

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Writ Petition (S/S) No.556 of 2020

Smt. Seema Rawat & Ors. Petitioners

versus

State of Uttarakhand & Ors. Respondents

Mr. D.S. Patni, Senior Advocate appearing for the petitioners
Mr. Tej Singh Bisht, Deputy Advocate General along with Mr. Narain Dutt, Mr. Sachin Mohan Singh Mehta and Ms. Indu Sharma, Brief Holders for the State

Chronological list of cases referred:-

1. (1983) 3 SCC 33
2. (1983) 3 SCC 284
3. (2007) 10 SCC 402
4. (2007) 11 SCC 605
5. WPSB No.532 of 2016
6. WPSS No.1470 of 2018

JUDGMENT

Hon'ble Lok Pal Singh, J.

By means of present writ petition, petitioners have sought the following reliefs:-

- (i) Issue a writ, order or direction in the nature of certiorari quashing the impugned Service Rules, 2020 namely Uttarakhand Service Rules, 2020 to the extent of Rule 5(b) whereby the qualifying service for promotion to the post of Marketing Inspector has illegally been enhanced from 5 years to 10 years and further direct the respondents to restrict the same to the earlier period of qualifying service i.e. five years in the case of the petitioners.
- (ii) Issue a writ, order or direction in the nature of mandamus commanding and directing the respondents to forthwith consider the petitioners promotion by the Selection Committee as per the earlier Service Rules i.e. Uttar Pradesh Food and

Civil Supplies, Marketing Branch Subordinate Service Rules, 1980 (as amended in the year 1993) by restricting the qualifying service to five years in the case of the petitioners.

2. Factual matrix of the case is that petitioners were appointed as Junior Assistants in the Department of Food and Civil Supplies, Government of Uttarakhand, on different dates between the year 2011 to 2013. The next higher post to which the petitioners could be promoted is Marketing Inspector. The Recruitment Rules known as Uttar Pradesh Food and Civil Supplies, Marketing Branch Subordinate Service Rules, 1980 (*as amended in the year 1993*) (*hereinafter to be referred as old Rules*) were applicable at that relevant point of time. Rule 5(1)(b) whereof provided that 25% posts of Marketing Inspector shall be filled up by way of promotion, on the basis of seniority subject to rejection of unfit from existing clerical cadre after completion of satisfactory service of five years. According to the petitioners, they having being completed five years' service in clerical cadre, are eligible for being considered for promotion to the post of Marketing Inspector, but no promotional exercise was carried out in the clerical cadre. In this regard, several representations were made by the petitioners themselves and through their Association also before the competent authority. The Regional Food Controller, Kumaon Region, Haldwani had written a letter dated 05.05.2020 to Commissioner, Food and Civil Supplies/respondent no.2 thereby recommending for the petitioners' promotion on the 16 vacant posts of Marketing Inspector, but to no avail. Meanwhile, The Uttarakhand Food and Civil Supplies and Consumer Affairs Department (Marketing Branch) Subordinate Service Rules, 2020 (*hereinafter to be*

referred as the new Rules) came into force. Petitioners are aggrieved by Rule 5(1)(b) of the new Rules which stipulates that for the post of Marketing Inspector, 23% percent recruitment shall be made by promotion amongst the Chief Assistant, Senior Assistant, Record Keeper and Junior Assistant cum Computer Operator substantially appointed who have completed ten years of service on any or more posts in the said categories on the first day of recruitment year, on the basis of seniority, subject to rejection of unfit through the selection committee. Petitioners contend that, by virtue of said amendment in the Rules, the qualifying service for promotion to the post of Marketing Inspector has been enhanced from 5 years to 10 years, and thus, their vested right of being promoted to the post of Marketing Inspector have been taken away.

3. A counter affidavit has been filed on behalf of respondent no.1 stating therein that the new Rules have been made by the Government of Uttarakhand in exercise of the powers conferred on it by the proviso to Article 309 of the Constitution of India, which is uniformly applicable to all the persons appointed in the feeding category. It is also stated that an employee has no right to be promoted; he has a right to be considered for promotion. Mere chance of promotion is not a condition of service and fixing qualification, eligibility criteria and norms for promotion is within the domain of legislature or the executive to decide what Rules or policy would serve the purpose best. It is further stated that Rule 4(2)(i) of the old Rules as well as the new Rules provide that the appointing authority may leave unfilled or the Governor may hold in abeyance any vacant post without thereby entitling any person to

compensation. It is also stated that it is the prerogative of the Government to take a decision to fill the old vacancies or under the new Rules. As regards the challenge to the Rule 5(1)(b) of the new Rules by the petitioners, it is stated that the prayer of the petitioners is defective as they have sought a writ in the nature of certiorari for quashing the Rule 5(b) of the Uttarakhand Food, Civil Supplies and Consumer Affairs Department (Marketing Branch) Subordinate Service Rules, 2020, instead of seeking a declaration to declare said Rules as ultra-vires.

4. In the counter affidavit, it is also stated that consequent to the issue of Government Order No.94 dated 18.03.2020 whereby the ban imposed on the promotions vide G.O. dated 11.09.2019 has been lifted, representations dated 19.03.2020 and 01.05.2020 were received, however, in the meantime, the Government of Uttarakhand in exercise of the power conferred on it by the proviso to Article 309 of the Constitution of India notified the Uttarakhand Food, Civil Supplies and Consumer Affairs Department (Marketing Branch) Subordinate Service Rules, 2020, which prescribes a minimum of 10 years service to be considered for promotion to the post of Marketing Inspector. It is further stated that the process of framing new Rules was in process since 2013 and the Finance Department had recommended/suggested that the post of Marketing Inspector should be filled 100% by direct recruitment, however, considering the interest of the departmental personnel's in the new rules of 2020 provision has been made that the recruitment to the post of Marketing Inspector is to be made 75% as direct recruitment and 25% by promotion amongst the Chief Assistant, Senior

Assistant, Record Keeper and Junior Assistant cum Computer Operator substantially appointed, who have completed 10 years of service on any or more posts in the said categories on the first day of recruitment year, on the basis of seniority, subject to rejection of unfit through the Selection Committee.

5. Petitioners have filed a rejoinder affidavit to the counter affidavit of respondent no.1 denying the averments of the counter affidavit. Besides, it is stated that the new Rules are not based on reasonable classification as far as the petitioners are concerned who have completed five years of service in Clerical Cadre and were eligible for promotion on existing vacancies before coming into force of the new Rules therefore the classification is not based on any intelligible differentia and there is no rationale or reason to the object of classification and as such hit by Article 14 of the Constitution of India.

6. I have heard Shri D.S. Patni, learned Senior Counsel appearing for the petitioners and Shri Tej Singh Bisht, learned Deputy Advocate General appearing for the State of Uttarakhand/respondents and have gone through the entire material brought on record.

7. Learned Senior Counsel appearing for the petitioners would submit that the petitioners were eligible for being considered for promotion when the old Rules were in existence but they were not considered at that relevant point of time, and subsequently new Rules came into force. He would submit that since the vacancies occurred prior to the new rules, the petitioners should be considered for promotion in terms

of the earlier Rules. He would further submit that the Rule 5(1)(b) of the new Rules is ultra-vires to Article 14 and 16 of the Constitution of India. To buttress his arguments, learned Senior Counsel would place reliance on the following judgments, which will be adverted to in subsequent paragraphs of the judgment:-

1. A.A. Calton v. Director of Education & Anr., reported in (1983) 3 SCC 33
2. Y.V. rangaiah and Ors. Vs. J. Sreenivasa and Ors., reported in (1983) 3 SCC 284
3. State of Punjab and Ors. Vs. Arun Kumar Aggarwal and Ors., reported in (2007) 10 SCC 402
4. Arjun Singh Rathore and ors. Vs. B.N. Chaturvedi and Ors., reported in (2007) 11 SCC 605
5. Writ Petition (S/B) No.532 of 2016 Rajesh Chauhan vs. State of Uttarakhand and others, decided on 10.03.2017
6. Hema Karki vs. State of Uttarakhand and others, WPSS No.1470 of 2018, decided on 21.05.2019

8. Per contra, learned Deputy Advocate General appearing for the State of Uttarakhand would submit that the new Rules, having come into force, the Department is entitled to go ahead with the promotion, as envisaged under the Rules, according to which, there is a condition of qualifying service of ten years for being promoted to the post of Marketing Inspector, which the petitioner has not completed so far. Thus, the case of the petitioners for promotion cannot be considered.

9. As regards the submission of learned Senior Counsel appearing for the petitioners that the vacancies existed when the old Rules were in existence and as such it ought to have been filled up by way of old Rules

itself, learned Deputy Advocate General would submit that it is the prerogative of the Government to take a decision to fill the vacancies as per old rules or under the new Rules.

10. In **A.A. Calton**¹, Hon'ble Supreme Court has observed as under:-

“5. It is no doubt true that the Act was amended by U.P. Act 26 of 1975 which came into force on August 18, 1975 taking away the power of the Director to make an appointment under Section 16-F(4) of the Act in the case of minority institutions. The amending Act did not, however, provide expressly that the amendment in question would apply to pending proceedings under Section 16-F of the Act. Nor do we find any words in it which by necessary intendment would affect such pending proceedings. The process of selection under Section 16-F of the Act commencing from the stage of calling for applications for a post up to the date on which the Director becomes entitled to make a selection under Section 16-F(4) (as it stood then) is an integrated one. At every stage in that process certain rights are created in favour of one or the other of the candidates. Section 16-F of the Act cannot, therefore, be construed as merely a procedural provision. It is true that the Legislature may pass laws with retrospective effect subject to the recognized constitutional limitations. But it is equally well settled that no retrospective effect should be given to any statutory provision so as to impair or take away an existing right, unless the statute either expressly or by necessary implication directs that it should have such retrospective effect. In the instant case admittedly the proceedings for the selection had commenced in the year 1973 and after the Deputy Director had disapproved the recommendations made by the Selection Committee twice the Director acquired the jurisdiction to make an appointment from amongst the qualified candidates who had applied for the vacancy in question. At the instance of the appellant himself in the earlier writ petition filed by him the High Court had

directed the Director to exercise that power. Although the Director in the present case exercised that power subsequent to August 18, 1975 on which date the amendment came into force, it cannot be said that the selection made by him was illegal since the amending law had no retrospective effect. It did not have any effect on the proceedings which had commenced prior to August 18, 1975. Such proceedings had to be continued in accordance with law as it stood at the commencement of the said proceedings. We do not, therefore, find any substance in the contention of the learned Counsel for the appellant that the law as amended by the U.P. Act 26 of 1975 should have been followed in the present case.”

11. In **Y.V. Rangaiah**², Hon’ble Supreme Court has held as under:-

“9. Having heard the counsel for the parties, we find no force in either of the two contentions. Under the old rules a panel had to be prepared every year in September. Accordingly, a panel should have been prepared in the year 1976 and transfer or promotion to the post of Sub-Register Grade II should have been made out of that panel. In that event the petitioners in the two representation petitions who ranked higher than the respondents Nos. 3 to 15 would not have been deprived of their right of being considered for promotion. The vacancies which occurred prior to the amended rules would be governed by the old rules and not by the amended rules. It is admitted by counsel for both the parties that henceforth promotion to the post of Sub-Registrar Grade II will be according to the new rules on the zonal basis and not on the State-wide basis and, therefore, there was no question of challenging the new rules. But the question is of filling the vacancies that occurred prior to the amended rules. We have not the slightest doubt that the posts which fell vacant prior to the amended rules would be governed by the old rules and not by the new rules.”

12. In **Arun Kumar Aggarwal**³, Hon’ble Supreme Court has held as under:-

“30. There is no quarrel over the proposition of law that normal Rule is that the vacancy prior to the new Rules would be governed by the old Rules and not by the new Rules. However, in the present case, we have already held

that the Government has taken conscious decision not to fill the vacancy under the old Rules and that such decision has been validly taken keeping in view the facts and circumstances of the case.”

13. In **Arjun Singh Rathore**⁴, Hon’ble Supreme Court has observed as under:-

“5. Mr. Calla, the learned senior counsel for the appellants has argued that the matter was fully covered by the judgment of this Court in State of Rajasthan v. R. Dayal wherein it had been held that the vacancies to be filled by promotion were to be filled under the rules which were in operation on the date when the vacancies had occurred. Relying on and referring to an earlier judgment in the case of Y.V. Rangaiah v. J. Sreenivasa Rao, it was opined as under:

This Court has specifically laid (sic) that the vacancies which occurred prior to the amendment of the Rules would be governed by the original Rules and not by the amended Rules. Accordingly, this Court had held that the posts which fell vacant prior to the amendment of the Rules would be governed by the original Rules and not the amended Rules. As a necessary corollary, the vacancies that arose subsequent to the amendment of the Rules are required to be filled in accordance with the law existing as on the date when the vacancies arose.”

6. The above legal position has not been seriously disputed by the learned Counsel for respondent nos.6 and 7. We are therefore of the opinion that the vacancies which had occurred prior to the enforcement of the Rules of 1998 had to be filled in under the Rules of 1988 and as per the procedure laid down therein. We are therefore of the opinion that the judgment of the learned Single Judge needs to be restored. We order accordingly.”

14. In **Rajesh Chauhan**⁵, the Division Bench of this Court has observed as under:-

“The question to be considered is, whether the vacancy, which apparently arose prior to the promulgation of the Rules of 2016 is to be filled up applying the criteria of merit under the Rules of 1979 or on the basis of seniority subject to the rejection of unfit in view of the Rules of 2016. This question is no longer res integra and is subject-matter of a catena of decisions. The earliest on this point is the decision of Hon’ble Apex Court in the case of Y.V. Rangaiah and others vs. J. Sreenivasa Rao and other reported in

(1983) 3 SCC 284, from which the principle emerges that in respect of the vacancy arising under the old Rules before change in the rules, it must be filled up in terms of the Rules as they existed at the time when the vacancy occurred.....

Therefore, the principle would appear to be that the ordinary rule is that the vacancies prior to the new rules would be governed by the old rules and not by the new rules. In certain exceptional circumstances, the Government may take a conscious decision to not to fill the vacancies under the old rules and there can be a deviation in exceptional case.

Therefore, we have to examine, whether there is any scope for applying the exceptional rule or the general rule. In this case, it appears that a requisition was sent on 20.12.2016, according to the petitioner, to the Public Service Commission, but, according to the Government, the requisition was sent on 19.12.2016. The new rules came into force on 20.12.2016. Even though, the new rules have come, there is no case set up before us that the Government has taken a conscious stand to fill up the vacancies in terms of the new rules.

Even before us, there is no case set up that the exceptional rule must prevail in this case. If that is so, the general rule, which has been followed in a number of decisions must prevail. Resultantly, we hold that in regard to the vacancies which arose prior to the promulgation of the new rules on 20.12.2016, they must be filled up in terms of the rules of 1979 by employing the criteria mentioned in the rules of 1979. Having made this clear, we direct that the needful will be done in terms of the observations, which we have made in this judgment.”

15. In **Hema Karki**⁶, a Coordinate Bench of this Court has held as under:-

“12. It is, thus, apparent that petitioner’s right to be considered for promotion could not be considered in 2015 due to unavailability of Commandant General, Home Guards on the dates fixed for meeting of Promotion Committee. Undisputedly, petitioner was eligible for promotion to the post of District Commandant in 2015. In such view of the matter, her claim for promotion deserves to be considered under the Old Rules, and her eligibility for promotion cannot be taken away under, under the New Rules.”

16. The ratio of the aforesaid decisions is that the general rule is that the vacancies existing prior to the

new rules would be governed by the old rules and not by the new rules, and the vacancies that has arisen after the amendment would be governed by the amended Rule. However, in certain exceptional circumstances, the Government may taken a conscious decision to not to fill the vacancies under the old rules and there can be a deviation in exceptional case.

17. Now, reverting to the facts of the instant case, a perusal of the record would reveal that the petitioners were appointed as Junior Assistants between the years 2011-2013. Thus, indisputably, all the petitioners had become eligible for promotion on the post of Marketing Inspector by the year 2018, on the basis of Rule 5(1)(b) of the old Rules, as the vacancies were also existing. Had the promotional exercise carried out before 12.05.2020, the date when the new Rules came into existence, the petitioners by virtue of their qualifying service stood a fair chance of being promoted to the post of Marketing Inspector, in accordance with the old Rules. However, the promotional exercise was not carried out for the post of Marketing Inspector, at that relevant point of time, and in the meantime, on 11.09.2019, the Government of Uttarakhand imposed a ban on promotions by a Government Order 11.09.2019. But the same has also been lifted up by another Government Order dated 18.03.2019.

18. In regard to not filling up the vacancy prior to the new Rules, it is only stated by the respondents that the process of framing the new Rules was underway and therefore the promotional exercise was not carried out for the post of Marketing Inspector and the Government

thus decided to leave the vacancy unfilled, at that point of time.

19. No doubt, it is the prerogative of the Government not to fill the vacancies under the old Rules under certain exceptional circumstances, but for that there has to be a conscious decision of the Government. In the case at hand, nothing has been brought on record to show any conscious decision of the Government in not filling the post of Marketing Inspector as per old Rules. In the absence of any conscious decision, there cannot be a departure from the aforesaid general rule.

20. In view of the foregoing discussion, I dispose of the writ petition directing the respondents to consider the petitioners' case for promotion as per the old Rules, within a period of two months from today.

21. No order as to costs.

(Lok Pal Singh, J.)
16.12.2020