

Chief Justice's Court

Case :- SPECIAL APPEAL No. - 234 of 2023

Appellant :- Rakesh Kumar

Respondent :- State Of U.P. Thru. Chief Secy. Civil Secrett.
U.P. Lko. And Others

Counsel for Appellant :- Yadukul Shiromani Srivastava
(Y.S.Lohit), Ankit Kumar Chaudhary, Ram Achal Gupta

Counsel for Respondent :- C.S.C., Raj Kumar Upadhyaya
(R.K.Upadhyaya)

Hon'ble Pritinker Diwaker, Chief Justice

Hon'ble Rajan Roy, J.

Heard Shri Yadukul Shiromani Srivastava, learned Counsel for the appellant, Shri V.P. Nag, learned State Counsel appearing for opposite parties no. 1 to 5 and Shri R.K. Upadhyaya, learned Counsel for the opposite party no. 5.

By means of this special appeal, the petitioner has challenged the order dated 11.04.2023 passed in Writ A No. 22921 of 2019.

The facts of the case in brief are that the appellant had been appointed on the post of Economics Statistical Inspector by way of direct recruitment through U.P. Public Services Commission vide appointment letter dated 06.01.2020, by giving the benefit of reservation as a Scheduled Caste as, at that time Gond was a Scheduled Caste. Subsequently, as claimed by the appellant's Counsel, by virtue of Scheduled Castes and Scheduled Tribes Order (Amendment) Act, 2002, Gond tribe was included in Scheduled Tribes in the State of U.P. for 13 districts including Varanasi and as the appellant belonged to district Varanasi, therefore, he was to be treated as Scheduled Tribe. Accordingly, the appellant gave an application for changing his category from that of Scheduled Caste to Scheduled Tribe on 06.08.2004 and when the seniority list was issued on 20.08.2004, the appellant was shown as Scheduled Tribe employee. The appellant was thereafter promoted to the next higher post of Additional Statistical & Economics Officer on recommendation of the DPC vide order dated 30.01.2006. Thereafter, subsequently the appellant was promoted to the next higher post of Block Development Officer vide promotion order dated 08.07.2010. It is the claim of the appellant that even this promotion was not made under Section 3(7) of the U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 (herein after referred as

Act, 1994) nor any benefit under Rule 8(A) of the U.P. Government Servants Determination of Seniority Rules, 1991 (herein after referred as Rules, 1991) was given.

The contention of the appellant's Counsel was that the aforementioned promotions were made under Section 3(2) of the Act, 1994 and not under Section 3(7) of the said Act, 1994. It is also the appellant's Counsel contention that this promotion was made when Rule 8(A) of the Rules, 1991 was not in force.

The fact of the matter is that the appellant-petitioner was reverted from the promotional post to his substantive post in view of the decision of Hon'ble the Supreme Court reported in **(2012) 7 SCC 1; U.P. Power Corporation Vs. Rajesh Kumar**; by which the judgment of a Division Bench of the Allahabad High Court at Lucknow Section 3(7) of the Act, 1994 and Rule 8(A) of the Rules, 1991 were declared ultra vires under Article 16(4-A) of the Constitution of India, with certain modifications. The reversion of the appellant belonging to the Scheduled Tribe was on account of the aforesaid judgment and consequential Government Orders issued in this regard. The appellant herein challenged the orders by which the appellant had been reverted as aforesaid, as also the order by which his representation in this regard had been rejected. These orders were dated 05.04.2019 and 09.09.2015. The challenge was made by means of aforesaid writ petition which was dismissed on 11.04.2023.

On a perusal of the judgment of the writ Court what comes out is that vide order dated 16.02.2023, the writ Court directed the State Counsel to produce the minutes of the DPC meeting dated 30.01.2006 and 08.07.2010 whereby the petitioner was promoted to the post of Additional Economics & Statistical Officer and then Block Development Officer respectively. In pursuance to the said direction, the Standing Counsel produced the minutes of the meeting dated 02.06.2010 before the writ Court which demonstrated that the petitioner was promoted with the aid of Section 3(7) of the Act, 1994 and Rule 8(A) of the Rules, 1991 which in fact had been struck down as ultra vires. The writ Court dismissed the writ petition of the appellant on this very ground, as, his reversion to Additional Economics & Statistical Officer vide order dated 09.09.2015 was in pursuance to the aforesaid judgment of Hon'ble the Supreme Court, as, the appellant herein had been promoted to the post of Block Development Officer by giving the benefit of reservation and on this very ground, the appellant's representation was also rejected on 05.04.2019. The writ Court found that the appellant-petitioner was placed at Serial No. 1411 of the seniority list whereas the person senior to him belonging to the unreserved category was placed at Serial No. 837. Accordingly, it opined

that he could not be promoted to the post of Block Development Officer in regular course except by giving the benefit of reservation. It accordingly rejected the contention of the appellant-petitioner's Counsel that the promotion was against backlog vacancy. It further recorded that in the minutes of the DPC meeting dated 02.06.2010, there were only 73 vacant posts for promotion out of which 57 posts were for the unreserved category, 15 were for Scheduled Caste and 1 for Scheduled Tribe and that the petitioner was promoted against one post reserved for Scheduled Tribe. It accordingly dismissed the writ petition.

Having heard the learned Counsel for the appellant and having perused the record, we find the contention of the appellant's Counsel that the promotion was under Section 3(2) and not 3(7) is absolutely misconceived. Section 3(2) of the Act, 1994 pertains to direct recruitment backlog vacancies and not to promotion. This is evident from a conjoint reading of Section 3(1) and 3(2) of the Act, 1994. The contention is therefore rejected. Secondly, the contention that Rule 8(A) was not in force on 08.07.2010 when he was promoted is irrelevant. Reservation in promotion in the services under the State of U.P. was provided as per the Government Orders which were in operation in terms of Section 3(7) of the Act, 1994. Based on such accelerated reservation based promotion, consequential seniority was also given. Rule 8(A) was a rule of seniority providing accelerated seniority based on accelerated reservation based promotion. The Division Bench of this Court at Lucknow in the case of **Rajesh Kumar vs. U.P. Power Corporation Ltd. & Ors., Writ Petition No. 146 (S/B) of 2009** and connected matters; declared the said provisions ultra vires. The said judgment was upheld by Hon'ble the Supreme Court with certain modifications in the case of Rajesh Kumar (Supra). Relevant extract of the said judgment is quoted herein below:-

"86. We are of the firm view that a fresh exercise in the light of the judgment of the Constitution Bench in M. Nagaraj is a categorical imperative. The stand that the constitutional amendments have facilitated the reservation in promotion with consequential seniority and have given the stamp of approval to the Act and the Rules cannot withstand close scrutiny inasmuch as the Constitution Bench has clearly opined that Articles 16(4-A) and 16(4-B) are enabling provisions and the State can make provisions for the same on certain basis or foundation. The conditions precedent have not been satisfied. No exercise has been undertaken. What has been argued with vehemence is that it is not necessary as the concept of reservation in promotion was already in vogue. We are unable to accept the said submission, for when the provisions of the Constitution are treated valid with certain conditions or riders, it becomes incumbent on the part of the State to appreciate and apply the test so that its amendments can be tested and withstand the scrutiny on parameters laid down therein.

87. In the ultimate analysis, we conclude and hold that Section 3(7) of the 1994 Act and Rule 8-A of the 2007 Rules are ultra vires as they run counter to the dictum in M. Nagaraj. Any promotion that has been given on the dictum of Indra Sawhney and without the aid or assistance of Section 3(7) and Rule 8-A shall remain undisturbed.

88. The appeals arising out of the final judgment of the Division Bench at Allahabad are allowed and the impugned order is set aside. The appeals arising out of the judgment from the Division Bench at Lucknow are affirmed subject to the modification as stated hereinabove. In view of the aforesaid, all other appeals are disposed of. The parties shall bear their respective costs."

It is apparent that Section 3(7) of the Act, 1994 having been declared ultra vires and appellants promotion not having been made on the dictum of Indra Sawhney and his promotion having been given as per Section 3(7), the very promotion of the appellant to the post of Block Development Officer on the basis of reservation was rendered void and as a consequence of the said decision, Government Orders were issued in pursuance to which he was reverted, as is mentioned in the order dated 09.09.2015, therefore, this contention regarding Rule 8(A) is completely irrelevant, as, once the reservation based promotion to the Block Development Officer was rendered void, then the only consequence which was to take place was reversion of the appellant-petitioner, therefore, the impugned orders did not suffer from any error and the writ Court has rightly dismissed the writ petition. The appellant's Counsel could not demonstrate before the Court that the promotions were not based on reservation, though bald averments in this regard were made in the writ petition, which as already stated hereinabove were belied from the records perused by the writ Court.

In view of the above, the appeal lacks merit and is accordingly ***dismissed.***

Order Date :- 16.5.2023
Lokesh Kumar

[Rajan Roy, J.] [Pritinker Diwaker, C.J.]