

AFR

Neutral Citation No. - 2024:AHC:197843-DB

Court No. - 29

Case :- SPECIAL APPEAL No. - 693 of 2024

Appellant :- Sudhanshu Aggarwal

Respondent :- State Of U.P. And 2 Others

Counsel for Appellant :- Usha Kiran

Counsel for Respondent :- C.S.C.,Gagan Mehta

Hon'ble Vivek Kumar Birla,J.

Hon'ble Dr. Yogendra Kumar Srivastava,J.

[Per : Dr Yogendra Kumar Srivastava, J.]

1. Heard Ms. Usha Kiran, learned counsel for the appellant-petitioner, Sri Manoj Kumar Mishra, learned Standing Counsel appearing for the State-respondent(s) and Sri Gagan Mehta, learned counsel for the respondent No. 2, the Uttar Pradesh Higher Education Service Commission.

2. The present intra-court appeal is directed against the judgment and order dated 23.07.2024 passed by a learned Single Judge of the Court in Writ - A No. - 8718 of 2024 (Sudhanshu Aggarwal Vs. State of U.P. and 2 Others).

3. The facts of the case as emerging from the records are that the writ petition had been filed seeking a direction to the opposite parties to give him a choice for appointment as Assistant Professor, Mathematics at Hindu College Moradabad or K.G.K.P.G. College Moradabad instead of Satish Chandra College, Ballia and permit him to join on any of the aforesaid two posts.

4. The selection process, pursuant to an advertisement, bearing Advertisement No. 50 of 2021, was initiated for making selections for

appointment to the posts of Assistant Professors in non-government aided colleges, which included 96 posts in the subject of Mathematics. The petitioner, upon declaration of results, was placed at Serial No. 8 of the waiting list, however various writ petitions were filed challenging the selection process. One of such writ petitions, being Writ - A No. 13104 of 2023 [Sanjay Prakash Dubey Vs. State of U.P. and 3 Others] was decided by means of a judgment and order dated 06.10.2023, remanding the matter to the Director of Higher Education and providing that the petitioner therein may prefer a comprehensive representation before him. In compliance of the order passed by this Court, the waiting list was corrected and the petitioner was placed at Serial No.28. The petitioner was directed to submit his preference of colleges for his appointment. The petitioner submitted his preferential list of 30 colleges, in which Satish Chandra College, Ballia was mentioned at Serial No.28. The Director Education (Higher Education) wrote a letter dated 15.03.2024 to the Secretary/Manager/Authorized Controller, Satish Chandra College, Ballia, recommending the name of the petitioner, for being appointed on a post of Assistant Professor in that college.

5. Insofar as the claim of the petitioner for a choice of appointment as Assistant Professor, Mathematics at Hindu College Moradabad or K.G.K.P.G. College Moradabad instead of Satish Chandra College, Ballia is concerned, learned Single Judge has taken note of paragraphs 9 and 10 of the supplementary affidavit of the petitioner wherein a claim based on equity was raised. However, since none of the aforesaid two colleges had been mentioned in the preferential list submitted by the petitioner, it was held that no illegality had been committed by the authorities in giving appointment to the petitioner in a college specified at serial no.28 of the preferential list submitted by the petitioner.

6. Learned Single Judge has also taken note of the fact that nothing had been placed on record to indicate that any person standing lower in the merit has been given appointment in any of the colleges above serial

no.28 in the preferential list of the petitioner in which, he had been offered appointment.

7. Upon the appeal being taken up, on 29.8.2024, before a coordinate Bench of this Court, it was sought to be argued by learned counsel for the appellant-petitioner that one Km Arti, who had been placed at serial no.31 of the revised select list, had been granted placement at an institution, which had not been notified for recruitment. It was also urged that in case, there is any vacancy, at this stage, the appellant-petitioner would seek the relief for being granted placement at any of the institutions, which had been specified at serial nos.1 to 27 of the preferential list submitted by the petitioner.

8. Taking note of the aforesaid submissions, counsel for the State-respondents was directed to obtain instructions.

9. In response to the aforesaid, learned counsel for the State-respondent has placed reliance upon paragraphs 9 and 10 of the instructions dated 05.10.2024, stated to have been received from the Director of Education (Higher Education), UP, which read as follows:

"9. चयनित अभ्यर्थी आरती जो कि प्रथम चयन सूची में क्रम सं० 28 पर स्थित थी, को आनलाइन आसन व्यवस्था के तहत उदित नारायण पी०जी० कालेज पडरौना, कुशीनगर आवंटित किया गया, जो विज्ञापन 50 में विज्ञापित था। याची का यह कथन की आरती के आसन-व्यवस्था अविज्ञापित पद पर की गई है, पूर्णतः असत्य है। आयोग द्वारा प्रेषित दूसरी चयन सूची में आरती क्रम सं० 31 पर स्थित है। मा० उच्च न्यायालय इलाहाबाद द्वारा स्पेशल अपील डिफेक्टिव संख्या-127/2023 में पारित आदेश दिनांक 12.04.2023 के अनुपालन में प्रथम चयन सूची के अभ्यर्थियों (आरती सहित) की आसन-व्यवस्था निरस्त नहीं की जा सकी जिससे उनको आवंटित महाविद्यालय पूर्ववत है।

10. इस कार्यालय में गणित विषय के परिणाम सूची के क्रम संख्या 1 से 27 तक के चयनित अभ्यर्थियों द्वारा कार्यभार ग्रहण करने के उपरान्त पद रिक्त की सूचना शून्य है।"

10. Based on the aforesaid written instructions, counsel for the State-respondents has submitted that the other candidate, namely, Arti, who was at serial number 28 of the first select list, had been granted placement at Udit Narayan PG College, Padrauna, Kushinagar through an on-line

procedure which had been adopted. It is stated that the aforesaid institution was duly notified in terms of Advertisement No.50 pursuant to which, these selections had been held, and therefore, the contention that the said candidate had been granted placement at an institution which had not been advertised, is absolutely incorrect.

11. In regard to the claim, which is now being sought to be made by the petitioner for being granted placement at any of the institution specified at serial number 1 to 27 of the preferential list submitted by him, counsel for the State-respondents, by referring to the instructions, has submitted that no vacancy exists at any of the said institutions.

12. Heard learned counsel for the parties and perused the record.

13. The procedure of appointment of teachers in the colleges which are affiliated / associated to the universities governed by U.P. State Universities Act, 1973¹ is to be as per the terms prescribed under Section 12 of the U.P. Higher Education Service Commission Act, 1980². The recommendation of the Commission is to be made as per Section 13 of the said Act. For ease of reference, the aforesaid provisions are being extracted 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 consent 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 Siksha Mantri/Sattar-6-98-15-95, dated 17.8.1998 or No. 393/Sattar-1-199-15(6)-99, dated 28.10.1999 shall be deemed to have been validly appointed as if the provisions of the principal Act as amended by the Uttar Pradesh Higher

1 Act, 1973

2 Act, 1980

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.

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 written examination and interview 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, whereto 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 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 under sub-section (3) or sub-section (4) or sub-section (5) to the candidate concerned.”

(emphasis supplied)

14. The procedure for selection of teachers is to be as per the terms of the **Uttar Pradesh Higher Education Services Commission (Procedure for Selection of Teachers) Regulations, 1983**³. The manner of notification of vacancies, submission of applications, and indication of preference is to be as per Regulation 5 of the aforesaid Regulations, which is being reproduced below:

“5. Notification of vacancies, submission of application and indication of preference.—The Commission shall advertise the vacancies in 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 thereto 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, in its discretion, recommend him for appointment in a college other than indicated by him.”

(emphasis supplied)

15. The aforestated statutory provisions and the Regulations framed thereunder indicate that the process for appointment of teachers to the Colleges, which are affiliated/associated to the Universities governed by the Act, 1973, is initiated by the Management intimating the existing

³ Regulations, 1983

vacancies and the vacancies likely to be caused during the course of the ensuing academic year, to the Director of Education (Higher Education) in the prescribed manner. The Director shall, then notify to the U P Higher Education Services 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. The manner of notification of vacancies, submission of applications, and indication of preference is to be as per the terms of Regulation 5 of the Regulations, 1983, which provides that the Commission shall advertise the vacancies in the newspapers and shall send copies thereof to the Director and also to the District Inspector of Schools and to the Colleges, if it considers proper. The 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 colleges and where they situate and shall require the candidates to apply in prescribed form and to give, if he so desires, the choice of 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. However, as per the second proviso of the aforesaid Regulation 5, the Commission shall not be bound by the choice given by the candidate and may, in its discretion, recommend him for appointment in a college other than indicated by him.

16. Section 13 of the Act, 1980 provides that the Commission shall, after notification of vacancies to it, hold written examination and interview of the candidates and send to the Director a list recommending candidates found suitable in each subject, the names being arranged in order of merit. The Director, as per sub-section (3) of Section 13 of the Act, 1980, having due regard to the order of preference, if any indicated by the candidates, intimate the Management the name of the candidate from the select list, for being appointed in the vacancy intimated by the institution.

17. The question as to whether entry of the name of a candidate in the select list or the existence of vacancies would give him a right to be appointed and whether a mandamus can be sought for issuance of such direction under Article 226 of the Constitution, was examined in the case of **State of Haryana vs. Subash Chander Marwaha**⁴, and it was held that mere entry in the select list or existence of vacancies would not give a legal right to a candidate to be appointed or to seek entitlement for a mandamus in regard to the same. The relevant observations made in the judgment are as follows:-

“7. In the present case it appears that about 40 candidates had passed the examination with the minimum score of 45%. Their names were published in the Government Gazette as required by Rule 10(1) already referred to. It is not disputed that the mere entry in this list of the name of candidate does not give him the right to be appointed. The advertisement that there are 15 vacancies to be filled does not also give him a right to be appointed. It may happen that the Government for financial or other administrative reasons may not fill up any vacancies. In such a case the candidates, even the first in the list, will not have a right to be appointed. The list is merely to help the State Government in making the appointments showing which candidates have the minimum qualifications under the Rules. The stage for selection for appointment comes thereafter, and it is not disputed that under the Constitution it is the State Government alone which can make the appointments.

... ..

10. One fails to see how the existence of vacancies gives a legal right to a candidate to be selected for appointment. The examination is for the purpose of showing that a particular candidate is eligible for consideration. The selection for appointment comes later. It is open then to the Government to decide how many appointments shall be made. The mere fact that a candidate's name appears in the list will not entitle him to a mandamus that he be appointed. Indeed, if the State Government while making the selection for appointment had departed from the ranking given in the list, there would have been a legitimate grievance on the ground that the State Government had departed from the rules in this respect.”

4 (1974) 3 SCC 220

18. In the Constitution Bench decision in **Shankarsan Dash Vs. Union of India**⁵, it was authoritatively laid down that a candidate included in the merit list has no indefeasible right to be appointed even if vacancies exist. It was stated as under:-

“7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in *State of Haryana vs. Subhash Chander Marwaha and others*, [1974] 1 SCR 165; *Miss Neelima Shangla vs. State of Haryana and others*, [1986] 4 SCC 268 and *Jitendra Kumar and Others v. State of Punjab and Others*, [1985] 1 SCR 899.

19. In a somewhat similar set of facts, where candidates selected for appointment to the Indian Administrative Service, sought to assert a right to be allocated to a cadre of choice or to their home State, the Supreme Court in the case of **Union of India and others Vs. Rajiv Yadav, IAS and others**⁶, held that a selected candidate has a right to be considered for appointment but he has no such right to be allocated to a cadre of his choice. It was observed as follows:-

“6. We may examine the question from another angle. A selected candidate has a right to be considered for appointment to the IAS but he has no such right to be allocated to a cadre of his choice or to his home-State. Allotment of cadre is an incidence of service. A member of an All India Service bears liability to serve in any part of

⁵ (1991) 3 SCC 47

⁶ (1994) 6 SCC 38

India. The principles of allocation as contained in Clause 2 of the letter dated May 31, 1985, wherein preference is given to a scheduled caste/scheduled tribe candidate for allocation to his home State, do not provide for reservation of appointments or posts and as such the question of testing the said principles on the anvil of Article 16(4) of the Constitution of India does not arise. It is common knowledge that the scheduled caste/scheduled tribe candidates are normally much below in the merit list and as such are not in a position to compete with the general category candidates. The "Roster System" ensures equitable treatment to both the general candidates and the reserved categories. In compliance with the statutory requirement and in terms of Article 16(4) of the Constitution of India 221/2% reserved category candidates are recruited to the IAS. Having done so both the categories are to be justly distributed amongst the States, But for the "Roster System" it would be difficult rather impossible for the scheduled castes/scheduled tribes candidates to be allocated to their home States. The principles of cadre allocation, thus, ensure equitable distribution of reserved candidates amongst all the cadres."

20. A similar view has been taken in **Union of India and another Vs. A. Shainamol, IAS and another**⁷, wherein it has been reiterated that allocation of a cadre is not a matter of right and that a selected candidate has a right to be considered for appointment but has no right to be allocated a cadre of his choice or to his home State.

21. The law laid down in the decision in **Shankarsan Dash** (supra) and also in the earlier decision in **Subash Chander Marwaha** (supra), that mere placement in the select list gives no indefeasible right to appointment, has been affirmed in a recent Constitution Bench decision in **Tej Prakash Pathak & Others vs, Rajasthan High Court and others**⁸.

22. The Regulations, 1983 provide for the procedure for selection of teachers in question in the present case. Regulation 5 thereof, requires the candidates to give a choice of colleges which have been advertised, in order of preference, in their applications. The second proviso to the aforesaid regulation, however makes it clear that the Commission would not be bound by the choice given by the candidate and may, in its

⁷ (2021) 20 SCC 267

⁸ 2024 SCC Online SC 3184

discretion, recommend him for appointment in a college other than indicated by him.

23. The option to the candidates to indicate their order of preference in the colleges, wherein vacancies have been advertised is also specified in the second proviso to sub-section (4) of Section 12 of the Act, 1980 and as per sub-section (3) of Section 13 of the said Act, upon receiving the recommendation of the Commission, the Director shall, having due regard in the prescribed manner to the order of preference, if any indicated by the candidates, intimate to the Management the names of candidates from the select list for being appointed against the vacancies which have been intimated.

24. It is legally settled that the mere inclusion of the name of a candidate in the select list or the existence in the vacancies would not give a right to be appointed and also no mandamus can be issued in exercise of powers under Article 226 of the Constitution in regard to the same. It is also a settled position in law that successful candidates in a recruitment process do not require a indefeasible right to appointment.

25. The statutory scheme which governs the procedure for appointment of teachers, which is in question before us, gives an option to candidates to indicate choice of colleges in order of preference in their applications; however, the Commission which is to make recommendations consequent to recruitment process is not to be bound by the choice given by candidates, and may, in its discretion make a recommendation for appointment in the college other than indicated by him. It is, therefore, clear that the option given to a candidate with regard to the colleges wherein he seeks appointment by his choice, would not in any manner be binding upon the Commission which is to make recommendation for appointment on the basis of the selection process .

26. It may therefore, be stated as a proposition of law that a candidate who has been selected in a recruitment process and whose name finds

mention in the select list cannot claim any indefeasible or vested right to be allocated a post of his choice.

27. In the facts of the present case, the petitioner was placed in the waiting list of the selected candidates and has been recommended for appointment on a post at Satish Chandra College, Ballia which was mentioned at serial no. 28 of the preferential list of 30 colleges submitted by the petitioner in his application. There being no dispute that two colleges namely, Hindu College, Moradabad and K.G.K.P.G. College, Moradabad where the petitioner has sought to raise a claim for being appointed were not mentioned in the preferential list submitted by him, no mistake can be said to have been committed by the concerned authority in giving him appointment to a college specified at serial no. 28 of the preferential list submitted by the petitioner.

28. As regards the alternative relief which was sought by the petitioner at the stage of the present special appeal, for being granted placement at any of the colleges which had been specified at serial nos. 1 to 27 of the preferential list, in view of the factual position borne out from the instructions placed by the learned counsel for the State-respondents that no vacancy exist at any of the said institutions, no direction can be issued in favour of the petitioner in this respect also.

29. We may also take note of the finding given by the learned Single Judge in the judgment under appeal that nothing has been placed on record to indicate that any person standing lower in the merit has been given appointment in any of the colleges mentioned in the preferential list of the petitioner above serial no. 28 where the petitioner has been offered appointment. The conclusion drawn thereafter that no illegality had been committed in offering appointment to the petitioner at a college specified at serial no. 28 of the preferential list submitted by the petitioner himself, in our opinion, therefore, cannot be faulted with.

30. Learned counsel for the appellant has not been able to point out any material error or illegality in the order passed by the learned Single Judge, which may persuade us to take a different view in the matter.

31. The appeal lacks merit and is, accordingly, **dismissed**.

Order Date :- 17.12.2024

Faridul/RKK