

Param Hans Singh Vs. State of U.P. and Others

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Court : Allahabad

Decided On : Jan-04-2000

Reported in : 2000(2)AWC1056; (2000)1UPLBEC312

Judge : Alope Chakrabarti, J.

Acts : Uttar Pradesh Excise Constables, Drivers and Tari Supervisors Service Rules, 1983 - Rule 13; [Constitution of India](#) - Article 14; Uttar Pradesh Subordinate Excise Service Rules, 1992 - Rules 10 and 13;

Appeal No. : C.M.W.P. No. 47786 of 1999

Appellant : Param Hans Singh

Respondent : State of U.P. and Others

Advocate for Def. : S.C.

Advocate for Pet/Ap. : Ashok Khare and ;O.P. Singh Sikarwar, Adv.

Judgement :

Alope Chakrabarti, J.

1. This writ petition was heard along with Civil Misc. writ petition Nos. 47781, 47785, 47793, 48529, 48844, 48912, 49015, 49241 and 49242 of 1999.

2. Facts relevant for disposal of this writ petition and other connected matters are that an advertisement was published in daily newspaper dated 8.4.1997 notifying a selection for the posts of Excise Constables in the Excise Department of the State of Uttar Pradesh. A selection committee consisted of four officers of the Excise Department considered the cases of the applicants including the petitioner taking their height measurement as also measurement of chest before and after expansion. Petitioner along with several other candidates were found fit and eligible and names of such selected candidates were notified by order dated 28.8.1997. Upon due compliance of further requirements including medical certificate by the Chief Medical Officer, appointment letters were issued to the selected candidates including the petitioner and thereupon the petitioner joined on the post of excise constable on 30.8.1997 and was continuously working thereafter.

3. On 15.1.1998 the Deputy Excise Commissioner, Kanpur Division, Kanpur Nagar, issued a communication that the petitioner and several other Excise Constables were required to be present at the office of the Excise Commissioner, U. P., for physical examination on 20.1.1998. Petitioner duly appeared accordingly and was subjected to a fresh physical verification. After the lapse of almost one and a half years, the Deputy Excise Commissioner, Kanpur Division issued a notice on 7.10.1999 to show cause as to why his services be not terminated. The notice had a recital that in the physical examination conducted on 20.1.1998, the chest measurement of the petitioner was found to be 79.5 cm. and upon expansion was found to be 84.5 cm. which was less than the required measurement of 81.3 cm. and 86.4 cm. as specified in Rule 13 Of the U. P. Excise Constables. Drivers and Tart Supervisors Services Rules. 1983. Petitioner submitted a detailed reply on 5.11.1999. Final order was passed on 6.11.1999 by the Deputy Excise Commissioner, Kanpur Division, Kanpur Nagar terminating the services of the petitioner. Challenging the said order the present writ petition was filed. Respondents filed counter-affidavit.

4. Heard Mr. Ashok Khare, learned counsel for the petitioner and the learned standing counsel for the respondents.

5. The first contention of the learned counsel for the petitioner is that the provisions mentioning height and chest measurement have no nexus with the job to be performed by the petitioner and, therefore, Rule 13 of the said Rules is liable to be quashed. In support of such contention, reliance was placed on the Judgment in Civil Misc. Writ Petition No. 36264 of 1995, Krishna Kumar Sharma v. State of U. P. and others, decided on 28.5.1997 a copy whereof has been annexed at Annexure-10 to the writ petition. In the said judgment, a similar provision contained in Rule 13 of U. P. Subordinate Excise Service Rules, 1992 to the extent it prescribed height and chest measurement was held to be violative of Article 14 of the Constitution.

6. The second contention of the petitioner is that the petitioner was appointed after due selection and verification of height and chest measurement as required and found fit there. Therefore, after appointment, the respondents could not get the chest measurement verified again and on a minor difference found, appointment of the petitioner could not be terminated. It has been stated on behalf of the petitioner that in measurement of height and chest no expertise is required and, therefore, the members of the duly constituted selection committee got the said measurement done and found to be satisfactory. There was no occasion to reverify the measurement and to take action on minor discrepancy noted. It is stated that any of the provisions of Rule 13 of the said Rules of 1983 does not indicate requirement of height and chest measurement by a qualified medical practitioner nor ordinary common sense requires a certificate from the trained person to certify height and chest measurement.;

7. The third contention on behalf of the petitioner is that Rule 13 (as contained in the copy of the aforesaid Rules of 1983 at Annexure-9 to the writ petition) does not provide for any chest measurement without expansion and, therefore, if there is any discrepancy in the measurement of chest without expansion, the same could not be treated as violative of Rule 13 of the said Rules of 1983.

8. Further to the above contention, one more argument was advanced that in any event difference in the two measurements, one before and one after appointment, is very small and that can occur on two different dates and this will not

automatically indicate that the petitioner was not having the requisite chest measurement at the time of appointment.

9. In respect of writ petition Nos. 48529 of 1999, Firoz Anwar v. State of U. P. and others, and 48912 of 1999, Rajendra Kumar Sen and others v. State of U. P. and others, the final orders passed have been challenged on a further contention that petitioners there were not given proper opportunities as against the show cause notice when the petitioners submitted their reply in English, the same was not considered and before their reply was again submitted in Hindi, the final order was passed and this violates principles of natural justice.

10. Mr. H. N. Tripathi, learned counsel for the petitioner in Civil Misc. writ petition No. 48844 of 1999, contended that even if there was a difference between the reading of measurement taken before and after appointment, the same could not be a ground for termination as respondents have also acquiesced by granting appointment on the basis of the physical conditions available.

11. In support of such contention, law has been referred to as decided in the case of Smt. Pushplata Saxena v. Chancellor, Agra University, 1996 (1) UPLBEC 347 and Bhagwati Prasad v. Delhi State Mineral Corporation, AIR 1990 SC 371.

12. Mr. P. K. Mishra, learned counsel for petitioner in Civil Misc writ petition No. 49242 of 1999 contended that in his case the petitioner filed a medical certificate mentioning the measurement and such medical certificates were produced before selection as appears from documents at Annexures-2 and 5 to the writ petition. It is, therefore, stated that facts are apparent that the petitioner was having requisite height and chest measurement duly certified by duly qualified person and, therefore, petitioner's appointment could not be terminated on an allegation that measurements were not done by persons having no expertise. This aspect is also similar to the case of the petitioners in Civil Misc. Writ Petition Nos. 47781, 48529, 48912 and 49241 of 1999.

13. On behalf of the respondents, it has been contended that the judgment in the case of Krishna Kumar Sharma (supra) does not help the present petitioners as the rule under consideration there was a different one than the rule under

consideration here. It is further stated that the post involved in the aforesaid case was a post of Excise Inspector and, therefore, reasons recorded in the said judgment do not apply in the present case of Excise Constables, It is further stated that Rule 13 of the Rules of 1983 clearly mentions a requirement of certificate regarding medical aspect by a duly qualified Medical Officer and, therefore, measurements of height and chest by members of selection committee, admittedly not having medical qualifications, cannot prevail to show that due compliance of the rules was made.

14. It is contended on behalf of the respondents that discrepancy In measurement and finding thereof showing a reading below the prescription, disentitles the petitioner from employment as it violates the provisions of statutory rules and there is no question to consider whether the discrepancy is minor or major. With regard to the provision relating to measurement of chest before expansion it is stated that the copy of the rules annexed to the writ petition does not contain the correct position and reference was made to U. P. Excise Manual where the aforesaid Rule 13 is available as quoted below :

13. Physical fitness.--No candidate shall be appointed to a post in the service unless he be in good mental and bodily health and free from any physical defect likely to interfere with the efficient performance of his duties. Before a candidate is finally approved for appointment to the service, he shall be required to produce a medical certificate of fitness in accordance with the rules framed under Fundamental Rule 10 and contained in Chapter 111 of the Financial Hand-book, Volume II, Part III :

Provided that a medical certificate of fitness shall not be required from a candidate recruited by promotion :

Provided further, that in the case of candidates from the posts of Excise Constable, their chest measurements should not be less than 81.3 cm. unexpanded and 86.6 cm. after expansion and height should not be less than 167.6 cm. (162.6 cm. In the case of candidates belong to Kumaon Division and the districts of Pauri Garhwal, Tehri Garhwal. Uttar Kashi, and Chamoli).'

The said provision indicates clearly that the chest measurements were prescribed before and after expansion.

15. In further support to the aforesaid contention, a copy of the Gazette Notification in respect of the said Rules of 1983 has also been produced which contains the provision as available in the Excise Manual with only difference in chest measurement on expansion as 86.4 cm.

16. Learned standing counsel contends that the present posts of Excise Constables require certain physical aspects of the candidates as the job involved herein is of a different nature than the job required to be rendered by Excise Inspectors, whose cases were considered in the aforesaid judgment of Krishna Kumar Sharma (*supra*).

17. With regard to the contention that the reply filed in English was not considered, on behalf of the respondents it has been contended that those replies were duly considered and in support of such contention reference was made to the statement made in the counter-affidavit which has not been effectively denied by the petitioner. It is contended that there was no violation of principles of natural justice.

18. As regards law it has been contended that in some of the writ petitions show cause notices have been challenged and the same are premature as held in the case of Executive Engineer v. Ramesh Kumar Singh, AIR 1986 SC 691. It has been stated that if the candidate concerned was not having qualification at the time of appointment, his appointment has to be cancelled as held in the case of District Collector v. M. Tripura, Sundari Devi, 11990) 3 UPLBEC 2032.

19. Interim orders passed in some of the writ petitions have also been challenged referring the law decided in the cases of State of Rajasthan v. Hitendra Kumar Bhatt, 1997 (3) ESC 1455. On the maintainability of the writ petition on the ground of existence of alternative remedy, it has been contended by the learned standing counsel that law justifies dismissal of the writ petition on the aforesaid ground in view of the law decided in the case of Km. Mamta Jahoori v. State of V. P., 1999 (1) UPLBEC 54.

20. After considering the aforesaid contentions of respective parties, I find that the Rule 13 as contained in the copy annexed to the writ petition is not correct and the actual provision as contained in the official Gazette, is the correct provision and the same includes the measurement of chest, both before and after expansion. Therefore, the contention of the petitioner on the aforesaid provision is not acceptable.

21. With regard to the judgment in the case of Krishna Kumar Sharma (supra), It is apparent that the petitioner therein was holding the post of clerk and was seeking appointment as Excise Inspector. The judgment was delivered taking specifically into consideration the duties of Excise Inspectors and upon a finding that their duties do not require such measurement as regards physical aspects and only brain and character matters. In the present case, the posts concerned are of Excise Constables In the Excise Department and in paragraph 21 of the counter-affidavit categorical statements have been made regarding requirement for the posts of Excise Constables as different from those of Excise Inspectors. Nature of duties of Excise Constables has also been described therein. No effective denial of the said contentions have been made by the petitioner nor any material has been produced for making the Court to disbelieve the aforesaid statements regarding nature of job and its requirements for the posts of Excise Constables. Therefore, the reasons given In the case of Krishna Kumar Sharma (supra) do not apply in the present cases of Excise Constables. Nothing has been shown on behalf of the petitioner leading the Court to reach a conclusion that such requirements regarding physical aspects of Excise Constables are without any nexus with the requirement for the post. Therefore, the provision of Rule 13 in the aforesaid Rules of 1983 do not appear to be violative of Article 14 of the [Constitution of India](#).

22. With regard to the present cases, it appears that admittedly at the time of selection and appointments, petitioners were found to be fit and satisfying requisite qualifications and such findings was by the Selection Committee. There is no material to reach the conclusion that the findings of the Selection Committee as regards measurement of height and chest were wrong. The impugned order also does not record such a finding. The allegation that the members of the Selection

Committee did not have expertise to measure height and chest is also devoid of any merit as ordinarily it cannot be accepted that in such measurement any expertise is required. On behalf of the respondents also the above was not substantiated in any manner at the time of hearing. Therefore, findings against the petitioners In the impugned order on the aforesaid ground, cannot stand.

23. In writ petition Nos. 49242, 49241, 48529 and 47781 of 1999, the finding of want of expertise of the persons measuring and termination of services on that ground, is further contrary to correct facts as documents disclosed in the writ petitions are not disputed by the respondents so far medical certificates were filed showing height and chest measurement of the candidates concerned before appointment. Therefore, termination on the aforesaid ground in those writ petition is bad.

24. In the facts of the present cases, it is apparent that as regards height and chest of the petitioners, selection committee gave a certificate and thereupon appointments were given. After the appointment, petitioners were called and those measurements were again taken and this time finding a deficiency termination was directed. This measurement was admittedly taken few months after the appointment. In such facts. I am of the opinion that termination could not be directed on measurement after appointment particularly when there is no finding that measurement by the members of the selection committee before appointment was not acceptable or was non-existent.

25. With regard to allegation as regards non-consideration of reply in English, I find this has been disputed by respondents and there is no material available on which the same can be decided here.

26. As affidavits have been exchanged and the writ petitions are being finally decided. I am not refusing exercise of jurisdiction on technical grounds raised by the respondents.

27. In view of the aforesaid findings, the impugned order of termination cannot stand. The writ petition is, therefore, allowed and the impugned order dated 6.11.1999 at Annexure-8 to the writ petition is hereby quashed.

