

(2014) 09 AHC CK 0350

In the Allahabad High Court

Case No : Service Single Nos. 687, 740, 1084, 1192, 1221, 1435, 3400 and 3066 of 2014

Savita Verma

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 03-09-2014

Acts Referred:

Citation : (2014) 6 ALJ 718 : (2014) 4 UPLBEC 2714

Hon'ble Judges : B. Amit Sthalekar, J

Bench : Single Bench

Advocate : Anand Dubey, Ambey Prasad Tiwari, Vidhu Bhushan Kalia, Alok Kirti Mishra, A.K. Singh Somvanshi and Pratap Singh Mehra, Advocate for the Appellant; Brijesh Kumar Shukla, Sanjay Bhasin, Vinayak Saxena, Brijesh Kumar and Brijesh Kumar Sinha, Advocate for the Respondent

Final Decision : Allowed

Judgement

B. Amit Sthalekar, J.—Since in all the above cases common questions of law and fact are involved therefore, all the above petitions are being heard together and decided by this common order. W.P. No. 687(S/S) of 2014 is being treated as the leading case in which Shri S.K. Kalia, learned senior counsel assisted by Shri Vidhu Bhushan Kalia for the petitioner and the learned Addl. Chief Standing Counsel for the respondent no. 1 and Shri Sanjay Bhasin for the other respondents have been heard.

2. The petitioners are seeking quashing of the advertisement no. 1-49/2013-14 inviting applications for appointment to the post of Sister Grade-II in the pay scale of 9300-34800 in the Grade Pay of Rs. 4600 and the select list dated 23.1.2014.

3. Briefly stated, the contention of the petitioners is that earlier the respondent no. 4-Director, Sanjay Gandhi Post Graduate Institute of Medical Science, Lucknow (S.G.P.G.I. for short) had issued an advertisement no. 1-13/2013-14 for

recruitment of several posts including 361 posts of Sister Grade II. In pursuance of the said advertisement the petitioners submitted their applications for the post of Sister Grade II and the same were accepted by the S.G.P.G.I. and roll numbers were allotted to them. A written examination was conducted on 17th and 19th November, 2013 for a total of 435 vacancies of Sister Grade II and in the said written examination the petitioners were declared successful. Thereafter the petitioners were invited to appear in the Institute between 2.12.2013 to 31.12.2013 with their testimonials. In pursuance of the said instructions the petitioners appeared before the respondents with their testimonials and also submitted their documents for verification. It is also stated that they were informed that their appointment letters would be uploaded on the official website of the S.G.P.G.I. and thereafter they would be required to appear before the Medical Board for purposes of medical fitness certificate. However, instead of being called before the Medical Board another selection list dated 21.3.2014 of 361 candidates was issued in which the names of the petitioners did not find place. It is stated that when the petitioners made enquiries from the authorities they were orally informed that the advertisement was operated for only 361 vacancies and since the names of the petitioners did not fall within the 361 vacancies no appointment letter could be issued to them.

4. It is also alleged by the petitioner that there were serious anomalies with regard to a previous selection in which W.P. No. 10862(M/B) of 2013 was filed and in that writ petition it was admitted by the respondents that infact the advertisement no. 1-13/2013-14, 435 posts of Sister Grade II were advertised. These facts have been noted by the Division Bench of this Court in its order dated 22.11.2013.

5. The case of the petitioner further is that in the advertisement no. 1-13/2013-14 dated 27.11.2013 (Annexure-2 to the writ petition) it was mentioned therein that "number of posts may be increased/decreased depending upon the need of the Institution" and there is a categorical averment in paragraph 15 of the writ petition that although in the said advertisement it was mentioned that the post of Sister Grade II were 361 but infact the selection was held against 435 vacancies by increasing the number of posts by 74. The contention of the petitioners therefore is that when the selection was held for 435 vacancies, the result could not have been declared for only 361 posts and in any case the action of the respondents in declaring the result for only 361 posts and ignoring the petitioners who were shown to be selected candidates against the over all 435 posts was most illegal and arbitrary act of the respondents.

6. A counter affidavit has been filed by one Dr. Uttam Singh on behalf of the respondents no. 3, 4 and 5, namely, S.G.P.G.I. and in paragraph 4 thereof a chart has been mentioned showing that the total posts of Sister Grade II in the S.G.P.G.I. was 719 and the total vacancies were 435. Break up of the vacancies applying the reservation quota has also been mentioned in paragraph 4 of the counter affidavit. In paragraph 5 of the affidavit it has been stated that the State

Government by its order dated 25.2.2013 had accorded permission to fill up only 361 posts of Sister Grade II as against the 435 vacancies. In paragraph 8 of the counter affidavit it has been stated that the necessity of obtaining the approval of the State Government arose because there was a general ban imposed by the State Government against filling up of any post by fresh recruitment without its permission and it is only after the approval was granted by the State Government on 25.2.2013, that the advertisement no. 1-13/2013-14 was published for filling up the vacancies in 361 posts of Sister Grade II.

7. In paragraph 22 of the counter affidavit it is also stated that on 17.8.2013 a proposal was sent to the President/Chief Secretary of the State to fill up additional 74 vacant posts alongwith 361 posts which had been advertised in May, 2013 and the said proposal was accorded approval by the Chairman on 19.8.2013 but on 28.12.2013 a proposal was submitted by the Chief Medical Superintendent to the Director for advertising 74 posts for the reason of getting better meritorious candidates since selecting incumbents from lower down the merit list would result in appointment of less meritorious incumbents. A fresh selection would invariably result in better candidates getting appointed against 74 additional vacant posts. Consequently it was proposed to review the earlier decision and to issue the fresh advertisement. Paragraph 22 of the counter affidavit reads as under:

"22. That in the meanwhile on 17.8.2013 a proposal was sent to the President to fill up additional 74 vacant posts along with 361 posts, which had been advertised in May 2013. The said proposal was also approved by the President on 19.8.2013. However, on 28.12.2013 a proposal was submitted by the Chief Medical Superintendent to the Director for advertising 74 posts for the reason of getting better meritorious candidates since selecting incumbents from lower down the merit list would result in appointment of less meritorious incumbents. A fresh selection would invariably result in better candidates getting appointed against 74 additional vacant posts. Consequently it was proposed to review the earlier decision and to issue fresh advertisement."

8. In paragraph 23 of the counter affidavit it has been stated that the Director consented to the proposal on 28.12.2013 and forwarded the same to the President of the Institution and the President also accorded his approval to the proposal on 7.1.2014.

9. Shri S.K. Kalia, learned Senior Counsel submitted that the fact that there were 435 vacancies of the post of Sister Grade II have not been denied by the respondents and rather in the chart prepared by them in paragraph 4 of the counter affidavit the said fact is admitted. He further submits that even before the Division Bench of this Court in Writ Petition No. 10862(M/B) of 2013 (Brashtachar Mukht Bharat through Patron M.C. Srivastava [P.I.L.] Vs. The Chancellor Of The S.G.P.G.I., Lucknow & Others) it was admitted by the respondents that in the recruitment process of 2013 a written examination was conducted on 17th and 19th November, 2013 for 435 posts. The final result was

declared on 27.11.2013. The names of the petitioners occurred in the select list, copy of which has been filed as Annexure 5 and 6 to the writ petition. The averment in paragraph 10 of the writ petition have been vaguely denied in paragraph 42 of the counter affidavit which reads as under:

"42. That the contents of paragraph 10 of the writ petition are not admitted in the manner stated and as such denied. There is nothing to substantiate the assertion made by the petitioner regarding information of the nature stated in paragraph under reply as having been provided to them."

10. It is also submitted that the petitioners have completed all the formalities and yet instead of issuing appointment letters to the petitioners the impugned advertisement was issued on 5.1.2014 by the respondents for 74 vacant posts with the last date for submitting applications being 7.2.2014.

11. Shri S.K. Kalia further submitted that even after admitting the vacancy position being 435 in paragraph 4 of the counter affidavit and also before the High Court in W.P. No. 10862(M/B) of 2013, the respondents in paragraph 22 of the counter affidavit have gone on to state that on 17.8.2013 a proposal was sent to the President/Chief Secretary of the State to fill up additional 74 vacancies along within 361 posts which had been advertised in May 2013 and for which approval was granted by the President on 19.8.2013 and therefore in the circumstances once the approval was granted and the selection had already been made by the respondents the result should have been declared for 435 vacancies instead of confining it only to 361 vacancies and thereafter arbitrarily issuing a fresh advertisement for 74 additional vacancies.

12. Shri Sanjay Bhasin, learned counsel for the respondents-S.G.P.G.I. however submitted that the advertisement no. 1-13/2013-14 was issued for filling up 361 vacancies of the post of Sister Grade II and not for 435 vacancies. He further submitted that although approval was sought from the State Government i.e. President/Chief Secretary of the State to fill up additional 74 posts through official communication dated 17.8.2013 but approval was granted by the President on 19.8.2013 and therefore 74 vacant posts were advertised by the impugned advertisement. He further sought to justify the fresh proposal for filling up 74 vacancies by advert to the averments in paragraph 22 of the counter affidavit and submitted that by inviting fresh applications more meritorious candidates were likely to be available then if the selection had been conducted for 435 vacancies. He has also referred to the resolution of the Governing Body of the S.G.P.G.I. dated 24.9.2011 and submitted that the resolution also stipulated that where ever vacant posts exist then based on need, advertisement will be made on the recommendation of the concerned department/establishment with due approval of the appointing authority. He therefore sought to submit that there was nothing arbitrary in issuing the advertisement for 74 additional vacancies, since it was open for the respondents to break up the vacancy position and hold a selection for 361 vacancies initially and thereafter through the second impugned advertisement to hold selection for

the remaining 74 vacancies so that more meritorious candidate may become available. He further submitted that the petitioners had never challenged the advertisement no. 1-13/2013-14 by which 361 posts of Sister Grade II had been advertised and therefore it was not open for them now to contend that they should be treated as having been selected against the total of 435 vacancies rather than having to apply afresh against the 74 additional vacancies advertised through the impugned advertisement.

13. Rebutting the submission of Shri Sanjay Bhasin, Shri S.K. Kalia, learned senior counsel submitted that since there were 435 vacancies of the post of Sister Grade II, there was no valid reason for the respondents to issue a fresh advertisement for 74 additional vacancies and in fact the result should have been declared for all 435 vacancies and in any case the approval for operating the 74 vacancies was granted by the President/Chief Secretary on 19.8.2013 long before the written examination was held on 17th and 19th November, 2013 and before the declaration of the final result, which was declared on 27.11.2013. It is further submitted that the entire action of the respondents was absolutely illegal and arbitrary. Therefore, the fresh advertisement impugned in the writ petition deserves to be quashed.

14. Sri Sanjay Bhasin has placed reliance upon a Constitution Bench decision of the Supreme Court in the case of Shankarsan Dash Vs. Union of India, and has submitted that even if it is assumed that the petitioners had been selected in the examination conducted for the post of Sister Grade-II, mere selection would not confer any right upon them to file the present writ petition claiming a right to be appointed in pursuance of the said selection. He further adverted to para 22 of his counter affidavit and submitted that a fresh advertisement for the remaining 74 vacancies was issued only so that more meritorious candidates may be available. Reliance has further been placed by Sri Sanjay Bhasin on the judgment of the Supreme Court in the case of State of U.P. and Others Vs. Rajkumar Sharma and Others, wherein the Supreme Court has referred to its earlier decision in the case of Shankarsan Dash (supra) and held that selectees cannot claim appointment as a matter of right and that mere inclusion of a candidate's name in the select list does not confer any right to be selected, even if some of the vacancies remained unfilled.

15. He has also placed reliance upon a decision of the Supreme Court in the case of Arup Das and Others Vs. State of Assam and Others, in which the Supreme Court has reiterated its earlier observations made in the case of Rajkumar Sharma (supra).

16. Sri S.K. Kalia, learned Senior Counsel has also referred to the judgment of Shankarsan Dash (supra) and has submitted that there is no quarrel so far as the legal proposition settled by the Supreme Court that the selected candidate has no right to claim appointment as a matter of right is concerned. However, he has referred to para-7 of the said judgment and submitted that although the State is under no legal duty to fill up all or any of the vacancies, but it does not

mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide and for appropriate reasons.

17. Para-7 of the judgment in the case of Shankarsan Dash (supra) reads as follows:-

"7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of Haryana V. Subhash Chander Marwaha, Neelima Shangla V. State of Haryana or Jatendra Kumar v. State of Punjab."

18. In para-8 of the judgment in Shankarsan Dash (supra) the Supreme Court has held as follows:-

"..... in this background it was observed that it is, of course, open to the government not to fill up all the vacancies for a valid reason, but the selection cannot be arbitrarily restricted to a few candidates notwithstanding the number of vacancies and the availability of qualified candidates; and, there must be a conscious application of mind by the government and the High Court before the number of persons selected for appointment is restricted..... ". The Supreme Court in this paragraph considered the judgment of Miss Neelima Shangla, Ph. D. Candidate Vs. State of Haryana and Others,

19. In Arup Das (supra) the Supreme Court considered its judgment in the case of Prem Singh and Others Vs. Haryana State Electricity Board and Others, of the judgment of Arup Das (supra) reads as follow:-

"22. The latter portion of para 25 of the said decision in Prem Singh case deals with a situation where posts in excess of those advertised had been filled up in extraordinary circumstances. In such a case it was observed that instead of invalidating the excess appointments, the relief could be moulded in such a manner so as to strike a just balance, if it is in the interest of the State and in the interest of the person seeking public employment, to the facts of such case. The facts of that case are different from the facts of the instant case, in that no extraordinary and/or exceptional circumstances exist in the present case requiring the filling up of the vacant seats available after filling up the 160 seats

advertised. The decision in Prem Singh case has to be read in such a context and cannot be said to be the rule, but rather the exception."

20. In the case of Arup Das (*supra*) it is to be noted that 62 posts had been advertised by the Haryana State Electricity Board but the appointments were made on 138 posts. The Supreme Court has noted that the selection process was started for 62 clear vacancies and at that time anticipated vacancies were not taken into account and, therefore, it held that the Board was not justified in making more than 62 appointments pursuant to the advertisement published on 2.11.1991 but the Board could have taken into account not only actual vacancies but also vacancies which were likely to arise because of retirement etc. by the time the selection process was completed it would not be just and equitable to invalidate all the appointments made on posts in excess of 62. The Supreme Court, however, held that the appointments which were made against future vacancies-in this case on posts which were newly created-must be regarded as invalid.

21. The judgment in the case of Arup Das (*supra*), in my opinion, does not help the case of the respondents rather it is in favour of the petitioners.

22. Learned counsel for the petitioners next submitted that the advertisement No. 1-13/2013-14 in which 361 posts of Sister Grade-II had been advertised itself mentioned that the number of posts may be increased/decreased depending upon the need of the Institute.

23. Sri S.K. Kalia, learned senior counsel submitted that on the date when 361 posts were advertised, 435 vacant posts of Sister Grade-II already existed and this fact is not only admitted by the respondents in the chart submitted by them in paragraph-4 of the counter affidavit but was also stated by them before the Division Bench of the High Court in Writ Petition no. 10862 of 2013 and has been noted by the Court in its order dated 22.11.2013 in that writ petition. Even if it is assumed that these vacancies were noticed subsequently due to variation his case would be fortified by the observations made by the Supreme Court in (2002) 10 SCC 269, *Suvidya Yadav vs. State of Haryana and others* wherein the number of vacancies published by the Haryana Public Service Commission for the post of Principal in the Higher Education Service Class-II was shown as 18 and it was stated in the said advertisement that the number of posts would be subject to variation to any extent. The Haryana Government Education Department made a fresh requisition to the Secretary Haryana Public Service Commission indicating that the number of vacancies as were available in 1991 was more than 18 and the Haryana Public Service Commission ultimately by its letter dated 1.10.1993 recommended the names of 30 persons for the post of Principal. The Supreme Court, therefore, held that on the date of recommendation made by the Public Service Commission on 1.10.93, the Government's requisition was for more than 18 posts (in fact 37) and therefore, there was no illegality in recommending 30 names and therefore all the 30 names recommended were entitled to be appointed.

24. Thus two points which emerge from the above discussion are that even on the date when the first advertisement no. 1-13/2013-14 for 361 vacant posts of Sister Grade-II was published, there actually existed 435 vacancies and it was not a case where 74 vacancies came into existence after the said advertisement had been issued. Moreover even before the written examination was held on 17th and 19th November, 2013 and the final result of the said selection was declared on 27.11.2013, the President/Chief Secretary on 19.8.2013 had granted its approval for filling up the remaining 74 vacancies and, therefore, there was absolutely no justifiable or valid cause for the respondents to have advertised the 74 vacancies. Therefore, a fresh advertisement (impugned advertisement) on the specious ground that more meritorious candidates would be available was not only thoroughly misconceived but wholly arbitrary and discriminatory, viz-a-viz the petitioners.

25. The second aspect of the matter is that the advertisement No. 1-13/2013-14 had itself contemplated that the number of posts may be increased/decreased depending upon the need of the Institute and the need of the Institution was demonstrated by the respondents themselves when they made a request for grant of approval for filling up 74 remaining existing vacancies, which was ultimately granted on 19.8.2013. Therefore, it could not be said that if the 74 existing vacancies were to be filled up from the candidates (i.e. the petitioners) who had applied against the initial advertisement no. 1-13/2013-14, the same would have been in violation of the Resolution of the Governing Body dated 24.9.2011.

26. The preliminary objection of the learned counsel for the respondents that the petitioners were merely selected candidates and, therefore, had no right to claim appointment in view of the law laid down by the Supreme Court in the case of Shankarsan Dash (*supra*) must necessarily be rejected inasmuch as in the same judgment the Supreme Court has held that though it was open for the Government to operate or not to operate the vacancies but it did not mean that the State had the licence of acting in an arbitrary manner and in fact the decision not to fill up the vacancies had to be taken bona fide for appropriate reasons. In the present case it was not a case where a decision had been taken by the State not to fill up the remaining 74 existing vacancies. Rather these 74 existing vacancies were treated to be fresh vacancies and advertised on the specious ground that more meritorious candidates would become available and it is in this view of the matter that the action of the respondents in publishing the Advertisement no. 1-49/2013-14 and the select list dated 23.1.2014 are wholly illegal and arbitrary and unsustainable in law.

27. Thus on a conspectus of facts and the law laid down by the Supreme Court the impugned Advertisement no. 1-49/2013-14 and the select list dated 23.1.2014 cannot survive and are accordingly quashed and the above writ petitions are allowed. A direction is issued to the respondents to consider the petitioners for appointment against the total of 435 vacancies for the post of

Sister Grade-II. This exercise shall be completed by the respondents within a period of one month from the date of receipt of a certified copy of this order.

28. There shall be no order as to costs.