

Om Prakash Singh Yadav And Others vs State Of U.P. And Others on 2 February, 2018

Author: Sangeeta Chandra

Bench: Sangeeta Chandra

HIGH COURT OF JUDICATURE AT ALLAHABAD

AFR

Reserved on 7.9.2017

Delivered on 02.02.2018

Case :- WRIT - A No. - 22272 of 2012

Petitioner :- Om Prakash Singh Yadav And Others

Respondent :- State Of U.P. And Others

Counsel for Petitioner :- Alok Kumar Yadav, K.N. Yadav, Kashi Nath Singh Yadav

Counsel for Respondent :- C.S.C., A.K. Yadav, A. Khare, Akhilanand Mishra, Akhilesh Mishra, C.P.

Hon'ble Mrs. Sangeeta Chandra, J.

1. This writ petition has been filed by the petitioners against the U.P. Secondary Education Services Selection Board (herein after referred to as the Selection Board) and 14 other private respondents praying for a writ in the nature of certiorari for quashing the result dated 24.9.2011 published by the Selection Board, in pursuance of the selection held of Trained Graduate Teachers in so far it has selected respondent nos. 3 to 16. A further prayer has been made for issuance of a mandamus to the respondents to appoint the petitioners while placing them at suitable places in the merit list, after rectifying the result and shifting 14 persons of OBC male into the general category result and declaring the petitioners as selected in OBC male category and for grant of other consequential reliefs.

2. The facts relevant for the controversy are being stated in brief herein below;

The Selection Board issued an Advertisement No. 1 of 2005 to fill up 399 vacancies of teachers as TGT in the subject of Social Science in different recognised and aided High School and Intermediate Education Institutions on 17.9.2005. After results of the written examination was declared and before interviews took could take place, Dr. Ramesh Chand Pandey and some others preferred the Writ Petition No. 43013 of 2006. This Court allowed the said writ petition on 27.4.2007 (judgment is reported in 2007 (7) ADJ 281) and quashed the selection on the ground that written examination results were declared by using incorrect answer key. A direction was issued for the Selection Board to forward the question papers to a team of experts comprising of teachers of Allahabad University and after correct answers are obtained to re-evaluate the answer sheets of all candidates by itself. On the basis of rectified results / re-evaluated results, interview were to be held in the ratio prescribed under sub clause (6) of Rule 12 of the Selection Board Rules 1998, and in the interview, each member of the interview Board was to allocate marks to candidates concerned separately under each of the indices as provided under Rule 12(4) of the Selection Board Rules 1998.

3. The Selection Board got the answer sheets reevaluated and declared the results afresh inviting 620 candidates in the ratio of five each to one vacancy as against 128 vacancies. Since initially 399 vacancies had been advertised, some candidates again filed Writ Petitions apprehending that remaining vacancies had been filled up by resorting to newly added Rule 13 (5) to the Rules of 1998, and prayed for declaring Rule 13(5) of the Rules of 1998 as ultra vires. These candidates further sought a mandamus to the Selection Board to declare the results for all 399 vacancies and to complete the process of selection.

4. These writ petitions were considered together and the leading case Writ Petition No. 40377 of 2008 (Raja Ram Vs. State of U.P.) was decided on 30.11.2009. The Writ-Court allowed the writ petitions holding that the filling up of the advertised vacancies, subject matter of advertisement no. 1 of 2005; (a) by adjustment in exercise of power under Section 13(5) of the Selection Board Rules 1998 of candidates selected in pursuance of earlier advertisement; (b) by transfer of candidates from other institution against advertised vacancies; (c) by compassionate appointment; (d) by promotion and (e) by absorption of subject experts under Section 31(E); is patently illegal and in the teeth of provisions of the Act of 1982 and the Rules of 1998 framed thereunder.

5. The Writ-Court held that all such kind of adjustments / appointments against advertised vacancies of advertisement no. 1 of 2005 were illegal and it issued further directions for the Board to complete the process of selection in respect of all advertised vacancies except for 57 posts, which were found to have been wrongly advertised, within a period of four months by inviting necessary number of candidates, with reference to the merit in written examination and quality point marks, for interview and by declaring the final results within a period of two months thereafter.

6. This judgment and order dated 30.11.2009 in Writ Petition No. 40377 of 2008 was challenged in Special Appeal No. 146 of 2010 by the Selection Board and the Special Appeal was dismissed on 21.1.2011. After dismissal of Special Appeal No. 46 of 2010, the Selection Board declared the result again for 136 vacancies only as against 145 vacancies. Thus, the total results declared by the Selection Board were against 197 vacancies initially and then against 136 vacancies. For 9 vacancies, the results were not declared.

7. The petitioners herein had participated in the selection held in pursuance of advertisement no. 1 of 2005 and after obtaining information by filing applications under Right to Information Act, they have challenged the said results on the ground that in the first result declared against 197 vacancies, the cut off merit of general category male was 448.60 and for OBC males was 441.40. In the second result declared, the cut off merit for general category male came down to 442.33 and the cut off merit for OBC males came down to 439.00.

8. It is the case of the petitioners that had the results been declared for all 342 vacancies together, then those OBC male candidates who had obtained at-least 442.33 marks would have been declared selected under general category, thus making way for the petitioners and other similarly situated candidates of OBC to be adjusted under vertical reservation available for their category. Such adjustment would be in terms of sub Section (6) of Section 3 of the U.P Act No. 4 of 1994.

9. It has further been pointed out by the learned counsel for the petitioners that while publishing the second result, the Selection Board has declared result against 136 vacancies only, leaving out 9 vacancies meant for OBC category. The petitioners have prepared and filed a chart of 56 general category male candidates along with the marks obtained in written examination as well as interview and their total marks as well as marks obtained by OBC male candidates, who ought to have been declared selected against general category, having secured more aggregate marks than the last selected general category male i.e. 442.33 as Annexure nos. 7, 8 & 9 to the writ petition.

10. It is the contention of the learned counsel for the petitioners that candidates from general category, who had obtained lesser marks than candidates of OBC male category should stand replaced and thus ousted from the said selection. On the other hand, OBC male category candidates would have then been declared selected as against the seats which became vacant, due to upward shifting of OBC male category candidates into the general category.

11. It is the case of the petitioners that they represented to the Board on 2.8.2011 and again on 29.9.2011, but the Selection Board did not pay any heed and hence this writ petition has been filed praying for quashing of the results declared by the Selection Board with respect to some general category candidates, who have been arrayed as respondent nos. 3 to 16 who, according to the petitioners, have been benefited out of results being declared piecemeal by the Selection Board.

12. It is the contention of the petitioners that as a result of upward shifting of OBC male category candidates into general category list, further selections of equal number of OBC male category candidates would have been possible and the 14 general category candidates arrayed as respondent nos. 3 to 16 would have been ousted and the petitioners would have been inducted in the said select list.

13. The private respondents have filed their counter affidavit to the writ petition. In the counter affidavit of respondent nos. 5, 10 & 15 filed on 10.7.2012, it has been pointed out that respondent no. 5 has been appointed on 23.3.2012 at Karma Kshetra Inter College, Itawah and has been since working in the said institution. The respondent no. 10 has been appointed on 13.12.2012 in Jagdishwar Dayal Janta Inter College, Chibramau, Kannauj and respondent no. 15 has been

appointed on 4.3.2012 at Kisan National Inter College, Moradnagar, Ghaziabad. All the respondent nos. 5, 10 & 15 have altered their status to the detriment.

14. The respondent no. 5 had earlier been working as Shiksha Mitra of Prathmik Vidyalaya, District Azamgarh and had been selected for under going special BTC Training Course, 2007, but left it to join as Assistant Teacher at Karma Kshetra Inter College, Itawah; his wife was employed as warden at Kasturba Gandhi Awasiya Balika Vidyalaya, Bhati, District Ambedkar Nagar and for enabling the entire family to remain together, the respondent no.5's wife left her job at Ambedkar Nagar .

15. Similarly respondent no. 10 also did not participate in any subsequent selection on account of his appointment although he had been called for interview by the U.P. Secondary Education Services Selection Board for the post of Assistant Teacher in L.T. Grade for Social Science in pursuance to advertisement no. 1 of 2010 also. Similarly, the respondent no. 15 also did not participate in any subsequent selection on account of his appointment in pursuance of impugned results declared by the Selection Board.

16. It is the case of the respondents that when Writ Petition No. 40377 of 2008 was allowed on 30.11.2009, the Writ-Court did not issue any direction for revision of result which had already been declared. Also, the grievance of the petitioners could not be entertained by this Court after a lapse of 4 years from the date of declaration of the first result by the Selection Board. It has been stated that since the petitioners did not raise their grievance in the earlier round of litigation, they could not be heard now at this belated stage.

17. In the counter affidavit filed on behalf of the respondent nos. 11 & 13 by Sri Indra Raj Singh, it has been pointed out that the petitioners have stated in the writ petition that they had secured 438.60 marks whereas the last selected candidates in their category for appointment on the post of TGT Teachers in Social Science has been awarded 439.00 marks. Admittedly, the petitioners have lesser marks than the last selected candidate of their category, and therefore, they cannot claim any mandamus to be issued for their appointment.

18. In the counter affidavit filed on behalf of the respondent nos. 6 & 12 by Sri Rakesh Pandey, it has been pointed out that reservation in institutions is to be applied subject wise and colleges wise and there is no common service of L.T. Grade Teachers in the State of U.P., and thus vacancies which were the subject matter of advertisement no. 1 of 2005 cannot be clubbed together, and reservation calculated thereafter. If the claim of the petitioners is accepted, it could adversely affect other OBC candidates, who have already been appointed against reserved vacancies in their respective colleges and their appointments would have to be cancelled for accommodating these candidates against general vacancies on the basis of upward shifting due to their having obtained higher marks, which would in turn adversely affect their seniority. Similarly, candidates, who had already been appointed against unreserved vacancies would also be adversely affected as their services would be terminated, despite being otherwise satisfactory, and without any fault on their part.

19. Also, the respondent no. 6 in pursuance of the impugned results, had joined service at Chitragupt Inter College and did not apply in any subsequent selection and respondent no. 12 had

joined in Heera Lal Inter College, District Sant Kabir Nagar. The respondent no. 12 was called for interview for L.T. Grade Teacher in 2009-10 also, but he did not participate as he was already in service.

20. It has been argued on behalf of all private respondents that if this Court directs rectification of result, it would lead to undue hardship for such respondents. Even if the petitioners' case is accepted, they can be directed to be adjusted against 9 vacancies, which are still admittedly vacant for OBC male category candidates.

21. It is the case of the respondents that in view of the peculiar facts relating to selections held for private aided Educational Institution, such reservation has to be worked out against sanctioned strength of a particular college and vacancies advertised cannot be clubbed together for the purpose of determining reservation. The OBC candidates who had allegedly obtained marks equal to general category candidates cannot be adjusted against unreserved seats since selection is confined to particular reserved category of a particular institution.

22. Section 3(6) of the U.P. Act, 4 of 1994 cannot be strictly applied in case of the peculiar nature of selection held by the Selection Board for appointment of Teachers in recognised and aided Secondary Institutions.

23. In the rejoinder affidavit filed by the petitioners, the contents of the writ petition are reiterated and it has been emphasised that since OBC male category merit dropped from 441 to 439 and general male category merit dropped from 448 to 442, the candidates of OBC male category who had obtained more marks than 442.33 i.e. the marks obtained by last selected general male category candidate would have to be included in the general male category select list as per Section 3(6) of the U.P. Act No. 4 of 1994.

24. It is the case of the petitioners that although the selection was advertised on 17.9.2005 appointment letters were issued in March 2012, there was no delay in challenging the said results when the writ petition was filed in May 2012

25. It is the case of the petitioners that they had obtained 438.60 marks and their selection was denied by 0.06 marks and if the provision of Section 3(6) of the U.P. Act No. 4 of 1994 was applied correctly then 14 candidates selected as OBC male category would shift to the merit list prepared for the general male category. As a result of this, the OBC male category cut off would further be lowered, enabling the petitioners and similarly situated candidates to be adjusted in vacancies meant for OBC category candidates.

26. It has further been stated that since the results were declared only in 2012 for 136 vacancies by the Selection Board, the cause of action arose only in 2012 and there was no cause of action for the petitioners to approach this Court in the earlier round of litigation.

27. A short counter affidavit has been filed in this writ petition on 18.10.2016 on behalf of the respondent no. 2 - the Selection Board. The Selection Board's statement in the counter affidavit in

paragraphs 12, 13, 14 & 15 are being quoted herein below:-

"12. That it is relevant to mention here that as directed by the Hon'ble Court, in case of Raja Ram & others, the result of 197 vacancies were declared on 1.5.2009 and subsequently the result of 136 vacancies were declared after the judgment passed in Special Appeal No. 146 of 2010 dated 23.9.2011. Bare perusal of the results of 342 vacancies, one of the results was declared on 1.5.2009 and the second result was declared on 23.9.2011 just after the two years of declaration of the first result. It is therefore submitted that on account of the result being declared in two phases as directed by the Hon'ble Court, therefore due to inadvertence some anomaly has been created in declaration of the result. It is evident to mention here, that in the context of the writ petition, in case the fresh result of all 342 vacancies is prepared, 12 candidates of OBC category would be included having higher merit against the panel of general vacancies, resulting which 12 candidates of general category would be ousted and it is further submitted that as further modification of the result, 12 candidates would be included as selected candidate related to OBC category, who were out of ambit of select list. Thus after preparation of the fresh result, the cut-off for general category under O1 group would be 444.733 and for OBC it would be 438.600.

13. That since the petitioners have attained 438.600 as their merit, therefore their candidature may be considered as they will come within the zone of consideration.

14. That the petitioners have contended that 9 vacancies have not been filled up by Selection Board, therefore they may be accommodated against the said vacancies. In this regard, it is submitted that in case the Hon'ble Court directs for their accommodation against the said vacancies, the claim of the petitioners may be considered against the available vacancies.

16. That since the selected candidates, who were empanelled against the vacancies of 197 & 136, might have joined in year 2009 and 2011, therefore, instead of disturbing the candidature of such selected candidates, it is desirable by this Hon'ble Court to issue a writ of mandamus to the Selection Board to accommodate the petitioners against the available vacancies in the said advertisement."

28. At the time of argument, Sri A.K. Yadav brought to the notice of the Court a judgment rendered by the Supreme Court in Civil Appeal No. 10808 of 2017 decided by the Supreme Court on 28.3.2017. It has been contended that since the Supreme Court has clarified that the exercise of adjustment of selected candidates can be undertaken by the Service Selection Board with respect to those candidates who have already been selected, but could not be accommodated for want of vacancies and this Court has already in several similarly situated cases directed for adjustment of selected candidates on vacancies arising subsequently, which, although were not advertised in advertisement no. 1 of 2005, are still available for appointment of selected candidates; the same relief may be given to the petitioner also. Copies of such orders passed in several writ petitions by

this Court directing for adjustment of selected candidates have also been handed over to this Court.

29. These judgments are as follows:-

(i) Judgment and order dated 12.9.2012 in Writ-A No. 46490 of 2012 (Bauddh Priya Gautam Vs. State of U.P.)

(ii) Judgment and order dated 17.12.2012 in Writ-A No. 65636 of 2012 (Shashi Kant Vs. State of U.P.)

(iii) Judgment and order dated 2.9.2013 in Writ-A No. 45409 of 2013 (Pramod Kumar Bharati Vs. State of U.P. & others)

(iv) Judgment and order dated 16.10.2014 in Writ-A No. 54910 of 2010 (Sangeeta Vs. State of U.P.)

30. I have perused the orders passed by this Court, copies of which have been provided by Sri A.K. Yadav and I find that in all these cases the writ petitioners were selected and recommended for appointment as TGT in different subjects in different institutions, but could not be so appointed because of some reason or the other. Joining could not be ensured by the District Inspector of Schools despite recommendation made by the Selection Board. This Court directed the Selection Board to exercise its power under Rule 13(5) of the U.P. Secondary Education Service Selection Board Rules 1988 and make adjustment of such selected candidates against vacancies notified by the Management for other institutions.

31. This Court in a full Bench decision in the case of Prashant Kumar Katiyar Vs. State of U.P. had affirmed the decision rendered by the Hon'ble Single Judge in Raja Ram Vs. State of U.P. & others and in Special Appeal No. 146 of 2010 (U.P. Secondary Education Service Selection Board Vs. State of U.P. & others) and had observed as follows in paragraphs 80, 81, 82, 83 & 84.

"80. We now come to the last lap of this reference relating to the scope and intent of Rule 13(5) of the 1998 Rules. This aspect requires reference to the legal position that existed prior to the introduction of this rule on the statute w.e.f. 23.1.2007.

81. A learned single judge of this court in the case of Smt. Savita Gupta Vs. State 2004 (4) AWC 3119 held relying on a Government Order dated 12.3.2001 that a candidate selected against a particular advertisement could be adjusted any other vacancy that may have been requisitioned and intimated but not advertised. This view was overruled in the case of Satish Kumar Vs. State of U.P. and other reported in 2006 (7) AWC 7570 and it was held that neither a choice can be given nor such a vacancy can be offered which has not been advertised. It was ruled that executive instructions in the shape of a government order cannot amend or supersede statutory rules. This decision was rendered on 22.9.2006.

82. The State Government issued a G.O. on 19.6.2006 (prior to the decision in Satish Kumar's case) again authorising adjustments. This was done after an order was passed in the shape of a general mandamus in the case of Prem Prakash Vs. State writ petition no. 75421 of 2005 decided on 19.2.2006 that had noticed large scale maladjustments resulting in candidates selected by the Board being not appointed. Accordingly to remove these anomalies a mechanism of a committee was adopted to resolve such disputes. Directions were also issued to adhere to the directions dated 25.8.2005 in w.p. no. 46861 of 2005 (Satish Kumar Vs. State of U.P.). Taking shelter of these orders, and the G.O. dated 19.6.2006, the Board proceeded to finalise selections.

83. A large number of irregularities were alleged in the selection process against Advertisement No. 1 of 2005 to which a challenge was raised in the case of Dr. Ramesh Chandra Pandey Vs. State reported in 2007 (7) ADJ Pg. 218. The entire selections were quashed vide judgment dated 24.7.2007 with a direction to prepare a fresh merit on re-evaluation of the written examination and hold interview.

84. It is at this stage that reference has to be made to the introduction of Rule 13(5) in the 1998 Rules that was brought into force on 23.1.2007. This allowed adjustments against vacancies that are "notified" to the Board as would appear from the language of the Rule. It does not use the word advertised. Taking help of this rule, the Board proceeded to comply with the judgment dated 24.7.2007 in the case of Dr. Ramesh Chandra Pandey (supra) and made adjustments vis-a-vis the candidates who were left out from being appointed against the earlier advertisement No. 1 of 2004 against vacancies of advertisement no. 1 of 2005. On account of further adjustment of candidates appointed through other modes like absorption, transfer, promotion and compassionate appointments, the vacancies were either reduced or altered that gave rise to a fresh challenge to the select list and also to the scope of applicability of Rule 13(5) to make adjustments against unadvertised posts. A learned single judge in the case of Raja Ram (supra) decided on 30.11.2009 proceeded to read down Rule 13(5) by declaring that adjustment of a candidate to another institution can be made against a vacancy which has been subject matter of the same advertisement under which the candidate had applied and been selected. While doing so, the learned single Judge also enjoined any other mode of appointment under Section 16, including compassionate appointments, after the vacancy has been notified and advertised by the Board. Thus no other mode of appointment was permitted after the vacancy was notified to the Board."

32. The Full Bench in effect held that once vacancy is determined and notified and advertisement issued and selection under way, then such vacancy cannot be withdrawn or its nature changed. Once selection is held and the Selection Board recommends the candidate for a particular vacancy, but he cannot be appointed because of unforeseen circumstances like adjustment of a dependent of deceased employee, or for any other valid reason, then under Rule 13 (5) the Service Selection Board can adjust such selected candidate in another vacancy, which was advertised in the same selection,

but could not be filled up due to non-joining of recommended candidate or due to no recommendation being made with regard to the same. Once selection is made and recommendation made, then the Selection Board cannot under Rule 13 (5) direct a for adjustment of a selected candidate in a vacancy, which has arisen thereafter, and has not been advertised in the same advertisement. Therefore, for instance if a candidate is selected for a vacancy notified in Advertisement No. 1 of 2004, then he cannot be adjusted against a vacancy notified for Advertisement No. 1 of 2005.

33. Against this observation limiting the role of the Board regarding adjustment in future vacancies, the Board approached the Supreme Court in Civil Appeal No. 10808 of 2017 (U.P. Secondary Education Service Selection Board vs State of U.P. and others), which was disposed of by the Supreme Court on 23.08.2017 by the observations made in paragraphs 4, 5 and 6 of the said judgment, which are being quoted herein-below:

"4. According to the learned counsel, in case the candidates who have reported pursuant to the advice and in case they are not accommodated, their case will have to be dealt with in terms of Rule 13 of the 1998 Rules, which has been amended on 23.01.2007. The amendment, to the extent relevant, reads as follows:-

"Where a candidate selected by the Board could not join in an allocated institution due to non-availability of vacancy or for any other reason, the District Inspector of Schools shall recommend to the Board in any other institution. On receipt of the recommendation of the District Inspector of Schools the Board shall allocate such candidate to another institution in a vacancy notified to the Board."

5. The issue pertains to the candidates who have already been selected but could not be accommodated for want of vacancies. In such cases, it cannot be said that the Board has no power to accommodate them. They will have to be certainly accommodated in available or arising vacancies.

6. The impugned order will stand clarified to the above extent."

34. It is on the basis of such clarification issued by the Hon'ble Supreme Court that argument has been made by Sri A.K. Yadav appearing for the Board that this Court can direct the Selection Board to adjust the petitioners in vacancies having arisen subsequently to the advertisement no. 1 of 2005 for the subject of Social Science TGT in various institutions.

35. However, this Court is also aware of observations made by the Hon'ble Supreme Court in Civil Appeal No. 367 of 2017 (Ran Vijay Singh & others Vs. State of U.P. & others) decided on 11.12.2017, the Supreme Court has observed in paragraph 33 as follows:-

"The law on the subject is therefore, quite clear and we only propose to highlight a few significant conclusions. They are: (i) If a statute, Rule or Regulation governing an examination permits the re-evaluation of an answer sheet or scrutiny of an answer sheet as a matter of right, then the authority conducting the examination may permit

it; (ii) If a statute, Rule or Regulation governing an examination does not permit re-evaluation or scrutiny of an answer sheet (as distinct from prohibiting it) then the Court may permit re-evaluation or scrutiny only if it is demonstrated very clearly, without any "inferential process of reasoning or by a process of rationalisation" and only in rare or exceptional cases that a material error has been committed; (iii) The Court should not at all re-evaluate or scrutinize the answer sheets of a candidate - it has no expertise in the matter and academic matters are best left to academics; (iv) The Court should presume the correctness of the key answers and proceed on that assumption; and (v) In the event of a doubt, the benefit should go to the examination authority rather than to the candidate."

36. It has been observed by the Hon'ble Supreme Court that in case writ petitions are entertained and orders passed therein for rectification of result by the Selection Board, such rectification of result might lead to several unintended complications. The Courts should ordinarily follow a hand off approach with respect to results declared by Service Selection Commission / Universities etc., unless the irregularity complained of is so glaring as would not require for any further examination, and unless it is easily rectifiable and would not lead to denial of legitimate rights or expectations of third parties, or result in unintended complications.

37. This Court is also aware that in *Rajesh Kumar & others Vs. State of Bihar & others* 2013 (4) SCC 690 and *Vikas Pratap Singh & others Vs. State of Chhatisgarh* 2013 (14) SCC 409, the Supreme Court has observed that candidates who have been selected as a result of a mistake committed by the Selection Board cannot be made to suffer.

38. This Court is also aware that after advertisement no. 1 of 2005 several other advertisements have been issued for selection of TGT in Secondary Institutions for subject of Social Science and rights of several other candidates have been crystallized in the meantime for claiming appointment on advertised vacancies and looking into the time lapse. There cannot be any mandamus issued by this Court for rectification of the result already declared by the Board. Although an affidavit has been filed in October 2016 by the Selection Board that the petitioners who are three in number can be considered in 9 vacancies still left to be filled up. As a consequence of result declared for advertisement no. 1 of 2005 in March 2012; there is no averment by the Selection Board that such 9 vacancies which existed in different private aided institutions in 2005 still continue to exist after 12 years and have not yet been filled up by the management of individual institutions by any other source. Hence the vague statement of the Selection Board cannot be accepted as it would lead to further unintended complications leading to unending litigation.

39. The writ petition is dismissed. No order as to costs.

Order Date :- 02.02.2018 Arif