

(2009) 11 AHC CK 0274
In the Allahabad High Court

State of U.P. and Others

APPELLANT

Vs

Rudra Pratap Pandey

RESPONDENT

Date of Decision : 19-11-2009

Acts Referred:

Citation : (2010) 3 AWC 2662 : (2010) 125 FLR 444

Hon'ble Judges : Ritu Raj Awasthi, J;Pradeep Kant, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Pradeep Kant and Ritu Raj Awasthi, JJ.—Heard the learned Counsel for the appellant Smt. Sangeeta Chandra and Sri Santosh Shukla. holding brief of Sri A. K. Jauhari for the respondent.

2. This appeal has been filed against the judgment and order dated 9.4.2009, passed by the learned single Judge with a delay of six months. Counsel for the respondent has no objection in condoning the delay. We, therefore, allow the application for condonation of delay. The delay in filing the appeal is hereby condoned.

3. After condoning the delay, we proceed to decide the appeal on merits.

4. The respondent was appointed on the post of Constable in U.P. Civil Police on 19.2.1988. He was given compassionate appointment as his father (Ram Kumar Pandey) who was also in police service, while working on the post of constable, died on 28.2.1968.

5. The respondent was allowed to continue in service throughout, when by means of an order dated 3.7.2009, his services were terminated under the orders of the Superintendent of Police, Barabanki treating the appointment of the respondent as void ab initio for the reason that on the date of appointment, i.e., 19.2.1988, the respondent was 24 years 8 months and 18 days, whereas the maximum age for appointment in general category in the police department as

constable by direct recruitment, was 20 years and, therefore, his appointment could not be treated under direct recruitment and the provisions of U.P. Recruitment of Dependents of Government Servants Dying-in-Harness Rules, 1974 (hereinafter referred to as the Dying-in-Harness Rules) were not applicable in the case as his father died much before the enforcement of the aforesaid Rules which have not been given retrospective application.

6. The learned single Judge has set aside the aforesaid order of termination from service only on the ground that before passing the said order, no opportunity was afforded to the respondent though he had been working for the last 20 years.

7. Smt. Sangeeta Chandra learned Additional Chief Standing Counsel assailing the aforesaid order submitted that the pleas raised by the State in the counter-affidavit filed before the learned single Judge have not at all been considered and the said plea, which has been considered in the order passed by the learned single Judge was not available to the respondent, the order of appointment being non est

8. To buttress the aforesaid submission, she has drawn the attention of the Court to the counter-affidavit and has argued that it was in pursuance of the direction issued by the High Court at Allahabad in Writ Petition No. 11505 of 2006, In re : Avnish Kumar v. State of U.P. and Ors. that an exercise was taken by the police department for identifying the fraudulently obtained appointment on the post of constable under the Dying-in-Harness Rules, 1974 and in this enquiry, the respondent's case was also considered and identified. Since the appointment on compassionate ground could not have been made under the aforesaid Rules, in the year 1988. as the father of the respondent (Ram Kumar Pandey) died in the year 1968, i.e., much before the commencement of the Dying-in-Harness Rules, 1974 therefore, such an appointment was declared void, which would not confer any right or authority upon the respondent to continue in service or to hold the post.

9. Further, submission is that the plea that respondent was not afforded any opportunity before passing the order of termination, is factually not correct as a show cause notice was issued to him by the Superintendent of Police, Barabanki on 2nd August, 2006 and in response thereto he had appeared and filed two affidavits of fact which have not been considered by the learned single Judge at all.

10. A perusal of the order passed by the learned single Judge though reveals that the impugned order of termination has been set aside only on the ground that it was passed without affording opportunity to the respondent but in view of the record, which is before us, i.e., the record of the writ petition and the plea which has been raised by the learned Counsel for the appellant, we have tested the case on merit and we proceed to record our reasons for upholding the order passed by the learned single Judge.

11. At the outset, it would be pertinent to record that the enquiry which was set

up under the direction of the High Court at Allahabad in the case of Avnish Kumar was with respect to fraudulent appointments obtained under the Dying-in-Harness Rules.

12. Needless to mention that there is a difference between fraudulent appointment and a wrong appointment. An appointment, if has been obtained fraudulently, is liable to be cancelled may be, even without affording opportunity but if an illegal or incorrect appointment has been made or so to say a wrong appointment has been made, it necessarily would not raise a presumption of fraud being played by the incumbent and that too in connivance with the officers who are responsible in making the appointment, unless and of course, it is found that some sort of misrepresentation was made by the person concerned and that misrepresentation, which goes to the very eligibility of the candidature was relied upon by the officer concerned and that such an act has resulted into issuance of appointment order, and may be in such a situation, the collusion and connivance of the officer responsible for giving such appointment be also there, for which they can also be proceeded with but where in case the incumbent does not conceal any fact by giving correct description about his eligibility for appointment and after due deliberation by the concerned authority and after consultation with the superior authority, appointment is given, though it could not have been given under the Rules, it cannot be said to be a fraudulent appointment. Again unless something more is alleged and is found proved in getting such appointment it cannot be treated to be a fraudulent action.

13. It is also true that in the instant case, the plea of lack of opportunity was not available as before the passing of the order, the Superintendent of Police, Barabanki had issued a show cause notice and the respondent in response has submitted his reply as well as filed two affidavits.

14. From a perusal of the order passed by the Superintendent of Police, it is clear that the respondent's case was taken to be within the scope of enquiry as directed by the Allahabad High Court in the case of Avnish Kumar.

15. In the affidavits submitted by the respondent on 3rd August, 2006, before the Superintendent of Police, Barabanki he had clearly mentioned that his father (Ram Kumar Pandey) died while working as police constable at Hardoi on 28.2.1968 and that he belongs to general category and. therefore, was appointed under the Dying-in-Harness quota, on 19.2.1988. The order further makes a reference of a report of the Superintendent of Police, Hardoi where the father of the respondent was working at the time of death, dated 25.3.2008, wherein it was admitted that the father (Ram Kumar Pandey) of the petitioner was working at Hardoi when he died on 28.2.1968 and that pension has been released to his dependents. The report further says that while making the appointment/recruitment of the respondent on the post of constable, correspondence had also taken place with the Police Head Quarters at Allahabad.

16. After noting the aforesaid facts, the Superintendent of Police on the ground

that Dying-in-Harness Rules, 1974 have been made applicable in the case of the respondent, though the same were not applicable, his father having died much before the enforcement of the aforesaid Rules and that he was also not eligible for direct appointment, he being over age on the date of appointment, i.e., 19.2.1988, passed the termination order.

17. From a perusal of the aforesaid order, it stands established that the respondent did not conceal any fact while seeking appointment, may be under a wrong but bona fide plea that since his father died during service, therefore, he was entitled for appointment, he moved an application for appointment.

18. Not only this, before making his appointment, correspondence did take place with the Police Head Quarters at Allahabad, by the authority concerned, and it was only thereafter that the appointment was given. The respondent had no hand in making his appointment or in convincing the authority that he was entitled to such an appointment, and may be that by ignorance or by reason of the fact that the interpretation of the aforesaid Rule was not very clear at that time, looking to the pitiable condition of the respondent family, the appointment on compassionate ground was given but in such a case it cannot be taken to be a fraudulent appointment obtained by the respondent by playing fraud or by misrepresentation.

19. The respondent in the writ petition has mentioned, and though it may not have any legal force in providing the appointment but it is relevant for the purpose to understand the pitiable condition of the respondent which might have weighted, with the appointing authority in giving him appointment on compassionate ground. He has stated that soon after the death of his father his one elder brother and one younger brother met with an accident and died and, in these circumstances, the respondent had applied for appointment.

20. We have also perused the four directions issued by the High Court in the case of Avnish Kumar for identifying the fraudulent appointment, which reads as under:

(a) Father/Mother of the employee appointed as dependent were never in the employment of the police department of the State of U.P.

(b) More than one dependent has been appointed on compassionate basis were a police officer had expired during harness.

(c) Father/Mother of the dependent are still alive yet compassionate appointments have been offered.

(d) Forged documentary certificates have been produced for the purpose of obtaining appointment on the respective posts.

21. It cannot be said that the father of the respondent (Ram Kumar Pandey) was not in employment in the police department to the State of U.P. nor more than one dependent was given appointment on compassionate ground nor that his father was in service or alive when he was given in the appointment, nor did he

furnish forged documents, certificates etc. for getting appointment. The enquiry under the High Court's order, was thus to be confined to the aforesaid four directions which were issued by the High Court in which the case of the respondent obviously did not fall under any of the aforesaid categories.

22. The respondent has put in more than 20 years of service. It may be that the respondent was not entitled to appointment under Dying-in-Harness Rules, 1974 though his appointment was made on compassionate ground but looking to the fact that it cannot be treated to be an appointment obtained fraudulently which was made after due deliberations, and after consultation with the Police Head Head Quarters at Allahabad, coupled with the fact that he has been in service for last more than 20 years, we do not find any illegality or infirmity in the order passed by the learned single Judge and uphold the order under challenge in appeal, though on different grounds, as observed above.

The special appeal is dismissed.