

(1989) 06 P&H CK 0017
In the Punjab And Haryana At Chandigarh
Case No : C.W.P. No. 6701 of 1989

Mukhtiar Singh

APPELLANT

Vs

State of Punjab and others

RESPONDENT

Date of Decision : 01-06-1989

Acts Referred:

Advocates Act, 1961 — Section 22, 24(1), 28(2), 49
Advocates Rules, 1961 — Rule 49
Civil Procedure Code, 1908 (CPC) — Section 2
Constitution of India, 1950 — Article 233, 233(1)
Criminal Procedure Code, 1973 (CrPC) — Section 24

Citation : AIR 1991 P&H 20 : (1989) 2 RCR(Criminal) 167

Hon'ble Judges : V. Ramaswami, C.J.;G.R. Majithia, J

Bench : Division Bench

Advocate : Mr. K.P. Bhandari, A.G. and Mr. H.S. Sidhu, for the Appellant;

Judgement

R. Majithia, J.—A writ of quo warranto was sought from this Court calling upon Mr. B. S. Nehra, District and Sessions Judge, Punjab, at present posted as Legal Remembrancer and Secretary to Government, Punjab Law and Legislative Department, Punjab, to show before this Court under what authority he is holding the office as a District and Sessions Judge. A letter dated May 15, 1989, purporting to be sent by Mukhtiar Singh, Ex-Sarpanch, Village Tandian, District Bhatinda was received. It was treated as writ petition and direction was issued to serve notices on Advocate General, Punjab, Advocate General, Haryana, Mr. B. S. Nehra and the petitioner. The petitioner was served through his son, but he did not put in appearance.

2. The facts: Mr. B. S. Nehra (respondent) was enrolled as a pleader on July 18, 1953 and he was enrolled as an Advocate of the Punjab High Court on October 24, 1958. Later on after the coming into force of the Advocates Act, 1961, the Bar Council of Punjab issued him certificate of enrolment as an Advocate under S. 22 of that Act on March 2, 1964. He was appointed as Assistant District Attorney by the Governor, Punjab, on February 20, 1961. The appointment,

envisaged that he will be a Government pleader within the meaning of sub-sec. (7) of S. 2 of the CPC and Public Prosecutor under the Code of Criminal Procedure. In response to an advertisement issued by the Punjab and Haryana High Court inviting applications for posts of Additional District and Sessions Judges, the respondent applied for the same. Along with the application he appended a certificate issued by the District and Sessions Judge, Patiala, to the effect that the respondent remained on the rolls as Pleader from July, 1953 to July, 1956 and from October 29, 1956 to December 31, 1958. The respondent was selected by the High Court and was appointed by the State Government on April 1, 1975. He submits that he had been a practising Advocate for more than 14 years exclusive of five years of practice as a Pleader and he fulfilled the qualifications laid down in Art. 233 of the Constitution for appointment as a District Judge. He further submits that during the period he was working as Assistant District Attorney or District Attorney, he remained enrolled as an Advocate. The Bar Council of India in exercise of power under S.49 of the Advocates Act, 1961 (for short "the Act") framed rules. R.49 of the rules provided that an Advocate shall not be a full-time salaried employee of any person, Government, firm, corporation, or concern so long as he continues to practice. A proviso has been added to this rule which excluded its applicability to Law Officers of Central or State Government or Public Corporation or Body constituted by a statute who is entitled to be enrolled under the rules of his State Bar Council made under S. 28(2)(e) read with S. 24(1)(e) of the Act.

3. Despite his being a full-time salaried employee, a Law Officer for the purpose of this rule means a person who is designated by the term of his employment and who by the said term is required to and/ or plead in Court on behalf of his employer. The period during which he was serving as Assistant District Attorney or District Attorney, he was a Government Pleader within the meaning of sub-sec. (7) of S. 2 of the CPC and Public Prosecutor within the meaning of S. 24 of the Code of Criminal Procedure in that capacity, he was required to act or plead in Courts on behalf of the Government. This period during which he continued in service as such, he will be deemed to be practising as an Advocate.

4. The expression "District Judge" includes an Additional District Judge. Art. 233 of the Constitution is a self-contained provision regarding appointment of District Judge. It contains two sources of recruitment as District Judges. The streams are separate. Only they get together after appointment. Cl. (i) deals with persons who are already in service. As to a person who is already in service of the Union or State, no special qualifications are laid down and the Governor can appoint such a person as a District Judge in consultation with the High Court. A person who is not already in service, the qualifications are laid down in Cl. (ii) and it is required that he should be an Advocate of seven years" standing. The period during which he functioned as Government Pleader or a Public Prosecutor, he was on the rolls of the Bar Council as an Advocate and that period would be deemed to be a period spent in practise as an Advocate. The respondent fulfilled the requirement and he was correctly appointed. A brief reference to Chandra Mohan

v. State of Uttar Pradesh, AIR 1966 SC 1987 , is necessary. The apex Court examined the scope of rules for recruitment under U.P. Higher Judicial Service Rules. The rules provided two sources of recruitment, one from Advocates, Barristers, Vakils with more than seven years" standing and the other from judicial officers. Selection was made as provided in the rules. The apex Court held that the rules were constitutionally void. The rules empowered the Governor to recruit District Judges from judicial officers who were already in service which was not permissible under the Constitution, The ratio of this judgment was restated in Satya Narain Singh and Others Vs. High Court of Judicature at Allahabad and Others, , and it will be useful to reproduce the ratio of this judgment in the words of O. Chinnappa Reddy, J. Satya Narain Singh and Others Vs. High Court of Judicature at Allahabad and Others, :--

"The gist of the said provisions may be stated thus: Appointment of persons to be, and the posting and promotion of, District Judges in any State shall be made by the Governor of the State. There are two sources of recruitment, namely, (i) service of the Union or of the State, and (ii) members of the Bar. The said judges from the first source are appointed in consultation with the High Court and those from the second source are appointed on the recommendation of the High Court. But in the case of appointments of persons to the judicial service other than as District Judges, they will be made by the Governor of the State in accordance with rules framed by him in consultation with the High Court and the Public Service Commission. But the High Court has control over all the district courts and courts subordinate thereto, subject to certain prescribed limitations.

5. Subba Rao, C.J. then proceeded to consider whether the Government could appoint as District Judges persons from services other than the judicial service. After pointing out that Art. 233(1) was a declaration of the general power of the Governor in the matter of appointment of District Judges and he did not lay down the qualifications of the candidates to be appointed or denoted the sources from which the recruitment had to be made, he proceeded to state.

"But the sources of recruitment are indicated in Cl. (2) thereof. Under Cl. (2) of Art. 233 two sources are given, namely, (i) persons in the service of the Union or of the State, and (ii) advocate or pleader."

5. Posing the question whether the expression "the service of the Union or of the State" meant any service of the Union or of the State or whether it meant the judicial service of the Union or of the State, the learned Chief Justice emphatically held that the expression "the service" in Art. 233(2) could only mean the judicial service. But he did not only mean by the above statement that persons who are already in the service, on the recommendation of the High Court can be appointed as district Judges, overlooking the claims of all other seniors in the subordinate Judiciary contrary to Art. 14 and Art. 16 of the Constitution."

6. Apart from this, this complaint lacks in bona fides and it appears to have been

engineered with ulterior motive by certain interested persons. The respondent was appointed in 1975 and no dispute was ever raised with regard to the correctness of his appointment. The instant move is with some sinister design. A writ of quo warranto is not issued as a matter of right. It is a discretionary relief and the Court should consider all the circumstances of the case including lapse of time, and circumstances which would establish laches, acquiescence or estoppel. The rules regarding issuance of discretionary relief were stated thus in Halsbury's Laws of England, 3rd Edition, Vol. II, para 281 in which it was stated thus:--

"An information in the nature of a quo warranto was not issued, and an injunction in lieu thereof will not be granted as a matter of course. It is in the discretion of the Court to refuse or grant it according to the facts and circumstances of the case..... the Court might in its discretion decline to grant a quo warranto information where it would be vexatious to do so, or where an information would be futile in its result, or where there was an alternative remedy which was equally appropriate and effective."

7. In *King v. Speyer* (1961) 1 KB 595 it was considered that:

"An information in the nature of a quo warranto will lie at the instance of a private relator against a member of the Privy Council whose appointment is alleged to be invalid. In this case, a rule nisi was issued calling upon Sir Edgar Speyer and Sir Ernest Joseph to show cause why information in the nature of a quo warranto should not be exhibited against them to show by what authority they were or claimed to be, members of His Majesty's Privy Council for Great Britain. Tindal, C.J. has said :--

"The result appears to be that this proceeding by information in the nature of quo warranto will lie for usurping any office, whether created by charter alone, or by the Crown, with the consent of Parliament, provided the office be of a public nature, and a substantive office, not merely the function or employment of a deputy servant held at the will and pleasure of others; for, with respect to such an employment, the Court certainly will not interfere, and the information will not properly lie.

Rex. v. Stacey (1785) holds that a writ of quo warranto is not a matter of course and it is in the discretion of the Court to issue it considering the circumstances of the case. The Canadian view as stated in *The King ex rel Beudret v. Johnston* (1923) 2 DLR 278 is that the Court has to take into consideration public interest, the consequences to follow the issue of a writ of quo warranto and all the other circumstances of the case."

8. The complaint, which was treated as writ petition is dismissed.

9. Order accordingly.