

(2011) 08 RAJ CK 0096

In the Rajasthan High Court

Case No : Civil Writ Petition No's. 8046 of 2008, 5367, 4732, 11577, 12953 and 12987 of 2009

Pawan Kumar Bardiya and Others

APPELLANT

Vs

State of Rajasthan and Another

RESPONDENT

Date of Decision : 08-08-2011

Acts Referred:

Citation : (2013) 1 RLW 562

Hon'ble Judges : M.N. Bhandari, J

Bench : Single Bench

Advocate : S.P. Sharma with Ankit Sethi, Mahendra Shah, Banwari Sharma, Ms. Anisha Jain and Vijay Pathak, for the Appellant; S.N. Kumawat, AAG, for RPSC and Pradeep Kalwania, Addl. G.C., for the Respondent

Judgement

M.N. Bhandari, J.—This bunch of writ petitions are decided by this common order as it involves common question of law. Rajasthan Public Service Commission (for short "the Commission") issued an advertisement dated 5.7.2008 calling for applications for the post of Agriculture Officer and Assistant Agriculture Officer. Petitioners applied for the posts. The candidature of petitioners is liable to be rejected as they have crossed maximum age limit provided under the advertisement. As per relevant clause, one should not have attained the age more than 35 years as on 1.1.2009 and, at the same time, should not be less than 20 years of age.

2. The grievance of the petitioners is that last advertisement for the posts in reference was advertised in the year 1996 thus fort the last 11 years no vacancy was advertised though it was existing.

3. Some of the petitioners accordingly submitted representation for grant of age relaxation but no heed was paid by the respondents on the aforesaid.

4. Learned counsel for petitioners submit that Rajasthan Agriculture Service Rules, 1960 (in short "the Rules of 1960") and Rajasthan Agriculture

Subordinate Service Rules, 1978 (for short "the Rules of 1978") provide for determination of vacancy on 1st April of every year. Since determination is required to be made each year, respondents were under an obligation to fill up the posts accordingly. It is on account of the respondents' failure that those who were eligible in the intervening period of 11 years now would not get a chance of consideration for their selection. This is more so when vacancies so advertised pertain to the years 1996 onwards. Due to failure in making selection to the posts every year, those who were ineligible in those years have become eligible due to delay in making recruitment and, at the same time, those, who were eligible for previous years' vacancies being within age, have now become ineligible.

5. Taking into consideration the similar situation, this court passed a detailed judgment in the case of Bansi Lal Jakhar (Dr.) Vs. State of Rajasthan and Another, and RLW 2007 (2) Raj 1067. Therein, petitioners were held entitled for selection.

6. Learned counsel for the petitioners further contended that Rules of 1960 as also the Rules of 1978 provide for relaxation in age thus, if at all, it is decided that petitioners are not within age limit as per the Rules then looking to the delay in holding recruitment, they are entitled for age relaxation. This is more so when pursuant to the interim directions of this court, all the petitioners have already appeared in the selection and would now be deprived to get appointment if they are not granted age relaxation. The outcome of the aforesaid would be leaving the meritorious to make room for less meritorious.

7. It is lastly contended by learned counsel for petitioners that advertisement was issued on 5.7.2008 and therein last date for submission of application was provided as 20.8.2008. The respondents issued a Notification for making amendment in the Rules to provide three years relaxation in age. The said Notification was issued on 23.9.2008 thus came into effect prior to completion of recruitment. The petitioners have been deprived to get benefit of aforesaid Notification, whereas, the State "Government has provided benefit of age relaxation while holding selection to the post of Assistant Engineer vide advertisement dated 13.8.2008. Same way, benefits were given for the post of Prison Welfare Officer and many other posts. This court in the case of Indra Kumar Meena and Others Vs. State of Rajasthan and Others, directed the respondents to consider the case for age relaxation in view of the past practice. Similarly, Hon'ble Apex Court in the case of Suraj Parkash Gupta and Others Vs. State of Jammu & Kashmir Others, held that rules can be relaxed keeping in mind the hardship in individual case. In the case of State of Maharashtra Vs. Jagannath Achyut Karandikar, it was held by the Apex Court that due to default of the government to hold departmental examination in time, the employee cannot be penalised by denying benefit of promotion more so when the government was under an obligation to hold examination every year.

8. The Apex Court while considering the case of Pitta Naveen Kumar and Others

Vs. Raja Narasaiah Zangiti and Others, held that if age is relaxed by the government then such decision cannot be held to be arbitrary because it only extend choice of jurisdiction.

9. Same view was taken in the case of State of M.P. and Others Vs. Sanjay Kumar Pathak and Others, , wherein, on account of cancellation of first examination when another examination was conducted, the candidates were held entitled for age relaxation.

10. This court, while deciding the case of Prakash Chand and Others Vs. That State of Rajasthan and Another, , held that if vacancy was not advertised for a particular year then the candidate eligible in the relevant year would be eligible for subsequent recruitment.

11. Learned counsel for petitioners further submit that looking to the notification dated 23.9.2008 and the language used therein, petitioners should be deemed to be within age for the years in which no recruitment took place. The fact that advertisement was issued earlier or last date of submission of application was prior to the notification have no consequence because last date for determination of age is 1.1.2009 i.e. subsequent to notification dated 23.9.2008. A reference of the judgment in the case of Hari Singh and Others Vs. The Military Estate Officer and Another, has been given to show meaning of the word "deemed" used in the notification dated 23.9.2008 apart from the judgment in the case of Aligarh Muslim University and Others Vs. Mansoor Ali Khan, . The prayer of the learned counsel is accordingly two fold; firstly to treat the petitioners within age looking to the delay in holding the recruitment and, in the alternative, to direct the respondents to grant relaxation in age to the petitioners in view of the Rules of 1960 and 1978.

12. Per contra, learned counsel for respondents submits that advertisement was issued on 5.7.2008 giving out last date of submission of application as 20.8.2008 thus one was required to be within age limit as notified in the advertisement. The petitioners are those who applied for the post knowing it well that they have already crossed the age limit provided under the Rules. If the prayer is accepted then it would result in discrimination as many candidates did not apply for the post in adherence to the Rules treating themselves to be overage. Hence, acceptance of the writ petitions would be to the benefit of those who have not adhered to the Rules.

13. Coming to the notification dated 23.9.2008, it is submitted that it is prospective in nature and cannot have application for the advertisement issued in the month of July having last date to submit application by 20.8.2008 i.e. much prior to the notification amending the Rules. One cannot apply and plead for the benefit of age relaxation anticipating some amendment in the Rules at a later stage. The notification dated 23.9.2008 has no application in the present recruitment even if the age is to be reckoned as on 1.1.2009. The aforesaid issue has already been decided by the Division Bench of this court in the case of "Inder

Bhan Singh Gujar vs. State of Rajasthan & Anr." reported in 2001 (2) RLR 168 : RLW 1999 (1) Raj. 156 and Single Bench judgment has otherwise been reported in 1999 (1) WLC 141. The present matter is squarely covered by the judgment in the case of Inder Bhan Singh Gujar (supra).

14. Now comes the issue as to whether one is entitled to be treated within age if recruitment has not taken place every year, rather if there is a delay of years together. It is submitted that after judgment of the Division Bench of this court in the case of Prakash Chand (supra) when the co-ordinate Bench took the same view, one of the judgments was challenged before the Apex Court by the Rajasthan Public Service Commission and, therein, the view was not approved. It was held that delay in holding recruitment will not entitle a candidate to get benefit of age. The controversy has been settled therein with authoritative pronouncement.

15. Same view was taken by this court in the case of Dr. Pushpa Gupta Vs. State of Rajasthan and Others, . In the case of E. Ramakrishnan and Others Vs. State of Kerala and Others, it was held that relaxation of age can be granted by the Government and not by the court.

16. Reliance has further been made on the judgment in the case of Mahesh Kumar and Another Vs. State of Rajasthan, . The issue of grant of age relaxation further came up for consideration in the case of Dr. Ami Lal Bhat Vs. State of Rajasthan and others, , wherein, relaxation in age limit was not allowed on wholesome basis but allowed only when public interest element is existing.

17. The Division Bench of this court in the case of "Smt. Shashi Kala Dadhich vs. RPSC & Anr., DB Civil Special Appeal (Writ) No. 923/2006, decided the same controversy vide its judgment dated 24th 1 January, 2008. Therein, the court considered earlier judgment in the case of Prakash Chand but considering the judgment of the Apex Court in the case of "RPSC vs. Smt. Anand Kanwar, Civil Appeal No. 52/93, decided on 8.2.1995, held that delay in recruitment by not determining the post every year would not entitle a candidate to get benefit in age bar. The appeal was accordingly dismissed.

18. I have considered rival submissions of learned counsel for parties and scanned the matter carefully besides perusing the judgments cited at the Bar.

19. The facts not in dispute are that last recruitment to the post in reference was held in the year 1996 and, thereupon, advertisement has now been issued in the year 2008 thus for intervening period of 11 years, no recruitment was held by the respondents.

20. First question for consideration of this court is as to whether those who were within the age limit during the intervening period of 11 years should be granted benefit in age limit, taking note of the year corresponding to the vacancy.

21. This court in the case of Prakash Chand and Dr. Banshi Lal Dhakar (supra) held that a candidate would be entitled to be treated within age if the

recruitment did not take place in previous years when the candidate was within age.

22. The Apex Court in the case of Smt. Anand Kanwar (supra) took a view otherwise than what has been taken by this court. In the case of Smt. Anand Kanwar (supra) the Apex Court even noticed the reason for treating a candidate to be within age as recorded by the Division Bench of this court, but reversed it. Following para of the judgment in the case of Smt. Anand Kanwar is quoted for ready reference thus-

It was not disputed before the High Court that prior to 1988, recruitment to the cadre of Assistant Teachers was made only in the year 1983. Recruitment to the said cadre is by way of direct recruitment and also by promotion. During the period 1983-89 promotions were being made to the cadre, but not direct recruitment was made. The only contention raised by the respondent before the High Court was that it was mandatory for the Rajasthan Government to have filled the quota of direct recruits during all those years. It was further contended that had the posts meant for direct recruitment been advertised during the year 1983-89, the respondent could have applied and may have been selected. She contended that at that point of time, she could not be rejected on the ground of over-age. The High Court accepted the contentions on the following reasoning:-

...The last advertisement was issued in the year 1983 and this advertisement has been issued in the year 1989 that is after a lapse of about six years and the petitioner has completed her age of 40 years in the year 1986. It has been held in this authority that if year-wise vacancies are not determined and if the advertisements are issued to fill up the vacancies of six years by the one advertisement, then the person's candidature cannot be rejected on that account...

The competent authority cannot avoid this responsibility by sheer inaction or omission and failure on the part of the competent authority cannot be used as a basis for denying eligibility to those who are eligible in a particular year but become ineligible on account of absence of determination of the vacancies...

She could have been denied right of a consideration only if there existed no vacancies till the time she has attained the age of 40 years. If vacancies were existing, she had a right of consideration and consequently the petitioner who has been allowed to appear in the interview under the orders of the Court, her result of the interview be declared and if she is found suitable for appointment on the basis of the merit that has been assigned to her by the Public Service Commission, she be afforded appointment as a Senior Teacher, which has now been designated as Lecturer in Secondary/Senior Secondary Section). The result be declared within a period of three weeks from today and if she is entitled to be appointed then appointment be accorded to her within 3 months from today.

We are of the view that the High Court fell into patent error bordering on perversity in issuing the mandamus on the reasoning quoted above. It is settled

proposition of law that the eligibility of a candidate has to be determined on the basis of the terms and conditions of the advertisement in response to which the candidate applies. There is nothing on the record to show that the State Government was in any manner negligent or at fault in not making the direct recruitment during the period 1983-89. Be that as it may, the High Court was not justified in taking the clock back to the period when unfilled vacancies were existing and holding that since the respondent was eligible on the date when vacancies fell vacant, she continues to be so till the time the vacancies are filled. Due to inaction on the part of the State Government in not filling the posts year-wise, the respondent cannot get a right to participate in the selection despite being over-aged.

We, therefore, allow the appeal and set aside the judgment of the High Court and dismiss the writ petition filled by the respondent. No costs.

23. Same view was taken by the Division Bench of this court in the case of Smt. Shashi Kala Dadhich (*supra*), wherein, even the judgment in the case of Prakash Chand (*supra*) was considered and, in the light of the judgment of the Apex Court in the case of Smt. Anand Kanwar (*supra*), detailed judgment was rendered. Para 5, 6 and 7 of the said judgment is quoted for ready reference thus -

5. The direct recruitment to the posts of Lecturer in Hindi, admittedly, is being made under Rajasthan Educational Service Rules, 1970 (for short "the Rules of 1970"). The counsel for the appellant did not dispute that the Rules of 1970 do not have a provision that the candidates who were eligible in a particular year but were rendered in-eligible in the subsequent years, they were to be treated as eligible to appear in the examination irrespective of age requirement in case no examination was held in the particular year in which they were eligible. We are afraid, for want of any provision in the Rules of 1970, the decision of the Division Bench in the case of Prakash Chand cannot be applied to the present fact situation.

6. We may now refer to the judgment of the Supreme Court in the case of Anand Kanwar. That was a case where Anand Kanwar applied for the post of Senior Teacher in the year 1989 pursuant to the advertisement. At that time she had already crossed the age of 40. She appeared in the preliminary examination conducted by the Rajasthan Public Service Commission (for short, "Commission") but at the time of viva-voce she was told that she was not eligible being over-age and her candidature was cancelled. Upon challenge of the cancellation of her candidature before this court, the Division Bench held that the last advertisement was issued in the year 1983 and thereafter the advertisement was issued in the year 1989 i.e. after a lapse of about 6 years. If year-wise vacancies were not determined and if the advertisement was issued to fill the vacancies of six years by one advertisement, then the person's candidature cannot be rejected on that ground. The Division Bench held that competent authority cannot avoid the responsibility by sheer inaction or omission and failure on the part of the

competent authority cannot be used as a basis for denying eligibility to those who were eligible in a particular year but became ineligible on account of absence of determination of vacancies. The consideration of the matter by the Division Bench was held by the Supreme Court bordering on perversity. The Supreme Court held thus:

It is settled proposition of law that the eligibility of a candidate has to be determined on the basis of the terms and conditions of the advertisement in response to which the candidate applies. There is nothing on the record to show that the State Government was in any manner negligent or at fault in not making the direct recruitment during the period 1983-89. Be that as it may, the High Court was not justified in taking the clock back to the period when unfilled vacancies were existing and holding that since the respondent was eligible on the date when vacancies fell vacant, she continues to be so till the time the vacancies are filled. Due to inaction on the part of the State Government in not filling the posts year-wise, the respondent cannot get a right to participate in the selection despite being over-aged.

7. In the light of the authoritative pronouncement of the Supreme Court as a fore noticed, we find no merit in the contentions of the counsel for the appellant. The appellant is not entitled to age relaxation as claimed by her.

24. Same view was taken by this court in the case of Dr. Pushpa Gupta and in the case of Mahesh Kumar (supra). In the light of the aforesaid judgments, petitioners cannot be held to be within age limit on the ground that no recruitment took place in previous 11 years. There is no provision under the Rules to treat a candidate eligible if he was otherwise within age limit in the years in which no recruitment took place.

25. So far as judgment in the case of Bansi Lal Jakhar (Dr.) Vs. State of Rajasthan and Another, is concerned, it is to be treated per incuriam in view of the judgment of the Apex Court in the case of Smt. Anand Kanwar (supra). So far as judgment in the case of Pitta Naveen Kumar (supra) is concerned, therein, the government itself granted age relaxation to the candidates which was then challenged before the court. The Apex Court held relaxation to be valid as Held of choice of the candidates was increased. The issue, therein, was not for grant of age relaxation or to treat a candidate within age if no recruitment took place in the previous years. The aforesaid judgment is thus distinguishable than decided by the Apex Court in the case of Smt. Anand Kanwar (supra). Same is the position in regard to the judgment of the Apex Court in the case of State of M.P. and Others Vs. Sanjay Kumar Pathak and Others, . Thus, none of the judgments referred by learned counsel for petitioners support their contentions other than the judgment in the case of Prakash Chand, reported in 1990 (2) RLW 1, but, looking to the subsequent judgment of the Apex Court in the case of Smt. Anand Kanwar (supra) and as considered by Division Bench of this court in the case of Shashi Kala Dadhich, it does not hold field. The First question is accordingly answered in negative holding that a candidate cannot be treated within age

merely for the reason that in previous years no recruitment took place and he was within age in those years.

26. The question now comes in reference to the Notification dated 23.9.2008. It is contended that though advertisement was issued in the month of July, 2008, giving out last date of submission of application forms by 20.8.2008, which is prior to the notification dated 23.9.2008 but the age of a candidate is to be determined as on 1.1.2009 thus aforesaid date is subsequent to the issuance of the notification granting three years' relaxation in age.

27. The aforesaid issue has been answered by this court in the case of Inder Bhan Singh Gujar (supra). In the aforesaid case, a candidate was required to be not less than 20 years and more than 23 years of age as on 1.1.1997. Petitioner, therein, completed age of 23 years in October, 1996 thus was treated as ineligible. The advertisement therein was issued on 23.1.1996 and, subsequently, vide notification dated 13.11.1996, two years' age relaxation was provided for the candidates belonging to OBC category. It was thus argued that age of the candidates to be determined as on 1.1.1997 hence notification should be applied to his case as it has been issued prior to the crucial date for determination of age i.e. 1.1.1997. Therein, even cut off date of 1.1.1997 was also challenged. The Division Bench of this court did not accept the aforesaid argument. For ready reference, relevant para of the aforesaid judgment is reproduced here as under-

In the appeal also, the contention of the learned counsel for the appellant is that the appellant was eligible and was not overage because the notification dated 13.11.1996 applied to his case. It was contended that since the notification was issued before cut off date for determining age of the candidates i.e. 1.1.1997, it should be made applicable to the appellant's case. It was also contended that the Rules providing for 1st January of the next year as the cut off date for determination of age was arbitrary and had no nexus with the purpose of selection. According to the learned counsel, the cut off date could be the date on which the advertisement was published or the last date for receipt of application forms.

Having heard learned counsel and having perused the record, we find no force in this appeal. Apart from the reasons given by the learned Single Judge in his order, we find that the writ petition could be thrown out on the sole ground of the appellant not coming to the court with clean hands. The appellant's conduct in applying for the post fully knowing that he was not eligible because of his having become overage, by itself was sufficient to deny any equitable or discretionary relief to him. When the appellant applied for the post, the notification relaxing the age for OBC candidates was not in existence. It came 7-8 months after the last date for submission of application forms and five months after the examination was held. Even the result of the examination was declared two months prior to the date of notification relaxing the age limit for OBC candidates. Granting relief to the appellant would be nothing else but rewarding him for his

audacity in applying for a post fully knowing that he had become over age for the post and was not eligible for making application. It will also set a bad example because a candidate who abides by the rules in force for the time being and respecting the rules does not apply when he knows that he is not eligible for the post and has become overage, would feel cheated and think that if he had also applied for the post, he could have taken advantage of notification subsequently issued relaxing the age limit. The responsible, self-disciplined and law abiding citizens would be put in a disadvantageous position and those who do not care for the rules and apply for a post knowing fully well that they are ineligible, would be in an advantageous position. Such a thing cannot be allowed to happen.

28. In the light of the judgment referred to aforesaid, contention of learned counsel for petitioners to treat them within age on the analogy that notification for age relaxation of three years was issued prior to the relevant date for determination of age. In fact, a prudent candidate may not have applied pursuant to the advertisement treating himself to be overage as nobody can expect that subsequent to the last date of submission of application forms, a notification would be issued granting relaxation in age thus acceptance of the plea of the petitioner, would result in discrimination as held by the Division Bench of this court in the case of Inder Bhan Singh Gujar (supra).

29. In view of the aforesaid, even second contention raised by learned counsel for petitioners cannot be accepted.

30. The issue now remains is as to whether petitioners can seek benefit of age relaxation from the State Government as it has power to relax the rules.

31. I have considered the matter and find that the State Government is having power to relax the rules in appropriate cases, thereby petitioners can make a representation to the State Government to extent benefit of age relaxation after making out a case, if such representation has not already been made by the petitioners.

32. It cannot be ignored that the recruitment in the present matter has taken place after 11 years and, during the intervening period, vacancies took place thus those who were within age limit corresponding to the year of vacancy have now become ineligible on account of delay in recruitment.

33. Looking to the aforesaid and other relevant factors, the matter may be considered by the government for relaxation in age. While considering representation of the petitioners, State Government may also keep in mind that they should try to get meritorious candidates so that they may get best talented persons in service.

34. Petitioners have already passed out the selection, though appeared therein pursuant to the interim order of this court. In the case of Abhishek Sharma & Ors. vs. State of Rajasthan & Anr., DB Special Appeal (Writ) No. 731/2007, decided on 22.5.2007, this court issued similar directions to the Government for

consideration of representation keeping in mind hardship of the appellant therein. That was also for grant of age relaxation under rule 46 applicable thereunder. This is more so when power to relax the age does not lie with the court but lies with the government only as held by the Apex Court in the case of E. Ramakrishnan and Others Vs. State of Kerala and Others, .

35. Similarly, the Apex Court in the case of Suraj Parkash Gupta and Others Vs. State of Jammu & Kashmir Others, also held that powers to relax the rules can be exercised by the government taking into consideration hardship of the candidates, after recording reasons.

36. In the case of Pitta Naveen Kumar and Others Vs. Raja Narasaiah Zangiti and Others, , the Apex Court did not interfere in the decision taken to relax (sic) age. Thus, it becomes clear that, absolute discretion lies with the government to relax the rules in regard to age in appropriate case. Same view has been expressed in other judgments also as cited by learned counsel for the petitioners.

37. Accordingly, respondents are directed to consider and decided the representation already made by the petitioners and, in that regard, petitioners are given further liberty to make an appropriate representation to the respondents within two weeks from today and, thereupon, same shall be considered by the government within a period of six weeks. The result thereof may be conveyed to the petitioners .If government takes a decision to relax the age, petitioners would obviously be entitled for the consequential benefits, if they stand in the merit. With the aforesaid, all these writ petitions so as the stay applications are disposed of.