

(2005) 11 AHC CK 0063
In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 16267, 35962 and 56521 of 2003

Jitendra Kumar and Others

APPELLANT

Vs

State of Uttar Pradesh and Deputy Cane Commissioner, East
Region.

RESPONDENT

Date of Decision : 16-11-2005

Acts Referred:

Uttar Pradesh Procedure for Direct Recruitment for Group C Posts (Outside the Purview of the Uttar Pradesh Public Service Commission) Rules, 1998 — Rule 5(5)

Citation : (2006) 5 AWC 4746

Hon'ble Judges : Tarun Agarwala, J

Bench : Single Bench

Advocate : Ashok Khare and Vijay Kant Dwivedi, for the Appellant; J.K. Tiwari and S.C., for the Respondent

Final Decision : Allowed

Judgement

Tarun Agarwala, J.—On 8.8.1998 an advertisement was issued for filling 91 posts of Cane Supervisor in the Cane Development Department of the Government of Uttar Pradesh. These 91 posts were to be filled up from the Scheduled Caste, Scheduled Tribes and Other Backward class categories and candidates from the General Class category. The result pursuant to the aforesaid advertisement was declared on 5.3.1999. Before the appointment letters could be issued, the results were cancelled. The cancellation of the results were challenged in Writ Petition No. 565 of 2000 which was eventually allowed by a judgement dated 1.5.2001 wherein the Court directed the respondents to appoint the selected candidates. It transpires that the State filed a Special Appeal which was dismissed by a judgment dated 18.7.2002.

2. In spite of the aforesaid, the State did not make any appointments. It transpires that several candidates filed contempt petitions and subsequently the first batch of appointments were made on 29.6.2002. It further transpires that the State Government, after verifying and scrutinising the certificates submitted

by the candidates, cancelled the selection of 9 candidates vide orders dated 2.10.2002 and 26.10.2002. Eventually, out of 91 posts the respondents appointed 83 persons and 9 posts remained vacant.

3. The petitioners are those persons who were in the waiting list declared by the respondents and have filed the present writ petition praying for a writ of mandamus commanding the respondents to appoint the petitioners on the post of Cane Supervisors on the basis of the waiting list prepared by them. The petitioners submitted that admittedly 9 posts have not been filled up and the same could be filled up from the candidates whose names were found in the waiting list and that the action of the respondents in not utilising the waiting list was arbitrary.

4. Heard Sri Ashok Khare, the learned Senior Counsel assisted by Sri Vijay Kant Dwivedi for the petitioner and Sri J.K.Tiwari, the learned Standing Counsel for the respondents.

5. Sri Ashok Khare, the learned Senior Counsel submitted that admittedly 9 posts were vacant which had not been filled up by the respondents inspite of preparing a waiting list. It was further submitted that the waiting list was prepared under Sub Rule (5) of Rule 5 of the Uttar Pradesh Procedure for Direct Recruitment of Group "C" Posts (Outside the Purview of the Uttar Pradesh Public Service Commission) (First Amendment) Rules, 1998 which provided that the number of names in the list would not be larger than 25% of the number of vacancies. The learned Counsel for the petitioner submitted that if the waiting list was utilised to fill up the vacancies, the petitioners would have a chance for being appointment on the post of a Cane Supervisor. In support of his contention, the learned Counsel for the petitioner has relied upon the decision in State of U.P. Vs. Rafiquddin and Others, in which it was held that in the absence of any Rules, the life of the waiting list could be utilised till the declaration of the results in the subsequent examination. The learned Counsel for the petitioner further placed reliance on a decision of Asha Kaul (Mrs) and Another Vs. State of Jammu and Kashmir and Others, , in which it was held that once a select list was sent in accordance with the regulations of the Government, it must accord its sanction and appoint the person as per the select list and that the Government cannot pick and choose or approve a portion of the select list and reject the other part of the list.

6. In State of U.P. v. Ram Swarup Saroj (2000)3 SCC 1999, the Supreme Court held that the mere fact that the period of the life of the select list expired during the pendency of the writ petition, the Court could not decline to grant the relief if the incumbent was found to be eligible by the High Court. In Shilesh Chandra Saxena v. State of U.P. and Ors. AIR 1989 SC 13, a Division Bench of this Court held that where no limitation was prescribed for the life of the list, in that event, the life of the list ensures till it was exhausted and, in any case, the period of three years was held to be reasonable to limit the life of the list.

7. On the other hand, the learned Standing Counsel submitted that merely because the petitioners' name were found in the waiting list, the same does not confer an indefeasible right for being appointed on the post inasmuch as, the State was under no obligation to fill up all or any of the vacancies. The learned Counsel submitted that the mere inclusion of the petitioner's name in the waiting list did not confer any right to be selected even if the vacancies remained unfilled and, even in such a situation, the petitioners cannot claim that they were being discriminated. In support of his submission, the learned Standing Counsel has relied upon the decision in *Shankarsan Dash Vs. Union of India*, *Asha Kaul (Mrs) and Another Vs. State of Jammu and Kashmir and Others*, *Union of India v. S.S. Uppal* AIR 1996 SC 2346.

8. Learned Standing Counsel also placed reliance upon the two decisions of this Court in the case of *Deputy General Manager, U.P. Power Corporation Ltd. and Ors. v. Bharat Singh* 2004 (4) ESC 1985 and in the case of *Hum Veer Singh v. State of U.P. and Ors.* 2004 (1) ESC 37, on the aforesaid proposition.

9. From the aforesaid, it is clear that number of candidates in the list prepared should not be more than 25% of the vacancies advertised. The reason for including more candidates than the number of vacancies is, that in the event a candidate fails to join, the said post could be filled up by the next incumbent in the waiting list. It is common knowledge that the selection process is a time consuming process and involves huge expenditure and that the selections are made infrequently. Therefore, the list is prepared in such a manner to enable the authorities to fill up the requisite number of vacancies so advertised.

10. In the present case, the Rules permit the respondents to prepare a waiting list. The petitioners in paragraph Nos.10 and 11 of the writ petition have categorically submitted that a waiting list of candidates which was 25% of the total vacancies was prepared by the respondents under the Rules of 1998 in which the petitioners name were found. These paragraphs has not been denied by the respondents in paragraph nos.12 and 13 of the counter affidavit.

11. Further this Court by judgment dated 1.5.2001 in Writ Petition No. 565 of 2000 directed the respondents to fill up the posts on the basis of the results declared by the respondents. Subsequently, the said judgment was affirmed by a Division Bench and consequently it was incumbent upon the respondents to fill the entire posts so advertised. The respondents have appointed a number of persons but have not filled the entire vacancies that were advertised. The action of the respondents in filling up some posts and keeping some post vacant is arbitrary and also amounts to discrimination against those persons who could be selected on the remaining posts. No doubt the petitioners' does not have an indefeasible right even against an existing vacancy and the State is under no obligation to fill up the vacancies. On the other hand, the State has the obligation to act fairly and cannot act arbitrary and adopt a pick and choose policy. If the respondents have chosen to fill up the seats pursuant to the directions of the Court, in that event, all the vacancies should be filled up by the

State. The State cannot adopt an arbitrary policy, namely, to fill up some of the posts and keep the remaining posts vacant. In my view, the action of the State was not fair. This aspect has been dealt with by a Constitution Bench of the Supreme Court in *Shankarsan Dash v. Union of India* (supra) wherein the Supreme Court held-

It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidate to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bonafide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court and we do not find any discordant note in the decisions in *State of Haryana v. Subhash Chander Marwaha*, *Neelima Shangla v. State of Haryana*, or *Jatendra Kumar v. State of Punjab*.

12. In *Asha Kaul* (supra) the Supreme Court held that where the select list was not being utilised, the Government must record its reasons of disapproval.

13. In the present case the reason given by the respondents in not utilising the waiting list was that the State Government had declared the post of a Cane Supervisor as a dying cadre. This plea is no longer tenable, in view of the fact, that inspite of this declaration the Court directed the respondents to fill up the vacancies and that the State Government, in compliance with the judgment of the Court, issued appointment letters to various candidates on the post of Cane Supervisor. Therefore, the reason for not invoking the waiting list does not exist any longer. The decision of the State Government not to fill up the remaining vacancies was not bonafide nor contained valid reasons.

14. In view of the aforesaid, the judgments cited by the Standing Counsel is distinguishable. Once a select list is prepared, the same has to be utilised in order to complete the vacancies so advertised.

15. The learned Counsel for the respondents submitted that the waiting list cannot be utilised today inasmuch as the life of the waiting list has now been exhausted and as such, no mandamus could be issued to the respondents to utilise the said waiting list. In my opinion, the submission of the learned Counsel for the respondent is misconceived. From a bare perusal of Rule 5 of the Rules of 1998, it is clear, that there is no limitation of the life of the waiting list. In *State of U.P. v. Ram Swarup Saroj* (supra), the Supreme Court held that the High Court could not decline to grant the relief to a candidate where the life of the select list

expired during the pendency of the writ petition.

16. In the present case, the appointments were made by the respondents on 29.6.2002. Some of the appointments were cancelled by the State Government by orders dated 2.10.2002 and 26.10.2002. The petitioners approached this Court on 10.4.2003 i.e. within one year from the date of issuance of the appointment letters. Even though there is no period of the limitation for the life of the waiting list and, assuming that the life should be of one year, even then, the petitioner approached this Court within the validity of the life of the waiting list. The mere fact that the life of the waiting list expired during the pendency of the writ petition does not mean that this Court is powerless to grant the relief. The Supreme Court in *State of U.P. v. Ram Swarup Saroj* (supra) has clearly held that where the validity of the period of the select list expires during the pendency of the litigation, the Court could still grant the relief, if the incumbent was entitled to the relief. In *Sheo Shyam and Ors. v. State of U.P. and Ors.* 2004 (2) ESC 256, the Supreme Court held that the period of one year of the life of the select list should be computed from the last date when the recommendations were made.

17. In view of the aforesaid, I find that the petitioners are entitled to the relief claimed. The respondents were not justified in leaving the vacancy vacant and the respondents should have utilised the waiting list prepared for filling up the remaining number of vacancies. Consequently, the writ petitions are allowed. A mandamus is issued to the respondents commanding them to utilise the waiting list so prepared and fill the remaining vacancies out of the total number of 91 that was advertised in the year 1998, within three months from the date of the production of a certified copy of this order. In the circumstances of the case, parties shall bear their own cost.