
(2009) 09 AHC CK 0119
In the Allahabad High Court
Case No : Special Appeal No. 1299 of 2009

Ram Prakash

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 09-09-2009

Acts Referred:

Citation : (2009) 09 AHC CK 0119

Hon'ble Judges : Chandramauli Kumar Prasad, CJ and A.P.Sahi, J

Final Decision : Dismissed

Judgement

1. This Appeal has been filed against the judgment and order dated 16.7.2009 passed by the learned Single Judge in Civil Misc. Writ Petition No. 17433 of 2008, whereby in a matter pertaining to the appointment on the post of Shiksha Mitra, the claim of the petitioner has been rejected upholding the order of District Magistrate dated 15.2.2008.

2. The facts giving rise to this Appeal are that under the Government Order dated 10.10.2005, an advertisement was issued for appointment on the post of Shiksha Mitra at Village Kalauli Teer, District Hamirpur, and the petitioner applied on 11.11.2005 against the unreserved post indicated in the Advertisement. The Government Order dated 10.10.2005, a copy whereof is enclosed as Annexure 1 to the petition, makes provisions forgiving of weightage to certain categories of candidates. The petitioner appellant claimed weightage under the physically handicapped category as per Paragraph No. 1 Clause 9 of the said Government Order which states that a weightage of 10% shall be given to such candidates, on the average of the aggregate of the marks obtained in relation to the minimum educational qualifications prescribed under the Government Order. The petitioner was not selected and, as such, he filed a writ petition in this Court being Civil Misc. Writ Petition No. 28090 of 2007 wherein a direction was issued on 4.12.2007 directing the competent authority to decide the petitioner's representation in accordance with law. The petitioner, accordingly, represented the matter on 17.12.2007 and the same was rejected on 15.2.2008 by the

District Magistrate, Hamirpur.

3. The rejection order dated 15.2.2008 recites that the petitioner, upon being given the weightage, had obtained the 8th rank in merit and, therefore, he was not entitled for being selected. The average of the aggregate marks obtained by the petitioner, according to his educational qualifications, came to 49.31. This figure is not disputed by the petitioner. The District Magistrate added 10% of the aforesaid figure and upon such addition the marks of the petitioner came to be 54.24 which placed him at serial No. 8 in the merit list.

4. The petitioner assailed the aforesaid order in the writ petition which has given rise to the present Appeal. The learned single Judge, upon a consideration of the matter, came to the conclusion that the District Magistrate has neither made any mistake of calculation nor has he committed any error in law so as to declare the order impugned illegal. The Court also took the Government Order dated 24.4.2006 into consideration and thereafter dismissed the Writ Petition.

5. Sri Singh, holding brief of Sri PS. Tiwari, Advocate, for the appellant advanced his submissions urging that the Government Order dated 10.10.2005 has been clarified by the Government Order dated 24.4.2006 and under Clause 2 of the said Government Order an illustration has been given which clearly demonstrates that the weightage has to be given by adding 10 marks and not by adding 10% of the average of the aggregate of the marks obtained on the basis of the educational qualification. The said Government Order is on record as Annexure 2. He contends that the said Government Order is clarificatory in nature as there was some confusion appearing in the opening paragraph of the said Government Order and the same will relate back to the date of the issuance of the original Government Order dated 10.10.2005. He submits that the Government Order dated 24.4.2006 adds nothing new but only clarifies the intention of the authority, according to which 10 marks have to be added as weightage. On the strength of the said submission, he contends that the conclusion drawn by the District Magistrate and the affirmance thereof by the learned Single Judge are both erroneous.

6. Learned Standing Counsel Sri Ghanshyam Dwivedi contends that the Government Order dated 24.4.2006 cannot be given retrospective effect and he relies on the decision of *Km. Rita Yadav v. State of U.P. and others*, 2007 (2) ESC 788 (All) (DB), to contend that it has been held by the Division Bench that the Government Order dated 24.4.2006 is not retrospective in Operation. He further invited the attention of the Court to the Government Order dated 29.9.2008 which further clarifies the Government Order dated 24.4.2006 that the weightage has to be given by adding 10 marks.

7. In rejoinder, Sri Singh cited two Supreme Court decisions in the case of *WPILLtd., Ghaziabad v. Commissioner of Central Excise, Meerut, U.P.*, (2005) 3 SCC 73 and *Commissioner of Income Tax 1, Ahmedabad v. Gold Coin Health Food Private Limited*, (2008) 9 SCC 622, to urge that the Government Order dated

24.4.2006 is clarificatory in nature and in view of the law laid down In the aforesaid two decisions, there can be no doubt that the Government Order dated 24.4.2006 simply clarifies the earlier Government Order dated 10.10.2005 and does not introduce anything new.

8. Having heard learned counsel for the parties and having given our thoughtful consideration to the same, we find that the same argument had been advanced in the case of Km. Rita Vadav (*supra*) and the Division Bench ruled as under:

"10. In this connection, we must note that there is a recent judgment of the Apex Court in the case of Secrefary, A.P. Public Service Commission v. B. Swapna and others, 2005 (2) ESC 247 (SC), wherein the Apex Court has laid down that statutory rule is normally prospective unless it is expressly, or by necessary implication, made to have retrospective effect. There must be words in the Statute showing intention to affect existing right. If the rule is clear in its language then there is no difficulty. But if it is capable of two interpretation it ought to be considered as prospective. In the present case, we have gone through this circular issued on 24th April, 2006. It undoubtedly states to begin with that the Government Order dated 10th October, 2005 has led to some confusion with respect to the addition of the weightage that was provided thereunder. However, the Government clarificatory order does not say anything to provide that it will govern the selection made earlier or made from any particular date in the past. There is no indication in this subsequent circular that it is to act retrospectively. Inasmuch as there is no specific indication therein, as stated by the Apex Court, assuming that two interpretations are possible, the circular will have to be operated as prospectively."

9. A perusal of the aforesaid conclusion drawn by the Division Bench reflects that the Court was of the clear opinion that the Government Order dated 24.4.2006 would not apply to cases in which selections or appointments had been made earlier. The Court further held that if two views are possible then in that event keeping in view the decision of the Apex Court it would be appropriate to hold that the Government Order dated 24.4.2006 would not operate retrospectively.

10. We have carefully gone through the decision in the case of WPIL Ltd., Ghaziabad (*supra*) relied upon by the learned counsel for the appellant wherein certain items relating to waterpumps had not been exempted and a clarification to that effect was issued later on which was held by the Court that, the subsequent notification, merely clarified the position, and makes explicit what was implicit.

11. In the other decision of Commissioner of Income Tax¹, Ahmedabad (*supra*), the Supreme Court enunciated the law to be followed when such situations arise. Paragraph 8 of the said decision is quoted below for ready reference:

"8. It would be of some relevance to take note of what this Court said in Virtual case. Pointing out one of the important tests at para 51 it was observed that even if the statute does contain a statement to the effect that the amendment is

clarificatory or declaratory, that is not the end of the matter. The Court has to analyse the nature of the amendment to come to a conclusion whether it is in reality a clarificatory or declaratory provision. Therefore, the date from which the amendment is made operative does not conclusively decide the question. The Court has to examine the scheme of the statute prior to the amendment and subsequent to the amendment to determine whether amendment is clarificatory or substantive."

12. The aforesaid decision does not come to the aid of the petitionerappellant inasmuch as we find from a close scrutiny that the Government Order dated 10.10.2005 provided for a different mode of calculation of weightage which was to the effect that 10% of the average of the aggregate of the marks of the educational qualifications was to be added. The said Government Order nowhere indicates that 10 marks have to be added. On the other hand, the Government Order dated 24.4.2006 for the first time introduced a new method of calculation by addition of 10 marks that was explained through an illustration, instead of 10% of the average of the aggregate marks on the basis of educational qualifications.

13. Learned counsel for the appellant vehemently urged that the opening paragraph of the Government Order dated 24.4.2006 clearly stated that there was some confusion which was being clarified. We cannot accept the said submission inasmuch as what has been described as a confusion appears to be a misnomer inasmuch as there is an entire change of the method of calculation through the Government Order dated.24.4.2006. The new mode brings about a complete change in the prescription of weightage which did not exist before. The earlier Government Order dated 10.10.2005, as a matter of fact, did not suffer from any ambiguity so as to cause confusion. The method therein was to add 10% of the average of aggregate marks of a candidate and not 10 marks flat. It was neither obscure nor perplexing and was in short plain enough to be understood clearly.

14. Clarifications are issued for easing out and removing confusions. The Government Order dated 24.4.2006 at first flush, on a reading of the opening paragraph, does give an impression to that effect, but on a second thought upon a reading of the entire Government Order, it is more than evident that the same intends to introduce a fresh variety of arithmetical calculation without intending to apply the same retrospectively. It is, therefore, not a clarification in the sense of what has been urged on behalf of the petitioner and as has been explained by the Apex Court in the decision of WPIL Ltd., Ghaziabad (supra).

15. We may further clarify that the subsequent Government Order dated 29.9.2008 which has been placed before us by the learned Standing Counsel is a clarification of the Government Order dated 24.4.2006 and not of the Government Order dated 10.10.2005. It is, therefore, evident that the earlier Government Order dated 10.10.2005 was substantively amended by the Government Order dated 24.4.2006 by introducing a new method of calculation

and was not a clarificatory order at all.

16. We have given the aforesaid reasons, in addition to what has been laid down in Km. Rita Yadav's case, upon a careful assessment of the previous as well as later Government Orders keeping in view the law laid down by the Apex Court in the case of Commissioner of Income Tax I, Ahmedabad (supra) and the relevant Government Orders that have been placed before us. To our mind neither the District Magistrate nor the learned single Judge has committed any error in arriving at the conclusion drawn by them.

17. Accordingly, there is no merit in the Appeal and the Appeal stands dismissed. No order as to costs.