
(2003) 07 AHC CK 0116

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 29252 of 2003

Om Prakash Pandey

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 14-07-2003

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (2003) 07 AHC CK 0116

Hon'ble Judges : B.S.Chauhan, J and D.P.Gupta, J

Final Decision : Dismissed

Judgement

Dr. B.S. Chauhan, J.—This writ petition has been filed challenging the judgment and order of the Central Administrative Tribunal dated 662003 by which it has upheld the order passed by the General Manager, North Eastern Railways dated 322003, rejecting the candidature of the petitioner on medical ground and further direction to provide him an alternative suitable job according to his medical category.

2. Facts and circumstances giving rise to this case are that the post of Assistant Station Masters were advertised by the Railway Recruitment Board. Petitioner after qualifying in the written examination etc. when found to be eligible and suitable, went through the medical examination wherein he was not found fit as per the requirement for the said post and, therefore, vide order dated 322003 passed by Respondent No. 2, he was not appointed rather found unfit. Petitioner made a representation before the respondents to appoint him on some other post as per his physical fitness subject to other eligibilities. But no order was passed on his representation. Being aggrieved, petitioner approached the Central Administrative Tribunal challenging the said order, which has been rejected by the impugned judgment and order dated 662003, hence this petition.

3. Learned Counsel for the petitioner has submitted that the learned Tribunal has committed gross error in rejecting the claim of the petition for alternative job according to his medical fitness and, therefore, the order of the tribunal is liable

to be set aside. On the contrary, learned Standing Counsel has opposed it contending that once the petitioner had applied for the post of Assistant Station Master and could not be selected for the same, he cannot claim to give appointment on any other alternative post as per his medical fitness.

4. We have considered the rival submissions made by learned Counsel for the parties.

5. It is settled legal proposition that in public employment, as of Rule, appointment is to be made by inviting applications from all eligible candidates by issuing advertisement and after considering their suitability. It is not permissible to fill up a vacancy without advertising as it would violate the fundamental rights guaranteed under Articles 14 and 16 of the Constitution of India, 1950, of those candidates who are eligible for the said post and had not been given a chance to apply and being considered. An appointment can be made as an exception without advertising the vacancy only as per Rules/scheme providing appointment on compassionate grounds to the dependants of the employees who die in harness. What to talk of appointing a person without advertising the vacancy, law does not permit to fill up the vacancy over and above the number of the vacancies advertised.

6. In *Prem Singh and Ors. v. Haryana State Electricity Board and Ors.*, 1996 (2) LBESR 694 (SC) : 1996 (4) SCC 319, the Apex Court observed as under:

?.....The selection process by way of the requisition and advertisement can be started from clear vacancies and also for anticipated vacancies but not for future vacancies. If the requisition and advertisement are for a certain number of posts only, the State cannot make more appointments than the number of posts advertised..... . The State can deviate from the advertisement and make appointments on the posts falling vacant thereafter in exceptional circumstances for only or in an emergent situation and that too by taking a policy decision in that behalf.?

7. In *Union of India and Ors. v. Ishwar Singh Khatri and Ors.*, 1992 Supl. (3) SCC 84, the Court held that selected candidates have right to appointment only against vacancies notified and that too during the life of the select list as the panel of selected candidates cannot be valid for indefinite period. Moreover, impanelled candidates? in any event cannot have a right against future vacancies.?

8. In *State of Bihar and Ors. v. The Secretariat, Assistant S.E. Union*, 1986 and Ors., AIR 1994 Supreme Court 736, the Apex Court held that ?a person who is selected does not, on account of being empanelled alone, acquire any indefeasible right of appointment. Empanelment is at the best a condition of eligibility for purposes of appointment, and by itself does not amount to selection or create a vested right to be appointed unless relevant service rules say to the contrary.? In the said case, as the selection process was completed in five years after the publication of the advertisement, the contention was raised that

the empanelled candidates deserved to be appointed over and above vacancies notified. The Hon''ble Supreme Court rejected the contention by observing that callousness of competent authority in not completing the selection process and issuing any fresh advertisement in between, may not be justified but offering the posts in such a manner would adversely prejudice the cause of those candidates who achieved eligibility in the meantime.

9. In *Surendra Singh and Ors. v. State of Punjab and Ors.*, AIR 1998 SC 18, the Apex Court held that 'it is not as matter of course that the authority can fillup more posts than advertised.' The said judgment has been approved by the Apex Court in *Kamlesh Kumar Gupta and Ors.*, (1998)3 SCC 45.

10. Thus, it is evident that neither the post can be filled up without advertising the vacancy nor authority is competent to make appointment over and above the number of vacancies advertised.

11. Learned Counsel for the petitioner has submitted that the Tribunal has erred as there is a provision in Railway Establishment Rules, which reads as under:

'Alternative Appointments to the Medically Unfitted Staff and their Seniority.

(1) Staff in Service. An alternative job must be offered to a Railway servant, who has failed in vision test or has been otherwise declared physically unfit to continue in a particular post. Only that alternative job should be offered to him which he is capable to perform.

(2) Staff Recruited Directly: In terms of Railway Board's Letter No. E (NG) 62/RCI95 dated 26101962, it was decided that if a candidate selected for a technical category fails in the prescribed medical examination, he may be considered for an alternative technical category provided he possesses the requisite qualifications and there is a shortage in that category subject to his being medically fit for that category.'

and it is submitted that as Clause (2) thereof provides for consideration of an alternative, the application ought to have been allowed.

12. Submission made by learned Counsel for the petitioner seems to be very attractive but hollow in substance for the reason that post cannot be filled up without being advertised. In view of the above, it becomes difficult to approve such a letter/decision as it is in contravention of the Constitutional scheme, as explained above. Though it is not under challenge but the Court can ignore in view of the law laid down by the Hon''ble Apex Court in *Bharathidasan University and Anr. v. All India Council for Technical Education and Ors.*, reported in (2001) 8 SCC 676, wherein the Apex Court as under:

'Consequently, when the power to make regulations is confined to certain limits and made to flow in a welldefined canal within stipulated banks, those actually made or shown and found to be not made within its confines but outside them, the Courts are bound to ignore them when the question of their enforcement

arises and the mere fact that there was no specific relief sought for to strike down or declare them ultra vires, particularly when the party in sufferance is a respondent to the lis or proceedings cannot confer any further sanctity or authority and validity which it is shown and found to obviously and patently lack.?

13. In *Ram Ganesh Tripathi v. State of U.P.*, 1997 (1) LBESR 461 (SC) : AIR 1997 Supreme Court 1446, the Supreme Court examined a similar order and quashed it without being challenged observing as under:

?The said order was not challenged in the writ petition as it did not come to the notice of the appellants. It has been filed in this Court along with the counter affidavit..... This order also deserves to be quashed as it is not consistent with the statutory Rules. It appears to have been passed by the Government to oblige the respondents and similarly situated ad hoc appointees.?

14. In view of the above, we are of the considered opinion that the said Government letter is not worth giving effect to, no order can be passed in favour of the petitioner.

15. The Hon''ble Apex Court has examined the cases where employee of a State or Corporation during the course of service became unfit for the post he was holding and claim some other light work on the ground of physical inability.

16. In *Anand Bihari and Ors. v. Rajasthan State Road Transport Corporation*, AIR 1991 SC 1003, the Apex Court considered the case of Bus drivers who developed defective eye sight because of their health and their services were terminated. The Apex Court held that such a termination would not fall within the ambit of retrenchment. However, the Apex Court held that instead of terminating the services of such persons, they be provided compensatory relief, such as alternative employment. Such a view was expressed by the Hon''ble Apex Court considering that the disability or defect of eye vision developed during the course of employment, and in such a case, the Corporation etc. were advised to frame a scheme for that purpose.

17. In *Narendra Kumar Chandla v. State of Haryana and Ors.*, 1994 (4) SCC 460, the Apex Court issued similar direction of absorption of the employees physically incapacitated due to disease giving them some light duty.

18. In *Rameshwar Dass and Ors. v. State of Haryana and Ors.*, 1996 (1) LBESR 755 (SC) : 1995 (3) SCC 285, the Hon''ble Supreme Court again placing reliance upon the judgment in *Anand Behari* (supra), issued a direction for consideration of rehabilitation of those employees who suffered injuries and became medically unfit and for providing alternative jobs till the date of superannuation.

19. However, in *UPSRTC v. Pukhraj Singh and Ors.*, 1999 (1) SCC 190 and *APSRTC v. K. Pochaiah and Anr.*, 1999 (1) SCC 191, the Hon''ble Apex Court held that issuing direction for absorption, reappointment or accommodating them on alternative job on humanitarian grounds is beyond the scope of judicial powers and in a very hard case if law permits such an employee who become medical

unfit during the period of employment, may be given some other engagement in the workshop or any other place if there is a scheme or Rules/regulation for that.

20. The issue was further reconsidered by the Hon''ble Apex Court in *Konal Singh v. Union of India and Ors.*, 2003(1) LBESR 841 (SC) : 2003 AIR SCW 1013. The Apex Court examined the provisions of Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 and held that if an employee becomes medically unfit during the employment, he should be given a suitable job against any post so that he could be kept till he attains the age of superannuation.

21. Therefore, the law emerges that generally in absence of any Rule or scheme, if a person becomes medically unfit during employment, he may not be entitled for an alternative job according to his physical conditions but if Rules/scheme permits, he may be accommodated till he attains the age of superannuation. While deciding the case, the learned Tribunal has held that the question of accommodating a person on some alternative post according to his medical fitness is meant only for those who were in employment, however, it can not be claimed at the time of initial stage of appointment.

22. It is also not apparent from the impugned judgment and order of the Tribunal that the issue raised by the petitioner before this Court was raised before the Tribunal, and he cannot be permitted to raise the issue first time in writ jurisdiction. Learned Counsel for the respondents has submitted if he is aggrieved of the order of Tribunal for nonconsideration of the points raised and not dealt with by the Tribunal, he should approach the Tribunal by filing a review application but he cannot agitate the said point in writ jurisdiction.

23. In *State of Maharashtra v. Ramdas Shrinivas Nayk*, AIR 1982 SC 1249, the Hon''ble Supreme Court while dealing with a similar case, held as under:

?We are afraid that we cannot launch into an enquiry as to what transpired in the High Court. It is simply not done. Public Policy bars us. Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena..... if a party thinks that the happenings in Court have been wrongly recorded in a judgment, it is incumbent upon the party..... to call the attention of the very Judges.....?

24. While deciding the said case the Hon''ble Apex Court placed reliance upon the judgment of the Privy Council in *Madhusudan v. Chandrabati*, AIR 1917 PC 30; and *Somasundaran v. Subramanian*, AIR 1926PC 136. In the latter case, it has been observed as under:

?Judgment cannot be treated as mere counters in the game of litigation.?

25. A similar view had been taken by the Calcutta High Court in *Sarat Chandra v. Bibhabati Debi*, AIR 1921 Cal 584, observing that the record of the Judge is conclusive and it is not permissible either for the lawyer or litigant to contradict it except by moving application before the same Judge.

26. In *King Emperor v. Barendra Kumar Ghose*, AIR 1924 Cal 257, the Full Bench of Calcutta High Court reiterated the same view observing that the judgment of the Court is not to be criticized or circumvented; much less has to be exposed to any animad version.

27. In *Union of India and Ors. v. N.V. Phaneendran*, 1995 (6) SCC 45, the Apex Court has held that if a party has taken various grounds before the Court below and not made submissions on all of that, it is not even desirable to remit the matter to the said Court. The Court held that no doubt, several contentions had been raised on merit, the Tribunal dealt with only one issue. The prayer of the party that they may be given an opportunity to agitate those issues/questions by remitting the matter to the Tribunal, cannot be accepted as the party itself had chosen to agitate a limited number of issues and there can be no justification to remit the matter.

28. The same view has been taken by the Supreme Court in *Kanwar Singh v. State of Haryana and Ors.*, (1997) 4 SCC 662; and *Transmission Corporation of A.P. Ltd. and Ors. v. P. Surya Bhagwan*, AIR SCW 2616.

29. Thus, in view of the aforesaid settled legal proposition, it emerges that the writ Court cannot conduct the enquiry as to what issues had been agitated before the Tribunal and if a party is aggrieved that some of the issues agitated by it have not been dealt by the Tribunal, the only remedy available to it is to file an application of Review before the Tribunal as those issues cannot be dealt with by the writ Court.

30. Thus, in view of the above, as vacancies cannot be filled up over and above the number of vacancies advertised, nor a post can be filled up without being advertised, the letter, relied upon by the petitioner is not worth giving effect to, we find no merit in the petition. It is accordingly dismissed.