

J & K Public Service Commission vs Dr Narinder Mohan on 7 December, 1993

Equivalent citations: 1994 AIR 1808, 1994 SCC (2) 630, AIR 1994 SUPREME COURT 1808, 1994 (2) SCC 630, 1994 AIR SCW 1701, (1993) 6 JT 593 (SC), 1994 SCC (L&S) 723, (1993) 2 LAB LN 938, (1994) 1 LAB LJ 780, (1994) 1 SCT 626, (1994) 27 ATC 56, (1994) 3 SCJ 16, (1994) 68 FACLR 363, (1994) 1 SERVLR 246, (1994) 1 CURLR 1

Author: K. Ramaswamy

Bench: K. Ramaswamy, N.P Singh

PETITIONER:

J & K PUBLIC SERVICE COMMISSION

Vs.

RESPONDENT:

DR NARINDER MOHAN

DATE OF JUDGMENT 07/12/1993

BENCH:

RAMASWAMY, K.

BENCH:

RAMASWAMY, K.

SINGH N.P. (J)

CITATION:

1994 AIR 1808

1994 SCC (2) 630

JT 1993 (6) 593

1993 SCALE (4) 597

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by K.RAMASWAMY, J.- In SLP (C) Nos. 16496-502 of 1993 the delay is condoned. Special leave is granted in all the cases. The appeals arise from the common judgment dated May 13, 1993 of the Jammu & Kashmir High Court, in LPA No. 76 of 1990

and batch.

2. Dr Narinder Mohan (R. 1) and Dr Tariq Parvez (R. 2), were appointed as lecturers on December 12, 1986 and January 21, 1987, respectively. Dr Jatinder Singh, Dr K. Mengi, Dr J.P. Singh, R. 3 to 5, were appointed in the same year 1986 and Dr Bharat Bhushan Gupta (R. 6) was appointed on May 12, 1988. All their appointments were on ad hoc basis in different disciplines of Medical Education. The Government relaxed the rules of recruitment and appointed on regular basis the Respondents 1 and 2 on September 19, 1988 and May 16, 1989 respectively. Their appointments and of the Respondents 3 to 6 were challenged in several writ petitions by Dr Vinay Rampal, appellant in C.A. of 1993 (arising out of SLP No. 13043 of 1993) and others. For regular recruitment when applications were invited, the recruitment also came to be challenged. The respondents in turn filed writ petitions for directions to regularise their services. The learned Single Judge by his judgment dated September 19, 1990 declared that the appointments of respondents should be in accordance with the Jammu and Kashmir Medical Education (Gazetted) Services Recruitment Rules, 1979 (for short 'the Rules'). The Government neither have power to relax the rules of recruitment nor have power to regularise the appointment of Respondents 1 and 2 on regular basis. Accordingly he quashed their appointments. The appointments of the other respondents were also quashed as being ultra vires of the Rules. However, he directed their continuance in the posts for a period of three months thereafter and the Government was directed to fill up the posts of lecturers on permanent basis as per the Rules through the Public Service Commission within three months from the date. The respondents were permitted to apply for regular recruitment and in case anyone becomes overaged, the cases may be sympathetically considered by relaxing age qualification under Rule 9(3). The posts of lecturers in Medical Education shall be filled up as per the Rules. If no regular appointments are made within three months, on its expiry, the appointments of the respondents shall stand lapsed. On appeal, the Division Bench by the impugned order held that as the Rules provide for appointment of ad hoc lecturers, their appointments were according to Rules. The respondents are possessed of the requisite qualifications to hold the posts. The Government have no power under Section 133 of the Jammu and Kashmir Constitution (Article 320 of the Constitution of India) to relax the rules of recruitment. The respondents are not members of the service, since they were not recruited according to the Rules. Therefore, directions were given as under:

"We direct the respondents in terms of decision in A.K. Jain v. Union of India' to regularise the services of all the appellants in consultation with the Public Service Commission on evaluation of their work and conduct based on the confidential reports within three months. Such evaluation shall be done by the Public Service Commission. The doctors so regularised shall be appointed as Lecturers with effect from the date from which they had been continuously working as Lecturers. The respondents shall be at liberty to terminate the services of those appellants who are not so regularised."

3. Calling in question these directions the Public Service Commission (for short 'PSC') the appellant filed the appeals, Dr Vinay Rampal who claimed for his appointment but was not granted relief, filed a separate appeal. The State came in appeal against the finding that Government have no power to relax the Rules and jurisdiction to make appointment of the respondents in disregard of the Rules.

4. Shri V.R. Reddy, the learned Additional Solicitor General, appearing for the PSC contended that Dr A.K Jain case' is not a precedent that the PSC should recruit ad hoc doctors de hors the Rules, which envisaged their appointment only by the process of direct recruitment. The ad hoc appointments being contrary to the Rules, the direction to regularise the services by the PSC is illegal. It is also contended that the PSC has to conduct its functions under Section 133 of the Jammu and Kashmir Constitution (Article 320 of the Constitution of India), any direction to make recruitment is in derogation of the Constitution. The Rules do not provide any power to regularise the services of ad hoc doctors. The direction, therefore, is clearly de hors the law. Shri P.P. Rao, learned senior counsel, sought to support the impugned decision on two grounds. The ad hoc appointments, though strictly are not according to the Rules, by virtue of their long service for over four years and by now seven years, the respondents gained enough experience. Equally they settled their lives in the 1 1987 Supp SCC 497: 1988 SCC (L&S) 222: (1988) 1 SCR 335 service, and so they are entitled to be regularised. The non-appointment of them is also denial of the service to the society. Dr A.K. Jain case' provides not only the norm but also ratio under Article 141 which the High Court has rightly followed in giving the impugned directions. It is notorious that the regular recruitment takes unduly long period. The Rules prescribe three years' experience as a condition for appointment as lecturer and unless ad hoc appointment has been made, it is difficult to have requisite experience. This Court in *State of Haryana v. Piara Singh*² gave directions to regularise services of all the ad hoc employees continuing in service for number of years. The Rules put no limitation on the power of the Government to make recruitment of the doctors by ad hoc appointment. Adopting rational approach, the directions given by the Division Bench cannot be termed to be illegal. Alternatively, it is contended that direction may be issued to the State Government to advertise yearwise vacancies for recruitment of the candidates who became eligible in that year so that the candidates having had requisite qualifications would be selected and absorbed from the respective dates and the left over vacancies' would be thrown open for general recruitment. Shri M.H. Baig, the learned senior counsel, appearing for Respondents I and 2, while stating that Dr A. K. Jain case' is not a ratio under Article 141, but to meet out justice, in other words to prevent injustice, this Court had given directions under Article 142 to continue the ad hoc doctors in service by regularisation through PSC. To buttress his argument he stated that during the year 1986 the State Government had imposed ban on private practice of government doctors. Consequently many doctors had resigned from service. Though Respondents I and 2 who were recruited as doctors in 'B' grade service to serve in rural areas with higher scale of pay, they were asked to and the respondents opted for teaching side. Accordingly they have been continuing on ad hoc basis. On completing requisite number of years' service, they would automatically become eligible for promotion as associate professors. Now directing them to stand in the queue for regular recruitment will result in depriving them of the long years of service they have put in. The State Government has power under these circumstances to relax the rules and to regularise the appointments. Therefore, to prevent injustice suitable direction should be given in that behalf. The learned counsel for the State sought to support the Government's power of relaxation of the rules and the offending action by regularising the service of Respondents

1. and 2.

5. Rule 3 of the Rules empowers the State Government to constitute Jammu and Kashmir Medical Education (Gazetted) Service comprising of (i) teaching (ii) administrative and

(iii) general. The service shall consist of such posts and classes and categories and such number of them to be determined by the Government from time to time. At the commencement of the Rules on September 19, 1979, the existing posts, classes and categories were specified in Schedule-I. Rule 4 provides membership of the service. The members of 2 (1992)4SCC118:1992SCC(L&S)825:(1992)21ATC403 the service shall be such persons "as are appointed to the service under the Rules". The proviso says that the members continuing immediately before the Rules under Jammu and Kashmir Medical Education (Gazetted) Service Recruitment Rules, 1974 shall be deemed to have been appointed to the corresponding posts in the service specified in Schedule-II. Clause (b) of the explanation to Rule 4 provides that for the purpose of this Rule "any persons appointed to any post in service only by virtue of such deputation, contract, or ad hoc appointment, shall not be members of the Service". Thereby it is clear that unless a member either appointed under 1974 Rules and continuing as such or appointed to the service in accordance with the Rules, be shall not become a member of the service. The Explanation (b) expressly amplifies that the persons appointed on ad hoc basis, by virtue thereof, shall not become members of the service.

6. Rule 5 provides the mode of recruitment. Recruitment and appointment to the service shall be made by (a) direct recruitment; or (b) promotion by selection in the manner indicated against each post in Schedule-III. The eligibility of the person for recruitment or promotion to a post in the service has been specified in Rule 7, the details whereof are not material. The method of recruitment has been provided in Rule 8. Sub-rule (1) of Rule 8 postulates that while making selections (i) to the post in the teaching wing of the service, the Commission/Departmental Promotion Committee shall have regard to the qualifications etc., the details of which are not material. Under Rule 9, the upper age has been prescribed for eligibility of a candidate for recruitment and sub-rule (3) gives power to the Government to relax upper age-limit in any case or category of cases. Rule 10 prescribes seniority of the members of the service as regulated under J & K Civil Services Classification, Control and Appeal Rules, 1956. Rule 11 provides rule of reservation for appointment for recruitment either by selection, by direct recruitment or by promotion, to the members of Scheduled Castes or any other category, or class or permanent residents of the State for whom such reservation may be made under orders of the Government. The persons so appointed shall be on probation as prescribed in Rule 13 and Schedule-I. In Schedule-III read with Rule 5(b) of the Rules for recruitment to the posts of Lecturers, including Clinical, Psychologist (NonMedical), the method of recruitment prescribed in column-V is "by direct recruitment". A reading of these rules clearly indicates that a person appointed to the service shall be a member of any of the services namely teaching wing, administrative wing and general wing. Appointment shall be only either by direct recruitment or by promotion by selection. On making recruitment by the PSC and appointment by the State Government, such person shall be on probation and on successful completion he becomes a member of the service and he gets his seniority from the date of the appointment in terms of CCA Rules. Though the Rules do not expressly give power to the State Government to make an ad hoc appointment but Rule 4 visualises appointment on ad hoc basis but such ad hoc appointees, by virtue of such appointment only do not become members of the service. It would appear that Rule

25 of CCA Rules read with Rule 4, Explanation (b), claimed to be the source of power to make ad hoc appointments. Rule 25 speaks of "temporary promotion" for short duration of three months but it does not appear to be a direct source of power for initial ad hoc appointment. A contention was raised and accepted by the Division Bench that the State under Article 162 of the Constitution has power to exercise executive power to make ad hoc appointments.

7. Existence of statutory rules is not a condition precedent to appoint an eligible and fit person to a post. The executive power is co-extensive with legislative power of the State and under Article 162, the State can create civil posts and fill them up according to executive instructions consistent with Articles 14 and 16 of the Constitution. It is settled law that once statutory rules have been made, the appointment shall be only in accordance with the rules. The executive power could be exercised only to fill in the gaps but the instructions cannot and should not supplant the law, but only supplement the law. The Governor exercising the power under proviso to Section 125 (Article 309 of the Constitution of India) made the rules which do not expressly give the power to the State Government to make ad hoc appointments. No such rule has been brought to our notice. No express power was conferred and in fact cannot be conferred to relax the rules of recruitment. Having made the rules the executive cannot fall back upon its general power under Article 162 to regularise the ad hoc appointments under the Rules. Rule 9(3) empowers only to relax the qualification of age in particular exigencies which cannot be called in aid to relax the rules of recruitment. To tide over unforeseen exigencies, power to make ad hoc appointments, may be visualised as envisaged by Explanation (b) to Rule 4 but it expressly states that by virtue of such appointment, the ad hoc appointee does not become member of the service. The Rules prescribe direct recruitment/promotion by selection as the mode of recruitment which would be done only by PSC or promotion committee duly constituted and by no other body. Therefore, ad hoc employee should be replaced as expeditiously as possible by direct recruits. A little leeway to make ad hoc appointment due to emergent exigencies, does not clothe the executive Government with power to relax the recruitment or to regularise such appointment nor to claim such appointments to be regular or in accordance with rules. Back door ad hoc appointments at the behest of power source or otherwise and recruitment according to rules are mutually antagonistic and strange bed partners. They cannot co-exist in the same sheath. The former is in negation of fair play. The latter are the product of order and regularity. Every eligible person need not necessarily be fit to be appointed to a post or office under the State, selection according to rules by a properly constituted commission and fitness for appointment assures fairness in selection and inhibits arbitrariness in appointments. In view of the Explanation (b) to Rule 4, the ad hoc appointments to any post in any of the three wings of the services under the Rules are therefore de hors the Rules. Appointments of Respondents I to 6 cannot be held to be in accordance with the Rules.

8. It is true that under Article 320 of the Constitution (Section 133 of the Jammu and Kashmir Constitution) by operation of the proviso, it shall not be necessary for the President or the Governor, as the case may be, to consult the PSC in respect of any service or post in connection with the affairs of the Union or the State, as the case may be, either in general or in particular class or classes or any particular circumstances, but clause (1) of Article 320 postulates that it shall be the duty of the PSC to conduct examinations for appointment of service of the Union and the service of the State, respectively, and to assist the State for recruitment to any service for which the candidates fulfilling

the qualifications are required. Though it is settled law that consultation is not mandatory but as held by this Court in *Jatinder Kumar v. State of Punjab*³ that the establishment of an independent body like PSC, is to ensure selection of best available persons for appointment to a post to avoid arbitrariness and nepotism in the matter of appointment. Commission is constituted by persons of high ability, varied experience and of undisputed integrity and further assisted by experts on the subject. Whenever the Government is required to make an appointment to a high public office, it is required to consult the PSC. The selection has to be made by the PSC and the Government has to fill up posts by appointing those selected and recommended by the Commission, adhering to the order of merit in the list of candidates sent by the PSC. The selection by the Commission, however, is only a recommendation of the Commission and the final authority for appointment is the Government. Government cannot appoint a person whose name does not appear in the list. But it is open to the Government to decide how many appointments will be made. The process for selection and selection for the purpose of recruitment against existing or anticipated vacancies, does not create a right to be appointed to the post which can be enforced by a mandamus. In *M.C. Bindal v. R.C. Singh*⁴ this Court held that a candidate in order to be considered for appointment for a post must have the requisite qualifications. Under Article 320(3)(a) and (b), it is the duty of the PSC to consider and to get itself satisfied as to which of the candidates have fulfilled the requisites specified in the advertisement. It is the constitutional duty of the Commission under Article 320 to recommend the candidates fulfilling all the requisite qualifications for the posts to the Government for being considered for appointment to the post concerned. In *Keshav Chandra Joshi v. Union of India*⁵ one of the contentions raised was that Rule 27 of the U.P. Forest Service Rules, 1952, empowers the Government to relax any conditions of service to remove undue hardship and the appointments of the ad hoc promotion is in 3 (1985) 1 SCC 122: 1985 SCC (L&S) 174: (1985) 1 SCR 899 4 (1989) 1 SCC 136: 1989 SCC (L&S) 86: (1988) 8 ATC 944:

AIR 1989 SC 134

5 1992 Supp (1) SCC 272: 1993 SCC (L&S) 694: (1993) 24 ATC accordance with Rule 27. Considering the contention, this Court held that: (SCC p. 288, para 33) "There is a distinction between 'rules of recruitment' and 'conditions of service'. To become a member of the service in a substantive capacity, appointment by the Governor shall be preceded by selection of a direct recruit by the Public Service Commission; undergoing training in Forestry for two years in the college and passing Diploma are conditions precedent. If the contention of the promotees that rules of recruitment are conditions of service is accepted, it would be open to the Governor to say that 'I like the face of "A" and I am satisfied that he is fit to be appointed; I dispense with the rules of recruitment and probation and appoint "A" straightaway to the service in a substantive capacity as Assistant Conservator of Forest.'" Therefore, it was held that rule of relaxation cannot be exercised in matters of recruitment. It would be only to remove undue hardship that the power to relax the conditions of service should be exercised and rules relating to recruitment of the service should not be relaxed. In *Syed Khalid Rizvi v. Union of India*⁶ (C.A. No. 823 of 1989 etc. dated November 20, 1992), it was reiterated that appointment to a post in accordance with the Rules is a precondition and the conditions of the rules of recruitment cannot be relaxed. Rule 3 of the Residuary Rules, though empowers the Government to relax the rules, it cannot be availed nor have power to relax conditions of recruitment. In *A.K. Bhatnagar v. Union of India*⁷ this Court held that from among temporary

appointees, those selected by UPSC became seniors according to the merit determined by the PSC and the non-selectees would become juniors to them though the non-selectees were seniors as temporary appointees.

9. Moreover the proviso to Article 320 (proviso to Section 133 of J & K Constitution), though gives power to the State Government to specify case or class of cases in respect of which consultation with the PSC may be dispensed with still the recruitment shall be in compliance with either of the Article 320(1) and Section 133(1) of the J & K Constitution or by duly constituted body or authority. The rules or instructions should be in compliance with the requirements of Articles 14 and 16 of the Constitution. The procedure prescribed shall be just, fair and reasonable. Opportunity shall be given to eligible persons by inviting applications through the public notification and recruitment should be according to the valid procedure and appointment should be of the qualified persons found fit for appointment to a post or an office under the State. Therefore, it must be held that power of relaxation exercised by the Government is ultra vires the Rules and the High Court is right in holding that Government cannot relax the rules of recruitment to be made by the PSC. Government have no power to make regular appointment under the Rules without selection by the Public Service Commission. 6 1993 Supp (3) SCC 575: 1994 SCC (L&S) 84 7 (1991) ISCC 544: 1991 SCC(L&S) 601: (1991) 6ATC 501 Commission under Section 133(1) read with Rule 5 and Schedule-III of the Rules.

10. The next question is whether the direction given by the High Court to regularise the services of the respondents is valid in law. It is true that the ad hoc appointees have been continuing from 1986 onwards but their appointments are de hors the Rules. Rules prescribe only two modes of recruitment, namely, direct recruitment or promotion by selection. As regards the lecturers are concerned, it is only by direct recruitment. The mode of recruitment suggested by the High Court, namely, regularisation by placing the service record of the respondents before the PSC and consideration thereof and PSC's recommendation in that behalf is only a hybrid procedure not contemplated by the Rules. Moreover, when the Rules prescribe direct recruitment, every eligible candidate is entitled to be considered and recruitment by open advertisement which is one of the well accepted modes of recruitment. Inviting applications for recruitment to fill in notified vacancies is consistent with the right to apply for, by qualified and eligible persons and consideration of their claim to an office or post under the State is a guaranteed right given under Articles 14 and 16 of the Constitution. The direction, therefore, issued by the Division Bench is in negation of Articles 14 and 16 and in violation to the statutory rules. The PSC cannot be directed to devise a third mode of selection, as directed by the High Court, nor be mandated to disobey the Constitution and the law.

11. This Court in *Dr A.K. Jain v. Union of India*⁸ gave directions under Article 142 to regularise the services of the ad hoc doctors appointed on or before October 1, 1984. It is a direction under Article 142 on the peculiar facts and circumstances therein. Therefore, the High Court is not right in placing reliance on the judgment as a ratio to give the direction to the PSC to consider the cases of the respondents. Article 142 - power is confided only to this Court. The ratio in *Dr P. P.C. Rawani v. Union of India*⁸ is also not an authority under Article 141. Therein the orders issued by this Court under Article 32 of the Constitution to regularise the ad hoc appointments had become final. When contempt petition was filed for non-implementation, the Union had come forward with an application expressing its difficulty to give effect to the orders of this Court. In that behalf, while

appreciating the difficulties expressed by the Union in implementation, this Court gave further direction to implement the order issued under Article 32 of the Constitution. Therefore, it is more in the nature of an execution and not a ratio under Article 141. In *Union of India v. Dr Gyan Prakash Singh*⁹ this Court by a Bench of three Judges considered the effect of the order in *A.K. Jain case*¹ and held that the doctors appointed on ad hoc basis and taken charge after October 1, 1984 have no automatic right for confirmation and they have to take their chance by appearing before the PSC for recruitment.

8 (1992) 1 SCC 331: 1992 SCC (L&S) 309: (1992) 19 ATC 503 9_ 1994 Supp (1) SCC 306: JT (I 993) 5 SC 681 In *H.C. Puttaswamy v. Hon'ble Chief Justice of Karnataka*¹⁰ this Court while holding that the appointment to the posts of clerk etc. in the subordinate courts in Karnataka State without consultation of the PSC are not valid appointments, exercising the power under Article 142, directed that their appointments as a regular, on humanitarian grounds, since they have put in more than 10 years' service. It is to be noted that the recruitment was only for clerical grade (Class-III post) and it is not a ratio under Article 141. In *State of Haryana v. Piara Singh*² this Court noted that the normal rule is recruitment, through the prescribed agency but due to administrative exigencies, an ad hoc or temporary appointment may be made. In such a situation, this Court held that efforts should always be made to replace such ad hoc or temporary employees by regularly selected employees, as early as possible. The temporary employees also would get liberty to compete along with others for regular selection but if he is not selected, he must give way to the regularly selected candidates. Appointment of the regularly selected candidate cannot be withheld or kept in abeyance for the sake of such an ad hoc or temporary employee. Ad hoc or temporary employee should not be replaced by another ad hoc or temporary employee. He must be replaced only by regularly selected employee. The ad hoc appointment should not be a device to circumvent the rule of reservation. If a temporary or ad hoc employee continued for a fairly long spell, the authorities must consider his case for regularisation provided he is eligible and qualified according to the rules and his service record is satisfactory and his appointment does not run counter to the reservation policy of the State. It is to be remembered that in that case, the appointments are only to Class-III or Class-IV posts and the selection made was by subordinate selection committee. Therefore, this Court did not appear to have intended to lay down as a general rule that in every category of ad hoc appointment, if the ad hoc appointee continued for long period, the rules of recruitment should be relaxed and the appointment by regularisation be made. Thus considered, we have no hesitation to hold that the direction of the Division Bench is clearly illegal and the learned Single Judge is right in directing the State Government to notify the vacancies to the PSC and the PSC should advertise and make recruitment of the candidates in accordance with the rules.

12. It is difficult to accept the contention of Shri Rao to adopt the chain system of recruitment by notifying each year's vacancies and for recruitment of the candidates found eligible for the respective years. It would be fraught with grave consequences. It is settled law that the Government need not immediately notify vacancies as soon as they arose. It is open, as early as possible, to inform the vacancies existing or anticipated to the PSC for recruitment and that every eligible person is entitled to apply for and to be considered of his claim for recruitment provided he satisfies the prescribed requisite qualifications. Pegging the recruitment in chain system would 10 1991 Supp (2) SCC 421 : 1992 SCC (L&S) 53: (1992) 19 ATC 292: AIR 1991 SC 295 deprive all the eligible

candidates as on date of inviting application for recruitment offending Articles 14 and 16.

13. Accordingly, we set aside the directions issued by the Division Bench of the High Court and confirm those of the Single Judge and direct the State Government of the J & K to notify the vacancies to the PSC which would process and complete the selection, as early as possible, within a period of six months from the date of the receipt of this order. The State Government should on receipt of the recommendation, make appointments in the order mentioned in the selection list within a period of two months thereafter. Since the respondents have been continuing as ad hoc doctors, they shall continue till the regularly selected candidates are appointed. They are also entitled to apply for selection. In case any of the respondents are barred by age, the State Government is directed to consider the cases for necessary relaxation under Rule 9(3) of the age qualification. If any of the respondents are not selected, the ad hoc appointment shall stand terminated with the appointment of the selected candidate. The direction sought for by Dr Vinay Rampal cannot be given. His appeal is accordingly dismissed and the State appeal is also dismissed. The appeals of the PSC are accordingly allowed but in the circumstances parties are directed to bear their own costs.