

(1994) 05 AHC CK 0008

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 42456 of 1993

Rakesh Kumar Trivedi

APPELLANT

Vs

High Court of Judicature and Another

RESPONDENT

Date of Decision : 03-05-1994

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226
Uttar Pradesh Higher Judicial Service Rules, 1975 — Rule 22(1), 22(2), 22(3),
22(4), 6
Uttar Pradesh State Universities Act, 1973 — Section 31(10)

Citation : (1994) 3 AWC 1292 : (1994) 2 UPLBEC 1400

Hon'ble Judges : R.N. Ray, J;B.M. Lal, J

Bench : Division Bench

Advocate : Chandra Prakash, for the Appellant;

Final Decision : Dismissed

Judgement

B.M. Lal, J.—By present petition under Article 226 of the Constitution of India, Petitioner has prayed for issuance of an order, direction or writ quashing the Full Court resolution dated 6-4-91 so far as it recommends the names of more than five candidates for the appointment to the U.P. Higher Judicial Service and the Full Court resolution dated 25-7-92 so far as it approves the names of additional sixteen candidates for the appointment to the U.P. Higher Judicial Service.

2. In short the case of the Petitioner is that in pursuance of the advertisement dated 26-7-89 (Annexure-2 to the writ petition), Petitioner applied for recruitment to the U.P. Higher Judicial Service (hereinafter referred to as the Service). It is submitted that the advertisement was made for selection of five candidates but ultimately by Courts resolution dated 6-4-91 names of 9 direct recruits were approved for appointment to the service and further by an other resolution dated 25-7-92 approval of 16 additional candidates was granted by the Full Court.

3. Learned Counsel for the Petitioner contended that selection and approval of

more than five candidates for appointment in the Service against the advertisement for five candidates is violative of Articles 14 and 16 of the Constitution of India.

4. Learned Counsel for the Petitioner further contended that the Rule 6 of the Uttar Pradesh Higher Judicial Service Rules 1975 (for short the Rules) deals with the quota for various sources of recruitment and Rule 8 of the Rules deals with the number of appointments to be made but the impugned selection and approval have been done without adhering to the provisions of these Rules, in as much as the selection process commenced without determining the actual vacancies to be filled in by direct recruits.

5. In support of his contentions, learned Counsel relied upon the decision of this Court in *Dr. R.C. Gupta v. Chancellor Kumaun University Rajbhawan Lucknow* 1992 UP LB EC 519 , and a decision of apex Court in *Hoshier Singh Vs. State of Haryana and Others*, , and Anr. decision Of apex Court in *O.P. Garg and others, Vs. State U.P. and others*, .

6. At the outset it appears just and proper to have the provisions of Rules 6 and 8 of the Rules and they are as follows:

6. Quota-Subject to the provisions of Rule 8, the quota for various Sources of recruitment shall be-

(i) direct recruitment from the Bar 15% (ii) Uttar Pradesh Nyayik Sewa 70% of vacancies. (iii) Uttar Pradesh Judicial Officers Service (Judicial Magistrates). 15%

Provided that where the number of vacancies to be filled in by any of these sources in accordance with the quota is in fraction, less than half shall be ignored and the fraction of half or more shall ordinarily be counted at one:

Provided further that when the strength in the cadre of the Judicial Magistrates gradually gets, depleted or is completely exhausted and suitable candidates are not available in requisite numbers or DO candidate remains available at all, the shortfall in the number of vacancies required to be filled from amongst Judicial Magistrates and in the long run all the vacancies, shall be filled by promotion from amongst the members of the Nyayik Sewa and their quota shall, in due course, become 85 per cent.

8. Number of appointments to be made:-(1) The Court, shall, from time to time, but not later than three years from the last recruitment, fix the number of officers to be taken at the recruitment keeping in view the vacancies then existing and likely to occur in the next two years.

Note :--The limitation of three years mentioned in this sub-rule shall not apply to the first recruitment held after the enforcement of these rules.

2. If at any selection the number of selected direct recruits available for appointment is less than the number of recruits decided by the Court to be taken from that source, the court may increase correspondingly the number of recruits

to be taken by promotion from the Nyayik Sewa:

Provided that the number of vacancies filled in as aforesaid under this sub-rule shall be taken into consideration while fixing the number of vacancies to be allotted to the quota of direct recruits at the next recruitment, and the quota for direct recruits may be raised accordingly, so, however, that the percentage of direct recruits in the service does not in any case exceed 15 percent of the total permanent strength of the service;

Provided further that all the permanent vacancies existing on May 10, 1974 plus 31 temporary posts existing on that date, if and when they are converted into permanent "posts, shall be filled by promotion from amongst the members of the Nyayik Sewa; and only the remaining vacancies shall be shared between the three sources under these rules:

Provided also that the number of vacancies equal to 1:5 percent of the vacancies referred to in the last preceding proviso shall be worked, out for being allocated in future to the Judicial Magistrates in addition to their quota of 15 percent prescribed in Rule 6, and thereupon, future recruitment (after the promotion from amongst the members of the Nyayik Sewa against vacancies referred to in the last preceding proviso) shall be so arranged that for so long as the additional 15 per cent vacancies worked out as above have not been filled up from out of the Judicial Magistrates, the allocation of vacancies shall be as follows:

(i) 15% by direct recruitment:

(ii) 30% from out of the Judicial Magistrates:

(iii) 55% from out of the members of the Nyayik Sewa.

7. Here in the instant case we are concerned with the direct recruits. The Rules 6 and 8 form part of the same scheme for recruitment. A combined reading of both the Rules makes it clear that the percentage of direct recruits in the service should not in any case exceed 15% of the total permanent strength of the service. Under Rule 8, within a period of three years from the last recruitment, the Court shall fix the number of officers to be taken at the recruitment keeping in view the vacancies then existing and the vacancies likely to occur in the next two years.

8. In the instant case, the Petitioner has filed report of the Selection Committee regarding 1988 recruitment to the U.P. Higher Judicial Service, as Annexure VI to the writ petition. A perusal of this Report shows that there is sufficient compliance of Rules 6 and 8 of the Rules. The report shows that the Court at the time of making recommendations for appointment to the service had taken into account the vacancies which had arisen till 31st December, 1990 in respect of the permanent posts available in the Higher Judicial Service cadre. The Government did not make any appointment in pursuance of the recommendations made by the Full Court in two meetings held on 6-4-91 and 18-1-92, in view of various representations which were made by the U.P. Nyayik Sewa Sangh. The aforesaid

representation were sent to the Court for sending its opinion in respect of the recruitment of the years 1988.

9. The report further reveals that before the Court could consider request of the Government to consider the representations by the U.P. Nyayik Sewa Sangh, the Supreme Court in writ petition No. 259 of 1990 O.P. Garg and Ors. v. State of U.P. struck down Rules 22(3) and 22(4) of the rules on the ground that these rules violate Article 14 and 16 of the constitution. However, the appointments already made under these Rules were not Invalidated by the apex Court.

10. Thus after the decision in O.P. Garg's case the position which Emerged is that the appointments made under Rule 22(1) and 22(2) of 1975 Rules have to be made to permanent as well as temporary posts from all the three sources in accordance with the quota provided under the said rules Therefore, since process of 1988 recruitment was not over and the Governor referred the matter back to the High Court for consideration of the represents lions moved by the Association of the U.P. Nyayik Sewa hence the directions given by the Supreme Court in O.P. Garg's case were complied with and in the light of the observations made by the apex Court the vacancies up to 11-12-90 were calculated again.

11. In this regard we have also perused the advertisement which is annexed as Annexure 2 to the writ petition. In the advertisement itself it was very clearly mentioned that there may be variation in the number of vacancies without prior notice.

12. The settled principle is that a candidate cannot assume better rights than the rights which originally flow from the advertisement itself in the instant case since in the advertisement itself it was made clear that there may be variation in the number of vacancies hence it was well within the powers of this Court to recalculate the vacancies in the light of the observations made by the apex Court in O.P. Garg's case and thereby no prejudice can be presumed to have been caused to the Petitioner if the High Court approved and recommended the name of candidates more than the vacancies advertised. By virtue of the clause pertaining to variation in the number of vacancies inserted in the advertisement it was open for the High Court to cope with the developments which took place in between from the date of advertisement till the date of final selection, therefore, impugned action of the High Court cannot be said to be contrary to the Rules 6 and 8 of the Rules.

13. Learned Counsel for the Petitioner gave much emphasis on the terms "variation in the number of vacancies" used in the advertisement and suggested that the word "vary" means change by decreasing the number but it cannot mean change by increasing the number. In this regard he placed reliance on a Division Bench decision of this Court in Dr. R.C. Gupta's case (supra).

14. According to the New Lexicon Webster's Dictionary of the English Language the word "vary" means to introduce variety into, to undergo change, to deviate from a standard, and to change in values amount or quality in direct or indirect

proportion. Thus the expression "vary" means to undergo change, or alter, to differ, diverge or depart.

15. No doubt, the expression "vary" has been interpreted in Dr. R.C. Gupta's case (supra) and it has been observed that it would not be correct that the expression "vary" includes a case of increasing the number of vacancies within its ambit. But the ratio laid down in Dr. R.C. Gupta's case (supra) has no application to the instant case in as much as in that case the expression "vary" was not interpreted in isolation rather it was interpreted coupled with the object behind Clause 5 of the advertisement as well as Section 31(10) of the U.P. State Universities Act which was found by the Court to be of Imperative nature and it was in that context that it was held that the expression "vary" does not include a case of increasing the number of vacancies within Its ambit. In the instant case there is no provision in the rules parimateria to the provisions of Section 31(10) of the Universities Act. Not only this, there is no rule absolutely in the Rules which puts any embargo upon the High Court in Inserting such clause in the advertisement regarding variation In the number of vacancies. Thus the ratio laid down in Dr. R.C. Gupta's case is of no avail to the Petitioner.

16. Learned Counsel further placed reliance on the decision of apex Court in Hoshiar Singh's case (supra) where the Selection Board was required to send its recommendation for certain number of posts only but the Board made recommendations of larger number of persons than the number of posts for which requisition was sent, it was held that appointment on additional posts on the basis of such selection would be legally unsustainable.

17. There cannot be two opinions about the ratio laid down by the apex Court in aforesaid case, but it has no application to the facts of instant case. In the instant case in the advertisement itself it was notified that there can be variation in the number of vacancies, therefore, no prejudice is caused to the Petitioner who applied in pursuance to the said advertisement but could not be selected. In this way this case is also of no avail to the Petitioner.

18. It was also contended that contrary to Rule 8 this vacancies were Increased from 9 to 25 in as much as earlier only 9 direct recruits were recommended by the Pull Court in pursuance of 91 recruitment for the period op to 31-12-90 and the increase in number of vacancies from 9 to 25 by Increasing the period of recruitment upto 31-12-92 was thus contrary to Rule 8 above.

19. To consider this argument we have sent for the files and noticed that the Full Court resolution which was sent to the Respondent No. 1 in its entirety makes it clear that up to 31-12-90 there were 237 vacancies out of which 29 fell in the quota of direct recruits. However, the Selection Committee found only 25 candidates suitable for being recommended for appointment, and thus increase in the period of recruitment does not result in the increase of quota of direct recruits. The Increase in the number of recruits from 9 to 23 was not contrary to the rules as said vacancies were available In the quota of direct recruits from the

total vacancies available up to 1990 and therefore, direct recruits recommendation could not have; been withheld on the ground of extension of the period from 31-12-90 to 31-12-92. Thus there is no force in this submission of learned Counsel for the Petitioner.

20. In this context, learned Counsel for the Petitioner referred a recent decision of the apex court rendered in *State of Bihar v. Madan Mohan Singh* 1993 (5) SLR 601. The ratio laid down in that decision is that the vacancies which occurred after the date of publication of the result of the competitive examination should not be filled In on the basis of earlier competitive examination.

21. Considering the facts of this case, the ratio laid down In aforesaid case of *State of Bihar* (supra) has no application in the instant case for the reason that the vacancies which occurred upto 31-12-90 have been taken into consideration for appointment which Is absolutely in conformity with Rules 8 of the Rules (detailed discussion in Annexure 6 itself) consequently, the question of considering vacancies which occurred after publication of result is not involved in the instant case.

22 Before parting with the case, it would not be out of place to mention here that as pleaded by the Petitioner, the advertisement of 1992 (Annexure V) is not relevant for the point in issue, therefore, it does not appear necessary to deal with the same in detail.

23. In view of the discussions made above, we are of the considered opinion that this petition lacks merit consequently it is dismissed.