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A.F.R.

Neutral Citation No. - 2024:AHC:182376

RESERVED ON 30.05.2024
DELIVERED ON 22.11.2024

Court No. - 1

Case :- WRIT - A No. - 5252 of 2024

Petitioner :- Vishal Saraswat

Respondent :- State of U.P. and Another

Counsel for Petitioner :- Mayank

Counsel for Respondent :- C.S.C.,Kalyan Sundram
Srivastava,Manoj Kumar Singh

Hon'ble Salil Kumar Rai,J.

At the behest of the sister-in-law of the petitioner, Case Crime No. 731 of 2017 under Sections 498-A / 323 / 324 / 504 / 506 of the Indian Penal Code read with Section 3/4 of the Dowry Prohibition Act, 1961 was registered against the petitioner as well as against his elder brother, father, mother and sister on 26.07.2017 and a charge-sheet has been submitted by the Investigating Officer. Charges have been framed in the said criminal case against all the accused, including the petitioner, and the trial of the case is still pending. It has been stated in the writ petition that the allegations made in the first information report are false and the attention of the Court has been drawn to the fact that the entire family of the petitioner has been implicated in the said criminal case.

By order dated 21.12.2020 passed by the Director, Rajya Sabha Secretariat, the petitioner was granted provisional appointment as Assistant Legislative Committee – Protocol / Executive Officer in the Rajya Sabha Secretariat. The appointment was subject to the final decision in the criminal case. The petitioner was subsequently selected in the Indian

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Defence Estates Service (Group 'A' Gazetted Post) under Directorate General of Defence Estates, Ministry of Defence and is presently posted as Chief Executive Officer, Roorkee Cantonment Board, Uttarakhand.

Meanwhile, the petitioner also applied in the Combined State & Upper Subordinate Service Examination, 2019 and was declared successful in the selection list published on 17.02.2021. The petitioner secured merit position no. 1 in the selections and was recommended by the Commission for appointment as Deputy Collector in the Provincial Civil Services (Executive). In his verification / declaration form, the petitioner disclosed the details of the criminal case pending against him. It has been stated in the petition that during the character verification of the petitioner, a report was sought by the Special Secretary, Government of Uttar Pradesh from the Rajya Sabha Secretariat and the Under Secretary, Rajya Sabha forwarded an office memorandum dated 22.06.2021 reporting that the petitioner was clear from vigilance angle and that no disciplinary case was pending against him. Still the petitioner was not issued an appointment letter by the State Government, therefore, he made several representations seeking appointment in Provincial Civil Services (Executive). By order dated 13.03.2023 passed by the Additional Chief Secretary, Appointment Section – III, Government of Uttar Pradesh, Lucknow, the representations of the petitioner were dismissed on the ground that a criminal case of a serious nature was pending against the petitioner. The order dated 13.03.2023 was challenged by the petitioner through Writ – A No. 6206 of 2023 and this Court vide its order dated 11.04.2023 quashed the order dated 13.3.2023 and remitted back the matter to the State Government for a fresh decision. The Additional Chief

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Secretary, Appointment Section – III, Government of Uttar Pradesh, Lucknow vide his order dated 28.02.2024 has again rejected the claim of the petitioner again on the ground of the pendency of criminal case reasoning that the post of Deputy District Magistrate is more sensitive than the post at present held by the petitioner. The order dated 28.02.2024 has been challenged in the present writ petition.

It has been argued by the counsel for the petitioner that the order dated 28.02.2024 is arbitrary and discriminatory and violates Articles 14 and 16 of the Constitution of India as it is unreasonable to deny appointment to the petitioner in Provincial Civil Services (Executive) on ground of pendency of criminal case against him even though the petitioner is in employment of the Central Government in a Group - 'A' Service. It was argued that the opinion expressed in the order dated 28.02.2024 that the post of Deputy District Magistrate in state of Uttar Pradesh was more sensitive than the post presently held by the petitioner is unreasonable. It was further argued that while passing the impugned order, the Additional Chief Secretary has not considered that the criminal case registered against the petitioner arises out of a matrimonial dispute and implicates the entire family of the petitioner which by itself shows falsity of the allegations made in the First Information Report. It was argued that for the aforesaid reasons, the order dated 28.02.2024 is liable to be quashed and a direction is to be issued to the State respondents to appoint the petitioner in Provincial Civil Service (Executive) in state of Uttar Pradesh. In support of his contentions, the counsel for the petitioner has relied on the judgments of the Supreme Court in *Joginder Singh vs. Union Territory of Chandigarh & Ors.* 2015 (2) SCC 377; *Avtar Singh vs. Union of India & Ors.* 2016 (8) SCC 471 and

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Pawan Kumar vs. Union of India & Anr. (2022) SCC OnLine SC 532.

Rebutting the arguments of the counsel for the petitioner, the Standing Counsel has argued that the State Government, while rejecting the claim of the petitioner, has applied its discretion in accordance with law. It was argued that the criminal case pending against the petitioner is not of trivial nature but involves serious charges under Section 498-A IPC and under Section 3/4 of Dowry Prohibition Act, 1961. It was argued that valid reasons have been given in the impugned order dated 28.02.2024 for rejecting the claim of the petitioner which are not subject to judicial review by this Court under Article 226 of the Constitution of India. It was argued that for the aforesaid reasons, the writ petition lacks merit and is liable to be dismissed. In support of his contention, the counsel for the respondents has relied on the judgment of this Court reported in ***Satish Chandra Yadav vs. Union of India and Anr. AIR Online 2022 SC 332.***

I have considered the submissions of the counsel for the parties.

The facts of the case are not in dispute. The petitioner has been charged and put on trial in Case Crime No. 731 of 2017 registered under Sections 498-A / 323 / 324 / 504 / 506 of the Indian Penal Code read with Section 3/4 of the Dowry Prohibition Act, 1961. The said case is still pending. The petitioner is already a member of the Indian Defence Estates Service (Group 'A' Gazetted Post) which is a Central Government Service. The petitioner has been selected for appointment in Provincial Civil Services (Executive) in the State of Uttar Pradesh in the examinations held in Combined

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State & Upper Subordinate Service Examination - 2019. In his verification form, the petitioner truthfully disclosed the details of the criminal case pending against him. It be noted that the criminal case was pending against the petitioner on the date the vacancies were notified by the Uttar Pradesh Public Service Commission.

In *Avtar Singh vs. Union of India & Ors. 2016 (8) SCC 471*, the Supreme Court held that even if the candidate has truthfully disclosed the details of the criminal case registered or pending against him, still, the employer has the right to consider his fitness for appointment and while doing so the effect of conviction and background facts of the case, nature of offence, nature of the post, etc. have to be considered. Even if the applicant is acquitted in the criminal case, the employer may consider the nature of offence, whether acquittal is honourable or has been made by giving benefit of doubt on technical grounds and the employer may decline to appoint a person who is unfit or is of dubious character. The Supreme Court further held that if *in a criminal case the incumbent has not been acquitted and the case is pending trial, employer may well be justified in not appointing such an incumbent or in terminating his services as conviction ultimately may render him unsuitable for job and the employer is not supposed to wait till outcome of the criminal case*. It was further held by the Supreme Court that the decision had to be taken by the employer after considering that a higher post would involve more rigorous criteria. In *Avtar Singh (supra)*, the Supreme Court referred to the judgment in *State of West Bengal & Ors. vs. S.K. Nazrul Islam (2011) 10 SCC 184* in which the order of the High Court directing the employer to issue appointment letter to the employee, subject to final decision in a pending

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criminal case was challenged by the State Government. The Supreme Court held that due to pendency of the criminal case under Sections 148 / 323 / 380 / 427 / 506 IPC, the High Court had committed an illegality in issuing a direction to appoint as till the case was pending, the employee could not have been held suitable for appointment to the post. In ***Nazrul Islam (supra)***, the Supreme Court observed that the authorities entrusted with the responsibility of appointment were under duty to verify the antecedents of the candidate to find out whether he is suitable for the post and so long as the candidate had not been acquitted in the criminal case, he could not possibly be held to be suitable for appointment to the post.

In ***Anil Bhardwaj vs. Hon'ble High Court of Madhya Pradesh & Ors. (2021) 13 SCC 323***, while considering the order of the High Court refusing appointment to a judicial officer on the ground that a criminal case under Sections 498 / 406 / 34 IPC was pending during the recruitment process, the Supreme Court held that mere inclusion in the select list does not give an indefeasible right to a candidate to be appointed and the employer has a right to refuse appointment to the candidate included in the select list on any valid ground. In ***Anil Bhardwaj (supra)***, the candidate was subsequently acquitted in the criminal case but even then the Supreme Court refused to interfere on his behalf on the ground that the subsequent acquittal was irrelevant because the applicant was acquitted after the close of recruitment process. The Supreme Court while considering the scope of judicial review in such matters held that unless the decision of the authority was arbitrary or actuated by mala fide, the decision of the appointing authority cannot be interfered with by the Constitutional Courts.

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Similarly, the Supreme Court in ***Commissioner of Police vs. Raj Kumar (2021) 8 SCC 347*** held that courts exercising the power of judicial review cannot second guess the suitability of a candidate for any public office or post. ‘Absent evidence of malice or mindlessness (to the materials), or illegality by the public employer, an intense scrutiny on why a candidate was excluded as unsuitable renders the courts’ decision suspect to the charge of trespass into executive power of determining suitability of an individual for appointment.’ The Supreme Court observed that public service - like any other, presupposes, that the State employer has an element of latitude or choice on who should enter its service. It was observed that judicial review is permissible only to ensure that the norms prescribed for appointment are fair and reasonable and applied fairly in a non-discriminatory manner but the autonomy or choice of the public employer is greatest as long as the process of decision-making is neither illegal, unfair or lacking in bona fides. The observations of the Supreme Court in Paragraphs - 28 and 31 are reproduced below : -

“28. Courts exercising judicial review cannot second guess the suitability of a candidate for any public office or post. Absent evidence of malice or mindlessness (to the materials), or illegality by the public employer, an intense scrutiny on why a candidate is excluded as unsuitable renders the courts’ decision suspect to the charge of trespass into executive power of determining suitability of an individual for appointment.

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31. Public service - like any other, presupposes that the state employer has an element of latitude or choice on who should enter its service. Norms, based on principles, govern essential aspects such as qualification, experience, age, number of attempts permitted to a candidate, etc. These, broadly constitute eligibility conditions required of

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each candidate or applicant aspiring to enter public service. Judicial review, under the Constitution, is permissible to ensure that those norms are fair and reasonable, and applied fairly, in a non-discriminatory manner. However, suitability is entirely different; the autonomy or choice of the public employer, is greatest, as long as the process of decision-making is neither illegal, unfair, or lacking in bona fides.”

(emphasis supplied)

It has been held by the Supreme Court in its various decisions that the courts while judging the validity of executive decisions do not sit as a court of appeal but merely review the manner in which the decision was made and can only inquire as to whether the decision of the executive has been actuated by any mala fide or bias or the decision is based on irrelevant considerations or whether relevant considerations have been ignored while taking a decision. The courts while exercising their power of judicial review also look into the question as to whether there is a proper application of mind by the concerned authority on the facts of the case. It has also been observed in different judgments that while judging the validity of the executive decisions, the courts must grant certain measure of freedom of ‘play in the joints’ to the executive and while exercising its power of judicial review, the constitutional courts do not substitute their own decision in place of the administrative decision. (Reference may be made to the observations in Paragraph Nos. 91 to 94 of the judgment of the Supreme Court in *Tata Cellular vs. Union of India (1994) 6 SCC 651*).

At this stage, it would also be relevant to note that there may be certain actions and matters which are not susceptible to judicial process because of want of any judicially manageable standards to judge them. The correctness of such actions are

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also not to be judged by the Constitutional Courts in exercise of power of judicial review. In this context, it would be relevant to refer to the observations of the Supreme Court in Paragraph – 12 of its judgment in **A.K. Kaul & Anr. vs. Union of India & Anr. (1995) 4 SCC 73** which are reproduced below : -

*“12. It is, therefore, necessary to deal with this question in the instant case. We may, in this context, point out that a **distinction has to be made between judicial review and justiciability of a particular action.** In a written constitution the powers of the various organs of the State, are limited by the provisions of the Constitution. The extent of those limitations on the powers has to be determined on an interpretation of the relevant provisions of the Constitution. Since the task of interpreting the provisions of the Constitution is entrusted to the Judiciary, it is vested with the power to test the validity of an action of every authority functioning under the Constitution on the touch stone of the constitution in order to ensure that the authority exercising the power conferred by the constitution does not transgress the limitations placed by the Constitutions on exercise of that power. This power of judicial review is, therefore, implicit in a written constitution and unless expressly excluded by a provision of the Constitution, the power of judicial review is available in respect of exercise of powers under any of the provisions of the Constitution. **Justiciability relates to a particular field falling within the purview of the power of judicial review. On account of want of judicially manageable standards, there may be matters which are not susceptible to the judicial process. In other words, during the course of exercise of the power of judicial review it may be found that there are certain aspects of the exercise of that power which are not susceptible to judicial process on account of want of judicially manageable standards and are, therefore, not justiciable.**”*

(emphasis supplied)

The petitioner is on trial in a case which involves moral turpitude. The Additional Chief Secretary, while passing the impugned order dated 28.02.2024, has considered the fact regarding the pendency of the criminal case against the petitioner and also the claim of the petitioner that the pendency of the aforesaid criminal case could not be a legal impediment in appointing the petitioner subject to the final decision of the

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trial court as was done by the Rajya Sabha Secretariat where the petitioner was appointed as Protocol / Executive Officer in the Rajya Sabha Secretariat. The petitioner also relies on the fact that he is already a member of the Group – A service under the Central Government. However, the aforesaid facts are not sufficient for this Court to hold that the appointing authority, in the present case, has wrongly exercised its discretion rejecting the claim of the petitioner. ***Two different public employers may have different views regarding the suitability of a candidate for appointment and one employer is not bound by the decision and discretion of the other employer.*** The State Government cannot be saddled with the liability to mechanically and slavishly follow the decision taken by the Central Government or the Rajya Sabha Secretariat. While rejecting the claim of the petitioner, the State Government has taken note of the fact that the petitioner is a claimant for appointment on the post of Deputy Collector in the Provincial Civil Services (Executive). The appointment sought by the petitioner is on a high post, therefore, in accordance with the judgment of the Supreme Court in ***Avtar Singh (supra)***, a rigorous scrutiny regarding the suitability of the petitioner for appointment cannot be considered as an improper exercise of discretion. Further, in light of the judgment of the Supreme Court in ***Nazrul Islam (supra)***, the petitioner cannot be considered as suitable for appointment in Provincial Civil Services (Executive) till the pendency of the criminal case against him.

So far as the opinion of the appointing authority that the post of the Deputy Collector is more sensitive post than the post currently held by the petitioner under the Central Government is concerned, the comparative assessment of the sensitivities of

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different posts lies within the exclusive domain of the Executive and the correctness of the decision regarding the sensitivity and importance of different posts cannot be made on the basis of any judicially manageable and recognized standards. The said fact is a non-justiciable fact preventing this Court from exercising its power of judicial review.

The records available with the Court do not show any improper motive or mala fide or bias in the competent authority and any such ground has also not been pleaded by the petitioner while challenging the impugned order.

There is no error in the opinion of the appointing authority so as to persuade this Court to interfere under Article 226 of the Constitution of India.

For all the aforesaid reasons, there is no error in the impugned order dated 28.02.2024 passed by the Additional Chief Secretary, Appointment Section – III, Government of Uttar Pradesh, Lucknow.

The writ petition is *dismissed*.

Order Date :- 22.11.2024
Vipasha/Satyam