

Sunil Kumar Vs. State of U.P. and ors.

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Court : Allahabad

Decided On : Dec-22-2010

Judge : Dilip Gupta, J.

Appeal No. : Civil Misc. Writ Petition No. 43201 of 2010; Civil Misc. Writ Petition No. 43202 of 2010; Civil Misc. Writ Petition No. 43203 of 2010; Civil Misc. Writ Petition No. 43204 of 2010; Civil Misc. Writ Petition No. 43205 of 2010; Civil Misc. Writ Petition No. 43206 of 2010; and Civil Misc. Writ Petition No. 43207 of 2010

Appellant : Sunil Kumar

Respondent : State of U.P. and ors.

Judgement :

1. All the petitioners of these seven writ petitions, who were appointed as temporary Forest Guards by the order dated 13th September, 2007 to fill the backlog vacancies of Scheduled Castes & Scheduled Tribes, have sought the quashing of the office orders dated 13th July, 2010 by which their services have been dispensed with under the provisions of the U.P. Temporary Government Servants (Termination of Service) Rules, 1975 (hereinafter referred to as the 'Rules'). The petitioners have also sought the quashing of the order dated 16th December, 2009 passed by the State Government for cancellation of the examination on the basis of which the petitioners had been appointed.

2. An advertisement was published on 22nd May, 2007 by the Divisional Forest Officer, Mirzapur for filling the backlog reserved category vacancies of Forest Guards and Driver. The petitioners appeared at the written examination and were called for interview and physical test and were ultimately appointed by the letters dated 13th September, 2007. After completing their training, they were given various postings by the order dated 30th June, 2008. However, by the impugned orders dated 13th July, 2010 their services have been dispensed with under the Rules as they were no longer required after making reference to the communications dated 16th December, 2009 of the State Government, 22nd December, 2009 of the Chief Conservator of Forest, Lucknow and 21st January, 2010 of the Chief Forest Conservator, Mirzapur.

3. Sri Ashok Khare, learned Senior Counsel appearing for the petitioners submitted that the order to dispense with the services of the petitioners under the Rules has been passed on the basis of the communication dated 16th December, 2009 sent by the State Government which is based on the inquiry report dated 28th August, 2009 placed before it but the said inquiry report does not point out any such irregularity/illegality in the conduct of the examination which could have prompted the State Government to cancel the entire examination. Elaborating his submission he pointed out that the inquiry report dated 28th August, 2009 does not find any of the seven allegations in the complaint to be established, but still the State Government observed in the impugned order dated 16th December, 2009 that prima facie irregularities were proved in the recruitment of the Forest Guards. He has, therefore, submitted that the decision of the State Government conveyed through the letter dated 16th December, 2009 to cancel the examination deserves to be set aside and consequently the order dated 13th July, 2010 passed for dispensing of the services of the petitioners on the basis of the said decision also deserves to be set aside. It is also his submission that the complaint was made regarding the conduct of the examination not by any candidate who had appeared at the examination but by one Ex-Forest Officer-Teju Prasad, who had no concern with it, and it is on the basis of such a complaint that inquiry was conducted and that the appointment of the petitioners could not have been cancelled without giving opportunity to the petitioners.

4. Sri Satish Chaturvedi, learned Additional Advocate General for the State of U.P. has placed before the Court the inquiry report with the supporting documents and the averments made in the supplementary counter affidavit to support the decision taken by the State Government for cancellation of the entire recruitment process. He has submitted that in the facts and circumstances of the case, when the recruitment process was not fair, there was no necessity of giving any opportunity to the petitioners before cancelling their appointment.

5. In order to appreciate the controversy involved in the writ petition, it will be useful to refer to the provisions of the U.P. Lower Subordinate Forest Service Rules, 1980 (hereinafter referred to as the 'Rules') dealing with the recruitment procedure. Rules 8, 9, 13, 14, 15 and 18 and 19 are quoted below:-

"8. Academic qualifications.- A candidate for direct recruitment to the various categories of posts must possess the following qualifications:

(1) Moharrir and Jamadar.- Must have passed High School Examination with Science or Agriculture of the U.P. Board of High School and Intermediate Examination or an examination recognised as equivalent thereto.

(2) Guards Essential.-Must have passed the High School Examination with Science or Agriculture of the U.P. Board of High School and Intermediate Examination or an examination recognised as equivalent thereto.

Preferential.-(1) In the case of recruitment of candidates from open marked preference will be given to ex-Home Guards who have worked as such for at least one year.

(2) In the case of seasonal workers weightage shall be given to the total length of service put in as seasonal worker and their record of service.

9. Preferential qualifications.-A candidate who has-

**(i)served in the Territorial Army for a minimum period of two years,
or**

(ii)obtained a 'B' certificate of the National Cadet Corps;

shall, other things being equal, be given preference in the matter of direct recruitment.

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 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 III of Financial Hand Book, Volume II, Part III:

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

Note.-In the case of a candidate for direct recruitment the following minimum standards for height and chest measurement shall be necessary:

Height 163 cm.

Chest Unexpanded 79cms. Expanded 84 cms.

Provided further that in case of candidates of Gurkha, Nepalese, Assamese, Meghalaya, Ladakh, Nepal, Manipuri, Garhwali, Kumaoni, Sikkimese and Bhutanese origin the minimum height limit will be 158 cms.

14. Determination of vacancies.- The appointing authority shall determine and in case of vacancies to be filled by direct recruitment, notify to the Employment Exchange, the number of vacancies to be filled during the course of the year as also the number of vacancies to be reserved for candidates belonging to Scheduled Castes, Scheduled Tribes and other categories under Rule 6.

15. Procedure for direct recruitment.- (1) For the purpose of recruitment, there shall be constituted a Selection Committee comprising :

(i)Appointing authority

(ii)Two officers not below the rank of Assistant Conservator of Forests to be nominated by the Conservator of Forest having jurisdiction.

(2) The Selection Committee shall scrutinise the applications and require the eligible candidates to appear in a written test.

Note.-- The syllabus and procedure for written test is given in Appendix B.

(3) After the marks obtained by the candidates in the written test have been tabulated, the Selection Committee shall have regard to the need for securing due representation of the candidates belonging to the Scheduled Castes, Scheduled Tribes and others under Rule 6, call for interview such number of candidates as, on the result of the written examination, 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 the names in the list shall be larger but not larger by more than 25 per cent of the vacancies.

18. Appointment.(1) On the occurrence of substantive vacancies the appointing authority shall make appointment by taking candidates in the order in which they stand in the list prepared under Rules 15, 16 or 17 as the case may be.

(2) The appointing authority may make appointments in temporary and officiating vacancies also from the list referred to in the sub-rule (1). If no candidate borne on these lists is available, he may make appointment in such vacancies from persons eligible, for appointment under these rules.

19. Probation.-(1) A person on appointment to a post in the service in or against a substantive vacancy shall be placed on probation for a period of two years.

(2) The appointing authority may, for reasons to be recorded, extend the period of probation in individual cases specifying the date up to which the extension is granted:

Provided that save in exceptional circumstances, the period of probation shall not be extended beyond one year and in no circumstances beyond two years.

(3) If it appears to the appointing authority at any time during or at the end of the period of probation or extended period of probation that a probationer has not made sufficient use of his opportunities or has otherwise failed to give satisfaction he may be reverted to

his substantive post, if any, and if he does not hold a lien on any post, his services may be dispensed with.

(4) A probationer who is reverted or whose services are dispensed with under sub-rule(3) shall not be entitled to any compensation.

(5) The appointing authority may allow continuous service, rendered in an officiating or temporary capacity in a post included in the cadre or any other equivalent or higher post, to be taken into account for the purpose of computing the period of probation."

6. Appendix 'B' referred to in Rule 15 is as follows:-

"The subjects for examination and the maximum mark allowed for each shall be as follows:

Subject Maximum Marks

(a) For candidates sponsored through Employment Exchange

1.Agriculture or Science 40

2.General Knowledge and Essay 40

3.Interview 20

(b) For seasonal Employment

1.Essay and Composition 40

2.General Knowledge including questions

relating to forest, knowledge about, which

the candidate is expected to have acquired

during his service in the department. 40

4.Physical Test-

Selected candidates will be required to undergo physical test (at their expenses) comprising of a brisk walk of 25 Kms. carrying a pack of 10 kgs. on their backs, to be completed in 4 hours.

Notes.- The written test will be in Hindi and the standard of the papers will be that of Hindi School. In order to qualify a candidate must obtain at least 40 per cent of the maximum marks in each subject.

2. No physical test will be necessary for candidates to be appointed by promotion from Class IV."

7. A perusal of the aforesaid Rules clearly shows that a detailed procedure has been provided for appointment of Forest Guards. The minimum educational qualification has been provided and written test is held in the manner as provided for in Appendix-'B'. The selected candidates are required to undergo a physical test in the manner provided for in Rule 13. The petitioners were appointed in September, 2007 after undergoing the said procedure. Their appointments have, however, been cancelled by the order dated 13th July, 2010 on the basis of the decision taken by the State Government on 16th December, 2009. This decision is based on the enquiry report dated 28th August, 2009 submitted by the Chief Conservator of Forest.

8. It will, therefore, be necessary to briefly refer to the inquiry report dated 28th August, 2009 submitted by Sri C.V. Nath, Chief Conservator of Forest, Southern Region U.P. Lucknow since it forms the basis for cancellation of the recruitment process by the State Government. The report is based on examination of the allegations made in the complaint, the statement of the complainant, perusal of the documents and the statements given by the persons involved in the recruitment process. The following facts and conclusions have been mentioned in the report relating to the seven allegations contained in the complaint.

No. 1- Examination was conducted on 9th September, 2007 by the District Forest Officer, Mirzapur.

No. 2- The allegations levelled is that three days before the holding of the written examination, the guardians of the candidates were orally informed about the questions likely to be asked in the examination but the complainant could not substantiate this by any evidence.

No.3- The allegation is that District Forest Officer, Mirzapur leaked the examination paper to his relatives and other employees one day before the holding of the examination, but this allegation has not been established since nothing was found in the records which could show that any benefit was conferred on the candidates.

No.4- The allegation is that many irregularities were committed during the physical test. It is seen that out of the 28 candidates who appeared for the physical test, only 19 candidates were called for interview and since there is nothing on the record to indicate why nine candidates were not called for interview, transparency has not been maintained in the holding of the physical test and the interview.

No. 5- The allegation that candidates who could not run the 25 Kilometres race properly were declared successful has not been found to be established.

No.6- The allegations that certain relatives of the District Forest Officer, Mirzapur and certain other persons who did not participate in the 25 Kilometres race were selected has also not been found to be established.

No. 7- Such irregularities were brought to the notice of the District Forest Officer, Mirzapur but as there is nothing on the record to indicate whether any action was taken, it is not possible to make any comments.

9. It is on the basis of the findings recorded in this report of the Enquiry Officer that the State Government held that the examination should be cancelled since prima facie irregularities were committed in its holding.

10. The submission of Sri Ashok Khare, learned Senior Counsel appearing for the petitioners is that a perusal of the report submitted by the Enquiry Officer does not establish that any irregularities were committed in the holding of the examination and, therefore, the decision taken by the State Government to cancel the examination on the basis of the report is arbitrary and deserves to be set aside.

11. Learned Additional Advocate General has, however, supported the decision of the State Government on the basis of the documents enclosed with the enquiry report and the averments made in the supplementary counter affidavit.

12. As noticed hereinabove, seven allegations were levelled in the complaint out of which six have not been found to be established. The comment made by the Enquiry Officer with respect to the fourth allegation regarding the holding of the physical test is that the 28 candidates who had appeared at the physical test should have been called for interview but only 19 were called for interview without giving any reason as to why 9 candidates were not called for interview. It is because of this fact that the Enquiry Officer observed that transparency was not maintained.

13. In this connection, it needs to be mentioned that none of the 9 candidates who were not called for interview had made any complaint and the complaint was only made by one retired Forest Officer. Sri Ashok Khare, learned Senior Counsel appearing for the petitioners has made an attempt to justify why these 9 candidates were not called for interview. According to him, Rule 13 of the Rules provides for the minimum standards of Height and Chest measurements necessary to be possessed by a candidate for direct recruitment and these nine candidates were not called for interview since the difference between unexpanded and expanded chest measurement in their cases was found to be less than 5 cms. He has pointed out from the documents on record that though the unexpanded chest measurement of these candidates was 79 cms. or more than 79 cms but as there was a difference of less than 5 cms. in the expanded chest measurement they were not medically fit and, therefore, rightly not called for interview. The contention of Sri Satish Chaturvedi, learned Additional Advocate General for the State of U.P. is that as the unexpanded chest measurement was 79 cms. or more

and the expanded chest measurement was also 84 cms. the candidates were physically fit and were not permitted to appear in the interview for no valid reason.

14. The interpretation put to Rule 13 by Sri Ashok Khare, learned Senior Counsel for the petitioners is that the unexpanded chest measurement should be at least 79 cms. and by mentioning the expanded chest measurement of 84 cms, what is required to be seen is that there should be at least 5 cms. expansion because if such an interpretation is not given, a candidate having unexpanded chest measurement of 84 cms. or more will necessarily satisfy the condition even if there is no expansion of chest. It is, therefore, his submission that by giving both the unexpanded chest measurement and the expanded chest measurement the Rule requires that there should be chest expansion of at least 5 Cms. In the case of these nine candidates the expansion is less than 5 Cms. Thus, though it is correct that this reason is not mentioned in the list prepared for calling the nine candidates, but explanation has been offered by the learned Senior Counsel for the petitioners. It is, however, not necessary to decide at this stage whether Rule 13 requires at least 5 Cms. chest expansion with a minimum chest measurement of 79 Cms. since the matter, as will be seen, is required to be sent back for a fresh decision and can be appropriately dealt with by the authorities.

15. It also needs to be noticed that all that has been mentioned by the Enquiry Officer is that transparency was not maintained since the list of candidates called for interview did not mention any reason for not calling the nine candidates. The enquiry report does not mention that these nine candidates were deliberately not called for interview. What is further to be noted is that these nine candidates, who were not called for interview have not been made any complaint.

16. There is, therefore, nothing in the enquiry report placed before the State Government which may suggest that such irregularities were committed in the examination process which required the examination to be cancelled.

17. In this connection reference needs to be made to the decision of the Supreme Court in *Inderpreet Singh Kahlon & Ors., v. State of Punjab & Ors.*, (2006) 11 SCC 356 in which factors which need to be established before examination can be cancelled have been spelt out and the observations are :-

"We at the outset would furthermore notice that having regard to the submissions made before us by Mr. Dwivedi and Mr. Rao that the services of the appellants before us were terminated not in terms of the rules but in view of the commission of illegality in the selection process involved, we need not consider the applicability of the relevant provisions of the statutes as also the effect of the provisions of Article 311 of the Constitution of India. An appointment made in violation of Articles 14 and 16 of the Constitution of India would be void. It would be a nullity. [See Secretary, State of Karnataka and Others v. Umadevi and Others, 2006 (4) SCALE 247] But before such a finding can be arrived at the appointing authority must take into consideration the foundational facts. Only when such foundational facts are established, the legal principles can be applied.

If the services of the appointees who had put in few years of service were terminated, compliance with three principles at the hands of the State was imperative, viz., (1) to establish satisfaction in regard to the sufficiency of the materials collected so as to enable the State to arrive at its satisfaction that the selection process was tainted; (2) to determine the question that the illegalities committed go to the root of the matter which vitiate the entire selection process. Such satisfaction as also the sufficiency of materials were required to be gathered by reason of a thorough investigation in a fair and transparent manner; (3) whether the sufficient material present enabled the State to arrive at a satisfaction that the officers in majority have been found to be part of the fraudulent purpose or the system itself was corrupt."

(emphasis supplied)

18. Thus, before taking any decision to cancel the examination, the State Government has to be satisfied from the materials on record that the selection process was tainted and determine whether the illegalities go to the root of the

matter and vitiate the entire selection process. Such satisfaction is to be gathered through investigation in a fair and transparent manner. In the present case, the State Government could not have formed an opinion on the basis of the report dated 28th August, 2009 submitted by the Chief Conservator of Forest that such irregularities had been committed in the selection process that required cancellation of the examination.

19. Learned Additional Advocate General has, however, placed reliance on the averments made in the supplementary counter affidavit to highlight that there were mistakes in the correction of answer books of two candidates namely Pramod Kumar and Sunil Rao, who were declared successful. The Enquiry Officer does not make mention of this fact and the report of the State Government also does not mention that it had examined the original answer books of the candidates or other documents because the order of the State Government mentions that it is on the basis of the said report that it had formed an opinion to cancel the examination. It is only in the supplementary counter affidavit filed by the State that facts dealing with the answer books have been stated.

20. It is for this reason that the contention of Sri Ashok Khare, learned Senior Counsel for the petitioners that opportunity should have been given to the petitioners and the members of the Committee conducting the examination to explain the position needs to be noticed. Reliance has been placed on the decisions of the Supreme Court in Shridhar son of Ram Dular, v. Nagar Palika, Jaunpur & Ors., AIR 1990 SC 307; in Basudeo Tiwary v. Sido Kanhu University & Ors., AIR 1998 SC 3261 and in Inderpreet Singh Kahlon (supra) and it has contended that opportunity is required to be given to the persons who have been appointed and have worked for some time before examination on the basis of which they were appointed is cancelled. It has also been submitted that a distinction needs to be drawn in case when only a select list has been prepared but no appointment order is issued and where appointment orders have been issued on the basis of the selection and then the selection is cancelled.

21. The submission of learned Senior Counsel for the petitioners is correct and it is not possible to accept the contention of the learned Additional Advocate General

of the State that no opportunity was required to be given to the petitioners before terminating the services of the petitioners. The Supreme Court has repeatedly held that appointments cannot be cancelled without giving opportunity to the persons who have been appointed and in *Inderpreet Singh Kahlon* (supra) the Supreme Court has observed that a distinction exists between a proven case of mere cheating in a Board Examination and unproven imputed charge where appointment of a Government servant is involved. If the State had relied only on the report then, as noticed hereinabove, things would have been different, but as reliance has been made on the averments made in the supplementary counter-affidavit and the records, it is necessary that adequate opportunity be given to the petitioners who have worked for a considerable period after appointment and the members of the Committee who held the examination.

22. It is, therefore, not possible to sustain the decision taken by the State to cancel the examination or the consequential termination orders.

23. Thus, the decision taken by the State Government on 16th December, 2009 for cancellation of the examination on the basis of the inquiry report is set aside. Consequently the order dated 13th July, 2010 also deserves to be set aside and is, accordingly, set aside. All consequential benefits shall accrue to the petitioners. It shall, however, be open to the State Government to hold a fresh enquiry after giving adequate opportunity to the petitioners and the members of the Committee who conducted the examination.

24. The writ petitions succeed and are allowed to the extent indicated above.

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