
(2007) 04 UK CK 0040
In the Uttarakhand High Court
Case No : Special Appeal No. 22 of 2003

Mahendra Singh Negi and Others	Vs	APPELLANT
State of Uttaranchal and Others		RESPONDENT

Date of Decision : 20-04-2007

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 309
Subordinate Forest (Rangers, Deputy Rangers and Foresters) Services Rules, 1951 — Rule 4

Citation : (2007) 04 UK CK 0040

Hon'ble Judges : Rajeev Gupta, C.J.; J.C.S. Rawat, J

Bench : Division Bench

Advocate : Alok Mehra, for the Appellant; Subhash Upadhyaya, Brief Holder, for the Respondent

Final Decision : Dismissed

Judgement

J.C.S. Rawat, J.—This special appeal, under Rule 5 Chapter VIII of the High Court Rules has been filed against the judgment and order dated 23-08-2003 passed by the learned Single Judge of this Court in Writ Petition No. 1777 of 2002 (S/B), Mahendra Singh Negi and Ors. v. State of Uttaranchal and others, whereby the learned Single Judge has dismissed the writ petition.

2. A writ petition bearing No. 1777/2002 (S/B) was filed before the learned Single Judge by the writ Petitioners-Mahendra Singh Negi and Ors. (Now Appellants in the present special appeal) for the following reliefs:

- i. To issue a writ, order or direction in the nature of mandamus commanding the Respondents to promote the Petitioners as Forester against the vacancies available on the said post in promotion quota.
- ii. To issue a writ, order or direction in the nature of mandamus restraining the Respondents from clubbing the vacancies which were available on the post of Jamadar and Moharrir before merger in the post of Forester for the purpose of

determining the posts under promotion quota and to fill all posts of Jamadar and Moharrir by promotion of Forest Guards.

iii. To issue any other suitable writ, order or direction as this Hon'ble Court may be deem fit and proper in the facts and circumstances of the case.

iv. To award the cost of the writ petition in favour of the Petitioners.

3. The Petitioners (Appellants) were appointed as Forest Guards In different Divisions of Forest Department which were within Western Circle under the control of Conservator of Forest Western Circle Nainital. The mode of recruitment and other conditions of service for the post of Forest Guard were regulated by statutory Rules known as Awar Adhinastha Van Sewa Niyamawali, 1980. The post of Jamadar and Moharrir was also regulated by the aforesaid rules. By means of Notification dated 31-12-1982, the aforesaid rules were amended and it was provided that the post of Jamadar and Moharrir should be filled up by promotion alone. It was alleged that before the appointed day i.e. 09-11-2000, there were 29 vacancies on the post of Jamadars and two were of the post of Moharrirs. The Petitioners (Appellants) and other Forest Guards serving in the Circle had a vested right to be considered for promotion against the said vacancies in accordance with the rules which provided 100% promotional quota for the said post. However, due to inaction on the part of authorities concerned, no promotion was made of the Forest Guards serving within the Circle. The Government of Uttaranchal took a policy decision on 24-11 -2001 by which the post of Jamadar and Moharrir were absorbed in the cadre of Forester. As per the rules, 50% of the total number of Foresters was to be filled by promotion of Forest Guards. It was alleged that the Conservator of Forest South Kumaon has promoted 75 Forest Guards belonging to general category to the post of Forester and the Conservator of Forest Western Circle has also promoted 62 Forest Guards to the post of Forester as against 116 vacancies on the post of Forester. It was alleged that after merger of the posts of Jamadar/Moharrir in the cadre of Forester, as many as 95 vacancies on the post of Forester were to be filled up by promotion whereas the Conservator of Forest Western Circle Nainital (Respondent No. 3) has promoted only 62 Forest Guards. Therefore, the Forest Guards serving in the said Circle were entitled to be promoted as against 33 remaining vacancies in promotion quota on the post of Forester. It was alleged that in South Circle the Forest Guards appointed upto 24-12-1986 have been promoted as Forester whereas in Western Circle, the last person promoted as Forester was appointed as Forest Guard on 01 -11 -1977. So, there was wide disparity in the matter of promotion of Forest Guards in the two circles of the Conservator situated in the same building. It was alleged that for promotion to the post of Deputy Ranger, Forester was the feeding post and no person could be considered for p-omotion as Deouty Ranger unless he was promoted as Forester. The Petitioners (Appellants) being senior, as such, they would lose their right to be considered for promotion due to the inaction on the part of authorities to hold the promotion exercise. It was alleged that the State wide seniority of Foresters

and the Foresters serving in other Circle will gain advantages over the Petitioners (Appellants) despite being juniors to the Petitioners (Appellants) on the post of Forest Guard. It was further alleged that Conservator of Forest Western Circle Nainital issued promotion orders on different dates in the year 2002 whereby 62 Forest Guards were promoted as Forester. Feeling aggrieved by the order of the Respondent and due to non consideration of their claim for promotion under the old rules despite availability of vacancies on the promotional post due to which persons much junior to them in other Circles have been promoted long back but the Petitioners (Appellants) were still continuing as Forest Guard. Hence the Petitioners (Appellants) filed writ petition before the learned Single Judge.

4. The Respondents (Respondents) (sic) have filed the counter affidavit and pleaded that the seniority list for the purpose of promotion to the post of Foresters was prepared at circle level and the vacant post were filled according to seniority subject to the rejection of unfit and the allegation that in the other circle Forest Guards appointed upto 24-12-1986 have been promoted to the post of Foresters was not factually correct. It was further pleaded that the Respondent No. 3 had directed to ask Forest Division and to Director, Corbett Reserve, Ramnagar vide his letter No. 516/25-3-3 dated 5-9-03 to send willingness alongwith service records in respect to promotion of Forest Guard to the post of Jamadar/Nikasi Moharrirs, senior Forest Guard who had completed more than 14 years of service and were getting pay scale of Forester?. Some of them had completed 24 years of service and expecting their promotion to Deputy Ranger based on their seniority They had given their consent not to promote them to the post of Moharrirs because of above fact promotion could not be considered. It was pleaded that the grievance of the Appellants (Petitioners) is superficial and misconceived and the merger order and the rules of sub-cadre of Jamadar/Moharrir into the cadre of Foresters, the cadre strength of Foresters has increased and has become almost double to original sub cadre and 50% posts of Foresters shall be filled from amongst Forest Guards alone. It could not be said the by merger of posts of Jamadar/Moharrir into the cadre of Forester, the chances of their promotion would be minimized. At last, it was pleaded that the writ petition was misconceived, not legally tenable and is liable to be dismissed.

5. After hearing the parties, the learned Single Judge has dismissed the petition vide impugned judgment and order 23-08-2003.

6. Feeling aggrieved by the said order, the present special appeal has been preferred by the Appellants (Petitioners).

7. Heard learned Counsel for the parties and perused the record.

8. Learned Counsel for the Appellants contended that the Subordinate Forest (Rangers, Deputy Rangers and Foresters) Services Rules, 1951 provide that 50% posts of Forester are to be filled up by promotion and the remaining were to be filled up by direct recruitment. The feeding cadre for the promotion of Foresters consists of Jamadar, Moharrir, Forest Guards and other subordinate staff as

provided in the Rules. It was further contended that the Forest Service Rules, 1980 as amended in the year 1982, the post of Jamadar and Moharrir had come into existence at that point of time and the post of Jamadar and Moharrir had to be filled 100% by promotion amongst the Forest Guards serving in the Division and Divisional Forest Officer was the appointing authority for the post of Jamadar, Moharrir and Forest Guards. The Government vide its order date 24-11-2001, the post of Jamadar and Moharrir alongwith other persons serving on the posts have been merged in the cadre of Forester leaving no posts of Jamadar and Moharrir against which the Appellants (Petitioners) could be promoted. 31 posts of Jamadar and Moharrir out of total 86 posts were lying vacant since long before the appointed day and the Appellants (Petitioners) and other Forest Guards had a vested right of promotion against the said vacancies in absence of any other source of recruitment available under the Rules. It was contended that after the merger, the Respondents had earmarked 50% of the combined strength of the posts of Jamadar, Moharrir and Forester under promotion quota which has resulted in substantial reduction in promotional avenues available to the Forest Guards including the Appellants (Petitioners). It was further contended that a reasonable promotional avenues should be made available in the public service as it generates efficiency in services and fosters the appropriate attitude to grow for achieving excellence. It was further contended that the operation of G.O. and Rules is in fact retrospective,

9. Sri Subhash Upadhyaya, learned Brief Holder for the Respondents refuted the contention and supported the judgment of the learned Single Judge.

10. Perusal of the record reveals that the Appellants (Petitioners) have not sought any relief with regard to the quashment of the G.O. dated 24-11-2001 and the Rules which have been made later on similar to the G.O. dated 21-11-2001. If the Rules and the G.O. had not been challenged before the Court, the relief claimed by the Appellants (Petitioners) cannot be granted in existence of the Rules. The Rules and order cannot be held to be retrospective in its operation. The person who had been promoted till the enforcement of the G.O. and Rules, they had not been reverted or their right has not been curtailed by the said order and the Rules. The Rules which clarify that such employees for promotional purposes undoubtedly, operates on those who would be promoted in the future. The said Rules and G.O. govern the future right of promotion of those who are already in service in feeding cadre. The Government can exercise its power under the provision of Article 309 and can make Rules for the service condition of any employee who is in the public services. Thus the competence of the executive cannot be challenged to frame the Rules. The said Rules may be open to challenge on the ground of violation of provision of the Constitution including the fundamental rights contained in Chapter 3 of the Constitution. In the instant case, the Appellants (Petitioners) have not challenged the said orders and the Rules, as such, it cannot be held that the Rules are violative of the provisions of the Constitution and the effect of the Rules cannot be taken away by issuing mandamus to promote the Appellants (Petitioners) from Forest Guards

to the post of Jamadar/ Moharrir under the old Rules. If the new Rules are in existence, the old Rules which have been substituted by way of amendment cannot be held to be operative. The sub cadre of Jamadar/ Moharrir has been merged into sub cadre of Forester for the reason that both the posts were carrying the same pay scale. After merger and according to the amended Rules the sub cadre of Jamadar/Moharrir has been merged into sub cadre of Forester and 50% quota has been reserved for the Forest Guards in the cadre of Forester. Seniority list for the promotion to the post of Jamadar/Moharrir was to be prepared at the circle level prior to the enforcement of the new merger Rules. The seniority list, for the purpose of promotion to the post of Forester has also to be prepared on the circle level and the vacant posts were filled up according to the seniority subject to the rejection of unfit. The Counter affidavit of the Respondents reveals that at the time of creation of Uttaranchal, the total strength of the Foresters in the western circle was 182 and of Jamadar 88, as such, there were 270 posts. The Appellants (Petitioners) were working in the western circle as Forest Guard. The grievance of the Appellants (Petitioners) raised by way of this writ petition was that earlier post of Jamadar/Moharrir was filled up by 100% promotion by Forest Guard and they were also entitled to be promoted within 50% quota to the post of Forester, as such, by not increasing percentage of promotion the avenue of promotion of the Forest Guards had been reduced. After the merger of sub cadre of Jamadar/ Moharrir into cadre of Forester, the cadre strength of the Forester has increased and has become 270. The chances of promotion to the cadre of Forester was open to the Appellants (Petitioners) if the authorities would have not provided any chance to the promotion to the Appellants (Petitioners) would have caused prejudice to the Appellants (Petitioners). The grievance of the Appellants (Petitioners) against the merger order and the Rules is misplaced.

11. Learned Counsel for the Appellants (Petitioners) contended that the authority caused inordinate delay in holding the promotion exercise for filling up the vacancy on the post of Jamadar and Moharrir. The department cannot take the benefit of its own wrong. Learned Counsel for the Appellants (Petitioners) further contended that the vested right has accrued to the Appellants (Petitioners) which cannot be taken away by the amending Rules with retrospective effect. Sri Subhash Upadhyaya, Brief Holder for the Respondents refuted the contention and contended that no right has been accrued and it cannot be said that the amending Rules take away the right of the Appellants (Petitioners) retrospectively.

12. Perusal of the record reveals that there is no doubt that some of the posts of Moharrir were vacant. Rule 4 of Rules 1951 clearly provides as under:

4. The sanctioned strength of the cadre of the service is as follows. Forest Rangers 110

Deputy Rangers 107

Provided that the Governor may -

(i) leave unfilled or hold in abeyance any vacant post or posts without thereby entitling any members of the service to compensation; and

(ii) create addition permanent or temporary posts from time to time as may be found necessary:

Provided further that subordinate authorities may also create temporary posts to the extent of powers delegated to them in this behalf.

Perusal of the Rule 4 clearly provides that if the posts were vacant, the eligible person would not be entitled for any compensation. Thus if the posts are kept vacant, no vested right accrued in favour of the Appellants (Petitioners).

13. Learned Counsel for the Appellants (Petitioners) relied upon the judgment of the Apex Court reported in *Chairman, Railway Board and others Vs. C.R. Rangadhamaiah and others*, . In this case the Respondents were railway employees and they have retired from the services after 01-01-1973 and before 05-12-1988. Their pensionary benefits were to be calculated on the basis of average emoluments as defined in Rule 2544 of the Indian Railway Establishment Code. The running allowance upto maximum of 75% taken as part average emoluments for determination of their pension and gratuity. The percentage of running allowance was reduced from existing percentage to 45% retrospectively w.e.f. 01 -04-1976 but the same was quashed by the CAT. in another case. The said order attained finality as that was not challenged before any superior Court. After the decision of the Tribunal, the impugned notifications were issued on 05-12-1998 to amend the Railway Establishment Code. GSR 1143 (E): "In exercise of the powers conferred by the proviso to Article 309 of the Constitution, the President is pleased to amend Rule 2544 of the Indian Railway Establishment Code, Volume II (Fifth Reprint) as in the Annexure. This amendment will be effective from 1-1-1973." The said notification was challenged before the Ernakulam Bench of the Tribunal and the Tribunal held that the notification had given a retrospective effect, as such, it was unjust, unreasonable and violative of Article 14 of the Constitution. Some of the Benches of the Tribunal had taken the contrary view. The matter was referred to the Full Bench. The Full Bench agreeing with the view of the Ernakulam Bench of the Tribunal held that it is unjust and unreasonable. The Railway Board feeling aggrieved by the said order preferred the appeal before the Hon''ble Apex Court. The Hon''ble Apex Court while allowing the appeal held as under:

34. The learned Additional Solicitor General has, however, submitted that the impugned amendments cannot be regarded as arbitrary for the reason that by the reduction of the maximum limit in respect of running allowance from 75% to 45% for the period 1-1-1973 to 31-3-1974 and to 55% from 1-4-1979 onwards, the total amount of pension payable to the employees has not been reduced. The

submission of the learned Additional Solicitor General is that since the pay scales had been revised under the 1973 Rules with effect from 1-1-1973, the maximum limit of 45% or 55% of the running allowance will have to be calculated on the basis of the revised pay scales while earlier the maximum limit of 75% of running allowance was being calculated on the basis of unrevised pay scales and, therefore, it cannot be said that there has been any reduction in the amount of pension payable to the Respondents as a result of the impugned amendments in Rule 2544 and it cannot be said that their rights have been prejudicially affected in any manner. We are unable to agree. As indicated earlier, Rule 2301 of the Indian Railway Establishment Code prescribes in express terms that a pensionable railway servant's claim to pension is regulated by the rules in force at the time when he resigns or is discharged from the service of the Government. The Respondents who retired after 1-1-1973 but before 5-12-1988 were, therefore, entitled to have their pension computed on the basis of Rule 2544 as it stood on the date of their retirement. Under Rule 2544, as it stood prior to amendment by the impugned notifications, pension was required to be computed by taking into account the revised pay scales as per the 1973 Rules and the average emoluments were required to be calculated on the basis of the maximum limit of running allowance at 75% of the other emoluments, including the pay as per the revised pay scales under the 1973 Rules. Merely because the Respondents were not paid their pension on that basis in view of the orders of the Railway Board dated 21-1-1974, 22-3-1976 and 23-6-1976, would not mean that the pension payable to them was not required to be computed in accordance with Rule 2544 as it stood on the date of their retirement. Once it is held that pension payable to such employees had to be computed in accordance with Rule 2544 as it stood on the date of the retirement, it is obvious that as a result of the amendments which have been introduced in Rule 2544 by the impugned notifications dated 5-12-1988 the pension that would be payable would be less than the amount that would have been payable as per Rule 2544 as it stood on the date of retirement. The Full Bench of the Tribunal has, in our opinion, rightly taken the view that the amendments that were made in Rule 2544 by the impugned notifications dated 5-12-1988, to the extent the said amendments have been given retrospective effect so as to reduce the maximum limit from 75% to 45% in respect of the period from 1-1-1973 to 31-3-1979 and reduce it to 55% in respect of the period from 1-4-1979, are unreasonable and arbitrary and are violative of the rights guaranteed under Articles 14 and 16 of the Constitution.

14. Perusal of the entire judgment of the Apex Court clearly reveals that the rules were made applicable with retrospective effect. In the case in hand, Rules have not been made applicable with retrospective effect but the Rules were to be operative in future. Thus the judgment is not applicable on the facts of this case.

15. Learned Counsel for the Appellants (Petitioners) cited another judgment of the Hon'ble Apex Court reported in *Y.V. Rangaiah and Others Vs. J. Sreenivasa Rao and Others*, . In this case the Petitioners were working as Lower Division

Clerks in the Department of Registration and Stamps, Andhra Pradesh. The original Rule prior to 1977 provided for the consideration of L.D.C. for appointment as Sub-Registrars Grade II and the said list of approved candidate of L.D.C. was to be prepared by the authority every year. The grievance of the Petitioners was that contrary to the rules, a list of the approved candidates of L.D.C. was not prepared as on 1st September, 1976 instead it was considerably delayed and drawn up only in May, 1977 when an amendment to the Rules had been incorporated by G.O. dated 22nd March, 1977 whereby the original rules, providing for consideration of L.D.C. for appointment as Sub-Registrars Grade II were done away with and promotion or transfer to that category was to be made from amongst U.D.C. employed in the Registration and Stamps Department. The said amendment was challenged before the Hon''ble Apex Court and it was pleaded that by the time the list was prepared in May, 1977 Rule 5 of the Andhra Pradesh Registration and Subordinate Services Rules was amended and the list prepared was in accordance with the rules then prevailing at the time of preparation, and therefore there was nothing wrong with the preparation of the panel. Under the old rules a panel had to be prepared every year in September. Accordingly, a panel should have been prepared in the year 1976 and transfer or promotion to the post of Sub-Registrar Grade II should have been made out of that panel in the year 1976. The vacancies which occurred prior to the amended rules would be governed by the old rules and not by the amended rules. In our case, there was no provision in the old Rules to prepare the list of the eligible candidates each and every year to fill up the post of Zamadar/Moharrir from Forest Guards. In the case which was before the Hon''ble Apex Court, the L.D.C. has vested right which had accrued to them in the year 1976 when the approved list for the promotion as provided under the old rules was not prepared well within time and it was the laches of the Department not to prepare the said approved list. In the case in hand, there is no obligation on the part of the State to prepare the approved list. Contra to this, there is a Rule quoted above that authority can keep the post vacant. As such, the above referred judgment is not applicable in this case.

16. The learned Single Judge was justified in holding that the Appellants (Petitioners) did not acquire any vested right prior to amendment made in the Rules by notification dated 24-11 -2001. The creation of the posts, merger of the cadres, providing service conditions etc. are the policy matters which fall within the domain of the executive. The court should not interfere unless it is shown that the said provisions are violative of any provision of the Constitution. Learned Counsel for the Appellants (Petitioners) could not demonstrate us any violation of Article 14 and 16 of the Constitution as a result of merger of the posts.

17. In view of the above, the impugned judgment and order passed by the learned Single Judge do not require any interference. The special appeal devoids of merit and is liable to be dismissed and is hereby dismissed accordingly.

18. No order as to costs.