
(2010) 09 AHC CK 0006
In the Allahabad High Court
Case No : C.M.W.P. No. 11527 of 2007

Smt. Neera Jassal

APPELLANT

Vs

State of U.P. and others

RESPONDENT

Date of Decision : 14-09-2010

Acts Referred:

Constitution of India, 1950 — Article 309

Citation : (2010) 127 FLR 907

Hon'ble Judges : A.P. Sahi, J

Bench : Single Bench

Advocate : R.N. Yadav, R.P. Dubey and Anubhav Dwivedi, for the Appellant; R.K. Shukla and C.S.C., for the Respondent

Final Decision : Allowed

Judgement

A.P. Sahi, J.—Heard learned Counsel for the petitioner Sri R.N. Yadav. learned Standing Counsel for respondent Nos. 1 to 3 and the learned Counsel for the Committee of Management the respondent No. 4.

2. The challenge in this petition is to the order dated 22.2.2006, whereby the claim of the petitioner for being promoted as Lecturer in Home Science in Durga Bari A.B. Balika Inter College, Meerut, has been rejected on the ground that the post claimed by the petitioner has to be filled up from amongst a reserved category candidate of Scheduled Caste and, therefore, the petitioner cannot be promoted as she belongs to the general category.

3. The petitioner has come up with a clear case that there are 12 posts of Lecturer in the institution and 50% of the posts in terms of Chapter-11 Regulation 5 of the U.P. Intermediate Regulation Act read with the Rules and Regulations framed under the U.P. Secondary Education Service Selection Boards Act have to be filled up by way of promotion. It is submitted that out of the said 12 posts only one post of Lecturer (Home Science) was vacant and 7 posts were occupied by the candidates, who had been appointed by way of direct

recruitment and 4 Lecturers are working by way of promotion. The post claimed by the petitioner has, therefore, to be filled up by way of promotion as it falls within 50% of the promotion quota. The submission, therefore, is that the direction issued in the impugned order diverting the post to be filled up by way of direct recruitment by a Schedule caste candidate is erroneous in law.

4. I Learned Standing Counsel, on the other hand, contends that since the Schedule Caste quota is not complete hence the order has been passed in order to provide benefit to a candidate of the reserved category and accordingly the post has been directed to be filled up by way of direct recruitment. He submits that even though the post is within the promotion quota yet in order to implement the law of reservation and the Rules prescribed as per the U.P. Act No. 4 of 1993, the claim of the petitioner is unacceptable.

5. A supplementary-affidavit has been filed by the petitioner pursuant to the direction dated 15.4.2010. The said supplementary-affidavit brings on record a letter of the District Inspector of Schools indicating that in view of the interim order dated 2.3.2007 passed in this writ petition, the post has not been filled up nor any candidate has been selected by the Board till today.

6. Counter-affidavit has been filed on behalf of the State opposing the prayer of the petitioner whereas the Committee of Management has supported the case of the petitioner .

7. Having heard learned Counsel for the parties, there is a statutory Rule of promotion providing for filling up 50% of the posts by way of promotion. This rule cannot be deviated from if there is a candidate available for being promoted on the post available. According to the calculation indicated herein above and as admitted in paragraph No. 6 of the counter-affidavit, the post of Lecturer (Home Science) falls within the promotion quota. It is undisputed that the petitioner is duly qualified and eligible and has the qualification of being promoted on the post of Lecturer (Home Science). There is no candidate of reserved category available for being promoted.

8. In view of this, the petitioner being a candidate available for promotion, she is entitled to be promoted and the post cannot be filled up by direct recruitment. The Supreme Court in the case of Heera Man v. State of U.P. and others, 1997 (77) FLR 257 (SC) has held that a post to be filled up by way of promotion cannot be offered to be filled up by way of direct recruitment under the compassionate appointment Rules framed, under Article 309 of the Constitution.

9. In view of the law laid down by this Court in the case of Heera Lal v. State of U.P. and others. 2010 (82) ALR 453 (FB) the claim of reservation has to be considered only in accordance with the post available in terms as provided for under the Statute.

10. It is, however, to-be noted that in such matters, the issue was raised before this Court in the case of Smt. Sunita Bhagat v. State of U.P. and a Division Bench

came to the conclusion that the post could not be diverted to be filled in by direct recruitment. The said decision is in 2005 All LJ 3828 but the position appears to have been some what reversed, without noticing the other provisions applicable to the controversy which do not appear to have been pointed out, before the Supreme Court in the case of Rachna Rani v. State of U.P. and others, Civil Appeal No. 5679 of 2006, decided on 8.12.2006.

11. The writ petition categorically states in paragraph No. 16 that the impugned order has been passed without giving any notice or opportunity to the petitioner .The respondent in the counter-affidavit does not deny the aforesaid assertion and simply states that the matter has been decided in terms of the Rules applicable. It has further been stated that the claim of promotion shall be considered in near future if the promotional post is made available. As noted above, the supplementary-affidavit indicates that the post has not been filled up for any candidate has been selected by the Board till today.

12. In view of the aforesaid position that emerges on facts as well as in law, the order impugned is unsustainable. Accordingly, the order dated 22.2.2006 and the consequential order dated 4.3.2006 are quashed. The claim of the petitioner shall now be considered by the competent authority within 6 weeks from the date of production of a certified copy of this order before him.

13. The writ petition is, accordingly, allowed No costs.