
(2004) 12 AHC CK 0100
In the Allahabad High Court
Case No : Special Appeal No. 382 of 2000

State of U.P.

APPELLANT

Vs

Triloki Nath Pandey (H.C.C.P. 232) and Others

RESPONDENT

Date of Decision : 02-12-2004

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 311(2)

Citation : (2005) 5 AWC 4136 : (2005) 1 ESC 400

Hon'ble Judges : Dilip Gupta, J; B.S. Chauhan, J

Bench : Division Bench

Advocate : Sudhir Agrawal, Addl. A.G. and S.C, for the Appellant; R.B. Singhal and Manoj Nigam, for the Respondent

Final Decision : Allowed

Judgement

B.S. Chauhan, J.—This special appeal has been preferred against the judgment and order of the learned Single Judge dated 10th March, 2000, by which the writ petition filed by the respondents has been allowed quashing the result of the Infantry Training/Physical Training test (hereinafter called the "IT/PT test"), held for the purpose of departmental promotion to the post of Sub-Inspector (Civil Police) from the post of Head Constable and directing the respondents to hold the selection in the light of the observations made therein.

2. The facts and circumstances giving rise to this appeal are that for the purpose of departmental promotion on the post of Sub-Inspectors of Police from the eligible Head Constables, having three years experience and below the age of 40 years, as on 1.1.1999, applications were invited and preliminary written examination was held on 5.9.1999. All the said respondents passed the said examination and they were asked to appear in the IT/PT test held from 16.11.1999 to 20.11.1999. It's result was declared on 11.2.2000 and none of the said respondents could qualify the said examination. They challenged the said result by filing the Writ Petition No. 9694 of 2000 on various grounds. Their petition stood allowed vide impugned judgment and order, basically on two

grounds. Firstly, the vacancies has not been determined year wise as the selection could not be held for several years, thus, unequals were treated equals. Vacancies should have been determined year wise and candidates eligible for the said posts should have been considered for the particular year only. The said conclusion was reached following the judgment of the Division Bench of this Court in State of U.P. and Ors. v. Shakuntala Shukla (1993) 3 UPLBEC 1702. Secondly, that the Selection Board constituted for the purpose of holding the IT/PT test was not in accordance with the U.P. Government Servant Criterion for Recruitment Promotion Rules, 1994 (hereinafter called the Rules 1994) and the Government Order, dated 27.2.1999. Thus, the result of the test stood vitiated.

3. Shri Sudhir Agrawal, learned Additional Advocate General, has submitted that promotions have to be made throughout the State of Uttar Pradesh and eligible Head Constables have a right to apply for the promotional posts. Vacancies could not be filled up for years altogether because of interim order of the Courts in respect of earlier selection process. Not determining the vacancies year-wise did not adversely affect any respondent. All the respondents had been fully aware of the promotion rules, Government orders in respect of the process of test as well as the constitution of the Board. If there was any deficiency in the procedure or defect in the Constitution of the Board they should not have participated at the relevant time. All of them participated in the selection process, took the chance of favourable result and as they failed, they cannot be permitted to turn around and challenge the result of the test. He further submitted that not a single candidate who qualified the test has been impleaded, though the successful candidates had also been screened by the same Board following the same procedure. There is nothing on record to show as to how the case of respondents got prejudiced. The appeal deserved to be allowed.

4. On the other hand, it has been submitted by Shri R.B. Singhal, learned Counsel appearing for the respondents that the Selection Board had not been constituted in accordance with the Rules 1994 and the Government order dated 27.2.1999 and instruction dated 13th March, 1999 issued by the Police Head Quarters. The Board for the purpose of holding IT/PT test consisted of eight members and one of them Shri Mujeebullah Khan, Reserve Inspector, Jhansi was not a Gazetted Officer, as required by the aforesaid Government Order and the Rules, 1994. The test had not been taken by the Board as a whole but the members divided the items of the test separately amongst themselves and had taken the test of all the candidates individually, for a particular item. Thus, the selection stood vitiated. In respect of the same, protest had been lodged by sending a detailed complaint to the Director General of Police on 28.12.1999 by the present respondents, levelling serious allegations of malafides, arbitrariness, casteism, nepotism and discrimination against the members of the Board. It has been mentioned in the said complaint that nepotism and casteism prevailed while assessing the suitability of the candidates and, thus, there is no cogent reason for this Court to interfere with the impugned judgment and order of the learned Single Judge.

5. We have considered the rival submissions made by the learned Counsel for the parties and perused the record.

6. The issue of determining the year-wise vacancies had been considered time and again by the Courts and issue does not remain res integra any more.

7. In J and K. Public Service Commission, etc. Vs. Dr. Narinder Mohan and others etc. etc., , has rejected a similar contention observing as under :

"It is difficult to accept the contention of Shri Rao to adopt the chain system of recruitment by notifying each year's vacancies and for recruitment of the candidates found eligible for the respective years. It would be fraught with grave consequences. It is settled law that the Government need not immediately notify vacancies as soon as they arose. It is open, as early as possible, to inform the vacancies existing or anticipated to the PSC for recruitment and that every eligible person is entitled to apply for and to be considered of his claim for recruitment provided he satisfies the prescribed requisite qualifications. Pegging the recruitment in chain system would deprive all the eligible candidates as on date of inviting application for recruitment offending Articles 14 and 16."

8. Similar view has been reiterated by the Hon"ble Supreme Court in Civil Appeal No. 52/1993, Rajasthan Public Service Commission v. Smt. Anand Kanwar and Ors., decided on 8.2.1995, holding that vacancies cannot be bifurcated year-wise for providing the eligibility in respect: of age. The same view has been taken by the Rajasthan High Court in Kumari Luni Yogesh v. State of Rajasthan and Ors.1999 (1) WLC 542.

9. The Hon"ble Supreme Court in Government of Orissa v. Hara Prasad Das and Ors.AIR 1998 SC 375, has held thus :

"Whether to fill up a post or not is a policy decision and unless it is shown to be arbitrary, it is not open to the Tribunal to interfere with such decision of the Government and direct it to make further appointments. The Tribunal in directing the Government to make further appointments on the efficiency ground of public administration went beyond its jurisdiction."

10. Similarly, the Apex Court in State of Haryana and others Vs. Piara Singh and others etc. etc., , has taken the view that creation and abolition of post and filling up the same is the prerogative of the Executive.

11. In Union of India and Ors. v. Yogendra Singh 1994 (Suppl) 2 SCC 226, the Hon"ble Supreme Court has held that the applicant must possess the requisite qualification as per the advertisement, even if the vacancies have arisen prior to the date of advertisement. In the said judgment, the Hon"ble Apex Court has categorically held as under :

"No candidate who does not possess the currently prescribed qualification and he possess the qualification prescribed earlier, can be said to be qualified or have any vested right to appointment even against some earlier unfilled vacancies.

Every candidate, who aspires to fill any vacancy, must possess the educational qualification that are then prescribed."

12. No candidate has a right to claim appointment as a matter of right though he has a right of being considered on the post being advertised for the reason that selection process gets initiated from the advertisement itself. Thus, the contention raised by the learned Counsel for petitioner in this respect is rejected being preposterous.

13. Be that as it may, the issue has been determined by the learned Single Judge placing sole reliance upon the judgment of the Division Bench of this Court in *Shakuntala Shukla* (supra).

14. The said judgment has been set aside by the Hon''ble Apex Court in *Chandra Prakash Tiwari and Others Vs. Shakuntala Shukla and Others*, , therefore, the ground on which the first issue has been decided by the learned Single Judge does not survive.

15. All the respondents had been fully aware of the promotion Rules 1994 and the Government Orders dated 27.2.1999 and 13th March, 1999. All of them had subjected themselves to the said test knowing it well that the Board had not properly been constituted and the entire Board did not examine the candidates individually. Merely because they could not succeed in the test, they cannot be permitted to turn around and to challenge the Constitution of the Board as it is barred by the principles of acquiescence.

16. Acquiescence, being the principle of equity, must be made applicable in a case where the order has been passed and complied with without raising any objection.

17. A Constitution Bench of the Hon''ble Supreme Court, in *Pannalal Binraj Vs. Union of India (UOI)*, , had explained the scope of estoppel observing that once an order is passed against a person and without raising any objection he submits to the jurisdiction or complies with such order, he cannot be permitted to challenge the said order merely because he could not succeed there, for the reason that such conduct of that person would disentitle him for any relief before the Court. A similar view has been reiterated by the Hon''ble Supreme Court in *Manak Lal Vs. Dr. Prem Chand*, ; *Maharashtra State Road Transport Corporation Vs. Balwant Regular Motor Service, Amravati and Others*, .

18. If all the candidates were made aware of the procedure for promotion before they sat for the written test and before they appeared before the Departmental Promotion Committee, they cannot turn around and contend later when they found they were not selected by challenging that procedure and contending that the marks prescribed for interview and confidential reports are disproportionately high and the authorities cannot fix a minimum to be secured either at interview or in the assessment on confidential report.

19. When a candidate appears at the examination without protest and is

subsequently found to be not successful in the examination, question of entertaining a petition challenging the said examination would not arise.

20. The result of interview itself on merit, cannot be successfully challenged by a candidate who get a chance to be selected in the interview. It is thus held that these writ petitions, challenging the criterion for promotion, are not maintainable at the instance of candidates who have participated in the selection without raising any objection. [Vide G. Sarana Vs. University of Lucknow and Others, ; Major Chandra Bhan Singh Vs. Latafat Ullah Khan and Others, ; Om Prakash Shukla Vs. Akhilesh Kumar Shukla and Others, ; Madan Lal and Others Vs. State of Jammu and Kashmir and Others, and Utkal University Vs. Dr. Nrusingha Charan Sarangi and Others,].

21. In State of Punjab and others Vs. Krishan Niwas, , the Hon"ble Apex Court examined a case where the services of the employee were terminated in exercise of the powers under Article 311(2)(b) of the Constitution. The appellate Court reduced the punishment imposed by the trial Court. In the Departmental Appeal, the order of dismissal was also converted into that of a lesser punishment. The employee had acted upon it and joined the post. He was held not entitled to challenge the reduced punishment as he was stopped by his conduct.

22. In Union of India and Another Vs. N. Chandrasekharan and Another, , the Hon"ble Apex Court observed as under :

"It is not in dispute that all the candidates were made aware of the procedure for promotion before they sat for the written test and before they appeared before the Departmental Promotion Committee. Therefore, they cannot turn around and contend later when they found that they were not selected, by challenging that procedure....."

23. In Power Control Appliances and Others Vs. Sumeet Machines Pvt. Ltd., , the Apex Court held as under :

"Acquiescence is sitting by, when another is invading the rights..... It is a course of conduct inconsistent with the claim.....It implies positive acts, not merely silence or inaction such as involved in laches. In Harcourt v. White [54 ER 382], Sir John Romilly said : "It is important to distinguish mere negligence and acquiescence." Therefore, acquiescence is one facet of delay..... If the acquiescence in infringement amounts to consent, it will be a complete defence as was laid down in Mouson (J.G.) and Co. v. Boehm (1884) 26 Ch. D. 406. The acquiescence must be such as to lead to the inference of a licence sufficient to create a new right in the defendant as was laid down in Rodgers v. Nowill (1847) 2 DGM & G 614."

24. Similar principle had been made applicable even in contractual matters. [Vide State of Orissa and others Vs. Narain Prasad and others, etc. etc., ; and State of Rajasthan and Others Vs. Anil Kumar Sunil Kumar and Party and Another,].

25. Undoubtedly, inaction in every case does not lead to an inference of implied

consent or acquiescence as has been held by the Hon"ble Apex Court in P. John Chandy and Company (P) Ltd. Vs. John P. Thomas, . But the Court has to examine the facts and circumstances in an individual case.

26. Undoubtedly, none of the respondents has raised the issue at the time of selection and in view of the settled legal proposition, as explained above, they cannot be permitted to agitate the issue merely because they could not succeed in the test.

27. Much voice has been raised by Shri Singhal, learned Counsel for the respondents that Shri Mujeebullah Khan, was Reserve Inspector and the Government Order, referred to above, provided for constitution of Board only by the Gazetted Officers. Therefore, his mere participation vitiated the result of the test.

28. Firstly, no objection has been raised to his participation during the test. Secondly, it has not been explained anywhere in the petition as to what particular role he had played in the test and how his participation has caused any prejudice to the respondents, as every order is to be tested on the touchstone of the doctrine of prejudice.

29. Unless in a given situation the aggrieved party makes out a case of prejudice or injustice, some infraction of law would not vitiate the order/inquiry/selection/result. Unless in a given situation, the aggrieved party makes out a case of prejudice or injustice, mere infraction of law will not vitiate the order/inquiry/selection. [Vide Jankinath Sarangi Vs. State of Orissa, ; Sunil Kumar Banerjee Vs. State of West Bengal and Others, ; Major G.S. Sodhi Vs. Union of India (UOI), ; Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc., ; Krishan Lal Vs. State of Jammu & Kashmir, ; Rajendra Singh Vs. State of Madhya Pradesh and others, ; State Bank of Patiala and others Vs. S.K. Sharma, ; S.K. Singh Vs. Central Bank of India and Others, ; Union of India (UOI) and Others Vs. Major A. Hussain (IC-14827), ; State of U.P. Vs. Shatrughan Lal and Another, ; State of U.P. Vs. Harendra Arora and Another, ; and Debotosh Pal Choudhary Vs. Punjab National Bank and Others,].

30. None of the members of the Selection Board for holding the IT/PT test has been impleaded, nor any specific allegation had been made against any of the members, nor it is alleged that the marks etc. had been given arbitrarily.

31. In absence of any specific allegation in a case of particular respondent, by a particular members of the Board cannot be a ground to challenge and that's too without impleading him. [Vide Dr. J.N. Banavalikar v. Municipal Corporation of Delhi and Anr. AIR 1996 SC 326; State of Bihar and Anr. v. P.P. Sharma, IAS and Anr.1992 Suppl (1) SCC 222 ; I.K. Mishra Vs. Union of India and Others, ; All India State Bank Officers" Federation and Others Vs. Union of India (UOI) and Others, ; and Federation of Railway Officers" Association and Ors. v. Union of India AIR2003 SCW 1764].

32. In *Federation of Railway Officers' Association v. Union of India and Ors.* AIR 2003 SCW 1764, the Apex Court has held that the allegation of malafide has to be specifically made and the person against whom such allegations are made has to be impleaded and in his absence such allegations cannot be taken into consideration.

33. Thus, in view of the above, the allegations in this respect are not worth consideration.

34. Not a single member from the select list has been impleaded by the respondents in the writ petition though they had also gone through the same IT/PT test and had been screened by the same Board adopting the same criteria. The petition was liable to be dismissed only on the ground of nonjoinder of necessary parties, as such a writ petition cannot be entertained unless a person whose interest may be adversely affected is impleaded as respondent. [Vide *Prabodh Verma and Others Vs. State of Uttar Pradesh and Others*, ; *Government of A.P. and Another Vs. A.V. Venugopala Rao*, ; *Bhagwanti and Ors. v. Subordinate Services Selection Board, Haryana and Anr.*, 1995 Supp (2) SCC 663,; *Central Bank of India Vs. S. Satyam and others*, ; *J. Jose Dhanapaul Vs. S. Thomas and Others*, ; *Arun Tewari and Ors. v. Zila Mansavi Shikshak Sangh and Ors.* AIR 1998 SC 331 ; *Azhar Hasan and Others Vs. Distt. Judge, Saharanpur and Others*, ; *Ram Swarup and Others Vs. S.N. Maira and Others*, ; *Shri L. Chandrakishore Singh Vs. State of Manipur and Others*, ; *Mohd. Riazul Usman Gani and Others Vs. District and Sessions Judge, Nagpur and Others*, ; *Nirmala Anand Vs. Advent Corporation Pvt. Ltd. and Others*, and *M.P. Rajya Sahkari Bank Maryadi Vs. Indian Coffee Workers' Co-operative Society Ltd. and Others*, ; and *Ramrao and Others Vs. All India Backward Class Bank Employees Welfare Association and Others*,].

35. In view of the above, we reach the inescapable conclusion that as the first part of the judgment of the learned Single Judge has been set aside by the Hon"ble Apex Court in *Chandra Prakash Tiwari* (supra) and the second issue had been decided by, the learned Single Judge without considering the applicability of the principles of the acquiescence/ estoppel, the appeal deserves to be allowed.

36. The appeal succeeds and is allowed. The order dated 10.3.2000, passed in Writ Petition No. 9694 of 2000, is hereby set aside. The appellants are directed to proceed with the selection process expeditiously. No cost.