

Reserved on: 17.10.2023

Delivered on: 30.10.2023

Court No. - 35

Case :- WRIT - A No. - 11724 of 2023

Petitioner :- Surya Kant Pathak

Respondent :- The State Of U.P. And 6 Others

Counsel for Petitioner :- Ramesh Kumar Tiwari, Aditi Pandey

Counsel for Respondent :- C.S.C, Akhtar Ali, Prabhakar Awasthi, Ramesh Kumar Tiwari, Shyam Mani Shukla

Hon'ble Vikas Budhwar, J.

1. Heard Sri Ashok Khare, learned Senior Counsel assisted by Sri Ramesh Kumar Tiwari, learned counsel for the petitioner, Sri Shailendra Singh, learned Standing Counsel, who appears for Respondent Nos. 1, 3, 4 & 5, Sri S.M. Shukla, who appears for Respondent Nos. 2 & 6 and Sri Prabhakar Awasthi along with Sri Akhtar Ali, who appear for Respondent no.7.

2. Since counter and rejoinder affidavits have been exchanged between the parties and the counsels for the parties have made a joint statement that the writ petition be decided on the basis of the affidavits exchanged between the parties and they do not propose to file any further affidavit, thus, the writ petition is being decided at the fresh stage with the consent of the parties.

3. The case of the writ petitioner is that the sixth respondent, Maulana Azad Inter College, Bareilly is an institution recognized under the provisions of U.P. Intermediate Education Act, 1921 and provisions of U.P. Act No.5 of 1982 and U.P. Act No.4 of 1971 are applicable.

4. It is the further case of the writ petitioner that he was appointed as Assistant Teacher (Science) on 10.01.2005 in the sixth respondent-Institution and he was accorded joining on 15.01.2005. Since then he is working in the Institution in question.

5. In paragraph-4 of the writ petition, it is further asserted that there are total 11 sanctioned posts of Lecturer in the sixth respondent-Institution, wherein 5 posts are reserved for direct recruitment and 6 posts for

promotion quota. A vacancy on the post of Lecturer (Chemistry) fell vacant consequent to the retirement of one Sri Hiramani on 31.3.2023. A certificate is stated to have been issued by the Principal/ Manager of the Institution in question to the said effect further mentioning that the post in question has not been requisitioned and the same is not a subject matter of dispute or challenge before any competent Court of Law. As per the writ petitioner, on 17.03.2023, a letter is stated to have been issued by the Principal of Institution in question to the District Inspector of Schools, Bareilly, fifth respondent, mentioning therein that two posts of Lecturer; one in Chemistry and second in Civics are going to be vacant on 31.03.2023. The writ petitioner further claims to have preferred representations/ application on 16.05.2023 before the Principal of the Institution staking his claim for being considered for promotion on the post of Lecturer (Chemistry) consequent to the vacancy, which had arisen on 31.03.2023 due to retirement of Sri Hiramani, Lecturer (Chemistry). In continuation of the same, the writ petitioner further claims to have represented his cause before the District Inspector of Schools on 12.06.2023. It is further the case of the writ petitioner that on 22.06.2023, the writ petitioner has further represented his claim before the Directorate at Lucknow for being considered for promotion. A document has also been annexed by the writ petitioner under the signature of the Joint Director of Education, Bareilly Region, Bareilly addressed to District Inspector of Schools, Bareilly dated 23.06.2023 to do the needful with regard to the claim raised by the writ petitioner for promotion. According to the writ petitioner on 30.06.2023, an order is stated to have been passed under the signature of the Additional Director of Education (Madhyamik), Uttar Pradesh seeking to transfer the seventh respondent, Mohammad Azim, Lecturer, from Hari Narayan Inter College, Gunjandwara, Kasganj to the sixth respondent-Institution.

6. Questioning the order dated 30.06.2023, passed by the Addl. Director of Education, Madhyamik transferring the seventh respondent to sixth respondent-Institution, the present writ petition has been preferred seeking further relief for a direction to the respondents to consider the candidature of the writ petitioner for the post of Lecturer (Chemistry) in pursuance of Rule 14 of the U.P. Secondary Education Service Selection Board Rules, 1998.

7. This Court entertained the writ petition on 10.08.2023 and thereafter on 06.09.2023, this Court proceeded to pass the following orders:-

“06.09.2023

This Court had entertained the writ petition on 10.08.2023, while passing the following orders :-

"Learned counsel for the petitioner is permitted to implead the Director of Education (Secondary), Government of U.P. at Lucknow in the array of parties.

The case of the writ petitioner is that he is an Assistant Teacher (Science), who has joined the sixth respondent-Institution on 15.10.2005. He claims that consequent to the retirement of Sri Hira Mani, Lecturer (Chemistry) on 31.03.2023, he is entitled to be considered for promotion on the said post and the exercise was undertaken by the official respondents, Addl. Joint Director (Madhyamik), Uttar Pradesh on 30.06.2023 seeking to transfer the seventh respondent in the institution in question is illegal. He further invites the attention of the Court towards page-31 of the paper-book, so as to contend that the Joint Director of Education, Bareilly Region, Bareilly has made correspondence with fifth respondent, District Inspector of Schools, Bareilly for considering the claim of the writ petition for promotion.

Sri Prabhakar Awasthi, learned counsel for the seventh respondent has invited the attention of the Court towards page-28 of the paper-book, which happens to be the representation of the writ petitioner addressed to the Directorate, Lucknow, wherein in paragraph-5, it has been sought to be stated that so far as the post of Lecturer is concerned, five posts are referable to be filled up by direct recruitment and 6 posts for promotion and three posts are lying vacant against which obviously writ petitioner can be considered. However, he cannot resist the transfer of the seventh respondent in this regard, which would come within the ambit of the residue post being lying vacant.

He further submits that pursuant to the letter dated 23.06.2023 issued by the Joint Director of Education, Bareilly Region, Bareilly to the District Inspector of Schools, Institution has already submitted the relevant documents in that regard.

Sri Atul Khaneja, learned State Law Officer, who appears for Respondents 1 to 5 and 7 seeks and is allowed time to obtain instructions from the office of the Director and it is expected that positively, the said instructions/ affidavit, if any, be filed before the next date fixed.

Issue notice to Respondent no.6.

Steps to be taken by tomorrow by both ways.

Affidavit of service be filed before the next date fixed.

The respondents shall file their response, if they so choose, before the next date fixed.

Put up this case on 06.09.2023 as fresh."

A counter affidavit dated 29.08.2023 has been filed on behalf of the respondent nos.1, 3, 4 and 5, the same is taken on record. A rejoinder affidavit to the same has already been filed, which is also taken on record.

Sri Shyam Mani Shukla, (AOR No. A/S 1239/23), learned counsel has made a statement at Bar that he has received instructions on behalf of respondent nos.2 and 6. He seeks time to file an affidavit.

Sri Prabhakar Awasthi, learned counsel, who appears for the respondent no.7 also seeks time to obtain instructions/file an affidavit.

Put up this case on 13.09.2023, as fresh.

In the meantime, learned Standing Counsel and the learned counsel appearing for the respondent nos.2 and 6 shall obtain instructions, as what would be the situation of the writ petitioner, who had applied in pursuance of a recruitment initiated by the respondent for appointment as a Principal, as the said selection stood set aside.

The status of the petitioner in the respondent no.6 institution may also be demonstrated by way of an affidavit.

When the matter is listed next, the name of Sri Shyam Mani Shukla be shown as counsel from the respondent side."

8. Pursuant to the service of the notice upon the respondents, a counter affidavit has been filed by the Associate District Inspector of Schools, Bareilly sworn on 29.08.2023 on behalf of the Respondent Nos. 1, 3, 4 and 5. A counter affidavit has also been filed by the Respondent Nos. 2 and 6 sworn by Tax Assessment Officer, Bareilly sworn on 11.09.2023. A counter affidavit on behalf of the seventh respondent is also available on record. To the said counter affidavits, rejoinder affidavits have also been filed.

9. Since already noticed, the counsel for the parties do not propose to file any further affidavit, thus this Court is proceeding to decide the matter at the fresh stage.

10. Sri Ashok Khare, learned Senior Counsel assisted by Sri Ramesh Kumar Tiwari, while assailing the order dated 30.06.2023 passed by the Addl. Director of Education (Madhyamik), Uttar Pradesh has sought to argue that the said order cannot be sustained for a single moment, particularly, in view of the fact that the writ petitioner being the senior most was entitled to be promoted on the said post in view of Rule 14 of the 1998 Rules. Elaborating the said submission, Sri Khare submits that in the sixth respondent-Institution, there happens to be total 11 posts of Lecturer sanctioned out of which 5 posts are earmarked for direct recruitment and 6 posts for promotion. According to the seniority list of the year 2022-23, the writ petitioner is a senior most Assistant Teacher in Science, thus he consequent to the retirement of Hiramani, Lecturer (Chemistry) is entitled to be accorded promotion. He submits that one Sri

Hiramani, Lecturer (Chemistry), who was working under direct recruitment quota and one Sri Anwar Ali, Lecturer (Civics), who was working under promotion quota, they both superannuated on 31.03.2023, so on 01.04.2023, the said two vacancies stood vacant giving room to the petitioner to have been accorded promotion against the vacancies arisen on account of retirement of Sri Hiramani, Lecturer (Chemistry). He further submits that on 01.04.2023 under direct recruitment quota, 4 Lecturers were manning the posts, with respect to promotion quota of Lecturers, three Lecturers were working and for two posts of Lecturers, the matter is pending before the Hon'ble High Court, which was under litigation and dispute and there remains available only one post of Lecturer (Civics). He submits that the writ petitioner's candidature ought to have been considered against the vacancy of Sri Hiramani, Lecturer (Chemistry). According to him, there is no Rule forbidding consideration of the claim of the writ petitioner for being accorded promotion against a post, which was earlier manned by a direct recruitee, as once a vacancy falls vacant irrespective of the fact as to whether under direct recruitment or promotion quota, the senior most Assistant Teacher is liable to be considered against the same and the said vacancy cannot be filled by mode of transferring the seventh respondent to sixth respondent-Institution. He thus submits that the order dated 30.06.2023 passed by the Addl. Director of Education (Madhyamik), Uttar Pradesh be set aside and the direction be issued for consideration of the claim of the writ petitioner for promotion on the post of Lecturer (Chemistry) against the vacancy arisen on account of the retirement of Sri Hiramani, Lecturer (Chemistry).

11. Countering the submission of learned Senior Counsel for the writ petitioner, learned Standing Counsel submits that the order dated 30.06.2023 transferring the seventh respondent to the sixth respondent Institution on 30.06.2023 cannot be faulted with, as the vacancy against which the seventh respondent has been transferred pertains to direct recruitment quota being the Lecturer (Chemistry) and the writ petitioner being not qualified for the post of Lecturer (Civics) which falls under promotion quota could not have been considered for promotion. He further submits that the only vacancy, which is under the promotion quota is the post of Lecturer (Civics) out of three posts of Lecturers, in which two posts of Lecturers are subject matter of challenge before the High Court and once the writ petitioner does not qualify for the post of Lecturer (Civics), thus he was rightly not accorded promotion. He further submits that the vacancy, which falls under a particular quota is to be filled up under said quota and in absence of any provisions in the Statute, the writ

petitioner cannot claim promotion against a post, which is earmarked for direct recruitment. According to him, the writ petition is wholly misconceived and is liable to be dismissed.

12. Sri S.M. Shukla, learned counsel, who appears for Respondent nos.2 & 6 submits that out of total 11 posts, sanctioned for Lecturer, the post of Lecturer (Chemistry) falls under direct recruitment quota along with post of Lecturer (Physics), Lecturer (Geography), Lecturer (Hindi) and Lecturer (Arts). So far as the post of Lecturers earmarked for promotion is concerned, the same is Lecturer (English), Lecturer (Mathematics), Lecturer (Economics), Lecturer (History), Lecturer (Urdu) and of course Lecturer (Civics). According to him, since the post of Lecturer (Chemistry) belongs to direct recruitment quota and on account of vacancy so arisen therein consequent to the retirement of Sri Hiramani, who was working as Lecturer (Chemistry), thus the claim of the writ petitioner was not rightly considered for promotion.

13. Sri Shukla has invited the attention of the Court towards Rule 10 of the U.P. Secondary Education Service Selection Board Rules 1998 so as to contend that the same provides for procedure for recruitment both by direct recruitment and by promotion and Rule 11 provides for determination and notification of the vacancies and the said task is entrusted to the Management, who shall determine the number of vacancies in accordance with Sub-Section (1) of Section 10 and notify the vacancy through the Inspector to the competent authority. Further reliance has been placed upon Rule 14 of the 1998 Rules, according to which where any vacancy is to be filled up through promotion teachers working in Trained Graduate Grade or Certificate of Teaching Grade, if any, and who possesses the qualification prescribed for the post shall subject to five years of continuous service on the first day of recruitment would be considered for promotion. He submits that mere eligibility does not confer indefeasible right for being accorded promotion, as the same is dependent upon the vacancy with co-relation to the fact as to whether it is under direct recruitment quota or promotion quota. Submission is that once a conscious decision has been taken by the management in terms of the Statute in question, then mere eligibility cannot be a ground to assert right while forcing the management to deviate from its conscious decision in that regard. It is the further submission of Sri S.M. Shukla, who appears for Respondent Nos. 2 and 6 that there was a complaint lodged against the writ petitioner that he had applied pursuant to a recruitment drive for selection and the appointment on the post of Principal/ Headmaster and

thus, it is now not open for the writ petitioner to claim promotion on the post of Lecturer (Chemistry) in that regard.

14. Sri Prabhakar Awasthi, along with Sri Akhtar Ali, who appears for the seventh respondent has adopted the submission of Sri Shukla and according to them, they have nothing to add except the fact that the writ petitioner has no fundamental right to be promoted, but he has a right to be considered for promotion and which takes into his ambit not only eligibility or suitability, but also the vacancy in relation to the quota for which it has been earmarked.

15. In rejoinder, Sri Khare, learned Senior Counsel for the writ petitioner submits that the chance for the writ petitioner for promotion would be foreclosed for time immemorial and further his candidature cannot be side-tracked in the manner, it has been done. He further submits that though the writ petitioner was an aspirant for the Principal or a Headmaster pursuant to a recruitment exercise, but since the selection has been put to naught, thus it would not wave his right not to claim consideration for promotion as Lecturer (Chemistry).

16. I have heard the arguments of the learned counsel for the parties and perused the records carefully.

17. Before delving into the tenability of the arguments of the rival parties, it would be apposite to scan the relevant statutory provisions, which would govern the field.

18. In exercise of the powers conferred under Section 35 of the Uttar Pradesh Secondary Education Service Selection Board Act 1982 (U.P. Act No.5 of 1982), the Rules by the name of Uttar Pradesh Secondary Service Selection Board Rules 1998 was framed.

19. Here in the present case, the controversy revolves around the recruitment on the post of teachers of Lecturer Grade. Clause (b) of Rule 10 provides that the teachers of Lecturer Grade are to be filled 50% by direct recruitment and 50% by promotion amongst substantively appointed teachers of Trained Graduate Grade. First proviso has also been appended according to which if in any year of recruitment, suitable eligible candidates are not available for recruitment by promotion, the posts may be filled by direct recruitment. Second proviso deals with the issue of fraction and rounding up. Then comes Rule 11 of the 1998 Rules, which provides for determination and notification of vacancy. Sub-Rule 1

of Rule 11 of the 1998 Rules provides that for the purposes of direct recruitment to the post of teacher, the management shall determine the number of vacancies in accordance with Sub-Section (1) of Section 10 and notify the vacancy through Inspector, in the Board, in the manner provided therein. Rule 12 of the 1998 Rules provides for direct recruitment, as whereas Rule 13 further provides for intimation of names of selected candidates. Rule 14 of the 1998 Rules provides for the procedure for recruitment by promotion. Sub-Rule (1) of Rule 14 provides where any vacancy is to be filled by promotion, all teachers working in trained graduate grade or certificate of training grade, if any, who possesses the qualification, prescribed for the post and have completed 5 years of continuous regular service, as such on the first day of year of recruitment shall be considered for promotion to the post of Lecturer.

20. The words employed in Rule 14 of the 1998 Rules “Where any vacancy is to be filled by promotion” “all teachers working in trained graduate grade or certificate of training grade, if any, who possesses the qualification” are of significance and importance. The said words so employed by the legislature in Rule 14 in 1998 Rules are clinching the issues raised in the writ petition. Here it is the stand of the Respondent Nos. 2 and 6, who happen to be the employer/ Committee of Management that a conscious decision has been taken that the post of Lecturer (Chemistry) is to be filled in through direct recruitment/ by mode of transfer. Once the Rule Making Authority itself has vested the Committee of Management/ employer with the power to determine the nature of the post as to whether it is under promotion or direct recruitment quota, then the writ petitioner cannot insist that he should be accorded promotion against a post, which has been earmarked for the direct recruitment. The natural corollary would be that a post which had fallen vacant under direct recruitment quota is to be filled through the mode of direct recruitment. Nevertheless, there happens to be a Policy decision of the State Government providing for transfers of an incumbent subject to the compliance of the relevant procedure prescribed therein being Regulation 55-61 of Chapter III of the U.P. Intermediate Education Act, 1921. The competence of the Committee of Management to determine the vacancy to be filled either by direct recruitment, promotion or by mode of transfer has not been questioned. The only grievance of the writ petitioner is that once he has attained eligibility, then he is entitled to be promoted irrespective of the fact as to whether the said vacancy falls within the promotion quota or the direct recruitment.

21. Notably, in the present case in hand, it is not disputed by the writ petitioner that the post of Lecturer (Chemistry) falls within the direct recruitment quota and the same became vacant on account of retirement of Sri Hiramani. It is also not disputed that under promotion quota, the post of Lecturer (Civics) fell vacant consequent to retirement of Sri Anwar Ali. Once the writ petitioner was not qualified to be promoted against the post earmarked for promotion on the post of Lecturer (Civics), then he cannot insist either the Committee of Management or the Educational Authorities to promote him on the post in question. Nevertheless, there is no provision pointed for the learned Senior Counsel for the writ petitioner under the relevant statute, which, as a matter of right, entitles the writ petitioner to stake its claim for according promotion against a post, which even otherwise earmarked under direct recruitment quota. In absence of any provision in the statutes, this Court is unable to subscribe to the contentions of the writ petitioner. At best the writ petitioner can claim a fundamental right for being considered for promotion, but the said right is not an unfettered right, however, the same is subject to the availability of the vacancies and the source through which the same is to be filled.

22. The Hon'ble Apex Court in the case of ***Ajay Kumar Shukla Vs. Arvind Kumar Rai, Civil Appeal (Defective) No. 5966 of 2021*** decided on 08.12.2021 has held that there is no fundamental right to promote, but an employee has only a right to be considered for promotion when it arises in accordance with the relevant Rules. In the said case, it was further held as under: -

"37. This Court, time and again, has laid emphasis on right to be considered for promotion to be a fundamental right, as was held by K. Ramaswamy, J., in the case of Director, Lift Irrigation Corporation Ltd. and Others vs. Pravat Kiran Mohanty and Others⁶ in paragraph 4 of the report which is reproduced below:

"4... There is no fundamental right to promotion, but an employee has only right to be considered for promotion, when it arises, in accordance with relevant rules. From this perspective in our view the conclusion of the High Court that the gradation list prepared by the corporation is in violation of the right of respondent/writ petitioner to equality enshrined under Article 14 read with Article 16 of the Constitution, and the respondent/writ petitioner was unjustly denied of the same is obviously unjustified."

38. A Constitution Bench in case of Ajit Singh vs. State of Punjab⁷, laying emphasis on Article 14 and Article 16(1) of the Constitution of India held that if a person who satisfies the eligibility and the criteria for promotion but still is not considered for promotion, then there will be clear violation of his/her's fundamental right. Jagannadha Rao, J. speaking for himself and

Anand, CJI, Venkataswami, Pattanaik, Kurdukar, JJ., observed the same as follows in paragraphs 21 and 22 and 27:

"21: Articles 14 and 16(1): is right to be considered for promotion a fundamental right

22: Article 14 and Article 16(1) are closely connected. They deal with individual rights of the person. Article 14 demands that the "State shall not deny to any person equality before the law or the equal protection of the laws". Article 16(1) issues a positive command that "there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State". It has been held repeatedly by this Court that clause (1) of Article 16 is a facet of Article 14 and that it takes its roots from Article 14. The said clause particularises the generality in Article 14 and identifies, in a constitutional sense "equality of opportunity in matters of employment and appointment to any office under the State. The word "employment" being wider, there is no dispute that it takes within its fold, the aspect of promotions to posts above the stage of initial level of recruitment. Article 16(1) provides to every employee otherwise eligible for promotion or who comes within the zone of consideration, a fundamental right to be "considered" for promotion. Equal opportunity here means the right to be "considered" for promotion. If a person satisfies the eligibility and zone criteria but is not considered for promotion, then there will be a clear infraction of his fundamental right to be "considered" for promotion, which is his personal right.

"Promotion based on equal opportunity and seniority attached to such promotion are facets of fundamental right under Article 16(1)

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27. In our opinion, the above view expressed in Ashok Kumar Gupta and followed in Jagdish Lal and other cases, if it is intended to lay down that the right guarantee to employees for being "considered" for promotion according to relevant rules of recruitment by promotion (i.e. whether on the basis of seniority or merit) is only a statutory right and not a fundamental right, we cannot accept the proposition. We have already stated earlier that the right to equal opportunity in the matter of promotion in the sense of a right to be "considered" for promotion is indeed a fundamental right guaranteed under Article 16(1) and this has never been doubted in any other case before Ashok Kumar Gupta right from 1950."

39. This Court in Major General H.M. Singh, VSM vs. UOI and Another 8 , again reiterated the legal position, i.e. right to be considered for promotion as a fundamental right enshrined under Article 14 and Article 16 of the Constitution of India. The relevant extract from paragraph 28 is reproduced below:

"28. The question that arises for consideration is, whether the non-consideration of the claim of the appellant would violate the fundamental rights vested in him under Articles 14 and 16 of the Constitution of India. The answer to the aforesaid query would be in the affirmative, subject to the condition that the respondents were desirous of filling the vacancy of Lieutenant-General, when it became available on 1-1-2007. The factual position depicted in the counter-affidavit reveals that the respondents

indeed were desirous of filling up the said vacancy. In the above view of the matter, if the appellant was the senior most serving Major-General eligible for consideration (which he undoubtedly was), he most definitely had the fundamental right of being considered against the above vacancy, and also the fundamental right of being promoted if he was adjudged suitable. Failing which, he would be deprived of his fundamental right of equality before the law, and equal protection of the laws, extended by Article 14 of the Constitution of India. We are of the view that it was in order to extend the benefit of the fundamental right enshrined under Article 14 of the Constitution of India, that he was allowed extension in service on two occasions, firstly by the Presidential Order dated 29-2-2008, and thereafter, by a further Presidential Order dated 30-5-2008. The above orders clearly depict that the aforesaid extension in service was granted to the appellant for a period of three months (and for a further period of one month), or till the approval of the ACC, whichever is earlier. By the aforesaid orders, the respondents desired to treat the appellant justly, so as to enable him to acquire the honour of promotion to the rank of Lieutenant-General (in case the recommendation made in his favour by the Selection Board was approved by the Appointments Committee of the Cabinet, stands affirmed). The action of the authorities in depriving the appellant due consideration for promotion to the rank of the Lieutenant-General would have resulted in violation of his fundamental right under Article 14 of the Constitution of India. Such an action at the hands of the respondents would unquestionably have been arbitrary."

23. The reliance placed by the learned Senior Counsel for the writ petitioner upon the judgment in the case of **Special Appeal (Defective) No. 442 of 2016, Smt. Sadhna Vs. State of U.P.**, decided on 30.05.2017, is out of context, as it does not deal with the said issues, which have been raised in the present petition and thus, the said judgment is not applicable in the facts of the case.

24. Accordingly, in the firm opinion of the Court the writ petitioner is not entitled to any relief as sought for in the writ petition.

25. Resultantly, the writ petition fails and is **dismissed**.

Order Date :- 30.10.2023

N.S.Rathour