

(1997) 05 AHC CK 0200

Allahabad High Court

Case No: C.M.W.P. No. 14140 of 1994

Vinod Sharma and
Others

APPELLANT

Vs

State of U.P. and
Others

RESPONDENT

Date of Decision: May 16, 1997

Acts Referred:

- Constitution of India, 1950 - Article 12, 14, 16, 16(1)
- Uttar Pradesh State Industrial Development Corporation Employees Service Rules - Rule 16, 17, 18, 19, 20

Citation: (1997) AWC 262 Supp

Hon'ble Judges: R.A. Sharma, J; A. Chakrabarti, J

Bench: Division Bench

Advocate: Ashok Khare, for the Appellant; Rakesh Tiwari, Rajendra Jaiswal and S.C., for the Respondent

Final Decision: Allowed

Judgement

R.A. Sharma, J.

Whether appointment to Group B post in U.P. State Industrial Development Corporation (hereinafter referred to as the Corporation), which under the service rules is required to be filled in "by open market selection", can be made without advertising the post, is a question which is involved in this writ petition.

2. Smt. Kanak Misra, Respondent No. 4 was a Group D employee, holding the post of Telephone Operator in the Corporation, having been appointed in 1991. Vide order dated 25.3.1994 she was appointed by way of direct recruitment as Assistant Manager (Legal) by the Managing Director of the Corporation. However, before making her appointment, neither the said post was notified to the Employment Exchange nor was it advertised in the newspapers. Being aggrieved, the Petitioners have filed this writ petition, challenging

the appointment of Respondent No. 5 as Assistant Manager (Legal), which is Group B post.

3. We have heard Sri Ashok Khare for the Petitioners, Sri J. N. Tiwari for the Corporation, Sri Ramendra Asthana for Respondent No. 5 and the learned standing counsel for the State.

4. Sri Ashok Khare, learned Counsel for the Petitioners has made two submissions, namely, (i) Respondent No. 5 could not have been appointed to the post of Assistant Manager (Legal) without advertising the post; and (ii) her appointment has been made on extraneous consideration, learned Counsel for the Respondents, apart from disputing the said submissions, have also disputed the locus standi of the Petitioners to challenge the appointment of Respondent No. 5. Before dealing with the submissions on merit, it is appropriate to deal with the preliminary objection regarding the locus standi at the threshold.

5. The Corporation is a Company incorporated under the Companies Act wholly owned by the Government of U.P. Respondent No. 5 paragraph 15 of her counter-affidavit has admitted this position and the same has also not been disputed by the Corporation. The Corporation is thus, an instrumentality of the Government and is "State" within the meaning of Article 12 of the Constitution of India. Petitioners No. 1 to 8 holding various posts in the Corporation and some of them being Law-Graduate are also eligible for appointment to the post of Assistant Manager (Legal) if the selection is made by direct recruitment. Had the post been advertised, some of them would have applied for the same and got their applications considered on merit in competition with the Respondent No. 5. Right to apply for a post under the State or its instrumentality and the right to get it considered on merit is a fundamental right guaranteed to a citizen under Article 16(1) of the Constitution of India. If the post is not advertised, the opportunity to apply for it is denied, with the result that the right under Clause (1) of Article 16 stands infringed. The Petitioners are, therefore, entitled to challenge the appointment of Respondent No. 5. The preliminary objection is rejected.

6. There are no statutory rules governing the conditions of service of the employees of the Corporation. However, the Board of Directors of the Corporation has framed non-statutory rules, known as U.P. State Industrial Development Corporation Employees Service Rules (hereinafter referred to as the Rules). Chapter III of the Rules consisting of Rules 16 to 27 provides for recruitment/appointment to the posts in Groups A, B, C and D and other consequential and incidental matters in connection therewith, Rule 17, which deals with the source of recruitment, is reproduced below:

(18) Sources of recruitment : Appointments may be made either;

(a) by direct recruitment;

(b) by promotion of the Corporation employees through a departmental test or an interview or selection or by any other manner prescribed by the Board from time to time;

(c) by deputation or employment on contract basis;

(d) from any other sources as approved by the Board. All Group A posts in the Corporation shall be selection posts and will be filled by selection. Such of those Corporation employees who are eligible in terms of qualification, age and experience may also compete for selection.

Seventy five per cent of the Group B posts will be filled in by open market selection and the rest will be filled from the employees of the Corporation. Fifty per cent of the Group C posts other than at the lowest level will be filled in by open market selection and the rest will be filled from the employees of the Corporation.

Seventy five per cent of the Group C posts at the lowest level will be filled in by open market selection and rest will be filled up by the promotion from Group D staff of the Corporation.

The recruitment from amongst the employees of the Corporation by promotion will be made only if suitable candidates with requisite qualifications are available. In case the sufficient number of employees are not available for filling in the quota by promotion, these posts may also be filled in by open market selection and there be no accumulation or carry over to subsequent years. In recruitment by promotion, the criteria of seniority subject to the rejection of "unfit for holding the higher post" shall apply.

Notwithstanding anything contained in the above Rules regarding sources of recruitment, the Appointing Authority will have full powers to modify the source of recruitment of the stipulated percentage for direct recruitment/promotion and the decision of the Appointing Authority shall in each such case, be final.

(Emphasis supplied)

Rule 19, which deals with the manner of selection is also reproduced below:

19. Selection.--Selection for the various posts in the Corporation either by direct recruitment or by promotion from within shall be made by a Committee of not less than 3 persons duly constituted by the Board of Directors. The Selection Committee may draw up a panel of names of candidates fit for selection and furnish it to the Appointing Authority together with its recommendations in the order of merit. While drawing up the list and recommending the order of merit, the Committee shall keep in mind the Government Orders issued from time to time regarding reservations for members of Scheduled Castes, Scheduled Tribes, Backward Classes etc.

Notwithstanding anything contained in the Rules, the Appointing Authority may decide any other mode of selection for filling up the posts and the decision of Appointing Authority shall be final and that appointments may be made by the Managing Director to any posts, whether created or not, in the Corporation on ad hoc basis for a period not exceeding three months or till next Board Meeting whichever is later to meet any emergent situation.

Emphasis supplied)

According to Rule 18, seventy five per cent of the Group B posits are to be filled in by "open market selection" and the remaining are to be filled on the basis of promotion from the employees of the Corporation. When the Rules require filling in a post "by open market selection" it is obligatory for the Corporation and its functionaries to advertise the post/vacancy inviting applications from eligible person for appointment. Selection from open market is not possible unless the posts are duly advertised. That apart, it is not open to the State or its instrumentality to make appointment to a post by way of direct recruitment without advertising the said post. Article 16 of the Constitution of India provides for equality of opportunity to all citizens in the matters of public employment. This Article guarantees a right to every citizen to make an application for any post under the State and to get it considered on merit in accordance with law. Supreme Court in [Ashok Kumar and Others Vs. Chairman, Banking Service Recruitment Board and Others](#), has laid down as follows:

Article 14 read with Article 16 of the Constitution enshrines fundamental right to every citizen to claim consideration for appointment to a post under the State. Therefore, vacant posts arising or expected should be notified inviting applications from all eligible candidates to be considered for their selection in accordance with their merit. The recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Article 14 read with Article 16 of the Constitution.

In [Krishan Chander Nayar Vs. The Chairman, Central Tractor Organisation and Others](#), the Supreme Court has held as under:

The fundamental right guaranteed by the Constitution is not only to make an application for the post under the Government but the further right to be considered on merit for the post for which an application has been made. Of course, the right does not intend to be actually appointed to the post for which an application may have been made.

The right under Clause (1) of Article 16 of the Constitution is guaranteed to each citizen with reference to each occasion of recruitment. In this connection, reference may be made to [Shibban Lal Saksena Vs. The State of Uttar Pradesh and Others](#), wherein the Supreme Court has laid down as follows:

We would like to emphasise that the guarantee contained in Article 16(1) is for ensuring equality of opportunity for all citizens relating to employment, and to appointments to any office under the State. This means that on every occasion for recruitment the State should see that all citizens are treated equally. The guarantee is to each individual citizens and, therefore, every citizen, who is seeking employment or appointment to an office under the State is entitled to be afforded an opportunity for seeking such employment or appointment whenever it is intended to be filled.

Although T. Devadasan's case (supra) has been overruled by the Supreme Court in [Indra Sawhney etc. etc Vs. Union of India and others, etc. etc.](#), on another point, but the aforesaid passage has been cited with the approval while declaring that a year should be taken as the unit for applying the rule of fifty per cent reservation.

7. Supreme Court while dealing with the procedural fairness in recruitment in the case of [Union of India \(UOI\) and Others Vs. N. Hargopal and Others](#), has held that:

The object of recruitment to any service or post is to secure the most suitable person who answers the demands of the recruitments of the job. In the case of public employment, it is necessary to eliminate arbitrariness and favouritism and introduce uniformity of standards and orderliness in the matter of employment. There has to be an element of procedural fairness in recruitment. If a public employer chooses to receive applications for employment where and when he pleases, and chooses to make appointments as he likes a grave element of arbitrariness is certainly introduced. This must necessarily be avoided if Articles 14 and 16 have to be given any meaning.

In [B.S. Minhas Vs. Indian Statistical Institute and Others](#), Supreme Court declared the appointment to the post of Director in the Indian Statistical Institute made under the non-statutory bye-laws without advertising the post, as illegal. The relevant extract from the said judgment is reproduced below:

In view of the pronouncement of this Court on the point it must be held to be obligatory on the part of Respondent No. 1 to follow the bye-laws, if the bye-laws have been framed for the conduct of its affairs to avoid arbitrariness. Respondent No. 1 cannot, therefore, escape the liability for not following the procedure prescribed by bye-laws 2.

Compliance with this bye-laws also seems to be necessary in the name of fair play. If the vacancy in the post of Director had been published as contemplated by bye-laws 2, all the persons eligible for the post may have applied and in that case, the field of consideration would have been enlarged and the selection committee or the counsel would have had a much larger field from which to choose the best available person and that would have removed all doubts of arbitrariness from the mind of those eligible for the post.

In [State of Bihar and another Vs. Madan Mohan Singh and others](#), Supreme Court held that it is not open to make appointment in excess of the advertised post. The same ratio has been reiterated by the Supreme Court in [Ashok Kumar and Others Vs. Chairman](#),

8. It is a constitutional mandate that no appointment by way of direct recruitment to a post under the State or its instrumentality can be made without advertising the post. Unless the post/vacancy is advertised, its existence remains unknown, with the result the fundamental right under Clause (1) of Article 16 of the Constitution to supply and to claim consideration for appointment to the post under the State cannot be exercised. The position would be different if the appointment is to be made otherwise than by direct recruitment. In such a case, the post is not required to be advertised. In this connection, reference may also be made to [B.S. Minhas Vs. Indian Statistical Institute and Others, .](#), wherein after declaring the appointment to the post of Director without advertising the post as illegal, the Supreme Court made the following observations:

Of course, we do not wish to suggest for a moment that appointment to every post must be made only after advertising or publishing the vacancy. That would not be right, for there are quite "a few posts at the top level which cannot be and should not be advertised or publicised, because they are posts for which there should be no lobbying nor should any applications be allowed to be entertained. Examples of such posts may be found in the post of Commander of Armed Forces of the Chief Justice or the Judges of the Supreme Court or the High Court.

9. In the instant case, the Corporation as well as the Respondent No. 5 in their counter-affidavit have stated that the post of Assistant Manager (Legal) was filled in by direct recruitment and not by way of promotion. It is, however, admitted by the Respondents in their counter-affidavits that neither the said post was notified to the Employment Exchange nor was it advertised in newspapers. The appointment of Respondent No. 5 having been made without advertising the post cannot be sustained.

10. Sri J. N. Tiwari, learned Counsel for the Corporation has submitted that under the non-obstante clause appended to Rule 18, which has already been reproduced hereinbefore, it is open to the Appointing Authority "to modify the source of recruitment". Rule 18 has provided four sources of recruitment, one of which is by direct recruitment. The Appointing Authority has not modified the source of recruitment in the instant case. It has rather followed the mode of direct recruitment. The submission of Mr. Tiwari, therefore, has to be rejected. Sri Ramendra Asthana, learned Counsel for Respondent No. 5 has, however, relied upon non-obstante clause appended to Rule 19, which empowers the Appointing Authority to adopt any other mode of selection in place of that provided for in the said Rule. Rule 19 has laid down that the selection for a post by the direct recruitment or by promotion is to be made by a Committee of not less than three persons, duly constituted by the Board of Directors of the Corporation. Under the non-obstante clause, the Appointing Authority could have changed the mode of selection; but that was not done. In the counter-affidavit, it has been stated that the Respondent No. 5 was selected by a duly constituted Committee of three persons. That apart, whatever may be the mode of selection, no vacancy can be filled in and no appointment can be

made to any post without advertising it.

11. As this writ petition is liable to be succeed on the first submission, it is not necessary to go into the second question raised by the learned Counsel for the Petitioners.

12. This writ petition is accordingly allowed with costs. The order dated 25.3.1994 (Annexure V to the writ petition), appointing Respondent No. 5 as Assistant Manager (Legal), is quashed. It is open to the Corporation to make the appointment to the said post after advertising it. If such a post is advertised, it will be open to the Respondent No. 5 and any other eligible person/persons including the Petitioners to apply for the same. If they make such applications, the same will be considered on merit in accordance with law. The claim of Respondent No. 5 will not be rejected merely on the ground that her appointment to the said post has been quashed by this Court.