

(2014) 02 AHC CK 0272

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 61171 of 2010

Union of India and Another

APPELLANT

Vs

Kamlesh Kumar and Another

RESPONDENT

Date of Decision : 24-02-2014

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2014) 2 ADJ 696 : (2014) 4 ALJ 447 : (2014) 103 ALR 660 : (2014) 4 AWC 3761 : (2014) 2 ESC 910 : (2014) 3 UPLBEC 1921

Hon'ble Judges : Rajesh Kumar Agrawal, J; Ashwani Kumar Mishra, J

Bench : Division Bench

Advocate : Ajay Bhanot, Advocate for the Appellant; Namwar Singh, O.P. Gupta, S.C. and Sanjiv Singh, Advocate for the Respondent

Judgement

Ashwani Kumar Mishra, J.—The Union of India through Secretary, Department of Posts, Ministry of Communications, Government of India, New Delhi and Superintendent of Post Offices, West Division, Varanasi have invoked the extraordinary jurisdiction of this Court, under Article 226 of the Constitution of India, in challenging the judgment and order dated 3.6.2010 passed by Central Administrative Tribunal, Allahabad Bench, Allahabad in Original Application No. 1393 of 2006 Kamlesh Kumar v. Union of India and others. The facts, in brief, are that an advertisement dated 7.3.2005 was published by the department, inviting applications from scheduled caste candidates, for appointment of Gramin Dak Sewak (Extra Departmental Delivery Agent). The qualification required as per advertisement was High School passed or equivalent examination, more than 18 years of age and possessing of other means to sustain the requirement of family. Following further requirement in the advertisement was mentioned.

2. The respondent No. 1-Kamlesh Kumar submitted his application pursuant to the aforesaid advertisement. The respondent No. 1 had obtained 72.33% marks in his High School Examination and, therefore, he stood at the top of the merit list. Smt. Shila Devi had obtained 65% marks in her High School Examination

and she also applied. She stood IInd in order of merit. It appears that the department proceeded to entertain the claim of respondent No. 1-Kamlesh Kumar. While examining the condition of providing space/premises for post office, Sri Kamlesh Kumar appears to have submitted a certificate offering premises of Sri Shauqat Ali son of Rahimullah, wherein the post office could be set up. This was verified by the department and it was found that Sri Shauqat Ali has expressed his inability to provide space for post office to Sri Kamlesh Kumar. Consequently, a notice dated 30.12.2005 was issued to Sri Kamlesh Kumar intimating that Sri Shauqat Ali has refused to provide the space, for establishment of post office, as had been mentioned in the application of Sri Kamlesh Kumar and, therefore, an opportunity was afforded to him for providing space to set up the post office within three days, failing which the application of the petitioner would not be considered. In response to this notice, Sri Kamlesh Kumar submitted an application stating that he is now offering another place/premises belonging to Sri Jitendra Kumar, who is ready and willing to provide the space, without rent to be charged from the department. This letter of Sri Kamlesh Kumar is dated 1.1.2006. Thereafter, Sri Kamlesh Kumar submitted yet another letter dated 7.1.2006, substituting the premises offered, belonging to Jitendra Kumar, with that of one Sharad Upadhyaya, on the ground that as only three days time was given to him in the letter of the department, as such, he had proceeded to offer the space belonging to Jitendra Kumar in haste, but from the security point of view the premises of Jitendra Kumar is not appropriate. The certificate dated 4.1.2006 of Sri Sharad Upadhyaya son of Tribhuwan Upadhyaya was annexed.

3. From the perusal of the records, it appears that the claim of the respondent No. 1-Kamlesh Kumar for offering the premises of Sri Sharad Upadhyaya, wherein the post office was previously run, was also examined. The Deputy Regional Inspector (Posts) of the concerned area appears to have conducted an enquiry, wherein it transpired that Sri Sharad Upadhyaya did not own any premises and the premises offered by him actually belonging to his father Sri Tribhuwan Upadhyaya. In the enquiry, it further transpired that Sri Sharad Upadhyaya had dispute with his real brothers and for resolving the dispute his parents had gone to Bombay.

4. The Department of Posts and Telegraph after having issued opportunity to the respondent No. 1-Kamlesh Kumar came to the conclusion that he had failed to provide the required space for setting up of post office and, therefore, the eligibility required for issuance of an appointment was found lacking and consequently the second candidate in order of merit was considered. Smt. Shila Devi met all eligibility criteria, including that of providing space for setting up of post office and, as such, a letter of appointment was issued to her on 14.3.2006.

Aggrieved against the action of the department in offering appointment to Smt. Shila Devi, Sri Kamlesh Kumar approached the Central Administrative Tribunal by filing Original Application No. 1393 of 2006. The order dated 14.3.2006

appointing Smt. Shila Devi was challenged and its quashing was sought. Further prayer for a mandamus was made, directing the respondents to select and appoint Sri Kamlesh Kumar.

5. The claim of Sri Kamlesh Kumar was opposed by the department, which filed a counter affidavit. It was contended through counter affidavit that the department did proceed to consider the case of Sri Kamlesh Kumar as he was placed higher in merit list, however, it was found by the department that Sri Kamlesh Kumar lacked the requirement of possessing space for the use of post office, which was a necessary condition to be fulfilled before issuance of the appointment order. It was stated that the department having found Sri Kamlesh Kumar lacking in possessing the requirement of having space in the village, duly intimated to him and also afforded opportunity to provide details of space for post office but even thereafter Sri Kamlesh Kumar failed to meet the requirement. Since opportunity was afforded to Sri Kamlesh Kumar, and the space offered on the third count was also not found to be actually available as required, the department had no option but to consider the candidature of next available candidate and rightly offered appointment to her.

6. The Tribunal considered the respective claims of the parties. The Tribunal after consideration of the cause came to the conclusion that the action of the authorities in not considering the claim of Sri Kamlesh Kumar for appointment lacked bona fide and consequently it allowed the claim of Sri Kamlesh Kumar. Para 13 to 15 of the judgment of the Tribunal is reproduced.

13. We have also perused Annexure A-1 to the C.A. which is originally a consent letter given in favour of the applicant. There is an endorsement in the hand of Nirikshak Dak, Uttar Up-Mandal, Varanasi; Annexure A-3 is consent letter given by Shri Jintendra Kumar. It bears an endorsement 7/1 /2006

14. Annexure A-5 the consent letter of Shri Sharad Upadhyaya. It is seen that in this case a complete outsider has offered information on acceptance and denials on behalf of Shri Sharad Upadhyaya. Curiously, authorities acted on information given by a unrelated party. There are all the indications that the authorizations have only over reached the mandate available to them under the rules, there action of making unsolicited inquiry from the consentees betrays lack of bona fide.

15. We have perused the rules and a few decisions of the coordinate Benches placed before us. There is no doubt about the sequence of actions as provided in the rules. We have no hesitation in holding that the offer for appointment should have been made to the applicant first and foremost. Any question of failing to secure proper accommodation will come later. That having been done, the order dated 31.5.2005 (Annexure CA-1) being against the rule and lacking in bona fide is accordingly set aside and quashed. We also direct the respondent No. 2 or any other authority competent in this behalf to make the offer of appointment to applicant No. 1 followed by reasonable opportunity affording to him within four

weeks time from the date of receipt of copy of this order. The case of the private respondent may be dealt with as per rules.

7. Challenging the judgment of the Tribunal, aforesaid, the department has filed the present writ petition.

8. We have heard Sri Ajay Bhanot, Advocate, who appears for the petitioners, Sri Sanjeev Singh, Advocate, appearing for respondent No. 1-Sri Kamlesh Kumar and Sri O.P. Gupta, Advocate, who appears for the appointed candidate Smt. Shila Devi.

9. Sri Ajay Bhanot appearing for the petitioners contended that the matter relating to grant of appointment of Extra Departmental Agent is governed by the provisions of the advertisement as well as the relevant circulars issued by the department. He has relied upon the contents of the circular dated 22.5.2002, of the Chief Postmaster General, relevant portion whereof was noticed by the Tribunal also, which is reproduced.

Meritorious candidate shall be considered first:

While making selection of candidate for recruitment to the post of EDA, the merit is prescribed qualification should be given preference and offer of appointment be given to highest meritorious candidates, if he/she fulfills the requirement for accommodation for housing the post office in post village/resident in delivery jurisdiction of the post office, as the case may be. If the candidate first in merit fails to satisfy the condition of accommodation/residence then offer be given to candidate second in merit and so on. In order to check recurrence of such cases in future, I am writing to you so that strict adherence of the instructions of the Directorate on the subject is ensured at all stage. These instructions may be brought to the notice of all concerned.

10. According to Sri Bhanot, the claim of Sri Kamlesh Kumar, who was at the top of the merit list had been considered by the department. However, as he had failed to satisfy the requirement of providing premises for running of the post office, which was mandatory, and for which adequate opportunity was also afforded, that the candidature of next candidate in order of merit was considered, which was in accordance with terms of the advertisement and circular of the department. He challenged the judgment of the Tribunal on the ground that the Tribunal misread the circular, terms of the advertisement as well as the facts of the present case and the finding returned by the Tribunal that the action of the department was mala fide is baseless, contrary to the materials available on record and perverse. He, therefore, prayed that the judgment of the Tribunal, which had already been stayed on 27.10.2010 by this Court in the instant case, is liable to be set aside. Sri O.P. Gupta, who appears for the selected candidate Smt. Shila Devi, adopted the arguments of Sri Ajay Bhanot.

11. Sri Sanjeev Singh, who appears for the respondent No. 1-Kamlesh Kumar, has attempted to justify the judgment of the Tribunal by stating that the

department was an under obligation to have offered appointment to the person at the top of the merit i.e. Kamlesh Kumar and only thereafter occasion to provide premises by Sri Kamlesh Kumar could have arisen. Since the department had not issued any letter of appointment to Sri Kamlesh Kumar, even though, he was highest in merit, as such, the action of the department was arbitrary. He also contended that the department had erred in holding the offer of space for post office of Sri Sharad Upadhyaya as not available, inasmuch as for neglecting such claim, reliance had been placed upon the statements of unrelated persons and without due opportunity, the department had ignored the claim of Sri Kamlesh Kumar. It was argued by Sri Sanjeev Singh that as per circular of the department, it was an under obligation first to have appointed Sri Kamlesh Kumar and only thereafter his client was required to provide the premises, which condition was actually fulfilled. Sri Sanjeev Singh further submitted that Tribunal was right in accepting the claim of his client and coming to the conclusion that the denial of the claim of his client was actuated with mala fide intent and thus judgment of the Tribunal does not require any interference.

12. We have considered the respective submissions of the parties and have examined material available on record. It is not disputed that Sri Kamlesh Kumar stood at the top of the merit list and his claim was liable to be considered first. The department, as a matter of fact, did proceed to consider the claim of Sri Kamlesh Kumar, first. It further appears from the record that application of Sri Kamlesh Kumar was duly processed further and the eligibility criteria of possessing premises/space for setting up of post office was duly inquired into. The department found the original offer of premises, submitted by Sri Kamlesh Kumar, belonging to Sri Shauqat Ali as not tenable, since upon enquiry Sri Shauqat Ali refused to provide the premises. The department admittedly intimated this fact to Sri Kamlesh Kumar vide letter dated 30.12.2005. Sri Kamlesh Kumar availed of the opportunity provided by the department and furnished alternative premises belonging to Sri Jitendra Kumar, which also was later found to be not available. As a third option, the premises alongwith the consent letter of Sri Sharad Upadhyaya for providing space was submitted by Sri Kamlesh Kumar. In the enquiry report of the Deputy Regional Inspector, Department of Posts, it transpired that Sharad Upadhyaya actually never owned any premises and the premises offered by him actually belonging to his father Tribhuwan Upadhyaya, whose consent was not on record. There is nothing on record to dispute this part of the report. The further facts appearing in the report, suggesting dispute between Sri Sharad Upadhyaya and his brothers, based on the report of Smt. Rita Devi, Ex-Pradhan, has been challenged on the ground that she was an unrelated person and her testimony could not be relied upon, particularly when no opportunity to Sri Kamlesh Kumar on this aspect was given.

13. According to the terms of the advertisement and the circular operating, the claim of person highest in merit was required to be considered first. This was precisely done by the department. However, before issuing advertisement, the

claim for providing premises for post office was required to be inquired/examined by the department. The department actually considered this aspect and in the enquiry admittedly the initial claim submitted by Sri Kamlesh Kumar for providing premises of Sri Shauqat Ali was found to be not available. The department, nevertheless proceeded to offer an opportunity to Sri Kamlesh Kumar, which is not disputed. Sri Kamlesh Kumar submitted the second option of offering premises of Jitendra Kumar, which also was not found to be available. The third option provided by Sri Kamlesh Kumar also was examined on merits and the department, in enquiry, found the offer of space provided by Sri Sharad Upadhyaya as no option in the eyes of law as in the enquiry it was found that the premises actually belonged to Sri Tribhuwan Upadhyaya and not to Sri Sharad Upadhyaya. No consent of Tribhuwan Upadhyaya was on record.

14. The department in considering the claim of Sri Kamlesh Kumar first and by granting him opportunity to furnish space for setting up of the post office acted clearly in terms of the circular and the advertisement. Having found the claim of Sri Kamlesh Kumar for providing premises/space for establishment of the post office was not available, it was clearly justified in proceeding to consider the claim of the second candidate in order of merit.

15. The finding of the Tribunal to the effect that consent letter of Sri Sharad Upadhyaya was disbelieved on the information given by unrelated party and that the authorities over reached the mandates available to them, under the rules and that their action of making unsolicited enquiry from the consentees betrays lack of bona fide, are clearly contrary to the materials available on record, and hence cannot be sustained. It is apparent from the record that the department proceeded to consider the claim of Sri Kamlesh Kumar first and it rightly examined the eligibility criteria of providing space, which was a relevant criteria for examining the candidature, in terms of the advertisement and the circular. The department acted in terms of the advertisement and its action in examining the claim by granting opportunity to Sri Kamlesh Kumar to substantiate the claim of providing space, on three different occasions, clearly shows transparency and fair play in action on part of the department, and it cannot be said to be lacking in bona fide.

16. The Hon'ble Supreme Court in the case of Smt. Kiran Singh Vs. Union of India (UOI) and Others, , noticed the terms of the advertisement for appointment of Extra Departmental Branch Postmaster and it was also observed by the Apex Court that educational qualification was not the only criteria for issuance of appointment and that other eligibility criteria were also required to be examined. Dealing with the other eligibility criteria, in Para 13 of the said decision, the Apex Court held as under:

13. In the facts and circumstances of the case, in our view the order of the CAT which has been affirmed by the High Court is manifestly erroneous and cannot be sustained. The appellant and respondent No. 5 both have qualified the High School Examination by securing first division. The eligibility and criterion for the

selection of the candidate to the post of EDBPM as per the Service Rules was not only the merit between the two candidates in High School Examination but the additional criterion was that the candidate must be one, who has adequate means of livelihood derived from landed property or immovable assets" if the candidate is otherwise eligible for appointment. The instructions governing the eligibility of the candidates also provide that no weightage will be given for any higher qualification. The appellant has fulfilled the essential qualification and required eligibility criterion and as such her selection to hold the post in question was valid whereas respondent No. 5 was not eligible to be appointed on the post for lack of income criterion in terms of the Circular.

17. The department was, therefore, clearly justified in examining the eligibility of Sri Kamlesh Kumar with reference to the availability of space/premises for establishment of post office building, before issuance of the appointment letter. The Tribunal on complete misconstruction of the terms of the advertisement and policy contained in the circular proceeded to observe that issuance of appointment was to be made first and the providing of space was to be examined thereafter. The finding in the judgment of the Tribunal, quoted above, is therefore, clearly contrary to the terms of the advertisement and circular.

18. In view of the discussion made above, we are of the considered opinion that the Tribunal was not justified in returning findings, accepting the claim of Sri Kamlesh Kumar, which are not supported by the materials available on record. The finding of the Tribunal, therefore, contained in para 14, reproduced above, are perverse and unsustainable and, therefore, are set aside.

19. The further finding contained in para 15 of the judgment of the Tribunal providing the sequence of actions requiring issuance of offer of appointment first and for occasion to consider accommodation thereafter, is also contrary to the terms of the advertisement and the provisions of the circular. The findings so contained in para 15 are also, therefore, based on complete misconstruction of terms of advertisement and relevant circular and being contrary to records are set aside.

20. The Apex Court in *Shama Prashant Raje Vs. Ganpatrao and Others*, , while dealing with the scope of powers of High Court under Article 226 of the Constitution of India, in interfering with the findings of inferior Tribunal, has held as under in para 5 thereof:

5. ----- . Undoubtedly, in a proceeding under Article 226 and 227 of the Constitution the High Court cannot sit in appeal over the finding recorded by a competent tribunal. The jurisdiction of the High Court, therefore, is supervisory and not appellate. Consequently Article 226 is not intended to enable the High Court to convert itself into a Court of appeal and examine for itself the correctness of the decision impugned and decide what is the proper view to be taken or order to be made. But notwithstanding the same, on a mere perusal of the order of an inferior tribunal if the High Court comes to a conclusion that such

tribunal has committed manifest error by misconstruing certain documents, or the High Court comes to the conclusion that on the materials it is not possible for a reasonable man to come to a conclusion arrived at by the inferior tribunal or the inferior tribunal has ignored to take into consideration certain relevant materials or has taken into consideration certain materials which are not admissible, then the High Court will be fully justified in interfering with the findings of the inferior tribunal.-----

21. In view of the facts and circumstances as noted above, the writ petition succeeds and is allowed. The judgment and order dated 3.6.2010 passed by Central Administrative Tribunal, Allahabad Bench, Allahabad in Original Application No. 1393 of 2006 "Kamlesh Kumar v. Union of India and others" is set aside. The original application No. 1393 of 2006, Kamlesh Kumar v. Union of India and others, is dismissed. No order is passed as to costs.