

(2005) 03 P&H CK 0081
In the Punjab And Haryana At Chandigarh
Case No : Civil Writ Petition No. 4190 of 2005

Bijender Singh

APPELLANT

Vs

The State of Haryana and Others

RESPONDENT

Date of Decision : 17-03-2005

Acts Referred:

Constitution of India, 1950 — Article 309

Citation : (2005) 140 PLR 559

Hon'ble Judges : S.S. Nijjar, J;M.M. Aggarwal, J

Bench : Division Bench

Advocate : N.K. Malhotra, for the Appellant;

Final Decision : Dismissed

Judgement

S.S. Nijjar, J.—The wife of the petitioner was appointed as Multi-purpose Health Worker (Female) In the Post-Graduate Institute of Medical Science, Rohtak (hereinafter referred to as "the PGI, Rohtak") in the year 1992. On 2.7.2003, she was retired from service on medical grounds as she had become 100% disabled. On 3.7.2003, she moved an application to the PGI, Rohtak for grant of ex-gratia appointment to her husband on compassionate grounds. On 30.12.2003, the petitioner was appointed on the post of Bearer. He joined on the aforesaid post on 2.1.2004. The petitioner claims that he had been appointed on the basis of the Haryana Compassionate Assistance to Dependents of Deceased Government Employees Rules, 2003 (hereinafter referred to as the "2003 Rules"). These rules were notified on 28.2.2003 in the Government Gazette dated 4.3.2003. By order dated 11.3.2005 (Annexure P-8), the appointment of the petitioner has been cancelled by the respondents on the ground that under the aforesaid rules dated 4.3.2003, there is no provision to provide employment to the dependents of the employees who have retired on medical grounds.

2. Learned counsel for the petitioner submits that the aforesaid order is liable to be quashed on the sole ground that the appointment given to the petitioner could not have been cancelled, without observing rules of natural justice. In

support of the aforesaid submission, the learned counsel relies on a judgment of the Supreme Court in the case of Gulzar Singh Vs. Sub-Divisional Magistrate and Another, . Learned counsel also submits that the claim of the petitioner is governed by the earlier instructions issued by the State of Haryana on 2.12.1975 and 23.11.1992. He submits that the 2003 Rules would not be applicable in the case of the petitioner, as the aforesaid instructions had not been withdrawn or superseded.

3. We have considered the submissions made by the learned counsel for the petitioner.

4. In normal circumstances, an appointment legally made, in accordance with the statutory service rules, after following an open and transparent procedure for selection, cannot be withdrawn, subsequently, without observing rules of natural justice.

5. In Gulzar's Singh's case (supra), the Supreme Court was considering the claim of the appellant who had been issued a Caste Certificate on 10.10.1998 in which it was, inter-alia, stated that the appellant belongs to Majhbi Sikh Caste, which was recognised as a Schedule Caste. The aforesaid certificate was cancelled by the authorities on the basis of an enquiry which had been conducted, without issuing any notice to the appellant therein. On the basis of the aforesaid enquiry, the authorities had come to the conclusion that the appellant belongs to the Christian Community. In these circumstances, it was held by the Supreme Court that it was incumbent on the department to issue a show cause notice to the appellant requiring him to explain as to why the Scheduled Caste Certificate be not cancelled. It was further observed that if there were statements of other which were recorded, as seem to have been done in the present case, on the basis of which the department came to the conclusion that the appellant was not a Majhbi Sikh by Caste, but was a Christian, then the fairness would require that the said statement should be put to the appellant before a final decision is taken. However, these observations would not be applicable in the facts and circumstances of the present case. The petitioner had been granted an appointment contrary to the Statutory Service Rules. The posts were never advertised. No selection procedure was followed. He had been appointed under the 2003 Rules. The appointment of the petitioner was even against these rules. Therefore, in our opinion, the respondents were at liberty to cancel the same. An appointment made against the statutory rules is void-ab-initio. It affects the rights of all other aspirants who would be entitled to apply for such a job. This view of ours will find support from a judgment of the Supreme Court in the case of The District Collector & Chairman Vizianagaram (Social Welfare Residential School Society) Vizianagaram and Anr. v. M. Tripura Sundari Devi 1990(4) S.L.R. 237. In the aforesaid case, the Supreme Court has observed as under:-

"4. It has been brought to our notice during the course of the arguments that the original selection was made by mistake on the presumption that the respondent

had satisfied the qualifications-recruitments as stated in the advertisement, without scrutinising the certificates copies of which were sent with her application. The Selection Committee presumed that all those who had applied in response to the advertisement must have had the requisite qualification needed for the posts. However, the order appointing the respondent had made it clear that the respondent should come along with the original certificates, when the respondent approached the appellants with the originals of the certificates which were scrutinised, it was found that in fact she was short of the qualifications. It is in these circumstances that she was not allowed to join the service...

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xxx xxx xxx

It is at that stage that the mistake was discovered in the present case and the respondent was not permitted to resume her duties. We see nothing wrong in this action.

6. It must further be realised by all concerned that when an advertisement mentions a particular qualification and appointment is made in disregard the same, it is not a matter only between the appointing authority and the appointee concerned. The aggrieved are all those who had similar or even better qualifications than the appointee or appointees but who had not applied for the post because they did not possess the qualifications mentioned in the advertisement. It amounts to a fraud on public to appoint person with inferior qualifications in such circumstances unless it is clearly stated that the qualifications are relaxable. No court should be a party to the perpetuation of the fraudulent practice. We are afraid that the Tribunal lost sight of this fact."

6. Compassionate appointment can only be granted to a member of a family whose sole bread-winner dies whilst in harness. These appointments are to be made only to tide over emergent situations. The purpose of such appointments is not to replace the retired employee with the children/dependents of such an employee. Appointments with the State and in Public Sector have to be made only after the candidates participate in a selection process which is open to all candidates who are eligible to apply for the jobs. This view of ours will find support from the judgment of the Supreme Court in the case of Umesh Kumar Nagpal Vs. State of Haryana and Others, wherein it has been observed as follows:-

"2. The question relates to the considerations which should guide while giving appointment in public services on compassionate ground. It appears that there has been a good deal of obfuscation on the issue. As a rule, appointments in the public services should be made strictly on the basis of open invitation of applications and merit. No other mode of appointment nor any other consideration is permissible. Neither the Governments nor the public authorities are at liberty to follow any other procedure or relax the qualifications laid down by the rules for the post. However, to this general rule which is to be followed

strictly in every case, there are some exceptions carved out in the interest of justice and to meet certain contingencies. One such exception is in favour of the dependents of an employee dying in harness and leaving his family in penury and without any means of livelihood. In such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment. The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased....

3. Unmindful of this legal position, some governments and public authorities have been offering compassionate employment sometimes as a matter of course irrespective of the financial condition of the family of the deceased and sometimes even in posts above classes III and IV. That is legally impermissible.

4. It is for these reasons that we have not been in a position to appreciate judgments of some of the High Courts which have justified and even directed compassionate employment either as a matter of course or in posts above classes III and IV. We are also dismayed to find that the decision of this Court in *Sushma Gosain v. Union of India*, has been misinterpreted to the point of distortion. The decision does not justify compassionate employment either as a matter of course or in employment in posts above Classes III and IV. In the present case, the High Court has rightly pointed out that the State Government's instructions in question did not justify compassionate employment in Class II posts. However, it appears from the judgment that the State Government has made at least one exception and provided compassionate employment in Class II post on the specious ground that the person concerned had technical qualifications such as M.B.B.S., BE., B.Tech. etc. Such exception, as pointed out above, is illegal, since it is contrary to the object of making exception to the general rule. The only ground which can justify compassionate employment is the penurious condition of the deceased's family. Neither the qualifications of his defendant nor the post which he held is relevant...."

7. The aforesaid observations make it abundantly clear that the appointment on compassionate ground is not meant for the purpose of giving a job for a job. It is only to tide over a situation which is created by the sudden demise of a public employee.. Undoubtedly, the petitioner had been granted the job, without any procedure of selection having been followed. It was clearly a back-door entry. This Court would not condone such an act on the ground that the cancellation of the appointment even though illegally made, has been cancelled without observing rules of natural justice. We are of the opinion that no legal right of the petitioner has been infringed. Therefore, it would be futile to issue a writ in the nature of *Mandamus*. Even if a show cause notice is issued, the reply to the petitioner would not legalise an illegal appointment. We are also unable to accept

the submission of the petitioner that the claim of the petitioner had to be considered under the instructions dated 2.12.1975 and 23.11.1992. The 2003 Rules have been framed under the Proviso to Article 309 of the Constitution of India. These would have to prevail over the executive instructions, especially when the instructions are contrary to the provisions of the Rules made. It is a settled proposition of law that the executive instructions can only supplement and not supplant the rules framed under Proviso to Article 309 of the Constitution of India. We draw support for this view for the judgment of the Supreme Court in the case Sant Ram Sharma v. State of Rajasthan, 1967 S.L.R. 906 wherein it has been held as under:-

"6.... It is true that Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point, Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed."

8. The instructions dated 2.12.1975 and 23.11.1992 are deemed to be superseded by the 2003 Rules. The claim of the petitioner arose after the 2003 Rules came into operation w.e.f. 4.3.2003. Thus his claim has been rightly considered and rejected under the aforesaid Rules.

9. Learned counsel for the petitioner has also argued that respondents No. 4, 5 and 6 have also been granted appointments on the same ground and they are still continuing in service. It is a settled proposition of law that benefits illegally granted by the authorities to one party would not create a legal right in favour of other party which can be enforced by issuance of a writ in the nature of Mandamus, in the case of Chandigarh Administration v. Jagjit Singh 1995(1) S.C.C. 751, the Supreme Court has held as follows:-

"8. We are of the opinion that the basis or the principle, if it can be called one, on which the writ petition has been allowed by the High Court is unsustainable in law and indefensible in principle. Since we have come across many such instances, we think it necessary to deal with such pleas at a little length. Generally, speaking, the mere fact that the respondent-authority has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in favour of the petitioner on the plea of discrimination. The order in favour of the other person might be legal and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the petitioner. If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of this case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the respondent-authority to repeat the illegality or to pass another unwarranted order. The extraordinary and discretionary power of the High Court cannot be exercised for such a purpose. Merely because the respondent-authority has passed one illegal/unwarranted order, it does not entitle the High Court to compel the authority to repeat that illegality over again and again....".

In view of the above, we find no merit in the writ petition and the same is dismissed.