

(2004) 01 AHC CK 0230

In the Allahabad High Court

Case No : C.M.W.P. No's. 19794 of 1999 and 54668 of 2000

R.K. Saraswat and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 27-01-2004

Acts Referred:

Constitution of India, 1950 — Article 309

Uttar Pradesh Transport Service Rules, 1990 — Rule 14, 5

Citation : (2004) 5 AWC 4501

Hon'ble Judges : Poonam Srivastava, J;M. Katju, J

Bench : Division Bench

Advocate : L.P. Naithani, H.P. Dube, V.K. Shukla and A.K. Misra, for the Appellant; Bhagwati Prasad and S.K. Singh, S.C., for the Respondent

Final Decision : Dismissed

Judgement

M. Katju and Poonam Srivastava, JJ.—Heard learned Counsel for the parties.

2. Counter and rejoinder-affidavits have been exchanged between the parties and are on record. As agreed by learned Counsel for the parties, both the writ petitions are being decided finally by a common judgment.

3. Writ Petition No. 19794 of 1999, R.K. Saraswat and Ors. v. State of U.P. and Ors. has been filed by five Petitioners praying for quashing the Notification No 3779/30-3-98-127-G.E./96 Lucknow dated 14.10.1998 (Annexure-5 to the writ petition) whereby Rule 5 of U.P. Transport Service Rules, 1990 (hereinafter referred to as the Rules, 1990) was amended and a proviso was added to Rule 5.

4. The Petitioners were appointed as Assistant Regional Inspectors (Technical) Technical Inspector (R.I. (T)/T.I. in short) in the transport department on various dates. Letters of appointment are annexed as Annexures-1 and 2 to the writ petition. Initially there were no Service Rules governing service conditions for the post of A.R.T.O. and same were being governed by the Executive Instructions issued by the State Government from time to time. The post of A.R.T.O. was

filled up by direct recruitment through competitive examination. For the first time in the year 1967, the State Government issued an order dated 27.10.1967, whereby a promotional avenue was introduced and 25% posts of A.R.T.O. were directed to be filled by promotion. Out of this 25%, 12.5% posts were to be filled by promotion from the candidates belonging to the cadre of the Petitioners, and the remaining 12.5% of A.R.T.O. were to be filled from another cadre known as Passenger Tax Officer/Goods Tax Officer (P.T.O./G.T.O. in short). On March 2, 1991, a Notification dated 4.12.1990 was published in the U.P. Gazette which contains the Service Rules, 1990. Part 3 of the Rules relates to the recruitment and Rule 5 provides that the post of A.R.T.O. is to be filled from two sources namely (i) 50% by promotion through Commission from amongst the permanent P.T.O./G.T.O. and R.I. (T)/T.I. who have put in at least 5 years continuous service (ii) 50% by direct recruit through the commission on the basis of the result of Combined State Service Examination.

5. The Petitioners' contention is that there were 167 posts of A.R.T. Os. and as per the quota 50% were to be filled by direct recruitment and remaining 50% by promotion. It has been further stated in paragraph 10 of the writ petition that 74 direct recruits were already working as A.R.T. Os. and only 9 vacancies belonging to the quota of direct recruits remained unfilled whereas three promotees belonging to P.T.O./G.T.O. cadre and 17 promotees of R.I.(T)/T.I. cadre from promotional quota were working, and in the circumstances 64 posts belonging to promotional quota were unfilled. The grievance of the Petitioners was raised when an advertisement was published in the daily newspaper Rashtriya Sahara dated 1.1.1999 whereby applications were invited for the Combined State Subordinate Services (Preliminary) Examination, 1999 and the number of vacancies given for the posts of A.R.T.O. was 35, whereas, according to the Petitioners only 9 vacancies were to be filled by direct recruits. The Petitioners approached the Respondent and were informed that an amendment has been brought in the Service Rules. The Services rules were amended by the impugned amending rules known as U.P. Transport Service (Ist Amendment) Rules, 1998 (hereinafter referred to as the Amending Rule). The Petitioners claimed that it was for the first time that they were made aware of the proviso being added to Rule 5 (i) of the Rules, 1990. The newly added proviso to Rule 5 (i) states:

Provided that if sufficient number of eligible or suitable candidates are not available for promotion, the post may be filled by direct recruitment though the Commission on the basis of the result of the Combined State Services Examination.

6. The present Writ Petition No. 19794 of 1999 was filed on a number of grounds. It was contended by the Petitioners that they were eligible for promotion to the next higher post, i.e., R.I. (T)/T.I. in the year 1986 and in fact they were promoted on ad hoc basis but due to arbitrary action of the Respondent they were not regularized on the post till 21.6.1996. The substantive posts were available and in the event they were regularized in the year 1986-87,

the basic requirement of five years continuous service would enable them to get promotion to the next higher promotion i.e., A.R.T.O. in quota of 50%. The Petitioner No. 1 was initially appointed in the year 1981 whereas the Petitioner Nos. 2, 3, 4 and 5 were appointed much earlier in the year 1977 but their services were regularized much later under the U.P. Regularization of Ad Hoc Employees Rules, 1979. The challenge of the Petitioners in respect of the newly added proviso to Rule 5 (i) of the Rules, 1990 was on a number of grounds. This Court issued an interim order on 1.9.1999 restraining the Respondent from transferring the quota of 50% posts of A.R.T.O. for direct recruitment. After the interim order was passed, the number of vacancies shown in the advertisement dated 1.1.1999 for the post of A.R.T.O. was reduced from 35 to 15. The result of 15 candidates were declared and out of the aggrieved candidates two Petitioners Shudhansu Tiwari and Ramakant Shukla filed Writ Petition No. 54668 of 2000 with a prayer for issuance of mandamus commanding the Respondent to fill up 35 posts of A.R.T.O. as per advertisement dated 1.1.1999 and also for declaring the reduction of the number of seats from 35 to 15 as illegal and arbitrary. Hence, the two writ petitions are connected and are being decided by a common judgment.

7. In both the writ petitions the main question to be decided is as to whether the newly added proviso Rule 5 (i) of the Rules, 1990 is invalid and whether the Petitioners of Writ Petition No. 54668 of 2000 are entitled for their promotion as A.R.T.O.

8. The Commission filed a counter-affidavit in Writ Petition No. 54668 of 2000 stating that it is always within the right of the commission to increase or decrease the number of posts as is clearly mentioned in the Advertisement No. A-1/E-1/99 published on 1.1.1999. There is yet another development in respect of five Petitioners in Writ Petition No. 19794 of 1999. During pendency of the writ petition, all the Petitioners have been promoted to the post of A.R.T.O. against the vacancies of 2001-2002 in 50% quota under the Rules, 1990. The promotional order has been annexed to the written argument submitted on behalf of the Petitioners.

9. The first question that is to be decided is whether amendment to the rule vide Notification dated 14.10.1998 U.P. Transport Service First Amendment Rules, 1998 is arbitrary or illegal. The recruitment to the post of A.R.T.O. prescribes 50% quota for promotion amongst the permanent P.T.O./G.T.O. and R.I. (T)/T.I. who have at least 5 years continuous service of first day of recruitment. By means of proviso (Amended Rule) it has been provided that in case sufficient number of eligible or suitable candidates are not available for promotion, then such posts would be filled up on the basis of the result of the Combined State Service by direct recruitment. The first ground of challenge is that the impugned proviso overrides the main rule which cannot be done, and secondly that there is no proviso in the Service Rules which provides how the vacancies of promotion quota can be reverted back to its own quota if it is once transferred to the quota

of direct recruits. Since the vacancy shall remain in the quota of direct recruits and can be reduced from 50% to 0% and hence the very purpose of the main rule will be defeated. The third ground of challenge is that if the added proviso is permitted to continue it may always be misused against the departmental candidates and gives an arbitrary power to the authority.

10. In support of his submissions learned Counsel for the Petitioners placed reliance on the decisions of the Supreme Court in *Dibyasingh Malana Vs. State of Orissa and Others*, and *A.N. Sehgal and others Vs. Raje Ram Sheoram and others*, .

11. The claim of the Petitioners that the proviso is contrary to the main rule, is in our opinion incorrect and is based on a misunderstanding of the intent of the 50% quota prescribed by Rule 5. Rule 14 of the 1990 Rules requires determination of the vacancies to be filled up in a given year, and the vacancy so determined would be apportioned in accordance with the quota prescribed under Rule 5. This clearly demonstrates that the quota for direct recruitment promotion is a quota with reference to the vacancies existing to be filled and is not relatable to the cadre strength of the particular cadre. This amendment of the proviso to Rule 5, in no manner, makes the main Rule inoperative nor does it result in breach of the main provision. There exists no threat of promotion quota being reduced from 50% to 0% as claimed by the Petitioners. The quota has been specified with reference to vacancies required to be filled up in a given year, and such calculation is to be done on an annual basis. The judgments relied upon by the Petitioners in *Dibyasingh Malana Vs. State of Orissa and Others*, and *A.N. Sehgal and others Vs. Raje Ram Sheoram and others*, , are decisions highlighting the principles governing the interpretation of a proviso. The proviso to Rule 5 conforms to what is said in the two aforesaid judgments. The main Rule 5 read with Rule 14 satisfies the general rule that out of vacancies determined to be filled in a given year, 50% would be filled up by direct recruits and 50% by promotion from amongst candidates, the eligibility requirement being that he should be permanent and having put in five years service. In the circumstances, the apprehension of the Petitioners that the promotion quota has been reduced from 50% to 0% by the amending rule is not correct and any apprehension of the Petitioners in this regard is baseless. Thus, the contention of the Petitioners that the amended "proviso" is contrary to the main rule has no force.

12. Another circumstance worth noticing is that the amending rule of 1998 contained in the notification dated 14.10.1998 is legislative in character. There exists undisputed authority that amendments can be made to the Rules under the proviso to Article 309 of the Constitution of India. This is neither contrary to any provision of the Constitution nor any statutory enactment. The wisdom of making such a policy decision is outside the scope of judicial review. In *Maharashtra State Board of Secondary and Higher Secondary Education and Another Vs. Paritosh Bhupeshkumar Sheth and Others*, it has laid down that any drawback in the policy incorporated in Rule or Regulation will not render it ultra

vires and the Court cannot strike it down on the ground that, in its opinion, it is not a wise or prudent policy. The extract of paragraph 16 is quoted below:

The Legislature and the delegate are the sole repositories of the power to decide what policy should be pursued in relation to matters covered by the Act and there is no scope for interference by the Court unless the particular provision impugned before it can be said to suffer from any legal infirmity, in the sense of its being wholly beyond the scope of the regulation making power or its being inconsistent with any of the provisions of the present enactment or in violation of any of the limitations imposed by the Constitution.

13. In Writ Petition No. 52499 of 2002, Pushpak Jyoti v. State of U.P., decided on 11.12.2003, a Division Bench of this Court has referred to a large number of decisions of the Supreme Court and also eminent Judges of the U.S. Supreme Court, e.g., Justice Holmes and Frankfurter, and English Judges like Lords Denning and Lawton who held that ordinarily the Court should not interfere with policy or administrative decisions.

14. The submission of the Petitioners that the power conferred by the impugned proviso to Rule 5 is liable to be misused, can be no ground for holding a provision to be illegal. In case the confirmation of a candidate is being delayed for no rational reason, such action can be directly challenged in the Court for seeking appropriate relief. But this would not be a ground for holding the provision itself to be bad. Reliance has been placed upon the decision of the Supreme Court in Sukumar Mukherjee Ors. Vs. State of West Bengal and another, , where it is observed:

38. It is also incorrect to contend that the provision is bad because it is likely to be utilized for victimization. If a transfer is motivated by a desire to victimize any person, the specific transfer can always be challenged in a court of law. However, no provision can be struck down on the ground that although it is valid, it is likely to be used for an unauthorized purpose.

15. The last submission of the Petitioners that the statutory provision of the Service Rule may be frustrated by executive action under the impugned proviso, is no ground for holding the amending rule as illegal as already stated above. In the circumstances, the amending Rule vide notification dated 14.10.1998 cannot be said to be illegal or unconstitutional and is not liable to be struck down.

16. However, since the Petitioners of Writ Petition No. 19794 of 1999 have already been promoted against the vacancies against the year 2001-2002 vide order dated 18.7.2003, they may continue to function as A.R.T.O. against the vacancies for the year 2001-2002.

17. Writ Petition No. 54668 of 2000, has been filed against the reduction of vacancies from 35 to 15. The act of the Respondent reducing the number of posts of A.R.T.O. from 35 to 15 is challenged by the Petitioners who were not given appointment as A.R.T.O. The Commission and State Government have filed

their counter-affidavits and a bare perusal of the advertisement dated 1.1.1999 clearly mentions that the Commission has reserved the right to reduce or increase the number of posts. The only ground of challenge by the Petitioners is that since an interim order was granted in Writ Petition No. 19794 of 1999, the number of vacancies were reduced. It may be pointed out that the Petitioners of Writ Petition No. 19794 of 1999 have been granted promotion against the vacancies pertaining to the year 2001-2002 and it is within 50% promotional quota of the particular year. As such the claim of the Petitioners in Writ Petition No. 54668 of 2000 cannot be granted and is liable to be rejected. The seats reduced by the Commission cannot be increased by the Court by an order in exercise of writ jurisdiction. This Court must exercise self-restraint and should not perform legislative or executive functions (like increasing seats) vide Pushpak Jyoti's case (supra).

18. For the reasons stated above, both the writ petitions fail and are dismissed. There shall be no order as to cost.