

(2009) 05 RAJ CK 0032
In the Rajasthan High Court

Indra Kumar Meena and Others

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 22-05-2009

Acts Referred:

Rajasthan Subordinate Service (Recruitment and Other Conditions of Service) Rules, 2001 — Rule 49

Citation : (2009) 4 RLW 2919

Hon'ble Judges : Prem Shanker Asopa, J

Bench : Single Bench

Judgement

Prem Shanker Asopa, J.—Since, all the aforesaid writ petitions involve common question of fact and law, therefore, they have been clubbed, heard together and are being decided by this common order.

2. In all the writ petitions, claim is of age relaxation to in-service prospective candidates for the post of Junior Marketing Officer and further, challenge to subsequent denial of relaxation of the age by the State Govt.

3. Briefly stated, the relevant facts of the case taken from S.B. Civil Writ Petition No. 5371/2008 (Indra Kumar Meena and Ors. v. State of Rajasthan) are that an advertisement for selection of 84 posts of Junior Marketing Officer as per Rule 16 of the Rajasthan Subordinate Service (Recruitment and Other Conditions of Service) Rules, 2001 (hereinafter to be referred as "the Rules of 2001") relating to age and as per clause -6 of the advertisement dated 28.2.2008, the age prescribed for in-service candidates is 40 years whereas the same is 35 years for other candidates. The case of the petitioners is that all of them were within the age limit as on 1.1.1997 when last advertisement was issued in 1996. The main grievance of the petitioners is that Junior Marketing Officers have been deprived of their rights of consideration against 25% direct recruitment quota as per Schedule of the Rules of 2001 for inaction on the part State of not fulfilling the vacancies since 1997.

4. As per Rule 13 of the Rules of 2001, vacancies are to be determined year wise

and the same are further required to be fulfilled yearwise but in the instant case, no advertisement has been issued and no selection has been made since 1996 i.e. for 12 years and selection for 1996. The relevant date for calculation was 1.1.1997 and on 1.1.1997 all the petitioners were within the age-limit. The further grievance of the petitioners is that they have been made to suffer on account of inaction on the part of Government not to make yearwise selection. Although the advertisement was issued subsequently also in the year 2004 yet no selection has been made. It has also been stated in the writ petition that as per Schedule 25% quota is prescribed for the in-service candidates and out of 84 advertised posts 25% quota comes to 21 and the candidates in the ratio 1:3 for interview are not available. The non-advertisement of vacancies has resulted in rendering the petitioners ineligible.

5. Counsel for both the parties have pointed out one of the fact that the Director Agriculture has recommended for relaxation of the age under Rule 49 of the Rules of 2001 and his recommendation was turned down without there being any change in the circumstances and without any justification also.

6. The State Government has stated in its reply that the respondents, while turning down the recommendations for age relaxation, have considered all the above aspects of the matter. It has also been stated in the reply that turning down of the request is in accordance with various judgments of the Supreme Court.

7. In support of the aforesaid submissions, counsel for the petitioners have placed reliance on the judgments reported in Baitarani Gramiya Bank Vs. Pallab Kumar and Others, State of Maharashtra Vs. Jagannath Achyut Karandikar, J.C. Yadav and others Vs. State of Haryana and others, Ram Bhagat Singh and Another Vs. State of Haryana and Another, RLR 1990(2) 1 : RLW 1990(2) Raj. 582 (Prakash Chand etc. v. State of Raj. and Anr.) Kendriya Vidyalaya Sangathan and Others Vs. Sajal Kumar Roy and Others, and S.B. Civil Writ Petition No. 6754/2003 : Bansi Lal Jakhar (Dr.) Vs. State of Rajasthan and Another,

8. Counsel for the petitioners have also placed reliance on some of the advertisements issued by the Government wherein age relaxation has been granted in respect of Service Rules where there is no specific provision of automatic age relaxation on account of non-advertisement.

9. Counsel for the petitioners have submitted that the non-advertisement of post for last 12 years has caused undue hardship to them as they have been deprived of being participation in the selection process of the recruitment, therefore, it was necessary and expedient for the Government to decide the issue of age relaxation in their favour. Further submission is that they have been rendered ineligible on account of non-advertisement of posts which has resulted in not fulfilling 25% quota for a long time and this time also the sufficient number of candidates are not available, therefore, equity is in their favour.

10. Submission of counsel for the petitioners can be sum up that the

Government has filed to consider the following relevant issues at the time of turning down the said recommendation of age relaxation:

(i) That the selection was to be made yearwise as per Rule 13 of the Rules of 2001 and no selection was made since 1996 and in between 1996 to 2008, on account of said inaction, they have crossed the age limit. Thus, they have been deprived of right of consideration against the said 25% quota.

(ii) Non selection from 1996 to 2009 renders the petitioners ineligible for advertisement of 2008.

(iii) That as per Rule 49 of the Rules of 2001, the Director was of opinion that it is necessary and expedient to give relaxation with regard to age for the aforesaid reasons but the Government has failed to give due weightage to said recommendation thus failed to consider it in a just and equitable manner while turning down the said request of relaxation in age.

(vi) As per Rule 16(iii) of the Rules of 2001, in case the person is appointed on adhoc temporary basis then he would be treated within the age limit when the regular selection is made.

(v) That the past practice of the Government is to relax the age in case of non advertisement.

11. The submission of learned Counsel for respondents is that age relaxation cannot be claimed as a matter of right and they have considered all the aforesaid aspects of the matter while turning down the recommendation of age relaxation and further the same is supported by the judgments of Hon"ble Supreme Court reported in J and K. Public Service Commission, etc. Vs. Dr. Narinder Mohan and others etc. etc., , DB Civil Special Appeal No. 114/1985 (State of Rajasthan and Anr. v. Prabhu Dayal Seema) decided on 22.5.85, E. Ramakrishnan and Others Vs. State of Kerala and Others, 1998(2) WLC (Raj.) 666 (Mahesh Kumar v. State of Rajasthan and Ors.) Smt. Oma Purohit Vs. State of Rajasthan and Others, 2002(1) RLR 1 : RLW 2001(2) Raj. 1199 (Ramji Lal Meena v. High Court of Judicature for Rajasthan and Anr.), 2001(2) RLR 782 : RLW 2001(3) Raj. 1377 (Archana Kumari v. State of Raj. and Ors.) and DB Civil Special Appeal (W) No. 923/2006 (Smt. Shashi Kala Dadhich v. RPSC, Ajmer and Anr.) decided on 24.1.2008. and D.B. Civil Special Appeal (W) No. 151/1999 : RLW 1999(1) Raj. 156 (Inder Bhan Singh Gujar v. State of Rajasthan and Anr.) decided on 14.5.2001.

12. I have gone through the record and further considered rival submissions of the parties.

13. Before proceeding further and dealing with the citations, I would like to quote relevant portions of Rules 3-0, 7, 13, 16(iii)(v) and 49 of the Rules of 2001 along with Schedule-G at Item No. 1 which are as follows:

3-0 : "Year" means the financial year, beginning from 1st April and ending on

31st March.

7. Method of recruitment.-(1) Subject to the provisions hereinafter contained in these rules, recruitment or appointment to post (s) in the service shall be made by the following methods in the proportion as indicated in the Schedule:

(i) by direct recruitment in accordance with the provisions contained in Part-V of these rules;

(ii) by promotion in accordance with the provisions contained in Part-V of these rules;

(iii)(a) by transfer from amongst the person(s) holding equivalent post (s) in other department:

Provided that if the post(s) to which transfer is proposed to be made within the purview of the Commission. Such person should have already been approved by the Commission on such equivalent post.

(b) by transfer of persons from any Institution that has been taken over by the State Government with condition to suitably absorbed its staff.

Provided that in case of transfer of person(s) serving in any such Institution, the employee must have put in not less than three years continuous serve and is found suitable in consultation with the Commission when such consultation is necessary:

Provided that:

(I) the Commission shall be consulted to all cases where the post(s) are within the purview of the Commission and direct recruitment to fill up all or a percentage of the vacancies is made.

(II) recruitment to the post of Labour Inspector shall be made through a competitive examination to be held by the Commission which may be combined with the Competitive Examination for recruitment to the Rajasthan Labour Welfare Service as per procedure prescribed in the Rajasthan Labour Welfare Service Rules, 1958.

(2) recruitment to the Service by the aforesaid method shall be made in such manner that the persons appointed to the service by each method do not at any time exceed the percentage laid down in rules or Schedule, as the case may be, of the total cadre strength as sanctioned for each category from time to time:

Provided that if the Appointing Authority is satisfied in consultation with the Commission where necessary, that suitable persons are not available for appointment by either method of recruitment in the proportion so indicated in the particular year, appointment the other method in relaxation of the prescribed proportion may be made in the same manner as specified in these rules/schemes.

13. Determination of vacancies.-(1) Subject to the provisions of these rules, the

Appointing Authority shall determine on 1st April every year, the actual number of vacancies occurring during the financial year.

(2) Where a post is to be filled in by a single method as prescribed in the Rule or Schedule, the vacancies so determined shall be filled in by that method.

(3) Where a post is to be filled in by more than one method as prescribed in the Rules or Schedule, the appointment of vacancies, determined under Sub-rule (1) above, to each such method shall be done maintaining the prescribed proportion for the over all number of post(s) already filled in. In any fraction of vacancies is left over, after apportionment of the vacancies in the manner prescribed above, the same shall be apportioned to the quota of various methods prescribed in a continuous cyclic order giving precedence to the promotion quota.

(4) The Appointing Authority shall also determine the vacancies of earlier years, year wise which were required to be filled in by promotion, if such vacancies were not determined and filled earlier in the year in which they were required to be filled in.

16(iii) the persons appointed temporarily to a post in the Service shall be deemed to be within the age limit had they been within the age limit, had they been within the age limit when they were initially appointed even though they have crossed the age limit when they appear finally before the Commission/ Appointing Authority and shall be allowed up to two chances had they been eligible as such at the time of their initial appointment.

16. (v) the upper age limit for persons service in connection with the affair of the State in substantive capacity, shall be 40 years.

49. Power to relax rules.-In exceptional cases where the Administrative Department of the Government is satisfied that operation of the rules relating to age or regarding requirement of experience for recruitment causes undue hardship in any particular case or where the Government is of the opinion that it is necessary or expedient to relax any of the provisions of these rules with respect to age or experience of any person, it may with the concurrence of the Department of Personnel and in consultation with the commission where necessary, by order dispense with or relax the relevant provisions of these rules to such extent and subject to such conditions as it may consider necessary for dealing with the case in a just and equitable manner, provided that such relaxation shall not be less favourable than the provisions already contained in these rules. Such cases of relaxation shall be referred to the commission by the Administrative Department concerned.

Schedule	State	Agriculture	Marketing	Department	Section
					S. Name Method
Qualifi- Post and exper- recruit-	Post which made	Qualification No. of experience promo-	of recruit- percen- for	cation for and experience Post ment Direct to be Direct Promotion	

----- 1. Junior 50% B.A. with 5 years 1. After Marke- 50% Econo- exper- promoting all ting mics as ience the Marketing Officer/ one on the shall be filled in Secre- of the post by direct tary subjects mentio- recruitment Market of ned in 2.25% of the Commi- B.Com. Column post direct ttees or B.Sc. No. 6 recruitment (Agricul- quota shall be ture) of reserved for University being filled in establi- from amongst shed by- the Marketing law in Supervisors and India. Ministerial Staff of the Department and Asstt. Secretaries Marketing Supervisor & Committees of the Marketing Committees subject to their possessing qualification mentioned in Column No. 5 and other conditions as laid down in Rules. -----

14. Before giving Finding on the age relaxation as per the interpretation of the pari-materia Rule existing in other Service Rules and jurisdiction of this Court, I have to first consider the language of Rule 49 of the Rules of 2001. (a) The first ingredient for invoking the Rule is exceptional circumstances causing undue hardship (b) where the Government is of the opinion that it is necessary or expedient to relax any of the provisions of these rules with respect to age (c) Concurrence of Department of Personnel in consultation with the Commission wherefrom necessary and the issue of relaxation to be decided in a just and equitable manner.

15. The judgments cited by the counsel for the petitioners are not touching the issue directly involved of age relaxation but same are in the matter either of the issue of discretion to be exercised judiciously and the constitutional reservation for SC/ST except two judgments, one is of Supreme Court reported in Kendriya Vidyalaya Sangathan and Others Vs. Sajal Kumar Roy and Others, and the other is of Division Bench's judgment reported in RLR 1990(2) 1 : RLW 1990(2) Raj. 582 (Prakash Chand etc. v. State of Rajasthan and Anr.). The relevant para 13 of the Kendriya Vidyalaya Sangathan's case (supra) is as under:

Yet again in Dr. Ami Lal Bhat Vs. State of Rajasthan and others, the law is stated in the following terms:

10. ...In other words, what is contended is that if on the date when the vacancy occurred, the candidates were within the maximum age prescribed by reference to the cut-off date, then if the advertisement is delayed, their age should be considered with reference to the cut-off date of 1st January following the date of occurrence of vacancy. For example, if the vacancy has occurred on 1st of April of a given year, and the applicant would be within the maximum age on the 1st of January of the" following year, then such a candidate will be considered as eligible even if the advertisement is issued not in April of that year but say February of the following year. All the candidates will get age relaxation of one year.

11. In our view this kind of an interpretation cannot be given to a rule for relaxation of age. The power of relaxation is required to be exercised in public

interest in a given case; as for example, if other suitable candidates are not available for the post, and the only candidate who is suitable has crossed the maximum age-limit; or to mitigate hardship in a given case. Such a relaxation in special circumstances of a given case is to be exercised by the administration after referring that case to the Rajasthan Public Service Commission. There cannot be any wholesale relaxation because the advertisement is delayed or because the vacancy occurred earlier especially when there is no allegation of any mala fides in connection with any delay in issuing an advertisement. This kind of power of wholesale relaxation would make for total uncertainty in determining the maximum of age of a candidate. It might be unfair to a large number of candidates who might be similarly situated, but who may not apply, thinking that they are age-barred. We fail to see how the power of relaxation can be exercised in the manner contended.

16. In the said case, the Supreme Court after considering the case of Dr. Ami Lal Bhat Vs. State of Rajasthan and others, came to the conclusion that the High Court directed the appointing authority to consider the case of the respondents for relaxation of the age-limit within a period of three months from the placement of a certified copy of the order before the appointing authority and on relaxation of the age-limit, include their names in the select list and thereafter issue appointment orders to them in accordance with law on the basis of the merit of the candidates. The proposition of law laid down is that the discretionary jurisdiction could be exercised in the relaxation of age provided in Rules, within the four corners thereof. As the respondents do not come within the purview of the exception contained in Article 45 of the Education Code, therefore, the Supreme Court held that the Tribunal and High Court committed a manifest error in issuing aforesaid directions.

17. The Prakash Chand's case (supra), the case was considered by the another Division Bench of this Court in D.B. Civil Special Appeal (Writ) No. 923/2006 (Smt. Shashi Kala Dadhich v. RPSC Ajmer and Anr.) decided on 24.1.2008 in the light of subsequent judgment of Supreme Court given in the case of Anand Kanwar's case in para 5, 6, 7 and 8 dismissed the appeal against claim of denial of entitlement of age relaxation. Para Nos. 5, 6, 7 and 8 are as follows:

5. The direct recruitment to the posts of Lecturer in Hindi admittedly, is being made under Rajasthan, Educational Service Rules, 1970 (for short "Rules of 1970"). The counsel for the appellant did not dispute that the Rules of 1970 do not have a provision that the candidates who were eligible in a particular year but were rendered in-eligible in the subsequent years, they were to be treated as eligible appear in the examination irrespective if age requirement in case no examination was held in the particular year in which they were eligible. We are afraid, for want of any provision in the Rules of 1970 the decision of the Division Bench in the case of Prakash Chand cannot be applied to the present fact situation.

6. We may now refer to the judgment of the Supreme Court in the case of Anand

Kanwar. That was a case where Anand Kanwar applied for the post of Senior Teacher in the year 1989 pursuant to the advertisement. At that time she had already crossed the age of 40. She appeared in the preliminary examination conducted by the Rajasthan Public Service Commission (for short "Commissioner") but at the time of viva-voce she was told that she was not eligible being over age and her candidature was canceled. Upon challenge of the cancellation of her candidature before this Court, the Division Bench held that the last advertisement was issued in the year 1983 and thereafter the advertisement was issued in the years. If year-wise vacancies were not determined and if the advertisement was issued to fill the vacancies of six years by one advertisement, then the person's candidature cannot be rejected on that ground.

The Division Bench held that competent authority cannot avoid the responsibility by sheer inaction or omission and failure on the part of the competent authority cannot be used as a basis for denying eligibility to those who were eligible in a particular year but became ineligible on account of absence of determination of vacancies. The consideration of the matter by the Division Bench was held by the Supreme Court bordering on perversity. The Supreme Court held thus:

It is settled proposition of law that the eligibility of a candidate has to be determined on the basis of the terms and conditions of the advertisement in response to which the candidate applies. There is nothing on the record to show that the State Government was in any manner negligent or at fault in not making the direct recruitment during the period 1983-1989. Be that as it may, the High Court was not justified in taking the clock back to the period when unfilled vacancies were existing and holding that since the respondents were eligible on the date when vacancies fell vacant. She continues to be so till the time the vacancies are filled. Due to inaction on the part of the State Government in not filling the posts year-wise, the respondent cannot get a right to participate in the selection despite being over-aged.

7. In the Light of the authoritative pronouncement of the Supreme Court as afore-noticed, we find no merit in the contentions of the counsel for the appellant. The appellant is not entitled to age relaxation as claimed by her.

8. The appeal has to be dismissed and is dismissed accordingly.

18. As regards other judgments cited by counsel for the respondents, most of them except three judgments reported in *Kendriya Vidyalaya Sangathan and Others Vs. Sajal Kumar Roy and Others*, *E. Ramakrishnan and Others Vs. State of Kerala and Others*, and Division Bench judgment of this Court in the case of *Smt. Shashi Kala Dadhich v. RPSC, Ajmer and Anr.* decided on 24.1.2008 are either of cut off date or of calculating the age, therefore, have no direct bearing on the issue. As regards judgment of cut off date, the same stands on different footing for the reason that there is no provision of relaxation and that has to be decided whether fixing the date is arbitrary or not and while considering the said

fact, the Supreme Court came to the conclusion that one date has to be fixed having reasonable nexus with the aim and object of Rules. The first January of the next following year to the date of issuance of advertisement is taken as cut off date for the purpose of calculating the age in all the Service Rules of Rajasthan and the same has been upheld, therefore, on this Count, there is no need to further discuss with respect of age relaxation. The aforesaid judgment of the Supreme Court in *Kendriya Vidyalaya Sangathan and Others Vs. Sajal Kumar Roy and Others*, has already been discussed along with judgment of Division Bench of this Court in D.B. Civil Special Appeal (W) No. 923/2006 (*Smt. Shashi Kala Dhadich v. RPSC Ajmer and Anr.*). The relevant paragraph No. 4 of the remaining relevant judgment reported in *E. Rama-krishna and Ors. v. State of Kerala and Ors.* (1996 (10) SCC) is as follows:

It is then contended that the petitioners have turned over-aged and, therefore, necessary direction may be given to regularise their service by filling up the unfilled posts. Even that relief also cannot be granted. If the petitioners have turned over-aged on the date of recruitment, it would be for the appropriate Government to relax the age requirement and the petitioners have to stand in the queue and get selection through the PSC. Thus that they get in only the right to appointment to the post.

19. On 4.3.2009, the State Government has filed an affidavit that the recommendation of the Director dated 21.1.2009 to increase the age from 40 to 45 years was turned down on 26.2.2009 on the ground that for fresh candidates the maximum age limit is 35 years whereas for inservice candidates, the same is 40 years. In my view the said decision virtually made Rule 49 of the Rules of 2001 inapplicable for inservice candidates.

The following are the relevant considerations while exercising power under Rule 49 of the Rajasthan Subordinate Service (Recruitment and Other Service Conditions) Rules, 2001:

(i) That there is 25% quota for in-service candidates as per Schedule for the post of Junior Marketing Officer while was to be filled year-wise and the same will remain unfilled or filled.

(ii) Neither the adhoc appointments were made on the post of Junior Marketing Officer nor the same were advertised which rendered the petitioners ineligible and the same is causing undue hardship.

(iii) The past practice of the Government is to grant age relaxation in case where there was non-advertisement of posts for long period for the fresh/in-service candidates, either by amending the rule for transitory period, as has been done in this case by inserting Rule 17-A in the Rules of 2001 vide notification dated 25.6.2004 (Anx. 3), or by exercising power of relaxation of age in the concerned Service Rules even before the advertisement by making a mention of the same in the advertisement concerned.

20. For the aforesaid reasons, the writ petitions are disposed of in manner that the turning down by the Government of the recommendations of the Director is set aside and the case is remanded back to the Government to consider the issue of age relaxation in the light of the observations made hereinabove within a period of one month from today and till then vacant posts of Junior Marketing Officer will not be filled up.