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

Writ Petition No. 46812 of 2003 and 8 Ors

Court: Allahabad High Court

Date of Decision: May 6, 2005

Acts Referred:
Constitution of India, 1950 â€" Article 16

Citation: (2005) 5 AWC 4956

Hon'ble Judges: Tarun Agarwala, J

Bench: Single Bench

Advocate: Ashok Khare, V.S. Gupta, Santosh Kumar Srivastava, R.K. Tripathi, Rahul Asthana, N.K. Singh, V.D. Chauhan and Alka Srivastava, for the Appellant; Sudhir Agarwal, Addl. Advocate Gen. V.K. Rai and J.K. Khanna, S.C., for the Respondent

Final Decision: Dismissed

Judgement

Tarun Agarwala, J.
U.P. Police Headquarters, Allahabad, issued an advertisement dated 2.6.2003 inviting applications to fill up 165 posts

of Constable (Ministerial) in the Police Department from the backlog of the vacancies reserved for the Schedule Caste and Schedule Tribe

candidates. Out of these 165 posts, 125 posts were required to be filled up from the candidates belonging to the Schedule Caste and 41 posts

were to be filled up from the candidates belonging to the Schedule Tribe. Based on the aforesaid advertisement, the Petitioners applied and sat in

the written examination as well as in the typing test, in which they qualified. Therefore, the Petitioners were called for an oral interview and

eventually on 13.8.2003, a select list was issued which included the names of the Petitioners. Thereafter, the Petitioners were directed to appear in

the medical examination in which the Petitioners were found to be medically fit. The entire process was completed and only a ministerial task of

issuing an appointment letter had remained to be executed. But before the appointment letters could be issued, the Government changed and a new

Government took over. The new Government issued an order dated 29.8.2003 imposing a ban on all the appointments in every department in the

State of U.P. as a result of which, all the appointments were stopped and no appointment letters could be issued in favor of the Petitioners.

Consequently, the present writ petition was filed praying for the quashing of the Government Order dated 29.8.2003, by which the ban was

imposed and further prayed for a writ of mandamus commanding the Respondents to issue the appointment letters in their favor on the post of

constable (M).

2. A large number of similar writ petitions have been filed praying for the same relief, which have been clubbed together and are being decided by

a common judgment. For facility, Writ Petition No. 46812 of 2003 has been made the leading case.

3. A counter-affidavit has been filed by the State Government which has been sworn by the Secretary (Appointment and Personal), stating therein

that the order dated 29.8.2003, had been cancelled by the State Government vide its order dated 15.1.2004 and, therefore, there was no

restriction in the recruitment process in the various departments of the State Government and that the selections/recruitments could now be held

and that the appointments on various points could be made by the concerned departments as per the Rules. The State Government filed another

counter-affidavit dated 19.5.2004 stating therein that the Home Department had issued an order dated 24.5.2003 sanctioning the creation of 165

supernumerary posts of constable (M) which was effective till the end of February 2004, i.e., till 29.2.2004 or till the availability of the posts due to

retirement or otherwise or till the cancellation of such post, whichever was earlier. Based on this order dated 24.5.2003, the advertisement dated

2.6.2003 was issued. The counter-affidavit further stated that the State Government vide order dated 6.5.2004, had now taken a decision to

cancel the 165 supernumerary post on the ground of financial constraints and also on the ground that there was no requirement of work. It was

also stated in the counter-affidavit that there existed only 134 sanctioned posts of constable (M) in the State of U.P. and on these 134 posts, 606

persons have already been appointed on compassionate ground under the Dying-in-Harness Rules and therefore, 472 candidates had been

appointed in excess of the sanctioned strength and therefore, on this ground the State Government had also decided to cancel the 165

supernumerary posts.

4. Upon the filing of the counter-affidavit by the State Government bringing on record the order dated 6.5.2004 by which 165 supernumerary post

was cancelled, the Petitioners filed an amendment application praying for the quashing of the order of the State Government dated 6.5.2004. This

amendment application was allowed and the Petitioners were directed to amend the writ petition.

5. During the course of the hearing of the petition, a supplementary rejoinder-affidavit dated 21.2.2005 was filed stating therein that the

Respondents further appointed 144 persons as Constable (M) in December 2004, under the Dying-in-Harness Rules. The Respondents filed a

Supplementary Counter-affidavit admitting the aforesaid position and submitted that these appointments were made under a legal compulsion by

creating supernumerary posts under Rule 8 (3) of the U.P. Recruitment of Dependants of Government Servants Dying-in-Harness Rules, 1974. By

the same affidavit, the Respondents submitted that the then Deputy Inspector General of Police in his letter dated 12.5.2003, indicated the

existence of 165 posts of constable (M) which was required to be filled up from the backlog quota from the Schedule Caste/Schedule Tribe

candidates. According to the Respondents, this information submitted by the then Deputy Inspector General of Police was incorrect inasmuch, as

he took into consideration the vacancies that would come into existence upon the promotion that would be made in future from this cadre in the

next higher cadre. Therefore, future vacancies had been taken into consideration. The affidavit further stated that out of 134 sanctioned posts, 29

posts was required to be filled up by the Schedule Caste candidates and 2 posts by the Schedule Tribe candidates and 36 posts by the candidates

from Other Backward Classes out of which 57 Schedule Caste candidates were already working on the post of constable (M) and 267

candidates were working at the present moment from Other Backward Classes. Therefore, there are no vacancies existing and the question of

filling up the 165 supernumerary posts does not arise.

6. Heard Sri Ashok Khare, the learned senior counsel assisted by Sri V.S. Gupta and Sri Santosh Kumar Srivastava, Sri R.K. Tripathi and Sri

Rahul Asthana, advocates for the Petitioners and Sri Sudhir Agarwal, the learned Additional Advocate General assisted by Sri V. K. Rai and G.

K. Khanna, standing counsel for the Respondents.

7. The learned Counsel for the Petitioners submitted that the entire selection process had been completed and only the ministerial task of the

issuance of the appointment letters had remained to be executed. The action of the Respondents in not issuing the appointment letters after the

lifting of the ban was wholly arbitrary and illegal. The subsequent decision of the State Government cancelling 165 supernumerary posts was not

only arbitrary, but also discriminatory, inasmuch as, by the same advertisement, other posts in other cadres had been filled up after the lifting of the

ban and other supernumerary posts in other departments were also filled up, but for reasons best known to the Respondents, these 165 posts of

constable (M) were not filled up and the same had illegally been cancelled to deprive the Petitioners from being appointed on the post of Constable

(Ministerial).

8. The learned Counsel further submitted that the supernumerary posts had been created in pursuance of the policy decision of the State

Government to fill the backlog vacancies reserved for the Schedule Caste and Schedule Tribe candidates. The computation of the backlog of the

unfilled vacancies had been given in the letter of the Deputy Inspector General of Police dated 12.5.2003, on the basis of which, the State

Government sanctioned the creation of 165 supernumerary posts. The learned Counsel submitted that the vacancies shown in the said letter was

correct and rightly took into consideration the posts which were required to be filled up by way of promotion. The decision for filling up the unfilled

backlog vacancies was not only with regard to the vacancies in the post of Constable (M) but was also with regard to the higher post, namely, in

the cadre of Sub-Inspector (M) and Inspector (M). The shortfall in these categories was also required to be filled up and such shortfall could only

be removed by inducting persons belonging to the reserved categories in the cadre of constable (M) and thereafter promoting them to a higher

post. Therefore, 165 supernumerary posts had been created for meeting the backlog of the reserved vacancies existing in various cadres from a

total of 2,963 posts.

9. The learned Counsel further submitted that supernumerary posts are substantive in nature and cannot be made for a limited period. The

supernumerary post would exist till such time a vacancy became available in the regular cadre itself. The learned Counsel for the Petitioners drew

the analogy of the appointments made on compassionate grounds under the Dying-in-Harness Rules as a substantive appointment and in support of

his submission, placed reliance on a judgment of this Court in Ravi Karan Singh Vs. State of U.P. and others,

10. The learned Counsel further submitted that the plea of financial constraint was a sham plea inasmuch as the State Government further

appointed 144 persons on supernumerary posts under the Dying-in-Harness Rules. If there was any financial constraints, no further appointments

could have been made even under the Dying-in-Harness Rules.

11. The learned Counsel further submitted that the entire recruitment in the Police department is governed by the Police Act. Since the field relating

to the appointments are covered by the aforesaid Act, the Dying-in-Harness Rules framed under the proviso to Article 309 of the Constitution

was, therefore, not applicable. In support of his submission the learned Counsel relied upon the following decisions namely:

Chandra Prakash Tiwari and Others Vs. Shakuntala Shukla and Others,

Subhash Chandra Sharma Vs. State of U.P. and others,

Chandra Prakash Shahi v. State of U.P. 2000 (3) AWC 1848 (SC): 2001 (2) UPLBEC 1661.

Vijay Singh and Ors. v. State of U.P. and Ors. 2004 (4) ESC 2209.

12. Sri Sudhir Agarwal, Additional Advocate General submitted that there does not exist any vacancies in the reserved category and the creation

of 165 supernumerary posts was sanctioned on account of an error made by the then Deputy Inspector General of Police in his letter dated

12.5.2003, wherein he not only included vacancies of other posts, but also took into consideration the future vacancies. The learned Additional

Advocate General submitted that there exist only 13 vacancies in the cadre of Constable (M) and therefore, the creation of 165 supernumerary

posts to fill the backlog vacancies in the reserved category was ex facie incorrect inasmuch as the creation of supernumerary posts could not

exceed the sanctioned posts.

13. The learned Counsel further submitted that against 134 posts, 29 posts were sanctioned for Schedule Caste candidates and 36 posts for

O.B.C. candidates against which 57 Schedule Caste candidates plus 267 O.B.C. candidates are already working. Therefore, at the moment there

exists no vacancy. The learned Counsel submitted that the entire exercise of filling 165 posts was illegal and futile inasmuch as there did not exist

any vacancy.

14. The learned Counsel for the Respondents further submitted that no relief has been sought for the creation of the post and, therefore, no

mandamus could be issued. In support of his submission, the learned Counsel placed reliance on a decision of the Supreme Court in Baitarani

Gramiya Bank Vs. Pallab Kumar and Others,

15. The learned Additional Advocate General further submitted that the mere fact that the Petitioners were placed in the merit list did not give them

an indefeasible right to get an appointment. In support of his submission the learned Counsel placed reliance on a decision of the Supreme Court in

Shankarsan Dash Vs. Union of India, The learned Counsel further submitted that the field relating to the appointment of the dependents of the

deceased employee on compassionate grounds was not occupied by the Police Act and therefore, the Dying-in-Harness Rules, 1974 was

applicable in the police force.

16. The controversy which is involved in the present case now revolves on the actual existence of the vacancy in the post of Constable (M).

Initially the Deputy Inspector General of Police by his letter dated 12.5.2003, intimated the State Government that 165 vacancies on the posts of

Constable (M) are existing which was required to be filled up from the backlog quota of the Schedule Caste and Schedule Tribe candidates.

Based on this information, the State Government sanctioned the creation of 165 supernumerary posts of Constable (M) which was effective till

29.2.2005. Subsequently, the State Government issued an order dated 6.5.2004, cancelling the said posts on certain grounds. The State

Government in their Supplementary Counter-Affidavits have now stated that the recommendation for the creation of the 165 posts by the then

Deputy Inspector General of Police was incorrect and it was not based on the actual number of vacancies existing but was based on the

occurrence of future vacancies.

17. The question to be considered is whether there exist any vacancy or not on the post of Constable (M). From a perusal of the chart annexed by

the Respondents as Annexure-SCA-4 to the supplementary counter-affidavit dated 28.2.2005, it is clear that there are 134 sanctioned posts for

Constable (M) in the State of U.P. From this chart, it is also clear that 165 vacancies have been shown against the vacancies existing on 2,963

posts in different cadres. It is also clear that out of the 134 posts of Constable (M) 517 persons are already working as Constable (M) in some

capacity or other. These 165 posts are not only from the post of Constable (M) but also from various other posts which includes promotional

posts. This chart indicates that certain vacancies had been taken out on the presumption that certain promotional posts would be filled up from

Constable (M) and, therefore, vacancy would be created on the post of Constable (M).

18. In my view, 165 posts have wrongly been created. Future vacancies cannot be taken into consideration for filling up the vacancies. In any

case, in the present case, future vacancies of a promotional post have been taken into consideration. Consequently, in my view the

recommendation sent by the Deputy Inspector General of Police by his letter dated 12.5.2003 was incorrect. From a perusal of the chart, it is

clear that there are 134 sanctioned posts of Constable (M) and that 517 persons are actually working (as per the Chart). Consequently, there is no

question of any vacancy occurring on the post of Constable (M). The learned Additional Advocate General rightly submitted that the entire

exercise of filling up 165 posts of Constable (M) was an exercise in futility. Since no vacancy existed, the creation of 165 posts was wholly illegal.

Consequently, it is immaterial now for this Court to consider the reasons and the justifications of the State Government in refusing to fill up the 165

posts as per their order dated 6.5.2004.

19. In any case, even if the Petitioners were the successful candidates, they did not acquire any indefeasible right to be appointed. In Shankarsan

Dash Vs. Union of India, the Constitutional Bench of the Supreme Court held:

It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful

candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an

invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant

recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the

licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the

vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test,

and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note

in the decisions in State of Haryana v. Subhash Chandra Marwaha,Neelima Shangla v. State of Haryana, or Jatendra Kumar v. State of Punjab.

20. In All India SC and ST Employees Assn. and Another etc. Vs. A. Arthur Jeen and Others etc., the Supreme Court held that the State was

under no obligation to fill up all or any of the vacancies and further held:

Merely because the names of the candidates were included in the panel indicating their provisional selection, they did not acquire any indefeasible

right for appointment even against the existing vacancies and the State is under no legal duty to fill up all or any of the vacancies.

21. Similar view was reiterated by the Supreme Court in S. Renuka and Others Vs. State of Andhra Pradesh and Another, Sabita Prasad and

Ors. v. State of Bihar and Ors. 1993 (1) SLR 44 SC and State of A. P. and Ors. v. D. Dastagiri and Ors. 2003 (3) ESC 291 (SC).

22. In Baitarani Gramiya Bank Vs. Pallab Kumar and Others, the Supreme Court held the writ Petitioners had not required any indefeasible right

to be appointed when the bank had taken a decision of not filling the vacancies and further the Bank was under no obligation or legal duty to fill up

any of the vacancies.

23. In view of the aforesaid, the Petitioners have no right or claim on the post. Further, it is not necessary for this Court to dwell upon the other

arguments raised by the learned Counsel for the Petitioner.

24. However, a glaring fact had come up before the Court and the Additional Advocate General was called upon to answer and justify the action

of the State.

25. Admittedly, there are only 134 sanctioned post of Constable (M) in the State of U.P. In the short counter-affidavit dated 19.5.2004, the

Respondents have stated that 606 persons had been appointed as Constable (M) under the Dying-in-Harness Rules against 134 sanctioned posts

and that 472 persons in excess of the sanctioned posts had been appointed. In the supplementary counter-affidavit dated 28.2.2005, the

Respondents have admitted in para 5 of the affidavit that 144 persons were again appointed in December 2004, on the post of Constable (M)

under the Dying-in-Harness Rules. According to the Additional Advocate General, these appointments were made under a legal compulsion and

that such appointments would continue to be made as per the statutory provisions under Rule 8 (3) of the Dying-in-Harness Rules, 1974 which

had been incorporated in the year 1991.

26. As a result of the aforesaid, out of 134 sanctioned posts, 606 persons plus another 144, i.e., 750 persons are at the moment, working on the

post of Constable (M) and if the present state of affairs continue, persons under the Dying-in-Harness Rules would be appointed as and when a

Government servant dies-in-harness.

27. The question which crept in the mind of the Court was why so many appointments had been made. The Additional Advocate General

submitted that in the Civil Police, the mortality rate is high and therefore, as per Rule 8 (3) of the Dying-in-Harness Rules, a supernumerary post is

created whenever an appointment is made under the Dying-in-Harness Rules. As a result of the aforesaid, the situation today is, that the number of

supernumerary post created under the Dying-in-Harness Rules is almost three times the existing sanctionsed strength.

28. For facility Rule 8 (3) of the U.P. Recruitment of Dependents of Government Servants Dying-in-Harness Rules, 1974 as it stood prior to the

amendment in 1991 is quoted hereunder:

Rule 8 (3).-An appointment under these rules shall be made against an existing vacancy only.

29. By amendment dated 12.8.1991, the existing Rule 8 (3) was deleted and substituted as under:

An appointment under these rules shall be made in the existing vacancy.

Provided that if no vacancy exists, the appointment shall be made forthwith against a supernumerary post which shall be deemed to have been

created for this purpose and which shall continue till a vacancy becomes available.

30. From the aforesaid, it is clear that even if there was no vacancy, a supernumerary post would be created automatically and a person would be

appointed immediately and such supernumerary posts would continue till the incumbent was absorbed in a regular vacancy.

31. This provision has now led to a startling result. At the moment, out of 134 sanctioned posts, all the 750 persons who are working are those

persons who had been appointed under the Dying-in-Harness Rules. Today, no Constable (M) has been appointed by direct recruitment.

Considering, the mortality rate, it is doubtful that these supernumerary post would ever come to an end. It is unlikely, that in the near future, the

sanctioned posts of Constable (M) would ever be advertised and vacant posts would be filled up from the general public.

32. This leads us to the object underlying the enactment of the U.P. Recruitment of Dependents of Government Servants Dying-in-Harness Rules,

1974. These rules were enacted to enable the family of the deceased to tide over the sudden crisis resulting due to the death of the breadwinner. A

humanitarian consideration was imbibed in these rules to make a provision for an appointment by relaxing the procedure for recruitment in order to

provide a source of livelihood to the family of the deceased employee. The provisions so made was a departure from the general procedure for

recruitment of a person in a Government service. Such provisions made in the rules was in the nature of an exception to the general provision and

such an exception could not subsume the main provision which otherwise would nullify the main provision by taking away the right conferred by the

main provision itself.

33. Thus, a provision relating to compassionate employment has to be scrutinised carefully and examined to ensure that it does not interfere with

the right of other persons who are eligible for an appointment against a post which would have been available to them but for the provisions

enabling employment being made on compassionate grounds of a dependant of a deceased employee.

34. As a result of the amended Rule 8 (3) of the Rules of 1974, the posts which were required to be filled up by direct recruitment have now been

made available only to the dependants of the employees who died-in-harness and the right of other persons who are eligible to seek appointment

on those posts by direct recruitment has now been almost excluded by necessary implication.

35. In my view, such a situation which has crept today in the appointment of Constable (M) is on account of a class created by the dependants of

the deceased employee which, in my opinion, has become a separate class by itself. Equality of opportunity means equality as between the

members of the same class of employees and not between that of a separate independent class. Article 16 of the Constitution guarantees equal

opportunity to all citizens to apply for employment under the State. Every citizen has a fundamental right to make an application for a post provided

the post exists and is advertised. But if the posts are filled up only from the dependants of the deceased, such action would be totally arbitrary and

violative of Article 16. In my view, the guarantee provided under Article 16 is being violated by the Government by filling up the posts of

Constable (M) under the Dying-in-Harness Rules.

36. In view of the aforesaid, the proviso to Rule 8 (3) of the Dying-in-Harness Rules, 1974 as inserted in 1991 is violative of the right to equality in

the matter of employment inasmuch as other persons who are eligible for appointment and who could be more meritorious than the dependants of

the deceased employees are being deprived of their constitutional right for being considered for such an appointment.

37. In view of the aforesaid, I declare the proviso to Rule 8 (3) of the U.P. Recruitment of Dependents of Government Servants Dying-in-Harness

Rules, 1974 as ultra vires Article 16 of the Constitution of India and quash the same.

38. Consequently, I am not inclined to interfere in the writ petition. The writ petition fails and is dismissed. There shall be no order as to cost.