

RESERVED

Court No. - 1

Case :- SPECIAL APPEAL No. - 700 of 2014

Appellant :- Sanjay Kumar Mishra And Ors. 3045s/S2008

Respondent :- The District Judge Ambedkar Nagar

Counsel for Appellant :- Dr.L.P.Misra,Dr. Shailendra Sharma

Counsel for Respondent :- U.N.Misra,Gaurav Mehrotra

Hon'ble Attau Rahman Masoodi,J.

Hon'ble Om Prakash Shukla,J.

- (1) Heard Dr. L.P. Mishra, learned Counsel representing the appellants and Shri Gaurav Mehrotra, learned Counsel representing the respondent.
- (2) The present Special Appeal has been preferred by four appellants under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952, interdicting the judgment/order dated 14.08.2014 passed by the learned Single Judge, whereby Writ Petition No. 3045 (S/S) of 2008 filed by writ petitioners/appellants against the order of termination dated 05.05.2008 has been dismissed.
- (3) The uncontroverted facts as could be made out from the impugned judgment/order are that an advertisement was published by the District Judgeship, Ambedkar Nagar in daily newspaper "Jan Morcha" dated 18.10.2000, wherein 12 vacancies of Class-IV employees were advertised in pay scale of Rs. 2550-3200/-. Apparently, after making selection, separate select list of General Category and reserved vacancies

of Other Backward Class (hereinafter referred to as the "OBC"), Scheduled Caste (hereinafter referred to as the "SC") and Scheduled Caste (hereinafter referred to as the "ST") were prepared and published. Records reveal that about 18 names were shown in the list of General Category, 10 names were shown in the select list of OBC and 8 were shown in the list of SC/ST. Therefore, against 12 vacancies a total select list of 36 was published. Appellant No. 1-Sanjay Kumar Mishra and appellant no.3-Surendra Kumar Bajpai were shown at serial Nos. 10 and 8, respectively in the select list of General Category, while appellant no. 2-Ram Chet was shown at serial No. 5 in the list of SC/ST category and appellant no. 4-Rameshwar Yadav was shown at serial No. 6 in the list of OBC candidate.

- (4) It is evident from the records of the present case that pursuant to the aforesaid selection, the then District Judge, against 12 advertised vacancies, issued appointment letters to 18 candidates including appellant no. 3-Surendra Kumar Bajpai on 30.01.2001. Subsequently, appellant no. 1, 4 and 2 were appointed vide appointment letters dated 12.02.2001 and 03.07.2001, respectively. Apparently, appellant no. 1 and 2 were given temporary promotion in ministerial cadre in the scale of Rs. 3050-4500/- and were posted in Copying Section by the order of District Judge dated 16.03.2007.

- (5) Subsequently, a show cause notice was issued to the appellants on 31.01.2008 stating that as their appointments were patently illegal being beyond the number of vacancies advertised and, therefore, they were show caused as to why their appointments should not be terminated. The appellant No. 1, 3 and 4, in the first round of litigation, challenged the said show cause notice vide Writ Petitions No. 1348 (S/S) of 2008 and 1349 (S/S) of 2008, which were disposed of vide judgment/order dated 13.03.2008, wherein the appellants were permitted to file their reply to the said show-cause notice and the competent authority was also permitted to take appropriate decision in accordance with law, after providing opportunity of hearing to the parties.
- (6) The learned Single Judge has recorded in the impugned judgment/order that after the submission of reply to the aforesaid show-cause notice, a notice for personal hearing was also issued by the District Judge on 30.04.2008 to appellants as well as five others since nine appointments against 12 advertised vacancies were made in excess. Thereafter, the order of termination was passed by the District Judge on 05.05.2008 as evidently out of 12 advertised vacancies, six were available in General Category, i.e., six were unreserved; three were reserved for OBC; and, three were for SC/ST category candidates. Against these 12 vacancies, ten appointments were made from select list of general candidates, six from OBC list and five from SC/ST list and that is how total 21 appointments

were made against the 12 advertised vacancies. Thus, the aforesaid information can be depicted in a tabular chart as herein below :-

	Total seats	General	OBC	SC/ST
Advertised Seats/vacancy	12	6	3	3
Select List Prepared	36	18	10	8
Appointment made	21	10 Appellant No.1 at serial No. 10 Appellant No. 3 at serial No. 8	6 Appellant No. 4 at serial No. 6	5 Appellant No. 2 at serial No. 5

(7) This court finds that in the impugned judgment, the learned Single Judge, after hearing the submission of the parties, framed the following three questions for consideration:

- i. Whether an appointment made in excess to number of vacancies advertised would be valid.
- ii. Whether the mere fact that petitioners have been appointed and continued for quite a long time would confer any benefit upon them to hold the post even if appointment made in excess number of vacancies is not legal.
- iii. Whether the doctrine of estoppel, waiver or acquiescence would be attracted in the case in hand.

(8) The learned Single Judge, after referring to Division Bench judgments of this Court in the case of “*District and Sessions*

Judge Vs. Ratnesh Kumar Srivastava and another : 2005 (2) UPLBEC 1156 and *The District Judge and The Hon'ble High Court of Judicature through its Registrar Vs. Sri Anurag Kumar and others* : 2005(2) ESC 1509 and “**Ram Sajiwan Vs. The State of U.P. and others** (Special Appeal No. 174 of 1998, decided on 17.10.2005)” concluded the answer to the aforesaid question framed at number-1 against the appellants/petitioners. As far as the second and third questions framed, the learned Single Judge, observed that the said issue was covered and was already answered by a Division Bench judgment of this Court in *The State of U.P. through Secretary Karmik Vs. Yogendra Kumar Pal and another* : 2008(6) AWC 5501 and as such after quoting extensively from the said judgment concluded both the questions against the petitioners/appellants. Thus, the writ petition came to be dismissed against the appellants.

- (9) The learned Counsel for the appellant has strenuously argued the present appeal and relied on various grounds to buttress his submission. However, the centrifugal argument addressed by the learned Counsel is relating to the fact that the services of the appellants have been terminated only because of they having been appointed from amongst the wait listed candidates and there being no dispute that the substantive vacancies were available and the appointment of these appellants were against available substantive vacancies within one year from the date of preparation of the select list. It is the contention of the appellant

that under the U.P Subordinate Civil Courts Inferior Establishment Rules, 1955 (hereinafter referred to as '**Rules, 1955**'), a wait list is required to be prepared and the select list is to include the wait listed candidates and as such it has been vehemently argued that the learned Single Judge has committed an illegality in not granting any relief to the appellants solely on the ground that more appointment was made than the number of posts advertised.

- (10) The learned Counsel has relied on the judgment of the Apex Court passed in *Naseem Ahmad & Others Vs State of U.P and another* : (2011) 2 SCC 374 to buttress his argument that appointments to inferior establishment under Rules, 1955 can be made from the wait list against the vacancies available in the concerned recruitment year as also being subsequently available till the wait listed candidates would cross the maximum age limit prescribed for appointment.
- (11) It has been further argued that the appellants had been serving as members of U.P Subordinate Civil Courts Inferior Establishment from 2001 to 2008 and although they participated in the fresh advertisement for appointment, after their termination in view of an interim order passed by the appellate Court, which provided for selection subject to the decision of the writ petition, however their candidature was not

considered merely as in 2008, they had all crossed the maximum age limit prescribed for appointment.

- (12) The learned Counsel has stressed repetitively on the point that the appellants were not on fault in any manner and as such they ought not to have been punished with any termination and since the appointment of first 12 persons are intact, it cannot be said that there was any illegality or irregularity in the matter of appointment of the appellants, except that in the list they were put as waitlisted candidates. It has also been argued vehemently that even before and after termination of the appellants from service, the authority had notified for filling of vacant post of Class-IV employee and thus it can be safely deduced that the appellants were appointed in the available vacancies pursuant to their selection and on their names appearing in the waiting list drawn in accordance with Rule 12 of the Rules, 1955.
- (13) Additional grounds of the select list being duly approved by the then Inspecting Judge/Administrative Judge, appointment made against existing posts, confirmation on the post after completion of probation, having been served for more than 8 years, having been promoted to Class III posts, not having been associated with any enquiry having been made before termination of their service, non-supply of relevant documents, not affording an opportunity of hearing, violation of Rule 12 of the Rules, 1955 have been taken by the learned Counsel for the appellants.

(14) At this juncture, it would be pertinent to observe that vide an order dated 14.09.2015, this Court had directed the respondent to file a supplementary affidavit within 2 weeks indicating therein the number of substantive vacancies of Class-IV employee available as on the date of publication of two advertisements as well as the vacancies available as on date i.e 14.09.2015 in the District Judgeship of Ambedkar Nagar. Pursuant to the said directions, the respondent filed a supplementary affidavit on 08.08.2016 and stated that as per the first advertisement dated 18.10.2000, the total number of class-IV post, which were advertised was 12 in number, whereas in the second advertisement dated 06.06.2008, the number of Class-IV post which were advertised was 29 and the total number of vacancies of Class-IV post in District Judgeship, Ambedkar Nagar as on 14.09.2015 was two in number.

(15) Apparently, after the aforesaid information having been provided by the respondent that there were only two vacancy in Class-IV post as on 14.09.2015, the appellants filed an objection to the said supplementary affidavit, disputing the number of vacancies existing on the date of first advertisement to be more than 16 vide their affidavit dated 05.09.2016, which was clarified by the respondent vide their affidavit dated 19.03.2017 that there was a total sanctioned strength of 53 Class IV post in District Judgeship, Ambedkar Nagar, against

which 41 post were occupied as on 18.10.2000 and only 12 post were lying vacant as on 18.10.2000 and therefore an advertisement was issued for filling up those 12 vacancies on Class IV post. Apparently, the said clarification was based on a report dated 22.09.2015 prepared by a three-member Committee headed by the District Judge, Ambedkar Nagar.

- (16) Thus, there cannot be any dispute as to the existence of total number of vacancy existing as on 18.10.2000, which comes to 12 post. Therefore, besides the said 12 sanctioned post, there did not exist any post, against which any person could have been appointed. Having held so, the argument of the appellants thus falls flat as far as their submission relating to their appointment against available substantive vacancies within one year from the date of preparation of the select list is concerned.
- (17) There can be no doubt on the submission putforth by the learned Counsel that appointment of any person from a wait list prepared by the department is valid but exhaustion of the waiting list beyond the number of advertised vacancies under Rules, 1955 is the real question that which calls for an answer. The present controversy essentially is not related to appointment of a person from the wait list, rather the issue is related to appointment of a person from the wait list to a non-advertised vacant post. Even the judgment relied by the learned Counsel for the appellants i.e. *Naseem Ahmad & Others Vs*

State of U.P and another (supra) does not help in addressing the real controversy in the present appeal. It must be understood that in Naseem Ahmed's case (Supra), the issue was as to duration or life for which the wait list existed as per Rule 12 of the Rules, 1995. The Apex Court interpreting the word "reasonable dimension" used in Rule 12 of the Rules, 1955 held that the expression "reasonable dimension" used in Rule 12 of the Rules, 1955 signifies that the wait list should be a moderate one containing that number of candidates which is adequate to meet the vacancies which might be available within a reasonable period in the year of recruitment or the year succeeding thereto and this list should be in reasonable proportion to the notified vacancies.

- (18) Apparently, the issue in the present appeal is not relating or appointment of the appellants from the wait list, but rather the issue as rightly framed by the learned Single Judge is '*whether an appointment made in excess to number of vacancies advertised would be valid*'. Further, in Naseem Ahmed's case (Supra), appointment was not only made in one year from the date of preparation of waiting list but post had fallen vacant and in these peculiar circumstances, the Apex Court allowed the persons to continue.
- (19) However, in the case at hand, there had been no vacant post, wherein these appellants could have been appointed. Further,

there is another aspect of the matter. Although, in Naseem Ahmed's case (supra), the Apex Court has held that the wait list should be a moderate one containing that number of candidates, which are adequate to meet the vacancies, which might be available within a reasonable period in the year of recruitment or the year succeeding thereto. This Court finds that a Co-ordinate bench of this Court in Judgment dated 25.02.2014 passed in Special Appeal No. 396 of 2001 : ***Ram Sajivan and Others Vs District Judge, Rai Bareli***, after noting the judgement of the Apex Court passed in Naseem Ahmed's case has held as follows :-

"The notified vacancies were only four. No vacancy has occurred for a period of three years, therefore, the claim of the appellants that they should be given appointment can survive only to the extent the exception carved out under Rule-12 of the Rules. The exception under Rule-12 has been carved out in Clause-(II), wherein liberty has been given to the District Judge to remove the name of the persons from the waiting list, who are not likely to receive appointment before attaining the maximum age prescribed under Rule-8. Apart from it, in Clause-(II)(b) of Rule-12, further provision has been made for deleting the name of the persons, who are found guilty of insubordination, misbehaviour or dishonesty in discharge of their duties in temporary or officiating vacancies, after giving them necessary opportunities to explain their conduct. It appears that the aforesaid provision has been made in respect of temporary and officiating vacancies.

The learned Single Judge has also recognized the right of the appellants by holding that they were appointed against the temporary vacancies and they have no further right to claim continuance on the substantive

vacancy. It appears that the learned Single Judge limited the right of the appellants to the extent of temporary appointment. Temporary appointments in the judgeship are given according to the exigency of service as and when it arises, but so far the right of the appellants to be given appointment against the substantive vacancy is concerned, the apex court has not recognized the said right beyond the recruitment year and the succeeding year.”

- (20) As per the supplementary affidavit dated 08.08.2016 filed by the respondent, based on a report dated 22.09.2015 prepared by a three-member Committee headed by the District Judge, Ambedkar Nagar, at the time of Advertisement dated 18.10.2000, the total number of Class-IV post, which were advertised, was 12 in number only.
- (21) Admittedly, the appellants although have been appointed on 30.01.2001, 12.02.2001 and 03.07.2001, however, these appointments were made beyond the number of vacancies advertised. The select list, which stood exhausted as soon as the twelve persons from the said list were appointed, left no power for the appointing authority to further operate the waiting list which conferred no indefeasible rights for substantive appointment, with no right. Moreover the second advertisement dated 06.06.2008 included all the 29 Class-IV posts which fell vacant after 18.10.2000 and the same were filled up on the basis of subsequent selection. Thus no vacant substantive posts existed, wherein these appellants could have been appointed and as such their appointments were always in excess to the

number of substantive posts, therefore, they had been rightly terminated vide the order dated 05.05.2008 as held by the learned Single Judge.

(22) Having regard to the submissions advanced by the learned Counsel for the parties and going through the record available before this Court, this Court is in full agreement with the findings recorded by the learned Single Judge while dismissing the writ petition. The appeal against the impugned judgment fails and deserves rejection.

(23) For all the foregoing observation, this Court is not inclined to interfere in the impugned judgment/order dated 14.08.2014 passed by the learned Single Judge in Writ Petition No. 3045 (S/S) of 2008.

(24) As a sequel to the aforesaid observation, the present special appeal fails and is **dismissed**.

(25) There shall be no orders as to cost.

(Om Prakash Shukla, J.) (Attau Rahman Masoodi, J.)

Order Date : 23rd January, 2024
Ajit/-