

Prakash Chand Vs State of Rajasthan and Others

Court: Rajasthan High Court

Date of Decision: Nov. 2, 2001

Acts Referred: Constitution of India, 1950 Article 14, 16, 226

Citation: (2003) 3 RLW 1711 : (2002) 4 WLC 491 : (2002) 1 WLN 637

Hon'ble Judges: B.S. Chauhan, J

Bench: Single Bench

Advocate: G.K. Vyas, for the Appellant; Kusum Rao, for the Respondent

Final Decision: Dismissed

Judgement

Chauhan, J.

The instant writ petition has been filed for quashing the order dated 15.10.1996 (Annex. 6) by which the Government had

issued a direction that there was no sanctioned post for Assistant Secretary in the Rajasthan Panchayati Raj Act, therefore, no person be

appointed on the said post.

2. The facts and circumstances giving rise to this case are that the petitioner claims to have been appointed as Assistant Secretary by the

respondent on a fixed salary of Rs. 800/- per month and he apprehend that he would be removed from service in pursuance of the said order. The

Court, on 21.8.2001, has directed the petitioner to place the advertisement on the basis of which he had been offered appointment on record. The

petitioner had filed an additional affidavit enclosing the copy of the advertisement which is a hand written note issued by the Sarpanch to be affixed

on the notice boards of Gram Panchayats of three villages only.

3. Miss Rao, learned counsel appearing for the respondents has submitted that the post in question is not in existence, therefore, the petitioner has

no right to continue on the post. She further submitted that the so-called advertisement cannot be held in any sense to be an advertisement for a

post under the State even if it is assumed that at the relevant time, the post could have been filled up by the respondents. Post has to be filled up

after publication of notice inviting applications in the newspaper having wide circulation in the locality and in case, such a course has not been

adopted, the appointment is to be treated, as having been made dehors the Rules. Thus, in view of the above Miss Rao has submitted that

petitioner has no right to continue in service as his appointment having been made without advertisement of post cannot be enforced, nor there is

any occasion for the writ Court to protect such a illegal appointment.

4. The question arises as to whether a person who has been appointed without advertising the vacancy or calling the names from the Employment

Exchange can be heard by a writ court if his services are terminated or are likely to be terminated and whether in such a case principles of natural

justice are attracted and whether holding of an enquiry is required at all and as to whether a person appointed by a spoiled system has a right to

continue in office.

5. In State of Haryana v. Piara Singh (1), the Apex Court has held that even for a short term vacancy, adhoc appointment can be made by

advertising the vacancy in local news-papers otherwise the appointment shall be hit by the provisions of Articles 14 and 16 of the Constitution of

India. Similar view has been reiterated by the Hon"ble Supreme Court in Prabhat Kumar Sharma and Ors. v. State of U.P. (2) and JAS Inter

College, Khurja and Ors. v. State of U.P. and Ors. (3). Further question arises in view of the judgments in the Excise Superintendent v. K.B.N.

Vishwavarraiya and Ors. (4), wherein the Hon"ble Supreme has over- ruled its earlier judgment in Union of India v. N. Hargopal (5), wherein it

had been held that appointment by calling the names from the Employment Exchange is valid. In subsequent case, the Hon"ble Supreme Court had

take a view that in addition to calling the names from the Employment Exchange, vacancy has to be advertised in the local news-papers and the

appointment only by calling the names from the Employment Exchange will be hit by the provisions of Articles 14 & 16 of the Constitution of India

for the reason that those persons who had not get their names registered with the Employment Exchange cannot be discriminated merely on that

grounds. An exception to the same had been carved out in a subsequent judgment reported in AIR 1988 SC 331 (6) to the extent that advertising

the vacancy in local news-papers can be dispensed with only in the exceptional circumstances where there is no time to advertise the vacancy and

only in case of grave urgency, appointment can be made only by calling the names from the Employment Exchange. Therefore, question itself arose

whether a person who has been appointed dehors the rules has a right to continue in office even if his termination is illegal.

6. The question of appointment dehors the Rules has been considered by the Hon"ble 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 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 (7), Smt.

Harpal Kaur Chahal v. Director, Industries, Punjab (8), State of Madhya Pradesh v. Shyama Pardhi (9), State of Rajasthan v. Hitender Kumar

Bhatt (10), Patna University v. Dr. Amita Tiwari (11), Madhya Pradesh Education Board v. Modh and Ors. (12) and Bhagwan Singh v. State of

Punjab and Ors. (13).

7. In Chancellor v. Shankar Rao and Ors. (14), 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.

8. 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., (15), 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. Mahadaswaran and Ors. v. Government of Tamil Nadu and Ors. (16), 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.

9. The reason for the same is that the appointment dehors the Rules violates the mandate of the provisions of Articles 14 and 16 of the Constitution

as held by the Hon"ble Supreme Court in Delhi Development Horticulture Employees Union v. Delhi Administration (17), and Piara Singh (supra).

10. In Delhi Transport Corporation v. D.T.C. Mazdoor Congress (18), the Hon"ble Supreme Court recognised the public property and all

persons similar situated have a right to share in it. In Sita Ram Mali v. State of Rajasthan (19), this Court held 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.

11. This Court deprecated such a direction and held that even the appointment on daily wages violating the provisions of Articles 16, the

relief of regularisation cannot be claimed.

12. In *Dr. M.A. Haque v. Union of India and Ors.* (20), the Hon'ble 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 by passing 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 Commissioners. 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 Commissions have been kept in cold storage and candidate

dictated by various considerations are being recruited as a matter of course.

13. Subsequently, deprecating the practice of making appointment by the State or other State instrumentalities in *Dr. Arundhati A. Pargaonkar v.*

State of Maharashtra (21), the 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. v. U.P. State Law Officers Assn.* (22), 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. Even if there are no Statutory Rules or Bye-laws of the society providing a mode for appointment, the Executive Instructions/Policy adopted

by the respondent-society must be there providing for a mode of appointment. 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. Yadorao Jagannath Kumbheru (23). In Ramesh Kumar Sharma and Anr. v. Rajasthan Civil

Services Appellate Tribunal and Ors. (24), the Hon"ble Supreme Court had 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 recruitment.

16. In Meghalaya State Electricity Board v. Jagadindra Arjun (25), the Apex Court held as under:-

In view of this settled legal position, MSEB, which is empowered to make appointment of its officers and employees and frame statutory

regulations laying down its service conditions, has power until the regulations are framed, to lay down service conditions in exercise of its

administrative power by passing resolution.

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

18. Undoubtedly, petitioner claims to have been appointed under the ""State"" within the meaning of Article 12 of the Constitution. Thus, he cannot

take the plea that his appointment could be made in flagrant violation of the provisions of Articles Hand 16 of the Constitution.

19. It is settled legal proposition that wherever public element in office is involved for calling the names from employment exchange, it may be

desirable that in addition thereto, applications have to be invited from all eligible candidates. Thus, even if it is assumed that there are no statutory

Rules, Guidelines, or Circular, procedure of appointment of any person in such a manner without advertising the vacancy creates a doubt regarding

the sanctity of his appointment.

20. In a recent judgment, i.e. Suresh Kumar and Ors. v. State of Hayana (26), the Hon"ble Supreme Court up-held the judgment of Full Bench of

Punjab & Haryana High Court quashing the appointments of 1600 Police Constables made without advertising the vacancies. The Hon"ble High

Court reached the conclusion that the process of selection stood vitiated because there had been no advertisement and no due publicity Inviting

applications from the candidates at large. The Hon"ble Supreme Court up-held the said judgment and the appointees, by such a spoiled system,

who had completed the training and were in continuous service for more than five years have been granted an opportunity to apply afresh only with

relaxation in age, but their appointments have not been saved. Similarly, in *Surinder Singh and Ors. v. State of Haryana and Ors.* (26), 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.

21. It is settled law that writ petition under Article 226 of the Constitution is maintainable for enforcing the statutory or legal right or when there is a

complaint by the petitioner that there is a breach of the statutory duty on the part of the respondents. Therefore, there must be judicially

enforceable right for the enforcement of which the writ jurisdiction can be resorted to. The Court can enforce the performance of a statutory duty

by public bodies through its writ jurisdiction at the behest of a person, provided such person satisfies the Court that he has a legal right to insist on

such performance. The existence of the said right is the condition precedent to invoke the writ jurisdiction. (Vide *State of Kerala v. K.G.*

Mahadavan Pillai (28), *State of Kerala v. Smt. A. Lakshmikutty* (29), *Mani Subrat Jain and Ors. v. State of Haryana* (30), and *Calcutta Gas*

Company (Propriety Ltd.) v. State of West Bengal and Ors. (31).

22. In *Rajendra Singh v. State of M.P.* (32), it has been held that even violation of each and every provision of law does not furnish a ground for

the writ court to interfere and if it is shown that substantial compliance of law has been made and unless it is shown that violation of law has caused

substantial prejudice to the rights of the petitioner, no interference is called for. Similar view has been taken by Hon"ble Supreme Court in *Rani*

Laxmibai Kshetriya Gramin Bank v. Chand Behari Kapoor and Ors. (33).

23. As the petitioner had not been appointed in pursuance of any valid provision of law or by following the procedure in consonance with Articles

14 and 16 of the Constitution of India, he has no right to continue on the post.

24. Moreso, the respondents have filed the reply in which it has been stated that no such post is in existence. There is no rebuttal to the said

averment made in the reply by the petitioner as no rejoinder affidavit has been filed, the question of keeping the petitioner in service or appointment

of any person on the said post does not arise.

25. There is no force in the petition, it is hereby dismissed. No order as to costs.