
(2003) 07 AHC CK 0158

In the Allahabad High Court

Case No : C.M.W.P. No's. 28012 and 28883 of 2003

Ram Swaroop Ahirwar and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 08-07-2003

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226, 309

Citation : (2003) 6 AWC 4753

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

Bench : Division Bench

Advocate : Ashok Khare and A.K. Singh, for the Appellant; Ratndeeep Misra, Neeral Tripathi, S.P. Kesarwani and S.C., for the Respondent

Final Decision : Dismissed

Judgement

B.S. Chauhan, J.—These writ petitions have been filed for seeking direction to the Respondents to consider the Petitioners for appointments as Ayurvedic Medical Officer in pursuance to the Advertisement No. 1 of 2003-04 (Annexure-6), issued by the U.P. Public Service Commission exempting the Petitioners from the upper age limit provided in the said Advertisement, or to grant relaxation in upper age limit for their consideration for the aforesaid post.

2. Facts and circumstances giving rise to the case are that an Advertisement dated 11.7.1996 was issued by the U.P. Public Service Commission inviting application for filling up 389 posts of Ayurvedic Medical Officers from amongst scheduled caste candidates for filling up the backlog of vacancies belonging to the said reserved category. Petitioners applied in pursuance of the said Advertisement and after completing selection in accordance with law their names were included in the select list published by the Commission on 9th June, 1997. However, no appointment letter could be issued to either of the successful candidates because of the interim order passed by this Court in Writ Petition No. 30542 of 1996, wherein the said Advertisement had been challenged as provided for 100% reservation for scheduled caste candidates. This Court vide judgment

and order dated 20.5.1998 quashed the said Advertisement while allowing the writ petition and further directed the re-advertise the said vacancies. Being aggrieved some of the successful candidates approached the Hon"ble Supreme Court by filing the SLP No. 14567 of 1998 Satish Kumar and Ors. v. State of U.P. and others, and the same was dismissed by the Hon"ble Apex Court by order dated 11.9.1998. The 81st Amendment Act, 2000 was passed on 9th June, 2000 inserting Clause 4B in Article 16 of the Constitution providing procedure for filling up the backlog of vacancies for reserved categories. Vide impugned Advertisement dated 21/27th June, 2003, 481 posts of Ayurvedic Medical Officers have been advertised only for the scheduled castes candidates and it included 389 vacancies advertised on 11.7.1996. However, Petitioners have become overage and are not eligible to apply against the said Advertisement. Hence these petitions.

3. Shri Ashok Khare, learned senior advocate appearing for the Petitioners has submitted that as the vacancies advertised vide impugned Advertisement includes the vacancies advertised earlier on 11.7.1996 and Petitioner had been declared successful candidates therein, it is by the judgments and orders of the Courts that they could not be issued appointment letters and during this period they have become overage, they cannot be deprived of their legitimate rights of being considered again against the vacancies advertised, particularly when the 81st Amendment of the Constitution had been brought to provide the procedure of filling up such vacancies. Recruitment in U.P. Government Services (Age Limit) Rules, 1972 and Recruitment by U.P. Public Service Commission (Relaxation of Age Limit) Rules, 1992 (hereinafter called Rules, 1972 and 1992) enable the Government to provide relaxation of age in individual case or for candidates of a particular category, the petition deserves to be allowed.

4. On the contrary, Shri S. P. Kesarwani, learned standing counsel appearing for the Respondents has submitted that the Division Bench of this Court while delivering the judgment dated 20.5.1998 quashed the Advertisement No. 1/96-97 and the said judgment has been affirmed by the Hon"ble Supreme Court dismissing the SLP vide order dated 11.9.1998 and neither this Court nor Hon"ble Apex Court made an observation in favour of the Petitioners that if the vacancies are re-advertised they may be given relaxation in age. Entertaining this petition would amount to reviewing the earlier judgment which is not permissible. More so, vacancies cannot be bifurcated year-wise and a candidate must possess the currently prescribed eligibility, including age etc. as on the last date of submitting the application forms as per the Advertisement Rules, 1972 and 1992 are not attracted in this case for the reason that the Rules under which the appointments are made, already have provided 5 years relaxation in age to the candidates belonging to scheduled caste. Petition is devoid of any merit and is liable to be dismissed.

5. We have considered the rival submissions made by the learned Counsel for the parties and perused the record.

6. The contention raised by Shri Ashok Khare, learned senior Advocate appearing for the Petitioners has been that because of the non-action of the State Government in not advertising the vacancies within reasonable time even after the order of the Hon''ble Supreme Court dated 11.9.1998 the Petitioners have become overage and have been deprived of their legitimate rights of being considered for the posts in question. Hence this Court must declare them eligible for the same or issue direction to the Respondents to grant relaxation in age.

7. The issue involved herein was considered by the Hon''ble Apex Court in J and K. Public Service Commission, etc. Vs. Dr. Narinder Mohan and others etc. etc., , wherein the Apex Court has observed as under:

"It is difficulty to accept the contention of Shri Rao to adopt the chain system of recruitment by notifying each year's vacancies and for recruitment of the candidates found eligible for the respective years. It would be fraught with grave consequences. It is settled law that the Government need not immediately notify vacancies as soon as they arose. It is open, as early as possible, to inform the vacancies existing or anticipated to the P.S.C. for recruitment and that every eligible person is entitled to apply for and to be considered of his claim for recruitment provided he satisfies the prescribed requisite qualifications. Pegging the recruitment in chain system would deprive all the eligible candidates as on date of inviting application for recruitment offending Articles 14 and 16."

8. In Union of India and Anr. v. Yogendra Singh, 1994 (Suppl.) 2 SCC 226, the Hon''ble Supreme Court has held that the applicant must possess the requisite qualification as per the advertisement, even if the vacancies have arisen prior to the date of the advertisement. In the said judgment the Hon''ble Apex Court has categorically held as under:

"No candidate who does not possess the currently prescribed qualification and he possess the qualification prescribed earlier, can be said to be qualified or have any vested right to appointment even against some earlier unfilled vacancies. Every candidate, who aspires to fill any vacancy, must possess the educational qualification that are then prescribed."

9. No candidate has a right to claim appointment as a matter of right though he has a right of being considered on the post being advertised for the reason that selection process gets initiated from the advertisement itself. Thus, the contention raised by the learned Counsel for Petitioner in this respect is rejected being preposterous.

10. Thus, in view of the above, the Advertisement cannot be held to be bad only on the ground that it does not provide for age relaxation if the examination has not been conducted immediately after the order passed by this Court.

11. It has been contended by Mr. Khare that in such an eventuality, this Court must fill up the gap and issue direction to consider such candidates to be eligible, and in the alternative, the Court must issue direction to the Respondents to grant

relaxation in age as per the Rules, 1972 and 1992. We are afraid, such contention is not acceptable for the reason that the Court has no power to issue any direction in contravention of the Statutory Rules. The Courts are meant to enforce the law, therefore, they cannot issue any direction to any Authority not to act in accordance with law.

12. The Court has no competence to issue a direction contrary to law. Vide Union of India and Another Vs. Kirloskar Pneumatic Company Limited, ; State of U. P. and others Vs. Harish Chandra and others, and Vice-Chancellor, University of Allahabad and Others Vs. Dr Anand Prakash Mishra and Others, .

13. In State of Punjab and others Vs. Renuka Singla and others, , dealing with a similar situation, the Hon"ble Apex Court observed as under:

"We fail to appreciate as to how the High Court or this Court can be generous or liberal in issuing such directions which in substance amount to directing the authorities concerned to violate their own statutory rules and regulations."

14. Similarly, in Karnataka State Road Transport Corporation Vs. Ashrafulla Khan and Others, , the Hon"ble Apex Court has held as under:

"The High Court under Article 226 of the Constitution is required to enforce rule of law and not pass order or direction which is contrary to what has been injected by law."

15. It is also settled legal proposition that neither the Court can legislate nor it can issue direction to the State Government to legislate a law in a particular manner. At the most, if the Court comes to the conclusion that a particular provision is ultra vires or unconstitutional, it can simply struck down the same, or in a particular case, write down a particular law to meet a particular situation. But these cases do not fall in that category.

16. In Union of India v. Deoki Nandan Aggarwal AIR 1992 SC 96, the Hon"ble Supreme Court observed as under:

"It is not the duty of the Court either to enlarge the scope of legislation or the intention of the Legislature when the nature of the provision is plain and unambiguous. The Court cannot re-write, re-cast or re-frame the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the Courts."

17. Moreso, the Court does not have the power to issue a direction to the Legislature to enact in a particular manner.

18. In Mallikarjuna Rao and Others Vs. State of Andhra Pradesh and Others, , the Hon"ble Apex Court has held that writ court, in exercise of its power under Article 226, has no power even indirectly to require the executive to exercise its law-making power. The Court observed that it is neither legal nor proper for the High Court to issue direction or advisory sermons to the executive in respect of the sphere which is exclusively within the domain of the executive under the

Constitution. The power under Article 309 of the Constitution to frame rules is the legislative power. This power under the Constitution has to be exercised by the President or the Governor of a State, as the case may be. The Courts cannot usurp the functions assigned to the executive under the Constitution and cannot even indirectly require the executive to exercise its law making power in any manner. The Courts cannot assume to itself a supervisory role over the rule-making power of the executive under Article 309 of the Constitution.

19. While deciding the said case, the Hon"ble Court placed reliance on a large number of judgments, particularly *Narinder Chand Hem Raj and Others Vs. Lt. Governor, Administrator, Union Territory, Himachal Pradesh and Others, and State of Himachal Pradesh Vs. A Parent of a Student of Medical College, Simla and Others, .*

20. In *Asif Hameed and others Vs. State of Jammu and Kashmir and Others, ,* the Hon"ble Apex Court observed as under:

"While doing so, the Court must remain within its self-imposed limits. The Court sits in judgment on the action of a co-ordinate branch of the Government. While exercising power of judicial review of administrative action, the Court is not an Appellate Authority. The Constitution does not permit the Court to direct or advise the Executive in matter of policy or to sermonize qua any matter which under the Constitution lies within the sphere of Legislature or Executive."

21. A Constitution Bench of the Supreme Court in *Afzal Ullah Vs. The State of Uttar Pradesh, ,* observed that validity of a subordinate legislation must be tested by reference to the question as to whether the authority had the power to provide for such a legislation. Thus, if the authority has the power of fixing the eligibility criteria, no fault can be found with the entry in the Schedule.

22. It is for the Government to prescribe the qualifications laying down the eligibility and Court cannot start probing the relevancy of the same. The Court cannot examine the wisdom, merit or efficacy of the policy of the Legislature to see whether it effectuates the purpose of the Act. Vide *Maharashtra State Board of Secondary and Higher Secondary Education and Another Vs. Paritosh Bhupeshkumar Sheth and Others, .*

23. In *V.K. Sood Vs. Secretary, Civil Aviation and others, ,* the Hon"ble Supreme Court observed as under:

"Thus, it would be clear that, in exercise of the rule-making power, the President or authorised person is entitled to prescribe method of recruitment, qualifications, both educational as well as technical, for appointment or conditions of service to an office or a post under the State. The Rules, thus, having been made in exercise of the powers under proviso (2) to Article 309 of the Constitution, being statutory cannot be impeached on the ground that authorities have prescribed tailor-made qualifications to suit the stated individual ... Suffice to state that it is settled law that no motives can be

attributed to the Legislature in making law. The Rules prescribe qualifications for eligibility and the suitability of Appellant would be tested by the Union Public Service Commission.... Moreover, it is for the rule-making authority or for the Legislature to regulate the method of recruitment, prescribe qualifications etc. It is open to the President or the authorised person to undertake such exercise and that necessary test should be conducted by the U.P.S.C. before giving certificates to them. It is not the province of the Court to trench into and prescribe qualifications in particular when matters are of technical nature."

24. In *District Mining Officer and Others Vs. Tata Iron and Steel Co. and Another*, , the Hon''ble Supreme Court held that function of the Court is only to expound the law and not to legislate.

25. Similarly in *Supreme Court Employees' Welfare Association and Others Vs. Union of India (UOI) and Another*, , the Hon''ble Supreme Court held that Court cannot direct the Legislature to enact a particular law for the reason that under the constitutional scheme the Parliament exercises sovereign power to enact law and no outside power or authority can issue a particular piece of legislation.

26. Similar view has been reiterated in *State of Jammu and Kashmir Vs. A.R. Zakki and others*, and *A.K. Roy and Others Vs. Union of India (UOI) and Others*, .

27. In *Union of India (UOI) Vs. Prakash P. Hinduja and Another*, , the Hon''ble Supreme Court held that if the Court issues a direction which amounts to legislation and is not complied with by the State, it cannot be held that the State has committed the Contempt of Court for the reason that the order passed by the Court was without jurisdiction and it has no competence to issue a direction amounting to legislation.

28. Thus, in view of the above, the Court has a very limited role and in exercise of that, it is not open to have judicial scrutiny regarding the qualifications/eligibility prescribed by the Rules. Neither the Court can legislate, nor it has any competence to issue directions to the Legislature to enact the law in a particular manner. Therefore, in view of the above, no such direction can be issued.

29. There is another aspect of the matter. This Court while allowing the petition earlier and quashing the Advertisement vide judgment and order dated 20.5.1998 did not issue a direction to grant relaxation to those who had been successful candidates in the earlier selection or for those who had been considered for the last selection. When the matter went before the Hon''ble Supreme Court Petitioners did not make any attempt to get such a direction. Issuing any direction providing the relaxation today would amount to reviewing the earlier judgment of this Court which is not permissible as the matter had been adjudicated upon before the Hon''ble Apex Court.

30. In *M/s. Kabari Pvt. Ltd. v. Sheo Nath Sharaff and others* AIR 1996 SC 742, the Court held that application for review cannot be entertained by a court if the party had approached a superior court.

31. Similar view has been reiterated by the Hon'ble Apex Court in *Gopabandhu Biswal Vs. Krishna Chandra Mohanty and Others*, ; *State of Maharashtra and another Vs. Prabhakar Bhikaji Ingle*, ; *Sree Narayana Dharmasanghom Trust Vs. Swami Prakasananda and Others*, ; *K. Ajit Babu v. Union of India and others*; *Raj Kumar Sharma v. Union of India*, (1995) 2 Scale 24 and *Abbai Maligai Partnership Firm and Another Vs. K. Santhakumaran and Others*, .

32. Thus, in view of the above, it is not permissible for this Court to review the earlier judgment of this Court or sit in appeal and over the same issue the directions sought by the Petitioners.

33. So far as the relaxation of age under the Rules, 1972 and 1992 is concerned, undisputedly there is already a relaxation of 5 years to the class as a whole, i.e., the candidates belonging to the scheduled castes. Asking the State to grant further relaxation would be unreasonable and being arbitrary may fall within the ambit of Article 14 of the Constitution for the reason that there may be a case where relaxation may be granted to different categories. For example, 5 years' relaxation in age for being a woman and 5 years' relaxation being in some other Government service. Therefore, the question does arise as to whether a female candidate can claim all the three benefits of relaxation and ask the authorities to permit her to face the selection process giving her relaxation of 15 years of age. Such a relaxation would be unwarranted and impermissible. As the Petitioners have already been granted five years' relaxation in age in general, it is difficult to be in agreement with them. Nor the State Government can be asked to grant further relaxation to them in such an eventuality.

34. To sum up, the Petitioners under the law are not found entitled for any further relaxation over and above of 5 years in age as provided in the Rules. Candidates are required to possess the currently prescribed qualification. In view of the fact that the Court cannot direct to legislate or act in contravention of law, no relief can be granted to the Petitioners.

35. Thus, in view of the above, we are of the opinion that petitions have no force and are accordingly dismissed. There shall be no order as to costs.