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SooperKanoon Citation : sooperkanoon.com/759858

Court : Rajasthan

Decided On : May-15-2009

Reported in : RLW2009(2)Raj1680

Judge : Prem Shankar Asopa, J.

Appellant : Manoj Kumar and ors.

Respondent : State of Rajasthan and ors.

Judgement :

Prem Shankar Asopa, J.

1. Since the common question of facts and law are involved relating to renew the contract of the petitioner(s) for vacant post of GNM/Nurse Grade II considering the fact that they are experience persons and are having more marks and percentage than the selected candidates. All the petitioner(s) have also claimed priority in the select list on the ground that adhoc appointee cannot be substituted by another adhoc fresh appointee, therefore, all the petitions have been heard together and are being decided together.

2. Briefly stated the relevant facts of the case are that on 04.05.2007 under the National Rural Health Mission (NRHM) a notification inviting application for appointment of 2500 GNM in Sub Health Centres in 24 districts was issued and the appointments were to be made at district level and the candidates of

the.respective districts were to be given preference. Then again second advertisement was issued on 08.08.2007 for 6172 GNM post on the same terms and conditions. On 25.08.2007, an amended notification was issued wherein it was stated that the merit list will be prepared at the State level. Then again on 21.01.2008, another amended notification was issued wherein it was stated that the merit list will be prepared at the district level.

3. The said order of 21.01.2008 of district level selection was challenged by some of candidates, out of which one was Shri Dema Ram Choudhary whose the writ petition was registered as S.B.C.W. No. 1120/2008 which was allowed by the Coordinate Bench of this Court and the corrigendum dated 21.01.2008 was set aside and the earlier corrigendum dated 25.08.2007 of State level was maintained on the ground that the district level selection and preference of the district will be discriminatory and no merit can be prepared at district level in view of the judgment of the Supreme Court in Rajesh Kumar Gupta and Ors. v. State of UP and Ors. reported in : AIR 2005 SC2540 .

4. The said judgment of Dema Ram Choudhary was followed by the Coordinate Bench at Principal Seat, Jodhpur in Dinesh Kumar and the said writ petition was disposed of in the same term on 16.05.2008.

5. Then again on 08.05.2008, in Santh Lal Yadav and Ors. v. State and Ors. passed in S.B. Civil Writ Petition No. 741/2008, the said judgment was followed in respect of ANM.

6. In all the aforesaid writ petitions, some of the candidates have been appointed either as Nurse Grade II/GNM/ANM prior to the issuance of notification dated 04.05..2007 but all of them have applied under the advertisement dated 04.05.2007, 08.08.2007 and they have disclosed the merit percentage and claiming themselves more meritorious with the further assertion that the persons lower in the merit have been appointed by the respondent in the State merit list which was prepared on 28.02.2009 after issuing the provisional merit list and inviting of the objections.

7. In some of the cases, the interim orders have been granted to the effect that the respective petitioners who were appointed in the post of Nurse Gr.II/GNM/ANM prior to present advertisement be allowed to continue and in one of the case of Leena Saini and Ors., the interim order was passed to stay the appointment subject to the decision of the writ petition wherein an application has also been filed by the respondent for clarification which is pending.

8. The submission of the counsel for the petitioner(s) in S.B.Civil Writ Petition No. 4298/2008, 4388/2008, 5611/2008, 10912/2008, 10393/2008, 11724/2008 and 13785/2008 is that the adhoc employee cannot be allowed to substitute by another fresh adhoc employee which has been further substantiated by the fact that they have faced the similar selection on earlier occasion on contract basis and now they are facing the same selection again for employment on contract basis.

9. In support of the aforesaid submission, the counsel for the petitioner(s) placed reliance on the judgment of the Supreme Court reported in AIR 1992 Supreme Court 2130 titled as State of Haryana v. Piara Singh. The relevant para 25 of the said judgment runs as under:

25. Before parting with this case, we think it appropriate to say a few words concerning the issue of regularisation of adhoc/ temporary employees in government service.

The normal rule, of course, is regular recruitment through the prescribed agency but exigencies of administration may sometimes call for an adhoc or temporary appointment to be made. In such a situation, effort should always be to replace such an adhoc/temporary employee by a regularly selected employee as early as possible. Such a temporary employee may also compete along with others for such regular selection/appointment. If he gets selected, well and good, but if he does not, he must give way to the regularly selected candidate. The appointment of the regularly selected candidate cannot be withheld or kept in abeyance for the sake of such an adhoc/temporary employee.

Secondly, an adhoc or temporary employee should not be replaced by another adhoc or temporary employee; he must be replaced only by a regularly selected

employee. This is necessary to avoid arbitrary action on the part of the appointing authority.

Thirdly, even where an adhoc or temporary employment is necessitated on account of the exigencies of administration, he should ordinarily be drawn from the employment exchange unless it cannot brook delay in which case the pressing cause must be stated on the file. If no candidate is available or is not sponsored by the employment exchange, some appropriate method consistent with the requirements of Article 16 should be followed. In other words, there must be a notice published in the appropriate manner calling for applications and all those who apply in response thereto should be considered fairly.

An unqualified person ought to be appointed only when qualified persons are not available through the above processes.

If for any reason, an adhoc or temporary employee is continued for a fairly long spell, the authorities must consider his case for regularisation provided he is eligible and qualified according to rules and his service record is satisfactory and his appointment does not run counter to the reservation policy of the State.

The proper course would be that each State prepares a scheme, if one is not already in vogue, for regularisation of such employees consistent with its reservation policy and if a scheme is already framed, the same way be made consistent with our observations herein so as to reduce avoidable litigation in this behalf. If and when such person is regularised he should be placed immediately below the last regularly appointed employee in that category, class or service, as the case may be.

So far as the work-charged employees and casual labour are concerned, the effort must be to regularise them as far as possible and as early as possible subject to their fulfilling the qualifications, if any, prescribed for the post and subject also to availability of work. If a casual labourer is continued for a fairly long spell - say two or three years - a presumption may arise that there is regular need for his services. In such a situation, it becomes obligatory for the concerned authority to examine the feasibility of his regularisation. While doing so, the authorities ought

to adopt a positive approach coupled with an empathy for the person. As has been repeatedly stressed by this Court, security of tenure is necessary for an employee to give his best to the job. In this behalf, we do commend the orders of the Government of Haryana (contained in its letter dated 6.4.90 referred to hereinbefore) both in relation to work-charged employees as well as casual labour. We must also say that the orders issued by the Governments of Punjab and Haryana providing for regularisation of adhoc/temporary employees who have put in two years/one year of service are quite generous and leave no room for any legitimate grievance by any one.

These are but a few observations which we thought it necessary to make, impelled by the facts of this case, and the spate of litigation by such employees. They are not exhaustive nor can they be understood as immutable. Each Government or authority has to devise its own criteria or principles for regularisation having regard to all the relevant circumstances, but while doing so, it should bear in mind the observations made herein.

10. Counsel for the petitioner(s) also placed reliance on the judgment reported in : (1986)ILLJ23SC titled as Ratan Lal and Ors. v. State of Haryana.

11. In S.B. Civil Writ Petition No. 2600/2009, 2662/2009, 3893/2009 and 3895/2009, counsel for the petitioner(s) Mr. Banwarl Lal Sharma submits that region wise selection is not illegal in case the candidates have freedom to apply for any region as held by the Supreme Court in a case reported in 2008(12), I titled as Balbir Kuar and Anr. v. U.P. Secondary Education Services Selection Board, Allahabad and Anr.

12. In S.B.Civil Writ Petition No. 12575/2008; Sharmila Paneri v. State of Rajasthan and Ors., the basis issue is with regard to the eligibility and non-eligibility regarding educational qualification of Senior Secondary (Vocational) which has not been treated equivalent to Senior. Secondary (Academic).

13. The submission of the counsel for the petitioner in Sharmila Paneri in this behalf is that now the law is well settled by the Supreme Court and further followed by this Court in a case reported in WLC 2002 (4) 681 titled as Deep Chand v.

State of Rajasthan, according to which both the qualifications are equivalent.

14. The submission of the Mr. Dinesh Yadav, Additional Advocate General is that the petitioner (s) have applied in pursuance of the advertisement dated 04.05.2007, 08.08.2007 and faced selection thus are estopped from challenging the selection process particularly when they did not find their name in the State merit list and merit of district level of no relevance in view of the direction issued by this Court for making appointment at State level.

15. Mr. Dinesh Yadav further submits that they have acted in accordance with the directions issued by this Court in a case of Dema Ram Choudhary, Dinesh Kumar and Santh Lal Yadav and Ors. (supra) and further provided an opportunity to raise an objection against the interim merit list and after consideration of the same, the final seniority list at State level was issued on 28.02.2009 and presently 2000 post of GNM/Nurse Grade II/ANM are lying vacant which could not be filled on account of the interim order.

16.1 have gone through the contents of the writ petition and further considered the rival submissions of the parties.

17. I am of the view, that the petitioner(s) cannot be allowed to raise the submission of substitution of adhoc employee by another fresh adhoc employee on contract basis for the simple reason that they have not challenged the advertisement at the relevant time and further they have participated in the selection process and when their name did not find place in the State merit list, they have raised the said ground. The law is well settled on the issue that having participated in the selection process, it is not open for the unsuccessful candidates/employees to challenge the same. If reference is needed, then the same is : [2002]3SCR948 ; titled as Chandra Prakash Tiwari and Ors. v. Shakuntala Shukla and Ors. para 32 and 33. The same are as follows:

32. In conclusion, this Court recorded that the issue of estoppel by conduct can only be said to be available in the event of there being a precise and unambiguous representation and it is on that score a further question arises as to whether there was any unequivocal assurance prompting the assured to alter his position or

status-the situation, however, presently does not warrant such a conclusion and we are thus not in a position to lend concurrence to the contention of Dr. Dhavan pertaining to the doctrine of estoppel by conduct. It is to be noticed at this juncture that while the doctrine of estoppel by conduct may not have any application but that does not bar a contention as regards the right to challenge an appointment upon due participation at the interview/selection. It is a remedy which stands barred and it is in this perspective in *Om Prakash Shukla v. Akhilesh Kumar Shukla* a three-Judge Bench of this Court laid down in no uncertain terms that when a candidate appears at the examination without protest and subsequently found to be not successful in the examination, question of entertaining a petition challenging the said examination would not arise.

33. Subsequently, the decision in *Om Prakash* stands followed by a later decision of this Court in *Madan Lal v. State of J & K* wherein this Court stated as below: (SCC p.493, paras 9-10)

9. Before dealing with this contention, we must keep in view the salient fact that the petitioners as well as the contesting successful candidates being respondents concerned herein, were all found eligible in the light of marks obtained in the written test, to be eligible to be called for oral interview. Up to this stage there is no dispute between the parties. The petitioners also appeared at the oral interview conducted by the members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned. Thus the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, we cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted. In the case of *Om Prakash Shukla V. Akhilesh Kumar Shukla* it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination, the High Court should not have granted any relief to such

a petitioner.

10. Therefore, the result of the interview test on merits cannot be successfully challenged by a candidate who takes a chance to get selected at the said Interview and who ultimately finds himself to be unsuccessful. It is also to be kept in view that in this petition we cannot sit as a court of appeal and try to reassess the relative merits of the candidates concerned who had been assessed at the oral interview nor can the petitioners successfully urge before us that they were given less marks though their performance was better. It is for the Interview Committee which amongst others consisted of a sitting High court Judge to judge the relative merits of the candidates who were orally¹ interviewed, in the light of the guidelines laid down by the relevant rules governing such interviews. Therefore, the assessment on merits as made by such an expert Committee cannot be brought in challenge only on the ground that the assessment was not proper or justified as that would be the function, of an appellate body and we are certainly not acting as a court of appeal over the assessment made by such an expert committee.

18. As regard these particular cases, there are 3 judgments of this Court namely Dema Ram Choudhary, Dinesh Kumar and Santh Lal Yadav and Ors. to prepare the merit list on State level and I respectfully agree with the said judgments.

19. The judgment of the Supreme Court cited by the petitioner(s) of State of Haryana v. Piara Singh was not the case where the candidates have participated in the selection and thereafter challenged the selection on the ground of substitution of the adhoc employee by another fresh adhoc employee, therefore, the same is of no assistance.

20. As regard the judgment of the Supreme Court reported in 2008(12), 1 titled as Balbir Kaur and Anr. v. U.P. Secondary Education Services Selection Board, Allahabad and Anr., it has been held that unless the district wise selection proved to be discriminatory it is not per se violative of the equality principle in Articles 14 and 16 of the Constitution. Here, in the instant case the preference to the resident of the district was given in the district level selection, therefore, the same was held to be discriminatory by this Court in the judgment of Dema Ram Choudhary, Dinesh Kumar and Santh Lal Yadav and Ors. The aforesaid judgment of the

Supreme Court has also no assistance to the petitioner(s). The relevant portion of question No. 4 in para 45,46 and 48 of the judgment of Balbir Kaur and Anr. v. U.P. Secondary Education Services Selection Board, Allahabad and Anr. runs as under:

(4) Region wise selection and declaration of results: it was contended that the region wise selection violated the constitutional principle of equality of opportunity in the matter of public employment.

Rejecting this contention, the Supreme Court

HELD

There is no warrant for accepting as general proposition that a region wise or district wise selection is per se violative of the equality principle in Articles 14 and 16 of the Constitution. It would be discriminatory only when the person who alleges discrimination, demonstrates certain appreciable disadvantage qua similarly situated persons, which he would not have faced but for the impugned State action. The onus was on the writ petitioners to show by cogent material that by resorting to region wise selection, they were placed in some disadvantageous position as compared to their counterparts or that in this process merit was the casualty. Neither Section 10 of the principal Act nor any other statutory provision forbids region wise selection. Besides, no restriction was imposed upon the candidates insofar as their choice for the regions was concerned. An eligible candidate could apply in any of the regions and his application was to be considered in accordance with the Rules. It has neither been pleaded nor can it be held that the right of any eligible candidate to apply in a particular zone was curtailed or that an equal opportunity to compete had been denied to the respondents. It is not even the case of the respondents that a less meritorious candidate has been selected on account of region wise selection. The respondents have neither pleaded nor placed on record any material to show that as a result of region wise selection, they have not been selected despite the fact that they were more meritorious as ' compared to the selected candidates. The selection process cannot be struck down as violative of Articles 14 and 16 of the Constitution.

21. In view of the above, the contention of the petitioner(s) have no force whereas the contention of the State has force and no relief claimed can be granted.

22. However, there are chances that the name of the petitioner(s) may appear in the State merit list,' therefore, all the writ petition except Sharmila Paneri are disposed of with a direction to the respondents that in case the name of the petitioner(s) stand in the State merit list dated 28.02.2009 of G.N.M. and the advertised vacancies are available then they may be given appointment as per their merit even if the less meritorious persons are continuing, then they have to make room for the petitioner(s) whose name stands higher on merit in State merit list.

23. In Sharmila Paneri v. State of Rajasthan and Ors. S.B.C.W.P. No. 12575/2008, her candidature for consideration of appointment on the post of G.N.M. was denied on the ground of ineligibility on account of having Senior Secondary (Vocational) although the controversy has been settled by the Supreme Court as well as this Court in a case reported in WLC 2002 (4) 681 titled as Deep Chand v. State of Rajasthan, therefore, the petition deserves to be accepted and the same is accepted with a direction to the respondents to now consider the candidature of Sharmila Paneri and assigned her proper merit in the State list thereafter act accordingly,

24. All the interim orders passed in the present writ petitions are vacated.