

HIGH COURT OF CHHATTISGARH AT BILASPUR

WPS No. 2337 of 2012.

Reserved on 11/02/2019.

Delivered on 11/03/2019.

1. Anil Kumar Dwivedi S/o Shri Ramakant Dwivedi, aged about 33 years, R/o Near Shanti Offset, Near Civil Court, Civil Lines, Ward No.21, Dongargarh, District Rajnandgaon (C.G.).
2. Dashrath Soni S/o Shri Devlal Soni, aged about 35 years, R/o Mahavirpara, Ward No.9, Dongargarh, District Rajnandgaon (C.G.).
3. Sayyad Abrar Ali S/o Shri Sayyad Anwar Ali, aged about 34 years, R/o village Sanwa, Post Sargaon, Tah. Mungeli, District Bilaspur (C.G.).

---- Petitioners

Versus

1. Secretary, Vidhan Sabha Sachivalaya, Chhattisgarh Vidhan Sabha, Baloda Bazar Road, Vidhan Nagar, Raipur (C.G.).
2. Shri Prahlad Kumar Soni S/o Shri Ramnath Ji Soni, aged about 38 years, working as Assistant Marshal, R/o Near Kaliji Mandir, Bramhinpara, Rajnandgaon (C.G.).
3. Shri Deepak Awasthi S/o Not Known, aged about 36 years, working as Assistant Marshal, R/o Zonal Market, Sector-10, Bhilai, District Durg (C.G.).
4. Shri Virendra Singh Chandel S/o Shri Devendra Singh Chandel, aged about 36 years, working as Assistant Marshal, R/o Station Road, Polsaipar, District Durg (C.G.).
5. Shri Manish Chandrakar S/o Not Known, aged about 30 years, Working as Assistant Marshal, R/o Village Mujhagahan, Post Sejbahar, District Raipur (C.G.).
6. Shri Dinesh Singh Thakur S/o Shri Girish Singh Thakur, aged about 30 years, Working as Assistant Marshal, R/o Govindpura, Kanker (C.G.).
7. Shri Rajesh Kumar Singh S/o Shri Laxmi Shankar Singh, aged about 34 years, Working as Assistant Marshal, R/o Kirana Store, Ramnagar, Supela, Bhilai, District Durg (C.G.).
8. Shri Sushil Kumar S/o not known, aged about 35 years, Working as Assistant Marshal, R/o Bajrangpara, Near Vinay Singh Garage, District Durg (C.G.).

---- Respondents

For petitioners	:	Shri Prateek Sharma, Advocate.
For resp.No.1	:	Shri Amit Buxy on behalf of Shri Abhishek Sinha, Advocate.
For resp.Nos. 2 to 8	:	Shri Mateen Siddiqui, Advocate.

Hon'ble Shri Justice P. Sam Koshy
CAV Order

1. The present Writ Petition has been preferred by the petitioners claiming for the following reliefs:-

“10.1 - To quash the appointment of respondents no. 2 to 8 on the post of Assistant Marshal as being contrary to the rules.

10.2 - The Hon'ble Court may kindly be pleased to issue a writ of and / or in the nature of Mandamus directing the respondent No. 1 to conduct the selection afresh in accordance with the rules thereby, directing the respondent no. 1 to consider afresh the case of the petitioners for appointment on the post of Assistant Marshal.”

2. The facts of the case in brief is that, the respondent No.1 published an advertisement in the year 2001 i.e. on 25/06/2001 filling up of the post and one such post was that of “Assistant Marshal”.
3. The petitioners herein applied for the same. Their candidature were also processed and lateron the petitioners were called upon for appearing in the physical examination to be held on 03/11/2001. The petitioners also underwent the physical test and since there was no further development after the physical test were conducted, the petitioners sought an information from the respondents and the petitioners were informed that the recruitment process initiated vide advertisement was subsequently cancelled and dropped. It was also informed that the respondents meanwhile have appointed the private respondents on the said post. Lateron the Writ Petition was filed by

some of the petitioners before the High Court vide WP No. 3134/2007 which was later on withdrawn on 12/04/2007 with liberty to revive if the cause of action still survives and subsequently the present Writ Petition has been filed.

4. The substantial grievance of the petitioners is that, having initiated the recruitment process for filling up of the post of Assistant Marshal at the first instance the respondents ought to have completed the recruitment process. The contention of the petitioners is that, the respondents deliberately and malafidely in order to show undue favour to the private respondents cancelled or dropped the recruitment process and thereafter gave appointment to the private respondents without following any recruitment process whatsoever without subjecting the private respondents to any sort of selection process. This according to the petitioners is nothing but nepotism and backdoor entry. According to the petitioners, any recruitment in any public employment ought to be carried out in consonance to the requirement under Articles 14 and 16 of the Constitution of India. There has to be a clear case of transparency in the entire recruitment process and while doing so, all the eligible candidates ought to have been permitted to participate and compete with each other and the best candidates among them ought to have been selected. Having not done so, the entire action on part of the respondents in granting appointment to the private respondents smacks malafides, arbitrariness and contrary to the very rules governing the establishment. According to the petitioners, the mode of recruitment for the post of Assistant Marshal is direct recruitment under the rules and in the instant case, no such recruitment process of written examination or an interview or both were conducted while granting appointment to the private respondents. The counsel for the petitioners relied upon few judgments which are **2014 14 SCC 50, AIR 2010 3783, AIR 1999 SC 2648, 2009 5 SCC 65 and 2015 15 SCC 602.**

5. Opposing the petition the counsel for the respondent No.1 submitted that, the Writ Petition by efflux of time has technically rendered of only

academic interest. All the petitioners who have filed the Writ Petition have crossed the maximum age of recruitment and as such even if the appointment of the private respondents are cancelled and fresh recruitment is held, it does not help the petitioners in any manner. He further contended that, infact, it is a case where the challenge primarily seems to be the appointment of the private respondents and which has been done at a belated stage and therefore the Writ Petition may not be entertained on that ground. It was further contended that as far as the recruitment process in which the petitioners had participated his contention is that, there is no challenge to the decision of the respondents in cancelling the recruitment or in other words the decision of cancelling the recruitment process in which the petitioners had participated is not questioned in the instant Writ Petition and therefore on this ground also, the same deserve to be rejected. He further submits that, since the recruitment was for the post of Assistant Marshal to be posted in the Vidhansabha of the State Government it cannot be said to be a public employment and the respondent No.1 had all the powers for appointment to be made even without a recruitment process being initiated.

6. Likewise, counsel appearing for the private respondents i.e. respondents 2 to 8 challenged the petition on the ground of the petitioners locus firstly in filing the writ petition and the necessity at this stage to go into the merit of the case when admittedly the petitioners would not be getting any substantial relief even if they succeed in the writ petition. Counsel for respondents 2 to 8 argued on the ground of equity stating that the private respondents had put in quite a length of service by now and at this juncture questioning their appointment or cancelling their appointment would be highly detrimental to their interest. It was contended that the petition suffers from misjoinder of party in as much as when the first round of writ petition was filed i.e. WPS No. 3134 of 2007, there were only two petitioners. However, when the subsequent writ petition has been filed, there are other

petitioners also who have joined in, which could not be permitted and to that extent the petition suffers from misjoinder of parties. It was argued that in the writ petition since there is no relief of quashment of any particular order of appointment of any of the private respondents, the relief questioning their appointment cannot be sustained. Referring to the relief clause, counsel for the private respondents submitted that since all the petitioners have already crossed the maximum age limit of recruitment, they stand debarred from participating in any fresh selection. There is no point in further entertaining the writ petition when the petitioners would not be getting any substantial relief even if the petition stands allowed. Thus, prayed for rejection of the writ petition.

7. According to the counsel for the private respondents, it is a case where few of the private respondents have meanwhile got two promotions and as such, at this juncture cancelling their initial appointment itself is totally uncalled for and would be causing irreparable loss to the private respondents who have by now put in more than 13 years of service. Counsel for the private respondents referring to the rules of Vidhan Sabha submitted that the Speaker of the Vidhan Sabha had residual powers vested under which appointments could have been made and if the appointments to the private respondents have been granted invoking the said residual powers, the same cannot be put to judicial review nor it can be said to be arbitrary and bad in law in any manner. It was further contended that it is not a case where any of the private respondents are not competent and do not fulfill the minimum eligibility criteria required for the post, rather it is a case where all of them are well qualified and have all the prerequisite attached to the posts for which they have been appointed and therefore their appointment does not call for any further interference.
8. Counsel for the private respondents argued on the question of delay laches. According to him, the appointment of respondents 2 to 8 was made in the year 2005. The first writ petition was filed in 2007 and the same was withdrawn in 2012 and without any change in the body and

the writ petition, the second writ petition has been filed. The challenge to the appointment of private respondents for the first time was made in the year 2012 and therefore, the petition deserves to be rejected on the ground of delay laches. It was contended that unless the order of appointment of each of the private respondents are independently challenged, the High Court would find it difficult in issuance of an order of quo warranto also and for this reason also, the writ petition deserves to be rejected. Counsel for the private respondents referred to the following decisions of the Hon'ble Supreme Court:-

1. 1991 Supp (2) SCC 162, D. M. Bharati Vs. L. M. Sud and others.
 2. 1993 (2) SCC 573, Asha Kaul (Mrs) and another Vs. State of Jammu and Kashmir and others.
 3. 1994 Supp (2) SCC 591, Gujarat State Dy. Executive Engineers' Association Vs. State of Gujarat and others.
 4. 1997 6 SCC 271, Sudhir Vishnu Panvalkar Vs. Bank of India.
 5. 2002 (7) SCC 29, Satish Rawat Vs. Union of India and others.
 6. 2006 (11) SCC 356, Inderpreet Singh Kahlon and others Vs. State of Punjab and others.
 7. 2007 (3) SCC 720, Sanjay Singh and Another Vs. U. P. Public Service Commission, Allahabad and Another.
 8. 2009 (1) SCC 768, Tridip Kumar Dingal and Others Vs. State of West Bengal and Others.
 9. 2013 (14) SCC 494, Vikas Pratap Singh and Others Vs. State of Chhattisgarh and Others.
9. Having heard the contentions put forth on either side and on perusal of record, the admitted factual position as it stands is that the respondent no.1 initially had published an advertisement in the year 2001 for filling up of various posts including that of Assistant Marshal. All the petitioners had participated in the said recruitment process and the

process had in fact reached the stage of physical examination of each of the petitioners and other similarly placed persons. However, the entire recruitment process got shelved without any public intimation being given. It is only at a later stage that the petitioners, on an enquiry being made under the Right to Information Act, came to know that the recruitment process had already been cancelled in January, 2003. Later on, it has also been learnt by the petitioners that the respondents have meanwhile appointed respondents 2 to 8 as Assistant Marshal in the Vidhan Sabha without undertaking any recruitment process whatsoever in as much as no advertisement or anything as such. Without any sort of recruitment process respondent no.1 have simply issued the order of appointment in favour of respondent no.2 to 8.

10.The service conditions of respondents 2 to 8 are governed by Chhattisgarh Vidhan Sabha (Recruitment and Conditions of Service) Rules 1990 and under the said rules, the mode of recruitment to the post of Assistant Marshal is only by way of direct recruitment.

11.There is no dispute to the fact that respondent no.1 had initially published an advertisement for filling up the post and later on, without any intimation to any of the petitioners who had participated in the recruitment process dropped the recruitment. In the advertisement, condition no.6 clearly reflects that the selection would be done on the basis of written test and interview for which separate intimation would be issued.

12.Now with the aforesaid admitted factual position if we look into the relief clause, it can be divided into two major sections. One is for cancelling the appointment of respondents 2 to 8 and second is for a direction to respondent no.1 for holding a fresh recruitment and also permitting the petitioners to participate in the same.

13.Not long ago this Court had an occasion of dealing with the similar issue, as to whether appointment could had been made without issuance of an advertisement or an appointment made contrary to the

rules governing the field and this Court in WPS No. 1765/2015 vide its order dated 30/07/2018 had disapproved of such recruitment which have been made ignoring the rules and also ignoring the requirements of issuing an advertisement calling upon the interested candidates to participate in the selection process. The writ petition was allowed and appointment illegally made were held to be bad in law and were set aside. The Supreme Court on the same issue in the case of **State of Orissa Vs. Mamta Mohanti, 2011 (3) SCC 436**, in its judgment in Paragraphs 35 to 37 held as under :-

“35. At one time this Court had been of the view that calling the names from Employment Exchange would curb to certain extent the menace of nepotism and corruption in public employment. But, later on, came to the conclusion that some appropriate method consistent with the requirements of Article 16 should be followed. In other words there must be a notice published in the appropriate manner calling for applications and all those who apply in response thereto should be considered fairly. Even if the names of candidates are requisitioned from Employment Exchange, in addition thereto it is mandatory on the part of the employer to invite applications from all eligible candidates from the open market by advertising the vacancies in newspapers having wide circulation or by announcement in Radio and Television as merely calling the names from the Employment Exchange does not meet the requirement of the said Article of the Constitution.

36. Therefore, it is a settled legal proposition that no person can be appointed even on a temporary or ad hoc basis without inviting applications from all eligible candidates. If any appointment is made by merely inviting names from the Employment Exchange or putting a note on the Notice Board etc. that will not meet the requirement of Articles 14 and 16 of the

Constitution. Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered. A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance of the said Constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16 requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit.

37. It is a settled legal proposition that if an order is bad in its inception, it does not get sanctified at a later stage. A subsequent action/development cannot validate an action which was not lawful at its inception, for the reason that the illegality strikes at the root of the order. It would be beyond the competence of any authority to validate such an order. It would be ironic to permit a person to rely upon a law, in violation of which he has obtained the benefits. If an order at the initial stage is bad in law, then all further proceedings consequent thereto will be non est and have to be necessarily set aside. A right in law exists only and only when it has a lawful origin. (vide: Upen Chandra Gogoi v. State of Assam & Ors., AIR 1998 SC 1289.)”

14. Again in 2011 5 SCC 142 in the case of **Chairman-cum-Managing Director, Coal India Ltd. & Ors. v. Ananta Saha & Ors.**, the Supreme Court in paragraph 32 has held as under:-

“32. It is a settled legal proposition that if initial action is not in consonance with law, subsequent proceedings would not sanctify the same. In such a fact-situation, the legal maxim "sublato fundamento cadit opus" is applicable, meaning thereby, in case a foundation is removed, the superstructure falls.

15. A similar view had been also propounded by the Supreme Court in the case of **Arun Kumar Nayak Vs. Union of India, 2006 (8) SCC 111** in the following words :-

"This Court in **Visweshwara Rao**, therefore, held that intimation to the employment exchange about the vacancy and candidates sponsored from the employment exchange is mandatory. This Court also held that in addition and consistent with the principle of fair play, justice and equal opportunity, the appropriate department or establishment should also call for the names by publication in the newspapers having wider circulation, announcement on radio, television and employment news bulletins and consider all the candidates who have applied. This view was taken to afford equal opportunity to all the eligible candidates in the matter of employment. The rationale behind such direction is also consistent with the sound public policy that wider the opportunity of the notice of vacancy by wider publication in the newspapers, radio, television and employment news bulletin, the better candidates with better qualifications are attracted, so that adequate choices are made available and the best candidates would be selected and appointed to subserve the public interest better."

16. It is not that such observations of the Supreme Court were new. As early as in 1996 in the case of **Malkapatnam, Krishna District, A.P. Vs. K.B.N. visweshwara Rao and others [(1996 6 SCC 216)]**, a three Judge Bench of the Supreme Court held as under:-

".... 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 come 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 subserved. The equality of opportunity in the matter of employment would be available to all eligible candidates."

17. Now coming back to the recent past again, Supreme Court in the case of **State of Bihar Vs. Upendra Narayan Singh, (2009) 5 SCC 65**, referring to the earlier decision on the field laid down or reiterated the earlier principles of law. The Supreme Court in paragraph 16 of the said judgment has held as under:-

"16. The ratio of the above noted three judgments is that in terms of Section 4 of the 1959 Act, every public employer is duty bound to notify the vacancies to the concerned employment exchange so as to enable it to sponsor the names of eligible candidates and also advertise the same in the newspapers having wider circulation, employment news bulletins, get announcement made on radio and television and consider all eligible candidates whose names may be forwarded by the concerned employment exchange and/or who may apply pursuant to the advertisement published in the

newspapers or announcements made on radio/television.”

18.From the factual matrix recorded initially in the order and also considering the legal position as it stands from the judgments cited above, the appointment made without issuance of an advertisement or without preparation of chart and without there being any sort of recruitment process conducted. Granting of appointment without fulfillment of the conditions stipulated in the recruitment rules would be hit by the provisions of Article 14, 16 & 21 of the Constitution of India and therefore the said employment even if the appointees have remained in employment for quite some time would not cure the default which stands at its inception.

19.Patna High Court in one of the matters in the case of **Shambhu Sharan Mahto Vs. State of Bihar”** in LPA No. 1639/2014 decided on 06/12/2014, held as under:-

“Public employment is national wealth and it cannot be withered away on a platter to favour few in violation of Articles 14 and 16 of the Constitution of India, which guarantees equal opportunity of public employment.”

20.So far as the judgments relied by the respondents are concerned the case of **Satish Rawat v. Union of India [2002 7 SCC 29]** is a judgment passed by the Hon'ble Supreme Court in the peculiar facts of the case where according to the Supreme Court itself, the entire mess/applications so far as the appellants and the private respondents in the said case was concerned was created by the department and for which they alone were blameworthy. Therefore in the said factual background, the ratio laid down by the Supreme Court in the said judgment cannot be attracted so far as the case of the respondent in the present case is concerned.

21.So far as the judgment in the case of **Tridip Kumar Dingal v. State of West Bengal [2009 1 SCC 768]**, the said case also have been decided in the peculiar set of facts. Taking into consideration the fact

that the persons against whom the petition had been filed were infact the candidates whose names were sponsored by the employment exchange and they had undergone the selection process and were granted appointments thereafter, unlike in the present case where the respondents had not undertaken any sort of selection procedure for the purpose of appointing the respondents No. 2 to 8.

22. So far as the case of **Sanjay Singh & Anr. v. Uttar Pradesh Public Service Commission [2007 3 SCC 720]** is concerned, as in the previous case, the said case also is one where the selected candidates had participated in recruitment process, but were given certain advantages on account of applying wrong scaling system whereas in the instant case, there was no such selection procedure adopted for appointment of respondents No. 2 to 8 and each of the private respondents have been appointed without there being any advertisement or a demand made by the employer before any authority like employment exchange etc. and the appointments of respondents No. 2 to 8 were purely on the basis of personal satisfaction of the officer concerned.

23. The judgment in the case of **Indrapreet Singh Kahlon v. State of Punjab**, is also distinguishable on its facts for the same reason of the selected candidates in the said case having been subjected to a selection process and thereafter were given appointments which is not the situation in the present case.

24. The judgment in the case of **Buddhinath Choudhary & Ors. v. Abahi Kumar & Ors. [2001 3 SCC 328]** again would not fit in the facts of the present case for the reason that, in the said case, the appointments of the respondents in the said case was questioned on the ground of not possessing sufficient experience as is required under the rules which again is not the bone of contention while challenging the appointments of respondents No. 2 to 8. Hence is distinguishable.

25. So far as the case of **Vikas Pratap Singh v. State of Chhattisgarh [2013 14 SCC 494]**, again the facts of the said case would not come to the aid of the respondents herein as in the said case also it was a case of erroneous evaluation of answer script by the respondent board and where the disputing parties had all undergone a due selection process unlike the present one where the private respondents have been selected directly without being subjected to any selection procedure. Thus the said judgment also would be distinguishable on facts.
26. As regards the judgment of **State of Jammu & Kashmir v. R.K. Zhalpuri & Ors. [2015 15 SCC 602]** which has been relied upon by the respondents attacking the Writ Petition on the ground of delay and laches. The facts enumerated in the initial part of this judgment and the dates mentioned therein including the earlier round of litigation made by the petitioners would show that there is no delay on part of the petitioners in raising the dispute and for putting forth their claim.
27. So far as the case of **D. M. Bharati Vs. L. M. Sud and Others, (1991) Supp. (2) SCC 162** are concerned, the writ petition in the aforesaid matter was not entertained by the Supreme Court for the reason that the appointment of the private respondents were challenged after about 14 years from the date of appointment orders were issued and for all these 14 years there was no objection or challenge made by the appellant. Whereas, in the instant case the petitioner had approached the Court well within a reasonable period of time and therefore the aforesaid judgment is again distinguishable on its merits. In the same manner the judgment of the Supreme Court in the case of **State of Maharashtra Vs. Digambar, (1995) 4 SCC 683** again is a case where the writ petition was filed after a delay of more than 20 years and for the same reason as enumerated in the preceding paragraphs the said judgment also is distinguishable on facts and cannot be used in support of the contentions of the petitioners.

- 28.As regards the judgment of **State of Rajasthan & Others Vs. D. R. Laxmi and Others, (1996) 6 SCC 445** the ratio laid down in the said judgment by the Hon'ble Supreme Court cannot be made applicable in the facts of the present case for the simple reason that the said judgment was pronounced under the context of the Land Acquisition Act, 1894. Whereas in the instant case it is the principles of the service of law jurisprudence which has to be applied.
- 29.The judgment of the Supreme Court in the case of **Life Insurance Corporation of India and Others Vs. Jyotish Chandra Biswas, (2000) 6 SCC 562** again is a case where the writ petition was initially filed before the Court after a period of more than six years from the date of termination which the Supreme Court held was not maintainable as the petition suffered the vice of delay and latches.
- 30.At this juncture, one should not forget that as early as in 1974 in the case of **E. P. Royappa Vs. State of Tamil Nadu and Another, (1974) 4 SCC 3** dealing with the issue of public employment made the following observations:-

"Article 14 is the genus while Article 16 is one of its species. Article 14 declares that the State shall not deny any person equality before the law or equal protection of the laws within the territory of India. Article 16 gives effect to the doctrine of equality in all matters relating to public employment. Article 16 embodies the fundamental guarantee that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. No citizen shall be ineligible for or discriminated against irrespective of any employment or office under the State on the grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them. Though, enacted as a distinct and independent fundamental right because of its great importance as a principle ensuring equality of opportunity in public employment which is so vital to the

building up of the new classless egalitarian society envisaged in the Constitution. The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose. J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it effects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment."

31. Later on in the case of **State of Bihar Vs. Upendra Narayan Singh and Others**, (2009) 5 SCC 65 in paragraphs 25, 38 , 44 & 45, it has been held as under:-

"25. The equality clause enshrined in Article 16 mandates that every appointment to public posts or office should be made by open advertisement so as to enable all eligible persons to compete for selection on merit - **Umesh Kumar Nagpal v. State of Haryana and others** [(1994) 4 SCC 138], **Union Public Service Commission v. Girish Jayanti Lal Vaghela** [(2006) 2 SCC 482], **State of Manipur and others v. Y. Token Singh and others** [(2007)

5 SCC 65] and Commissioner, Municipal Corporation, Hyderabad and others v. P. Mary Manoranjani and another [(2008) 2 SCC 758]. Although, the Courts have carved out some exceptions to this rule, for example, compassionate appointment of the dependent of deceased employees, for the purpose of this case it is not necessary to elaborate that aspect.

38. With a view to insulate the public employment apparatus in independent India from the virus of spoil system, the framers of the Constitution not only made equal opportunity in the matter of public employment as an integral part of the fundamental rights guaranteed to every citizen but also enacted a separate part, i.e., Part XIV with the title "Services under the Union and the States". Article 309 which finds place in Chapter I of this part envisages enactment of laws by the Parliament and the State Legislatures for regulating the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State. Proviso to this Article empowers the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union and the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts till the enactment of law by the appropriate legislature.

44. The scenario is worst when it comes to appointment to lower strata of the civil services. Those who have been bestowed with the power to make appointment on Class III and Class IV posts have by and large misused and abused the same by violating relevant rules and instructions and have indulged in favouritism and nepotism with impunity resulting in total negation of the

equality clause enshrined in Article 16 of the Constitution.

45. Thousands of cases have been filed in the Courts by aggrieved persons with the complaints that appointment to Class III and Class IV posts have been made without issuing any advertisement or sending requisition to the employment exchange as per the requirement of the 1959 Act and those who have links with the party in power or political leaders or who could pull strings in the power corridors get the cake of employment. Cases have also been filed with the complaints that recruitment to the higher strata of civil services made by the Public Service Commissions have been affected by the virus of spoil system in different dimensions and selections have been made for considerations other than merit.”

32. In 2006 2 SCC 482 in the case of **Union Public Service Commission v. Girish Jayantilal Vaghela & Ors.** in a matter relating to public employment and also on the issue of equality of opportunity in matters of employment, the Hon'ble Supreme Court in paragraph 12 held as under:-

“12. Article 16 which finds place in Part III of the Constitution relating to fundamental rights provides that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. The main object of Article 16 is to create a constitutional right to equality of opportunity and employment in public offices. The words 'employment' or 'appointment' cover not merely the initial appointment but also other attributes of service like promotion and age of superannuation, etc. The appointment to any post under the State can only be made after a proper advertisement has been made inviting applications from eligible candidates and holding of selection by a body of experts or a specially constituted committee whose members are fair and impartial through a written examination or

interview or some other rational criteria for judging the inter se merit of candidates who have applied in response to the advertisement made. A regular appointment to a post under the State or Union cannot be made without issuing advertisement in the prescribed manner which may in some cases include inviting applications from the employment exchange where eligible candidates get their names registered. Any regular appointment made on a post under the State or Union without issuing advertisement inviting applications from eligible candidates and without holding a proper selection where all eligible candidates get a fair chance to compete would violate the guarantee enshrined under Article 16 of the Constitution."

33. Coming on the issue whether the private respondents have to be retained in employment on the ground of sympathy because they have put in a considerable period of time, the Supreme Court in the case of **M.S. Patil v. Gulbarga University [AIR 2010 SC 3783]** in respect of person who was wrongly appointed and who had worked over a period of 17 years on the post of Reader in University in paragraph 12 has held as under:-

"12. We are unimpressed. In service law there is no place for the concepts of adverse possession or holding over. Helped by some University authorities and the gratuitous circumstances of the interim orders passed by the Court and the delay in final disposal of the matter, the appellant has been occupying the post, for all these years that lawfully belonged to someone else. The equitable considerations are, thus, actually against him rather than in his favour. The matter can also be looked at from a slightly different angle. It is noted above how the appellant was able to secure the appointment and how he managed to continue on the post. By notification dated August 13, 2004, the appellant was discharged from the service of the

University on the post of Reader in Kannada but was asked to continue on ad-hoc basis until the appointment of the new incumbent to the post. His position is, thus, only ad- hoc till the appointment of the new incumbent and in that position he is continuing on the basis of the direction of this court to maintain status quo. We see no reason to continue this ad-hoc arrangement any further and we do not wish to stand any longer in the way of the post being filled up on a regular basis.”

34. The same view was earlier also taken by the Supreme Court in the case of **M.P.State Coop. Bank Ltd., Bhopal v. Nanuram Yadav & Ors. [2007 8 SCC 264]** wherein in paragraph 24, the Supreme Court had in a very categorical terms laid down certain principles which had to be followed in matter of public appointments. These principles are:-

- “1) The appointments made without following the appropriate procedure under the Rules/Government Circulars and without advertisement or inviting applications from the open market would amount to breach of Arts. 14 & 16 of the Constitution of India.
- 2) Regularisation cannot be a mode of appointment.
- 3) An appointment made in violation of the mandatory provisions of the statute and in particular, ignoring the minimum educational qualification and other essential qualification would be wholly illegal. Such illegality cannot be cured by taking recourse to regularization.
- 4) Those who come by back door should go through that door.
- 5) No regularization is permissible in exercise of the statutory power conferred under Art. 162 of the Constitution of India if the appointments have been made in contravention of the statutory Rules.

6) The Court should not exercise its jurisdiction on misplaced sympathy.

7) If the mischief played so widespread and all pervasive, affecting the result, so as to make it difficult to pick out the persons who have been unlawfully benefited or wrongfully deprived of their selection, it will neither be possible nor necessary to issue individual show-cause notice to each selectee. The only way out would be to cancel the whole selection.

8) When the entire selection is stinking, conceived in fraud and delivered in deceit, individual innocence has no place and the entire selection has to be set aside.”

35. The same principle has further been reiterated by the Supreme Court in the case of **Renu & Ors. v. District and Sessions Judge, TIS Hazari Courts, Delhi & Anr.** [2014 14 SCC 50] wherein in paragraph 8 it has been held as under:-

“8. As Article 14 is an integral part of our system, each and every state action is to be tested on the touchstone of equality. Any appointment made in violation of mandate of Articles 14 and 16 of the Constitution is not only irregular but also illegal and cannot be sustained in view of the judgments rendered by this Court in **Delhi Development Horticulture Employees’ Union v. Delhi Administration, Delhi & Ors.**, AIR 1992 SC 789; **State of Haryana & Ors. v. Piara Singh & Ors. etc.etc.**, AIR 1992 SC 2130; **Prabhat Kumar Sharma & Ors. v. State of U.P. & Ors.**, AIR 1996 SC 2638; **J.A.S. Inter College, Khurja, U.P. & Ors. v. State of U.P. & Ors.**, AIR 1996 SC 3420; **M.P. Housing Board & Anr. v. Manoj Shrivastava**, AIR 2006 SC 3499; **M.P. State Agro Industries Development Corporation Ltd. & Anr. v. S.C. Pandey**, (2006) 2 SCC 716; and **State of Madhya Pradesh & Ors. v. Ku. Sandhya Tomar & Anr.**, JT 2013 (9) SC 139.”

36. From the aforesaid legal position as it stands it clearly reflect that the Supreme Court has been repeatedly deprecating such appointments which are back-door appointments or appointments dehorse the rules. In the said judgment of Renu (Supra) in paragraph 15 dealing with the challenge being made to such appointments have referring to the Writ of quo-warranto which could be issued has held as under:-

“15. Where any such appointments are made, they can be challenged in the court of law. The quo warranto proceeding affords a judicial remedy by which any person, who holds an independent substantive public office or franchise or liberty, is called upon to show by what right he holds the said office, franchise or liberty, so that his title to it may be duly determined, and in case the finding is that the holder of the office has no title, he would be ousted from that office by judicial order. In other words, the procedure of quo warranto gives the Judiciary a weapon to control the Executive from making appointment to public office against law and to protect a citizen from being deprived of public office to which he has a right. These proceedings also tend to protect the public from usurpers of public office who might be allowed to continue either with the connivance of the Executive or by reason of its apathy. It will, thus, be seen that before a person can effectively claim a writ of quo warranto, he has to satisfy the Court that the office in question is a public office and is held by a usurper without legal authority, and that inevitably would lead to an enquiry as to whether the appointment of the alleged usurper has been made in accordance with law or not. For issuance of writ of quo warranto, the Court has to satisfy that the appointment is contrary to the statutory rules and the person holding the post has no right to hold it. (Vide: The University of Mysore & Anr. v. C.D. Govinda Rao & Anr., AIR 1965 SC 491; Shri Kumar Padma Prasad v. Union of India & Ors., AIR 1992 SC

1213; B.R. Kapur v. State of Tamil Nadu & Anr., AIR 2001 SC 3435; The Mor Modern Co-operative Transport Society Ltd. v. Financial Commissioner and Secretary to Govt., Haryana & Anr., AIR 2002 SC 2513; Arun Singh v. State of Bihar & Ors., AIR 2006 SC 1413; Hari Bansh Lal v. Sahodar Prasad Mahto & Ors., AIR 2010 SC 3515; and Central Electricity Supply Utility of Odisha v. Dhobei Sahoo & Ors., (2014) 1 SCC 161).”

37.From the aforesaid judicial pronouncements made by the Hon'ble Supreme Court and which are referred to in the preceding paragraphs what is clearly reflected is that in matters of public employment there has to be a great element of transparency required. In order to fulfill the object of Article 14 and 16 of the Constitution of India it is mandatorily required that any public appointment made should be after following a due selection process duly advertised and after giving much publicity so that all the eligible candidates could apply and participate in the recruitment process. Today we are living in an era where there is large number of unemployment and educated persons are waiting for a chance for being called for an employment. It could not be perceived at this juncture of recruitments being made by totally keeping the rules and regulations and the process of recruitment in abeyance.

38.In the instant case, what is all the more bad is that, the respondents at the first instance had published an advertisement for the same post and at a later stage for reasons best known and which has also not been divulged in the present Writ Petition, the selection process was dumped half way detrimental to the interest of the petitioners and in the course of litigating period, all the petitioners have crossed their maximum age of recruitment.

39.This Court therefore in the given facts and circumstances has no hesitation in holding that the recruitment of the private respondents are totally arbitrary and contrary to the rules governing the establishment and is also without undergoing any sort of selection process

whatsoever hence their appointment are not sustainable in the eye of law.

40. This Court therefore holds that the appointment issued in respondents No. 2 to 8 was bad in law and deserve to be set-aside/quashed and it is ordered accordingly. Since the petitioners had participated in the advertisement issued for the said post at one point of time and which has been cancelled without any cogent, satisfactory or justifiable reasons and at the same time the respondents No. 2 to 8 have been appointed by the respondent No.1 dehorse the rules and on the quashment of the appointments of the respondents No. 2 to 8 the respondents may initiate fresh recruitment process for filling up of the post in accordance with the Rules and procedures governing the field.

41. At this juncture, taking shelter from a recent decision of the Hon'ble Supreme Court in the case of **The State of Tripura & Ors. v. Tanmoy Nath & Ors.** decided by the Supreme Court while considering the bunch of Special Leave to Appeal (C) No(s) . 18993-19049/2014 which was decided by the Supreme Court on 29/03/2017 wherein the Supreme Court had made the following observations:-

“(b) - The fresh selection process be completed on or before 31st December, 2017 and till the fresh process is completed, the teachers already appointed shall continue.

(c) - The candidates who participated in the selection process pursuant to the advertisements in question, whether selected or not, will be allowed to participate in the fresh selection process by relaxing their age but subject to their having necessary qualifications.”

42. Accordingly, it is ordered that let a fresh selection process be initiated by the respondents for filling up of the post of “Assistant Marshal” under the respondent No.1 and till the fresh selection is completed, the private respondents shall be permitted to continue.

43.It is further ordered that, when a fresh selection process is initiated, all the petitioners if they had participated in the advertisement that was issued on 25/06/2001 for the post of “Assistant Marshal” and the respondents No.2 to 8 be permitted to participate in the selection process by relaxing their age subject to they having other minimum eligibility criteria including qualification.

44.The Writ Petition accordingly stands allowed and disposed off.

Sd/-
(P. Sam Koshy)
Judge

Sumit