

(2017) 04 RAJ CK 0185
In the Rajasthan High Court
Case No : 10669 of 2016

Rashmi Choudhary

APPELLANT

Vs

State of Rajasthan & ors.

RESPONDENT

Date of Decision : 04-04-2017

Acts Referred:

Citation : (2017) 04 RAJ CK 0185

Hon'ble Judges : Dinesh Mehta

Bench : SINGLE BENCH

Advocate : SS Rathore, B.L. Bhati

Judgement

1. The petitioner has filed the present writ petition with the following prayers:- A. By an appropriate writ order or direction, the eligibility published along with the information dated 5.9.2016 (Annex-2) may kindly be quashed and set aside to the extent that it mentions the DPC year against the petitioner's name as 2013-2014.

B. By an appropriate writ, order or direction, the respondents may kindly be directed to call the petitioner for counseling in accordance with the name mentioned at Sr. NO. 6 in the eligibility list for the purpose of allotting her the place of posting.

C. By an appropriate writ, order or direction, the respondents may kindly be directed to afford the petitioner promotion on the post of Teacher grade-II in the DPC year 2016-17.

D. By an appropriate writ, order or direction, the respondents may kindly be directed to make correction in the eligibility list while mentioning the DPC year as 2011-12 against the petitioner's name instead of DPC year 2013-14.

E. Any other appropriate writ, order or direction which this Hon'ble Court may deem just and proper in the facts and circumstances of the case may kindly be passed in favour of the petitioner. F. Writ petition filed by the petitioner may

kindly be allowed with costs.

2. The skeleton facts, necessary to be narrated for the purpose of deciding the present writ petition are that the petitioner was appointed on the post of Teacher Grade-III on 12.4.2005. It is an admitted fact that petitioner gave birth to third child after 01.6.2002. According to the petitioner, she became eligible for promotion to the post of Teacher Grade-II for the recruitment year 2011-12, but her case was not considered in view of the provisions contained in Rule 2 of the Rajasthan Various Service (Amendment) Rules, 2001 which denies promotion to a candidate for a period of 5 years from the date when he/she becomes eligible, after giving birth to third child post the cut off date i.e. 01.6.2002.

3. The petitioner has pleaded in her writ petition that her application/particulars were invited by the respondents for considering her candidature for promotion to Teacher Grade-II, for recruitment year 2011-2012, vide communication dated 25.11.2013, the same was denied on account of her disqualification in light of the birth of the third child.

4. Subsequently, vide communication dated 5.9.2016, the respondent No. 3 called for particulars of various candidates in prescribed proforma, for considering their candidature for promotion to Teacher Grade-II. Pursuant thereto a tentative list of eligible candidates was prepared, wherein petitioner was shown as ineligible, as her promotion stood withheld in the year 2013-2014, on account of birth of third child. The petitioner, therefore, proceeded to make a representation dated 08.9.2016 to the respondents inter alia contending that her case had been considered for promotion to the Teacher Grade-II for the year 2011-12 in the meeting of the Department Promotion Committee and the same was deferred by the respondents for a period of five years. It has been a stand of the petitioner that she should be given promotion for the recruitment year 2016-2017. Petitioner thus represented and protested against the note mentioned in the list of eligible candidates against her name, indicating that petitioner's promotion has been withheld for the year 2013-2014, on account of third child.

5. The petitioner has invoked writ jurisdiction of this Court challenging the order dated 05.9.2016, particularly the stipulation therein that the petitioner's promotion has been withheld for five years with effect from the recruitment year 2013-2014 on account of birth of third child after 01.6.2002.

6. The respondents have filed a reply to the writ petition and asserted that the petitioner's right of promotion occurred only in the year 2013-2014 and not in the year 2011-2012 as claimed by the petitioner. It has been clarified by the respondents that in the year 2011-2012, the last promoted candidate in the category of the petitioner was the one, standing at seniority list No.11024, whereas the petitioner's standing in the seniority list was at position No. 11262. It has added that during the year 2012-2013, there were no vacancies for grant of promotion and the petitioner's claim for promotion was found only in the year

2013- 2014, from where the petitioner's promotion was deferred for 5 years and when person junior to her was promoted.

7. Counsel for the respondents apprised the Court that whenever vacancy arises for promotion, a list of eligible candidates comprising three times the number of available vacancies is prepared creating a zone of consideration and particulars of all such persons are called for. As such seeking petitioner's particulars is not indicative much less conclusive of the fact that her candidature has been considered.

8. Mr. Bhati, learned counsel for the respondents pointed out that on 21.9.2016, this Court while issuing notices had directed the petitioner to make a detailed representation, with corresponding direction to the respondents to consider the same for correction in the eligibility list prepared by the respondent.

9. He informed that the petitioner's representation after being considered objectively has been rejected by the Dy. Director, Secondary Education, Jodhpur vide order dated 29.9.2016 and the same has duly been sent to the petitioner. A copy of the said order dated 29.9.2016 has also been placed on record, in the form of annexure R/2. In the backdrop of this fact, Mr. Bhati argued that until and unless the petitioner amends her writ petition and incorporates requisite changes in the pleadings, laying challenge to the order dated 29.9.2016, the present writ petition as filed cannot be heard.

10. Mr. Sajjan Singh Rathore in rejoinder first of all submitted that there is no need for the petitioner to challenge the order dated 29.9.2016 as the same is based on incorrect interpretation of the Rules of 2001, for which the petitioner has already laid a challenge to the information dated 05.9.2016 and that the order dated 29.9.2016 has been passed in pursuance of the direction issued by this Court, in the present case as an interlocutory order on an alternative ensuing expeditious redressal of petitioner's grievance as such, there is no requirement of separately challenging the same.

11. He contended that perusal of the order dated 29.9.2016 proves that the petitioner's apprehension was correct, that though the petitioner had been considered for promotion for the recruitment year 2011-2012, yet her case has been held to be deferred for 5 years in the recruitment year 2013-2014. He argued that the stand of the respondents that the petitioner shall not be considered for promotion for a period of five years from the recruitment year 2013-14 is absolutely illegal. Comparing the provisions contained in Rule 2 and Rule 3 of the Rules of 2001, he submitted that in Rule-2, which deals with appointment", the Rule Making Authority has used the phrase "no person shall be eligible" whereas in Rule 3 relating to promotion, the Rule Making Authority has used the word, "no person shall be considered", in light of the above distinction, he urged that the term "considered" has to be given its natural meaning and once the petitioner's particulars have been sought for the recruitment year 2011-12 and her candidature has been denied on account of

third child by way of order dated 25.11.2013, it should be presumed that petitioner's candidature had been considered and rejected for the first time in 2011-2012, and the petitioner should be treated for promotion for the recruitment year 2016-2017.

12. Heard counsel for the parties and perused material available on record including the pleadings. The petitioner has prayed that the information dated 5.9.2016 be quashed. A look at said communication dated 05.9.2016, (Annexure /2) shows that it is on information/notice by respondent No. 3, calling information from various candidates in prescribed proforma. This Court wonders how can the petitioner feel aggrieved of such communication? A perusal of the record, coupled with arguments of the petitioner reveal that the petitioner is aggrieved of the provisional list of eligible candidates wherein petitioner (at serial No. 6) has been shown as ineligible. As a matter of fact, the petitioner may be concerned about her exclusion from the provisional list of eligible candidates, for which she had made a representation dated 08.9.2016 and thereafter pursuant to the order of this Court dated 21.9.2016, her representation has been decided by the respondents, vide a detailed and speaking order dated 29.9.2016.

13. In considered view of the Court it was required of the petitioner to challenge the same by way of amending the petition, incorporating requisite grounds in the memo of writ petition or at least by way of filing a rejoinder. The writ petition as framed and argued is not competent. However at the insistence of the counsel for the petitioner that the question involved in the present writ petition is a pure question of law and the petition be decided on the basis of the submissions made. This Court is proceeding to pronounce in decision on the question "as to when the period of five years, prescribed for deferment of promotion will commence?".

14. In a bid to answer the moot question involved in the case, it would be appropriate to reproduce the relevant notification dated 20.6.2001, vide which amendments in various service rules of the State of Rajasthan have been incorporated, and disqualification for appointments as well as for promotion have been inserted as result of giving birth to third child or subsequent child, after the cut off date of 01.6.2002. Notification dated 20.6.2001 is reproduced as under:-
"In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, the Governor of Rajasthan hereby makes the following rules further to amend the various service Rules as specified in the Schedule appended hereto namely:-

1. Short title and commencement:- (1) These rules may be called the Rajasthan Various Service (Amendment) Rules, 2001.

(ii) They shall come into force with immediate effect.

2. Amendment: After the existing sub-rule (2) or (3) or (4), as the case may be, of rule as mentioned in column NO. 3 against each of the service rules as mentioned in column NO. 2 of the Schedule appended hereto, the following new

sub-rule at the serial number shall be added, namely:-

No candidate shall be eligible for appointment to the service who has more than two children on or after 1.6.2002. Provided that where a candidate has only one child from earlier delivery but more than one child are born out of a single subsequent delivery, the children so born shall be deemed to be one entity while counting the total number of children."

3. Amendment:- After the existing sub-rule (1) of (8 of 11) rule as mentioned in Column NO. 4 against each of the Service rules as mentioned in Column NO. 2 of the Schedule appended hereto, the following new sub-rule shall be added, namely:-

"(1A) No person shall be considered for 5 recruitment years from the date on which his promotion becomes due, if he/she has more than two children on or after 1st June, 2002.

Provided that the person having more than two children shall not be deemed to be disqualified for promotion so long as the number of children he/she has on 1st June, 2002, does not increase. Provided further that where a Government servant has only one child from the earlier delivery but more than one child are born out of a single subsequent delivery, the children so born shall be deemed to be one entity while counting the total number of children."

15. A close and conjoint reading of the Rule 2 and Rule 3 reveals that the Rule Making Authority has used the term "eligible" in Rule 2 while in Rule 3 they have used the term "considered", however, these expressions cannot be read in isolation, as has been attempted to by Mr. Rathore, arguing for the petitioner.

17. Now advertent to the petitioner's contention that her promotion became due in 2011-2012, because her particulars were placed before the Departmental Promotion Committee, I find that her contention is essentially based on the document/office order dated 25.11.2013 (Annexure-1), relevant extract whereof is reproduced hereunder: "VERNACULAR MATTER OMITTED"

A reading of the above order reveals that name of petitioner has been deleted from the select list sent by Departmental Promotion Committee, for the reason mentioned in column No. 9, which in petitioner's case is that her candidature had been deferred for five recruitment years, on account of third child after 01.6.2002.

18. A careful reading of the above referred order reveals that there is no stipulation regarding terminus quo or the starting point of the period of five years, or as to when the period of five years would commence or start to run.

19. Mr. Bhati's explanation to the communication dated 25.11.2013 appears to be palatable rather acceptable that whenever vacancies arise, candidates to the extent of three times, the number of vacant posts are called upon to furnish their particulars; and merely because a candidate's particulars and detail have been

solicited, it cannot be concluded that her case has been considered for promotion.

20. In the opinion of this Court, inviting particulars can at the best be indicative of the person falling in zone of consideration. A person's candidature shall be deemed to have been considered, only when the DPC taking applications at seriatim considers a candidate's case and then accepts, rejects or defers his/her candidature.

21. The respondents have categorically stated in their reply that petitioner's case was not considered for the year 2011-12 and it was considered only in the year 2013-14; and the persons junior to the petitioner were promoted.

22. No rejoinder to such reply has been filed by the petitioner nor any specific case has been brought to the record and notice of the court, showing that the persons junior to her have been promoted in 2011-2012.

23. As such, this Court has no reason to disbelieve the version of the respondents that the petitioner's candidature for promotion was for the first time considered in the year 2013-14 having reached to such conclusion, this Court has no hesitation in holding that the rigours of Rule 22 (1A) of Rajasthan Educational Service Rules, 1971 shall begin to operate from 2013-2014. In other words, petitioner's right of consideration for promotion shall be kept in abeyance for 5 years from 2013-2014.

24. Tested on the anvil of the law laid down above the impugned action on the part of the respondents in deferring petitioner's promotion for a period of five years from 2013-2014, on account of the fact that the petitioner had given birth to third child after 01.6.2002, is perfectly just and valid in the eye of law. This Court approves such stand of the respondents, duly reflected in the order dated 29.9.2016, submitted by the respondents as annexure(R/2) with the reply.

25. The upshot of the above analysis is a declaration that "For the purpose of Rule 3 of the Rajasthan Various Service (Amendment) Rules, 2001," the period of 5 year for withholding/deferring the promotion will commence from the date when the Departmental Promotion Committee considers the candidature of a candidate and decide to defer the promotion for five years or in other words 5 years from the day, when person's junior to such candidate are promoted". The writ petition thus fails.