

Virendra Kumar Misra Vs. State of U.P. and Others

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Court : Allahabad

Decided On : Jun-16-1999

Reported in : 1999(3)AWC2107; (1999)3UPLBEC2318

Judge : V.M. Sahai, J.

Acts : Uttar Pradesh Office (Collectorate) Clerk Grade Service Rules, 1980 - Rules 5, 14, 16, 16(1), 17 and 17(2) and (3)

Appeal No. : C.M.W.P. No. 40769 of 1996

Appellant : Virendra Kumar Misra

Respondent : State of U.P. and Others

Advocate for Def. : S.C. and;Ashok Khare,;D.D. Chauhan and;U.N. Sharma, Advs.

Advocate for Pet/Ap. : G.K. Singh,;R.N. Singh and;G.C. Yadav, Advs.

Judgement :

V. M. Sahai, J.

1. A post of Stenographer grade-I fell vacant in the collectorate of Azamgarh on account of retirement of one Shri Mahadeo Prasad on 31.7.89. Another vacancy of Stenographer grade-II was created under the Sub-Divisional Magistrate,

Budhanpur, Azamgarh. The respondents on 3.9.89 advertised in the news paper 'Aaj' for filling up the vacancy of Stenographer grade-I and grade-II by direct recruitment. The advertisement permitted that even those candidates could apply whose names were not registered in the employment exchange. The candidates were further informed that they should be personally present with their testimonials, etc. on 5.9.89 at 10 a.m. as their tests may be held at 12 p.m. on the same day. The petitioner was not registered in the employment exchange. He applied for direct recruitment. The respondent No. 4 constituted a selection committee under Rule 16 of the U. P. District Office (Collectorate) Clerk Grade Service Rules, 1980 (in brief rules). The test for direct recruitment was held on 5.9.89. On next day, the selection committee did not find any candidate, from grade-II, suitable for promotion as they could not qualify in the written test held on 6.9.89. The selection committee decided that since no departmental candidate was suitable to be promoted on the vacant post of Stenographer grade-I, the petitioner who on the test held on 5.9.89 was placed at serial number one may be appointed. The Additional District Magistrate forwarded the recommendation of the selection committee to the District Magistrate who appointed him on the same day, i.e., 6.9.89 as stenographer grade-I on temporary basis and confirmed him by order dated 8.9.90.

2. Respondent No. 5. Shyam Nath Chaurasia, who was found unsuitable for promotion made a representation to the Commissioner stating that the petitioner was attached as Hindi Stenographer to Collector. Azamgarh and worked from 1963 to 1989. He worked from 1969 to 1973 with Sub-Divisional Magistrate. Sadar. He worked as Hindi Stenographer to Collector from 1973 to 1975. He worked as Stenographer to Additional District Magistrate (Finance and Revenue from 1978. Since 1985 he was working on the newly created post of Stenographer to Additional District Magistrate (Executive) till the date he made representation. He further said in his representation that the District Magistrate. Azamgarh was interested in making appointment on the post of Stenographer grade-I which is clear from the fact that he was present at the time of written test of the respondent No. 5 and directed the Additional District Magistrate (Executive) to increase the speed of the dictation, therefore, the petitioner could not take the dictation properly nor could he convert the same into a proper type-written matter. On the same

date, the petitioner was selected by direct recruitment. Since the respondent No. 5 was found unsuitable, he declared his intention of challenging the selection by a writ petition. The District Magistrate on coming to know of it, in order to bring pressure upon the respondent No. 5, transferred him and posted him in the court of Sub-Divisional Officer, Lalganj. When he approached the Collector to explain his difficulties, then the Collector told him that if he does not file a writ petition, then his transfer order to Lalganj will be stayed. He could not also dare to file a representation to the Commissioner out of fear of the Collector. He filed a representation to the Commissioner only after the Collector was transferred. He further stated that there were four candidates working as stenographer grade-II including him who were eligible for promotion as Stenographer grade-I. Out of the four departmental candidates, two candidates, namely, Shivanand and Shankar Ram did not participate in the selection and gave in writing that their candidature should not be considered for promotion to the post of Stenographer grade-I. The other two persons Adil Abbasi and respondent No. 5 appeared in the written test held by the Additional District Magistrate. Respondent No. 5 was rejected as he obtained zero marks in the written test. The Additional District Magistrate who had taken the written examination of respondent No. 5 was the same officer with whom he was working at the time of his written test. He claimed that the appointment of petitioner as well as entire selection process was contrary to the rules. It was claimed that as per Rule 5 (ii), promotion on the post of Stenographer grade-I could be made from amongst permanent Stenographers grade-II and if suitable persons were not available for promotion, only then the posts could be filled by direct recruitment. It was claimed that his work and conduct was always appreciated by his superior officers and he was awarded excellent entries in his character roll but the entries recorded in his character roll were not considered and he was illegally denied promotion to the post of Stenographer grade-I. The respondent further claimed that till the respondents came to conclusion that no suitable candidate was available for promotion to the post of stenographer grade-I, they could not have resorted to appointment by direct recruitment. The representation filed by respondent No. 5 was allowed by the Commissioner by his order dated 27.11.91 and it was directed that he may, be promoted as Stenographer grade-I and the petitioner be reverted to the post of Stenographer

grade-II.

3. This order of the Commissioner was challenged by the petitioner before this Court by means of Civil Misc. Writ Petition No. 37261 of 1991 which was allowed on 16.1.95 and the order dated 17.11.91 was quashed. The main reason for allowing the petition was that the Commissioner had passed the order without hearing the petitioner. The Commissioner was directed to decide the matter afresh keeping in view the observations made in the judgment and in accordance with law after giving opportunity of hearing to the petitioner and respondent No. 5. After the matter was remanded, the Commissioner reconsidered the entire matter and by his order dated 6.12.96 allowed the representation of respondent No. 5 and recording a finding that while the representation of respondent No. 5 was pending before him, the District Magistrate confirmed the petitioner. He held that the procedure for direct recruitment adopted by the respondents was illegal as proceedings for promotion and direct recruitment were taken up simultaneously which was contrary to rules and appointment by direct recruitment could have been made only when there was no suitable candidate available in Stenographer grade-II to be promoted on the post of Stenographer grade-I. He recorded a finding that on 31.8.89, a selection committee was constituted but there was no order on record appointing the selection committee nor any documents pertaining to selection are available which could show as to on what basis departmental candidates were rejected for promotion on the post of Stenographer grade-I. He held that the written test of respondent No. 5 was taken by Sri Chandrika Prasad Tewari, Additional District Magistrate (Administration) under whom Sri Chaurasia was working and not by Principal/Instructor of the Industrial Training Institute. The Commissioner observed that Sri Chandrika Prasad Tewari, the Additional District Magistrate himself had awarded entries in the character roll of the petitioner on 25.4.89 for the year 1988-89 which is quoted below :

'Yah ek yogya imandar, karmath, parishrami and vishwasniya ashulekhak hain. Inhe nyayalaya tatha anya star ke karyon ki gahan jankari hai. Aadeshon ki gopniyata kayam rakhne ke liye mere vichar me collectorate me inka pratham asthan hai. Yah ek yogya noter evam drafter bhi hain. Apne karyon ke prati purna rupen jagruk hain. Koi bhi jimmedari ka karya inhen saunpa ja sakta liai. Hindi ke

daksha ashulekhak ke sath sath inhe Angreji tankan तथा Angreji ashulekhan ka bhi achchha gyan hai.

Yah collectorate ke utkrishta koti ke karmchari hain तथा prortnati ke sarvatha patra hain.

Satya nishtha pramanit ki jati hai.'

After considering the character roll entries of Shri Chaurasia, the Commissioner found that he was illegally denied promotion on the post of Stenographer grade-I. He further found that the appointment of the petitioner was illegal but since the petitioner has been working for seven years and has been confirmed also, therefore, taking a liberal view he directed that the petitioner be absorbed on the post of Stenographer grade-II. Consequently, the representation of respondent No. 5 was allowed and the order of the District Magistrate dated 6.9.89 was modified to the extent that respondent No. 5 was directed to be promoted as Stenographer grade-I w.e.f. 6.9.89 and his salary was also directed to be fixed in higher pay scale but he was not found entitled for balance salary of Stenographer grade-I for the period 6.9.89 to 6.12.96 and the petitioner Sri Virendra Kumar Mishra was directed to be absorbed as Stenographer grade-II. This order dated 6.12.96 passed by Commissioner has been challenged by the petitioner in the present writ petition.

4. I have heard Sri G. K. Singh, learned counsel for the petitioner. Sri Ashok Khare, learned counsel appearing for respondent No. 5 and standing counsel appearing for respondent Nos. 1 to 4. During the course of arguments, it was not disputed that respondent No. 5 is due to retire on 30.6.99 and a request was made that since this Court is sitting during the vacations in the week commencing 14.6.99, therefore, the Judgment may be delivered in the aforesaid week. The prayer was accepted and the counsel for the parties at the time of reserving the judgment were informed that the judgment may be delivered in the week commencing 14.6.99.

5. Learned counsel for the petitioner Sri G. K. Singh argued that order dated 6.12.96 passed by the Commissioner cannot be upheld as he having been

transferred on 5.9.89, he was under transfer, therefore, he should not have passed the impugned order. The other submission of Sri G. K. Singh was that this Court in Writ Petition No. 37261 of 1991 had recorded a finding that even if a person was having good character roll, his suitability had to be judged at the time of promotion and he could not be promoted and appointed to a higher post only on past conduct and character roll entries. The learned counsel urged that since the selection committee has found Sri Chaurasia not suitable for promotion to the post of Stenographer grade-I and he was awarded zero marks in the written test held on 6.9.89, he was not suitable to be promoted. He further relied upon the observations of this Court made in the earlier judgment that selection of prospective promotees and direct recruits could take place on the same day except that the rights of prospective promotees had to be considered first. Since the rights of prospective promotees was considered by the respondents and no departmental candidate was found suitable for promotion, the petitioner's selection did not suffer from any flaw. The learned counsel argued that there was no contravention of Rule 5 or Rule 17 of the Rules as the rules do not provide that selection by direct recruitment should be resorted to only after the result of prospective promotees have been declared. The last submission of Sri G. K. Singh was that the Commissioner has not considered the judgment of this Court in its true perspective and has tried to sit over it and has considered the character roll of Sri Chaurasia to come to the conclusion that he was suitable for promotion to the post of Stenographer grade-I which was contrary to the judgment of this Court.

6. Sri Ashok Khare learned counsel for the respondent No. 5 urged that against the order of Commissioner dated 6.12.96, the petitioner had filed two review petitions before the Commissioner which were dismissed. The petitioner has not challenged those orders. Since the order passed by the Commissioner has merged in the order passed by him in review petition as is clear from the question answer which has been annexed as Annexure-4 to the counter-affidavit, the writ petition is liable to be dismissed. The other argument of Sri Khare was that as per Rule 5 (ii) read with Rule 17 of the Rules, it is clear that the candidates belonging to Stenographer grade-II ought to have been considered first and after it was found that no suitable candidate was available for promotion to the post of Stenographer grade-I only then the respondents could have resorted to direct

recruitment and not prior to it and the Commissioner rightly found that the procedure adopted for direct recruitment was illegal. The last submission of Sri Khare was that the petitioner was having excellent service record and character roll. The authorities found him to be an excellent stenographer of Hindi and English as well and the last entry awarded for the year 1988-89 just before promotion mentioned that the petitioner was an employee of excellent category and was entitled for promotion. This entry was awarded by the same Additional District Magistrate who took the written test of the respondent No. 5 on 6.9.89 and awarded zero marks to the petitioner in Hindi Stenography. There is nothing on record of the selection committee to show as to on what basis, the selection committee found the departmental candidates unsuitable for promotion to the post of Stenographer grade-I. The order of Commissioner, therefore, does not require any interference by this Court.

7. Before considering whether the order of the Commissioner suffers from any error of law which requires to be corrected in equity jurisdiction exercised by this Court, it is necessary to examine whether this Court in its earlier order has recorded any finding which prevented the Commissioner from deciding the controversy raised by the respondent No. 5 on merits. As observed earlier, the petition was allowed as the order was passed without hearing the petitioner who had not only been appointed but Joined as well. Once the court was satisfied that the order was contrary to principles of natural justice, it was not necessary to record any finding on other issues. But since the learned counsel for the respondent No. 5 raised certain objections, the court made observations but they did not preclude the Commissioner from deciding the representation on merits. However, the observations on which reliance has been placed by the learned counsel for petitioner were that selection for direct recruitment and promotion could be held simultaneously and suitability of a candidate could be judged by the selection committee. I will be dealing with both these aspects as they squarely arise for decision in this petition but I may point out that the court after making observations on the general principle of judging suitability observed that the Commissioner, while deciding the representation of respondent No. 5, did not record any finding that the view of the selection committee was based on no material or it was perverse. Therefore, the Commissioner was directed to decide the

matter afresh keeping in view the observations made by the court but in accordance with law. It is, therefore, not correct to say that the Commissioner could not have decided whether the selection of petitioner was contrary to law or whether the selection committee acted illegally in denying promotion to respondent No.5. Therefore, I am of the opinion that the Commissioner did not commit any error of law in deciding the representation on merits.

8. The question whether under the Rules, departmental candidates have to be considered first and thereafter direct recruitment should be resorted to or could be held simultaneously is dependent upon the interpretation of Rule 5 and Rules 14, 16 and 17 of the Rules which are extracted below :

'5. Source of Recruitment.--Recruitment to the various categories of posts in the service shall be made district wise from the following sources :

Category A.....

Category B.....

Category C.....

Category D.....

Category E.....

Category F.....

(i) Stenographer Grade II.--By direct recruitment.

(ii) Stenographer Grade I.--By promotion from amongst the permanent stenographers in the scale of Rs. 250-425. If suitable persons are not available for promotion the post may be filled up by direct recruitment.

16. Procedure for direct recruitment to the post of Stenographer.--(I) For the purpose of direct recruitment to the posts of Stenographer, there shall be constituted a Selection Committee comprising

(i) the District Officer of the district ;

(ii) two other officers of the District not below the rank of Deputy Collector to be nominated by the District Officer.

(2) The selection committee shall scrutinise the applications and require the eligible candidates to appear in a competitive test and interview.

(3) After the marks obtained by the candidate in the written test, have been tabulated, the selection committee shall, having regard to the need for securing the 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 as on the result of the written test, have come up to the standard fixed by the committee in this respect. The marks awarded to each candidate in the interview, shall be added to the marks obtained by him in the written test.

(4) The selection committee shall prepare a list of candidates in order of merit, as disclosed by the aggregate of marks obtained by them in the written test and Interview. If two or more candidates obtain equal marks, the candidate obtaining higher marks in the written test shall be placed higher. The number of names in the list shall be larger (but not larger by more than 25 per cent than the number of vacancies).

17. Procedure for recruitment by promotion to the posts other than, the posts of Office Superintendent. --(1) Recruitment to the posts of category 'B' 'C' and 'D' and Stenographer Grade-I mentioned in Rule 5 shall be made on the basis of seniority subject to the rejection of the unfit through the Selection Committee constituted under Rule 16(1).

(2) The appointing authority shall prepare category wise eligibility lists of the candidates arranged in order of seniority and place the list before the Selection Committee along with their character rolls and such records pertaining to them so may be considered proper.

(3) The Selection Committee shall consider the case of the candidates on the basis of character rolls and records referred to in sub-rule (2) and if it considers

necessary it may also interview the candidates.

(4) The Selection Committee shall prepare a list of selected candidates arranged in order of seniority and forward the same to the appointing authority.'

9. Rule 5 (ii) clearly lays down that the post of Stenographer shall be filled up by promotion from amongst the permanent Stenographers. If suitable persons are not available for promotion, the post may be filled up by direct recruitment and Rule 17 provides the procedure for recruitment by promotion and lays down that promotion shall be made on the basis of seniority subject to rejection of the unfit. Rule 5 (ii) is clear that the post of Stenographer grade-I has to be filled up by promotion from amongst the permanent Stenographers, therefore, the post of Stenographer grade-I is a promotional post and has to be filled by promotion. The only exception which the rule provides is that if suitable persons are not available for promotion, the post may be filled by direct recruitment. This presupposes that first the procedure for recruitment by promotion is to be adopted for filling up the post of Stenographer grade-I and if no suitable candidate is available, only then the procedure for direct recruitment can be adopted by the respondents. Otherwise, It may lead to arbitrariness. It is true that there is nothing in the rules which debars simultaneous selection but the rules should be interpreted reasonably to avoid any confusion. When a post is a promotional post and the occasion to initiate process for direct selection is dependent on non-availability of any one from the lower category due to non-suitability to be decided objectively in the manner provided in the rules, then the initiation of second step without exhausting first would be contrary to rules. The word 'If in Rule 5 (ii) is very important. According to dictionary, it means 'In the event that' 'so long as'. This leaves no room for doubt that so long it was not decided that no suitable candidate from grade-II was available, the authorities could not have initiated the process of direct selection. Therefore, the respondents could not adopt the simultaneous procedure for filling, up the post of Stenographer in grade-I. The entire selection procedure thus was contrary to rules. Even if the argument of counsel for the petitioner is accepted that the respondents could have resorted to both the processes of recruitment by promotion and by direct recruitment, simultaneously, even in that case it is clear from the records that the respondents initiated the process of selection by direct

recruitment on 3.9.89 and written test for direct recruitment was held, first, on 5.9.89 and written test of prospective promotees was held on 6.9.89 which was not permissible under the rules as the prospective promotees under the rules were entitled to be considered first.

10. There is another aspect of the matter. The post for direct recruitment was advertised on 3.9.89. The written test of direct recruits was held on 5.9.89 whereas the written test of prospective promotees was held on 6.9.89. This demonstrates that the allegation of respondent No. 5 that respondents were interested in making appointment by direct recruitment and the written test taken of the prospective promotees was only a lip service to the rules is notwithstanding substance. The Commissioner after examination of the record has held that the petitioner was unjustifiably denied promotion due to personal prejudice of the Additional District Magistrate against the respondent and to help the petitioner. For this purpose, I examined the marks sheet of respondent No. 5 filed by the petitioner and I am satisfied that the Commissioner did not commit any error as no reasonable person on it would have come to the conclusion that respondent was not suitable. It is true that there are mistakes but there is always margin of error in transcription. In any case, it is very doubtful if it could attract zero marks. The respondent No. 5 on the entries awarded to him was an excellent stenographer. The entries were consistent for many years under different officers. He was given cash awards as well. The award of zero marks in these circumstances by an officer who had given him excellent entry few months earlier in discharge of his official duty does not meet the eye and if the Commissioner on these facts and on allegations made in the representation held that the respondent No. 5 was purposely denied promotion by giving zero in test, the order cannot be faulted.

11. The post of Stenographer grade-I under the rules is a promotional post. The procedure for it is provided in Rule 17. It is seniority subject to rejection of unfit by the selection committee. The expression, 'subject to rejection of unit', has been subject matter of Judicial Interpretation. But it is not necessary to refer to them as Rule 17 (2) gives the procedure in detail for determining it. It requires the appointing authority to prepare the list of eligible candidates in order of seniority and place it before the selection committee along with their character rolls and

such records pertaining to them as it may consider proper. The selection committee under Rule 17 (3) then is required to consider the case of the candidates on the character rolls and records submitted under Rule 17 (2). In other words, the selection committee is required under the rules to take a decision on suitability of a promotee on the record and on no other material. The rules do not require any test for the stenographer obviously because the field of eligibility is confined to Stenographers working in grade-II if the expression such other record in the rule can be stretched to include test of dictation, then it should have been held before to enable the appointing authority to send it along with character roll entries to the selection committee. But on the facts, it is clear that it was not so as the selection committee was constituted on 3-9.89 much before the test was held on 6.9.89. It is thus clear that the record of the test held by the Additional District Magistrate did not form part of the record which was required to be submitted to the selection committee under Rule 17 (2). It was for this reason that the Commissioner held that since the record of the selection committee was not available nor it was clear when it was constituted, it could not be said as to on what ground the respondent No. 5 was unsuitable. Since the test was held on 6.9.89, it could not form part of the record sent under Rule 17 (2), therefore, the opinion of the selection committee was based on extraneous material and against the rules.

12. So far as the other argument of Sri G. K. Singh that the Commissioner was under orders of transfer is concerned, it is devoid of any merit. The Commissioner had heard arguments of the petitioner and respondent No. 5 on 26.6.96 and 2.7.96. He was duty bound to pass the order before handing over charge. In absence of any allegation against him, the submission of Sri Singh has to be rejected. The other submission of Sri Singh that the Commissioner did not consider the judgment of this Court is also not tenable in view of the fact that this Court directed the Commissioner to decide the matter afresh keeping in view the observations made in the judgment and in accordance with law after giving opportunity of hearing to the petitioner and respondent No. 5. The Commissioner considered the judgment of this Court and gave opportunity of hearing to the petitioner and respondent No. 5 and he found that the selection by direct recruitment could not have been resorted to by the respondents without

finalising the recruitment by promotion and only when no suitable candidate was available then procedure for direct recruitment could have been resorted to. Therefore, the Commissioner found that the entire procedure for direct recruitment was illegal. No doubt this Court said in the Judgment that merely because a person had good character roll did not entitle him for promotion and his suitability had to be judged by the selection committee but as the Commissioner has recorded a finding that there is nothing on record to show the basis on which Sri Chaurasia was found unsuitable, he was justified in placing reliance upon the character roll of the petitioner as well as entry of 1988-89 recorded on 25.4.89. In my opinion, the Commissioner did not sit over the judgment of this Court rather complied with the directions given in the Judgment and his order dated 6.12.96 does not suffer from any error of law. On the findings as have been recorded by the Commissioner that Sri Chaurasia, was illegally denied promotion on the post of Stenographer grade-I and appointment of the petitioner was totally illegal and contrary to rules, the appointment of the petitioner dated 6.8.89 was liable to be set aside.

13. There is yet another reason which disentitles the petitioner from seeking any relief. The Commissioner has recorded a finding that issuing of the advertisement on 3.9.89 without first determining whether any Stenographer grade-II was suitable or not left a doubt that entire selection process was suspicious. He further held that after examining the notings of Sri Chandrika Prasad Tewari, Additional District Magistrate (Administration) on 30.8.89 and 3.9.89, it was clear that the entire proceedings were taken with personal prejudice of the officer against respondent No. 5 and with a view to favour the petitioner. Both these findings have not been assailed in the writ petition. In fact they are fully supported by the record. The mention in the advertisement that even those who were not registered with employment exchange could apply was to help the petitioner as he was not registered. Then the respondent No. 5 has cast aspersions on the District Magistrate in his representation which are quite serious. It was stated by him that the District Magistrate was personally interested in the petitioner, therefore, contrary to the past practice, he decided to fill the vacancy by direct recruitment. It was stated that he was so interested that he personally was present when the Additional District Magistrate was taking the test. He asked the Additional District Magistrate to raise the speed of dictation to ensure that the candidates did not fair

well. And when the petitioner intended to challenge the order, he was transferred. He meet the District Magistrate for stay of his transfer. He was told not to file any writ or make any representation. It was stated in the representation that due to this reason, he could not make the representation and he filed it only when the District Magistrate was transferred. These are very serious matters. The authorities played with the rules and went to the extreme to help the petitioner and harm the respondent No. 5. There is no equity in favour of petitioner. On these facts, the entire selection of petitioner was liable to be set aside but since the Commissioner has taken a liberal view and has directed that since the petitioner is in service for about seven years, at present about 10 years, he should be absorbed on the post of Stenographer grade-II, I am refraining from exercising my powers for setting aside the appointment of the petitioner.

14. In the result this writ petition is dismissed. But the direction of the Commissioner that the respondent No. 5 shall not be paid salary of Stenographer grade-I from 6.9.1989 even though he shall be deemed to have been promoted is modified and it is directed that the respondent shall be paid his salary as Stenographer grade-I from the date of the order dated 6.12.1996 passed by the Commissioner as the respondent should not suffer due to interim order passed by this Court.

15. The respondents are further directed to treat the respondent No. 5 Sri Shyam Nath Chaurasia as Stenographer grade-I w.e.f. 6.9.1989 in accordance with directions of the Commissioner, He shall be paid the difference of salary from 6.12.1996 and the post retiral benefits shall also be calculated treating him as Stenographer grade-I w.e.f. 6,9.1989.

16. Respondent No. 5 shall be entitled to his costs.