
(1977) 10 RAJ CK 0019
In the Rajasthan High Court
Case No : Civil Writ No. 1418 of 1973

Dr. P.S. Gehlot

APPELLANT

Vs

The State of Rajasthan and Others

RESPONDENT

Date of Decision : 13-10-1977

Acts Referred:

Constitution of India, 1950 — Article 16, 299, 311
Evidence Act, 1872 — Section 115

Citation : (1977) WLN 384

Hon'ble Judges : M.L. Jain, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

M.L. Jain, J.—The petitioner was a lecturer in Psychiatry in the RNT Medical College, Udaipur, while one Dr. D.D. Bhattacharya was also a lecturer in the same discipline. According to the Rajasthan Medical Services (Collegiate Branch) Rules, 1962, two posts of Reader in the same faculty were required to be filled in 1970 one by promotion and one by direct recruitment. The petitioner contends that the Departmental Promotional Committee which met sometime in the year 1970 for selection of a promotee, put Dr. Bhattacharya at No. 1 and the petitioner at No. 2. Meanwhile, the other post had also been advertised by the Public Service Commission. Dr. Bhattacharya was selected also by the Public Service Commission and was appointed a Reader on 15-12-70 against the direct vacancy retrospectively w.e.f. 8-12-70. The Dy. Secretary to the Government of Rajasthan in the Medical Department thereafter wrote a letter on 23-12-70 to the Public Service Commission that both Dr. Bhattacharya and the petitioner Dr. Gehlot were approved by the Departmental Promotion Committee held in the year 1970 Dr. Bhattacharya who was placed at No. 1 has been appointed against the direct quota on probation. It was, therefore, proposed to appoint Dr. Gehlot against the promotion quota. Since under the said Rules, a promotee candidate ranks senior to a direct recruit, and undertaking was obtained from Dr. Gehlot that he will not claim seniority over Dr. Bhattacharya. After concurrence of the

Commission and prolonged consideration, at various levels in the Secretariat the petitioner was appointed on 13-4-71 as a Reader on probation of 6 months retrospectively, w.e.f. 27-10-1970, or the date of joining whichever was later. The appointment was without prejudice to the seniority of Dr. Bhattacharya in the specialty. Later on, it was discovered that the Departmental Promotion Committee had in fact, not recommended the name of Dr. Gehlot. His appointment was therefore, without any prior notice, cancelled by the State Government by its order dated 16th August, 1973, but he was not reverted as a lecturer and by the same order, was appointed retrospectively as officiating Reader w.e.f. 27-10-70 until a candidate selected by Departmental Promotion Committee was made available. In 1973, the Departmental Promotion Committee again assembled on 29-9-73 to review its earlier recommendations made in 1970, but was unable to approve Dr. Gehlot for the post of the Reader and it did not recommend any change in its 1970 proposals. Dr. Bhattacharya now opted to be appointed against the promotion quota and he was so appointed on 23-1-74, of course retrospectively w.e.f. 8-12-70. Thereafter, Dr. Bhattacharya was again appointed against the direct quota and is alleged to have retired as such. The petitioner, filed this petition on 24-9-73 and prayed for a declaration that the order of 16-8-73 revoking his appointment was illegal and be quashed with a direction to give him all consequential benefits.

2. The State Government in its reply has stated that the Departmental Promotion Committee recommended only one name that of Dr. Bhattacharya, that too not on the basis of merit formula but on the basis of seniority-cum-merit. It was incorrect to say that the name of the petitioner was also recommended by the said Committee. Moreover, the marking formula having been struck down by the Supreme Court, all selections made on its basis in the year 1970 were reviewed by the Departmental Promotion Committee. In 1973, the DPC which reviewed the recommendations of 1970 did again not recommend the case of the petitioner. No enquiry or notice was necessary to be served upon the petitioner for cancellation of his appointment which was made in order to rectify the mistake that had crept in and hence vitiated his initial appointment.

3. The petitioner has rejoined that Shri Bhattachann having accepted the appointment as a direct recruit, could not then be appointed against the promotion quota. It is contended on the basis of a decision of this Court in *Badrinath Khandelwal v. State of Rajasthan* in D.B. Civil Writ Petition No. 384 of 1961 dated April 3, 1961, that if a particular post is open to be filled by two methods and the person chooses one instead of another, then he cannot later on, turn back and say that he is entitled to be appointed by another method. The argument perhaps is that if Dr. Bhattacharya were not given the option, the petitioner could continue to be appointed against the promotion quota even though not found fit by the DPC. It was then stated that if Dr. Bhattacharya was appointed against the promotion quota, then the post vacated by him should have been filled by direct recruitment at least in the year 1973 but by not calling upon the Rajasthan Public Service Commission to fill that post by direct

recruitment, the Government of Rajasthan has violated Rule 7 of the aforesaid Rules, which enjoins that the recruitment to the post of the Reader shall be in equal proportion by both the methods. Later on Dr. Bhattacharya sought voluntary retirement from service and requested the Government that he might be allowed to retire from the post on which he was appointed by direct recruitment. He was permitted to do so. It is only now after the retirement of Dr. Bhattacharya that a post is being advertised to be filled by direct recruitment. If the petitioner is now made to face the Public Service Commission, then, he shall stand deprived of the right to seek employment guaranteed by Article 16 of the Constitution in as much as he shall be seriously handicapped by competing with a large number of candidates and perhaps better that has qualified and joined the arena during the past six years or so.

4. The stand of the Government appears to be that the order of the appointment of the petitioner was required in any case to be cancelled firstly, because it was made in consequence of a mistake that the DPC in 1970 had recommended the petitioner as well and secondly, because Dr. Bhattacharya having been selected, both as a direct recruit and as a promotee chose to be appointed against the promotion quota.

5. On 25-1-74, the operation of the order dated 16-8-73 was stayed. The RPSG advertised one post in 1976. On 23-12-76, the Government was refrained by this Court from making any appointment on the post of the Reader.

6. I have heard arguments and seen the record of the case. It appears from the record of the proceedings of the DPC shown to me that the appointment of the petitioner, Dr. Gehlot was not recommended by the DPC in 1970, nor in 1973.

7. The learned Counsel for the petitioner submits that the order of appointment of the petitioner made on 13/14-4-1971 could not be revoked for the following reasons:

(1) As required by Sub-rule (2) of Rule 24 of the aforesaid Rules the Departmental Promotion Committee was required to prepare a list containing names of suitable candidates upto twice the number of posts required to be filled by promotion under Sub-rule (1). Since one such post was required to be filled by promotion, the Departmental Promotion Committee was bound to make a recommendation of two names. If it did not specifically mention the name of the petitioner, it has not discharged its duty, and there being only two lecturers in the field, Dr. Gehlot shall be deemed to be the second name.

(2) Under Sub-rules (6) and (7) of Rule 24 the DPC is required to include in its list also the name of a superseded candidate and it is open to the Government to approve such list with such modification as may in their opinion be just and proper. Rule 25 requires that appointments can be made only out of the list submitted and modified as aforesaid. The order of appointment of Dr. Gehlot, therefore, is covered by Sub-rule (7) of Rule 24 and Rule 25 because it shall be deemed that the list submitted by the DPC was modified by the Government.

(3) The respondent State was bound by equitable estoppel and could not have made the impugned order to the detriment of the petitioner.

(4) The order of appointment could not be revoked without giving the petitioner an opportunity of being heard.

8. As regards the first contention, the duty cast upon the DPC under Sub-rule (2) of Rule 24 is to prepare a list containing names of "suitable candidates" upto twice the number of posts to be filled by promotion. It is therefore clear that if the Departmental Promotion Committee did not find suitable candidates in the requisite number, then, it cannot recommend names which it did not consider suitable. It will be failing in its duty if it prepared a list which also contained names which it considered unsuitable. The first contention, therefore, is rejected and no breach of any provision of the aforesaid rule can be said to have been committed by the DPC in not recommending Dr. Gehlot whom it did not find suitable.

9. As regards the second contention, the name of the petitioner could not be forwarded because he was not superseded as no one junior to him was recommended by the DPC. But it is urged that the Government had powers to modify the list sent by the DPC and the order of appointment of Dr. Gehlot shall be deemed to be a result of such modification made by the State Governments. The learned Counsel for the petitioner in this connection referred to the case of *Dr. Mahendra Patni v. State of Rajasthan* and Ors. S.B Civil Writ petition No. 536 of 1966 decided on 9-5-66, in which the appointment of a superseded candidate was held valid as it was covered by Sub-rule (7) of Rule 24 and 25 of the aforesaid Rules. I do not think that case can be pressed into service because the case of the petitioner is no doubt of non-selection yet it is not a case of appointment of a superseded candidate. The learned Counsel cited several rulings to show that if a power to do a thing is there, and if a wrong provision of law is invoked or referred, then too the exercise of such power cannot be considered to be illegal or void simply because proper reference of the law conferring power has not been invoked or cited. No one can dispute this proposition and it is hardly necessary to burden this judgment with the citations of all these cases. But the question is whether this proposition can be applied in this case, namely, whether the order of appointment of the petitioner dated 13th April, 1971 can be held to have been made; under Sub-rule (7) of Rule 24 and Rule 25 of the said rules, To my mind this is not possible. It is not the case of the Government that the appointment was made or should be considered to have been made by way of modification of the list sent by the DPC. In other words, it should be a conscious exercise or invocation of the power and while doing so, a reference to a wrong provision or no reference to any provision of law it will not derogate from that power or vitiate its exercise. The case of the Government is that the appointment of Dr. Gehlot was made upon a mistaken idea that his name was included in the list sent by the DPC. In that situation, it cannot be said that the appointment was consciously made by the State Govt. even though the

name of the petitioner was not recommended by the DPC. If the Government had taken the decision to appoint him inspite of the recommendation of the DPC, then, it could perhaps be urged that the appointment was covered by Sub-rule (7) of Rule 24. Here, the Government says that it had acted mistakenly on a foundation which did not exist. The second contention must therefore, fail.

10. The third contention is based upon a decision of the Supreme Court reported in *Union of India v. Anglo Afgan Agencies* AIR 1968 SC 718 in that case the Supreme Court found that (a) the authority vested in the Textile Commissioner by the relevant rules, even though executive in character, was from its nature an authority to deal with the matter in a manner consonant with the basic concept of justice and fair play. If he made an order which was not so consonant, his proceedings were open to scrutiny and rectification by the courts, and (b) even though the case did not fall within the terms of Section 115 of the Evidence Act, it was still open to a party who had acted upon the representation made by the Government to claim that the Government shall be bound to carry out the promise made by it, even though the promise was not recorded in the form of a formal contract as required by Article 299 of the Constitution. This decision was again affirmed in *Century Spinning and Manufacturing Company Ltd. and Another Vs. The Ulhasnagar Municipal Council and Another*, and it was held that there is a clear distinction between a representation of an existing fact and a representation that something will be done in future. The former may raise an estoppel if another person alters his position relying upon that representation. The latter may result in a contract if another person to whom it is addressed acts upon it. If the statute requires that the agreement shall be in a certain form, no contract may result but in appropriate cases an equity may be raised against him to compel performance of the obligation arising out of his representation. In *Turner Morrison and Co. Ltd. Vs. Hungerford Investment Trust Ltd.*, it was observed that the rule of equitable estoppel, has gained new dimensions in recent years. Where one party has taken the other at his word and acted on it, the party who gave the promise or assurance cannot afterwards be allowed to go back to the previous legal relationship as if no such promise or assurance was ever made by him but he must accept their legal relationship. This principle however does not create any new cause of action which did not exist before. But the *Indo Afgan Agencies* case AIR 1968 SC 718 had been distinguished in *Narinder Chand Hem Raj and Others Vs. Lt. Governor, Administrator, Union Territory, Himachal Pradesh and Others*, purporting to hold that notwithstanding any representation made by the Government, no court can issue a direction to a law making body not to enact a law or to a Government to refrain from enforcing a provision of law. And in *M. Ramanatha Pillai Vs. The State of Kerala and Another*, it was clearly held that as a general rule, the doctrine of estoppel will not be applied against the State in its government or public or sovereign capacity except to prevent fraud or manifest injustice. In *Excise Commissioner, Uttar Pradesh, Allahabad and Others Vs. Ram Kumar and Others*, the Supreme Court remarked that it is now well settled that there can be no question of

estoppel against the Government in the exercise of its legislative, sovereign or executive powers. The Government cannot divest itself of the right incidental to its office by conduct which in the case of a private person would amount to estoppel. In view of these latest pronouncements of the Supreme Court, the argument is no more available to the petitioner that the State was bound by equitable estoppel and that the petitioner having acted upon the representation of the State made by it in its order of April 13, 1971, the State cannot cancel that order even though it was based upon some mistaken belief of facts. The considerations such as if the petitioner is now asked to face a competition before the R.P.S.C., he will have to meet a larger and tougher competition, or if the petitioner had not been told that he had been selected by the D.P.C., he could have in the year 1971, itself, sought avenues of better employment elsewhere, cannot be allowed to override the fundamental principle that the State cannot fetter its future legislative or executive action by any contract or equity what so ever. The third contention must therefore, also fail.

11. The last contention. Since it is not a case of reduction in rank by way of punishment, Article 311 of the Constitution will not be attracted. There is no provision in the rules for revocation of the order of the appointment, but a right to revoke a wrong appointment vide Section 18 of the Rajasthan General Clauses Act 1955, and the Government is always at liberty to rectify its mistake. If a power to rectify a mistake is denied to the Government, then, power of good governance is denied. It must further be borne in mind that the D.P.C. having not recommended the petitioner, his appointment was invalid and when the mistake was known, it became the duty of the State Government to rectify the same. Can such an order be not made without giving any notice to the petitioner and will it in the absence of an enquiry or notice amount to a breach of principles of natural justice and therefore, bad in law? In *A.K. Kraipak and Others Vs. Union of India (UOI) and Others*, and in *State of Gujarat and Others Vs. Ambalal Haiderbhai and Others*, , it was observed that the Rules of natural justice are not rules embodied always expressly in a statute or in the rules framed thereunder. They may be implied from the nature of the duties to be performed under a particular statute. What particular rule of natural justice should be implied and what its content should be for a given case must depend to a great extent on the facts and circumstances of that case, the frame-work of the law under which the enquiry is held and the constitution and nature of duties of the Tribunal or the body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been controverted, the court has to decide whether observance of that rule was necessary for a just decision on the facts of that case. Now looking to the aforesaid service Rules, it appears to me that while exercising the powers under the rules, the Government is not required to act judicially or quasi judicially but rules, required it to act justly & fairly & not arbitrarily or capriciously. When a court holds that an administrator should act fairly, "in general it means a duty to observe the rudiments of natural justice for a limited purpose in exercise of functions that are not analytically

judicial but administrative, vide S.A. de Smith. Judicial Review of Administrative Action (Ed. 3rd) p 208. In this case, the Government has acted justly and fairly more than what the situation demanded as it was bound to set aside an order of appointment made under a mistake and while doing so, it appointed the petitioner with retrospective effect until a candidate selected by the D.P.C. is available. It would have been arbitrary and unfair on its part to have allowed his illegal appointment to continue and consolidate by passage of time. He could have been reverted to the post of lecturer forth with but instead of doing so, the Government gave him an opportunity of being considered by the D.P.C. once more. But in 1973 the D.P.C. refused to review his case. With the resignation of Dr. Bhattacharya, he again has a chance of being appointed a Reader both, as a promotee and as a direct recruit. I, therefore, reject the fourth contention.

12. The result is that the petition has no force and fails and is hereby dismissed. However, there shall be no order as to costs.