

**SUPREME COURT OF INDIA**

State of U.P.

Vs.

Santosh Kumar Mishra

S.L.P.(C) No.20558 of 2009

(Altamas Kabir and S.S. Nijjar JJ.)

03.08.2010

**JUDGEMENT**

**ALTAMAS KABIR, J.**

1. The same criteria differently applied at two different points of time leading to different results and consequences, is the problem we are faced with in these Special Leave Petitions. The same principles which were applied in the case of the Respondents to deny them the benefit of appointment, were not given effect to when it came to their turn to get the benefit thereof.

2. In order to appreciate this unusual situation, it is necessary to relate some of the relevant facts of these cases.

3. The Respondents have passed the diploma course in Pharmacy from different institutions which

have been recognized by the Pharmacy Council of India and are also registered with the State Pharmacy Council of U.P. Their claim is for selection and appointment to the post of Pharmacist, which is governed by the U.P. Pharmacists Service Rules, 1980, hereinafter referred to as the '1980 Rules'.

According to them, under Rule 15(2) of the 1980 Rules, all diploma holders were required to be appointed against the vacancies which became available in each recruitment year by first appointing those Pharmacists who had obtained their diplomas earlier.

4. They claim that appointment to the post of Pharmacist should be made batchwise from each year and that the vacancies which had accrued, should be filled up by giving appointment to those Pharmacists according to the dates on which they had obtained their diplomas, irrespective of their merit. According to the Respondents, till those belonging to the earlier batches were not considered and given appointments in such vacancies, the diploma holders of the subsequent batches should not be given appointment, irrespective of their merit.

5. The aforesaid controversy was triggered by an advertisement dated 12th November, 2007, whereby 766 vacancies were advertised for being filled up by diploma holders. The advertisement provided that the recruitment would be made in accordance with the U.P. Procedure for Direct Recruitment of Group 'C' Posts (Outside the Purview of Public Service Commission) Rules, 2000, as amended by the U.P. Procedure for Direct Recruitment of Group 'C' Posts (Outside the Purview of Public Service Commission) (First Amendment) Rules, 2003, and the relevant Service Rules in force with regard to educational qualifications and other conditions of service.

6. According to the Respondents, on an interpretation of Rule 15(2) of the 1980 Rules by the State Government, they were entitled to be selected and appointed first on the vacancies advertised, as they belonged to previous batches and were denied appointment by the State Government earlier on the plea that notwithstanding their merit being superior to those of some of the diploma holders, who had obtained diploma prior in point of time, the latter candidates were to be given appointment first. As a result, those diploma holders, who had obtained diploma before the Respondents, were adjusted against the vacancies first, irrespective of their merit vis-à-vis the diploma holders of subsequent batches and the said practice was continued till 2002.

However, when the fresh vacancies were declared and the Respondents were to be appointed on the same principle and practice, they were denied the benefit of the same citing the Rules of 1980 read with Rules of 2002, as amended by the Rules of 2003. According to the Respondents, it was not open to the State government to take a different stand in interpreting the Rules to severe prejudice of the Respondents' right to appointment, though similarly situated persons have been given the benefit of the said Rules and whereunder the Respondents had been denied appointment when their turn came to be appointed.

7. Questioning the said discriminatory and arbitrary treatment, the Respondents herein moved several writ petitions before the Lucknow Bench of the Allahabad High Court for quashing the above- mentioned advertisement dated 12th November, 2007 and for a writ in the nature of Mandamus to command the Petitioners herein to make recruitment to the vacant posts of Pharmacists strictly in accordance with Rules 14 and 15 of the 1980 Rules, by specifying the vacancies year-wise, and, thereafter, appointing the writ Petitioners to the post of Pharmacists after providing for age relaxation. A further prayer was made in one of the writ petitions (Writ Petition No.7771 (SS) of 2007) to declare Rule 5(2)(iv)(b) of the amended Rules as ultra vires. After a detailed consideration of the rules and the existing procedures, the amended Rules were held to be intra vires. Considering the same, the Petitioners herein were competent to issue the advertisement and to constitute a Selection Committee in terms of Rule 6 of the 2002 Rules and the First Amendment Rules 2003. It was, however, also indicated that until and unless Clause (a) of Sub-Rule (3) of Rule 5 of the 2003 Rules was amended, selection could not be undertaken by computing the marks as per the procedure prescribed therein and selection had to take place as per the provisions of Rule 15(2) of the 1980 Rules on the basis of the marks obtained in the Pharmacy Diploma Examination.

8. The said order of the learned Single Judge was challenged by the Respondents herein in several writ appeals before the Division Bench of the Lucknow Bench of the Allahabad High Court.

9. Taking notice of the peculiar situation which had developed on account of the differing interpretations of the Rules in question, the Division Bench very succinctly summarized the issue in the following words :

"A peculiar and a piquant situation has arisen in the instant case, where it is not the case that an aspirant of the higher post in service on becoming eligible for promotion or a person seeking direct appointment on the date when he is to be considered for such a promotion or appointment, seeks to interpret the rule of recruitment in a particular manner, looking to the past practice, to his advantage, but here is a case where the appellants were excluded from consideration of their appointment at the relevant time earlier, by interpreting the rule to their disadvantage, and were made to believe that likewise their candidature shall be considered later on, for which various circulars and instructions were also issued by the State Government, but when their turn came for getting employment, they were again being put out of consideration, by interpreting the rule in a different manner."

10. On the basis of its aforesaid observations, the Division Bench disposed of the several appeals with a direction that the case of the Appellants therein would be considered in accordance with pre-existing practice by considering their appointment on the basis of their merit taking their objects into consideration as was being done earlier, but this process would be available only for said appellants. They would be accommodated if they were otherwise found eligible and the remaining

vacancies would be filled in by following Rule 15(2) strictly as directed by the Single Judge. A direction was also given to the respondents in the said appeals to give age relaxation to the said appellants as per the Rules, if they had crossed the age limit, for the reason that right from the year 1998 no selection had been made and in certain cases, age relaxation had already been given. A further direction was given to complete the selection process within three months from the date of receipt of a certified copy of the order.

11. Appearing for the Petitioners, Ms. Shobha Dikshit, learned Advocate, submitted that the 1980 Rules prescribe the eligibility conditions for selection of Pharmacists. Rule 10 provides for the minimum and maximum ages while Rule 14 provides for determining the number of vacancies to be filled during the course of the year. Rule 15 provides the procedure for direct recruitment by the constitution of a Selection Committee and preparation of a select list in order of merit, which would be valid for a period of one year. On the other hand, the 2003 Rules provide the detailed procedure for determining the merit and suitability of candidates with technical qualifications. Ms. Dikshit submitted that there was no clash or contradiction between the said two Rules and that both, therefore, exist side by side.

12. Ms. Dikshit submitted that the 2003 Rules were being followed by the State Government for direct recruitment to Class III posts which were outside the purview of the Public Service Commission, such as Pharmacists, Lab. Technicians, ECG Technicians, etc. She submitted that the last advertisement dated 11th February, 2007 was a composite advertisement inviting applications from all paramedical trades such as Pharmacists, Lab.

Technicians, X-ray Technicians, Physiotherapists and ECG Technicians and selections had already been made. It was also submitted that while filling the backlog of reserved category candidates for filling up the posts of Pharmacists for the year 2007, the Rules of 1980 read with the Rules of 2003 had been followed and about 73 vacancies had been duly filled in. Furthermore, since the matters relating to selection and appointment of Pharmacists were pending consideration before this Court for other trades other than the selection of Pharmacists, the Rules of 2003 had been applied and the selected candidates had already joined their posts.

13. Ms. Dikshit, submitted that Rule 5 of 2003 Rules made it very clear that only the merit of the eligible candidates was required to be judged on the basis of the minimum technical qualifications, as provided in the Educational Regulation Act, 1991, for the diploma course in Pharmacy, and the marks obtained in the qualifying examination and the diploma in Pharmacy are taken into consideration for determining merit. The method adopted for allocating certain percentage of marks as contained in Sub-Rule (2) is only to give more credit to meritorious candidates as compared to candidates having lesser merit. Ms. Dikshit urged that the special procedure did not offend Article 14 of the Constitution nor was it contrary to the 1980 Rules, since it did not result in any kind of bias or prejudice to the candidates of any particular batch. Ms. Dikshit submitted that all eligible candidates were graded similarly and the object of the procedure, as provided in the 2003 rules, is to

adjudge the merits of the candidates on the basis of the technical qualifications uniformly throughout the State so as to maintain efficiency in Government service.

14. Ms. Dikshit submitted that the observations made to the contrary by the learned Single Judge of the High Court were erroneous and instead of appreciating the same, the Division Bench also erroneously accepted the contentions that notwithstanding the 2003 Rules, the past practice should be followed. Ms. Dikshit submitted that neither was there any past practice nor was there any other rule or guidelines for selections to be made for appointment to the post of Pharmacist after the year 2003, when the 2002 Rules came into operation. According to Ms. Dikshit, even otherwise, the directions issued by the Division Bench in the impugned judgment would create two different procedures to select candidates in one selection process.

15. Ms. Dikshit also urged that the tenor of the impugned judgment gives the impression that the State Government had been following a practice of giving preference to earlier batches over later batches. According to Ms. Dikshit, such a practice was factually incorrect and till date, no candidate from previous batches had been left out. However, having regard to the decision of the High Court in case of Rajat Yadav & Anr. vs. State of U.P. & Anr. (Writ Petition No.2473 (SS) of 2000), issuing a mandamus to the State Government to accommodate the 54 candidates left over from the selection, the State Government, while implementing the said direction, had filled up the posts accordingly. In the process of such an exercise, candidates with lesser merit came to be appointed, more so, having regard to the fact that the State Government did not choose to challenge the correctness of the judgment. Ms. Dikshit submitted that even on such grounds the stand of the Respondents that past practice should be followed in future also ignoring merit, was not capable of being accepted.

According to Ms. Dikshit, such an action would be contrary to the 1980 Rules and the established service jurisprudence. She also pointed out that the learned Single Judge had come to the positive conclusion that only an amendment was made to Rule 5(3)(a) since selection could not be undertaken by computing the marks in terms of the procedure prescribed, and, on the other hand, selection would have to take place as per the provisions of Rule 15(2) of the U.P. Pharmacists Service Rules, 1980, on the basis of the marks obtained in the Pharmacy Diploma Examination, irrespective of the year in which the candidate had appeared in the Diploma Examination.

16. Several Special Appeals were filed by the writ Petitioners before the High Court which were disposed of by a common judgment dated 4th May, 2009, with a direction that the age of the Respondents be relaxed as per rule, if they had crossed the age limit for the reason that right from the year 1998, no selection had been made and in certain cases, age relaxation had been granted.

17. Ms. Dikshit further pointed out that while disposing of the Writ Appeals, the Division Bench of the High Court had also relied on the submission that unless the Respondents were considered for

selection, they would lose their right to be considered for such selection for all times to come on account of an incorrect interpretation of the Rule, forgetting that the Respondents could have challenged their non-selection at the time when they were excluded from the zone of consideration on the ground that their case would be considered only after the diploma holders who had obtained diploma prior to them were accommodated or selected irrespective of their merit. Ms. Dikshit concluded on the note that if the State Government had interpreted the rule in question otherwise and had adopted a policy which would accommodate all diploma holders and the same was not challenged by the Respondents and, on the other hand, the State Government deliberately and consciously, in the interest of the diploma holders, adopted a policy which would accommodate all diploma holders, the Petitioners could not be penalized for not coming to court earlier. Ms. Dikshit submitted that having regard to the rules for appointment to the post of Pharmacist having been promulgated in the year 2003, there was no justification in the claim of the Respondents that for filling up future vacancies the cases of the candidates who had obtained their diplomas earlier should be considered for appointment in earlier batches till such time as all such candidates were accommodated against the vacancies that existed or were to arise in future. Ms. Dikshit submitted that the judgment and order of the learned Single Judge, as also the Appeal Court, was liable to be set aside.

18. In support of her aforesaid submissions, Ms. Dikshit firstly referred to the decision of this Court in *S. Prakash & Anr. vs. K.M. Kurian & Ors.*

[(1999) 5 SCC 624], which deals with the question of rules of interpretation and in this case the interpretation of the maxim "generalalia specialibus non derogant" and "generalalia specialibus derogant".

The first of the two maxims indicate that general things do not derogate from special things and it was held by this Court that although, ordinarily the special law would override the general law, in special circumstances if the language of the general provision is clear and unqualifying, it would prevail over the special provision and the special provision would have to give way, if the legislature intended to establish a rule of universal application. Ms. Dikshit urged that in the instant case, since there was no existing rule and only a practice was being followed, when a special provision was enacted relating to recruitment, the same would have precedence over the past practice which had been followed till such time as the rules were promulgated.

19. Ms. Dikshit also referred to the decision of this Court in *Maya Mathew vs. State of Kerala & Anr.* [2010 (2) SCALE 833], which deals with the rules of interpretation when a special matter is governed by two such rules. The ratio which was laid down by this Court is that if a subsequent law did not repeal the earlier rule, there cannot be a presumption that the earlier rule was intended to be repealed. It was indicated that when two provisions of law, one of which is general and the other is special, govern the same matter, the court should make an attempt to give a harmonious construction to both the provisions, but when there was a clear expression in the general rules to exclude the

special rules, the same would have to be given effect to. Applying the aforesaid decision to the facts of the instant case, Ms. Dikshit urged that in the present case when special rules have been framed for appointment to the post of Pharmacist and earlier appointments to the said post were made on the basis of the prevailing practice, it is the enacted rules which would prevail and the practice as followed so far would have to give way.

20. On the question of acting on the basis of the past practice for the purpose of appointment or promotion, Ms. Dikshit referred to the decision of this Court in *Suraj Prakash Gupta & Ors. vs. State of J&K & Ors.* [(2000) 7 SCC 561], wherein while considering the question of promotion on the basis of the quota and rota rules, this Court had occasion to consider the legal value of past practice in such matters. This Court went on to hold that in the absence of any provision for rota in the rules, the same could not be claimed on the basis of past practice. Ms. Dikshit submitted that since in the 2003 Rules no mention had been made regarding the continuance of the appointment to the post of Pharmacist on the basis of past practice, both the Single Judge, as well as the Division Bench of the High Court, had erred in placing reliance on the said practice and the appointments to be made on the basis thereof.

21. Ms. Dikshit submitted that out of the 16 Special Leave Petitions being heard, the State is the petitioner in 12 and the 4 other SLPs have been filed by the private parties. Ms. Dikshit submitted that the submissions in respect of all the SLPs are common to those made in the instant SLP.

22. Mr. L. Nageshwar Rao, learned Senior Advocate appearing for the Respondents in SLP(C)No.21570 of 2006, submitted that the said Special Leave Petition was in fact the lead matter and all the other Special Leave Petitions were filed subsequently for the same relief. Joining issue with the submissions made by Ms. Dikshit, Mr. Rao submitted that in order to prevent the perpetrating of an injustice which had been caused to the candidates who had successfully completed the diploma course in Pharmacy prior to 2003 and had been denied appointment solely on the ground that those who had completed Pharmacy course before each year, had to be accommodated first, and were being denied appointment on the basis that such appointment could not be made batch-wise, the High Court had to work out a formula by which they could also be provided relief without interfering with the provisions of the 2003 Rules, as has been indicated in the very beginning of this judgment.

Mr. Rao submitted that in 1998 only a part of the 1992 batch of Pharmacists had been appointed in general category and upto 1997 the reserve category had been cleared. However, the Respondents were only concerned with the question of batch-wise promotion from prior to the promulgation of 1993 Rules on the ground that having been deprived once on the basis of the past practice, they could not be deprived for the second time by virtue of the promulgation of 2003 Rules. Further more, it was also pointed out that the State Government had itself admitted in paragraph 22 of its affidavit that the past practice was being followed for a long time prior to the promulgation of 2003 Rules.

23. In support of his submissions, Mr. Rao relied on the decision of this Court in *N. Suresh Nathan & Anr. vs. UOI & Ors.* [(1992) Supp. (1) SCC 584], wherein, while considering the question of promotion to the post of Assistant Engineer in the Public Works Department, this Court had occasion to consider the construction of the service rules in consonance with the long-standing practice in the concerned department and it was held that such long standing practice was to be preferred. In fact, in the said decision, this Court was considering the decision of the Central Administrative Tribunal which had held that in considering the question of preferring the decree holders in Civil Engineering to Diploma holders in the same discipline, the case of the decree holders was to be preferred on account of their superior qualification and question of past practice could not be introduced while considering the respective cases of their promotion. Disagreeing with the view expressed by the Tribunal, this Court was of the view that the rules must be interpreted to mean that the three years' service in the grade of a degree-holder for the purpose of Rule 11 is three years from the date of obtaining the degree and that the same is quite tenable and in conformity with past practice which had been followed consistently. Accordingly, the Tribunal was not justified in taking a contrary view and unsettling the settled practice in the said department.

24. Reference was also made to another decision in *Shailendra Dania & Ors. vs. S.P. Dubey & Ors.* [(2007) 5 SCC 535], where a similar question arose in connection with the eligibility for promotion wherein differential service experience based on differential educational qualifications had been prescribed and longer period of service experience was prescribed for diploma holder Junior Engineers in comparison to degree holder Junior Engineers for the post of Assistant Engineer. Explaining the rationale behind the permissibility of making such a distinction, this Court held that the difference between the service qualifications has been an essential criterion for promotion based on interest of an establishment. While considering the said question, this Court had also the occasion to consider the possibility of two views being taken while interpreting a particular set of service rules. In such a situation, this Court held that the rules should be interpreted in consonance with the practice followed by the department for a long time. In fact, while arriving at such a conclusion, this Court had also the occasion to consider the earlier case of *N. Suresh Nathan* (supra).

25. Mr. Rao urged that having applied the relevant Rules in a particular manner at a particular point of time to the prejudice of the Respondents, the Petitioners have acted arbitrarily and unfairly in not applying the same set of Rules, again to the prejudice of the Respondents, thereby completely eliminating the chance of appointment in case of some of the Respondents, who, in the meantime, had become over-aged. Mr. Rao submitted that such arbitrariness should not be allowed to continue and the decision of the Petitioners not to give batch- wise promotion to those Pharmacists, who have obtained their diplomas prior to 1998, was liable to be quashed.

26. The same line of submissions was advanced by Mr. Mukesh Giri, learned Advocate, appearing for some of the Respondents in SLP(C)No.22678/09 and SLP(C)No.22749/09. In addition to what was submitted by Mr. Rao, Mr. Giri submitted that having regard to Rule 3(g) of the 1980 Rules, the vacancy position should have been provided by the State. On the other hand, there was a complete

violation of the provisions of Rules 14 and 15 of the said Rules which provided for the same.

Reiterating Mr. Rao's submissions, Mr. Giri submitted that the Respondents could not be denied an opportunity of employment twice on the basis of the same set of Rules, but on being applied differently.

27. Mr. D. Roy Choudhary, learned Senior Advocate, appearing for some of the Respondents in SLP(C)No.20558/09 and various other Special Leave Petitions, contended that if any inconsistencies were to be found in the 1980, 2002 and 2003 Rules, the benefit would have to be presumed to be in favour of the Respondents. Mr. Roy Choudhary submitted that the question of discontinuance of the past practice was irrelevant and having followed the 1980 Rules consistently, it was not open to the State to resile from its position to the detriment of those candidates who were available for appointment according to the said Rules, but were not considered, since the earlier diploma holders in Pharmacy had to be adjusted against the existing vacancies. Mr. Giri submitted that the decision of the High Court was sound and did not require any interference.

28. Mr. S.K. Verma, learned counsel, who appeared for the private Respondents in SLP(C)No.22732/09, also supported the judgment of the High Court and urged that this was not a case where any of the candidates, who had the necessary qualifications, was rejected. On the other hand, it would appear that their cases were deferred in order to accommodate those diploma-holders who were waiting from previous batches for appointment in the vacancies occurring from time to time. He too submitted that the impugned order of the High Court did not merit any interference and the Special Leave Petitions filed by the State of U.P. were liable to be dismissed.

29. The submissions made by Mr. Rao, Mr. Choudhary and Mr. Giri were reiterated by Mr. Shree Pal Singh appearing in SLP(C)No.20558/09. He, however, added that the Rules of 2000 and 2003 would have to be read in harmony with the Rules of 1980, which had not been repealed by the subsequent Rules and continued to be in existence.

30. Mr. Kailash Vasudev and Mr. P.S. Narasimhan, learned Senior Advocates, appearing for some of the Respondents in two of the Special Leave Petitions, reiterated Mr. Rao's submissions that the practice which had been followed since 1980, could not be discarded, till all those who were to be benefitted under the said Rules had been duly accommodated.

In fact, it was submitted that there was no provision which prevented the State Government from following such practice merely because of the intervention of the 2000 and 2003 Rules.

31. We have carefully considered the submissions made on behalf of the respective parties, having particular regard to the fact that a practice which had been consistently followed and had deprived some of the diploma-holders in Pharmacy earlier, is now being discarded against them to deprive them of an opportunity of employment. Although, an attempt has been made by Ms. Shobha Dikshit to justify the action of the State authorities, in the face of apparent injustice caused to the private Respondents in these Special Leave Petitions, we are unable to accept her contentions. In our view, the learned Single Judge while deciding the various writ petitions filed by the private Respondents herein and allowing the benefit of relaxation of age, erred in directing that the selections of even the said Respondents were to be made strictly on the criteria of merit, irrespective of the batch in which the incumbents had obtained their diplomas in Pharmacy. The said error was rightly corrected by the Division Bench in the Special Appeals, which had been filed, which is reflected in the extract of the impugned judgment set out hereinbefore. The Division Bench quite rightly held that the injustice caused to the private Respondents on account of the interpretation of the Rule to their disadvantage at a subsequent stage by the State Government, required to be corrected.

32. It is on account of a deliberate decision taken by the State Government that the private Respondents were left out of the zone of consideration for appointment as Pharmacists in order to accommodate those who had obtained their diplomas earlier. The decision taken by the State Government at that time to accommodate the diploma-holders in batches against their respective years can no doubt be discontinued at a later stage, but not to the disadvantage of those who had been deprived of an opportunity of being appointed by virtue of the same Rules. In our view, the same decision which was taken to deprive the private Respondents from being appointed, could not now be discarded, once again to their disadvantage to prevent them from being appointed, introducing the concept of merit selection at a later stage. The same may be introduced after the private Respondents and those similarly-situated persons have been accommodated.

33. The various decisions cited by Ms. Dikshit are of little help to the case of the Petitioners. The facts in the case of Suraj Prakash Gupta & Ors. (supra) bear no comparison to the facts at issue in these Special Leave Petitions. There can be no divergence of opinion with regard to the principles of law laid down in the said decision, but the same was referred to in the facts of that case, where it was held that in the absence of any provision for rotation in the Rules, the same could not be claimed on the basis of the past practice. As indicated hereinbefore, in this case a certain set of Rules were applied in a manner which deprived the private Respondents of an opportunity to be considered for appointment as Pharmacists, despite having acquired the requisite qualification and being deprived of appointment once again by discarding the same Rules to their detriment. In our view, the decision in N. Suresh Nathan & Anr.

(supra) is more apposite to the facts of this case.

Of course, this is not a case for applying the "doctrine of past practice" alone, in addition, this is a case which involves the deprivation of certain candidates by application of the procedure differently at two different points of time.

34. We, therefore, are of the view that in the facts of this case no interference is called for with the decision of the Division Bench of the High Court impugned in these SLPs. The 12 Special Leave Petitions filed by the State of U.P., being S.L.P. Nos. 20558, 20769, 20774, 20785, 20901, 20908, 22655, 22678, 22732, 22749, 22851, 22955 of 2009, along with S.L.P.(C) Nos. 25647 and 25649 of 2009, filed by Vaibhav Kumar Singh and Ors. and Brijesh Kumar Sharma and others, whose cases are similar to that of the State of U.P., are dismissed, but without any order as to costs. Special Leave Petition (C) Nos. 22114 of 2009 and 32977 of 2009 filed by Ajay Singh and others and Shravan Kumar Pandey and others, stand allowed. The petitioners therein shall be entitled to the same benefits as those Diploma holders governed by the 1980 Rules, having obtained their Diplomas in Pharmacy prior to 1998. There will be no order as to costs in these S.L.Ps also.