

Dr. Mithilesh Kumar Vs. State of U.P. and Others

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Court : Allahabad

Decided On : Jan-10-2014

Judge : Rajesh Kumar & Mahesh Chandra Tripathi

Appeal No. : WRIT - A No. 25561 of 2011

Appellant : Dr. Mithilesh Kumar

Respondent : State of U.P. and Others

Judgement :

M.C. Tripathi, J.

1. Heard Sri R.K. Ojha, learned Senior Advocate appearing on behalf of the petitioner, Sri Pankaj Rai, learned Additional Chief Standing Counsel appearing on behalf of the State and Smt. Archana Singh, Advocate appearing on behalf of the Commission. Parties have exchanged their affidavits. With the consent of the learned counsel for the parties, the writ petition is being finally disposed of at the admission stage itself.

2. The present writ petition has been filed by the petitioner with following prayers:-

(i) Issue a writ, order or direction in the nature of mandamus directing the respondent No. 3 to consider the claim of the petitioner against the vacant seats for the O.B.C. Category.

(ii) Issue a writ, order or direction in the nature of mandamus directing the respondent No. 3 to decide the representation of the petitioner dated 31.03.2011 (Annexure No. 5 of the writ petition).

(iii) Issue any other writ, order or direction, which this Hon'ble Court may deem fit and proper in the circumstances of the case.

(iv) Award cost of the petition to the petitioner.

3. Briefly stated facts giving rise to the present writ petition are that the petitioner possesses the essential qualification for the appointment as a Lecturer in Degree/Post Graduate College in the State of U.P. The U.P. Higher Education Service Commission (hereinafter referred to as 'Commission') had issued an Advertisement No. 41, which was published in the newspaper on 07.02.2007 which invited applications for recruitment of Teachers in various subjects. The said Advertisement has been brought on record through Annexure No. 1 to the writ petition and as per the schedule, the Commission vide letter dated 01.09.2008 had informed to the petitioner that the interview would take place on 22.09.2008. As per the schedule, the result was declared on 08.10.2008 on the Notice Board of the U.P. Higher Education Commission and the petitioner's name finds mention at serial No. 10 of the overall waiting list and further it reflect from the record that the petitioner was placed at serial No. 1 in the waiting list of the O.B.C. Category. The said result dated 08.10.2010 has also been brought on record through Annexure No. 3 to the writ petition.

4. The claim as set out by the petitioner by means of the present writ petition is that one selected candidate of the O.B.C. Category, namely, Sri Abhinav Kumar, whose name figures at serial No. 58 of the select list, refused to join, as he got appointment as Lecturer in the Lucknow University, Lucknow and immediately after non-joining of Sri Abhinav Kumar, O.B.C. Candidate, the petitioner had made representation before the Director, Higher Education, requesting that on account of nonjoining of Sri Abhinav Kumar, the post is still vacant under the O.B.C. Category and he must be given offer in place of Sri Abhinav Kumar specially on the ground that he had been placed at serial No. 1 in the O.B.C. Category of the waiting list. It had also been brought on record that two more candidates of the

O.B.C. Category, namely, Dr. Shahla Rehmani, whose name is at serial No. 38 and Dr. Archana Maurya, whose name finds mention at serial No. 55 of the select list also not joined as Dr. Shahla Rehmani got appointment as Lecturer in the Allahabad University and again on this fact, the petitioner had also made representation dated 31.03.2011 requesting the Director, Higher Education to give offer for joining the post in the aforementioned facts and circumstances. The petitioner, specially in paragraph No. 16 of the writ petition had also made a categorical averment that one Dr. Rohit Kumar Singh, who was also in the waiting list had been offered appointment and another Dr. Priyanka Singh subject of economics, have also been given offer of appointment and petitioner has been discriminated in spite of the fact that he was placed at serial No. 1 of the waiting list of the O.B. C. category in the subject of Chemistry, still he has not been offered appointment inspite of the fact that 3 posts in the O.B.C. Category fell vacant. It has also been submitted by the learned counsel for the petitioner that the placement could be continued from the waiting list specially under the background that the Advertisement No. 41 was still in existence and there was no legal impediment in this regard.

5. In the present matter, initially counter affidavit had been filed on behalf of respondent Nos. 1 and 3 and the relevant portion of the counter affidavit is being quoted below.

œParagraph No. 3.....(b) That selection and appointment of teachers in the non-govt. Degree and P.G. Colleges in the State is made on regular and substantive basis in accordance with the provisions of the U.P. Higher Education Service Commission Act, 1980. Section 13 (1) of the said Act provides for selection of the candidates. Section 13 (2) states that such a list continues to be valid till the receipt of the new list. Section 13 (4) speaks of the process to fill the vacancies that arise because of death, resignation or otherwise. Expression otherwise has been duly explained to be closely connected with the words, death and resignation. It is submitted that Legislature has not used the term 'waiting list' or 'wait list' candidates, though the said Act empowers the Commission to select number of candidates more than that of the advertised vacancies. Select list is to be prepared in order of the merit of the selectees.

(c) That, petitioner's case is that he is at serial No. 10 in the overall list of wait list of candidates and at No. 1 in the O.B.C. waiting list candidates. He stakes his claim to be appointed against the posts which have been fallen to be vacant by resignation of the duly selected O.B.C. candidates or by not joining of them. Dr. Abhinav Kumar, an O.B.C. selectee was recommended to be appointed in M.M. Town Degree College, Ballia. He did not join there. And the said vacancy was filled by another O.B.C. candidate Sri Akhilesh Prasad of the same list. Dr. Archana Maurya, an O.B.C. selectee was recommended to be appointed in the D.S.N. College, Unnao and she has duly joined her duties there. Another O.B.C. Selectee Dr. Shahla Rehmani was given placement order to join in Pt. Jawahar Lal Nehru P.G. College, Banda. Officially any information regarding her joining is not available. And any other selectee's name has not been forwarded therefor.

(d) That vacancies arising out of resignation, death or otherwise are to be filled up in accordance with Section 13 (4) of the Commission Act, 1980. It includes the vacancy that remains as such because of not joining of the duly selected and recommended candidates for the relevant post. It is very common that waiting list candidates could be considered only when any candidate from the main select list is not available. Secondly, select lists are prepared on merit basis. A candidate who happens to be at No. 10 in the select list is by implication inferior in quality to those nine who are above him. Object of the Act is to select the most qualified and best suited persons as teachers subject to constitutional mandates. It is submitted that petitioner has not got any vested right to be appointed simply because his name happens to be on No. 10 in the wait list. It appears that wait list has not been prepared following reservation laws. It means and implies that vacancies arising under Section 13 (4) are to be filled primarily from the main list candidates, as the case may be. And, only when main list appropriate candidates are not available resort could be taken to wait list. Wait list has not been prepared on the basis of quota basis. It means and implies that wait list candidates are to be given opportunity on the basis of their order of merit. In this situation petitioner's claim has no basis and legally unfounded and untenable. Therefore, writ petition is devoid of merit and substance and deserves to be dismissed?.

At the time of hearing of the matter, this Court on account of some factual error in the averment made in the counter affidavit had passed detailed order dated 19.11.2013. The same is quoted below:-

œFrom the reading of the counter affidavit, we find that there is some factual error in the averment made in the clause-C of Paragraph No. 3. Sri Akhilesh Prasad has been stated as OBC candidate while he appears to be S.C. candidate. We also find some contradiction in the averment in Clause-B.

Let learned Standing Counsel may file another affidavit to explain this discrepancy and urther to explain that if OBC candidate does not join, why the OBC candidate in the waiting list may not be adjusted. In the rejoinder affidavit, it is stated that one Sri Rohit Kumar Singh of general category who finds place at serial No. 2 of the waiting list had been adjusted against the OBC category. Under which circumstance, he has been adjusted?

He prays for and is granted ten days' time to file supplementary counter affidavit. Learned counsel for both the parties are directed to provide authorities on the subject also.

List on 10.12.2013 as unlisted for further hearing.

Learned Additional Government Advocate is directed to assist the Court on the next date fixed?.

7. In response to the order dated 19.11.2013, the answering respondent had filed the supplementary counter affidavit and rectified the factual incorrect averment by means of Paragraph Nos. 3 and 4, the same is quoted below:-

œ3. That the present supplementary affidavit is being filed in pursuance of the Hon'ble Courts order dated 19.11.2013 where by it has been directed to:-

a. rectify error in Clause C of paragraph No. 3 of the Counter Affidavit.

b. to explain contradiction in the averment in Clause-B of paragraph 3 of the Counter Affidavit and,

c. To explain that if OBC candidates does not join, why the OBC candidate in the waiting list may not be adjusted.

4. That it is humbly submitted that in Clause C of paragraph No. 3 of the Counter Affidavit it has been mentioned, by mistake, that Sri Akhilesh Prasad is an OBC category candidate. It is most humbly submitted that Sri Akhilesh Prasad in S.C. category candidate. It is prayed that mistake occurred in the abovementioned clause of the Counter Affidavit while stating the fact may kindly be condoned?.

8. Sri Pankaj Rai, learned Additional Chief Standing Counsel while opposing the writ petition has vehemently contended that the select list, which is filed as Annexure No. 3 to the writ petition, is being prepared strictly as per the merit list and also tried to convince this Court that if the O.B.C. candidate does not join or resign, the same is to be filled up by the candidates in the waiting list irrespective of General, O.B.C. or S.C./S.T. specially on the ground that the said wait list had been prepared on the basis of merit and in fact if the O.B.C. resigns or does not join, then the same could not be filled up by the O.B.C. category whereas the petitioner finds his place at serial No. 10 in the waiting list and as claim set out by the petitioner, if he is being placed on account of non joining of O.B.C. Candidate, then it would be double reservation. He had also submitted that once the selection have been made by the Higher Education Service Commission after making reservation, a combined select list in order of merit is prepared and placement order is strictly made in accordance with the combined list. In that case, it may not be possible to fill the vacancy caused in the main list due to non joining of a candidate of a particular category by the candidate of same category of the wait list. He has also relied his submission on the basis of Writ Petition No. 39758 of 2001 (Alka Rani Gupta (Kumari) Vs. Director of Education (Higher), Directorate of Higher Education, U.P., Allahabad and another) (2003) 2 UPLBEC 1152.

9. We have heard the matter at length and submissions made by the learned counsel for the parties and perused the record. As per the selected list of candidates which is being filed as Annexure No. 3 to the writ petition clearly demonstrate that there were 75 posts of Chemistry out which, 37 for general, 21 for O.B.C. And 16 for S.C. And 1 for S.T. and in the said select list Dr. Shahla

Rehmani, Dr. Archana Maurya and Dr. Abhinav Kumar placed at serial Nos. 38, 55, 58 respectively under the O.B.C. category and Sri Akhilesh Prasad was placed at serial No. 64 under the S.C. Category, they were all selected candidates. After 75 selected candidates, 19 other persons were shown in the waiting list and from serial Nos. 1 to 9 they were all belonging to general category and from serial Nos. 10 to 15 have been shown under the O.B.C. Category and serial Nos. 16 to 19 have been shown under the S.C. category. It is relevant to mention that the selection and appointment of teachers in the non-govt. Degree and P.G. Colleges in the State of U.P. are being made on regular and substantive basis in accordance with the provisions of the U.P. Higher Education Service Commission Act, 1980.

10. In the present matter, just to appreciate the real controversy, the relevant provisions specially contained in Chapter-III of the U.P. Higher Education Service Commission Act, 1980 (hereinafter referred as Act) specially Section 12 is being quoted below:-

"12. Procedure for appointment of teachers.- (1) Every appointment as a teacher of any College shall be made by the management in accordance with the provisions of this Act and every appointment made in contravention thereof shall be void.

Provided that a permanent teacher of an affiliated or associated college, who has been appointed in accordance with the provisions of this Act and has completed five years' service as such and who wishes to be transferred to any other college, may be transferred in the manner prescribed by rules from one college to another, only when the respective management of the colleges concerned give their consents in writing.

(1-a) Notwithstanding any decree or order of a Court, a teacher who has been appointed as such by transfer from one college to another in pursuance of the Government Orders No.429 Shiksha Mantri/Sattar-6-98-15-95, dated 17.8.1998 or No.393/Sattar-1- 99-15(6)-99, dated 28.10.1999 shall be deemed to have been validly appointed as if the provisions the principal Act as amended by the Uttar Pradesh Higher Education Services Commission (Second Amendment) Act, 2004

were in force at all material times.

(2) The management shall intimate the existing vacancies and the vacancies, likely to be caused during the course of the ensuing academic year, to the Director at such time and in such manner, as may be prescribed.

Explanation.--The expression "academic year" means the period of 12 months commencing on July 1.

(3) The Director shall notify to the Commission at such time and in such manner as may be prescribed a subject-wise consolidated list of vacancies intimated to him from all Colleges.

(4) The manner of selection of persons for appointment to the posts of teachers of a College shall be such, as may be determined by regulations:

Provided that the Commission shall with a view to inviting talented persons give wide publicity in the State to the vacancies notified to it under sub-section (3):

Provided further that the candidates shall be required to indicate their order of preference for the various Colleges, vacancies wherein have been advertised?.

11. Every appointment as teacher of any college shall be made by the management in accordance with the provisions of this Act and every appointment made in contravention thereof shall be void. The relevant portion of the Section 13 of the Act which is relevant to adjudicate the present controversy is reproduced herein under:-

œ13. Recommendation of Commission.- (1) The Commission, shall as soon as possible, after the notification of vacancies to it under sub-section (3) of Section 12, hold interview (with or without written examination) of the Candidates and send to the Director a list recommending such number of names of candidates found most suitable in each subject as may be, so far as practicable, twenty five per cent more than the number of vacancies in that subject. Such names shall be arranged in order of merit shown in the interview, or in the examination and interview if an examination is held.

(2) The list sent by the Commission shall be valid till the receipt of a new list from the Commission.

(3) The Director shall having due regard in the prescribed manner, to the order of preference if any indicated by the candidates under the second proviso to sub-section (4) of Section 12, intimate to the management the name of a candidate from the list referred to in sub-section (2) of Section 12.

(4) Where a vacancy occurs due to death, resignation or otherwise during the period of validity of the list referred to in sub-section (2) and such vacancy has not been notified to the Commission under sub-section (3) of Section 12, the Director may intimate to the management the name of a candidate from such list for appointment in such vacancy.

(5) Notwithstanding anything in the preceding provisions, where to abolition of any post of teacher in any college, services of the person substantively appointed to such post is terminated the State Government may make suitable order for his appointment in a suitable vacancy, whether notified under subsection (3) of Section 12 or not in any other college, and thereupon the Director shall intimate to the management accordingly.

(6) The Director shall send a copy of the intimation made under sub-section (3) or sub-section (4) or sub-section (5) to the candidate concerned?.

12. Bare perusal of the Section 13 (1) of the Act would clearly demonstrate that the Commission after taking written examination and interview of the candidates shall send a list to the Director recommending such number of names of candidates found most suitable in each subject as may be, so far as practicable, twenty five per cent more than the number of vacancies in that subject. Such names shall be arranged in order of merit shown in the interview, or in the examination and interview if an examination is held. Section 13 (2) also provides that the list sent by the Commission shall be valid till the receipt of a new list from the Commission.

13. It is further noteworthy to highlight the provisions of Section 13 (4) which provides that where a vacancy occurs due to death, resignation or otherwise during the period of validity of the list referred to in sub-section (2) and such vacancy has not been notified to the Commission under sub-section (3) of Section 12, the Director may intimate to the management the name of a candidate from such list for appointment in such vacancy. These provisions would clearly demonstrate that as per the provision of Section 13 (1) there is categorical provision of making waiting list which could only be twenty five per cent more than the number of vacancies in that subject and further as per the provisions of Section 13 (2) the said list would be valid till the receipt of a new list from the Commission and further on account of death, resignation or otherwise if the list continues to be valid, the Director may intimate to the management the name of a candidate from such list for appointment in such vacancy.

14. In the present matter also, the Commission consciously prepared the list of 75 selected candidates as per the provisions of Section 13 of the Act and simultaneously had also provided the wait list of total 19 persons. Bare perusal of the said list, it is amply clear that in response to the 37 general category, the commission had recommended 37 persons and additional 9 names in the wait list of general category and against 21 O.B.C. candidates, the Commission had recommended 21 O.B.C. candidates and additional had recommended 6 O.B.C. candidates in the wait list and as per 16 S.C. candidates the Commission had recommended 16 S.C. candidates and additional had recommended 4 S.C. candidates in the wait list. The said waiting list is fully in consonance with the provisions of Section 13(1) which provides 25 percent additional wait list candidates in each category and the Commission was conscious enough that in case of any eventuality or on account of death or resignation or otherwise, the Director may recommend the names of candidates from the waiting list to the Management. It is no doubt that the waiting list is being prepared on the basis of merit but on account of vacancy occurred due to non joining of Sri Abhinav Kumar who is placed at serial No. 58 under the O.B.C. Category. The petitioner had every right to replace Sri Abhinav Kumar under the O.B.C. category. It is absolutely wrong to say that under the O.B.C. Category where they claim to have 21 posts, the general candidate could be given placement.

15. We have perused and considered the judgment cited by Sri Pankaj Rai, learned Additional Chief Standing Counsel, the said judgment pertains to the placement and is fully distinguishable and would not be applicable in the present facts and circumstances of the case. The matter relates to basically for placement of a candidate selected by the Commission and the same had been decided by the Division Bench keeping in mind once the Commission has prepared the result in making reservation, therefore, list namely, of the general candidates, O.B.C., S.C. must be complied and common combined selected list in order of merit must be prepared and the placement order must be made strictly in the order of combined merit list. But in the present matter, the matter does not deal to any placement order. Therefore, the same is not applicable.

16. Therefore, on the ground of admitted facts, there were admittedly 3 posts of Lecturer for O.B.C., fell vacant and admittedly the petitioner who is in the waiting list at serial No. 1 under the O.B.C. category had every right to get placement on account of non joining of Dr. Abhinav Kumar, Dr. Shahla Rehmani and Dr. Archana Maurya. Further from the provisions of Section 13 (2) of the Act, waiting list of the candidates which had been prepared is still valid specially the vacancy had not been still advertised and the waiting list prepared by the Commission is still in existence. Hence, the writ petition is liable to allowed. In the result, the writ petition is allowed with a direction to the Director of Education (Higher), Allahabad to provide the placement to the petitioner within a period of three weeks from the date of submission of certified copy of this order.

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