
(2015) 01 AHC CK 0128
In the Allahabad High Court
Case No : Writ A. No. 96 of 2015

Om Prakash Yadav

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 23-01-2015

Acts Referred:

Citation : (2015) 2 ALJ 363

Hon'ble Judges : Manoj Kumar Gupta, J

Bench : Single Bench

Advocate : Ram Milan Mishra and Ashok Khare, for the Appellant; B.P. Singh, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Manoj Kumar Gupta, J.—Heard Sri Ashok Khare, Senior Advocate assisted by Sri Ram Milan Mishra on behalf of the petitioner, learned standing counsel for respondent Nos. 1 and 2 and Sri B.P. Singh for respondent Nos. 3 and 4. The facts in brief giving rise to the instant writ petition are that the petitioner was appointed on 31.12.2005 as Assistant Teacher in Junior Basic School namely, Prathmik Vidyalaya, Chakchamran, Block-Baragaon, District Varanasi. He joined on 7.1.2006. Later on, he opted for his transfer to rural local area of Azamgarh, being his home district. The request was accepted by the Board of Basic Education (hereinafter referred to as "the Board"). In pursuance thereof, he came to be posted as Assistant Teacher in Prathmik Vidyalaya, Paigoopar, Block-Martinganj, District-Azamagarh. The specific date on which transfer order was passed has not been disclosed in the writ petition. However, the order of the posting passed by District Basic Education Officer, Azamgarh is dated 23.9.2013 and in pursuance thereof, the petitioner joined on 24.9.2013 and since then, he is working in the said institution.

2. The service of the petitioner is governed by the provisions of the Uttar Pradesh Basic Education (Teachers) Service Rules, 1981 (hereinafter referred to as "the Rules"). Under the Rules, the post of Headmasters and Head Mistresses of Junior

Basic School and Assistant Master and Assistant Mistress of Senior Basic School is to be filled up by promotion of candidates possessing five years teaching experience as permanent Assistant Master or Assistant Mistress of Junior Basic School, Assistant Master or Assistant Mistress of Junior Basic School and Assistant Master or Mistress of Senior Basic School. The respondents accordingly prepared a provisional seniority list for undertaking exercise for promotion, against which the petitioner is stated to have filed objection complaining that his name has not been included in the seniority list. A further request was made to include his name in the seniority list by reckoning his seniority from the date of his appointment in substantive capacity as Assistant Teacher. The respondents, thereafter, published final seniority list of candidates, who joined the cadre upto November, 2008. The seniority list of candidates, who joined the cadre, thereafter, was not published. On the basis thereof, the respondents proceeded to consider the candidates for promotion. Vide impugned order dated 27.12.2014, the candidates, whose names figure in the final seniority list, were promoted. Aggrieved thereby, present writ petition has been filed for a writ of certiorari quashing the promotion order dated 27.12.2014 and also the final seniority list Annexure-9 and for a mandamus directing the respondents to fix the seniority of the petitioner at proper place and thereafter, promote him on the post of Head-master of Junior Basic School.

3. Sri Ashok Khare, Senior Advocate appearing on behalf of the petitioner contended that the seniority of the petitioner is to be reckoned from the date of his initial appointment i.e. 31.12.2005 or in any case from 7.1.2006, when he joined the post. It is contended that there are several teachers in the rural local area of Azamgarh, whose date of substantive appointment is much later, as compared to the petitioner and thus, they were junior to him. However, the respondents have promoted such teachers and thus, the impugned order of promotion is liable to be quashed. The anchor sheet of his argument is a letter issued by the Secretary of the Board dated 14.6.2013, in which, certain directions were issued regarding the manner in which seniority is to be determined and it inter alia provides for reckoning the seniority from the date of initial appointment on substantive basis. It is contended that the seniority list prepared by the respondents purportedly contains name of candidates, who have joined the service upto November, 2008, but the petitioner, who was appointed on 31.12.2005, has not been included and thus, the seniority list prepared by the respondents as well as the order of promotion issued on basis thereof, are liable to be quashed.

4. On the other hand, learned standing counsel and the counsel appearing for the Board submitted that the seniority of the petitioner in the rural local area of Azamgarh is to be reckoned from the date of his transfer to such local area. According to them, the petitioner joined the rural local area of Azamgarh on 24.9.2013 and, therefore, he comes much lower in the seniority list. It is submitted that the Board had considered the candidates for promotion, who have joined the service upto November, 2008. In case of the petitioner, his seniority

considered as per Rule 22(2), would not entitle him for being considered for promotion. Thus, there is no illegality in the action of the respondents.

5. I have considered the submissions made by learned counsel for the parties and perused the record.

6. The issues which fall for consideration before this Court are as under:

(1) What would the criteria for including the name of the petitioner in the seniority list? Is it the date of initial appointment as Assistant Teacher as contended by the petitioner?

(2) What would be the effect of non-inclusion of the name of the petitioner in the seniority list? Does it vitiate the promotions made in pursuance of the impugned seniority list?

(3) What is the relief to which the petitioner is entitled to?

Issue No. 1:--

7. Certain provisions of the service rules, which are relevant for determining the controversy, are as under:--

"2. (i) "Local Area" means the area over which a local body exercises jurisdiction;

(k) "Rural Local Area" means the area over which a [Zila Parishad] exercises jurisdiction;

(r) "Urban Local Area" means the area over which a Nagar Mahapalika Municipal Board, Town Area Committee, or Notified Area Committee exercises jurisdiction."

4. Strength of the Service--(1) There shall be separate cadres of service under these rules for each local area.

(2) The strength of the cadre of the teaching staff pertaining to a local area and the number of the posts in the cadre shall be such as may be determined by the Board from time to time with the previous approval of the State Government.....

5. Sources of recruitment.--The mode of recruitment to the various categories of posts mentioned below shall be as follows:--

8. (3) The minimum experience of candidates for promotion to a post referred to in clause (b) of Rule 5 shall be as shown below against each--

18. Procedure for recruitment by promotion.--(1) Recruitment by promotion to the posts referred to in clause (b) of Rule 5 shall be made on the basis of seniority subject to rejection of unfit through the Selection Committee constituted under Rule 16.

(2) The appointing authority shall prepare an eligibility list of candidates in order of seniority and place it before the Selection Committee along with their

character rolls and such other records pertaining to them as may be considered proper.

(3) The Selection Committee shall consider the cases of the candidates on the basis of the records referred to in sub-rule (2).

(4) The Selection Committee shall prepare a list of selected candidates in order of seniority as disclosed from the eligibility list referred to in sub-rule (2) and forward the same to the appointing authority."

21. Procedure for transfer.--There shall be no transfer of any teacher from the rural local area to an urban area or vice-versa or from one urban local area to another of the same district or from local area of one district to that of another district except on the request of or with the consent of the teacher himself and in either case approval of the Board shall be necessary.

22. Seniority.--(1) The seniority of a teacher in a cadre shall be determined by the date of his appointment in a substantive capacity:

(2) The seniority of a teacher who has been transferred from one local area to another in accordance with the provisions of Rule 21 shall be placed at the bottom of the list of teachers of the corresponding class or category pertaining to the local area to which he has been transferred, as on the date of orders for transfer are passed, such a persons shall not be entitled to any compensation."

8. A perusal of the scheme under the Rules reveals that there are separate cadres of service for each local area. The strength of cadre of teaching staff pertaining to a local area and the number of posts in the cadre, is such as has been determined by the Board with previous approval of the State Government. The post of Head Master and Head Mistresses of Junior Basic Schools and Assistant Masters of Senior Basic School are to be filled by promotion as per the procedure prescribed under Rule 18. Only a candidate possessing five years teaching experience can be considered for promotion. Under Rule 18, the criteria for promotion is seniority subject to rejection of unfit. The seniority is to be reckoned from the date of initial appointment of a candidate in substantive capacity. However, there is an exception to this general rule, which is provided under sub-rule (2) of Rule 22, according to which, seniority of a teacher, who has been transferred from one local area to another local area in accordance with the provisions of Rule 21, is to be reckoned from the date of order for transfer. This is apparently for the reason that there is separate cadre of service for each local area. Ordinarily, a teacher is born in his respective cadre on the date of his appointment in substantive capacity. However, when there is change of cadre, which is permissible as per Rule 21, on request of the teacher himself, the seniority is reckoned in the new cadre from the date of his transfer, for the reason being that such teacher is deemed to be born in the new cadre on such date. The effect of sub-rule (2) of Rule 22, is that the teacher transferred to the other local area is placed at the bottom of the list of teacher of the corresponding class pertaining to the local area, as those already serving in the cadre, were

born prior to him. It recognizes the fundamental principle of service jurisprudence that a person cannot be given seniority in the cadre from a date prior to his entry/birth in the cadre.

9. Now the argument of the petitioner is to be tested on the basis of the aforesaid provisions under the service rules. The initial appointment of the petitioner was in rural local area of Varanasi vide appointment letter dated 31.12.2005. He joined the service on 7.1.2006. The petitioner admits that on his own request, he was transferred to the rural local area of Azamgarh sometimes in the year 2013. The date of order of transfer has not been disclosed in the writ petition. However, it is admitted that in pursuance of the order of transfer to rural local area of Azamgarh, Basic Education Officer, Azamgarh vide order dated 23.9.2013, allocated the present institution to the petitioner and he has been working there since 24.9.2013.

10. In view of the aforesaid undisputed facts, the seniority of the petitioner is to be reckoned from the date of order for transfer to rural local area of Azamgarh as per sub-rule (2) of Rule 22, and not from the date of his initial appointment at Varanasi. Reliance placed on the letter of the Secretary of the Board dated 14.6.2013 in making submission that seniority is to be reckoned from the date of initial appointment, if considered in the light of the provisions and the service rules, would show that the letter does not provide, nor could it provide, anything contrary to that stipulated under the service rules. It merely says that in accordance with the service rules, seniority is to be reckoned from the date of first appointment on substantive basis. Indeed, this is also the criteria for reckoning the seniority under sub-rule (1) of Rule 22. The exception to the said general rule is provided under sub-rule (2) and since the petitioner was transferred from one local area to another local area, and thus, his seniority has to be reckoned as per the provisions of sub-rule (2). Thus, the argument made is untenable.

Issue No. 2:--

11. The question now to be considered is regarding the effect of non-inclusion of the name of the petitioner in the seniority list and whether it will vitiate the impugned promotion order.

12. Similar controversy cropped up before the Apex Court in the case of Union of India (UOI) and Others Vs. Deo Narain and Others, (2008) 10 JT 294 : (2008) 12 SCALE 439 : (2008) 10 SCC 84 : (2008) 2 SCC(L&S) 985 : (2009) 1 SLJ 269 : (2009) 1 SLR 575 : (2009) AIRSCW 353 : (2008) 6 Supreme 608 . The respondents were working as lower division clerk in the office of Central Excise and Customs, Department of Revenue. They got themselves transferred to Meerut Collectorate. Under the Inter-Collectorate Transfer Policy, the respondents were placed at the bottom of the seniority list and they thus lost their seniority, which they were having in the parent department. As a result thereof, they did not come within the zone of consideration for promotion to the post of upper

division clerk and were accordingly not considered by the Departmental Promotion Committee. They approached the Central Administrative Tribunal, which allowed the application and directed the authorities to convene D.P.C. and consider the applicants for promotion taking into consideration their past services rendered as lower division clerk. In the appeal filed by the Union of India before the Apex Court, their Lordships of the Supreme Court, after considering the earlier judgment in the case of Union of India and others Vs. C.N. Ponnappan, (1996) 1 AD 243 : AIR 1996 SC 764 : AIR 1995 SC 764 : (1995) 9 JT 175 : (1996) LabIC 763 : (1995) 7 SCALE 116 : (1996) 1 SCC 524 : (1995) 6 SCR 220 Supp and Smt. Renu Mullick Vs. Union of India and another, AIR 1994 SC 1152 : (1994) 68 FLR 215 : (1993) 6 JT 527 : (1993) 4 SCALE 556 : (1994) 1 SCC 373 : (1993) 3 SCR 825 Supp : (1994) 1 UJ 154 held that seniority and eligibility for promotion are two different concepts. It was held that the respondents, in view of their transfer to district Meerut, are to be placed at the bottom of the seniority list. However, for determining their eligibility for promotion, the experience gained prior to their transfer to Meerut Collectorate shall not be wiped out. However, that itself was not sufficient to entitle the respondents to promotion, as being at the lowest rung in the seniority list, they do not come within the zone of consideration, and thus, rightly not considered for promotion by the D.P.C. In this regard, relevant observations made in the judgment by their Lordships of the Supreme Court are as under:--

"32. What was held in Ponnappan by this Court was that if an employee is transferred from one department to another department on compassionate ground, he would be placed at the bottom of the seniority in the transferee department. Hence, at the time of his transfer in the transferee department, all employees in the same cadre who were very much serving at that time would be shown above such transferee employee and in such combined seniority list, the transferred employee would be shown as junior most. The only thing which this Court said and with respect, rightly, is that such an employee who had already worked in a particular cadre and gained experience, will not lose past service and experience for the purpose of considering eligibility when his case comes up for consideration for further promotion.

33. In our judgment, the ratio laid down by this Court in Ponnappan clearly lays down the principle formulated in the Government of India's letter dated 20.5.1980 as also in a subsequent communication, 23.5.1997 issued by the Ministry of Finance, Department of Revenue. Even otherwise, in our considered opinion, the two concepts, viz. (i) eligibility, and (ii) seniority are quite distinct, different and independent of each other. A person may be eligible, fit or qualified to be considered for promotion. It does not, however, necessarily mean that he must be treated as having requisite "seniority" for entry in the zone of consideration. Even if he fulfils the first requirement, but does not come within the zone of consideration in the light of his position and placement in "seniority", and the second conditions is not fulfilled, he cannot claim consideration merely on the basis of his eligibility or qualification. It is only at the time when

"seniority" cases of other employees similarly placed are considered that his case must also be considered. CAT, in our view, therefore, was not right in applying Ponnappan and in granting relief to the applicants. There is no doubt in our mind that it says to the contrary.

35. In our opinion, Renu Mullick also supports the view which we are inclined to take, namely, that an employee who is transferred to an other Collectorate does not lose his/her past service for the purpose of considering his/her eligibility, But, if such transfer is voluntary or unilateral on condition that he/she will be placed at the bottom of the seniority list in the transferee department, the said condition would bind him/her and he/she cannot claim seniority over the employees in the transferee department."

13. A perusal of the provisional and final seniority list indicates that only such candidates of the rural local area of Azamgarh, who have joined the cadre till November, 2008, were considered for promotion, the criteria for promotion being seniority subject to rejection of unfit. The petitioner was born in the rural local area cadre of Azamgarh on the date order for his transfer was passed, as per Rule 22(2). In all possibility, there would be large number of candidates still above the petitioner, who were not considered for promotion. Even in the writ petition, it is not the case of the petitioner that any person, who was born in rural local area cadre of Azamgarh after him, has been granted promotion. In para 24 of the writ petition, the petitioner himself admits that only those teachers, whose date of initial appointment in the district is upto November, 2008, have been considered for promotion. As such, I am of the opinion that non-inclusion of name of the petitioner in the seniority list, which has been brought on record, has not caused any prejudice to him, nor will it vitiate the impugned promotions.

Issue No. 3:--

14. The question, which remains to be answered, is whether in the facts and circumstances aforesaid, the petitioner is entitled to any relief or not. Under Rule 22 as noted above, it is incumbent upon the respondents to prepare a separate seniority list for each local area. Thus, in case the respondents have not prepared any seniority list of the candidates borne in the rural local area cadre of Azamgarh after November, 2008 upto the present time, it is incumbent upon the authorities to finalize such list. A candidate serving in a cadre is entitled to know where he stands in the seniority list and such exercise, in my opinion, cannot be deferred. Accordingly, the petitioner is entitled to the limited relief for a direction to the respondents to finalize the seniority list of all candidates borne in the cadre, in accordance with the provisions laid down under Rule 22. It is also clarified that whenever, further exercise for promotion is undertaken, the respondents shall proceed to hold such exercise in accordance with the procedure prescribed under Rule 18. If the petitioner comes under the zone of consideration as per the criteria laid down under Rule 18(1) viz. seniority subject to rejection of unfit, he will not be excluded from consideration on the ground

that he does not possess five years teaching experience as his services rendered in the parent department i.e. in rural local area of Varanasi is also to be counted for such purpose, as held by this Court in the case of Priyanka Shukla v. State Writ No. 305(S/S) of 2014 (Lucknow Bench) decided on 28.10.2014.

15. In view of the discussion made above, this writ petition is disposed of with the following directions:--

(a) The respondents shall undertake the exercise for preparing the seniority list of the candidates who entered the rural local area cadre of Azamgarh after November, 2008 upto the present time as per Rule 22.

(b) In future, whenever exercise for promotion is held, the petitioner subject to his coming within the zone of consideration, shall be so considered, by counting his services rendered in the rural local area cadre of Varanasi for purposes of determining his eligibility for promotion.

Subject to aforesaid observations/directions, writ petition stands disposed of.