

Reserved

Case :- WRIT - A No.1600 of 2019

Petitioner :- Sushil Mishra and another

Respondent :- State Thru Addl.Chief Secy/Prin.Secy. Food and Civil Supply others

Counsel for Petitioner :- Gaurav Mehrotra, Hari Om Pandey, Utsav Misra

Counsel for Respondent :- C.S.C., Arun Kumar, Ashutosh Kumar Singh, Dinesh Kumar Tripathi, Hari Om Pandey, Meenakshi Parihar Singh, Prashant Kumar Singh, Veerendra Kumar Tiwari, Vinod Kumar Pandey

Hon'ble Dinesh Kumar Singh, J.

1. The present petition under Article 226 of the Constitution of India has been filed impugning the seniority list dated 31.3.2016 of Area Rationing Officers in Department of Food and Civil Supplies, Government of Uttar Pradesh in so far as it relates to placing the petitioners below the 173 Senior Supply Inspectors, the post which got merged with the post of Area Rationing Officer. Further prayer has been made for quashing the promotion orders dated 14.5.2015 and 30.7.2018, whereby private opposite party nos.3 to 12 got promoted to the post of District Supply Officer, Grade-II in Department of Food and Civil Supplies, Government of Uttar Pradesh. A Writ of Mandamus has also been prayed for direction/command to the opposite parties to consider the case of the petitioners for promotion to the post of District Supply Officer, Grade-II, Department of Food and Civil Supplies by convening a Departmental Promotion Committee.

2. The services of the petitioners are governed by the Uttar Pradesh Food and Civil Supplies (Supply) Service Rules, 1981 (for short 'Service Rules, 1981'). Rule 5 of the Service Rules, 1981 provided that the posts of Area Rationing Officer were to be filled up by two sources of recruitment i.e. 50% by promotion from amongst Senior Supply Inspectors and 50% by means of direct recruitment. By way of First Amendment in the Service Rules, 1981, the direct recruitment to the post of Area Rationing Officer was to be made by means of

examination to be conducted by the Uttar Pradesh Public Service Commission (for short 'Commission').

3. The recruitment and the conditions of service of persons appointed on Class-III posts of subordinate service in the Department of Food and Civil Supplies are governed with the Uttar Pradesh Food and Civil Supplies (Supply Branch) Subordinate Service Rules, 1980 (for short 'Service Rules, 1980'). The posts of Supply Inspector and Senior Supply Inspector are the category of posts which would be governed under the said Service Rules, 1980. Under Rule 5 of the Service Rules, 1980, 50% of the posts of Supply Inspector are to be filled up by direct recruitment through Commission, and 50% by promotion through Commission from amongst permanent Head Clerks/Accountants working in the Supply Branch of the Food and Civil Supplies Department. Similarly, 50% of the posts of Senior Supply Inspector were to be filled up by direct recruitment through Commission and 50% by promotion through Commission from amongst the permanent Supply Inspectors having put in five years substantive service.

4. The recruitment to the posts of Area Rationing Officer and Senior Supply Inspector were governed by two sets of service rules i.e. Service Rules, 1980 and the Service Rules, 1981. The post of Area Rationing Officer is within the purview of the Commission, whereas the post of Senior Supply Inspector is a Class-III post.

5. The petitioners got selected to the post of Area Rationing Officer by the Commission in pursuance to the advertisement issued by the Commission for 12 posts of Area Rationing Officer, for which the requisition was sent by the State Government on 10.3.2010. After selection, the petitioners joined the post of Area Rationing Officer in March, 2013.

6. The Government issued Government Order dated 30.6.2011 to implement the recommendation of the Pay Committee for Food and Civil Supplies Department providing for merger of post of Senior

Supply Inspector in the post of Area Rationing Officer and the post of Area Rationing Officer would be filled up only by promotions from amongst the substantively appointed Supply Inspectors having five years service. It was also directed that the relevant rules should be amended as early as possible. Thus, source of recruitment was directed to be amended and post of Senior Supply Inspector was to be abolished.

7. In pursuance to the direction issued by the State Government vide Government Order dated 30.6.2011, Service Rules, 1981 came to be amended on 6.9.2013 by the Uttar Pradesh Food and Civil Supplies (Supply) Service (Fourth Amendment) Rules, 2013. Rule 5 of the Service Rules, 1981, which provided that the post of Area Rationing Officer would be filled up by two sources of recruitment i.e. 50% by direct recruitment and 50% by promotion from amongst substantively appointed Senior Supply Inspectors, who had put in five years service got amended by providing that 100% posts of Area Rationing Officer would be filled up through Departmental Promotion Committee from substantively appointed Supply Inspectors, who had completed five years service as such on the first day of the year of recruitment. By amendment in rules, two important changes were brought in i.e. abolition of post of Senior Supply Inspector and as the said post got merged in the post of Area Rationing Officer, and only source of recruitment for the post of Area Rationing Officer would be promotion from the substantively appointed Supply Inspectors having put in minimum five years of service on the first day of year of recruitment.

8. It would be relevant to take note of the structure in the supply wing of Food and Civil Supplies Department in the Government of Uttar Pradesh prior to the Government Order dated 30.6.2011 and to implement the said Government Order, the Rules got amended on 6.9.2013 as under:-

(i) Supply Inspector;

- (ii) Senior Supply Inspector;
- (iii) Area Rationing Officer;
- (iv) District Supply Officer, Grade-II;
- (v) District Supply Officer, Grade-I; and
- (vi) Assistant Commissioner.

9. The Uttar Pradesh Public Service Commission vide letter dated 28.6.2012 informed the State Government that promotion to the vacant posts of Area Rationing Officer, for which requisition was sent, would not be proper to be made in pursuance to the Government Order dated 30.6.2011 in absence of requisite amendment in the Service Rules. Thereafter, the State Government prepared a draft rules, namely, Uttar Pradesh Food and Civil Supplies (Supply) (Fourth Amendment) Rules, 2012 to implement the decision taken in the Government Order dated 30.6.2011. The said draft rules of Fourth Amendment Rules was sent to the Commission for approval by the State Government and the Commission vide letter dated 1.6.2013 accorded its approval to the aforesaid draft Fourth Amendment Rules and the Fourth Amendment Rules, 2013 were notified on 6.9.2013.

10. Sri Gaurav Mehrotra assisted by Mr. Utsav Misra, learned counsel for the petitioners has submitted that before the Fourth Amendment Rules, 2013 came into existence on 6.9.2013, the petitioners had already been appointed substantively on the post of Area Rationing Officer in March, 2013 and merger of posts of Senior Supply Inspectors in the post of Area Rationing Officer could take effect only w.e.f. 6.9.2013 and not prior to the said date. Treating the Senior Supply Inspectors to have got merged in the post of Area Rationing Officer w.e.f. 30.6.2011 i.e. the date of issuance of the Government Order, is wholly illegal and against the Rules itself. The statutory Rules would have prospective effect inasmuch as in the Rules, it is not provided that the Rules would be treated to have come into effect w.e.f. 30.6.2011, the date of Government Order, whereby it was

directed to merge the post of Senior Supply Inspector in the post of Area Rationing Officer.

11. On the other hand, Sri Sandeep Dixit, learned Senior Advocate, assisted by S/Sri Hari Om Pandey, Prashant Kumar Singh and Arun Kumar appearing for the private opposite parties has submitted that posts of the private opposite parties, who were holding substantive post of Senior Supply Inspector, stood merged in the post of Area Rationing Officer vide Government Order dated 30.6.2011. The cadres of Senior supply Inspector and Area Rationing Officer became one. The petitioners were not born in the service when the private opposite parties were designated as Area Rationing Officer as a result of merger w.e.f. 30.6.2011. The private opposite parties would naturally wound be senior to the subsequently appointed Area Rationing Officers such as the petitioners. The petitioners cannot challenge effect of the order dated 30.6.2011 when they were not born in the service. He has, therefore, submitted that this writ petition is liable to be dismissed on this ground alone. It is further submitted that Rule 4 of the Service Rules, 1981 empowers the Government to determine the strength of service of each category of posts. The Government is empowered to increase and decrease the number of posts in a service. Vide Government Order dated 30.6.2011 by merging the posts of Senior Supply Inspector in Area rationing Officer, the Government had increased the strength of service of Area Rationing Officer, and for increase the strength, no amendment in the Rules was required.

12. Sri Virendra Singh, learned Standing Counsel has submitted that merger of post of Senior Supply Inspector in the post of Area Rationing Officer would fall within the domain of the policy decision and the Government had taken a policy decision vide Government Order dated 30.6.2011 to merge the existing posts of Senior Supply Inspector in Area Rationing Officer. He has further submitted that the petitioners, who were not born in service on the date of the said decision, have no right to challenge the merger.

13. I have considered the submissions advanced on behalf of the learned counsel for the parties and perused the record.

14. The short question which arises for consideration and the decision in this petition, is that whether without amendment in the statutory rule i.e. Rule 5 of the Service Rules, 1981 by the executive instructions dated 30.6.2011, the sources of recruitment for the post of Area Rationing Officer could be changed. It is well settled law that the statutory rules cannot be amended by the executive instructions. The executive instructions can supplement the rules, but cannot supplant the statutory rules. The Government Order dated 30.6.2011 is nothing but a policy decision, which itself prescribed that the necessary amendment in the rules be carried out forthwith. However, the said amendment came into existence only on 6.9.2013. The private opposite parties might have been given the designation of Area Rationing Officer, but their right to be treated as Area Rationing Officer would be only w.e.f. the amendment in the Rules i.e. 6.9.2013. The petitioners had already been appointed substantively in March, 2013 on the posts of Area Rationing Officer and, therefore, after merger of the posts of Senior Supply Inspector in Area Rationing Officer, which would have taken place only w.e.f. 6.9.2013, the petitioners would be senior to the private opposite parties inasmuch as the private opposite parties would be treated as Area Rationing Officer only w.e.f. 6.9.2013 and not w.e.f. 30.6.2011.

15. I do not find substance in the submission of Sri Sandeep Dixit, learned Senior Counsel that the decision dated 30.6.2011 was only to increase the service strength of Area Rationing Officer. The said decision was to amend the source of recruitment for the post of Area Rationing Officer and not merely to increase the strength. Therefore, unless Rule 5 of the Service Rules, 1981 could have been amended, the source of recruitment to the post of Area Rationing Officer would not have got changed. The U.P. Public Service Commission had flagged this issue in its letter dated 28.6.2012, and it refused to make recommendation for promotion to the post of Area Rationing Officer

from Supply Inspectors in pursuance to the requisition sent by the State Government in absence of the amendment in the statutory rules. By taking policy decision, the statutory rules would not get amended. To give effect to the policy decision dated 30.6.2011, the statutory rules were required to be amended as provided in the Government Order dated 30.6.2011 itself.

16. In view thereof, I find substance in the submission of learned counsel for the petitioners. The petitioners are to be treated as senior to the private opposite parties, who got designation of the post of Area Rationing Officer as a result of merger of the posts of Senior Supply Inspector in Area Rationing Officer inasmuch as the said merger would have taken effect only w.e.f 6.9.2013 and not w.e.f. 30.6.2011. Therefore, the seniority list and the promotion orders are liable to be set aside.

17. Thus, the present writ petition is *allowed* and the seniority list dated 31.3.2016 of Area Rationing Officer, Department of Food and Civil Supplies, Government of Uttar Pradesh in so far as it relates to placing the petitioners below 173 Senior Supply Inspectors, is hereby set aside. Consequences to follow.

(Dinesh Kumar Singh, J)

Order Date: 3rd May, 2023
Rao/-