

(2000) 11 AHC CK 0030

In the Allahabad High Court

Case No : C.M. Contempt Petition No's. 1686 of 1996 and 354 of 1997

Santosh Kumar Srivastava

APPELLANT

Vs

Managing Director, U.P. Rajkiya Nirman Nigam Ltd. and
others

RESPONDENT

Date of Decision : 03-11-2000

Acts Referred:

Contempt of Courts Act, 1971 — Section 12, 2

Citation : (2001) 1 AWC 681 : (2001) CriLJ 2054 : (2001) 3 RCR(Criminal)
368 : (2001) 1 UPLBEC 642

Hon'ble Judges : S. Rafat Alam, J

Bench : Single Bench

Advocate : K.M.L. Hajela and S.M.A. Kazmi, for the Appellant; Sunit Kumar and V.N. Sharma, for the Respondent

Final Decision : Dismissed

Judgement

S. Rafat Alam, J.—These are petitions u/s 12 of the Contempt of Court's Act for initiating contempt proceeding against the respondents for the alleged defiance of Division Bench judgment and order dated 24.5.1996 of this Court in Special Appeal No. 384 of 1993 and Writ Petition No. 16816 of 1993. Both the contempt petitions arise out of the common judgment and, therefore, they were heard together and are being disposed of by this judgment.

2. Heard Sri K. M. L. Hajela assisted by Sri S. M. A. Kazmi, learned counsel for the petitioner and Sri Sunit Kumar, learned counsel appearing for the respondents.

3. The short fact of the case giving rise to the contempt petition is the U. P. Rajkiya Nirman Nigam advertised 70 posts of Sub-Engineers (Civil) in the year 1988 inviting applications for appointment. The vacancy was subsequently increased from 70 to 146. The petitioners were diploma holders in civil engineering and being eligible applied in the prescribed proforma for selection and appointment. They also appeared in the written test as well as interview

conducted in the year 1989. However, when their results were not declared, the petitioner, Santosh Kumar Srivastava, filed Writ Petition No. 30071 of 1992 which was heard and allowed vide judgment and order dated 21.5.1993. The operative portion of the order is as under :

"For the reasons given in Writ Petition No. 5859 of 1991. Mahesh Kumar v. U. P. Rajkiya Nirman Nigam Ltd., Lucknow and another, the respondents are directed to declare the result of the petitioner within a period of two weeks from the date of filing of a certified copy of this order. In case the petitioner qualifies in the said examination, then a letter of appointment may be issued in his favour within a period of one month from the date of declaration of the result.

The writ petition is allowed.

There will be no order as to costs."

4. Rajkiya Nirman Nigam Limited filed Special Appeal No. 384 of 1993 for setting aside the above order of the learned single Judge. The Division Bench of this Court while hearing the special appeal also summoned Writ Petition No. 16816 of 1993 filed by Sri Rakesh Kumar Sharma and they were heard together and disposed of vide judgment and order dated 24.5.1996. The Division Bench in view of the settled legal position that no mandamus can be issued directing issuance of appointment order to the petitioner even if he is successful in the recruitment examination, and a selected candidate cannot claim appointment as a matter of right, quashed that part of the order of the learned single Judge whereby mandamus was issued for issuing the letter of appointment in favour of the petitioner. However, their Lordships directed the appellant Rajkiya Nirman Nigam Limited to declare the result of the recruitment examination within four weeks. It was further pointed out that if the petitioners are declared successful, they may be considered for appointment in accordance with law. The operative portion of the order of the Division Bench is as under:

"Accordingly, it is ordered that the respondents shall declare the result of the recruitment examination within four weeks from the date of production of a certified copy of the judgment and thereafter if the petitioners are found to be successful in the examination consider their cases for appointment in accordance with law keeping in view the vacancy position.

The special appeal and the writ petition are disposed of on the above terms. No costs."

5. Admittedly, the results have been declared pursuant to the order of the Division Bench in special appeal and petitioner Rakesh Kumar Sharma has been declared successful and he stands at Serial No. 62 in the merit list but the petitioner Santosh Kumar Srivastava could not qualify the examination.

6. It is argued by the learned counsel for the petitioner that the contemnor-opposite party has not considered the claim of appointment of petitioner Rakesh Kumar Sharma who was at Serial No. 62 of the successful candidate. It is also

contended that one Mahesh Kumar who also appeared in the interview and declared successful along with him has been given appointment and, therefore, the respondents cannot deny the appointment to the petitioner. Learned counsel also relying on two judgments of the Apex Court rendered in the case of Jatinder Kumar and Others Vs. State of Punjab and Others, and in the case of State of Bihar and others v. Secretariat Assistant Successful Examinees Union, 1986 and others AIR 1984 SC 736, sought to argue that once the petitioner has been declared successful, he has a right to be considered for appointment and, therefore, the respondents having refused to consider the claim of the petitioner for appointment has committed gross contempt of this Court.

7. On the other hand, the respondents--Nigam has filed affidavit stating that it is true that in the merit list, the name of the petitioner Rakesh Kumar Sharma finds place at Serial No. 62 but there is no vacancy in the Nirman Nigam for making fresh appointment. In the supplementary counter-affidavit, they have further stated that the result pursuant to the aforesaid interview was not declared earlier because of pendency of the Writ Petition No. 5686 of 1990 filed by Muster Roll Diploma Holders Engineering who were seeking their regularisation but after the judgment of this Court in Special Appeal, the result has been declared. It has also been averred that the financial position of the Nigam was not sound and it was found that there are surplus employees in Nigam and, therefore, manpower planning was done by the Nigam and a proposal was accordingly sent to the State Government which was subsequently approved. Prior to the manpower planning, the total posts of Sub-Engineers of all categories were 443 against which 304 regular Sub-Engineers and 177 on muster roll were working. Thus, against 443 posts of Sub-Engineers, 481 persons were working as Sub-Engineer. However, after man-planning, the sanctioned posts of Sub-Engineers were reduced from 443 to 330 as a result of which 168 Sub Engineers became surplus. Therefore, the State Government directed the Nigam not to make any appointment unless all the employees who have become surplus because of the manpower planning are regularised against the sanctioned posts.

8. In para 12 of the counter-affidavit, the Board has also given figure about their financial position and it has been submitted that the Nigam's financial position does not permit to make any fresh appointment. It has also been averred in para 14 of the counter-affidavit that the Nigam has considered the case of the selected candidates but for the reason that the surplus employees have to be adjusted, it is not possible to make fresh appointment from the selection held in the year 1988.

9. In short, the stand of the respondents for not giving appointment to the petitioners is, firstly : their poor financial condition, secondly ; reduction of sanctioned strength on account of man-power planning and thirdly ; the staff declared surplus on account of manpower planning is to be accommodated first.

10. Learned counsel for the petitioner vehemently contended that the Division Bench has made specific direction that if the petitioners are found to be

successful in the examination, the respondents shall consider their case for appointment in accordance with law keeping in view the vacancy position. Therefore, the respondents are duty bound to consider the claim of the petitioner for appointment.

11. In spite of my anxious consideration, I am not persuaded with the contention for the reason that the direction of this Court was two-fold, firstly to declare the result and secondly to consider their cases for appointment in accordance with law keeping in view the vacancy position. First part of direction has been complied with by declaring the result and, therefore, now the controversy centres round to the second part only. The second part of the order is clear and admits only one interpretation, that to consider them for appointment provided there is vacancy. The order of the Division Bench is "to consider their cases for appointment in accordance with law keeping in view the vacancy position". Therefore, in the absence of vacancy, they are not required to be considered. In other words, consideration of their claim for appointment in the event of their being declared successful, is dependent on the availability of the posts. Respondents in their counter-affidavit have disclosed the existing number of sanctioned posts of Sub-Engineers and the number of Sub-Engineers who are already working in the Nigam (Corporation). It appears that due to financial constraint, the Nigam with the approval of the State Government decided to down size their strength. Consequently, they reduced the posts of Sub-Engineers from 443 to 330. Therefore, the second part of the direction being dependent on the vacancy position, in the absence of any vacancy, was not possible to be carried out and therefore, in the facts and circumstances, it cannot be held that it amounts to deliberate defiance of this Court's order. Respondents have given detailed explanation in their affidavit, which, in my opinion, is convincing and sufficient.

12. It is settled legal position that a selected candidate has no right to the post and he cannot claim appointment as a matter of right but he is only entitled to be considered. In the case in hand, in view of the fact that there was no vacancy and the Nigam has decided not to make any appointment unless the surplus employees are adjusted against the vacancies, in my opinion, it could not be held that the respondents have wilfully flouted the order of this Court. The authorities cited by the learned counsel for the petitioner are also of no help as in the case of *Jatinder Kumar and others v. State of Punjab*, (supra), the Apex Court has held that a selected candidate has no right to be appointed which could be enforced by mandamus. Similar view was taken in the case of *State of Bihar v. Secretariat Assistant Successful Examinees Union*, (supra), wherein the Apex Court has quashed that part of the order of the High Court wherein mandamus was issued to make appointment.

13. During the course of submission, Mr. Hajela, learned counsel sought to argue that there was a clear direction of the Division Bench to consider the petitioner against the existing vacancy for appointment. I am afraid such interpretation, if

accepted, will amount to restore that part of the judgment of the learned single Judge which has been quashed by the Division Bench. The learned single Judge vide order dated 21.5.1992 directed the Nigam to declare the result of the petitioners within a period of two weeks from the date of filing of the certified copy of the order and in case, they have qualified, the letter of appointment may be issued in their favour within a period of one month from the date of publication of the result. The Division Bench, on appeal, by the Nigam quashed the second part of the order directing to appoint the petitioners in view of the settled legal position that such a direction could not be appropriately issued.

14. In a contempt proceeding, it is to be seen as to whether there is any wilful disobedience or not and if such wilful disobedience is found to be on account of compelling circumstances, the contemner may not be held liable for contempt.

15. In the case of Capt. Dushyant Somal Vs. Smt. Sushma Somal and Another, , the Hon"ble Supreme Court observed as under :

"Nor is a person to be punished for contempt of court for disobeying an order of Court except when the disobedience is established beyond reasonable doubt, the standard of proof being similar, even if not the same, as in a criminal proceeding. Where the person alleged to be in contempt is able to place before the Court sufficient material to conclude that it is impossible to obey the order, the Court will not be justified in punishing the alleged contemnor."

16. In the case of Niaz Mohammad and others v. State of Haryana and others 11994) 6 SCC 332, the Apex Court has observed as under:

"9. Section 2(b) of the Contempt of Courts Act, 1971 (hereinafter referred to as "the Act") defines "civil contempt" to mean "wilful disobedience to any judgment decree, direction, order, writ or other process of a Court...." Where the contempt consists in failure to comply with or carry out an order of a Court made in favour of a party, it is a civil contempt. The person or persons in whose favour such order or direction has been made can move the Court for initiating proceeding for contempt against the alleged contemner with a view to enforce the right flowing from the order or direction in question. But such a proceeding is not like an execution proceeding under Code of Civil Procedure. The party in whose favour an order has been passed, is entitled to the benefit of such order. The Court while considering the issue as to whether the alleged contemner should be punished for not having complied with and carried out the direction of the Court, has to take into consideration all facts and circumstances of a particular case. That is why the framers of the Act while defining civil contempt, have said that it must be wilful disobedience to any judgment, decree, direction, order, writ or other process of a Court. Before a contemner is punished for non-compliance of the direction of a Court, the Court must not only be satisfied about the disobedience of any judgment, decree, direction or writ but should also be satisfied that such disobedience was wilful and intentional. The civil court while executing a decree against the judgment-debtor is not concerned and bothered

whether the disobedience to any judgment, or decree, was wilful. Once a decree has been passed it is the duty of the Court to execute the decree whatever may be the consequence thereof. But while examining the grievance of the person who has invoked the jurisdiction of the Court to initiate the proceeding for contempt for disobedience of its order, before any such contemner is held guilty and punished, the Court has to record a finding that such disobedience was wilful and intentional. If from the circumstances of a particular case, brought to the notice of the Court, the Court is satisfied that although there has been a disobedience but such disobedience is the result of some compelling circumstances under which it was not possible for the contemner to comply with the order, the Court may not punish the alleged contemner."

17. Therefore, before holding guilty for the alleged defiance of the order, the Court is required to take into consideration all facts and circumstances of a particular case and has to be satisfied that such disobedience is wilful, deliberate and intentional before punishing the contemner under the Contempt of Courts Act. If, however, it is found that there is disobedience but such disobedience is on account of some compelling circumstances under which it is impossible for the contemner to comply with the order, the contemner may not be punished. In the case in hand, as noticed earlier, there was only direction to consider the petitioner for appointment in accordance with law keeping in view the vacancy position. In the absence of any vacancy, there is no occasion to consider the petitioner for appointment and, therefore, no part of the order of this Court can be said to have flouted by the respondent-contemner.

18. Having heard learned counsel for the parties at length and having regard to all the facts and circumstances of the case, in my opinion, there is no wilful disobedience on the part of the respondents by not considering their claim for appointment in view of the fact that no vacancy exists. In such a circumstance, it cannot be held that the respondents have wilfully disobeyed the order of this Court and as such liable to be punished for committing contempt of this Court.

19. For the discussions made above, the contempt petition is dismissed. The respondents are discharged from the rule. However, there will be no order as to costs.