(1982) 09 AHC CK 0080

Allahabad High Court (Lucknow Bench)

Case No: Writ Petition No. 1671 of 1981.

Sultan Ahmad		APPELLANT
	Vs	
State of Uttar Pradesh and Others		RESPONDENT

Date of Decision: Sept. 8, 1982

Acts Referred:

- Constitution of India, 1950 - Article 235, 309
- Government of India Act, 1935 - Section 246
- Uttar Pradesh District Officer (Collectorates) Ministerial Services Rules, 1980 - Rule 1(2), 18, 18(2)

Hon'ble Judges: S.S. Ahmad, J; R.C. Deo Sharma, J

Bench: Division Bench

Advocate: S. Mirza, Prashant Chandra and M. Afzal, for the Appellant;

Final Decision: Allowed

Judgement

R.C. Deo Sharma, J.

The Petitioner is a Sadar Nazir in the Collectorate of Pratapgarh and according to the service rules applicable to him is eligible for being appointed to the post of Office Superintendent in the Collectorate through promotion. Earlier the matters regarding promotion were governed by paragraphs 1043 and 1044 of the Revenue Manual which are contained in Annexure-1 to the petition. Briefly the procedure for selection was that the Deputy Commissioners of the various districts within the Commissioner''s Division used to forward to the Commissioner names of eligible candidates along with their character rolls and service records and then the Commissioner prepared a list of candidates found suitable on the basis of seniority subject to rejection of unfit. Whenever a vacancy arose in any district within the Division, appointment used to be made from that list in the order in which names appeared in the list. In the case of Petitioner his name was sent by the Deputy Commissioner to the Commissioner since vacancies were likely to occur in certain districts including Bahraich and Barabanki. A list was accordingly

prepared by the Commissioner in which the Petitioner''s name appeared at serial No. 6. He was a Muslim Kayastha and accordingly belonged to a backward-class in whose favour there was reservation in the matter of promotion. A vacancy arose in January, 1980 in Bahraich and Anr. in April 1980 in Barabanki. The Commissioner, however, kept the names pending for quite some time and ultimately perpared the list in October, 1980 in which the Petitioner''s name was at serial No. 6. According to the G.Os. governing reservation in promotion, the Petitioner claims to be entitled to one such post on the basis of 15 percent reservation because the G.Os. also provided that in case there were two vacancies, one would go to the backward class candidate and the other was to be treated general and if there was only one vacancy, it was to go to general category. Since there were two vacancies in the Division, the Petitioner claimed that one of the vacancies may be offered to him. It was further alleged that his posting to one of these posts had already been decided upon and only formal communication was to be sent to him when suddenly the Commissioner, Faizabad Division wrote to the Deputy Commissioner, Pratapgarh that the select list prepared and sent with his letter, dated 15th November, 1980 to the Deputy Commissioners conveying the names of the persons selected should be treated as cancelled because meanwhile the earlier service rules had been re-placed by the U.P. District Office (Collectorate) Ministerial Service Rules, 1980 and consequently it was proposed that new selection according to the said rules be made. The Petitioner''s contention, however, is that since he had already been selected to one of the vacancies then existing and mere formal orders had remained to be issued, his selection could not have been cancelled, particularly so because till the date of the cancellation letter the new rules had not been published in the Gazette. It will appear that the select list containing the Petitioner''s name was conveyed to the Deputy Commissioners on 15th November, 1980 vide Annexure 3 but the new rules were issued through a Notification on 13-10-1980 which fact was perhaps not within the knowledge of the Commissioner when he issued the select list. On coming to know about the rules he issued cancellation letter on 17-12-80 contained in Annexure-4 although by that time the rules which were sent through Notification to the Commissioner, had not been notified in the Gazette and which publication was ultimately made on 7th February, 1981 in the U.P. Gazette. The Petitioner''s contention, therefore, is that the rules not having been published in the Gazette could not have been given effect to before 7th February, 1981 and consequently the cancellation of the selection by letter dated 17-12-1980 was clearly contrary to law and would indirectly mean giving retrospective effect to the rules which could not be given unless there was specific provision to the effect.

2. Another contention of the Petitioner was that the rules, and particularly Rule 18 of the new Rules as worded, applied to vacancies arising after the commencement of these rules and since the vacancy for which the Petitioner was selected had already arisen much before the rules were notified, his selection should not be governed by the new Rules. He made representations to the Commissioner which were rejected and his representation to the State Government was withheld by the Commissioner on the ground that it contained no merit and the Petitioner could seek his remedy in a Court of law. It is

in these circumstanses that the Petitioner has prayed for a writ in the nature of mandamus commanding the opposite parties to treat the Petitioner as Office Superintendent in pursuance of the selection already made vide letter, Annexure-3 and by a writ of certiorari the orders rejecting his representations and contained in Annexures 4 and 6 were sought to be quashed.

3. In their counter affidavits filed by the opposite parties Nos. 2 and 3 on almost identical grounds it was admitted that the Petitioner was a Muslim Kayastha belonging backward class and that vacancies to the post of office Superintendent of the Collectorate had arisen in Bahraich and Barabanki on 31-1-80 and 31-3-80 respectively. It was also admitted that a select list was prepared according to rules on 15-10-80 and the Petitioner''s name stood at serial No. 6. The contention was that the Petitioner could, therefore, be appointed by promotion only after 15-10-80 when the select list was prepared and since in the meanwhile the new Rules had been notified on 13-10-80, the list prepared on 15-10-80 happened to be contrary to the rules then applicable and hence it was cancelled by a letter, dated 17-12-80. It has been disputed on behalf of opposite darties that the rules to be effective required to be published in Gazette anp the contention was that from the very fact that they were issued with Notification, dated 13-10-80 to the concerned Heads of the Departments and Offices, it should be inferred that they had come into force immediately with effect from the date of the Notification irrespective of the fact that they were published in the Dazette only subsequently, on 7th February, 1981.

4. The main contention of the Petitioner''s learned Counsel was that the new Rules having been framed in exercise of the powers under the proviso to Article 309 of the Constitution, they were statutory Rules and could not. Have come into force without their having been published in the Gazette. Statutory Rules according to him had the same force as any piece of Legislation enacted by the State Legislature under the main provision of Article 309 and since such legislation in order to become effective required publication in the Gazette, it could not be said that the Rules made in exercise of the powers under the proviso to Article 309 could become effective without such publication.

5. Another contention of the learned Counsel was that Rule 18 as worded itself indicated that the new Rules were to apply to vacancies arising in future, i.e., only after the promulgation of the Rules but not to vacancies which already existed from before and to which the old Rules continued to apply, or atleast selection already made under the old Rules should be considered valid. The Sub-Rule (2) of Rule 18 of the new Rules reads like this:

(2) For recruitment to the post of Office Superintendent the Commissioner shall call for the names of the five senior most assistants of Category ''D'' of the district where the vacancy is expected to occur. The names shall be arranged in order of seniority on the basis of dates of confirmation in the grade and selection by the Selection Committee shall be made from the list so prepared.

The Notification, dated October 13, 1980 through which the new Rules were issued, indicated that they were being issued in exercise of the powers conferred by the proviso to Article 309 of the Constitution and in supersession of all existing Rules and orders on the subject. Sub-Rule (2) of Rule 1 indicated that the Rules were to come into force at once. Reservations in the service were to be made in accordance with the orders of the Government in force at the time of the recruitment and it has not been denied that the reservation of 15 percent vacancies for backward class candidates in the matter of promotion was provided at the relevant time and is still in force.

6. Now so far as the first contention is concerned, reliance has been placed on various authorities indicating that in the matter of subordinate legislation publication of the concerned rule or notification was absolutely essential so that the matter could be brought to the notice of the persons affected thereby. In Harla Vs. The State of Rajasthan, it was observed that the case of subordinate legislation stood on a different footing from that of the Acts of the legislature inasmuch as the latter received sufficient publicity during the course of the debates in the Parliament or the State Legislature but not so in the case of subordinate legislation. That was, however, a case where violation had been done of certain provisions of the Jaipur Opium Act and it was held that without proper publication it could not be said that the Act was a validly and properly promulgated piece of legislation simply on the ground that the Act was made by a resolution passed by the Council of Ministers. Since it was a case where penal provisions were under consideration it is obvious that in the absence of publication of the relevant law which was said to have been violated it would not be just and fair to convict a person for violation. In the instant case, however, the matter under consideration relates to service rules made under Article 309 of the Constitution. Even in that case, the observation was that the mode of publication may vary, but some sort of reasonable publication was absolutely essential.

7. Reliance was also placed on State of Maharashtra Vs. Hans George, . Certain Foreign Exchange Regulations had been violated in that case and it was held that the publication of the Regulations was necessary in order that a person violating the same could be found guilty of committing an offence. The question involved, however, was whether publication of the concerned Regulation in India was enough or they should have been published in other countries also if foreigners from those countries visiting India were charged of violating the Regulations. It was held that publication in India was sufficient and it was immaterial whether the foreigners visiting this country had or had not the knowledge of the Regulations. That case again is not an authority about the requirement of the publication of service rules made under Article 309 of the Constitution since it related to penal provisions contained in certain Foreign Exchange Regulations.

8. Another case relied upon by the Petitioner''s learned Counsel was of I.N. Saksena Vs. State of Madhya Pradesh, . There a memo had been issued by the Government raising the age of compulsory retirement to 58 years and providing for circumstances in which a person could be compulsorily retired before attaining that age. Since that memo had not

been published in the gazette and it specifically mentioned that formal amendment in F.R. 56 would be incorporated in due course, it was held that the O.M. did not amount to a rule. Moreover, when formal amendments to F.R. 56 were actually issued they were materially different from the provisions contained in the O.M. which had not been published in the gazette. It was in these circumstances that the O.M. was held not to have the force of a rule under Article 309 of the Constitution. In the instant case, however, all the ingredients necessary for making rules under Article 309 are present and the attack has been made only on the ground that rules were not published in the gazette till the material date on which the Petitioner"s selection was cancelled. Article 309, however, does not by itself require the publication of the rules in the gazette nor there is any provision in the General Clauses Act requiring such publication. It is, only on the general principles and principles of natural justice that subordinate legislation including service rules are required to be published and even though such publication may not necessarily be in the gazette yet it should be sufficient and reasonable publication so that the contents become known to the persons affected.

9. The matter also came up for decision in the case of P. Radhakrishna and Others Vs. State of Andhra Pradesh and Others, . Certain rules governing conditions of service and promotion of Junior Engineers were made through various government orders and office memos but they had not been published in the gazette. It was held that even though the office memos or G.Os., might have been issued in the name of the Governor but unless they were published in the official gazette or in any other prescribed manner for the purposes of informing the persons concerned, it could not be said that they had the force of statutory rules. Even in that case although there was insistence on publication of the rules but it was never held that publication in the gazette was a pre-condition for the rules to be effective.

10. Reliance was next placed on Sita Ram v. Speaker Haryana Vidhan Sabha 1972 SLR 756 . In that case the question for consideration was whether the G.O. issued by the Government and addressed to the Speaker laying down the manner relating to recruitment and conditions of service amounted to a rule regulating the conditions of service. The Government orders so communicated had not been published in the gazette. The matter came up before the Punjab and Haryana High Court which held that the underlying object of making rules was to make them known to the class to be affected by them. An order which is to be given the status of a rule must, therefore, be held to come into operation only when it becomes known. It was further observed that in a country like India governed by the rule of law where the Constitution guarantees Fundamental Rights including the equality of opportunity in matter relating to employment or appointment to any office under the State, the necessity for publication of the rules relating to any service cannot be over-emphasised the idea being that the rules relating to conditions of service of employees should be published atleast in a reasonable manner if not in the gazette in order to ensure that they can be made known to persons affected thereby. Our attention was also drawn to certain observations made by the Supreme Court in the case of B.S.

Yadav and Others Vs. State of Haryana and Others, . It was observed that the power to make law governing the conditions of service vested by Article 309 in the Legislature, and until such law was made, the power to make rules vested in the Governor. Whether it was the Legislature which passed an Act or the Governor who made the rules regulating service matters, the end product was law within the meaning of the second part of Article 235 which was under consideration in that case. Relying on this observation it was argued that since the rules made by the Governor in exercise of the powers under the proviso to Article 309 had the same status and force as an Act of the appropriate Legislature or Parliament and since the latter could not be effective without publication in the gazette, the former should also be held not to be effective unless publication was made in the official gazette. The observations that "the end product was law" undoubtedly lend strength to his proposition, but there is no warrant for inferring that the rules to be valid and enforceable should be published in the official gazette and not in any other manner.

11. The matter had recently come up for consideration before the Kerala High Court in R.K.V. Motors and Timbers (P) Ltd. and Others Vs. Regional Transport Officer and Another, . After considering the various authorities on the point some of which have already been referred to above, it was held that the rules to be effective must be published for the information of the persons affected thereby. In that case, the rules were published in the gazette dated 29th September, 1975 but the gazette was released from the press on 14-10-1975 and it was held that the rules could not be effective from any date prior to 14-10-1975. The emphasis therefore, in all the cases referred to above was on publication of rules though not necessarily in the gazette, so that they are known to the persons affected thereby.

12. On the other hand, reliance was placed on behalf of the State on two decisions of this Court, namely, Banarasi Das Kankan Vs. Uttar Pradesh Government and Another, and Prahlad Singh v. State of U.P. 1976 (2) SLR 752. In the former case, Reserved Posts Rules, 1938 which primarily governed service conditions of ICS Officers were made on 27-10-1938 but published in the gazette on 17-12-1938. Distinguishing the case of Harla (supra) on the ground that it related to a penal provision where publication was definitely essential, it was held that in the matter relating to service rules made by the employer publication in the gazette was not necessary since there was no such requirement in Section 246 of the Government of India Act, 1935 under which they were made. Indeed there is no provision either in Article 309 of the Constitution requiring that rules made by the Governor in the exercise of the powers under the proviso thereto in order to be effective must be published in the gazette. On broad principles of natural justice, however, publication in some form or the other has consistently been held necessary, the idea being that the rules should be known to the persons affected thereby.

13. In the subsequent decision of Prahlad Singh, the facts were very much similar. Certain rules expressed to be provisional rules were made in the name of the Governor and a covering letter was issued to concerned departmental heads calling upon them to

take action in accordance with the provisional rules. Final rules were intended to be made in due course. They were, however, not published in the gazette. It was held that in the absence of a specific statutory provision, it could not be insisted that publication in official gazette was necessary in order to make the rules effective. It was also observed that it was desirable that rules framed under Article 309 should be published in the gazette but the mere fact that they had not been so published would not take away the binding force of the rules in case all other requirements of that Article were satisfied. In that case, however, sufficient publication otherwise than through gazette was found to have been done inasmuch as the Secretary to the Government through a letter had circulated those rules to the concerned departmental heads. The officers who were affected by the rules were also found to have knowledge of those rules as they had filed relevant extracts with the writ petition. The conflict in that case was between the said rules which were duly made but not published in the gazette and a circular letter which was a mere executive instruction and ran counter to various rules contained in the service rules. It was in view of this matter that the executive instructions which ran counter to the service rules were held ineffective and effect was given to the rules which though not published in the gazette were in all other respects validly made in exercise of the power under the proviso to Article 309. On facts, however, it was held that all the concerned departmental heads besides the affected employees were made aware of the rules and knew their contents. Thus publication in that sense was held sufficient and only, insistence on publication in the official gazette was negatived. Broadly speaking, therefore, the ratio of these decisions is that the service rules to be effective should be reasonably published so as to be known to the persons affected thereby even though publication in the official gazette was not absolutely necessary though desirable.

14. In the instant case, the select list was prepared on 15-10-1980 and communicated to the Deputy Commissioners concerned through a letter dated 15-11-1980 Annexure 3 and in which the Petitioner''s name appeared at Serial No. 6. The new rules were promulgated with notification dated 13-10-1980 which appears to have been circulated later by the Board of Revenue to the Commissioners of Divisions through a letter dated 31-10-1980. Rules were, however, published in the gazette dated 7th February 1981. Thus when the select list was perpared on 15th October, 1980 the notification dated 13th October 1980 had already been issued though not published. It had, however, not also been endorsed to the heads of departments and offices before 31st October, 1980 and at least this has not been shown to have been so endorsed. Letter dated 24th February, 1981 Annexure 6 addressed to District Magistrate Pratapgarh by the Commissioner, Faizabad Division, rejecting the Petitioner''s representation indicated that the new rules issued with notification dated 13-10-1980 were conveyed by the Board of Revenue through its letter dated 31-10-1980. Thus there was no publication before that date even otherwise than in the gazette. When the employees if at all came to know about these rules is also not clear. But in any case, the select list had been prepared before the Board of Revenue endorsed copies of the new rules to the Commissioners of Divisions. No copy of the circular letter has been produced before us, but Annexure 6 indicates that the new rules

were circulated through the letter dated 31-10-1980 to the Commissioners while the Petitioner had already been selected much earlier in accordance with the old rules. The cancellation of the select list therefore, on the basis that new rules had come into force on 13-10-1980, two days before the select list was prepared, was not justified because judging from any standard the new rules cannot be said to have come into force before the letter dated 31-10-1980 was brought to the notice of the Commissioners of the Divisions. It may be indicated that the Commissioner of the Division was to be the Chairman of the Selection Committee in respect of the posts in question.

15. It was argued that mere selection will not give the Petitioner a right to be appointed. It is undoubtedly so because it is open to the appointing authority to keep a post vacant, but in the instant case, the Commissioner has cancelled the select list not on any other basis but simply because he felt that the new rules had come into force on 13-10-1980 whereas the select list was prepared on 15-10-1980. The basis for cancellation therefore, was erroneous and the Petitioner who was selected before the new rules became effective could have been offered appointment in any of the two vacancies which existed since January and April 1980. It would be a different matter if knowing that the Petitioner was entitled to be appointed against one of those vacancies and the new rules did not affect that position, the appointing authority had decided to keep the post vacant and deferred the promotion of the Petitioner for any reasons considered valid. This being not the case here, the order of cancellation of the select list and refusing appointment to the Petitioner on the aforesaid ground was not legally justified.

16. There is, however, another aspect of the matter also. It was argued that Rule 18 of the new rules clearly indicated that these were applicable to vacancies arising after the commencement of these new rules. Sub-Rule (2) of Rule 18 has already been extracted above. The Commissioner was required to call for names of five senior most assistants of category ''D'' of the district where the vacancy was expected to occur. The words ''expected to occur'' indicated that these rules applied only in respect of the vacancies occurring after the commencement of these rules and not to vacancies which had already occurred prior to that like the ones in the instant case where they had arisen in the months of January and April 1980. Giving any other interpretation to this provision will amount to giving retrospective effect to the application of the rules for which there was no warrant. It is not a case where it could be said that filing of the pre-existing vacancies under the new rules would amount to retroactive operation of the rule because the use of the words "where the vacancy is expected to occur" excludes the application of the rules to vacancies already existing prior to the commencement of the rules. In any view of the matter, therefore, the Petitioner, in our opinion, is entitled to the relief claimed though not in terms prayed for. The prayer in the petition was to command the opposite parties by a mandamus to treat the Petitioner as the Office Superintendent in accordance with the selection made and conveyed through Annexure 3. This could not be done because the appointing authority was to issue an appointment order promoting the Petitioner to the post in question and it could not be said that merely by the inclusion of the Petitioner''s

name in the select list he became entitled to the office of the Office Superintendent automatically. Since, however, the select list was cancelled by the Commissioner on a wrong assumption that the new rules rendered it inoperative and ineffective, the order of the Commissioner contained in his letter dated 17-12-1980 Annexure 4 is liable to be quashed. Annexures 5 and 6 also deserve to be quashed for the same reasons.

17. We therefore allow the petition and quash the order dated 17-12-1980 contained in Annexure 4 and the orders dated 9th January 1981 and 24th February 1981 Annexures 5 and 6 rejecting the Petitioner''s representations. The Petitioner shall be entitled to be considered for appointment to the post of the Office Superintendent in accordance with the selection already made on 15-10-1980 and conveyed through the letter dated 15th November, 1980 Annexure 3 to the District Officers. We, however, make no order as to costs.