

(2009) 12 AHC CK 0277

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 28351 of 2009 and Civil Miscellaneous Application No. 190089 of 2009 (Under Article 215 of Constitution of India) connected with Civil Miscellaneous Writ Petition Nos. 28351 and 37581 of 2009

Vipin Bihari Singh and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 16-12-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 215, 226, 309
Uttar Pradesh Public Works Department Group-B Civil Engineering Service Rules, 2004 — Rule 15(2)

Citation : (2009) 12 AHC CK 0277

Hon'ble Judges : Amitava Lala, J and Ashok Srivastava, J

Final Decision : Dismissed

Judgement

Amitava Lala, J.

Since both the aforesaid writ petitions involving similar controversy are connected with each other, therefore, the same are being decided by this common judgement having binding effect upon both the matters, taking Civil Misc. Writ Petition No. 28351 of 2009 as leading one.

This writ petition, being Civil Misc. Writ Petition No. 28351 of 2009, has been filed by the petitioners praying inter alia as follows:

"i. Issue a writ order or direction in the nature of mandamus declaring the Rule 15 (2) of the Uttar Pradesh Public Works Department Group "B" Civil Engineering Service Rules, 2004, as notified on 3.1.2004 as ultravires of Article 14 read with Article 16 of the Constitution of India.

ii. Issue a writ order or direction in the nature of Mandamus commanding the rule making authority to provide for the criteria of written examination followed by vivavoce for the purposes of direct recruitment on the post of Assistant Engineer in Public Works Department.

iii. Issue a writ order or direction in the nature of certiorari calling for the record and quash the advertisement published in the Employment News dated 713th June, 2008 being Advertisement No. 1/200809 dated 7.6.2008 in so far as it pertains to the post of Assistant Engineer in Public Works Department in the pay scale of Rs.800027513500.

iv. Issue a writ order or direction in the nature of certiorari calling for the record and quashing the entire selection held in pursuance of the advertisement published in the Employment News dated 713th June, 2008 being Advertisement No. 1/200809 dated 7.6.2008 on the post of Assistant Engineer in Public Works Department in the pay scale of Rs.800027513500.

v. Issue a writ order or direction in the nature of certiorari calling for the record and quashing the result published in pursuance of the advertisement so offloaded from the Internet (Annexure No. 4 to the writ petition).

vi. Issue a writ order or direction in the nature of mandamus commanding the respondents to conduct the selection afresh on the post of Assistant Engineer in Public Works Department in the pay scale of Rs.800027513500 in pursuance of the advertisement published in the Employment News dated 713th June, 2008 being Advertisement No. 1/200809 dated 7.6.2008, after resorting to written examination followed by vivavoce examination.

vii. Issue any other suitable writ, order or direction, as this Hon''ble Court may deem fit and proper under the facts and circumstances existing in the present case.

viii. Award the costs of this writ petition in favour of the petitioners."

Virtually the petitioners have challenged the advertisement, which has been meant for selection only by way of interview but not written examination followed by interview. Contentions of the petitioners are strongly opposed by the State and the private parties i.e. selected candidates.

Admittedly, the petitioners have participated in the selection process, which includes examination/interview as per the advertisement, and came out unsuccessfully and thereafter challenged the selection process. Therefore, by virtue of well settled principle there is no necessity to interfere with such selection process, which has been conducted by the experts. But since vires of Rule 15(2) of the Uttar Pradesh Public Works Department Group "B" Civil Engineering Service Rules, 2004 (hereinafter in short called as the "Rules, 2004") has been challenged, we are constrained to enter into merit of the matter to come to a definite conclusion in this respect. The Rules, 2004 was made in the year 2004 for civil engineering services. The procedure for recruitment as provided under such Rule is as follows:

"14. Determination of vacanciesThe appointing authority shall determine and intimate to the Commission the number of vacancies to be filled during the course of the year of recruitment as also the number of vacancies to be reserved

for candidates belonging to Scheduled Castes, Scheduled Tribes and other categories under Rule 6. The vacancies to be filled by direct recruitment and promotion through the Commission shall be intimated to them.

15. Procedure for direct recruitment(1) Application for being considered for selection by direct recruitment shall be invited by the Commission in the prescribed proforma published in the advertisement issued by the Commission.

(2) The Commission shall, having regard to the need for securing due representation of the candidates belonging to the Scheduled Castes, Scheduled Tribes and other categories in accordance with Rule 6, call for interview such number of candidates, who possess the requisite qualifications as they consider proper.

(3) The Commission shall prepare a list of candidates in order to their proficiency, as disclosed by the marks obtained by each candidate in the interview. If two or more candidates obtain equal marks, the candidate senior in age shall be placed higher in the list. The Commission shall forward the list to the appointing authority.

16. Procedure for recruitment by promotion through the Commission Recruitment by promotion through the Commission shall be made on the basis of seniority subject to the rejection of the unfit in accordance with the Uttar Pradesh Promotion by Selection in Consultation with Public Service Commission (Procedure) Rules, 1970 as amended from time to time.

17. Combined select list If in any year of recruitment appointments are made both by direct recruitment and by promotion, a combined select list shall be prepared by taking names of the candidates from the relevant lists, in such manner that the prescribed percentage is maintained, the first name in the list being of the person appointed by promotion."

The Rules, 2004 has been made in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India and notified on 03rd January, 2004. The advertisement in question issued as per said Rules is available on pages 66 & 67 of the writ petition. The petitioners have contended that while procedure of written examinations is being followed in respect of electrical and mechanical branches under the Public Works Department of the State, there is only deviation in respect of civil engineering branch. Relying upon the judgement reported in AIR 1973 SC 930 (Janki Prasad Parimoo and others Vs. State of Jammu & Kashmir and others) Dr. R.G. Padia, learned Senior Counsel appearing for the petitioners, wanted to establish that the interview can not be made the sole test in cases of efficiency test, which is otherwise dependable upon several considerations. When in the selection the merit takes first place, it is implicit in such selection that the persons must not be just average. Dr. Padia has relied upon various other rules in support of his contention. He has also relied upon the judgement reported in AIR 2001 SC 152 (Praveen Singh Vs. State of Punjab and others) to establish that interview should not be the only method of assessment

of the merits of candidates. The vice of manipulation can not be ruled out in viva voce test. Though interview undoubtedly is a significant factor in the matter of appointments, it plays a strategic role but it also allows creeping of a lacuna rendering the appointments illegitimate. Obviously it is an important factor but ought not to be the sole guiding factor since reliance thereon only may lead to a "sabotage of the purity of the proceedings". In such judgement it has been further held that while it is true that the administrative or quasijudicial authority clothed with the power of selection and appointment ought to be left unfettered in adaptation of procedural aspect but that does not, however, mean and imply that the same would be made available to an employer at the cost of fair play, good conscience and equity. While we go through the factual aspect of the matter, we find that, in the referred case, the essentiality of viva voce test, however, stands established by reason of express narration under the scheme of examination viz. "followed by viva voce test". In the event of there being a written test for elimination, the scheme of the examination would not have been detailed in the manner, as it has been so stated. In the instant case, there is no such thing. Not only in the advertisement but also in the Rules, 2004 it has been categorized that selection will be made on the basis of interview. Therefore, no question of abrupt decision by the authority is available to establish the more fair play, good conscience and equity on the part of the authority.

By filing an application under Article 215 of the Constitution of India an incidental issue has also been raised by the petitioners saying that on 09th July, 2009 though this Court verbally observed not to issue any appointment letter in respect of the appointment on the post of Assistant Engineer pursuant to the selection, which is under challenge, but the same was done by the appropriate authority. Therefore, there is a clear case of contempt and unless the contempt is purged, writ petition can not be required to be heard and disposed of. To such application, Sri Kapil Dev, Principal Secretary, Department of Public Works Department, Government of Uttar Pradesh, Lucknow has filed a counter affidavit by saying that in another writ petition, being Writ Petition No. 918 (S/B) of 2009 (Om Prakash and another Vs. State of U.P. and others) the Lucknow Bench of this High Court has passed an order on 02nd July, 2009 directing the respondents that the vacancies of Assistant Engineers (Civil) meant for the promotional quota through direct recruitment will not be filled up but it shall be open for the respondents to fill up the vacancies falling within the quota of direct recruitment. Against this background, the desire of order dated 09th July, 2009 passed by this Division Bench was to examine the stand of the State on exchange of affidavits. The respondents have also taken a preliminary objection in this writ petition to the effect that after making participation in the selection process it is not open for the petitioners to challenge the same. Therefore, whatever has been done by the State, the same has been done in compliance of the order passed on 02nd July, 2009 i.e. prior to the oral observation made by this Court on 09th July, 2009. However, since Dr. Padia has repeatedly insisted for purging the contempt first before going into the merit of the writ petition, we

have carefully considered the respective submissions of the contesting parties to arrive at a conclusion under Article 215 of the Constitution of India and found that issuance of appointment letter, if any, by the State can not be held to be wilful and deliberate flouting of the order dated 09th July, 2009. The reason behind the same is that this Court on 09th July, 2009 might have made a stray observation without knowing the fact that there is a prevailing interim order passed by a parallel Division Bench of this Court on 02nd July, 2009. Secondly, both the Division Benches are the Court so far as the respondents are concerned. Had the case been that the respondents did not comply with the order dated 02nd July, 2009, in such a situation they could have faced a direct contempt of Court for flouting an order. It would have been proper for the learned Standing Counsel appearing before this Court on 09th July, 2009 to inform the Court that there is an order existing from 02nd July, 2009, but that might be a mistake on the part of the Counsel and for that it can not be held by this Court that there is a clear case of wilful and deliberate contempt of order of the Court by the respondent authority. Hence, the explanation with apology as made by the deponent (Sri Kapil Dev) in support of his defence can be accepted as an appropriate explanation and thus, the cause of contempt is purged.

Dr. Padia has cited a Constitution Bench judgement of the Supreme Court reported in AIR 1955 SC 19 (M.Y. Shareef and another Vs. Hon'ble Judges of the Nagpur High Court and others) to establish that the proposition is well settled and selfevident that there can not be both justification and an apology. Two things are incompatible. Again an apology is not a weapon of defence to purge the guilty of their offence, nor is it intended to operate as a universal panacea, but it is intended to be evidence of real contriteness.

According to us, interpretation of law as propounded by the Constitution Bench of the Supreme Court can not be applicable herein in view of the facts and circumstances of the case. To maintain the rigour of the Court, the Court seeks for apology but when it is merged with the available justification, it seems to be additional. The justification, which has been given by the respondent authority herein, is neither illogical nor mere or bare defence, so that we shall ignore the justification and only accept the apology upon holding that there is a clear intentional violation of the order of the Court. We do not require any further discussion in the matter in view of the facts and circumstances of this case and as such, once again we hold and say that the cause of contempt is purged and the contempt application is treated to be disposed of on the basis of such observations and order, however, without imposing any cost.

So far as the question of locus standi of the petitioners to maintain the writ petition is concerned, we have come across several decisions of the Supreme Court and this High Court. In 2003 (2) LBESR 899 (All) (Anand Narain Singh Vs. U.P. Secondary Education Services Selection Board, Allahabad & ors.) a Division Bench of this Court has held that once a candidate has taken a chance by appearing in interview, it is not open for him to challenge the advertisement or to

challenge the rules. This Court as well as the Supreme Court have in various cases held that once a candidate has taken a chance of appearing before the Board at the time of selection then it is not open for him to challenge the selection proceedings or to challenge the rules or advertisement under which he has appeared and as such the candidates have no locus standi. However, it has also been held that in case of palpably arbitrary exercise of power the Court can interfere and declare the same as void. Further, a Division Bench of this Court in 2009 (1) AWC 239 (Rajesh Kumar Srivastava and others Vs. State of U.P. and others) has held that when selection as per the advertisement is to be made on the basis of performance of candidates in written test and interview but the selection is made only on the basis of the interview, the same is vitiated in law and, therefore, writ petition is maintainable. In 1997 (9) SCC 527 (Raj Kumar and others Vs. Shakti Raj and others) it has been held by the Supreme Court that when the Government has committed glaring illegalities in the procedure to get the candidates for examination under the rules, the principle of estoppel by conduct or acquiescence has no application. From AIR 1989 SC 903 (Deepak Sibal Vs. Punjab University and another) we find that it is now well settled that Article 14 of the Constitution forbids class legislation, but does not forbid reasonable classification. Whether a classification is a permissible classification or not, two conditions must be satisfied, namely, (i) that the classification must be founded on an intelligible differentia, which distinguishes persons or things that are grouped together from others left out of the group, and (ii) that the differentia must have a rational nexus to the object sought to be achieved by the statute in question. In the instant case, the Rules, 2004 is made in the year 2004, which relates to civil engineering alone, and the advertisement has not been issued contrary to such Rule. In the advertisement the mode of selection through either examination or interview was prescribed. The Commission adopted the process of interview. Therefore, there is nothing to be said that the same is an arbitrary action on the part of the authority. Secondly, the Rules, 2004 is not made for the entire selection of engineering, be it civil or be it mechanical or be it electrical. Thus, the candidates of the civil engineering are differentiated from others. In this case, the Rules, 2004 itself has been made for the purpose of civil engineering and civil engineering alone. Therefore, there is no question of any discrimination from one to others in making such selection by the Selection Board consisting of several persons being experts not an individual. The rules of plurality in making selection is always appreciated by the Courts of law unless, of course, any allegation is made against any member of such Selection Board. But no such case is available herein. In 2007 (8) SCC 100 (Union of India and others Vs. S. Vinodh Kumar and others) it has been held that the candidates who appear for examination do not have any vested right for appointment. It is well settled that even waitlisted candidates have no legal right to be appointed. It is well known that even selected candidates do not have any legal right in this behalf. Ultimately it has been held by the Supreme Court in such judgement that it is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein

are not entitled to question the same and, like the present case, it was held therein that the Court is not oblivious that there are certain exceptions to the Rules. But in the present case the Court is not concerned with the same.

Mr. Ravi Shanker Prasad, learned Additional Chief Standing Counsel appearing for the State, has contended that it has been held by the Supreme Court in 2009 (5) SCC 515 (K.A. Nagamani Vs. Indian Airlines and others) that when Corporation did not violate the right to equality guaranteed under Articles 14 and 16 of the Constitution and the candidates having participated in the selection process along with the contesting respondents therein without any demur or protest, they can not be allowed to turn round and question the very same process having failed to qualify. In 2008 (4) SCC 171 (Dhananjay Malik and others Vs. State of Uttaranchal and others) it was also similarly held by the Supreme court that once the candidates participated in the selection process without any demur, they are estopped from complaining that the selection process was not in accordance with the rules. If they think that the advertisement and selection process were not in accordance with the rules, they could have challenged the advertisement and selection process without participating in the selection process. This has not been done. A Division Bench of this Court, in which one of us (Amitava Lala, J.) was a member, has held in the judgement reported in 2008 (2) ADJ 205 (DB) (Dr. U.S. Sinha Vs. State of U.P. and others), as follows:

"15. Last, but not the least, point pertains to locus standi of the writ petitioners. Since they have participated in the selection process and become unsuccessful, can not challenge the discretion of the selectors in respect of the experience, as categorically held in 2007 (7) Supreme 433, Trivedi Himanshu Ghanshyambhai v. Ahmedabad Municipal Corporation and others, therefore, such latest view of the Supreme Court which is clearly applicable in these writ petitions, can not be avoided under any circumstance."

In 2002 (2) SCC 712 (G.N. Nayak Vs. Goa University and others) the Supreme Court has held that when a candidate was aware about the eligibility criteria for the post yet applied and appeared at the interview without protest, he can not be allowed to contend that the eligibility criteria were wrongly framed. In 1986 (Supp) SCC 285 (Om Prakash Shukla Vs. Akhilesh Kumar Shukla and others) the Supreme Court discouraged the challenge to the examination after participating in the same without protest.

So far as merit is concerned, we find that in 1985 (4) SCC 417 : 1986 SCC (L&S) 88 (Ashok Kumar Yadav and others Vs. State of Haryana and others) a Constitution Bench of the Supreme Court has held that the written examination which is definitely more objective in its assessment than the viva voce test will lose all meaning and credibility and the viva voce test, which is to some extent subjective and discretionary in its evaluation, will become the decisive factor in the process of selection. But on the question of viva voce examination it has been held by the Constitution Bench that suspicion can not take the place of proof and can not strike down the selections made on the ground that the

evaluation of the merits of the candidates in the viva voce examination might be arbitrary. It is necessary to point out that the Court can not sit in judgement over the marks awarded by the interviewing bodies unless it is proved or obvious that the marking is plainly and indubitably arbitrary or affected by oblique motives. It is only if the assessment is patently arbitrary or the risk of arbitrariness is so high that a reasonable person would regard arbitrariness as inevitable, that the assessment of marks at the viva voce test may be regarded as suffering from the vice of arbitrariness. In 1994 (1) SCC 150 (Anzar Ahmad Vs. State of Bihar and others) it has been held by the Supreme Court that the question of weightage to be attached to viva voce would not arise where the selection is to be made on the basis of interview only. From 2003 (2) SCC 132 (Jasvinder Singh and others Vs. State of J&K and others) we find the Supreme Court has held that what ultimately required to be ensured is as to whether any oblique intention or arbitrariness is reflected or not.

It has been pointed out by Mr. Ashok Khare, learned Senior Counsel appearing for the private respondents, by citing the judgement reported in 2003 (11) SCC 559 (State of Punjab and others Vs. Manjit Singh and others) that it is certainly the responsibility of the Commission to make the selection of efficient people amongst those who are eligible for consideration. The unsuitable candidates could well be rejected in the selection by interview. It is not the question of subservience but there are certain matters of policies, on which the decision is to be taken by the Government. Independent and fair working of the Commission is of utmost importance. In 2008 (4) SCC 619 (Sadananda Halo and others Vs. Momtaz Ali Sheikh and others) the Supreme Court has held that it is also a settled position that unsuccessful candidates can not turn back and assail the selection process. In 2000 (7) SCC 719 (Kiran Gupta and others Vs. State of U.P. and others) it has been held by the Supreme Court that it is difficult to accept the omnibus contention that selection on the basis of viva voce only is arbitrary and illegal. In 1998 (2) SCC 566 (Siya Ram Vs. Union of India and others) it has been held that sometimes, only interview is considered to be best method for certain posts. In AIR 1964 SC 1823 (R. Chitralekha Vs. State of Mysore and others) a Constitution Bench of the Supreme Court has held that if there can be manipulation or dishonesty in allotting marks at interviews, there can equally be manipulation in the matter of awarding marks in the written examinations. In the ultimate analysis, whatever method is adopted its success depends on the moral standards of the members constituting the selection committee and their sense of objectivity and devotion to duty. In 1981 (4) SCC 159 (Lila Dhar Vs. State of Rajasthan and others) it has been held that ordinarily, recruitment to public service is regulated by the rules made under the proviso to Article 309 of the Constitution and it is not for the Courts to redetermine the appropriate method of selection and the relative weight to be attached to the various tests, unless exaggerated weight has been given with proven or obvious oblique motives. The written examination assesses the man's intellect and the interview tests the man himself and "the twin shall meet" for a proper selection. But there can not be any

rule of thumb regarding the precise weight to be attached respectively to the written test and the interview. It must vary from service to service according to the requirement of the service, to which recruitment is made, the source material available for recruitment, the composition of the Interview Board and several like factors.

On a question of vires of the rule, we would like to place here the ratio of the judgement reported in 2007 (6) SCC 236 [Greater Bombay Coop. Bank Ltd. Vs. United Yarn Tex (P) Ltd. and others], whereunder it has been held that the constitutional validity of an Act can be challenged only on two grounds viz. (i) lack of legislative competence; and (ii) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. No third ground can invalidate a piece of legislation. In considering the validity of a statute the presumption is always in favour of constitutionality and the burden is upon the person who attacks it to show that there has been transgression of constitutional principles. For sustaining the constitutionality of an Act, the Court may take into consideration matters of common knowledge, reports, preamble, history of the times, objection of the legislation and all other facts which are relevant. It must always be presumed that the legislature understands and correctly appreciates the need of its own people and that discrimination, if any, is based on adequate grounds and considerations. It is also well settled that the Courts will be justified in giving a liberal interpretation in order to avoid constitutional invalidity. A provision conferring very wide and expansive powers on authority can be construed in conformity with legislative intent of exercise of power within constitutional limitations. Where a statute is silent or is inarticulate, the Court would attempt to transmute the inarticulate and adopt a construction which would lean towards constitutionality albeit without departing from the material of which the law is woven. While examining the challenge to the constitutionality of an enactment, the approach of the Court is to start with the presumption of constitutionality. The Court should try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it. The Court should not approach the enactment with a view to pick holes or to search for defects of drafting, must less inexactitude of language employed. Indeed, any such defects of drafting should be ignored out as part of the attempt to sustain the validity/constitutionality of the enactment. The Court must recognise the fundamental nature and importance of legislative process and accord due regard and deference to it, just as the legislature and the executives are expected to show due regard and deference to the judiciary. After all an Act made by the legislature represents the will of the people and that can not be lightly interfered with. The unconstitutionality must be plainly and clearly established before enactment is declared as void. The same approach holds good while ascertaining intent and purpose of an enactment or its scope and application. In 1996 (3) SCC 709 (State of A.P. And others Vs. McDowell & Co. and others) it has been observed by the Supreme Court that no enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other

constitutional infirmity has to be found before invalidating an Act. The Court can not sit in judgement over their wisdom.

Against this background, if we analyse the whole issue, we can get two aspects of the matter. Firstly, whether a person after participating in the interview can turn round and challenge the same; and secondly, whether the Rules, 2004 made for selection process in the year 2004 can be challenged after becoming unsuccessful in the year 2009 by way of this writ petition. We are of the definite conclusion on the strength of facts and law as well as analysis thereof that the petitioners' claim is totally contrary to the settled position of law, therefore, they are not entitled to any relief as claimed herein either for declaration of Rule 15 (2) of the Rules, 2004 as ultra vires in nature or for any relief in connection with selection process, in which they have participated but failed.

Hence, in totality the writ petitions can not be sustained and, therefore, the same are dismissed, however, without imposing any cost. Interim order, if any, stands vacated.

(Justice Amitava Lala)

I agree.