
(2010) 05 UK CK 0069

In the Uttarakhand High Court

Case No : Writ Petition No. 945 of 2007 and 301 of 2009 (S/S)

Karunesh Joshi

APPELLANT

Vs

State of Uttarakhand and Others

RESPONDENT

Date of Decision : 11-05-2010

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 162, 309

Uttar Pradesh Class IV Employees Service Rules, 1975 — Rule 33

Citation : (2010) 05 UK CK 0069

Hon'ble Judges : Tarun Agarwala, J

Bench : Single Bench

Advocate : Sudhir Singh, for the Appellant; S.N. Babulkar, General assisted by, J.P. Joshi, Chief Standing Counsel for State, for the Respondent

Final Decision : Dismissed

Judgement

Tarun Agarwala, J.—Since both the writ petitions raise a common issue, the same is being decided together.

2. The Petitioner Karunesh Joshi has filed the Writ Petition No. 945 of 2007 (S/S) for the quashing of the order dated 18th May, 2006 passed by the District Magistrate, Nainital as well as the order dated 13th June, 2006 passed by the Secretary, Department of Personnel, Government of Uttarakhand and further sought a relief in the nature of mandamus commanding the Respondents to give an appointment to the Petitioner pursuant to the Government Order dated 11th August, 2004.

3. The brief facts leading to the filing of the writ petition is, that the Petitioner contend that he is a permanent resident of Uttarakhand and was an active participant in the agitation for the creation of the State of Uttaranchal (now "Uttarakhand"). It is alleged that during the agitation for the creation of the State of Uttarakhand, several residents of this area were injured in the movement and also went to jail. Some of them were seriously injured and were hospitalized and others went to jail. Upon the creation of the State of

Uttarakhand on 09th November, 2000, the Chief Minister made a public statement in his speeches that persons who had participated in the movement for the creation of the State of Uttarakhand would be rewarded suitably by giving them appointments in the public sectors and based on that promise, the State Government issued an order dated 11th August, 2004 providing appointments on the post of Group "C" and "D" as per the educational qualification and also offered appointments on such posts, which were outside the purview of the Public Service Commission. This Government Order indicated that the persons who are domicile of the State of Uttarakhand and who participated in the agitation for the creation of Uttarakhand and who were injured and who produced a medical certificate of such injury and who had spent seven days or more in jail, would be given an appointment in the State of Uttarakhand. Such persons would be identified by the District Magistrate in all the districts of Uttarakhand and a list would be prepared, on the basis of which, the appointing authorities would be directed to issue such appointments on Group "C" and Group "D" posts on the basis of the educational qualifications. The Government Order further stipulated that there would be a relaxation of the age as well as in the selection process.

4. Based on the aforesaid G.O., lists were prepared by the District Magistrates in their area of jurisdiction and it has been stated at the Bar that several hundreds of people were given appointments pursuant to the G.O. dated 11.08.2004 in the last five years.

5. In so far as the Petitioner Karunesh Joshi is concerned, he alleged that he was an active participant in the agitation for the creation of the State of Uttarakhand and in the incident of 29th September, 1995, the Petitioner was injured and was under the treatment of a private doctor, who had certified that the Petitioner was under his treatment. On the basis of this certificate, the Petitioner applied for an appointment on a Class IV post pursuant to the G.O. dated 11.08.2004. The Petitioner's application remained pending and ultimately, the District Magistrate, by an order dated 18th May, 2006, rejected the same. The Petitioner made a representation to the Secretary, Department of Personnel, who also rejected the Petitioner's application by an order dated 13th June, 2006 on the ground that the medical certificate produced by the Petitioner was not authentic. The Petitioner Karunesh Joshi, being aggrieved by these orders, has filed the Writ Petition No. 945 of 2007 (S/S).

6. In so far as the Writ Petition No. 301 of 2009 (S/S) is concerned, the Petitioner Narayan Singh Rana contends that he also participated in the movement for the creation of the State of Uttarakhand and was injured as well and also went to jail for 23 days and that pursuant to the Government Order dated 11th August, 2004, the District Magistrate, Udham Singh Nagar issued a list of 28 persons, who were eligible for an appointment as per the G.O. dated 11.08.2004. The Petitioner has further alleged in his petition that in that list of 28 persons, the Petitioner was placed at serial No. 10, inspite of which, he was

not given an appointment letter, whereas other persons were issued appointment letters. The Petitioner made several representations, which remained pending and eventually, he was informed under the Right to Information Act that he could not be given an appointment since he did not apply for an appointment pursuant to the selection list issued by the District Magistrate. The Petitioner, accordingly, filed the present writ petition seeking a writ of mandamus commanding the Respondents to issue an appointment letter to the Petitioner.

7. During the course of the hearing, the Respondents in the writ petition of Narayan Singh Rana has filed an affidavit of compliance bringing on record an appointment letter dated 26th April, 2010 issued in favour of the Petitioner Narayan Singh Rana. This Court, by an order dated 29th April, 2010 passed in the writ petition of Narayan Singh Rana, had directed the District Education Officer not to allow the Petitioner to join his duties pursuant to the appointment letter so issued till the disposal of the writ petition.

8. While hearing the writ petitions, the court noticed that the Government Order dated 11.08.2004 could not withstand the scrutiny of Articles 14 and 16 of the Constitution of India in as much as, in the opinion of the Court, the said G.O. was violative of the fundamental rights guaranteed to every citizen under Articles 14 and 16 of the Constitution. Accordingly, the Court by an order dated 27th April, 2010 and again by an order dated 29.04.2010 requested the Advocate General to address the court on the question as to whether the State Government has the power to issue such an order dated 11.08.2004 and whether the said order could relax the rules with regard to the appointment process specified under the Acts or the Rules framed under Article 309 of the Constitution relating to appointments in the public sector.

9. Heard Sri Sudhir Singh, the learned Counsel for the Petitioner in Writ Petition No. 945 of 2007 (S/S), Sri Tumul Kr. Nailwal, the learned Counsel for the Petitioner in Writ Petition No. 301 of 2009 (S/S) and Sri S.N. Babulkar, the learned Advocate General assisted by Sri J.P. Joshi, the learned Chief Standing Counsel for the State.

10. At the outset, the contention of Sri Sudhir Singh, the learned Counsel for the Petitioner Karunesh Joshi is that the Petitioner was injured in the agitation and had submitted a medical report of a private doctor, which was sufficient for the Respondents to issue an appointment letter. The contention of the learned Counsel for the Petitioner that the G.O. dated 11.08.2004 provided that a person who had participated in the movement for the creation of the State of Uttarakhand and who was injured or went to jail for 7 days or more, was eligible for an appointment on a Group "C" or Group "D" post, cannot be accepted. From a complete reading of the G.O. dated 11.08.2004, it is clear that the Government offered appointments to such agitators, who, while struggling for the creation of the State of Uttarakhand, was injured and was also went to jail for 7 or for more than 7 days. Further, the intention in the G.O. created a mandate for the production of a medical certificate from a Government Hospital or a Government

doctor. The production of a medical certificate from a private doctor was not the intention in the GO. dated 11.08.2004. In the light of this fact, the Petitioner's application could not have been accepted for appointment under the said Government Order.

11. The Petitioner Narayan Singh Rana contends that he was sent to jail for 23 days and his case was covered under the said Government Order for an appointment. As stated earlier, while hearing the matter, the Court was of the opinion that the GO. was violative of Articles 14 and 16 of the Constitution. The learned Advocate General was, consequently, called upon to address on this issue.

12. The learned Advocate General submitted that the GO. dated 11.08.2004 was issued in exercise of the executive powers conferred under Article 162 of the Constitution and that the Government Order was validly issued relaxing the age and selection process as framed under the relevant rules. The learned Advocate General submitted that the appointment given to a certain class of persons, who had actively participated in the agitation for the creation of the State of Uttarakhand, was a reasonable and intelligible classification, which could be done while exercising the powers under Article 162 of the Constitution and that there was no need to frame any Rules under Article 309 of the Constitution since the executive power of the State is coextensive with the power that of the State legislature under Article 162 of the Constitution.

13. From the arguments advanced by the learned Advocate General, it follows that the State executive may make rules or issue administrative orders regulating any matter within the legislative competence of the State legislature without prior legislative authority under Article 162 of the Constitution. For facility, Article 162 of the Constitution is extracted hereunder:

162. Extent of executive power of State.- Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws:

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof.

14. In the opinion of the Court, under the aforesaid provision, a rule or administrative order conferred by Article 162 of the Constitution may be enforced in certain circumstances provided it does not conflict with any existing law or any provision of the Constitution. Further, such administrative order or rule would become inoperative when a law made by the legislature occupies the field and in any case, such administrative orders or rules so framed could not be made where it would affect the fundamental right of a citizen under Article 14 and 16 of the Constitution of India.

15. In the light of the aforesaid, the learned Advocate General pointed out a provision in which the appointment of Class IV employees could be made, namely, the U.P. Class IV Employees Service Rules, 1975, which have been framed under Article 309 of the Constitution. The learned Advocate General pointed out that Rule 33 of the U.P. Class IV Employees Service Rules, 1975 (hereinafter referred as Rules of 1975), gave power to the State Government to relax any rule regulating the conditions of service of persons appointed in the establishment and based on this provision, the Government Order was issued. For facility, Rule 33 of the Rules of 1975 is quoted below:

33. Relaxation from conditions of service.- Where the State Government is satisfied that the operation of any rule regulating the conditions of service of persons appointed to the Establishment causes undue hardship in any particular case, it may, notwithstanding anything contained in the rules applicable to the case, by order, dispense with or relax the requirements of the that rule to such extent and subject to such conditions as it may consider necessary for dealing with the case in a just and equitable manner.

16. The learned Advocate General in the light of Rule 33 of the Rules of 1975 submitted that the G.O. dated 11.08.2004 was issued relaxing the eligibility criteria for making appointments in the public sector.

17. In my opinion, the submission of the learned Advocate General is bereft of merit. Such administrative order could not be issued under Article 162 of the Constitution when a Rule under Article 309 of the Constitution has already been framed, which occupies the field. A Government Order could be issued only when the field is not occupied by any legislative enactment. In the present case, as per the own contention of the learned Advocate General, the rules for appointments of Class IV employees have already been framed under Article 309 of the Constitution of India, which is known as the U.P. Class IV Employees Service Rules, 1975 and that any relaxation of the conditions of service could be made by the State Government by exercising the powers under Rule 33 of the Rules of 1975, and not by issuance of an omnibus order, namely, the Government Order dated 11th August, 2004 by which the procedure of the selection process by direct recruitment has been waived. Such issuance of the Government Order is clearly arbitrary and the State has discriminated with impunity between individuals, which is in clear violation of Article 14 of the Constitution of India as held by the SC in a plethora of cases namely, Col. A.S. Sangwan Vs. Union of India (UOI) and Others, , Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, , R.R. Verma and Others Vs. Union of India (UOI) and Others, and Ram and Shyam Company Vs. State of Haryana and Others, . The SC held that where the action of the State fails the reasonable test of Article 14 of the Constitution, such action would be clearly arbitrary. In the present case, the GO. dated 11.08.2004 discriminates between individuals and the provision of Article 16 of the Constitution, which provides equality of opportunity for all citizens of India in the matter of public employment, has been violated

with impunity. The said GO., in my opinion, is violative of Article 14 and 16 of the Constitution of India.

18. There is another aspect of the matter, namely, if there is a conflict between an executive instruction and a rule made under Article 309 of the Constitution, the SC has held in the case of *Union of India and Ors. v. Sh. Somasundaram Viswanath and Ors.* AIR 1988 SCC 2255 that the latter, i.e. rule, would prevail. In the present case, the issuance of this omnibus order dated 11.08.2004 violates the rules relating to appointment in the public sector and especially, the provision for relaxation of the service conditions. Such type of an order giving a go by to the selection procedure for appointment in the public sector on merits cannot be sustained. This is clearly violative of Articles 14 and 16 of the Constitution. The SC in *R.N. Nanjundappa Vs. T. Thimmiah and Another*, has held that even though, the executive power, in the scheme of a constitutional power, could be exercised in the absence of any legislation to support such action, it cannot be so exercised to contravene any law relating to matter or rules having the force of law.

19. In *Ravindra Kumar v. District Magistrate, Agra* 2005 (1) UPLBEC 118, a full bench of the Allahabad High Court held that the government order providing employment to one member of a family of a person, whose land has been acquired, was invalid and that no writ could be issued to the authority to consider the claim of the Petitioner for an appointment. The full bench held:

20. It is a general rule that appointments in the public services should be made by inviting applications through open advertisement and strictly on merit so that every citizen should get equal opportunity in the matter of appointment. This rule should be adhered to in the matter of any public employment or appointment. Neither the State Government nor its instrumentality nor any public authority can deviate from this common rule of appointment and if any other procedure or mode is adopted, it would be violative of Articles 14 and 16 of the Constitution of India which ensures and guarantees equal opportunity to all citizens in the matter of appointment to any office or of any other employment under the State. However, some exceptions to the general rule for public employment or appointment is also some exceptions to the general rule for public employment or appointment is also recognized which is commonly known as appointment on compassionate ground which is evolved purely on humanitarian ground and in the interest of justice. This rule was made to meet certain contingencies and to give appointment to a dependant of an employee dying-in-harness to prevent his family from destitution.

20. In view of the aforesaid, this Court is of the opinion that appointments in the public services could only be made under the Act or the Rules framed therein by inviting applications through an open advertisement and such appointments are made strictly on merit so that every citizen should get equal opportunity in the matter of public appointment. In the present case, the court is of the opinion that the G.O. dated 11.08.2004 has not been issued under any statutory

provision and does not have a statutory force and the provision of Article 162 of the Constitution of India could not be invoked when the field was already occupied. The G.O. dated 11.08.2004 providing benefit, which is inconsistent with the Act and Rules framed in relation to the appointment in the public sector, violates Article 16 of the Constitution. Consequently, no mandamus could be issued to compel the authority to do something, which is not provided under the statute or the Rules. It is well settled that if there is a statute, which imposes a legal duty, the aggrieved party has a legal right to compel the authorities to enforce such performance by invoking a writ of mandamus. In the present case, the Petitioners have no legal right to enforce the Government Order dated 11.08.2004, which the court holds to be violative of Article 14 and 16 of the Constitution. Consequently, such Government Order cannot be enforced. In the light of the aforesaid, the Petitioners are not entitled for any relief.

21. Both the writ petitions fail and are dismissed. The appointment letter dated 26.04.2010 issued in favour of the Petitioner Narayan Singh Rana is quashed. Even though the validity of the Government Order dated 11.08.2004 has not been challenged in the writ petition, the court finds that the Government Order dated 11th August, 2004 is violative of Article 14 and 16 of the Constitution of India. The Court could not be a mute spectator and allow the Government Order to reap illegal benefits to a certain class of people. Consequently, the Government Order dated 11.08.2004 is also quashed.