
(2002) 07 AHC CK 0104

In the Allahabad High Court

Case No : C.M.W.P. No's. 4864 and 36512 of 2001

Trilok Nath Mishra and Others

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

Date of Decision : 17-07-2002

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 309

Citation : (2002) 4 AWC 2804 : (2002) 3 UPLBEC 2675

Hon'ble Judges : Sunil Ambwani, J

Bench : Single Bench

Advocate : G.S.D. Mishra and P.P. Srivastava, for the Appellant; Pushpendra Singh, Ashok Khare and B.N. Singh, S.C., for the Respondent

Final Decision : Allowed

Judgement

Sunil Ambwani, J.—These writ petitions filed by unsuccessful candidates of the Combined Lower Subordinate Examination, 1998, held by U. P. Public Service Commission, Allahabad challenge office memorandum dated 15th November, 1999 issued by Secretary, Karmik Anubhag-4, Government of Uttar Pradesh, Lucknow, issuing direction to give up preparation of waiting list and reshuffling, in all the selections to be made by U. P. Public Service Commission, except where there is single post in the cadre.

2. I have heard Sri Ashok Khare, Senior Advocate, for petitioners ; Sri B.N. Singh, learned counsel appearing for U. P. Public Service Commission, as well as learned standing counsel for State Government.

3. Brief facts leading to filing of the writ petitions are, that an advertisement No. A-2/E-1/98-99 was issued on 6th September, 1998 for holding Combined Lower Subordinate State Services (Preliminary) Examination, 1998. The petitioners, who are eligible and qualified, applied and appeared in the examination. They were found successful in preliminary examination allowed to appear in the main examination and were declared to have qualified. Interviews were held between

1.11.1999 to 4.12.1999. During this period, while the interviews were in progress, the impugned office memorandum was issued to give up preparation of waiting list. A select list equal to the number of posts requisitioned by State Government from U. P. Public Service Commission, was declared on 19.12.1999. A corrigendum was declared, amending the list on 26.6.2000 and recommendations were sent to the State Government on the same day.

4. It is submitted that a number of selected candidates did not join, on account of which equal number of vacancies remained unfilled, during the year of selection and that in case a waiting list was prepared, the petitioners had a fair chance to be considered for recommendation and appointment against the vacant posts, left to be filled up for the next selection, which has not been held so far. These vacancies were required to be filled up in the year of selection and that all candidates should have been given a fair opportunity to be considered for appointment. The purpose of waiting list is to fill-up the vacancies in the event the selected candidates did not join. There is no object or purpose to be achieved in allowing the vacancies to be carried forward to next selection and that on these grounds, the office memorandum dated 15th November, 1999, is violative of Articles 14 and 16 of the Constitution of India.

5. Sri B.N. Singh, learned counsel appearing for Commission, submits that Commission does not initiate action suo motu with regard to the sending names of substitutes by reshuffling. It only recommends on receipt of proposals from State Government by sending names of candidates on the basis of combined examination for vacancies which are forwarded by the State Government. The State Government has neither informed the Commission with regard to such vacancies nor demanded substituted candidates. The State Government has stopped the process of preparation of waiting list and reshuffling through office memorandum dated 15.11.1999. In Civil Misc. Writ Petition No. 36512 of 2001. Petitioner Nos. 1, 4, 5, 6, and 7 were not selected. Petitioner Nos. 2 and 3 found their places in the final result but after manual checking, it was found that some candidates were not allotted their due position and thus a revised list was declared on 24.6.2000 in which petitioner Nos. 2 and 3 were not declared successful. Petitioner No. 2 has also filed a Civil Misc. Writ Petition No. 29477 of 2000 in which counter-affidavit has been filed.

6. Learned standing counsel defended the impugned office memorandum dated 15th November, 1999 for the reasons stated in the counter-affidavit of Sri D.K. Verma, Special Secretary, Karmik Vibhag, Government of Uttar Pradesh, Lucknow. In paragraphs 4 and 5 of this counter-affidavit, it has been stated that increasing number of writ petitions are filed in High Court by the candidates who do not want to join the posts on reshuffling and desired to continue on their originally allotted posts. Writ petitions have also been filed by candidates for giving them benefit of the period of service on the posts allotted to them after reshuffling and also to give appointments out of reshuffling/waiting list. Legal difficulties were felt in complying directions given by Courts for which there is no

provision in the Union Public Service Commission and looking into the increasing tendency of filing such writ petitions restrictions were imposed by Government Order dated 15.11.1999 to save precious time of Court and Government as well as Administration. The State Government decided that where the results of the competitive examination have been declared before 15th November, 1999. the waiting/ reshuffling provisions applicable in the Government order dated 31.12.1994 shall be applicable and that Government order dated 15th November, 1999 shall be applicable only where the results have been declared after 15th November, 1999. In the present case since the result was declared on 19.12.1999 and the recommendations were made to the State Government on 24.6.2000, the Government order dated 15th November, 1999 shall be applicable.

7. A perusal of office memorandum dated 31.1.1994 (Annexure-7 to Civil Misc. Writ Petition No. 36512 of 2001) shows that the Government was facing some difficulties with regard to the joining of candidates after they were given appointment letters. A decision was taken to make correct calculation before requisitioning the vacancies, for issuing appointment orders within three months of allotment of candidates for filling up vacancies, and thereafter to cancel the recommendation if they did not join, and requisitioning the names from the waiting list. Clause (4) of this office memorandum provided that waiting list shall not be published and shall be kept in sealed envelope with the Commission for making the candidates available to the State Government, whenever, it was felt necessary, Clause (5) confined the validity of such waiting list for a period of one year from the year of selection with a clarification that where the names of candidates have been requisitioned from Commission within a period of one year, the waiting list shall remain valid even beyond the period of one year. By the impugned office memorandum dated 15.11.1999, the State Government took a decision that except for single post cadre, for all other services, waiting list shall not be prepared and no proceeding for reshuffling shall be taken. The requisition should be made only after calculation of vacancies, and that no change shall be made so far as possible for these vacancies. The selected candidates must join after receiving recommendation except in cases where the department, institutions, organizations have been closed or the Court has given any direction to the contrary. The concerned department shall issue appointment orders within three months and that the candidates shall be given only one month (time) to Join which can be extended for period of one month in special circumstances. The appointment letters should be issued only after character verifications and medical examinations and the recommendation of those candidates, who do not join within prescribed period should be cancelled and the resultant vacancies to be carried over to the next selection year. The select list should be used only for the year for which the vacancies have arisen.

8. Sri Ashok Khare, senior advocate, has relied upon the case of Jai Narain Ram Vs. State of U.P. and others, In this case Public Service Commission recommended the names of four duly selected candidates. The names of appellant Jai Narain Ram and three others--one Balkesh Singh, Bali Ram Prasad.

Amar Singh, could not be recommended, as there was no request by the Government for putting them in the waiting list. Out of 15 posts, four posts were reserved for scheduled caste. The duly selected candidates did not opt to join service. The High Court dismissed the writ petition on the ground that the petitioner was not selected and that there was no information that he was put in the select list. In appeal, Supreme Court held that the right to seek appointment to a post under Article 14 read with Article 16(1) and (4) is a constitutional right to equality. The State failed to perform its constitutional duty to requisition the Commission to recommend the next qualified person to the post reserved for scheduled castes. Under the circumstances, the denial of appointment to the appellant and three others above him is unconstitutional and thus a direction was issued recommending name of appellant for appointment. In *State of U.P. and others Vs. Ravindra Nath Rai and others*, a Division Bench of this Court found that after lapse of five years from the initiation of selection process for the post of Sub-Inspector in Civil Police, list of candidates chosen to fill up 630 vacancies was declared. On the same date, a communique was issued from the Police Headquarters under the signatures of the Deputy Inspector General of Police (Karmik) Uttar Pradesh, notifying that no waiting list had been prepared, and thus, it would not be possible to send any candidate for training from waiting list. Eighty six posts were sought to be filled up from the list. Out of 716 recommended candidates, 123 did not join and 13 dropped out of training course resulting in 136 vacancies. Following the decision in the case of *Shankarsan Dash Vs. Union of India*, holding that a person may not have indefeasible right to be appointed, yet this does not mean that the State has the licence for acting arbitrarily, it was found that the writ petition was maintainable. Following cases of *R.S. Mittal Vs. Union of India (UOI)*, in which it was held that the person has a right to be considered for appointment and that the appointing authority cannot ignore the select panel or decline to make the appointment on its whims, learned single Judge held that the petitioner has a right to maintain the petition and directed that the list be utilized for vacancies which had arisen during the year. The judgment was upheld by the Division Bench. In *Ved Prakash Tripathi Vs. State of U.P. and others*, a Division Bench of this Court opined that candidates from the waiting list must be offered appointment and a direction was issued to send additional names from waiting list for the vacancies to which appointments were made but the candidates did not join, in respect of Assistant Prosecuting Officer Examination, 1996. Reliance has also been placed on *Neelkanth Tripathi v. State of U. P. and Ors.* 1995 AWC 1169.

9. Sri B.N. Singh, on the other hand, has cited Judgments in Civil Misc. Writ Petition No. 16899 of 2001, *Surendra Kumar Pandey and Anr. v. State of U. P. and Ors.* decided on 1,3.2002. in which this Court did not grant the prayer of recommending the names out of waiting list on the ground that the Government order dated 15th November, 1999 has given up preparation of waiting list and reshuffling and the life of select list was only one year. In other Division Bench judgment in "*Civil Misc. Writ Petition No. 26913 of 2001, Dharmendra Kumar*

Singh and Ors. v. State of U. P. and Ors., decided on 18.1.2002 a Division Bench of this Court while dealing with the Combined State Upper Subordinate Services Examination, 1994 in view of Government order dated 31.1.1994, found that where vacancies were available and the candidates sent from the waiting list, did not join the list could not be utilized after its validity of the period of one year and thus no relief could be granted to the petitioners. In Civil Misc. Writ Petition No. 8842 of 1987, Ram Sutta v. State of U. P. and Ors., a Division Bench of this Court considered the question of selection to the post of Assistant Development Officer for the year 1981 of which the result was declared on 10.6.1983, and held that the waiting list was valid for one year. It expired on 10.6.1984 and that in spite of large number of vacancies remained unfilled the petitioner could be given only those vacancies which became available within one year from the date of declaration of result i.e., during the currency of waiting list. Sri B. N. Singh submits that the office memorandum dated 15.11.1999 is in the domain of policy decision made by the executive on which judicial bodies cannot sit in Judgment unless it is assailed on the ground of arbitrariness or discrimination. He relied upon State of Andhra Pradesh and Another Vs. V. Sadanandam and Others, wherein it was held that it is not for judicial bodies to sit in judgment over the wisdom of the executive in choosing the mode of recruitment of the categories from which the recruitment should be made. These were matters of policy decision falling exclusively within the purview of the executive.

10. On 20.5.2002, the matter was adjourned to enable Sri B.N. Singh to inform the Court as to whether any merit/waiting list in respect of the examination, which was held before the impugned office memorandum was issued, was prepared beyond the number of candidates recommended for appointment. He informed the Court that no waiting list was prepared as the impugned office memorandum was made available to the Commission before the declaration of result of the examination in question, but that a list based on merit over and above the recommendation was prepared.

11. From the above facts, two questions arise for consideration :

(a) Whether office, memorandum dated 15.11.1999 will be applicable to the subject selection for which the advertisement was made on 6.9.1998, select list were published on 19.12.1999 and recommendations made on 24.6.2000?

(b) Whether the decision of State Government of giving up preparation waiting list is arbitrary, unreasonable, and thus violative of Articles 14 read with 16 of the Constitution of India?

12. The first question need not detain this Court for long. The effect of office memorandum dated 15.11.1999 was not to change the selection procedure, namely, the number of vacancies, eligibility of candidates and method of selection. Petitioners do have a vested right regarding preparation of select list or a waiting list. The advertisement was made on 6.9.1998, preliminary examination was taken on 7.2.1999, main written examination was held in June,

1999, and interviews were held between 1.11.1999 to 4.12.1999. Final result was declared on 19.12.1999. The impugned office memorandum dated 15.11.1999 was issued while interviews were in process. It was not issued only for subject selection but covered all the selections to be made by the U. P. Public Service Commission for the State Government. A corrigendum notification dated 24.6.2000 was published in news paper "Rastriya Sahara" on 25th June, 2000 with regard to the selected candidates in the circumstances the first question is answered in affirmative.

13. The next question needs closer-examination as it affects all the selections to be made by the U. P. Public Service Commission. The earlier notification dated 31.1.1994 confined the list of select list for a period of one year. In the present case, the final select list was recommended by notification dated 24.6.2000. A Constitution Bench of Supreme Court in *Shankarsan Dash Vs. Union of India*, , has held that even if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates do not acquire any indefeasible right to be appointed against the existing vacancies. Ordinarily, an advertisement merely amounts to an invitation to qualified candidates to apply for recruitment on their selection. They do not acquire any right to the post. Unless the relevant recruitment, rules so indict, the State is under no legal duty to fill up 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. 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 position of law has been followed in *The State of Haryana Vs. Subash Chander Marwaha and Others*, ; *Miss Neelima Shangla, Ph. D. Candidate Vs. State of Haryana and Others*, and *Jatinder Kumar and Others Vs. State of Punjab and Others*,

14. In *Gujarat State Dy. Executive Engineers" Association Vs. State of Gujarat and Others*, the Supreme Court examined the scope and intention of a waiting list. The observations are quoted as below :

"How a waiting list should operate and what is its nature may be governed by the rules. Usually, it is linked with the selection or examination for which it is prepared. For instance if an examination is held say for selecting 10 candidates for 1990 and the competent authority prepares a waiting list then it is in respect of those 10 seats only for which selections or competition was held. Such lists are prepared either under the rules or even otherwise mainly to ensure that the working in the office does not suffer if the selected candidates do not join for one or the other reason or the next selection or examination is not held soon. Therefore, once the selected candidates join and no vacancy arises due to resignation etc. or for any other reason within the period the list is to operate under the rules or within reasonable period where no specific period is provided, then candidate from the waiting list has no right to claim appointment to any

future vacancy which may arise unless the selection was held for it.

Appointment in future vacancies from waiting list prepared by the Commission should be exception rather than the rule. It has many ramifications. There was no contingency nor the State Government had taken any decision to fill the vacancies from the waiting list as it was not possible for it to hold the examination nor any emergent situation had arisen except the claim of some of the candidates from the waiting list that they should be given appointment for vacancies which arose between 1980 and 1983 and between 1983 and 1993. The direction of the High Court, therefore, to appoint the candidates from the waiting list in the vacancies which, according to its calculation, arose between the years 1980 to 1983 and between 1983 to 1993 cannot be upheld."

15. The Supreme Court in a number of decisions relied upon in Prem Singh and Others Vs. Haryana State Electricity Board and Others, has held after following the earlier decisions, that if the requisition and advertisement are for a certain number of posts only, the State cannot make more appointments than the number of posts advertised, even though it might have prepared a select list of more candidates.

16. In the present case, on a request made by the State Government, the selections were held and a merit list for equal number of candidates was forwarded by the Commission. In paragraphs 34 and 35 of writ petition, an averment has been made that about 108 vacancies continue to exist on account of non-joining of candidates who have already been selected in Upper Grade, P.C.S. These vacancies relate to the same recruitment year and arose before the select list could be finalised on 24.6.2000 and thus the petitioners, who claimed to have secured marks, next to the selected candidates, had a right to be considered for appointment on the said vacancies. In Shankarsan Dash v. Union of India (supra) the Constitution Bench of Supreme Court found that the State Government is under no legal duty to fill up all or any of the vacancies and, however, the State does not have a licence to act in an arbitrary manner, and the decision not to fill up vacancies has to be taken bona fide for appropriate reasons.

17. It is not the case of the State Government that the competent authority decided to keep the vacancies unfilled or that there was any special contingency, or any policy decision taken not to fill up these posts. In the same recruitment year. The decision was taken on the ground of increasing number of writ petitions filed by the candidates of the selected list for their appointments on the posts, which could not be filled or remained vacant on account of reshuffling and legal difficulties faced in implementing the orders of courts. These reasons, to my mind, are wholly unreasonable, extraneous to the object of preparing waiting list, and are arbitrary. A candidate has a constitutional right under Article 14 read with 16 of the Constitution of India to be considered for appointment on the available vacancies after going through the process of selection. This right cannot be defeated on the ground that some of candidates in some other selections have filed writ petitions and challenging the number of vacancies, which could

not be filled up for various reasons ; or that it takes a long time, firstly in calculating the number of vacancies and thereafter going through the process of selection. The selection for the recruitment to Combined Lower Subordinate Services is not held every year. The accumulated vacancies of several years are offered for appointment through the selection to be held by the U. P. Public Service Commission. The next recruitment also takes long time. In the present case, the Court informed that after the subject recruitment, no further selection process has been initiated for appointments to the Lower Subordinate Services in U. P. The candidates, next to the last person in the merit list, thus has a right to be considered on the vacancies of the same year within period of the validity of the list. In the present case, it has not been denied that some of the selectees out of the select list, which came to be finalised on 24.6.2000, did not join, and, thus, the right of next to the last person in the list cannot be defeated on the ground of difficulties faced by the State Government as well as the U. P. Public Service Commission in implementation of orders passed in writ petitions in respect of recruitment to other services, and for saving time in determination of such litigation.

18. There is no object sought to be achieved by giving up preparation of waiting list. The vacancies will remain unfilled for long period, whereas deserving candidates will be kept waiting or take up other jobs. The U. P. Public Service Commission shall have to bear avoidable cost of selections for the same vacancies afresh. The candidates will either become overage or will have to again compete for the same vacancies. It is thus, in the interest and benefit of candidates, as well as in public interest to prepare a waiting list.

19. The contents of the impugned office memorandum speak for the state of affairs in the State Government. The direction contained in paragraph 2 of the order states that correct calculation of vacancies must be ascertained in respect of recruitment before sending the requisition to the Commission and no change should be made in the number of vacancies after the requisition has been sent. After the receipt of recommendation, the selected candidates must be allowed to join and that appointment orders must be issued within three months giving a maximum extension for one month in unavoidable circumstances. These directions were issued when the offices in the State Government, in which the vacancies arise, were found to be negligent in the past in calculating the number of vacancies and in requesting the appointments made within the time. The decision of the State Government for giving up the waiting list and reshuffling for reasons stated above is thus wholly unjustified, unreasonable and arbitrary and amounts to violation of petitioners' right under Article 14 read with 16 of the Constitution of India.

20. In Writ Petition No. 26913 of 2001, between Dharmendra Kumar Singh and Ors. and State of U. P. and Ors. and Writ Petition No. 16899 of 2001, between Surendra Kumar Pandey and Anr. and State of U. P. and Ors., the decision taken to give up waiting list in office memorandum dated 15.11.1999 was not

challenged and as such these writ petitions were decided on the basis of the impugned office memorandum.

21. The office memorandum dated 15.11.1999 is applicable to all the services for which selections are to be made by the Public Service Commission. These services are governed by their respective service rules made under Article 309 of the Constitution of India, and the office memorandum as such, cannot be allowed to supersede all those rules with regard to the selection process unless these rules are amended. Further, I find that the impugned office memorandum does not refer to or supersede the earlier office memorandum dated 31.1.1994 providing for a waiting list to be operative for a period of one year.

22. For the reasons aforesaid, the writ petitions are allowed and the decision taken by the State Government in the office memorandum dated 15th November, 1999, to give up the preparation of waiting list and reshuffling by U. P. Public Service Commission in respect of selections to the posts in the State Government to be made by the U. P. Public Service Commission is quashed ; with a direction to the U. P. Public Service Commission and the State Government to prepare a waiting list in accordance with the office memorandum dated 31.1.1994. A further direction is issued to the respondent to calculate the number of vacancies which could not be filled up out of the original requisitioned vacancies and remained vacant within one year, i.e., 24.6.2001 and to forward the names of the candidates next to the last recommended candidate for appointment in Combined Lower Subordinate Services Examination, 1998. The waiting list shall be prepared within a period of two months and the appointment orders shall be issued within next one month.

23. The costs to be paid by the respondents to the petitioners are quantified at Rs. 5.000.