
(2011) 10 UK CK 0038

In the Uttarakhand High Court

Case No : Writ Petition No. (S/S) 463 of 2010

Deewan Singh Bhandari and Another

APPELLANT

Vs

State of Uttarakhand and Others

RESPONDENT

Date of Decision : 21-10-2011

Acts Referred:

Constitution of India, 1950 — Article 3, 309

Uttar Pradesh Reorganisation Act, 2000 — Section 73, 74

Citation : (2011) 10 UK CK 0038

Hon'ble Judges : Sudhanshu Dhulia, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Hon'ble Sudhanshu Dhulia, J.—Since the issue raised in both the above writ petitions is the same, the two are being heard and decided together by a common order. However, it is made clear that the particular facts referred to in the present order pertain to Writ Petition (S/S) No. 463 of 2010.

2. Heard Mr. D. S. Bisht, Advocate for the petitioners, Mr. N. P. Sah, Standing Counsel for the State of Uttarakhand and Mr. Manoj Tiwari, Senior Advocate assisted by Mr. Bhagwat Mehra, Advocate for respondent nos. 4 to 19.

3. The petitioners before this Court are class III employees of Horticulture and Food Processing Department, State of Uttarakhand. They have challenged by means of the present writ petition the promotion of respondent nos. 4 to 19 from class IV post to class III post, which have been made under the Uttarakhand Horticulture and Food Processing Subordinate (Group-C) Service Rules, 2009. The challenge of the petitioners to these Rules is as it prescribes a particular method and criteria of promotion from Class IV to Class III. In other words, it introduces "merit" while making promotion from class IV post to class III post as class IV candidates will have to successfully pass a "written examination" conducted by the Selection Committee. Earlier though, under the 1993 Rules pertaining to the Horticulture Department, promotion was to be made only on

the basis of seniority subject to the rejection of unfit. The petitioners also submit that it is in violation of the 2004 Rules, applicable to the service conditions of the Government Employees in the State of Uttarakhand, more precisely known as Uttarakhand Government Servants (Criterion of Recruitment by Promotion) Rules, 2004. As per the said rules (i.e. 2004 Rules) apart from post of Head of Department and the post next to the Head of Department and the post carrying the pay-scale of Rs. 18300/- or above, all other promotions are to be made on the basis of seniority subject to rejection of unfit.

4. Respondent nos. 1 to 3 are represented by the State Government who have defended their stand as well as the Rules on the basis of which the promotion exercise has been made. Respondent Nos. 4 to 19 are represented by Mr. Manoj Tiwari, Senior Advocate assisted by Mr. Alok Mehra, Advocate who has justified the promotion exercise.

5. Brief facts of the case giving rise to the present writ petition are as follows :-

The petitioners are admittedly senior to respondent nos. 4 to 19 who have been promoted from class IV post to class III post. The date of appointment of the present petitioners in the department are as follows:

Petitioner No.

Date of birth

Date of Initial appointment

Qualification

Petitioner No. 1

2.7.1963

4.7.1981

M.A./H.S. 1984

Petitioner No. 2

4.10.1958

5.1.1987

High School/1980

The date of appointment of the respondents who have been selected are all of a later date. In other words, all the respondents are admittedly junior to the petitioners in group IV service.

6. Though in 1993 Rules earlier, known as Uttar Pradesh Horticulture and Food Processing Subordinate Service Rules, 1993 applicable to the petitioners and Respondents, 80 per cent of class III posts had to be filled by way of direct recruitment and the remaining 20 per cent by way of promotion from class IV

employees and the criteria for promotion was seniority subject to rejection of unfit. In other words, merit was nowhere a consideration, while making such promotions. During this time, Uttarakhand was a part of State of Uttar Pradesh and the said 1993 Rules was applicable to the undivided State of Uttar Pradesh. The State of Uttarakhand was created by an Act of Parliament known as Uttar Pradesh Reorganisation Act, 2000. After the creation of the State of Uttarakhand, the State of Uttarakhand framed its own rules pertaining to the Horticulture Department in the year 2009 known as Uttarakhand Horticulture and Food Processing Subordinate (Group-C) Service Rules, 2009. The Rules clearly state that these rules are "in supersession of all existing rules and orders on the subject". Meaning thereby that there is an implied repeal of 1993 Rules and Rules 2009 will now prevail over the 1993 Rules. In 2009 Rules though 80 per cent of the seats of class III employees in the Horticulture and Food Processing Department had to be filled by way of direct recruitment and the remaining 20 per cent of the seats had to be filled by those employees who were high school (as it was earlier), but this is subject to their qualification in a written examination conducted by the selection committee. It is this "written examination", which has become the subject matter of dispute in the present cases. The petitioners refused to appear in the written examination, as according to them it amounted not only to change in the service condition but was also in violation of 2004 Rules. For sake of convenience, we will refer to 2004 Rules as "General Rules" and 2009 Rules on which respondents are relying upon as "Special Rules". A heavy reliance has been placed by the petitioners on the non-obstante clause in "General Rules". The actual wordings of the non-obstante clause in "General Rules" reads as follows :-

2. Overriding effect - These rules shall have effect notwithstanding anything to the contrary contained in any other Service rules made by the Governor under the proviso to Article 309 of the Constitution of, or Orders, for the time being in force.

In other words, in case of any conflict between "General Rules" and any other law which was on the subject, "General Rules" would prevail. This would be the logical interpretation of the non obstante clause, according to the petitioners. However, according to Sri Manoj Tiwari, senior advocate appearing for respondent nos. 4 to 19 as well as Sri N. P. Sah, Standing Counsel appearing for the State the "Special Rules" which have been relied upon by the respondents are not only "special" and under the principle of "special overriding the general" would prevail but also these are also in later point of time. Undoubtedly, the "special rules" now introduce merit, though in "general rules" the criteria of promotion for such post would be only seniority. However, on the basis of principle of "special overriding the general", the Special Rules shall prevail, more particularly in view of the fact that "special rules" are of later point in time and in view of the fact that the "general rules" which start with the non obstante clause are in any case limited to the law "for the time being in force" i.e. in force in the year 2004, as these are the precise words in the non obstante clause, of the

General Rules.

7. The precise issue before this Court is as to whether the "General Rules" i.e. 2004 Rules (more precisely known as Uttarakhand Government Servants (Criterion of Recruitment by Promotion) Rules, 2004) or the "Special Rules of 2009 (more precisely known as Uttarakhand Horticulture and Food Processing Subordinate (Group-C) Service Rules, 2009) shall prevail in the present case. In case the General Rules of 2004 will have an overriding effect since it contains a non obstante clause then the sole criteria for promotion would be seniority in the present case. However, in case the Special Rule i.e. 2009 Rules are held to be applicable then the criteria as prescribed in the said rules i.e. merit (which would mean a written examination) shall prevail.

8. Undoubtedly, we have today before us a case where the subject matter i.e. promotion from class IV post to class III post is governed by two set of rules, as noted above. All these two provisions of law between which a repugnancy is alleged have been enacted by the Government of Uttarakhand under Article 309 of the Constitution of India. All the same, the rules of interpretation when a subject is governed by two set of rules are by now well settled. In the present case, before us we shall only enumerate the necessary condition which is necessary for the present purposes, alone.

9. Whenever there are two set of laws on a subject, the effort of the Court should first be to make an endeavour to arrive at a harmonious conclusion while interpreting the two different statutes or provisions. All the same, while interpreting the two provisions if it becomes clear that the Legislatures were clear in their mind as to which set of provision shall apply in case of a conflict or repugnancy then that provision must be given effect to. In case there is no clarity on this aspect then the prior special law shall always prevail over the general law, even if the general law is later in time and has a non obstante clause. This is based on the principle of "generalia specialibus non derogant". However, when it is clear from the wording of the two statutes that the later general law shall prevail over the earlier special law then it would be later general law which shall prevail.

10. Having stated this, we presently have a situation where the special law is not only later in time but the general law, with its non obstante clause has an overriding effect only over the laws already existing at that point of time i.e. in the year 2004. In any case, where a special law is later in time then inspite of non obstante clause in the general law, the special law shall prevail in case of an inconsistency between the two. In the light of the aforesaid settled provision of law, let us examine the two set of laws relied upon by the two parties before us.

11. The general law is of the year 2004 known as Uttarakhand Government Servants (Criterion of Recruitment by Promotion) Rules, 2004. The non obstante clause in the said provision reads as follows :-

2. Overriding effect - These rules shall have effect notwithstanding anything to

the contrary contained in any other Service rules made by the Governor under the proviso to Article 309 of the Constitution of, or Orders, for the time being in force.

12. A bare reading of the aforesaid non obstante clause makes it very clear that it was the clear intention of the State Legislation that this provision will prevail or will have an overriding effect over any other service rules made by the Government under Article 309 of the Constitution of India, which would mean, inter alia, "any other law relating to such promotions", however, it will override only the law which are "for the time being in force". In other words, 2004 General Rules shall have an overriding effect over all other laws made on the subject prior to that date (i.e. prior to the date of enactment of 2004 General Rules).

13. At this juncture, it may be necessary to state that this would include 1993 Rules framed for the Horticulture Department, with which we are presently concerned, in the erstwhile State of Uttar Pradesh, as well as in the State of Uttarakhand till 2009 these Rules were known as the Uttar Pradesh Horticulture and Food Processing Subordinate Service Rules, 1993, were in force. However, in the year 2009, the State of Uttarakhand has enacted another set of Rules for the Horticulture Department which is the special enactment known as Uttarakhand Horticulture and Food Processing Subordinate (Group-C) Service Rules, 2009. These Rules start with a declaration that they have been framed "in supersession of all existing rules and orders on the subject". Hon''ble Apex Court in the case of Om Prakash Shukla Vs. Akhilesh Kumar Shukla and Others, has stated that the phrase "in supersession of all existing rules and orders on the subject" only refer to those matters in the existing rules which correspond to the matters dealt with the present Rules. Therefore, the 2009 Rules only supersede the 1993 Horticulture Rules alone.

14. In 1993 Horticulture Rules provisions relating to promotion from a class IV post to a class III post is given in Section 5, which reads as under :-

5. Source of recruitment. - Recruitment to the various categories of posts in different sections/sub-sections in the Service shall be made from the following sources:

Posts

Source of Recruitment

Section A - Horticulture Development

Group - I Posts

....

Group - II Posts

....

Group - III Posts

(i.) Twenty percent by promotion from amongst substantively appointed Group "D" employees of the section who have passed High School Examination from the Board of High School and Intermediate Education, Uttar Pradesh or an examination recognised by the Government as equivalent thereto and have completed five years substantive service on their respective posts on the first day of the year of recruitment.

(ii) Eighty percent by direct recruitment through the Commission on the basis of competitive examination and interview.

15. As we have already noticed above, these Rules were adopted by the State of Uttarakhand and hence were applicable in the State of Uttarakhand. However, in 2009 Rules which are in supersession of all existing rules and orders on the subject, the new provision u/s 5 reads as follows :

5. Source of recruitment. - Recruitment to the various categories of posts in the Service shall be made from the following sources:

Source of Recruitment

Section A - Horticulture Development

Group - III Posts

(i) 20 percent by promotion from such substantively appointed Group-D employees, who have passed High School examination from Board of Secondary Education, Uttarakhand, Uttarakhand/Uttar Pradesh or any other examination recognized by the Government equivalent thereto and have completed five years of service on their respective posts on the first day of the year of recruitment on the basis of objective type written examination through selection by Departmental Selection Committee

(ii) 80 percent by direct recruitment through competitive examination.

16. Though 2009 Special Rules have not superseded the 2004 General Rules, these being the Special Rules shall have an overriding effect for the simple reason that these Special Rules are later in time to the General Rules. The principle of interpretation has already been discussed above. This aspect has been elaborated and dealt with in rather detail in a recent judgment of Hon"ble Apex Court in Maya Mathew Vs. State of Kerala and Others, , where the Hon"ble Apex Court has held that the Special Rules being later in time will prevail over the General Rules. In the case at hand, a primacy has to be given to 2009 Special Rules not only because it is later in time but the non obstante clause being so heavily relied upon by the petitioners in 2004 General Rules clearly states that 2004 General Rules shall prevail over other rules on the subject which are "presently in force". Definitely 2009 Horticulture Rules which are Special Rules were not even existing in the year 2004. In fact the majority of Judges of Hon"ble Apex Court in R.S. Raghunath Vs. State of Karnataka and another, have

even held that depending upon the language of the non obstante clause the General Rules though later in time to the Special Rules, will not prevail over the Special Rules.

17. That being the position of law, this Court is of considered view that 2009 Special Rules will prevail in the present situation and the criteria for promotion as given in 2009 Special Rules will be applicable and therefore the contention of the petitioners to that effect stands rejected.

18. There is, however, another aspect to this issue which must be dealt with now.

19. In spite of the fact that this Court has held that the Special Rules i.e. 2009 Horticulture Rules shall prevail over 2004 General Rules, there is another ground urged by the petitioners in their favour, which must now be dealt with. This is, reliance upon certain provision of the Uttar Pradesh Reorganisation Act, 2000.

20. The new State of Uttarakhand was formed under Article 3 of the Constitution of India by an Act of Parliament known as Uttar Pradesh Reorganisation Act, 2000 (from hereinafter referred to as the "Reorganisation Act"). The new State of Uttarakhand came into force on the "appointed day" which is 9th November, 2000. The Reorganisation Act is divided into various parts which deal with various subjects, such as apportionment of assets and liabilities between the two states (i.e. the State of Uttar Pradesh and the State of Uttarakhand) and other provisions as well as provisions relating to service conditions of employees who stand allocated or reallocated to the new States. In short, Section 73 of Reorganisation Act lays down a provision whereby the Central Government has been authorized to allocate the employees of the erstwhile State of Uttar Pradesh to the successor States of Uttar Pradesh and Uttarakhand. However, we are presently concerned with Section 74 (and more precisely to its proviso) of the Reorganisation Act, which reads as under :-

74. Other provisions relating to Services.-(1) Nothing in this section or in Section 73 shall be deemed to affect on or after the appointed day, the operation of the provisions of Chapter I of Part XIV of the Constitution in relation to determination of the conditions of service of persons serving in connection with the affairs of the Union or any State:

Provided that the conditions of service applicable immediately before the appointed day in the case of any person deemed to have been allocated to the State of Uttar Pradesh or to the State of Uttaranchal u/s 73 shall not be varied to his disadvantage except with the previous approval of the Central Government.

(2) All services prior to the appointed day rendered by a person,-

(a) if he is deemed to have been allocated to any State u/s 73, shall be deemed to have been rendered in connection with the affairs of that State;

(b) if he is deemed to have been allocated to the Union in connection with the administration of the Uttaranchal, shall be deemed to have been rendered in

connection with the affairs of the Union, for the purposes of the rules regulating his conditions of service.

(3) The provisions of Section 73, shall not apply in relation to members of any All India Service.

21. It is an admitted case that both the petitioners as well as respondent nos. 4 to 19 were all appointed in the Horticulture Department, in the erstwhile State of Uttar Pradesh (all barring respondent no. 15 who was appointed on 30.7.2002). It is also admitted that the petitioners as well as the respondents stand allocated to the new State of Uttarakhand by an order of the Central Government u/s 73 of the Reorganisation Act. Now counsel for the petitioners would argue that proviso to Section 74 of the Reorganisation Act, which also refers to Section 73, states as under :-

Provided that the conditions of service applicable immediately before the appointed day in the case of any person deemed to have been allocated to the State of Uttar Pradesh or to the State of Uttaranchal u/s 73 shall not be varied to his disadvantage except with the previous approval of the Central Government.

22. The counsel for the petitioners have now argued that the two laws under which they were governed (i.e. the 1993 Rules relating to the Horticulture Department as well as the General Rules of 2004), class IV employees were to be promoted to class III posts only on the basis of seniority subject, however, to the fact that they had high school qualification. This provision has now been varied to their disadvantage, without any approval of the Central Government.

23. A bare reading of the two provisions of 1993 Rules and 2009 Rules makes it clear that a "merit" has now been introduced while making promotion from a class IV post to a class III post under 2009 Special Rules in form of a written test. This the petitioners contend amounts to varying their service condition to their disadvantage and since this has been done without any prior approval of the Central Government it is in violation to the proviso to Section 74 of the Reorganisation Act, which is a Parliamentary Legislation and hence would prevail over the rules relied upon by the respondents.

24. The prior approval from the Central Government is mandatory before service condition of an employee is adversely affected i.e. an employee allocated to a newly created State which has undergone a reorganization. Although the law on the subject is clear that such approval may be either explicit or implicit, as held by the Hon''ble Apex Court in Bishan Chand and Others Vs. Sarbjit Singh and Others, . All the same, nothing has been shown to this Court by any of the respondents including the State Counsel that prior approval of the Central Government, whether expressed or implied, had been obtained before framing the 2009 Special Rules known as Uttarakhand Horticulture and Food Processing Subordinate (Group-C) Service Rules, 2009. Therefore, undoubtedly unless such a permission is taken from the Central Government these Rules cannot be enforced.

25. The position which ultimately emerges is that the respondents have to be refrained from enforcing such Rules (2009 Rules), unless they first obtain the permission of the Central Government under proviso to Section 74 of the Reorganisation Act. The net result of this would be that the entire promotion exercise as done by the respondents for promoting respondent nos. 4 to 19 in view of Uttarakhand Horticulture and Food Processing Subordinate (Group-C) Service Rules, 2009 is in violation of the law and hence illegal.

26. The Writ Petition therefore stands allowed, but only on the question of law regarding the violation of proviso to Section 74 of the Reorganisation Act. Consequently order dated 31.3.2010 (Annexure No. 6 to the writ petition) is set aside.

27. In view of the aforesaid Writ Petition (S/S) No. 511 of 2010 is also disposed of accordingly. Order dated 31.3.2010 and 13.4.2010 (Annexure Nos. 6 and 8 to the writ petition) are also set aside.

28. No order as to costs.