

Union of India and Others

Vs

N. Hargopal and Others

Civil Appeal Nos. 9-15 of 1986

(M. M. Dutt, O. Chinnappa Reddy JJ)

13.04.1987

JUDGMENT

CHINNAPPA REDDY, J. -

1. The question raised in these appeals is whether an 'establishment in the public sector' or an 'establishment in the private sector' as defined in the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 may make appointments to posts to which the Act applies, of persons not sponsored by the Employment Exchanges ? A further question is whether the Act covers government establishments also ? A Division Bench of the High Court of Andhra Pradesh has held that the Act has no application to government establishments, that the Act casts no obligation either on the public sector establishment or on the private sector establishment to make the appointments from among candidates sponsored by the Employment Exchanges only and that any insistence that candidates sponsored by the Employment Exchanges alone should be appointed would be contrary to the right guaranteed by Articles 14 and 16 of the Constitution. The learned Additional Solicitor General appearing for the Union of India argued that the object and the scheme of the Employment Exchanges) Compulsory Notification of Vacancies) Act and the instructions issued by the Government of India from time to time left no option to the employers but to confine their field of choice to candidates sponsored by the Employment Exchanges. It was argued that such insistence the appointments should be made from candidates sponsored by the Employment Exchanges only did not offend Articles 14 and 16 of the Constitution. He also argued that the Act was applicable to government establishment also.

2. We may refer to the provisions of the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 without further ado. The title of the Act itself suggests that the compulsion is in regard to notifying of vacancies only and nothing more. The preamble to the Act, like the title of the Act, also does not suggest any compulsion in the making of appointments, but only in the notifying of vacancies. The preamble says "An Act to provide for the compulsory notification of vacancies to employment exchanges". Section 2(e), (f) and (g) defines "establishment", "establishment in public sector" and "establishment in private sector" as follows :

(e) "establishment" means -

(a) any office, or

(b) any place where any industry, trade, business or occupation is carried on;

(f) "establishment in public sector" means an establishment owned, controlled or

managed by -

- (1) The government or a department of the government;
 - (2) a government company as defined in Section 617 of the Companies Act, 1956;
 - (3) a corporation (including a cooperatives society) established by or under a Central, provincial or State Act, which is owned, controlled or managed by the government;
 - (4) a local authority;
- (g) "establishment in private sector" means an establishment which is not an establishment in public sector and where ordinarily twenty-five or more persons are employed to work for remuneration;

The High Court thought that the definition of "establishment in public sector" as meaning an establishment owned, controlled or managed by the government or a department of the government indicated that an establishment in public sector was something different from the government or a department of the government and did not include the government or department of the government. It had to be something which could be owned, controlled or managed by the government or a department of the government. The High Court also thought that the expression 'public sector' was used in contradiction to 'private sector' and that it could not include offices of the government. The expression would only take in an agency or instrumentality of the State, but not the State itself. We are unable to agree with the conclusion of the High Court on this part of the case. If the definition of 'establishment' which includes an 'office' is read alongside the definition of 'establishment in public sector', it will be clear that government offices are also included in the expression 'establishment in public sector'. That is the interpretation which the government itself is advancing before us and that is how the government has always understood the provision during these three decades as will be evident from the instructions issued by the government from time to time to which we shall be referring later in the course of our judgment. We are unable to agree with the view of the High Court that the Act is not applicable to government establishments.

3. Section 3 of the Act specifies posts, vacancies to which the Act does not apply. Section 4 provides for the notification of vacancies to Employment Exchanges. It is desirable to extract the whole of Section 4 which is as follows :

4(1) After the commencement of this Act in any State or area thereof, the employer in every establishment in public sector in that State or area shall, before filling up any vacancy in any employment in that establishment, notify that vacancy to such employment exchanges as may be prescribed.

(2) The appropriate government may, by notification in the official gazette, require that from such date as may be specified in the notification, the employer in every establishment in private sector or every establishment pertaining to any class or category of establishments in private sector shall, before filling up any vacancy in any employment in that establishment, notify that vacancy to such employment exchanges as may be prescribed, and the employer shall thereupon comply with such

requisition.

(3) The manner in which the vacancies referred to in sub-section (1) or sub-section (2) shall be notified to the employment exchanges and the particulars of employments in which such vacancies have occurred or are about to occur shall be such as may be prescribed.

(4) Nothing in sub-sections (1) and (2) shall be deemed to impose any obligation upon any employer to recruit any person through the employment exchanges to fill any vacancy merely because that vacancy has been notified under any of those sub-sections.

Sections 5 deals with the duty of the employers to furnish information and returns in prescribed forms. Section 6 provides for official access to records and documents. Section 7 provides for penalties. Section 8 deal with cognizance of offences. Section 9 provides for protection of action taken in good faith. Section 10 vests the rule making power in the Central Government.

4. It is evident that there is no provision in the Act which obliges an employer to make appointments through the agency of the Employment Exchanges, Far from it. Section 4(4) of the Act, on the other hand, makes it explicitly clear that the employer is under no obligation to recruit any person through the Employment Exchanges to fill in a vacancy merely because that vacancy has been notified under Section 4(1) or Section 4(2). In the face of Section 4(4), we consider it utterly futile for the learned Additional Solicitor General to argue that the Act imposes any obligation on the employers apart from notifying the 'vacancies to the Employment Exchanges. The learned Additional Solicitor General invited our attention to the speech of the Minister of Labour and Employment and planning (Shri Nanda) made at the time of the introduction of the Employment Exchanges (Compulsory Notification of Vacancies) Bill. Far from being of any assistances to the learned Additional Solicitor General, the speech appears to be against his submission. In his speech, the Minister quoted from the report of the Training and Employment Services Organisation Committee and observed that the recommendation of the Committee offered a full explanation of the provisions of the Bill. The recommendation of the Committee which he quoted was :

Though we have not, for the present, recommended compulsion on private employers to recruit through the Employment Exchanges, we recommend that they be required on a compulsory basis to notify to the Exchanges all vacancies, other than vacancies for unskilled categories, vacancies of very temporary duration and vacancies proposed to be filled through promotion.

The Minister further said :

The main thing is that an obligation is being placed that after this legislation becomes operatives, from that date, the employer in every establishment in the public sector shall, before filling up any vacancy in any employment in that establishment, notify that vacancy to such Employment Exchanges as may be prescribed. And so far as the private sector is concerned, there is this further qualification that the government concerned may specify by notification that the employer in every establishment in private sector or every establishment pertaining to any class or category of establishments in privates sectors shall, before filling up any vacancy in any employment in that establishment, notify that vacancy to such Employment

Exchanges as may be prescribed. This is the kernel of this provision. This is the main object, that is, an obligation placed on the employer to notify the vacancies that may occur in their establishment before filling those vacancies.

The Minister was conscious that there was a likelihood of the Bill being misunderstood as compelling the employers to make appointments through the Employment Exchanges only. He clarified the position saying :

The misunderstanding is as if this Bill gives power to the government to compel the employers to recruit only such persons as are submitted by the Employment Exchanges. That is not so. This compulsion extends only to notification of vacancies. Naturally the employer has to consider the names which are submitted by the Employment Exchanges but there is no compulsion that they must restrict the choice only to the least (sic list) that is submitted to them. Of course, there is also the objection from the other side that it may not go far enough. We believe that even this will make things very much better. In any case, when the Committee reported, they also suggested this much advance. At present, they said, we should have only compulsory notification, but not compel the employers to recruit only out of the list that is sent by the employment exchanges.

5. As we said the speech of the Minister, at the time of the introduction of the Bill, is totally destructive of the contention of the learned Additional Solicitor General that the employers are under an obligation to recruit persons for appointment through the Employment Exchanges only. The learned Additional Solicitor General requested us to give a purposive interpretation to the provisions of the Act and insist that employers, in making appointments, should restrict their field of choice to candidates sponsored by the Employment Exchanges. We are unable to appreciate the argument since there is no provision of the Act which requires interpretation by us and which we may reasonably interpret as compelling the employer to appoint persons sponsored by the Employment Exchanges. On the other hand, we have already referred to Section 4(4) which is explicit that there is no such obligation on the part of the employer. We also notice that the object of the Act is not to restrict the field of choice in any particular manner, but to enlarge the field of choice. That is why in his introductory speech, the Minister said :

... a large number of employers, particularly in similar industrial and in construction works, do not employ any scientific method, but depend for their supply of labour on agents or recruit in a haphazard manner from amongst those assembled at factory gates or at works sites. The methods adopted are not always dictated by a consideration of efficient service, but as more a matter of bestowing patronage and favour. This applies in varying degrees to a large number of employers.

The Minister discussed the existing position and anticipated position in the following words :

The Act of notification of vacancies has important consequences. In the first place, so far as the employer is concerned, he will be placed in a position to have a much wider choice for the purpose of selection. Now, what is the present position ? Any person knocks at the gate of the factory or the mill or other establishment and from those few who are there they choose. Now it would be possible for them to have a wider area of selection. The names of so many others who may not be able to go and knock at every gate, can be submitted and out of them, the best can be selected. So

far as the quoting of selection is concerned, it should improve because of the wider range of choice. On the side of the worker certainly it means a more equitable distribution of employment opportunities. It should not be necessary for a person to be all the day moving from place to place. It should be sufficient for him to register at a place, give all the particulars about his qualifications and then he should be sure that at any rate, his name will be considered along with other names and there will be some regard for fitness in the choice of people who enter these new places for employment.

6. It is, therefore, clear that the object of the Act is not to restrict, but to enlarge the field of choice so that the employer may choose the best and the most efficient and to provide an opportunity to the worker to have his claim for appointment considered without the worker have to knock at every door for employment. We are therefore, firmly of the view that the Act does not oblige any employer to employ those persons only who have been sponsored by the Employment Exchanges.

7. The next question for consideration is whether the instructions issued by the government from time to time have the effect of compelling the employers to restrict their field of choice to candidates sponsored by the Employment Exchanges. We may straightway refer to some of the instructions on which reliance was placed by the learned Additional Solicitor General. In O.M. No. 14/11/64-Estt.(D) dated March 21, 1964, the Ministry of Home Affairs addressed all the Ministries regarding recruitment of staff through the agency of the National Employment Service and the utilisation of Employment Exchanges by quasi-government institutions and statutory organisations. It is enough if we extract paragraphs 1, 4 and 5 of this communication which are as follows :

1. The undersigned is directed to say that in paragraph 6 of this Ministry's office Memorandum No. 71/40-DGS (Appts) dated December 11, 1949 (copy enclosed) it was laid down that all vacancies in Central Government establishments, other than those filled through the Union Public Service Commission should be notified to the nearest Employment Exchange and that no department or office should fill any vacancy by direct recruitment unless the Employment Exchanges certified that they were unable to supply suitable candidates. Subsequently in this Ministry's Office Memorandum Nos. 71/49-DGS (Appts) dated January 30, 1951 and 71/222/56-CS(C) dated December 14, 1956 (copy enclosed), the Ministry of Finance etc. were requested to issue immediate instructions to all quasi-government institutions and statutory organisations with which they were concerned asking them to fall in line, as far as possible, with the Central Government establishments in the matter of recruitments, by suitably amending their recruitment rules or adopting resolutions to achieve their recruitment rules or adopting resolutions to achieve this object if necessary. The Ministries were also requested to impress upon these institutions that it was in their own interest as well as in the interest of the country as a whole that recruitment should be made through the Employment Exchanges, as a large number of experienced and trained hands were available on their registers and the need for tapping other sources of recruitment should arise only if the Employment Exchange has certified that they were unable to nominate suitable recruits from their registers
....

4. Under the EE(CNV) Act, recruitment of staff through the Employment Services is voluntary so far as the private sector is concerned. Even so, efforts are made by the Employment Service to persuade the private sector to accept candidates sponsored by the Employment Exchanges. The

Directorate General of Employment and Training are placed in a very embarrassing situation when they have to approach the State Governments and establishments in the private sector to utilise the Employment Service in filling up the vacancies, when some establishments in the public sector do not recognise the Employment Service as the normal channel of recruitment.

5. It is accordingly requested that the Ministry of Finance etc., may issue instructions to all quasi-government institutions and statutory organisations with which they are concerned requiring them to notify vacancies in the manner and form prescribed in Rule 4 of the EE(CNV) Rules, 1960 to the prescribed Employment Exchange and to fall in line with the Central Government departments in the recruitment of staff through the agency of the Employment Service. The need for issuing advertisements for inviting applications or tapping other sources of recruitment should be considered only if the Employment Exchanges issue non-availability certificates. A copy of the instructions issued by the Ministry of Finance etc., may kindly be endorsed to the Ministry of Home Affairs and the Directorate General of Employment and Training.

It will be noticed that in order to give effect to such instructions in the case of quasi-government institutions and statutory organisations, it would be necessary to suitably amend the recruitment rules or adopt resolutions to achieve that object. This is so mentioned in para 1. In Office Memorandum No. 14/22/65-Estt.(D) dated June 12, 1968, the Ministry of Home Affairs informed all the other Ministries :

The undersigned is directed to say that in paragraph 6 of this Ministry's O.M. No. 71/49/DGS(Apptt) dated December 11, 1949, it was laid down that all vacancies in Central Government establishments, other than those filled through the Union Public Service Commission, should be notified to the nearest Employment Exchange and that no department or office should fill any vacancy by direct recruitment unless the Employment Exchange certified that they were unable to supply candidates.

In Office Memorandum No. 14024/2/77-Estt(D) dated April 12, 1977, the Department of Personnel addressed all the Ministries/Departments and said :

As the Ministry of Agriculture and Irrigation, etc. are aware, in accordance with the instructions issued by the Central Government (vide marginally-noted communications), all vacancies arising under Central Government offices/establishments (including quasi-government institutions and statutory organisations), irrespective of the nature and duration (other than those filled through the Union Public Service Commission), are not only to be notified to, but also to be filled through, the Employment Exchange alone and other permissible sources of recruitment can be tapped only if the Employment Exchange concerned issues a 'non-availability' certificate. There can be no departure from this recruitment procedure unless a different arrangement in this regard has been previously agreed to in consultation with this department and the Ministry of Labour (Directorate General of Employment and Training). Similar instructions are also in force requiring vacancies against posts carrying a basic salary of less than Rs. 500 p.m. in Central Public Employment Exchanges.

8. It is clear that it is the desire of the Government of India that all government departments, government organisations and statutory bodies should adhere to the rules 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 organisations 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 it. 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 ignorances, it was not right that employment opportunities should necessarily be channelled through the Employment Exchanges 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 :

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