The State of Uttar Pradesh Vs Sri Bhola Nath Srivastava and Others

Court: Allahabad High Court

Date of Decision: Feb. 24, 1972

Acts Referred: Constitution of India, 1950 â€" Article 14, 16, 16(1)

Citation: AIR 1972 All 460

Hon'ble Judges: G.C. Mathur, J; A.K. Kirty, J

Bench: Division Bench

Advocate: V.K. Mehrotra, P.C. Srivastava and V.K. Khanna, for the Respondent

Final Decision: Allowed

Judgement

G.C. Mathur, J.
These three special appeals have been filed by the State Government against the judgment of a learned Single Judge

allowing three writ petitions. All the three writ petitions were filed by Sri Bhola Nath Srivastava, an Advocate of this Court. By one writ petition he

challenged the appointment of Sri Rishi Ram as Government Advocate; by the second he challenged the appointment of Sri Prem Shankar Gupta

as Deputy Government Advocate; and by the third he challenged the appointments of Sarvsri Girdhar Malaviya, V. P. Goel, T. N. Sinha, S. V.

Goswami and S. M. Tripathi as Assistant Government Advocates. The writ petitions have been allowed and the notifications appointing these law

officers have been quashed on the ground that the appointments were made in violation of the provisions of Article 16(1) of the Constitution

inasmuch as no advertisement or notice was issued, before making the appointments, inviting applications from eligible members of the Bar for the

appointments.

2. The general instructions relating to the appointment and tenure of law officers of the State of U. P. are given in Appendix "B" to the Manual of

Rules and Orders relating to the Department of the Legal Remembrancer to Government, U. P. (IV Edition, 1942). By a notification dated June

29, 1968, a new set of general instructions were issued by the Governor, replacing the existing ones given in appendix "B". Paragraph I of the

general instructions provides:

Law officers of the State in the High Court, namely, Government Advocate, Additional Government Advocate, Deputy Government Advocates

and Assistant Government Advocates on the criminal side, and Chief Standing counsel and Standing counsel on the civil side, are legal practitioners

appointed by the State Government to conduct in the High Court such Government litigation as may be assigned to them either generally or

specially by Government.

Paragraph II lays down that a legal practitioner to be eligible for appointment as a law officer should have a standing of, at least, five years as an

Advocate of the High Court, Paragraph III states that no age limits are prescribed for appointments of law officers but appointments shall be made

with due regard to physical fitness. Paragraph IV, which is important, reads thus:--

The Governor may appoint any qualified legal practitioner as a Law Officer and, before making any such appointment, he may, if he thinks fit,

take into consideration the views of the Advocate General or of -the Chief Justice or any other Judges of the High Court or of any Committee that

the Governor may constitute for the purpose. All appointments shall be notified in the Official Gazette.

Paragraph V provides for the remuneration etc. of the law officers and paragraph VI for their tenure.

3. Sri Rishi Ram was appointed Government Advocate for a period of three years by a notification dated October 30, 1968. By another

notification dated November 11, 1971, his term was extend ed by one year. Sri Prem Shanker Gupta was appointed Deputy Government

Advocate by a notification dated March 18, 1971, for a period of three years. The five persons named above were appointed Assistant

Government Advocates by a notification dated March 18, 1971, upto February 28, 1972. Admittedly, no advertisements or notices, inviting

applications for these appointments, were issued by the State Government. The appointments were, however, made by the State Government after

consulting the Advocate-General.

4. The petitioner challenged the appointments on three grounds, namely,

(i) that they were made in violation of Article 16(1) of the Constitution;

(ii) that paragraph IV of the general instructions, under which the appointments were made, offended Article 14 of the Constitution; and

(iii) that the appointments were made mala fide and amounted to nepotism. Since the learned Single Judge decided in favour of the petitioner on the

first ground, he did not go into the other two grounds.

5. Two points have been urged before us in support of the appeals:

(i) That Article 16(1) is not applicable to the appointment of law officers; and

(ii) that even if Article 18(1) is applicable to such appointments, there has been no contravention of its provisions. Article 16(1) reads thus :--

There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

6. In support of the first point, it was said that the general instructions show that the appointment of law officers is nothing but engaging and

retaining the services of an Advocate for a fixed period by the Government for doing its work in the High Court. In essence, the relationship

between the State and the law officers is one of client and counsel. The law officer does not hold any office. It is then said that the ""office

contemplated under Article 16(1) is one in which there is relationship of master and servant between the State and the holder of the office. Even if

the law officer holds an office, there is no relationship of servant and master between him and the State and, therefore. Article 16 is not applicable

to this office. Reliance is placed upon the following observations of Chagla, C. J. in Dattatraya Motiram More Vs. State of Bombay,

The language used in Article 16(1) is ''employment or appointment to any office under the State"", and, in our opinion, ''appointment'' must be read

''ejusdem generis'' with ''employment''. Further, the expression ''under the State'' makes it clear that the person holding office to which Article 16(1)

applies is a person who stands to the State as a subordinate would to a higher officer, or, in other words, there must be a relationship of employer

and employee between the person holding office and the State or, at least, there must be an element of subordination to the State in the office

contemplated by Article 18(1).

The question before the Bombay High Court was whether Article 16 was applicable to a councillor of a borough municipality who held an elective

office. It was eld that a councillor was not ""employed or appointed to an office under the State."" The observations of Chagla, C. J. must be read in

the context of that case. In our opinion, it is not necessary that the relationship of master and servant must exist in every case between the

Government and the holder of office in order to attract the application of Article 16(1) to it. Even with respect to the expression ''holds an office of

profit under the Government'' used in Article 191(1)(a) of the Constitution, the Supreme Court observed in Gurugobinda Basu Vs. Sankari Prasad

Ghosal and Others,

We agree with the High Court that, for holding an office of profit under the Government, one need not be in the service of the Government and

there need be no relationship of master and servant between them.

A fortiori, for holding an office under the Government such a relationship is not necessary. We also think that the existence of a relationship of

client and counsel between the State and the holder of the office does not necessarily mean that he does not hold an ''office'' within the meaning of

Article 16(1). The Attorney-General of India and the Advocate-Generals of States hold office under the State even though the essential

relationship between them and the State is one of counsel and client.

7. We have then to see what the words ''office under the State* mean. In Gazula Dasaratha Rama Rao Vs. The State of Andhra Pradesh and

Others, the Supreme Court said that the expression ''office under the State* in Article 16(1) must be given its natural meaning. It was - observed in

this case that the application of Article 16 was not confined to organised public services. As to what is an office is now settled by two decisions of

the Supreme Court. In Mahadeo v. Shanti-bhai (Civil Appeal No. 1832 of 1967 decided on 15-10-1968 (SC)), the question which arose for

consideration was whether a person on the panel of lawyers prepared by the Railway Administration held an ""office of profit under the State"" and

was disqualified from seeking election to the Madhya Pradesh Legislative Assembly by Article 191(1)(a). The Supreme Court held that such a

person held an office of profit and observed:

If by ''office'' is meant the right and duty to exercise an employment or a position to which certain duties are attached as observed by this Court, it

is difficult to see why the engagement of the appellant in this case under the letter of February 6, 1962, would not amount to the appellant''s holding

an office. By the said letter he accepted certain obligations and was required to discharge certain duties. He was not free to take a brief against the

Railway Administration. Whether or not the Railway Administration thought it proper to entrust any particular case or litigation pending in the court

to him, it was his duty to watch all cases coming up for hearing against the Railway Administration and to give timely intimation of the same to the

office of the Chief Commercial Superintendent. Even if no instructions regarding any particular case were given to him, he was expected to appear

in court and obtain an adjournment. In effect, this cast a duty on him to appear in court and obtain an adjournment so as to protect the interests of

the Railway. The duty and obligation was a continuing one so long as the railway did not think it proper to remove his name from the panel of

Railway lawyers or so long as he did not intimate to the Railway Administration that he desired to be free from his obligation to render service to

the Railway. In the absence of the above he was bound by the terms of the engagement to watch the interests of the Railway Administration, give

them timely intimation of cases in which they were involved and on his own initiative apply for an adjournment in proceedings in which the Railway

had made no arrangement for representation.

8. In Srimati Kanta Kathuria Vs. Manak Chand Surana, the question again was whether Srimati Kathuria, an Advocate, who was appointed

Special Government Pleader by the Government, held an office of profit within the meaning of Article 191(1)(a) of the Constitution. Certain

arbitration cases between the State and a private company were being conducted by the Government Advocate. The Government Advocate

needed some one to assist him in these cases. Srimati Kathuria was appointed Special Government Pleader to conduct the cases along with the

Government Advocate. The majority of Judges constituting the Bench held that Srimati Kathuria did not hold ''any office'' and, consequently, was

not disqualified as the holder of an ""office of profit"". The majority adopted and cited with approval certain tests laid down in English decisions for

determining what an ""office"" was. Sikri, J. (as he then was), speaking for the majority, said that the following definition of the word ''office'' given

by Rowlatt, J. in Great Western Rly. Co. v. Bater (1920) 3 KB 266 was appropriate:--

Now it is argued, and to my mind argued most forcibly, that that shows that what those who use the language of the Act of 1842 meant, when

they spoke of an office or an employment, was an office or employment which was a subsisting, permanent, substantive position, which had an

existence independent from the person who filled it, which went on and was filled in succession by successive holders; and if you merely had a man

who was engaged on whatever terms, to do duties which were assigned to him, his employment to do those duties did not create an office to which

those duties were attached. He merely was employed to do certain things and that is an end of it; and if there was no office or employment existing

in the case as a thing, the so-called office or employment was merely an aggregate of the activities of the particular man for the time being. And I

think myself that that is sound.

Sikri, J. then observed that the language of Rowlatt, J. was accepted as generally sufficient by Lord Atkin and Lord Wright in Mcmillan v. Guest

(1943) 24 Tax Cas 190. Lord Atkin observed:--

There is no statutory definition of ''office''. Without adopting the sentence as a complete definition, one may treat the following expression of

Rowlatt, J. ..... as a generally sufficient statement of the meaning of the word: ''an office or employment which was a subsisting, permanent,

substantive position, which had an existence independent of the person who filled it, which went on and was filled in succession by successive

holders-''

Lord Wright observed:--

The word "office" is of indefinite content; its various meanings cover four columns of the New English Dictionary, but I take as the most relevant

for purposes of this case the following: "As position or place to which certain duties are attached, especially one of a more or less public

character".

It thus appears "that, to be an "office" a position or place has to satisfy three tests:

(i) It must be a subsisting, permanent and substantive position;

(ii) it must exist independently of the incumbent who occupies it; and

(iii) it must be a position of a more or less public character to which certain duties are attached.

In Srimati Kanta Kathuria Vs. Manak Chand Surana, the majority took the view that the first two tests were not satisfied and, therefore, Srimati

Kathuria did not hold an office. The minority applied the same tests but took the view that all the tests were satisfied. We think that, in the cases

before us, the posts of the law officers satisfy all the three tests. The posts of law officers are undoubtedly subsisting, permanent and substantive

posts. They have been existing for a long time and continue to do so even now. These posts have been filled in succession by successive holders

and, therefore, exist independently of the persons who hold them. These posts are, more or less, public posts and there are duties attached to

them. It is immaterial that the duties are of a nature which are normally imposed upon a counsel in his relation with his client. In Mahadeo"s case,

Civil Appeal No. 1832 of 1967, D/- 15-10-1968 (SC) also, though the duties imposed upon the panel lawyers were duties which are normally

imposed upon a counsel by his client and the relationship between them and the State was essentially that of counsel and client, yet the Supreme

Court held that they held office under the State. For these reasons, we think that the posts of the law officers are clearly "offices".

9. We may now notice two decisions of this Court which were placed before us. In Raj Kishore Lal v. State of U. P. (Writ Pern. No. 2829 of

1967 decided on 8-9-1967 (All.)), a Division Bench of this Court held that a District Government Counsel did not hold a civil post under the State

as he was not a servant of the State and that Article 311 of the Constitution was not applicable to him. This. case has no bearing on the question

which arises before us. In order that a post or position should be an "office" under the State, it is not necessary that the incumbent must be a

servant of the State. In Suresh Prakash Agarwal v. State of U. P. 1970 All LJ 351 Satish Chandra, J. held that a panel lawyer of the State in the

district courts held an "office under the State* and Article 16(1) was applicable to him. The decision is based upon a consideration of the

provisions of the Legal Remembrancer''s Manual and not on the tests laid down by the Supreme Court for determining whether a post or position

is an ''office'' or not.

10. We have, therefore, come to the conclusion that the posts or positions of the law officers in the High Court are ''offices''. Since the

appointments and continuance in office of the persons appointed to the offices rests solely with the Government and their remuneration is fixed and

paid by the Government, they are ''offices under the State''. Appointments to these offices are covered by Article 16(1). The first point raised on

behalf of the appellant is thus without any substance.

11. The next point that has to be considered is whether the appointment of the law officers by the Government without first issuing an

advertisement or a notice inviting applications for the posts violated the provisions of Article 16(1). In this connection, the petitioners have relied

upon two decisions of the Supreme Court. In Krishan Chander Nayar Vs. The Chairman, Central Tractor Organisation and Others, after the

termination of the services of the petitioner, a ban was imposed by the Government against his employment under the Government. The Supreme

Court held:

It is clear, therefore, that the petitioner has been deprived of his constitutional right of equality of opportunity in matters of employment or

appointment to any office under the State, contained in Article 16(1) of the Constitution. So long as the ban subsists, any application made by the

petitioner for employment under the State is bound to be treated as waste-paper. The fundamental right guaranteed by the Constitution is not only

to make an application for a post under the Government but the further right to be considered on merits for the post for which an application has

been made. Of course, the right does not extend to being actually appointed to the post for which an application may have been made. The ''ban''

complained of apparently is against his being considered on merits. It is a ban which deprives him of that guaranteed right. The inference is clear

that the petitioner has not been fairly treated.

In B. N. Nagarajan v. State of Mysore AIR 1968 SC 1942, it was urged that, if the Government was held to have power to make appointments

and lay down conditions of service without making rules Under Article 309, Articles 15 and 16 would be breached. Repelling this contention, the

Supreme Court said:

If the Government advertises the appointments and the conditions of service of the appointments and makes a selection after advertisement, there

would be no breach of Article 15 or Article 16 of the Constitution, because everybody, who is eligible in view of the conditions of service, would

be entitled to be considered by the State.

On the basis of these decisions, the learned Single Judge held that the issuing of an advertisement or notice was necessary to fulfil the requirements

of Article 16(1). We are unable to agree with this view. The Supreme Court has not laid down that equality of opportunity under Article 16(1) can

only be afforded by publishing an advertisement or issuing a notice.

12. It has been contended on behalf of the appellant that equality of opportunity under Article 16(1) means that there should be the same or similar

opportunity for all citizens and that what this article forbids is discrimination against any citizen in the matter of public employment. This contention

is justified. In Gazula Dasaratha Rama Rao Vs. The State of Andhra Pradesh and Others, the Supreme Court said :--

It would thus appear that Article 14 guarantees the general right or equality; Articles 15 and 16 are instances of the Same right in favour of citizens

in some special circumstances. Article 15 is more general than Article 16, the latter being confined to matters relating to employment or

appointment to any office under the State.

Again, in Ganga Ram and Others Vs. The Union of India (UOI) and Others, the Supreme Court observed :--

The right of equality is guaranteed by Articles 14 to 16 of our Constitution. The petitioners rely on Articles 14 and 16(1). Article 14 is an

injunction to both the legislative and the executive organs of the State and other subordinate authorities not to deny to any person equality before

the law or the equal protection of the laws. Article 16 is only an instance of the general rule of equality laid in Article 14. Sub-Article (1) of Article

16 guarantees to every citizen equality of opportunity in matters of public employment, thereby serving to .give effect to the equality before the law

(guaranteed by Article 14.

That being so, it is legitimate to read Articles 14 and 16 together. Such a reading shows that Article 16(1) lays down that no citizen shall be

discriminated against in the matter of public employment, i.e., such employments must be open to all citizens. This does not prevent the State from

prescribing eligibility qualifications or from making reasonable and rational classifications. The method of employment or appointment, weedier any

rules have been framed thereforeor not, must be such that every eligible person has the same opportunity of being considered for the office. In this

sense, the petitioner and every other eligible Advocate had the same or similar opportunity of being appointed to the offices of the law officers.

Neither by any rule nor by any executive action was the petitioner or any other Advocate excluded from consideration for the appointment to these

offices.

13. Articles 14 and 16(1) do not require any positive act on the part of the State to give equal opportunity to all citizens; they only prohibit the

State from doing anything, whether by making a rule or by executive action, which would deny equal opportunity to all citizens. It is not necessary

that the State must, in every case of public employment, issue an advertisement or notice, inviting applications for the office. In S. T. Venkataiah

Thimmaiah V. State of Mysore AIR 1969 Mys 186, a Division Bench of the Mysore High Court held :--

Nevertheless, it does not follow that omission to advertise posts for which appointments are to be made, necessarily results in infringement of

Article 16 of the Constitution. Such omission may amount to violation of Article 16 in certain circumstances, while in certain other circumstances, it

may not.

In Dr. Kartar Singh Rai Vs. State of Punjab and Another, Sodhi, J. observed :--

It is a mistaken approach to think that in case of every appointment or recruitment to a service or promotion, the State should first invite

applications.

14. In the appointment of law officers, we think that it would not be proper for the State to issue advertisements or notices inviting applications for

the same. It must be remembered that, even after appointment as a law officer, the Advocate so appointed continues in the legal profession and

appears as an Advocate before the High Court on behalf of the State. The relationship between him and the State is still essentially that of counsel

and client. Therefore, the making of an application by an Advocate to the Government applying for the office, whether in response to an

advertisement or notice or otherwise, would amount to soliciting work and would be highly unprofessional and unethical. In the matter of ''A'' an

Advocate AIR 1962 SC 1337, an Advocate of the Supreme Court wrote to the Government of Maharashtra stating: ""I would like to place my

services at your disposal if you so wish and agree"". The Supreme Court held that the Advocate was guilty of professional misconduct and

suspended him from practice.

It is not correct to say that soliciting individual or particular briefs alone is unprofessional and that soliciting a retainer in all briefs from a client is

permissible. In view of the decision of the Supreme Court, any Advocate, who applies for appointment as a law officer, would be committing

professional misconduct and would render himself liable to suspension from practice. That is why we think that the petitioner''s complaint that he

was denied equality of opportunity in the appointment of law officers, as no advertisement or notice was issued by the Government has no validity.

The petitioner''s charge that, in making appointments, there was a violation of Article 16(1) must fail.

15. The petitioner also attacked the validity of paragraph 4 of the general instructions on the ground that it conferred an arbitrary and unguided

power on the Government and empowered it to pick and choose any person arbitrarily for appointment as law officer. This paragraph has been

quoted in the earlier part of this judgment. We are unable to agree that this paragraph confers any arbitrary power on the Governor. The power to

appoint law officers vests in the Governor independently of paragraph 4. This paragraph does not confer the power to appoint law officers; it

merely provides that, in making appointments, the Governor may consult the Advocate-General or the Chief Justice or a Judge or any committee

constituted by him. This paragraph merely provides for the consultation with the Advocate-General etc. and confers no power of appointment. The

guiding principle is inherent in the power of making such appointment, i.e., suitability for the office. In the present cases, the appointments were

made after consultation with the Advocate-General. The Advocate-General is the leader of the Bar in the State, and ex-officio member of the Bar

Council and can reasonably be expected to recommend names of competent and dependable Advocates to whom Government can entrust its

work with confidence. We are unable to agree that paragraph 4 of the general instructions is void.

16. In the writ petitions, allegations have been made against the previous Chief Minister and against the Law Minister that they are persons, with

whom they were closely connected and related, appointed to the posts. Allegations have also been made against the Advocate-General and the

Legal Remembrancer. But none of these persons has been impleaded as a party in any of the writ petitions. The allegations have been denied in the

counter-affidavits filed on behalf of the State. On the materials on the record, we are unable to hold that the appointments or any of them were

made mala fide or by way of nepotism.

17. None of the grounds, upon which the writ petitions were based, has been substantiated. The appeals are accordingly allowed, the judgments of

the learned Single Judge are set aside and the three writ petitions are dismissed. Parties will bear their own costs of these appeals.