
(2019) 10 UK CK 0082

In the Uttarakhand High Court

Case No : Writ Petition (S/B) No. 499 Of 2019

Poonam Joshi

APPELLANT

Vs

State Of Uttarakhand And Another

RESPONDENT

Date of Decision : 21-10-2019

Acts Referred:

Uttarakhand Public Service Commission (Computer Staff Service) Regulations, 2011 — Rule 5, 27
Constitution Of India, 1950 — Article 14, 16, 226, 318
Uttarakhand Public Service Commission (Computer Staff Service) Regulations, 2011 — Regulation 2(2)

Citation : (2019) 10 UK CK 0082

Hon'ble Judges : Ramesh Ranganathan, CJ;Alok Kumar Verma, J

Bench : Division Bench

Advocate : Subhash Upadhyay, C.S. Rawat, B.D. Kandpal

Final Decision : Dismissed

Judgement

Ramesh Ranganathan, CJ

1. Heard Mr. Subhash Upadhyay, learned counsel for the petitioner, Mr. C.S. Rawat, learned Additional Chief Standing Counsel for the State of Uttarakhand and Mr. B.D. Kandpal, learned Standing Counsel for the second respondent-Uttarakhand Public Service Commission and, with their consent, the Writ Petition is disposed of at the stage of admission.

2. The jurisdiction of this Court, under Article 226 of the Constitution of India, has been invoked to call for the Office Order dated 16.10.2015 by which the petitioner's representation dated 03.09.2019 had been rejected; a writ of certiorari to quash the decision taken on 30.08.2018 for filling up the post of Systems Analysts through direct recruitment; a writ of certiorari to call for the records, and quash the advertisement dated 23.09.2019 by which the Commission intends to fill up the post of Systems Analyst through direct recruitment; and to declare Rule 5 of the Uttarakhand Public Service Commission

(Computer Staff Service) Regulations, 2011, in so far as it relates to filling up the Category-A post of Systems Analyst, through direct recruitment, as ultra vires the Constitution of India.

3. Facts, to the limited extent necessary, are that the petitioner was appointed as a Data Entry Operator in the Uttarakhand Public Service Commission (for short "the UPSC") on 29.04.2004. She was promoted as a Programming Assistant on 21.09.2010 on completion of five years' service as a Data Entry Operator. The Service Rules, promulgated on 02.12.2011, provided that a person, who has completed four years' service as a Programming Assistant, shall be eligible to be promoted to the post of Assistant Programmer. Consequently, on completion of four years' service as a Programming Assistant, the petitioner was promoted as an Assistant Programmer on 20.09.2013. In terms of the 2011 Service Rules, promotion to the post of Programmer can be made from persons who have completed four years' service as an Assistant Programmer and, in case no candidate is available to be considered for promotion, then through direct recruitment. In the same manner, Rule 5 of the 2011 Service Rules provided for the next promotional post of Systems Analyst, to be filled up by promotion from the feeder cadre of Programmers who have completed four years of service and, in case no candidate is available to fill up the post through promotion, then through direct recruitment.

4. As noted hereinabove, the petitioner was promoted as an Assistant Programmer on 20.09.2013. When she was holding the post of an Assistant Programmer, the UPSC issued an advertisement on 19.02.2015 inviting applications from eligible candidates for appointment to the solitary post of Systems Analyst, 01 post of Programmer, 01 post of Assistant Programmer, 02 posts of Programming Assistant/Console Operator and 07 posts of Data Entry Operators.

5. In its meeting held on 30.04.2015, the UPSC decided to keep the selection process, for direct recruitment to the posts of Systems Analyst, Programmer and Assistant Programmer, in abeyance; and to proceed with direct recruitment to the posts of Programming Assistants and Data Entry Operators. Thereafter a meeting of the UPSC was held on 20.07.2018, wherein it was decided that the posts of Assistant Programmer and Programmers would not be filled up through direct recruitment and, instead, would be filled up by promotion. However, for the solitary post of Systems Analyst, it was decided to resort to the process of direct recruitment.

6. Thereafter, another meeting of the UPSC was held on 30.08.2018, wherein the earlier decision taken on 20.07.2018 was reviewed and it was decided that the process of selection, pursuant to the advertisement dated 19.02.2015, would be continued for appointment by direct recruitment to the post of Systems Analyst, and an advertisement would be issued informing the public at large that the posts of Programmer and Assistant Programmer, would not be filled up by direct recruitment. A corrigendum was issued on 05.09.2018, modifying the earlier

advertisement dated 19.02.2015, and confining direct recruitment only to the post of Systems Analyst, and not to the posts of Programmer and Assistant Programmer. Consequent upon the decision of the UPSC, not to fill up the post of Programmer by direct recruitment, it was decided to fill up the said post by way of promotion, and the petitioner was promoted as a Programmer, by order dated 09.08.2019, w.e.f. 01.07.2019. Likewise, the post of Assistant Programmer, vacated by her, was filled up by promotion of another employee.

7. An advertisement was issued by the UPSC on 27.08.2019 informing the public at large that, pursuant to the advertisement issued on 19.02.2015 for the post of Systems Analyst, written examination would be held on 16.10.2019. Since Panchayati Raj Elections were scheduled to be held on 16.10.2019, a corrigendum was issued by the UPSC informing the public at large that the written examination, scheduled to be held on 16.10.2019, would, instead, be held on 23.10.2019. While matters stood thus, the petitioner and others submitted a representation on 03.09.2019, to the Secretary, UPSC requesting him to cancel the recruitment process to the post of Systems Analyst through direct recruitment, and to exercise powers under Rule 27 of the 2011 Service Rules. Since the UPSC was proceeding with the selection process, to fill up the post of Systems Analyst by direct recruitment, the petitioner has now invoked the jurisdiction of this Court under Article 226 of the Constitution of India.

8. Mr. Subhash Upadhyay, learned counsel for the petitioner, would submit that, since there exists only one post of Systems Analyst, filling it up through direct recruitment would close all promotional avenues for the petitioner, and she would stagnate in the post of Programmer till she retired from service; Rule 5 of the 2011 Service Rules enables the UPSC to resort to direct recruitment only if no candidates are available, to be considered for promotion to the post of Systems Analyst, from the feeder category of Programmers; while Rule 5 of the 2011 Service Rules, no doubt, prescribes four years' minimum service as a Programmer to be eligible to be considered for promotion to the post of Systems Analyst, Rule 27 of the 2011 Service Rules confers the power of relaxation, including the power to dispense with the rigor of the Rules; the UPSC is obligated in law to forward the petitioner's representation, for relaxation of the rigor of the Rules and dispense with the requirement of four years' minimum service as a Programmer to be eligible for promotion as a Systems Analyst, and to consider her case for promotion, to the State Government to enable it to take a decision regarding relaxing the rigor of the Rules; since the word used in the proviso to Rule 5 of the 2011 Service Rules is "if", it is only if, after providing relaxation in terms of Rule 27 of the 2011 Service Rules, no candidate is eligible for promotion, can direct recruitment be resorted to; filling up the post of Programmers through direct recruitment, instead of by promotion, would deprive persons, in the feeder cadre of Programmers, of being considered for promotion; failure to provide a channel of promotion is ultra vires Articles 14 and 16 of the Constitution of India; and the UPSC has committed an illegality in seeking to fill-up the post of Systems Analyst, through direct recruitment in the year 2019, on

the basis of an advertisement issued in the year 2015, instead of issuing a fresh advertisement. Learned counsel would rely on *Akhilesh Kumar Singh v. Ram Dawan and others* : (2015) 16 SCC 619 in this regard.

9. As noted hereinabove, Rule 5 of the 2011 Rules relates to the source of recruitment and, for the post of Systems Analyst in Group-A, the source of recruitment is through promotion, from substantively appointed Programmers who have completed four years' service on the first day of the recruitment year, by a selection committee. In terms of the proviso thereto, in case no person, eligible under the promotion quota, is available then the Selection Committee shall fill up the said post through written examination and interview.

10. The petitioner was promoted as a Programmer by proceedings dated 09.08.2019 w.e.f. 01.07.2019, and has rendered just 3½ months' service, as a Programmer, even as on date. As noted hereinabove, the eligibility, for promotion to the post of Systems Analyst, is a minimum of four years' service as a Programmer on the first day of the recruitment year. For recruitment in the year 2019, candidates, who have completed four years' service as a Programmer on 01.01.2019, are alone eligible to be considered for promotion as a Systems Analyst. It is only candidates, appointed as Programmers on or before 01.01.2015, who are eligible, in terms of Rule 5 of the 2011 Service Rules, to be considered for promotion to the post of Systems Analyst. The petitioner was not even a Programmer and did not form part of the feeder cadre for promotion as Systems Analyst, before 09.08.2019 when she was promoted as a Programmer w.e.f. 01.07.2019. As noted hereinabove, the initial advertisement was issued by the UPSC on 19.02.2015, and, on that date, the petitioner was not even occupying the post of Programmer, in the feeder category for promotion to the post of Systems Analyst, and she was promoted to the said post nearly 4½ years thereafter on 09.08.2019.

11. Rule 27 of the 2011 Service Rules confers power on the State Government to relax the rigor of the said Rules, and also to dispense with any requirement of the said Rules. The power of relaxation, under Rule 27, is available to be exercised by the State Government if it is of the opinion that there is difficulty in implementing the said Rules. While it is true that the State Government is required to consult the UPSC before it either relaxes the rigor of the 2011 Service Rules, or dispenses with the requirement of the said Rules, it is only if the State Government is satisfied that the rigor of the said Rules should be relaxed, or the conditions stipulated therein dispensed with, would it then be required to consult the UPSC before actually relaxing the rigor of the said Rules or dispensing with the conditions stipulated therein. The petitioner cannot be heard to contend that, even before the State Government is satisfied that there is a need to relax the rigor of the 2011 Rules, a mandamus should be issued by this Court to the UPSC directing them to request the State Government to relax the rigor of the said Rules, and to consequently direct the State Government to relax the rigor of the said Rules and to dispense with the conditions stipulated in the said Rules of a

candidate having a minimum four years of service to be eligible to be considered for promotion to the post of Systems Analyst so that the petitioner, who was appointed in the feeder cadre of Programmer around 3½ months ago, would be eligible to be considered for promotion to the post of Systems Analyst.

12. The contention that the proviso to Rule 5 of the 2011 Service Rules would come into operation only if there is no candidate available for promotion and, since the petitioner is available for promotion if the rigor of the Rules is relaxed in terms of Rule 27 of the 2011 Service Rules, direct recruitment for the post of Systems Analyst should not be resorted to, needs only to be noted to be rejected.

13. The mode and manner in which recruitment should be made, to different posts in the service, are for the rule making authority to prescribe. While the validity of any Rule can be examined on the touchstone of Part III of the Constitution of India, or any other constitutional provision, that would not justify this Court substituting its views for that of the rule making authority, or for it to prescribe the conditions subject to which a candidate would be eligible for promotion. The proviso to Rule 5 of the 2011 Service Rules stipulates that, in case no candidate is eligible for promotion to the post of Systems Analyst, then direct recruitment can be resorted to. The burden to establish the invalidity of a Rule, made by the UPSC in the exercise of its powers under Article 318 of the Constitution of India, lies heavily on the person invoking the jurisdiction of this Court. The petitioner has failed to discharge this onus. As noted hereinabove, when the advertisement was initially issued by the UPSC on 19.02.2015, the petitioner was not even promoted to the feeder cadre of Programmer, and it is only persons, who have put in four years' service as Programmer, who are eligible for promotion to the post of Systems Analyst. In terms of the proviso to Rule 5, no person with the minimum service of four years in the feeder cadre is available to be considered for promotion to the post of Systems Analyst, and the UPSC was therefore justified in resorting to direct recruitment for the post of Systems Analyst. Rule 5 gives primacy to promotion, and it is only if there is no eligible candidate available to be considered for promotion, can direct recruitment be resorted to. The petitioner has not been able to show how the proviso to Rule 5 is so manifestly arbitrary as to violate Articles 14 and 16 of the Constitution of India. We see no reason, therefore, to declare the proviso to Rule 5 of the 2011 Service Rules ultra vires Articles 14 and 16 of the Constitution of India.

14. The petitioner's complaint of the delay in filling up the posts, pursuant to the advertisement issued on 19.02.2015, does not also merit acceptance. As noted hereinabove, a decision was taken by the UPSC on 30.05.2015 to keep the selection process, to the posts of Systems Analyst, Programmer and Assistant Programmer, in abeyance and to continue the process of selection for the remaining posts. It is only, thereafter, on 20.07.2018 that the UPSC took the decision to fill up the posts of Assistant Programmer and Programmer by promotion, and to undertake the process of direct recruitment only for the post

of Systems Analyst. This decision of the Commission, taken on 20.07.2018, was reviewed on 30.08.2018 and it was held that the process of selection, initiated pursuant to the advertisement dated 19.02.2015, would govern recruitment to the post of Systems Analyst. But for the decision of the UPSC, taken on 20.07.2018, even the post of Programmer would have been filled up by direct recruitment, in which event the petitioner would not even have been promoted to the post of Programmer. It is only because the UPSC, in its meeting held on 20.07.2018 (nearly three and half years after it issued the advertisement on 19.02.2015), resolved to delete the posts of Programmer and Assistant Programmer from the process of direct recruitment, was the post of Programmer available to be filled up by promotion; and it is only because of such a decision that the petitioner was, in fact, promoted to the post of Programmer by proceedings dated 09.08.2019 w.e.f. 01.07.2019. The petitioner, a beneficiary of the decision of the UPSC, in its meeting held on 20.07.2018, can hardly turn around and contend that the UPSC should not proceed with the earlier recruitment process, and instead wait for four more years till she becomes eligible for promotion to the post of Systems Analyst or relax the rigor of the Rules only to promote her to the post of Systems Analyst within four months of her promotion as a Programmer.

15. The contention, urged on behalf of the petitioner, that filling up the post of Systems Analyst by direct recruitment would result in the stagnation of the petitioner in the service, is also to be noted to be rejected. It is no doubt true that, for an efficient service, it is obligatory to provide promotional avenues for career advancement, and as an incentive for personal development. What is necessary is to provide an opportunity of advancement; promotion being a normal incidence of service. (*Food Corporation of India v. Parashotam Das Bansal* : (2008) 5 SCC 100; *O.Z. Hussain (Dr) v. Union of India* : 1990 Supp. SCC 688; *State of Tripura & others v. K.K. Roy* : (2004) 9 SCC 65; and *Council of Scientific and Industries Research & another v. K.G.S. Bhatt & others* : (1989) 4 SCC 635). If there is no channel of promotion in respect of a particular group of officers, resulting in their stagnation over the years, the jurisdiction of the High Court to issue directions cannot be denied. (*Food Corporation of India v. Parashotam Das Bansal* : (2008) 5 SCC 100).

16. It is only in cases where there is no channel of promotion available, that Courts have held that a channel of promotion should be provided. In the present case, the petitioner joined service as a Data Entry Operator. She was, thereafter, promoted first as an Assistant Programmer and, thereafter, as a Programmer. The contention that the petitioner would stagnate in service because of absence of a channel of promotion, is not tenable. In any event, the petitioner who has been the recipient of three promotions since she joined the post of Data Entry Operator in the year 2004 (firstly as a Programming Assistant on 21.09.2010, thereafter as Assistant Programmer on 20.09.2013 and thereafter as a Programmer w.e.f. 01.07.2019 less than three and half months ago), can hardly complain of stagnation in service because of lack of promotional avenues.

17. While there has, undoubtedly, been a delay in initiating the process of selection, pursuant to the advertisement dated 19.02.2015, the petitioner cannot be heard to complain of any such delay since, in terms of the original advertisement dated 19.02.2015, the post of Programmer was also required to be filled up by direct recruitment, and it is only because of the subsequent decision taken by the Commission, nearly three and half years thereafter on 20.07.2018 to delete this post from the process of recruitment, was the post of Programmer available to be filled up by promotion, and consequently the petitioner was promoted to the said post by proceedings dated 09.08.2019.

18. Applicants, who have submitted their applications pursuant to the advertisement dated 19.02.2015, cannot be deprived of the opportunity of participating in the selection process, for no fault of theirs. The UPSC was, therefore, justified in proceeding with the selection process in terms of the advertisement dated 19.02.2015 with a view not to deprive those, who had applied pursuant to the said advertisement, of their eligibility to be considered for direct recruitment to the post of Systems Analyst because of the delay on the part of the UPSC in completing the said process.

19. Reliance placed by Mr. Subhash Upadhyay, learned counsel for the petitioner, on the judgment of the Supreme Court, in *Akhilesh Kumar Singh v. Ram Dawan and others* : (2015) 16 SCC 619, is also of no avail. Regulation 2(2) of the Regulations, which fell for consideration before the Supreme Court, reads thus:

"Fifty percent of the total number of sanctioned posts of head clerk and clerks shall be filled among the serving clerks and employees through promotion. If employee possesses prescribed eligibility and he has served continuously for 5 years on his substantive post and his service record is good, then promotion shall be made on the basis of seniority, subject to rejection of the unfit. If any employee is aggrieved by any decision or order of the management committee in this respect then he can make representation against it to the Inspector within two weeks from the date of such decision or order. Inspector on such representation can make such orders as he thinks fit. Decision of the Inspector would be final and promptly executed by the management.

Note: - In calculating fifty percent of posts parts less than half would be left and half or more that half post would be deemed as one."

20. The question, which arose for consideration before the Supreme Court in the aforesaid judgment, was the manner in which the 50 percent of posts earmarked for promotion should be computed, and it is in this context that the Supreme Court observed that, on a conjoint reading of Regulation 2(2) and the note below, if a single post was available, it should be filled up by promotion from among eligible candidates in the feeder cadre.

21. Rule 5 of the 2011 Service Rules is distinct and different from Regulation 2(2) which fell for consideration before the Supreme Court in *Akhilesh Kumar Singh v. Ram Dawan and others* : (2015) 16 SCC 619. In terms of the proviso to

Rule 5 of the 2011 Service Rules, the post of Systems Analyst is required to be filled up by direct recruitment only if there is no eligible candidate in the feeder cadre of Programmers, who have a minimum of four years' service in the said post for promotion to the post of Systems Analyst. Admittedly, there is no eligible candidate, fulfilling the minimum eligibility criteria, available in the feeder cadre to be considered for promotion to the post of Systems Analyst. The petitioner has been promoted by proceedings dated 09.08.2019 w.e.f. 01.07.2019, and would satisfy the eligibility criteria, in terms of the proviso to Rule 5 of the 2011 Service Rules, only four years from now.

22. Accepting the petitioner's contention would require the UPSC to keep the post of Systems Analyst unfilled for the next four years or to recommend relaxation of the rigor of the 2011 Rules to the State Government. We are afraid that such a contention cannot be countenanced.

23. Viewed from any angle, we see no reason to interfere with the action of the UPSC in proceeding with the process of direct recruitment to fill up the post of Systems Analyst. The petitioner is not entitled to any of the reliefs sought for in the Writ Petition.

24. The Writ Petition fails and is, accordingly, dismissed. No costs.