

SUPREME COURT OF INDIA

U.P.Jal Nigam

Vs.

Ajit Singh Patel

C.A.No.11017-11018 of 2018

(Kurian Joseph and A.M.Khanwilkar,JJ.,)

15.11.2018

JUDGMENT

A.M. Khanwilkar,J.,

1. Delay condoned. Leave granted.

2. These appeals take exception to the judgment and order dated 28th November, 2017 in Writ-A No.37143/2017 and 25th Signature-Net Verified July, 2018 in Review Application No.2/2018 passed by the High Court of Judicature at Allahabad. The said writ petition was filed by the respondent Nos.1 to 11 herein to challenge the order dated 11th August, 2017 passed by the Chief Engineer/Adhistan-2-1, U.P. Jal Nigam (for short “Nigam”). The said decision of the Chief Engineer was preceded by a decision of the Board of Directors of Nigam taken in its 166 th meeting held on 26th July, 2017. It was found that the appointments made to 113 posts of Assistant Engineer (Civil), 5 posts of Assistant Engineer (Electrical/Mechanical) and 4 posts of Assistant Engineer (Computer Science/Electronics and Communication/Electrical and Electronics) pursuant to notification dated 19th November, 2016, were void ab initio.

3. The High Court vide impugned common judgment and order dated 28th November, 2017 allowed the said writ petition and connected matters, essentially, being of the view that the order passed by the Chief Engineer dated 11th August, 2017, was in breach of principles of natural justice. The High Court also opined that the said order of the Chief Engineer declaring the appointments of 122 candidates as void ab initio, had failed to record the foundational fact that it was not possible to distinguish tainted and untainted case(s) and that there was possibility of all of them getting the benefit of the irregularities committed in the selection process; and yet hastened to terminate the appointments of all the 122 candidates by one order, that too, without giving notice and opportunity of hearing to the concerned appointees. As regards the irregularities committed in the subject selection process as noted in the order dated 11th August, 2017, the High Court held that individual notice to the concerned appointee was indispensable.

4. Being aggrieved, the appellants filed Special Leave Petition (Civil) Nos.5410-5419 of 2018 before this Court. The same was disposed of vide order dated 16th March, 2018, in the following terms:

“ORDER

Mr. Rakesh Dwivedi, learned senior counsel appearing for the petitioners, points out that the petitioners having found out that there were defective questions and incorrect answer keys, the High Court should have permitted the petitioners to re-work the merit list. He submitted that the High Court has gone wrong in insisting for an individual notice in the factual matrix of this case. In this regard he has also placed reliance on a judgment of this Court in *Vikas Pratap Singh and Others v. State of Chhattisgarh and Others, reported in'*. Mr. Mukul Rohatgi, learned senior counsel appearing for the respondent(s), however, points out that whether the questions were defective or key answers were incorrect are disputed questions and, therefore, liberty should be granted to the respondents to participate in the inquiry. He further submits that the decision of this Court referred to by the learned senior counsel for the petitioners may not apply to the facts of this case.

Be that as it may, having gone through the impugned judgment, we do not find that the door is yet closed. It is for the petitioners, if they are so advised, to approach the High Court itself for a liberty to re-work the answer sheets on the basis of the corrections, in case the High Court is also of the view that the corrections need to be made.

The special leave petitions are, accordingly, disposed of. Pending application(s), if any, shall stand disposed of.”

(emphasis supplied)

5. Pursuant to the liberty granted to the appellants, a review application came to be filed before the High Court being Civil Misc. Review Application No.2 of 2018. The appellants raised the following grounds in the said review application:

“GROUNDS

(I) Because this Hon'ble Court while deciding the matter has not considered the fact that there is malpractice in the selection, however, on the technical ground that opportunity of hearing was done, therefore, order of selection was set aside and they were directed to reinstate and be paid salary subject to the liberty given to the Authority to pass a fresh order.

(II) Because this Hon'ble Court has not considered the fact that against 113 posts once candidates have called for interview and they were not even eligible for interview and finally out of 113 posts 26 candidates are not even qualifying for interview, therefore, they have wrongly been called for interview.

(III) Because this Hon'ble Court has also not considered the fact that out of 5 posts of Assistant Engineer (Electrical/Mechanical), 6 new candidates are being found eligible and 4 candidates who have earlier found eligible for interview are not found eligible for interview and 2 candidates out of 5 candidates who have finally selected are not found eligible even for interview, therefore, they cannot be even considered for interview.

(IV) Because this Hon'ble Court has further not considered the fact that for appointment on the post of Assistant Engineer (Computer) 8 candidates who were being found eligible for interview are not found eligible for interview and 3 candidates out of 4 candidates who are selected even they are not eligible for interview, therefore, whole selection process is bad.

(V) Because this Hon'ble Court while passing the order has directed for reinstatement and consequently the persons who are not eligible for interview they have been permitted to allow for interview.

(VI) Because the matter has gone before the Hon'ble Apex Court and the Hon'ble Apex Court in Special Leave to Appeal (C) No. (s) 5410-5419/2018 has directed the present Respondents (Petitioner in SLP) may approach before the High Court, Allahabad so that proper direction may be given by the Court.

(VII) Because while this Hon'ble Court deciding the matter has held that reservation is not applicable against the temporary post, it is not sustainable in the eye of law, as reservation is applicable for both on temporary appointment or on permanent appointment.

(VIII) Because this Hon'ble Court while allowing the writ petition has further directed to reinstate and make payment of salary, which amount to allowing the persons who are not even qualified for interview, therefore, passing the order for reinstating them and also be paid salary to them is not permissible under law.

(IX) Because whole appointments are temporary against the temporary Posts, therefore, the Authorities have right to pass order, if they are not to continue with the Employees.

(X) Because the selection was cancelled on the ground of malpractice, as whole appointment was made in haste, without proper calculation and checking of marks, without publishing answer key as required and also there is some other allegations for which STF is already making enquiry.”

6. The High Court disposed of the review application on 25th July, 2018 in the following terms:

“The Managing Director, U.P. Jal Nigam, Lucknow and the Chief Engineer, U.P. Jal Nigam, Lucknow have both filed an application for the review of the judgment and

order dated 28.11.2017 by which a bunch of these writ petitions were finally decided. The submission of learned Advocate General of State of U.P. is that the applicants be granted liberty to segregate tainted and untainted candidates in passing a fresh order for which liberty has been given. The order impugned in the writ petitions was of 11.08.2017 passed by the Chief Engineer, Jal Nigam which cancels the entire selection. In allowing the petition, we have held that the order impugned in the writ petition has been passed in violation of principles of natural justice and that the selection as a whole was not liable to be cancelled without undertaking any exercise to separate the tainted candidates from the untainted one's. The court in the end while allowing the writ petitions had permitted the applicants to pass a fresh reasoned order after providing opportunity of hearing to the petitioners and the other affected parties keeping in view the observations made in the judgment.

The applicants till date have not passed any fresh order.

In passing the fresh order they may consider each and every aspect of the matter and they do not require any permission of the court for the manner in which they would pass the fresh order.

In view of above, we do not consider that any liberty for the above purpose is needed from the court.

We do not find any apparent error in the judgment and order which is sought to be reviewed.

The Review Application stands disposed of.”

(emphasis supplied)

7. In the present appeals, the appellants have assailed the aforementioned judgment and order passed by the High Court in the review application as also the main judgment and order passed in the writ petition, which was the subject matter of challenge in Special Leave Petition (Civil) Nos.5410-5419 of 2018. These appeals have been filed by the appellants despite the undertaking given by them before the High Court on 19th April, 2018 that the direction given in the order of the High Court dated 28th November, 2017 would be complied with on or before 15th May, 2018.

8. The respondents have raised preliminary objections regarding the maintainability of these Special Leave Petitions. First, because the impugned judgment and order was already challenged by the appellants in Special Leave Petition (Civil) Nos.5410-5419 of 2018. The said SLPs were disposed of on 16th March, 2018 without any liberty to the appellants to challenge the impugned judgment dated 28th November, 2017 afresh. The appellants cannot be permitted to challenge the self-same judgment by filing successive petitions. If this objection is upheld, contends learned counsel for the respondents, the present appeals can be pursued by the appellants, at best, only in respect of the judgment and order passed on the

review application. In that case, however, the Special Leave Petition solely against the judgment passed on review application would not be maintainable, in view of the dictum in *Sandhya Educational Society and Another Vs. Union of India and Others*². The respondents would then contend that the appellants cannot be permitted to resile from the undertaking given to the High Court, especially when the appellant(s) is a State within the meaning of Article 12 of the Constitution of India. Relying upon the order passed by this Court on 16th March, 2018 in Special Leave Petition (Civil) Nos.5410-5419 of 2018 and the impugned judgment passed in review application including the order passed by this Court on 20th August, 2018 in the present Special Leave Petitions, the respondents would then contend that the appellants cannot be permitted to raise any other ground except the contention that the appellants ought to be permitted to revise the merit list by segregating the tainted and untainted candidates with liberty to pass a fresh order. In other words, the appellants cannot be permitted to urge any other argument in support of the order dated 11th August, 2017 passed by the Chief Engineer. For, that order has already been quashed and set aside for the reasons recorded in the judgment whilst allowing the writ petition filed by the respondents and which reasons commended to this Court vide order dated 16th March, 2018.

9. The appellants, however, urge that the disposal of Special Leave Petitions by this Court on 16th March, 2018 will not come in the way of the appellants to challenge the common judgment and order of the High Court dated 28th November, 2017 passed in Writ Petition-A No.37143 of 2017. Inasmuch as there is clear indication in the order dated 16th March, 2018 that this Court had not dismissed the special leave petitions; but acceded to the argument of the appellants and gave liberty to the appellants to approach the High Court to re-work the answer sheets on the basis of corrections. It is urged that the technicalities should not come in the way of the appellants to persuade this Court to uphold and restore the order dated 11th August, 2017 passed by the Chief Engineer, as the entire selection process was replete with irregularities and fraud, for which even criminal action has been initiated against the then Chairman and other officials including the persons who were authorised representatives of the agency which had conducted the online examination, by filing an F.I.R. for offences punishable under Sections 409, 420, 120-B/201 of I.P.C. and 13(1)(d) of the Prevention of Corruption Act, 1988. The counsel for the appellants stated that the appellants are in the process of terminating the appointments of all other candidates appointed under the same selection process who are presently working with the appellants. That has become necessary in view of the informed opinion given by the experts of Indian Institute of Information Technology, Allahabad, that identification and segregation of tainted and untainted candidates is not possible. The said experts, on examination of the files and CDs, have reached at the following conclusions, as recorded in the communication addressed to the appellants dated 11th September, 2018:

“Conclusions:

I. To identify “tainted” candidates essentially implies identifying those candidates, whose response data may have been modified after the end of the computer-based exam. To perform this assessment, the original response data of the candidates (captured immediately at the closure of the examination window) along with relevant

checksum information is required. This reference (checksum) information, as per observation 1 above, was neither recorded by the service provider nor communicated to UPJN. Therefore, identification and segregation of tainted and non-tainted candidates is not possible.

II. In the absence of information (as per observation 1) and by noting observations 3-4, the authenticity of the data as and in the form provided (observations 5-6) cannot be accepted and/or verified.

III. The veracity of the entire process is also doubtful in view of observations 7-10.

IV. Considering observation 8 above, it stands to reason that the candidate response files, as submitted by the service provider were created, rather hurriedly and certainly not as expected. In the absence of any validating information, there is every possibility that these candidate response files (provided on the CDs) might have been doctored.

Final notes:

All the above observations are based on the implicit condition that all the documents and data shared with the undersigned have a verified provenance, and responses provided by the personnel made available for interaction with the undersigned on 9th and 10th September, 2018 at the UPJN head office in Lucknow, are true.

Additionally - This report uses two technical terms which are being explained below for your convenience.

- **Checksum:** A small block of digital data generated by a checksum algorithm such as MD5 (Message Digest 5), SHA-1 (Secure Hash 1), SHA-2, etc. when it operates on a given source data (file). This small block of digital data generated is like a digital fingerprint and is unique to the file it was generated for. In the event that the source file changes or is modified in any form, its checksum will change.
- **HTML:** Hyper Text Markup Language is the basic computer language, used to create web pages.

I hope that this report, answers the two queries raised in your letter 104/CE (E-2-1) Camp/18 dated 31.8.2018 to your satisfaction.”

Reliance is also placed on the opinion given by the Associate Professor, Computer Science and Engineering, Indian Institute of Technology, Kanpur dated 15th September, 2018, which reads thus:

“After going through the pertinent agreements between the Uttar Pradesh Jal Nigam and M/s Aptech Limited and relevant documents, I have the following observations to humbly present.

A brief chronology of the events is as follows:

- (i) The examination was conducted on December 16, 2016.
- (ii) After short listing candidates based on the exam conducted on December 16, 2016, the interviews of the short listed candidates were held between 30th Dec. and 31st Dec. 2016.
- (iii) The final result was declared on January 3, 2017.
- (iv) On February 27, 2017, M/s Aptech Limited delivered the result files on several CDs to U.P. ,Jal Nigam Limited.

Upon examining the contents of the files presented by M/s Aptech Limited, it appears that the earliest modification date of any file on the CDs is much after December 16, 2016.

In a computer-based test, the response of the candidates is uploaded in the main server (in the present case the cloud server) immediately after the completion of the exam. Immediately after the examination is over, each candidate’s response is secured so that interpolation or manipulation is not possible after wards. In the present case, the submitted file was modified after 16th December, 2016 which raises a strong doubt and it cannot be ruled out that response sheets of candidates were not manipulated during this period. Under the present circumstance, it is not possible to independently confirm that response sheets of candidates in the CDs made available are the same as responses made by the candidates on the date of examination. There is no file in the CDs provided by M/s Aptech Limited with the last modification date equal to the day of the examination. Since I have been informed that the primary data on the cloud server is no longer available, it is difficult for me to corroborate that the data provided on the CDs is an exact copy of the data available immediately upon the completion of the exam.

No audit trail containing the individual mouse clicks and timestamps of the choices made by the students has been provided in the CDs. Such an audit trail will make it easier to corroborate that the answers given by the students in the examination is the same as the answer sheet that they were graded on later. Such an audit trail is helpful to settle any discrepancies and challenges that the exam candidates may later raise. Since M/s Aptech Limited has not provided such an audit trail, it is not possible for me to corroborate and confirm that there are no discrepancies between the student’s actual responses and those, which were used for grading.

Moreover, I am informed that the standard procedures followed in public examinations like JEE (Mains), JEE (Advanced) and GATE, were not followed. It is a customary practice in these exams to publish the answer key to the exam, invite any objections or rebuttals from the candidates, consolidate these responses, and subsequently, freeze the answer key. Grading of the answer sheets is done only after such an opportunity has been provided to the candidates. This common practice has not been followed in the present case, which raises doubt as well as apprehension that the response sheets of individual candidates might have been compromised. The errors in answer keys of this particular examination may have been reduced or eliminated all together, had such an opportunity been given before the publication of the results of the computer-based test.

Considering the lack of primary data with M/s Aptech Limited, it is not possible to independently confirm the authenticity of the provided data on the CD, and hence the segregation of tainted & untainted candidates is not possible.

This is with response to your letter No. 110/C.E. E-2-1 (camp)/2018, dated 04/09/2018”

The appellants have placed reliance on the decision in P.R. Deshpande Vs. Maruti Balaram Haibatti to contend that despite the undertaking given to the High Court, it is open to pursue the legal remedy available to the appellants under Article 136 of the Constitution of India.

10. We have heard the learned counsel for the parties, including the counsel for the applicants in intervention applications. We deem it apposite to first turn to the efficacy of the order of this Court dated 16th March, 2017. On a fair reading of the said order passed by a two-Judge Bench (to which one of us, Mr. Justice Kurian Joseph was a party), this Court noted the limited grievance of the appellants that in the wake of defective questions and incorrect answers given, the High Court should have permitted the appellants to revise the merit list. After noting that position, the Court granted liberty to the appellants to approach the High Court for that limited purpose. While doing so, no liberty was granted to the appellants to challenge the impugned judgment dated 28th November, 2017 afresh before this Court. No such liberty was sought at that time. This position is restated in the order dated 20th August, 2018 passed in the present Special Leave Petitions, which reads thus:

“O R D E R

The only liberty granted to the petitioners and as rightly understood by the learned Advocate General appearing for the State was to segregate the tainted from the untainted as per Order dated 16.03.2018.

We direct the petitioners to file a report, in a sealed cover, within one month from today, as to what steps have been taken pursuant to the Judgment dated 28.11.2017 passed by the High Court and the order dated 16.03.2018 by this Court in the Special Leave Petition.

List on 20.09.2018.

The petitioners may approach the High Court and seek for extension of time.”
(emphasis supplied)

One of us (Mr. Justice Kurian Joseph) was a party even to this order. Upon reading the order dated 16th March, 2018 and/or along with the order dated 20th August, 2018, it is amply clear that the liberty granted to the appellants was very limited. It posits that no other contention was kept open or could be raised in the review application or in any subsequent proceedings before this Court. As no liberty had been granted to the appellants to challenge the judgment of the High Court dated 28th November, 2017 afresh, it would mean that the appellants can pursue the Special Leave petition only against the decision of the High Court in review application, which the High Court had rejected for the reasons recorded in its order dated 25th July, 2018 (reproduced in paragraph No.6 above). In absence of such liberty to the appellants, filing of fresh special leave petition against the self-same judgment is not permissible. [See *Vinod Kapoor Vs. State of Goa and Others*³, *Kumaran Silks Trade (P) Ltd.. (2) Vs. Devendra and Others*⁴ and Sandhya Educational Society (supra).]

11. The respondents have relied upon the dictum in Sandhya Educational Society (supra), that a Special Leave Petition only against the judgment in a review application is not maintainable. Be that as it may, the judgment of the High Court in review application is a benign one and is certainly not more adverse to the appellants. For, the High Court has restated the dictum in its judgment dated 28th November, 2017 - that it would be open to the appellants to separate the tainted candidates from the untainted ones and to pass a fresh, reasoned order after providing opportunity to the affected candidates. The High Court has also clarified that the order passed by the Chief Engineer dated 11th August, 2017 has been quashed on the sole ground that it was hit by principles of natural justice, having been passed without issuing notice and affording opportunity of hearing to the concerned candidates and also because the said order does not refer to the fact that an exercise was already undertaken by the appellants to distinguish the case of tainted and untainted candidates and arrived at the conclusion that it was not possible to do so, before issuing the impugned order dated 11th August, 2018.

12. The appellants have now relied upon the opinions given by the experts (Indian Institute of Information Technology, Allahabad and Indian Institute of Technology, Kanpur) as noted in the report submitted to this Court dated 20th August, 2018. The same were certainly not available to the appropriate authority before the order was passed on 11th August, 2016. Indeed, the appropriate authority took into account two inquiry reports but the same did not evince that an exercise had already been undertaken to distinguish the tainted and untainted candidates or that it was not possible to do so, so as to uphold the decision of declaring the entire selection process as void. Had the appropriate authority done that exercise and recorded its satisfaction in that behalf, to be reflected in the order passed by the Chief Engineer on 11th August, 2017, the High Court could have then followed the settled legal

position expounded in *Union of India and Others Vs. O.Chakradhar*⁵ - that the nature and extent of illegalities and irregularities committed in conducting a selection will have to be scrutinized in each case so as to come to a conclusion about the future course of action to be adopted in the matter. Further, if the mischief played is so widespread and all- pervasive, affecting the result so as to make it difficult to pick out the persons who have been unlawfully benefited or wrongfully deprived of their selection, in such cases, it will neither be possible nor necessary to issue individual show- cause notices to each selectee. In that case, the only option would be to cancel the whole selection process and not limiting to one section of appointees. This view has been restated in the recent decision in *Veerendra Kumar Gautam and Others Vs. Karuna Nidhan Upadhyay and Others*⁶, (also see *Joginder Pal and Others Vs. State of Punjab and Others*)⁷. The dictum in the two judgments relied upon by the appellants of O. Chakradhar (supra) and *Vikas Pratap Singh and Others Vs. State of Chhattisgarh and Others*⁸ will be of no avail to the appellants in the fact situation of the present case.

13. Suffice it to observe that while disposing of the Special Leave Petition filed by the appellants on the earlier occasion vide order dated 16th March, 2018, this Court has neither disturbed the conclusion reached by the High Court in its order dated 28th November, 2017 nor granted liberty to the appellants to challenge the said conclusion in the review application or for that matter, by way of a fresh Special Leave Petition. The relevant conclusion of the High Court in its order dated 28th November, 2017, reads thus:

“In view of the above, we are of the considered opinion that the impugned order dated 11.8.2017 has been passed in violation of principles of natural justice without issuing notice and without affording opportunity of hearing to the petitioners, no exercise was undertaken to distinguish the case of tainted and non-tainted candidates to arrive at the conclusion while passing the impugned order as such the impugned order dated 11.8.2017 is not sustainable and is liable to be set aside.”

14. The limited plea taken before this Court as noted in the first paragraph of order dated 16th March, 2018 was to allow the appellants to re-work the question and answer sheets and revise the merit list and issue fresh, reasoned order after providing opportunity of hearing to the affected candidates. That option has been kept open. It is for the appellants to pursue the same. In other words, the appellants must, in the first place, act upon the decision of the High Court dated 28 th November, 2017 whereby the order passed by the Chief Engineer dated 11th August, 2017 has been quashed and set aside. The appellants may then proceed in the matter in accordance with law by passing a fresh, reasoned order. Indeed, while doing so, the appellants may take into consideration the previous inquiry reports as also all other relevant material/documents which have become available to them. We make it clear that we have not dilated on the efficacy of the opinion given by the experts of “IIT Allahabad and IIT Kanpur”.

15. In view of the above, the challenge to the impugned judgment dated 28th November, 2017 and 25th July, 2017 must fail but with a clarification that the competent authority of Nigam is free to pass a fresh, reasoned order in accordance with law.

16. We may not be understood to have expressed any opinion either way on the merits of the course of action open to the appellants against the respondents including against the other appointees under the same selection process. All questions in that behalf are left open.

17. The appeals along with all the interlocutory applications are disposed of in the above terms. No order as to costs.

Judgment Referred.

¹(1998) 6 SCC 0507

²AIR 2013 SC 3722

³(2006) 8 SCC 0555

⁴(2002) 3 SCC 0146

⁵(2015) 11 SCALE 0702

⁶(2014) 6 SCC 0644

⁷(2013) 8 SCALE 0713