

(2011) 01 AHC CK 0320

Allahabad High Court

Case No: Civil Misc. Writ Petition No. 56098 of 2009

Dr. Tungvir Singh Arya

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision: Jan. 29, 2011

Acts Referred:

- Constitution of India, 1950 - Article 14, 16
- Education Code - Article 45
- Uttar Pradesh Forest Service Rules, 1952 - Rule 27
- Uttar Pradesh State Medical Colleges Teachers Service (Third Amendment) Rules, 2006 - Rule 15
- Uttar Pradesh State Medical Colleges Teachers Service Rules, 1990 - Rule 15, 15(1), 15(2), 15(3), 27

Citation: (2011) 3 ADJ 63

Hon'ble Judges: Sunil Ambwani, J; Jayashree Tiwari, J

Bench: Division Bench

Final Decision: Allowed

Judgement

1. We have heard Shri A.R. Masoodi, learned Counsel for the Petitioner. Shri S.P. Gupta and Shri Navin Sinha, Senior Counsels assisted by Shri A.K. Srivastava appear for the Respondent No. 4. Shri Satish Chaturvedi, Addl. Advocate General appears for the State Respondents.

2. The recruitment of the teaching staff of Government Medical Colleges in the State of U.P. is regulated by the U.P. State Medical Colleges Teachers Service Rules, 1990 (in short the Rules of 1990). The Rules have been amended by the Second Amendment in the year 2005 notified on 12.5.2005, and by Third Amendment in the year 2006 notified on 13.11.2006. Prior to the amendments the post of Asstt. Professor was provided to be filled up by way of direct recruitment, and the post of Associate Professor and Professor could be filled up both by direct recruitment and

promotion. The Second Amendment to the Rules notified on 12.5.2005 made a provision of personal promotion to the post of Asstt. Professor Associate Professor as also the Professor, of which the procedure was prescribed under Rule 15. A substantively appointed Lecturer after completing 3 years satisfactory service was entitled to personal promotion as Asstt. Professor along with his own post. Under Rule 15 (2) after completing four years a Lecturer or Asstt. Professor appointed substantively was entitled to personal promotion with his own post to the post of Associate Professor, and after completing two years, and if he possesses D.M7 M.C.H. qualification. Under Rule 15 (3) an Associate Professor substantively appointed as Lecturer/Asstt. Professor/Associate Professor was entitled to personal promotion with his own post after completing 6 years of satisfactory service as Associate Professor or 8 years of satisfactory service as Asstt. Professor including 4 years as Associate Professor.

3. By the Third Amendment to the Rules of 1990 notified on 13.11.2006 a specific proviso was added under Rule 15(1), whereby regularization of service rendered as Asstt. Professor or Associate Professor under the Society System (between 2.4.1998 to 8.11.2002) by virtue of his option was also liable to be computed in the qualifying service prescribed for personal promotion. The substituted provision further added a proviso to Rule 15(1) that if Junior Teacher became eligible for personal promotion, after taking into account length of service in the Society System, a Teacher senior to him will also be eligible for personal promotion, even though he may not have worked in the Society System and did not have prescribed length of service. Rule 15 as amended upto Third Amendment Rules, 2006 is quoted as below:

Provided further that if a teacher has worked on the post of Assistant Professor or Associate Professor under the society system in U.P. Government (Allopathic) Medical Colleges, as existed on and from April 2, 1998 till November 8,2002 by virtue of his option, the services so rendered by him shall be taken into account for the purpose of computing the qualifying service for personal promotion to the post of Associate Professor or Professor, as the case may be, but such personal promotion shall in no case be given with retrospective effect:

Provided also that if a junior teacher becomes eligible for personal promotion to the post of Associate Professor or Professor, as the case may be, on the basis of the aforesaid proviso, a teacher senior to him but who has not worked under the society system in U.P. Government (Allopathic) Medical Colleges shall also be eligible for personal promotion to the post of Associate Professor or Professor, as the case may be, notwithstanding the fact that he has not put in the requisite length of service prescribed for such personal promotion.

4. The cause of action arose to the Petitioner, to file this writ petition challenging the communication of Public Service Commission, U.P. Allahabad dated 8.10.2009 issued to him refusing to calling for interview for the post of Principal by way of direct recruitment as the Petitioner has not annexed the certificate of essential eligibility

condition. The Petitioner has prayed for direction to quash the communication issued by the Public Service Commission, U.P. Allahabad to Dr. Girish Kumar Aneja (Respondent No. 4) by which he has been held eligible to be interviewed for the post of Principal. He has also prayed for quashing the orders dated 8.2.2008 and 12.12.2008 by the State Government giving notional promotion to Respondent No. 4 to be promoted as Professor w.e.f. 31.3.2003, or to command the State Government to sanction the same benefit to the Petitioner.

5. The dispute in the present case has arisen from the proceedings initiated by the U.P. Public Service Commission to fill up the posts of Principals in the State Medical Colleges in the U.P. under Rule 5 (iv), for which eligibility condition is provided in Table-I of Rule 8 and which provides that for the post of Principal/Dean/Director of medical institutions the academic qualifications are: "who possess the recognized post graduate medical qualifications and other academic qualifications from a recognized institutions with a minimum of 10 years teaching experience as Professor/Associate Professor/Reader in a Medical College/institute out of which atleast 5 years should be as Professor in a department. The preference for these appointments may be given to the Head of the Department.

6. The post of Principal, State Medical Colleges was advertised by the Public Service Commission, U.P. under the Advertisement No. 3 of 2009-10 published in Rozgar Samachar dated 29.8.2009 to 4.9.2009 advertising 8 vacancies out of which 4 are unreserved; 2 are reserved for OBC and 2 for SC candidates. Both the Petitioner and Respondent No. 4 though they are not competing for any advertised post had applied. The Respondent No. 4 has been treated to be eligible, whereas the Petitioner has not been treated to be eligible, giving rise to this writ petition.

7. Dr. Girish Kumar Aneja-Respondent No. 4 was appointed as ad hoc Lecturer in Medicine on 8.1.1986. The comparative charge of the services of Dr. Tungvir Singh Arya, the Petitioner and Dr. Girish Kumar Aneja-Respondent No. 4 given in para 6 of the rejoinder-affidavit of Dr. Tungvir Singh Arya to the counter-affidavit of Respondent No. 4 is given as below:

Comparison chart of services

Dr. Tungvir Singh Arya		Dr. Girish Kumar Aneja	
Name of Post	Date	Name Post	Date
Lecturer in Medicine	10.10.1986	Lecturer in Medicine	13.1.1986
Assistant Professor	2.11.1986	Assistant Professor	7.8.1989
Medicine		Medicine	

		Assistant Professor Cardiology (by transfer of service)	1.10.1992
Associate Professor Medicine (in society system)	10.3.1999	Associate Professor Cardiology (in society system)	31.3.1999
Associate Professor Medicine (Direct recruitment by Public Service . Commission) Professor of Medicine (by personal promotion)	17.12.2002 4.9.2006	Associate Professor Cardiology (Direct recruitment by Public Service Commission) Professor of Cardiology (by personal promotion)	6.11.2004 18.8.2006
		Professor of Cardiology (from before date again by personal promotion)	From back date of 22.5.2005
		Professor of Cardiology (by Notional promotion)	From back date of 31.3.2003

8. There is no dispute that both the Petitioner and Respondent No. 4 were appointed as Associate Professor in Society System on 10.3.1999 and 31.3.1999 respectively and thereafter they were appointed as Associate Professor by direct recruitment by Public Service Commission on 17.12.2002 and 6.11.2004 respectively. There is also no dispute that the Petitioner and Respondent No. 4 were appointed as Professor of Medicine by personal promotion on 4.9.2006 and 18.8.2006 respectively and thus both of them were not eligible for being considered for direct appointment, as both of them did not have 5 years experience as Professor upto the date of advertisement and filling up of the application form for the post of Principal.

9. It is submitted by Shri A.R. Masoodi that keeping an eye on the post of Principal for which Dr. Girish Kumar Aneja-Respondent No. 4 had acquired knowledge from his sources of the possible dates of advertisement, a representation was made by him to give him promotion as Professor of Cardiology by backdating the promotion from 18.6.2006 to 22.5.2005. The State Government willingly obliged in promptly considering his representation and in issuing an Office Memorandum dated 8th February, 2008 promoting him as Professor of Cardiology by personal promotion w.e.f. 22.5.2005. The State Government in para 4,5 and 6 of the Office Memorandum dated 8th February, 2008 observed that Dr. Aneja, Associate Professor had given option in the Society System and was working w.e.f. 30.3.1999. He was also recommended for promotion as Associate Professor by the Public Service Commission by direct recruitment. The recommendation was stayed by the High Court on account of which it was received in the State Government with considerable delay for which Dr. Aneja was not responsible. The Personnel Department and Law Department of the State Government, had advised that he was entitled to personal promotion w.e.f. 30.3.2003 but that since the Selection Committee met for the first time on 25.5.2005 after the amendment of the Rule on 12.5.2005, his name could not be considered and that he was promoted as Associate Professor on 18.6.2006. The Selection Committee was convened on 8.2.2008, and considering all the circumstances the date of his promotion was amended and that instead of 18.8.2006, he was given promotion w.e.f. 22.6.2005.

10. Shri Masoodi submits that a special concession was given to Dr. Aneja in backdating his promotion on the ground that his recommendation for direct recruitment was received much later and that the Selection Committee met after the Rules were amended but his name was not considered. Instead of giving the same benefit to all the persons, who were similarly situate, the State Government chose to confer it only to Respondent No. 4.

11. Shri Masoodi submits that backdating of promotion of Respondent No. 4 as Professor of Cardiology from 18.8.2006 to 22.5.2005 also did not make him eligible as he did not get 5 years as Professor on the date of advertisement on 29th August, 2009. The Respondent No. 4, therefore, made a further representation to the State Government, which was also given priority by the State Government. By Office Memorandum dated 12th December, 2008, the State Government in exercise of his powers of exemption given under Rule 27 of the Rules of 1990 gave notional promotion to Dr. Aneja-Respondent No. 4 w.e.f. 31.3.2003 and thus making him eligible for direct appointment as Principal.

12. In order to clear any doubts, which may have arisen Dr. Aneja-Respondent No. 4 made a further representation to the State Government to issue a no objection/experience certificate to him clarifying that he was eligible to be considered for the post of Principal. The State Government again readily obliged by issuing the third Office Memorandum dated 28th March, 2009, giving him a

certificate that he had worked as Lecturer from 13.1.1986 to 6.8.1989; Asstt. Professor from 7.8.1989 to 30.3.1999; Associate Professor from 31.3.1999 to 30.3.2003 and thereafter as Professor from 31.3.2003, and in addition he is Head of the Department of Medicine w.e.f. 1.9.2006 is thus eligible to be considered for the post of Principal by direct recruitment in the forthcoming selections.

13. Shri Masoodi submits that the selections were advertised five months later on 29th August, 2009 with the last date of application as 22nd September, 2009. He submits that firstly by backdating the Petitioner's promotion as Professor from 18.8.2006 to 22.5.2005 by Office Memorandum dated 8th February, 2008, thereafter giving him exemption under Rule 27 of the Rules of 1990, in allowing notional promotion as Professor w.e.f. 31.3.2003 by Office Memorandum dated 12.12.2008 and thereafter issuing no objection/experience certificate, as desired by him in the same terms, for the forthcoming selections, which were not advertised, the State Government virtually bent backwards and played to the tune of Dr. Girish Kumar Aneja-Respondent No. 4. He was given backdated promotions and exemptions for personal promotion as exceptional favours without any delay and without any invention of the Court.

14. Shri Masoodi submits that the Petitioner also represented to the State Government on 4.2.2009 much before the advertisement was issued by the Public Service Commission to give him similar benefits and to treat him as Professor w.e.f. 31.3.2003. His representation was forwarded with a covering letter of the Principal of the L.L.R.M. College dated 5.9.2009 and is still pending. He submits that Dr. Girish Kumar Aneja, for the reasons best known, has become a blue eye boy of the State Government, and received favourable consideration as and when and in whatever manner he desired.

15. Shri Masoodi submits that power of relaxation in the condition of service under Rule 27 of the Rules of 1990 can be exercised only if the Governor is satisfied that the operation of any rule regulating the conditions of service of persons appointed to the service causes undue hardship in any particular case. This power can not be utilised to remove the obstacles in the path of any individual and to make him eligible by promoting him with retrospective effect for the purposes of making him eligible in selections to the post of Principal. Rule 27 of the Rules of 1990 is quoted as below:

27. Relaxation in the conditions of service.--Where the Governor is satisfied that the operations of any rule regulating the conditions of service of persons appointed to the service causes undue hardship in any particular case, he may, notwithstanding anything contained in the rules applicable to the case, by order, dispense with or relax the requirements of that rule to such extent and subject to such conditions as he may consider necessary for dealing with the case in a just and equitable manner:

Provided that where a rule has been framed in consultation with the Commission, that body shall be consulted before the requirement of the rules are dispensed with or relaxed.

On 26.10.2009, when the writ petition was presented, this Court passed an interim order as follows:

Issue notice to Respondent No. 4.

Sri P.S. Baghel, learned Senior counsel appears for Respondent No. 3. Learned Standing Counsel accepted notice on behalf of Respondent Nos. 1 and 2.

Learned Counsel for the Petitioner in support of the writ petition contends that the Respondent No. 5 is junior to the Petitioner and by the orders dated 12.12.2008 and 8.2.2008 he has been granted personal promotion on the post of Professor with retrospective effect against the provisions of U.P. State Medical College Teachers' Service (Second Amendment) Rules, 2005. He submits that the Petitioner has also made an application to the State Government claiming the same benefit but no orders were passed. He submits that the Respondent No. 4 is not eligible for appearing on the post of Principal of Medical College but the Petitioner's candidature has been rejected by the Commission and Respondent No. 4 has been permitted to participate in the selection on the post of Principal. Learned Counsel for the Petitioner submits that the Respondent No. 4 has now been granted notional promotion as Professor w.e.f. 31st March, 2003 whereas by earlier order dated 8th February, 2008 he was granted personal promotion w.e.f. 22nd June, 2005. It is contended that on 6.11.2004 the Respondent No. 4 was appointed as Associate Professor in Cardiology by the Commission and therefore, he submits that the Personal Promotion or Notional Promotion as Professor cannot be from any date anterior to 06.11.2004. He further submit that in accordance with Proviso (i) & (ii) to Rule 15 of Rules, 1990 (as amended) the promotion cannot be given with any date earlier to 12th May, 2005.

The submission needs scrutiny.

The Commission shall not declare the result of the post of Principal in the event the recommendation is made in favour of the Respondent No. 4.

16. A modification application was filed and was argued by Shri S.P. Gupta, Sr. Advocate. The Court found that out of 8 posts of Principals, which were advertised, the selection is to be made in the cadre and not made against individual post of Principal. The order was thus clarified that in the event the Respondent No. 4 is recommended for appointment, one post of Principal shall be kept reserved for him and the result with regard to the post shall not be declared. The stay vacation application was heard and decided on 28.9.2010. The interim order dated 26.10.2009 was vacated with directions to list the case for hearing.

17. Shri A.R. Masoodi, learned Counsel for the Petitioner submits that though both the Petitioner and Respondent No. 4 were not eligible, the turn of events in which the Respondent No. 4, who is similarly situate has managed to remove the obstacles by twice backdating his promotion as Principal, firstly by Office Memorandum dated 18.2.2008 from 18.8.2006 to 22.5.2005 and thereafter by Office Memorandum dated 12.12.2008 under Rule 27 from 22.5.2005 to 31.3.2003, has made the Petitioner apprehensive and aggrieved by the grant of relaxations to Respondent No. 4, and the delay in considering the Petitioner's representation made in the same terms. In consequence to the impugned orders the Petitioner has suffered, gross discrimination, and apprehension of gross illegality and arbitrariness by the State Government in selections. He has relied upon Keshav Chandra Joshi and others etc. Vs. Union of India and others, M. Venkateswarlu and Others Vs. Govt. of A.P. and Others, Sodagar Singh Vs. State of Punjab and Others, Suraj Parkash Gupta and Others Vs. State of Jammu & Kashmir Others, Dr. Chandra Bhushan Dwivedi v. The Rajyapal, U.P. and Ors. (2004) 4 ESC 2273 ; R.S. Garg Vs. State of U.P. and Others, and Union of India (UOI) Vs. Dharam Pal Etc., in support of his submissions.

18. In Keshav Chandra Joshi (Supra) the Supreme Court held that seniority has to reckon from the date of initial appointment and not from confirmation. It was held that service rules must be so interpreted to result in justice to all. A harmonious construction should be applied to the statutory rules. Where the power of relaxation is provided in the rules, the same must be exercised equitably. Shri Masoodi submits that Rule 27 of the U.P. Forest Service Rules, 1952 is paramateria to Rule 27 of the Rules of 1990. The power of relaxation must be applied consciously and not by deeming it to have been exercised. Such conscious exercise of power also includes within it the responsibility that exemption should not cause discrimination and injustice to similarly situate persons. If the power has to be exercised, the same must be exercised fairly and reasonably and not to promote the cause of one person to detriment of the other.

19. In M. Venkateswarlu and Ors. (Supra) the Supreme Court considered the power of relaxation in the service rules under Rule 47 of the Andhra Pradesh State and Subordinate Service Rules. It was held that the power must be exercised considering the issue of justice and equality. In Sodagar Singh (Supra) the Supreme Court held that the Government could not exercise its powers under Rule 22 of the Punjab Roadway (Ministerial) State Service Class III Rules to relax the qualifications for direct recruitment and grant the Petitioner further extension in that post. When direct recruitment is made, the Supreme Court observed, the Government has no power to relax the conditions required to be fulfilled for being eligible for appointment by direct recruitment and to give further promotion.

20. In Suraj Parkash Gupta and Ors. (Supra) the Supreme Court considered the powers under Rule 5 of the J & K Civil Service (CCA) Rules, 1956 to relax the rules. The Supreme Court held that power can be exercised on the ground of hardship in

individual case for reasons to be recorded. The wholesale relaxation by the authority by way of implied relaxation of rules to the gazetted category was found to be invalid. The Government could not be carried away merely by sympathy for the remedies.

21. In Dr. Chandra Bhushan Dwivedi (Supra) the Full Bench of this Court while interpreting Statute 11.12-B of the First Statute of the Gorakhpur University providing that personal promotion on the post of Reader or Professor as the case may be to take effect from the date of taking over charge of the said post, held that if rule is plain and unambiguous, it cannot be read otherwise and that in any case Clause-4 of the Rule, which provides that meeting of the selection committee should be held atleast once ever year cannot be read to give personal promotion to Lecturer on the post of Reader or Professor with effect from the date he became eligible or in the year in which he became eligible. His seniority has to be reckoned from the date he took over charge under Clause-7 of the statute.

22. In R.S. Garg (Supra) the Supreme Court held that where 5 years service after substantive appointment as Asstt. Director was required for the post of Deputy Director, experience gained in the post of Asstt. Director consequent to ad hoc appointment without selection by Public Service Commission did not meet the requirement of the Rule. Shri Masoodi submits that in the present case both the Petitioner and Respondent No. 4 were promoted as Professors of Medicine by personal promotion on 4.9.2006 and 18.8.2006 respectively. The five years' experience as Professor in a department given in Table-1 of the Teachers in Medical Institution Regulation, 1998 Schedule-II refers to the teaching experience of five years as a Professor. The Respondent No. 4 did not have teaching experience as Professor and that power of exemption could not be exercised by the State Government to fill in the gap and to give him promotion from back date, which did not qualify for experience for appointment.

23. In *Union of India v. Dharam Pal* (Supra) the Supreme Court relying upon [Kendriya Vidyalaya Sangathan and Others Vs. Sajal Kumar Roy and Others](#), held in para 32 as follows:

In any view of the matter, it is now well settled that even power of relaxation even specifically provided in the appointing authority himself being created a statute cannot be exercised in an arbitrary and cavalier fashion. In [Kendriya Vidyalaya Sangathan and Others Vs. Sajal Kumar Roy and Others](#), this Court held:

11. ...The appointing authorities are required to apply their mind while exercising their discretionary jurisdiction to relax the age limits. Discretion of the authorities is required to be exercised only for deserving candidates and upon recommendations of the Appointing Committee/Selection Committee. The requirements to comply with the rules, it is trite, were required to be complied with fairly and reasonably. They were bound by the rules. The discretionary jurisdiction could be exercised for

relaxation of age provided for in the rules and within the four corners thereof. As Respondents do not come within the purview of the exception contained in Article 45 of the Education Code, in our opinion, the Tribunal and consequently, the High Court committed a manifest error in issuing the aforementioned directions.

24. Shri Masoodi submits that though both the Petitioner and Respondent No. 4 were not eligible, the orders passed by the State Government making Respondent No. 4 eligible, makes the exercise of power to give the personal promotion from back dates, as reckless and arbitrary, and exercised with the object only to give benefit to Respondent No. 4. The orders of the State Government are, therefore, violative of the equal protection of laws and equality before law guaranteed by Articles 14 and 16 of the Constitution of India.

25. Shri S.P. Gupta and Shri Navin Sinha submit that the entire effort of the Petitioner, who is not eligible, is to point out the lacuna in the candidature of Respondent No. 4. The advertisement was issued for 9 posts on 29.8.2009 with last date to submit applications by 22.9.2009. The eligibility conditions in the advertisement provided for 10 years experience as Associate Professor/Professor of which atleast 5 years should be as Professor. The Petitioner's candidature has been rejected as he did not annex the certificate of having experience of 5 years as Professor. The interviews were held on 28.10.2009. The writ petition was filed on 23.10.2009. No challenge was made to the advertisement and that prayers are not feasible at all. The Petitioner did not challenge the seniority list prepared by the State Government annexed to the counter-affidavit. The Tikku Committee recommendations for time bound promotions, to avoid stagnation, were made applicable in the Medical College, which was converted into societies and in which options were invited. Both the Petitioner and Respondent No. 4 became Associate Professors in the society system, on 10.3.1999 and 31.3.1999 respectively. The High Court quashed the orders converting the Medical Colleges into societies on 8.7.1999. The Supreme Court passed the interim order on 16.10.2000 but thereafter dismissed the writ petitions on 3.12.2003. In between the Public Service Commission advertised the post of Asstt. Professors. The Petitioner was found successful in the results declared by the Commission on 29.6.2004. He was given posting at Kanpur. He did not join and that finally joined at Meerut on 28.1.2003. The second amendment was made to the Rules of 1990 on 12.5.2005 after which first Selection Committee met on 22.6.2005. The Respondent No. 4 was not considered on which second DPC was held on 18.8.2009. Considering the extraordinary hardship faced by the Respondent No. 4 selected as Associate Professor by the Public Service Commission in the results declared on 29.6.2004 and thereafter since his name could not be considered by the first Selection Committee for personal promotion as Professor, he was given personal promotion w.e.f. 22.5.2005, and thereafter considering his hardships the State Government in valid exercise of its powers gave him notional promotion w.e.f. 31.3.2003. The Petitioner did not challenge the order of promotions in Writ Petition No. 11445 of 2009 filed by him. In his representation

he has claimed same status. Until he is given same status, he cannot challenge or dispute the eligibility of Respondent No. 4. There is no issue of parity between them.

26. Shri Navin Sinha submits that the Petitioner cannot be allowed to claim the same rights and to challenge the orders on the same conditions passed by the State Government in favour of Respondent No. 4. Since the selections are not to be made for any one post, there is no inter-se contest between the Petitioner and Respondent No. 4. The Petitioner has taken inconsistent and contradictory pleas in making the prayers, which cannot be granted to him. Shri Navin Sinha has relied upon the judgments in Retd. Armed Forces Medical Association and Ors. v. Union of India and Ors. : (2006) 11 SCC 731 and [Tridip Kumar Dingal and Others Vs. State of West Bengal and Others](#), in submitting that the Petitioner has no locus standi. The Court cannot sit in judgment over the wisdom of the Government in choice of the person to be appointed, so long as the person chosen possesses prescribed qualifications. In the recruitment process a person is stopped from challenging the qualifications of the other person. The Petitioner cannot approbate or reprobate in the same writ petition.

27. Shri Satish Chaturvedi, Addl. Advocate General appearing for the State Government submits that the Petitioner did not claim interim relief to appear in the interviews. There is no clash of interest between the Petitioner and Respondent No. 4 and that proxy petition should not be permitted to be filed in service matters. The Petitioner does not have locus to challenge the orders passed by the State Government in favour of Respondent No. 4. Rule 27 of the Rules of 1990, gives powers to the State Government to relax rules in case of exceptional hardship. The rule has overriding effect over all other rules. He submits that all the three orders of relaxation have been passed on the recommendation of the [The Calcutta Gas Company \(Proprietary\) Ltd. Vs. The State of West Bengal and Others](#), and [Lakhi Ram Vs. State of Haryana and Others](#), in submitting that the Petitioner does not have locus to challenge these orders.

28. In this writ petition we are required to consider; (i) whether the Petitioner has locus to challenge the orders dated 18.2.2008, backdating the personal promotion of Respondent No. 4 from 18.8.2006 to 22.5.2005 and thereafter the order passed under Rule 27 of the Rules of 1990 by way of exemption in further backdating the promotion of Respondent No. 4 as Professor of Cardiology by notional promotion from 22.5.2005 to 31.3.2003; and (2) whether the power to grant relaxation has been exercised in favour of the Respondent No. 4 fairly and reasonably without causing any discrimination to the Petitioner or the other similarly situate person, who could also be eligible for consideration for direct recruitment on the post of Principal in Government Medical Colleges.

29. We are also incidentally called upon to find out whether the exercise of powers by the State Government in backdating the personal promotion and exemption suffers from mala fides.

30. Before proceeding to consider the arguments, we may observe here the unusual manner and haste in which the State Government has called the meetings of Departmental Promotion Committees for an individual to backdate his promotion on the assumptions of hardship caused to him and the exercise of powers under Rule 27 of exemption without recording any reasons in Office Memorandum dated 12th December, 2008 backdating notional promotion from 22.5.2005 to 31.3.2003 and making the Respondent No. 4 eligible for direct recruitment as Principal.

31. We have not been given the dates, when these vacancies were forwarded to the Public Service Commission, U.P. Both the Petitioner and Respondent No. 4 were promoted as Professor in the Society System in the year 1999. They were, thereafter, promoted as Associate Professors by way of direct recruitment by Public Service Commission on 17.12.2002 and 6.11.2004 respectively and were considered and given promotions as Professor of Medicine by way of personal promotion under Rule 15 on 4.9.2006 and 18.8.2006 respectively along with many other persons. In the absence of date on which requisition was sent to the Public Service Commission, we assume that the Respondent No. 4 had some inside information, when he made a representation to give him personal promotion to him w.e.f. 22nd June, 2005. The Office Memorandum dated 8th February, 2008 refers to the Second Amendment to the Rules of 1990 notified on 12.5.2005 accepting the recommendation of Tikku Committee for giving personal promotion. The Office Memorandum refers to the meeting of the Selection Committee dated 22.5.2005 for giving personal promotion in terms of the Second Amendment to the Rules. It was found that in the first meeting of the Selection Committee dated 25.5.2005 his name was not considered. He was given promotion by Office Memorandum dated 18.8.2006 on the post of Professor subsequently. The Selection Committee in its meeting dated 8.2.2008 considered his representation and recommended to give him promotion w.e.f. 22nd June, 2005. The only reason given in the Office Memorandum dated 8th February, 2008 is that the Selection Committee in its first meeting dated 22.5.2005 after the amendment of the Rules on 12.5.2005 did not consider his name. Though the Respondent No. 4 had requested for giving him personal promotion w.e.f. 30.3.2003, when he became eligible after completing 4 years" service as Associate Professor, the State Government thought it appropriate to give him promotion w.e.f. 22nd June, 2005, which appears to be the date on which the other persons recommended by the Selection Committee in its meeting dated 25.5.2005 were given promotions. The Office Memorandum dated 8th February, 2008 did not make Respondent No. 4 eligible for the post of Principal and therefore he further represented to give him promotion w.e.f. 31.3.2003, when he had completed four years as Associate Professor. This time the State Government went over board to exercise powers under Rule 27 for exemption reserved for any case of exceptional hardship and antedated his notional promotion from 22.5.2005 to 31.3.2003. The Office Memorandum dated 12th December, 2008 issued in purported exercise of Rule 27 of granting exemption in case of exceptional hardship was thus clearly

violate of the purposes for which the power has been conferred upon the State Government.

32. Rule 27 provides for relaxation in the conditions of service on the satisfaction of the Governor that the operation of any rule regulating the conditions of service of persons appointed to the service caused undue hardship in any particular case. After such satisfaction is reached and recorded, the requirement of the rule may be dispensed with or relaxed. In view of the judgments cited as above beginning from Keshav Chandra Joshi in 1992 to Dharam Pal in 2009 the Supreme Court and this Court has consistently held that the rules of relaxation cannot be exercised to hold an individual to become eligible for selections.

33. We also find that for personal promotion under Rule 15 a proviso was added to Rule 15 (1) providing that notwithstanding the fact that teacher has completed the requisite length of service prescribed for personal promotion to the next higher post before the date of commencement of the U.R State Medical College Teachers Service (Second Amendment) Rules 2005 he shall not be given personal promotion to the next higher post from such earlier date, which falls before such commencement. The proviso to Rule 15 (1) clearly mandates that personal promotion to the next higher post shall not be given prior to the date of the enforcement of the Second Amendment Rules, 2005. The proviso is applicable to all the promotions, which are given after the commencement of the Rules and that no exception could be carved out in exercise of powers under Rule 27, as no individual hardships can be said to have been caused to the Petitioner by way of operation of the rule.

34. If we accept the argument of Shri S.P. Gupta and Shri Navin Sinha that the State Government could have given promotion in relaxation to the proviso to Rule 15(1) under Rule 27 of the Rules, all the persons, who were given personal promotion, were entitled to promotion with effect from the date, when they completed four years as Associate Professor and in such case the Petitioner should also be given relaxation and his promotion as Professor should also have been backdated from 10.3.2003. Such an exercise would, however, be abuse of the powers of relaxation given in Rule 27 as no special hardship would either be mitigated by violating rule specifically at prohibiting backdating of promotions. The Petitioner was thus clearly wronged giving him cause of action to file the writ petition.

35. Where the Rule prohibiting the backdating of the promotion is plain and unambiguous and the language implied is determinative of the legislative intent, the power of relaxation cannot be permitted to overreach the rule. It is not a case, as held in para 24 in R.S. Garg (Supra) where undue hardship suffered by Respondent No. 4 could legitimately be raised being belonging to a particular case of an employee. No such case in law has been made out. The relaxation infact discriminated other employees belonging to the same category and who were similarly situate. There was absolutely no reason why any exception should have

been carved out in the case of Respondent No. 4.

36. In the sequence of event in which three orders came to be passed in favour of Respondent No. 4 in quick succession namely by antedating the promotion in violation of the rules granting relaxation in further antedating the promotion; and also in giving no objection and experience certificate, whereas the representation of the Petitioner for similar treatment was kept pending, clearly suggest malice in law. We can assume malice in such case as held in para 26 of the R.S. Garg (Supra) to have been done intentionally without any just cause or excuse or for any reasonable or probable cause. The influence of Respondent No. 4 on the officers of the Medical and Health Department and the State Government is clear and visible. He was not only aware of the dates of selection by the Public Service Commission but that every move made by him by backdating the promotions on two successive occasions within a year demonstrates that he was aiming on the selection as Principal by direct recruitment. The manner in which the State Government obliged him, makes it further clear, as apprehended by the Petitioner, he will manage to make his way upto the post of Principal of the same medical college. Some person surely as suggested by the Petitioner have their ways to manage in climbing ladders much fast than others and these people make bad precedents, causing discrimination and heartburning within the cadres.

37. We are further of the opinion that the power of exemption could not have been exercised without disclosing the reasons, which are implicit in exercise of such powers. It is only for the reasons, if they are given in the order of exemption or in the counter-affidavit that the State Government could have justified exercise of powers. In the counter affidavit of Shri Javed Ahteshawn, Deputy Secretary, Medical Education, U.P. Secretariat, the reasons given in para 4 (d) and (e) for exercise of powers of exemption are quoted as below:

4. (d) By the order dated 12.12.2008 the Respondent No. 4 had been given promotion on the post of Professor notionally w.e.f. 31 st March, 2003 on the recommendation of Departmental Promotion Committee dated 14th August, 2008. It is further submitted that the notional promotion on the post of professor has been granted to the deponent on the completion of his regular qualifying service of 4 years on the post of Associate Professor on which post he was promoted on 31 st March, 1999.

(e) That in view of the fact that the Respondent No. 4 having put in more than five years qualifying service as a Professor w.e.f. 31.3.2003, no objection certificate dated 28th March, 2009 has been issued by the State Government in general and nothing to do with any selection process. A copy of his "HOC dated 28th March, 2009 is at page 86 of the writ petition.

38. The State Government has not given any reason of exceptional hardship caused to the Respondent No. 4 to grant exemption inspite of clear bar in the proviso of

Rule 15 (1) added by the Second Amendment to the Rules on 12th May, 2003 not to give promotion from any date prior to the date of enforcement of the Rules. The fact that the Respondent No. 4 had put in more than 5 years qualifying service as Professor w.e.f. 31.3.2003, was not a ground on which his promotion could be backdated to that date.

39. We are thus of the opinion that there was no such exceptional hardship caused to the Respondent No. 4 by operation of any rule nor any reasons have been given in the order or in the counter-affidavit, to have exercised the powers of exemption.

40. Since we find that the impugned orders were passed in clear violation of the rules and that power of backdating the notional promotion and thereby further backdating it, was exercised in clear violation of Rule 15 (1), the Petitioner is also not entitled to the same benefits and thus both the Petitioner and Respondent No. 4, as a consequence of setting aside these orders are held to be ineligible for want of five years" experience as Professor for direct recruitment on the post of Principal.

41. The writ petition is allowed. The impugned office memorandum dated 8.2.2008 and 12.12.2008 issued by the State Government in favour of Respondent No. 4 as well as Office Memorandum dated 28th March, 2009 by which certificate was given to him for being eligible for the post of Principal are set aside. Both the Petitioner and Respondent No. 4 are declared to be ineligible for being considered for selection to the post of Principal in Government Medical Colleges in pursuance to the Advertisement No. 3 of 2009-10 dated 29th August, 2009 issued by the U.P. Public Service Commission.