
(2014) 08 P&H CK 0222
In the Punjab And Haryana At Chandigarh
Case No : CWP No. 5520 of 2010

Kavita Rai

APPELLANT

Vs

Chandigarh Administration

RESPONDENT

Date of Decision : 06-08-2014

Acts Referred:

Citation : (2014) 4 SCT 483

Hon'ble Judges : Hemant Gupta, J;Ajay Tewari, J

Bench : Division Bench

Advocate : Rajiv Atma Ram, Senior Advocate and Jagdish Rai, Advocate for the Appellant; Sanjeev Sharma, Senior Advocate, Vikram Vir Sharda, Advocate, R.K. Malik, Senior Advocate, Kuldeep Sheoran and Surjeet Bhadu, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Hemant Gupta, J.—Challenge in the present writ petition is to an order passed by the Central Administrative Tribunal, Chandigarh Bench, Chandigarh (for short "the Tribunal") on 23.02.2010 (Annexure P-10), whereby an Original Application filed by the petitioner challenging her non-selection to the post of Yoga Instructor in the Chandigarh Administration, remained unsuccessful.

2. The brief facts leading to the present writ petition are that Chandigarh Administration published an advertisement in the newspaper inviting applications for 8 posts of Yoga Instructors to be filled up on regular basis in Government College of Yoga Education & Health, Sector-23, Chandigarh. The last date for submission of application was 16.08.2007. As per the advertisement, the essential qualification was "Graduate with at least 45% marks with B.Ed. in Yoga". The applications were required to be submitted in the prescribed form alongwith self attested copies of all the testimonials. It was also mentioned that where number of applications received is large, selection committee may restrict number of candidates for interview to a reasonable limit on the basis of qualifications & experience. In the prescribed application form, Column 7 was of

Educational Qualification, which was in relation to examination passed i.e. Graduation, Post-graduation & any other; Column 8 was of Professional Qualification i.e. B.Ed./Yoga & any other; whereas, Column 9 provided for Experience, which was required to be counter-signed. The criteria to determine suitability and to calculate the marks for academic/professional and additional higher qualification stands approved on 16.10.2007. As per the said criteria, 15 marks have been allocated for Essential Academic Qualification, which were to be arrived at by applying 15 to the aggregate marks obtained at Graduate level; 10 marks have been allocated for Essential Professional Qualification, which were to be arrived at by multiplication of 10 with the marks obtained at B.Ed. Yoga; 6 marks have been allocated for Additional Academic Qualification, the calculation of which was on the basis of weightage of marks for additional higher qualifications in the relevant stream i.e. for 1st Division in MA/M.Sc./M/Com. or its equivalent 3 marks, 2nd Division in MA/M.Sc./M/Com. or its equivalent 2 marks & 3rd Division in MA/M.Sc./M/Com. or its equivalent 1 marks and for Honour's at Graduate Level 2 marks and for Ph.D./M.Phil 1 mark; 3 marks have been allocated for Additional Professional Qualification, which were assigned to the candidate having M.Ed. in Yoga/Post Graduate Diploma in Yoga or its equivalent i.e. 3 marks for 1st Division, 2 marks for 2nd Division & 1 marks for 3rd Division; 5 marks have been allocated for Personality Factors including experience, extra-curricular activities etc., to Experience (from Government/Recognized Institution only will be counted) (minimum period-6 months) i.e. One mark for one year, maximum five marks and for Extra Co-curricular activities; 6 marks have been allocated i.e. Sports, NCC & NSS activities; and, lastly interview for which 10 marks have been allocated. Thus, the total comes to 55 marks.

3. The petitioner and the private respondents were amongst the applicants to the said 8 posts of Yoga Instructors. The details of the marks obtained by the selected candidates as well as the petitioner are as under:

(Note-* The total of marks awarded to Anupma Kaushal comes to 29.08 instead of 28.58)

4. Challenge in the Original Application before the Tribunal was on the ground that the respondents have violated their own criteria for making selection, as the petitioner has not been given 2 marks for Honour's degree at the Graduation level and that she has been awarded lowest marks in interview. One of the ground to challenge the selection was that Rajwant Kaur is a General category candidate with 25.22 total marks, whereas Roshan Lal, an OBC category candidate has got more marks i.e. 25.29, therefore, Roshan Lal has been wrongly given appointment in OBC category, whereas he is required to be considered as a General category candidate. It was also averred that some of the selected candidates were working as contractual employee in the institution and were lagging behind the applicant in studies, but they have been preferred.

5. Out of the selected candidates, reply was filed only on behalf of respondent

No. 8 before the Tribunal apart from the official respondents. The Tribunal dismissed the Original Application finding that the controversy in the present case mainly rests on eligibility of the applicant for awarding 2 marks for qualification of Honours at the Graduation level or not. It was found that no candidate has been given 2 marks for Honours at Graduation level, as such marks were to be given only if the Honours is in the relevant stream, which is Yoga as none of the candidate has Honours Degree in Yoga. It was also found that even awarding of 2 more marks could not have made the petitioner on merit, as she is much below in merit.

6. However, before this Court, the petitioner pleaded the facts, which were not pleaded before the Tribunal, wherein reference was made to Chandigarh Education Service (School Cadre) (Group-C) Recruitment Rules, 1991 (for short "the Rules"), whereby it is sought to contend that vide notification dated 25.07.2007, the minimum marks for eligibility as Yoga Instructor were increased from 45% in B.A. to 50% in B.A. It was, thus, alleged that Mohinder Kumar was not eligible having obtained 47% marks in B.A. The claim of the petitioner is that there is no Honours Degree in Yoga, therefore, the petitioner, who possesses Honours in Hindi, is entitled to 2 more marks as per the criteria. The petitioner had also filed an additional affidavit dated 10.08.2010 to assert that the post of Yoga Instructor is governed by the Rules, which is a TGT (Group C), B.Ed. post and that there is no other Rules, which governed the post of Yoga Instructor except the said Rules.

7. In reply to the writ petition, the stand of the Chandigarh Administration is that benefit of Honours only is to be given in the stream concerned and that the Honours was not done by the petitioner in Yoga, therefore, she cannot claim benefit of 2 marks. It was also averred that minimum marks required for Yoga Instructor, as per Rules, is 45%, whereas the amendment referred to vide notification dated 25.07.2007 only enhances the minimum qualifying marks to 50% for NTT, JBT, B.Ed. Teachers and not for Yoga Instructors.

8. In an additional affidavit filed on behalf of the Director, Higher Education, Chandigarh Administration, it was averred that the post of Yoga Instructor forms part of the cadre of Masters/Mistress/TGT, as laid down in the Rules. It was also averred that the process of filling up the post of Yoga Instructor was initiated on 04.07.2007 and consequently issued a letter dated 24.07.2007 for publication of advertisement in the newspaper. Therefore, the amendment notified on 25.07.2007 cannot be made applicable to the posts against which advertisement stood already appeared in the newspaper.

9. In the reply on behalf of respondent Nos. 5 to 12, it is averred that the petitioner had passed B.A. (Honours) in Hindi, therefore, she has not been granted the weightage of the said qualification, as the same is not in the same stream. It is further averred that respondent No. 7 Sarghi Kohli had also passed B.A. (Honours) in Economics and she had also not granted any weightage because the qualification was not in the same stream. Similarly, respondent No.

9 Rajwant Kaur had also passed M.A. in Political Science, but no weightage was granted to her, as the qualification was not in the relevant stream. It was denied that the Rules referred to by the petitioner are applicable to the posts in question. In fact, the Rules are applicable to school teachers, whereas the appointments have been made as Yoga Instructors in Government College of Yoga Education & Health, Sector 23, Chandigarh. In respect of the argument that Roshan Lal, an OBC candidate has obtained more marks than the last General category candidate, it was pointed out that weightage of experience was not granted to Rajwant Kaur. Rajwant Kaur was having more than 6 months experience from a recognized institution, but she has not been given 0.5 marks. In case, she is given such marks, she is entitled to be assigned 25.72 marks as against Roshan Lal, who was assigned 25.29 marks. Therefore, Roshan Lal would not have secured higher marks than the last General category candidate. It is also pleaded that the petitioner is not the next candidate in merit even if her claim is to be accepted, as there is another candidate namely Harjit Singh Saini is higher in merit.

10. Learned counsel for the petitioner challenged the selection process on the following grounds:

(i) That the Rules have fixed the minimum eligibility for the post of Yoga Instructor as 50% marks in B.A., whereas Mohinder Kumar was not having 50% marks at the Graduation level, therefore, he was not eligible for appointment as Yoga Instructor. It is also argued that the Administration has admitted in the affidavit dated 30.09.2010 on behalf of the Director, Higher Education, that the posts in question are governed by the Rules.

(ii) That the Administration has admitted in the affidavit that the posts in question are governed by the Rules, as per the Affidavit of Director, Higher Education dated 30.09.2010.

(iii) That the petitioner has not been given 2 marks for Honours in Hindi, as per the criteria finalized. Had such 2 marks given, the petitioner would have been the one of the suitable candidates for appointment as Yoga Instructor.

(iv) That Rajwant Kaur has not disputed non-grant of 0.5 marks for her experience before the Tribunal, nor filed written statement before the Tribunal, therefore, she cannot raise a new claim before the writ Court in the absence of a positive challenge by her before the Tribunal. It is also argued that her experience is not in Yoga, but is in Physical Education and that too at the school level, therefore, such experience cannot be counted towards the post of Yoga Instructor, as per the stand of the respondents, the posts were in College Cadre.

(v) That Roshan Lal, an OBC candidate has obtained more marks than the last General category candidate namely Rajwant Kaur, therefore, she was wrongly selected, as Roshan Lal has to be treated as a General category candidate. Thus, the resultant vacancy has to be filled up amongst the OBC candidate. If the first candidate namely Harjeet Singh Saini does not join, the petitioner is entitled to

be offered appointment as Yoga Instructor.

11. On the other hand, Mr. Sharma, learned senior counsel representing the Chandigarh Administration, has argued that the posts of Yoga Instructor were advertised for Government College of Yoga Education & Health, Sector 23, Chandigarh and that to such posts, Chandigarh Education Service (School Cadre) (Group-C) Recruitment Rules, 1991 are not applicable. Such Rules are applicable only to School Cadre and not to the posts in the Colleges. It is also argued that even if the post carry the same pay scale as in the School Cadre and has almost the similar qualifications, as are fixed in the School Cadre, but that will not make the appointments to be governed by Chandigarh Education Service (School Cadre) (Group-C) Recruitment Rules, 1991. It is also argued that marks in Honours have to be granted, if it is in the relevant stream. Since none of the candidate was having Honours in Yoga, no additional marks have been given to them.

12. Mr. R.K. Malik, learned senior counsel representing the private respondents, argued that it is not necessary for Rajwant Kaur to challenge non-grant of 0.5 marks by way of an Original Application, as she was a selected candidate. She is at liberty to defend her selection on any ground, which is available to her. She cannot be non-suited for the reason that she has not filed an Original Application or has not claimed benefit of 0.5 marks before the Tribunal.

13. Having heard learned counsel for the parties, we find that first question, which is required to be examined is, whether the posts in question are governed by the Rules or not.

14. Chandigarh Education Service (School Cadre) (Group-C) Recruitment Rules, 1991, as the name suggests, are applicable to Group-C posts in the School Cadre. Such Rules are applicable to posts specified in Column 1 of the Posts annexed to the Rules. As against the posts of Masters/Mistresses (TGTs), Column 7 is of essential qualification, wherein for Physical Training Masters (DPE)/Yoga Instructors falling in clause (iv), the essential qualification is Graduate with at least 45% marks with training in advanced Physical Education Training Course or Diploma/B.Ed. in Yoga. The pay scale of such post in terms of the said Rules was Rs. 1400-2600. Subsequently, there was amendment in the said Rules notified on 25.07.2007, which is to the following effect:

"Education Department Notification The 25th July, 2007

xx xx xx

2. In the Chandigarh Education Service (School Cadre) (Group C) Rules, 1991, the Schedule appended thereto:-

In the Recruitment Rules for appointment to the post of NTT/JBT/B.Ed. Teachers, the percentage of marks at the 10+2/Graduation level/NTT or diploma/JBT Certificate or Diploma/B.Ed. level wherever occurring in the recruitment rules notified-vide notification No. 233-DPI-UT-S1-11(12) 1995, dated 17th August,

2001, Notification No. 402-DPI-UT-S1-11(14) 1991, dated 8th April, 2004 may be read as 50% instead of 45% as per NCTE norms. In the case of JBT Teachers the minimum percentage of marks shall continue to be 40% at the graduation level, but they must have at least 50% marks at the +2 or equivalent. However, candidates belonging to SC/OBC Communities shall be granted relaxation as fixed by the Government from time to time.

xx xx xx"

15. A perusal of the record produced by Mr. Sharma shows that the process for creating and filling up of the posts of yoga instructors starts with a note dated 12.01.2007 by DD(C). The said note reads as under:

"Subject: Conversion of posts of Tailoring Mistress into Yoga Instructor.

The Chandigarh Administration is running the Government Yoga Health Organisation in Sector-23, where Yoga Training classes are being conducted and B.Ed. Degree course is also being run.

In the next year plan 2007-08, it has been proposed to upgrade the Government Yoga Health Organisation to introduce Yoga Subject and Yoga Training in all Government Schools and Colleges. As such, more posts of Yoga Instructors will be required to cope up with the heavy work load. At present there are only two Yoga Instructors who are looking after the entire Yoga activities in the centre.

As enquired from the office of District Education Officer, Chandigarh Administration, five posts of Tailoring Mistress are lying vacant. A list of these vacant posts is placed below at flag-A. Some of the posts are vacant since 1999-2001.

Since these vacant posts of Tailoring Mistress are not being utilized in the Government Schools, it is proposed that these posts may be converted into Yoga Instructors and shifted to Yoga Health Organisation, Sector-23, Chandigarh to utilize their services in Government Colleges and Schools. The pay scale of both these posts is the same.

Submitted please."

16. Thereafter, there was consideration at different levels and on 09.03.2007, it was recorded as under:

"Subject: Conversion of posts of Work Experience Instructors into Yoga Instructors.

It is submitted that 8 posts of Work Experience Instructors (Wood work, Electrical and Tailoring etc.) are lying vacant in various Government Schools in Chandigarh as per detail attached. These posts are in the pay scale of Rs. 5000-8100 and are non-functional posts.

It has been proposed to upgrade the Government Yoga Health Organisation, Sector-23, Chandigarh into a full fledged Government Yoga Training College from

the academic session 2007-08. It has also been proposed to impart Yoga Training in all Government Schools and Colleges in UT Chandigarh. In order to meet the increased workload it has been decided to convert these 8 posts of Work Experience Instructor into Yoga Instructors and shifting of the same to the Government Yoga Health Organisation, Sector 23, Chandigarh.

Education Secretary has already approved the proposal at page 4 ante.

Finance Department is requested to give their concurrence please."

17. Subsequently, an agenda was circulated on 07.05.2007 for the meeting of the Screening Committee to the effect that there are only two posts of Yoga Instructors in the pay scale of Rs. 5480-8925 existing in the Cadre, which stands filled up. However, 8 posts of Work Experience Instructors in the pay scale of Rs. 5000-8100 are lying vacant, which are nonfunctional. On the other side, 8 posts of Yoga Instructors are urgently required in the Government Yoga Health Organisation, Sector 23A, Chandigarh for the introduction of new courses in order to introduce Yoga Training in all Government Schools and Colleges. The meeting of the Screening Committee was held on 12.05.2007, wherein it was decided that 8 posts may be converted into Yoga Instructors. The Office Order consequent to the decision of the Screening Committee issued by the Director, Higher Education, Chandigarh Administration, reads as under:

"ORDER

In pursuance of the recommendation of the Screening Committee conveyed vide Finance Department, Chandigarh Administration letter No. UTFII(12)2007/3663, dated 19.06.2007, Eight posts of Work Experience Instructor as per Annexure enclosed are hereby converted into Yoga Instructor and upgraded in the pay scale of Rs. 5480-8925. The said converted posts are hereby shifted to Government College of Yoga Education & Health, Sector 23, Chandigarh with immediate effect."

18. It was in pursuance of such order, the posts in question were advertised.

19. A perusal of the above proceedings shows that 8 posts of Work Experience Instructors were converted into Yoga Instructors and upgraded in the pay scale of Rs. 5480-8925 and were shifted to Government College of Yoga Education & Health, Sector 23, Chandigarh. Though the posts of Work Experience Instructors were in the School Cadre, but the said posts were to be filled up in the Government College of Yoga Education & Health, Sector 23, Chandigarh. Such conversion takes the post of Yoga Instructors out of the purview of School Cadre Rules. It was a post under the Chandigarh Administration independent of the School Cadre and, therefore, the Rules were not applicable in respect of the posts in question. It is admitted that there is no other Rules which are in force. In the absence of the Statutory Rules, the decision taken by the executive will govern the conditions of appointment to a post.

20. Even otherwise, we find that the Rules contemplate 45% marks as the

eligibility criteria for the post of Physical Training Masters (DPE)/Yoga Instructors and the amendment is only in respect of three categories of posts i.e. NTT/JBT/B.Ed. posts. 50% marks have been made in respect of the posts of NTT/JBT/B.Ed. Teachers. The minimum marks required to be obtained in respect of specific posts and not across all categories of the posts. NTT/JBT are the category of posts mentioned in the Schedule of the Rules at Sr. Nos. 7 & 8, whereas B.Ed. is not the post in the Rules. Therefore, the condition of obtaining 45% marks at the Graduation level is not the condition for the posts of Yoga Instructors. In view of the said fact, we do not find any merit in the first argument raised by the learned counsel for the petitioner.

21. In respect of second argument, no doubt as per the affidavit, the posts in question are said to be governed by the School Cadre Rules, however, a careful perusal of the record produced by Mr. Sharma shows that the posts of Work Experience Instructors lying vacant in the School Cadre were converted to the posts of Yoga Instructors in exercise of the executive powers of the State. The posts of Work Experience Instructors were in the pay scale of Rs. 5000-8100, whereas the posts of Yoga Instructors are in the pay scale of Rs. 5480-8925. Since the posts were in Government College of Yoga Education & Health, Sector-23, Chandigarh, the same are not governed by the School Cadre Rules. It was an arrangement arrived at by the Administration to take out the posts of Work Experience Instructors lying vacant in the School Cadre to be filled up after converting the same as Yoga Instructors. It is an arrangement arrived at more for the financial reasons rather than treating the posts as School Cadre posts. The affidavit, which is based upon an argument raised in the writ petition for the first time is proved to be not correct on the basis of record produced. Therefore, we are unable to agree that the posts of Yoga Instructors are governed by the School Cadre Rules. We have dealt with that even if the posts are of School Cadre, still the eligibility conditions in respect of Yoga Instructors have not undergone change, as the change was in respect of posts of NTT/JBT & B.Ed. Teachers.

22. In respect of the third argument, the criteria approved contemplates grant of 2 marks for degree in Honours in the "relevant stream". The petitioner has Honours degree in Hindi, which is not a relevant stream, the post being of Yoga Instructor. Not only the petitioner, but other candidates such as respondent No. 7 Sarghi Kohli had also passed B.A. (Honours) in Economics and respondent No. 9 Rajwant Kaur had also passed M.A. in Political Science, were also not granted additional marks for having Honours in Economics and M.A. in Political Science. Therefore, the petitioner is not entitled to additional 2 marks, she being Honours in Hindi, which is not a subject in the relevant stream.

23. In respect of the next argument, Mr. R.K. Malik, learned Senior counsel representing Rajwant Kaur has vehemently argued that in the writ of certiorari, this Court can exercise the power of judicial review to advance the cause of justice, but not merely on technicalities. Though Rajwant Kaur has not filed reply

before the Tribunal, but the record of her experience was available before the Selection Committee. She has the experience as a Physical Education Teacher. Her experience certificate is from a recognized Institution i.e. Gian Jyoti Public School, Mohali and is counter-signed by the Chandigarh Administration. Therefore, in terms of the criteria approved, she is entitled to 0.5 marks for her experience of more than six months i.e. from 17.08.2000 to 08.03.2001. It is contended that though in respect of educational qualification, the additional marks were available only if the higher qualification was in the "relevant stream", but in respect of experience, there is no such stipulation. Therefore, the experience of Rajwant Kaur as a Physical Education Teacher in a school has been wrongly excluded from consideration. It is argued that Rajwant Kaur can defend her appointment on any available ground. It is not necessary for her to file an Original Application, as is sought to be argued before this Court.

24. We find that Rajwant Kaur has worked as Physical Education Teacher from 17.08.2000 to 08.03.2001 in Gian Jyoti Public School, Mohali, which is a recognized School. In terms of the criteria, she is entitled to 0.5 marks for her experience being more than 6 months and less than one year experience. Though Mr. Malik was at pains to say that Yoga is part of Physical Education, but without giving any definite opinion on that, the fact remains that Yoga is part of physical fitness regime, so is the job of Physical Education Instructor. It is not totally unconnected with the subject. It is not the experience in the subject like Hindi or Physics, which is to be counted for the posts of Yoga Instructors. No doubt, Rajwant Kaur has not filed an Original Application nor raised such a plea before the Tribunal, but the fact remains that even the petitioner has enlarged the scope of her Original Application.

25. Apart from the said fact, the writ of certiorari would be issued only if there is a patent illegality causing manifest injustice. The non-granting of 0.5 marks is, in fact, causing injustice to Rajwant Kaur, as she is continuing on the post of Yoga Instructor for the last 7 years. Since the action of the Administration in not granting 0.5 marks to Rajwant Kaur is not legal, therefore, Rajwant Kaur would be deemed to have obtained 25.72 marks, which would be more than Roshan Lal, an OBC candidate.

26. In view of the findings on the fourth argument, we do not find that there is any resultant vacancy for OBC candidate, which is required to be filled up. Even if, there is any vacancy, the same has to be filled up firstly by Harjit Singh Saini only then the petitioner could be offered appointment as Yoga Instructor. Since in terms of the discussion above, Rajwant Kaur has obtained more marks than Roshan Lal, an OBC candidate, Roshan Lal cannot be treated as a General category candidate, so as to make a vacancy of OBC category available.

27. In view of the above, we do not find any merit in the present writ petition. The same is dismissed.