

(2014) 01 AHC CK 0245

In the Allahabad High Court

Case No : Civil Misc. Writ Petition Nos. 49356, 60376, 71329, 73255 of 2011 and 11341, 11343 of 2012

Vijay Shankar Yadav and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 28-01-2014

Acts Referred:

Citation : (2014) 3 ADJ 150 : (2014) 5 ALJ 123 : (2014) 2 AWC 1961 : (2014) 2 UPLBEC 1225

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Advocate : Ashok Khare, Siddharth Khare and Nisheeth Yadav, Advocate for the Appellant

Final Decision : Allowed

Judgement

Sudhir Agarwal, J.—Heard Sri Ashok Khare, Senior Advocate, assisted by Sri Siddharth Khare, learned counsel for the petitioners and learned Standing Counsel for the respondents. In all these writ petitions, common questions of law are involved and therefore, they have been heard together and are being decided by this common judgment. However, for the purpose of brevity, facts and pleadings from Writ Petition No. 73255 of 2011 have been taken and counsel for the parties in other matters stated at the bar that facts in all other matters are more or less similar and issue in fact is the same, therefore, whatever is said in respect of the leading writ petition, that would equally apply to other matters and, hence, I proceed accordingly.

2. The result of physical efficiency test declaring petitioners unqualified, and, communicated by order dated 2.11.2011 of Deputy Superintendent of Police, Establishment on behalf of Deputy Inspector General of Police, (Establishment) U.P., has been challenged in this writ petition on various grounds. It is said that appropriate electronic gadget was not attached to the legs of candidates which would have recorded the number of rounds completed by a candidate correctly

and instead rounds were sought to be counted by a few persons present though number of candidates running was quite large. A more serious issue has been raised regarding constitution of Selection Committee and it is said that Selection Committee was not constituted as per the Rule 15(e) read with Appendix 2 of U.P. Sub-Inspector and Inspector (Civil Police) Service Rules, 2008 (hereinafter referred to as "Rules, 2008") and petitioners have been examined by a body, which was not lawfully constituted. It is argued that Selection Committee, who conducted "Physical Efficiency Test" consisted of Sri Ashutosh Pandey, Deputy Inspector General of Police, Special Inquiry, U.P. Lucknow as Chairman, Sri D.C. Mishra, Commandant, 35th Battalion, P.A.C., Lucknow and as Members, Smt. Geeta, Additional Superintendent of Police, C.B.C.I.D., U.P. Lucknow, Sri Shahab Rasheed Khan, Additional Superintendent of Police, S.T.F., U.P. Lucknow and Sri Ram Badan Singh, Assistant Commandant, 35 Battalion, P.A.C., U.P., Lucknow, which is not as per the requirement of the rules.

3. 248 male and 48 female candidates were called for participation in Physical Efficiency Test between 25.7.2011 to 27.7.2011. 30 male and 48 female candidates were to participate on 25.7.2011, 168 male candidates in four batches were required to participate in the above test on 26.7.2011 and 50 male candidates, in two batches, were to participate on 27.7.2011.

4. It is worthy to notice that above Physical Efficiency Test was specially convened for making compassionate appointments on the post of Sub-Inspector and all the petitioners, in the writ petitions, are candidates seeking compassionate appointment on the post of Sub-Inspector, who have been found unsuccessful in physical efficiency test having not completed requisite distance of running in the prescribed time.

5. Sri Ashok Khare, learned counsel for the petitioners drew attention of this Court to Appendix-2 read with Rule 15(e) of Rules, 2008 and contended that for conducting physical efficiency test for direct recruitment with reference to rule 15(e), three members team is required to be constituted comprising of following:

1. Sub-Divisional Magistrate/Deputy Collector;
2. Doctor/Sports Officer/National Cadet Corps, Officer;
3. Deputy Superintendent of Police.

6. He also pointed out that for physical standard test/physical efficiency test under Rule 15(c), the Committee, which is to be constituted under Appendix-1, is also a three members team with the same composition, as is contemplated in Appendix-2 with reference to Physical Efficiency Test under Rule 15(e). In the present case, since the team, which has conducted the test in question, is not the one as provided in the Rules, the physical efficiency test/physical standard test is illegal. Since the test has been conducted by a Committee constituted de hors the rules, it is no test in the eyes of law and deserves to be quashed, Sri Khare pleaded.

7. The respondents have contested the writ petition by filing counter-affidavit in which applicability of Rules, 2008 is not disputed. In para. 6, it is said that in order to claim appointment on the post of Sub-Inspector, candidates must satisfy physical standard of completion of 10 kilometers runs in 60 minutes (for male) and 5 kilometers in 35 minutes (for female). The scope of any mistake in manual counting of completed rounds has been denied in para. 7. It is urged that Selection Committee, headed by Sri Ashutosh Pandey, examined petitioners and once they have failed in physical standard test, no further opportunity can be given to them and, instead, they may apply for any other post. It is argued that no candidate seeking compassionate appointment has a right to claim appointment against a particular post. The respondents have also relied on the decision in *State of U.P. and Others Vs. Pankaj Kumar Vishnoi*, .

8. Having gone through the decision cited at the Bar by learned Standing Counsel in *State of U.P. and others v. Pankaj Kumar Vishnoi* (supra), I find that it has no application in the case in hand. Therein, physical test was conducted from 27.6.2005 to 29.6.2005 for the post of Sub-Inspector (Civil Police), wherein petitioner participated but returned unsuccessful. Challenging his non selection, he preferred Writ Petition No. 63596 of 2006 with a prayer that he should be allowed compassionate appointment on the post of Sub-Inspector (Civil Police) but did not disclose in the writ petition that he was already subjected to physical test for appointment on the said post but failed. The writ petition was dismissed by learned Single Judge vide judgment dated 23.11.2006 on the ground that earlier writ petition with the same prayer was filed and was dismissed as withdrawn without any liberty to file another writ petition, therefore, second writ petition was not maintainable for the same relief and second prayer that he should be offered post of Sub-Inspector (Civil Police) without subjecting him to undergo physical efficiency test is misconceived. This judgment of learned Single Judge was assailed in intra Court appeal i.e. Special Appeal No. 1602 of 2006 under Chapter VIII, Rule 5 of the Rules of the Court, which was allowed by Division Bench and judgment of learned Single Judge was set aside. The Division Bench observed that dismissal of earlier petition would not come in the way of second petition since with the passage of time, the petitioner may have become more fit or may be unfit. The Court, therefore, directed the State to test Pankaj Kumar Vishnoi again. It is this judgment of Division Bench, which was taken in appeal by State. The Apex Court has reversed Division Bench judgment observing that compassionate appointment is not a matter of right. If applicant does not conform to the physical efficiency required under the rules or as decided by appointing authority, such applicant cannot claim appointment on compassionate basis as a matter of right ignoring such efficiency or suitability test as prescribed. The Court further held that in the present case petitioner Pankaj Kumar Vishnoi was already subjected to test for appointment on the post of Sub-Inspector (Civil Police) but he did not qualify and in these circumstances, High Court was not justified to direct Department to give him another opportunity only on the ground that there has been efflux of time. The Court said:

The respondent being disqualified in the physical test could not have claimed as a matter of right and demand for an appointment in respect of a particular post and the High Court could not have granted further opportunity after the crisis was over.

9. Here, petitioners-candidates are not claiming any second opportunity but they have challenged the test, already conducted by respondents, on the ground that it has been conducted by a Selection Committee, which was not constituted in accordance with rules and have tried to buttressed their argument by observing that an illegally constituted Committee having all the department officials as Chairman and Members has subjected the petitioners to test in a biased atmosphere. The submission is that in any case when selection has not been made strictly in accordance with rules, it is illegal and void ab initio and mere fact that petitioners have appeared in such test would not validate an otherwise illegal selection.

10. Thus, proposition in general that no candidate seeking compassionate appointment has a right to claim such appointment against a particular post, raised by respondents in the counter-affidavit, is well established but in the present set of writ petitions, it has no application at all.

11. The question up for consideration in these writ petitions is, whether physical efficiency test conducted in the case in hand has been done in accordance with statutory rules, which learned Standing Counsel also admits are applicable and binding.

12. Selection Committee, which has to conduct test, is a statutory body. It cannot be altered, changed, modified or substituted by a committee of a different constitution and composition at the whims of employer i.e. Government. The kind of composition of Committee provided in the rules shows that rule framing authority contemplates that Selection Committee must consist of officials not only from Police department but from other departments also so that there may be lessor scope of any plea of bias etc. The scope of independent objective consideration by members of Selection Committee from different departments would be more emphatic and the reason as to why aforesaid Selection Committee did not hold Physical Efficiency Test in the case in hand has not been explained.

13. Learned Standing Counsel, when confronted with Rules, 2008 could not dispute that Committee, which conducted Physical Efficiency Test in the case in hand is entirely different than what is contemplated in the Rules. It is not a case where petitioners are claiming any relaxation or concession in respect of application of statutory rules but what they are contending is, "when something is required to be done in a particular manner, respondents cannot proceed to do the same in any other manner" as that would be illegal. They are bound and obliged to follow rules, strictly, in words and spirit. Any deviation therefrom would vitiate their action. The principle was recognized in AIR 1936 253 (Privy

Council) and, thereafter, it has been reiterated and followed consistently by Apex Court in a catena of judgments, which I do not propose to refer all but would like to refer a few recent one.

14. In *Dhananjaya Reddy etc. Vs. State of Karnataka*, of the judgment the Court held:

It is a settled principle of law that where a power is given to do a certain thing in a certain manner, the thing must be done in that way or not at all.

15. In *Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala and Others*, , it was held:

It is a normal rule of construction that when a statute vests certain power in an authority to be exercised in a particular manner then the said authority has to exercise it only in the manner provided in the statute itself.

16. The judgments in *Anjum M.H. Ghaswala (supra)* and *Dhananjaya Reddy (supra)* laying down the aforesaid principle have been followed in *Captain Sube Singh and Others Vs. Lt. Governor of Delhi and Others*, .

17. In *Competent Authority Vs. Barangore Jute Factory and Others*, , it was held:

It is settled law that where a statute requires a particular act to be done in a particular manner, the act has to be done in that manner alone. Every word of the statute has to be given its due meaning.

18. In *State of Jharkhand and Others Vs. Ambay Cements and Another*, , in para. 26 of the judgment, the Court held:

It is the cardinal rule of interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way.

19. In fact a similar question was considered by Division Bench of this Court [in which I was also a member with Hon"ble S.R. Alam, J., (as His Lordship then was)] in *Daya Shankar Singh and Others Vs. State of U.P. and Others*, and this Court has observed:

A modification, amendment etc., therefore, is permissible by exercising the power in the like manner and subject to like sanction and conditions in which the main provision was made initially. Since, Staff Regulations were framed admittedly with the previous sanction of the State Government and by publication in the official Gazette, same can be amended only following the same procedure and not otherwise. Therefore, the proposal/resolution passed by the Board of Directors, UPSWC by no stretch of imagination can be said to have the effect of either amending Regulation 12 of Staff Regulations or to bind UPSWC and its employees to be governed by such resolution/proposal which are inconsistent with the existing provisions contained in Staff Regulations.

20. Learned Standing Counsel feebly sought to argue that petitioners having

participated in the selection before the Committee constituted by respondents cannot be allowed to subsequently challenge the very constitution of Committee and therefore, this Court should decline to interfere.

21. This submission is also thoroughly misconceived. Here is a case where respondents have conducted selection through a Selection Committee which is patently illegal, having not been constituted in accordance with rules. There cannot be any estoppel against law. When something has been done by a body, not legally constituted, such action would be void ab initio. In such a case, principle that once you have participated in the selection, you cannot challenge rules of the game will not apply for the reason that, here, petitioners are not challenging rules of the game, but their grievance is that rules say something while respondents have played the game in complete defiance thereof and therefore, their action is illegal and void ab initio.

22. In my view, since petitioners have not been tested for physical efficiency test/ physical standard test, by a Committee, validly constituted, in accordance with rules, their rejection by an unauthorised and illegally constituted committee is patently illegal.

23. The view, this Court is taking with respect to aforesaid selection, is bound to render entire selection and result declared by the aforesaid committee, illegal. However, candidates, who have been declared successful are not party before this Court. It is stated at the bar that most of those candidates may have already been appointed in service. In their absence, therefore, it will not be appropriate for this Court to pass an order affecting their interest adversely. In these facts and circumstances I am confining consequence of this judgment only to the extent of result of present petitioners and make it clear that declaration of result of petitioners only would stand set aside. The petitioners shall be allowed Physical Efficiency Test, afresh, in accordance with rules, through a team consisting of members as provided in Rules, 2008. The respondents shall proceed accordingly. This exercise shall be completed expeditiously and in any case, within three months from the date of communication of this judgment.

24. The writ petitions are allowed, in the manner, as aforesaid. The petitioners shall also be entitled to cost, which I quantify to Rs. 2000/- for each set of writ petitions.