

(1979) 08 MP CK 0007

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 341 of 1979

V.K. Seth

APPELLANT

Vs

State of M.P. and another

RESPONDENT

Date of Decision : 18-08-1979

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226

Citation : (1979) 08 MP CK 0007

Hon'ble Judges : G.P. Singh, C.J.;U.N. Bhachawat, J

Bench : Division Bench

Advocate : Gulab Gupta, for the Appellant; M.V. Tamaskar, Govt. Advocate, for the Respondent

Final Decision : Dismissed

Judgement

G.P. Singh, C.J.—By this petition under Article 226 of the Constitution, the petitioner Dr. V.K. Seth, prays that the High Court be pleased to:

(i) direct Dr. M. L. Gupta, respondent No. 2, to show his authority to hold the post of Specialist (Ophthalmology) at Guna and quash his appointment to the said post by issuance of a writ of quo warranto and by holding that he is not entitled to hold the said post; and

(ii) direct the State of Madhya Pradesh, respondent No. 1, by a writ of mandamus or some other suitable writ or direction to appoint the petitioner to the post of Specialist (Ophthalmology) as he has already been selected for the said post.

2. The material facts are that the petitioner is M. S. in Ophthalmology and is employed as Assistant Surgeon. There were four vacancies of Specialists in Ophthalmology. The Public Service Commission was requested by the Government to advertise these four posts and to make selection for them. Consequently, on 5th March 1976 the Commission issued an advertisement inviting applications for these posts. The interviews were held on 16th January

1978. As a result of the interview, the Commission selected five candidates and sent their names arranged in the order of merit to the Government. The petitioner's name was at serial No. 5 in the list. As only four vacancies were advertised, the petitioner's name formed part of the Reserve List. Two candidates out of the first four were appointed as Specialists on 13th July 1978. The remaining two were appointed as Specialists on 27th February 1979. On the same date, Dr. Gupta, respondent No. 2, who is a confirmed District Health Officer and was working at Jagdalpur as a Specialist in Ophthalmology, was transferred in the same capacity to Guna. It may here be mentioned that one more vacancy of Specialists in Ophthalmology occurred in October 1977 as a result of resignation of one Dr. Ayachit. The vacancy arising consequent upon the resignation of Dr. Ayachit was not advertised. It may also be mentioned that the respondent Dr. Gupta had appeared before the Public Service Commission for the post of Specialist in Ophthalmology in pursuance of an earlier advertisement and was not selected. The petitioner as Assistant Surgeon is in the pay-scale of Rs. 425-900. The pay scales of Specialist, Civil Surgeon and District Health Officer are the same i. e. 680-1150. The petitioner contends that the transfer of Dr. Gupta as a Specialist to Guna on 27th February 1979 was an act of favouritism and that the petitioner ought to be appointed because of his selection by the Public Service Commission in the fifth vacancy that occurred as a result of the resignation of Dr. Ayachit.

3. In the return filed by the State it is contended that as the Government has sent requisition for four posts only to the Public Service Commission and as only four posts were advertised in March 1976, the list submitted by the Commission exhausted itself after the first four persons in the list were appointed as Specialists. It is also contended that simply because the petitioner's name was in the reserve list, he had no right to be appointed in the fifth vacancy which occurred much after the four posts were advertised. It is further contended in the return that a list submitted by the Commission is valid for a period of one year and, therefore, the list which was received by the Government on 31st January 1978 became inoperative on 30th January 1979 and that it was for this reason that the list was extended with the consent of the Commission for a period of three months to enable the appointment of the candidates at serial Nos. 3 and 4 by order 27th February 1979. As regards Dr. Gupta, it is contended that he is a confirmed District Health Officer and was working as a Specialist in Ophthalmology on ad hoc basis or as temporary arrangement and it was in that very capacity that he was transferred to Guna as a Specialist. It is submitted that the fifth vacancy which occurred on the resignation of Dr. Ayachit, will be advertised through the Public Service Commission and selection will be made in accordance with the recommendations of the Commission.

4. At the time of hearing of the petition, the learned Government Advocate conceded that the Government was not entitled to continue Dr. Gupta as a Specialist on ad hoc basis. We were later informed that the appointment of Dr. Gupta as a Specialist on ad hoc basis or as a temporary arrangement at Guna

had been cancelled and that he is now working only as District Health Officer. In view of the stand taken by the Government, the petitioner's challenge to the appointment of Dr. Gupta as a Specialist has become infructuous and we have only to consider whether the petitioner has a right to be appointed as a Specialist.

5. The appointment to the posts of Specialists is governed by the Madhya Pradesh Health (Gazetted) Service Recruitment Rules, 1967. The appointment to these posts can only be made by direct recruitment. The material rules for our purposes are Rules 11 (1) and 12 (1) which reads as follows:

11 (1). Selection for recruitment to the service shall be made as and when necessary "by the Commission when the requisition in this behalf is made by Government in accordance with such procedure as may be prescribed by the Commission."

12(1). The Commission shall forward to the appointing authority the names and other details of candidates whom they consider most suitable, duly arranged in order of preference and of the Scheduled Castes and Scheduled Tribes who, though not qualified by that standard, are declared by the Commission to be suitable for appointment to the service with due regard to the maintenance of efficiency of administration :

Explanation :--The inclusion of the name of candidate in such list shall not create or confer any right to be appointed to the post and it shall be in the discretion of Government not to appoint such a candidate.

6. A perusal of the rules will show that the authority of the Commission to make selection under Rule 11 (1) arises when "the requisition in this behalf is made by the Government". The Government made a requisition for selection of four candidates for filling in four vacancies and it was in pursuance of this requisition that the advertisement was issued in March 1976 by the Commission inviting applications for four posts of Specialists. The fifth vacancy which occurred in October 1977 was never advertised. As the Government has not sent any requisition for the fifth vacancy and as that post had not been advertised, we are unable to hold that any person in the list recommended by the Commission could claim any right for appointment in this vacancy. The petitioner's name figured in the reserve list which, in our opinion, meant that if for some reason or the other any one out of the four candidates could not be appointed to one of the four posts that were advertised, the petitioner had a chance of being appointed to that post. The inclusion of the petitioner's name in the reserve list did not enable him to claim any right for appointment to a post which was never advertised.

7. In *Omprakash v. State of M. P.* 1978 M P L 136 a Full Bench of this Court considered the Madhya Pradesh Educational Service (Collegiate Branch) Recruitment Rules, 1967. The Full Bench answered a number of questions. The view of the Full Bench is that in spite of the fact that a vacancy exists and the list sent by the Commission is effective and operative, the Government is not bound to fill in the vacant post; but if the Government decides to fill in the

vacant post it can only do so by appointing a person from the list sent by the Commission; and in making the appointments, the Government cannot change the order in which the names are recommended by the Commission. It will be seen that there is an explanation to Rule 12 (1) of the M. P. Health Service Rules, which provides that the inclusion of the name of a candidate in the list shall not create or confer any right to be appointed to the post and it shall be in the discretion of Government not to appoint such a candidate. There is no such explanation in the Madhya Pradesh Educational Service (Collegiate Branch) Recruitment Rules. Even so, the Full Bench held that the Government has a discretion not to make an appointment at all though a vacancy exists. The Full Bench was also of the view that the Government could issue executive instructions to the effect that the list sent by the Commission will automatically lapse on the expiry of one year. Another important case which throws considerable light on the problem before us is the case of *State of Haryana v. Subhash Chander*². In this case, the Supreme Court clearly held that the mere fact that a candidate's name appears in the list recommended by the Commission it does not entitle him to a mandamus that he be appointed. In that case, 15 vacancies were advertised and first seven candidates from the list recommended by the Commission were appointed to seven vacancies. The remaining vacancies were not filled in although there were qualified candidates in the list, yet it was held that no one from the list could claim a mandamus for appointment to the remaining posts, for it was open to the Government to decide not to make appointments to such posts.

8. The petitioner's claim for being appointed has to be examined in the light of the principles laid down by the Full Bench and the Supreme Court in the aforesaid cases. The petitioner has no legal right to be appointed in the fifth vacancy which occurred after the advertisement inviting applications for the four vacancies had been issued by the Commission for various reasons. Firstly, the Commission's power to make recommendations for appointment is only in respect of a post for which requisition is sent by the Government. It may be open to the Government to send in a requisition for anticipated future vacancies, but it was not so done in this case and no requisition for the fifth vacancy was sent by the Government and this vacancy was never advertised by the Commission. The Commission's recommendations were not in fact made and could not be made for this vacancy. Secondly, the list sent by the Commission ceased to be operative after the lapse of one year. In this connection, the learned Government Advocate brought to our notice a circular issued on 29th October 1957 by the Government. The circular contains the decision of the Government that the recommendations of the Commission in regard to appointment or promotion should be considered as holding good only for one year. It was for this reason that for making appointments for the two vacancies on 27th February 1959, the period of validity of the list was extended by the Government in consultation with the Commission. The list is now not operative. Thirdly, the list is also not operative for the reason that it was meant for the four vacancies and it

exhausted itself after those vacancies were filled in by appointment of the first four candidates mentioned in the list. Fourthly, even if it was open to the Government to appoint the petitioner who was in the reserve list in the fifth vacancy, there was no obligation on the Government to fill in that post from the reserve list and the Government was free to take the decision to advertise it through the Commission and to fill in it later. And lastly, the petitioner had no right to claim the appointment simply because his name figured in the list.

9. Learned counsel for the petitioner submitted that since the Government made the appointment of Dr. Gupta to the fifth post, the petitioner got a right to that post as he was a person selected by the Commission and Dr. Gupta's name was not in the list. As earlier stated, Dr. Gupta is a substantive District Health Officer and worked as a Specialist in Ophthalmology at Jagdalpur on ad hoc basis and it was in "the same capacity" that he was transferred to Guna. The words "in the same capacity" meant that Dr. Gupta functioned as Ophthalmologist at Guna also only on ad hoc basis or as a temporary arrangement. There is some allegation that the Minister concerned intended to appoint Dr. Gupta as Ophthalmologist at Guna as a permanent arrangement. But the intention of a Minister unless embodied in a properly worded Government order has no validity and has to be ignored as irrelevant. The transfer of Dr. Gupta to Guna "in the same capacity", in our opinion, did not mean that the Government decided not to send a requisition to the Commission to advertise the fifth vacancy for selecting a candidate for appointment in that vacancy. It may be, although it is not necessary now to decide, that Dr. Gupta's appointment even on a temporary or ad hoc basis in the fifth vacancy was invalid, yet that did not confer on the petitioner any right to get appointed in that vacancy when it was not advertised and the recommendations of the Commission were not in respect of that vacancy.

10. Learned counsel for the petitioner relied upon a decision of the Supreme Court in *State of Mysore Vs. S.R. Jayaram*, in which a part of Rule 9 (2) of the Mysore Recruitment of Gazetted Probationers' Rules, 1959, which reserved to the Government the right of appointing to any particular cadre any candidate whom it considered more suitable for such cadre, was struck down as violative of Articles 14 and 16 of the Constitution, on the ground that it vested in the Government an arbitrary power of patronage. In that case, the Government had made appointments of candidates ranking first, second, third and fifth in the list of the Public Service Commission and the candidate ranking fourth in order of merit was not appointed. As the Government in making the appointments had appointed a person lower in order of merit, the Supreme Court directed the appointment of the person who ought to have been appointed in order of merit recommended by the Commission. The facts in the instant case are entirely different and the Supreme Court case has no application. Learned counsel for the petitioner also relied upon the case of *Miss Shakuntala Sharma v. State of Himachal Pradesh* 1976 AISLJ 288. In this case a person from waiting list was appointed. On his resignation, the petitioner in that case, who was also in the waiting list, claimed that she should be appointed in the vacancy. It was held that

non-appointment of the petitioner created a discrimination between two persons in the waiting list as one of them was appointed and the other was not appointed. On facts, this case also has no application. The learned counsel for the petitioner also referred to the case of *Indian and Eastern Newspaper Society, New Delhi Vs. Commissioner of Income Tax, New Delhi*, to show that the Supreme Court directed the appointment of a person by promotion. The facts in that case were entirely different and, therefore, the decision has no application here.

11. Learned counsel for the petitioner also submitted that according to the usual practice, the reserve list is meant for future vacancies and a person in the reserve list has a right to be appointed in the vacancy which occurs after the advertisement. In this connection, he submitted that there is a printed pamphlet issued by the Public Service Commission in which it is stated that "in order to provide for possible casualties and unexpected vacancies, the Commission may keep a reserve list of candidates for appointment in order of preference". The printed pamphlet was not produced before us. Even assuming that there is such an instruction issued by the Commission, it has no validity in face of Rule 11 (1) to which we have earlier referred. As pointed out by us, the Commission's authority to make selection arises on a requisition made by the Government and if the requisition is for four vacancies, the Commission cannot make selection for five vacancies. It may be that the Government may anticipate future vacancies and may send in a requisition to the Commission even for such vacancies; but unless that is done, the Commission cannot on its own select candidates for anticipated future vacancies for which no requisition is sent by the Government. The reserve list sent by the Commission in this case was meant for the four vacancies which were advertised and not for a vacancy for which no requisition was sent by the Government and which was not advertised. The object of the reserve list, in the circumstances, only was that if one of the candidates out of the first four could not, for some valid reason, be appointed to one of the four posts, the candidate whose name found place in the reserve list could be appointed to that post. The learned counsel further submitted that there are many instances in the past where future vacancies were filled in from existing lists. Although the petitioner has exhibited a chart to show the instances, the circumstances in which those appointments were made are not clear. Moreover, there is no allegation that the practice is that all future vacancies must be filled in from an existing list until the reserve list is exhausted and the Government till then has no discretion to advertise the vacancy. Further, any practice which is contrary to statutory rules cannot be given effect to and cannot also form the basis of any argument of violation of Article 14 which guarantees equality before the law and equal protection of the laws and not equality before a practice which is violative of the law.

12. The petition fails and is dismissed, but without any order as to costs.