

(2012) 06 UK CK 0070

In the Uttarakhand High Court

Case No : Writ Petition No. 253 of 2012 (S/S)

Smt. Ritu Agarwal

APPELLANT

Vs

State of Uttarakhand and three Others

RESPONDENT

Date of Decision : 19-06-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 16(1)

Citation : (2013) 2 UC 1101

Hon'ble Judges : Tarun Agarwala, J

Bench : Single Bench

Judgement

Tarun Agarwala, J.—Heard Sri Sanjay Bhatt, learned counsel for the petitioner, Sri N.S. Pundir, learned Brief Holder for the State and Sri Rajendra Dobhal, learned Senior Counsel assisted by Sri G.D. Joshi, learned counsel for respondent No. 4. The Court has also heard Sri Sharad Sharma, learned Senior Counsel, who was requested to assist the Court. The Director, Treasury and Finance Services, Government of Uttarakhand, issued an advertisement, inviting applications from eligible candidates for appointment on the post of Assistant Accountant in all the government treasuries/sub-treasuries in the State of Uttarakhand. The total number of posts advertised were 175 and it was mentioned in the advertisement that the posts could be increased or decreased on or before the declaration of the result. The advertisement indicated that 9 posts were advertised for District Udham Singh Nagar, out of which 7 posts were for general category. The advertisement indicated that reservation would be given to eligible candidates as per the reservation policy issued by the State Government and that the horizontal reservation would also be applicable to Uttarakhand Women to the extent of 30%.

2. The petitioner, being eligible as a woman candidate in the general category, applied for the post of Assistant Accountant from Udham Singh Nagar, under the quota prescribed for Uttarakhand Women. The petitioner appeared in the written examination and qualified, which was published in the newspaper on 21st April,

2011. The petitioner was shown at serial No. 16 of the merit list. On 10th June, 2011, the petitioner was intimated that she was required to appear in the computer test. The petitioner appeared and qualified again in the computer test. A final merit list was prepared in which 4 male and 1 woman candidate were selected September, 2011 from the Office of the Chief Treasury Officer, Udham Singh Nagar, intimating the petitioner that 7 posts are vacant in the said Office and that 1 post was reserved for general category woman. The petitioner being aggrieved by the reduction of the vacancies and reserving only 1 seat in the woman category, approached this court, praying that a writ of mandamus be issued commanding the respondents to allocate 2 posts for women candidates from the general category posts and accordingly rectify the final select list, and the petitioner was kept in the waiting list under the general women category. The petitioner moved an application seeking information regarding status of the vacancies in Udham Singh Nagar and was informed by the Chief Treasury Officer, Udham Singh Nagar that there are only 5 posts for general category candidates, out of which 1 post was reserved for a woman candidate. Subsequently, the petitioner received a communication dated 29th.

3. According to the petitioner, she obtained 140.75 marks and another candidate Surjit Kaur received 141.50 marks. According to the petitioner, the advertisement clearly indicated that the vacancies could increase or decrease on or before the declaration of the result and in no case the vacancies could be altered after the declaration of the result.

4. The learned counsel contended that the results were declared on 21st April, 2011 whereas the decision to reduce the seats was taken after a review meeting was held by the respondents on 12th July, 2011. The learned counsel submitted that the action of the respondents in reducing the seats was wholly arbitrary and against the clear terms mentioned in the advertisement. It was contended that the vacancies so mentioned in the advertisement cannot be altered under any circumstances and the words "that the seats could be increased or decreased" was redundant. The learned counsel further contended that if 7 posts are taken into consideration, 30% quota for women works out to 2.1 and if 5 posts are taken into consideration for the general category, 30% reservation for women would come out to 1.5. The learned counsel contended that in either of the two cases whether it is 2.1 or 1.5, the total number of seats reserved for the women quota would work out to 2. In this regard, the learned counsel placed reliance upon a decision of the Supreme Court, *State of U.P. and Another Vs. Pawan Kumar Tiwari and Others*, , and a decision of the Division Bench of this Court, *Vinod Kumar Burman Vs. Uttarakhand Public Service Commission and Others*, .

5. The respondents have filed a counter affidavit. In paragraph-5 of the counter affidavit, it has been admitted that the advertisement clearly mentioned that the number of advertised posts could be increased or decreased till the declaration of the result and that at the time of the issuance of the advertisement the total number of posts advertised for Udham Singh Nagar were 9, out of which 7 posts

were for general category. In paragraph-6, it has been stated that after the review meeting was held on 12th July, 2011, in respect of Udham Singh Nagar, the total number of vacant posts were reduced from 9 to 7, out of which 5 posts were notified for general category, 1 post for scheduled caste and 1 post for scheduled tribe category. It was also stated that out of the 5 posts of general category, 1 post was notified for general category woman candidate. The respondents contended that 30% of 5 posts comes to 1.5 which was rounded off as 1 post and, therefore, for Udham Singh Nagar 1 post was rightly notified for general category woman candidate.

6. In paragraph-6 of the writ petition, the petitioner categorically contended that the results were declared on 21st April, 2011 which is admitted by the respondents in paragraph-10 of the counter affidavit. In paragraph-13 of the writ petition, the petitioner further contended that under the same advertisement for District Tehri Garhwal, out of 5 general category posts, 2 posts have been allotted to the women candidates on the basis of 30% reservation. This categorical averment is again admitted by the respondents in paragraph 15 of their counter affidavit.

7. In the light of the aforesaid, it is apparently clear that the respondents have taken a contradictory stand for Udham Singh Nagar. The respondents contend that for 5 posts 30% reservation comes to 1.5 and accordingly it was rounded off as 1 post and therefore 1 post was rightly allotted for a woman candidate for Udham Singh Nagar but on the other hand the respondents admit that they have allotted 2 posts for women candidate out of 5 posts in the general category for District Tehri Garhwal.

8. In the light of the aforesaid, the moot question which the Court is required to decide is whether the respondents were justified in reducing the number of vacancies advertised, from 9 to 7, after the declaration of the results, and whether 30% of 5 posts would be 1 post or 2 posts for women candidate.

9. At the outset, the practice of advertising the words "posts can be increased or decreased" is deprecated. Such practice gives a tool in the hands of the respondents to manipulate the vacancies, on their whims and fancies, which is not permissible.

10. One finds that invariably whenever an advertisement is made inviting applications to fill up a certain post or posts, a clause is always inserted in the advertisement that the number of vacancies could increase or decrease. This is being done mechanically and without any application of mind and thereby making a mockery of the recruitment process.

11. At the outset, it may be stated that filling up of vacancies is made in accordance with the procedure prescribed under the Act, Rules or Regulations. If there are no Rules or Regulations governing the procedure for filling up vacancies, government orders are issued for this purpose. The employers are thus not remediless but are governed by certain sets of Rules, Regulations and

Government Orders describing the procedure to fill up the vacancies.

12. In the present case, 175 vacancies were advertised. It is quite obvious that the respondents had undertaken an exercise in determining the number of vacancies and it only after identifying the vacancies that the posts were advertised. It is therefore clear that before an advertisement is made, it is preceded by an exercise of calculating the number of vacancies.

13. When an advertisement is made, it discloses the number of vacancies and consequently the number of candidates to be recruited. The advertisement therefore will include such number of vacancies which are available in accordance with the calculation made.

14. The recruitment therefore is required to be made in accordance with the number of vacancies shown in the advertisement. Consequently, the recital in the advertisement that the vacancies are likely to increase or decrease has to be strictly construed. It also follows that the employers are not at liberty to change the number of vacancies advertised on their whims and fancies.

15. The use of words in the advertisement that the number of vacancy may increase or decrease has been a subject-matter of consideration in various decisions. The law on this issue can be summed up that at the time of advertising the vacancy, the authority may take into account the existing vacancies alongwith vacancies likely to occur because of retirement and no other vacancy which may occur because of death, promotion, compulsory retirement, voluntary retirement, removal or dismissal. The vacancies over and above the number of vacancies advertised cannot be filled up as it would violate the fundamental right of those candidates who have become eligible subsequent to the date of advertisement. Any appointment made over and above the vacancies so advertised would be de hors the rules, thus, unenforceable and inexecutable. Even if the vacancies have wrongly been determined it does not give any cause of action to any person to challenge the same.

16. In *State of Orissa and Another Vs. Rajkishore Nanda and Others etc. etc.*, , the Supreme Court held:

It is a settled legal proposition that vacancies cannot be filled up over and above the number of vacancies advertised as "the recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Article 14 read with Article 16(1) of the Constitution", of those persons who acquired eligibility for the post in question in accordance with the statutory rules subsequent to the date of notification of vacancies. Filling up the vacancies over the notified vacancies is neither permissible nor desirable, for the reason, that it amounts to "improper exercise of power and only in a rare and exceptional circumstance and in emergent situation, such a rule can be deviated and such a deviation is permissible only after adopting policy decision based on some rational", otherwise the exercise would be arbitrary. Filling up of vacancies over the notified vacancies amounts to filling up of future vacancies and thus, not

permissible in law. (Vide State of Bihar and Others Vs. Secretariat Assistant Successful Examinees Union 1986 and Others, ; Prem Singh and Others Vs. Haryana State Electricity Board and Others, ; Ashok Kumar and Others Vs. Chairman, Banking Service Recruitment Board and Others, ; Surinder Singh and Others Vs. State of Punjab and Another, ; and Rakhi Ray and Others Vs. The High Court of Delhi and Others, .

17. Similar view was reiterated by the Supreme Court in Arup Das and Others Vs. State of Assam and Others, .

18. In the light of the aforesaid, it is clear that it would be an improper exercise of power to make appointments over and above those advertised. It is only in rare and exceptional circumstances and in emergent situation that this rule can be deviated from. The words "posts can be increased or decreased" can only be utilized as stated aforesaid, i.e., only in rare and exceptional circumstances and in emergent situation.

19. In the present case, the respondents have not indicated in their counter affidavit that the exercise of decreasing the posts was done in rare and exceptional circumstances or in emergent situation nor have they brought on record that it was permissible for the respondents to increase or decrease the number of seats as per their Rules and Regulations applicable. In the absence of the aforesaid, the Court is of the opinion that the exercise made by the respondents in reducing the seats was wholly arbitrary, coupled with the fact that the seats were reduced after the declaration of the results.

20. As has been stated earlier, the advertisement has to be strictly construed. The advertisement clearly indicated that the posts could be increased or decreased till the declaration of the results. It was therefore incumbent upon the respondents to ensure that the exercise of increasing or decreasing the seats could only be done on or before the declaration of the results and under no circumstances could such an exercise be done after the declaration of the results. The reason is that once the result is declared, a legitimate expectation arises to that candidate who has qualified in the written examination.

21. In the present case, the advertisement indicated that the posts can be increased or decreased till the declaration of the result i.e. to say that once the results have been declared the number of vacancies advertised will not be altered. In the present case, the results were declared on 21st April, 2011. It was displayed on the website as well as published in the newspaper. The respondents admit that the vacancy for Udham Singh Nagar was reduced from 9 to 7 posts after a review meeting was held on 12th July, 2011.

22. In the light of the advertisement and as per the decisions of the Supreme Court (supra), it is clear that the vacancies could not be reduced nor the vacancy so advertised could be altered. The action of the respondents in this regard was patently erroneous.

23. With regard to the calculation of reservation for women candidate, the question is no longer res integra and has been settled by the Supreme Court.

24. In *State of U.P. and Another Vs. Pawan Kumar Tiwari and Others*, , the issue was that 93 posts of Civil Judge (Junior Division) in the Uttar Pradesh Judicial Service was advertised. 50% of the seats was reserved for the general category. The percentage worked out was 46.50 and the total number of seats reserved was 46. The Supreme Court held that the total number of posts so reserved should have been 47 posts and not 46 posts. The Supreme Court, in paragraph-7, further held:

... The rule of rounding off based on logic and common sense is: if part is one-half or more, its value shall be increased to one and if part is less than half then its value shall be ignored. 46.50 should have been rounded off to 47 and not to 46 as has been done...

25. Similarly, in *Vinod Kumar Burman vs. Uttarakhand Public Service Commission & six others*, 2009 (1) U.D., 11, the Division Bench of this Court held that 30% of 5 vacancies would be 2 seats. The Division Bench, in paragraph 8, held:

...In our opinion 30% horizontal reservation has to be accounted for only in the concerned category and because in the concerned category of Scheduled Caste there are total 5 vacancies, accounting for 30% would mean that two seats would be reserved in the horizontal reservation for women candidates...

26. In the light of the aforesaid rulings, the rule of rounding off is that if a part is one-half or more, its, value shall be increased to one and if part is less than half then its value shall be ignored. For example, if the value is 0.01 to 0.49 then its value shall be ignored. But if its value is from 0.50 to 0.99 its value shall be increased to one.

27. In the light of the aforesaid, 30% of 7 seats is 2.1 and therefore out of 7 seats reserved for general category, out of 9 posts advertised, 2 seats will go to a women candidate in the general category. In the alternative, if the seats are reduced from 9 to 7 and out of 7 seats 5 seats are reserved for general category then 30% of 5 seats for women candidate comes to 1.5, which is rounded off to 2 seats. Consequently, in either case, whether it is 7 seats reserved for a general category candidate or 5 seats for a general category candidate, 2 seats in any case would be reserved for a women candidate. In the present case, the Court finds that 1 seat has been reserved for woman candidate for *Udham Singh Nagar*, which is incorrect.

28. In paragraph 16 of the counter affidavit, it has been stated that only 58 candidates have been given appointment and the remaining 104 posts are still vacant as the process of verification is still going on. In the light of the aforesaid, since the decision of the respondents to reserve 1 woman candidate for *Udham Singh Nagar* is incorrect, the writ petition is allowed and a writ of mandamus is issued directing the respondents to allocate 2 posts for women candidate in the

general category post in district Udham Singh Nagar and rectify the final selection list accordingly within three months from the date of production of a certified copy of the order. In the circumstances of the case, parties shall bear their own cost.