

Neutral Citation No. - 2024:AHC-LKO:55815-DB

Reserved

Court No. - 1

Case :- SPECIAL APPEAL No. - 541 of 2023

Appellant :- State Of U.P Thru. Addl. Chief Secy. Food And Civil Supplies, Lko. And Another

Respondent :- Shushil Mishra And 18 Others

Counsel for Appellant :- C.S.C.

Counsel for Respondent :- Gaurav Mehrotra,Utsav Mishra

connected with

(1) **Case :-** SPECIAL APPEAL No. - 272 of 2023

Appellant :- Abhay Singh

Respondent :- Sushil Mihra And Others

Counsel for Appellant :- Shobhit Mohan Shukla,Manoj Kumar Chaurasiya

Counsel for Respondent :- Gaurav Mehrotra,Ashutosh Kumar Singh,C.S.C.,Hari Om Pandey,Meenakshi Singh Parihar,Utsav Mishra,Vinod Kumar Pandey

(2) **Case :-** SPECIAL APPEAL No. - 273 of 2023

Appellant :- Anjani Kumar Singh And Another

Respondent :- Sushil Mihra And Others

Counsel for Appellant :- Satyanshu Ojha

Counsel for Respondent :- Gaurav Mehrotra,C.S.C.,Utsav Mishra

Hon'ble Attau Rahman Masoodi,J.

Hon'ble Brij Raj Singh,J.

[Per Attau Rahman Masoodi, J.]

(1) Heard Sri V. P. Nag, learned Additional Chief Standing Counsel appearing for the State-appellants in Special Appeal No. 541 of 2023, Sri J. N. Mathur, learned Senior Advocate assisted by Sri Satyanshu Ojha, learned counsel for the appellants in Special Appeal No. 273 of 2023 and Sri Sandeep Dixit, learned Senior Advocate assisted by Sri Shobhit Mohan Shukla, learned Counsel appearing for the appellants in Special Appeal No. 273 of 2023 and Sri Gaurav Mehrotra & Sri Utsav Mishra, learned counsel for the contesting respondents in all appeals.

(2) All the aforesaid three appeals are filed under Chapter VIII Rule 5 of Allahabad High Court Rules, 1952 challenging the

judgment and order dated 03.05.2023 passed in Writ-A No. 1600 of 2017, *Sushil Mishra and another v. State of U.P. and others* whereby the writ petition filed by the petitioners, respondents herein, was allowed setting aside the seniority list dated 31.03.2016 of Area Rationing Officer, Department of Food and Civil Supplies, Government of Uttar Pradesh in so far as it relates to placing the petitioners in the writ petition below 173 Senior Supply Inspectors.

- (3) The facts of the case that can be drawn in narrow compass are to the effect that 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 under the Uttar Pradesh Food and Civil Supplies (Supply Branch) Subordinate Service Rules, 1980 (in brief, it is stated as '**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 Rules, 1980, 50% of the posts of Supply Inspector are to be filled up by direct recruitment through Commission, and 50% by promotion through consultation with the 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 consultation with the Commission from amongst the permanent Supply Inspectors having put in five years substantive service.
- (4) Rule 5 of Uttar Pradesh Food and Civil Supplies (Supply) Service Rules, 1981 (here-in-after it has been referred to as '**Rules, 1981**') provides 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, 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 (briefly, it is stated as 'Commission').

- (5) The appellants of Special Appeal Nos. 272 of 2023 and 273 of 2023 were inducted in service as Supply Inspectors in the year 2001 and they were governed under Rules, 1980. Later on, they were promoted on the post of Senior Supply Inspector on 26.02.2010.
- (6) Considering that two distinct and separate wings, namely, Supply and Marketing Branches are actively working in the department, the Pay Committee, 2008, while examining the nature of duties of two branches and looking to the enhancement of area of working and duties, the Committee made a recommendation for merger of Senior Supply Inspector working in the pay scale of Rs.5000-8000 (revised pay scale of Rs.9300-34800 and Grade Pay Rs.4,200/-) with Area Rationing Officer working in the pay scale of Rs.5500-9000 (revised pay scale of Rs.9300-34800 and Grade Pay Rs.4,200/-) and to upgrade the pay scale of the post of Area Rationing Officer to Rs.7450-11500 (revised pay scale of Rs.9300-34800 and Grade Pay of Rs.4,600/-). The Finance Department in this backdrop issued an order dated 24.12.2009 to all departments for determination of the pay structure and the Department of Finance of U.P. has issued an order on 18.03.2011 for enforcement of the report of Pay Committee, 2008. On the basis of the recommendations of the Pay Committee, 2008, the Cabinet took a decision to merge the post of Senior Supply Inspector with Area Supply Inspector, to which His Excellency

the Governor of U.P. has given consent to merge and upgrade the aforesaid pay scales and accordingly, on 30.06.2011, the State of U.P. has issued the Government Order for enforcement of new arrangement with immediate effect as per the recommendations of the Pay Committee, 2008, which is the genesis of the litigation between the parties. Consequently, the appellants and their colleagues working on the post of Senior Supply Inspectors were merged with the post of Area Rationing Officer and upgraded their pay scale.

- (7) The writ petitioners were entered into the service of Area Rationing Officer on 28.01.2013 and 04.03.2013 respectively who are governed under Rules, 1981. The Service Rules, 1981 were amended for the first time in 1993, second amendment in the year 1999, third amendment in the year 2004 and lastly, fourth amendment was carried out on 06.09.2013.
- (8) Learned Counsel for the appellants has submitted that the writ petitioners who were not born in the cadre on the date of merger of appellants do not have any locus to question any event which had taken place in the department prior to their birth in the cadre/department and the said Government Order dated 30.06.2011 is still in tact.
- (9) Initially, a tentative seniority list of Area Rationing Officers dated 29.05.2013 was published by the department which was challenged in Writ-A No. 30801 of 2014, *Sushil Mishra and another v. State of U.P. and others*. The said writ petition was dismissed as infructuous vide order dated 21.05.2018 on the submissions of learned counsel for the petitioners in the said writ petition that the department set aside the the seniority list dated 29.05.2013 and prepared a fresh seniority list dated 31.03.2016. In the final seniority list dated 31.03.2016, the appellant of Special Appeal No. 272 of 2023 is at Sl. No. 334,

whereas the writ petitioners are at Sl. No. 475 and 479 respectively.

- (10) Against the subsequent seniority list dated 31.03.2016, the writ petitioners preferred Writ-A No. 1600 of 2019 which was allowed by means of the impugned judgment and order dated 03.05.2023.
- (11) During pendency of the aforesaid writ petition, the appellant No.1 of Special Appeal No.273 of 2023 was promoted to the post of District Supply Officer – II on 19.05.2015 and on the post of District Supply Officer – I on 21.08.2020, whereas appellant No.2 of the aforesaid appeal was promoted on the post of District Supply Officer – II on 20.07.2018. The appellant of Special Appeal No. 272 of 2023 was promoted on the post of District Supply Officer – II on 20.06.2022.
- (12) S/Sri J. N. Mathur and Sandeep Dixit, learned Senior Advocates, assisted by S/Sri Satyanshu Ojha and Shobhit Mohan Shukla, learned counsel appearing for the appellants has submitted that on the basis of the recommendation of the Pay Committee, 2008 in respect of Officers and Inspectors of Supply Wing and Marketing Wing of Food and Civil Supply Wing & Marketing Wing of Food and Civil Supplies, the State Government vide its order dated 30.06.2011 implemented the recommendations of the Pay Committee, 2008 with immediate effect, however, the Rules came to be amended on 06.09.2013. Learned Single Judge has lost sight of the prescription made in Rule 4 of Rules, 1981 which provides for strength of service and each category of posts shall be determined by the Government from time to time.
- (13) He has further submitted that when the Rules provide for determining the strength of service and each category of posts,

the Government Order dated 30.06.2011 is well within its competence issued under Rule 4 of the Rules, 1981 read with Article 162 of the Constitution of India. Elaborating his submissions, he has submitted that when the Rules framed under the proviso to Article 309 of the Constitution of India, which provides power of the State Government to issue orders for determining the strength of service and each category of posts, the Government Order dated 30.06.2011 issued by the State Government cannot be diluted.

- (14) Pursuant to the Government Order dated 30.06.2011, the appellants-respondents, who were holding substantive post of Senior Supply Inspector, stood merged in the post of Area Rationing Officer. Consequentially, the cadres of Senior supply Inspector and Area Rationing Officer became one. At the time of merger, the contesting respondents/writ petitioners were not born in the service. So the natural phenomena is that the appellants would be senior to the subsequently appointed Area Rationing Officers, who cannot challenge the order dated 30.6.2011 when they were not born in the service.
- (15) It is further submitted that the merger/amalgamation of two posts while granting a new pay scale to both as a result of cadre restructuring which was the basis of the recommendation of Pay Committee was rightly within the jurisdiction of the State Government. Further, it has been urged that the order dated 18.03.2011 issued by the Department of Finance and consequential order dated 30.06.2011 issued by the Department of Food and Civil Supplies has the sanction of Rule 4 of the Rules and therefore, on this score also, the impugned judgment is not tenable. By way of order dated 18.03.2011 issued by the department concerned, a categorical direction was issued for

admitting upgraded/amended pay scale of the concerned post with immediate effect.

- (16) As a consequence of orders dated 18.03.2011 and 30.06.2011, the appellants-respondents and similarly situated persons working on the post of Senior Supply Inspector were upgraded alongwith the post as Area Rationing Officer and above, therefore, such upgradation and consequential amalgamation, which, in effect, was annihilation of the difference between the two posts and a new pay scale/pay band was allotted to homogeneous cadre of Area Rationing Officer. Not only the appellants-respondents and other Senior Supply Inspectors were benefited from the Government Order dated 30.06.2011, but simultaneously the Area Rationing Officers including the respondent Nos.1 and 2-writ petitioners were also benefited from the Government Order, inasmuch as both the cadres which carried same pay band, i.e., Pay Band – 2 were placed in higher grade pay of Rs.4,600/-.
- (17) He has further submitted that the phenomena of upgradation of post of Senior Supply Inspector in the instant case is a simultaneous contemporary phenomena of upgradation of pay scale of Area Rationing Officer as well. In view of the provisions contained in Rule 4 of 1981 Rules, His Excellency the Governor had taken a decision to increase the number of posts of Area Rationing Officer and from time to time, the number of posts were also increased in pursuance of the amended Service Rules by the State Government after the assent of His Excellency the Governor.
- (18) The grade pay of Rs.4,600/- which came into existence by virtue of Government Order dated 30.06.2011 was also given to the respondent Nos.1 and 2/writ petitioners on their appointment. On one hand, they are availing the benefits of

Government Order dated 30.06.2011 and on the other hand, they are questioning the upgradation of the appellants-respondents having been done by virtue of said Government Order dated 30.06.2011 itself.

- (19) The earlier existing seniority list dated 29.05.2013 ought to have been revised only to the extent of those who were benefited by Rule 8-A but it was cancelled as a whole to the detriment of the appellants-respondents inasmuch they were in the said seniority list according to their date of appointment as Area Rationing Officer. By cancelling the entire seniority list gave a pedestal to writ petitioners and several other colleagues of respondents-writ petitioners to enter into the arena and to question such event, which had taken place prior to their birth in the department. Therefore, the writ petitioners do not have any locus to question any event, which has taken place in the department prior to their birth in the cadre/department.
- (20) For the sake of dispute, the writ petitioners what to say of their appointment who were selected subsequent to merger could not have any say as regards the merger implemented through Government Order dated 30.06.2011 which is still in tact. The order dated 30.06.2011 has not been unsettled at any forum.
- (21) As a matter of fact, learned Single Judge was dealing with the situation of upgradation and amalgamation of the post of Senior Supply Inspector with the post of Area Rationing Officer and not in respect of the issue relating to source of recruitment to the post of Area Rationing Officer.
- (22) Learned Single Judge has, while misconstruing the aforesaid legal position, vis-a-vis factual position has erred in pushing the appellants-respondents in seniority list while giving complete go-by to their services rendered from 30.06.2011 to 06.09.2013.

Policy decision being implemented in the shape of an executive instruction cannot be faulted with, particularly when it does not override, supplant, replace or nullify the statutory rules or the rules framed under Article 309 of the Constitution of India and this aspect of the matter has escaped notice of learned Single Judge.

- (23) The finding returned in paragraph 14 of the judgment and order under reply has not taken into consideration the fact that the respondent Nos.1 and 2 were appointed on the post of Area Rationing Officer in the Pay Band sanctioned by the Government Order dated 30.06.2011 and therefore they were also the beneficiaries of the said Order.
- (24) Finding of the learned Single Judge that the appellants-respondents might have been given designation of Area Rationing Officer but their right to be treated as Area Rationing Officer would be only from the date of amendment in the Rules, i.e., 06.09.2013 is absolutely erroneous inasmuch as the designation as a result of upgradation was qua Senior Supply Inspector but upgradation of Pay Band was qua Senior Supply Inspector and Area Rationing Officer both.
- (25) Without there being any challenge to the prescription made in the Government Order dated 30.06.2011 in this regard, upgradation of appellants-respondents as Area Rationing Officer was not an empty formality as it was neither an officiating arrangement nor stop-gap arrangement. It was a conscious decision of the State Government.
- (26) Though the issue of Rule 5 was not under consideration before the learned Single Judge, as can be seen from the contents of writ petition filed by the respondent Nos.1 and 2/writ petitioners, the learned Single Judge has exceeded his

jurisdiction. An unforeseen phenomena during transitional stage, change in the nature of duties and authorities of the government servants, the change in the policies of the public, i.e., State, the law on the subject, like the present one, needs to be viewed with the object to achieve justice.

- (27) In the instant case, the first test was to examine as to what the need of constitution of Pay Committee, the object sought to be achieved by its recommendation and the object of consequential decision of the State Government. The locus of writ petitioners was also needed to be tested inasmuch as legally and ethically they would not have any concern with the events already taken place prior to their birth in the cadre.
- (28) The appellants-respondents were in the cadre prior to induction of respondent Nos.1 and 2/writ petitioners in the service before 30.06.2011 and both the posts, namely, Senior Supply Inspector and Area Rationing Officer carried same pay scale and pay band but on 30.06.2011 they emerged as a homogeneous cadre in a better pay band i.e., Pay Band under which writ petitioners were also appointed after coming into effect the re-structuring policy decision.
- (29) The re-structuring did not require to amend about abolition of post of Senior Supply Inspector or merger of Senior Supply Inspector in the cadre of Area Rationing Officer and as such the amendment in Rules in the year 2013 has no relevance for considering the effective date of upgradation of Senior Supply Inspector into Area Rationing Officer.
- (30) The learned Single Judge has completely erred in not visualizing the difference between the promotion and upgradation with a view to improve job conditions, whereas promotion refers to process of shifting of an employee on the

higher post and this vital aspect of the matter has completely been overlooked by the learned Single Judge.

- (31) Amendment in 1981 Rules is also insignificant in view of the fact that no amendment in 1981 Rules has been done i.e., the Rules in which the post of Senior Supply Inspector finds mention, a need was there to amend 1981 Rules in the year 2013 whereby the post of Area Rationing Officer has been made hundred percent promotional post for eligible Supply Inspector and therefore amendment in 1981 Rules is only in respect of source of recruitment for the Area Rationing Officer and not in respect of upgradation of the post of Senior Supply Inspector as Area Rationing Officer. The Government Order dated 30.06.2011 at the relevant point of the amendment regarding time had already settled in the Service Rules, 1981 when recruitment on the post of Area Rationing Officer was made in the year 2013.
- (32) The grounds of attack in the writ proceedings completely lack to maintain a distinction between re-structuring of service and amendment in Service Rules for alteration of the source of recruitment.
- (33) The learned Single Judge has failed to consider the provisions of Rule 4 of 1981 Rules empowering the State Government to determine the number of posts from time to time as under Rule 4(2), His Excellency the Governor may create such additional and permanent as also temporary posts, as and when required and thus for determining and creating the posts from 77 to 250, no amendment in Rule was required as the same was well within the competence of State Government in Rules itself for re-structuring the cadre.

- (34) The learned Single Judge omitted to appreciate that the order dated 30.06.2011 was issued exercising the power under Rule 22 of 1980 Rules, Rule 23 of 1981 Rules read with Rule 4(1) and 49(2) of 1981 Rules which has been in the name of His Excellency the Governor and was also decided to be given immediate effect and thus the finding recorded by the learned Single Judge is self-contradictory for the reason that it has been held that the appellants-respondents will be treated as Area Rationing Officer w.e.f. 06.09.2013 and will be entitled to the scale of pay as decided by the State Government w.e.f. 30.06.2011 but will be treated as Area Rationing Officer w.e.f. 06.09.2013.
- (35) The learned Single Judge has failed to consider that after the increase in the number of posts, the designation of the scale and pay having been validated by the learned Single Judge, denial of seniority would amount to violation of the well-settled principle of law relating to seniority as settled by Hon'ble Supreme Court that in absence of any Rule, the incumbent will be entitled to seniority from the date of initial appointment.
- (36) Further, it has been pointed out by the learned counsel for the appellants that since the upgradation and allowing the higher pay scale was already granted by His Excellency the Governor, only a ministerial exercise was required to be done under Rule 23. Though the seniority list was finalized in the year 2016, but the same was challenged in the year 2019 with a delay of three years, which escaped the attention of learned Single Judge. For all these reasons, the impugned judgment and order is liable to be set aside.
- (37) Sri V. P. Nag, learned Additional Chief Standing Counsel has submitted that since the merger of post of Senior Supply Inspector in the post of Area Rationing Officer would fall

within the domain of the policy decision, after obtaining necessary approval from His Excellency the Governor, the State Government issued a Government Order dated 30.6.2011 to merge the existing posts of Senior Supply Inspector into Area Rationing Officer. He has further submitted that the writ petitioners, who were not born in service on the date of the said decision, have no right to challenge the merger.

- (38) In support of the aforesaid submissions, learned counsel for the appellants as also learned Additional Chief Standing Counsel appearing for the State Government has relied upon the judgments of *S. Sivaguru v. State of T. N. [2013 (7) SCC 335]*, *Bihar State Government Secondary School Teachers Association v. Ashok Kumar Sinha [2014 (7) SCC 441]*, *Rajasthan Public Service Commission v. Chanan Ram [1998 (4) SCC 202]*, *S. P. Shivprasad Pipal v. Union of India [1998 (4) SCC 598]* and *Bihar State Govt. S. S. Teachers Association v. Bihar Education Service Association [2012 (13) SCC 33]*.
- (39) Sri Gaurav Mehrotra alongwith Sri Utsav Misra, learned Counsel appearing for the respondents/writ petitioners has submitted that the contesting respondents are direct appointees on the post of Area Rationing Officer, Department of Food & Civil Supplies, Government of U.P., which is a Class II/Group B Post.
- (40) In continuation of his submissions, he has submitted that the State Government vide Government Order dated 30.06.2011 took a decision for merger of 173 posts of Senior Supply Inspector into the cadre of Area Rationing Officer (ARO).
- (41) Sri Gaurav Mehrotra has further submitted that before the merger or amendment took place in Rules on 6.9.2013, the respondents/writ petitioners had already joined their services on

the post of Area Rationing Officer in March, 2013. 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 from the date of issuance of Government Order, i.e., 30.6.2011, whereby it was directed to merge the post of Senior Supply Inspector in the cadre of Area Rationing Officer.

- (42) He has further submitted that it was explicitly provided in the Government Order dated 30.06.2011 that to give effect to the provision of the aforesaid Government Order, the relevant Service Rules would be amended at the earliest. Thereafter, the State Government vide its letter dated 28.06.2012 informed the Commissioner, Food and Civil Supplies, Government of U.P. that since the Service Rules have not been amended, it would not be proper to take any action with regard to filling up the post of Area Rationing Officer.
- (43) On 19.06.2012, the State Government sent draft Rules to the U.P. Public Service Commission. On the same very day, the Special Secretary, Department of Law and Justice informed that since the Service Rules, 1981 have not been amended in light of the explicit provisions contained in the Government Order dated 30.06.2012, it would not be conducive to fill the post of Area Rationing Officer in absence of the amended Service Rules.
- (44) Though on 25.06.2012, 41 Supply Inspectors were promoted to the Area Rationing Officer, but in the promotion order, it was categorically mentioned that the Supply Inspectors were being

promoted on the post of Area Rationing Officer on the basis of the proposed Fourth Amendment Rules, 2012.

- (45) On 01.06.2013, the U.P. Public Service Commission accorded its approval to the aforesaid draft Fourth Amendment Rules, 2012 and the said Rules were notified by the State Government in the State Gazette on 06.09.2013, which were made applicable from the date of publication of the Rules.
- (46) In the meantime, on 18.03.2013 and 19.03.2013, the contesting respondents/writ petitioners were substantively appointed on the post of Area Rationing Officer. When the tentative seniority list was published, the contesting respondents/ writ petitioners preferred objections on 15.04.2013 and 29.05.2013.
- (47) On 06.03.2014, this Court in Writ-A No. 14110 of 2014 ordered that any action taken for consideration for promotion on the post of District Supply Officer, Grade – II, shall be subject to the decision of this Court in the aforesaid writ petition. Under Right to Information Act, 2005, the department supplied the information on 25.03.2015 that though in the Government Order dated 30.06.2011, a provision has been made for merger of Senior Supply Inspector into the cadre of Area Rationing Officer, but the aforesaid provision of merger has yet not been made in the Service Rules by appropriately amending the Service Rules.
- (48) The Commissioner, Department of Food and Civil Supplies issued and circulated a tentative seniority list of Area Rationing Officer on 01.02.2016. Though the contesting respondents/writ petitioners preferred detailed objections to the aforesaid tentative seniority list, but without considering the same, the final seniority list dated 31.03.2016 was issued.

- (49) On 21.03.2017, the answering respondents/writ petitioners preferred representation before the Commissioner objecting their placement below 173 Senior Supply Inspectors who were born in the cadre of Area Rationing Officer only on 06.09.2013.
- (50) Writ-A No. 30801 of 2014 preferred by the respondents/writ petitioners was dismissed as having become infructuous vide order dated 21.05.2018 with liberty granted to them to assail the fresh seniority list dated 31.03.2016 in accordance with law. In the meantime, on 14.05.2018 and 30.07.2018, the impugned promotion orders of appellants to the post of District Supply Officer Grade – II were issued.
- (51) Learned counsel for the contesting respondents has submitted that prior to coming into force of the Fourth Amendment Rules, 2013, 173 Senior Supply Inspectors were illegally treated to have been merged on the post of Area Rationing Officer w.e.f. 30.06.2011, i.e., the date of issuance of the Government Order though the merger could not have been given effect to without amending the Service Rules, 1981.
- (52) He has further submitted that since the aforesaid fourth amendment was approved by the Commission on 01.06.2013 and came into force only on 06.09.2013, its effect is prospective. Since the writ petitioners were duly appointed on the post of Area Rationing Officer on 18.03.2013 and 19.03.2013 respectively, i.e., before enactment of the Rules, by no stretch of imagination it can be said that they are not senior to the appellants.
- (53) In support of the submissions that statutory provisions cannot be supplanted by issuance of executive instructions, he has relied upon the judgments of the Apex Court in the cases of ***Union of India and another v. Ashok Kumar Aggarwal***

[(2013) 16 SCC 147] and *Government of Andhra Pradesh and others. v. P. Laxmi Devi [(2008) 4 SCC 720]*.

- (54) On placing reliance of the judgment of Hon'ble Supreme Court in the case of *B. N. Nagaranjan and others v. State of Mysore and others [AIR 1966 SC 1942]*, he has submitted that if there is a statutory rule or an Act, the executive must abide by the Act or Rule.
- (55) Further, he has relied on the judgment of *Shiba Shankar Mohapatra v. State of Orissa and others [(2010) 12 SCC 471]* wherein it has been held that the seniority list should be challenged within a reasonable period.
- (56) For determining the seniority, the relevant date is substantive appointment of the employee who has joined on the post. In this regard, he has relied on the judgment of the Apex Court in *'Pawan Pratap Singh and others v. Reevan Singh and others [(2011) 3 SCC 267]*.
- (57) In support of the submission that merger of cadre can be only given effect by amending the relevant service rules, reliance has been placed upon the judgments of the Apex Court in *Dr. Rajinder Singh v. State of Punjab and others [(2001) 5 SCC 482]*, *Union of India through Government of Pondicherry and another v. V. Ramakrishnan and others [(2005) 8 SCC 394]* and *R. Shyamlala and another v. Union of India and others [2014 SCC OnLine Del 4908]*.
- (58) Lastly, he has submitted that in the facts and circumstances of the case, the judgments relied upon by the learned counsel for the appellants on *S. Sivaguru (supra)* and *S.P.Shivprasad (supra)* are not applicable in the instant case.

- (59) Considered the submissions made by the learned counsel for the parties and perused the material available on record in all the aforesaid three appeals.
- (60) Since both parties have laid much emphasis on Articles 162 and 309 of the Constitution of India, it is necessary to look into the provisions of the aforesaid Articles which read as under:-

Article 309 - Recruitment and conditions of service of persons serving the Union or a State

Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and **for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act.**

Article 162 - Extent of executive power of State

“Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws:

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by the

Constitution or by any law made by Parliament upon the Union or authorities thereof.”

- (61) A perusal of Rules, 1980 and Rules, 1981 indicates that the Rules were framed under Article 309 of the Constitution of India. Further, the Article 309 provides that the Acts of the appropriate Legislature may regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or any State. It also provides that pending provision in this behalf being made by or under an Act, the President or such persons, as he may direct, shall be competent to make, in the case of services and posts in connection with the affairs of the Union, rules regulating the recruitment and other service conditions of persons appointed to such services and posts.
- (62) A government order can be implemented immediately after its issuance, as it has a prospective operation. However, it cannot be applied retrospectively. Also, executive orders cannot override statutory rules or amend or supersede statutory provisions, which have the force of law. If an executive order is inconsistent with statutory rules, it cannot be enforced.
- (63) The situation which was not visualized by the Rule framed under Article 309 of the Constitution of India can be supplemented by issuing executive instructions under Article 162 of the Constitution. Restructuring of cadre is a phenomena, which cannot be foreseen at the time of framing of Service Rules and therefore, the cadre restructuring having taken place by virtue of power conferred under Article 162 of the Constitution of India cannot be viewed in the light of existing Service Rules having been notified under proviso to Article 309 of the Constitution of India.

- (64) On the strength of Article 309 of the Constitution of India, the State Government framed Rules, 1980 and Rules, 1981. Time to time, amendments took place till the year 2013 in the aforesaid two Rules. However, on the basis of the detailed recommendations made by the Pay Committee, 2008 through its 10th report (part – I), a decision was taken by the Cabinet to merge the posts of Senior Supply Inspector having pay scale of Rs.5000-8000 (placed in pay band – 2 of Rs.9300-34800 with grade of Rs.4200/- in the revised pay structure) with the posts of Area Rationing Officers having the pay scale of Rs.5500-9000 (placed in pay band of Rs.9300-34800) with grade pay of Rs.4200/- in the revised pay structure) and after merger of the said posts of Senior Supply Inspector and Area Rationing Officers, the scale of pay was upgraded/amended to Rs.7450-11500 (placed in pay band – 2 of Rs.9300-34800 with grade pay of Rs.4600/- in the revised pay structure) and accordingly the post of Area Rationing Officers be filled up through 100% promotion from amongst the substantively appointed Supply Inspector.
- (65) The said decision has been circulated by the State Government vide Government Order dated 30.06.2011, para – 2 of which specifically provides that the decision taken by the State Government be enforced with immediate effect and accordingly the posts of Senior Supply Inspectors and Area Rationing Officers have been merged. In para – 4 of the Government Order dated 30.06.2011 it provides that the necessary amendments in the relevant rules will also be made.
- (66) The proceedings for merger of the posts of Senior Supply Inspectors and Area Rationing Officers have been undertaken with immediate effect and the corresponding amendments have

been made in the relevant Service Rules after due approval of the U.P. Public Service Commission, Prayagraj.

- (67) The decision with regard to increasing the strength of the posts of Area Rationing Officers has been taken by His Excellency the Governor under the provisions of Rule 4 of 1981 Rules as amended from to time and after the decision of His Excellency the Governor the strength of Area Rationing Officers has been increased by the State Government.
- (68) Admittedly, writ petitioner Nos.1 and 2 have been appointed on the post of Area Rationing Officer vide orders dated 28.02.2013 and 04.03.2013 respectively through direct recruitment by the Commission, whereas re-structuring of cadre took place, on the basis of the recommendations of the Pay Committee, 2008, in the year 2011. After publication of Rules in the Government Gazettee, the rest of the employees working in the department have been promoted.
- (69) Considering the aforesaid position, it can safely be held that merger/amalgamation of the two posts while granting a new pay scale to both as a result of cadre restructuring which was based on the recommendation of the Pay Committee was rightly within the jurisdiction of the State Government. Accordingly, the appellants have been given benefit of the aforesaid merger and by passage of time, they have been promoted on the higher posts as per Rules.
- (70) If the aforesaid analogy is taken into consideration, the appellants who are serving the department since 2001 and have been given benefit of merger in the 2011 have to be placed in the seniority list first. Next, the writ petitioners/direct recruitees who have joined in the month of March, 2013, i.e., before publication of Rules, have to be given preference in the

seniority. Thereafter, the eligible employees who have been given promotion after publication of Rules in the month of September, 2013 have to be placed in the seniority list.

- (71) Considering the aforesaid aspects of the matter, the final seniority list dated 31.03.2016 has been prepared in accordance with the provisions of Rules 7 and 22 of the Rules, 1981 after due process.
- (72) It is apt to quote the relevant observations of the learned Single Judge as under:-

“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.”

(73) From the aforesaid paragraph, it is conspicuous that the entire controversy has been settled only on the basis of the publication of the rules in the government gazette and nothing has been considered in the impugned judgment.

(74) Based on the aforesaid logic, further observations and directions given by the learned Single Judge are as under:-

“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.”

(75) From a plain reading of the aforesaid paragraphs, it is crystal clear that a finding has been recorded that the writ petitioners are senior to the respondents in the writ petition and accordingly, the writ petition filed by the writ petitioners was allowed while quashing the final seniority list. Consequently, all the promotional orders were also quashed.

(76) At this stage, it is necessary to look into some of the citations relied upon by the learned counsel for the appellants which are extracted hereunder:-

(i) In paragraphs – 52, 60 and 72 of *S. Sivaguru (supra)*, the Apex Court has held as under:-

52. From the above, it becomes apparent that the G.O.Ms. No. 320 dated 27th June, 1997 did not have the effect of amending the rules. It is also clear that the aforesaid G.O. did not supplant the statutory provisions. It is also further clear that there was no relaxation of the qualifications on the post of Multi Purpose Health Assistant (Health Inspector Grade II) or on the post of Multi Purpose Health Supervisor (Health Inspector Grade I). Therefore, in our opinion, upon integration of Leprosy Inspectors into the cadre of Multi Purpose Health Supervisors, the further categorization into Health Inspector Grade IA and Health Inspector Grade IB was wholly unjustified. It had no rational nexus with any object sought to be achieved, and therefore, violated Articles 14 and 16 of the Constitution of India.

60. Upon merger of the two posts, it was no longer permissible to treat the re-designated Health Inspector Grade IA differently from Health Inspector Grade IB. Since 1997, all incumbents on the posts of Health Inspector Grade IA and Health Inspector Grade IB were performing the same duties. There was intermixing of the duties performed by the two categories of the Health Inspector Grade IA and IB. Both the posts had lost their original identity since 27th June, 1997, and formed one homogenous cadre. Further, having relaxed the qualifications on the basis of their length of service and experience, they were at par with the Health Inspector Grade IA. Thereafter, the State was not justified in denying to the erstwhile Health Inspector Grade IB, the same treatment as was given to Health Inspector Grade IA. Therefore, the respondents could not have been denied the benefit of service on the post of Health Inspector Grade I from the date of the initial integration. It would be appropriate to notice the ratio of law laid down in the case of Sub-Inspector Rooplal (*supra*), wherein it was inter-alia held that the previous service of the transferred officials who are absorbed in an equivalent cadre in the transferred post is permitted to be counted for the purpose of determination of seniority. It would be appropriate to notice here that Leprosy Inspectors re-designated as Health Inspector Grade IB have not been granted the benefit of seniority in their cadre from the date of their initial appointment. They have been deprived of their service on the post of Leprosy Inspector upto 27th June, 1997 when they were

integrated and re-designated as Health Inspector Grade IB. However, upon merger w.e.f. 27th June, 1997, there was no distinction in the services rendered by Health Inspector Grade IA and Health Inspector Grade IB. Therefore, in our opinion, the provision in G.O. (MS) No. 382 of 2007 not to grant the Health Inspectors Grade IB/erstwhile Leprosy Inspectors the benefit of the service from 1997 for determination of their seniority for promotion to the post of Block Health Supervisor was completely unjustified.

72. At this stage, we may summarise the conclusions recorded by us in the following manner:-

72.1 The integration of Leprosy Inspectors into the Department of Health and Preventive Medicine by G.O.Ms. No. 320 dated 27th June, 1997 was complete in all respects.

72.2 The aforesaid G.O. Ms. No. 320 dated 27th June, 1997 did not bring about an amendment in the Statutory Services Rules contained in G.O. Ms. No. 1507 dated 16th August, 1989. The G.O.Ms. was supplementary to the aforesaid Rules and did not supplant the same.

72.3 There was no relaxation in the educational qualification for the integration/re-designation of Leprosy Inspectors as Multi Purpose Health Supervisors as the post of Leprosy Inspector was equated with the post of Multi Purpose Health Supervisor. The qualifications prescribed for appointment on the post of Multi Purpose Health Assistants re-designated as Health Inspector Grade II were not applicable for the post of Multi Purpose Health Supervisor.

72.4 Since, there was a complete integration of the posts of Leprosy Inspector and Multi Purpose Health Supervisor by virtue of G.O.Ms. No. 320 dated 27th June, 1997; both categories were entitled to the same treatment. Therefore, Leprosy Inspectors re-designated as Health Inspector Grade IB were entitled to the pay-scale of Rs.1350-2000 w.e.f. 1st August, 1997 and the pay-scale of Rs.4500-7000 w.e.f. the same were given to Health Inspector Grade IA, with all consequential benefits.

72.5 Upon integration vide GOMs No. 320 dated 27th June, 1997, Multi Purpose Health Supervisors and Leprosy Inspectors were to be re-designated as Health

Inspector Grade I. The birth mark of the Leprosy Inspector got obliterated with the integration. There could be no further distinction in the cadre of Health Inspector Grade I. There could be no such division as Health Inspector Grade IA and Health Inspector Grade IB.

72.6 Since Paragraph 6(iv) and 6(v) of G.O.Ms. No. 382 dated 12th October, 2007 was in violation of Articles 14 and 16 of the Constitution of India, they have been correctly struck down by the High Court.

72.7 The denial of seniority to the re-designated Health Inspectors Grade IB, i.e., erstwhile Leprosy Inspectors on the post of Health Inspector Grade I w.e.f. 1st August, 1997 to 12th October, 2007 violated Articles 14 and 16 of the Constitution of India. The Division Bench of the High Court has correctly concluded that the integrated Leprosy Inspectors, re-designated as Health Inspector Grade IB are to be re-designated as Health Inspector Grade I and to be given seniority as well as consequential reliefs such as seniority and further promotions.

72.8 The provision contained in Clause 6(v) of G.O.Ms. No. 382 dated 12th October, 2007 denying promotion of the re-designated Health Inspector Grade I to the post of Block Health Supervisor and Technical Personal Assistant till the last person in the existing list of Health Inspector Grade I gets promotion as Block Health Supervisor and Technical Personal Assistant, has been rightly held by the High Court to be violative of Articles 14 and 16 of the Constitution of India.

72.9 The continuance of the existing promotion channels as Non-Medical Supervisor and Health Educator to the re-designated Health Inspector grade I (erstwhile Leprosy Inspectors) did not amount to bestowing a double benefit upon this category. Therefore, the High Court did not enforce negative equality. The High Court has correctly observed that upon integration and merger into one cadre, the pre-existing length of service of the Leprosy Inspectors re-designated as Health Inspector Grade IB had to be protected as it can not be obliterated. Therefore, the Leprosy Inspectors have been correctly placed at the bottom of the seniority list of the already existing Health Inspectors Grade I w.e.f. 27th June, 1997. Therefore, it can not be said that benefit has been given to the Leprosy Inspectors /Health Inspector Grade IB /Health Inspector Grade I with retrospective effect.”

(ii) In para – 12 of *S. P. Shivprasad Pipal (supra)*, the Apex Court held as under:-

“12. A decision to merge such cadres is essentially a matter of policy. Since the three cadres carried the same pay scale at the relevant time, merging of the three cadres cannot be said to have caused any prejudice to the members of any of the cadres. The total number of posts were also increased proportionately when the merger took place so that the percentage of posts available on promotion was not in any manner adversely affected by the merger of the cadres.”

- (77) For the reasons stated in the preceding paragraphs, the citations relied upon by the learned counsel for the respondents/writ petitions are not applicable.
- (78) In view of what has been stated above, since the seniority list dated 31.03.2016 prepared by the department is perfectly just and proper, the findings recorded in the impugned order are not tenable.
- (79) Accordingly, all the Special Appeals are **allowed** and the impugned judgment and order dated 03.05.2023 passed in Writ-A No. 1600 of 2019, *Sushil Mishra and another v. State of U.P. and others* is hereby set aside. No order as to costs.

[Brij Raj Singh, J.] [Attau Rahman Masoodi, J.]

Order Date :- 13.8.2024
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