
(2010) 03 AHC CK 0258
In the Allahabad High Court
Case No : Special Appeal. No. 353 of 2010

Udayveer Singh and Others	Vs	APPELLANT
State of U.P. and Others		RESPONDENT

Date of Decision : 17-03-2010

Acts Referred:

Citation : (2010) 5 AWC 4412

Hon'ble Judges : Amitava Lala, Acting C.J.; Ashok Srivastava, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

Amitava Lala, A.C.J.

1. The writ petitioners, before us as appellants, have been selected in the written and oral examinations under the dying-in-harness category but they failed in the test of physical fitness. According to them, due to shortage of time, i.e., 10 days between the other examinations and the physical fitness test, they were not prepared for such physical fitness test. Therefore, they are entitled for the second opportunity, if the relevant Rules. Government orders and the order of the Division Bench dated 20th December, 2006, passed in Special Appeal No. 1602 of 2006 Pankaj Kumar Vishnoi v. State of U.P. and Ors. are taken together.

2. Learned single Judge, in his order dated 16.2.2010 has held that no right can be vested with the candidates to become successful in the examinations under the category of dying-in-harness alongwith others, who get appointment, with the confirmation of a status and reservation of the post. Time always vitiates the need of compassionate appointment and, in the present case, no financial hardship is supposed to be faced by the family and at least the same can be reflected when they are also fighting for cause for the last four years. Moreover, the judgment of selfsame learned single Judge dated 28.10.2009, passed in Civil Misc. Writ Petition No. 52357 of 2009 Smt. Neelam Verma v. State of U.P. and Ors. which is favouring the cause of the appellants herein, has been held per

incurium in nature.

3. Mr. C. B. Yadav, learned senior counsel appearing for the appellants, has contended before us that the appellants before this Court cannot be discriminated with others, who have already been given an opportunity by the self-same learned single Judge in Smt. Neelam Verma (supra). According to learned standing counsel, such judgment is only applicable in the case of Rule 16 (b) of the Uttar Pradesh Sub-Inspector and Inspector (Civil Police) Service Rules, 2008, (hereinafter in short called as the Rules, 2008), i.e., with regard to promotion. But we find from such judgment in re : Smt. Neelam Verma (supra) that the issue involved therein was as follows:

The petitioner seeks a writ of mandamus commanding the respondents to provide her one more opportunity of appearing in physical efficiency test for the recruitment on the post of Sub-Inspector of Police on the compassionate ground.

4. Moreover, we have to go by the import of the order of the Division Bench in Pankaj Kumar Vishnoi (supra) with reference to the Rule, if any, when the reason has been shown therein with regard to the dependent of the deceased employee, that after a period of four years whether he became unfit or more fit, it necessitates for consideration.

5. We further find from the order of the learned single Judge in Smt. Neelam Verma (supra), as referred, that in the said case the selection under the dying-in-harness category was proceeded on the basis of an application of the petitioner therein dated 24th May, 2001, wherein she failed and thereafter on the basis of her letter dated 3rd July, 2009, she sought another opportunity, which was declined by the authority concerned. In this background, the order was passed therein. Therefore, the cause was considered by the selfsame learned single Judge after a period of eight years from the date of original application for appointment on compassionate ground. Hence, without apprising all these facts, we cannot hold and say whether at this belated stage, such order can be passed on account of compassionate appointment or not.

6. Further facts are that the order of the Division Bench in Pankaj Kumar Vishnoi (supra) was followed by the learned single Judge in the order dated 5.2.2010, passed in Writ Petition No. 1895 (S/S) of 2005 Sri Prakash Mishra and Ors. v. State of U.P. and Ors. and in another order dated 22nd February, 2007, passed in Civil Misc. Writ Petition No. 9702 of 2007 Amit Shahi v. State of U.P. and Ors. the second opportunity was allowed by another learned single Judge. Therefore, the question for consideration before us is whether second opportunity can be given in this case or not.

7. Before going into such controversy, we should say that giving or not giving the compassionate appointment in the cases not backed by any rule is different from the cases which are backed by any rule. The question of bread-winning of the dependent will be considered at the threshold, but when the ball has been rolled by allowing the appellants to sit for the written and oral examinations and they

have become successful, we cannot put the clock backwards without affording any equitable justice. The Uttar Pradesh Recruitment of Dependents of Government Servants Dying-in-Harness Rules, 1974 is favouring the cause of such appointment. Further, Rules, 2008 has made a provision under Rule 5(1) of Part III for source of recruitment. Therefore, the appointment of Sub-Inspector from the dying-in-harness category is one of the sources but not an exception to the source, which can be differentiated for giving an opportunity of equitable justice. Rule 13 of the Rules, 2008 speaks about physical fitness and possibly is made for the examination by the Medical Board. Physical efficiency test is also there under the provisions of Rule 15 (e).

8. A technical plea has been taken by the learned standing counsel and it is rightly shown that as per Rule 16 (b) of the Rules, 2008, physical efficiency test here means recruitment by promotion but not otherwise. But that does not necessarily mean that for the recruitment of the candidates, when compassionate appointment is one of the source, the principle of selection will be ignored. A query of the Court to Mr. Yadav was that since there is no scope available under both the aforesaid Rules, how the opportunity prayed for can be provided to which he answers that opportunity for the physical fitness is allowed not only for the second time but also for the third time as per the Government order dated 27th January, 2010. Learned standing counsel has contended that the Government order is in the form of proposal only and no position has been finalized to that extent. However, Government order is applicable to the extent of S.I. (M), i.e., Sub-Inspector (Ministerial), but the orders which have been passed by the Division Bench and other learned single Judge of this Court are clear on the point that the compassionate appointment and the second physical fitness test are not restricting itself to the Sub-Inspector (Ministerial) but are for the Sub-Inspectors also.

9. Learned standing counsel has contended before us by citing the judgment of the Supreme Court in I.G. (Karmik) and Ors. v. Prahlad Mani Tripathi 2007 (6) AWC 6075 SC, that relaxation cannot be made in respect of the candidates who are to be appointed in the police services, to which Mr. Yadav has submitted that he is not asking for any relief to the extent of relaxation but he only requires an opportunity of physical test.

10. According to us, whether the persons will be selected or not by the test of physical fitness, is totally in the hands of the authority. Since no relaxation is required to be considered, therefore, there cannot be any embargo to consider them on the basis of the second physical fitness test.

11. In view of the circumstances and the references made by this Bench in respect of earlier decisions either by the Division Bench or by the learned single Judges, we should not deviate from the judicial orders otherwise multiplicity of the proceedings will prevail. Therefore, balance of convenience prescribes for such test as early as possible preferably within a period of one month from the date of communication of this order.

12. With the above observations and order, the special appeal is disposed of, however, without imposing any cost.

Ashok Srivastava, J.

13. I agree.