which specifically provides for giving

"Variyata" for past experience. It is submitted that the power to make selection on the post of Prerak flows out of Government Order dated 6.5.2010 and thus, no applicant can claim any right to be selected, contrary to the terms and conditions of the Government Order.

5. I have considered the submissions made by learned counsel for the parties and perused the record. On basis of arguments advanced by learned counsel for the parties, following points call for determination:--

"1. Whether applicant with past experience of working in literacy programme, becomes automatically entitled for appointment as Prerak?

2. Whether notification dated 19.9.2014, 20.10.2014 and 22.10.2014, amounts to altering the conditions of the advertisement dated 3.12.2014?

I proceed to examine these points one by one."

Point No. 1:

6. The advertisement dated 3.12.2011 stipulates that the applicants who possess experience of working as Prerak, social worker, master trainer, will be given "Prathmikta" . At the same time, condition No. 14 of the advertisement relating to selection on the post of Prerak is to the following effect:--

7. The advertisement in question inviting applications for appointment on the post of Prerak has been issued in pursuance of Government Order dated 6.5.2010, which provides for the mode of selection. It envisages engaging services of two Preraks in every Lok Shiksha Kendra to be established at Gram Panchayat level. The minimum educational qualification is High School and the applicants will be engaged on contractual basis on payment of honorarium of Rs. 2000/- per month. The terms and conditions in the Government Order regulating the selection are as under:--

8. The other directives relating to the selection specifically provides for selection being held under overall supervision of Zila Lok Shiksha Samiti. It has been conferred with the power to grant approval to the selection of the candidates by Gram Panchayat Lok Shiksha Samiti. It has also been made responsible in relation to any controversy relating to the selection process.

9. A perusal of conditions No. 1 and 2 of the Government Order reveals that atleast at two places the word "Variyata" has been used. Candidates possessing higher educational qualification as well as those having past experience are to be given "Variyata".

10. Counsel for the petitioners contended that there is difference between "Variyata" and "Prathmikta". It is contended that "Prathmikta" means priority, while "Variyata" means preference. The petitioners, who possess past experience, are thus entitled for automatic selection as Prerak, as the advertisement provides for giving "Prathmikta" for past experience, and not "Variyata".

11. Allied Chambers Hindi-English Dictionary defines "Prathmikta" as priority or precedence and "Variyata" as seniority or precedence or preference. The expression "preference" inter alia means, prior right, advantage, precedence (vide *Sher Singh Vs. Union of India (UOI) and Others*, . According to Oxford Dictionary, the word "preference" means "favour shown to one person over other", "a greater liking over another", a prior right or precedence and "priority" means preference, precedence or greater importance. Thus, words "Prathmikta" and "Variyata" have varied meanings, some of which are common. It is to be ascertained as to whether, in the circumstances of the case, they convey same or different meaning and what would be that meaning.

12. The selection on the post of Prerak notified vide advertisement dated 3.12.2011 derives its legitimacy from Government Order dated 6.5.2010. The source of power to hold the selection and the criteria on basis of which, the selection is to be made, thus, has its genesis in the Government Order dated 6.5.2010. Consequently, the advertisement cannot prescribe any condition, which is contrary to the Government Order or else the selection itself will be illegal. The words used in the advertisement, are to be interpreted in the contextual background of the Government Order. Government Order prescribes for giving "Variyata" for past experience, as in case of higher qualification. It has already been seen that at times, even according to dictionary meaning, both the words have same meaning. The word "Prathmikta" employed in the advertisement, when interpreted in contextual background of the Government Order, connotes the same thing as "Variyata".

13. It seems that in view of use of the phrase "Prathmikta" in the advertisement, there was an element of confusion prevailing in the mind of the applicants and to set at rest the said controversy, the respondents issued Press notification dated 22.10.2014 providing that as per condition No. 2 of Government Order dated 6.5.2010, wherein, person with past experience has to be given "Variyata", the word "Prathmikta" used in the advertisement dated 3.12.2011 be read as "Variyata".

14. Further, condition No. 14 of the advertisement and stipulation No. 1 in the Government Order that candidates with "higher education" will be given "preference", are to be read alongwith the stipulation regarding "preference/priority" to a candidate having "past experience". It is amply clear therefrom that experience is not the sole criteria for selection of a candidate but higher educational qualification has also to be given preference. How the said exercise is to be held, is mentioned in condition No. 14 of the advertisement, which stipulates that selection is to be made on the basis of the marks assigned by Zila Lok Shiksha Samiti for higher education and for past experience. This conclusively demonstrates that past experience is not the sole criteria for selection and thus interpreted, the word "Prathmikta" used in the advertisement, would mean giving preference to a candidate having past experience, as in case of higher education.

15. However, the question which remains to be answered is whether a person with past experience becomes automatically entitled for selection. A Division Bench of this Court in the case of *Parvati Devi v. State of U.P.* 2007 (6) ADJ 384 had the occasion to consider the law on the point. After considering various judgments of the Apex Court, it was concluded that where the rules provide for giving preference for experience or for higher qualification, it would not mean that an absolute en bloc preference to such candidates akin to reservation. It only means giving weightage to such priority category candidates, other things being equal. Relevant portion of the said judgment, which takes notice of the decisions of the Apex Court, is reproduced below:--

"30 In *Government of Andhra Pradesh v. P. Dilip Kumar and Anr.*, the Hon'ble Supreme Court held as under:

"The matter may be looked at from another viewpoint. The word "preference" as understood in ordinary parlance means preferring or choosing as more desirable, favouring or conferring a prior right. What then is the purpose and object sought to be achieved by the insertion of the preference clause in the rule? There is no doubt that preference was sought to be granted under Note 1 to post-graduates in the larger interest of the administration. How would the interest of the administration be served by granting preference to postgraduates? It is obvious that it was thought that on account of their higher mental equipment the quality of performance that the State will receive from highly qualified engineers would be better and of a high order. In other words the State considered it necessary to strengthen the engineering service by recruiting post-graduates to the extent available so that the State may benefit from their higher educational qualifications and better performance. If this was the objective surely it would not be realized unless post-graduates are treated as a class and given preference en bloc over the graduates.... It is true that notwithstanding the preference rule it is always open to the recruiting agency to prescribe a minimum eligibility qualification with a view to demarcating and narrowing down the field of choice with the ultimate objective of permitting candidate with higher qualifications to enter the zone of consideration. It was, therefore, held that screening a candidate out of consideration at the threshold of the process of selection is neither illegal nor unconstitutional if a legitimate field demarcating the choice by reference to some rationale formula is carved out. Thus the challenge based on Articles 14/ 16 of the Constitution was repelled.

32. The Supreme Court in *Secretary, A.P. Public Service Commission v. Y.V.V.R. Srinivasulu and Ors.*, dealing with the issue held as under:

The "preference" envisaged in the Rules, in our view, under the scheme of things and contextually also cannot mean, an absolute en bloc preference akin to reservation or separate and distinct method of selection for them alone. A mere rule of preference meant to give weightage to the additional qualification cannot be enforced as a rule of reservation or rule of complete precedence.... It is not to be viewed as a preferential right conferred even for taking up their claims for

consideration. On the other hand, the preference envisaged has to be given only when the claims of all candidates who are eligible are taken for consideration and when any one or more of them are found equally positioned, by using the additional qualification as a tilting factor, in their favour vis-?-vis others in the matter of actual selection. Whenever, a selection is to be made on the basis of merit performance involving competition, and possession of any additional qualification or factor is also envisaged to accord preference, it cannot be for the purpose of putting them as a whole lot ahead of others, dehors their intrinsic worth or proven inter se merit and suitability, duly assessed by the competent authority. Preference, in the context of all such competitive scheme of selection would only mean that other things being qualitatively and quantitatively equal, those with the additional qualification have to be preferred. There is no question of eliminating all others preventing thereby even an effective and comparative consideration on merits, by according en bloc precedence in favour of those in possession of additional qualification irrespective of the respective merits and demerits of all candidates to be considered.... The word first has to be construed in the context of even giving preference only in the order and manner indicated therein, inter se among more than one holding such different class of degrees in addition and not to be interpreted vis-?-vis others who do not possess such additional qualification, to completely exclude them en bloc.

33. In State of U.P. and Anr. v. Om Prakash and Ors., after considering the earlier judgments on the issue, the Hon'ble Apex Court held that the word "preference" would mean that when the claims of all candidates who are eligible and who possess the requisite educational qualification prescribed in the advertisement are taken for consideration and when one or more of them are found equally positioned, then only the additional qualification may be taken as a tilting factor, in favour of candidates vis-?-vis others in the merit list prepared by the Commission. But "preference" does not mean en bloc preference irrespective of inter se merit and suitability.

34. In view of the above, it is evident that question of giving preference would arise provided the person claiming preference stands on equal footings with others, otherwise not."

16. In the said judgment, the Division Bench also considered Full Bench judgment in the case of Daya Ram Singh v. State 2007 (25) LCD 1427 and held that the use of the word "Pratham Variyata" in Government Order dated 10.10.2005 in relation to the scheme for appointment of Shiksha Mitra, would mean that persons possessing experience form a separate class and will be preferred over others. The Division Bench noted with concern that such stipulation would give a complete go-bye to merit, creating a separate class of persons based on experience alone, and thus be contrary to Article 14 and 16 of the Constitution. However, without expressing any final opinion on the said issue, as Government Order was not under challenge, the judgment concludes with words of wisdom to the State authorities, by observing as under:--

"54. The candidates who could claim selection on the basis of their merit neither challenged the selection on any ground nor the validity of the Government Orders is under challenge. Thus, we are not in a position to examine as to whether the Government Orders providing precedence in favour of the candidates having worked as Inspector/Supervisor in formal Education Schemes meet the requirement of Articles 14 and 16 of the Constitution. Thus, we request the State Government to consider the issue and pass appropriate order considering the aforesaid law laid down by the Hon''ble Supreme Court, keeping in mind the importance of basic education and protecting the interest of the children, as the basic purpose of issuance of the Government Orders seem to impart basic quality education to the children of the State and not to give employment. Lessor meritorious candidates if employed would not serve the cause of the State, as they cannot be "friends of education" rather would be "enemies of education".

55. The learned Standing Counsel is requested to send a copy of the judgment to the Principal Secretary, Basic Education for appropriate means to be undertaken for bringing about such modifications that may be necessary in the larger interest of students as observed herein above."

17. It seems that the State Government on the basis of the observations made by the Division Bench in the above mentioned judgment, reviewed the scheme for selection of Shiksha Mitra and replaced it by a new scheme vide Government Order dated 6.5.2008, whereunder, certain marks were assigned in lieu of experience, instead of giving Pratham Variyta. It became subject matter of challenge before this Court in the case of Dhirendra Kumar Tiwari Vs. State of Uttar Pradesh and others . The Court upheld the Government Order providing for giving preference to past experience by allocating extra marks for it by observing that it strikes a balance between merit and experience. It was held as under:--

"....In the present case decision in question, which has been taken by the State Government, therein conscious policy decision has been taken to strike balance in between merit and experience, and for the experience which has been acquired by the instructors/supervisors for the same they have been suitably rewarded by awarding marks in lieu of the same..."

18. The State Government, while issuing the Government Order dated 6.5.2010 providing for selection of Preraks, was conscious of the observations made by the Division Bench in the case of Parvati Devi (supra). It, therefore, ensured that a balance is maintained between merit and experience as amongst those who possess minimum qualification of High School. It is for the said reason that Government Order specifically provides for giving preference to both higher educational qualification, which is an index of merit, and the past experience vide conditions No. 1 and 2 of the Government Order. Thus, the contention of the petitioners that they are entitled for selection merely on the basis of past experience, irrespective of their educational qualification, is not acceptable.

Point No. 2.

19. The question to be considered is whether the notification dated 22.10.2014 by which condition No. 2 of the advertisement dated 3.12.2011 has been amended by providing that "Prathmikta" shall be read as "Variyata" and the notification by Basic Shiksha Adhikari dated 19.9.2014 based on recommendations made by the District Lok Shiksha Samiti providing quality points for past experience and higher education amounts to altering the conditions of the advertisement.

20. It is settled law that selection is to be made on the basis of the rules and conditions existing on the date of the advertisement. Further, the rules even if amended, will normally not apply to selection, which is under way since before (vide 2010 (3) SCC 467: cited by the petitioners).

21. Thus, it is to be seen whether the notification dated 19.9.2014 issued by Basic Shiksha Adhikari and the Press notification dated 22.10.2014 amounts to altering the criteria for selection, after the last date for submitting the application form is over. First, I proceed to test the arguments of the petitioners in relation to Press notification dated 22.10.2014. Admittedly, the advertisement was issued in pursuance of the Government Order dated 6.5.2010, which prescribes the eligibility and the criteria for selection on the post of Prerak. It has already been noted that the source of power to hold the selection and the criteria on basis of which, the selection is to be made, has its genesis in the Government Order dated 6.5.2010 and the advertisement cannot go beyond or contrary to it, otherwise, the selection itself will be illegal. It has also been held that use of word "Prathmikta" and "Variyata" if read in the context of the Government Order, would mean the same thing. Thus, I am of the considered opinion that the Press notification dated 22.10.2014 is only by way of clarification, removing ambiguity in the mind of the candidates. It does not change any condition relating to selection, nor it takes away any vested right of the petitioners. Thus, challenge to the selection process on the ground aforesaid, cannot be accepted.

22. It is now to be examined as to whether by issuing the notification dated 19.10.2014, whereby, quality points have been assigned for academic qualification and experience, the criteria for selection has been altered or not.

23. As noted above, the selection criteria provided under the Government Order seeks to strike a balance between merit and experience both of which are to be given "preference". However, the Government Order is silent as to how inter se merit of the applicants seeking benefit of having higher education and/or past experience, is to be adjudged. It is for the said reason that under clause 14 of the advertisement, it was specifically provided that the same shall be adjudged on the basis of quality points assigned under various heads, by the District Lok Shiksha Samiti. It has been held by the Apex Court in the case of Secy. (Health) Deptt. of Health and F.W. and Another Vs. Dr. Anita Puri and Others, that in absence of any rules, the body holding selection has the discretion to lay down

the mode of evaluating the merit of the candidates. It has been held as under:--

"31. In Secy. (Health) Deptt. of Health & F.W. and Anr. v. Dr. Anita Puri and Ors., the question raised before the Supreme Court was answered as follows:

....The question then arises is whether a person holding a M.D.S. qualification is entitled to be selected and appointed as of right by virtue of the aforesaid advertisement conferring preference for higher qualification? The answer to the aforesaid question must be in the negative. When an advertisement stipulates a particular qualification as the minimum qualification for the post and further stipulates that preference should be given for higher qualification, the only meaning it conveys is that some additional weightage has to be given to the higher qualified candidates. But by no stretch of imagination it can be construed to mean that a higher qualified person automatically is entitled to be selected and appointed. In adjudging the suitability of person for the post, the expert body like Service Commission in the absence of any statutory criteria has the discretion of evolving its mode of evaluation of merit and selection of the candidate. The competence and merit of a candidate is adjudged not on the basis of the qualification he possesses but also taking into account the other necessary factors like career of the candidate throughout his educational curriculum, experience in any field in which the selection is going to be held, his general aptitude for the job to be ascertained in course of interview, extracurricular activities like sports and other allied subjects, personality of the candidate as assessed in the interview and all other germane factors which the expert body evolves for assessing the suitability of the candidate for the post for which the selection is going to be held."

(emphasis supplied)

24. Since the Government Order is silent on this aspect and, therefore, condition No. 14 of the advertisement stipulates that quality point marks for higher qualification and experience will be assigned by the District Lok Shiksha Samiti, under whose supervision the entire selection process is being held. A perusal of the notification issued by Basic Shiksha Adhikari, Ambedkar Nagar dated 19.10.2014 reveals that it has been issued on the directives issued by the District Lok Shiksha Samiti. In the aforesaid background, I am of the firm opinion that the District Lok Shiksha Samiti was fully justified in allocating quality point marks for past experience and academic qualification for evaluating the comparative merit of the candidates. Such exercise, as held above, is permissible under law and also vide Clause 14 of the advertisement. Thus, directives issued by District Lok Shiksha Samiti and notified by Basic Shiksha Adhikari on 19.9.2014, does not change or alter the terms and conditions on which selection is to be made.

25. It is noticeable that the allocation of quality point marks under various heads, by the impugned circular dated 19.10.2014, is not under challenge, nor the Government Order dated 6.5.2010. As such, I do not find any illegality in

issuing the impugned circular dated 19.10.2014. In my considered opinion, the same was necessary to give final shape to the selection process as per condition No. 14 of the advertisement.

26. A feeble attempt was made in some of the writ petitions to contend that reservation prescribed by issuing circular dated 19.9.2014 is contrary to the conditions of the advertisement. However, the argument is wholly misconceived. A perusal of Government Order dated 6.5.2010 reveals that it specifically provides for reservation as per the reservation policy of the State Government. Condition No. 4 of the advertisement is also to the same effect. In the notification dated 19.9.2014 vide condition Nos. 4 and 5 reservation is provided to various categories of candidates, which in my opinion, is in no manner contrary to the stipulations in the Government Order.

27. In the end, it is contended that notification dated 20.10.2014, whereby, candidates have been permitted to submit attested copies of their testimonials at the time of their counseling, amounts to altering the conditions of the advertisement. A perusal of clause No. 2 of the notification dated 20.10.2014, reveals that all candidates were directed to appear in the counseling on 5.11.2014 along with photostat copies and original testimonials. The Principal D.I.E.T. has been directed to compare the photostat copies with original testimonials and after due verification, the photostat copies of the testimonials are to be retained. Only such testimonials, which relate to educational qualification of a candidate before the date of advertisement dated 3.12.2011, are to be taken into consideration.

28. A perusal of condition No. 15 of the advertisement, reveals that self attested photo stat copies of educational certificates are to be annexed with the application form. Thus, condition No. 1 of notification dated 20.10.2014 does not amount to varying any condition relating to the selection process, but is only a step in aid for verifying the authenticity of the educational qualification of a candidate obtained prior to date of issuance of advertisement dated 3.12.2011. There is no allegation in any of the writ petition that any person who had not filed any certificate earlier along with his application, is being permitted to fill such lacunae at the time of counseling. Thus, challenge on the said ground, also cannot be sustained.

29. In writ petition No. 6538 (S/S) of 2014 Jagdish Prasad v. State of U.P. & Ors., the petitioner had laid challenge to the select list dated 9.11.2014 on the ground that he has not been awarded any marks for past experience. It is noticeable that according to paragraph 6 of the writ petition, the petitioner had three days experience of working in the literacy programmes i.e. from 14.5.2001 to 16.5.2001. As per the notification dated 19.9.2014, persons with less than six months experience, are to be awarded zero marks. In view of the above, the respondents were justified in not awarding any marks to the petitioner for previous experience. Even otherwise, I am of the opinion that three days alleged experience of the petitioner in the literacy programme is wholly negligible and

does not warrant any preferential treatment to him, as compared to those with no such experience.

30. In the end, it may be noted that scheme for engagement on the post of Prerak is not a scheme for giving employment but for spread of education at the Panchayat level. The object was to seek participation of young educated persons in the spread of village education. What is given to a Prerak is mere honorarium and the scheme was initially confined to the period till 31.3.2010 and is being extended from time to time. Thus, no right of the petitioners, herein, has been infringed. Writ petitions lack merit and are dismissed.