(2009) 12 AHC CK 0298

Allahabad High Court

Case No: None

Iftekhar Hussain		APPELLANT
	Vs	
State of U.P. and Others		RESPONDENT

Date of Decision: Dec. 23, 2009

Acts Referred:

- Constitution of India, 1950 - Article 21
- Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 - Section 3

Citation: (2010) 3 AWC 2476 : (2010) 2 UPLBEC 960

Hon'ble Judges: Sudhir Agarwal, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Sudhir Agarwal, J.
Heard Sri V.S. Sinha, learned Counsel for the petitioners and learned standing counsel for the respondents.

2. In all these writ petitions common questions of law and facts are involved hence have been heard together and are being decided by this common judgment.

3. In all these writ petitions the termination orders have been passed on 15.12.2003. In Writ Petition No. 5336 of 2004 filed by Iftekhar Hussain, the order of termination has been passed stating that he was appointed as Class IV employee (Peon-cum-Chaukidar) by order dated 19.10.2002 though no such vacancy was available since only 10 sanction posts exist which were all occupied and therefore, the appointment of the petitioner was contrary to the rules hence his appointment is being cancelled. The orders of termination in Writ Petition No. 5432 of 2004 filed by Kishan Pal Singh, 5430 of 2004 filed by Kamal Kumar, 5334 of 2004 filed by Mustkeem Husain, 5332 of 2004 filed by Sanjai Kumar and

5330 of 2004 filed by Raju are all similarly worded. Another orders of termination though are of same date, i.e., of 15.12.2003 have been passed by which services of the petitioners have been terminated in purported exercise of power under Rule 3 of U.P. Temporary Government Servants (Termination of Service) Rules, 1975, hereinafter referred to "1975 Rules" by stating that it is no longer required. This impugned order are also worded similarly in all the writ petitions.

4. It is vehemently contended by Sri V.S. Sinha, counsel for the petitioners that the petitioners were appointed after observance of the procedure prescribed in the rules and therefore, could not have been terminated in such an illegal and arbitrary manner. He further contended that despite of the interim order passed by this Court in the earlier writ petitions filed by the petitioners challenging the show cause notice and despite of an interim order passed therein, the respondent-appointing authority passed the impugned order dated 15.12.2003 with back date so as to give an impression as if the impugned orders of termination have been passed before communication of the interim order passed by this Court in Writ Petition No. 55247 of 2003 filed by the petitioners-Iftekhar Hussain and 4 others and Writ Petition No. 55249 of 2003 filed by Sanjai Kumar. He lastly contended that though the petitioners submitted their reply against the show cause notice but the impugned order nowhere show to have discussed the same and therefore also it is liable to be set aside.

5. Learned standing counsel sought to support the impugned order relying on the defence taken in the counter-affidavit. The stand of the respondents as per the averments made in the counter-affidavit is that by Government order dated 8.11.1996 the District Homoeopathy Medical Officers were conferred the power of appointment of Class IV employees but after obtaining prior approval from the State Government. On 16.7.2002 the State Government issued a Government order directing the various authorities in the State to take step for filling the backlog vacancies of Class IV employees under the reserved category, namely Scheduled Caste, Scheduled Tribe and Other Backward Classes. Pursuant thereto, a circular was issued by the Director (Homoeopathy) on 14.8.2002. Taking pretext under the aforesaid Government order and the circular of the Director (Homoeopathy) the then respondent No. 3 Dr. C. L. Kureel wrongly worked out the backlog vacancies of Class IV employees and proceeded to make selection and appointment vide requisition/advertisement dated 13.9.2002. The said requisition was for district Moradabad and J. P. Nagar since he was holding charge of both the districts and issued appointment letter on 28.10.2002 to the petitioners. When the matter came to the notice of the Director (Homoeopathy), it was examined and he found that the above selection was contrary to law hence directed the District Homoeopathy Medical Officer, Moradabad by letter dated 14.11.2003 to take appropriate steps for cancellation of the above appointments being contrary to law. Show cause notices were issued to the petitioners and thereafter the impugned orders have been passed.

6. In the reply submitted by the petitioners to the show cause notices their defence is mainly that the vacancies were advertised, selection was made by duly constituted

Selection Committee and they having been selected therein were appointed. If there was any irregularity or illegality, there was no fault on the part of the petitioners. Therefore for fault, if any, on the part of the District Homoeopathy Medical Officer, Moradabad, the petitioners cannot be made to suffer. The appointments of all the petitioners were treated to be irregular and contrary to the rules and on this ground show-cause notices were issued to all the petitioners and thereafter the respondents passed two sets of termination orders in respect to all the petitioners that is simultaneously by first set of the termination orders of the same date, i.e., 15.12.2003 the services of the petitioners were terminated on the ground that their appointments were not made validly but simultaneously by another set of orders of termination of the same date the services of the petitioners was terminated simplicitor.

7. No doubt, apparently the respondents appointing authority in passing two types of the orders for the same persons terminating their services or cancelling their appointment cannot be said to have acted in a manner it was expected. Being a senior responsible officer he was expected to know at least the relevant provisions and the manner in which the appointment and termination of Class III and Class IV employees take place. However, this Court cannot lose sight of the fact that taking the advantage of large scale unemployment prevailing in the country, for scrupulous officers, it has become a useful mode to help them in their corrupt practice by resorting to appointments as and when they get an opportunity but not in accordance with law but for various other reasons. However, without looking to other aspect of the matter, in my view, if this Court finds that the appointments of the petitioners were made in accordance with law, this Court must come to their rescue by setting aside the orders of termination since a person who has got employment after facing a regular selection and competing in the huge sea of unemployed persons should not be lightly allowed to lose such selection and appointment since right to earn livelihood, once the appointment has been made in accordance with law, is a fundamental right under Article 21 of the Constitution of India but simultaneously where this Court is satisfied that the appointment itself was not in accordance with law but by making mockery of the procedure prescribed in law or other substantive provisions, minor technical inaccuracy or irregularity in the orders passed by the competent authority cancelling such appointment would not prevail over the Court to set aside such orders and to help those persons who are beneficiary of some illegality. This is, how, in my view, particularly in service matter, the Court should examine the matter and proceed, and that is how this Court shall consider the matter.

8. From the record it appears that there are ten sanctioned posts of Peon-cum-Chaukidar in the office of District Homoeopathy Medical Officer, Moradabad and seven posts of Sweeper-cum-Chaukidar. It appears that all the ten posts of Peon-cum-Chaukidar were lying vacant, as is evident from para 8 of the counter-affidavit in Writ Petition No. 5334 of 2004. Out of seven posts of Sweeper-cum-Chaukidar, 5 were occupied and two were vacant. The State Government''s order dated 16.7.2002 circulated by the Director''s letter dated 14.8.2002 makes it clear that in modification of the ban imposed by the

Government order dated 3.11.1997 regarding recruitment against Class IV posts, the Government relaxed ban to the extent of filling in "backlog reserved vacancies" only. It further directed that against the existing vacant posts, there shall be deduction of 2% and thereafter steps would be taken for filling backlog vacancies. From the record it does appear that the vacancies of Peon-cum-Chaukidar in their entirety were unfilled but there is nothing on record to show that the unfilled vacancies can be said to be the backlog vacancies in reserved category. Though the respondent No. 3 in the impugned order has said that no vacancy in the category of Peon-cum-Chaukidar could be treated to be a backlog vacancy but has not discussed the same in detail as to what he meant therefrom. What appears to this Court from a careful reading of the impugned order as well as the stand taken by the respondents in the counter-affidavit is that since no steps for filling in any vacancy of Peon-cum-Chaukidar was taken earlier, hence the vacancies, sought to be filled in by the respondent No. 3 treating the same to be backlog vacancies, was illegal.

9. Here it would be appropriate to understand as to when a vacancy can be considered to be a backlog vacancy. If in a cadre there are 10 sanctioned posts and all are lying vacant it would be open to the competent authority to take steps for filling in the vacancies but it cannot keep more than 50% vacancies reserved for different categories. However, where the process of selection against existing vacancies has already undergone and in such a selection despite of efforts made by competent authority the reserved vacancies remained unfilled due to non-availability of the competent person of the relevant category, such unfilled vacancies of reserved category in the relevant class can be treated to be a "backlog vacancy" and not otherwise. If no step for making recruitment against the existing vacancy from the various categories has ever been taken by the competent authority by dividing the same to relevant category like General, S.C., S.T. and O.B.C., proceeding to fill in the vacancy in reserved quota cannot be permitted in the garb treating vacancies as backlog since it would be in violation of the law laid down by the Constitution Bench of the Apex Court in the case of Indira Sawhney and Ors. v. Union of India and Ors. 1992 Supp (3) SCC 217, wherein it has been held categorically that in one selection more than 50% vacancies cannot ,be kept reserved except of the cases where the recruitment is in respect to backlog vacancies. What I have noticed above is supported by what has been provided in Section 3 of U.P. Public Services (Reservation of Scheduled Castes, Schedule Tribes and Other Backward Classes) Act, 1994 which reads as under:

3. (1) In Public services and posts, there shall be reserved at the stage of recruitment, the following percentage of vacancies to which recruitments are to be made in accordance with the roster referred to in Sub-section (5) in favour of persons belonging to Scheduled Castes, Schedule Tribes and Other Backward Classes of citizens:

(a) in the case of Scheduled Castes Twenty-one per cent;

(b) in the case of Schedule Tribes Two per cent;

(c) in the case of Other Backward Classes of citizens twenty-seven percent;

Provided that the reservation under Clause (c) shall not apply to the category of Other Backward Classes of citizens specified in Schedule II:

Provided further that reservation of vacancies for all categories of persons shall not exceed in any year of recruitment fifty per cent of the total vacancies of that year as also fifty per cent of the cadre strength of the service to which the recruitment is to be made;

(2) If, in respect of any year of recruitment any vacancy reserved for any category of persons under Sub-section (1) remains unfilled, such vacancies shall be carried forward and be filled through special recruitment in that very year or in succeeding year of years of recruitment as a separate class of vacancy and such class of vacancy shall not be considered together with the vacancies of the year of recruitment in which it is filled and also for the purpose of determining the ceiling of fifty per cent reservation of the total vacancies of that year notwithstanding anything to the contrary contained in Sub-section (1);

(3) Where a vacancy reserved for the Schedule Tribes remains unfilled even after three special recruitments made under Sub-section (2), such vacancy may be filled from amongst the persons belonging to the Scheduled Castes; and

(5) The State Government shall for applying the reservation under Sub-section (1), by a notified order, issue a roster comprising the total cadre strength of the public service or post indicating therein the reserve points and the roster so issued shall be implemented in the form of a running account from year to year until the reservation for various categories of persons mentioned in Sub-section (1) is achieved, and the operation of the roster and the running account shall, thereafter, come to an end, and when a vacancy arises thereafter in public service or post the same shall be filled from amongst the persons belonging to the category to which the post belongs in the roster.

10. Sub-section (2) of Section 3 makes it clear that only unfilled vacancies shall be carried over and be filled by special recruitment and thus comes the backlog vacancy. The counsel for the petitioner could not bring to the notice of this Court any authority taking a contrary view to what I have discussed above. Therefore, I have no hesitation in holding that the then respondent No. 3 proceeded wholly illegally taking the pretext of the Director''s circular dated 14.8.2002 by notifying 5 vacancies of Peon-cum-Chaukidar in district Moradabad reserved for Scheduled Caste and Other Backward Classes (2 and 3 respectively) as backlog vacancies though they could not have been said to be backlog vacancies since no process of selection against those vacancies earlier had taken place at any point of time and there is nothing to show that those were the unfilled vacancies despite of selection process having undergone once. If the said vacancies were not backlog vacancies, no recruitment could have been made by the respondent No. 3 or in case even he would have proceeded to make recruitment out of 5 vacancies notified by

him only two could have been reserved otherwise it would amount to making recruitment by reserving the vacancies more than 50% and could not have been sustained since the exception for keeping all the vacancies reserved was applicable only for backlog vacancies. In absence of anything to show that the said vacancies were rightly treated to be backlog, I have no hesitation, in view of the above discussion, to hold that the said vacancies cannot be said to be backlog vacancies. In the impugned order it has already been held that the appointment of the petitioners was not against backlog vacancy hence the selection in question" against Peon-cum-Chaukidar has rightly been cancelled.

11. Now coming to the recruitment against Sweeper-cum-Chaukidar vacancies, the respondents have shown that the sanctioned strength was 7 out of which 5 were filled in from candidates belong to scheduled caste. In the circumstances the remaining two vacancies by no stretch of imagination could be reserved for Scheduled Caste category candidates. Even otherwise in respect to these two vacancies also this Court is of the view that the same could not be treated to be backlog vacancies for the same reason as I have discussed above qua the post of Peon-cum-Chaukidar, inasmuch as, there is nothing on record to show that against these two posts also selection was ever made in past and these vacancies remained unfilled due to nonavailability of the suitable candidates or for any other some valid reason. Since this very reason is suffice to hold that the selection and appointment of the petitioners was not made validly and in accordance with law and in fact was in violation of Article 16 (1) of the Constitution of India having been made by the respondent No. 3 in a camouflage manner, I do not find it a fit case where this Court under Article 226 of the Constitution of India must interfere. Even if the order impugned in the writ petition is not within the four corners of the statute to make it valid, it is well-settled that this Court may not necessarily exercise its extraordinary equitable jurisdiction under Article 226 of the Constitution where the claim of the petitioners is based on illegal action/order. Even otherwise, it is not always necessary to interfere with an order, even if it is illegal, if it would result in revival of another order, which is also illegal.

12. In the result I find no merit in the writ petitions. Dismissed. Interim orders, if any, are vacated.