

(2005) 11 AHC CK 0227

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 18363 of 2005

Bipin Prakash

APPELLANT

Vs

High Court of Judicature

RESPONDENT

Date of Decision : 21-11-2005

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (2006) 5 AWC 5230

Hon'ble Judges : Arun Tandon, J

Bench : Single Bench

Advocate : Pankaj Naqvi, for the Appellant; K.R. Sirohi and Amit Sthalekar and S.C., for the Respondent

Judgement

Arun Tandon, J.—Heard Sri Pankaj Naqvi, Advocate on behalf of the petitioner and Sri Amit Sthalekar, Advocate on behalf of the respondents.

2. An advertisement dated 18th October, 2004 was published in daily newspaper, Dainik Jagran inviting applications for the 15 vacant posts in the clerical grade, six post of stenographer and 7 posts of Class IV employee in the judgship of Bareilly. In the advertisement so published it was mentioned that the reservation shall be applicable as per the Government orders issued on the subject.

3. The petitioner, who is an ex-service man, applied in pursuance of the aforesaid advertisement. In the application the petitioner claimed benefits of U.P. Public Service (Reservation for Physically handicapped, Dependants of Freedom Fighters & Ex-serviceman) Act, 1993 (hereinafter referred to as "the Act of 1993") as amended vide Act No. 26 of 1999, which provides for 5% of the total vacancies being reserved for ex-service man in all categories. The application so made by the petitioner was processed and he appeared in the written examination conducted by the respondents. The result of the written examination was declared on 21st January, 2005, the name of the petitioner was included in list of successful candidate. It is stated that the petitioner was the only a candidate, who was declared successful in the reserved category of ex-service man.

4. Surprisingly the petitioner was not issued any call letter for interview. The respondents proceeded to complete the process of selection ignoring the claim of the petitioner for consideration against the reserved category of ex-service man. Hence the present writ petition.

5. On behalf of the petitioner it is contended that against 15 advertised posts, of clerks 5% works out to 0.75 posts and the petitioner being the only successful candidates in the written examination within the reserved category of ex-service man, was entitled to be called for interview by the respondents. It is stated on behalf of the petitioner that the petitioner being a member of backward class category, is entitled to be considered against the quota of ex-service man within the seats reserved for backward class. It is stated that the name of the petitioner was mentioned at serial No. 71 in the category of backward class, and there are still advertised vacancies available against which the petitioner's claim can still be considered.

6. On behalf of the respondent a counter affidavit has been filed and in paragraph-12 it has been stated as follows:

12. That the facts stated in para-18 of the writ petition are in correct and are denied. It is stated that a perusal of the advertisement dated 18.10.2004 (Annexure No. 2 to the writ petition) will show that there were 15 posts of Clerks, 6 posts of Stenographer and 7 posts in Class IV. Thus the total strength of posts advertised was 28. However, there were only 15 posts of Clerk and the petitioner had applied only for the post of Clerk. It is further stated that as per Section 3 of the Act of 1993 as amended from time to time, the petitioner will be entitled to claim the benefit of reservation as Ex-serviceman only in his quota Backward Class category. Against 15 posts of Clerks, there is no quota available for Ex-Serviceman in the quota of Backward Classes and therefore, the petitioner is not entitled for appointment. It is stated that the petitioner submitted never any representation before the Senior Administrative Officer in the Bareilly Judgeship. It is further submitted that as per the final list of the selected candidates prepared according to the roster Rules, the name of the petitioner was placed at Serial No. 71 in the category of backward class and as per latest position only 25 candidates of this list have been given appointments and the name of the petitioner is at serial No. 71 and as such the question of the petitioner being considered for appointment after the advertised vacancies had already been filled up, does not arise. The select list finalized by the District Judge is perfectly legal and valid and there has been no violation of Article 14 and 16 of the Constitution of India.

7. Since the averments made in Paragraph-12 of the Counter Affidavit with regard to the appointment offered to 25 candidates, was not categorical, this Court insisted upon the respondents to file a better affidavit categorically disclosing all the details of the appointments of 25 candidates made on Group-III posts. Such an affidavit has been filed which shall be dealt with later.

8. The controversy, up for consideration before this Court is as to whether the petitioner, who had applied under the category of ex-service man being a member of backward class category, could be denied selection on the ground that within the quota of other backward class category, no posts can be reserved for ex-service man in the facts of this case.

9. It is not in dispute that as against the total number of vacancies of clerks, which had been advertised (15 in number), 5% of the same would work out to 0.75. In accordance with the judgment of Hon''ble Supreme Court in the case of State of U.P. and Anr. v. Pawan Kumar Tiwari and Ors. 2005(1) E.S.C. (S.C.) 86, the said figure has to be rounded off to one post. Relevant portion of the judgment of the Hon''ble Supreme Court reads as follows:

We do not find fault with any of the two reasonings adopted by the High Court, The rule of rounding off based on logic and common sense is: if part is one-half or more, its value shall be increased to one and if part is less than half then its value shall be ignored. 46.50 should have been rounded off to 47 and not to 46 as has been done. If 47 candidates would have been considered for selection in general category, the respondent was sure to find a place in the list of selected meritorious candidates and hence entitled to appointment.

10. In view of the aforesaid judgment, 0.75 should be rounded off to mean 1 post. Petitioner was therefore, entitled to be considered for selection against said one post reserved for Ex-serviceman category.

11. Under the U.P. Public Service (Reservation for Physically handicapped, Dependants of Freedom Fighters & Ex-serviceman) Act, 1993 as amended vide Act No. 26 of 1999, (which provided for 5% of the total vacancies being reserved for ex-service man) reservation has to be applied as provided under Rule 3(3) U.P. Public Service (Reservation for Physically handicapped, Dependants of Freedom Fighters & Ex-serviceman) Act, 1993, which reads as follows:

3. Reservation of vacancies in favour of Physically handicapped etc.--- (1) In public services and posts in connection with the affairs of the State there shall be reserved five per cent of vacancies at the stage of direct recruitment in favour of---

- (i) physically handicapped,
- (ii) dependents of freedom fighters, and
- (iii) ex-servicemen.

(2) The respective quota for the categories specified in Sub-section (1) shall be such as the State Government may from time to time determine by a notified order.

(3) The persons selected against the vacancies reserved under Sub-section (1) shall be placed in the appropriate categories to which they belong. For example, if a selected person belongs to Scheduled Castes category, he will be placed in

that quota by making necessary adjustments; if he belongs to Scheduled Tribes category, he will be placed in that quota by making necessary adjustments; if he belongs to Backward Classes category, he will be placed in that quota by making necessary adjustments. Similarly if he belongs to open competition category, he will be placed in that category by making necessary adjustments.

(4) For the purposes of Sub-section (1) an year of recruitment shall be taken as the unit and not the entire strength of the cadre or service, as the case may be:

Provided that at no point of time the reservation shall, in the entire strength of cadre, or service, as the case may be, exceed the quota determined for respective categories.

(5) The vacancies reserved under Sub-section (1) shall not be carried over to the next year of recruitment.

12. Therefore, it is of no consequence that the petitioner has placed at serial No. 71 in the category of Backward Class with reference to written examinations held. The petitioner was liable to be adjusted against horizontal quota for Ex-service Man category within the vertical reservation provided for the Backward Class. Since no other candidate belonging to the said physically handicapped category, belong to Other Backward Class Category qualified the written examinations, the petitioner alone could be adjusted against the reserved vacancy of Ex-service man, provided he was successful in the interview. However, for the said purpose, it was necessary to call the petitioner for interview.

13. In view of the aforesaid non-consideration of the claim of the petitioner in the interview held for the post of Class-III in the judgeship of Bareilly, cannot be legally sustained. Hence it is provided that the claim of the petitioner shall be considered within the quota reserved for physically handicapped ex-service man and appointment offered, if the petitioner is successful after interview against the post of Clerk. It would be necessary for the District Judge, Bareilly to take appropriate action in accordance with law accordingly. Such an exercise may be completed within 6 weeks of the production of this order.

14. This leads us to another serious issue as borne out from the facts stated in the supplementary counter affidavit filed on behalf of the District Judge, Bareilly. It is admitted that as against advertised 15 posts of Clerks, 15 persons in accordance with the merit list were offered appointment between 24th January, 2005 to 29th January, 2005 (Paragraph-5). However, it is further stated in paragraph-6 of the supplementary counter affidavit that in pursuance of the same selection, between 28th January, 2005 to 3rd August, 2005, 14 other persons have been offered appointment on class-III posts on the basis of same merits list prepared in pursuance of the advertisement dated 18th October, 2004. It is further stated that such appointments have been made against, (a) non-existing posts; (b) subsequent vacancies, which have been caused in the judgeship.

15. In similar facts and circumstances, the Division Bench of this Court in the case of the District Judge, Baghpat and Anr. v. Sri Anurag Kumar and Ors. Special Appeal No. 702 of 2005 decided on 31st May, 2005 has held that appointment made in excess of the posts advertised/ against subsequent vacancies is legally not justified. The relevant portion of the judgment of the Division Bench of this Court is being quoted herein below:

A perusal of the aforesaid Rules would establish that the number of vacancies which have to be advertised are to be in accordance with the Rule 9 and, therefore, the recital in the advertisement that the vacancies are likely to increase or decrease has to be strictly construed in accordance with the aforesaid Rules. What logically follows is that the District Judge is not at liberty to prepare a list dehors the number of vacancies advertised. This position stands further clarified by the Circular Letter No. 9/VIIb-104 Admin. Dated 29.04.1999 issued by the High Court which clearly states that the select list shall not be prepared by the District Judges for more than the double of the vacancies advertised....

In view of the above, we are of the considered opinion that as only ten vacancies had been advertised, there could be no justification for the authority concerned to fill up more than ten vacancies as it included the then existing as well as vacancies likely to occur in the course of the year. Once ten vacancies had been filled up, the selection process stood exhausted, and the authority concerned become functus officio. Any appointment made by him beyond that number, is without jurisdiction, therefore, a nullity, inexecutable and un-enforceable in law.

In such an eventuality after issuing appointment letters to ten candidates, the select list/waiting list stood exhausted and could not have been used by perennial source for appointment against any other vacancy. There can be no controversy to the settled legal proposition that even if a successful candidate joins the post and resigns or dies or stands transferred, his vacancy stands exhausted merely by his joining and the post could not be filled up from the waiting list as the statutory rules do not provide for such a course.

16. In view of the aforesaid judgment of the Division Bench of this Court the learned District Judge is directed to act in accordance with law and to ensure that illegality so committed is rectified within two months from the date of production of a certified copy of the order. The Registrar General of this Court is directed to ensure the compliance of the Division Bench Judgment of this Court and to report the action taken by the District Judge in pursuance of the order passed today, within two months.

17. Office is directed to issue a certified copy of this order to the learned Registrar General of this Court for necessary action.