

Vikas Pratap Singh & Ors vs State Of Chhatisgarh & Ors on 9 July, 2013

Equivalent citations: AIR 2013 SUPREME COURT 3414, 2013 (14) SCC 494, 2013 AIR SCW 4826, 2013 LAB. I. C. 3779, (2013) 4 JCR 47 (SC), 2013 (3) SERVLJ 155 SC, 2013 (8) SCALE 713, (2013) 4 SCT 766, (2013) 5 SERVLR 141, (2013) 8 SCALE 713, (2013) 138 FACLR 567

Bench: Jagdish Singh Khehar, H.L. Dattu

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.5318-5319 OF 2013
(@ S.L.P.(C) Nos.26341-26342 of 2011)

|Vikas Pratap Singh and Ors.

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Appellants

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Versus

|State of Chhattisgarh and Ors.

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Respondents

|

WITH

CIVIL APPEAL NO. 5320 OF 2013
(@ S.L.P.(C) No. 26349 OF 2011)

Rajendra Singh Kanwar and Ors.

Appellants

Versus

State of Chhattisgarh and Ors.

Respondents

on 08.04.2008, whereby all the appellants herein were selected. Based on the said merit list, the appointment letters were issued to the selected candidates including the appellants on various dates between 21.08.2008 and 15.09.2008. In the meanwhile, the Inspector General of Police and the respondent- Board received complaints in respect of defects/mistakes in several questions of the Main Examination Papers. The respondent-Board constituted an Expert Committee to inquire into the complaints. Upon examination of the two Papers, two sets of defects were noticed: (a) eight questions in Paper II itself were incorrect and (b) model answers for evaluation of answer scripts to another eight questions of Paper II were incorrect. The respondent-Board directed for deletion of the first set of eight questions in Paper II and preparation of correct model answers key for objective questions in Papers I and II and accordingly carried out re-evaluation of the answer scripts of the candidates. On 27.06.2009 a new revised merit list was published wherein the names of twenty six appellants did not figure at all and accordingly, the appointment of the appellants were cancelled by the respondent-State.

5. At the time of publication of the revised merit list, the appellants were already undergoing training along with other candidates who were selected in the first list. The appellants aggrieved by the cancellation of the aforesaid appointment in the wake of revised merit list filed several Writ Petitions before the learned Single Judge inter alia challenging the validity of the revised merit list on the ground that decision of re-evaluation by the respondent-Board was arbitrary and irrational and therefore the said list requires to be quashed.

6. The learned Single Judge while entertaining the Writ Petitions had issued an interim order directing the respondent-State not to take any coercive steps against the appellants and further to allow them to continue their training programme. The learned Single Judge has observed that a substantial question of public importance has arisen in the matter and therefore, referred the matter to the Division Bench with a request to consider and decide the following question of law of public importance:

“Whether the VYAPM (respondent-Board) after publication of the select list and passing of the appointment orders also on the basis of evaluation of questions, could have done the exercise of re-evaluating the answers after editing and reframing answers, and prepare the second select list for fresh recruitment of the candidates, cancelling the first select list?”

7. The Division Bench has delved into merits of the matter at length and analyzed the arguments advanced by both the parties. The Division Bench has noticed the pattern of the Main Examination to include two separate papers: Paper I comprising of both objective and subjective type questions- 7 and 4 in number in Hindi and English languages, respectively and Paper II comprising of 150 objective-type questions of General Knowledge. Further that the Expert Committee constituted by the respondent-Board examined both Paper I and II and found irregularities only in respect of the eight incorrect objective questions of Paper II and model answers to another eight questions in model answers key of Paper II, pursuant to which the respondent-Board re-evaluated Paper II and

only objective questions of Paper I on basis of fresh model answers key and in toto only sixteen questions and answers of Paper II were interfered with upon such re-evaluation. The eight incorrect questions were deleted and their marks were distributed on the pro- rata basis in accordance with Clause 14 of the Examination Conduct Rules (for short “the Rules”) of the respondent-Board and the other eight questions, answers to which were incorrect in the first model answers key were re-evaluated on the basis of new model answers key and marks were awarded accordingly. The Division Bench has observed that since all the questions so re-evaluated were objective type carrying fixed marks for only one correct answer, the possibility of difference in marking scheme or prejudice during re-evaluation does not arise and therefore has concluded that no irregularity or illegality could be said to have crept in the manner and method of re-evaluation carried out by the respondent-Board and that the said decision of re-evaluation was justified, balanced and harmonious and has not caused any injustice to the candidates and therefore cannot be interfered with unless found arbitrary, unreasonable or malafide which is not the case at hand. In consequence of the aforesaid conclusion, the Division Bench has thought it fit to uphold the cancellation of appointments of the appellants qua the first list and accordingly dismissed the writ petitions.

8. It is the correctness or otherwise of the said judgment and order passed by the High Court which is before us in these appeals by special leave.

9. We have heard Shri P.P. Rao and Shri Ravindra Srivastava learned Senior Counsels appearing for the appellants and Shri Mukul Rohtagi and Shri P.S. Patwalia learned Senior Counsels appearing for the respondents and have also carefully perused the documents on record.

10. Shri Rao would submit that the decision of the respondent-Board to re-evaluate the answer scripts in the absence of any statutory provisions for the same and subsequent publication of a revised merit list cancelling the appointment of the appellants is arbitrary and has caused prejudice to the appellants. He would further submit that Clause 14 of the Rules providing for procedure to be adopted in respect of erroneous objective questions is of a wider ambit and includes exigencies such as model answers to examination questions being incorrect and therefore, the respondent- Board instead of directing re-evaluation of answer scripts ought to have acted in compliance with the said statutory provision.

11. Per contra, Shri Rohtagi, learned Senior Counsel would submit that the re-evaluation of answer scripts affected three genre of objective questions: firstly, the eight questions in Paper II which were found incorrect; secondly, the eight questions in Paper II answers to which were found to be incorrect in the model answers key and thirdly, the questions in Paper I to which no model answers were provided for prior to the appointment of the Expert Committee. He would submit that the first set of eight questions was deleted and marks were awarded on a pro-rata basis in accordance with Clause 14 of the Rules. The second set of eight questions were re- evaluated on the basis of corrected model answers key and the third set of questions in Paper I, all being objective type, were re-evaluated with the aid of model answers key prepared by the Expert Committee. He would submit that the decision of the respondent- Board to re-evaluate the answer scripts has not caused any prejudice to the appellants-herein but in fact identified and rectified the irregularities in the earlier evaluation of answer scripts of the candidates and therefore, such decision cannot be termed as

arbitrary, vindictive and whimsical.

12. In these appeals what falls for our consideration is whether the decision of the respondent-Board in directing re-evaluation of the answer scripts has caused any prejudice to the appellants appointed qua the first merit list, dated 08.04.2008.

13. At the outset, before delving into the merits of the submissions made by the learned Senior Counsels, the relevant statutory provisions and the re-evaluation scheme requires to be noticed.

14. It is not in dispute nor it can be disputed that for the purposes of re-evaluation, the eight questions found incorrect were deleted and their marks were rightly allotted on a pro-rata basis in accordance with Clause 14 of the Rules which reads as under:

“Clause 14. Wrong (Defective) objective type question, its cancellation and marks to be allotted in lieu of it.

After the exams, the Chhattisgarh Professional Examination Board (VYAPAM) gets each question examined by the subject expert. If, upon examination by the subject experts, the questions are found defective/ wrong, it is rejected. Questions may be rejected on the following reasons:

- i) if the structure of the question is wrong;
- ii) out of the options given as answers, if more than one options are correct.
- iii) If no option is correct.
- iv) If there is difference in Hindi and English translation of any question because of which different meaning is drawn from both and one correct answer could not be ascertained.
- v) If any other printing mistake is there because of which correct answer is not ascertainable or more than one option is correct.

On such rejection of question upon the recommendation of Subject Expert Committee, on such questions the marks would be awarded by the Chhattisgarh Professional Examination Board (VYAPAM) to the candidates in proportion to their marks obtained in the particular question paper. Whether the rejected question has been or not been attempted. The question papers in which the questions have been rejected, their evaluation procedure would be as follows, if in any question papers out of 100 questions two questions are rejected and after evaluation candidate secures 81 marks out of 98 questions then in such case calculation of marks would be done as $(81 \times 100) / 100 - 2 = 82.65$. On which basis merit would be determined. ” The other eight questions whose answers were found incorrect in the earlier model answers key were re-evaluated on the basis of revised model answers key. In Paper I, only the objective type questions were re-evaluated with the aid of model

answers key prepared and provided to the examiners for the first time after the inquiry by the respondent-Board.

15. The submission made by Shri Rao in respect of Clause 14 being an inclusive provision and thus providing ample room for inclusion of similar irregularities that may occur in conduct of competitive examinations fails to convince us. Clause 14 contemplates and enlists five specific instances wherein the question in the examination paper itself is wrong and thus could not possibly be evaluated to have any correct answer. It is in such circumstances that it provides for deletion of such incorrect questions and the consequent pro-rata distribution of the marks allocated to them. The said Rule is clear and only provides for the procedure in case of discrepancies in questions only. It does not leave any room for inclusion of the exigency such as errors in answers/model answers and therefore, the respondent-Board has rightly re-evaluated only eight incorrect questions as per Clause 14.

16. In respect of the respondent-Board's propriety in taking the decision of re-evaluation of answer scripts, we are of the considered view that the respondent-Board is an independent body entrusted with the duty of proper conduct of competitive examinations to reach accurate results in fair and proper manner with the help of Experts and is empowered to decide upon re- evaluation of answer sheets in the absence of any specific provision in that regard, if any irregularity at any stage of evaluation process is found. (See: *Chairman, J & K State Board of Education v. Feyaz Ahmed Malik and others*, (2000) 3 SCC 59 and *Sahiti and Ors. v. The Chancellor, Dr. N.T.R. University of Health Sciences and Ors.*, (2009) 1 SCC 599). It is settled law that if the irregularities in evaluation could be noticed and corrected specifically and undeserving select candidates be identified and in their place deserving candidates be included in select list, then no illegality would be said to have crept in the process of re- evaluation. The respondent-Board thus identified the irregularities which had crept in the evaluation procedure and corrected the same by employing the method of re-evaluation in respect of the eight questions answers to which were incorrect and by deletion of the eight incorrect questions and allotment of their marks on pro-rata basis. The said decision cannot be characterized as arbitrary. Undue prejudice indeed would have been caused had there been re- evaluation of subjective answers, which is not the case herein.

17. In view of the aforesaid, we are of the considered opinion that in the facts and circumstances of the case the decision of re- evaluation by the respondent-Board was a valid decision which could not be said to have caused any prejudice, whatsoever, either to the appellants or to the candidates selected in the revised merit list and therefore, we do not find any infirmity in the judgment and order passed by the High Court to the aforesaid extent.

18. It is brought to our notice that in view of the interim orders passed by the learned Single Judge the appellants have now completed their training and have been in service for more than three years. Therefore the only question which survives for our consideration and decision is whether after having undergone training and assumed charge at their place of posting the 26 appellants be ousted from service on the basis of cancellation of their appointment qua the revised merit list.

19. Shri Rao would submit that the case of these appellants requires sympathetic consideration by this Court, since the appointment of appellants on the basis of a properly conducted competitive examination cannot be said to have been affected by any malpractice or other extraneous consideration or misrepresentation on their part. The ouster of 26 appellants from service after having successfully undergone training and serving the respondent-State for more than three years now would cause undue hardship to them and ruin their lives and careers. He would further submit that an irretrievable loss in terms of life and livelihood would be caused to eight appellants amongst them who have now become over aged and have also lost the opportunity to appear in the subsequent examinations. He would place reliance upon the decision of this Court in *Rajesh Kumar and Ors. v. State of Bihar and Ors.*, 2013(3) SCALE 393 wherein this Court has directed the respondent-State to re-evaluate the answer scripts on the basis of correct model answers key and sympathetically considered the case of such candidates who, after having being appointed in terms of erroneous evaluation and having served the State for considerable length of time, would not find place in the fresh merit list drawn after re- evaluation and directed the respondent-State against ousting of such candidates and further that they be placed at the bottom of the fresh merit list.

20. The pristine maxim of *fraus et jus nunquam cohabitant* (fraud and justice never dwell together) has never lost its temper over the centuries and it continues to dwell in spirit and body of service law jurisprudence. It is settled law that no legal right in respect of appointment to a said post vests in a candidate who has obtained the employment by fraud, mischief, misrepresentation or malafide. (See: *District Collector & Chairman, Vizianagaram Social Welfare Residential School Society, Vizianagaram and another v. M. Tripura Sundari Devi*, (1990) 3 SCC 655, *P. Chengalvaraya Naidu v. Jagannath and others*, (1994) 1 SCC 1 and *Union of India and others v. M. Bhaskaran*, 1995 Suppl. (4) SCC 100). It is also settled law that a person appointed erroneously on a post must not reap the benefits of wrongful appointment jeopardizing the interests of the meritorious and worthy candidates. However, in cases where a wrongful or irregular appointment is made without any mistake on the part of the appointee and upon discovery of such error or irregularity the appointee is terminated, this Court has taken a sympathetic view in the light of various factors including bonafide of the candidate in such appointment and length of service of the candidate after such appointment (See: *Vinodan T. and Ors. v. University of Calicut and Ors.*, (2002) 4 SCC 726; *State of U.P. v. Neeraj Awasthi and Ors.* (2006) 1 SCC 667).

21. In *Girjesh Shrivastava and Ors. v. State of M.P. and Ors.*, (2010) 10 SCC 707, the High Court had invalidated the rule prescribing selection procedure which awarded grace marks of 25 per cent and age relaxation to the candidates with three years' long non-formal teaching experiences as a consequence of which several candidates appointed as teachers at the formal education institutions under the said rule stood ousted. This Court while concurring with the observations made by the High Court kept in view that upon rectification of irregularities in appointment after a considerable length of time an order for cancellation of appointment would severely affect economic security of a number of candidates and observed as follows:

“28. ...Most of them were earlier teaching in Non-formal education centers, from where they had resigned to apply in response to the advertisement. They had left their previous employment in view of the fact that for their three year long teaching

experiences, the interview process in the present selection was awarding them grace marks of 25 per cent. It had also given them a relaxation of 8 years with respect to their age. Now, if they lose their jobs as a result of High Court's order, they would be effectively unemployed as they cannot even revert to their earlier jobs in the Non-formal education centers, which have been abolished since then. This would severely affect the economic security of many families. Most of them are between the age group of 35-45 years, and the prospects for them of finding another job are rather dim. Some of them were in fact awaiting their salary rise at the time of quashing of their appointment by the High Court.” Therefore, mindful of the aforesaid circumstances this Court directed non-ouster of the candidates appointed under the invalidated rule.

22. In Union of India (UOI) and Anr. v. Narendra Singh, (2008) 2 SCC 750 this Court considered the age of the employee who was erroneously promoted and the duration of his service on the promoted post and the factor of retiring from service on attaining the age of superannuation and observed as follows:

“31. The last prayer on behalf of respondent, however, needs to be sympathetically considered. The respondent is holding the post of Senior Accountant (Functional) since last seventeen years. He is on the verge of retirement, so much so, that only few days have remained. He will be reaching at the age of superannuation by the end of this month i.e. December 31, 2007. In our view, therefore, it would not be appropriate now to revert the respondent to the post of Accountant for very short period. We, therefore, direct the appellants to continue the respondent as Senior Accountant (Functional) till he reaches the age of superannuation i.e. upto December 31, 2007. At the same time, we hold that since the action of the Authorities was in accordance with Statutory Rules, an order passed by the Deputy Accountant-General canceling promotion of the respondent and reverting him to his substantive post of Accountant was legal and valid and the respondent could not have been promoted as Senior Accountant, he would be deemed to have retired as Accountant and not as Senior Accountant (Functional) and his pensionary and retiral benefits would be fixed accordingly by treating him as Accountant all through out.

32. For the foregoing reasons, the appeal is partly allowed.

Though the respondent is allowed to continue on the post of Senior Accountant (Functional) till he reaches the age of retirement i.e. December 31, 2007 and salary paid to him in that capacity will not be recovered, his retiral benefits will be fixed not as Senior Accountant (Functional) but as Accountant. In the facts and circumstances of case, there shall be no order as to costs.”

23. This Court in Gujarat State Deputy Executive Engineers' Association v. State of Gujarat and Ors., 1994 Supp (2) SCC 591 although recorded a finding that appointments given under the 'wait list' were not in accordance with law but refused to set aside such appointments in view of length of service (five years and more).

24. In *Buddhi Nath Chaudhary and Ors. v. Akhil Kumar and Ors.*, (2001) 2 SCR 18, even though the appointments were held to be improper, this Court did not disturb the appointments on the ground that the incumbents had worked for several years and had gained experience and observed:

"We have extended equitable considerations to such selected candidates who have worked on the posts for a long period."

(See: *M.S. Mudhol (Dr.) and Anr. v. S.D. Halegar and Ors.*, (1993) II LLJ 1159 SC and *Tridip Kumar Dingal and Ors. v. State of West Bengal and Ors.*, (2009) 1 SCC 768)

25. Admittedly, in the instant case the error committed by the respondent-Board in the matter of evaluation of the answer scripts could not be attributed to the appellants as they have neither been found to have committed any fraud or misrepresentation in being appointed qua the first merit list nor has the preparation of the erroneous model answer key or the specious result contributed to them. Had the contrary been the case, it would have justified their ouster upon re-evaluation and deprived them of any sympathy from this Court irrespective of their length of service.

26. In our considered view, the appellants have successfully undergone training and are efficiently serving the respondent-State for more than three years and undoubtedly their termination would not only impinge upon the economic security of the appellants and their dependants but also adversely affect their careers. This would be highly unjust and grossly unfair to the appellants who are innocent appointees of an erroneous evaluation of the answer scripts. However, their continuation in service should neither give any unfair advantage to the appellants nor cause undue prejudice to the candidates selected qua the revised merit list.

27. Accordingly, we direct the respondent-State to appoint the appellants in the revised merit list placing them at the bottom of the said list. The candidates who have crossed the minimum statutory age for appointment shall be accommodated with suitable age relaxation.

28. We clarify that their appointment shall for all intents and purpose be fresh appointment which would not entitle the appellants to any back wages, seniority or any other benefit based on their earlier appointment.

29. The order passed by the High Court shall stand modified to the above extent. Appeals disposed of.

30. There shall be no order as to costs.

Contempt Petition No. 433 of 2011 in Civil Appeal No.5320 of 2013 (@ S.L.P. (C) No. 26349 of 2011) In view of the orders passed in Special Leave Petition (C) Nos. 26341-26342 of 2011 and Special Leave Petition (C) No. 26349 of 2011, nothing survives in this Contempt Petition for our consideration and decision. The Contempt Petition is accordingly dismissed as having become infructuous.

Ordered accordingly.

.....J. [H.L. DATTU]J. [JAGDISH SINGH KHEHAR] NEW DELHI;

JULY 09, 2013.
