

Krishna Mohan Singh Vs. State of U.P. and ors.

Krishna Mohan Singh Vs. State of U.P. and ors.

SooperKanoon Citation : sooperkanoon.com/486178

Court : Allahabad

Decided On : Jan-05-2005

Reported in : 2005(3)ESC1542

Judge : B.S. Chauhan and ;Dilip Gupta, JJ.

Acts : Service Rules; [Constitution of India](#) - Articles 14, 16, 16 (1) and 309

Appeal No. : Special Appeal No. 467 of 1997

Appellant : Krishna Mohan Singh

Respondent : State of U.P. and ors.

Disposition : Appeal dismissed

Judgement :

1. This Special Appeal has been filed against the judgment and order dated 30.5.1997 of a learned Judge of this Court by which the writ petition was dismissed on the ground that the appointment of the petitioner-appellant had been made without advertising the post.

2. The petitioner-appellant claims to have been appointed as an Assistant Teacher in the L.T. grade in the year 1991. The petition had been filed for payment of salary. It is an admitted fact that the appointment of the petitioner-appellant had been made by the Committee of Management. The District Inspector of Schools

did not grant approval to the appointment of the petitioner-appellant.

3. Learned Counsel for the appellant has submitted that the judgment of *Radha Raizada v. Committee of Management*, 1994 (2) ESC 345 (All), does not apply with retrospective effect and as the appointments were being made without advertising the vacancy, prior to the said judgment the case of the petitioner-appellant ought to have been considered without entering into the issue as to whether the appointment was permissible without advertising the vacancy. In order to fortify his case a very heavy reliance has been placed upon the Division Bench judgment of this Court in *Ashika Prasad Shukla v. District Inspector of Schools, Allahabad and Anr.*, 1998 (3) ESC 2006 (All), wherein it had been held that as the directions had been issued in *Radha Raizada* (supra) by this Court not to fill up the vacancies without advertisement, the said judgment does not operate retrospectively.

4. On the contrary, Sri S.N. Singh, learned Standing Counsel has vehemently opposed the Appeal contending that making the appointment without advertising the vacancy has always been considered being violative of the rights conferred by Articles 14 and 16 of the [Constitution of India](#) upon all eligible candidates who ought to have applied for the said post. The judgments of *Radha Raizada* or *Ashika Prasad Shukla* (supra) do not have any bearing whatsoever and the Special Appeal is liable to be dismissed.

5. We have considered the rival submissions made by the learned Counsel for the parties and perused the record.

6. In *State of Haryana and Ors. v. Piara Singh and Ors.*, AIR 1992 SC 2130, the apex Court held that even for a short-term vacancy, ad hoc appointment should be made by adopting a procedure consonance with the provisions of Articles 14 and 16 of the [Constitution of India](#). Similar view has been reiterated in *Prabhat Kumar Sharma v. State of U.P.*, AIR 1996 SC 2638 ; *J.A.S. Inter College, Khurja v. State of U.P.*, (1996) 10 SCC 71 ; and *Delhi Development Horticulture Employees-Union v. Delhi Administration, Delhi and Ors.*, AIR 1992 SC 789.

7. In *Excise Superintendent v. K.B.N. Visweshwara Rao*, (1996) 6 SCC 216, the Supreme Court impliedly over-ruled its earlier judgment in *Union of India and Ors. v. N. Hargopal and Ors.*, (1987) 3 SCC 308, wherein it had been held that appointment by calling the names from Employment Exchange was valid. The Court took the view that in addition to calling the names from the Employment Exchange, vacancy has to be advertised in the local newspapers and the appointment only by calling the names from the Employment Exchange will be hit by the provisions of Articles 14 and 16 of the [Constitution of India](#) for the reason that those persons who could not get their names registered with, the Employment Exchange cannot be discriminated merely on that ground. An exception to the same had been carved out subsequently in *Arun Tewari v. Zila Mansavi Shikshak Sangh*, AIR 1998 SC 331, to the extent that advertising the vacancy in local newspapers can be dispensed with only in exceptional circumstances where for grave urgency there is no time to advertise the vacancy and only in such an event appointments can be made by calling the names from the Employment Exchange only.

8. The question of appointment *de hors* the Rules has been considered by the Supreme Court from time and again and the Court held that such appointments are unenforceable and unexecutable. It is settled legal proposition that any appointment made *de hors* the Rules violates the Public Policy enshrined in the rules and thus being void, cannot be enforced. [Vide *Smt. Ravindra Sharma v. State of Punjab*, (1995) 1 SCC 138 ; *Smt. Harpal Kaur Chahal v. Director, Punjab Instructions*, 1995 (Suppl) 4 SCC 706 ; *State of Madhya Pradesh v. Shyama Pardhi*, (1996) 7 SCC 118 ; *State of Rajasthan v. Hitendra Kumar Bhatt*, (1997) 6 SCC 574 ; *Patna University v. Dr. Amita Tiwari*, AIR 1997 SC 3456 ; *Madhya Pradesh Electricity Board v. S.S. Modh*, AIR 1997 SC 3464 ; *Bhagwan Singh v. State of Punjab*, (1999) 9 SCC 573 ; and *Chancellor v. Shankar Rao*, (1999) 6 SCC 255].

9. In *Dr. Amita Tiwari (supra)*, it has been held that the appointment has to be made only in consonance with the recruitment rules. Similarly, in *Union Territory, Chandigarh, Admn. v. Managing Society, Goswami GDSDC*, AIR 1996 SC 1759; and *V. Karnal Durai v. District Collector*, (1999) 1 SCC 475, it has been held that

the terms of contract must be read and enforced in consonance with the statute and not otherwise even if the contract contains the terms contrary to the statutory provision. Similarly, in *A. Mahudeshwaran v. Government of T.N.*, (1996) 8 SCC 617, it has been held that a person can have a legitimate expectation only in consonance with the statute and the rules framed thereunder and not in contravention of the same.

10. In *Delhi Transport Corporation. v. D.T.C. Mazdoor Congress*, AIR 1991 SC 101, the Hon'ble Supreme Court recognised the public employment as public property and all persons similarly situated have a right to share in it.

11. In *Sita Ram Mali v. State of Rajasthan*, 1994 (2) WLC 177, the Rajasthan High Court deprecated the practice to appoint even on daily wages without advertising the temporary/ad hoc vacancies, observing as under :

'Making appointment on daily wages without the availability of the post and without following the provisions of Articles 14 and 16 suffers from patent illegality. Apparently for the reasons which are only extraneous, the Officers of the Department have given appointments on daily wages to few favoured. Those who have waited in queue at the employment exchange have been altogether ignored. In fact, while the length of the queue continuously increase, the back-door entrants got the entry in service as daily wages employee and got the order of appointment on salary in the regular pay scale and ultimately the order of regularisation on the service.'

12. In *Dr. M.A. Hague v. Union of India*, (1993) 2 SCC 213, the Supreme Court observed as under :

'...We cannot lose sight of the fact that the recruitment rules made under Article 309 of the Constitution have to be followed strictly and not in breach. If a disregard of the rules and bypassing of the Public Service Commissions are permitted, it will open a back-door for illegal recruitment without limit. In fact this Court has, of late, been witnessing a constant violation of the recruitment rules and a scant respect of the constitutional provisions requiring recruitment to the services through the Public Service Commissions. It appears that since this Court has in some cases

permitted regularisation of the irregularly recruited employees, some Governments and authorities have been increasingly resorted to irregular recruitments. The result had been that the recruitment rules and the Public Service Commission have been kept in cold storage and candidate dictated by various considerations are being recruited as a matter of course.'

13. Deprecating the practice of making appointment de hors the Rules by the State and other State instrumentalities in *Dr. Aruridhati A. Pargaonkar v. State of Maharashtra*, AIR 1995 SC 962, the Hon'ble Supreme Court rejected the claim of the petitioner therein for regularisation on the ground of long continuous service observing as under :

'Nor the claim of the appellant, that she having worked as Lecturer without break for 9 years, on the date the advertisement was issued, she should be deemed to have been regularised appears to be well found. Eligibility and continuous working for howsoever long period should not be permitted to over-reach the law. Requirement of rules of selection...cannot be substituted by humane considerations. Law must take its course.'

14. The Hon'ble Supreme Court in *State of U.P. and Ors. v. U.P. State Law Officers Association and Ors.*, AIR 1994 SC 1654, has observed as under :

'This being so those who come to be appointed by such arbitrary procedure can hardly complain if the termination of their appointment is equally arbitrary. Those who come by the backdoor have to go by the same door.... The fact that they are made by public bodies cannot vest them with additional sanctity. Every appointment made to a public office, howsoever made, is not necessarily vested with public sanctity. There is, therefore, no public interest involved in saving all appointments irrespective of their mode. From the inception some engagements and contracts may be the product of the operation of the spoils system. There need be no legal anxiety to save them.'

15. In absence of Statutory Rules or Bye-laws providing a mode for appointment, the Executive Instructions/Policy adopted by the authority must be adhered to. Even if no such Executive Instructions/ Policy/Guidelines/Circular etc. is in

existence then a fair procedure for appointment has to be adopted in consonance with the provisions of Articles 14 and 16 of the Constitution. [Vide Nagpur Improvement Trust v. Yadaorao Jagannath Kumbhare, AIR 1999 SC 3084].

16. In Ramesh Kumar Sharma and Anr. v. Rajasthan Civil Services Appellate Tribunal and Ors., 2000 AIR SCW 4206, the Hon'ble Supreme Court held that 'expression 'Service Rules' cannot be given a restrictive meaning in the absence of the definition of the said term and, therefore, it would include within its sweep, the necessary Government order providing the method of recruitment.'

17. In Meghalaya State Electricity Board v. Jagadindra Arjun, AIR 2001 SC 2440, the apex Court held that an Authority or State Agency, where Service Rules have not yet been framed, should lay down service conditions in exercise of its administrative power by passing resolution. But appointments should not be made arbitrarily.

18. Therefore, in view of the above, it is abundantly clear that in absence of Service Rules, a fair procedure can be adopted for recruitment.

19. In Suresh Kumar and Ors. v. State of Haryana and Ors., 2001 AIR SCW 2545, the Supreme Court upheld the judgment of Full Bench of Punjab and Haryana High Court quashing the appointments of 1600 Police Constables made without advertising the vacancies. The High Court had reached the conclusion that the process of selection stood vitiated because there had been no advertisement and no due publicity inviting applications from the eligible candidates at large. Similarly, in Surinder Singh and Ors. v. State of Haryana and Ors., JT 2001 (5) SC 461, the apex Court quashed the appointments made over and above the number of vacancies duly advertised being violative of Articles 14 and 16 of the Constitution as candidates who possessed eligibility subsequent to the advertisement had no chance to be considered for recruitment.

20. A Constitution Bench of the Hon'ble Supreme Court, in a recent judgment in B.R. Kapur v. State of Tamil Nadu, (2001) 7 SCC 231 ; (Jayalalitha case), has declared that the appointment of the Chief Minister made by the Governor did not give the appointee any right to hold the appointment for the reason that the

appointment was found to be contrary to the Constitutional provisions and further declared that any order unsupported by any authority of law must be rejected. The Court further held that in every such case, the Courts, while exercising their power of judicial review, must examine 'whether the incumbent possesses qualification for appointment and the manner in which the appointment came to be made or the procedure adopted was fair, just and reasonable.' The Supreme Court further declared as under :

'It is the essence of the rule of law that the exercise of the power by the State, whether it be the Legislature or the Executive or any other Authority, should be within the Constitutional limitations and if any practice is adopted by the executive which is in violation of its Constitutional limitations, then the same could be examined by the Courts.'

21. It is settled legal proposition that invalidity of an appointment may arise not only for want of qualification as per required eligibility but also from the violation of such legal conditions or procedure for appointment as mandatorily required and as a result of which the appointment becomes void. [Vide Constitution Bench judgments in *M. Pantiah and Ors. v. Muddala Veeramallappa and Ors.*, AIR 1961 SC 1107 ; *University of Mysore v. C.D. Govinda Rao and Anr.*, AIR 1965 SC 491 ; and *P.L. Lakhanpal v. Ajit Nath Ray*, AIR 1975 Del. 66].

22. The appointment made without following the procedure violates the mandatory requirement of State Policy framed under Article 16 of the Constitution, which enables the Authority for providing reservation to candidates of Scheduled Castes, Scheduled Tribes and Other Backward Classes. State/Authorities are bound to adhere to the said policy. As per the law, Roster System is to be provided and, thus, appointment made without following the procedure by the State Agency amounts to fraud upon the Constitution itself.

23. Any appointment made without advertising the vacancy remains unenforceable being violative of the mandate of the Articles 14 and 16 of the Constitution and does not require to be protected and such an appointee cannot claim the relief of regularisation. [Vide *State of Mysore and Anr. v. S.V. Narayanappa*, AIR 1967 SC 1701 ; *R.N. Nanjundappa v. T. Thimmaiah and Anr.*, AIR 1972 SC 1767; *B.N.*

Nagarajan and Ors. v. State of Karnataka and Ors., AIR 1979 SC 1676; State of Himachal Pradesh v. Suresh Kumar Verma and Anr., AIR 1996 SC 1565; State of M.P. and Anr. v. Dharam Bir, (1998) 6 SCC 165 ; Dr. Chanchal Goyal (Mrs.) v. State of Rajasthan, AIR 2003 SC 1713; State of Haryana and Anr. v. Tilak Raj and Ors., AIR 2003 SC 2658; Haryana Tourism Corporation Ltd. v. Fakir Chand and Ors., AIR 2003 SC 4465 ; and Sultan Sadik v. Sanjay Raj Subba and Ors., AIR 2004 SC 1377].

24. In *M.P. Hasta Shilpa Vikas Nigam Ltd. v. Devendra Kumar Jain*, (1995) 1 SCC 638, the Supreme Court examined a case where a person had been given employment in undue haste without following the procedure prescribed by law. The Court held that where the person had been appointed by an officer of a Government Company, fully financed by the State Government, in undue haste, his termination order should not have been interfered by the High Court and, thus, the High Court's order was found to be unsustainable.

25. A Constitution Bench of the Hon'ble Supreme Court, in *Ajit Singh (II) v. State of Punjab*, (1999) 7 SCC 209, observed as under :

'Article 14 and Article 16(1) are closely connected. They deal with the individual rights of the persons. Article 14 demands that 'State shall not deny to any person equality before the law or the equal protection of law'. Article 16(1) issues positive command that 'there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State'. It has been held repeatedly by this Court that Clause (1) of Article 16 is a facet of Article 14 that it takes its roots from Article 14. The said clause particularises the generality in Article 14 and identifies, in a Constitutional sense 'equality of opportunity' in matter of employment and appointment to any office under the State.... The right to equal opportunity in the matter of promotion in the sense of right to be 'considered' for promotion is, indeed, a fundamental right guaranteed under Article 16(1) and this has never been doubted in any case before *Ashok Kumar Gupta v. State of U.P.*, (1997) 5 SCC 201, right from 1950.'

26. Thus, the right of consideration for appointment/ promotion is not merely a statutory right but is a fundamental right.

27. In *Indra Sawhney II v. Union of India*, AIR 2000 SC 498, the Hon'ble Supreme Court reiterated the law laid down by it time and again that Articles 14 and 16(1) of the [Constitution of India](#) provide for rule of equality which is the basic feature of the Constitution and, therefore, there can be no deviation from the principles enshrined therein while making the appointment. Rule of equality is an antithesis of any kind of arbitrariness or private gain, whim or caprice of any individual. Even if the State has the discretionary power to issue executive instructions, such discretion is coupled with the duty to act in a manner which will promote the object for which the power is conferred and also 'satisfy the mandatory requirement of the Statute. [Vide *A.P. Aggarwal v. Government of N.C.T. of Delhi*, AIR 2000 SC 205]. In *Kumari Shrilekha Vidyarthi and Ors. v. State of U.P. and Ors.*, AIR 1991 SC 537, the apex Court held that every State act, in order to survive, must not be susceptible to vice of arbitrariness which is a crux of Article 14 of the Constitution and basis to the rule of law.

28. In *Lokmat Newspapers (P) Ltd. v. Shankarprasad*, AIR 1999 SC 2423, the Hon'ble Supreme Court deprecated the practice of proceeding in undue haste by a Statutory Authority as it would be tantamount to arbitrariness. Similar view has been reiterated by the apex Court in *Pankaj Gupta and Ors. v. State of J and K and Ors.*, (2004) 8 SCC 353.

29. In the instant case the learned single Judge has recorded a finding that the advertisement had not been made while filling up the vacancy and, therefore, the question of granting any relief to the appellant did not arise.

30. We do not see any good reason to take another view. The Special Appeal is dismissed. No costs.