

Ashok Kumar Vs. State of Rajasthan and ors.

Ashok Kumar Vs. State of Rajasthan and ors.

SooperKanoon Citation : sooperkanoon.com/770226

Court : Rajasthan

Decided On : May-10-2000

Reported in : 2000(2)WLN574

Judge : B.S. Chauhan, J.

Appeal No. : S.B. Civil Writ Petition Nos. 1321 457 to 469, 1399, 1400, 1419 to 1422, 1434 to 1446 of 2000

Appellant : Ashok Kumar

Respondent : State of Rajasthan and ors.

Judgement :

B.S. Chauhan, J.

1. The instant writ petition has been filed for quashing the order dated 25.11.1999 (Annx. 8) passed by the Government issuing directions to make appointments as per the directions contained therein. The said impugned order dated 25.11.1999 has also been challenged by other petitioners by way of filing separate writ petitions. Some petitions have been filed challenging the discriminatory attitude of the respondents while implementing the order dated 25.11.1999. Particulars of all petitions have been furnished in the Schedule annexed to this judgment. Since common questions of law and facts are involved, all the writ petitions are being decided by a common judgment taking the instant Petition as the leading case.'

2. The facts and circumstances giving rise to this case are that respondent No. 3 advertised 222 posts of Teachers Grade III, vide Advertisement dated 15.6.1998 (Annx. 1), inviting applications from the eligible candidates. Posts had to be filled up as per the provisions contained in the Rajasthan Panchayati Raj Rules, 1996 (for short, 'the Rules, 1996'). The advertisement itself lays down the eligibility of candidates including educational qualification, age etc. Certain Guidelines had also been issued in the Circular dated 10.6.1998 (Annx. 2) for filling up the said posts. The said Guidelines do not provide for any appointment/preference to any person possessing the vocational qualification or to those persons who had already worked with State on contractual basis. On the contrary, the respondents issued a Circular dated 19.8.1998 (Annx. 2-A) clarifying that the persons possessing the vocational qualification shall not be considered as eligible for the posts. Petitioner as well as other eligible candidates applied for the post and interviews were held on 29/30 June, 1998. A select list was published, in which petitioner's name appeared at Serial No. 212. As per the advertisement and as per the Statutory Rules, the selection list had to expire on 30.6.1999. The State Government, vide order dated 29.6.1999 (Annx. 6) extended the life of the select list till new advertisement is issued. Ignoring the claim of the petitioner, appointments are being offered to the persons who had worked earlier on contract basis and/or possessed the Vocational qualification as per the order dated 25.11.1999 (Annx. 8) as is evident from the letter of the respondents dated 23.2.2000 (Annx. 9). Hence this petition.

3. A large number of substantial questions have been raised by the petitioner in this petition, inter alia:

(i) Whether executive instructions can over-ride the Statutory Rules and provide for appointment contrary to the same;

(ii) If the Statute itself fixes the life of the select list, whether it can be extended by issuing an executive order till the vacancies are advertised in future;

(iii) Whether such an extension of select list for indefinite period violates the rights of those persons for being considered for appointment, who attained eligibility subsequent to the advertisement dated 15.6.1998;

(iv) Whether the persons, who had earlier worked on contract basis or possessed vocational qualification, can be given preference over other candidates possessing the eligibility as per the Statutory Rules; and

(v) What can be the fate of appointments if made de hors the Statutory Rules.

4. Respondents have filed reply admitting the averments/ allegations made in the petition. The salient features, as per the reply, are that the vacancies were increased from 222 to 310 vide order dated 13.10.1998. Two hundred candidates were issued appointment letters as per the eligibility provided under the advertisement and as per the Statutory Rules. The preference to the persons who had earlier worked on contract basis or possessed vocational qualification, was given on the basis of the Government Order dated 25.11.1999, which has been passed in pursuance of the Policy Decision taken by the State Government.

5. Before entering into the merit of the case, it will be pertinent to make a reference to the Statutory Rules. Chapter XII of the Rules, 1996 provides for Process of Recruitment and other Service Conditions. Rule 256 provides for Suitability of Candidate for Employment and it also provides for disqualification. Rule 257 deals with Strength of the Service. Rule 258 provides for Categories of Posts. Rule 259 provides for Method of Recruitment. Sub-rule (6) thereof reads as under:

Recruitment on post encadred in Panchayat Samiti and Zila Parishad Services, as per Sub-section (2) of Section 89, shall be made district-wise through District Establishment Committee as per provisions of Sections 80 and 90 of the Act.

Rule 260 provides for Source of Recruitment to the Post. Rule 261 provides for Reservation in favour of Scheduled Castes/Scheduled Tribes and Other Backward Classes. Rule 263 deals with Determination of Vacancies. Rule 265 provides for Minimum and Maximum Age for Service and it also provides for certain Explanation and Relaxation in certain circumstances. Rule 270 provides for Inviting Applications by Open Advertisement in Daily News Papers having wide circulation. Rule 274 provides for procedure for preparing the Merit List by the District Establishment Committee and the second proviso thereto reads as under:

The merit list of the candidates so prepared shall remain valid for a period of one year in general and upto the end of Academic Session for teachers. After expiry of such period, it will be deemed to have lapsed.

Rule 284 provides for Filling up of Urgent and Temporary Vacancies by calling the names from Employment Exchange. Rule 296 empowers the State Government to relax the rules and its reads as under:

On a reference by the Panchayat Samities/Zila Parishads concerned, in an exceptional case where the Administrative Department is satisfied that operation of the rules relating to age or regarding experience for recruitment, if any, causes undue hardship in any particular case or where the Government is of the opinion that it is necessary or expedient to relax any of the provisions of these rules with respect to age or experience of any person, it may, with the concurrence of the Department of Personal and Administrative Reforms, relax the relevant provisions of these rules to such extent and subject to such conditions as it may consider necessary for dealing with the case in a just and equitable manner provided that such relaxation shall not be less favourable than the provisions already contained in these Rules.

6. If the above referred to rules are read together, the Scheme of the Rules makes it abundant clear that the vacancies have to be advertised and selection is to be made strictly on merit and the select list would expire at the end of the academic session, so far as teachers are concerned, automatically as the legislature, in its wisdom, has inserted the deeming clause for the purpose. The State Government has been empowered to relax the age and experience only in certain circumstances arising in a given case, and not in general, when the reference is made by the Panchayat Samiti/Zila Parishad and it can be done only after having concurrence with the Department of Personnel and Administrative Reforms.

It is settled law that when the action of the State or its instrumentalities is not as per the rules or regulations and supported by a statute, the Court must exercise its jurisdiction to declare such as act to be illegal and invalid.

In *Sirsi Municipality v. Cecelia Kom Francis Tellis* : (1973)ILLJ226SC , the Supreme Court observed that 'the ratio is that the rules or the regulations are binding on the authorities.'

Similarly, a Constitution Bench of the Hon'ble Supreme Court, in *Sukhdeo Singh and Ors. v. Bhagatram Sardar Singh Raghuvanshi and Anr.* : (1975)ILLJ399SC , has observed as under:

The statutory authorities cannot deviate from the conditions of service. Any deviation will be enforced by legal sanction of declaration by Courts to invalidate actions in violation of rules and regulations. The existence of rules and regulations under statute is to ensure regular conduct with a distinctive attitude to that conduct as a standard. The statutory regulations in the cases under consideration give the employees a statutory status and impose restrictions on the employer and the employee with no option to vary the conditions.... In cases of statutory bodies there is no personal element whatsoever because of the impersonal character of statutory bodies... the element of public employment or service and the support of statute require observance of rules and regulations. Failure to observe requirements by statutory bodies is enforced by courts by declaring (action) in violation of rules and regulations to be void. This Court has repeatedly observed that whenever a man's rights are affected by decision taken under statutory powers, the Court would presume the existence of a duty to observe the rules of natural justice and compliance with rules and regulations imposed by statute.' (Emphasis added).

Similar view has been taken by the Supreme Court in *Ambica Quarry Works etc. v. State of Gujarat and Ors.* : [1987]1SCR562 and *Commissioner of Police v. Gordhan* : [1952]1SCR135 . In both the cases, the Apex Court relied upon the judgment of the House of Lord in *Julius v. Lord Bishop of Oxford* 1880 5 AC 214, wherein it was observed as under:

There may be something in the nature of thing empowered to be done, something in the object for which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is

reposed, to exercise that power when called upon to do so.

In Commissioner of Police (supra), the Apex Court observed as under:

Public authorities cannot play fast and loose with the powers vested in them, and persons to whose detriment orders are made are entitled to know with exactness and precision what they are expected to do or forbear from doing and exactly what authority is making the order....

An enabling power of this kind conferred for public reasons and for the public benefit is, in our opinion, coupled with a duty to exercise it when the circumstances so demand. It is a duty which cannot be shirked or shelved nor it be evaded, performance of it can be compelled.

In Dr. Meera Massey v. Dr. S.R. Mehrotra and Ors. : [1998]1SCR470 , the Apex Court observed as under:

If the laws and principles are eroded by such institutions, it not only pollutes its functioning deteriorating its standard but also exhibits...wrong channel adopted.... If there is any erosion or descending by those who control the activities all expectations and hopes are destroyed. If the institutions perform dedicated and sincere service with the highest morality it would not only up lift many but bring back even a limping society to its normally.

The Supreme Court has taken the same view in Ram Chand and Ors. v. Union of India and Ors. : (1994)1SCC44 , and held that the exercise of power should not be made against the spirit of the provisions of the statute, otherwise it would tend towards arbitrariness.'

In Purushottam v. Chairman, Maharashtra State Electricity Board and Anr. 1996 6 SCC 49, the Hon'ble Supreme Court has held that appointment should be made strictly in accordance with the statutory provisions and a candidate who is entitled for appointment, should not be denied the same on any pretext whatsoever as usurpation of the post by somebody else in any circumstance is not possible.

A Constitution Bench of the Hon'ble Supreme Court, in *Ajit Singh (II) v. State of Punjab and Ors.* : AIR 1999 SC3471 , has 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 a 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 a right to be 'considered' for promotion is, in deed, a fundamental right guaranteed under Article 16(1) and this has never been doubted in any case before *Ashok Kumar Gupta v. State of UP.* : [1997]3SCR269 right from 1950.

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

In *Indra Sawhni v. Union of India and Ors.* : AIR 2000 SC498 , 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 appointments. 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 and Ors.* : AIR 2000 SC205 . In *Kumari Srilekha Vidharthi etc. etc. v. State of U.P. and Ors.* : AIR 1991 SC537 , 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.

The Hon'ble Apex Court has considered time and again the scope of issuing the executive orders. A Constitution Bench of the Hon'ble Supreme Court, in B.N. Nagarajan v. State of Mysore 0043/1966 : (1967)ILLJ698SC , has observed as under:

It is hardly necessary to mention that if there is a statutory rule or an Act on the matter, the executive must abide by that Act or the Rules and it cannot, in exercise of its executive powers under Article 162 of the Constitution, ignore or act contrary to that Rule or the Act.

Similarly, another Constitution Bench of the Hon'ble Supreme Court in Sant Ram Sharma v. State of Rajasthan and Ors. : (1968)ILLJ830SC , has observed as under:

It is true that the Government cannot amend or supersede statutory Rules by administrative instruction, but if the Rules are silent on any particular point, the Government can fill-up the gap and supplement the rule and issue instructions not inconsistent with the Rules already framed.' (Emphasis added).

The law referred to above has consistently been followed and it is settled proposition of law that the Authority cannot issue the orders/office memorandum/executive instructions in contravention of the statutory Rules. However, instructions can be issued only to supplement the statutory rules but not to supplant it. (Vide Commissioner of Income Tax v. A. Raman & Co. : [1968]67ITR11(SC) ; Union of India & Ors v. Majji Jangammya and Ors., : [1977]2SCR28 ; Ramendra Singh and Ors. v. Jagdish Prasad and Ors. : [1984]2SCR598 ; P.D. Agrawal and Ors. v. State of U.P. and Ors. : [1987]3SCR427 ; Beoper Sahayak (P) Ltd. v. Vishwa Nath : [1987]3SCR496 ; Paluru Ramkrishnanianah and Ors. v. Union of India and Ors. : (1989)ILLJ47SC ; and Comptroller & Auditor General of India and Ors. v. Mohan Lal Mehrotra and Ors. : (1992)ILLJ335SC .

The Constitution Bench of the Hon'ble Supreme Court, in Naga People' Movement of Human Rights v. Union of India and Ors. : AIR 1998 SC465 , held that the executive instructions are binding provided the same have been issued to fill up

the gap between the statutory provisions and are consistent with the said provisions.

In *C. Rangaswamaiah and Ors. v. Karnataka Lokayukta and Ors.* : [1998]3SCR837 , the Hon'ble Supreme Court held that executive instructions can be passed even for creating the post so long as they remain consistent with law/rules. In *Nagpur Improvement Trust v. Yadaora Jagannath Kumbhera*, : AIR 1999 SC3084 , the Hon'ble Supreme Court observed that in absence of statutory rules, appointments can be made on the basis of executive instructions but there is no scope of deviation of rules, if the same exist.

7. Thus, it is settled law that executive instructions cannot amend or supersede the statutory rules or add something therein. The orders cannot be issued in contravention of the statutory rules for the reason that an administrative instruction is not a statutory rule nor does it have any force of law; while statutory Rules have full force of law as held by the Constitution Bench of the Hon'ble Supreme Court in *State of U.P. and Ors. v. Babu Ram Upadhyaya* : 1961 CriLJ773 ; and *State of Tamil Nadu v. M/s. Hind Stone etc.* : [1981]2SCR742 .

In *Union of India v. Sri Somesundram Vishwanath* AIR 1988 SC 2255, the Hon'ble Apex Court has observed that if there is a conflict between the executive instruction and the Rules framed under the proviso to Article 309 of the Constitution, the Rules will prevail. Similarly, if there is a conflict in the rules made under the proviso to Article 309 of the Constitution and the law, the law will prevail.

In *Ram Ganesh Tripathi v. State of U.P.* : AIR 1997 SC1446 , the Hon'ble Supreme Court considered a similar controversy and held that any executive instruction/order which runs counter to or is inconsistent with the statutory rules cannot be enforced, rather deserves to be quashed, being *dehors* the rules. The Court observed as under:

They (respondents) relied upon the order passed by the State. This order also deserves to be quashed as it is not consistent with the statutory rules. It appears to have been passed by the Government to oblige the respondents and similarly situated *ad hoc* appointees.

Similarly, in *Sadhon Chandra Dey and Ors. v. Union of India and Ors.* : AIR 1998 SC3326 , the Hon'ble Apex Court has held that extension of wrong decision is not warranted.

8. In view of the above, If the statutory provisions involved in this case are examined analytically, it is evident that the State Government has exceeded its jurisdiction in issuing the order dated 25.11.1999 and there is no need to go into the matter as under what circumstances such a decision was taken and even if it is based on the Policy Decision taken by the Cabinet, there is no hesitation to the Court to declare that the Government was incompetent to issue such a direction without amending the statutory Rules. Thus, the impugned order dated 25.11.1999 is liable to be struck down.

9. The statutory provisions provide that the select list prepared by the District Establishment Committee shall remain in force generally for a period of one year and upto the end of the academic session for teachers. On the analogy of the principles referred to above, the life of the select list cannot be extended contrary to the statutory provisions and while extending the life of the select list, the Statutory Authorities have exceeded their jurisdiction for the reason that the Statute does not confer any power to relax the said provisions of Rule 274 of the Rules. The State Government has been conferred with the power of relaxation of rules only in respect of age and experience in a particular case and not even in general by Rules 265 and 296. Therefore, the extension of the life of the select list is invalid as being in flagrant violation of the Statutory Rules. Select list expires automatically by efflux of time by virtue of the deeming clause contained in Rule 274. Moreso, extending the life of the select list, after the period provided by the statute itself, violates the fundamental rights of the candidates who became eligible subsequent to the last advertisement made on 15.6.1998 (Annex. 1). By adopting this oblique and illegal method, if the select list in this case is kept alive for several years without resorting to the fresh selection process, the candidates who have attained the eligibility subsequent to the last advertisement, would be deprived of their fundamental right being considered for the vacancies which came into existence subsequent to the said advertisement. Select list prepared in pursuance of the said advertisement cannot be used as a reservoir to fill up the

vacancies whenever they come to the existence. Therefore, the order dated 29.6.1999 (Annx. 6) is also illegal and has been passed without having any consideration to the statutory provisions. Moreso, normally the respondents have no power to fill-up the vacancies more than advertised and it can be done only in exceptional circumstances, where the decision is taken by the Government considering the exigency; (Vide Surinder Singh v. State of Punjab and Ors. AIR 1998 SC 18).

10. There can also be no quarrel to the legal proposition that no appointment can be made after expiry of the select list. (Vide J. Ashok Kumar v. State of Andhra Pradesh, : [1996]2SCR1035 ; State of Bihar v. Mohd. Kalimuddin : [1996]1SCR314 ; State of Uttar Pradesh v. Harish Chandra : (1996)IILLJ627SC and Dr. Surendra Singh Jamwal v. State of Jammu & Kashmir : (1996)IILLJ795SC).

11. It is not only astonishing and strange but also unfortunate and contemptuous on the part of the State Government to issue direction to appoint persons possessing the Vocational qualification, for the reason that this Court, in unequivocal and crystal clear words, has held, in Kanta Parihar v. State of Rajasthan and Ors., 1999 (3) RLW 1467, that persons possessing the said qualification were not eligible for the post of Teacher Grade III. The said judgment stood approved by a Division Bench of this Court (Jaipur Bench) in State of Rajasthan v. Mukesh Kumar Jhajharia and Anr., 1999 (2) RLW 1305.

12. So far as the matter relating to the teachers who had earlier been working on contract basis a decade ago is concerned, they cannot be preferred on any ground whatsoever except that they may be given an opportunity to compete with other candidates. Merely because they had been employed as untrained teachers for some period at a particular point of time, that eventually would not confer any right on them to have any kind of preferential treatment except that they could be given some relaxation in age only, as held by the Hon'ble Supreme Court in Ram Sukh and Ors. v. State of Rajasthan and Ors. : (1990)ILLJ107SC . The teachers, who had worked earlier under the contract basis, have failed in their attempt before this Court to seek any kind of further relief and a large number of writ petitions filed by

them were dismissed vide judgment dated 15.5.1997 in S.B.C.W.P. No. 3533/1996, Dinesh Kumar v. State of Rajasthan.

13. Thus, the aforesaid facts make it crystal clear that the respondents have exercised their power arbitrarily, whimsically and capriciously for extraneous consideration without any rhyme or reason and the aforesaid instruction is violative of the mandate of Constitutional provisions as well as the judgments delivered by the Hon'ble Supreme Court from time to time on the subject. The attitude adopted by the State shows a complete disregard to the law of land and the orders seem to have been passed just to please a particular section of the society for political gain or other similar reason.

14. It is settled legal proposition that any appointment made dehors the Rules violates the Public Policy enshrined in the rules and thus being void, cannot be enforced. (Vide Smt. Ravindra Kaur Sharma v. State of Rajasthan, 1995 (Suppl) 1 SCC 138; Smt. Harpal Kaur Chahal v. Director, Industries, Punjab, 1995 (Suppl) 4 SCC 706; State of Madhya Pradesh v. Shyama Pardhi : AIR 1996 SC2219 ; State of Rajasthan v. Hitender Kumar Bhatt. : (1997)6SCC574 ; Patriot University v. Dr. Amita Tiwari AIR 1997 SC 3456; Madhya Pradesh Education Board v. Modh and Ors. AIR 1997 SC 3664; and Bhagwan Singh v. State of Punjab and Ors. : (1999)9SCC573).

In Chancellor v. Shankar Rao and Ors. : (1999)6SCC255 , the Apex Court held that the recommendations made by the Selection Committee are binding on the Chancellor and he can reject the same only on the ground that the same had been made in contravention of the statutory Rules/ Statute.

In Patna University and Anr. v. 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 of Chandigarh Administration and Ors. v. Managing Society, Goswami G.D.S.T.C. : [1996]2SCR620 , 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 provisions. Similarly, in A. Mahadawswaran and Ors. v. Government of Tamil Nadu and Ors. : [1996]3SCR312 , 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.

15. The appointments, if any, made dehors the Statutory Rules/provisions, are declared illegal and violative of the mandate of the Constitutional provisions. Undoubtedly, there may be some persons who have been appointed illegally under the impugned orders and they are not before this Court, but I may be failing in my duty if I do not appreciate the fairness shown by Mr. R.L. Jangid, learned Additional Advocate General and Miss Kusum Rao, learned Counsel for respondents No. 2 and 3, who have conceded to the extent that such appointments cannot be saved. Moreso, learned Counsel for the respondents have given in writing that the respondents themselves are, now, purporting to terminate the services of such persons who had been given appointments under the impugned order date 25.11.1999. It has also been fairly conceded that the discrimination amongst the teachers, who had earlier worked on contract basis whether they had worked for 240 days or less, is immaterial and meaningless as the respondents have taken the policy decision to terminate the services of the persons so illegally appointed.

16. Thus, in view of the above, the instant petition is disposed of finally with a direction to the respondents to examine the entire selection process pursuant to the said advertisement dated 15.6.1998 in the light of this judgment and pass appropriate orders and in case they feel it necessary to give an opportunity of hearing to the persons who may be adversely affected by such an order, they may also hear them before passing such order. There shall be no order as to costs.

In view of the aforesaid judgment, the other writ petitions, the particulars of which have been furnished in the Schedule annexed to this judgment, are also disposed of accordingly.