



REPORTABLE

IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

ON THE 8th DAY OF MARCH, 2022

BEFORE

HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN

CIVIL WRIT PETITION (ORIGINAL APPLICATION)

NO. 4729/2019

BETWEEN:

ROSHAN LAL,

....PETITIONER

(BY SH. DUSHYANT DADWAL, ADVOCATE)

AND

- 1. H.P. POWER CORPORATION LTD.,
HIM FED BHAWAN, PANJRI
BELOW OLD MLA QUARTERS,
SHIMLA-5, THROUGH ITS MANAING DIRECTOR.**
- 2. HIMACHAL PRADESH STATE ELECTRICITY BOARD
THROUGH ITS SECRETARY
(EXECUTIVE DIRECTOR PERSONNEL),
VIDYUT BHAWAN, CHAURA MAIDAN,
SHIMLA-5.**
- 3. SHRI VINOD SINGHA PRESENTLY WORKING
AS ASSISTANT PERSONNEL OFFICER,
CORPORATE OFFICE, H.P. POWER CORPORATION
LTD., HIM FED BHAWAN, PANJRI,
BELOW OLD MLA QUARTERS, SHIMLA-5.**
- 4. SHRI RAJESH MAMGAIN,
JUNIOR OFFICER (P&A),
H.P. POWER CORPORATION LTD.,**

**HIM FED BHAWAN, PANJRI,
BELOW OLD MLA QUARTERS, SHIMLA-5.**

...RESPONDENTS

**(SH. SUNIL MOHAN GOEL, ADVOCATE, FOR R-1
SH. TARA SINGH CHAUHAN, ADVOCATE, FOR R-2,
SH. VIKAS RAJPUT, ADVOCATE, FOR R-3 & R-4)
RESERVED ON: 2.3.2022**

The petition coming on for admission after notice this day, the court passed the following:

ORDER

It was more than four decades back that the Hon'ble Supreme Court had observed that "it must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesses, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norm which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesses including award of jobs, contracts quotas, licences etc., must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary,

but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory (Refer: ***Erusian Equipment and Chemicals Ltd. vs. State of West Bengal, AIR 1975 SC 26***).

2 Can the official respondents go to justify the appointment of respondents No. 3 and 4, who despite being ineligible not only got appointments, but further have not chosen to contest the petition as probably they are confident that respondents No. 1 and 2 are there to defend them at any costs.

3 The records, more particularly, supplementary affidavit filed by respondent No.1 in compliance to the order dated 29.12.2011 and thereafter order dated 5.5.2015, whereby respondents No. 1 and 2 were directed to clarify the circumstances under which respondents No. 3 and 4 came to be appointed without even the post being advertised, reveals that respondent No.3 was serving as Personnel Assistant in Agro Industrial Packaging India Limited on regular basis and was appointed on secondment basis in Himachal Pradesh Power Corporation Limited (HPPCL) vide office letter dated 6.10.2007 and joined as such on 16.10.2007, whereas respondent No.4 was serving as Junior Assistant in Himachal Pradesh State Cooperative Marketing & Consumers Federation Limited (HIMFED) and was appointed on secondment basis in HPPCL

vide office letter dated 6.10.2007 and joined as such on 22.10.2007. The management of HPPCL decided that 31 officers/officials working on secondment basis in HPPCL from organizations other than Himachal Pradesh State Electricity Board Limited (HPSEBL) be considered for absorption in HPPCL. Accordingly, a circular dated 14.5.2009 was issued calling upon to give their options on the prescribed performa. Both respondents No. 3 and 4 submitted their options for being permanently absorbed in HPPCL and after receipt of such options, a three-member Committee was constituted by the Managing Director of HPPCL vide office order dated 19.6.2009 comprising of (a) Director (Electrical); (b) General Manager (Personnel); and (c) General Manager (Finance) to decide the terms and conditions and level of absorption of these employees in HPPCL by taking into consideration the factors mentioned in the said office order.

4 However, later on the service committee of the HPPCL in its meeting held on 30.12.2009, in order to ensure transparency and afford opportunity to all, recommended that the posts in question be filled up by inviting applications from eligible candidates working in GoHP or any GoHP owned PSUs including HPSEBL, as would be evident from agenda item No.1 of

the meeting dated 30.12.2009, relevant portion whereof reads as under:-

"The Managing Director explained that the officers/officials given in the Memorandum had joined the Corporation almost on its inception and have become well conversant with working of the power sector. It was further informed that they are discharging their duties and responsibilities to the entire satisfaction of the management and advocated for their absorption.

After detailed discussions, the Committee recommended the absorption of 14 Nos. of officials in workmen category i.e. Drivers, Peons, Chainman etc.

For Executive and Supervisory Category of staff, the Committee recommended that these posts be filled up by inviting applications from eligible candidates working in GoHP or any GoHP owned PSUs including HPSEB, in order to give opportunity to all and ensure transparency"

5 Accordingly, advertisement dated 11.1.2010 was issued seeking applications against specific posts for permanent absorption.

6 According to the petitioner, respondent No.3 did not appear in the interview yet he was selected and respondent No.4, who otherwise did not possess requisite qualification i.e. B.A., and has passed only his pre-University examination, being ineligible was illegally appointed. Categorical averments to this effect are contained in para 4 of the petition, relevant portion whereof reads as under: -

“The respondent No.3 is B.A. in third division as is clear from the certificate annexed herewith as Annexure-P16 and copy of detail of matriculation certificate is annexed as Annexure-P17 in which he has secured third division. The said respondent has also crossed the age of 45 years being date of birth as 17.12.1963 and not eligible to be appointed as Assistant Personnel Officer and has not appeared in the interview to whom higher post has been given ignoring the merit. The only candidate who is fit for this post is the petitioner. The ACRs of Vinod Singha is Good and Very Good as is clear from Annexure-P17A, whereas the ACRs of petitioner are Excellent throughout. As regard to the selection of respondent No 4 Rajesh Mamgian, it is submitted that he has passed only Pre-University examination in third division, as is clear from detail marks certificate Annexure-P18, and the respondent No.4 has also passed his matriculation in third division as is clear from the certificate annexed herewith as Annexure-P19. His ACRs are Good and Very Good, as is clear from Annexure-P20. The Said Rajesh Mumgian did not fulfil the requisite qualification at all because he is neither B.A. nor has working experience of 10 years in Power Sector and he has been offered the post of Junior Officer Personnel and Administration for which he is not eligible at all and the petitioner is eligible to be appointed as Assistant Personnel Officer having passed his BA, MA and doing his MBA having 23 years experience in Power Sector and it not known how the selection committee has ignored the petitioner for the post of Jr. Officer P&A and Assistant Personnel Officer against which respondent No.3 and 4 have been selected and appointed.”

7 It is in this background that the petitioner has filed the instant petition for grant of the following substantive reliefs:

i) That the appointment of respondent No.3 as Assistant Personnel Officer (E-1) made vide letter contained in Annexure-P21 dated 4.3.2010 as well as the appointment of respondent No.4 Rajesh Mamgian as Junior Officer (Personnel & Administration) made vide letter dated 4.3.2010, Annexure-P27 may kindly be quashed after issuing a writ of certiorari.

ii) The respondent No.1 may kindly be directed to give appointment to the petitioner as Assistant Personnel Officer (E-1) in place of respondent No.3 and the recommendations made by the Selection Committee dated 19.2.2010 vide Annexure-P5 may kindly be quashed.

8 Respondent No. 1 contested the petition by filing reply, wherein factual position including allegations set out by the petitioner, as reproduced above, have not been controverted. The only explanation offered by respondent No.1 for justifying the appointment of respondents No. 3 and 4 is that the age, qualification, experience, past record and present posting of all the candidates was duly considered by the selection committee constituted for the purpose and the management committee had right to relax the age, experience and qualification clause for officers/officials having working experience in power sector, more particularly, for candidates from HPSEBL/HPPCL. It is

after taking into consideration all these factors that respondents No. 3 and 4 were selected in a fair and impartial manner.

9 I have heard the learned counsel for the parties and have also gone through the material placed on record.

10 At the outset, it needs to be reiterated that earlier, on two occasions, the official respondents were asked to justify the selection of respondents No. 3 and 4, who strangely enough themselves have not chosen to contest the petition, and the only justification given by the official respondents has already been set out hereinabove, hence not being reiterated.

11 Therefore, in the given background, the moot question at the threshold is whether the official respondents could have appointed respondents No. 3 and 4 in relaxation to the recruitment rules/selection criteria when eligible candidates including the petitioner were already available.

12 This question need not detain this Court any longer in view of the settled legal position that the power to relax should be exercised with respect to any class or category of persons only when eligible and qualified candidates are not available or else the same would amount to perpetuate mistake. Reference in this regard can conveniently be made to the judgment rendered by the Hon'ble Supreme Court in **Union of India and anr. Vs. Narendera Singh, (2008) 2 SCC 750**, para 25.

13 Therefore, what appears to be settled is that the official respondents may have power to relax the rules, but the same cannot be consciously and deliberately exercised so as to deviate from the rules itself.

14 Equally settled is the proposition that the appointment made in infraction of the recruitment rules is violative of articles 14 and 226 of the Constitution and being nullity would be liable to be cancelled.

15 Confronted with this, respondents No. 1 and 2 would vehemently argue that respondent No.3 in fact had appeared for the post in question and marked his attendance, however to say the least, even this stand of the official respondents is totally false and contrary to the record.

16 Respondent No.3 appeared and marked his attendance for the post of Executive/Junior (Pers.Fin.) held on 18.2.2010, but did not appear and mark his attendance for the post of Junior Officer (Personnel) held on the same date and his attendance otherwise was not marked on the said date as is evident from page 124 of the paper book.

17 Respondents No. 1 and 2 being creation of a statute are not free to act like an ordinary individual, in dealing with the public property, as it cannot act arbitrarily at its, sweet will and, like a private individual, deal with any person it pleases, but its

action must be in conformity with some standard or norm which is not arbitrary, irrational or irrelevant. The action of the official respondents must not be arbitrary or capricious, but must be based on some principle which meets the test of reason and relevance. After all, it is the principle of reasonableness and non-arbitrariness in governmental action that lies at the core of our entire constitutional scheme and structure.

18 It was observed by Wades *Administrative Laws*, 5th Edition at page 347 that “The first requirement is the recognition that all powers have legal limits, the next requirement, not less vital, is that the Court should draw this limit in a way which strikes the most suitable balance between executive efficiency and legal protection of the citizen. Parliament consistently confers upon public authorities powers which on their face seem absolute and arbitrary. But arbitrary power and unfettered discretion are what the Courts refuse to countenance. They have woven a net-work of restrictive principles which require statutory powers to be reasonable and in good faith and in accordance with the spirit and letter of the empowering Act.” At page 359, it was also observed that “Discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That amounts at least to this that the statutory body must be guided by relevant consideration and not irrelevant. If its

decision is influenced by extraneous consideration which ought not have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith, nevertheless, the decision will be set-aside.”

19 Here, it shall be apposite to make a reference to the judgment of the Hon'ble Supreme Court in ***New India Public School vs. Huda (1996) 5 SCC 510***, wherein it was observed that when public authority discharges its public duty, it has to be consistent with the public purpose and clear and unequivocal guidelines or rules are necessary and the same cannot be acted at the whim and fancy of the public authorities or under their garb or cloak for any extraneous consideration.

20 The concept of reasonableness and non-arbitrariness pervades the entire constitutional spectrum and is a golden thread which runs through the whole fabric of the Constitution. Thus, Article 14 read with Article 16(1) of the Constitution accords right to an equality or an equal treatment consistent with principles of natural justice. Therefore, any law made or action taken by the employer, corporate statutory or instrumentality under Article 12 must act fairly and reasonably. Right to fair treatment is an essential inbuilt of natural justice.

21 Having regard to the entire facts and circumstances, the irresistible conclusion is that fraud has reached its

crescendo. Deeds as foul as these are inconceivable much less could be permitted to be perpetrated.

22 Shakespeare aptly described such sordid affairs in the following manners: *thus much of this, will make Black, white; foul, fair; Wrong, right; Base, noble; Ha, you gods: why this?* This is clearly evident from the fact that both the President and Vice President of respondent No. 1 have recently resigned from the office purportedly because of a video widely circulated showing them accepting bribe from the Contractor.

23 As observed earlier, it is highly regrettable that the officials respondents have been completely oblivious to the fact that the office entrusted to them are sacred and were meant for use and not for abuse.

24 The official respondents cannot act as despots or monarchs and are obliged to act in accordance with the principles of democracy, equity, equality and solidarity.

25 The entire scenario shocks the conscience of this Court to come across such systematic fraud committed by those who are at the helm of affairs of respondent-Corporation in dealing with its property as if it was their personal property. It has to be remembered that respondents No. 1 and 2 like anybody corporate have power to hold property and are capable to entering into contract strictly in accordance with the Rules that

too in a fair and transparent manner without indulging in any favouritism or nepotism.

26 Respondent No. 1 and 2 have failed to take into consideration that discretion can only be exercised if there is a power to do so and the same otherwise cannot be contrary to law. The absence of arbitrary power is the first postulate of rule of law upon which whole constitutional edifice is based. In a system governed by law, discretion when conferred upon an executive authority must be confined within clearly defined limits. If the discretion is exercised without any principle or without any rule, it is a situation amounting to the antithesis of rule of law. Discretion mean sound discretion guided by law or governed by known principles of rules, not by whim or fancy or caprice of the authority.

27 Thus, what can be taken to be well settled is that an unfettered discretion is a sworn enemy of the constitutional guarantee against discrimination. No authority, be it administrative or judicial has any power to exercise the discretion vested in it unless the same is based on justifiable grounds supported by acceptable materials and reasons thereof.

28 The concept of equality before law means that among equals the law should be equal and should be equally administered, and that like should be treated alike. There must

not be discrimination among equals unless there is reasonable classification. When something is to be done within the discretion of the authorities, it must not be done according to the whims of the authorities. Article 14 of the Constitution is violated by powers and procedures which in themselves result in unfairness and arbitrariness. It must be remembered that our entire constitutional system is founded in the rule of law, and in any system so designed it is impossible to conceive of legitimate power which is arbitrary in character and travels beyond the bounds of reason.

29 Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned 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 the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and it therefore violative of Article 14. Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence.

30 It is not in dispute that respondent No.1 is the "State" within the meaning of article 12 as also article 226 of the Constitution of India and has duty to observe equality. An ordinary individual can choose not to deal with any person, but Government cannot choose to exclude persons by discrimination. Whatever its activity, the Government is still the Government and will be subject to restraints, inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal.

31 The Government is a Government of laws and not of men. The petitioner was entitled to equal treatment with others, who were to be appointed in the same manner as the petitioner. Democratic form of Government demands equality and absence of arbitrariness and discrimination. There are limitations upon exercise of authority by the State and that is to act fairly and rationally without any way being arbitrary and thereby such a decision can be taken for some legitimate purpose. The activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure.

32 This proposition would hold good in all cases of dealing by the Government with the public, where the interest sought to be protected is a privilege. It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largess, the Government cannot act arbitrarily as its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant.

33 The power or discretion of the Government in the matter of grant of largess including award of jobs, contracts, quotas, licences etc., must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.

34 It is more than settled that where power is conferred to achieve a purpose, it has been repeatedly reiterated that the power must be exercised reasonably and in good faith to

effectuate the purpose. And in this context “in good faith” means “for legitimate reasons”. Where power is exercised for extraneous or irrelevant considerations or reasons, it is unquestionably a colourable exercise of power or fraud on power and the exercise of power is vitiated. If it is exercised for an extraneous, irrelevant or non-germane consideration, the acquiring authority can be charged with legal mala fides.

35 Reverting back to the facts of the case, it needs to be noticed that in the meeting held on 30.12.2009 (supra), the official respondents itself had decided that for executive and supervisory category of staff, the posts should be filled up by inviting applications from eligible candidates working in GoHP or any GoHP owned PSUs including HPSEBL so as to give opportunity to all and ensure transparency. But, eventually when it came down to actually making selection and thereafter appointments, the official respondents blatantly violated their own decision and appointed respondent No.3, who has passed his matriculation and B.A., both in 3rd division, and on the date of consideration was ineligible as he had already crossed the age of 45 years his date of birth being 17.12.1963 and further despite the fact that he had not appeared for the interview and not being eligible at all was appointed as Assistant Personnel Officer. Even the ACRs of respondent No.3 were not comparable as the

petitioner has earned excellent throughout, whereas respondent No.3 ACRs' were assessed as only good and very good.

36 Likewise, respondent No.4 was also not at all eligible as he did not possess the requisite qualification of being a graduate. He had only qualified his pre-university examination that too in 3rd division as is evident from the certificate, Annexure P-18. Even this respondent had also passed his matriculation in 3rd division as is evident from the certificate, Annexure P-19. Even his ACRs like respondent No.3 were only good and very good as compared to that of the petitioner, which were assessed excellent throughout.

37 The aforesaid narration of facts clearly goes to show that the selection lacks transparency and there was no proper valuation process, where ineligible persons were not only considered, but came to be appointed even though the eligible and qualified candidates like the petitioner were available. The selection is clearly arbitrary and capricious and the official respondents were pre-determined and had only fixed the candidates to be selected. The action of the official respondents is vitiated and tainted by mala fides.

38 All the facts speak for themselves. This is an illustration as to how and in what manner a government company, once considered to be the commanding heights of

Indian economy, was managed by the concerned to whom the management has been entrusted by throwing all norms to winds. Even those persons, who had not been subjected to undergo any formal selection process have been given appointment.

39 Confronted with this, learned counsel for the official respondents would argue that the appointments of the private respondents be protected on the ground of equity.

40 I am not at all impressed by the submission of the learned counsel. A person who has been appointed by throwing all the procedures to wind, cannot take shelter behind equity. After all, equity is not an empty concept. In fact, it tilts the balance when all other things are equal. An employee appointed throwing all the procedure to wind and in breach of articles 14 and 16 of the Constitution cannot take shelter behind equity. Once initial appointment is bad, then such person cannot be permitted to continue in service only on the ground that such person had continued in service for long time would amount to giving premium to illegality and shall encourage corruption.

41 I am firmly of the opinion that what is illegal and void shall continue to be so and principle of equity cannot save such appointment. In fact the equity must come against such employees, who had enjoyed the illegal employment and received

salary for long years though they had no right or authority to occupy the post/office or receive the salary simply because the doors were opened for them by some unauthorized officer(s) by his unauthorized act.

42 As observed above, if such persons, whose initial appointments are bad are allowed to occupy the office and post simply because they continued to hold the same then it would be adding premium to illegality. What was void would continue to be void. Either of these cannot be legalized nor can the Court grant relief in favour of such persons applying the principles of equity. The equity bridges the gaps and not the voids.

43 Under the service law, appointments are to be made following certain norms and principles. When a procedure is prescribed then the same is to be religiously followed. If contrary to all these, anyone is to be appointed, then the employer cannot be permitted to appoint the person(s) he likes, who may otherwise be a blue eyed boy or chosen one.

44 It is otherwise more than settled that principle of equity cannot be run contrary to law and right of equality enshrined under the constitution.

45 What is more disturbing is that the official respondents appear to have no respect for the law. This is clearly evident from the fact that when the instant case came up for

consideration before a coordinate bench of this Court (Justice Sanjay Karol) on 29.12.2021, following order came to be passed:-

“It is the grievance of the petitioner that private respondent No.3 was given appointment without issuing any advertisement or inviting applications from similarly situated persons. Mr. Ajay Mohan Goel, learned counsel to verify this fact. List on 3.1.2012.”

46 The aforesaid order in itself had given clear indication to the official respondents that in case the allegations of the petitioner were true, then they ought to have introspected and thereafter put their house in order, yet the official respondents had audacity for not only filing the affidavit, but even sought to justify the appointment of respondents No. 3 and 4, who as stated above, were not even qualified and one of them had not appeared in the interview.

47 If this was not enough, the official respondents did not appear to have again learnt lesson when another coordinate bench of this Court (Justice Rajiv Sharma) on 5.5.2015 passed the following order:-

“Respondent No. 1 and 2 are permitted to file a supplementary affidavit clarifying therein the circumstances in which respondent No.3 without the post being advertised has been appointed, by the next date of hearing. List next week.”

48 Like on the earlier occasion, here again, instead of mending their ways the official respondents filed a supplementary affidavit again trying to justify the appointment of private respondents even after knowing fully well their appointments were illegal.

49 The private respondents have not chosen to contest the petition and yet it is respondents No. 1 and 2, who are pleading equity on their behalf.

50 Obviously, in such circumstances, permitting such state of affairs to continue by simply quashing appointment of respondents No. 3 and 4, the court would not be doing complete justice between the parties.

51 In view of aforesaid discussions and for the reasons stated above, appointments of respondents No. 3 and 4 as Assistant Personnel Officer (E-I) and Junior Officer (P&A) respectively vide letters dated 4.3.2010 (Annexure P-21) and P-27) are quashed and set aside. Respondent No.1 is directed to consider the case of the petitioner as Personnel Assistant Officer (E-1) in place of respondent No.3 and consequently recommendations made by the selection committee dated 19.2.2010 are quashed and set aside.

52 The Additional Chief Secretary (Power) to the Government of Himachal Pradesh is directed to personally hold

an enquiry into the entire episode and initiate disciplinary or criminal, or both, proceedings against the erring officers irrespective of whether these officers are serving or retired. Such inquiry be completed as expeditiously as possible and in no event later than six months.

53 Since the petitioner has been dragged in the unwarranted or otherwise avoidable litigation, therefore, he is entitled to costs of litigation and damages, which is assessed at Rs. 1,00,000/- to be paid initially by respondents No. 1 and 2 to be recovered from erring officers.

54 The instant petition is allowed, in the aforesaid, terms. Pending application application(s), if any, also stands disposed of.

For compliance, list on 8.9.2022.

(Tarlok Singh Chauhan)
Judge

8.3.2022
(pankaj)