

(2016) 02 AHC CK 0085

In the Allahabad High Court

Case No : Writ-A Nos. 42941 and 35100 of 1999

Reena Kanaujia and Others

APPELLANT

Vs

Commissioner, Kanpur Division and Others

RESPONDENT

Date of Decision : 01-02-2016

Acts Referred:

Constitution of India, 1950 — Article 14, Article 16

Citation : (2016) 02 AHC CK 0085

Hon'ble Judges : Ashwani Kumar Mishra, J.

Bench : Single Bench

Advocate : A.C. Tiwari, A.K. Tewari, R.J. Sahai and S.K. Chaudhary, for the Appellant; C.S.C. and Pankaj Bhatia, for the Respondent

Final Decision : Dismissed

Judgement

Ashwani Kumar Mishra, J.—1. Both the writ petitions have been heard together and as the dispute involved is in respect of the same post, are being disposed of by this common judgment.

2. Writ Petition No. 35100 of 1999 has been filed by Sri Santosh Kumar, son of Sri Chhote Lal, challenging the order dated 27.7.1999, whereby notice has been given to petitioner for terminating his temporary appointment, in terms of the provisions contained under the U.P. Temporary Government Servants (Termination of Service) Rules, 1975, (hereinafter referred to as "the Rules of 1975"). Petitioner has further prayed that the respondents be restrained from interfering in the working of petitioner as Steno-Typist (Ashu-Lipik) and he be paid salary from month to month.

3. While entertaining the present writ petition, an interim order was granted by this Court on 19.8.1999 and petitioner asserts that in pursuance thereof he continues to work and various service benefits have already been granted to him.

4. Writ Petition No. 42941 of 1999 has been filed by Km. Reena Kanaujia, challenging the appointment of respondent No. 5 Santosh Kumar (petitioner in

writ petition No. 35100 of 1999) and a prayer has been made to direct the respondents to forthwith appoint her on the post of Steno-Typist in the department concerned.

5. Perusal of records of the two writ petitions reveal that Department of Public Works had issued an advertisement for appointment to various posts, including three post of Steno-Typist to be filled by scheduled caste candidates. The qualification prescribed for the post was intermediate with knowledge of Hindi Shorthand speed of 80 words per minute and Hindi Typing speed of 25 words per minute. This advertisement was published in Hindi newspaper "Dainik Jagran" in Kanpur Edition on 10.8.1998. The advertisement was issued in terms of the criteria prescribed in Public Works Department Clerical Establishment Niyamawali 1965, which was published vide notification dated 21.1.1965, providing therein that there should not be more than 5% mistake.

6. A total number of 23 candidates, including petitioners in both the writ petitions, participated in the test conducted on 25.2.1999. Petitioner Santosh Kumar's speed in Hindi Shorthand was 80 words per minute and he could type 20 words per minute in Hindi, whereas petitioner Km. Reena Kanaujia could take dictation of 80 words per minute in Hindi Shorthand and could type 34 words per minute in Hindi. In terms of the qualification prescribed in the advertisement dated 10.8.1998, petitioner Santosh Kumar failed to qualify the eligibility criteria prescribed in the advertisement for the post. The marks awarded to the candidates have been brought on record as Annexure CA-3 to the counter affidavit in Writ Petition No. 35100 of 1999. As per marks, in the combined list of scheduled caste and backward caste candidates, one Sri Vinod Kumar was placed at serial No. 4, in scheduled caste category, petitioner Km. Reena Kanaujia was placed at serial No. 5, Smt. Phoolmati was placed at serial No. 6, and Sri Santosh Kumar was placed thereafter at serial No. 7.

7. It appears that appointment letters were issued to Sri Vinod Kumar, Smt. Phoolmati and petitioner Sri Santosh Kumar by ignoring the claim of petitioner Km. Reena Kanaujia. A letter of appointment was also issued on 8.3.1999 to petitioner Santosh Kumar, though he was ineligible, and according to respondents, since he had not qualified the eligibility criteria, as such, he was rightly issued notice for termination on 27.7.1999. While entertaining the Writ Petition No. 35100 of 1999 of Sri Santosh Kumar, this Court noticed the contention of petitioner that his termination was not simpliciter and that the order of termination was stigmatic and having noticed such contention, the operation of the order of termination was stayed.

8. The State authorities have filed a counter affidavit in the Writ Petition No. 42941 of 1999, filed by Km. Reena Kanaujia, in which the result of the same date has been annexed, showing placement of petitioner Santosh Kumar at serial No. 4, Vinod Kumar at serial No. 5, Smt. Phoolmati at serial No. 6 and petitioner Km. Reena Kanaujia at serial No. 7. Annexure CA-1 to the counter affidavit contains a chart showing marks secured by the candidates in written examination

out of 150 marks and petitioner Santosh Kumar is shown to have secured 79 marks, whereas Vinod Kumar secured 72 marks, petitioner Km. Reena Kanaujia secured 72 marks and Smt. Phoolmati secured 60 marks. Respondents have not been able to disclose the basis for calculating the awarding of marks to the candidates, as it is not in terms of advertisement or the rules. In the score sheet annexed as Annexure CA-1 to the counter affidavit a weightage of 20% has been awarded in column No. 5, 30% on the basis of intermediate marks in column No. 6 and 10% marks for interview and 20% for shorthand/typing in column No. 9. This again is not in terms of the advertisement, which required possessing of qualification specified above and it is difficult to understand that a person, who had failed to qualify the eligibility criteria, could be placed at the top of the list, on the basis of marks awarded dehors the advertisement and the rules. It further appears from the record that a complaint was made by petitioner Km. Reena Kanaujia before the Chief Minister, upon which an enquiry was ordered. A report dated 29.4.1999 was submitted by the Additional Commissioner (Administration) stating that petitioner Santosh Kumar, bearing roll No. 16, has illegally been selected and appointed, as he has failed to clear the typing test. It was also stated that in case petitioner Santosh Kumar was not selected, petitioner Km. Reena Kanaujia would have been selected against the post filled with the appointment of Santosh Kumar. This report has also been forwarded by the Commissioner to the State Government vide his letter dated 30.4.1999. Thereafter, another enquiry report appears to have been submitted by the Chief Engineer on 18.11.1999. The conclusion drawn by the Chief Engineer in his report dated 18.11.1999 are somewhat unusual. Following passage from the enquiry report, which justifies the appointment of Santosh Kumar is extracted below:--

9. Although, it is admitted in the report that petitioner Santosh Kumar was not qualified to have been called for interview, yet, it is observed that this was a special and strange marginal case and the appointing authority has exercised its discretion, which was in terms of government order dated 9.6.1998, and such decision of the appointing authority was to be final. It appears that this report has subsequently been brought into effect and has been relied upon by the State in order to protect the appointment of petitioner Santosh Kumar, although in the previous enquiry report submitted it was categorically stated that petitioner Santosh Kumar was not found eligible in terms of the advertisement for being selected and appointed. The subsequent enquiry report also agrees on this aspect, but for reasons specified and extracted above, appointment of petitioner Santosh Kumar has been sustained by the State.

10. I have heard learned counsel for the petitioners in both the petitions and learned Standing Counsel for the respondent State and have perused the materials brought on record.

11. Learned counsel for the petitioner Santosh Kumar submits that the appointment of petitioner was validly made and under the interim order, he has

continued for a period of almost 16 years and various service benefits have been granted to him, as such, no interference with his working is liable to be made.

12. Per contra, learned counsel for the petitioner Km. Reena Kanaujia submits that Santosh Kumar was not eligible for being selected and appointed, as he had failed to qualify the eligibility criteria (typing test), as prescribed in the advertisement, and mere continuance of Santosh Kumar on the basis of an ex-parte interim order would not create any equity in his favour. Reliance has been placed upon the decisions of the Apex Court in the case of Dr. Arundhati Ajit Pargaonkar v. State of Maharashtra and others: , (1994) 3 Supp. SCC 380 and Purushottam v. Chairman, MSEB, and another: , (1999) 6 SCC 49.

13. It would be relevant to observe that selection for the post of Steno-Typist was required to be made pursuant to advertisement dated 10.8.1998, which admittedly was published in Hindi newspaper Dainik Jagran. The qualification required for appointment to the post was intermediate with speed of 80 words per minute in Hindi Shorthand and speed of 25 words per minute in Hindi Typing. The criteria laid down in the advertisement was in accordance with the notification dated 21.8.1965, referred to above. It is undisputed that in the examination conducted for the purposes petitioner Santosh Kumar had failed to qualify the eligibility criteria (typing test), inasmuch as he could type only 20 words per minute in Hindi, which was below the requirement of typing of 25 words per minute. It is further apparent that petitioner Km. Reena Kanaujia had not only been able to take dictation of 80 words per minute in Hindi Shorthand, but was able to type 34 words per minute in Hindi, and therefore, she had secured much better marks than Santosh Kumar, in terms of the criteria prescribed in the notification as well as in the advertisement. In the enquiry report submitted by the Additional Commissioner (Administration), it has categorically been recorded that Santosh Kumar had not qualified eligibility criteria (typing test), and as such, he could not be appointed and that Km. Reena Kanaujia on the basis of her performance was liable to be selected for appointment to the post. This finding returned in the enquiry report clearly stands corroborated from the materials available on record. The other enquiry report submitted by the Chief Engineer also records that Santosh Kumar could not be called for interview, as he had failed to qualify the typing test, but thereafter strange reasoning has been recorded by the enquiry officer to sustain the appointment of Santosh Kumar. The provisions in the government order dated 9.6.1998, that the decision of appointing authority would be final, could not be invoked to justify the appointment of Santosh Kumar, in view of the admitted position that he had failed to qualify the eligibility criteria (typing test), as prescribed in the advertisement. In case a person, who fails to qualify the eligibility criteria/test, is appointed and the candidate with higher merit is ignored, it would clearly offend Article 14 and 16 of the Constitution of India.

14. In view of the discussions and facts narrated above, I am of the opinion that on the basis of selection proceedings undertaken, pursuant to the advertisement,

petitioner Santosh Kumar had clearly failed to qualify the eligibility criteria (typing test) and his appointment was clearly illegal. In the opinion of the Court, Km. Reena Kanaujia, having qualified the test and having secured higher marks, was entitled to be appointed, as is clearly noticed in the report of the Additional Commissioner (Administration) dated 29.4.1999.

15. Although, it does appear that the termination of petitioner Santosh Kumar by invoking the provisions of the U.P. Temporary Government Servants (Termination of Service) Rules, 1975, was not justified, inasmuch as his appointment was against a substantive vacancy, pursuant to advertisement made, but as he had not qualified in the test, his appointment itself was a result of manipulation, and in case even for a wrong reason his services were dispensed with, this Court would not be inclined to interfere in the matter, as it would result in an illegality getting restored. I am further of the opinion that no equity is created in favour of petitioner Santosh Kumar on the strength of his continuance under the interim order of this Court for the last 16 years, as a person who has secured appointment even after having failed to qualify the eligibility criteria (typing test), as prescribed in the advertisement, is not liable to be protected by this Court in exercise of its equity jurisdiction. The Court is amused at the reasoning contained in the report of the Chief Engineer, whereby appointment of petitioner Santosh Kumar is sought to be protected even after noticing the fact that he was not entitled to be called for interview. However, no further comments against the Chief Engineer need be made, at this stage, as with passage of time the officer concerned may have retired by now. However, the report submitted by him to justify appointment of petitioner Santosh Kumar has to be discarded and no protection is liable to be granted on its basis. Hon'ble Supreme Court in *Purushottam* (supra) has been pleased to hold that right of a selected candidate cannot be taken away on the pretext that the post has already been filled by somebody else. Para 4 of the judgment in *Purushottam* (supra) is reproduced:--

"4. In view of the rival submission the question that arises for consideration is whether a duly-selected person for being appointed and illegally kept out of employment on account of untenable decision on the part of the employer, can be denied the said appointment on the ground that the panel has expired in the meantime. We find sufficient force in the contention of Mr. Deshpande appearing for the appellant inasmuch as there is no dispute that the appellant was duly selected and was entitled to be appointed to the post but for the illegal decision of the screening committee which decision in the meantime has been reversed by the High Court and that decision of the High Court has reached its finality. The right of the appellant to be appointed against the post to which he has been selected cannot be taken away on the pretext that the said panel has in the meantime expired and the post has already been filled up by somebody else. Usurpation of the post by somebody else is not on account of any defect on the part of the appellant, but on the erroneous decision of the employer himself. In that view of the matter, the appellant's right to be appointed to the post has been illegally taken away by the employer. We, therefore, set aside the impugned

order and judgment of the High Court and direct the Maharashtra State Electricity Board to appoint the appellant to the post for which he was duly selected within two months from today. We make it clear that appointment would be prospective in nature. "

16. Similarly, in Dr. Arundhati Ajit Pargaonkar (supra), the Hon''ble Supreme Court has been pleased to observe that continuation by a candidate on the strength of interim order would not confer any right. Para 8 of the said judgment is reproduced:--

"8. Even then, at one stage, the selection and appointment of the appellant by a duly constituted Board against a temporary post in accordance with rules against a permanent post and her continuance for nine years coupled with inaction of the Government to take any steps to fill the post through Commission thus preventing the appellant from availing of any opportunity for regular selection was bothering us. But when the Under Secretary in the Medical Department filed the additional affidavit on direction of this Court what transpired indicated that in fact the appellant has continued partly because of the circumstance that the regularly selected candidate did not join and partly due to interim orders granted by the courts. In the affidavit it is stated that advertisement for regular selection through Commission was issued by the Government on 13th January 1984 for the post of Lecturer in Dentistry. The appellant along with others applied for the same but it was one Dr. S.C. Bhoir who was selected and posted as Lecturer in B.J. Medical College, Pune. He, however, did not join due to certain unavoidable circumstances. The affidavit states that it was due to this reason that the appellant continued as temporary lecturer even when she was not selected by the commission. The appellant, therefore, cannot make any grievance that she was not afforded any opportunity to become regular through appointment by the Commission. And unfortunately for her when the post was advertised again in 1988 the eligibility criteria had changed under Maharashtra Medical and Research Services Class-II in Directorate of Medical and Research (Recruitment) Rules, 1986, yet she has continued till now on strength of interim Orders granted in her favour first from the High Court, continued by the Tribunal and then by this Court. The interim orders have already caused enough injury to the selected candidate. "

17. Law is settled that no right accrues in favour of a person, who is not validly selected and appointed, to continue merely because he has secured appointment contrary to law and has continued under the interim orders granted by a court of law.

18. For the reasons, aforesaid, the Writ Petition No. 35100 of 1999, filed by petitioner Santosh Kumar, is dismissed. The other Writ Petition No. 42941 of 1999, filed by petitioner Km. Reena Kanaujia, succeeds and is allowed. The selection and appointment of Sri Santosh Kumar, being backed by no valid selection and appointment, is set aside. The respondent No. 3 is directed to forthwith consider petitioner's claim for appointment on the post reserved for scheduled

caste candidate. However, in view of the observations made by the Hon''ble Supreme Court in the judgment in Purushottam (supra), the direction to appoint Km. Reena Kanaujia would only be prospective.

19. There shall, however, be no order as to costs.