

(2011) 02 AHC CK 0095

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 999 of 2009

Dr. Smt. Meera Tripathi

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 24-02-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 16
Uttar Pradesh Educational (General Education Cadre) Service Rules, 1992 — Rule 3, 4(1), 5
Uttar Pradesh Public Service Commission (Posts outside the Purview of Public Service Commission), Eligibility List for Promotion Rules, 1986 — Rule 2
Constitution of India, 1950 — Article 14, 16
Uttar Pradesh Educational (General Education Cadre) Service Rules, 1992 — Rule 3, 4(1), 5
Uttar Pradesh Public Service Commission (Posts outside the Purview of Public Service Commission), Eligibility List for Promotion Rules, 1986 — Rule 2
Constitution of India, 1950 — Article 14, 16
Uttar Pradesh Educational (General Education Cadre) Service Rules, 1992 — Rule 3, 4(1), 5
Uttar Pradesh Public Service Commission (Posts outside the Purview of Public Service Commission), Eligibility List for Promotion Rules, 1986 — Rule 2

Citation : (2011) 3 ADJ 764 : (2012) 1 AWC 370

Hon'ble Judges : Sunil Ambwani, J; Jayashree Tiwari, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. Heard learned Counsels appearing for the parties.
2. Dr. (Smt.) Meera Tripathi-the Petitioner is M.A in Philosophy and in Sanskrit, was awarded B. Ed and Ph.D degree. She was appointed as Principal of Sri Har Kumari Pathak Kanya Inter College, Shahjahanpur in 1989 and worked upto 22.10.1999.
3. By this writ petition the Petitioner has prayed for quashing the Office Order dated 2.7.2007, in so far as it limits her notional promotion to the post of District Inspector of Schools w.e.f. 23.10.2005. She has also prayed for directions to

sanction to her notional promotion as District Inspector of Schools w.e.f. 10.8.1995 and as Deputy Director of Education, an equivalent post w.e.f. 21.8.1998 i.e. with effect from the date from which Smt. Shail Kumari Yadav, the person immediately junior to the Petitioner was promoted. The Petitioner has also prayed for a direction to disburse the arrears of salary worked out on the basis of promotion as District Inspector of Schools and Deputy Director of Education w.e.f. 10.8.1995 and 21.8.1998 and for re-fixation of her salary taking into account her promotion as District Inspector of Schools and Deputy Director of Education w.e.f. 10.8.1995 and 21.8.1998 respectively.

4. In the year 1985 the Petitioner applied in pursuance to an advertisement and was interviewed by the U.P. Public Service Commission, Allahabad to the posts of Principal in Government Inter Colleges, in the State of U.P. She was placed at serial No. 2 in the waiting list of the merit list. A Writ Petition No. 26753 of 1997 filed by her was allowed by this Court on 7.12.1998 with directions to appoint her on the post of Principal in Government Intermediate College, based upon the directions issued in Writ Petition No. 10175 of 1993 filed by Dr. (Smt.) Uttam Gulati, placed at serial No. 1 in the same waiting list.

5. An appointment letter was issued to the Petitioner on 20.10.1999 in pursuance to which she joined as Principal of the Government Girls Inter College, Lakhimpur Khiri on 23.10.1999 after being relieved from Sri Har Kumari Pathak Kanya Inter College Shahjahanpur on 22.10.1999, without any break in between.

6. The Petitioner was placed in the pay scale of Rs. 8000-275-13500, as against her salary of permanent Principal in Sri Har Kumari Pathak Kanya Inter College Shahjahanpur in the pay scale of Rs. 10000-325-15200. She filed a Dr. (Smt.) Meera Tripathi v. State of UP and Ors. Writ Petition No. 45637 of 2002, to protect her pay scale. The writ petition was allowed on 23.5.2006 with following directions:

Thus, from the aforesaid decisions, it is absolutely clear that the appointment has to be given on the basis of the ranking given in the select list and the seniority is required to be determined as per the procedure prescribed in the Rules in vogue. In the present case, Rule 5 of the Rules, applicable to a Government servant appointed by direct recruitment through Commission, provides that seniority shall be the same as it is shown in the merit list prepared by the Commission. Thus, even though the Petitioner was given appointment in the year 1999, she having been selected by the Commission pursuant to the vacancies notified/advertised in the year 1985, she is entitled to be given the seniority as shown in the select list dated 14.6.1989, prepared by the Commission. Thus, the Petitioner is entitled for being given due seniority in terms of Rule-5 of the Rules and in the light of the observations made above.

In view of the foregoing discussions, the writ petition succeeds and is allowed. The impugned order dated 14.6.2002 passed by the Secretary, Madhyamik Shiksha, Government of Uttar Pradesh, Lucknow, Respondent No. 1, and filed as

Annexure 9 to the writ petition, cannot be sustained and is hereby set aside. The Respondent No. 1 is directed to reconsider the matter and determine the seniority of the Petitioner in accordance with Rule 5 of the U.P. Government Servants Seniority Rules, 1991 and the observations made above, within six weeks from the date of production of a certified copy of this order before him. The Petitioner shall be further entitled to all the consequential benefits except the salary for the period prior to the date of her joining the post after her appointment as per directions contained in the judgment dated 7.12.1998 of this Court in Civil Misc. Writ Petition No. 26753 of 1997. However, on the facts and circumstances of the case, the parties are left to bear their own costs.

23.5.2006

Sd/-R.K. Agarwal Sd/-Sanjay Misra

7. There is nothing on record to show that the judgment dated 23.5.2006, (the operative portion of which is quoted as above), was challenged and thus we presume that it has become final.

8. In compliance with the directions quoted as above, the Government of U.P, by Office Memorandum dated 10.11.2006 issued by the Special Secretary, Shiksha Anubhag-I, passed an order directing Petitioner's name to be placed in the final seniority list of Group "B" Officers of the Education Department dated 12.11.1992, to the effect, that the name of Dr. (Smt.) Uttam Gulati was directed to be placed just below the name of Dr. (Smt.) Meera Pal at serial No. 242-A and the name of Smt. Shail Yadav was directed to be kept at serial No. 242-B. Since Dr. (Smt.) Meera Tripathi-the Petitioner was placed below Dr. (Smt.) Uttam Gulati in the waiting list at serial No. 2 and the name of Smt. Shail Yadav was in the waiting list at serial No. 6, the Petitioner's name was directed to be placed in the seniority list at serial No. 242-B and the name of Smt. Shail Yadav at serial No. 242-C. The order recorded that the Governor has been pleased to give all consequential benefits to Dr. (Smt.) Meera Tripathi, except the arrears of salary.

9. The Office Memorandum dated 10.11.2006 was amended to the effect that the Petitioner, in consequence to her placement at serial No. 242-B in the seniority list, was allowed notional promotion w.e.f. 23.10.2005 when she completed six years of qualifying service in Group "B" w.e.f. 23.10.1999, to be promoted on the post of District Inspector of Schools, a post at equivalent level in the pay scale of Rs. 10000-15200. Accordingly her seniority in Group "A" was determined at serial No. 79-A just above Smt. Shail Yadav placed at serial No. 80. It was also directed that Smt. Tripathi will be given the benefit of the pay fixation under Rule 27 of the Fundamental Rules Vol.II, Part 2 to 4 on her notional promotion on the post of District Inspector of Schools, or an equivalent post but that the arrears of pay was not to be paid to her on the post of District Inspector of Schools or the post at equivalent level for the period for which she had not actually worked on the post.

10. From the aforesaid facts we find that the Petitioner was placed at serial No. 1

in the merit list published by the Commission on 14.6.1989 of the selections advertised of various post of Principal of Government Intermediate Colleges by the Public Service Commission in the year 1985. She was working as permanent Principal in Sri Har Kumari Pathak Kanya Inter College Shahjahanpur from 8.4.1989 to 22.10.1999, and had joined as Principal, Government Girls Intermediate College Lakhimpur Khiri on 23.10.1999. Her seniority was adjusted in pursuance to the directions issued by this Court on 23.5.2006 in Writ Petition No. 45637 of 2002 vide Office Memorandum dated 10.11.2006 and thereafter by Office Memorandum dated 2.7.2007 she was also given notional promotion on the post of District Inspector of Schools or a post at equivalent level on 23.10.2005 when she completed six years of qualifying service with effect from the date of her joining on 23.10.1999. She was given the benefit of the pay only for the period when she had actually worked on the post of District Inspector of Schools or on the post at equivalent level.

11. Shri Ashok Khare appearing for the Petitioner submits that the denial of promotion to the Petitioner is violative of Articles 14 and 16 of the Constitution of India. There is no justification to give her notional promotion as District Inspector of Schools w.e.f. 23.10.2005. The placement of her merit position stands conclusively settled by the High Court. She was correctly assigned her seniority immediately below Dr. (Smt.) Uttam Gulati and above Smt. Shail Kumari Yadav, but that she has not been given same benefit. Smt. Shail Kumari Yadav was granted promotion on the post of District Inspector of Schools w.e.f. 10.8.1995, and on the post of Deputy Director of Education w.e.f. 21.8.1998. He has relied upon a judgment of Supreme Court in Union of India and Ors. v. K.B. Rajoria (2000) 3 SCC 562 to support his submission.

12. Learned Standing Counsel appearing for the State Respondents submits that ten candidates were placed in the waiting list of the competitive examination 1985. Dr. (Km.) Uttam Gulati was placed at serial No. 1; the Petitioner placed at serial No. 2 and Smt. Shail Kumari Yadav (OBC) placed at serial No. 6. Smt. Shail Kumari Yadav filed a Writ Petition No. 3791 of 1990 for her appointment as OBC candidate as Kumari Rama Verma belonging to OBC was selected as general category candidate. Her writ petition was allowed on 18.7.1995.

13. In paragraph-6 of the counter affidavit of Km. Gayatri, Deputy Director, Services-I, UP Directorate of Education, Allahabad, it is stated that on the selection of Km. Rama Verma as general candidate, Sushree Mumtaj Jahan-a general candidate at serial No. 23 was adjusted out of two vacancies as two candidates did not join from the select list. Smt. Uttam Gulati was given appointment on 12.7.1999 in pursuance to the directions issued in Writ Petition No. 10175/1993 decided on 2.5.1996. She was given appointment on 12.7.1999. Her second Writ Petition No. 43529 of 1999 for seniority and other consequential benefits was allowed on 3.10.2002 and by Government Order dated 5.1.2004, she was treated to be appointed w.e.f. 1.8.1990 and was placed at serial No. 242-A in the seniority list of Group-B officers just below Smt. Meera Pal and all

consequential benefit/promotion was granted to her except salary.

14. It is stated in paragraph-8 of the counter affidavit that the writ petition of Smt. Meera Tripathi was allowed on 7.12.1998. In compliance thereof the Petitioner Smt. Meera Tripathi was appointed by Government Order dated 20.10.1999 and joined as Principal in Group "B" service. In paragraphs 13 and 14 of the counter affidavit, it is stated as follows:

13. That thereafter, after getting the opinion from the judicial department, the Petitioner's case was placed before the departmental selection committees in its meeting dated 1.11.2007 for the grant of notional promotion at the level of Deputy Director of Education and it was recommended by the Committee that the opinion from establishment department obtained for the grant of the notional promotion to the Petitioner at the level of the Deputy Director of Education from the date of which her junior Smt. Shail Yadav was granted the promotion on the post of Deputy Director of Education, in view of recommendation above mentioned the Petitioner's matter was referred to the establishment department along with facts of promotion of Smt. Shail Yadav to grant notional promotion to the Petitioner at the level of Deputy Director of Education w.e.f. 21.8.98 in the meeting of departmental selection committee dated 4.9.2008.

14. That it was found by the departmental selection committee that in compliance of the order dated 7.12.98 passed by this Hon'ble Court in civil misc. writ petition No. 26753 of 1997 filed by the Petitioner, she was granted appointment on the basis of examination of the year 1985 on the vacancy of the year 1999, because there was no vacancy at that time and two candidates namely Smt. Mumtaj Jahan and Smt. Uttam Gulati have already been appointed on two vacant posts in pursuance of cancellation of two candidates out of 33 selected candidates who had not joined in the general category. In fact, the vacancies mentioned in the order dated 7.12.98 passed by this Hon'ble Court was not in existence at that time. It is pertinent to mention here that in view of the prayer of the Petitioner, if she is granted notional promotion at the level of the D.I.O.S. w.e.f. 10.8.95 and at the level of Deputy Director of Education w.e.f. 21.8.98 it will be the case of double payment to her, because at that time Smt. Tripathi was posted in non-government College and she received all the salary/allowance and annual increments etc., if the Petitioner is granted promotion at par to Smt. Shail Yadav, then all consequential benefits except the salary will have to be granted to the Petitioner in which the period when the Petitioner worked in a non-government college as Principal will also be calculated as the service period in the government department which will be improper. Since the Petitioner was appointed in Group B as Principal, Government Girls Inter College on the basis of the examining of the year 1985 only in compliance of the order dated 7.12.1998 passed by this Hon'ble Court, as such the Petitioner's appointment may be treated as exceptional case, as such it will not be proper to grant promotion to the Petitioner at the level of D.I.O.S. and Deputy Director of Education in view of the recommendation dated 4.9.2008 of the departmental

selection committee from the date Smt. Shail Yadav was granted promotion.

15. In the counter affidavit filed on behalf of UP Public Service Commission, it is stated in reply to paragraphs 4 and 5 that the final result was declared by the Commission and the Petitioner was selected in the waiting list at serial No. 2. Dr. (Smt.) Uttam Gulati and Smt. Shail Kumari Yadav were selected at serial No. 1 and 6 respectively.

16. The Petitioner's services are governed by the U.P. Educational (General Education Cadre) Service Rules, 1992. Rule 5 provides for the source of recruitment in various category of posts. For the posts of District Inspector of Schools (boys and girls), and equivalent posts at item No. 7 and for the posts of Deputy Director of Education and equivalent posts at item No. 5, the source and eligibility are provided as follows:

(7) District Inspector of Schools By promotion through the (boys and girls), Regional Selection Committee from Assistant Director of Education amongst persons who are (Basic), Principal and Senior substantively appointed to Research, Officer, Government the posts mentioned at serial Central Pedagogical Institute, numbers 44 to 63 of the Allahabad, Text-Books Officer, Appendix-I and who have Additional Secretary Text-Books, completed six years Additional Secretary (Recognition) service, as such, on the Board of High School and first day of the year of Intermediate Education, Uttar recruitment Pradesh, Adviser (Non-Formal Education), Vice-Principal and Associate Director of State Institute of Education, Allahabad, Registrar, Departmental Examinations, Assistant Director of Education at Headquarters, Joint Secretary, Board of Basic Education, Uttar Pradesh, Principal, Government Training College for Women, Allahabad.

(5) Deputy Director of By transfer from amongst Education, Regional Deputy officers mentioned at serial Director of Education, Regional number (3) who possess the Inspectress of Girls Schools, qualifications mentioned Principal, State Institute of against the posts in the Education, Allahabad, Additional Appendix-II By promotion Secretary, Board of High School through the Selection and Intermediate Education Committee from amongst Regional Offices, Additional persons who are Secretary (Administration) at substantively appointed to Headquarters, Secretary Board of the posts mentioned at Serial Basic Education, Uttar Pradesh and numbers 25 to 33 of the Senior Adviser (Non-Formal Appendix-I and who have Education), State Institute of completed six years Education service, as such, on the first day of the year of recruitment.

17. The Petitioner had applied in pursuance to the advertisement and was selected for the post of Principal of Government Intermediate College. At item No. 46 in the Appendix-I with reference to Rule 4 (1) of the Rules classified as Group "A" posts for promotion to the post of District Inspector of Schools (boys and girls) or equivalent posts, the selection is to be made through selection committee from amongst persons substantively appointed to the posts mentioned at serial Nos. 44 to 63 of Appendix-I, and who have completed six

years of service as such on the first day of the year of recruitment. The Petitioner joined on 23.10.1999. She completed six years qualifying service and was promoted as District Inspector of Schools on 23.10.2005.

18. The Petitioner was required to complete six years on the post of District Inspector of Schools at item No. 25 in Appendix-I for being further promoted through the selection committee on the first day of the year of recruitment to the post of Deputy Director of Education or an equivalent post. She would have completed six years for being promoted as District Inspector of Schools on 23.10.2011.

19. In *Union of India and Ors. v. K.B. Rajoria* (supra) the Supreme Court held that in terms of Para 18.4.3 of the Department of Personnel and Training OM dated 10.4.1989 (issued by the Central Government), notional service becoming available as a result of retrospective promotion also counts as a "qualifying service" for promotion. The service in Note-1 to the Office Memorandum dated 10.4.1989 refers to qualifying service and which leaves no room for doubt that the word "service" means qualifying service. Shri K.B. Rajoria was wrongly superseded on 22.2.1995. The notional promotion was given to him retrospectively and from that date to set right to the wrong. It was held that if he was denied promotion to the post of Director General (Works) (CPWD) on the basis of such notional promotion, it would result for perpetuating the wrong done to him.

20. In paragraphs 18 and 19 the Supreme Court, after quoting Para 18.4.3 of the Office Memorandum dated 10.6.1998, held as follows:

19. The distinction drawn by the High Court between the word "service" used in the eligibility criteria in this case and the words "qualifying service" in para 18-4-3 is specious. The Notes to the eligibility criteria as set out in the said schedule fortify this view. Notes 1 and 2 to the said schedule clarify the position with regard to the calculation of "two years regular service in the grade."

(1) The eligibility list for promotion shall be prepared with reference to the date of completion by the officers of the prescribed qualifying service in the respective grades/posts.

(2) If a junior with the requisite years of service is considered, the senior will also be considered notwithstanding the fact that he does not possess the requisite years of service."

(Emphasis added)

20. Note 1 leaves no room for doubt that the word "service" means "qualifying service", and Note 2 makes it clear that in case of supersession actual service for the prescribed period is not required. This is in keeping with para 18.4.3 of the O.M. quoted earlier. As the notional date of promotion of Krishnamoorti was 22-2-95 he was eligible to be considered for the post of Director General in 1999.

21. The Petitioner has relied upon Office Memorandum No. 13/2/84-Ka-1/97 dated 23.8.1997, of the Personnel Section-1, Government of U.P. by which in supersession to all previous Government Orders/provisions, it was decided by the State Government, that object of Rule-3 of the U.P. Public Service Commission Procedure for Promotions by Consultation Rules, 1978 and Rule (2) of U.P. Public Service Commission (Posts outside the Purview of Public Service Commission), Eligibility List for Promotion Rules, 1986 provides for separate eligibility list for separate years with the object that those employees, who were eligible for being placed in the list, will also be included in the list, even if at the time of selection they had died or retired, but that so far as the question of notional promotion is concerned, there is no legal compulsion for giving promotion with effect from the date when the vacancy had arisen. Consequently notional promotion, which is always required to be considered with effect from the date of promotion of the junior provided the junior has been found to be suitable by the selection committee for such notional promotion.

22. In *Amarjeet Singh and Others Vs. Devi Ratan and Others*, the Supreme Court, after reiterating the principles settled in *Shiv Shankar and Others Vs. Board of Directors, U.P.S.R.T.C. and Another*, *M/S. GTC Industries Limited Vs. Union of India and Others*, *Jaipur Municipal Corporation Vs. C.L. Mishra, Ram Krishna Verma and Others Vs. State of U.P. and Others*, *South Eastern Coalfields Ltd. Vs. State of M.P. and Others*, held that no litigant can derive any benefit from mere pendency of case in a court of law, based on the maxim, "*actus curiae neminem gravabit*," which means that the act of the court shall prejudice no one. It was held in para-27, that the law permits promotion with retrospective effect only as an exceptional circumstance when there has been some legal impediment in making the promotions, like an intervention by the Court. An officer cannot be granted seniority prior to the date of his birth in the cadre adversely affecting the seniority of other officers who had been appointed before him. The late comers to the regular stream cannot steel a march over the early arrivals in the regular queue.

23. In this case indisputably the Petitioner was serving as Principal in Sri Har Kumari Pathak Kanya Inter College, Shahjahanpur from 1989 to 22.10.1999. She was placed in the waiting list of the merit list of the selected candidate published by the Commission on 14.6.1989. She was in employment, at that time. She had worked as Principal of a private Intermediate College upto the date she joined as Principal in Government Girls Inter College Lakhimpur Khiri. She could get first promotion through a selection committee on the post of District Inspector of Schools after completing six years of service on the first day of the year of recruitment.

24. The first promotion was allowed to her w.e.f. 23.10.2005 in the pay scale of Rs. 10, 000-15200/-. For the second promotion she was required to complete six years of service on any of the posts mentioned at serial Nos. 25 to 33 of the Appendix-I of the Rules of 1992. She could be eligible to the post of Deputy

Director of Education or an equivalent post only on completing six years of service to be considered for promotion by the selection committee.

25. The Petitioner's claim for notional promotion as District Inspector of Schools w.e.f. 10.8.1995, and as Deputy Director of Education w.e.f. 21.8.1998 (when she was working as Principal of Shri Har Kumari Pathak Kanya Inter College, at Shahjahanpur) on the basis of promotion of Smt. Shail Kumari Yadav, would relate back her promotions even prior to the date of her joining the service as Principal of the Government Intermediate College, Lakhimpur Khiri on 23.11.1999. She was not even born in the cadre on that date.

26. The notional promotion is provided to set off the loss caused to a person in equity on account of some injustice caused to her. The principle, that a person should not suffer injustice on account of delay in appointment, or on account of a court order, and should be given the same benefit after that delay has been rectified in comparison to the person next below in the seniority list i.e. immediately junior to her, has to be balanced with the principle, that the notional promotion cannot relate back and be given retrospectively from the date when person was not even born in the cadre. The Petitioner is aggrieved by the promotion granted to Smt. Shail Yadav placed at serial No. 6, in the waiting list as against the Petitioner placed at serial No. 2, and thereafter placed just below to the Petitioner in the seniority list after the judgment in her favour was given effect to. Smt. Shail Yadav got her notional promotion by the State Government w.e.f. 10.8.1995 on the post of District Inspector of Schools and thereafter on 21.8.1998 as the Deputy Director of Education. She has not been impleaded as party to the writ petition to appreciate as to how she could be given promotion and to set aside her promotion, and if she was wrongly given promotion, instead of perpetuating illegality.

27. The Office Memorandum dated 23.8.1997 refers to the Rules of 1978 for promotions either in consultation with the Public Service Commission or on the posts outside the purview of Public Service Commission. The State Government clarified that there is no legal compulsion to grant promotion from the date of vacancy but that since notional promotion is effective from the date when next junior was promoted unless the Government servant has been found to be suitable for the post.

28. On the date, when the writ petition was filed, the Petitioner was not eligible for promotion as Deputy Director of Education as she has not completed six years of qualifying service for being considered by the Selection Committee.

29. The prayers made by her cannot be granted, as in such case her date of promotions even if allowed notionally, will fall prior to the date when she had joined and became member of the service.

30. The writ petition is dismissed.