

**IN THE HIGH COURT OF JUDICATURE AT PATNA****Letters Patent Appeal No.371 of 2023****In****Civil Writ Jurisdiction Case No.17991 of 2013**

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1. Bechan Paswan Son of Late Ratneshwar Paswan, Resident of Village- Harijan Colony, Bariyahi Bazar, P.S.- Bangaon, District- Sasharsa.
 2. Indu Tanti @ Indu Das S/o Suman Tanti, Resident of Village- Balha Garhiya, P.S.- Bangaon, District- Sasharsa.
 3. Arun Paswan S/o Rameshwar Paswan, Resident of Village- Makhar, P.S.- Simri Bakhtiyarpur, District- Sasharsa.

... .. Appellant/s

Versus

1. The State of Bihar through the Secretary, Department of Home (Police), Government of Bihar, Patna.
2. The Secretary, Department of Home Police, Government of Bihar, Patna.
3. The District Magistrate, Saharsa.

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Pramod Mishra, Advocate
For the Respondent/s	:	Mr. P. K. Verma (AAG-3)
		Mr. Saroj Kumar Sharma, AC to AAG-3

CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH**and****HONOURABLE MR. JUSTICE SOURENDRA PANDEY****ORAL JUDGMENT****(Per: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH)****Date: 05-08-2026**

The present appeal has been filed by the appellants against the order dt. 17.01.2023 passed by the Ld. Single Judge of this Court in CWJC No. 17991 of 2013, whereby and whereunder the writ petition filed by the aforesaid appellants has been dismissed being devoid of merit.

2. The brief facts of the case, according to the appellants,





are that a meeting of the Chaukidar/Dafadar Establishment Committee in the district of Saharsa was held on 21.01.2004 and 22.01.2004 and it was decided to fill up 70 vacant posts of Chaukidar/Dafadar in Saharsa district on compassionate basis by appointing dependent of deceased Chaukidar/Dafadar in their place as also nominees of the retired Chaukidars/Dafadars including the petitioners, whereafter appointment of 52 persons was made by the District Magistrate from the list of 70 candidates vide Memo dated 27.01.2004, however the appellants were not appointed, leading to them approaching the authorities. The appellants had then filed a writ petition bearing CWJC No. 11769 of 2007, which was disposed of by an order dt. 08.04.2011 with a direction to the Collector, Saharsa to examine the case of the appellants and one another upon representation being filed by them within a period of 6 months. The Collector, Saharsa by an order dated 26.10.2012 had rejected the representation of the appellants on the ground that firstly as per the Bihar Chaukidar Cadre Rules, 2006, appointments can be made on the post of Chaukidars only by publication of advertisement and under a valid selection process, hence the appellants cannot be appointed on the post of Chaukidar on "*Awaji*" or nomination basis and secondly, the





Hon'ble High Court has held in a catena of judgments that appointment cannot be made on the post of Chaukidar/Dafadar on the basis of nomination. In this regard reference be had to a judgment rendered in the case of ***Suresh Prasad Kushwaha vs. The State of Bihar & others***, reported in ***2006(2) PLJR 106*** and the one rendered in the case of ***Ram Pukar Sah vs. The State of Bihar & others***, reported in ***2006(3) PLJR 436***.

3. Being aggrieved by the aforesaid order dated 26.10.2012 passed by the District Magistrate, Saharsa, the appellants had filed the connected writ petition bearing CWJC No. 17991 of 2013, which has been dismissed by the impugned order dated 17.01.2023.

4. The Ld. Counsel for the appellants has submitted that 52 other candidates, who were appointed as Chaukidar/Dafadar, were also removed from service, however their issue of removal came up for consideration before this Court in LPA No. 95 of 2013, which was allowed by a coordinate Bench of this Court vide order dated 02.04.2013, hence it is submitted that the order dated 26.10.2012 passed by the District Magistrate, Saharsa has become ineffective, thus the appellants are required to be appointed on the post of Chaukidar.

5. We have heard the Ld. Counsel for the parties and





perused the materials on record from which it is clear that as far as the order dated 02.04.2013 passed by a coordinate Bench of this Court in LPA No. 95 of 2013 is concerned, the said appeal was partly allowed and the direction issued by the Ld. Single Judge to the effect that the Chaukidars/Dafadars appointed pursuant to the proceedings dated 22.01.2004, shall be removed only after giving them opportunity of being heard was modified to the extent that the legality of the appointment of the said Chaukidars/Dafadars will be considered by the appointing authority after perusal of reply to the show cause notice which may be submitted by each of the appellants as also in light of the statutory rules framed by the State Government and the prevalent circulars/orders/instructions issued by the State Government, whereafter the appointing authority will take a decision independently in accordance with law without being influenced by the observations made by the Ld. Single Judge. Thus, we find that the aforesaid appeal bearing LPA No. 95 of 2013 was not allowed by a coordinate Bench of this Court vide order dated 02.04.2013 and in fact the appointing authority was only directed to consider the legality of the appointment of the appellants of the said appeal after perusal of reply to the show cause notice and keeping in view the statutory rules framed by





the State Government and the prevalent circulars/orders/ instructions issued by the State Government.

6. We would now delve on the law settled by this Court as also the Hon'ble Apex Court on the issue involved in the present appeal. One of the initial litigation pertaining to the issue in question had arisen by way of a writ petition bearing CWJC No. 16519 of 2001 having been filed by one Sudhir Kumar & Ors. against the State of Bihar & Ors. including private respondents, challenging the appointment of the private respondents on the ground that they have been selected and appointed only because they were relations or nominees of the erstwhile Chaukidars/ Dafadars, which is contrary to the earlier orders of the Court. The Ld. Single Judge of this Court by an order dated 16.10.2008 had cancelled the appointment of such private respondents on the post of Chaukidars/Dafadars. The said order dt. 16.10.2008 was challenged in LPA No. 997 of 2008 (Surendra Paswan & Ors. Vs. The State of Bihar & Ors.), however the Ld. Division Bench of this Court by an order dated 04.03.2009 dismissed the appeal and the aforesaid order dated 16.10.2008 passed by the Ld. Single Judge was upheld. The aforesaid appellants i.e. Surendra Paswan & Ors. had then approached the Hon'ble Apex Court and the Hon'ble Apex Court by a judgment dated





19.04.2010, reported in **(2010) 6 SCC 680** has held that the appellants cannot claim any right to be appointed as legal heirs/nominees of the erstwhile Chaukidars/Dafadars, hence the appeal filed by the aforesaid appellants was disposed of with a direction to hold fresh selection process for the post of Chaukidars which shall be done by the selection committee constituted as per the Bihar Chaukidar Cadre Rules, 2006.

7. It appears that yet another round of litigation had arisen upon a writ petition bearing CWJC No. 6471 of 2021 having been filed by one Devmuni Paswan, wherein it has been claimed that since the father of the writ petitioner was working as Chaukidar and he had made an application seeking voluntary retirement, the writ petitioner should be appointed in place of his father, however the said writ petition was dismissed by the Ld. Single Judge of this Court by an order dated 25.08.2022. The said order dated 25.08.2022 was challenged before the Ld. Division Bench of this Court and by an order dt. 25.02.2023, reported in **2023 SCC Online Pat. 11866**, the said appeal was dismissed while holding that Rule 5(7) of the Bihar Chaukidar Cadre (Amendment) Rules, 2014 (hereinafter referred to as the 'Rules, 2014'), which provides for appointment by way of nomination of the dependent of the erstwhile Chaukidar, is





contrary to the express provision of the Constitution of India being violative of Article 14 and 16 of the Constitution, hence the said provisions were set aside and it was held that the appellants could not claim any benefit under Rule 5(7) of the Rules, 2014. The said judgment dated 25.02.2023 passed by a coordinate Bench of this Court was challenged by filing a Special Leave Petition bearing SLP (C) No. 12954 of 2023, however the same has stood dismissed vide order dated 17.07.2023 passed by the Hon'ble Apex Court.

8. We also find from the records that the ***Bihar Rajya Dafadar Chaukidar Panchayat (Magadh Division)*** had also challenged the aforesaid judgment dated 25.02.2023 passed by the Ld. Division Bench of this Court in LPA No. 508 of 2022 (Devmuni Paswan vs. The State of Bihar & others), by filing a Special Leave Petition bearing SLP (C) No. 18983 of 2023, which culminated into a judgment dated 2nd April, 2025, paragraphs no. 2 to 11, 19, 20, 26 to 33, 37 and 42 to 44, whereof are being reproduced herein below:-

" 2. The challenge in the SLP is to a judgment & order dt. 25th Feb., 2023 of a Division Bench of the High Court dismissing an intra-court appeal of the respondent no. 7.

3. In the pre-constitutional set-up, the practice in Bihar was to appoint village chaukidars (village watchmen) for lifetime who used to work without any leave or





retirement. During his illness or absence, any of his family members would assist him in performance of his duties; and when he died or became infirm, usually his family member nominated by him would take over the functions of a chaukidar, though the post was not strictly hereditary [see: Surendar Paswan v. State of Bihar⁵].

4. The father of the respondent no. 7, who was a chaukidar, had applied for appointment of his son, i.e., the respondent no. 7, as a chaukidar in terms of the Bihar Chaukidari Cadre (Amendment) Rules, 2014⁶. However, such application was rejected since the father of the respondent no. 7 had made the application after his retirement. This triggered a writ petition⁷ by the aggrieved respondent no. 7, which was dismissed by the Single Judge of the High Court on 25th August, 2022. It is the said order that has been upheld by the Division Bench vide the impugned judgment and order.

5. The SLP is at the instance of a registered trade union. The petitioning union was not a party to the proceedings before the High Court, either before the Single Judge or the Division Bench. It claims to represent members who are in position to claim benefits flowing from the BCC (A) Rules. Proviso (a) to sub-rule (7) of Rule 5 of the BCC (A) Rules⁸, introduced by way of an amendment in 2014, ordains that any person working in the cadre of chaukidar would be at liberty, a month prior to his retirement, to nominate his dependent kin for appointment in his place as chaukidar. The Division Bench proceeded to hold the offending proviso to be contrary to Articles 14 and 16 of the Constitution of India and, consequently, struck it down. As a sequitur, it was also held that the application of the respondent no. 7's father for grant of benefit of employment to respondent no. 7 in accordance with Rule 5 of the BCC (A) Rules does not arise.

6. The primary contention of the petitioning union is that the offending proviso not being under challenge in the





writ petition or in the appeal of the respondent no. 7, the Division Bench clearly exceeded its jurisdiction in striking it down. It is the further contention of the petitioning union that the offending proviso is perfectly legal and valid; also that such an order was made without even putting the members of the petitioning union on notice and, therefore, any order adversely affecting the chaukidars in service ought to be nullified being in breach of principles of natural justice. One other contention was also raised.

7. The brazen manner in which the respondent no. 19 has derogated from Constitutional provisions to favour a handful of employees working as chaukidars, much to the detriment and prejudice of those patiently waiting for public employment, has engaged our due attention. As we proceed further, we would notice precedents declaring the law on the topic in no uncertain terms, which have been way-laid by the respondent no. 1 with impunity.

8. Even as we celebrate 75 (seventy-five) years of our Constitution and take pride in governance of the country in terms thereof, still we find some of the States following archaic models of employment as if employment in public service is a hereditary right. It is for this reason that we propose to pen a few words in support of our conclusion that the Division Bench was perfectly justified in striking down the offending proviso although, admittedly, the same had not been subjected to any formal challenge.

9. The Division Bench referred to the decisions of this Court in Renu v. District and Sessions Judge, Tis Hazari Courts, Delhi, Bhawani Prasad Sonkar v. Union of India, V. Sivamurthy v. State of Andhra Pradesh and Ahmednagar Mahanagar Palika v. Ahmednagar Mahanagar Palika Kamgar, to support its conclusion that the Constitution of India shuns appointment in public service by succession. In other words, employment should not flow as if it were heritable.

10. Two propositions in our Constitutional jurisprudence





are no longer debatable. One is, there has to be equality of opportunity in matters of public employment and the other that, any law, which permits entry into public service without granting equal opportunity to all, would fall foul of Article 16 and is liable to be outlawed unless a reasonable classification, which is also valid, can be shown to exist.

11. Taking the discussion further, having read the decisions relied on by the Division Bench as well as the decisions referred to therein, law seems to have crystallised to the effect that apart from a scheme for employment on compassionate ground envisaging offer of appointment to an eligible dependant family member of an employee dying-in-harness or an employee suffering medical incapacitation, rendering him unfit to continue in service, or any scheme for public employment to a landowner, who relinquishes his right to receive compensation for acquisition of his land in lieu of an appointment, or any other scheme devised as a measure of protective discrimination, not breaching principles of reasonable classification, public employment has to be preceded by (i) an appropriate advertisement inviting applications from eligible aspirants to offer their candidature or/and by requisitioning names of prima facie eligible candidates from the employment exchanges, (ii) screening the eligible aspirants by keeping aside the ineligible, (iii) conducting of a process of selection meeting the tests of fairness and transparency with a body of selectors constituted in accordance with the relevant law, (iv) making an impartial and bias-free selection upon due assessment of the inter se merits of the aspirants, (v) preparation of a merit list of candidates found suitable as per merit and arranging their names recognising such merit with due regard to rules of reservation, both vertical and horizontal, (vi) preparing a wait-list of candidates, if the governing rules so require and (vii) then proceeding to offer appointments from the merit list as well as from the waiting list, if the occasion





to operate such waiting list does arise, giving due regard to merit - and merit alone.

19. Arising from Bihar, there is the decision in Surender Paswan (supra). The dispute there was between the appellants (who claimed themselves to be the hereditary nominees in terms of a circular dated 20th December, 1995 issued by the respondent no. 1) and the private respondents (who were appointed on the post of Chaukidar pursuant to an advertisement dated 3rd October, 1994). The appointment of the private respondents was terminated by the respondent no. 1 on 21st January, 1997. The High Court, vide order dated 07th April, 1997, quashed the order dated 21st January, 1997 as illegal and directed the Divisional Commissioner to ascertain whether there was any irregularity in the appointment of the private respondents and, if there were none, the claim of the appellants was to be considered on merits and not in accordance with the circular dated 20th December, 1995. It is imperative to note that the order of the High Court attained finality as it was never challenged. Thereafter, the Divisional Commissioner found irregularities in the appointment of the private respondents and directed the District Collector to consider the individual claim of the appellants. This order was set aside by the High Court on the ground that the earlier order of the High Court dated 07th April, 1997 was not followed in letter and spirit and directed the Divisional Commissioner to take steps and pass appropriate orders. The Divisional Commissioner relegated the matter to the Collector for making fresh appointments, who in turn, offered appointment to the appellants. Appellants' appointments were thereafter challenged by private respondents in a writ petition which was yet again disposed of with the direction to decide the issue strictly in terms of the order of the High Court dated 07th April, 1997. Challenge to this order was





unsuccessfully carried through a Letter Patents Appeal, which was impugned before this Court. This Court while deprecating hereditary appointments, did not feel the need to go into the question of constitutionality of the rules as the original order of the High Court dated 07th April, 1997 directing, inter alia, appointment strictly on the basis of merit, was never challenged. In view of the order dated 07th April, 1997 having attained finality, it was held that the appellants cannot claim any right to be appointed as legal heirs/nominees of the erstwhile chaukidars; therefore, the question of either examining the validity of the Circular dated 20th December, 1995 or considering whether the appointment of the appellants was in terms of the said circular, does not arise. Hence, this Court, directed fresh selection as per the Bihar Chowkidar Gradation (sic, Cadre) Rules, 2006.

20. Surender Paswan (supra) too, therefore, did not approve of appointments on the ground of descent.

26. It would, therefore, appear from the above that this Court has consistently deprecated the practice of appointment in public service as if public offices are heritable and has also upheld a law which abolished village officers being appointed on hereditary basis. Importantly, the observation made in B.R. Shankarnarayana (supra) regarding the extent of the powers of a court to put a law to scrutiny which, in form, appears to be within the power of the legislature but, in substance, exceeds its reach has to be borne in mind while deciding whether the Division Bench could have struck down the offending proviso.

27. It is indeed surprising that despite the aforesaid precedents of the sixties of the past century declaring the law authoritatively and the decision in Surender Paswan (supra), which emerged from Bihar, as late as in 2014, the respondent no. 1 again sought to make appointment on the post of chaukidar a heritable right in favour of the dependent kin of the chaukidar in service. The offending





proviso being in the teeth of the precedents noted above, the same was rightly struck down by the Division Bench and the impugned judgment and order is unexceptionable on this score.

28. The next contention that the offending proviso was not under challenge in the writ petition and, therefore, the Division Bench ought not to have struck it down is liable to be rejected for the reason that follows.

29. Several decisions have been cited in support of the aforesaid contention. We need not refer to them individually.

30. Law is well settled that a law, be it a primary legislation or a subordinate legislation (rules, regulations or orders made under the authority of a primary legislation), cannot be struck down by a court unless there is a direct challenge to such legislation. It is also a well-established principle of Constitutional Law that constitutional questions should not be decided in vacuum and that they must be decided only if and when they arise properly on the pleadings of a given case & where it is found necessary to decide them for a proper decision of the case.

31. However, the common thread that runs through all these precedents laying down such law is that the party aggrieved in each case, seeking relief from the court, omitted to lay a challenge to the law and the said omission impeded the grant of relief to such party.

32. The situation here is completely different. The respondent no. 7 was seeking relief from the High Court relying on the offending proviso. In a case where the party aggrieved seeks enforcement of a provision of a rule, which is seemingly unconstitutional, would he raise the plea of its unconstitutionality? It would be imprudent for him to do so and hence, the answer cannot but be in the negative. While considering the plea of the respondent no. 7, the Division Bench found the offending proviso to be so obtrusively unconstitutional that notwithstanding absence of a specific challenge thereto, it proceeded to declare the same as void. Although the





Division Bench had no occasion to refer to the decisions that we have referred to above, nothing much turns on it. The Division Bench must be presumed to be aware of the law on the subject that appointment cannot be claimed as a hereditary right and, thus, without even a challenge being laid to the offending proviso thought of striking it down. We do not see any illegality in such an approach.

33. However, a caution needs to be sounded. While not suggesting for a moment that the course of action which the Division Bench adopted in this case can routinely be adopted, we see no reason as to why the power to suo motu declare a subordinate legislation invalid, on the ground of its being manifestly contrary to a Fundamental Right read with binding precedents in terms of Article 141, should not be conceded to be within the vast reserve of powers of the Constitutional Courts. Though exercise of powers, suo motu, in an appropriate case in exercise of jurisdiction under Article 226 of the Constitution cannot be doubted, it is indubitable that such power has to be exercised sparingly and with due care, caution and circumspection. We are minded and do hold that, a writ court, when it finds its conscience to be pricked in a rare and very exceptional case by the patent unconstitutionality of a subordinate legislation connected with the issue it is seized of, may, upon grant of full opportunity to the State to defend the subordinate legislation and after hearing it, grant a declaration as to unconstitutionality and/or invalidity of such legislation. After all, as the sentinel on the qui vive, it is not only the duty of the writ courts in the country to enforce Fundamental Rights of individuals, who approach them, but it is equally the duty of the writ courts to guard against breach of Fundamental Rights of others by the three organs of the State. This power is a plenary power resident in all the Constitutional Courts. Should, in a given case, it be found that there has been an egregious violation of a Fundamental Right as a result of operation of a subordinate legislation and the issue is concluded by a binding decision of this Court, we





consider it the duty of the writ courts to deliver justice by declaring the subordinate legislation void to safeguard rights of others who might not still have been affected thereby. We reiterate, it can only be done rarely and in cases which stand out from the ordinary.

37. Having given the said contention of Mr. Sankarnarayanan the consideration it deserves, we are of the view that the Division Bench after hearing the learned counsel for the respondent no. 1 as well as on consideration of the wealth of authorities that it relied on to strike down the offending proviso arrived at a correct conclusion that the same was void and its exercise of powers to quash it cannot be a subject of assail on the ground of it being beyond the jurisdiction of the High Court.

42. While it is true that a dependent kin of an employee cannot be favoured with a public employment by his employer merely on the ground that the employee seeks to retire voluntarily before attaining the age of superannuation, it is equally true that the dependant kin, if he is otherwise eligible for appointment and on competing with other aspirants has achieved the requisite standard, figures high up in the merit list and there are sufficient vacancies, he would seem to acquire a right to be considered for selection & consequent appointment; however, the fact that his father is/was an existing/a former employee of the same employer should make no difference while considering the candidature purely based on merit.

43. That is, however, not the case here. No right, far less any enforceable right of the members, has been infringed by reason of the impugned judgment and order. For reasons assigned above, since the offending proviso does not conform to Article 16 of the Constitution, the plinth of the petitioning union's attack to the impugned judgment and order crumbles. Therefore, even if the petitioning union did not have any audience before the High Court, it





matters less since its members' grievance has duly been considered by us.

44. We are, thus, of the considered opinion that the impugned order of the Division Bench does not warrant any interference."

9. Considering the law laid down in a catena of decisions rendered by the Hon'ble Apex Court as also this Court, as enumerated hereinabove in the preceding paragraphs, we find that it is a trite law that dependent kin of a Chaukidar/Dafadar cannot be favored with public employment by his employer merely on the ground that the employee seeks to retire voluntarily before attaining the age of superannuation.

10. Having regard to the facts and circumstances of the case and for the foregoing reasons, we find that the claim of the appellants for being appointed on the post of Chaukidar/Dafadar in Saharsa District on "*Awaji*"/compassionate/nomination basis is untenable in the eyes of law, hence we do not find any merit in the present appeal, thus the same stands dismissed.

(Mohit Kumar Shah, J)

(Sourendra Pandey, J)

S.Sb/-

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