

(2009) 11 AHC CK 0247
In the Allahabad High Court

Kamta Prasad

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 23-11-2009

Acts Referred:

Citation : (2010) 2 AWC 1610 : (2010) 124 FLR 298

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Sudhir Agarwal, J.—The petitioner has sought the following reliefs :

(I) Issue a writ order or direction in the nature of mandamus directing the respondents to appoint the petitioner as Regular Collection Peon under 50% quota meant for Seasonal Collection Peons, as provided by Rule 5 of U.P. Collection Peon Services Rules, 2004.

(II) Issue a writ, order or direction in the nature of mandamus directing the respondents/ respondent No. 2 to decide the representation dated 5.1.2009 filed by petitioner (Annexure-2 to this writ petition).

(III) Issue any other writ order or direction, which this Hon''ble Court may deem fit and proper under the facts and circumstances of the present case.

(IV) To award the cost of writ petition.

2. Learned Counsel for the petitioner contended that there are at present 18 vacancies of Collection Peon available and 50% quota is meant for Seasonal Collection Peon, therefore, the petitioner is entitled to be considered for promotion and any delay in the matter, make the petitioner overage, therefore, the respondents are under obligation to proceed for recruitment in accordance with Rules and consider the petitioner for substantive appointment on the post of Collection Peon.

3. The submission is thoroughly misconceived. It is well-settled that the employer has a right to keep the post vacant and no mandamus can be issued for the same unless the Rules so requires or there is a case of mala fide on the part of the employer which is not the case of the petitioner. The question as to whether the employer is bound to fill vacancy as and when it occurred has been considered by a Division Bench of this Court (in which I was a member) in *Sanjai Agrawal Vs. State of Uttar Pradesh*, High Court of Judicature and District Judge, , where following the Full Bench decision of this Court in Writ Petition No. 65189 of 2006. *Sanjay Kumar Pathak Vs. State of U.P.*, High Court of Judicature at Allahabad and *U.P. Public Service Commission*, , the Court in paras 41 and 43 held as under :

41. Further a person if fulfils requisite educational and Ors. qualifications does not possess a fundamental or legal right to be considered for appointment against any post or vacancy as soon as it is available irrespective of whether the employer has decided to fill in the vacancy or not. The right of consideration does not emanate or flow from existence of the vacancy but commences only when the employer decides to fill in the vacancy and the process of recruitment commences when the notification or advertisement of the vacancy is issued. So long as the vacancy is not made available for recruitment, no person can claim that he has a right of consideration since the vacancy exists and therefore, he must be considered. We have not ,been confronted with any statutory provision or authority in support of this contention that the petitioners have a right of consideration on mere existence of vacancy. On the contrary, we are of considered view that the right of consideration would come in picture only when the vacancy is put for recruitment, i.e., when the advertisement is published. That being so, the right of consideration commences when the recruitment process starts. The incumbent would obviously have right of consideration in accordance with the provisions as they are applicable when the advertisement is made and in accordance with conditions provided in the advertisement read with relevant rules. It is also obvious that if there is any inconsistency between the advertisement and Rules, the statutory rules shall prevail. In *Malik Mazhar Sultan (supra)*, the Apex Court has clearly held that recruitment to the service could only be made in accordance with the Rules and not otherwise.

43. In view of the above discussion, it is held that Rule 8 makes it obligatory for the Court to make periodical recruitment but any deviation in compliance thereof for just and valid reasons would not give any advantage or consequence to the candidates who failed to participate in selections due to delay in recruitment by becoming overage or otherwise ineligible.

4. A Full Bench in *Sanjay Kumar Pathak (supra)* meeting a similar contention observed that : "nobody can claim as a matter of right that recruitment on a post should be made every year."

5. Even otherwise, the law is well-settled that the employer has a right to keep the vacancy unfilled and for that purpose no mandamus can be issued unless it

can be shown to be mala fide. It goes without saying that as and when the respondents proceed to make recruitment all eligible persons who are within the zone of consideration would be considered in accordance with law.

6. With the aforesaid observations the writ petition is dismissed.