
(1998) 10 AHC CK 0055
In the Allahabad High Court
Case No : C.M.W.P. No. 11221 of 1992

Kanhaiya Lal Tripathi

APPELLANT

Vs

State of U.P. and others

RESPONDENT

Date of Decision : 28-10-1998

Acts Referred:

Constitution of India, 1950 — Article 14, 16
Uttar Pradesh Government Servants Subordinate Offices Ministerial Staff (Direct Recruitment) Rules, 1975 — Rule 16, 2, 5, 9

Citation : (1999) 1 AWC 232

Hon'ble Judges : D.K. Seth, J

Bench : Single Bench

Advocate : M.D. Singh, for the Appellant; S.C. and K.R. Singh, for the Respondent

Final Decision : Disposed Of

Judgement

D.K. Seth, J.—The petitioner was initially appointed on 16.11.1989 on daily wage basis in the department of Samaj Kalyan. He worked there till 9.6.1991. The petitioner on 3.6.1991 was given appointment in the post of clerk in the Department of Samaj Kalyan on regular basis. The petitioner submitted his joining report on 10.6.1991 and he had been working in the said department. By an order dated 31.1.1992 issued by the Director, the Deputy Director was directed to discontinue the service of the petitioner on the ground that the petitioner was appointed at a point of time when there was a ban on appointment and as such, his appointment having been illegal and irregular, it was not justified to continue his service. The Deputy Director by an order dated 3.2.1992 terminated the services of the petitioner on the ground that the petitioner was appointed as junior clerk against the vacancy in the post of senior clerk, on which one Udai Singh Verma has been reinstated, due to which the petitioner, a junior clerk, became surplus and, therefore, his service was terminated. These two orders have since been challenged in this writ petition. By an order dated 7.4.1992 both these orders were stayed by this Court.

2. Mr. M. D. Singh, learned counsel for the petitioner contends that some persons, namely, one Anil Kumar Srivastava, though junior to the petitioner has been allowed to continue while the petitioner's service was terminated on the ground that by reason of reinstatement of Udal Singh Verma, a senior clerk, the petitioner became surplus. But the petitioner could not have been said to be surplus in the post of junior clerk particularly when there were sufficient vacancies available and juniors to the petitioner were allowed to continue. He secondly contends that the petitioner having been appointed as junior clerk, he cannot be declared surplus by reason of the re-installment of the senior clerk. He next contends that the petitioner having been regularly appointed and the said fact having not been disputed by the respondents, it cannot be said that the petitioner's appointment was irregular. He contends further that the petitioner was appointed on 3.6.1991 while the alleged ban was operative since 29.6.1991, therefore, petitioner's services cannot be terminated on the basis of the direction of the Director on the ground that his appointment was made when ban was operative. The Deputy Director had given a different reason than that of the Director, which was wholly misplaced and cannot be substantiated as contended by him earlier. He further contends that service of the petitioner cannot be terminated on these vague grounds as assigned in the impugned orders. Therefore, the order of termination should be set aside and the writ petition should be allowed.

3. Mr. K. R. Singh, learned standing counsel on the other hand contends that there cannot be any appointment on the post of junior clerk against the vacancy in the post of senior clerk. Since the appointment has been made against a particular vacancy, the petitioner cannot claim retention of his service against some other vacancy. According to him there being no vacancy in the post of junior clerk and the appointment having been made against the vacancy in the post of senior clerk, the petitioner did not acquire any legal right to espouse his cause. He further contends that regular appointment has been used in the pleadings in the writ petition in contradistinction to his appointment on daily wage basis. In the absence of specific pleadings, it cannot be said that the petitioner was appointed through regular recruitment process. Relying on the U. P. Government Servants Subordinate Offices Ministerial Staff (Direct Recruitment) Rules, 1975, he contends that the petitioner's appointment has not been made following the said Rules which requires appointment in the lowest grade after notification of the vacancies to the employment exchange through constitution of selection committee following the procedure provided in Rule 16 of the said Rules. There cannot be any appointment in the post of senior clerk which is not the lowest grade post. The appointment has been sought to be made in the post of junior clerk which is lowest grade against the vacancy in the post of senior clerk without following the said rules. Such appointment being void, the petitioner cannot claim any legal right which he can establish through writ proceedings. The writ Jurisdiction can be invoked only to enforce legal right, and not otherwise. He also contends that judicial process cannot be utilised to

support a mode of recruitment de-hors the rules. Howsoever long the period of service may be. If initial appointment itself is invalid, no legal right, could accrue by reason of such appointment, in order to establish a legal right through writ proceedings.

4. I have heard both Mr. M. D. Singh and Mr. K. R. Singh, learned counsel for respective parties at length.

5. The appointment letter contained in Annexure-2 contains that the petitioner was appointed against the vacancy of senior clerk purely on temporary basis which could be terminated without any notice at any point of time. By an order dated 31.1.1992 the Director had pointed out that the appointment was made during the period when ban was operative and therefore on account of irregular appointment, service of the petitioner should not be continued. Mr. M. D. Singh while interpreting this order points out that the expression irregular appointment mentioned in the said order refers to the appointment made during the period of ban. It does not refer to any other irregularity in the appointment.

6. From the order dated 3.2.1992 contained in Annexure-5, it appears that the Deputy Director had terminated the service of the petitioner on the ground that he had become surplus as soon as Udai Singh Verma. senior clerk was reinstated in the vacancy of the senior clerk, against which the petitioner was appointed as junior clerk, it was also mentioned that in terms of the order dated 31.1.1992, the petitioner's appointment having been irregular, his services are being terminated pursuant to the direction received by him through order dated 31.1.1992. The said order stipulates that the appointment of the petitioner as junior clerk against the vacancy of the senior clerk was being terminated.

7. The question raised by Mr. M. D. Singh that the petitioner's service cannot be terminated on the ground that the appointment was made during the period of ban and, therefore, it was irregular one, since the petitioner was appointed on 3.6.1991 while the ban was imposed on 29.6.1991. has to be considered in the light of legal right of the petitioner so established. Unless the petitioner has a legally enforceable right, he cannot invoke writ jurisdiction. Therefore, let us examine as to whether the petitioner has been able to establish a legal right which can be enforced through writ proceeding on the ground that his appointment has been illegally cancelled or illegally terminated.

8. The appointment of the petitioner was admittedly made at a point of time when 1975 Rules referred to above was in force. Rule 2 thereof provides that the said rules will govern the posts of lowest grade other than the post of stenographers in all subordinate offices under the control of the Government. Admittedly, the office in which the petitioner was appointed was under the control of the Government and was not excluded by reason of conditions contained in Rule 2. The post of junior clerk is admittedly a lowest grade post and it was not a post of stenographer. Thus, the said post was within the ambit and scope of 1975 Rules. Under the said rules, recruitment can be made through

selection committee to be constituted in terms of Rule 5. Such recruitment can be made only after the vacancies are notified to the employment exchange under Rule 9. In order to make such appointment, the procedure laid down in Rule 16 which consists of several procedures for grant of marks, etc., are to be followed.

9. In the present case, in the pleadings it was pointed out that the petitioner was working on daily wage basis and he was granted regular appointment on 3.6.1991, The expression regular appointment used in the pleadings has not been explained. When it is being used in reference to the appointment on daily wage basis, it normally connotes a regular appointment in contradistinction to daily wage appointment. It has not been pleaded in the writ petition that the appointment was made through proper selection in terms of 1975 Rules. The appointment order also does not disclose that the appointment was being made by the selection committee through the process to be undertaken under 1975 Rules. On the other hand, the appointment letter envisages an appointment in the post of junior clerk against the vacancy in the post of senior clerk. The post of senior clerk is not a lowest grade post. Against the vacancy of the senior clerk, therefore, no direct recruitment could be made. Whereas the petitioner has been appointed in the post of junior clerk against the vacancy of senior grade clerk. No appointment in the post of junior grade clerk could be made against the vacancy of senior grade clerk. By reason of such appointment, therefore, it cannot be said that the petitioner had acquired any legal right. In the absence of any material to show that the petitioner was regularly selected through the process prescribed under 1975 Rules, it is not possible to hold that the petitioner was regularly appointed against the vacancy in the junior grade clerk. On the other hand, the appointment having been made against the vacancy of senior grade clerk itself shows that the appointment itself was irregular.

10. Admittedly, the petitioner was given appointment on 3.6.91 which was the period when ban was not operating since it was imposed with effect from 29.6.91. Therefore, services of the petitioner could not be terminated on the ground that he was appointed during the period of ban. Mr. M. D. Singh may be correct in seeking to interpret that the irregular appointment mentioned in the order dated 31.1.92 may refer to the appointment made during the period of ban, but that does not help the petitioner unless the petitioner is able to establish that he has a legal right to continue on the post. On the other hand, the order dated 3.2.1991 specifically points out that the petitioner's appointment was made against the vacancy in the post of senior clerk, which post was filled up on account of reinstatement of Udai Singh Verma. Therefore, there being no vacancy available. the appointment of the petitioner became surplus even against the vacancy on the post of senior clerk.

11. In the case of Harpal Kaur Chahal v. Director, Punjab Instructions, Punjab and another. 1995 (4) SCC 706 . the order of termination of the petitioner's service therein on the ground that his appointment was illegal and irregular was not interfered with despite the fact that the petitioner therein had continued in

employment for 23 years. However, the Apex Court considering such fact had granted liberty to make a representation to the Government to consider the petitioner's case. Relying on the said decision, a single Judge of this Court in Sanjay Gupta and others Vs. State of U.P. and others, , had taken a similar view and had declined to direct appointment even though by virtue of interim order, the petitioner therein had continued for long time.

12. In the case of Dr. Ram Murti Chaturvedi Vs. Chancellor, Sampurnanand Sanskrit Vishwavidyalaya and Others, , a Division Bench of this Court has taken a view that the High Court should not ignore illegality in the appointment merely on the ground that several years have passed.

13. In the case of E.P. Royappa Vs. State of Tamil Nadu and Another, , a concept was evolved to the extent that Article 14 of the Constitution of India lays down that every person who is qualified has equal right for consideration on the post. It deals with equality before law. Article 16 of the Constitution of India deals with equal opportunity in the matter of public employment. Arbitrariness and unreasonableness in the matter of procedure followed for selection of the post is contrary to the spirit of Article 14 of the Constitution of India. Consequences of these two articles are dynamic and positive consequence. It embodies guarantee against arbitrariness and antithesis to arbitrariness. This concept was repeated in the case of Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, and in the case of Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, . The purpose of publication as provided in the rules is in commensurate with the concept referred to above within the scope and ambit of Articles 14 and 16 of the Constitution in order to enable all eligible candidate to apply for the post.

14. Thus, the appointment being illegal and irregular for the reasons discussed above, the same does not confer any right on the petitioner, even though he had continued for some time. However, in this case, the continuation is by virtue of interim order which is subject to the decision in the writ petition. The interim order never does confer any right independent of the final order to claim any benefit thereout.

15. But at the same time, it may be remembered that the petitioner was appointed in the post of junior clerk. In the order of termination, nothing has been mentioned as to whether the petitioner became surplus on account of absence of any vacancy in the post of Junior clerk. By reason of grant of interim order by an order dated 7.4.92 passed in this writ petition, the petitioner is alleged to be continuing even till today. Mr. M. D. Singh. however, fairly concedes that he is not aware as to whether the petitioner in the meantime has been regularised or not. In case the petitioner has been regularised in the meantime, in that event, the order that is being passed in this writ petition shall not be given effect to and the regularisation of the petitioner if any shall not be interfered with.

16. Since the petitioner has not been able to establish a legal right by reason of the facts disclosed above, he is not entitled to invoke writ jurisdiction in the facts and circumstances of the case, even though the grounds on which his services has since been terminated, therefore. the said order of termination impugned in this writ petition cannot be interfered with and the same may be given effect to afresh by passing a fresh order from a prospective date from this date, if the respondents are so advised. But however, in the peculiar facts and circumstances of the case, the respondents may in its discretion consider case of the petitioner since he has worked for these long years almost for 8 years, if he could be accommodated against any existing vacancy on the ground that by reason of his appointment, he has earned sufficient expertise and experience relaxing the age if he has become over age by this time.

17. Mr. M. D. Singh had relied on the decision in the case of Vipin Chandra Shukla v. State of U. P. 1992 (1) AWC 431, to contend that the appointment made inspite of the ban imposed by the Government, in view of continuous working in a post of permanent nature, the appointment was directed to be continued and the service to be regularised. But the said decision does not help in the facts and circumstances of the case since the appointment was made before the ban was imposed and secondly the appointment was not made against the post of junior clerk.

18. In the result, the writ petition stands finally disposed of in the manner as observed above. There will be no order as to costs.