
(2009) 02 AHC CK 0156
In the Allahabad High Court

Arvind Kumar

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 11-02-2009

Acts Referred:

Constitution of India, 1950 — Article 16

Citation : (2009) 2 AWC 1327 : (2009) 122 FLR 710 : (2009) 2 UPLBEC 1160

Hon'ble Judges : H.L. Gokhale, C.J.; Dilip Gupta, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

H.L. Gokhale, C.J.—Shri Ashok Khare, learned senior advocate has appeared for the appellants. Dr. Y.K. Srivastava, learned standing counsel of the State of U.P., has appeared for the respondents.

2. All these special appeals seek to challenge the judgment and order dated 6.5.2005, passed by a learned Judge of this Court in Civil Misc. Writ Petition No. 46812 of 2003 and other connected petitions, whereby the learned Judge has dismissed the writ petitions filed by the appellants herein. Though the writ petitions have been dismissed, the learned Judge has declared the proviso to Rule 8(3) of the U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 (in short "Rules 1974") ultra vires the provisions of Article 16 of the Constitution of India and quashed the same.

3. All these appellants had applied in pursuance to an advertisement published on 2.6.2003 to fill up the backlog vacancies of Scheduled Castes and Scheduled Tribes on the posts of "Constable (Ministerial)". In all, 165 posts were to be filled and the appellants had appeared in the written tests followed by typing test and interviews and their names were included in the select list published on 13th August, 2003. The Government of U.P., however issued Government order dated 29th August, 2003 placing in abeyance all direct recruitments. The appellants herein filed writ petitions to challenge the said Government order. The other

prayer in the writ petitions was to seek a writ of mandamus directing the respondents to forthwith issue appointment orders to the appellants on the post of Constable (Ministerial). The respondents in the writ petitions were State of U.P., through Principal Secretary (Appointment and Personnel Department); Secretary, Department of Home (Police Section) and the U.P. Police Headquarters.

4. The petitions were contested, amongst others, on the ground that the calculation of these 165 backlog vacancies of Scheduled Caste and Scheduled Tribes was not correct. The matter was considered by the learned Judge, who accepted this submission. He also accepted the submission of the counsel for the respondents that the selectees did not have indefeasible right to appointment. The learned Judge referred to and relied upon the judgment of the Apex Court in *Shankarsan Dash Vs. Union of India*, and *All India Scheduled Castes and All India SC and ST Employees Assn. and Another etc. Vs. A. Arthur Jeen and Others etc.*,

5. By the time, these appeals came up for final hearing, certain subsequent developments had taken place and they have been placed through a counter-affidavit affirmed by one Smt. Neeti Sharma, Deputy Superintendent of Police (Legal Cell), U.P., Police Headquarters, Allahabad and the rejoinder-affidavit filed by one Arvind Kumar who is one of the appellants. Through these affidavits, it has been pointed out that whereas the posts which were advertised in the year 2003 were the posts of Constable (Ministerial), now the State Government has decided not to appoint candidates on the post of Constable (Ministerial) and there will be appointment on the post known as Assistant Sub-Inspector (Ministerial). Reliance is placed on the Government communication dated 8th May, 2006, issued by the Secretary, Government of U.P., to the Director General of Police. In this communication, it is recorded that as against 134 sanctioned posts of Constable (Ministerial), infact 982 Constable (Ministerial)/Paid Apprentices were actually working. The posts of Constable (Ministerial) were actually carrying fixed pay of Rs. 3,050. Now, it is proposed that the Assistant Sub-Inspector (Ministerial) will be given pay scale of Rs. 4,000-100-6,000 and all the persons working on the post of Constable (Ministerial) will be given this pay scale of Rs. 4,000-100-6,000 and all future vacancies will be adjusted towards these posts of 982 posts of Assistant Sub-Inspector (Ministerial). It is further stated in Clause (4) of the communication/direction dated 8th May, 2006 that in future, there will be no appointment on the post of Constable (Ministerial)/Paid Apprentice on the fixed pay of Rs. 3,050, though further appointment in the Cadre will be effected only after new Rules are framed.

6. The rationale for this communication is to be found in the first paragraph of the communication dated 8th May, 2006, which states that as against 134 sanctioned posts of Constable (Ministerial), 982 Constables (Ministerial)/Paid Apprentices were working. The work of Constable (Ministerial) as well as the Assistant Sub-Inspector (Ministerial) is by and large the same. Their educational and technical qualifications are also the same and, therefore, a decision had been taken to abolish the post of Constable (Ministerial) and to appoint them on the

post of Assistant Sub-Inspector (Ministerial) carrying the pay scale of Rs. 4,000-100-6,000.

7. There is also an Office Memorandum dated 25th November, 2008, issued by the Principal Secretary (Home), Police Anubhag-I, Lucknow. In this office memo, it is stated in Paragraph 6 that vide Government order dated 8.5.2006, the posts of Constable (Ministerial) have been kept in abeyance/abolished and in its place the posts of Assistant Sub-Inspector (Ministerial) have been created. It is further stated in paragraph 7 that as far as the posts of Constable (Ministerial) are concerned, earlier the calculation of the backlog vacancies was not done correctly and since there was no requirement of these posts, therefore, a decision has been taken not to appoint the selected candidates. In such circumstances, it was not possible to make appointments on the post of Constable (Ministerial).

8. In view of these subsequent developments, Dr. Srivastava, standing counsel of the State of U.P., submitted that earlier the learned Judge has held that the calculations for the backlog post was erroneous. He also submitted that since the posts of Constable (Ministerial) were no longer in existence and the same had been upgraded for the benefit of the Constable (Ministerial) working at that time and they were to be placed in the pay scale of Rs. 4,000-100-6,000 of Assistant Sub-Inspector (Ministerial), those who were selected on the basis of the advertisement published in the year 2003, cannot claim any right that they should be absorbed. He submitted that the judgment and order of the learned Judge was right. He also submitted that the Government's decision of 29th August, 2003, which banned all recruitments and which was challenged in that petition, was subsequently substituted by the subsequent orders but even on the basis of the subsequent developments, the relief as claimed by the appellants in the petitions cannot be granted.

9. As against these submissions of Dr. Srivastava, Mr. Ashok Khare learned senior counsel appearing for the appellants drew our attention to the further communication of the State Government, which has been issued on 26th June, 2008, which has been filed alongwith the rejoinder-affidavit. In that communication, some 164 posts of Assistant Sub-Inspector (Ministerial) are identified as posts belonging to backlog vacancies of Scheduled Castes and Scheduled Tribes and that the Governor has granted sanction to fill up those posts and efforts are to be made to fill up those backlog vacancies. Mr. Khare firstly disputed that the calculations made earlier were erroneous but even assuming that they were erroneous, in view of the fact that now the Government has arrived practically on the same figure, i.e., 164 {and not 165}, and the claimants are 165, since they had participated in the selection process, they should now be absorbed against these vacancies, which the Government is proposing to fill up. Mr. Khare referred to a judgment of the Apex Court in the case of Asha Kaul (Mrs) and Another Vs. State of Jammu and Kashmir and Others, wherein the judgment of Shankarsan Das (supra), was referred, which laid down that though a successful candidate does not acquire any indefeasible

right to be appointed, the decision not to fill up the vacancies has to be taken in a bona fide manner for appropriate reasons. We cannot, however, ignore that even after making such observations, the Supreme Court declined to grant the relief in view of the delay on the part of the appellant therein in taking necessary steps. Mr. Khare further relied upon another judgment of the Apex Court in the case of A.P. Aggarwal Vs. Govt. of N.C.T. of Delhi and Another, wherein a question for filling up a vacancy of Member of Sales Tax Tribunal under the Sales Tax Act was under consideration and although the appellant was available in the reserved list for appointment, yet fresh selection process was initiated. The Supreme Court disapproved that selection process and in the facts of that case, directed that the appellant therein should be absorbed in that particular post. He also relied upon a judgment of a Division Bench of this Court in the case of State of U.P. and others Vs. Ravindra Nath Rai and others, wherein a direction was given by a learned Judge to prepare a waiting list of the candidates who had appeared at an examination for the post of Sub-Inspector in Civil Police. The appellate court while deciding the special appeal, held that the list having not been treated as exhausted and there being no plausible reason not to consider the candidature of the candidates figuring in the comparative merit, they could be considered for appointment.

10. As against this submissions of Mr. Khare, Dr. Srivastava, standing counsel of the State of U.P., referred to and relied upon the judgment of the Apex Court in the case of Shankarsan Das (supra) and also a recent judgment of the Apex Court in case of State of Haryana and Others Vs. Navneet Verma, , wherein the Apex Court has clearly held that creation and abolition of posts fall within the domain of the Government and the Government is fully competent to take a decision in that behalf and there cannot be a judicial review of such decisions. After taking into consideration various judgments particularly M. Ramanatha Pillai Vs. The State of Kerala and Another, Shri Kedar Nath Bahl Vs. The State of Punjab and Others, State of Haryana Vs. Shri Des Raj Sangar and Another, and Dr. N.C. Singhal Vs. Union of India (UOI) and Others, the Apex Court came to the following conclusions in paragraph 17 of the judgment:

- (a) the power to create or abolish a post rests with the Government;
- (b) whether a particular post is necessary is a matter depending upon the exigencies of the situation and administrative necessity;
- (c) creation and abolition of posts is a matter of Government policy and every sovereign Government has this power in the interest and necessity of internal administration;
- (d) creation, continuance and abolition of posts are all decided by the Government in the interest of administration and general public;
- (e) the Court would be the least competent in the face of scanty material to decide whether the Government acted honestly in creating a post or refusing to create a post or its decision suffers from mala fides, legal or factual;

(f) as long as the decision to abolish the post is taken in good faith in the absence of material, interference by the Court is not warranted.

11. Dr. Srivastava also submitted that these vacancies are calculated in view the exercise undertaken under Article 16(4)(B) of the Constitution. That exercise is yet to be completed and the only thing which can be said is that as and when the exercise is done and advertisements are issued, the appellants can apply but no direction as sought by the appellants can be given as that will mean that against these vacancies, they should be accommodated/absorbed.

12. We have noted the submissions of learned Counsel for both the parties.

13. The law laid down by the Apex Court right from the judgment in *Shcmkarsan Dash* (supra) and other cases, is clear that a selectee does not have an indefeasible right. The same view has been reiterated in the case of *State of Haryana and Ors. v. Navneet Verma* (supra). It is for the Government to decide as to how it should organize its work force. In the instant case, the earlier cadre known as Constable (Ministerial)/Paid Apprentice which had a fixed pay has been abolished. The Government has now decided to have a new post, i.e. Assistant Sub-Inspector (Ministerial) in the pay scale of Rs. 4,000-100-6,000. The appellants were selectees in pursuance of an advertisement published in the year 2003 for the cadre of Constable (Ministerial) in a fixed pay. The Government having decided to abolish that post, it cannot in any manner be forced with a direction that these appellants should be absorbed against the post of Assistant Sub-Inspector (Ministerial) for which an advertisement is yet to be given. No such direction can be issued by this Court to absorb the appellants against the posts of Assistant Sub-Inspector (Ministerial).

14. Having observed as above, we however, note the fact that the work which the Constables (Ministerial) were doing or were supposed to do, is identical to the work which the Assistant Sub-Inspector (Ministerial) are supposed to do and in fact it is an up-gradation of that particular post. The appellants and others who are 165 in number, are waiting for their appointments since 2003, although they were selected after a due selection procedure of advertisement, written test, typing test and interview. We are not entertaining these appeals of the appellants, but it will be open for them to represent to the Government their case. Mr. Khare has drawn our attention to the fact that the Police Headquarters had also recommended their case by its letter dated 3rd August, 2007 and had observed that when the examination had already been held and candidates were available, there did not appear to be much propriety in holding another examination to fill up the backlog vacancies of Scheduled Castes and Scheduled Tribes. We, however, make it clear that it is for the Government to take a decision in the event any such representation is made.

15. Although these special appeals are being dismissed subject to the aforesaid observations, we may also observe that the declaration given by the learned Judge that the proviso to Rule 8(3) of the Rules 1974 is ultra vires the provisions

of Article 16 of the Constitution of India and has quashed the same, was neither sought by the appellants and certainly not by the State Government. Mr. Khare made a statement that the question was not in issue before the learned Judge, it was not pressed into service by either of the parties and the observation was, therefore, totally uncalled for. It will be open to the State Government to file an appeal with respect to this declaration, if it intends to file though it has not filed any appeal so far, inasmuch as the principal decision was otherwise in favour of the State Government.

16. All the appeals are dismissed with the aforesaid observations.