
(2009) 04 SHI CK 0082
In the High Court Of Himachal Pradesh

Dhian Singh

APPELLANT

Vs

State of Himachal Pradesh and Others

RESPONDENT

Date of Decision : 21-04-2009

Acts Referred:

Citation : (2009) 3 ShimLC 407

Hon'ble Judges : Rajiv Sharma, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Rajiv Sharma, J.—Brief facts necessary for the adjudication of this petition are that the petitioner was appointed as a Clerk in the respondent-department on 1.11.1981. He was given the senior scale with effect from 1.7.1985. The next promotion from the post of Clerk is either Senior Assistant or Extension Officer (Industries). The Clerks are required to give option either for the post of Senior Assistant or Extension Officer (Industries). However, in the case of Senior Assistant, a Clerk with three years service is eligible for promotion whereas for the post of Extension Officer (Industries), minimum service required as a Clerk is ten years. In the year 1989, the Director (Industries) sought option from the petitioner regarding his promotion. He opted for being promoted as Senior Assistant. Respondents No. 3 and 4 opted for promotion to the post of Extension Officer (Industries) in the year 1988 and 1986, respectively. The petitioner was promoted to the post of Assistant (now re-designated as Senior Assistant) on 7.7.1990. His promotion was cancelled on 1.10.1992 (Annexure A-2). Respondents No. 3 and 4 were promoted to the post of Senior Assistants on 1.10.1992 itself.

2. Mr. D.P. Gupta, Advocate has strenuously argued that the action of respondents No. 1 and 2 of conceding the promotion of the petitioner vide letter dated 1.10.1992 and promoting respondents No. 3 and 4 on the same date was arbitrary. He then contended that his client has given option in the year 1989 for being considered to the post of Senior Assistant. Respondents No. 3 and 4 have

given option for being considered to the post Extension Officer. According to him the option of respondents No. 3 and 4 was irrevocable. He lastly contended that the respondents No. 3 and 4 could not give option retrospectively after the petitioner stood promoted on 7.7.1990.

3. Mr. R.K. Sharma, learned Senior Additional Advocate General has supported the letter dated 1.10.1992. According to him it was open" to respondents No. 3 and 4 to give option on the basis of instructions issued on 30.7.1990.

4. I have heard the learned Counsel for the parties and perused the record carefully.

5. It was not in dispute that two channels are available for promotion to the clerk. He can be considered against the post of Senior Assistant as well as Extension Officer (Industries), however, the candidate is required to give his option for a particular channel. In the present case, the petitioner had given his option for being considered to the post of Senior Assistant in the year 1989-90. Respondents No. 3 and 4 have given option for being considered to the post of Extension Officer (Industries) in the year 1988 and 1986 respectively. The petitioner was promoted to the post of Senior Assistant on 7.7.1990. In fact respondent No. 3 had submitted an application for change of option on 10.2.1989. It was turned down by the Director (Industries) on 3.3.1989. Once the petitioner has been promoted though on ad-hoc/temporary basis to the post of Senior Assistant, there was no occasion for respondents No. 1 and 2 to reconsider the option exercised by respondents No. 3 and 4. In any case, even, if the option was changed as per letter dated 30.7.1990, the same could be applied prospectively. These instructions have been issued on 30.7.1990 and by that time the petitioner already stood promoted to the post of Senior Assistant pursuant to letter dated 7.7.1990. A bare perusal of Annexure A-I reveals that the promotion of the petitioner was initially for a period of three months or till Shri Ram Lal Gupta, Assistant resumes his duty whichever is earlier. He joined his duties as Assistant (now designated as Senior Assistant) on 21.8.1990 after Sh. Ram Lal Gupta had already joined on 1.8.1990 and he was continued for two years and he also earned two increments against the post of Senior Assistant. In these circumstances it was not open to respondents No. 1 and 2 to promote respondents No. 3 and 4 to change their option once exercised in the year 1988 and 1986 respectively. The petitioner has been replaced by ad hoc promotees i.e. respondents No. 3 and 4. This was also not permissible under law.

6. The petitioner was promoted on 7.7.1990. He continuously discharged his duties for two years and earned two increments. Mr. D.P. Gupta has vehemently argued that no notice was issued to the petitioner before reverting his client on the basis of letter dated 1.10.1992. This position has not been disputed by the learned Senior Additional Advocate General. The petitioner has definitely been visited with civil and evil consequences and he was required to be heard before the issuance of letter dated 1.10.1990. There is violation of principle of natural justice. He was rightly promoted after taking into consideration his option to the

post of Senior Assistant.

7. The learned Senior Additional Advocate General towards the end has strenuously argued that the petitioner had no right for consideration for promotion since the promotion in question was on ad hoc basis.

8. A Division Bench of this Court in *Dr. V.K. Bhargava v. State of Himachal Pradesh and Ors.* ILR 1985(HS) has held that Articles 14 and 16 will apply to ad hoc promotions as well. Their Lordships have held as under:

33. It cannot be possibly disputed that even an ad-hoc appointment to a post is an appointment to an office, howsoever tenuous its character may be. Such ad-hoc appointment authorizes the appointee to occupy the post and to perform the functions and to discharge the duties and to draw the emoluments attached to the post. In case of ad-hoc appointment to any post by way of promotion, there is also the conferment of a higher status or position. When such an appointment is made to any office under the State, Articles 14 and 16 will undoubtedly have an impact. Article 16, Sub-Article (1) provides that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the the State. It is settled law that Article 16 is only an incident of the application or the concept of equality enshrined in Article 14. Article 16, Sub-Articles (1) and (2), really give effect to ths equality before law guaranteed by Article 14 and to the prohibition of discrimination guaranteed by Article 15(1). These three provisions form part of the same constitution code of guarantees and supplement each other and they give effect to the doctrine of equality in the matter of appointment and promotion. In other words, Article 16 guarantees that there shall be equality of opportunity for alt citizens. In matters relating to employment or appointment to any office under the State or to promotion from one office to a higher office threreunder. (See: *General Manager, Southern Railways and Anr. v. Rangachari*, Respondent, *Gurbux Dass*, Intervener AIR 1968 SC 349 and *C.A. Rajendran Vs. Union of India (UOI) and Others*, In deciding the scope and ambit of the fundamental right of equality of opportunity guaranteed the relevant Article a technical or pedantic approach must be avoided. Looked at from this angle, there is no reason to exclude the applicability of Article 16 In matters relating to ad-hoc employment or appointment to any office under the State. Any Arbitrariness, unfairness or inequality of treatment in the matter of ad-hoc employment or appointment, including an appointment by way of ad-hoc promotion, to any office under the State would, therefore, give rise to any legitimate challenge enforceable in writ jurisdiction on the ground of the breach of Article 16. If there are any policy decisions/executive instructions governing ad-hoc appointments and there any arbitrary or irrational departure therefrom on the part of the State, the act impinges upon the guarantee of equality of treatment enshrined In Article 16. If there is a statutory enactment regulating such appointments and there is a breach thereof, an additional ground of challenge based on the infringement of a legal right would also be available. This much on principle.

34. In *E.P. Royappa Vs. State of Tamil Nadu and Another*, the petitioner, an IAS Officer, challenged his order of transfer on several grounds, including the violation of Article 14. There are direct and pertinent observations in that decision on the issue under consideration in the concurring judgment of Bhagwati, K. Those observations at pages 583 and 584 may be quoted with advantage:

Article 16 embodies the fundamental guarantee that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Though enacted as a distinct and independent fundamental right because of its great importance as a principle ensuing equality of opportunity in public employment which is so vital to the building up of the new classless egalitarian society envisaged in the Constitution, Article 16 is only an instance of the application of the concept of equality enshrined in Article 14. In other words, Article 14 is the genus while Article 16 is a species. Article 16 gives effect to the doctrine of equality in all matters relating to public employment. The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalizing principle? It is a founding faith, to use the words of Bose, J. "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all embracing scope and meaning, for to do so, would be to violate with may aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to whim and caprice of an absolute monarch. Where and act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore, violative of Article 14 and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: In fact the latter comprehends the former. Both are inhibited by Articles 14 and 16.

It is also necessary to point out that the ambit and reach of Articles 14 and 16 are not limited to cases where the public servant is in an officiating position, he can complaint of violation of Articles 14 and 16 and if he has been arbitrarily or unfairly treated or subjected to mala fide exercise of power by the State machine. It is, therefore, no answer to the charge of infringement no right to the post of Chief Secretary, but was merely officiating in that post. That might have some relevance to Articles 311, but not to Articles 14 and 16.

The above quoted observations, In our opinion, furnish a complete answer to the plea that since an ad-hoc appointment does not confer any right to the post, the protection of Articles 14 and 16 is not available and no enforceable right comes into existence In relating to such appointment. The principle laid down in the decision affirms the legal position that if the State action concerning an appointment to a post, which a public servant has no right to hold, is not based on valid and relevant principle applicable alike to all similarly situate and is guided by extraneous or irrelevant considerations, there would be denial of equality within the meaning of Articles 14 and 16. The public servant affected will be entitled under such circumstances to complain and seek relief on the ground that he has been arbitrarily or unfairly treated or subjected to mala fide exercise of power by the State machine. It is no answer to the charge of infringement of Articles 14 and 16 to say then that the public merely on an officiating or ad-hoc basis. True it is that in an "officiating post". The distinction if any, sought to be made on that ground to our mind, is based on no real difference. The ratio of the decision fs that even a person, who has no right to hold a post, is entitled to the protection of Articles 14 and 16. It makes little difference whether the situation In which there is no right to hold the post arises on account of the person holding the post in ad-hoc or officiating capacity.

41. These case illustrate that the protection of Articles 14 and 16 has been extended even in cases of ad-hoc appointments. The cases are illustrative and not exhaustive. However, it is no use multiplying authorities in view of the fact that the question under consideration stands concluded, on principle, by the decision in E.P. Royappa's case. Apparently, therefore, it is too late in the day now to contend that since an ad-hoc appointment does not confer a right to the post, even if a public servant has been arbitrarily or unfairly treated or subjected to mala fide exercise of power by the State authorities in connection with such appointment, no actionable claim arises which can be enforced in writ jurisdiction. In our opinion, therefore, even in respect of ad-hoc appointments, an aggrieved public servant can invoke the writ jurisdiction in any of the following three situations: (1) where there is a statutory enactment governing ad-hoc appointments and any action is taken concerning such appointment which Is in breach of such enactment, (2) where there is no statutory enactment but there is a policy decision or an executive order governing ad-hoc appointments and any action is taken concerning such appointment by making an "arbitrary, irrational or fanciful departure from such policy or an executive order, and (3) even where there is no statutory enactment or policy decision or an executive order governing ad-hoc appointments but any action is taken concerning such appointment without regard to valid and relevant principles applicable alike to all similarly situate and guided by extraneous or irrelevant considerations or founded on mala fide exercise or abuse of power. Any such action can be challenged in writ jurisdiction on the ground of statutory violation and/or infringement of Articles 14 and 16 as the case may be.

9. In view of the observations made hereinabove, the petition is allowed. The

impugned letter dated 1.0.1992 whereby respondent Nos. 3 and 4 have been promoted to the posts of Senior Assistants is quashed and set aside. The petitioner is held entitled to all the consequential benefits from the date, respondents No. 3 and 4 were promoted i.e. 1.10.1992. The consequential benefits shall be worked out within a period of eight weeks from today. There will, however, be no order as to costs.