

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

206

CWP No. 9035 of 2020
Decided on :19.01.2021

Kamaljeet

... Petitioners

Versus

Union of India and others

... Respondents

CORAM : HON'BLE MR. JUSTICE G.S. SANDHAWALIA

Present : Mr. Rakesh Bakshi, Advocate,
for the petitioner.

Ms. Anita Balyan, Advocate,
for the respondent-UOI.

(The proceedings are being conducted through
video conferencing as per instructions.

G.S. Sandhawalia, J.

The present writ petition has been filed under Articles 226 and 227 of the Constitution of India praying for issuance of a writ in the nature of certiorari for quashing of arbitrary appointment of respondent No. 7 vide Annexure P-17 dated 28.04.2020 whereby, the result was declared for the post of IT Net Tech at the polyclinic at Ambala. Further prayer has been made for issuance of a writ in the nature of Mandamus directing the respondents to appoint the petitioner on the said post being more meritorious than respondent No.7.

The challenge is on the ground that the said candidate lacks the qualifications required, which is minimum of 2 years' work experience as per advertisement Annexure P-9 and also does not have the requisite diploma. The additional ground taken is that the petitioner is a contractual employee and is being replaced by another contractual employee against the policies of the respondents themselves. The respondents are stated to have introduced Ex-

servicemen Contributory Health Scheme dated 22.03.2003 (Annexure P-2) (in short, ECHS') wherein, medical care is to be provided to ex-servicemen and their dependents through network poly clinics and service medical facilities across the country. The appointment under ECHS was to be on contractual basis.

The petitioner was initially appointed on 30.04.2013 for a period of 11 months as a Technical Service Provider (Annexure P-3) and thereafter on 08.09.2014 (Annexure P-5) as a Computer Operator –cum- Bill Verifier, again on contractual basis. On 21.06.2018 (Annexure P-6), he was appointed as IT Net Tech on temporary basis for a period of 89 days at the regional centre ECHS Ambala. On 25.09.2018 (Annexure P-7), he was again appointed on the same post upto 31.03.2019 and was drawing contractual fee of Rs.28,100/- per month. The said appointment was continued for another period of one year vide letter dated 31.03.2019 (Annexure P-8) on the same terms and conditions. Thus, it is his case that he had been working for the last 6 years to the satisfaction of seniors and colleagues. Reliance is also placed upon the certificate issued to him on 31.01.2020 (Annexure P-18) whereby, it is held out that there was no adverse report against the individual.

It is not disputed that in terms of the last appointment letter, a contract dated 01.04.2019 (Annexure R-2) was also entered into. The advertisement, as such, was issued in February, 2020 wherein, again applications were invited for engaging staff on contractual basis for polyclinics for a period of 11/12 months from civilians and ex-servicemen which was respectively renewable for an additional period of 11/12 months based on satisfactory performance in the first year. It is not disputed that as per clause (4) of the advertisement, there was open vacancy for the said post along with other posts. Separate number of reserved

vacancies for ex-servicemen at different places were also advertised. The qualification was stated to be Diploma Certificate equivalent in IT networking. Computer Application. The experience required was also to be of 2 years. Specific averments, thus, have been made in para nos. 8 to 10 of the petition that the petitioner has the requisite diploma in hardware and networking (Annexure P-12 and P-13) whereas, the private respondent No. 7 has no such qualification. Additional plea has also been taken that as per letter dated 22.12.2017 (Annexure P-14), the duration of contractual employment is to be for 2 years and the second extension is to be granted on the basis of satisfactory performance in the 1st year. Thus, claim had been made for extension of 1 year on the strength of the positive report given which is dated 31.01.2020 (Annexure P-18). Apart from the fact that the petitioner has been continuously working with respondents for the last 6 years, it is pertinent to notice that respondent no. 7 has chosen not to contest the writ petition and was proceeded ex parte on 04.08.2020. An adverse inference has to be also drawn against him regarding his lack of qualifications, as has been pleaded by the petitioner. Lack of qualifications has further not been specifically denied by the official respondents in para nos.8 to10, which read as under:-

“8 to 10. That in reply to para nos. 8 to 10 of the petition, it is submitted that the petitioner on the basis of his qualification and eligibility, participated in the selection process initiated vide advertisement dated 22.01.2020. The Board of Officers conducted the selection process and the interview as per the policy of the ECHS in free and a fair manner. All applicants based on their qualification and experiences were evaluated and the most meritorious got selected.”

The defence of the official respondents is that the action of the respondents is in conformity with the policy and that the agreement governing the petitioner does not have a renewable clause. It is stated that the petitioner had appeared as a fresh candidate in the selection process but could not make the merit in the over-all performance and, therefore, his name did not figure in the list of selected reserved candidates of the result of the selection board. The private respondent was selected just prior to the onset of the corona pandemic and the newly selected personnel could not join their assignment due to movement restrictions. The employees who were serving on the post were asked to continue on contractual basis till lock down was relaxed. The defence was taken that the engagements were made with the specific object in mind to provide re-employment opportunities to the ex-servicemen by facilitating them and giving preference over civilian employees. Only when suitable ex-servicemen were not available, preference had to be shifted to civilian employees and the ratio was stated to be 70:30 in case of non-medical staff. The petitioner having participated in the selection process, now could not turn around and challenge the same, on account of the principle of estoppel.

Replication was also filed by the petitioner placing reliance upon the orders passed by this Court in ***CWP No.20113 of 2013, Dr. Sukhpreet Singh versus Union of India & others*** (Annexure P-10) that the said exercise was in defiance of the directions issued earlier by this Court which were upheld by the Division Bench on 19.12.2016 in ***LPA No.1691 of 2015, Union of India vs Paramjit Kaur*** (Annexure P-11) and the plea of the Union of India that the petitioners could not seek renewal of their service was rejected. Reliance was placed upon the agreement wherein in clause (2), it was mentioned that the

employment will be for a period of 2 years subject to the review of the conduct and the performance after 11 months. In para nos. 8 to 10, it was further pleaded that the respondents have not given any reply and therefore, the petition was liable to be allowed on that ground itself. It was further clarified that the vacancies were mentioned as "open vacancies" and, therefore, the contention of Union of India that the ratio of ex-servicemen and civilians was to be maintained was without any basis. Counsel for the petitioner has argued on the same lines that in the absence of anything adverse against him, there was no need to advertise his post and it was a 2 year appointment. It was further submitted that respondent no. 7, as such, did not have qualifications and, thus, his appointment was liable to be set aside.

Ms. Anita Balyan, counsel for the Union of India has tried to defend the said action on the ground that as per clause (15), the engaged person had no right to approach any Court of law for extension of the service beyond the contractual period and, therefore, justified the appointment of respondent no. 7.

In the opinion of this Court, the present writ petition is liable to be allowed on the following grounds:-

(i) It is not disputed that the post was advertised and the qualifications were prescribed wherein, the requirement was of a Diploma Certificate equivalent in IT Networking (Computer Applications). An experience certificate was also required of two years. Apart from the reserved posts, there was an open vacancy at Ambala and the said fact has not been controverted by the selected candidate. The stance of the respondents has already been reproduced above in reply to para nos. 8 and 10 and, thus, they have not been able to place the material on record to show that the said respondent was qualified as such to hold the said post

as per the terms of the advertisement. Necessarily it has to be held that his appointment is bad in law as he did not fulfil the terms of the advertisement and his appointment is absolutely arbitrary and at the whims and fancies of the official respondents, who though are bound by their own advertisement.

(ii) The argument as such that the petitioner had participated in the selection process and, therefore, is estopped from challenging the appointment of respondent No.7 is without any basis. Once the writ of mandamus is sought for appointment of said post on the ground of having all the qualifications as per the advertisement and the candidate has been selected who is not qualified, the petitioner is liable to be granted the benefit of issuance of a writ of mandamus by this Court, irrespective of the fact that he had participated in the selection process. The respondents cannot be allowed and permitted to take advantage of their own wrong. As per the policy dated 22.12.2017 (Annexure P-14), the employment is normally for a period of two years and the second year employment is to be allowed on the basis of satisfactory performance in the first year. Clause (2) reads as under:

“2. Govt orders on the subject of contractual employment allow employment normally for a period of two years. Second year employment is allowed on extn after first year based on satisfactory performance in the first year based on appraisal system as promulgated earlier & amended vide our letter No. B/49760/AG/ECHS ®/2017 dt 06 Oct 2017 and even No. dt 10 Nov 2017 and continued reqmt of the said apt while granting the extension for the second year,

minimum three days gap will be ensured. Anyone found unsuitable for extension in any Polyclinic will be 'ineligible' for subsequent contractual employment in any ECHS est at any stage."

In pursuance of letter of appointment on 31.03.2019 (Annexure P-8) which was for a period upto 31.03.2020 subject to the signing of the contract, the petitioner entered into a contract with the respondents. The terms of the contract also provide stability for a period of two years subject to the same terms and conditions of the satisfactory service and in view of the conduct and performance after 11 months. The said clause of the contract entered into between the parties on 01.04.2019 (Annexure R-2) reads as under:-

"2. The employment of the staff will be entirely contractual in nature and will be for a period of two years at the maximum based on the selection process by the competent authority subject to review of their conduct and performance after eleven months."

Thus, the respondents are bound by the terms of the contract as such and no material has been placed to show that the performance of the petitioner was, in any manner, not upto the mark and his performance was not satisfactory, rather a positive certificate has been issued (Annexure P-18) in favour of the petitioner.

Resultantly, the action of the respondents in not permitting the petitioner to continue for the next year is also against their own regulations and the contract and cannot be held to be justified in any manner. The argument raised that clause 15 provides that the petitioner has no right to approach the Court is without any basis. The respondents are not private employers but working for the benefit of ex-servicemen through the Ministry of Defence and cannot behave in an

arbitrary manner. Clause 15, as such, is violative of the employees as such to seek judicial review and can be said to be a clause which is not binding upon the employee. Reference can be made to the observations of the Supreme Court in ***Central Inland Water Transport Corporation Limited and another vs. Brojo Nath Ganguly and another, 1986 (3) SCC 156*** wherein, such a defence had been sought to be taken and which had been repelled by the Apex Court and it was held that unconscionable terms in contract of employment which are entered with the Government company/State are infringing Article 14 of the Constitution of India. The rule of the Corporation provided that the services of a permanent employee could be dispensed with by giving 3 months' basic pay and and therefore, it was held that "the Courts cannot sit back and watch supinely while the strong trample under foot the rights of the weak". Resultantly, it was held that such a clause is harmful and injurious to public interest for it tends to create a sense of insecurity in the minds of those to whom it applies and such a clause is opposed to public policy and is void. Relevant portion of the judgment reads as under:

"101. The Corporation is a large organization. It has offices in various parts of West Bengal, Bihar and Assam, as shown by the said Rules, and possibly in other States also. The said Rules form part of the contract of employment between the Corporation and its employees who are not workmen. These employees had no powerful workmen's Union to support them. They had no voice in the framing of the said rules they had no choice but to accept the said Rules as part of their contract of employment. There is gross disparity between the Corporation and its employees, whether they be workmen or officers. The Corporation can afford to dispense with the services of an officer. It will find hundreds of others to take his place but an officer cannot afford to lose his job because if he does so, there are not hundreds of jobs waiting for him. A clause such as clause (i) of Rule 9 is against right and reason. It is wholly unconscionable. It has been entered into between parties between whom there is gross inequality of bargaining power. Rule 9(i) is term of the contract between the Corporation and all its

officers. It affects a large number of persons and it squarely falls within the principle formulated by us above. Several statutory authorities have a clause similar to Rule 9(i) in their contracts of employment. As appears from the decided cases, the West Bengal State Electricity Board and Air India International have it. Several Government companies apart from the Corporation (which is the First Appellant before us) must be having it. There are 970 Government companies with paid-up capital of Rs.16,414.9 crores as stated in the written arguments submitted on behalf of the Union of India. The Government and its agencies and instrumentalities constitute the largest employer in the country. A clause such as Rule 9(i) in a contract of employment affecting large sections of the public is harmful and injurious to the public interest for it tends to create a sense of insecurity in the minds of those to whom it applies and consequently it is against public good. Such a clause, therefore, is opposed to public policy and being opposed to public policy, it-is void under [section 23](#) of the Indian Contract act."

The said judgment was followed by a Division Bench of this Court in **'Jullundur District Co-operative Agricultural Service Societies Employees Union (Regd.) Vs. State of Punjab and others', 2011 (2) RCR (Civil) 275.**

Resultantly the present writ petition is allowed. The appointment of respondent no. 7 is quashed at the Regional Centre, Ambala. A writ of mandamus is further issued to respondents to re-employ the petitioner for a period of one full year as per the terms of the contract. The petitioner shall also be entitled to costs of Rs.25,000/- for the unnecessary harassment which has been caused to him for which he has to seek legal redressal. Order be complied within a period of one month from the date of receipt of certified copy of the judgment.

19.01.2021
shivani

Whether reasoned/speaking

Whether reportable

(G.S. SANDHAWALIA)
JUDGE

Yes/No

Yes/No