

**BEFORE THE UTTARAKHAND PUBLIC SERVICES TRIBUNAL
AT DEHRADUN**

Present: Hon'ble Mr. Justice U.C.Dhyani

----- Chairman

Hon'ble Mr. Rajeev Gupta

-----Vice Chairman (A)

CLAIM PETITION NO. 75DB/2018

Ashish Sati s/o Late Sri Shambhu Prasad Sati aged about 34 years, presently posted as Technician Grade II (Electrical) at 33/11 KV Sub Station, Turner Road, Dehradun.

.....Petitioner.

vs.

1. State of Uttarakhand through Secretary, Energy, Secretariat, Dehradun.
2. Managing Director, Uttarakhand Power Corporation Ltd., VCVGS Urja Bhawan, Kanwali Road, Dehradun.
3. Director (HR) UPCL, VCVGS Urja Bhawan, Kanwali Road, Dehradun.

.....Respondents.

Present: Sri Shashank Pandey, Counsel, for the petitioner.

Sri V.P.Devrani, A.P.O., for Respondent No.1.

Sri V.D.Joshi & Sri S.K.Jain, Counsel for Respondents No. 2 & 3.

JUDGMENT

DATED: AUGUST 17, 2019

Justice U.C.Dhyani (Oral)

By means of present claim petition, petitioner seeks following reliefs:

“(i) To issue an order or direction directing the respondents to undertake the promotional exercise from Technician Grade (II) to Junior Engineer as per the Rules, 1972 as the vacancies had occurred prior to the coming in force of the new Rules..

(ii) To grant any other relief which this Hon'ble Court may deem fit in the present facts and circumstances of the case.

(iii) To give cost of the petition to the petitioner.”

2. Facts, giving rise to present claim petition, are as follows:

Petitioner's father was a permanent employee in U.P. State Electricity Board (for short, UPSEB). He passed away in the year 2002. Petitioner was appointed under Dying in Harness Rules as *Shramik*, on 07.10.2002. *Vide* order dated 01.12.2009, petitioner was promoted as Technician Grade-II (Electrical). On 06.06.1972, The Uttar Pradesh State Electricity Board Subordinate Electrical and Mechanical Engineering Service Rules, 1972 (for short, Rules of 1972) were framed. Rule 17 of the Rules of 1972 has been quoted in Para 4(d) of the claim petition. *Vide* Government order dated 06.02.2004, Uttarakhand Power Corporation Limited (for short, UPCL) increased the promotion quota for appointment to the post of Junior Engineer (J.E.) from operating staff to 40%. Earlier it was 33.13%. UPCL, *vide* order dated 18.01.2011 advertized 35 vacancies, to be filled up, following the procedure laid down as per the Rules of 1972, as amended on 06.02.2004. Petitioner submitted his application form against the vacancies advertized. On 07.10.2011, petitioner was shortlisted for promotion. UPCL, thereafter, cancelled the exercise of promotion. On 17.11.,2014, State Government amended the test for promotion of Technical Grade- I/II and Cable Jointer. Petitioner has passed High School examination and he is also I.T.I. holder from Government Industrial Training Institute, Srinagar (Uttarakhand). On 17.10.2015, the departmental committee presented draft Uttarakhand Power Corporation Limited Junior Engineer (E& M) Service Regulation, 2015 (for short, Regulations of 2015) to the State Government, after the Hon'ble High Court of Uttarakhand decided three writ petitions by a common judgment and order dated 17.02.2014. On 29.11.2016, Respondent No.1 again sent proposal to Respondent No.2. Petitioner received the copies of communication between Respondent No.1 and Respondent No.2, through RTI, whereby Respondent No. 2 asked Respondent No.1 to amend the proposal. In special appeal, Hon'ble High court of Uttarakhand, *vide* judgment and order dated 04.05.2018 directed Respondent No.2 to take a

decision on the draft Rules within a period of two months. The said order was not complied with by Respondent No.2, as a result of which, a contempt petition was filed, whereupon the Hon'ble Court directed the steps to be taken before 26.10.2018.

On 23.10.2018 the State Government passed the Rules, whereby procedure for appointment was changed. Change in the appointment procedure has adversely effected the accrued right of the petitioner to be promoted, in as much as with the enforcement of new Rules, the petitioner, who was eligible for promotion prior to the passing of such Rules, is no more entitled to be promoted to the higher post. New Rules have taken away right of petitioner to be considered for promotion. There are more than 220 vacancies, which arose during the period when the Rules of 1972 were in operation. According to the petitioner, respondents are now preparing to get the vacancies filled up, according to new Rules.

The petitioner has relied upon certain decisions of Hon'ble Apex Court, which we shall advert to during the course of discussion. Having no alternative or efficacious remedy, petitioner was compelled to file present claim petition.

3. C.A. has been filed on behalf of Respondents No. 2 & 3. It has been averred in the written statement that new Regulations have been prepared in compliance of order dated 17.12.2014 of Hon'ble High Court of Uttarakhand. UPCL was already in the process of making new Regulations. Copy of draft Regulations was circulated to all the representative bodies of the employees. The Regulations of 1972 were adopted by UPCL. Petitioner joined UPCL on 07.10.2002 as *Shramik*. Petitioner was not eligible to appear as per advertisement dated 18.01.2011, as he had not completed the eligibility period of four years' experience after completion of ITI. Amendment in the Rules was incorporated by UPCL with the approval of Board of Directors. Annexure: A 7 to the claim petition is only the copy of letter dated 17.10.2015 written to the Under Secretary, Government of Uttarakhand by DGM of UPCL, which was in reply to the queries raised by Govt. of Uttarakhand *vide*

letter dated 22.09.2015. It has been averred in Para 20 of the written statement that the new Rules have not taken away the right of the petitioner to be considered for promotion. UPCL had promoted 42 TG II Junior Engineers in the year 2011. 35 such posts were advertised on 18.01.2011. It is reiterated, in the W.S., that new Rules were framed in compliance of the order of Hon'ble Court.

4. Rejoinder Affidavit has also been filed by the petitioner reiterating the facts contained in the claim petition. '
 5. Facts of the claim petition lie in a narrow compass, which have been adverted by us in the forgoing paragraphs of the judgment. Short point which requires decision of the Court is— Whether the petitioner has earned his right to be considered for promotion? If so, whether his accrued right could be taken away by respondents?
6. In Y.V. Rangaiah and others vs. J. Sreenivasa Rao and others, (1983) 3 SCC 284, it was held by Hon'ble Apex Court that, **the posts which fell vacant prior to the amended Rules, would be governed by the old Rules and not by the new Rules.**
7. Relevant paragraph of the aforesaid decision reads as under:

“8. The contention on behalf of the appellants herein is that by the time the list was prepared in May, 1977 Rule 5 of the Andhra Pradesh Registration and Subordinate Service Rules was amended and the list prepared was in accordance with the rules then prevailing at the time of preparation, and therefore there was nothing wrong with the preparation of the panel. It was further contended that the petitioners in the two representation petitions having not challenged the validity of the amendment to Rule 5 of the Andhra Pradesh Registration and Subordinate Service Rules, it was not open to them to challenge the list prepared in May, 1977 which is in accordance with rules prevailing at that time.”
8. The challenge to the contention of those who were in favour of filling up old vacancies as per amended Rules, was quoted by the Hon'ble Court thus:

“.....The vacancies which occurred prior to the amended rules would be governed by the old rules and not by the amended rules. It is admitted by counsel for both the parties that henceforth promotion to the post of Sub-Registrar Grade II will be according to the new rules on the zonal basis and not on the State-wide basis and, therefore, there was no question of challenging the new rules. But the question is of filling the vacancies that occurred prior to the amended rules. We have not the slightest doubt that the posts which fell vacant prior to the amended rules would be governed by the old rules and not by the new rules.”

9. In para 12 and 14 of decision rendered by Hon'ble Apex Court in Union of India and others vs. Tushar Ranjan Mohanty and others, 1994 SCC (5) 450, the following was observed:

“In T.R. Kapur v. State of Haryana, 1986 Supp SCC 584..... This Court came to the conclusion that the retrospective effect given to the amendment was violative of Articles 14 and 16 of the Constitution of India on the following reasoning: (SCC p. 595, para 16)

"It is well settled that the power to frame rules to regulate the conditions of service under the proviso to Article 309 of the Constitution carries with it the power to amend or alter the rules with a retrospective effect: B.S. Vadera v. Union of India, AIR 1969SC 118, Raj Kumar v. Union of India, (1975)4SCC 13, K.Nagaraj v. State of A. P., (1985)1SCC 523 and State of J & K v. Triloki Nath Khosa, (1974) 1SCC 19. It is equally well-settled that any rule which affects the right of a person to be considered for promotion is a condition of service although mere chances of promotion may not be. It may further be stated that an authority competent to lay down qualifications for promotion, is also competent to change the qualifications. The rules defining qualifications and suitability for promotion are conditions of service and they can be changed retrospectively. This rule is however subject to a well recognised principle that the benefits acquired under the existing rules cannot be taken away by an amendment with retrospective effect, that is to say, there is no power to make such a rule under the proviso to Article 309 which affects or impairs vested rights."

14. The legislatures and the competent authority under Article 309 of the Constitution of India have the power to make laws with retrospective effect. This power, however, cannot be used to justify the arbitrary, illegal or unconstitutional acts of the Executive. When a person is deprived of an accrued right vested in him under a statute or under the Constitution and he successfully challenges the same in the court of law, the legislature cannot render the said right and the relief obtained nugatory by enacting retrospective legislation.”

10. It was, therefore, held that the retrospective operation of law should not deprive a person from accrued right vested in him under the statute.

11. Similar observation was made by Hon'ble Apex Court in Food Corporation of India vs. *Om Prakash Sharma*, (1999) ILLJ 1 215 SC (Para 36). It was held in *State of Rajasthan vs. R Dayal & others*, (1997) SCC(L&S) 1631, that the posts which fell vacant prior to the amendment of the rules would be governed by the original rules and not by the amended rules. As a necessary corollary, the vacancies that arose subsequent to the amendment of the rules are required to be filled up in accordance with the law existing as on the date when the vacancies arose. Even a carried-forward vacancy is required to be considered in accordance with the law existing unless suitable relaxation is made by the Government while arriving at such a decision, Hon'ble Apex Court relied on its' earlier decision of *Y.V. Rangaiah and others vs. J. Sreenivasa Rao and others*, (1983) 3 SCC 284.
12. **This Tribunal, therefore, finds substance in the submission of the Ld. Counsel for the petitioner that the posts which fell vacant prior to the amendment of the Rules, would be governed by the original Rules, and not by the amended Rules.**
13. It has repeatedly been argued by Ld. Counsel for UPCL, in reply, that the Rules were amended in view of the decision dated 17.12.2014 in WPSS No. 256/2013 and connected writ petitions, relevant paragraphs of which read as below:

“13. Therefore, the learned Senior Advocate, Mr. B.D. Upadhyay, who is appearing on behalf of the Uttarakhand Power Corporation would argue that powers are there with the Corporation to frame Rules of such employees who have been transferred from the Board to the Corporation. Under these powers, the Regulations are being amended from time to time. He has also drawn the attention of this Court that now new Regulations are in the process of being framed and after this being done, the appointments will be made as per the new Regulations. This being the factual situation before this Court, the decision of the Corporation to call for interview and practical test to such candidates who had appeared in the test and managed to get even 1 mark will now be considered for promotion is totally arbitrary. The respondent/corporation is restrained from doing so.

14. In view thereof, the Office Memo dated 05.03.2013, issued by the Uttarakhand Power Corporation cancelling the selection process initiated vide office order dated 18.01.2011 and directing for making promotions from the earlier promotion exercise is hereby quashed.

15. Let the Power Corporation initiate fresh exercise for promotion as per the new Regulations. In case the new Regulations are in the pipeline, the same be framed as early as possible and the needful be done within a period of six months from today.”

[Emphasis supplied]

14. This Tribunal is, therefore, faced with piquant situation. On one hand, there is accrued right in favour of the petitioner, in terms of the aforesaid decisions of the Hon'ble Supreme Court read in conjunction with Section 6(c) of the General Clauses Act, 1897; but on the other hand, there are directions of Hon'ble High Court of Uttarakhand that fresh exercise for promotion be done as per new Regulations, which have now come into force. On one hand, the Tribunal is required to enforce the accrued right of the petitioner, but at the same time the Tribunal has to respect the decision of Hon'ble Court.
15. Ld. Counsel has placed a copy of letter No. 1982/1(2)/2018-06(2)-21/2015, sent by Ms. Radhika Jha, Secretary to the Government in Energy Department, to show that the Uttarakhand Power Corporation Ltd. Junior Engineer (Electrical & Mechanical) Service Bylaws, 2018 have been notified *vide* letter dated 23.10.2018.
16. In such Bylaws, there is a provision for relaxation of service conditions. Rule 29(1) of the Bylaws of 2018 provides for relaxation in any of the service conditions of the employees, as a special case, in case it becomes difficult to comply with such Bylaws.
17. After fruitful deliberation at length, this Tribunal finds that the respondents should be directed to consider the case of the petitioner for relaxation of service conditions under Rule 29(1) of the Uttarakhand Power Corporation Ltd. Junior Engineer (Electrical & Mechanical) Service Bylaws, 2018, if the petitioner moves for it, within stipulated time frame.

18. Ld. Counsel for UPCL submitted that UPCL shall consider the application of the petitioner for relaxation under Rule 29(1) of the Bylaws, to bring him in the zone of eligibility for promotion to the post of Junior Engineer, in case the petitioner applies for the same.
19. Thus, the only solution to the problem which we are faced with, is to direct the respondent department to consider the application, if moved, of the applicant under Section 29(1) of the Bylaws for providing relaxation to bring him within the zone of eligibility.
20. Order accordingly.
21. Needless to say that if such an application/ representation is moved by the petitioner, the same shall be decided by the Respondents, as per law, at an earliest possible, but not later than ten weeks of presentation of certified copy of this order along with representation/ application by the petitioner before the Respondents/UPCL.
22. The claim petition is, accordingly, disposed of. No order as to costs.

(RAJEEV GUPTA)
VICE CHAIRMAN (A)

(JUSTICE U.C.DHYANI)
CHAIRMAN

DATE: AUGUST 17, 2019
DEHRADUN

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