

Mahendra Nath

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Court : Allahabad

Decided On : Feb-02-2011

Judge : Arun Tandon, J.

Appeal No. : WRIT - A No. - 18744 of 1989

Appellant : Mahendra Nath

Advocate for Def. : C.S.C., Adv

Advocate for Pet/Ap. : A.N. Tripathi, Adv

Judgement :

1. Petitioner before this Court seeks quashing of the order dated 17.03.1989 whereunder the Chief Medical Officer, Azamgarh had cancelled the promotion earlier granted to the petitioner as Clerk under an order dated 14.03.1989.

2. Facts in short giving rise to the present writ petition are as follows :

2. According to the petitioner he was working as Ward Boy in hospital at Taihar Kushun Deopur, Azamgarh. He made an application for promotion on the post of Clerk which was forwarded to the Joint Director (Child Disease) Medical Health and Family Welfare, U.P., Lucknow. The Joint Director passed an order requiring the Chief Medical Officer to promote the petitioner on the post of Clerk. On the strength of the said letter of the Joint Director, an order was passed by the Chief Medical Officer granting promotion to the petitioner as Clerk in the pay scale of

Rs.354-500. The order of promotion specifically records that the same was purely temporary and could be cancelled at any point of time without notice and opportunity of hearing. This appointment offered to the petitioner has been cancelled within three days of the issuance of the order of promotion to be precise on 17.03.1989 which according to the petitioner was served upon him on 08.06.1989.

3. Counsel for the petitioner challenging the aforesaid order contended that he was promoted against a substantive vacancy and that that such order of promotion could not have been cancelled without notice and opportunity of hearing to the petitioner, whatever may be the reasons for the same. For the proposition, he has placed reliance upon the Division Bench judgment of this Court in the case of Vishwamitra Yadav vs. U.P. State Public Service Tribunal, Licknow and others reported in (1998) 1 UPLBEC, 23 as well as upon the judgment of the Hon'ble Single Judge in the case of Ram Jeet Yadav vs. Chief Medical Officer, Azamgarh and others passed in Civil Misc. Writ Petition No. 14933 of 1989 decided on 05.12.2001. The present writ petition is stated to have been connected with the petition of Ram Jeet Yadav. He explains that in view of the aforesaid two judgements, this Court is bound to take the same view and if it disagrees, the only option left is to refer the matter to be considered by the Larger Bench. For the proposition, Counsel for the petitioner has also placed reliance upon the judgment of the Apex Court in the case of Mahadeolal Kanodia vs. The Administrator General of West Bengal reported in AIR 1960 SC, 936 and upon the Division Bench judgement of this Court in the case of Shyamu vs. State of U.P. & others reported in (2010) 3 UPLBEC, 2376.

4. Counsel for the petitioner has specifically stated that such promotion to the petitioner has been granted in terms of the Government Order dated 31.08.1982 which provides that 15% of the post of Clerk in the lowest grade shall be filled by promotion. Therefore, if there is no statutory rule providing for such promotion, the vacuum stands filled by the said Government Order and is binding upon the State authorities. He submits that the impugned order should be tested for the reasons recorded therein and not otherwise. The reasons cannot be supplemented through affidavits.

5. Standing Counsel on behalf of the State respondents in reply submits that according to the own case of the petitioner, he claims promotion under the Government Order dated 31.08.1982 but the petitioner has hopelessly failed to establish the satisfaction of the mandatory requirements of the aforesaid Government Order for such promotion being granted in accordance thereto. He points out that under the Government Order dated 31.08.1982, such Class IV employees who had completed 5 years of continuous service could be promoted and for the purpose not only a written examination of 30 marks but also interview of 10 marks is required to be held. Further maximum 10 marks are fixed for the character roll entries. It is on the basis of marks so obtained that the promotion is to be granted. In the facts of the present case, no such exercise has been undertaken. On the contrary the order of appointment itself records that the petitioner was appointed on temporary basis by the Chief Medical Officer only on the direction of the Joint Director. It was specifically mentioned in the appointment letter that the promotion was temporary and can be cancelled at any point of time without notice and opportunity of hearing. In the alternative, he contends that even if there may be some illegality in the order of cancellation, this Court may not interfere with the order as any interference may perpetuate the illegal promotion which can never be the outcome of a petition under Article 226 of the Constitution of India. With regard to the judgements relied upon by the counsel for the petitioner, he explains that not only the facts of the present case are distinguishable, even otherwise the Apex Court has repeatedly held that there cannot be any negative equality, therefore, no case is made out to interfere with the order impugned.

6. I have heard learned counsel for the parties and have gone through the records of the present writ petition.

7. It is not in dispute between the parties that promotion, in the facts of the case, was regulated under the Government Order dated 31.08.1982. The Government Order specifically provides that 15% of Class III post in the lowest grade shall be filled by promotion from Class IV employees. However, the Government Order lays down the procedure in detail to be adopted for the purpose. It specifically provides that only such Class IV employees shall be entitled for promotion who

have completed 5 years of continuous service and for selection, a written examination shall be held which shall comprise of two questions only and for the same, maximum 30 marks have been provided. Thereafter interview is to take place maximum marks whereof have been provided as 10. For the character roll entries, maximum 10 marks have been provided. It is with reference to the merit secured after such selection that promotion is to be granted within the quota provided.

8. On the examination of the present writ petition, this Court finds that there is absolutely no averment that the petitioner had completed 5 years of continuous service on the date he is alleged to have been promoted under the Order dated 14.03.1989. Further there is no averment that any Selection Committee was constituted or any written examination or interview took place. From the order of promotion itself, it is apparently clear that the petitioner was promoted only in pursuance to an order of the Joint Director (Child Disease) Medical Health and Family Welfare. The order of promotion contained a categorical recital that the same was temporary and could be cancelled without any notice and opportunity of hearing.

9. This Court, therefore, has no hesitation to record that the promotion granted to the petitioner on temporary basis under the order dated 14.03.1989 is not referable to the Government Order dated 31.08.1982. The promotion granted to the petitioner was de hors the provisions of the Government Order. It is in this background that the same was termed as purely temporary and could be cancelled at any point of time without notice and opportunity of hearing to the petitioner. The petitioner accepted the promotion with open eyes. Within three days of such promotion it was cancelled vide order dated 17.03.1989.

10. I am of the considered opinion that cancellation of such an promotion order does not call for any interference under Article 226 of the Constitution of India. The Supreme Court of India has repeatedly held that the High Court shall not exercise its power under Article 226 of the Constitution by quashing an order if the same has the effect of restoring an earlier illegal order. (Ref. *Gadde Venkateswara Rao v. Government of Andhra Pradesh & Ors.*, AIR 1966 SC, 828 and *Mallikarjuna*

Muddnagal Nagappa & Ors. v. State of Karnataka & Ors., (2000) 7 SCC, 238). The Apex Court has also held that there cannot be any negative equality and no mandamus can be issued by a writ Court asking the authorities to perpetuate the illegality. (Ref. Ghulam Rasool Lone vs. State of Jammu & Kashmir, JT 2009 (13) SC, 422).

11. The Court may now consider the judgments which have been relied upon by the counsel for the petitioner.

12. So far as the judgment in the case of Vishwamitra Yadav (Supra) is concerned, it may be recorded that this Court finds that it has specifically been recorded that the ad hoc appointment continued for two years and thereafter one fine morning it was cancelled. In the said factual background the Court proceeded to hold that an opportunity should have been afforded before cancellation of the promotion. This Court may record that the Division Bench ultimately permitted the petitioner to approach the Director.

13. So far as the judgment of the Single Judge in the case of Ram Jeet Yadav (Supra) is concerned, the Court had not noticed any facts as were mandatory for grant of promotion under the Government Order dated 1982. It had not been examined as to whether in absence of the procedure prescribed under the Government Order for making promotion against 15% post being followed, could the promotion be legally justified. This Court may further notice that there is absolutely no consideration of the issue as to whether the candidate was qualified for promotion on the relevant date in terms of the Government Order dated 31.08.1982 or not. The Apex Court in the case of Bhavnagar University v. Palitana Sugar Mills (Pvt.) Ltd. & Ors., reported in 2003 (2) SCC 111, has held as follows:

?It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.?

14. The said judgement has been followed in the recent judgement of the Apex Court in the case of Dr. Rajbir Singh Dalal v. Chaudhari Devi Lal University, Sirsa

& Anr., reported in AIR 2008 SCW 5817.

15. It is held that the judgment relied upon by the counsel for the petitioner are clearly distinguishable in the facts of the present case.

16. So far as the judgments in the case of Mahadeolal (supra) and Shyamu (Supra) are concerned, the legal proposition laid down therein cannot be disputed. This Court is not laying down any legal proposition contrary to the judgments referred to by the counsel for the petitioner. This Court has held that the facts of this case are clearly distinguishable.

17. Writ petition is dismissed.

18. Interim order, if any, stands discharged.

19. If during this period the petitioner has become eligible to be considered for promotion as per the Government Order dated 31.08.1982, the authorities are free to proceed in accordance with law.

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