

(2009) 08 AHC CK 0142
In the Allahabad High Court

Superintending Engineer, P.W.D. and Others and Chief
Engineer, Jhansi Zone, Public Works Department and Others

APPELLANT

Vs

Anoop Kumar Rathore

RESPONDENT

Date of Decision : 04-08-2009

Acts Referred:

Citation : (2010) 1 AWC 214

Hon'ble Judges : C.K. Prasad, C.J;A.P. Sahi, J

Bench : Division Bench

Judgement

1. These two special appeals arise, though against separate judgments dated 09.09.2005 and 12.01.2009 respectively, out of common questions of law and fact pertaining to the same process of selection on the post of Junior Clerk in the Public Works Department, against an advertisement dated 10.08.1998 published by the Chief Engineer, Public Works Department, Jhansi Region, Jhansi, where the respondent-petitioner Anoop Kumar Rathore (hereinafter referred to as the ""petitioner") claimed appointment on the basis of the said selection.

2. The dispute raised by the petitioner is that knowledge of Hindi typewriting was only a preferential qualification, and not essential, as per the advertisement itself, and therefore, the appellants - employer could not have disqualified the candidature of the petitioner on that count. The stand of the appellants in response is that the word preference in the advertisement was a mistake, and that the Rules provide for knowledge of Hindi typewriting as an essential qualification for the post in question, which would prevail as against an error in the advertisement. The learned Single Judges while allowing the writ petitions have found favour with the plea of the petitioner, hence these appeals under Rule 5 Chapter VIII of the Allahabad High Court Rules, 1952.

3. Short facts giving rise to the present appeals are that the petitioner applied for the post of Junior Clerk in the Public Works Department in the Jhansi Region against the advertisement issued by the Chief Engineer of the said region dated 10.08.1998. He appeared in the written examination, which was conducted on

13th December 1998 and by a subsequent letter dated 5th February 1999, he was called upon to appear in the typing test scheduled on 13.02.1999. The petitioner appears to have made himself available for the typing test, but could not qualify the same. The result of the written test was declared and a merit list was prepared, which was sent to the State Government. The petitioner was, however, not interviewed, as only those candidates were called for interview who qualified in the Hindi typing test with a speed of 25 words per minute.

4. At this stage, the petitioner filed Writ Petition No. 7660 of 1999 praying for a writ of mandamus commanding the respondent authorities (appellants herein) to give him an opportunity to appear in the interview for the post of Junior Clerk and thereafter declare his result. This Court entertained the writ petition and thereafter vide order dated 26.02.1999 stayed the declaration of the result of the said selections. Out of the selected candidates, one Santosh Kumar Yadav filed Writ Petition No. 7903 of 2000 and the said writ petition was heard along with Writ Petition No. 7660 of 1999, where after by an order dated 20.04.2001, the interim order dated 26.02.1999 was modified directing the respondents therein to declare the results, which were made subject to the final decision of the writ petition. These facts are mentioned in the order dated 26.08.2006 passed by the Chief Engineer, Public Works Department, Jhansi Region, Jhansi.

5. The writ petition filed by the petitioner, i.e. Writ Petition No. 7660 of 1999 was finally decided on 9th September 2005 after exchange of affidavits, and the learned Judge held that the qualification of possessing proficiency in Hindi typewriting was only a preferential qualification as per the advertisement for the post in question, and since it was not an essential qualification, the Department had erred in excluding the petitioner from the interview. Accordingly, a direction was issued to interview the petitioner separately and to convey the result of the said interview to the Board for final consideration. The Department preferred Special Appeal (Defective) No. 318 of 2006 assailing the said judgment, which was presented before the Court on 08.05.2006 and an order was passed on 11.05.2006 to list the appeal after the delay condonation application was disposed off.

6. The Department interviewed the petitioner on 24.07.2006 in compliance of the directions of this Court. The petitioner also filed Contempt Petition No. 2092 of 2006 alleging disobedience of the order dated 09.09.2005, in which an order was passed on 27th July, 2006 directing the Chief Engineer to decide the claim of the petitioner within a period of six weeks. Accordingly, the Chief Engineer proceeded to consider the claim of the petitioner and rejected the same by order dated 26.08.2006.

7. The aforesaid order dated 26.08.2006 gave rise to Writ Petition No. 51691 of 2006 preferred by the petitioner assailing the said order on the ground, that once this Court had already held that knowledge of Hindi typewriting by a candidate was a preferential qualification, then the same could not have been made a ground to reject the candidature of the petitioner. The said writ petition

was finally allowed on 12.01.2009 by this Court, which has given rise to Special Appeal (Defective) No. 615 of 2009. It is in the aforesaid backdrop that both the appeals have been heard and are being disposed off together.

8. Shri M.S. Pipersenia, learned Additional Chief Standing Counsel, appearing on behalf of the appellants, addressed the Court in both the appeals and Shri Indra Raj Singh has been heard in response thereto on behalf of the petitioner - Anoop Kumar Rathore.

9. Shri Pipersenia, while advancing his submissions in Special Appeal (Defective) No. 318 of 2006 against the judgment of the learned Judge dated 09.09.2005, urged that the said judgment proceeds on an erroneous assumption of fact as well as in law, inasmuch as the knowledge of typewriting in Hindi, as reflected in the advertisement dated 10.08.1998 as a preferential qualification, was a mistake and which had been pointed out through the averments contained in the counter affidavit and further, even otherwise the Rules applicable to the controversy clearly provide the knowledge of Hindi typewriting as an essential qualification and not as a preferential qualification. He contends that in view of the above, the finding recorded by the learned Judge in the judgment dated 09.09.2005 treating the knowledge of Hindi typewriting as a preferential qualification is erroneous and, therefore, the same deserves to be set aside. For this, he has invited the attention of the Court to the contents of the advertisement, the averments contained in the counter affidavit filed on behalf of the State in the writ petition as well as the provisions contained in the Public Works Department Ministerial Establishment Rules 1965, the Subordinate Offices Ministerial Staff (Direct Recruitment) Rules 1975, the U.P. Subordinate Offices Ministerial Staff (Direct Recruitment) Rules, 1985 and the Uttar Pradesh Procedure for Direct Recruitment for Group "C" Posts (Outside the Purview of the Uttar Pradesh Public Service Commission) Rules, 1998. On the strength of the relevant Rules prescribed therein, Shri Pipersenia contends that since the Rules provide for knowledge of Hindi typewriting as an essential qualification, therefore, the learned Judge committed an error in accepting the contention on behalf of the petitioner that the said qualification was preferential.

10. Shri Indra Raj Singh, on the other hand, urged that the advertisement clearly indicates that the knowledge of typing in Hindi was a preferential qualification and the Rules 1998, which have an overriding effect read with the subsequent amendments, ruled out the possibility of possession of the knowledge of typewriting in Hindi as an essential qualification.

11. Shri Indra Raj Singh further contends that since the order passed by the Chief Engineer on 26.08.2006 suffered from the same infirmity, and since the learned Judge in the judgment dated 09.09.2005 had already held that the qualification was only a preferential qualification, therefore, the subsequent writ petition filed by the petitioner, i.e. Writ Petition No. 51691 of 2006 was rightly allowed and, as such, the judgment dated 12.01.2009 also does not require any interference at the instance of the appellants.

12. Shri Pipersenia, in rejoinder, has urged that the judgment of the learned Judge dated 12.01.2009 in Writ Petition No. 51691 of 2006, giving rise to Special Appeal No. 615 (Defective) No. 2009, is founded on an earlier decision of this Court dated 09.09.2005. Therefore, in the event the judgment dated 09.09.2005 is set aside, then the judgment dated 12.01.2009 in the subsequent writ petition has also to fall through. He contends that the order of the Chief Engineer dated 26.08.2006 is valid and in accordance with the Rules and, therefore, the same was unjustifiably interfered with by the learned Judge.

13. Having heard the learned Counsel for the parties, it would be appropriate to refer to the relevant Rules, which have been relied upon by the contesting parties. From the record, it appears that for the purposes of recruitment to the post of ministerial staff, the State Government framed "Rules for the Recruitment of Ministerial Staff to the Subordinate Offices", which were promulgated on 11.07.1950 and published in the gazette on 16.07.1950. Rule 6 of the said Rules provided as follows:

6. Subjects of the test. - (1) The competitive tests shall comprise a written test as well as an oral test.

(2) The subjects of the tests and maximum marks on each subject shall be as follows:

Subjects Marks

Oral

1. Personality.... 25

2. General knowledge and suitability for the particular post. 25

Written

1. Simple drafting (in Hindi).... 50

2. Essay and Precis writing (in Hindi).... 50

3. Simple drafting and Precis writing (in English) 50

Optional

1. Typewriting in English and Hindi... 50

2. Shorthand in Hindi and English.... 50

NOTE- Candidates must take one of the optional subjects but may take both if they so choose.

14. The aforesaid Rule along with the other provisions in the said Rules was incorporated as Appendix ""B" in "the Public Works Department Ministerial Establishment Rules, 1965". The relevant Rule 5 (2) is quoted below:

5. Sources of recruitment - (1)

(2). Direct recruitment to the post of Junior Noters and Drafters, Record Keepers, Routine Clerks and the Lower Grade Clerks in all the offices shall be made on the results of a competitive examination prescribed in the "Rules for the Recruitment of Ministerial Staff to the Subordinate Offices" published under Government notification No. 0-1119/II-B/50, dated July 11, 1950, as amended from time to time.

NOTE- A copy of the Rules referred to above in force at the time of commencement of these rules is given in Appendix "B" to these rules.

15. These Rules continued to be in vogue till the new Rules were framed by the State Government notified on 29th July, 1975 known as "the Subordinate Offices Ministerial Staff (Direct Recruitment) Rules, 1975". The aforesaid Rules were made applicable to all the departments as per Rule 2 of the said Rules. Simultaneously, the said Rules were given an overriding effect insofar as the pre-existing Rules were inconsistent with the said Rules. This provision was contained in Rule 3 thereof. The State Government, however, through a specific Rule 20 of the said Rules further rescinded the Rules for the Recruitment of Ministerial Staff to the Subordinate Offices, which had been promulgated on 11.07.1950 and published in the gazette on 16.07.1950, referred to hereinabove. Thus, the Rules 1975 thereafter held the field. The State Government promulgated another set of new Rules known as "the U.P. Subordinate Offices Ministerial Staff (Direct Recruitment) Rules, 1985", which also has an overriding effect insofar as the previous Rules are inconsistent in this regard. Rule 35 of the said Rules provided for regulation of other matters, if they were not specifically covered by the said Rules. Sri Pipersenia, during the course of his submission, specifically invited the attention of the Court to Sub-rule (5) of Rule 23, which makes a provision for the procedure of selection on the post of Clerk/Typist. The same is quoted below:

23. Procedure of Selection.-(1)....

(2)....

(3)....

(4)....

(5) In the case of candidate to be selected for the post of clerk/typist as also for any other post for which typing has also been prescribed as an essential qualification only those candidates who know typewriting will be considered and final assessment of merit shall be made only after adding the marks obtained in Hindi typewriting. The candidates shall be required to appear at a competitive test for Hindi typing. Marks shall be allowed for Hindi typing out of the maximum marks of 50. The marks obtained in Hindi typing shall be added to the marks already obtained under Sub-rule (4) and the final merit list shall in such case be prepared on the basis of aggregate marks..

16. The aforesaid Rule, therefore, clarifies that in the case of a candidate to be selected for the post of a Clerk or Typist, only those candidates who know Hindi typewriting would be considered and the final assessment of merit shall be made only after adding the marks obtained in the Hindi typewriting.

17. Sri Indra Raj Singh, questioning the applicability of the said Rule, urged that the said Rule would apply only to the post of Clerk-cum-Typist and, therefore, the said Rule would not be applicable in the present case.

18. Having given our anxious consideration to the aforesaid aspect of the matter, we are unable to subscribe to the suggestion made by the learned Counsel for the petitioner that the aforesaid Rule would apply in the case of a candidate applying for Clerk-cum-Typist. The words Clerk and Typist are clearly segregated by an oblique stroke, which clearly means the said words do not, in any way, suggest a single post of Clerk-cum-Typist, rather the placement of the words are clearly narrated in the alternative and separate. The words cannot be construed to mean a post, which has both the connotations.

19. Nonetheless, taking any view of the matter, whether the post is of a Clerk or a Typist or a Clerk-cum-Typist, the position remains the same, namely that the candidate for any of such posts has to qualify a Hindi typewriting test for being selected.

20. The advertisement also clearly indicates the post of a Junior Clerk and, therefore, the essential qualification of typing as prescribed in the said Rule is clearly relatable to both the posts separately. A candidate applying for the post of a Clerk shall only be considered provided such a candidate knows typing as well. It is a well-known Rule of Interpretation that the Legislature or the Rule-making Authority cannot be presumed to have used surplusage and the literal meaning has to be given its true sense. Viewed from any angle, it is more than clear that the Rule provides that for both the posts, i.e. posts of Clerk as well as Typist, a candidate should know typewriting in order to enable him to qualify for appointment on such a post. The preparation of the final merit has to be made after assessment of the knowledge of typing as indicated in the aforesaid Rule. We are, therefore, of the firm view that the post of Junior Clerk, which was advertised by the Department, was clearly governed by the qualifications prescribed and referred to herein above under the 1985 Rules.

21. It is further clear that the Department itself realized its mistake and error in the advertisement and took up a clear stand before the learned Judge in Writ Petition No. 7660 of 1999 that the advertisement suffered from an error to the effect that the knowledge of typing was a preferential qualification. The said position has been reiterated before us by the learned Counsel for the appellants that the word "preferential" occurring against the column of "knowledge of typing" was a clear mistake and de hors the Rule aforesaid. The order dated 26.08.2006, which was impugned in Writ Petition No. 51691 of 2006, also narrates the same position. We do not find any error in the stand taken by the

appellants and, therefore, we hold that the knowledge in typing in Hindi was an essential qualification as per the Rule aforesaid and that the advertisement suffered from an error to that extent. In view of this, the conclusion drawn by the learned Judge in the judgment dated 09.09.2005 does not appear to be in conformity with law.

22. At this juncture, it would be apt to record that whenever there is a conflict between the Rules and the advertisement, it is settled law that the Rules would prevail. Reference may be had to the decision of the Supreme Court in the case of Malik Mazhar Sultan and Another Vs. U.P. Public Service Commission and Others, .

23. This is not a case where any change of qualification has been brought about after the advertisement was made. This is a clear case where the incorrect qualification was reflected in the advertisement. A qualification, which was essential under the Rules, was wrongly referred to as a preferential qualification. In our opinion, an incorrect advertisement referring to a wrong Rule would neither create or confer a right on a candidate to claim selection nor would it give rise to any legitimate expectation to a candidate, in law. The Rule on the date of advertisement, which has been pointed out on behalf of the appellants, was very much in existence and was applicable. Learned Counsel for the petitioner could not successfully dispute the applicability of the Rules 1985.

24. Sri Indra Raj Singh alternatively urged that the Rules 1998 have an overriding effect. We have perused the same and the said argument is stated only to be rejected, inasmuch as the Rules 1998 are the Rules of procedure and they, in no way, take away the impact of the substantive Rules, which held the field on the date when the advertisement was issued. Even otherwise, the Rules 1998, in no way, contradict the Rules 1985 and rather they supplement the same, as would be evident from a perusal of Rules 5 and 6 of the Rules 1998.

25. We may hasten to add that the Rules have been subsequently modified in the year 2001 and even thereafter, but such modifications are not at all relevant to be discussed herein, as this matter specifically concerns the 1985 Rules that were applicable on the date of advertisement, i.e. 10.08.1998. No other Rule apart from the Rules 1985 was applicable in respect of the selections in question in the year 1998 and the learned Counsel for the petitioner could not show anything to the contrary.

26. In view of the findings aforesaid, we are of the view that the learned Single Judge committed an error in allowing Writ Petition No. 7660 of 1999 and permitting the petitioner to be interviewed. We, accordingly, set aside the judgment dated 09.09.2005 passed in Writ Petition No. 7660 of 1999.

27. The judgment in Writ Petition No. 51691 of 2006 dated 12.01.2009 appears to have been delivered under the impression that the said judgment dated 09.09.2005 had become final and had not been challenged. We may record that the judgment dated 09.09.2005 had already been assailed through Special

Appeal (Defective) No. 318 of 2006, which fact appears to have escaped the notice of the learned Judge, while rendering the judgment dated 12.01.2009. In view of the fact that Writ Petition No. 7660 of 1999 stands dismissed upon the judgment dated 09.09.2005 having been set aside, the very foundation of the judgment dated 12.01.2009 is taken away. Accordingly, the petitioner would, therefore, not be entitled to any benefit under the judgment dated 09.09.2005 and, therefore, he would not be entitled for being considered against the post of Junior Clerk in question.

28. In view of the judgment dated 09.09.2005 having been set aside by us, we have no hesitation in further expressing the same opinion in respect of the judgment dated 12.01.2009 passed in Writ Petition No. 51691 of 2006, inasmuch as the said judgment proceeds on the same presumption and findings that were drawn in favour of the petitioner in Writ Petition No. 7660 of 1999. Therefore, the judgment dated 12.01.2009 passed in Writ Petition No. 51691 of 2006 is also set aside. Accordingly, both the special appeals are allowed and the writ petitions filed by the petitioner, i.e. Writ Petition No. 7660 of 1999 and Writ Petition No. 51691 of 2006 are dismissed.

29. In the facts and circumstances of the case, there shall be no order as to costs.