

Raj Kumar & Ors. Etc vs Shakti Raj & Ors. Etc on 11 February, 1997

Equivalent citations: AIR 1997 SUPREME COURT 2110, 1997 (9) SCC 527, 1997 AIR SCW 1959, 1997 LAB. I. C. 2088, 1997 (2) SCALE 228, (1997) 1 SCR 1159 (SC), 1997 (2) UJ (SC) 6, 1997 UJ(SC) 2 6, (1997) 2 JT 688 (SC), 1997 (1) SCR 1159, (1997) 2 SCT 75, (1997) 3 SUPREME 572, (1997) 4 SCJ 104, (1997) 2 SERVLR 130, (1997) 2 SCALE 228, (1997) 3 ESC 1424, 1997 SCC (L&S) 1029

Author: K. Ramaswamy

Bench: K. Ramaswamy

PETITIONER:
RAJ KUMAR & ORS. ETC.

Vs.

RESPONDENT:
SHAKTI RAJ & ORS. ETC.

DATE OF JUDGMENT: 11/02/1997

BENCH:
K. RAMASWAMY, S. SAGHIR, AHMAD, G.B. PATTANAIK

ACT:

HEADNOTE:

JUDGMENT:

With CIVIL APPEAL NOS. 924,925-984 OF 1997 (Arising out of SLP (C) Nos. 4694, 4702-4791 of 1996) AND SPECIAL LEAVE PETITION (C) 8221-8282 & 10357/96 O R D E R Mr. R.C. Verma, learned counsel seeks permission to withdraw these petitions. they are accordingly dismissed as withdrawn.

IN CA NOS. 923-984 /97 (@ SLP (C) NOS. 4151, 4694 AND 4702 -4761/96 :

Application for intervention is allowed. Leave granted. We have heard learned counsel on both sides.

These appeals by special leave arise from the Division Bench judgment of the Punjab & Haryana High Court, Made on December 20, 1995 in CWP No. 6816 of 1995 and batch.

The admitted facts are that the posts of Canal patwaris in the Irrigation Department of the State of Haryana are class II posts in the State Service. Earlier, they were called Irrigation Booking Clerks and came to be designated as Patwaris in 1981. Prior to the formation of the State of Haryana on November 1, 1966, the recruitment of Canal Patwaris was governed by the Punjab Public Works Department (Irrigation Branch) Patwaris State Service, Class III Rules, 1955 (for Short, '1955 Rules') issued under proviso to Articles 309 of the Constitution. Rule 2(i) defines "Apprentice Patwari" to mean a person who after passing the patwar examination is posted as a reserve against 7% of the limiting scale of Patwaris sanctioned for a circle. Rule 4 prescribes conditions for appointment to the service. Rule 5 postulates that no person shall be accepted as candidate Patwari who is less than 18 years or more than 22 years (now 25 years) of age at the time of acceptance (proviso being not relevant, omitted). Rule 6 envisages that "No person shall be appointed to the Service unless he has passed the Matriculation or School Leaving Certificate Examination of a recognised university or its equivalent, but preference shall be given to candidates possessing higher qualifications" (Proviso is not relevant, hence omitted).

Rule * postulates that "All appointment to posts in the service shall be made by the divisional Officers". rule 10

(a) envisages that "Appointments to the Service shall be made by direct appointment", Rule 10(b) provides that:

"(b) The Divisional Officer shall keep a register of accepted candidates for training purposes.

Not more than twice the number of candidates required to fill the vacancies for the ensuing year shall be brought on to the list of accepted candidates and trained and sent up for the examination. No candidate shall be accepted for enrolment in the Divisional Candidate's List unless he complies with the conditions mentioned in Rules 4, 5, 6, 7, and 9 of these Rules."

Rule 12 provides thus:

"12 (a) All candidates, who pass the examination, shall be brought on to the circle register of passed candidates in serial order of passing the examination. When a permanent Vacancy occurs in any Division of the Circle. The order of appointment shall be posted from the circle register irrespective of whether he is serving in a leave

or temporary vacancy in another Division of the Circle. The order of appointment shall be issued by the Divisional Officer. The name of a passed candidate who reaches the age of 25 years without having been employed temporarily as patwari shall be struck off the list.

Provided that this maximum age limit shall be relaxed in the case of members of Scheduled Castes, Scheduled Tribes and other Backward Classes to the extent of such period as may be prescribed by Government in this behalf from time to time, in respect of entry of such candidates into service under Government and the names of such candidates shall be retained on the list upto that age, it is the duty of the Superintending Engineer to examine the circles register of passed candidates early in January each year, in order to see that sufficient candidates are borne on the register to fill all vacancies that are likely to occur during the next two years, and to ensure, as far as possible, that all candidates shall ordinarily obtain permanent employment before they reach the maximum age prescribed under this Rule, A selection board consisting of all the Divisional Officers of the Circles shall sit before June 1st every year to select the candidates for training for the years in accordance with rule 11.

(b) No person may be brought on to the circle register of passed candidates unless he has passed the patwar examination,"

Rule 14 provides that "the seniority of members of the Service shall be determined in accordance with Circle register of passed candidates in serial order of passing the patwar examination. If the position secured in the examination is the same, in the case of two or more persons, their seniority shall be determined by age, a younger member being junior to an older member. Rule 15 adumbrates as under:

"(a) Member of the service shall be entitled to the pay scales as are given in Appendix A provided that the scales of pay may be altered by the government as and when necessary. They shall also be entitled to bonus, they earn in each crop, in accordance with Chapter 12 of the Revenue Manual.

(b) Apprentice Patwaris shall receive Rs.32/-per mensem each when not employed in leave or regular vacancies."

It is to be noted that pursuant to a query raised by the Chief Engineer (Admn.), Irrigation Works, Punjab, by a letter dated February 5, 1962, the then Punjab Government had clarified that the recruitment to the posts of Canal Patwaris is to be made through the Subordinate Service Selection Board (for Short, SSSB'.) After formation of State of Haryana on January 28, 1970, the Governor, exercising the power under proviso to Article 309 of the Constitution and in modification of all other Rules in this behalf, constituted the SSSB for recruitment and appointment to Class III and IV posts. Para 6 of the notification issued in this behalf postulates the functions of the Board. Clause (a) thereof adumbrates that for appointments to Class - III posts under the State Government, except appointment of officers and employee of the Punjab and Haryana High Court Provided for in Article

229 of the Constitution of India, the Board shall be consulted. Clause (d) provides that the Board is also required to be consulted in the matter of methods of recruitment and the principles to be followed in making appointments to Class III and class IV posts, under the State Government. The proviso thereto gives power to the State Government thus:

"Provided that it shall not be necessary to consult the Board in respect of such posts and matters as the State Government may, by notification, specify."

It would, thus, be seen that in the matter of recruitment to Class III and Class IV posts 1970 Rules have modified the 1955 Rules by providing for recruitment by the Canal Divisional Officer adumbrated in 1955 Rules. Unless there is exercise of the power under proviso to Rule 6 excluding, by a notification issued in that behalf, the recruitment of consulting the Board, the recruitment to 7% posts of the Canal Patwaris in the Irrigation Department is required to be made through SSSB. A bird's eye examination of the 1955 rules and 1970 notification, both statutory Rules, reveals that the former, to fit into the frame work of 1970 notification need suitable amendments in particular, in the matter of the source and method of recruitment, seniority and all related issues. However, it is the duty of the Court to give harmonious interpretation to the Rules so as to make them co-exist and work as a continuous whole. It is unfortunate to notice from the record that the Government was adopting its own procedure convenient to them, namely, in many a occasion, it appointed Patwaris on circle basis under the 1955 Rules and in some instances, like the selection made in the year 1974, the selection came to be made through SSSB. In other words, the selection and the appointments to the posts of Canal Patwaris under 1955 Rules is not in accordance with the law. However, we need not declare all the selections and appointments as illegal. It is not in dispute that for the impugned selection made in the year 1992, The examinations came to be conducted between April 25 and April 28, 1992 under 1955 Rules. it is also undisputed that common examinations conducted on different dates in four centres was on uniform pattern of examinations as Statewide one. The results thereof were declared in 1993. Subsequent thereto, the Government have excluded from the purview of the Board by four notifications, a total of 47 posts of Patwaris. Subsequently, the Government has constituted a selection committee for selection of Canal Patwaris, consisting of Chief Engineering, YWS Unit as Chairman, Chief Engineer BWS Unit as Member, General Manager (o) Irrigation Department as Member Secretary, Deputy Collector, BWS/C Kaithal as Member and Executive Engineer Canal Hissar as Co-oted member. They interviewed the candidates and came to select the appellants in these cases. The unofficial respondents, who were unsuccessful in the interview, filed the writ petitions in the High Court has held that the constitution of Selection Committed and the selection of the appellants is ultra vires the power of the Government. The reason in support thereof is that since 1955 Rules occupy the field for selection, administrative instruction cannot be issued to constitute Selection and appointment of all the appellants as Canal Patwaris. Instead, it directed to make appointment in terms of 1955 Rules, those who appeared in the examinations conducted between April 25 and April 28, 1992 and remained successful and fulfilled other qualifications in that behalf. thus these appeals by special leave.

Shri K. Madhava Reddy, learned senior counsel and Shri Ranjit Kumar, learned counsel appearing for the appellants, contend that 1955 Rules have to give place to 1970 notification which envisages selection by the SSSB. By exercise of power under proviso to para 6 of the 1970 notification , the

Government excluded the posts from the purview of the SSSB. Consequently, the Government came to appoint the Selection Committee for selection of the candidates. The Committee has prescribed various guidelines for selection of the candidates. Even assuming that 1955 Rules would occupy the field, in view of the fact that the provisions of the Employment Exchange (Compulsory Notification of Vacancies) Act, 1959 having been in force, Rule 12 of the 1955 Rules had become inoperative. As a consequence, the maintenance of circle - wise register by the authorities under 1955 Rules became illegal, the Committee had duly interviewed the successful candidates in the written examination and selected them on merit. The unofficial respondents having appeared before the Selection, it would not be open to them to contend that the selection of the appellants is invalid in law. It is also contended that the appellants have been working since the dates of their appointment and, therefore, they cannot be denied of their appointment and, therefore, they cannot be denied of their appointment duly made by the Government.

Shri Jitender Sharma, learned senior counsel appearing for the unofficial respondents and Shri Qamarudin, Learned counsel appearing for some of them, contend that the method of selection adopted by the Committee is without jurisdiction. Having excluded the posts from the purview of 1970 Rules, the operation of 1955 Rules came into vogue. As consequence, the only power the Government have is to follow the method prescribed in 1955 Rules and Rule 12 made thereunder. The Government, therefore, was devoid of power to constitute a Committee for selection of the candidates. Since the statutory Rules are in operation the executive instructions cannot be issued to supplant the statutory Rules. Even on merits also, they pointed out that the High Court has gone into the select list, method of awarding the marks which would show that even their own procedure prescribed for awarding the mark itemwise was not adhered to; instead lumpsum marks come to be awarded to the candidates which method is arbitrary. It is accordingly contended that unofficial respondents having secured high marks than the appellants cannot be deprived of their legitimate expectation to seek appointment in accordance with the Rules.

Having regard to the respective contentions, the question is: whether the view taken by the High Court in quashing the selection and appointment of the appellants is correct in law? It is rather unfortunate that the State having filed the appeals has chosen to withdraw the same at the last minute and sought permission therefor. We have no option but to permit them to withdraw as they do not seek to contest the matter on merits. Rather we have availed of the assistance rendered by the learned counsel on either side. From the facts, it is seen that 1955 Rules operate as regards the qualifications and other conditions of eligibility prescribed thereunder. They are statutory rules. Equally, 1970 notification of the extant 1955 Rules. In other words, the source of manner and method of recruitment for selection of Canal Patwaris stood modified by 1970 notification. As a consequence, the direct recruitment of Canal Patwaris shall be made only through SSSB. Unfortunately, the Government chose to select candidates at their convenience, sometimes under 1955 Rules and sometimes under 1970 notification, according to their convenience. But in this case, they have dispensed with both and instead constituted a Committee for selection of the candidates having excluded from the purview of 1970 notification, that too after written examinations were conducted under 1955 Rules. the question, therefore, is: whether the method of selection adopted by the Selection Committee is correct in law? It is seen that the procedures adopted both under 1955 Rules and 1970 notification are not correct. After 1970 notification came to be issued, to the extent

of the method and manner of selection of Canal Patwaris, 1955 Rules stood modified and the only competent authority to select the candidates is SSSB. The Board is required to advertise the Vacancies and select the candidates but that was not done. On the other hand, after the examinations were conducted and results declared under 1955 Rules, the posts were taken out from the purview of the Board. The board did not even conduct the examinations. The power of the governor under proviso to Article 309 is constituent power and legislative in character subject to an Act of Legislation. He need not have prior consultation with the Board for laying the principle of recruitment or withdrawal of the posts from the purview of the Board. The committee constituted by the Government had not conducted written examinations. It called for interview all those who were declared successful in Patwari examination. The selection Committee had evolved a criteria of awarding marks to select the candidates. For academic qualifications, they allocated total marks of 25 to be rationalised to come within the said quota; for the written examination, maximum of 25; 5 marks were allocated for sports qualifications, for experience, 10 marks; for extra-curricular activities, 5 marks and for viva voce 30 marks totalling to 100 marks. But, unfortunately, as pointed out by the High Court in the judgment, they have given a decent burial and go by to their own method of awarding the marks to the candidates and instead awarded marks in lumpsum. the High Court has pointed out thus:

"During the course of arguments, on our direction the respondent- State produced the record prepared by the Selection Committee after interviewing the candidates. No other record has been produced in spite of our specific direction. From a bare perusal of the record produced it is evident that the Selection Committee has awarded the marks to every candidate in lump. No record has been produced to show that the candidates were awarded marks on itemwise basis.

The prescribed criteria is thus:

"Mark 'C,I' Matric 3rd Divn. = 20 Matric 2nd, Prep, or +1 = 21 Matric Ist+SSLC+2 = 22 +2 Ist -BA Part I & II B.A. = 23 B.A. = 24 B.A. Ist or M.A. or B.Ed. etc. = 25 25
PATWARI EXAMINATION 230-240 = 20 241-260 = 21 261-280 = 22 281-290 = 23
291-300 = 24 301- + = 5 25 25 SPORTS = 5 EXPERIENCE: = 10 Extra-Curricular = 5
20 Viva Voce = 30 30

Total Marks = 100 100

Having prescribed maximum marks for each item, necessarily they are required to apply the rationale to each of the candidates in accordance with the academic qualification etc. acquired by the candidates. 1955 Rules give preference in the matter of selection to the person possessing higher academic qualifications. But, unfortunately, the Government did not adopt and apply the said rule. Equally, noting

has been indicated as to the marks awarded on each item. they had cut off the marks actually secured in the written examination and rationalised them to come within 255 quota. Though prescription of the marks for those items is perfectly valid and legal, but cutting off the marks actually secured by the candidates in the common written examination is arbitrary and unwarranted. It is not the case that examinations were conducted on circle-wise basis according to the paper set by each circle. On the other hand, the admitted facts are that examinations were conducted between April 25 And April 28, 1992 at four centres on different dates in respect of all the candidates. The examination papers were of common standard and all were required to write the same examination. Under those circumstances, the appropriate procedure should have been to apply the marks as secured by them in the written examination plus the marks awardable to the respective candidates either on the academic qualifications or on the sports qualification or experience qualification or extra- curricular qualification or the marks actually secured in the via voce and to pool them as total marks secured by each candidates and the merit list should have been prepared in the light of the Rules. On the basis of the aggregate marks secured by candidates, select list should have been prepared and recommendation made to enable them to appear in accordance with the prescribed Rules: including the rule of reservation applicable to various categories mentioned in the Rules and allotment made to the respective circles as envisaged under 1955 Rules and all other rules issued in that behalf. Unfortunately, this procedure has not been adopted. On the other hand, the admitted position is that after the candidates were given training for three months as prescribed under the 1955 Rules and written examination were conducted, they were again called for from the respective employment exchange and interviews were conducted thereafter.

A Bench of three Judges of this court in *Excise Superintendent vs. Visweshwara Rao* [(1996) 6 SCALE 6761 had thus:

"It is common knowledge that many a candidates are unable to have the names sponsored, thought their names are either registered or are waiting to be registered in the employment exchange, with the result that the choice of selection is restricted to only such of the candidates whose names come to be sponsored by the employment exchange. Under these circumstances, many a deserving candidates are deprived of the right to be considered for appointment to a post under the State. Better view appears to be that "It should be mandatory for the requisitioning authority/establishment to intimate the employment exchange, and employment exchange should sponsor the names of the candidates to the requisitioning departments for selection strictly according to seniority and reservation, as per requisition. In addition, the appropriate Department or undertaking or establishment, should call for the names by publication in the newspapers having wider circulation and also display on their office notice boards or announce on radio, television and employment news-

bulletins; and then consider the cases of all the candidates who have applied. If that procedure is adopted, fair play would be subserved. The equality of opportunity in the matter of employment would be available to all eligible candidates."

In view of this legal position, the necessary requirement should be that they should necessarily not only notify but also call the names from employment exchange; in addition they should give wide publicity in the media inviting application from qualified persons for selection. Instead, they have adopted the procedure under 1955 Rules. They did not call the names from the employment exchange and conducted the examinations for them. After the selection of the candidates, names of selected candidates were called from the employment exchange. Obviously, the successful candidates in the written examinations were asked to approach the employment exchange of the concerned circle and, accordingly, names came to be sponsored. The procedure adopted is clearly illegal denying equal opportunity to many candidates waiting in the register of the concerned employment exchange. Therefore, the Government hereafter should strictly follow the procedure by not only calling their names from the employment exchange, but also by publishing in the local and national news papers and giving wide publicity in the media as well as getting the written examination and the interview conducted by the SSSB; marks should be awarded strictly according to the procedure.

Yet another circumstance is that the Government had not taken out the post from the purview of the Board, but after the examinations were conducted under the 1955 Rule and after the results were announced, it exercised the power under the proviso to para 6 of 1970 notification and the post was taken out from the purview thereof. Thereafter the Selection Committee was constituted for selection of the candidates. The entire procedure is also obviously illegal. It is true, as contended by Shri Madhava Reddy, that this Court in *Madan Lal vs. State of & K* [(1995) 3 SCC 486] and other decisions referred therein had held that a candidate having taken a chance to appear in an interview and having remained unsuccessful, cannot turn round and challenge either the constitution of the selection Board or the method of selection as being illegal; he is estopped to question the correctness of the selection. But in his case, the Government have committed glaring illegalities in the procedure to get the candidates for examination under 1955 Rules, so also in the method of selection and exercise of the power in taking out from the purview of the and also conduct of the selection in accordance with the Rules. Therefore, the principle of estoppel by conduct or acquiescence has no application to the facts in this case, thus, we consider that the procedure offered under the 1955 Rules adopted by the Government or the Committee as well as the action taken by the Government are not correct in law.

The question then is: what would be the correct procedure under the law? Unfortunately, no outside candidate has questioned the selection of the candidates in the interview. In the light of what we have stated in the facts and circumstances, the appropriate and better course would be that SSSB should call the names of all the

candidates who were successful in the written examinations conducted between April 25 and April 28, 1992, interview the candidates and select them in accordance with law laid down above. Since the appellants came to be appointed by virtue of the selection made, they would continue in service till the proper selection is made and the candidates are appointed in accordance with the Rules.

The Government is directed to send within three weeks from the date of the receipt of the order, all the names of the candidates who became successful in the Patwari examination conducted between April 25 and April 28, 1992 to the SSSB as per the results declared. The Board is directed to call, for interview, all the candidates within four weeks from the date of the receipt of the record from the Government. The Board is further directed to interview all those candidates according to the procedure, consider their cases in accordance with the above law laid down and then select the candidates as per merit list duly applying the rule of reservation. The Board would recommend to the appointing authority and appointments would be made strictly in accordance with the merit list prepared after following the rule of reservation. If any of the candidates would, at the relevant time become barred by age, necessary relaxation of age would be given to them and appointment made accordingly.

The appeals are accordingly allowed and the writ petitions filed in the High Court stand disposed of No. Costs.