

**(2009) 11 AHC CK 0297****Allahabad High Court****Case No:** None

Veer Pal Singh

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

**Date of Decision:** Nov. 27, 2009**Acts Referred:**

- Constitution of India, 1950 - Article 14, 16

**Citation:** (2010) 2 AWC 1841 : (2010) 124 FLR 801**Hon'ble Judges:** Sanjay Misra, J**Bench:** Single Bench**Final Decision:** Dismissed

### **Judgement**

Sanjay Misra, J.

Heard Sri Vikas Budhwar, learned Counsel for the petitioner, learned standing counsel for the respondent No. 1 and Sri Amit Sthalekar, learned Counsel for the respondent Nos. 2 and 3.

2. The controversy involved in this writ petition does not involve any factual dispute and the respondents do not intend to file any counter-affidavit since the facts are not in dispute and the petitioner may substantiate any facts averred in the writ petition on the basis of the record.

3. The petitioner claims to be appointed on temporary basis as a Gardner (Class IV post) on 14.1.2003 by the District Judge, Jyotiba Phule Nagar under Rule 4 (3) of the Uttar Pradesh Subordinate Civil Courts Inferior Establishment Rules, 1955 (hereinafter referred to as the "1955 Rules") and confirmed on the post by the order dated 27.5.2009. He is aggrieved by the order dated 18.11.2009, passed by the District Judge whereby he has been "ceased to work with immediate effect", an order passed in view of the direction issued by the High Court on 5.11.2009 and on the basis of a report dated 13.11.2009 submitted by a committee appointed by the District Judge. He has assailed the order dated 18.11.2009 in this writ petition.

4. Sri Budhwar has argued that the petitioner was appointed under Rule 4(3) of the 1955 Rules on temporary basis on a Class IV post and his services were confirmed by an order dated 27.5.2009 hence he acquired the status of a permanent employee. His services could not be terminated in the manner as has been done particular when his work and conduct has always been good and satisfactory and he has never been subjected to any disciplinary proceedings whatsoever. He has submitted that the impugned order is violative of the principles of natural justice since he was not given any show cause notice nor any opportunity of hearing. He also submits that once his services were confirmed by the competent authority then the authority had no power to review his decision particularly when there is no such power conferred under the recruiting Rules. He has further argued that under Rule 4 (3) of the 1955 Rules the District Judge on his discretion can recruit chaukidars, malies, Waterman and Sweepers and when the District Judge on his discretion appointed the petitioner as mali (Gardner) there was no illegality in it.

5. In support of his submissions he has relied on the decisions of the Supreme Court in the case of [Shridhar Vs. Nagar Palika, Jaunpur and Others,](#) and Shrawan Kumar Jha and Ors. v. State of Bihar 1992 (6) SLR 718 , as also on a decision of a learned single Judge of this Court in the case of [Anil Kumar Agarwal Vs. State of U.P. and Others,](#)

6. Sri Amit Sthalekar has opposed this writ petition on behalf of the respondents No. 2 and 3. He has argued that the discretion exercised by the District Judge under Rule 4 (3) of the 1955 Rules was illegally exercised because a discretion of an authority cannot be exercised in an arbitrary manner. According to him even when the authority is exercising discretion in matters of recruitment he has to ensure compliance of the scheme under Articles 14 and 16 of the Constitution of India and non-adherence to the procedure in matters of employment would render such action illegal. He further submits that the direction dated 5.11.2009 was issued by the High Court not only for the petitioner but to all the subordinate courts in the State where several such illegal appointments have been made in the past and have come to the notice of the High Court. He states that in view of the fact that the appointment was made without following any procedure known to law the petitioner has been rightly directed to "cease to work with immediate effect" and hence no opportunity of hearing or show cause notice was required to be given to the petitioner. He refers to the impugned order to point out that the records relating to the petitioner's appointment were examined by a committee appointed by the District Judge and the committee report dated 13.11.2009 found that the petitioner's appointment was made by direct recruitment and no procedure was followed for selection.

7. In support of his submissions Sri Sthalekar has cited the Supreme Court decisions in the cases of [Ashok Kumar Sonkar Vs. Union of India \(UOI\) and Others,](#) and [Aligarh Muslim University and Others Vs. Mansoor Ali Khan,](#)

8. Having considered the submission of learned Counsel for the parties, perused the record as also the decisions cited by them the issues raised in this writ petition are not disputed questions of fact. The petitioner does not aver that his appointment by direct recruitment was made by following any procedure. He states that the District Judge on his discretion appointed the petitioner under his discretionary power as conferred under Rule 4(3) of the 1955 Rules.

Rule 4(1), (2) and (3) of the 1955 Rules are reproduced hereunder:

4. Method of recruitment.--Recruitment to the following posts in the establishment shall be made--

(1) Daftaries and bundle lifters.--By promotion strictly on merits from amongst process-servers, orderlies, office peons, and farrashes who have put in at least five years service as such ;

Provided that no persons shall be promoted to these posts unless he is able to read and write Hindi in Devanagri script with correctness and fluency and can discharge the duties of the office satisfactorily and in the case of the post of daftari unless he also knows book binding.

(2) Process servers, orderly peons, office peons and farrashes. -- (a) by appointment of candidates on the waiting list prepared under Rule 12 or,

(b) by transfer from one post to another according to suitability.

(3) Chaukidars, malis, waterman and sweepers.--By direct recruitment on the discretion of District Judge.

9. Rule 4(3) is relevant for the purposes of this writ petition. A discretion has been given to the District Judge in the mode of recruitment of chaukidars, malis, Waterman and Sweepers. It is a statutory discretion which he has to exercise while making recruitment. Undisputedly the District Judge has picked up the petitioner for appointment on his discretion. The Rule provides for recruitment on his discretion.

10. This Court is of the opinion that when an authority is conferred a discretion by a statute it is not to be exercised in an arbitrary manner. It has to be justiciable. In matters of employment to State services manner and method of recruitment are governed by the recruitment rules and in the absence of any such prescribed manner and method of recruitment the Constitutional Scheme of Articles 14 and 16 of the Constitution of India are attracted. The mode of recruitment in Rule 4 (3) of the 1955 Rules is on the discretion of the District Judge, therefore, there is no procedure prescribed therein. But when exercise of discretion has to be justiciable it has to be exercised reasonably and the authority has to direct himself properly in law. Discretion exercised cannot be absolute. It is not unfettered.

11. In matters of employment the Constitutional Scheme of Articles 14 and 16 cannot be ignored only for the reason that the authority exercising a discretion

conferred to it under a Statute did not consider its application, which otherwise it was bound to consider in law. It would therefore, be incorrect to say that when the recruiting rules did not prescribe a procedure but conferred only discretion, then no such procedure as required to be followed in matters of employment could be imported or read into the rules. Equal opportunity in employment cannot be given a go-bye in purported exercise of discretion.

12. While exercising discretion conferred by the recruiting rule the authority has to be guided by relevant considerations. The discretion cannot be exercised unreasonably. Secrecy in filling up a post in the judiciary thereby depriving others who may claim entitlement and suitability would be an unreasonable action thereby shutting out all and sundry who otherwise would be vying for an opportunity to gain employment. Therefore, when in the present case, the District Judge has exercised his discretion unlawfully, and not in accordance with law his decision to appoint the petitioner was non-est and a nullity in law.

13. Having held that the initial recruitment done by the District Judge was in illegal exercise of his discretion conferred by Rule 4(3) of the 1995 Rules and the consequential appointment of the petitioner was non-est and a nullity in law it has to be held that the subsequent confirmation of the services of the petitioner would not cure the illegality. It would be incorrect to say that the wrong done earlier has subsequently been corrected. An illegal act done cannot be legalised subsequently. The illegality cannot be cured, if it was illegal it goes. This is not a case where there was an irregularity in recruitment which can be regularised. Therefore, by virtue of such an appointment the petitioner cannot claim any legal right to continue.

14. The argument that the District Judge had confirmed the services of the petitioner by his order dated 27.5.2009 and hence he could not review his order does not appeal to this Court. Where the recruitment was in illegal exercises of discretion and the decision to appoint the petitioner and his appointment was non-est and a nullity in law then the impugned order cannot be brought within the ambit of an order of review.

15. In the aforementioned background the submission relating to violation of the principles of natural justice have to be considered. Admittedly the petitioner was not given any show cause notice or any opportunity of hearing.

16. The principles of natural justice are not a straitjacket formulat. Whether they are attracted in a given set of facts is to be established failing which such principles of fair play cannot be unnaturally expanded to strike down even those actions of an authority where they could not and cannot be applied.

17. In the case of *Ashok Kumar Sonkar* (supra) the Supreme Court has clearly defined the distinction between an "illegal appointment" and an "irregular appointment". When an appointment is illegal the principles of natural justice become inapplicable for the reason that it would be a futile exercise to give an

opportunity to be heard and even then the result would be the same. Paragraphs 27, 28 and 34 are reproduced hereunder:

27. It is also, however, well-settled that it cannot put any straitjacket formula. It may not be applied in a given case unless a prejudice is shown. It is not necessary where it would be a futile exercise.

28. A Court of law does not insist on compliance with useless formality. It will not issue any such direction where the result would remain the same, in view of the fact situation prevailing or in terms of the legal consequences. Furthermore in this case, the selection of the appellant was illegal. He was not qualified on the cut-off date. Being ineligible to be considered for appointment, it would have been a futile exercise to give him an opportunity of being heard.

34. it is not a case where appointment was irregular. If an appointment is irregular, the same can be regularised. The Court may not take serious note of an irregularity within the meaning of the provisions of the Act. But if an appointment is illegal, it is non-est in the eye of law, which renders the appointment to be a nullity.

18. In the present case, it is undisputed that no procedure known to law was ever followed. The statutory discretion was illegally exercised by the District Judge. That renders the recruitment and appointment non-est and a nullity in law. No rights were conveyed to the petitioner in accordance with law. Therefore, when the factual aspect is not disputed then the legal implications arising there from cannot be disputed. As such the principles of natural justice would have no application in the facts and circumstances of this case for the specific reasons that; (1) The discretion exercised by the District Judge under Rule 4(3) of the 1955 Rules was not in accordance with law ; (2) The appointment of the petitioner was made without following any procedure known to law ; (3) The appointment was non-est and a nullity in law hence no prejudice can be caused or shown to have occasioned to the petitioner; (4) When the final conclusion/result would be the same then granting opportunity would be a futile exercise.

19. Now coming to the direction issued by the High Court on 5.11.2009 (Annexure-4 to the writ petition). The direction is clear. It has directed that such appointees as referred to therein shall "cease to work".

20. Such appointees in the subordinate court in the State of U.P. were working illegally. Their illegal appointments did not give them the status of an employee much less a permanent employee. The alleged appointment letters were issued in illegal exercise of the statutory discretion conferred on the District Judge by Rule 4(3) of the 1955 Rules apart from being in total violation of the constitutional scheme in matters of employment.

21. The petitioner's appointment, being one such case, was non-est and a nullity in law and hence there was no requirement that a procedure should be followed as is

followed in cases of termination or dismissal. The direction "cease to work" is not akin to an order of termination or dismissal.

22. An employee validly and legally appointed is clothed with a status and hence can be removed, terminated or dismissed. By virtue of his status he performs his duties and is paid. Work may or may not be taken from him but any affect on his status or financial entitlements can give him a cause. But when a person is not clothed with the status of an employee due to an illegal act of appointment and such illegality cannot be legalised subsequently, then he is neither required to be proceeded against for removal, termination nor for dismissal. He has to be "ceased to work".

23. The impugned order dated 18.11.2009, passed by the District Judge is a consequential order which has been passed after a committee constituted by the District Judge examined the records and gave its report dated 13.11.2009. It was accepted by the District Judge who found that the appointment of the petitioner was made without following any procedure known to law.

24. Learned Counsel for the petitioner has relied on two decisions of the Supreme Court in the cases of Shridhar Vs. Nagar Palika, Jaunpur and Others, and Shrawan Kumar Jha and Ors. v. State of Bihar 1992 (6) SLR 718, as also on a decision of a learned single Judge of this Court in the case of Anil Kumar Agarwal Vs. State of U.P. and Others,

25. In the case of Shrawan Kumar Jha (supra) the issue was of the Government cancelling the appointment of teachers made by the District Inspector of Schools. The cancellation was done without affording any opportunity of hearing to the teachers. The Supreme Court directed the authority to give an opportunity to the teachers and then record a finding whether the teachers were validly appointed.

26. The present case is not similar to the case of Shrawan Kumar Jha (supra). In that case there was a dispute raised by the teacher that he was validly appointed hence an opportunity was necessarily to be given to him. In the present case there is nothing on record of the writ petition to show that the petitioner was validly appointed. There is no averment nor any material is on record to show that the petitioner alleges that he was validly appointed. When there is no dispute facts then the legal implications on the undisputed facts shall follow. No benefit can be derived by the petitioner from the decision.

27. In the case of Anil Kumar Agarwal (supra) he was appointed as a clerk in an educational institution and his appointment by direct recruitment was approved by the District Inspector of Schools. The approval was subsequently recalled. The learned single Judge found that there was a dispute between the parties as to whether the post of clerk was to be filled by direct recruitment or by promotion. Since the petitioner had been appointed and his appointment by direct recruitment had been approved then any order to be passed to his detriment required to be proceeded by following the principles of natural justice because there was factual

dispute involved and hence hearing the versions of the waring parties was a must.

28. The facts of the present case are not such. There is no dispute at all that the petitioner's appointment was de hors the constitutional scheme in matters of employment and that the District Judge has exercised his statutory discretion not in accordance with law. There is no pleading to the contrary in the writ petition. When the facts are not disputed the legal implications arising therefrom cannot also be disputed.

29. In the case of Shridhar (supra) the Supreme Court held that when the order of appointment conferred a vested right to hold the post of Tax Inspector that right could not be taken away without affording an opportunity of hearing. In this case an advertisement was issued inviting applications for appointment on the post of Tax Inspector. One Hari Mohan claimed that the post is to be filled by promotion and he being seniormost should be promoted and no outsider should be considered. His claim was ignored and an outsider namely Shridhar, the appellant was appointed. Subsequently on the motion of Hari Mohan the Commissioner cancelled the appointment of Shridhar on the ground that the post was to be filled by promotion. The Supreme Court held that when Shridhar had a vested right by virtue of his selection and appointment he ought to have been given an opportunity particularly when it held that appointment to the post of Tax Inspector was rightly made by the Municipal Board by direct recruitment.

30. The facts of the present case are totally different. Here no vested right accrued to the petitioner. His appointment was illegal de hors the constitutional scheme in matters of employment and illegal exercise of statutory discretion by the District Judge. It was an illegal appointment which could not be cured by any subsequent action or order. It could not be made legal even by the order of confirmation passed on 27.5.2009.

31. For the reasons given above the legal submissions advanced by learned Counsel for the petitioner are answered as follows:

(A) The principles of natural justice were not attracted to the facts and circumstances of this case being excluded for the reason of being a futile exercise.

(B) The discretion exercised by the District Judge under Rule 4 (3) of the 1955 Rules was not in accordance with law.

(C) The petitioner did not acquire any vested right or the status of an employee of the civil court even by virtue of his confirmation order dated 27.5.2009, hence the principles of natural justice stood excluded.

(D) The impugned order dated 18.11.2009 is not an order reviewing the earlier order dated 14.1.2003 or 27.5.2009.

32. The writ petition has no merits and is dismissed.

No order is passed as to costs.