

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

WPS No. 1875 of 2015

1. Anil Sharma S/o Shyam Dayal Sharma Aged About 25 Years
Resident Of Sharma Nivas, Laxmi Nagar, Ring Road No.1,
Pachpedi Naka, Raipur, District-Raipur (Chhattisgarh)

---- Petitioner

Versus

1. State Of Chhattisgarh, Through The Secretary, Urban
Administration And Development Department, Mahanadi
Bhawan, Mantralaya, New Raipur (Chhattisgarh)
2. The Director, Urban Administration And Development, Raipur
(Chhattisgarh)

---- Respondent

And

WPS No. 1876 Of 2015

1. Rakesh Kumar Sahu S/o Heeralal Sahu Aged About 26 Years
Resident Of Pragati Vihar, Santoshi Nagar, P.S.- Tikrapara,
Raipur, District- Raipur (Chhattisgarh)

---- Petitioner

Vs

1. State Of Chhattisgarh Through The Secretary, Urban
Administration And Development Department, Mahanadi
Bhawan, Mantralaya, New Raipur (Chhattisgarh)
2. The Director, Urban Administration And Development, Raipur
(Chhattisgarh)

---- Respondent

And

WPS No. 2119 Of 2015

1. Monesh Sahu S/o Deena Nath Sahu Aged About 23 Years
R/o Mandrol, Police Station- Kurud, District- Dhamtari,
Chhattisgarh

---- Petitioner

Vs

1. State Of Chhattisgarh Through The Secretary, Urban Administration And Development Department, Mahanadi Bhawan, Mantralaya, New Raipur, Chhattisgarh
2. The Director Through Urban Administration And Development, Raipur, Chhattisgarh

---- Respondent

For Petitioners	Mr. Gautam Khetrapal, Advocate
For Respondent/State	Mr. Shashank Thakur and Mr. P.K. Bhaduri, Government Advocates
For Intervener	Mr. Alok Bakshi, Advocate

Hon'ble Shri Justice Prashant Kumar Mishra

C A V Order

18/12/2015

1. In all the three writ petitions filed under Article 226 of the Constitution of India, the petitioners have assailed the legality and validity of the advertisement dated 02.02.2015 issued by the Directorate of Urban Administration and Development, Chhattisgarh (henceforth "the Directorate") inviting applications for recruitment of Sub Engineers in various Municipal Corporations, Municipal Councils and Nagar Panchayat (hereinafter collectively referred to as 'the Municipalities'). Since the challenge is based on the similar facts and law, all the writ petitions are considered and disposed of by this common order.
2. Seminal issue placed for consideration before this Court is – whether a common advertisement for filling up posts in different Municipalities can be issued by the Directorate even

though the procedure prescribed for such recruitment at the level of the concerned Municipality is provided under the Chhattisgarh Municipal Corporation Act, 1956 (for short “the Act, 1956”) and the Chhattisgarh Municipalities Act, 1961 (for short “the Act, 1961”) and the Rules framed thereunder ?

3. Referring to various provisions under the Act, 1961, it is put forth by Shri Gautam Khetrapal, learned counsel for the petitioners, that when the Chhattisgarh Municipal Services (Scale of Pay and Allowances) Rules, 1967 (henceforth “the Rules, 1967”) and the Chhattisgarh Municipal Employees (Recruitment and Conditions of Service) Rules, 1968 (henceforth “the Rules, 1968”) providing for a particular method of recruitment for which only the concerned Municipality is empowered, a consolidated advertisement issued by the Directorate is without any authority of law.
4. Per contra, Mr. Shashank Thakur and Mr. P.K. Bhaduri, learned Government Advocates, would refer to the decision of the Supreme Court rendered in **State of Sikkim v. Dorjee Tshering Bhutia and others**¹ to argue that large number of posts of Sub Engineers were lying vacant in different Municipalities throughout the State which have not been filled up for years together hampering the development work, therefore, the situation being unusual, the Directorate sought consent from the concerned local body and on the basis of the reservation roster applicable for each Municipality, the

¹ AIR 1991 SC 1933

Directorate decided to initiate process of recruitment by direct recruitment on the basis of merit.

5. Shri Shashank Thakur and Shri P.K. Bhaduri would further submit that the right of the concerned Municipality in making appointment has not been taken away inasmuch as once a particular candidate has preferred/chosen a Municipality for his appointment, the appointment order shall be issued by the Municipality and not by the State Government. They would next submit that in the obtaining facts and circumstances with which the State is faced, the procedure adopted is neither illegal nor unconstitutional though such procedure for recruitment is adopted for the first time, therefore, it may appear to be unusual. It is vehemently put forth that the selection process has already been completed as the select list has been drawn, therefore, the writ petitions are not maintainable without impleading all the selected candidates as necessary party-respondents.
6. I have heard learned counsel appearing for the parties, perused the pleadings and the documents appended thereto.

Relevant provisions under the State Law :

7. Section 86 of the Act, 1961 provides for constitution of State Municipal Service (Executive); (Health); and (Engineering) and to frame rules in respect of recruitment, qualification, appointment, promotion, leave, scale of pay, allowances,

dismissal, transfer etc. Sub-section (4) of Section 86 empowers the State Government to transfer any member of the State Municipal Service from one Council to another Council.

8. Section 94 (1) empowers the Council to appoint a Revenue Officer and Accounts Officer, whereas, sub-section (2) empowers the Council to appoint a Sanitary Inspector, **Sub Engineer**, Revenue Inspector and Accountant. Sub-section (3) empowers the State Government to relax the provisions of sub-section (1) or sub-section (2) as the case may be, subject to such conditions as it may think fit to impose. Under sub-section (4), such appointment by a Council has been made subject to confirmation by the State Government with further stipulation that no such post or the post of any other officer or servant as may be specified by the State Government in this behalf shall be created or abolished and no alteration in the emoluments thereof shall be made without the previous approval of the State Government, and every appointment to and dismissal from such post shall be subject to a like approval. Sub-section (6) provides that unless the State Government otherwise directs the power of appointing Municipal Officers and servants other than those mentioned in or specified under sub-section (4) shall vest in the President-in-Council.
9. Section 95 of the Act, 1961 confers rule making power on the State Government in respect of qualification, recruitment,

appointment etc., for municipal employees other than a member of the State Municipal Service.

10. In exercise of powers under Section 95 of the Act, 1961, the State Government has framed the Rules, 1967. This rule is mainly for classification of council, approval of departmental set up and designation of posts, their equation and absorption of employees/servants other than those mentioned in sub-section (4) of Section 94 of the Act, 1961. Thus, this provision does not deal with the direct recruitment of Sub-Engineers.
11. Recruitment of Sub-Engineers is governed by the Rules known as the Chhattisgarh Municipal Employees (Recruitment and Conditions of Service) Rules, 1968. Schedule III of the Rules, 1968 provides for various categories of posts and the qualifications required. Rule 11 of these Rules provides for communication by the Standing Committee to the Chief Municipal Officer regarding number of vacancies to be filled by direct recruitment. The District Selection Committee has been defined under Section 2 (b) of the Rules, 1968 to mean the Committee constituted under Rule 11 of the Rules, 1967. Rule 11 of the Rules, 1968 further provides for advertisement of vacancy and scrutiny of the applications, interview of the candidates, arrangement of their name in order of preference.
12. Under Rule 48 of the Rules, 1968, all the Municipal Employees have been placed under the control and superintendence of Municipal Council, whereas, Rule 49

prescribes for the penalties, which may be imposed on a municipal employee.

13. Under the Act, 1956 dealing with the Municipal Corporations, similar power of appointment has been conferred on the respective Mayor-in-Council or Commissioner of the Corporation, however, under Section 58 (1) proviso (iii) of the Act, 1956, such appointment has been made subject to prior confirmation of the State Government and the decision of the State Government has been made final. Section 58 (3) confers power on the State Government to send any employee on deputation from one Corporation to another Corporation or from the State Government to a Corporation, whereas, sub-section (5) empowers the State Government to transfer on deputation subject to the conditions specified in sub-section (6), any employee of the Corporation.
14. A careful reading of the provisions leads to irresistible conclusion that the appointment on the post of Sub-Engineer for a particular Municipality has to be made by the concerned Municipality, however, it is nowhere provided that the State Government would have no control over such appointment.
15. Under both the enactments i.e. the Act, 1956 and the Act, 1961, clear provisions have been made to say that appointment of Sub Engineers shall be subject to prior approval of the State Government. Thus, it is not a case where

the State Government has absolutely no role to play in the matter of appointment of Sub Engineers.

16. In the case at hand, as put forth by the State Counsel, an unusual situation is created in the State wherein 56 posts of Sub Engineers in different categories of Municipalities are lying vacant. It is a matter of common knowledge that all the developmental/construction activities, within the municipal areas is supervised by the Sub Engineers, therefore, absence of a Sub Engineer would definitely hamper the developmental/construction activities of the Municipal bodies. It is not that the State Government was not aware of the provisions concerning appointment of Sub Engineers and the role of a Municipality in making such appointment, therefore, before proceeding to issue the advertisement, the State Government obtained consent from each of the Municipality. It is only after according such consent, the State Government has proceeded to issue the impugned advertisement in order to save the time and the difficulty to be faced by each of the candidates in applying every time a municipal body issues an advertisement.
17. In response to the query raised by the Court as to the manner by which a particular candidate will be sent for appointment to a particular Municipality, documents have been produced before the Court to demonstrate that every candidate has to submit preference for a Municipality and based on such preference, subject to merit for the particular Municipality, the

name would be recommended by the recruiting agency to the concerned Municipality for appointment.

18. In view of the fact that the advertisement has not provided for any written test/interview, but the appointment shall be made strictly on the basis of merit to be determined on the basis of marks obtained at the qualifying examination, the possibility of making appointment in an arbitrary manner at the whims and fancies of the recruitment agencies is completely eliminated. There being no *mala fide* in issuing consolidated advertisement, but rather it is for adopting a smooth hassle free manner of recruitment for all the Municipalities in one go, a slight deviation from the rules would not render the entire exercise unconstitutional.
19. In **Dorjee Tshering Bhutia** (supra), the State of Sikkim proceeded to make recruitment even though the posts were to be filled up by the Public Service Commission. Negating the challenge to the advertisement/recruitment, the Supreme Court held thus :

“15) The executive power of the State cannot be exercised in the field which is already occupied by the laws made by the legislature. It is settled law that any order, instruction, direction or notification issued in exercise of the executive power of the State which is contrary to any statutory provisions, is without jurisdiction and is a nullity. But in this case we are faced with a peculiar situation. The Rules, though enforced, remained unworkable for about five years. The Public Service Commission, which was the authority to implement the Rules, was not in existence during the said period. There is nothing on the record to show as to why the Public Service Commission was not constituted

during all those five years. In the absence of any material to the contrary we assume that there were justifiable reasons for the delay in constituting the Commission. The executive power of the State being divided amongst various functionaries under Article 166 (3) of the Constitution of India there is possibility of lack of coordination amongst various limbs of the Government working within their respective spheres of allocation. The object of regulating the recruitment and conditions of Service by statutory provisions is to rule out arbitrariness, provide consistency and crystallise the rights of employees concerned. The statutory provisions which are unworkable and inoperative cannot achieve these objectives. Such provisions are non est till made operational. It is the operative statutory provisions which have the effect of ousting executive power of the State from the same field. When in a peculiar situation, as in the present case, the statutory provisions could not be operated there was no bar for the State Government to act in exercise of its executive power. The impugned notification to hold special selection was issued almost four years after the enforcement of the Rules. It was done to remove stagnation and to afford an opportunity to the eligible persons to enter the service. In our view the State Government was justified in issuing the impugned notification in exercise of its executive power and the High Court fell into error in quashing the same.”

(Emphasis supplied)

20. In the case at hand also, the posts of Sub Engineers were lying vacant in different Municipalities for years together and the concerned Municipality has accorded consent in favour of the State Government for issuance of consolidated advertisement. Thus, an unusual situation has arisen requiring the State Government to step in, in exercise of its executive powers and proceed to issue advertisement by selecting candidates on the basis of merit for their appointment to a particular Municipality in order of choice and merit for issuance of appointment order by the concerned Municipality.

21. This Court does not see any such illegality on unconstitutionality in issuing the advertisement which would call for interference under Article 226 of the Constitution of India. This is more so because the Rules itself provided for the State's role in the appointment of Sub Engineers inasmuch as the appointment has been made subject to approval of the State Government.
22. In addition to the above, it is also to be seen that the pleadings made in each of the writ petitions do not suggest that the petitioners have applied for the post. In such a situation, the petitioners have no locus to challenge the advertisement.
23. The Supreme Court in **R.K. Jain v. Union of India**², held that in service jurisprudence it is settled law that it is for the aggrieved person i.e. non-appointee to assail the legality of the offending action. Third party has no *locus standi* to canvass the legality or correctness of the action.
24. In case, the petitioners have participated in the selection process by submitting applications, but have not been selected, the writ petitions suffer from dual defects. *Firstly*; there is concealment of fact that the petitioner has participated in the selection process and; *secondly*; once having participated and failed to secure position in the select list, the person cannot challenge the selection process. If the candidate had any valid objection, he should have challenged the advertisement and selection process without participating

2 (1993) 4 SCC 119

in the selection process. {See: **Vijendra Kumar Verma v. Public Service Commission, Uttarakhand and Others**³ & **Dhananjay Malik and Others v. State of Uttaranchal and Others**⁴.

25. There is yet another hurdle for the petitioners to succeed in these petitions because as stated by the State counsel, the advertisement was issued in February 2015. The writ petitions have been filed in May 2015. In the meanwhile, the selection process is almost complete as the select list has been prepared, therefore, the candidates who have been shortlisted should have been impleaded in the writ petition as party-respondents. In absence of selected candidates, the writ petitions are not maintainable. (See: **Ranjan Kumar etc. etc. v. State of Bihar & Others**⁵).
26. Accordingly, all the writ petitions, *sans* merit, are liable to be and are hereby dismissed. No order as to costs.

Sd/-

Judge

Gowri

Prashant Kumar Mishra

3 (2011) 1 SCC 150

4 (2008) 4 SCC 171

5 2014 (3) Supreme 646