

State Of U.P.& Ors vs Mahesh Narain Etc on 6 March, 2013

Author: Gyan Sudha Misra

Bench: Gyan Sudha Misra, T.S. Thakur

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 2208-2209 OF 2013
(Arising out of SLP (Civil) Nos. 7441-7442/2008)

State of U.P. & Ors.

...Appellants

Versus

Mahesh Narain Etc.

...Respondents

J U D G M E N T

GYAN SUDHA MISRA, J.

Leave granted.

2. The appellant-State of Uttar Pradesh has preferred these appeals against the common judgment and order dated 5.9.2007 passed in two writ petitions bearing Nos. 1049(S/B)/2007 and 1040(S/B)/2007 whereby the Division Bench of the High Court of Allahabad, Lucknow Bench, Lucknow was pleased to dismiss both the writ petitions filed by the appellant/State of U.P. herein.

3. The aforesaid two writ petitions were filed by the appellant/State of U.P. represented by the Department of Forensic Science and the Department of Home assailing the judgment and order of the State Public Services Tribunal, Lucknow (for short 'the Tribunal') and seeking a writ in the nature of certiorari for quashing the judgment and order dated 10.4.2007 passed by the Tribunal whereby the Tribunal was pleased to direct the State of U.P. to consider the case of the respondents for promotion on the post of Assistant Director and grant them all consequential benefits if found suitable. The High Court vide its impugned judgment and order dated 5.9.2007 was pleased to dismiss both the writ petitions preferred by the State of U.P. after recording a finding that the Rules of U.P. Forensic Science Laboratories Technical Officers' Service (First Amendment) Rules 1990 dated 15.9.1990 which were published in the U.P. Government Gazette on 20.10.1990 will be deemed to be enforced from the date when they were duly published in the U.P. Government Gazette and not from the date when the rules were prepared and passed by the Government. As a

consequence of this finding, it was held by the High Court as also the Tribunal that the Respondent/claimant-officials were duly eligible and qualified for consideration of their claim for promotion on the posts of Assistant Director Forensic Science as they had acquired the requisite years of experience for promotion by the time the rules were published in the gazette.

4. The facts of the case insofar as it is relevant for determining the controversy between the contesting parties indicate that the respondent No. 1 was initially appointed as Junior Chemical Assistant in the Forensic Science Laboratory in the year 1968. The nomenclature of the said post of Junior Chemical Assistant was subsequently changed to Scientific Assistant. The respondent No.1 was promoted to the post of Senior Chemical Assistant in the year 1973 and was further promoted as Scientific Officer on 16.9.1985 and in compliance of the promotion order he joined on the said post on 20.9.1985. The said promotion order was issued with a condition that the order of promotion would be effective for a period of one year or until the service rules were published. The State Government thereafter published the U.P. Forensic Science Laboratories Technical Officers Service Rules 1987 (Shortly referred to as the Rules). Rule 5 of the said rules laid down that 75% posts would be filled through direct recruitment and the remaining 25% posts would be filled by promotion from amongst the permanent scientific officers having 5 years of experience. Besides this, the proviso to the said rule 5 laid down that where permanent scientific officers are not available, such temporary and officiating personnel may also be considered for promotion to the said post as may be permanent on the next lower post. There were 15 posts of Assistant Directors in the Department which were sanctioned by the State when the Rules of 1987 came into force. Rules of 1987 were subsequently amended by U.P. Forensic Science Laboratories Technical Officers Service (First Amendment) Rules 1990 which was published in the U.P. Government Gazette dated 20.10.1990. In the meantime, the Respondents had already acquired 5 years of experience on the next lower post due to which they had become eligible for promotion to the post of Assistant Director Forensic Science.

5. But in pursuance to the Rules of 1990, the State Government notified 11 vacancies for direct recruitment through a notification published in the Employment News dated 5.1.1995. Since the promotion was not granted to the respondents on the post of Assistant Director even after five years of service against four vacancies which were available to be filled under promotion quota, the respondents filed claim petitions under the U.P. Public Service Tribunal Act (1976).

The tribunal allowed the claim petition and directed the authorities to consider the case of the respondents for promotion against the said quota on the post of Assistant Director and to promote them with all consequential benefits including pay and allowances if found suitable.

6. The department Forensic Science of U.P. felt aggrieved by the order of the tribunal and hence filed two writ petitions which were dismissed by the High Court vide the impugned judgment and order dated 5.9.2007 recording a finding that the U.P. Forensic Science Laboratories Technical Officers Service (First Amendment) Rules 1990 dated 15.9.1990 were published in the U.P. Government Gazette on 20.10.1990 and they will be deemed to be enforced from the date when they were duly published in the U.P. Government Gazette and not from the date when the rules were prepared by the State Government as a result of which the Respondents were eligible to be

considered for promotion as they had the requisite experience.

7. The appellant/State of U.P. felt aggrieved with the judgment and order passed by the High Court as also the tribunal and hence has filed these two special leave petitions which arises out of the common judgment and order of the High Court under challenge wherein the principal ground of challenge is that the respondents were not eligible for promotion to the post of Assistant Director under Rules 5 and 16 of the 1987 Rules as they were not possessing five years of experience nor were functioning on permanent post of Scientific Officers. Thus, they were not eligible in terms of Rule 5 and 16 of the 1987 Rules which provided for recruitment to 25% of vacancies to the post of Assistant Director found amongst the permanent scientific officers with five years experience. It was stated that the respondents were promoted to the post of Scientific Officer purely on ad hoc basis on 16.9.1985 and were thereafter promoted on the said post on permanent basis only on 20.3.1989 but the Rules of 1987 were amended on 15.9.1990, whereby all the posts of Assistant Director were to be filled by direct recruitment. In these circumstances, it was submitted that the respondents could not be deemed to have had five years experience to their credit on the permanent post of Scientific Officer as required by Rule 5 of the 1987 Rules so as to be eligible for consideration of promotion on the post of Assistant Director.

8. In response to a show cause notice which was issued to the respondents by this Court, it was contended in sum and substance that the respondents were duly qualified to be promoted as they had already put in five years of service on the next lower post of Scientific Officer to which they were promoted and were, therefore, rightly held eligible to be considered for promotion to the post of Assistant Director. Arguments were also advanced to the effect that the respondents had already completed five years of service in terms of Rule 5 of the 1987 Rules itself which were applicable on the Respondents. It was further elaborated that in view of Rule 5 of the 1987 Rules, the respondents were entitled for consideration for promotion to the posts of Assistant Directors against the quota of 25% of the vacancies reserved for departmental candidates which were to be filled in by the candidates who were already discharging duties in the department since the amendment of 1990 laying down to fill all the post of Assistant Directors by direct recruitment came into effect on 20.10.1990 by which time the promotion of the Respondent on the post of Scientific Officer already stood confirmed so as to be eligible for consideration of promotion for the post of Assistant Director under the unamended Rules of 1987 and thus would not be affected by the Amended Rules of 1990 laying down to fill all the posts by direct recruitment.

9. In order to ascertain the correctness of the orders passed by the High Court as also the Tribunal, we have carefully examined the contesting claims of the parties. In the process, we noticed that the respondents were initially promoted to the post of Senior Chemical Assistant in the year 1973 and were further promoted as Scientific Officer on 16.9.1985 which they joined on 20.9.1985. It is no doubt true that this promotion order indicated that the promotion was to remain effective only for a period of one year or until the rules of 1987 were published but thereafter when the Rules of 1987 were finally published, it provided that 25% post of the total posts of promotion were to be filled in from amongst the permanent Scientific Officers having experience of five years of service. Hence if the five years of service is counted from the date of initial promotion until publication of amended Rules of 1990, the respondents had already completed five years of service on the post of Scientific

Officer making them eligible for further promotion of Assistant Director under the 25% promotion quota to be filled by the departmental candidates possessing the required experience of five years. However, the appellant/State of U.P. contested all through that the experience of the Respondents would be counted not from the date when the rules were published in the Gazette but would be from the date when the rules were under preparation in view of which they did not possess the requisite experience of five years on the post of Scientific Officer.

10. We however have no hesitation in holding that this contention is fit to be rejected outright as the rules cannot be held to be made effective from the date of its preparation but will attain legal sanctity and hence capable of enforcement only when the rules are made effective and the date on which it is to be made effective would obviously be the date when the rules are published vide the gazette notification. In that view of the matter, we find no infirmity in the Respondents plea that they possessed the requisite experience of five years on the post of Scientific Officer as they had already put in five years of service from the publication of the amended Rules of 1990 and, therefore, they were rightly held eligible for consideration of promotion to the next post of Assistant Director. We are thus pleased to approve and uphold the view taken by the High Court on this count.

11. But even if we were to hold that the reasons assigned by the High Court in the impugned judgment suffered from some aberration since the respondents had joined on the post of Scientific Officer in the year 1989 due to which in 1990, they did not acquire the requisite experience, it cannot be overlooked that the respondents had been promoted on the post of Scientific Officers on 16.9.1985 on ad hoc basis which had to remain effective for a period of one year only but it had also ordered that the incumbent would be entitled to continue on the promoted post till the service rules of 1987 were published. Thus the respondents had a right to continue on the promoted posts when the Rules of 1987 were finally published and made effective in 1987 which earmarked that 25% of total posts were to be filled by promotion from amongst the permanent Scientific Officers having experience of five years of service and further added a proviso which laid down that:

“where permanent Scientific Officers are not available, such temporary and officiating personnel may also be considered for promotion to the said posts as may be permanent on the next lower post.” Rules of 1987 were amended thereafter in the year 1990 which was published in the U.P. Government Gazette dated 20.10.1990 laying down that the subsequent promotion would be made only by direct recruitment. But this amendment cannot be allowed to affect the respondents’ claim for promotion as a rule cannot work to the prejudice of an employee who was holding the post of his eligibility prior to the enactment and enforcement of the Amended Rules of 1990. Since the respondents were eligible and entitled to the promotion for the post of Scientific Officer in terms of the Rules of 1987, their experience could not have been ignored on the said post so as to deny them the benefit of consideration for the subsequent post of Assistant Director on the basis of Rules of 1990 which could be made effective for the vacancies which arose after 1990.

12. Learned counsel for the respondents in support of this position has also cited the authority of this Court in the matter of Nirmal Chandra Bhattacharjee & Ors. vs. Union of India & Ors. reported 1991 Supp. 2 SCC 363 wherein this Court observed as under:-

“No rule or order which is meant to benefit employees should normally be construed in such a manner as to work hardship and injustice specially when its operation is automatic and if any injustice arises then the primary duty of the courts is to resolve it in such a manner that it may avoid any loss to one without giving undue advantage to other”.

The Court further observed that the mistake or delay on the part of the department should not be permitted to recoil on the appellants, more so since, the restructuring order in the said case itself provided that vacancies existing on July 31, 1983 should be filled according to procedure which was in vogue before August 1, 1983. This Court therefore, restored the promotion order of the employees to which they were entitled prior to the change of service rules as it was held that the change of service rules cannot be made to the prejudice of an employee who was in service prior to the change. The Court further went on to hold that if the delay in promotion takes place at the instance of the employer, an employee cannot be made to suffer on account of intervening events.

13. The principle laid down in the aforesaid case aptly fits into the facts and circumstances of this case as the subsequent amendment of 1990 laying down to fill in all the posts of Assistant Director Forensic Science by direct recruitment could not have been applied in case of the respondents who were already holding the post of Scientific Officer and hence were eligible to the promoted quota of 25% posts of Assistant Director after completion of five years of service as Scientific Officers in terms of the Rules of 1987 and, therefore, their experience of five years on this post could not have been made to go waste on the ground that the amendment came into effect in 1990 making all the posts of Assistant Director to be filled in by direct recruitment. In support of this view, the counsel for the Respondents also relied on the decision of this Court in the matter of B.L. Gupta & Anr. vs. M.C.D. reported in (1998) 9 SCC 223 wherein this Court had held that any vacancy which arose after 1995 were to be filled up according to rules but the vacancies which arose prior to 1995 should have been filled up according to 1978 rules only.

14. As a consequence of the aforesaid analysis, we have no hesitation in holding that the High Court was right in taking the view that the respondents were eligible for promotion to the post of Assistant Director under the Rules of 1987 against 25 per cent quota to be filled in by promotion as they satisfied the conditions of five years of requisite experience on the post of Scientific Officer if the experience were to be counted from the date of publication of the Rules in the U.P. Government Gazette.

15. But besides the above, it cannot be overlooked that even if it were to be assumed that the respondents had not completed five years of experience on the post of Scientific Officer for any reason whatsoever making them ineligible for consideration of further promotion, they also had the

statutory protection and benefit of the proviso to the said Rule 5 which laid down that where permanent scientific officers were not available for absorption under the 25% quota, such temporary and officiating personnel were also to be considered for promotion to the said posts who were functioning on permanent basis on the next lower post. It is an admitted position that the respondents had already been confirmed on the next lower post when they were promoted to the post of Scientific Officers and as they were entitled to the benefit of the proviso which laid down that even the temporary scientific officers who are permanent on next below post may also be considered for the purpose of promotion, the Respondents had a right to be considered for promotion since they were continuing on the post of Scientific Officer and had completed five years even before the Amended Rules came into effect on 20.10.1990 which laid down that all post of Assistant Directors would be filled by direct recruitment. Thus, for this additional and sure shot reason as also for the reasons which have been assigned by the High Court, we find no infirmity in the orders of the High Court as also the Tribunal which had held in favour of the respondents directing the appellant/State of U.P. to consider their eligibility for promotion to the post of Assistant Director Forensic Science and grant them the consequential benefit if found eligible.

16. We thus, find no substance in these appeals filed by the appellant/State of U.P. and consequently dismiss them but in the circumstances without any order as to costs.

.....J. (T.S. Thakur)J. (Gyan Sudha Misra) New Delhi, March
06, 2013
