

(2010) 03 AHC CK 0021

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 51266 of 2007 (With C.M.W.P. No. 31628 of 2009)

Manoj Kumar and others

APPELLANT

Vs

State of U.P. and others

RESPONDENT

Date of Decision : 12-03-2010

Acts Referred:

Constitution of India, 1950 — Article 309

Citation : (2010) 125 FLR 406

Hon'ble Judges : A.P. Sahi, J

Bench : Single Bench

Advocate : Siddharth Khare and Ashok Khare, for the Appellant; Piyush Shukla, C.S.C., for the Respondent

Judgement

A.P. Sahi, J.—These two writ petitions have been filed by the 10 petitioners in relation to their claim of fixing and making payment of salary on the post of Stenographers in the office of Labour Commissioner, U.P. Kanpur in the pay scale of Rs. 4500-7000. Writ petition No. 51266 of 2007 was filed praying for a mandamus for making payment of salary in the said pay scale and during the pendency of the said writ petition orders were passed extending the said benefit which was recalled by the Labour Commissioner giving rise to the filing of the second writ petition No. 31628 of 2009. Affidavits have been exchanged between the parties and a caveat was also filed by one Ghanshyam Das whose reference has been made in para 2 of the writ petition No. 31628 of 2009. The matter was taken-up on several occasions where after it was ultimately heard on 2.2.2010 when the judgment was reserved after hearing learned Counsel for the parties.

2. Both the writ petitions raise common questions and are found on common set of facts as such they are being disposed of by a common judgment as agreed by the learned Counsel for the parties.

3. The selection and appointment to the post of Stenographers in the office of the Labour Commissioner, U.P. Kanpur are governed by the provisions of U.P. Labour

Department Ministerial Service Rules, 1981. A copy of the said rule has already been appended along with both the writ petitions. The said rules have been framed under Article 309 of the Constitution of India, The post in question includes the posts falling within Group "C of the post under the Government Establishment. The said rules include Appendix "A" and according to the said Appendix one post of Stenographer has been created in the pay scale of Rs. 250-425 to be appointed by the Assistant Labour Commissioner by direct recruitment. 23 permanent posts and two temporary posts of Stenographers i.e. total 25 are provided for in the pay scale of Rs. 300-500 to be appointed by the Assistant Labour Commissioner, U.P. from amongst the permanent Stenographers working in the pay scale of Rs. 250-425 on regular basis and in the headquarters by promotion. In the event of non-availability of any such candidate the posts have to be filled up by direct recruitment. The posts carrying the pay scale of Rs. 250-425 were revised to the pay scale of Rs. 4000-6000 and the posts earning the pay scale of Rs. 300-500 were revised to the pay scale of Rs. 4500-7000.

4. From the aforesaid facts which remain undisputed, it is clear that there were 25 posts available in the higher pay scale of Rs. 4500-7000 to be filled up firstly by way of promotion as provided for in the rules and in the event of non-availability of such candidates for being promoted the same was to be filled up by direct recruitment. It remains undisputed that the solitary post in the pay scale of Rs. 4000-6000 had already been filled up by the appointment of one Jitendra Singh Bhadoria who was functioning on the date when the selection of the petitioners took place and they were appointed.

5. The dispute arose later on as all the petitioners were initially selected and appointed against an advertisement which was published in August, 2001 and which indicated the pay scale of Rs. 4000-6000. The advertisement a copy whereof is Annexure 1 indicates 12 posts of Stenographers in the pay scale of Rs. 4000-6000 in the office of the Labour Commissioner and 3 posts of Stenographers in the office of Deputy Labour Commissioner at Kanpur in the same pay scale.

6. The posts which have been shown in the pay scale of Rs. 4000-6000 were not availability at all inasmuch as there was only one post in the cadre in the said pay scale which had already been filled up. The 12 posts which were advertised as vacant were of the pay scale of Rs. 4500-7000. The petitioners were selected and offered appointment against the said post but the pay scale which was offered to them was. Rs. 4000-6000. Learned Counsel for the petitioners contends that they are entitled for the pay scale of Rs. 4500-7000 which was wrongly indicated in the advertisement as Rs. 4000-6000.

7. Learned Counsel for the respondents contends that the petitioners have been appointed against non-existent posts in the pay scale of Rs. 4000-6000 about which an inquiry has been set up and the State Government is still in the process of examining the same. In such, a situation the grant of higher pay scale of Rs. 4500-7000 is erroneous as the very appointment of the petitioners is in jeopardy.

Learned Counsel for the respondents further contends that the posts which had been advertised had to be first filled up by way of promotion under the rules and could not have been filled up by way of direct recruitment. It is for this that the inquiry has been set up by the State Government to find out as to how this advertisement was tailored in a way to offer the post of direct recruitment in the pay scale of Rs. 4000-6000 and therefore, if the petitioners have been given the benefit of a deliberate attempt to fill up the post through an incorrect advertisement they should not be paid their salary in the higher pay scale and as a matter of fact their appointments are also against the rules.

8. When the matter was heard on the previous occasion and as the aforesaid picture emerged after the exchange of affidavits, it was further pointed out through the pleadings that all candidates who were entitled for promotion have already been extended such benefit and the request for promotion by such candidates has already been granted. Hence there is no occasion to cancel the appointments of the petitioners on any such ground as all the candidates have already been accommodated and have been granted the said pay scale.

9. An argument was advanced on behalf of the State to protect the interest of the promotees contending that if the promotions have been made then the petitioners who could not have been appointed without the promotion having been finalised, cannot claim seniority over them. Thus the claim of seniority of the promotees was to be protected. According to the respondents for which Sri Ashok Khare learned Senior Counsel for the petitioners made a statement and has also filed an affidavit that the petitioners are not claiming seniority over the promotees who are entitled to be promoted and they are prepared to forego their seniority to that extent.

10. ...Learned Standing Counsel Sri Piyush Shukla contends that the Government may be directed to conclude the inquiry and pass an appropriate order and this Court may not pre-empt the conclusion of the said inquiry and the finalisation of the claim of the petitioners.

11. After having heard learned Counsel for the parties, it remains undisputed that the posts against which the petitioners claim appointment are posts which had been advertised depicting a wrong pay scale. The question as to whether the pay scale was deliberately indicated in the advertisement or not, is a subject-matter of inquiry by the State Government and the said inquiry therefore cannot be pre-empted by this Court at this stage. However, the fact remains that the process which has been followed is that of direct recruitment. There is no dispute between the parties that the qualification and eligibility of the post in question are fulfilled by the petitioners and they were eligible for being considered to be appointed against the post of Stenographers whether in the grade of Rs. 4000-7000 or in the grade of Rs. 4500-7000. The only dispute is as to whether the petitioners could have been offered appointment before the promotional candidates had been accommodated. The affidavits which had been filed on behalf of the petitioners do positively assert that all the candidates who were

entitled for being considered to be promoted in the pay scale of Rs. 4500-7000 have been extended the said benefit. If that situation has come then the Question is, should the appointment of the petitioners to be disturbed. 12. Sri Ashok Khare learned Senior Counsel for the petitioners relying on the decision in the case of Malik Mazhar Sultan and Another Vs. U.P. Public Service Commission and Others, contends that a wrong advertisement cannot confer any right and therefore, conversely, incorrect mentioning of a pay scale does not deprive the petitioners of their right to continue in service and receive the higher pay scale. 13. From the records, it appears that after the advertisement was made in August, 2001 a selection committee was constituted at the district level in all the districts through out the State of U.P. notifying all such vacancies in Group "C". The advertisement in the present case has been issued by the Additional District Magistrate, Kanpur who was the Chairman of the Committee. The said advertisement has been made on the basis of the information given by the Labour Commissioner office. Whether the information was correctly given or not is subject-matter of inquiry before the State Government. Nonetheless, the petitioners applied against the said advertisement and there is nothing to indicate that the petitioners were at fault. 14. The selections were held and finalised in December, 2001 but the appointment could not be made on account of a dispute relating to the applicability of the law relating to the reservation. The State Government had issued certain executive instructions which became subject-matter of challenge before the Apex Court and certain interim orders were issued in this respect. The candidates who had been selected against the said advertisement of 2001 filed writ petitions before this Court and also before the Lucknow Bench of this Court for a direction that they should be offered appointment keeping in view the various orders passed by the Supreme Court. This Court finally through the judgment dated 4.10.2002 in the case of Ajeet Kumar Singh v. State of U.P., 2002. (5) ESC 338 has cleared the issue and allowed the writ petitions with a direction to complete the Selection process so initiated after applying the reservation in accordance with law. The petitioners succeeded in getting the appointments after the State Government issued a Government Order in April, 2003. The petitioner Nos. 1 to 9 were issued letters of appointment on 24.4.2003 whereas the petitioner No. 10 was issued a letter of appointment on 2nd of May, 2003.

15. A perusal of the letters of appointment also indicates the pay scale of Rs. 4000-6000. The petitioners thereafter joined and after joining they made a representation for giving them the pay scale of Rs. 4500-7000. It is on this representation that the matter was inquired into and a 3 Member Committee was set up to submit a report to the Labour Commissioner on 30.8.2006. A report was submitted on 3.4.2007. The inquiry could not be completed and another order was issued on 23.4.2009 by the State Government regarding the said inquiry, where after the State Government on 9.11.2009 has appointed Sri S.P. Singh, special Secretary, Government of U.P. as new the Enquiry Officer to examine the whole case. The said inquiry has not been concluded so far.

16. The matter got complicated when the Labour Commissioner passed the order on 5.3.2009 extending the benefit of the pay scale of Rs. 4500-7000 to the petitioners. Learned Counsel for the State Government contends that the Labour Commissioner had passed this order without permission and consent of the State Government fully knowing that the inquiry was pending and therefore he corrected his erroneous decision by passing the order dated 3.6.2009 and the consequential order on 15.6.2009. It is, therefore evident that the order extending the benefit of pay scale given in the aforesaid background and the withdrawal of the said order is sought to be justified by the respondents on the ground that it was due to misunderstanding and misconception. The fact, that the order passed on 3.6.2009 and the consequential order on 15.6.2009, was without giving any notice or opportunity to the petitioners and in violation of the principles of natural justice, has not been disputed.

17. Learned Counsel for the petitioners contends that the order deserves to be set aside and it is for this reason that this Court passed an interim order staying the operation of the impugned order on 29.6.2009.

18. From the aforesaid discussions, it is clear that the petitioners were not at fault when they moved the application for the consideration of their candidature, but they had applied against a pay scale which was referred in the advertisement. The posts which had been advertised were obviously not with the correct pay scale which was depicted in the advertisement. This was also not the fault of the petitioners and in view of the law laid down by the Apex Court in Malik Mazhar Sultan's case (supra) an erroneous advertisement cannot confer a right or extend a benefit to which the petitioners were not entitled. The selections which were held, have not been cancelled by the State Government so far and the inquiry continues for the past nine years. In such a situation the respondents cannot continue to deny the benefit to the petitioners on the excuse of the pendency of the inquiry. On the other hand the rights of the petitioners are dependent, insofar as their pay scale is concerned, on the out come of the inquiry in relation to the incorrect advertisement and also with regard to the selections which were held. The rights therefore which are available to the petitioners, would for the time being, have to be governed by the terms of the advertisement. There is no discrepancy in the process of selection. It is not the case of the respondents that the selections of the petitioners were held contrary to the procedure laid down in the rules. The allegation is that by mentioning an incorrect pay scale the posts were diverted for direct recruitment without completing the process of promotion. The petitioners have filed two affidavits which have been captioned as S.A. dated 17.1.2010 and SRA-II dated 19.1.2010 wherein they have stated that all the candidates who had given their consent for promotion have been considered and extended the benefit of promotion. These affidavits are in response to the facts stated in paragraph 5 of supplementary counter affidavit-II of A.K. Rai filed on behalf of the respondents. Thus, there is a positive assertion of fact to the effect that the persons who claim promotion have already been given the said benefit and none of the rights of the candidate

entitled for promotion have been defeated or diluted by the selection and appointment of the petitioners. To remove all such doubts, the petitioners in the supplementary affidavit dated 17.1.2010 have clarified their no objection for being treated juniors to three stenographers namely Virendra Prasad Singh, Sunil Kumar Maurya and Sheo Charan.

19. The facts as narrated above and the affidavits exchanged between the parties, therefore indicate that the claim of the candidates who were entitled to the post in the pay scale of Rs. 4500-7000 through promotion therefore have been saturated. In such a situation, when there is no fault on the part of the petitioners in respect of their selection and it would not be appropriate to upset their selection on the said post. This would however be subject to an order to be passed by the authority after verifying the correctness or otherwise of the fact that persons claiming promotion would not be affected at all by the selection and appointment of the petitioners at present. If the respondents come to the conclusion that the promotees are no were affected and the offer made by the petitioners that they may be treated Juniors as indicated herein above, then in that event further action as per claim of the petitioners will have to be taken in order to finalise and adjust the claim of the petitioners.

20. So far as the inquiry proceeding before the State Government is concerned the same will therefore have to be proceeded keeping in view the fact that the petitioners were not at fault and the incorrect advertisement would neither take away or grant any right to the petitioners which they were not entitled under the statutory rules, 1981. The State Govt. will also have to keep in mind that all the petitioners are fully eligible and qualified for being directly appointed under the 1981 Rules against the pay scale of Rs. 4500-7000 as well. They have already functioned after a due selection for the past nine years and there was no error on the part of the petitioners, the fault shall not be transferred on them.

21. So far as the extension of the benefit of the salary in the pay scale of Rs. 4500-7000 is concerned, the Commissioner has passed the order after narrating the entire facts including the report dated 3rd April, 2007 and the oral direction of the Principal Secretary (Labour) dated 2.3.2009. It also narrates that the orders were passed after the directions were issued by the Principal Secretary (Labour) to the Labour Commissioner to pass an appropriate order. The consequential orders dated 13.4.2009 and 23.4.2009 also indicate that the Principal Secretary had not issued any such directions and even otherwise any such oral instructions which had been made, cannot take shape of oral directions unless and until formal orders are not issued in this regard.

22. In view of the aforesaid, the impugned order dated 3.6.2009 was passed. In such a situation, it is correct that the order had been passed without giving any notice or opportunity to the petitioners but the orders were recalled within a span of two months after the Principal Secretary himself indicates that the orders could not have been issued. In my considered opinion the question of grant of pay scale was subject-matter of the Writ Petition No. 51266 of 2007 wherein a

stand had already been taken by the State Government The State Government was already making an inquiry into the matter. In such a situation either the Labour Commissioner ought to have awaited a final mandamus in Writ Petition No. 51266 of 2007 or he should have sought written instructions from the State Government and not to have acted upon an alleged oral direction which has been denied by the Principal Secretary himself.

23. Thus the grant and its cancellation both were an incorrect exercise and it could have been avoided. Accordingly, this Court is of the opinion that this matter is also to be decided by the State Government keeping in view of the aforesaid background of the case.

24. The writ petition is being disposed of With a direction that the State Government shall now decide the matter without being influenced by the order dated 5.3.2009 or the consequential order dated 3.6.2009 and the correspondence in between in this regard and shall pass a fresh order after giving an opportunity of hearing to the petitioners.

25. The State Government shall proceed to pass the orders in the light of the observations made herein above within a period of 3 months from the date of production of a certified copy of this order before the Principal Secretary (Labour), Government of U.P. Lucknow. In the event the petitioners are found entitle to any such benefits then the respondents will release the same without any further delay. The order to be passed by the State Government shall be a composite order keeping in view the offer made by the petitioners with regard to their placement of seniority in accordance with law.

26. Both the writ petitions stand disposed of accordingly.