
(2015) 05 AHC CK 0067

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 17365 of 2015

Farook Khan and Others

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 29-05-2015

Acts Referred:

Citation : (2015) 6 ADJ 398 : (2015) 4 AWC 4029

Hon'ble Judges : V.K. Birla, J

Bench : Single Bench

Advocate : Ashok Khare and Seemant Singh, for the Appellant

Final Decision : Dismissed

Judgement

V.K. Birla, J—Heard Sri Ashok Khare, learned Senior Counsel, assisted by Sri Seemant Singh, learned counsel appearing for the petitioners and the learned Standing Counsel appearing for all the respondents.

The present petition has been filed seeking following reliefs:

"(a) issue a writ, order or direction in the nature of CERTIORARI calling for the records of the case and quashing the impugned result declared on 21st February, 2015 to the extent by which petitioners have been declared not qualified in physical efficiency test held on 21st February, 2015 at the Centre 35th Battalion, PAC, Mahanagar, Lucknow pursuant to selection on the post of Sub-Inspector in Civil Police by promotion from the post of Constable and Head Constables.

(b) issue a writ, order or direction in the nature of MANDAMUS directing the respondents to hold the Physical Efficiency Test of 10 kms. run in 75 minutes afresh in respect of the petitioners pursuant to the selection on the post of Sub-Inspectors in Civil Police by way of promotion from the post of Constables and Head Constables within a stipulated period of time as fixed by this Hon'ble Court and the date for holding the Physical Efficiency Test of 10 kms. run in 75 minutes be fixed after giving proper time to the petitioners for practising the same;

(c) issue such other writ, order or directions as this Hon"ble Court may deem fit and proper in the facts and circumstances of the present case; and

(d) award costs of the petition in favour of the petitioner."

Subsequently, after filing of the counter-affidavit by the State placing before this Court, as the representations moved by the petitioners before the U.P. Police Recruitment and Promotional Board (hereinafter referred to as the Board) have been rejected individually by orders dated 7.4.2015 and 9.4.2015, an amendment application was filed by the petitioners to amend the petition, the grounds and the prayer clause. The said application was allowed by order dated 8.5.2015 and the petitioners were directed to carry out such amendments. Consequently, following prayer was added to the writ petition:

"(b)(i) issue a writ, order or direction in the nature of certiorari calling for the record of the case and to quash the impugned order dated 9.4.2015 passed by the U.P. Police Recruitment and Promotion Board, Lucknow (Annexure 22 to the writ petition)."

2. The facts of the case are that Constable Mohd. Faruk Khan (petitioner No. 1) was appointed in the year 1988, Constable Iftaq Ahmad Khan (petitioner No. 2) was appointed in the year 1990, Constable Arif Khan (petitioner No. 3) was appointed in the year 1991, Constable Sarjan Singh (petitioner No. 4) was appointed in the year 1993, Head Constable Mohd. Nasim Khan (petitioner No. 5) was appointed in the year 1992, Constable Kamal Kaushal Tiwari (petitioner No. 6) was appointed in the year 1991 and Constable Mohd. Meraj Ali (petitioner No. 7) was appointed in the year 1993. The petitioners became eligible for selection to the post of Sub-Inspector in Civil Police by way of promotion by the year 1998 from the post of Constable pursuant to the notification dated 12.6.2010 issued by the Police Board. The aforesaid notification dated 12.6.2010 issued by the Police Board includes the vacancies arising from the year 1999 to 2008 for such selection. The petitioners were called for appearing in the preliminary written test and were issued admit cards.

Consequently, all the petitioners appeared in the preliminary written test held on 13th March, 2011 but, it is alleged that unfortunately due to human error they could not fill up the booklet series in their OMR sheets/answer scripts of the preliminary written test. The result of the preliminary written test was declared on 22nd June, 2011 by the Board but the result of the petitioners was not declared on account of non-filling of booklet series in their OMR sheets/answer scripts of the preliminary written test. One of the similarly situated candidates, namely, Devi Charan Shahu aggrieved by the same preferred Writ Petition No. 42613 of 2012, which was allowed by this Court by judgment dated 28th August, 2012 directing the respondents to declare the result of the petitioner. Being aggrieved by the aforesaid judgment, the Board preferred Special Appeal (Defective) No. 143 of 2013, Chairman, U.P. Police Recruitment & Promotional Board v. Constable Devi Charan Shahu. In appeal by judgment and order dated

8.1.2014, the judgment of the Hon"ble Single Judge was upheld holding that non-filling up of booklet series was a bona fide mistake for which the career of the appellant cannot be put at stake and further directed the Board to declare the result of the appellant. Being aggrieved by the aforesaid judgment, the Board preferred Special Leave Petition (Civil) No. 12957 of 2014, State of U.P. and others v. Constable Devi Charan Shahu, which was dismissed by the Hon"ble Apex Court by judgment dated 8.9.2014.

3. Initially, the result of 4488 candidates in reference to preliminary written test was declared online on 22.11.2014 and the Board issued a notice on its official website asking candidates, in reference to Special Leave Petition (Civil) No. 2702 of 2014, Anil Kumar and others v. State of U.P. and others, in pursuance of the judgment and order dated 18th July, 2014 and in pursuance of the judgment and order dated 30th July, 2014 passed by this Court in Special Appeal (Defective) No. 149 of 2013, State of U.P. and another v. Sudhakar Pandey, to start practice of running 10 kms. in 75 minutes in case of male candidates and 5 kms. in 45 minutes in case of female candidates. This notice was put on the website on 4.1.2015. Subsequently, another result of 220 candidates, who were not qualified in the physical efficiency test held in the year 2011, was declared. These 220 candidates also included 25 candidates in pursuance of the judgment and order dated 18th July, 2014 passed by the Hon"ble Apex Court in Special Leave Petition (Civil) No. 2702 of 2014, Anil Kumar and others v. State of U.P. and others.

4. The case of Sudhakar Pandey is in relation to the candidates who were earlier declared unsuccessful in the physical efficiency test. 25 candidates, as mentioned above, were those candidates who could not fill up the booklet series in their OMR sheets/answer scripts of the preliminary written test. After dismissal of their petition by this Court, they preferred Special Leave Petition (Civil) No. 25413/25421 of 2014, which was allowed by the Hon"ble Apex Court directing the respondents to consider the case of such persons also. The Board put a notice on its official website informing that 8th February, 2015 has been fixed for holding physical efficiency test in reference to the 4488 candidates whose result was declared on 22nd November, 2014. It was also mentioned that the result of those candidates whose result was declared on 14th February, 2015, in pursuance to the judgment and order dated 30th July, 2014 passed in Special Appeal (Defective) No. 149 of 2013, State of U.P. and others v. Sudhakar Pandey and others, will be informed soon about holding of their physical efficiency test. The result of the petitioners was declared on 18th February, 2015 alongwith other candidates (who had not filled up their booklet series in their OMR sheets/answer scripts of the preliminary written test). Notices were issued to the petitioners to appear in the physical efficiency test, which was scheduled to be held on 21st February, 2015. It is not in dispute that all the petitioners have appeared in the physical efficiency test on 21st February, 2015 and could not qualify the same.

5. A counter-affidavit has been filed by the State of U.P. pointing out that in view of the directions of the Hon"ble Apex Court dated 12.1.2015 in Special Appeal No. 25377 of 2014, Kamar Hasan Khan and others v. State of U.P. and others and other connected Special Leave Petition Nos. 25413 - 25421 of 2014, the answer sheets of the petitioners and other such similarly situated candidates were evaluated. A notice was uploaded on the website of the Board on 14.1.2015 that the physical efficiency test of the eligible candidates will be conducted very soon and they should start practising for the same. The physical efficiency test of such candidates was held on 18.2.2015 and 21.2.2015 and the petitioners could not qualify the same. In paragraph 6 of the counter-affidavit, the rounds completed and the time taken by each of the petitioners has been mentioned. The stand taken in the counter-affidavit is that there was sufficient notice as the candidates were informed on 4.1.2015 itself that they should start practising for physical efficiency test. Alongwith the counter-affidavit all orders dated 7.4.2015 and 9.4.2015 dismissing the claim of the petitioners have been annexed. Copies of the judgments passed by this Court dismissing such writ petitions have also been annexed. A perusal of the judgment dated 23.3.2015 passed by the Hon"ble Single Judge in Writ Petition (S/S) No. 1099 of 2015, Salique Ahmad v. State of U.P. and others, indicates that the same was dismissed on the ground that admittedly the petitioner has appeared in the physical efficiency test on 21.2.2015 (same test) after signing the declaration about his fitness and has clearly stated that he is appearing in the said test voluntarily, therefore, on being unsuccessful he cannot claim to provide him another opportunity to participate in the physical efficiency test on the ground of illness. Writ-A No. 44285 of 2011, Jagat Pal Singh v. State of U.P. and others, was dismissed on the ground that in the absence of any provision for the second physical efficiency test, the same cannot be accepted.

6. Learned counsel for the petitioners, on the strength of the judgment of this Court dated 1st February, 2013 passed in Writ Petition (S/S) No. 5254 of 2011, Sudhakar Pandey v. State of U.P. and others and the judgment dated 10.12.2012 passed in Special Appeal (Defective) No. 1068 of 2012, Ajai Kumar Yadav v. State of U.P. and others, submitted that when a very short notice is given for physical efficiency test this Court has held that reasonable time must be given to prepare for the endurance test. What is the reasonable time depends upon the severity of the physical test. The contention was that since the physical efficiency test is only of qualifying nature, therefore, the petitioners shall suffer irreparable loss in case the petitioners are not granted promotions simply for this reason.

7. The submission is that while running the petitioners No. 1 and 2 fainted after completing 18 rounds and 21 rounds and were taken to the Hospital. The submission is that since very short time was granted, the petitioners could not qualify the same as they could not prepare for the physical efficiency test and granting short time is contrary to the decision of this Court as mentioned above.

8. I have gone through the judgment rendered in Sudhakar Pandey's case

(supra). Suffice to say that in the aforesaid case, the undertaking given by the petitioners that they are fit to undertake the physical efficiency test and are willing to participate in the same, was not under consideration, as such the same is clearly distinguishable. Even otherwise in this case, the petitioners were contesting the litigation upto the Hon''ble Apex Court which was allowed and were, thus, aware that soon they may be called for physical efficiency test particularly in view of the fact that such information, i.e. to start practice for such test had been put on the website of the Board in relation to other candidates who were also litigating regarding same recruitment.

9. I have also gone through the judgment rendered by the Hon''ble Division Bench in Special Appeal (Defective) No. 1068 of 2012, Ajai Kumar Yadav and others v. State of U.P. and others. In this case too, the undertaking given by the petitioner that he is fit to undertake the physical efficiency test was not under consideration and the same is also clearly distinguishable. Further, in the said Special Appeal the appellants were seeking appointment on compassionate grounds whereas in the present case the petitioners are already working as Constables and it is expected that they are physically fit at all point of time. For this purpose the important instructions issued to the candidates in the admit card itself are also relevant. Relevant clauses 9, 10 and 11 and the undertaking given by the petitioners are being quoted as under:

10. The police officials must answer to the best standards of physical strength, endurance, stress, efficiency etc., which must be quite higher than the average common man, otherwise the members of police force may not be able to perform the kind of job they are supposed to.

11. Further, a glance over the representations filed by the petitioners before the Board clearly indicates that the same have been filed subsequent to the physical efficiency test in which they have admittedly failed. It may be noticed that in case of Mohd. Farook Khan, the representation was submitted on 26.2.2015 i.e. after 5 days; in the case of Kamal Kaushal Tiwari, the representation was submitted on 22.2.2015; Mohd. Meraj Ali; Mohd. Naseem Khan, Sri Sarjan Singh filed their undated representations; and Sri Arif Khan submitted his representation on 25.2.2015.

12. Apparently, in view of the undertaking submitted by the petitioners at the time of physical efficiency test that they are physically fit to undertake the same and are going through the same voluntarily and willingly, and that the candidates themselves shall be responsible for any mishap during the course of physical efficiency test, claim to have another opportunity of physical efficiency test cannot be granted. I find support from the judgment dated 23.3.2015 passed in Writ (Service Single) No. 1099 of 2015, Salique v. State of U.P. and others, wherein the same physical efficiency test held on 21.2.2015 at 35th Battalion, P.A.C. at 6.30 a.m. was under consideration, and as already noticed, the writ petition was dismissed on the ground that after giving undertaking about his fitness and that he is appearing in the test voluntarily, it is not open to the

petitioner to claim another opportunity to participate in the physical efficiency test on the ground of illness or otherwise. In such cases, representations were submitted or protest was raised by the candidates before appearing in the physical efficiency test. The representations which were filed subsequently and the undertaking given at the time of attempting physical efficiency test clearly indicate that the claim regarding another opportunity, as being raised, is an after thought. Moreover, admission is the best piece of evidence and when the petitioners themselves have given in writing that they are physically fit to undertake the physical efficiency test and are going through the test voluntarily, nothing further needs to be proved. In case the petitioners want to wriggle out of such undertaking, the onus on the petitioners is extremely heavy, which the petitioners have failed to discharge, as except making assertions in the petitions there is no cogent piece of evidence on record to support the contentions raised by the petitioners.

13. In a recent decision dated 16.3.2015, the Hon"ble Apex Court in Special Leave Petition (Civil) No. 36023 - 36032 of 2010, P. Suseela and others v. University Grants Commission and others, has held as under in paragraph 24, relevant extract whereof is quoted as under:

"In SLP (C) No. 3054-3055/2014, a judgment of the same High Court dated 6th January, 2014 again by a Division Bench arrived at the opposite conclusion. This is also a matter which causes us some distress. A Division Bench judgment of the same High Court is binding on a subsequent Division Bench. The subsequent Division Bench can either follow it or refer such judgment to the Chief Justice to constitute a Full Bench if it differs with it. We do not appreciate the manner in which this subsequent judgment, (even though it has reached the right result) has dealt with an earlier binding Division Bench judgment of the same High Court. In fact, as was pointed out to us by learned counsel for the appellants, the distinction made in paragraph 20 between the facts of the earlier judgment and the facts in the later judgment is not a distinction at all. Just as in the 2012 judgment Ph.D. degrees had been awarded prior to 2009, even in the 2014 judgment Ph.D. degrees with which that judgment was concerned were also granted prior to 2009. There is, therefore, no distinction between the facts of the two cases. What is even more distressing is that only sub para 4 of the conclusions in the 2012 judgment is set out without any of the other sub paragraphs of Paragraph 104 extracted above to arrive at a result which is the exact opposite of the earlier judgment. This judgment is also set aside only for the reason that it did not follow an earlier binding judgment....."

14. Hence, once the petition regarding the same physical efficiency test held on 20.4.2015 has already been dismissed by the Hon"ble Single Judge, no other view should be taken in the matter. This writ petition lacks merit and is, accordingly, dismissed.