

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.9788 of 1998

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Keshav Kumar, son of Sri Laxmikant Thakur, resident of village Lakhnour, Police Station Lakhnour, District Madhubani, at present Mohalla-Samastipur Block Colony, Qrt. No. 9, P.S. Samastipur Sadar, District-Samastipur

.... Petitioner/s

Versus

1. The State of Bihar
 2. The Secretary, Department of Welfare, Govt. of Bihar, Old Secretariat, Patna
 3. The Director, Social Welfare, Directorate of Social Welfare, Department of Welfare, Sichai Bhawan, Patna
 4. The Under Secretary, Department of Welfare, Old Secretariat, Govt. of Bihar, Patna
 5. The Deputy Director, Welfare cum Social Welfare Darbhanga Division, Darbhanga
 6. The Commissioner, Darbhanga Division, Darbhanga
 7. The District Magistrate, Samsatipur
 8. The Child Development Project Officer, Bibhutipur Anchal Bibhutipur, P. S. Bibhutipur District.
- Respondent/s
- =====

Appearance :

For the Petitioner/s : Mr. Rajendra Prasad Singh, Sr. Adv.
Mr. Amar Nath Mishra, Advocate

For the Respondent/s : Mr. Anshuman Singh, GP-24
Mr. Siddhartha Shankar Pandey, AC to GP-24
Mr. Sriram Krishna, AC to GP-24

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CORAM: HONOURABLE THE ACTING CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE NAVANITI PRASAD SINGH

and

HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

CAV JUDGMENT

(Per: MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date: 24-06-2016

Noticing conflict between the two Division Bench decisions of this Court, one in case of *Abhay Kumar Rai and others Vs. State of Bihar and others* reported in 2001(4) PLJR 245 and in case of *Ram Swarath Yadav and others Vs. The State of Bihar and others* vide order, dated 29.06.1998, passed in LPA No. 162 of 1990, this matter has been referred by a Division Bench of this Court for

consideration and resolving the conflict between the said two decisions, by a Full Bench.

2. Following is the order, dated 17.02.2009, whereby the matter has been referred by the Division Bench to the Full Bench for consideration:-

“Initially this writ application was referred for consideration by a Full Bench because learned single Judge came to doubt the correctness of a Division Bench judgment in the case of Abhay Kumar Rai & ors. Vs. State of Bihar & ors, reported in 2001(4) PLJR 245. The matter was then considered by the Full Bench which did not go into the merits but held that initially the matter required hearing by a Division Bench.

No doubt, the aforesaid judgment in the case of Abhay Kumar Rai and others supports the case of the writ petitioner but learned counsel for the State has relied upon a Division Bench judgment, dated 29.6.1998 passed in LPS No. 162 of 1990 (Ram Swarath Yadav & Anr. Vs. The State of Bihar & ors.), which is apparently in conflict with the Division Bench Judgment in the case of Abhay Kumar Rai & ors. Both the judgments have given different interpretations to a Policy decision of the Government of Bihar issued by the Appointment Department through letter No. 8176 (sic) dated 21.6.1976 (sic).

On going through the aforesaid two judgments, we find that the conflict between two judgments needs to be looked into and resolved by a Full Bench. Hence, let this matter be listed before a Full Bench.

Let a copy of this reference order be given to learned SC.8”.

3. It is evident from the order of reference as quoted above, that the conflict revolves around interpretation and

consequence of a policy decision of the State of Bihar, ascertained in letter No. 8167, dated 21.06.1966 issued by the Appointment Department. To allay any doubt or confusion, it is pointed out that the letter number and date of issuance of policy decision in question appears to have been wrongly typed in the order of reference as letter No. 8176, dated 21.6.1976 in place of letter No. 8167, dated 21.06.1966.

4. Dealing with the said letter, the Division Bench in case of **Abhay Kumar Rai and others** (supra) in its decision, held in paragraph 8 as follows:-

“8. So far as the Appointment Department’s letter No. 8167 dated 21st of June, 1976 is concerned, it will be evident from paragraph 4 therein that the vacancies are to be notified by the Employment Exchange, whenever number of such vacancies are five or more than five. Thereby it is clear that for vacancies lesser in number than five vacancies there in no need of advertisement to be published by the Employment Exchange in the newspaper. Admittedly in the case of the appellants requisition were made four vacancies, which were vacant under the respondents. Such being the position it cannot be held that the Appointment Department’s letter No. 8167 dated 21st of June, 1976(sic) was violated in the matter of appointment of appellants.”

5. This is to be pointed out again that in the above quoted paragraph, year of the letter in question has wrongly been typed as “1976” in place of “1966”.

6. It is easily noticeable from the Division Bench decision of this Court in case of **Abhay Kumar Rai & ors** (supra), that while interpreting the provisions of Appointment

Department's letter No. 8167, dated 21.6.1966, the Court held that in case of the vacancies lesser in number than five, there would be no need of advertisement to be published by the Employment Exchange in the Newspaper, This analogy has been drawn by the Division Bench in case of ***Abhay Kumar Rai*** (supra), by reading paragraph 4 of the said letter, dated 21.6.1966, which required that the vacancies were to be notified by the Employment Exchange, whenever number of such vacancies are to be filled up is five or more.

7. In case of ***Ram Swarath Yadav and others vs. the State of Bihar*** (supra), the Division Bench referred to Clauses 5 and 6 of the same letter and held that since no procedure prescribed under Paragraph 5 of the said letter was adopted and no advertisement was issued, the appointment of the petitioners of that case could not be upheld and that learned single Judge was correct in upholding the order of termination, while dismissing the writ application.

8. In order to appreciate the conflict between the two decisions, it would be apt to quote relevant portion of the order, dated 29.06.1998, passed by Division Bench of this Court in case of ***Ram Swarath Yadav and another*** (supra):-

“ Challenging the order impugned learned counsel first invited out attention to the notification No. 8167 Government of Bihar, Appointment Department, dated 20th June, 1966 Clauses-5 which reads as under is emphatic:-

“5. When the number of vacancies, to be

filled in an establishment, is less than 5 appointment authority, if so desire may issue an advertisement in the newspaper at his own cost the intending candidates to send their application to the Employment Exchange concerned a date to be prescribed in the advertisement.

The notification of the vacancies together with a copy of advertisement should be sent to the Employment Exchange in the manner as prescribed in paragraph-3 above.

Clause-6 prescribes as under:

'The Employment Exchange will only be responsible for submitting names of the suitable candidates to the employing authority for his selection against the vacancy. Whenever so desired by the employing Department.

Admittedly, in the instant case, no such procedure is adopted, no advertisement was issued, only it is contended that the advertisement was pasted in the department and on that basis the appointment letter was issued.

Since the appointment has not been made in accordance with the memo referred to above, rightly learned writ Court upholding the order of termination dismissed the writ petition. ”

9. Since the letter No. 8167, dated 21.06.1966 is at the centre of controversy, with particular reference to paragraphs 4, 5 and 6, it is considered appropriate to reproduce the said paragraphs which are as under:-

“4. Employment Exchange maintain a register of persons who are looking for employment and their names are registered on a free and voluntary basis. In order, however, to ensure that the best available candidates registered with the Employment Exchanges, it has been decided that whenever 5 or more vacancies are notified by any State Government establishment, the Employment

Exchange concerned will advertise these vacancies in newspapers. This will also ensure that those who have not registered themselves earlier but are desirous of being considered for the post may also take advantage of this opportunity by registering with the Employment Exchange.

5. When the number of vacancies, to be filled in an establishment is less than 5, the appointing authority, if so desires, may issued an advertisement in the newspaper at his own cost, directing the intending candidates to send their applications to be Employment Exchange concerned within a date to be prescribed in the advertisement. The notification of the vacancies together with a copy of advertisement should however be sent to the Employment Exchange in the manner as prescribed in paragraph 3 above.

6. The Employment Exchange will only be responsible for submitting names and particulars of suitable candidates to the employing authority for his selection against the vacancy notified by him. Whenever so desired by the employing department the Employment Exchange concerned will associate a representative of his, for screening of applications available with the Employment Exchange for the purpose of preparing a short list of candidates, who will be called for interview or other tests.”

(Emphasis supplied)

10. It is not difficult to appreciate that the Division Bench in case of **Abhay Kumar Rai Vs. State of Bihar** (supra), has not referred to paragraph 5 of the letter No. 8167, dated 21.06.1966, and conclusion has been recorded on the basis of inference drawn from the requirement under Paragraph 4 of the said letter, of advertising the vacancies in the Newspaper when the vacancies were to be filled up were five or more. Upon con-joint reading of paragraphs 4 and 5 of the said letter, it is easily

discernable that letter prescribed that whenever more or five vacancies were to be notified by the State Government Establishment, the Employment Exchange concerned will advertise these vacancies in the newspapers and when the vacancies are less than five, the appointing authority “may” issue an advertisement if he so desires, in the newspaper at his own cost, directing the intending candidates to send their applications to the Employment Exchange concerned, within a date to be prescribed in the advertisement. Paragraph 5 further required that notification of vacancies together with a copy of advertisement issued, be sent to the Employment Exchange in the manner as prescribed in paragraph 3 of the said letter.

11. Paragraphs 2 and 3 of the letter No. 8167, dated 21.06.1966 read thus:-

“2. It has now been decided that henceforth all recruitments to State Government vacancies will be channelised through the Employment Exchanges, on a compulsory basis, except vacancies that are filled on the recommendations of the Bihar Public Service Commission or by promotion, transfer or deputation. For the rest, other sources of recruitment will be tried only when the employment Exchanges concerned issue a non-availability certificate.

3. Therefore, all such vacancies in State Government establishments to be filled up here after should be notified to the nearest Employment Exchange on the prescribed proforma which is reproduced on Appendix I to this letter. The vacancies should normally be notified to the concerned employment Exchange by giving reasonable notice, say minimum of three weeks in respect of vacancies to be notified in the newspapers and ten days in respect of other

vacancies. In case of urgent demands, however, the candidates may be called for at a shorter notice. A list of Employment Exchange in the State together with their respective operational jurisdiction has been reproduced on Appendix II to this letter for guidance of all concerned."

12. A decision was, thus, apparently taken in the year 1966 to the effect that all recruitments to the State Government vacancies shall be channelised only through the Employment Exchange, on compulsory basis, except where the vacancies were to be filled up on the recommendations of the Bihar Public Service Commission or by promotion, transfer or deputation.

13. For the purpose of approaching the controversy involved, I consider it proper to refer to a similar notification/decision of the Government of India, Ministry of Home Affairs, making it obligatory that all vacancies in Central Government Establishments, other than those filled through the Union Public Service Commission be notified through the nearest Employment Exchange and that no Department or office should fill up any vacancy by direct recruitments unless the Employment Exchanges certified that they were unable to supply suitable candidates. The reference to the said notifications/instructions are found in Supreme Court's decision in case of *Union of India and ors vs. N.Hargopal and others* reported in (1987) 3 SCC 308. The validity of such decision of the Union of India was under challenge. It is made clear that the said notifications do not appear to have prescribed that employer may in his discretion advertise the post when the vacancies were less than

five.

14. The Supreme Court held in case of *N.Hargopal* (supra), that the system of appointment through Employment Exchanges advances, rather than restricts the rights guaranteed by Articles 14 and 16 of the Constitution of India and the restriction that employment in Govt. Department should be through the medium of employment exchange does not offend Articles 14 and 16 of the Constitution of India.

15. The Supreme Court upheld the requirement of making appointments exclusively through employment exchange.

Paragraphs 8 and 9 of the said decision read as follows:-

“8. It is clear that it is the desire of the Government of India that all government departments government organizations and statutory bodies should adhere to the rule that not merely vacancies should be notified to the Employment Exchanges, but the vacancies should also be filled by candidates sponsored by the Employment Exchanges. It was only when no suitable candidates were available, that other sources of recruitment were to be considered. While the government is at perfect liberty to issue instructions to its own departments and organizations provided the instructions do not contravene any constitutional provision or any statute, these instructions cannot bind other bodies which are created by statute and which function under the authority of statute. In the absence of any statutory prescription the statutory authority may however adopt and follow such instructions if it thinks fit. Otherwise, the government may not compel statutory bodies to make appointments of persons from among candidates sponsored by Employment Exchanges only. The question, of course, does not arise in the case of private employers which cannot be so compelled by any instructions issued

by the government.

9. The further question is whether the instructions issued by the government that in the case of government departments the field of choice should, in the first instance, be restricted to candidates sponsored by the Employment Exchanges offend Articles 14 and 16 of the Constitution. Shri P. Parmeshwara Rao, learned counsel appearing for some of the respondents strenuously urged that such a restriction would offend the equality clauses of the Constitution, namely, Articles 14 and 16. He urged that when Parliament had gone into the question and decided that there should be no compulsion in the matter of appointment by way of restriction of the field of choice, it was not open to the government to impose such compulsion. He argued that it would be unreasonable to restrict the field of choice to those sponsored by the Employment Exchanges. In a country so vast as India, in a country where there was so much poverty, illiteracy and ignorance, it was not right that employment opportunities should necessarily be channeled through the Employment Exchanges when it is not shown that the network of Employment Exchanges is so wide, that it reaches all the corners of this vast country. He argued that it is futile to expect that persons living in distant places could get themselves registered with Employment Exchanges situated far away. The submission of Shri Parmeshwara Rao is indeed appealing and attractive. Nonetheless, we are afraid we cannot uphold it. The object of recruitment to any service or post is to secure the most suitable person who answers the demands of the requirements of the job. In the case of public employment, it is necessary to eliminate arbitrariness and favoritism and introduce uniformity of standards and orderliness in the matter of employment. There has to be an element of procedural fairness in recruitment. If a public employer chooses to receive applications for employment where and when he pleases, and chooses to make appointments as he likes, a grave element of arbitrariness is certainly introduced. This

must necessarily be avoided if Articles 14 and 16 have to be given any meaning. We, therefore, consider that insistence on recruitment through employment Exchanges advances rather than restricts the rights guaranteed by Articles 14 and 16 of the Constitution. The submission that Employment Exchanges do not reach everywhere applies equally to whatever method of advertising vacancies is adopted. Advertisement in the daily press, for example, is also equally ineffective as it does not reach everyone desiring employment. In the absence of a better method of recruitment, we think that any restriction that employment in government departments should be through the medium of employment exchanges does not offend Articles 14 and 16 of the Constitution. With this modification of the judgment of the High Court, the appeals and the special leave petitions are disposed of. No orders are necessary in the writ petition.

(Emphasis mine)

16. The law relating to filling up posts through Employment Exchange has since undergone a sea change and the Courts have repeatedly held that exclusion of the candidates who were not sponsored through the medium of employment exchange and restricting the choice of selection to the candidates sponsored through the medium of employment exchange, would offend the equality clause of Articles 14 and 16 of the Constitution of India.

17. This same issue again emerged before a larger bench of Supreme Court in case of ***Excise Superintendent Malkapatna, Krishna District, A.P. V. K. B.N. Visweshwara Rao and others*** reported in (1996) 6SCC 216, pertaining to effect of decision of India to channelize recruitments exclusively through employment

exchange.

18. The Supreme Court in case of *Excise Superintendent Malkapatatna* (supra), made it mandatory that 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 candidates who have applied including those sponsored by the employment exchange. The Supreme Court in case of *Excise Superintendent* (supra), overruled impliedly, its earlier decision in case of *Union of India Vs. Hargopal* (supra), to this limited extent whereby the decision of Central Government to make appointment on certain posts were required to be made exclusively through the employment exchange was upheld. The Supreme Court in case of *Excise Superintendent Malkapatna* (supra), held that the methods suggested by the Court would be consistent with the principles of fair play, justice and equal opportunity. Paragraph 6 of the said decision is relevant and is being extracted hereinbelow:-

“6. Having regard to the respective contentions, we are of the view that contention of the respondents is more acceptable which would be consistent with the principles of fair play, justice and equal opportunity. It is common knowledge that many a candidate is unable to have the names sponsored, though 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 to be sponsored by the employment exchange. Under these circumstances, many a deserving candidate is 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 this procedure is adopted, fair play would be sub served. The equality of opportunity in the matter of employment would be available to all eligible candidates.” (Emphasis mine)

19. In case of Excise **Superintendent Malkapatnam, Krishna District**, the Supreme Court explicitly held that if selection is confined to the names sponsored by the Employment Exchange, many a deserving candidate would be deprived of the right to be considered for appointment to a post under the State. The Supreme Court, therefore, observed that it should be mandatory for the requisitioning authority/establishment to intimate the employment exchange, and the employment exchange should sponsor the names of the candidates to the requisitioning departments for selection strictly in accordance with the seniority and reservation as per the requisition. The Apex Court further held that 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 case of all candidates who had applied. The Apex Court concluded that the equality of opportunity in the matter of employment would be thus, available to all eligible candidates and fair play would be subserved if the said procedure is adopted.

20. In view of the ratio laid down by the Supreme court in case of *Excise Superintendent* (supra), the State Government decision as contained in letter, dated 21.6.1966, has lost its efficacy for all practical purposes inasmuch as the posts mentioned in the said letter cannot, now, be filled up only through employment exchange. It is mandatory, now, that all the posts are duly advertised so that every eligible persons has equal opportunity to apply and participate in the process of selection inconformity with the requirements of Articles 14 and 16 of the Constitution of India.

21. I have referred to these developments because in my considered view, the letter dated 21.6.1966, has become otiose to the extent it made it obligatory that recruitment of the State Government vacancies will be canalized by the employment exchanges on a compulsory basis.

22. Appointment to any post under the State or its instrumentality cannot be made without making a proper advertisement inviting applications from all eligible candidates, thus, giving such candidates an equal opportunity of participation in the process of selection. All persons having eligibility for a post have a right to be considered for any post under the State

within the meaning of Article 12 of the Constitution of India in order to satisfy the basic requirements of rationality and fair play, otherwise the action shall be hit by Articles 14 and 16 of the Constitution of India.

23. The right of a citizen to be considered for appointment against a post under the State is his fundamental right envisaged under Articles 14 and 16 of the Constitution of India. The right pre-supposes equality of opportunity in the matter of appointment to any office/post under the State. Equality of opportunity cannot be achieved if the eligible candidates are not provided due opportunity to apply. It is for this reason that publicity regarding vacancies is an essential requirement which is one of the basic elements for fulfilling the mandate of Articles 14 and 16 of the Constitution of India in a matter of public employment. The prescription in the notification/letter, dated 21.6.1966 that it would be upto the discretion or sweet-will of the employer to advertise the post or not if the number of vacancies is less than five clearly offends the provisions of Articles 14 and 16 of the Constitution of India. It has been held by superior courts that such posts are to be essentially advertised in newspapers, having wide circulation so that all eligible candidates have due opportunity to participate.

24. Bare reading of paragraph 5 of the letter, dated 21.06.1966, it will appear that it confers discretion on the appointing authority to issue an advertisement in the newspapers at this own cost when the vacancies is to be filled up are less than

5. Such discretion of issuance of an advertisement by the appointing authority as contemplated in paragraph 5 of the letter, dated 21.06.1966, has no rationale and it is, rather, mandate of the equality clauses of Articles 14 and 16 of the Constitution of India. In this background, will it be impermissible for the State to give effect to Clauses 4 and 5 of the notification in question which leaves it to the discretion of the employer to advertise the vacancies or not, if the number of vacancies is less than five.

25. Any provisions conferring discretion on an authority to advertise post or not, in my view, will be in breach of Articles 14 and 16 of the Constitution of India. Paragraph 5 of the letter dated 21.6.1966, in my view, cannot be upheld being violative of Articles 14 and 16 of the Constitution of India. The Government letter, dated 21.06.1966 (supra), cannot be applied to allow selection/appointment against any vacancies under the State Government of Bihar on the ground that less than 5 vacancies were/are required to be filled up. It is, accordingly, held that paragraph 5 of the letter in question, dated 21.06.1966, cannot be read to mean that there would be no requirement of due advertisement in newspapers for filling up of vacancies less than 5.

26. The reference is answered accordingly.

27. Bearing in mind the fact that the case has remained pending since 1998, instead of sending the matter back before learned Single Judge for final disposal of the case on merit, I have considered it apt

to dispose of the writ application, after having answered the reference.

28. It is petitioner's case that there were four sanctioned vacant posts in Clerical category in the office of the Deputy Director, Welfare, Darbhanga and, accordingly, names of qualified candidates eligible for the said posts were requisitioned from the local District Employment Exchange, Samastipur and the same was notified in Employment Exchange, Samastipur, Darbhanga and Muzaffarpur. The petitioner was said to be enrolled with the District Employment Exchange, Samastipur vide registration No. 1915 of 1987 and in pursuance of the requisition, the Employment Exchange had forwarded ten names of the candidates including that of the petitioner through letter No. 550 dated 26.09.1991, addressed to the Deputy Director, Welfare, Darbhanga Division, which was duly received.

29. It is his further case that an interview was held on 10.09.1995 and after following the procedure and certain executive instructions issued by the Government of Bihar, he was appointed against the vacant sanctioned post of Clerk in the scale of Rs. 1200-30-1800/- by the Deputy Director, Welfare, Darbhanga on provisional basis, temporarily at Child Development Project Office, Bibhutipur in the District of Samastipur. Pursuant to his appointment, he joined the post on 26.10.1995 and he started functioning thereafter and getting salary. It is specific case of the petitioner that the posts were not advertised, number of the same being four and process of selection was undertaken through Employment Exchange. It is also his case that the reservation roster was also followed inasmuch as out of four

vacant posts of clerk, two from general category and rest from Scheduled Castes category were appointed, for which roster clearance was obtained from the office of the Commissioner, Darbhanga Division. There is statement in paragraph 20 of the writ application that the roster clearance was granted on 18.09.1995, whereas it appears from paragraph 8 of the writ application that requisition was sent in 1991 and the petitioner claims to have been interviewed on 10.09.1995, much before the said clearance of roster on 18.09.1995. In such circumstance, the plea that roster clearance was obtained before start of the selection process cannot be readily accepted.

30. Few months after the petitioner's appointment, a show cause notice dated 26.7.1996 was issued indicating that his appointment was in violation of various instructions issued by the State Government. The petitioner responded to the said show cause notice and denied allegations of irregularities.

31. By an order dated 07.01.1997, the Director, Social Welfare Department declaring the petitioner's appointment as illegal and terminated his service. The petitioner had put to challenge the said order by filing a writ application being CWJC No. 1703 of 1997 before this Court. This Court by an order, dated 23.07.1997, disposed of the writ application and remanded the matter back to the Director Welfare, after quashing the order of termination dated 07.01.1997, on the ground that the order under challenge contained vague allegation of non-compliance of Government instruction.

From the said order, it appears that the State Government had taken plea before this Court that petitioner and several other persons were illegally appointed by one B.P. Choudhary, the then Deputy Director, Welfare Division, Darbhanga. This Court, considering the said stand observed that if the State Government was of the opinion that the appointment was in violation of the circular of the Government, it was a fit case in which they should have proceeded against Sri B.P. Choudhary. This Court observed that between case of the appointing authority and appointees, in the matter of illegal appointment in contravention of the rules/guidelines, the appointing authority stands on a worse footing.

32. In the light of this Court's order dated 23.07.1997, the petitioner was allowed to resume his duty on 04.08.1997, whereafter, detailed show cause notice was given to him. After having received the petitioner's show cause reply and considered the same, the respondent again came out with an order dated 12.02.1998 terminating the petitioner's appointment on the ground of the same having been made illegally without proper advertisement and without following the procedure prescribed by the State Government and various circulars.

33. The said order dated 12.02.1998 has been challenged in the present writ application with a plea that no advertisement was needed in view of the Government instructions/circulars as only four posts were required to be filled up. I have already considered this aspect and have come to a conclusion that making appointment,



against posts under the State, within the meaning of Article 12 of the Constitution of India without advertisement would be in violation of Articles 14 and 16 of the Constitution of India, even if the number of posts, is less than five. The question which may arise as to whether in view of what I have held in the present judgment with regard to the requirement of issuance of advertisement, termination of the petitioner's appointment by the Respondents on that sole ground can be justified. I am of the view that it was the State Government policy to make appointment when the vacancies were less than four, without advertisement. The same policy has been held to be violative of Articles 14 and 16 of the Constitution of India. But the fact remains that if the petitioner was appointed in accordance with the said policy, it may be unequitable to declare his appointment wholly illegal on the said ground alone. However, from the facts which have emerged on the basis of pleadings that there are other grounds for termination of his service.

34. From the facts which I have taken note of, it is evident that the petitioner worked for the period 26.10.1995 to 07.01.1997 (nearly 14 months), when his appointment was held to be illegal. Thereafter, he was allowed to join on 04.08.1997 by virtue of order, dated 27.10.1997 passed by this Court in CWJC No. 1703 of 1997. Again his service came to be terminated by an order, dated 12.10.1998. He thus, worked as Clerk for a total period of nearly 28 months in the Department, and since 1998 he is out of service.

35. A counter affidavit has been filed on behalf of the



State of Bihar stating, inter alia, that the names of the applicants were procured by the then Deputy Director, Welfare, Darbhanga Division, Darbhanga from the Employment Exchange as there is neither any reference of requisition letter nor the number of posts to be filled up in the transaction is mentioned in the letter received from the Employment Exchange. It has further been asserted in the counter affidavit that names of the applicants were forwarded by the Employment Exchange in 1991, whereas the appointment of the petitioner was made in the year 1995, which is violation of the provisions as contained in letter No. 1541 dated 22.02.1983. The counter affidavit says that no objective method was adopted neither any typing test was done to ascertain the petitioner's ability. It has further been asserted in the counter affidavit that no merit list was prepared to show that the appointments were made in a legal manner. It has also been pleaded in the counter affidavit that appointment of the petitioner was purely provisional and temporary in nature which was liable to be terminated without any notice. It has been stated that in the light of the Court's observation made in the order dated 23.07.1997 passed in CWJC No. 1703 of 1997, the State Government decided to take disciplinary action against the B.P. Choudhary, the then Deputy Director, Welfare Division, Darbhanga. These facts have not been specifically controverted by the petitioner.

36. Fact remains that the petitioner's appointment in question was provisional in nature on temporary basis. He is out of service since 1998. From the facts discussed above, it cannot be said

he was appointed following due procedure, in conformity with principles of equality and fair play. I have noticed inconsistencies in the pleadings of the writ application in relation of petitioner's claim of clearance of roster before requisition was allegedly made by the Department from Employment Exchange. In such circumstance, I do not feel inclined to interfere with the impugned stale action, applying principles of equality.

37. There is no merit in this application which is, accordingly, dismissed.

38. There shall be no order as to costs.

(Chakradhari Sharan Singh, J)

(I.A. Ansari, ACJ)

(Navaniti Prasad Singh, J)

ArunKumar/-