
(2010) 08 AHC CK 0444
In the Allahabad High Court

Sri Sant Saran Lal Bhatnagar

APPELLANT

Vs

U.P. Power Corp. Nigam Ltd. and Others

RESPONDENT

Date of Decision : 28-08-2010

Acts Referred:

Constitution of India, 1950 — Article 16, 16(4A), 335

Uttar Pradesh Government Servants (Seniority) Rules, 1991 — Rule 8A

Uttar Pradesh Government Servants Seniority (Third Amendment) Rules, 2007 — Rule 6, 7, 8, 8A

Uttar Pradesh State Electricity Regulations, 1998 — Regulation 8A

Citation : (2010) 08 AHC CK 0444

Hon'ble Judges : Virendra Kumar Dixit, J; Ashok Bhushan, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Ashok Bhushan, J.—Heard Sri Ranjit Saxena, learned Counsel for the petitioner and Sri Pankaj Kumar Shukla, learned Counsel appearing for the respondents No. 1, 2, 3, 5 and 6 as well as learned Standing Counsel. Affidavits have been exchanged between the parties and with the consent of learned Counsel for the parties, the writ petition is being finally decided.

2. The petitioner, who is working as Chief Engineer Level-II in Purvanchal Vidyut Vitran Nigam Ltd. has come up in this writ petition complaining against an order dated 26.12.2009 by which he has been transferred from the post of Chief Engineer Distribution Varanasi Zone Varanasi and attached with the respondent No. 6, who while holding the post of Director Technical is officiating as Managing Director of Purvanchal Vidyut Vitran Nigam Ltd. an officer of 1982 batch. The petitioner claims to be an officer of 1973 batch and his grievance is that he has been attached with an officer, who is junior to the petitioner and has to work under him. The petitioner also claims that by virtue of his seniority, he is entitled to officiate as Managing Director of Purvanchal Vidyut Vitran Nigam Ltd. in view of the interim orders dated 2.3.2009, 6.3.02009 and 11.12.2009 passed by this Court in Writ Petition No. 344 (S/B) of 2009 Randheer Singh v. State of U.P. and

Ors.

3. The brief facts of the case which emerged from the pleadings of the parties are as follows. The petitioner was appointed in the erstwhile U.P. Electricity Board as an Assistant Engineer of 1973 batch. The respondent No. 6, Sri Suresh Ram, is an Assistant Engineer of 1982 batch belonging to Scheduled caste category. The petitioner was promoted as Chief Engineer Level II w.e.f. 6.7.2009 whereas the respondent No. 6 was promoted as Chief Engineer Level-II on 17.4.2004. The petitioner was transferred to Varanasi Zone in July, 2009 and was posted as Chief Engineer Distribution. By an order dated 3.12.2009, the petitioner was transferred from the post of Chief Engineer Distribution Varanasi zone and attached as Director Commercial U.P. Power corporation Ltd. Lucknow, prior to the passing of the said order, recommendation was sent by the respondent No. 6 on 29.11.2009 recommending transfer of the petitioner and with a request that Superintending Engineer Commercial namely; S. N. Yadav be transferred as Superintending Engineer and attached with Chief Engineer, Distribution be entrusted duties of Chief Engineer Distribution. The order dated 3.12.2009 was challenged by the petitioner in this Court on several grounds, one of the grounds being that the transfer order was issued in breach of the orders of the Apex Court dated 21.3.2007 passed in Writ Petition No. (C) No. 79 of 1997 Suresh Chandra Sharma v. Chairman UPSEB. and Ors. The writ petition filed by the petitioner challenging his transfer order being writ petition No. 66517 of 2009 was allowed by the Division Bench vide judgment dated 17.12.2009 by which the order dated 3.12.2009 was quashed. The petitioner's case is that copy of the order dated 17.12.2009 was submitted to the Chairman cum Managing Director on 26.12.2009 . It is stated that on the same day i.e. on 26.12.2009 an order of transfer of the petitioner was passed after holding meeting of the independent committee, which is said to have approved the transfer of the petitioner on 26.12.2009 itself. The petitioner's case is that by order dated 26.12.2009, the petitioner has been transferred from the post of Chief Engineer Level-II Distribution and attached with the respondent No. 6, who is officiating as Managing Director.

4. The petitioner further claims that he is senior to the respondent No. 6, being Assistant Engineer of 1973 batch whereas the respondent No. 6 is Assistant Engineer of 1982 batch. It is submitted that the seniority list was issued on 19.2.2009 which seniority list was challenged in the Lucknow Bench of this Court in Writ Petition No. 344 of 2009 Randheer Singh v. State of U.P. and Ors.. A Division Bench of this Court passed an interim order on 2.3.2009, which order is to the following effect:

Heard Sri S.K. Kalia, Senior Advocate assisted by Sri Rajan Roy and Sudeep Seth for the petitioners. Sri Sandeep Dixit learned Counsel for opposite party No. 2, learned Standing Counsel for opposite party No. 1, Sri K.S. Rastogi, for opposite party No. 3 and Sri Ashwani Kumar for opposite party No. 4 who pray for and are granted two weeks' time to file counter affidavit.

List this petition along with writ petition Nos. 146(S/B) of 2009, 62(S/B) of 2009 and other connected matters.

In the meantime, the opposite parties shall not issue any order of officiating promotion on the basis of the impugned seniority list.

5. The interim order dated 2.3.2009 was further modified on 6.3.2009 providing that opposite parties shall not issue any order of promotion or officiating Promotion on the basis of the impugned seniority list. The petitioner's case is that in disregard to the said orders, relying on the seniority list in which the respondent No. 6 was shown much senior to the petitioner, the respondent No. 6 was given as officiating charge of the Managing Director on 3.10.2009. The petitioner's case further is that again another seniority list was issued on 14.11.2009 by the respondents showing the respondent No. 6 senior to the petitioner which was challenged in writ petition No. 344 (S/B) of 2009. Before the Division Bench statement was made by Additional Advocate General that seniority list dated 14.11.2009 was issued under mistake and it may be withdrawn. The petitioner's case is that in the said writ petition a counter affidavit was filed by the Chairman-cum-Managing Director himself stating that seniority list was withdrawn and an order dated 9.5.2010 had been issued by the Chairman cum Managing director cancelling the seniority list. The petitioner's case is that the seniority list has not yet been finalized but the respondent No. 6 is being treated as senior and is allowed to work as officiating Managing Director. The petitioner's case further is that the transfer and attachment of the petitioner with the respondent No. 6, officiating Managing Director has been done at the instance of the respondent No. 6, who is harming the interest of the petitioner. It is stated by the petitioner that the performance of the petitioner as Chief Engineer Level-II has been exemplary. During his period of working, the revenue recovery of electricity after July, 2009 (i.e. after 7.7.2009 when the petitioner joined) has improved substantially. It has been stated that in August, September, October and November, the recovery of Purvanchal Vidyut Vitran Nigam Ltd. has been first in all U.P. which has 21 zones. There has been substantial increase in the revenue recovery due to excellent performance of the petitioner. The petitioner in the writ petition has prayed for the following reliefs:

(i) Issue a writ, order or direction in the nature of mandamus directing Chief Secretary, Govt. of U.P. Lucknow to take appropriate action for conspiracy of transfer of Sri S.S.L. Bhatnagar Chief Engineer Distribution Varanasi Zone, Varanasi (Assistant Engineer of 1973 batch) posting under Engineer Suresh Ram (Assistant Engineer of 1982 batch) to fix public responsibility against Sri Navneet Sahgal, I.A.S., Desh Deepak Verma I.A.S. and Engineer Suresh Ram for the malafidy transfer of the petitioner in view of the law laid down by Hon'ble Supreme Court of India in the case of Arvind Dattatraya Dhande Vs. State of Maharashtra and others,

(ii) Issue a writ, order or direction in the nature of certiorari quashing the impugned order of transfer dated 26.12.2009 No. 53 (Annexure No. 21 of the

writ petition) issued by Sri Navneet Sahgal, I.A.S., Chairman Cum Managing Director of the U.P. Power Corporation Ltd. after obtaining the approval of the Independent Committee consisting of Sri Navneet Sahgal, I.A.S., Secretary Power Govt. of U.P. Lucknow and Sri Desh Deepak Verma, I.A.S. Principle Secretary Govt. of U.P. Lucknow and the order dated 29.12.2009 No. 1803 (Annexure No. 22 of the writ petition) issued by Engineer Suresh Ram holding the post of Managing Director of the Purvanchal Vidyut Vitran Nigam Ltd.

(iii) to issue writ, order or direction in the nature of mandamus directing Chief Secretary, Govt. of U.P. to give only one post of Chairman Cum Managing Director, U.P. Power Corporation Ltd. OR Secretary Power Govt. of U.P. Lucknow to Sri Navneet Sahgal, I.A.S.

(iv) to issue writ, order or direction in the nature of mandamus directing the respondents to allow the petitioner (1973 batch A.E.) to work as officiating Managing Director in view of the interim order dated 02.03.2009, 06.03.2009 and 11.12.2009 passed in Writ Petition No. 344 Service Bench of 2009 Randhir Singh v. State of U.P. by which the seniority list of Engineer Suresh Ram (1982 batch A.E.) has been cancelled.

6. The petitioner has also filed an amendment application on 15.3.2010 praying for permitting the petitioner to add several subsequent events. We see no justification for permitting such amendments in the writ petition.

7. Learned Counsel for the petitioner in support of the writ petition contended that petitioner's transfer and attachment with officiating Managing Director has been done at the instance of respondent No. 6 and is actuated with bias and malafide of respondent No. 6. Although it was pleaded in the writ petition that independent committee which was constituted in pursuance of the directions of the apex Court dated 21.3.2009 in writ petition of Suresh Chand Sharma (supra) was not properly constituted since the Chairman and Managing Director, who are authority to transfer the petitioner himself was the member of the independent Committee and approved the said transfer. Learned Counsel or the petitioner submitted that the said issue being pending in the apex Court arising out of Writ Petition No. 6 of 2010 Pradeep Kumar Jain v. U.P. Power Corporation Ltd. in SLP filed by the U.P. Power Corporation Ltd. challenging the Division Bench judgment of this Court, the said issue is not pressed at this stage.

8. Sri Saxena further contends that the petitioner, who is senior Assistant Engineer of 1973 batch has been attached with the respondent No. 6, who is Assistant Engineer of 1982 batch which is not permissible looking to the seniority of the petitioner. Learned Counsel for the petitioner submits that the order passed in writ petition No. 344 (S/B) of 2009 is still continuing, which order provides for benefit of the interim order passed in writ petition No. 1389 (S/B) of 2007 affirmed by the apex Court on 10.9.2009, the respondent No. 6 cannot be treated to be senior. Learned Counsel for the petitioner submits that the seniority list prepared by the respondents having been withdrawn as per statements of

Additional Advocate General, the respondent No. 6 cannot be treated to be senior to the petitioner. Learned Counsel for the petitioner has placed reliance on judgment of the apex Court dated 10.9.2009 passed in Civil Appeal No. 6187 of 2009 Anil Chandra v. Radhakrishna Gaur and Ors.. Reliance has also been placed on the judgment of the apex Court in Arvind Dattatraya Dhande Vs. State of Maharashtra and others, Learned Counsel for the petitioner submits that the petitioner whose performance has been excellent, is being shunted out at the instance of the respondent No. 6, which order is not in the interest of the Corporation or in the public interest.

9. Sri Pankaj Kumar Shukla, learned Counsel for the respondents refuting the submissions of learned Counsel for the petitioner supported the order impugned and submitted that the respondent No. 6 is senior to the petitioner. Learned Counsel for the respondents has placed reliance on Rule 8A of the U. P. Government Servant Seniority Rules, 1991 as amended in 2007 and submits that by virtue of the said rule, the respondent No. 6 is senior. He further submits that similar rules have also been incorporated in U.P. State Electricity Regulations 1998 which Rules and Regulations having not yet been struck down, the seniority of respondent No. 6 cannot be disputed. A counter affidavit and Short counter affidavit have been filed by the respondent No. 6, stating that in case, the petitioner is of the view that any contempt has been committed by the respondents of the order passed in writ petition No. 344 (S/B) of 2009, it is open for the petitioner to initiate contempt proceedings. It is further stated that the seniority list dated 14.11.2009 has not been cancelled and only its uploading on the website of the U.P. Power Corporation Ltd. has been withdrawn. It has been stated in the supplementary counter affidavit that in view of the allegations of the petitioner against the respondent No. 6 of bias, the petitioner is proposed to be transferred out side the Varanasi Zone, which is also an administrative urgency. In the second supplementary counter affidavit it has been stated that the respondents are also ready to consider the petitioner's transfer from Chief Engineer Level-II Varanasi zone to Chief Engineer Level-II Faizabad zone, which supplementary counter affidavit was filed after the writ petition was heard by this Court and a query was made by the Court as to whether the petitioner can be transferred to any other place on the post of Chief Engineer Level-II. Sri Pankaj Kumar Shukla, learned Counsel for the respondents submits that conduct of the petitioner was not good. Reference has also been made to the news items published in the news paper dated 26.6.2010 regarding inspection of Energy Minister when the petitioner was not found sitting in his office.

10. We have heard learned Counsel for the parties and have perused the record.

11. The pleading of the parties disclose that a dispute regarding seniority of Chief Engineer Level-II and of other engineers is engaging the attention of Lucknow Bench of this Court, wherein the seniority list of 19.2.2009 is under challenge in writ petition No. 344 (S/B) of 2009, in which interim orders were passed on 2.3.2009 and 6.3.2009. Against the order dated 6.3.2009, SLP No. 13242 of

2009 was filed by U.P. Power Corporation, which was dismissed on 7.7.2009. Again when seniority list dated 14.11.2009 was uploaded on the website of the Corporation, statement was made before the Bench on 11.12.2009 by Additional Advocate General that the said seniority list has been issued under some mistake and may be withdrawn subsequently. The said seniority list has been withdrawn by the order issued by the Chairman and Managing Director of the Corporation on 9.5.2010 which has been brought on record by the Supplementary counter affidavit filed by the respondents at page 125. The rule with regard to seniority is Rule 8A which has been inserted in U.P. Government Servant Seniority Rules in the year 2007 as well as the Regulations 2008. The said regulation provides that a member of Scheduled castes or scheduled tribes on their promotion by virtue of rules of reservation/roaster are entitled to consequential seniority also. The contention of learned Counsel for the petitioner is that the said rule cannot effect the seniority list retrospectively and has no application with regard to inter-se seniority of the petitioner and the respondent No. 6, whereas the submission of learned Counsel for the respondents is that the said rule entitles member of Schedule castes to be treated senior on his promotion as a reserved category candidate and Regulation 8A has not been struck down as yet by the State or any Court, the placement of the respondent No. 6 as senior is in accordance with law. In this context, it is relevant to notice the judgment of the apex Court in Anil Chandra v. Radhakrishna Gaur and Ors. (supra) and others which has been relied by learned Counsel for the petitioner. Similar rules pertaining to seniority being Rule 8A of U.P. Government Servant Seniority Rules 2007 came up for consideration by the supreme Court with regard to engineers of U.P. Jal Nigam. The said writ petition being writ petition No. 1496 (S/B) of 2007 was filed before the Lucknow Bench of this Court in which interim order was passed on 4.12.2007 to the effect that seniority of the respondents as existing prior to the enforcement of the third Amendment Rules, 2007, shall not be disturbed in pursuance of the Rules. An appeal was filed against such interim order, the apex Court while deciding the appeal made following observations in paragraphs 10, 11, 13 and 19.

10. On 19th of October, 2006, the aforesaid reference was decided by the Constitution Bench in M. Nagaraj and Others Vs. Union of India (UOI) and Others, and the Constitution Bench held in that decision that the provision contained in Article 16(4-A) of the Constitution is an enabling provision and the State is not bound to make reservation for SCs/STs in the matter of promotion. However, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance of Article 335 of the Constitution of India. It is clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely.

11. Further, after the passing of aforesaid judgment by the Constitution Bench, the U.P. Government issued a Notification on 14th of September, 2007 by which the U. P. Government Servants Seniority (3rd Amendment) Rules, 2007, were issued which runs as under:

Rule 8A: Entitlement of consequential seniority to a person belonging to scheduled castes and scheduled tribes: Notwithstanding anything contained in Rules 6, 7 or 8 of these rules, a person belonging to the SC or ST shall, on his promotion by virtue of rule of reservation/roster, be entitled to consequential seniority also from 17.6.1995 in the seniority rules, 1991 and also provided for consequential seniority to the scheduled Castes and scheduled tribes from the date of their promotion as per the Roster/rule of reservation.

13. On 17th of October, 2007, the State Government issued another order, wherein it was directed that as a result of the aforesaid Amendment in the Seniority Rules, 1991, necessary amendments should be made in the Seniority List by adopting the procedure in accordance with the seniority Rules. But before making any such provision, it was the Constitutional obligation and duty of the State Government to see in each case the existence of the compelling reason, namely, backwardness, inadequacy of representation and overall administrative inefficiency on the basis of qualified data collected but in the present case, no such exercise has been undertaken by the State of U.P.

19. In the present case and in the facts and circumstances stated herein earlier, we are of the view that it was the constitutional obligation of the State, at the time of providing reservation in the matter of promotion to identify the class or classes of posts in the service for which reservation is required, however, neither any effort has been made to identify the class or classes of posts for which reservation is to be provided in promotion nor any exercise has been done to quantify the extent of reservation. Adequate reservation does not mean proportional representation. Rule 8(A) has been inserted mechanically without taking into consideration the preconditions for making such a provision as required under Article 16(4-A) of the Constitution of India. The ceiling-limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which, the structure of equality of opportunity in Article 16 would collapse. However, in this case, as stated, the main issue concerns the "extent of reservation" and in this regard, the State should have shown the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. As observed in *M. Nagaraj and Ors. v. Union of India & Ors.* (Supra), it has been held that the State is not bound to make reservation for SC/ST in matter of promotions. However, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance of

Article 335 of the Constitution. It is clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling-limit of 50% or obliterate the creamy layer or extend the reservation indefinitely.

12. The apex Court however, while dismissing the appeal observed that the High Court may decide the petition on merits and shall not be influenced by any of the observations made by the apex Court.

13. Learned Counsel for the petitioner has given much emphasis on the fact that the petitioner is Assistant Engineer of 1973 batch, whereas the respondent No. 6 is Assistant Engineer of 1982 batch. The petitioner is senior and is also entitled to be given officiating charge of Managing Director looking to his seniority. We are not inclined to enter into the issue of inter-se seniority between the petitioner and the respondent No. 6. The question of seniority is directly in issue in writ petition No. 344 (S/B) of 2009 before Lucknow Bench of this Court. From the pleadings of the parties, it also does appear that the seniority list which was uploaded on the website of the Corporation dated 14.11.2009 has been withdrawn on 9.5.2010 but there is no material to indicate that seniority list has been finalized as yet. The question of seniority being in issue in different writ petitions, we leave this question here and do not proceed to make any adjudication in this writ petition.

14. Learned Counsel for the petitioner has placed reliance on the judgment of the apex Court in the case of Arvind Dattatraya Dhande v. State of Maharashtra and Ors. (supra). The apex Court in the said judgment was considering the transfer of an Excise Inspector, whose working was highly commended. The apex Court made strong objections against such arbitrary transfer at the behest of the interested persons. Following was laid down in paragraph 6 of the judgment:

In view of the unimpeachable and eloquent testimony of the performance of the duties, it will be obvious that the transfer is not in public interest but is a case of victimisation of a honest officer at the behest of the aggrieved complainants carrying on the business in liquor and toddy. Under these circumstance, as stated earlier, the transfer of the appellant is nothing but mala fide exercise of the power to demoralise honest officers who would efficiently discharge the duties of a public office.

15. The petitioner during his submission has pressed only reliefs (i), (ii) and (iv) of the writ petition. The relief (iii) has not been pressed since the said issue is pending consideration before the apex Court in SLP arising out of judgment of this Court in Pradeep Kumar Jain v. U.P. Power Corporation Ltd. (supra). The relief (iv) of the writ petition by which the petitioner has prayed for a writ of mandamus directing the respondents to allow the petitioner to work as officiating Managing Director in view of the interim orders passed in writ petition No. 344 (S/B) of 2009, cannot be acceded in this writ petition when the question of seniority is still under adjudication in writ petition No. 344 (S/B) of 2009. Thus,

the relief No. (iv) as claimed by the petitioner cannot be granted in this writ petition. Although the petitioner has made serious allegations of bias and malafide against the Managing Director and Chairman, respondents No. 6 and 9 of the U.P. Power Corporation Ltd. and notices were issued in the writ petition but for the purpose of this case, it is not necessary to inter into various allegations made in the writ petition in this regard for deciding the writ petition. However, in view of the foregoing discussions, one thing is clear that the issue of seniority is hotly contested between the engineers of U.P. Power Corporation at different levels. The petitioner, who is an Assistant Engineer of 1973 batch and had been working as Chief Engineer Level-II Transmission, Varanasi zone has been attached with the respondent No. 6, who is officiating as Managing Director of Purvanchal Vidyut Vitran Nigam Ltd., and is Assistant Engineer of 1982 batch. By virtue of his being member of Scheduled Castes, he has received accelerated promotion and claims that he is senior to the petitioner. When the seniority list of Engineers of various level of U.P. Power Corporation Ltd. is in issue in writ petition No. 344 (S/B) of 2009 which is pending consideration and the interim order is operating in the said writ petition that on that basis of seniority list dated 19.2.2009 in which the respondent No. 6 was shown senior to the petitioner, no promotion even on officiating basis can be made. It is in the interest of justice that the petitioner be not attached with respondent No. 6. The petitioner has also in the writ petition categorically pleaded that after his joining as Chief Engineer Level-II Varanasi in July, 2009, the revenue recovery of the zone has substantially increased which has been categorically pleaded in paragraph 12 of the writ petition in details and has not been specifically denied in paragraph 22 of the counter affidavit except vague allegations that the petitioner was shifted from Distribution Varanasi Zone and attached with the office of Managing Director of Purvanchal Vidyut Vitran Nigam Ltd. Varanasi in the public interest at large/administrative ground.

16. In view of the above, we are satisfied that the order dated 26.12.2009 deserves to be set aside and is hereby set aside. The writ petition is allowed to above extent.