
(2012) 04 UK CK 0133

In the Uttarakhand High Court

Case No : Writ Petition (S/S) No. 1625 of 2011

Anil Joshi and Others

APPELLANT

Vs

State of Uttarakhand and Others

RESPONDENT

Date of Decision : 02-04-2012

Acts Referred:

Citation : (2013) 1 UC 770

Hon'ble Judges : Sudhanshu Dhulia, J

Bench : Single Bench

Advocate : Sandeep Kothari, for the Appellant; P.C. Bisht, Brief Holder for the State of Uttarakhand, Mr. Manoj Tiwari assisted by Mr. Alok Mehra, Advocate for Respondent Nos. 4 to 43, for the Respondent

Judgement

Sudhanshu Dhulia, J.—Heard Mr. Sandeep Kothari. Advocate for the petitioners, Mr. P.C. Bisht, Brief Holder for the State of Uttarakhand and Mr. Manoj Tiwari, Senior Advocate assisted by Mr. Alok Mehra, Advocate for respondent Nos. 4 to 43. The petitioners before this Court, by means of the above writ petition, have sought a writ of certiorari for quashing the advertisement dated 4.5.2011 which was, inter alia, for the recruitment to the post of Physiotherapists in the department of Medical Health and Family Welfare Uttarakhand, and also for quashing of the subsequent proceedings including the result dated 2.11.2011 issued by respondent No. 3 by which certain persons have been selected on the post of physiotherapists in the State of Uttarakhand. The petitioners have also impleaded as respondent Nos. 4 to 43 the selected candidates to the post of physiotherapists—a selection which stands challenged in the writ petition.

2. In the year 2009, respondent No. 2 i.e. Director General of Medical Health and Family Welfare, Government of Uttarakhand issued an advertisement calling applications from the eligible candidates for recruitment to the post of physiotherapists. The advertisement clearly stated that the recruitment to the post of physiotherapists shall be done in accordance to the provisions made in Government Order dated 4.8.2008. On 4.8.2008 the earlier rules, namely, U.P.

Medical Health and Family Welfare Department Physiotherapist and Occupational Therapist Service Rules, 1998 stood amended. At this juncture it must be stated that the recruitment and appointment of physiotherapists in Uttarakhand as well in the erstwhile State of Uttar Pradesh were earlier done under the rules known as U.P. (Outside the purview of the Public Service Commission) Direct Recruitment Rules, 1998. Rule 15 of the said Rules reads as under:

15. Processor of direct recruitment to a post in the Services of Group "C" (on post outside the purview of Uttar Pradesh Public Service Commission) shall be done framed under rule 1998.

3. It must be stated that the recruitment for the post of Physiotherapist was earlier also done under the general rule pertaining to direct recruitment of Group "C" posts. All the same, this rule stood amended on 4.8.2008 in the State of Uttarakhand and instead of Rule 15 (as referred above) the following Rule was substituted:

15. (1) For direct recruitment, the Appointing Authority shall notify the format of application form and vacancies together in the following manner:-

- (i) By issuing advertisement in daily newspapers, having wide circulation;
- (ii) By pasting the notice on the notice board of the office or by advertising through Radio/Television and other employment newspapers;
- (iii) By notifying vacancies to the Employment Exchange.

(2) For the purpose of direct recruitment, there shall be constituted a Selection Committee comprising the following:-

(i) Appointing Authority-Chairman

(ii) If the Appointing Authority does not belong to the Scheduled Castes or Scheduled Tribes, an officer belonging to the Scheduled Castes or Scheduled Tribes, not below the rank of Joint Director, shall be nominated by the Director General. If the Appointing Authority belongs to the Scheduled Castes or Scheduled Tribes, in that case an officer belonging to other than Scheduled Castes or Scheduled Tribes, shall be nominated by the Director General-Member

(iii) An officer belonging to the minority community, not below the rank of Joint Director, to be nominated by the Director General-Member

(iv) An officer belonging to Backward Classes, not below the rank of Joint Director, to be nominated by the Director General-Member

(3) The Selection Committee shall, having regard to the need of securing due representation of the candidates, belonging to the Scheduled Castes, Scheduled Tribes and other categories in accordance with rule 6, scrutinize the applications.

(4) (i) For selection, there shall be an objective type written examination of 100 marks consisting of single question paper which will include General Hindi

General Knowledge and concerned subject. While evaluating the question paper, one mark shall be awarded for each correct answer and 1/4 mark shall be deducted for each incorrect answer as negative marking.

(ii) After the examination is over, the candidates shall be allowed to carry back the Question Booklet of the written examination with them.

(iii) After the written examination, the Answer Key of the written examination shall be displayed on the Uttarakhand website www.ua.nic.in or published in the daily newspaper, having wide circulation.

(iv) The Answer Sheet of the written examination shall be in duplicate (including the carbon copy) and the candidates shall be permitted to carry back the duplicate copy with them.

(v) The candidates will be awarded 30 percent and 70 percent marks for the percentage of marks obtained in the intermediate examination and Diploma/Degree examination, respectively.

(vi) Candidates obtaining less than 40 percent marks in the written test and less than 30 percent marks in Diploma examination shall be unfit for selection.

(vii) The merit list shall be prepared by the Selection Committee on the basis of the aggregate of marks obtained in the test for selection carrying 200 marks, which will include 100 marks for written examination, 30 percent marks of intermediate examination and 70 percent marks of Diploma/Degree examination.

(5) Thereafter, the Selection Committee shall prepare a list in order of proficiency as disclosed by the aggregate of marks obtained by each candidate and recommend such number of candidates/it considers suitable for appointment. If two or more candidates obtain equal marks in the aggregate, the name of the candidate obtaining more marks in the written examination shall be placed higher in the list. If two or more candidates obtain equal marks in the written test also, the candidate senior in age shall be placed higher in the selection list. The number of names in the list shall be more (but not more than 25 percent) than the number of vacancies. The Selection Committee shall forward the list to the Appointing Authority.

4. In other words the intention of the legislature was quite clear, which was that instead of applying the general procedure for recruitment (i.e. the procedure which was applicable for recruitment to Group "C" general posts) a special procedure was adopted, which would. Inter alia, mean that not only will a candidate's merit be appreciated and judged through a written examination but also by his past qualifications such as intermediate examination and the diploma or degree obtained by him in physiotherapy. It must also be noted that 30 percent of marks were for intermediate qualification and 70 percent for diploma or degree in physiotherapy. In other words, a candidate's merit was to be evaluated not only by a written examination which would be of 100 marks but he would be evaluated further by another 100 marks i.e. 30 marks for intermediate

examination and 70 marks for the degree of diploma in physiotherapist. Therefore the total evaluation was of 200 marks.

5. Apart from this Rule 15(4)(vi) stated as under:-

15(4)(vi) Candidates obtaining less than 40 percent marks in the written test and less than 30 percent marks in Diploma examination shall be unfit for selection.

6. In other words, Rules also stipulated that a candidate must have 40 percent or more marks in the written examination and should have not less than 30 percent marks in diploma examination otherwise he would not be fit for selection. In this advertisement which was given in 2009 for recruitment of Physiotherapists it was clearly stated that the recruitment shall be made as per the amended provisions of physiotherapist rules. All the same, on 16.9.2010 another advertisement for the post of physiotherapists was issued by respondent No. 2 i.e. Director General of Medical, Health and Family Welfare, Uttarakhand stating that the recruitment will be done in accordance with the Government Order dated 4.8.2008. After this though on 10.2.2011, respondent No. 3 i.e. The Secretary, Uttarakhand Technical Education Board cancelled the earlier advertisements dated 28.5.2009 and 16.9.2010, and declared that fresh recruitment would be done as per the new advertisement which was made on 4.5.2011. This new advertisement was for inter alia for recruitment to the post of physiotherapists. This time it was not by the Director General of Medical, Health and Family Welfare but by respondent No. 3 i.e. Uttarakhand Technical Education Board stating that the recruitment will be done in accordance to Uttarakhand Procedure for Direct Recruitment for Group "C" posts (outside the purview of the Uttarakhand Public Service Commission) Rules, 2008 and a candidate's worth will be judged on the basis of a written examination which should consist of 100 marks, out of which 50 per cent marks are for General Studies and the remaining 50 per cent marks would be specifically for the department in which a candidate is appearing. In other words, in case a candidate is appearing for Physiotherapists, 50 per cent of marks would consist of General Studies whereas remaining 50 percent would focus on his subject i.e. Physics in department. The advertisement dated 4.5.2011 lists Group "C" vacancies of various departments in the State including Medical Health and Family Welfare, of which Physiotherapy was a part. All of which were to be filled though one single examination.

7. In other words, in supersession of all the earlier advertisements and cancelling the same respondent No. 3 i.e., Uttarakhand Technical Education Board, stating that the recruitment shall be made on group "C" post of various departments including the Department of Medical Health and Family Welfare where the posts such as lab technician, X-ray Technician, etc. including the physiotherapist were to be filled by way of a common examination issued the advertisement dated 4.5.2011. Admittedly, the petitioners appeared in the said examination and have not been successful in the said examination. The physiotherapists who have been selected are the present respondent Nos. 4 to 43 who have been selected by a recruitment agency i.e. Uttarakhand Technical Education Board. It is this

selection which has been challenged.

8. The main contention of the petitioners is that the entire recruitment for the Physiotherapist drive is bad inasmuch as the rules which have been adopted for recruitment are not the correct rules. According to the petitioners the rules which were liable to be adopted were Physiotherapist Rules which stood amended in the year 2008. On the other hand, the respondent No. 3 i.e. Uttarakhand Technical Education Board has made selection for recruitment for entire group "C" posts of various department under the general rules known as The Uttarakhand Procedure for Direct Recruitment for Group "C" Posts (Outside the purview of the Public Service Commission) Rules, 2008 (from hereinafter referred to as "General Rules"). The principal contention of the petitioners is that this process is faulty, as the rules which have been adopted are wrong. Apart from this, the counsel has also pointed the material difference between the two rules such as in the amended physiotherapist rules of 2008 (from hereinafter referred to as the "Special Rules") a candidate has to be judged not only on the basis of written examination which consists of 100 marks out of which he must have a minimum of 40 marks in order to qualify in the said examination. Apart from this, there are another 100 marks on which the candidates have to be evaluated which consist of 30 marks for intermediate and 70 marks for his degree or diploma in physiotherapy, and again he must get atleast 30 percent marks for evaluation of his degree and diploma in physiotherapy. In the present recruitment though a candidate has only to be judged on the basis of a written examination. What has happened in the present case is not merely a change of rules but a change of rules where two rules are having entirely different methods and criteria for evaluating a candidate's worth.

9. This Court has received the counter affidavit on behalf of the private respondents whose case is being argued by Sri Manoj Tiwari, Senior Advocate as well as the counter affidavit of the State who is being represented by Sri P.C. Bisht, Brief Holder for the State.

10. A learned Single Judge of this Court vide its order dated 8.12.2011 had passed an interim order directing the respondents not to take any action in pursuance of result declared on 2.11.2011.

11. The principal contention of the learned senior counsel appearing for the private respondents Sri Manoj Tiwari, while praying from the dismissal of petition and vacation of interim order dated 8.12.2011 is on two grounds: Firstly the principle of "special overriding the general" is not applicable in the present case and the General Rules of Recruitment of 2008 would prevail as the general rules are later in point of time with a non-obstante clause. Secondly, the learned Senior Advocate submits that in any case examination process and results have been challenged by a group of unsuccessful candidates, the petitioners have appeared and failed to qualify the examination and now they are estoppel from challenging this examination.

12. It is undoubtedly true that whereas the amended 2008 rules pertaining to the physiotherapy came into effect on 4.8.2008, the rules applicable for direct recruitment i.e. General Rules came into effect on 1.10.2008. Therefore, undoubtedly they are in later point of time. Furthermore, the opening sentence of rules of 1.10.2008 states that these rules are made in supersession of all existing rules and order on the subject. The expression "in supersession of existing rules" has been explained in a catena of judgments by the Hon''ble Apex Court. Reference can be made here of one such cases which is Om Prakash Shukla Vs. Akhilesh Kumar Shukla and Others, wherein it has been held that "the phrase "in suppression of all existing rules and orders on the subject" only refer to those matters in the existing rules which correspond to the matters dealt with the present Rules". In other words, the 2008 General Rules are in suppression of all previous Rules on the same subject. In view of this Court, such similar rules would be the rules pertaining to direct recruitment of general Group "C" posts and it has no application for physiotherapist rules. Further, however, rules of 1.10.2008 also have a non-obstante clause which reads as follows:

2. These rules shall have effect notwithstanding anything to the contrary contained in any other Rules or Orders.

13. Undoubtedly we have a case where two different rules are occupying the field-(a) Physiotherapist Rules i.e. Physiotherapy Rules of 1998 which stood amended in the year 2008 by the Government of Uttarakhand (b) the General Rules for recruitment of Group "C" posts of the year 2008. Not only there has to be a harmonious construction of these two rules, the Court has to determine as to which rule actually occupies the field i.e. the field of recruitment in the case of physiotherapists.

14. In view of this Court, even though the General Rules of 2008 have a non-obstante clause, it will be the special rules i.e. Physiotherapists Rules which will occupy the field i.e. the field for recruitment of physiotherapists for the simple reason that the special would override the general. This Court had an occasion to examine such an aspect in the case of Deewan Singh Bhandari and another v. State of Uttarakhand and others (Writ Petition (S/S) No. 463 of 2010) where after relying upon various judgments of Hon''ble Apex Court this Court came to the conclusion that in such a situation it will be the special rules which have an overriding effect unless it appears from the language of the later general rules that the legislature was clearly of intent that the rule which is of later point in time will occupy the field. In the present case, after going through the general rules of 2008 there is nothing in it which shows that the General Rules will be applicable inspite of the fact that for the physiotherapist there are special Rules which were already in existence.

15. In R.S. Raghunath Vs. State of Karnataka and another, the Hon''ble Apex Court has held that depending upon the language of the Rules, even if the special Rules are earlier in time they shall prevail even though the later General Rules have a non-obstante clause. Special Rules being already in force the

application of subsequent General laws is excluded to the extent the field is occupied by the special law.

16. Learned Senior Advocate Sri Manoj Tiwari has cited a judgment of the Hon"ble Apex Court in Ajoy Kumar Banerjee and Others Vs. Union of India (UOI) and Others, where the following proposition of law was laid down:

38... The general rule to be followed in case of conflict between two statutes is that the later abrogates the earlier one. In other words, a prior special law would yield to a later general law, if either of the two following conditions is satisfied:-

(i) The two are inconsistent with each other.

(ii) There is some express reference in the later to the earlier enactment.

If either of these two conditions is fulfilled, the later law, even though general, would prevail.

Such a condition, however, is evidently not there in the present case. Therefore, the case law cited by the learned senior counsel is not applicable in the present case.

17. The other contention of the learned Senior Advocate was that even assuming for the sake of argument if the rules which are occupying the field are the amended Physiotherapist Rules the petitioners cannot challenge the same recruitment now by filing a writ petition for the simple reason that they had appeared in the written examination and after becoming unsuccessful they cannot turn around and challenge the procedure, as it is clearly hit by the principle of estoppel and acquiescence.

18. This second contention of the learned senior advocate could have outweighed every other argument from the other side as indeed in the present case the petitioners are a group of failed candidates challenging a recruitment in which they had unsuccessfully appeared. Their petition was liable to be dismissed on this objection alone without going any further into the matter. All the same after appreciating the arguments of both the sides and in view of the materials available on record, this Court is of a clear view that the doctrine of estoppel and acquiescence will not be attracted in the present case for simple reason that there have been glaring irregularities in the present matter which go to the very root of the matter. The rules which were actually applicable in the recruitment of physiotherapists were undoubtedly the Physiotherapist Rules and not the General Rules of the year 2008. The two rules are on different platforms altogether. It involves different mechanism for appreciating a candidate's worth, as it has already been discussed above. Therefore, respondent No. 1 and its instrumentality and agencies have committed a fundamental error in adopting the General Rules of the year 2008 whereas there was already a Special Rule applicable for recruitment of physiotherapists, which have not been followed. Therefore, the principle of estoppel by conduct or acquiescence has no application in the facts of the present case as held under similar circumstances

by the Hon''ble Apex Court in Raj Kumar and Others Vs. Shakti Raj and Others, . The main challenge by the respondents in Raj Kumar's case (supra) was that the petitioners were unsuccessful in the recruitment and therefore they are estopped, now from challenging the recruitment. All the same, the Hon''ble Apex Court came to the conclusion that such a principle will not be applicable because the respondents have committed a fundamental error in adopting wrong rules. The situation as is being faced by this Court, with similar facts.

19. Sri Manoj Tiwari, Senior Advocate has cited number of cases in his favour including that of Dhananjay Malik and Others Vs. State of Uttaranchal and Others, where the Hon''ble Apex Court has held that it is not given to the unsuccessful candidates to challenge the recruitment process if he has himself gone through the process. In fact, there are many other judgments on the same point, but as this Court has already held that where glaring irregularities have been committed by the respondents the principle of estoppel and acquiescence will not be applicable.

20. Therefore, the writ petition succeeds and is hereby allowed. The entire selection process and the selection of the candidates to the post of physiotherapists is hereby quashed. Since it has been brought to the knowledge of this Court that there are many posts of physiotherapist lying vacant, the respondents are directed to forthwith start the recruitment process for the post of physiotherapists by a fresh advertisement so that information can reach one and all. All the same, this recruitment will only pertain to the posts of physiotherapists as it existed on 4.5.2011, from the candidates holding qualification at that relevant time. No order as to costs.