

याचिका संख्या-39758 / 2001

कु० अलका रानी गुप्ता बनाम् निदेशक उच्च शिक्षा व अन्य

आदेश दिनांक-27.02.2003

मुख्य बिन्दु- आसन व्यवस्था में आरक्षण लागू न करने के सम्बन्ध में

Civil Misc. Writ Petition No. 39758 of 2001
 Km. Alka Rani Gupta Petitioner
 Versus
 Director of Education (Higher) and another

Hon'ble M. Katju, J.

Hon'ble Prakash Krishna, J.

Delivered by Hon'ble M. Katju, J.)

This writ petition and connected Writ Petition No. 23044 of 2000 and Writ Petition No. 35822 of 2001 are being disposed off by a common judgment.

The controversy in this case has arisen in a large number of similar cases, and is also likely to arise in a large number of cases in future also. Hence we are giving this detailed judgment so that the present controversy as well as other controversies of similar nature may be set at rest.

We are concerned with the placement of teachers selected under the U.P. Higher Education Service Commission Act 1980 (hereinafter referred to as the Act) in degree and postgraduate colleges in U.P. The procedure of appointment of the teachers is given in Section 12 of the said Act. Under the Act, appointments of teachers, which would include Principals vide Section 2(g) of the Act read with Section 2(18) of the U.P. State Universities Act, involves two stages. In the first stage, selection is done by the U.P. Higher Education Service Commission. Thereafter, in the second stage, placement in a particular college is done by the Director of Higher Education, U.P.

The controversy which has arisen in these cases and which arises often in similar other cases, and which we propose to resolve in this case is about the manner of placement of candidates who have been selected by the Commission.

In this connection Section 13 of the Act states as follows:

"13. 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 (1) for being

appointed in the vacancy intimated under 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 suitable vacancy whether notified under sub-section (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 sub section (3) or sub-section (4) or sub-section (5) to the candidate concerned."

Regulation 5 of the U.P. Higher Education Service Commission (Procedure for Selection of Teachers) Regulations, 1983 states as follows: -

"5. Notification of vacancies, submission of application and indication of preference- The Commission shall advertise the vacancies in the three issues of at least three newspapers. The Commission shall send a copy of the advertisement to the Director and may, if it considers proper, also send a copy thereof to the District Inspector of Schools and to the Colleges. Such advertisement shall, inter alia, indicate the total number of vacancies as also the number of vacancies in women's colleges and other colleges separately, the names of the college(s) and where they are situate and shall require the candidates to apply in prescribed form and to give if he so desires, the choice of not more than five colleges in order of preference. Where a candidate wishes to be considered for a particular college or colleges only, and for no other, he shall mention the fact in his application:

Provided that where the number of colleges is large or for any other reason the Commission considers it inexpedient, it may, instead of mentioning the names and particulars of the colleges in the advertisement, send the copy thereof to the colleges and to the District Inspector of Schools and mention in the advertisement that particulars of the colleges may be seen in the office of the Commission, the office of District Inspector of Schools or in the Colleges:

Provided also that the Commission shall not be bound by the choice given by the candidate and may recommend him for

appointment in a college other than indicated by him."

Regulation 7(3) states as follows:

"(3) The posts of the Principal of degree colleges in the higher grade shall be offered in order of merit with due regard to the preference given by the candidates and the posts in the lower grade shall similarly be offered to the candidates standing next in order of merit."

(4) The procedure mentioned in sub regulations (2) and (3) shall, mutates mutandis, be followed in respect of the posts of teachers other than principal"

We have quoted the above provisions in detail so as to state the legal position in this connection. Ordinarily, the Commission advertises a large number of posts of Principals/teachers in a single advertisement after receiving the requisitions from the colleges concerned through the Director about the vacancies. The selections by the Commission are not in respect of any particular institution. It is the Director of Higher Education who under Section 13(3) read with Regulations 5 and 7 makes the placement in accordance with these provisions. Section 3(3) of the Act makes it clear that the Director shall have due regard in the prescribed manner to the order of preference, if any, indicated by the candidates under the proviso to 12(4) of the Act and he shall then indicate to the College concerned the names of the selected candidates for giving appointment. The management of the college has to comply with the directions of the Director and it has no choice in the matter. The manner which has been prescribed is given in Regulation 5 and Regulation 7(3). Every candidate can name not more than five colleges in order of preference as mentioned in Regulation 5(1). The Second proviso to Regulation 5 specifies that the Commission shall not be bound by the choice of the candidates and may recommend choice for appointment in the other college indicated by him.

We clarify that the Commission's recommendations regarding placement of selected candidates for a particular college are not binding on the Director. The Director is bound by the mandate of Section 13(3) of the Act which states that he must have due regard to the order of the preference indicated by the candidates. Under Regulation 7(3) read with Section 13(3) the placement is to be done in order of merit with due regard to the preference given by the candidates. Normally, after the interview/examination the Commission awards marks to each of the candidates, and the select list is prepared in accordance with merit as per the marks obtained by the candidates.

Thus the legal position which emerges from the above provisions in the Act and Regulations is as follows:

- (1) Where a large number of candidates are selected for various institutions by the Commission, the Commission has to prepare a select list in accordance with the merit determined by the Commission.
- (2) The candidate who is on the top of the select list will be given his first preference;

- (3) Then the candidate who is at serial position no.2 in the select list will be considered by the Director. If his first choice has already been filled by the candidate at the top of the select list then this candidate will be given his second choice, otherwise he will get his first choice.
- (4) Then we come to the candidate who is on the third position in the select list. If the choice of his first preference has not been already allotted to a candidate higher than him in the select list he will be given that institution, otherwise he will be given his second choice, unless that too has been allotted to the candidate above him, in which case he will be allotted the institution of his third choice. In this way the Director will do the placement.

In our opinion this is the only logical and reasonable method for making placement of a candidate selected by the Commission, and if this is not followed there is bound to be chaos, corruption, arbitrariness, casteism etc. There shall be only one exception to the above method and procedure for making placement, namely that if there is an adhoc Principal already working in the College, or Lecturer working in the said College who has been selected by the Commission for the post of Principal, then the adhoc Principal/Lecturer should be given placement in the same College as Principal provided that the management has no objection.

We are laying down ^{the} exception in view of ^{the} division bench decision of this Court in Dr. Prakash Chandra Srivastava v. Director of Higher Education, Allahabad and another 2003(1) AWC 142. In paragraph 10 of the said decision it has been observed that problems and disputes arise between the Principal and the management when the management is forced to issue an appointment order in favour of a person against its wishes. Thrusting an unwilling Principal on an unwilling management is not in the interest of the institution. This is the only exception to the method and procedure of placement, which we have laid down in this judgment.

No doubt this procedure will sometimes, work hardship, but as is said "Dura lex sed lex" which means "the law is hard, but it is the law."

In our opinion where there is a conflict between the law and equity it is the law which is to prevail, vide West U.P. Sugar Mills Association V. State of U.P., 1997 (1) UPLBEC 540. Equity cannot override the law. Equity can supplement the law but cannot override it, vide Smt. Rampati Jaiswal V. State of U.P., 1996 A.W.C. 1373. In M. Ramappa V. M. Rajappa, AIR 1963 S.C. 1633 the Supreme Court observed "What is administered in Courts is justice according to law, and considerations of fair play and equity, however important they may be, must yield to clear and express provisions of the law."

In the present bunch of cases the petitioner in Writ Petition No. 39758 of 2000 Km. Alka Rani is higher in the select list than the petitioners in the other two connected writ petitions. Hence it is her preference that should be seen first.

Since her first preference is for U.P.College, Varanasi obviously she has to be given appointment in that college.

Learned counsel for the petitioner in the two connected writ petitions have submitted that there will be hardship to those petitioners, since their husbands are employed in Varanasi. The petitioner in Writ Petition no.23044 of 2000 Smt. Anupam Shahi has been given placement in S.B.Degree College, Badalpur, Jaunpur while her husband is working as Lecturer in Harish Chandra Degree College, Varanasi.

In our opinion we cannot take hardship into consideration for the reasons already indicated above. Jaunpur district is adjacent to district Varanasi and hence hardship will not so much to Smt. Anupam Shahi. As regards the third petitioner Smt. Renuka Singh in Writ Petition No. 23044 of 2000 she has been allotted the Degree College Dubey Chapra, district Ballia whereas her husband is Surgeon in Varanasi. For the reasons given above we cannot take hardship into consideration because the law is very clear in this matter as indicated by us above.

We may also mention that under the U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backwards Classes) Act, 1994 (U.P.Act No.4 of 1994) reservations are to be given in educational institutions receiving grant in aid vide Section 2(e)(iv) read with section 3 of the said Act. Hence reservations have to made on posts of teachers in degree and P.G.Colleges as laid down in U.P.Act No.4 of 1994.However, in our opinion a candidate selected against a reserved category cannot thereafter claim a second benefit of reservation in the matter of placement also.

In our opinion once the selections have been done by the Higher Education Service Commission after making reservations thereafter all the lists, namely the list of general category candidates, backward class candidates and Scheduled Caste candidates must be combined and a common combined select list in order of merit must be prepared and placement order be made strictly in accordance with the combined list.

The writ petitions are disposed off with the above observations.

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Sd/- M. K. S. S.
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