

**Court No. - 39**

**Case :-** WRIT - A No. - 5414 of 2020

**Petitioner :-** Manoj Kumar Singh 17 Others

**Respondent :-** State of U.P. and Another

**Counsel for Petitioner :-** Rakesh Kumar Verma, Sr. Advocate (Ashok Khare)

**Counsel for Respondent :-** C.S.C.

**Hon'ble Ashwani Kumar Mishra, J.**

1. Whether, delay in selection for appointment, *ipso facto*, can be a ground to apply pension scheme applicable on the date of issuance of advertisement, for such selection, notwithstanding specific stipulation in the pension rules specifying date of entry in the service to be determinative of its applicability is the question that arises for consideration in this case.

2. Admitted facts in the context of which the above question arises for consideration are that an advertisement came to be issued by the U.P. Public Service Commission on 28<sup>th</sup> October, 2002 inviting applications for appointment against Combined Subordinate Services (Preliminary) Exam, 2002. Last date for making application as per the advertisement was 28<sup>th</sup> October, 2002. The recruitment was to be held in three stages i.e. Preliminary test; Main written test and lastly the Interview. All the petitioners applied against the advertisement and cleared the preliminary examination conducted on 30<sup>th</sup> March, 2003. Main Written Examination followed between 17.8.2004 to 27.8.2004, wherein also the petitioners qualified. Interview was conducted by the Commission between 9.5.2005 to 28.5.2005. The final select list was published on 13.6.2005. After the verification process was completed the petitioners were issued appointment letters on 7.3.2006 and 19.4.2006, pursuant to which they have joined and are working in different districts as Audit Officers. Some of the petitioners are also working as Assistant Accounts and Finance Officer. New Pension Scheme enforced w.e.f. 1.4.2005 has been made applicable upon all the petitioners and contribution from their salary is also being deducted since their

initial appointment without any protest.

3. The process of recruitment had commenced in October, 2002 and petitioners contend that if it was concluded within a reasonable period, they could have been appointed before 31<sup>st</sup> of March, 2005 by when the erstwhile pension scheme was applicable. Submission is that for any delay occasioned in finalizing the recruitment they ought not be put to an disadvantageous position, as the terms of new pension scheme are less favourable in comparison to the terms contained in the old pension scheme.

4. New Pension Scheme has been enforced for government servants in State of Uttar Pradesh vide notification dated 28<sup>th</sup> March, 2005. Uttar Pradesh Retirement Benefits Rules, 1961 (hereinafter referred to as 'the Rules of 1961'), which regulated the earlier pension scheme also got amended vide U.P. Retirement Benefits (Amendment) Rules, 2005 vide Notification, dated 7.4.2005. The amended Rules and the Notifications enforcing New Pension Scheme upon the petitioners are not challenged in the writ petition. It is, however, urged that petitioners are entitled to the benefit of provisions under the Old Pension Scheme which remained operative till 31<sup>st</sup> March, 2005 in view of the law laid down by the Division Bench of this Court in *Firangi Prasad Vs. State of U.P. and others* reported in 2011 (2) UPLBEC 987, as also a recent judgment of this Court in *Mahesh Narayan and others Vs. State of U.P. and others, Writ Petition No. 55606 of 2008*. Contention is that delay in holding of selection cannot prejudicially effect the rights of the petitioners, inasmuch as, the pension scheme as per the old rules applicable on the date of advertisement would have to be applied. Reliance is also placed upon a judgment of the High Court of Uttarakhand in *Writ Petition (S/S) No. 1170 of 2010 (Ashutosh Joshi and others vs. State of Uttarakhand and others)*, decided on 17.6.2013, which has been approved by the Division Bench with dismissal of *Special Appeal No. 330 of 2013 vide judgment dated 26.6.2014*. Reliance is placed upon

the observation made by the Uttarakhand High Court in Ashutosh Joshi (*supra*) that as selection process had already begun during currency of old pension scheme and the advertisement also provided for the posts to be pensionable, therefore, a contrary stand would be impermissible. Petitioners have also placed reliance on the judgment of the Delhi High Court in *Inspector Rajendra Singh Vs. Union of India reported in (2017) SCC Online Delhi 7879* as also the subsequent decision of the same Court in *Govt. of NCT Delhi Vs. Ajay Kumar and others* against which a SLP filed before the Supreme Court has also been dismissed.

5. Sri Ashok Khare, learned Senior Counsel for the petitioners contends that this Court in the case of Mahesh Narayan (*supra*) has accepted similar contention of the petitioners and the Old Pension Rules have been made applicable even upon persons appointed to the government service after 1.4.2005 and, therefore, the petitioners' are also entitled to similar benefit.

6. Per-contra, learned State Counsel states that the date of entry into service would be the relevant date for applicability of pension scheme and as the pension rules have not been questioned as such petitioners are not entitled to any relief.

7. It is in the above context that the question formulated requires consideration by this Court.

8. The Rules of 1961 came to be notified on 29.3.1962 under the proviso to Article 309 of the Constitution of India and was to apply upon all officers appointed under the rule making power of the Governor in the State of Uttar Pradesh. The rules of 1961 came into force w.e.f. 1<sup>st</sup> April, 1961 and provided for payment of pension; death-cum-retirement gratuity; nomination; family pension; commutation, etc. Pension Scheme under the rules of 1961 allegedly contains more favourable terms (hereinafter referred to as the 'old

pension scheme') than the Contributory Pension Scheme introduced w.e.f. 1.4.2005 (hereinafter referred to as 'New Pension Scheme'). Rules of 1961 have been amended vide Uttar Pradesh Retirement Benefits (Amendment) Rules, 2005, notified on 7<sup>th</sup> April, 2005 w.e.f. 1.4.2005. Clause (3) has been inserted in Rule 2 of the Rules of 1961, which reads as under:-

*"[(3) These Rules shall not apply to employees entering services and posts on or after April 1, 2005 in connection with the affairs of the State, borne on pensionable establishment, whether temporary or permanent.]"*

9. The provisions of General Provident Fund (Uttar Pradesh) Rules, 1985 have also been amended vide Notification, dated 7<sup>th</sup> April, 2005 so as to exclude applicability of the Provident Fund Rules of 1985 upon such government servants who enter into service of State after 1.4.2005.

10. Above noted statutory scheme makes it explicit that all government employees entering in the services of State on or after 1.4.2005 on a pensionable post will be governed by the 'New Pension Scheme' and the provisions of 'Old Pension Scheme' will not be applicable upon them. Amendments incorporated in the statutory rules are not under challenge. In addition to the various judgments relied upon, the petitioners also urge that the pension scheme applicable on the date of advertisement of vacancy would be applicable notwithstanding the contrary stipulation in the Rules of 1961.

11. Before advertizing to the judgments relied upon on behalf of the petitioners, it would be necessary to examine the legal character of pension and the nature of right that accrues to an employee to receive pension as per the pension scheme applicable on the date of advertisement.

12. Right to receive pension is a statutory right and the pensionary benefits can be claimed or granted only in accordance with the

applicable pension Rules. Payment of salary, pension or other benefits of service form part of the conditions of service. Conditions of service and rules of recruitment are two different aspects which are dealt with distinctively in law.

13. A distinction exists in law between Rules of recruitment and conditions of service which needs to be noticed at this stage. Rules of recruitment would regulate different stages of recruitment i.e. from the issuance of advertisement till the issuance of appointment letter while conditions of service would come into play after appointment is offered. It has been observed by the Apex Court in State of Madhya Pradesh and others Vs. Shardul Singh, (1970) 1 SCC 108, that the expression "conditions of service" is an expression of wide import and means all such conditions which regulate the holding of a post by a person right from the time of his appointment till his retirement and even beyond it in matters like pension etc. (See: para 9).

14. Thus, payment of pension being part of the conditions of service would be governed by Rules relating to pension where the post is pensionable. It would be apposite to refer to the observation of the Supreme Court in State of W.B. Vs. Ratan Bihari Dey, (1993) 4 SCC 62, which is reproduced:-

*"7. .... Now, it is open to the State or to the Corporation, as the case may be, to change the conditions of service unilaterally. Terminal benefits as well as pensionary benefits constitute conditions of service. The employer has the undoubted power to revise the salaries and/or the pay-scales as also terminal benefits/pensioners benefits, as the case may be, shall take effect is a concomitant of the said power. So long as such date is specified in a reasonable manner, i.e., without bringing about a discrimination between similarly situated persons, no interference is called for by the Court in that behalf. ...."*

15. As against this (conditions of service) the Rules relating to recruitment would regulate the stages spanning from issuance of advertisement till issuance of appointment letter. The recruitment

process has been equated in law with holding of a 'game' to apply the principle that rules of game cannot be changed during its continuance. Doing so would unsettle the recruitment process and would thus become arbitrary. (See. *A.A. Calton Vs. Director of Education, AIR 1983 SC 1143*). The rules applicable on the date of issuance of advertisement would therefore continue to operate so long as the recruitment exercise itself is not concluded.

16. The aforesaid principle that rules of game cannot be changed during the midst of game itself would operate only till the recruitment gets finalized and cannot be stretched to include an exigency which falls in the realm of conditions of service. The principle would be exhausted as soon as the appointment is made and the stages thereafter, including the stage after retirement like pension etc., would be governed exclusively by the rules regulating conditions of service.

17. The date on which the petitioners came to be regulated by the service rules is the date of issuance of their appointment letters which is after 1.4.2005. Prior to this date, there exists nothing in law that can be regulated by the service rules governing the post to which the petitioners had sought appointment. The old pension scheme, operating on the date of advertisement, would therefore have no relevance for the purposes of applicability of pension scheme qua the petitioners as evidently, prior to their appointment, the rules relating to pension i.e. Rules of 1961 had undergone change and on the date of issuance of their appointment letters, which is the relevant date, on which the rules regulating conditions of service became applicable, the new pension scheme had come in vogue.

18. Law is settled that no right accrues in favour of an applicant merely on the strength of filing of an application pursuant to advertisement issued for appointment. The advertisement issued for

appointment can at best be equated to an invitation to offer; an expression occurring in the realm of contract. Application made against advertisement is akin to an 'offer' which creates no right in favour of the applicant/candidate. The applicant has to undergo various stages of recruitment in accordance with the provisions contained in the applicable recruitment rules and the advertisement for selection. It is only thereafter that name of the candidate is included in the select list. The nature of right accrued in favour of a selected candidate is also settled. In *Shankarsan Das Vs. Union of India and others* (1991) 3 SCC 47 a Constitution Bench of the Apex Court examined whether a selected candidate acquires an indefeasible right to be appointed against available vacancies. The contention advanced in that regard has been specifically repelled in paragraph 7 of the judgment which is reproduced hereinafter:-

*"7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of Haryana v. Subhash Chander Marwaha, (1974) 1 SCR 165, Neelima Shangla v. State of Haryana, (1986) 4 SCC 268 or Jatendra Kumar v. State of Punjab, (1985) 1 SCR 899."*

19. Above view has been consistently followed in *State of Bihar Vs. Secretariat Assistant S.E. Union and others*, (1994) 1 SCC 126; *Union of India Vs. Kali Dass Batish*, (2006) 1 SCC 779; *Punjab State Electricity Board Vs. Malkiat Singh*, (2005) 9 SCC 22; *Rakhi Rai Vs. The High Court of Delhi*, (2010) 2 SCC 637 and *Vijoy Kumar Pandey Vs. Arvind Kumar Rai and others*, (2013) 11 SCC 611. The law is clear that merely on being

selected a candidate does not acquire an indefeasible right to be appointed unless the relevant recruitment rules so provide. State is not under any duty to fill up all or any of the vacancies. The only exception to the proposition is that State cannot act in an arbitrary manner while making appointment. The limited right in the selected candidate, therefore, is of protection against arbitrary action of the State in denying him appointment.

20. It is only where right to be considered for appointment after selection had crystallized in favour of candidate but the selected candidate was arbitrarily denied appointment during the applicability of previous pension scheme that the Court while granting relief may also extend such service benefits including pension which were available on the date when such right was denied.

21. In Inspector Rajendra Singh (supra), the petitioners were selected but were declared medically unfit. Petitioners therein were then examined in other hospitals and were found not to be suffering from any deformity/illness. They applied for review medical board. While matter was pending before the review medical board the Commission declared results of all other selected candidates, except the petitioners. Different paramilitary forces were allocated to them and appointment letters were also issued. Such candidates also joined on or before 31<sup>st</sup> December, 2003, which was prior to the introduction of the New Pension Scheme. Ultimately the petitioners were also appointed, but their joining was after the New Pension Scheme had been enforced. The Delhi High Court found that denial of appointment to petitioners alongwith other similarly selected candidates was arbitrary. Since other selected candidates including those placed lower in merit than petitioners were offered appointment prior to 31<sup>st</sup> December, 2003, while the old pension scheme was applicable, therefore, Old Pension Scheme was extended to petitioners also. Similar were the facts in the case of Naveen Kumar Jha Vs. Union of India and others, decided by Delhi



High Court on 2.11.2012.

22. In paragraph 17 of the judgment in Avinash Singh Vs. Union of India, Writ Petition (C) No. 5400 of 2010, the Court observed that if appointment is by selection, seniority of the entire batch has to be reckoned with respect to the merit position obtained in the selection and not on the fortuitous circumstance of the date on which a person is made to join. All other judgments of the Delhi High Court, which have been relied upon by the petitioners, therefore, are on the facts of its own, inasmuch as, the Court found that petitioner's right to appointment got crystallized during the old pension rules and while similarly placed persons were appointed and extended the benefit of old pension scheme, as such, the petitioners cannot be discriminated. These judgments clearly are covered by the exception carved out in the case of Shankarsan Das (supra). None of the judgments of the Delhi High Court relied upon by the petitioners lay down any proposition that merely on account of delay in holding of selection the pension rules applicable on the date of advertisement would become applicable upon the employee notwithstanding the fact that new pension scheme had come into play.

23. The Division Bench Judgment of this Court in the case of Firangi Prasad (supra) also dealt with a different exigency. In Firangi Prasad (supra) the appellant was appointed on adhoc basis in a selection held by District Inspector of Schools on 5.1.1993 who was the competent authority. Appointment, however, was to be offered by the private management within ten days as per the scheme. However, for no obvious reason the private management denied issuance of appointment letter within ten days and ultimately the appointment was offered on 25.8.1993. The applicable U.P. Secondary Education Service Selection Boards Act, 1982 got amended on 20.4.1998 and adhoc appointments made till 6.8.1993 were to be regularized. The question before the Division Bench was as to whether benefit of regularization could be denied to the

appellants. The Division Bench held that the appellant since was arbitrarily denied appointment by the private management, though the appellant stood selected, therefore, his appointment would be treated in law to have been made prior to 6.8.1993. This case would also be covered within the exception carved out in Shankarsan Das (supra) as appointment had been arbitrarily denied to the selected candidate.

24. Facts occurring before the Uttarakhand High Court in Ashutosh Joshi (supra) also are distinct. Vacancy was advertised on 5.10.2003 for appointment to be made in different Intermediate Colleges. Vacancies for men were 1120 while for women it was 99. Both male and female candidates applied and while women candidates were appointed during old pension rule the male candidates got appointed after the new pension scheme was introduced. Court found that both men and women candidates were evenly placed and any delay in offering appointment to male candidates would not disentitle them from the benefit of old pension scheme as similarly placed women candidate were covered by the old pension scheme. Although a passing observation is made that selection having commenced during old pension scheme would be applicable upon male candidates appointed later, yet, this observation has to be read in the context of the fact that similarly placed women candidate were covered by the old pension rule. The Court apparently was protecting the petitioners against an arbitrary scenario and thus this case also falls in the excepted category in Shankarsan Das (supra).

25. The Judgment of Uttarakhand High Court in Balwant Singh and others Vs. State of Uttarakhand (Writ Petition No. 16 and 944 of 2011) was also a case where persons selected together were being subjected to different pension scheme based upon the fortuitous circumstance i.e. delay in appointment to some. The Division Bench, however, has observed that service conditions prevailing on the commencement of recruitment process cannot be altered to the

detriment of recruitees. This observation of the Division Bench, with utmost respect, does not correctly lay down the law as the distinction between rules of recruitment and conditions of service have been ignored. The principle that rules of recruitment cannot be changed can have no applicability in a scenario where conditions of service is changed on account of change in the service rules.

26. In Mahesh Narayan and others (supra) a co-ordinate bench of this Court had the occasion to consider a case where recruitment commenced vide notification dated 20.10.1999 in respect of a pensionable post. The recruitment got delayed on account of a dispute raised before this Court. Although by virtue of the order passed in Special Appeal No. 485 (S/B) of 2001, dated 29.12.2001, there was no impediment in completion of recruitment but the selection got completed only after dismissal of writ petition on 5.7.2005. In between, a subsequent advertisement was issued and the selected candidates were appointed prior to 1.4.2005 i.e. during the Old Pension Scheme. The notifications dated 28.3.2005, 7.4.2005 and the amended rules of 2005 were challenged as not being applicable upon the petitioners. The writ petition has been partly allowed in view of the observations extracted hereinafter:-

*"So far as facts of the case are concerned, there is no dispute on the point that pursuant to advertisement No. A-3/E-1/2000, advertisement was issued in news paper on 22.12.2000 and as per order of this Court dated 29.12.2001 passed in Special Appeal No. 485 (S/B) of 2001 (supra), there was no legal impediment in completion of recruitment process, but due to inaction on the part of respondents, it was completed only after dismissal of writ petition on 05.07.2005. Final selected list of selected candidate was published in daily newspaper 'Dainik Jagran' dated 12.03.2006 and thereafter appointment letters were issued. It is also not disputed that in between again in subsequent advertisement No. A-3/E-1/2002, recruitment was completed and candidates had been granted appointment prior to 01.04.2005 and getting the benefit of 'Old Pension Scheme'.*  
"

27. The judgment in the case of Mahesh Narayan (supra) is again on the facts of its own, inasmuch as, the recruitment process was delayed for no obvious reason and persons appointed pursuant to a

subsequent notification were appointed earlier and were granted the benefit of old pension rules. Persons appointed against a previous advertisement cannot be denied benefits which have already been extended to the appointees of a later recruitment exercise. The protection in the form of benefit under old pension rules has been extended only to protect against an arbitrary act. This judgment also does not lay down any proposition that delay in concluding selection would ipso facto result in applicability of old pension scheme.

28. The petitioners have not been able to demonstrate that they have been arbitrarily discriminated or have been denied appointment prior to 31<sup>st</sup> March, 2005. For any delay in conclusion of selection the previous pension rules would not get attracted in view of the express stipulation in the statutory rule itself. Date of entry into service would otherwise determine the applicability of pension rules by virtue of the U.P. Retirement Benefits (Amendment) Rules, 2005, notified on 7.4.2005. Petitioners have otherwise accepted the terms of new pension scheme ever since their appointment in the year 2006. No protest of any kind was made during the last fourteen years. Petitioners therefore, have acquiesced to the new pension scheme and they cannot be permitted to resile from its applicability particularly when no challenge is laid to the statutory rule itself.

29. It is otherwise settled that no sympathy can be claimed to override express provisions contained in the applicable pension rules. In a matter arising out of claim of pension the Supreme Court in *Sudhir Kumar Consul Vs. Allahabad Bank*, (2011) 3 SCC 486, observed as under:-

*"31. We have sympathies for the appellant but, in a society governed by Rule of law, sympathies cannot override the Rules and Regulations. We may recall the observations made by this Court while considering the issue of compassionate appointment in public service.*

*32. In Life Insurance Corporation of India v. Asha Ramachandra Ambekar and Anr. (1994) 2 SCC 718, wherein the Court observed:*

*"The High Courts and the Administrative Tribunals cannot confer benediction impelled by sympathetic consideration.... Yielding to instinct will tend to ignore the cold logic of law. It should be remembered that "law is the embodiment of all wisdom". Justice according to law is a principle as old as the hills. The Courts are to administer law as they find it, however, inconvenient it may be."*

30. In view of the discussions aforesaid, this Court is of the considered opinion that any delay in selection for appointment, *ipso facto*, cannot be a ground to extend benefit of old pension scheme notwithstanding the clear stipulation in the pension rule specifying date of entry in service to be determinative of the pension scheme.

31. Writ petition lacks merit and is dismissed.

**Order Date :-** 13.10.2020  
Ranjeet Sahu/Anil

(Ashwani Kumar Mishra, J.)