

(2014) 12 AHC CK 0073

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 7143 of 2012

Rama Shankar Pandey

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 11-12-2014

Acts Referred:

Constitution of India, 1950 — Article 309, 309, 310, 311, 312
Government of India Act, 1935 — Section 241

Citation : (2015) 2 ADJ 438 : (2015) 2 AWC 1993 : (2015) 1 UPLBEC 218

Hon'ble Judges : Rajan Roy, J

Bench : Single Bench

Advocate : Manoj Kumar Upadhyay, Anand Mohan Pandey and Prabha Shanker Pandey, Advocates for the Appellant; A.K. Srivastava, Ranjan Srivastava, Yashwant Verma and Sameer Sharma, Advocates for the Respondent

Judgement

Rajan Roy, J.—Heard Sri M.K. Upadhyay alongwith Sri A.M. Pandey, learned Counsel for the petitioner and Sri Sameer Sharma for the respondent and Sri A.K. Srivastava for the Respondent No. 5. This matter was heard earlier and judgment was reserved on 5.12.2014, however, while going through the record and perusing the judgment of this Court in the case of Sayed Muttaqui Raza v. District Judge, Banda, reported in 1999 Law Suit (All) 947 it was revealed that there are Rules known as U.P. Government Service Criteria for Recruitment or Promotion Rules, 1994 (hereinafter referred as "Rules, 1994"), according to which, the criteria for promotion to the post in question would be "seniority subject to rejection of unfit" and not "merit with due regard to seniority" as is provided in Sub Rule 3 of Rule 20 of the Subordinate Civil Court Ministerial Establishment Rules, 1947 (hereinafter referred as "Rules, 1947"). Rules of 1947, accordingly, the matter was posted for rehearing today vide order dated 8.12.2014 which reads as under:-

"The judgment was reserved in this case on 5.12.2014. After going through the records, I find that the parties have not addressed the Court on the issue as to whether U.P. Government Servants Criterion for Recruitment by Promotion Rules,

1994 or Rule 20(3) of the U.P. Subordinate Civil Courts Ministerial Establishment Rules, 1947 will apply in the instant case. This Court in Sayed Muttaqui Raza v. District Judge, Banda, 1999 Law Suit (All), 947 took note of this issue but did not give any categorical finding in this regard.

List this case for rehearing on 11.12.2014 at 10 A.M."

Today the matter has been heard.

2. The dispute in this writ petition relates to promotion of Respondent No. 5 to the post of Sadar Munsarim in the judgeship of Allahabad. There are two posts of Sadar Munsarim. The dispute revolves round promotion on one of the post.

3. Sri Sameer Sharma, learned Counsel for the respondent submits firstly that the petitioners have not taken any plea regarding applicability of the "Rules 1994" in the pleadings, therefore, it is not open for this Court to consider the same in the absence of any pleading. In fact in paragraph 40 the petitioner has himself pleaded violation of Rule 20 sub Rule 3 of the Rule 1947, therefore, even according to him Rules 1947 apply. In the alternative, Sri Sameer Sharma submitted that assuming though not conceding that the Rules 1994 were applicable, the petitioner was not found fit, therefore, the promotion in question is not liable to be interfered with and no relief can be granted to him. Moreover, there was one person senior to the petitioner, therefore, for this reason also he is not entitled for any relief. He also submitted that once the petitioner has appeared in the selection for promotion then it was not open to him to challenge the process/procedure, including the criteria, adopted therein.

4. Sri A.K. Srivastava, learned Counsel for the Respondent No. 5 supported the stand of Sri Sameer Sharma and took the same plea.

5. On the other hand, learned Counsel for the petitioner submitted that even if, the plea regarding applicability of Rule 20(3) of Rules, 1947 had not been taken, the respondents were under an obligation to determine as to which rule was applicable and to act accordingly.

6. The terms and condition of service relating to the post of Sadar Munsarim are governed by the "Rules, 1947", which were notified on 1.8.1947 in pursuance to the provisions of Clause (b) of Sub-section (1) and Clause (b) of Sub-section (2) of Section 241 of the Government of India Act, 1935, in suppression of all existing Rules and Orders on the subject, by the Governor of United Provinces; for regulating appointment to the Ministerial establishment of the Civil Court in the United Provinces subordinate to the High Court of Judicature at Allahabad and the Chief Court of Oudh at Lucknow.

7. Even after framing of the Constitution of India the said Rules have continued to govern the terms and conditions of service of the post in question, in view of the provisions contained in Article 313 (Part XIV Chapter 1) of the Constitution of India) and Article 372 thereof.

8. The incumbents of the post of Sadar Munsarim as also those holding the feeder posts in the District Courts in the State of U.P. are Government Servants and there is no dispute regarding their status as such, thus, the provisions contained in Article 309 to 313 of the Constitution of India are applicable to them, as, they are appointed to Public Services and posts in connection with the affairs of the State of Uttar Pradesh.

9. The Government of Uttar Pradesh in exercise of the power vested under the proviso to Article 309 of the Constitution of India has framed the "Rules 1994", which were notified in the Gazette on 10.10.1994, these Rules were amended firstly in the year 1998 and thereafter on 12.8.2010. Rule 1(3) of the "Rules, 1994" provides that they shall apply to the recruitment by promotion to a post or service for which no consultation with the Public Service Commission is required on the principle to be followed in making promotion under the U.P. Public Service Commission Limitation of Functions Regulations, 1954, as amended from time to time.

10. It is not in dispute that the post in question is not one for which consultation with the Public Service Commission is required, therefore, covered by the said Rules. Rule 2 of the said Rule of 1994 gives overriding effect to it over anything to the contrary contained in any other service Rules made by the Governor under the proviso to Article 309 of the Constitution or Orders for the time being in force. Rule 4 of the said Rules, 1994 as amended on 12.8.2010 i.e. prior to the selection in question held on 7.7.2011, reads as under:-

"4. Criterion for recruitment by promotion-Recruitment by promotion to the post of Head of Department, to a post just one rank below the Head of Department and to a post in any service carrying the pay Band 4 (Rs. 37,400-67,000) and Grade Pay Rs. 8,700 or above shall be made on the basis of merit, and to rest of the posts in all services to be filled by promotion, including a post where promotion is made from a non-Gazetted post to a Gazetted post or from one service to another service, shall be made on the basis of seniority subject to the rejection of the unfit."

11. It is not in dispute that the promotion in question was held by the respondents on the basis of criteria of "merit with due regard to seniority" as prescribed in sub Rule 3 of sub Rule 20 of the Rules, 1947 and not the criteria of "seniority subject to rejection of unfit" The proceedings of the Selection Committee reveal that there was a comparative assessment of merit of the candidates for selecting the "most meritorious" which is not done under the criteria of seniority subject to rejection of unfit. The Respondent No. 5 was selected, in spite of being junior, as he was of "Outstanding Merit" and the petitioner, in spite of being senior was not found efficient. This position that there was a comparative assessment of merit as per Rules, 1947 has not been disputed even at the bar. It is also not in dispute that there is one eligible person senior to the petitioner herein and that the Respondent No. 5 was the junior most amongst the eligible persons.

12. The question which falls for consideration and which is purely a legal one, is, whether the Rules of 1994 or the Rules of 1947 would apply for the purpose of determining the criteria for promotion to the post of Sadar Munsarim in the District Courts including the judgeship of Allahabad.

13. If it is found that Rule 4 of the "Rules of 1994" will apply then, in its light, it will have to be determined as to whether the criteria for promotion to the post in question is "merit or seniority subject to rejection of unfit". If it is found that it is the latter then the entire proceedings based on the criteria prescribed under Sub Rule 3 of Rule 20 of Rules 1947 i.e. "merit with due regard to seniority", will stand vitiated and a fresh selection would be required.

14. The "Rules 1947" were made under the Government of India Act, 1935, prior to coming into force of Constitution of India. However, as per Article 313 of the Constitution of India read with Article 372 thereof, such Rules continued to be applicable to any public service or any post which continues to exist after the commencement of the constitution as an All India Service or as Service or post under the Union or a State, so far as consistent with the provisions of the Constitution and until other provision is made in this behalf under the Constitution.

15. After coming into force of the Constitution of India and in view of the provisions contained in Article 309 thereof the State Government has framed "Rules, 1994" as already referred herein above, for regulating the criteria for promotion to the posts mentioned herein. These Rules have been framed in exercise of powers under the proviso Article 309. Rules 1994 have overriding effect over all other Rules, or orders, therefore, in the event of inconsistency the same will override the Rules 1947 also, especially in view of the provisions contained in Article 313 which contain the word, "until other provision is made in this behalf under this constitution".

16. A Division Bench of this Court in the case of Omvir Sharma Vs. State of U.P. and Others, has held that the term "Service Rules" used in Rule 4(g) of the U.P. Government Servant Seniority Rules, 1991 includes the Service Rules made under the Government of India Act, 1935. Based on the same reasoning the Rules, 1947 are covered under Rule 2 of the Rules, 1994. Paragraph 14 of the judgment reads as under:-

"The crucial words in the Rule 2 as quoted above is that rules shall apply to all Government servants in respect of whose recruitment and conditions of service, rules may be or have been made by the Governor. The submission pressed by learned Counsel for the appellant is that since no rules were framed under proviso to Article 309 of the Constitution of India regarding determination of seniority earlier and the Rules, 1991 supersedes the rules framed under provision to Article 309, it can have no effect on the 1947 Rules. The above submission is fallacious as noticed above. The applicability of Rules can be judged on two scores. Firstly, if the rule under proviso to Article 309 may be framed by the

Governor and secondly the Rule under proviso to Article 309 have been made by the Governor. Non framing of any earlier rules under Article 309 is not decisive. The competence of Governor to frame Rule under proviso to Article 309 is sufficient enough to apply the 1991 Rules. It cannot be denied that ministerial staffs of the subordinate Courts are within the rule making power of the Governor. 1950 Rules as noticed above have already been held to be applicable to the ministerial staffs of the subordinate Courts by the apex Court in O.P. Shukla case (supra). Thus when the Governor is competent to frame rule under Article 309, the 1991 Rules shall be applicable. The word service rules have been defined under rule 4(g). Service rule under rule 4(g) includes administrative instructions issued by the Governor regulating the recruitment and conditions of service of persons, why statutory Rules framed under Section 241 of the Government of India Act can be held not to be service rules is not understandable. Rules framed by the Governor prior to the Constitution of India under Section 241 of the Government of India Act are also service rules within the meaning of 1991 Rules which shall be overridden by 1991 Rules. Again the said issue has already been decided in O.P. Shukla's case (supra) which has held that 1947 Rules shall be impliedly overruled by 1950 Rules for the subject which has been covered by 1950 Rules."

17. Now, the question for consideration is as to whether there is any conflict between sub Rule 3 of Rule 20 of the "Rules, 1947" and Rule 4 of the "Rules 1994".

18. Not much discussion is required on this issue as a conjoint reading of the said Rules leaves no doubt that there is apparent difference in the two provisions. As per Rule 4, in the matters of promotion to the post of Head of the Department, one post lower in rank to that of the Head of the Department and the posts in any service carrying pay band 4 (37400-67000) and grade pay Rs. 8700 or above, shall be made on the basis of "merit" and the rest of the posts in all services to be filled up by promotion, including a post where promotion is made from a non-gazetted post to a gazetted post or from one service to another service shall be made on the basis of seniority subject to rejection of unfit. The post of Sadar Munsarim does not carry pay band 4. The pay scale of Sadar Munsarim is (Rs. 9300-34800, grade pay 4600), therefore, in view of the aforesaid Rule 4 of the Rules of 1994, the post of Sadar Munsarim is not one to be filled by promotion on the basis of "merit", in stead, it is a post which is to be filled by promotion on the basis of "seniority subject to rejection of unfit". Thus the criteria for promotion under Rule 4 of "Rules, 1994" is either merit or "seniority subject to rejection of unfit" depending upon the factors mentioned therein, whereas under Rule 20(3) of Rules, 1947 it is "merit with due regard to seniority," which is apparently different and inconsistent with the criteria under the Rules 1994. Neither "merit nor seniority" subject to rejection of unfit can be equated with "merit with due regard to seniority". The Governor in exercise of his rule making power under Article 309 has also made "The U.P. Promotion by Selection (on post outside the preview of the Public Service Commission)

eligibility list Rules, 1986, which have been amended from time to time. These Rules lay down the criteria for preparing the eligibility lists for promotion based on "merit" and seniority subject to unfit, separately."

19. In view of the above inconsistency in Rule 4 of "Rules 1994" and Sub Rule 3 of Rule 20 of the "Rules 1947" it is the former which will prevail and not the latter. In view of the words "until other provision is made in this behalf under this Constitution", occurring in Article 313 of the Constitution of India, the words "but subject to other provisions of this Constitution" occurring in Article 372 and also in view of the non-obstante clause contained in Rule 2 of Rules 1994, the criteria of promotion applicable in this case is seniority subject to unfit and not "merit with due regard to seniority".

20. As the promotion in question has been held on the basis of the criteria of "merit with due regard to seniority" as prescribed under Sub Rule 3 of Rule 20 and not on the basis of the criteria of seniority subject to rejection of unfit as prescribed under Rule 4 of the Rules 1994, therefore, the very premise on which the selection has been held, is contrary to the mandatory provision contained in Rule 4 of the Rules of 1994, accordingly, the same cannot be sustained.

21. A Division Bench of this Court in the case of Omvir Sharma (supra) was seized with a similar issue i.e. whether the criteria for determination of seniority as laid down in "Rules 1947" would be applicable or the criteria laid down in the U.P. Government Servants Seniority Rules, 1991 would apply to the cadre of service in the District Courts and after considering the relevant provisions and relying upon the judgment of the Supreme Court in Om Prakash Shukla Vs. Akhilesh Kumar Shukla and Others, , it also came to the conclusion that seniority will have to be determined as per the Seniority Rules of 1991 framed under the Rule making power of the Governor under Article 309 and not "Rules of 1947," made under the Government of India Act, 1935, in view of the inconsistency, therefore, the view taken in this case is supported by the said Division Bench judgment also.

22. In this context, I am not able to accept the submissions of Sri Sameer Sharma for the reason, firstly, the terms and conditions of service including the criteria of promotion is to be governed by the rules made by the competent authority and not by the consent of the parties nor by alleged acquiescence of any party. The issue of criteria for promotion goes to the root of the matter. It was incumbent upon the selecting authority, as also the appointing authority, to first of all, ascertain the criteria of promotion and the Rule relevant in this context, especially, when a Division Bench of this Court in Omvir Sharma case (supra) had already considered a similar issue relating to seniority and vide judgment dated 13.7.2010 had already held that it is the Seniority Rules, 1991 issued by the Governor, which would apply and not the "Rules 1947" made under the Government of India Act, 1935. Merely because this plea has not been raised in the pleadings, the Court cannot shut its eyes to such a fundamental question nor can this omission on the part of the petitioner, validate an apparently

unsustainable act of the respondents.

23. Moreover, as this Court had already put the learned Counsels for the respective parties to notice about the aforesaid issue, while posting the matter for rehearing vide its order dated 8.12.2014, and it being purely a question of law, it cannot be said that any prejudice has been caused to the respective parties on account of absence of pleading on the issue, therefore, for this reason also, the submission of Sri Sharma is not acceptable.

24. So far as the fitness or otherwise of the petitioner is concerned, the same is to be assessed by the selecting authority as per the criteria mentioned in the relevant rules, but, the selection in question was held on the basis of a wrong criteria applying an inapplicable rule.

25. The selection was based on comparative assessment of merit of the candidates by holding an interview and not on the basis of "seniority subject to rejection of unfit", therefore, it cannot be sustained. The question as to whether interview could be held for assessing the fitness of a candidate, on the basis of criteria of "seniority subject to rejection of unfit" is left open for being considered by the competent authority in the light of the provisions of law and the past practice which is not contrary to Rules but with the rider that there has to be uniformity in the matter. It would be impermissible to hold interview in one judgeship but not in others.

26. For the reasons aforesaid, the submission that once the petitioner has appeared in the selection it was not open for him to challenge the same, is also not acceptable, as, this principle does not apply in the facts of this case. It is the respondents, who have committed a folly by applying a wrong rule and a wrong criteria for selection; the issue, is too fundamental to be brushed aside on this submission of Sri Sharma.

27. Sri Sameer Sharma invited the attention of the Court to the U.P. State District Courts Service Rules, 2013, which have come into force w.e.f. 4.7.2013, which now regulate the terms and conditions of service of the posts in question. As per Rule 4 read with Scheduled "B" thereof the criteria of promotion to the post in question is "seniority cum merit", vide Rule 29 thereof the Rules, 1947 have been repealed. In my view this does not make any difference to the case, as, the selection in question herein was held prior to 4.7.2013. The process of selection having been initiated and completed prior to 4.7.2013, in my view, the vacancy will have to be filled in according to the Rules, 1994.

28. The other submissions of the learned Counsel for the parties assuming the application of Rule 20(3) of Rules, 1947, need no consideration.

29. In view of the above discussion, the order of promotion of the Respondent No. 5 dated 5.1.2012, passed by the District Judge, Allahabad cannot be sustained and is quashed. The selection proceedings on the basis of which the said promotion order was issued are declared a nullity in the eyes of law.

However, as the post in question should not remain vacant, it is provided that the Respondent No. 5 shall continue to function as Sadar Munsarim on the same terms and conditions on which he has been continuing. No recovery of financial benefits already given shall be made from him. His continuance shall be subject to the fresh selection and promotion to be made by the respondents, expeditiously, if possible, before 15.1.2015. So far as Relief No. 2 is concerned, the same cannot be considered at this stage as it will depend upon the fresh selection to be held, as aforesaid. Learned Counsel for the petitioner informs that the other post of Sadar Munsarim is lying vacant since 2009, accordingly it is provided that, if there is no legal impediment then the respondents may consider filling up the said post also accordingly. Subject to above, the writ petition is allowed.