

Ajit Singh Toofan and others v. State of Haryana and others.
(Surinder Singh, J.)

omission would make the evidence, which is produced to prove those facts, suspect as an after-thought. The omission is not inherently fatal to the prosecution case but the Court while assessing the evidence would certainly be entitled to take the view that evidence of the facts not mentioned in the complaint or the first information report cannot be safely relied upon. By the same reasoning, although it may not be necessary to mention the factum of making the milk homogenous for maintainability of the complaint, yet it would be open to the Court not to place implicit reliance on the evidence produced in respect thereof in the Court on the ground that in the light of the omission in the complaint this evidence could possibly be an afterthought. We must hasten to make it clear that the Court is not bound to reject the evidence of stirring of the milk simply because this facts is omitted in the complaint. But the view taken by us is that the trial Court cannot be faulted in giving benefit of doubt to the accused if on taking overall view of the evidence it arrives at the conclusion that due to the omission in the complaint it would be hazardous to rely upon the evidence to hold the milk vendor guilty of adulterating the milk.

(7) On the analysis made above, we find no reason to interfere with the view taken by the Subordinate Courts in these cases that owing to the non-mentioning of the making of the milk homogenous in the complaint the evidence of the Food Inspector became doubtful in respect thereof which entitled the milk vendors to invoke the doctrine of the benefit of doubt in their favour. These State appeals are, therefore, dismissed.

K. S. Tiwana, J—I agree.

H.S.B.

Before : D. S. Tewatia and Surinder Singh, JJ.

AJIT SINGH TOOFAN AND OTHERS,—Petitioners

versus

STATE OF HARYANA AND OTHERS,—Respondents.

Civil Writ Petition No. 2939 of 1985.

May 30, 1986.

Constitution of India, 1950—Article 16—Persons appointed on ad hoc basis to government posts—Letters of appointment stipulating that tenure of service would terminate on availability of candidates for regular appointment—Ad hoc appointees

accepting such stipulation—Such appointees—Whether entitled to claim absorption against regular vacancies—Writ petition filed by such appointees—Whether liable to be dismissed as being not competent.

Held, that the appointees who were appointed only on ad hoc basis and who accepted their appointment with a clear stipulation that the tenure of their service would terminate as soon as suitable candidates were available for regular appointment cannot acquire any legal or even equitable right for being absorbed against the regular vacancies. The writ petition filed by such appointees is, therefore, liable to be dismissed as being not competent.

(Para 11).

Civil Writ Petition under Article 226 of the Constitution of India praying that :

- (i) the records of the case may be called for ;*
- (ii) service of prior notices on the respondents be dispensed with ;*
- (iii) filing of certified copies of annexures be dispensed with ;*
- (iv) a writ in the nature of mandamus be issued to respondents to appoint the petitioners in the same terms and conditions as the persons who are in the merit list from No. 1 to 51 were appointed ;*
- (v) a writ in the nature of certiorari be issued to quash the action of the respondents by which the petitioners were appointed on ad hoc basis while they were entitled to be appointed in the same terms and conditions as the candidates from No. 1 to 51 of the merit list have been appointed ;*
- (vi) to issue any other such or similar writ, order or direction as this Hon'ble Court may deem fit in facts and circumstances of this case;*
- (vii) Costs of this petition be awarded to the petitioners.*

It is further prayed that during the pendency of the writ petition the further process to fill up the posts by the respondents No. 4 against which the petitioners were working be stayed.

Ajit Singh Toofan and others v. State of Haryana and others.
(Surinder Singh, J.)

Civil Misc. No. 1135 of 1986.

Application Under Order I Rule 10 read with section 151 of the Code of Civil Procedure praying that the application may kindly be allowed in the interest of justice and the applicants may be ordered to be arrayed as respondents in the above said writ petition.

Kuldip Singh, Sr. Advocate (R. K. Malik, Advocate with him, for the petitioner.

G. S. Bawa, Advocate, for the added petitioner.

H. L. Sibal, A.G. Hy. with Jagdev Sharma, D.A.G. Hy,—for respondents Nos. 1 to 3.

J L. Gupta, Sr. Advocate (Subash Ahuja, Rajiv Atma Ram and Rakesh Khanna, Advocates, with him),—for respondent No. 4.

Bhoop Singh, Advocate, for respondent No. 5.

C. B. Kaushik Advocate for applicant's (In C.M. No. 1135/86).

JUDGMENT

Surinder Singh, J.

(1) Whether a person who has been appointed by the Government on *ad hoc* basis can claim appointment on regular basis as a matter of right, is the pivotal question for consideration in this Writ Petition filed by Ajit Singh Toofan and eight others under Article 226 of the Constitution of India against the State of Haryana and other respondents. Gurcharan Singh Petitioner No. 10 was allowed to be arrayed along with the other petitioners in the present writ petition,—*vide* order dated November 26, 1985, passed in Civil Miscellaneous No. 3117 of 1985.

(2) The salient averment in the writ petition and the reply on behalf of the State in regard to these averments may be, briefly recapitulated. By means of advertisement appearing in 'The Tribune', dated July 20, 1981 (Annexure P/1), the Director of Prosecution, Haryana, invited applications to fill up 66 posts of Assistant District Attorneys. Again another advertisement was inserted by the Director of Prosecution, Haryana, in The Tribune, dated September 7, 1982 (Annexure P/2) inviting applications for filling up 77 posts of Assistant District Attorneys. The case of the respondent-State is that the first-mentioned advertisement was

replaced by the second advertisement dated September 7, 1982, meaning thereby that the two advertisements were not independent of each other. It is not disputed that about 2,000 candidates had applied for being considered for the 77 posts, referred to above. These candidates were interviewed by a Selection Committee consisting of (1) Advocate-General, (2) Legal Remembrancer and (3) Director of Prosecution, Haryana, on various dates. The averment in the writ petition goes on to say that the Selection Committee recommended the names of 161 candidates who were highest in merit for appointment as Assistant District Attorneys on December 7, 1984. The allegation is that respondent No. 2, i.e. the Secretary to Government Haryana, issued two types of appointment letters to the candidates recommended by the Selection Committee. The candidates who were in the Merit List from Serial Nos. 1 to 51 were issued 'different type' of appointment letter, a specification of which has been attached as Annexure P/3. The candidates who were in the Merit List from Serial Nos. 52 to 161 were, however, issued another type of appointment letter, a specimen of which has been produced as Annexure P/4. It would be appropriate to notice the stand of the Government in this behalf at this stage. It is stated in its reply that the Selection Committee adjudged 51 candidates as suitable for regular appointment against 77 posts. The break-up of these 51 posts as given, is as follows :

(i) general category	...	39
(ii) scheduled castes	...	2
(iii) backward class	...	5
(v) physically handicapped	...	2

The remaining 26 posts were reserved posts. The allegation that a Merit List of 161 candidates had been prepared by the Selection Committee was refuted as being factually incorrect. It was further averred that the candidates at Serial Nos. 52 to 161 i.e. 110 in all were absorbed purely on *ad hoc* basis for a period of six months, with a clear stipulation that their services are liable to be terminated at any time without any notice, after the selection of eligible candidates on regular basis was made. In regard to the Merit List, the averment in the reply is quite specific that this Merit List consisted of only 51 candidates in order of merit. The remaining candidates were not in the Merit List.

Ajit Singh Toofan and others v. State of Haryana and others
(Surinder Singh, J.)

(3) Coming back to the averment in the Writ Petition, it was stated that the petitioners felt surprised when they came to know that they had been appointed on *ad hoc* basis. The petitioners met the Chief Minister and requested him that they should also be appointed on regular basis as was done in the case of candidates at Serial Nos. 1 to 51. The petitioners were assured that justice shall be done to them. This contention is, however, controverted on behalf of the State by a reiteration of the fact that there was no justification for the petitioners to be surprised on their *ad hoc* appointment as they were not found suitable for regular appointment. They were, however, taken on *ad hoc* basis with a view to cope up with the day-to-day working of the Courts including the newly created posts. Reliance was also placed in the writ petition on instructions dated May 26, 1972 issued by the Haryana Government (Copy Annexure P/5), according to which all posts created before the date of recommendation as well as posts created within six months from the date of recommendation had to be filled up from out of the same selection. The reply on behalf of the State is that these instructions are applicable only in the case of candidates who are selected by the Haryana Public Service Commission or Subordinate Services Selection Board and in any case the petitioners who have been appointed only on *ad hoc* basis could not avail of the benefit of these instructions.

(4) The petitioners go on to allege that they had read in the newspaper that the posts against which they are working had been re-advertised. A copy of the relevant advertisement was produced as Annexure P/6. The fact that an advertisement was issued for filling up 91 posts of the Assistant District Attorneys was not disputed on behalf of the State. It was, however, re-asserted that the *ad hoc* appointees (like the petitioners) had no right to be appointed on regular basis. With these averments, the petitioners prayed for a *mandamus* to be issued to the respondents to appoint them on the same terms and conditions as the persons who were appointed on regular basis, i.e., Serial Nos. 1 to 51. The claim has been refuted by the State Government.

Instructions, annexure P. 5, envisage a waiting list to be prepared by the Public Service Commission. In this case the Selection Committee, from which the names are to be picked up for filling the

vacancies occurring within the given period from the date of receipt of the recommendation of the selecting authority, in this case the Selection Committee. The Advocate-General Mr. H. L. Sibal appearing for the State of Haryana has argued that the Selection Committee had prepared no waiting list, as envisaged by the said instructions and, therefore, the question of filling up of the given vacancies by the candidates, whose names figured in the waiting list, did not arise.

(5) The question which would, therefore, require consideration at the very threshold is, as to whether any Merit List and or a Waiting List had been prepared by the Selection Committee and if so of how many candidates. All other arguments would flow from this determination alone. In this behalf, the State Government produced for our perusal, the complete record relating to the selection made by the Selection Committee to fill up the advertised posts of Assistant District Attorney. It may be observed that the said record contains a list of 1921 candidates who had been interviewed on various dates between December 22, 1982 and March 3, 1984. The total marks obtained by each candidate from out of 150 marks are mentioned against his name and address. The respondent-State has also placed on the record copies of certain communications, details whereof may be noticed. The first document in the series is a memo of the proceedings of the Selection Committee signed by all its three members as per which the Committee recommended 39 candidates (including 9 posts which were required to be filled up by transfer from other Departments, but no such candidate was found suitable) for General Category and 12 for the Reserved Categories, 51 in all, to be appointed on temporary basis against these posts (Emphasis mine). A list of these candidates along with their Roll Nos. was appended with the recommendation. On the basis of this recommendation, the Director of Prosecution Haryana, by means of letter, dated September 7, 1984 intimated to the Financial Commissioner Revenue and Secretary to the Government, Haryana, that with reference to the Government Notification, dated July 30, 1982 for the selection of Assistant District Attorneys, a Committee comprising of three members i.e. Advocate-General, Legal Remembrancer and Director of Prosecution had conducted interviews for filling up the 77 posts and as a result thereof, the names of 51 candidates had been recommended for being appointed on temporary basis. It is not disputed that these 51 candidates were duly appointed on regular basis on the posts of Assistant District Attorneys.

**Ajit Singh Toofan and others v. State of Haryana and others
(Surinder Singh, J.)**

(6) The next letter in the chronological order is dated September, 11, 1984 from the Director of Prosecution, Haryana to the Financial Commissioner, Revenue and Secretary to the Government, Haryana on the subject of recruitment of 35 candidates on *ad hoc* basis on the posts of Assistant District Attorneys. It is necessary to be noticed *in extenso* :

“Subject: Recruitment of Assistant District Attorneys on *ad hoc* basis.

The candidates for 77 vacancies had been advertised for recruitment from open market and 9 vacancies had to be filled by transfer from other departments. Interviews were held but only 51 candidates of various categories for temporary appointment.

2. These 51 candidates were out of 77 posts but not a single suitable candidate was available on transfer from other departments. Readvertisement of these posts and their interviews for regular appointment will take time and the working in the Courts will be unduly held up for want of prosecutors.
3. It is therefore, recommended that these 35 posts falling vacant in both the categories mentioned above may please be filled up on *ad hoc* basis till suitable candidates are available for regular appointment.
4. List of 35 candidates those who were found suitable for appointment on *ad hoc* basis is enclosed herewith. The seniority of all these candidates is according to the merit approved by the Committee.”

(7) Still another letter material to the present controversy is, dated September 17, 1984 from the Director of Prosecution, Haryana to the Financial Commissioner, Revenue, and Secretary to the Government, Haryana, which pertains to the recruitment of 47 more candidates on *ad hoc* basis for the posts of Assistant District Attorneys. This letter is also reproduced below for facility of reference :

“Subject : Recruitment of Assistant District Attorneys on

21 posts had fallen vacant since Sept./1982 and 26 more posts had been caused due to the creation of new Courts in the State. As such there is immediate need of 47 ADAs to fill up these posts.

"2. It will take considerably long time to advertise and to hold the interviews for the selection of ADAs for the regular appointments. It is therefore, recommended that these 47 posts may please be filled up on *ad hoc* basis till suitable candidates are available for appointment. List of 47 candidates those who were found suitable for appointment on *ad hoc* basis is enclosed herewith. The seniority of all these candidates is according to the merit approved by the Committee."

(8) Lastly, a similar recruitment of 28 Assistant District Attorneys on *ad hoc* basis was made on the basis of the letter, dated September 17, 1984 from the Director of Prosecution Haryana to the same addressee. This recruitment was necessitated on account of four vacancies having been caused due to four Assistant District Attorneys being appointed as Subordinate Judges and 24 more vacancies were caused as a result of promotion of Assistant District Attorneys to the posts of Deputy District Attorneys. Even in the case of this appointment, it was clearly stated in the letter as follows:—

"It will take considerably long time to advertise and to hold the interviews for the selection of ADAs for the regular appointment. It is, therefore, recommended that these 28 posts may please be filled up on *ad hoc* basis out of the list attached herewith. The seniority of all these candidates is according to the merit approved by the Committee constituted for the recruitment of ADAs."

(9) A perusal of the above documents and the supporting averments made in the replies on behalf of the respondents leave no room for doubt that the appointment of the First Batch of 51 candidates as indicated in the letter dated September 7, 1984 was made on temporary basis i.e. on regular basis, whereas in the case of the later three sets of appointments, these were specifically made on *ad hoc* basis as indicated in the relevant communications, reproduced above. It is meaningful to notice that it was clearly mentioned in these letters that after the appointment of the Batch of 51

Ajit Singh Toofan and others v. State of Haryana and others.
(Surinder Singh, J.)

candidates on regular basis, the remaining posts out of 77 vacancies would be re-advertised but as interviews for filling up these remaining regular posts would take time, causing disturbance in the working of the Courts for want of Prosecutors, a recommendation was made for filling up more posts 'on *ad hoc* basis till suitable candidates are available for regular appointment'. (See letters, dated September 11, 1984 and September 17, 1984, reproduced above). The argument pressed into service on behalf of the present petitioners who are some of the *ad hoc* appointees is that the *ad hoc* appointees may be deemed to be on the Waiting List of the selection made by the committee. We do not, however, think that this argument is tenable. The record produced before us does not indicate that any Waiting List was prepared by the Selection Committee. In fact, this is pointedly denied on behalf of the State. There is no other material placed before us from which a conclusion can be drawn that such a Waiting List was prepared by the Selection Committee. We, therefore, hold that no Waiting List had been prepared during the selection. The question of the petitioners, who are *ad hoc* employees being considered for regular appointment on the basis of any such Waiting List, does not, therefore, arise.

(10) It was, however, contended on behalf of the petitioners that the selecting authority had to evolve a criteria on the basis of which it was to decide that a given candidate was suitable for being recommended for appointment to the advertised posts. If, as is argued on behalf of the respondent State, the Selection Committee had not prescribed the obtaining of given minimum marks by the candidate for being considered eligible to be recommended for appointment to the post in question, then this Court should evolve on its own such a criteria which may be the same as may have been evolved by the Haryana Public Service Commission in the case of candidates for the very posts for which the interviews are being currently conducted by the said Public Service Commission.

Before exploring the feasibility of our evolving such a criteria, it would be necessary to find out as to whether the Selection Committee had or had not, in fact, evolved any such criteria, whether expressly or impliedly.

The Selection Committee, no doubt, had not expressly laid down that a candidate before being considered eligible to be recommended

for appointment to the post must obtain no less than the given number of marks. However, a scrutiny of selection of candidates of various categories, in our opinion, would reveal that the Selection Committee had impliedly decided that the candidates obtaining marks below a certain percentage were not to be considered eligible for being recommended for appointment to the given post.

The Selection Committee was to recommend 16 scheduled caste candidates for appointment. It recommended only two candidates whose names figured at Serial Nos. 44 and 45 of the selection list which comprised of 51 names. They obtained 121 and 120½ marks respectively. The scheduled caste candidate, who in the merit list of scheduled caste candidates figured at Serial No. 3 and was not selected, was Sohan Pal Singh (with Roll No. 983) who had obtained 101 marks.

The Selection Committee was required to recommend 21 ex-servicemen. The Committee recommended only 3 candidates from this category. Their names appeared at Serial Nos. 46, 47 and 48 of the selection list in question. They obtained 120, 119½ and 119 marks respectively. The ex-servicemen who stood fourth in the merit list of ex-servicemen candidates and was not selected for appointment, was Kehar Singh (Roll No. 1582) and had obtained 107 marks.

That means that even in the case of reserved category, the Selection Committee did not consider a candidate obtaining 107 marks as fit to be selected. The standard that the Selection Committee must have impliedly fixed in case of general category candidates, would certainly be higher than that which would be the number of marks which the candidate, whose name in the list of the selectees from general category figured at the fag-end, had obtained. Candidates obtaining marks equal to that and above had all been recommended for appointment and the candidates obtaining marks below the said percentage of marks were not considered fit to be selected. Hence, no waiting list came to be prepared. Such a list is prepared only when candidates considered eligible for appointment happen to be more than the number of posts then required to be filled. When such is not the case, then there is no question of maintaining a waiting list by the selecting authority which could be resorted to in terms of the executive instructions, annexure P. 5.

ad hoc basis.

V. K. Construction Works (P) Ltd. v. M/s. Food Corporation
of India and another (D. S. Tewatia, J.)

In view of the above conclusion, it is not necessary to advert to the other contentions advanced at the Bar on behalf of the respondent-State.

(11) Consequently, we hold that the petitioners who are appointed only on *ad hoc* basis and who accepted their appointment with a clear stipulation that the tenure of their service would terminate as soon as suitable candidates are available for regular appointment cannot acquire any legal or even equitable right for being absorbed in the regular vacancies. In the absence of such a right, the present writ petition filed by them is not competent nor can the relief prayed for be granted to them in this petition, which stands dismissed. However, we make no order as to costs.

D. S. Tewatia, J.—I agree.

H. S. B.

Before D. S. Tewatia, J.

V. K. CONSTRUCTION WORKS (P) Ltd.,—*Appellant.*

versus

M/S FOOD CORPORATION OF INDIA

AND ANOTHER,—*Respondent.*

First Appeal From Order No. 247 of 1983.

and Cross-Objection No. 48-CII of 1983.

May 30, 1986.

Arbitration Act (X of 1940)—Sections 8 and 20(4)—Arbitration agreement specifically authorising a designated authority to appoint an arbitrator—Authority entitled to make appointment failing to do so—Failure as aforesaid—Whether disentitles a party to seek a reference to arbitration.

Held, that the substantive provision which confers a right to approach the Court is Section 8 of the Arbitration Act, 1940, and the provisions of Section 20 provides the machinery for enforcing that