

Court No. - 4

Case :- WRIT - A No. - 4764 of 2024

Petitioner :- Hameedullah

Respondent :- State Of U.P. Thru. Prin. Secy. Deptt. Of Irrigation And Water Resources, Lko. And 3 Others

Counsel for Petitioner :- Abhinav Trivedi, Prashant Kumar Singh

Counsel for Respondent :- C.S.C.

Hon'ble Rajesh Singh Chauhan, J.

1. Heard Sri Abhinav Narain Trivedi, assisted by Sri Prashant Kumar Singh, learned counsel for the petitioner as well as Sri Prashant Singh Atal, learned Chief Standing Counsel-I and Sri Sandeep Sharma, learned Standing Counsel for the State-opposite parties.

2. Sri Prashant Singh Atal, learned Chief Standing Counsel for the State-opposite parties has filed supplementary counter affidavit, which is taken on record.

3. Learned counsel for the petitioner has submitted that he will not file reply to the aforesaid supplementary counter affidavit inasmuch as he has already argued on the points, which have been indicated in such supplementary counter affidavit.

4. By means of this petition, the petitioner has prayed following main reliefs:-

"i. Issue a writ, order or direction in the nature of Certiorari thereby quashing the impugned Show Cause Notice dated 21.05.2024, annexed as Annexure-1 to the Writ Petition after summoning the originals with consequential benefits.

ii. Issue a writ, order or direction in the nature of Mandamus thereby directing the Opposite Party No.4 i.e. Additional Chief Secretary, Department of Appointment and Personnel, Government of U.P, Civil Secretariat Lucknow to forthwith convene Departmental Promotion Committee and consider the Petitioner's claim for promotion on the post of Engineer-in-Chief (Mechanical) ignoring the Show Cause Notice dated 21.05.2024, within a stipulated time and consequently the Respondents be directed to issue appropriate orders in terms of recommendations of Departmental Promotion Committee."

5. Learned counsel for the petitioner has submitted that there is error apparent on the face of impugned show cause notice dated 21.05.2024 inasmuch as the main allegation against the

petitioner is that while filling up his application form for seeking appointment on the post of Assistant Engineer (Mechanical), he indicated his date of birth as 06.06.1964 but he moved an application on 06.10.1993 making request that in place of 06.06.1964, his date of birth may be considered as 07.07.1964. The allegation further says that even if the date of birth of the petitioner is considered as 07.07.1964, he would not be eligible to be appointed on the post of Assistant Engineer (Mechanical) for the reason that he was not 21 years of age as on 01.07.1985, the date which has been indicated in Advertisement No.8/85-86. Undisputedly, the Uttar Pradesh Service of Engineers Local Self Government Engineering Branch Rules, 1946 (hereinafter referred to as "the Rules, 1946") are the Rules regulating recruitment to the posts and conditions of service of persons appointed to the U.P. Service of Engineers Local Self Government Engineering Department. Rule 9 of the Rules, 1946 prescribed about the age, which reads as under:-

"AGE- (i) No person shall be appointed to the service under the provisions of rule 5 (a) (i) or 5 (d) (i) unless he be under 30 years (35 years for Scheduled Caste Candidates) of age on the first day of August of the year in which announcement of the examination by the Commission is made."

6. Perusal of Rule 9 of the Rules, 1946 reveals that for making appointment on any post under the Rules, the maximum age has been defined as 30 years for general category and 35 years for Scheduled Castes category and that age would be counted from first day of August of the concerning year. Though the minimum age has not been prescribed under Rule 9 of the Rules, 1946 or anywhere in such Rules but the minimum age for making appointment would be 21 years and the cut off date counting such age would be the first day of August of the concerning year on the basis of principles of '*ejusdem generis*'. Further, so as to know the intent and purport of the legislature, to determine the minimum age of a candidate, no other interpretation may be possible inasmuch as if the first day of August of particular year would be the date to count the maximum age, the same date would be applicable to count the minimum age. If the intention of the Legislators was different, it would have been clarified in specific words. The Legislators could have said that the minimum age of 21 years and maximum age of 30 or 35 years, as the case may be, would be considered either on the date of advertisement or on the date of appointment but in absence of the cut off date to calculate the minimum age, the minimum age of a candidate would be counted on the first day of August of the concerning year.

7. Undisputedly, the advertisement in question is of the year 1985-86 and the advertisement says that a person should be 21 years of age as on 01.07.1985. The aforesaid condition of the advertisement is in violation of the Rules which provides the cut off date would be counted on the first day of August of the concerning year.

8. Annexure No.2 of the writ petition is the application form submitted by the petitioner pursuant to the aforesaid advertisement, which clearly indicates that the last date to accept the application form would be 16.12.1985. In such application form, the petitioner has categorically indicated his date of birth as 07.07.1964 (in Hindi). Notably, almost all the details in such application form have been filled up by the petitioner in Devanagari Lipi (Hindi).

9. If the minimum age of the petitioner is counted in terms of Rule 9 of the Rules, 1946, on first day of August of the concerning year i.e. 1985, the age of the petitioner would be 21 years 24 days. Though the petitioner was appointed as Assistant Engineer (Mechanical) on 18.03.1991 in the Irrigation Department through U.P. Public Service Commission. The petitioner was promoted as Executive Engineer (Mechanical) on 24.07.2012; thereafter, he was promoted as Superintending Engineer (Mechanical) on 19.07.2021 and presently, he is serving as Chief Engineer (Level-II) in Mechanical Branch w.e.f. 29.12.2023. At this stage, learned counsel for the petitioner has drawn attention of this Court towards one order dated 31.10.1995 passed by one Sri D.D. Srivastava, Senior Staff Officer on behalf of Engineer-in-Chief, Irrigation Department, which has been enclosed with the counter affidavit of the State in Writ-A No.3649 of 2024, which has been filed by the petitioner. As per the aforesaid order dated 31.10.1995, the Department has admitted that due to inadvertence, the date of birth of the petitioner has been wrongly indicated as 06.06.1964 whereas he had indicated his date of birth as 07.07.1964 in Hindi, so the aforesaid error on the part of the Department is corrected and his date of birth would be treated as 07.07.1964 in place of 06.06.1964 in future.

10. Sri Abhinav Narain Trivedi, learned counsel for the petitioner, has stated that the impugned show cause notice is an outcome of the strict orders having been passed by this Court in his Writ-A No.3649 of 2024, Hameedullah Vs. Chief Secretary, Government of U.P. and Others, inasmuch as by means of the aforesaid writ petition, the petitioner prayed to direct the competent authority to convene meeting of Departmental Promotion Committee at the earliest i.e. prior to the date of occurrence of the vacancy on the post of Engineer-in-Chief

(Mechanical) i.e. 01.07.2024 with all consequential benefits and to consider the candidature of the petitioner for promotion on such post as he is fully eligible to be considered for that post. For one reason or another, the authorities did not take any appropriate steps despite this Court passed the orders dated 17.05.2024, 24.05.2024 and 29.05.2024. In the order dated 29.05.2024, all the aforesaid orders have been referred; for the convenience, the order dated 29.05.2024 passed in Writ-A No.3649 of 2024 (supra) reads as under:-

"1. Heard learned counsel for the petitioner, Shri Prashant Singh Atal, learned Chief Standing counsel appearing on behalf of the respondents No.1 to 5 as well as Shri Avinash Singh Bishen, learned counsel appearing for respondents No.6 & 7.

2. There is a consensus at Bar that the facts of the case have already been set forth in detail in the order dated 24.05.2024.

3. For the sake of convenience, the order dated 24.05.2024 is reproduced below:

"1. Heard learned counsel for the petitioner, Shri Sandeep Sharma, learned Standing counsel appearing for the respondent Nos.1 to 5 and Shri Avinash Singh Vishen, learned counsel appearing for respondent Nos.6 & 7.

2. There is a consensus at Bar that the facts of the case have already been set forth in detail in the order dated 17.05.2024.

3. For the sake of convenience, the order dated 17.05.2024 is reproduced below:

"Heard.

The contention of learned counsel for the petitioner is that the petitioner is working on the post of Chief Engineer (Level II) and his next promotion has to be on the post of Engineer-In-Chief. The said post would be falling vacant on account of the present incumbent retiring on attaining the age of superannuation on 30.06.2024.

The contention is that as the petitioner is also due to retire on the attaining the age of superannuation on 31.07.2024 (wrongly typed as 30.07.2024 in the order of this Court dated 10.05.2024) as such, keeping in view the Government order dated 04.10.2019, the respondents be required to hold a Departmental Promotion Committee for consideration of his case at the earliest.

This Court vide order dated 10.05.2024 had required the learned Standing counsel to seek instructions in the matter.

Today, Sri Sandeep Sharma, learned Standing counsel on the basis of instructions sent by Special Secretary, Irrigation Department dated 16.05.2024 as well as Joint Secretary, Department of Personnel & Appointment dated 16.05.2024 states that the vacancy which would be created on retirement of the existing incumbent of the post of Engineer-In-

Chief on 30.06.2024 would be considered for the next year i.e 2024-2025. It is also contended that an ambiguity in the initial appointment of the petitioner on the post of Assistant Engineer has also been noticed. However, he fairly states that as of date there is no departmental inquiry pending against the petitioner.

Responding to that, Sri Abhinav Narain Trivedi, learned counsel for the petitioner has invited the attention of the Court towards Clause 2 (1) of the Government order dated 04.10.2019, a copy of which is part of annexure 4 to the writ petition to contend that the said clause categorically provides that the vacancies which are to arise in the year of recruitment would also include the vacancy which would accrue on 01.07.2024 on account of the retirement of the person and the same is to be treated in the same year of recruitment. Placing reliance on the definition clause namely Rule 3 (h) of the Uttar Pradesh Service of Engineers (Irrigation Department) (Group A) Rules, 1990 (hereinafter referred to as "Rules, 1990"), a copy of which is annexure 2 to the writ petition, the contention of Sri Trivedi is that the "year of recruitment" has been defined as meaning a period of twelve months commencing from the first day of July of a calendar year.

Placing reliance on Clause 2 (1) of the Government order dated 04.10.2019 read with the definition under Rule 3 (h) of the Rules, 1990, the contention of learned counsel for the petitioner is that once the year of recruitment is to commence from the first day of July of a calendar year and the vacancy which would be arising on 30.06.2024 on account of the retirement has to be treated as a vacancy of the same recruitment year consequently, the vacancy would relate back to the recruitment year starting from 01.07.2023 to 30.06.2024 and thus, the contention on the part of the respondents that the same would relate to the year 2024-2025 i.e 01.07.2024 to 30.06.2025 is patently misconceived.

Upon the same being pointed out, Sri Sandeep Sharma, learned Standing counsel prays for and is granted three days time to seek specific instructions in this matter in the light of the Government order dated 04.10.2019 and the Rules, 1990.

List this case in the next week as fresh.

Sri Avinash Singh Vishen, learned counsel for the respondent no. 6 is also present."

4. In pursuance thereof, Shri Sandeep Sharma, on the basis of instructions sent by Special Secretary, Irrigation and Water Resources, Lucknow dated 22.05.2024, states that (a) no eligible person has been found for the purpose of being considered for promotion to the post of Engineer-in-Chief (Mechanical) for the year 2023-24 and (b) a notice under Rule 10(2) of The Uttar Pradesh Government Servants (Discipline and Appeal) Rules, 1999 (hereinafter referred to as "Rules, 1999") has been issued to the petitioner on 21.05.2024 to which the petitioner has still not filed any reply.

5. As regards, no eligible persons being in zone of consideration for the post of Engineer-in-Chief (Mechanical) for the year 2023-24 no reasons have been indicated by Shri Sandeep Sharma, more particularly keeping in view the detailed order of the Court dated 17.05.2024.

6. As regards, issue of notice to the petitioner under Rule 10(2) of the Rules 1999, Shri Trivedi, learned counsel for the petitioner states that the petitioner, although is reserving his right of challenging the said notice, would be submitting his reply within two days from today.

7. However, learned Standing counsel have to clarify as to why the instruction has been sent that there is no eligible person for being considered for promotion to the post of Engineer-in-Chief (Mechanical) for the year 2023-24 inasmuch as, even if a notice has been issued to the petitioner under Rule 10(2) of the Rules, 1999 and it can be said that the disciplinary proceedings are pending against the petitioner yet on account of pendency of the said disciplinary proceedings, the claim of the eligible persons has to be considered though can be kept in sealed cover.

8. On the the request of Shri Sandeep Sharma to get instructions on the aforesaid points, list this case on 29.05.2024 as fresh i.e. the date as suggested by Shri Sharma."

4. Today, Shri Prashant Singh Atal, learned Chief Standing counsel, on the basis of instructions sent by the Special Secretary, Irrigation and Water Resources, Lucknow dated 28.05.2024 states that considering the order dated 24.05.2024, the matter of the petitioner has been considered. As per Rule 5(v)(b) of the Uttar Pradesh Service of Engineers (Irrigation Department) (Group A) Rules, 1990 (hereinafter referred to as "Rules, 1990"), the promotion to the post of Engineer-in-Chief (Mechanical) of the Irrigation Department is to be made by promotion from amongst the substantively appointed Chief Engineers (Level I) of the Mechanical Department. As per proviso to the said Rule, in case Chief Engineer (Level I) in either branch is not available or is not found suitable for promotion, the post of Engineer-in-Chief can be filled by promotion from amongst substantively appointed Chief Engineers (Level II) of the respective branch.

5. Shri Prashant Singh Atal, learned Chief Standing counsel states on the basis of instructions given in Court that sufficient number of Chief Engineers in Level I (Civil) are available and as such, there cannot be any question for consideration of the claim of the petitioner for promotion to the post of Engineer-in-Chief (Mechanical), Irrigation Department as he is working as Chief Engineer (Level II).

6. On the other hand, Shri Abhinav Trivedi, learned counsel for the petitioner states that the proviso when read in totality would indicate that the words "respective branch", as used in the proviso, would mean that the availability of Chief Engineer (Level I) has to be seen in respective branch and not in totality and consequently, as in this case the promotion still remains to be made on the post of Engineer-in-Chief (Mechanical), Irrigation Department and as per his information, no Chief Engineer (Level I) is available in the Mechanical / Irrigation, consequently, the claim of the petitioner whose is working as Chief Engineer (Level II) is to be considered. He also states that the respondents while sending the instructions to the learned Chief Standing counsel, have not indicated the proviso to the said rule which appears to be a deliberate attempt on the part of the respondents.

7. Upon the same being pointed out, Shri Prashant Singh Atal prays for the shortest possible time to file the short counter affidavit as well as

personally serve the same to the learned counsel for the petitioner indicating the aforesaid facts and also elaborating his case.

8. As such, on his request and considering the urgency in the matter that the post of Engineer-in-Chief (Mechanical), Irrigation Department is to fall vacant on 30.06.2024 and the DPC is to be held prior to it, list this case in the week commencing 18.06.2024 as fresh."

11. During the course of the argument, Sri Prashant Singh Atal, learned Chief Standing Counsel-I, has stated that pursuant to the aforesaid show cause notice, the petitioner was awarded punishment of censure entry and withholding of one increment for one year and when such punishment order was sent to the U.P. Public Service Commission for approval, the U.P. Public Service Commission is of the opinion that the petitioner should be awarded major punishment of dismissal for his misconduct applying for the post when he was underage, though no order has been passed to that effect by the appointing authority till date.

12. Having heard learned counsel for the parties and having perused the material available on record, though by means of this writ petition, show cause notice has been assailed and ordinarily, the writ court may not exercise its discretionary jurisdiction to entertain the writ petition questioning the show cause notice unless the same appears to have been issued without jurisdiction. Besides, if the show cause notice is issued with premeditation, a writ petition may be entertained inasmuch as in such an event, even if the Court directs the statutory authority to hear the matter afresh, ordinarily, such hearing would not serve any fruitful purpose. The aforesaid position has been settled by the Apex Court in catena of cases.

13. Having considered the facts and circumstances of the issue in question and also the relevant Rules, it is clear that for the concerning year when the advertisement in question had been issued i.e. year 1985, the petitioner was 21 years and 24 days as on first day of August of the concerning year, therefore, he may not be treated as underage on the date when he applied for the post in question i.e. Assistant Engineer (Mechanical). Besides, the petitioner got three promotions; first, on the post of Executive Engineer (Mechanical) on 24.07.2012; second, on the post of Superintending Engineer (Mechanical) on 19.07.2021 and third, on the post of Chief Engineer (Level-II) Mechanical Branch on 29.12.2023. The impugned show cause notice has been issued at the fag end of the retirement of the petitioner as the petitioner would be retiring on 31.07.2024. For the reiteration sake, when no cut off date for minimum age has been indicated in the Rules, 1946 but the cut off date for maximum age has been indicated as first day of August of the

concerning year, then for calculating the minimum age, the cut off date would be the first day of August of the concerning year on the basis of principles of '*ejusdem generis*' as no other interpretation may be possible to calculate or count the age of the petitioner. Therefore, the impugned show cause notice has been issued on unfounded allegations and the same appears to have been issued without jurisdiction, premeditation and with malafide intention, thus, the same is liable to be quashed.

14. Accordingly, the writ petition is **allowed**. The impugned show cause notice dated 21.05.2024, annexed as Annexure-1 to the writ petition, is hereby quashed.

15. Consequences to follow.

16. No order as to costs.

[Rajesh Singh Chauhan,J.]

Order Date :- 26.7.2024
RBS/-