

Court No. - 2

Case :- SPECIAL APPEAL No. - 86 of 2022

Appellant :- Rahul Kumar In Wria 323 Of 2022

Respondent :- State Of U.P Thru.Addl.Chief Secy.Basic Edu.
Dept. U.P. Govt. Civil Sectr. Lko. And Ors

Counsel for Appellant :- Ashok Kumar Singh

Counsel for Respondent :- C.S.C.,Ran Vijay Singh,Sridhar
Awasthi

Hon'ble Devendra Kumar Upadhyaya,J.

Hon'ble Ajai Kumar Srivastava-I,J.

Heard Shri Sandeep Dixit, learned Senior Advocate, assisted by Shri Ashok Kumar Singh for the appellant, Shri Ran Vijay Singh, learned Additional Chief Standing Counsel for the State-respondents and Shri Sudeep Seth, learned Senior Advocate, assisted by Shri Sridhar Awasthi for respondent nos.6 to 11.

By means of this intra-court appeal, the appellant has sought to impeach an interim order dated 27.01.2022 passed by the learned Single Judge in Writ-A No.323 of 2022 filed by the respondent nos.6 to 11, whereby it has been ordered that in no circumstances, candidates in excess of 69000 vacancies which were advertised on 01.12.2018 (Assistant Teacher Recruitment Examination 2019)) shall be appointed and unadvertised vacancies shall not be filled in without being advertised and selection being held in respect thereof.

Submission of Shri Sandeep Dixit, learned Senior Advocate representing the appellant, who is arrayed as respondent no.9 in the writ petition, is that the learned Single Judge has erroneously entertained the writ petition filed by the respondent nos.6 to 11, though these respondents do not have any locus to file the writ petition for the reason that they cannot be said to be aggrieved by the decision of the State Government, dated 05.01.2022 whereby it has been decided to issue an additional select list of 6800 candidates by revising the selection process held pursuant to the advertisement/government order dated 01.12.2018. Further submission on behalf of the appellant is that these respondents also do not have any locus to challenge the select list dated 05.01.2022 which relates to selection of 6800 reserved category candidates pursuant to the selection held for 69000 posts of Assistant Teachers which were directed to be filled in by the Government Order dated 01.12.2018 for the reason that these respondents do not have any claim so far as the selection held against 69000 vacancies is concerned.

Shri Dixit, learned Senior Advocate representing the appellant has also argued that in the writ petition before the learned Single Judge the respondent nos.6 to 11 herein, who are petitioners, had failed to establish infringement of any legal, statutory or constitutional right, which can be said to have occurred on account of the decision of the State Government, dated 05.01.2022 issuing additional select list of 6800 candidates. In this regard, it has been submitted that the writ petition was not maintainable at the behest of these respondents as they can only be said to be prospective applicants in case in future any selection against any vacancy takes place. He has further argued that no law confers any right of appointments on a candidate; it is only the right of consideration which is available to the candidates/prospective candidates but such right is exercisable only once the employer decides to undertake any selection process. In this view, submission is that at the behest of prospective applicants/candidates the writ petition in which the order under appeal herein has been passed was not maintainable.

Opposing the submissions and prayers made by the learned counsel representing the appellant, Shri Sudeep Seth, learned Senior Advocate representing the respondent nos.6 to 11 has submitted that the order dated 27.01.2022 which is under appeal herein is, admittedly, interim in nature and since by the said interim order no issue or lis between the parties has conclusively been decided by the learned Single Judge, the instant special appeal is not maintainable. It has further been argued that the learned Single Judge has only provided as an interim measure that 6800 vacancies are since in excess of 69000 vacancies which were advertised pursuant to the Government Order dated 01.12.2018 as such no appointment should be made against these 6800 vacancies which are in excess of number of vacancies advertised. Thus, the submission is that against such an interim order provided by the learned Single Judge, this special appeal is not maintainable.

It has further been argued on behalf of the respondent nos.6 to 11 that the learned Single Judge has considered the issue relating to locus of these respondents who have filed the writ petition and has held that no law permits for making appointment in excess of vacancies advertised and in case vacancies are filled in without being advertised and without subjecting them to selection process, the same would clearly amount to infringement of fundamental rights of these respondents-petitioners of consideration for appointment in public employment.

Thus, the submission is that the interim order dated 27.01.2022

passed by the learned Single Judge even on merit does not suffer from any illegality or error so as to call for any interference by this Court in this special appeal.

We have considered the rival submissions made by the learned counsel representing the respective parties and have also perused the records available before us on this special appeal.

From the facts, which can be culled out from the records available before us, it is apparent that the learned Single Judge while passing the interim order dated 27.01.2022 has concluded that the select list of 6800 candidates is in excess of 69000 vacancies which were advertised. Learned Single Judge has thus, relied upon a well settled principle of law that no appointment can be permitted to be made in excess of number of vacancies advertised and without subjecting such vacancies to selection. The said finding recorded by the learned Single Judge, in our considered opinion, cannot be said to be erroneous in law. If the State or its instrumentalities are allowed to make appointment against the vacancies which are in excess of the number of vacancies advertised, in our considered opinion, the same would be in clear violation of Articles 14 and 16 of the Constitution of India.

Article 16 of the Constitution of India guarantees equal opportunities to all in the matters relating to employment under the State or its instrumentalities. It is thus obvious that if equality of opportunity in relation to appointment is to be made meaningful and effective, no appointment can be permitted to be made under the State or its instrumentalities where equal opportunity is denied to the candidates. At this juncture, we may notice that if any appointment is sought to be made without advertising the vacancies or without subjecting such vacancies to selection, the same would necessarily result in denial of equal opportunity as enshrined in Article 16 of the Constitution of India. If vacancies are advertised, there would not be any breach of Article 16 of the Constitution of India because every one who is eligible, in view of the conditions of service, would be considered for employment under the State or its instrumentalities, however, in case any attempt is made to fill in vacancies without advertising the same, that would unambiguously infringe the fundamental right of consideration for public employment as enshrined under Article 16 of the Constitution of India.

In the instant case, it has vehemently been argued by the learned Senior Advocate representing the appellant that the respondents nos.6 to 11 does not have any locus to file the writ petition challenging the decision of the State Government

issuing additional select list of 6800 candidates and preparing the select list for the said purpose. Such submission, in our considered opinion, is fallacious for the reason that whether or not these respondents-petitioners succeed in the earlier litigation, they would still be deprived of their right of consideration against these 6800 vacancies. By taking the decision to fill up in 6800 vacancies which are admittedly in excess of 69000 vacancies which were advertised, these vacancies would never be either advertised or subjected to any selection which would clearly infringed upon the right of these respondents to participate in the selection. It is true that mere availability of vacancy does not confer any right of even consideration unless the employer intends to make recruitment against such vacancies, however, in this case, it is not that against 6800 vacancies recruitment/appointment is not being made, rather appointments are being made by the action which is impugned in this writ petition, that too, without advertising the vacancies. In our considered opinion, thus, the petitioners of the writ petition are entitled to appear for selection against these 6800 vacancies as and when the same are advertised or a decision is taken to fill up the same in future, of course, subject to their fulfillment of eligibility criteria at the relevant point of time. By not subjecting these 6800 vacancies to any selection and by simultaneously deciding to fill them up, certainly results in denial of right of consideration of the petitioners of the writ petition. In this view, we are of the considered opinion that the respondent nos.6 to 11, who were petitioners in the writ petition, have locus to file the writ petition. The submissions made to the contrary by the learned Senior Advocate representing the appellant, thus, merits rejection which is hereby rejected.

Apart from the merit of this special appeal which has been discussed herein above, we may also notice that the instant special appeal challenges only an interim order passed by the learned Single Judge it has been ordered that no candidate in excess of 69000 vacancies shall be appointed and that unadvertised vacancies shall not be filled up without being advertised and selection being held in respect thereof. Such a direction in our opinion is nothing but only reiteration of well established law that no appointment can be made in excess of number of vacancies advertised. It, substantively, does not decide any issue between the parties and in this view of the matter as well we find that this special appeal would not be maintainable against such an interim order.

For the discussion made and reasons given above, we find that the order under appeal dated 27.01.2022 passed by the learned Single Judge does not suffer from any error or illegality which

may warrant any interference in this special appeal.

Having observed as above, considering the fact that the matter relates to large number of candidates who are waiting for their fate relating to their respective claims of appointment, we request the learned Single Judge that the proceedings of Writ-A No.323 of 2022 and other connected matters shall be expedited and concluded as early as possible. We also expect that the parties to the proceedings pending before the learned Single Judge shall complete their pleadings at the earliest and shall make all possible endeavour to get the writ petition pending before the learned Single Judge, decided at the earliest.

The special appeal is, thus, **disposed of** in the aforesaid terms.

No order as to costs.

Order Date :- 15.3.2022

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