

(1971) 04 RAJ CK 0005
In the Rajasthan High Court
Case No : Civil Writ Petition No. 312 of 1970

Dr. Swayambar Prasad Sudrania

APPELLANT

Vs

State of Rajasthan and Another

RESPONDENT

Date of Decision : 09-04-1971

Acts Referred:

Constitution of India, 1950 — Article 16, 226

Rajasthan Service (Collegiate Branch) Rules, 1963 — Rule 30(2)

Citation : AIR 1972 Raj 69 : (1971) RLW 397 : (1971) 4 WLN 187

Hon'ble Judges : P.N. Shinghal, J

Bench : Single Bench

Advocate : M.L. Joshi, for the Appellant; Ashok Kumar Mathur, Dy. Govt. Advocate, D.P. Gupta and S.K. Keshote, for the Respondent

Judgement

P.N. Shinghal, J.—Petitioner Dr. S. P. Sudrania passed the M. B- B. S. examination in 1962 and joined the service of the Rajasthan State as Civil Assistant Surgeon on February 28, 1964. He was selected for that post by the Rajasthan Public Service Commission, and was confirmed on July 31, 1966. In the meantime he graduated M. D, in Paediatrics from the Rajasthan University in the first attempt in 1966.

2. Dr. K. M. Hemrajani, respondent No. 2, took the diploma in Child Health in 1963. and the M. D. In Paediatrics in 1964 (in the second attempt). He joined the service of Rajasthan State as Civil Assistant Surgeon on July 20, 1966 and on selection by the Rajasthan Public Service Commission he was confirmed on October 1, 1968.

3. Both the petitioner and respondent Dr. Hemrajani wanted to be appointed as Clinical Tutors in Paediatrics. They were interviewed by the Central Selection Committee on January 4, 1967. Ex. R. 1 records the minutes of the meeting of the Committee by which respondent Dr. Hemrajani was selected and placed at No. 1 in the order of merit, while petitioner Dr. Sudrania was placed at No. 2. The petitioner was posted as a Clinical Tutor in Paediatrics in Jodhpur and he

assumed charge on February 4, 1967 by an order dated January 30, 1967, while respondent Hemrajani was posted in Ajmer and took over charge of Clinical Tutor on February 9, 1967 under the same order. Dr. Hemrajani was however transferred to Jaipur.

4. A vacancy arose in the post of Lecturer in Paediatrics in February 1970 when the professor happened to proceed on leave for further studies. The State Government issued order Annexure Rule 1 No. F. 1(5) Appts./C/52 dated March 13, 1970 appointing respondent Hemrajani as Lecturer in Paediatrics. The order reads as follows,--

"Dr. Kanhaya H. Hemrajani, CAS-and Tutor in Paediatrics S. H. S. Medical College. Jaipur, is hereby appointed as Lecturer in Paediatrics, S. P. Medical College, Bikaner, purely - on temporary and ad hoc basis till further orders."

The petitioner felt aggrieved against that order on the grounds that he ranked senior to Dr. Hemrajani, applications were not invited for filling the post, an equal opportunity was not given to those eligible for it, there was violation of the fundamental right guaranteed by Article 16 of the Constitution and there was breach of the service rules etc. He therefore filed the present writ petition on March 16, 1970. It was admitted on March 17, 1970. and Rule was issued to the respondents. An order was made the same day for the issue of notices of the stay application returnable within 2 weeks, with the direction that, ut the meantime, effect shall not be given to the impugned order (Annexure No. 1) dated March 13, 1970 relating to the appointment of respondent No. 2 as Lecturer in Paediatrics if he had not already taken over the charge of that post. The respondents, however, took the stand that Dr. Hemrajani had already taken over charge, and the stay application was rejected. In view of the nature of the impugned appointment, a direction was then given that the respondents may file their replies within 3 weeks and the case listed for hearing within 5 weeks. It appears that it could not be taken up for hearing until now for one reason or the other.

5. Both the respondents have traversed the claim of the petitioner En their replies. The reply of the State of Rajasthan contains some important statements of facts which are within its special knowledge as the employer. Thus the State has stated that the inter se seniority of the petitioner and respondent No. 2 has not been fixed or published, that the question of rilling the post of Lecturer in Paediatrics in accordance with the Rajasthan Medical Service (Collegiate Branch) Rules, 1962, hereinafter to be referred to as "the Rules", did not arise as it was merely a leave vacancy, and that as it was a stop-gap arrangement the post was filled on a purely ad hoc basis to meet a purely temporary need.

It has been stated in this connection that the State Government, was "bound" to respect the selection made by the highly qualified persons and that for that reason respondent No. 2 was ap pointed on an ad hoc basis, temporari- ly, on the post of Lecturer. It has been contended further that Rule 30 (which, it is

admitted before me, has been incorrectly typed as 13 in paragraph 12 of the reply) did not apply to the ad hoc appointment.

6. Respondent Dr. Hemrajani has taken the plea that he was found to be "more meritorious" by the Central Selection Committee when it interviewed the candidates for selection as Clinical Tutors in Paediatrics, and that he is also better qualified as he has passed the diploma in Child Health in 1963-He has thus contended that the petitioner is junior to him, and that his claim to the contrary is quite unsustainable. It has also been pleaded that the State Government had considered the claim of the petitioner for appointment as Lecturer, before making the impugned order Annexure Rule 1 dated March 13, 1970. It has further been contended that it was not at all necessary for the State Government to invite any applications for filling the purely temporary vacancy, that the impugned appointment has been made in accordance with Rule 30 (2) of the Rules, and that the contention of the petitioner regarding the denial of equal opportunity is untenable so that there was no breach of Article 16 of the Constitution.

7. The petitioner has filed a replication, and a supplementary rejoinder has been filed by the respondent State. I shall refer to the pleadings to the extent necessary when I deal with the arguments of the learned counsel.

8. It has been pointed out by Mr. Joshi, learned counsel for the petitioner, that the post of Clinical Tutor does not belong to the Rajasthan Medical Service (Collegiate Branch), so that it does not fall within the purview of the Rules, and is in fact quite independent of it. On the other hand, the post of the Lecturer in Paediatrics belongs to the Clinical Wing of the service, and the Rules require that it should necessarily be filled entirely by direct recruitment. He has therefore argued that the post could not be filled by promotion from amongst Clinical Tutors, so that it was necessary for the appointing authority to consider the cases of all those candidates who belonged to the same category or sphere or source of selection for filling the temporary vacancy. The learned counsel has contended further that as the petitioner and respondent Dr. Hemrajani belonged to the same category and were persons who fell within the same sphere of selection or source, it was necessary to consider their competing claims before selecting one of them for appointment as a temporary lecturer. As this was not done and the petitioner was not considered at all while appointing respondent Dr. Hemrajani as a temporary Lecturer, it has been argued that the appointing authority violated the petitioner's fundamental right under Article 16 of the Constitution. The first point for consideration therefore is whether this argument is correct.

9. In order to appreciate the argument, it is necessary to refer to the reply of the respondent State. It will be recalled that the following important statements of fact have been made in that reply,--

(i) Respondent Dr. Hemrajani was recommended at No. 1 in the order of preference of the Central Selection Committee which was constituted for selecting the Clinical Tutors in Paediatrics (paragraphs 3, 6 and 10) of the reply).

(ii) The inter se seniority of the petitioner and respondent No. 2 has not been fixed on the post of Clinical Tutor (paragraph 6 of the reply).

(iii) The State Government was "bound" to respect the selection made by the highly qualified persons and on that ground respondent No. 2 was appointed on ad hoc basis temporarily on the post of Lecturer (paragraph 10 of the reply)

(iv) Article 16 of the Constitution had not been violated because respondent No. 2 was given the chance on the basis of the recommendation of the Central Selection Committee (paragraph 10 of the reply).

It has thus been established beyond doubt, from the special facts within the knowledge of the appointing authority, namely, the State Government, that it considered itself "bound" by the recommendation of the Central Selection Committee, which made its recommendations for the appointment of Clinical Tutors, and that it appointed Dr. Hemrajani on the post of Lecturer entirely on the basis of that recommendation. As soon as the petitioner came to know of these averments in the reply of the State, he filed a rejoinder taking the specific plea that he was left out of consideration when respondent Dr. Hemrajani was appointed as a Lecturer by the impugned order Annexure Rule 1 dated March 13, 1970. He also pleaded that in doing so the appointing authority did not consider the cases of all the eligible candidates so that its order of appointment was quite invalid. The respondent State has not met this ground of the petitioner, by any reply to the contrary. Respondent Dr. Hemrajani! has no doubt stated in his reply that the petitioner's case was also taken into consideration at the time of making the impugned order Annexure Rule 1 dated March 13, 1970, but no value can be attached to it because he had no means of knowing what the facts were. At any rate, he could not know more in the matter than the appointing authority.

10. The fact therefore remains that the petitioner's case was not taken into consideration at the time of filling, the post of Lecturer on a temporary basis. It has to be remembered that the petitioner and Dr. Hemrajani were both Civil Assistant Surgeons and were working as Clinical Tutors in Paediatrics. They therefore belonged to the same category or source or sphere of selection, and it was not permissible for the appointing authority to consider only the case of Dr. Hemrajani and to exclude altogether the competing claim of the petitioner. There is therefore justification for the argument of the petitioner's learned counsel that the petitioner was not given an equal opportunity relating to employment or appointment on the post of Lecturer in Paediatrics within the meaning of clause (1) of Article 16 of the Constitution, so that the impugned appointment is quite invalid. It may be that it was permissible for the appointing authority to attach importance to the fact that respondent Dr. Hemrajani had been preferred to the petitioner in the matter of appointment as a Clinical Tutor, but that could not justify the complete exclusion of the petitioner's case from consideration while filling the different post of lecturer- Then there is the further fact that a period of a little more than 3 years had gone by since the petitioner and ? respondent Dr. Hemrajani were appointed as Clinical Tutors, and the appointing authority was

thus in a position to take their performance as Clinical Tutors also into consideration. The failure to do so shows that the appointing authority remained under the impression that once Dr. Hemrajani had been preferred to the petitioner in the matter of appointment as a Clinical Tutor, it was "bound" to adhere to that preference for every other post. In taking this view, the appointing authority fell into a serious error because it has been admitted in the reply of the respondent State that the Inter se seniority of the petitioner and respondent No. 2 and others had not been fixed on the posts of Clinical Tutors. It is therefore difficult to repel the argument that the preference which was once shown in arranging the names of the petitioner and respondent Dr. Hamrajani was in a way of an ephemeral nature inasmuch as it was spent after their initial appointment as Clinical Tutors. I have therefore no doubt that the appointment of Dr. Hemrajani as Lecturer under the impugned order Annexure Rule 1 was quite invalid.

11. The law bearing on the point has been considered in a number of judgments of their Lordships of the Supreme Court which bear out the view I have taken. Thus it has been held in *Banarsi Das and Others Vs. The State of Uttar Pradesh and Others*, with reference to Article 16 of the Constitution, that selection for appointment in government service has got to be made on a competitive basis. Then it has been held in *High Court, The High Court, Calcutta Vs. Amal Kumar Roy*, that an equal opportunity must be provided- by considering all the eligible candidates. Again, it has been held in *Sant Ram Sharma Vs. State of Rajasthan and Another*, that if the appointing authority has considered the case of the petitioner along with the other eligible candidates before filling the vacant higher post, there would be no breach of the provisions of Articles 14 and 16 of the Constitution because everyone who was eligible in view of the conditions of service and was entitled to consideration was actually considered for promotion. In this judgment also the requirement as to the consideration of the competing claims of the eligible candidates has been reiterated.

12. Apart from the above judgments of the Supreme Court, it has been held in *A. N. Nagnoor v. State of Mysore AIR 1964 Mys 229* which was a case of a temporary appointment, that an employee has a right to ask for consideration of his claim for promotion along with others who are similarly situated, and that if the appointing authority overlooks his claim, or does not apply its mind to it, that amounts to denial of equality of opportunity in violation of Article 16 of the Constitution. A similar view has been taken in *K.M. Joseph, Trivandrum and Another Vs. State of Kerala and Another*, *Mrs. Davender Brarnee Sandhu v. State of Punjab. 1969 Serv LR 613 = (1970 Lab IC 727 Punj)* was a case of a leave vacancy but the appointment was set aside on the ground that the selection was not made on a competitive basis and the cases of all the eligible candidates were not considered on the merits.

13. The view I have taken regarding the invalidity of the appointment of respondent. Dr. Hemrajani is therefore supported by a large number of decisions.

14. There is however one more reason for the view I have taken. The post of Lecturer in Paediatrics belongs to the Rajasthan Medical Service (Collegiate Branch). It is a junior post, and is governed by the Rules. Rule 30 of the Rules deals with temporary or off-ciating appointments. Sub-rule (2) of that rule deals with the filling of a temporary vacancy in a junior post, and provides as follows,--

"(2). A temporary vacancy in the Junior post may be filled by Government by appointing thereto temporarily a person eligible for appointment by direct recruitment to the service under the provisions of these Rules."

It is the admitted case of the parties that the vacancy in the post of Lecturer in Paediatrics, in respect of which the impugned order Annexure 1 was made on March 13, 1970, was a leave vacancy of some 10 months duration. It was therefore a temporary vacancy within the meaning of the aforesaid Sub-rule (2) of Rule 30 of the Rules, and it should have been filled by the appointing authority in accordance with the provisions of that rule. The petitioner has contended in paragraph 12 of the petition that the impugned appointment was made in violation of Rule 30 (2) of the Rules, for I have no doubt that the mention of Sub-rule (3) of that rule in that paragraph is a typographical error as a period of six months had not expired so as to attract Sub-rule (3) thereof. At any rate when the respondent State has itself taken the plea that the impugned appointment was made on a purely ad hoc basis and that "the question of filling up that post in accordance with the Rajasthan Medical Services (Collegiate Branch) Rules, 1962 does not arise". It is quite permissible for the petitioner to contend that the appointment having not been made in accordance with the requirement of the Rules was invalid for that reason also. Then it has been further stated in paragraph 12 of the reply that "Rule 13 does not apply to ad hoc appointments made against the Vacancies created by leave". It has been frankly admitted by learned Deputy Government Advocate that "13" is a typographical mistake for "30". The argument of the petitioner's learned counsel thus really emerges from the statement of facts in the reply of the appointing authority, and there is no reason why it should not be assessed on that basis.

15. A reading of Sub-rule (2) of Rule 30 of the Rules shows that it is meant to govern a temporary vacancy, in a junior post. The vacancy which occurred in the post of Lecturer in the present case was a temporary vacancy, so that it had to be filled in accordance with the provisions of Sub-rule (2) which controlled the discretion of the appointing authority. It was no doubt permissible for the appointing authority to take the impugned order of appointment out of the purview of Sub-rule (2) of Rule 30 by showing those facts and circumstances which excluded it from its purview, but this has not been done. All that has been pleaded is that the appointment was made on an ad hoc basis, and it has been argued by learned Deputy Government Advocate that it was outside the purview of Rule 30 (2) of the Rules.

16. The expression "ad hoc" has been defined as follows in Webster's Third New International Dictionary.-

"ad hoc/(") ad"hok also -ok/ adv [NL, Lit., for this] : for the particular end or purpose at hand and without reference to wider application or employment a special number appointed ad hoc according to the problem under consideration..

Ad hoc/ (") = / =/ adj; made, established, acting, or concerned with a particular end or purpose (a coordinated policy instead of ad hoc decisions (an ad hoc commission of inquiry)".

It will thus appear that if an appointment is made for a particular end or purpose at hand, and without reference to wider application or employment, it would be an ad hoc appointment. So where there is a leave or other temporary vacancy, it is quite permissible for the appointing authority to make an ad hoc appointment for the particular end or purpose of filling it, so long as that appointment is otherwise unexceptionable. Such ad hoc appointments are often made where there are no service rules to guide and control the discretion of the appointing authority. It may also be that the service rules may themselves provide for the making of ad hoc appointments. But where a service rule provides for the filling of a temporary vacancy, that rule will govern the discretion of the appointing authority and will prevail. It may be that while making the appointment Under the service rules the appointing authority may, as a matter of abundant caution, characterise it as ad hoc, but it is not possible for that authority to disregard the rule altogether and take ! the stand that it is not bound by it. To put it more plainly, it is not per- missible for the appointing authority in such a case to say that it can make an ad hoc appointment simply for the particular end or purpose of giving the employment to a particular person.

17. What has happened in the, present case is that even though the temporary vacancy in the post of Lecturer fell squarely within the purview of Sub-rule (2) of Rule 30 of the Rules, the appointing authority (the State Government) has taken the stand that the rule did not apply as the appointment was made on an ad hoc basis. Even so, care has not been| taken to state for what particular end or purpose the appointment of Dr. Hem-rajani was made as a Lecturer in Paediatrics if not to give the appointment to him, when it should really have been made in accordance with Sub-rule (2) of Rule 30 of the Rules. In other words, no such fact or circumstance has been brought on the record as could take the impugned appointment out of the purview of that sub-rule. So when the State of Rajasthan has categorically pleaded that the appointment was not made under that sub-rule, this should justifiably lead to the conclusion that the appointment has been made in violation of the rule, and is therefore invalid for that reason also.

18. It has however been argued by the learned counsel for respondent No. 2 that as the impugned appointment was made in a leave vacancy, for a period of about 10 months, by the impugned order Annexure R 1 dated March 13, 1970, that order has spent itself and the Writ Petition must be dismissed as infructuous. He has tried to support his argument by a reference to G. M. Dar v. State of Jammu and Kashmir 1970 Serv LR 1 = (AIR 1970 J. & K. 90). As I shall show, this argument is also untenable.

19. It will be recalled that the present Writ Petition was filed on March 16, 1970, three days "after the passing of the impugned order Annexure Rule 1. An ad interim stay order was also made on March 17, 1970. The respondent however took the plea that the order had already been implemented, and it was for that reason that the stay application could not proceed further and was rejected. Care was however taken to direct that the Writ Petition may be listed for hearing within 5 weeks. The intention therefore was to examine the petitioner's claim for the issue of a mandamus, well in time. In these facts and circumstances, it will not be just or proper to refuse the examination of the petitioner's grievance merely because it has not been possible to hear and dispose of the Writ Petition before the expiry of the period for which respondent Dr. Hemrajani was appointed as a Lecturer in the Paediatrics.

20. it is true that the petitioner cannot now secure a mandamus, for now there is nothing to set aside -- the order (Annexure 1) dated March 13, 1970 having spent itself by efflux of time- But I do not think that there is any justification for refusing the declaratory relief prayed for by the petitioner's learned counsel that the impugned appointment of respondent No, 2 was invalid. it is well settled that such a declaratory relief falls within the purview of Article 226 of the Constitution and can be granted in a proper case. It will be enough for me to refer to the decisions of their Lordships of the Supreme Court in T. C. Basappa v. T. Nagappa, AIR 1654 SC 440. Kavalappara Kottarathil Kochunni Moopil Nayar Vs. The State of Madras and Others, A.B. Abdulkadir and Others Vs. The State of Kerala and Another, and Dwarka Nath Vs. Income Tax Officer, Special Circle D-ward, Kanpur and Another, In A.B. Abdulkadir and Others Vs. The State of Kerala and Another, the new Rules were abrogated as from January 1958, and it was urged on behalf of the State that their Lordships should not grant a mere declaration as to the invalidity of the Rules when they were no longer in existence. Their Lordships repelled the contention for the reason that they "must look to the situation as it was when the petitions were presented," and they granted a declaration that the Rules were invalid. The law is thus well settled that a declaratory relief can be granted in a proper case. I am mindful of the fact that such a relief cannot be granted as a matter of course and that the Court has to examine each case with the necessary care and caution. Applying the well-known tests, the facts which have prevailed with me in declaring the impugned appointment of respondent Dr. Hemrajani as invalid are that the appointment was made in violation of the petitioner's fundamental right under Article 16 of the Constitution and in derogation of the provisions of Rule 30 (2) of the Rules. The other fact which has led to this conclusion is that the petitioner approached this court with all possible expedition for the grant of the relief which was then within his reach, and he should not be denied a declaration merely because, for reasons beyond his control, mandamus is not now an appropriate remedy. it has to be appreciated that if such a declaration is not granted, respondent Dr. Hemrajani will be free to take every possible advantage of the fact that he has held charge of the post of Lecturer in Paediatrics for a period of some 10 months and he may thereby

score, or try to score, and undue advantage over the petitioner.

21. This is therefore a fit case for declaring that the appointment of Dr. Hemrajani, respondent No. 2, as Lecturer was invalid and it is ordered accordingly, with costs on respondent No. 1. It is however clarified that nothing in this judgment is meant to prejudice the receipt of the higher emoluments by respondent No. 2 during the period he worked as Lecturer.