

(2009) 10 PAT CK 0006

In the Patna High Court

Case No : Civil Writ Jurisdiction Case Nos. 6539 of 1991 and 454 of 1992

Ashok Kumar

APPELLANT

Vs

The State of Bihar and Others
 Krishna Prasad and
Others Vs The State of Bihar and Bihar State Subordinate
Service Selection Board

RESPONDENT

Date of Decision : 16-10-2009

Acts Referred:

Citation : (2009) 10 PAT CK 0006

Final Decision : Allowed

Judgement

Sudhir Kumar Katriar, J.—The two writ petitions challenge the validity of Sub-section (3) of Section 4 of the Bihar Reservation of Vacancies in Posts and Services (for Scheduled Castes, Scheduled Tribes and other Backward Classes) Ordinance 1991 (Bihar Ordinance No. 33 of 1991) (hereinafter referred to as the "Ordinance"), which provides that a reserved category candidate who is selected on the basis of his merit shall be counted against 50% vacancies of open merit category and not against the reserved category vacancies. The two writ petitions also challenge the validity of Sub-section (4) of Section 4 of the Ordinance which provides that the same shall apply in supersession of anything to the contrary in the said Ordinance or any other law, rules enforced earlier, or any other judgment and decree of the Court, to all such cases in which all formalities of selection have completed before 1st of November 1990, but the appointment letters have not been issued.

2. The present writ petition was dismissed by order dated 13.4.2000, on the ground that the petitioners had not laid the factual foundation for their contentions. The same was challenged by preferring Civil Appeal Nos. 1486 & 1487 of 2001 (Harendra Kumar Dubey v. State of Bihar and Ors.), which was allowed by the Supreme Court by order dated 23.2.2001, whereby the order dated 13.4.2000 was set aside, and the matter was remitted to this Court for a fresh decision in accordance with law. We are, therefore, required to re-hear the matter and dispose of the writ petition on merits.

3. A brief statement of facts essential for the disposal of the writ petitions may be indicated. The basic facts shall be drawn from CWJC No. 454 of 1992. Resolution Nos. 756 and 757, dated 10.11.1978, intended to be of general application, issued by the Government of Bihar in the Department of Personnel and Administrative Reforms, prescribes the percentage of seats allocated to different categories for employment in the Government of Bihar. The State Government sent its requisition dated 8.1.1988 (Annexure 2), to the Subordinate Selection Board (hereinafter referred to as the "Board"), to make recommendations to fill up 424 posts for appointment in the Subordinate Education Service. Consequently, the Board issued advertisement No. 5/88, dated 30.5.1988 (Annexure 3), inviting applications for appointment. The advertisement stated that 50% of the seats were reserved in the proportion indicated in the aforesaid resolution dated 10.11.1978. The selection process comprised of written test only. By the resolution of the State Government in the Department of Personnel and Administrative Reforms dated 29.10.1988 (Annexure-4), it was decided that 11.2.1988 should be the cut-off date to count the vacancies. The Board conducted the written test on 8.7.1989 and 9.7.1989. The Government sent its supplementary requisition dated 7.8.1990 (Annexure 5), requesting the Board to recommend candidates for appointment on 240 more posts. The Board issued notices to 664 candidates for verification of testimonials on 20.9.1990 (Annexure 9 to CWJC No. 678 of 1991). The petitioners and others appeared on that day for the purpose. The Board published the results which were put up on the notice Board on 22.9.1990, and were published in the newspaper on 18.11.1990 (Annexure-6). By further notifications dated 25.4.1991, 27.9.1991, 15.2.1992 and 1.8.1992, appointments were made by the State Government. A summary of the appointments made by the State Government is reflected in the chart placed on record marked Annexure-D to the Counter affidavit of respondent No. 4, according to which 311 candidates of the general category, and 439 candidates of the reserved categories, have so far been appointed. In other words, altogether 750 persons have been appointed. According to the petitioner, this was the first attempt on the part of the respondent authorities to alter the proportion of vacancies available to each category without even executive instructions.

4. The State Government issued executive instructions dated 7.1.1991 (Annexure-7), being the pre-cursor of the later Ordinance which, in its turn, was converted into an Act of the State Legislature, and is the subject matter of adjudication in the present proceedings, whereby it was in substance notified that those of the reserved category candidates who were successful on merits will be appointed against the vacancies allocated to the general category. The same was made retrospectively applicable with effect from 1.11.1990. This accounts for alteration of the vacancies by communication dated 7.11.1990 (Annexure-A). Alteration of vacancies to the detriment of the candidates of the general category led to CWJC No. 678 of 1991 (Harendra Kumar Tiwary v. The State of Bihar and Ors.), and CWJC No. 1338 of 1991 (Ram Prabesh Singh v.

State of Bihar and Ors.). The writ petition was allowed by a Division Bench on 23.5.1991 (Annexure-9), and the executive instructions dated 7.1.1991 (Annexure-7) was set aside, inter alia, on the ground that the State action cannot adversely affect the rights which have already accrued in favour of the candidates of the general category. It was also set aside on the ground that the Secretary of the Personnel and Administrative Reforms Department was not the competent authority to amend/alter the resolution of the Governor of Bihar (Annexure-7 thereto). Consequently the State Government was directed to issue letters of appointment to the petitioners therein and others for their appointment on the post of Subordinate Education Service for which they were declared successful by the Subordinate Selection Board. No appeal was preferred and the judgment attained finality.

5. Instead of implementing the judgment of the Court, the State Government issued Bihar Ordinance No. 33 of 1991, published in the official Gazette on 26.9.1991 (Annexure-1), namely "THE BIHAR RESERVATION OF VACANCIES IN POSTS AND SERVICES (FOR SCHEDULED CASTES, SCHEDULED TRIBES AND OTHER BACKWARD CLASSES) ORDINANCE, 1991", to provide for adequate representation of Scheduled Castes and Scheduled Tribes and other Backward classes in posts and Services in the State and made retrospectively applicable with effect from 1.11.1991. It is a measure intended to consolidate the said executive instructions dated 7.1.1991 (Annexure-7). This led to the present writ petition.

6. By the order dated 22.10.1991 of the State Government, the duties and functions of the Board were transferred to the Bihar Public Service Commission (hereinafter referred to as the "Commission"), with effect from 1.3.1992. During the pendency of the present proceedings, the Ordinance was replaced by Act No. 3 of 1992 (Annexure 1/A). On the heels of it came the letter dated 12.8.1992 (Annexure-11 = Annexure-B), of the State Government to the Commission, whereby the latter was informed that altogether 930 vacancies have to be filled up, and 750 vacancies had till then been filled up. The Commission was, therefore, requested to recommend 177 more persons to fill up the vacancies in the various reserved categories. By order dated 30.9.1992, this Court stayed the operation of the said letter dated 12.8.1992 (Annexure-11), directed maintenance of Status Quo, and is in force till date.

7. While assailing the validity of the impugned action, learned Counsel for the petitioners submitted that the terms and conditions of the advertisement cannot be altered after the selection process has commenced. He relies on the following reported judgments:

- (i) State of Kerala and Others Vs. K.G. Madhavan Pillai and Others,
- (ii) AIR 1968 S.C. 718 (The Union of India and Ors. v. Anglo Afghan Agencies etc);
- (iii) Ramana Dayaram Shetty Vs. International Airport Authority of India and

Others,

(iv) British India Corporation Ltd. Vs. Industrial Tribunal, Punjab and Others,

(v) 1990 (6) S.L.R. 79 (Anuj Gupta and Ors. v. State of Himachal Pradesh and Ors.)

(vi) Namita Jayaswal Vs. The State of Bihar and Others,

7.1) He next contended that the State Government has stated in its letter dated 12.8.1992 (Annexure-11), that 930 vacancies were required to be filled up in which case 465 vacancies must be filled up by candidates of the General category without taking aid of transfer of vacancies.

7.2) He also submitted that if the selection process has made substantial headway, retrospectivity of legislation shall not apply to the existing procedure obtaining on the date of the advertisement.

7.3) Counsel next contended that retrospectivity of legislation cannot take away the rights which have already accrued in favour of candidates. He relies on the following reported judgments:

(i) B.N. Nagarajan and Others Vs. State of Mysore and Others,

(ii) A.A. Calton Vs. Director of Education and Another,

(iii) Y.V. Rangaiah and Others Vs. J. Sreenivasa Rao and Others,

(iv) P. Ganeshwar Rao and Others Vs. State of Andhra Pradesh and Others,

(v) N.T. Bevin Katti, etc., Vs. Karnataka public Service Commission and others,

(vi) Chairman, Railway Board and others Vs. C.R. Rangadhamaiah and others, paragraphs 14 to 22;

(vii) B.S. Yadav and Others Vs. State of Haryana and Others,

(viii) State of Gujarat and Another Vs. Raman Lal Keshav Lal Soni and Others,

7.4) He also submits that Section 4(3) of the Ordinance prescribes different dates for its enforcement which is impermissible in law. He relies on the judgment of the Supreme Court in P. Tulsi Das and Ors. v. Government of Andhra Pradesh AIR 2003 S.C. 43, paragraphs 11 to 14.

8. Learned Counsel for the petitioners in CWJC No. 6539 of 1991 has adopted the aforesaid arguments, and has added that a large number of vacancies are still available, all vacancies till the date of interview must be filled up by the selection process in question. He relies on the judgment of the Supreme Court In Sandeep Singh v. State of Haryana and Anr. reported in : (2002) 10 SCC 549.

9. Mr. Anil Kumar Jha, learned Government Advocate No. 2, has opposed the writ petitions. In his submission, the petitioners have not been able to make out a case that retrospectivity of the Ordinance really affects them. No vested right has

been adversely affected. He submits in the same vein that the Legislature has the power and the authority to enact laws retrospectively applicable. He relies on the following reported judgments:

(i) Jilubhai Nanbhai Khachar, etc. etc. Vs. State of Gujarat and another, etc. etc., paragraph 18.

(ii) State of Tamil Nadu Vs. M/s. Arooran Sugars Ltd., paragraph 13.

9.1) He also submitted that the Legislature has the legislative competence to transfer vacancies in the manner as has been done. He relies on the following reported judgments:

(i) Indra Sawhney etc. etc Vs. Union of India and others, etc. etc., paragraph 94A.

(ii) AIR 1996 S.C. 488 (Union of India and Ors. v. Virpal Singh Chauhan etc.) paragraph 28.

9.2) He lastly submitted that a writ of mandamus cannot be issued to fill up vacancies.

10 Mr. Sanjay Pandey appearing for the Commission submitted that the issues raised by the petitioners are in the domain of the State Government. He has also submitted that the petitioners have no legal right to be appointed because their names figured in the merit-list, unless they are able to establish discrimination and/or arbitrariness. He relies on the judgment of the Supreme Court in S.S. Balu and Another Vs. State of Kerala and Others, (paragraphs 12 and 13).

11. We have perused the materials on record and considered the submissions of learned Counsel for the parties. While setting aside the order of this Court dismissing the present writ petition, the Supreme Court allowed the appeal by the following order dated 23.2.2001, passed in Civil Appeal No. 1486 and 1487 of 2001 (Harendra Kumar Dubey and Ors. v. State of Bihar and Ors.):

Heard learned Counsel for the parties.

Leave granted.

In pursuance of our order dated 8th January 2001, respondent No. 1 has produced the record pertaining to the results/merit list of the candidates interviewed in the year 1988 by the Bihar State Subordinate Selection Board. The Bihar State Public service Commission has also produced for our perusal only tabulation statement and the results of the interviews held in the year 1988 by the Bihar State Subordinate Selection Board. Considering the aforesaid results, learned Counsel for the respondents also agrees that the case of the appellants and intervenors requires to be reconsidered by the High Court on the basis of the Reservation Policy. In this view of the matter, the impugned order dated 13th April, 2000, passed by the High Court in CWJC No. 454 of 1992 is set aside. The High Court is directed to reconsider the case on merits after giving an

opportunity of hearing to the appellants as well as intervenors and the respondents. The respondent authorities would produce the aforesaid documents before the High Court for its perusal at the time of hearing of the matter. With these observations, these appeals are disposed of with no order as to costs.

The matter has thereafter been placed before this Court on 11 occasions and, in spite of clear directions, the documents have not been produced before us.

12. Learned Counsel for the petitioners has submitted that the terms and conditions of advertisement cannot be altered after the selection process has commenced and has progressed substantially. He has relied on the judgment of the Himachal Pradesh High Court in *Anuj Gupta v. State of Himachal Pradesh* (Supra), which was with respect to admission to Engineering College. The admission brochure (prospectus) stipulated that the students having passed 10+2 examination were entitled to admission in the college on the basis of merit. The selection process was later changed for merit to be determined on the basis of the result at the pre-entrance test. The Himachal Pradesh High Court held that change of policy, and super-imposition of pre-entrance test, after issuance of the prospectus, was unfair and unsustainable in law.

12.1) A Division Bench of this Court had the occasion to apply the aforesaid proposition of law in *Namita Jayaswal v. The State of Bihar* (Supra). That was a case where the State Government had taken a policy decision incorporated in the prospectus to grant 30 additional marks to girl candidates for admission in the Engineering Colleges of the State Government. The same was later on altered and the benefit was given only to those girl students who sought admission in the Bihar Engineering College, Patna. The same was not approved by this Court.

12.2) We must candidly state that acts of administrative discretion had given rise to the two cases, and were not based on legislative intervention as the case here is.

13. The Supreme Court has held in one line of cases that the selection process should take place in accordance with the terms and conditions of the advertisement read with the Rules and orders in force on the date of advertisement. The candidate acquires a vested right to be tested accordingly except where the process has been altered by legislative intervention during the pendency of the selection process provided clearly or by necessary intendment. The judgments of the Supreme Court in *A.A. Calton v. The Director of Education* (supra), and *N.T. Devin Katti v. Karnataka Public Service Commission* (supra), are to that effect. This principle of law on first flush seems to be applicable to the present case. However, another line of cases relevant in the present context must be noticed before a final view could be taken.

14. The Supreme Court has held in a long line of cases that retrospectivity of legislation has to conform to the constitutional norms and must not contravene fundamental rights of the citizens. A Constitution Bench of the Supreme Court in *B.S. Yadav v. State of Haryana* (supra), held that the power exercised by the

Governor under the proviso to Article 309 partakes the characteristics of the legislative, not executive, power, and it is open to him to give retrospective operation to the Rules made under that provision. When the retrospective effect extends over a long period, the date from which the Rules are made to operate must be shown to bear, either from the face of the Rules or by extrinsic evidence, reasonable nexus with the provisions contained in the Rules (SCR p. 1068: SCC p. 5 57, para 76).

15 A Constitution Bench of the Supreme Court in the case of *State of Gujarat v. Raman Lal Keshav Lal Soni* (supra) has held as follows:

52...The legislature is undoubtedly competent to legislate with retrospective effect to take away or impair any vested right acquired under existing laws but since the laws are made under a written Constitution, and have to conform to the do's and don'ts of the Constitution, neither prospective nor retrospective laws can be made so as to contravene Fundamental Rights. The law must satisfy the requirements of the Constitution today taking into account the accrued or acquired rights of the parties today. The law cannot, say twenty years ago the parties had no rights, therefore, the requirements of the Constitution will be satisfied if the law is dated back by twenty years. We are concerned with today's rights and not yesterday's. A legislature cannot legislate today with reference to a situation that obtained twenty years ago and ignore the march of events and the constitutional rights accrued in the course of the twenty years. That would be most arbitrary, unreasonable and a negation of history.

16. The issue came up for consideration of the Supreme Court in *Chairman, Railway Board v. C.R. Rangadhamaiah* (supra), and the aforesaid law was reiterated. Paragraphs 23 and 24 of the judgment are reproduced hereinbelow for the facility of quick reference:

23. The said decision in *Raman Lal Keshav Lal Soni* of the Constitution Bench of this Court has been followed by various Division Benches of this Court (See *K.C. Arora v. State of Haryana*; *T.R. Kapur v. Haryana*; *P.D. Aggarwal v. State of U.P.*; *K.Narayanan v. State of Karnataka*; *Union of India v. Tushar Ranjan Mohanty* and *K. Ravindranath Pai v. State of Karnataka*.)

24. In many of these decisions the expressions "vested rights" or "accrued rights" have been used while striking down the impugned provisions which had been given retrospective operation so as to have an adverse effect in the matter of promotion, seniority, substantive appointment, etc., of the employees. The said expressions have been used in the context of a right flowing under the relevant rule which was sought to be altered with effect from an anterior date and thereby taking away the benefits available under the rule in force at that time. It has been held that such an amendment having retrospective operation which has the effect of taking away a benefit already available to the employee under the existing rule is arbitrary, discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the Constitution. We are unable to hold

that these decisions are not in consonance with the decisions in Roshan Lal Tandon, B.S. Yadav and Raman Lal Keshav Lal Soni.

It is thus evident that a legislation or a rule must not be arbitrary, should be reasonable, and must conform to the Constitutional norms. The same should not adversely affect or dilute, or take away, vested right of a candidate for appointment.

17. The Supreme Court has held on a number of occasions that if a selection process has made substantial headway, retrospectivity of a legislation shall not apply to the existing procedure obtaining on the date of the advertisement.

18. We are thus faced with two seemingly opposite line of cases handed down by the Supreme Court in different situations and decision has to be taken in the light of the peculiar facts and circumstances of the present case as to which one is more appropriately applicable in the present case. It appears to us that the procedure of pending selection process can be altered by a legislation or under the rule-making powers provided it does not violate the constitutional norms, fundamental rights, and does not adversely affect vested rights. If the selection process as per the procedure in force on the date of the advertisement has made substantial headway, the candidates have acquired a right to be considered as per the existing procedure, and cannot be taken away by legislative intervention made retrospectively applicable. In such a situation, retrospective operation of law has disturbed the settled affairs and created uncertainty which is not a sign of good governance. State must treat all sections of society with fairness without exposing itself to the charge of favouritism, arbitrariness, or the like.

19. The chronology of events clearly shows that the Government has sought to intervene by issuing the impugned Ordinance at a belated stage which tends to unsettle the settled affairs, and deprives the petitioners and similarly circumstanced persons of their right to be appointed as per the system in force at the time of issuance of the advertisement. It is evident that the Board had issued notices to 664 candidates on 20.9.1990, and the results were published on the notice board on 22.9.1990. The executive instruction of 7.1.1991 was the first intrusion on the part of the State Government to alter the situation, after the selection process had closed. It had given rise to legitimate expectation in the minds of all those candidates who had received notices to appear for verification of testimonials, whose names had appeared on the notice board, including the petitioners and other persons of their category, that the selection process shall take place as per the terms and conditions of the advertisement.

20. The Supreme Court has held as follows in Kuldeep Singh Vs. Govt. of NCT of Delhi, (at page 712, paragraph 25):

25. It is, however, difficult for us to accept the contention of the learned Senior Counsel Mr. Soli J. Sorabjee that the doctrine of "legitimate expectation" is attracted in the instant case. Indisputably, the said doctrine is a source of procedural or substantive right. (See R. v. North and East Devon Health

Authority, Ex p. Coughlan). But, however, the relevance of application of the said doctrine is as to whether the expectation was legitimate. Such legitimate expectation was also required to be determined keeping in view the larger public interest. Claimants' perceptions would not be relevant therefor. The State actions indisputably must be fair and reasonable. Non-arbitrariness on its part is a significant facet in the field of good governance. The discretion conferred upon the State yet again cannot be exercised whimsically or capriciously. But where a change in the policy decision is valid in law, any action taken pursuant thereto or in furtherance thereof, cannot be invalidated.

21. While dealing with the doctrine of legitimate expectation, the Supreme Court has observed in its judgment in *Jitendra Kumar and Others Vs. State of Haryana and Another*, , that the same is not the same as anticipation. It is based on right and is different from desire or hope. The doctrine has been evolved to ensure regularity, predictability, and certainty in Government's dealing with the public. Legitimate expectation operates both in procedural and substantive aspects. The Supreme Court also relied on the aforesaid observations in *Kuldeep Singh v. Govt. of NCT of Delhi* (supra).

22. The executive instructions were set aside by a Division Bench of this Court on 23.5.1991, which should have been taken seriously by the state Government that such an attempt has not been approved by the Court, notwithstanding which attempt has been made to force alter the situation by promulgation of the Ordinance/the Act in question. We are, therefore, of the view that retrospective operation of the Ordinance/the Act does not apply to the present selection process because the same had been completed on the date it was sought to be retrospectively applied. It is relevant to state that the petitioners have not challenged the legislative competence, nor the power, to issue such an Ordinance/Act retrospectively. Their case is that substantial progress made in the selection process has rendered retrospective operation of the Ordinance/Act inoperative.

23. The Supreme Court has held in its judgment in *P. Tulsi Das v. Government of A.P.* (Supra), that such a course as has taken place in the present case, and has the effect of depriving citizens of their rights by retrospective application of laws, cannot be countenanced. The relevant portion of paragraph 14 of the judgment is reproduced hereinbelow:

...Such rights, benefits and perquisites acquired by the Teachers concerned cannot be said to be rights acquired otherwise than in accordance with law or brushed aside and trampled at the sweet will and pleasure of the Government, with impunity. Consequently we are unable to agree that the Legislature could have validly denied those rights acquired by the appellants retrospectively not only depriving them of such rights but also enact a provision to repay and restore the amounts paid to them to the State. The provisions of the Act, though can be valid in its operation "in futuro" cannot be held valid insofar as it purports to restore status quo ante for the past period taking away the benefits already available, accrued and acquired by them. For all the reasons stated above the

reasons assigned by the majority opinion of the Tribunal could not be approved in our hands. The provisions of Sections 2 and 3(a) insofar as they purport to take away the rights from 10.2.1967 and obligates those who had them to repay or restore it back to the State is hereby struck down as arbitrary, unreasonable and expropriatory and as such is violative of Articles 14 and 16 of the Constitution of India. No exception could be taken, in our view, to the prospective exercise of powers thereunder without infringing the rights already acquired by the appellants and the category of the persons similarly situated whether approached Courts or not seeking relief individually. The provisions contained in Section 2 have to be read down so as to make it only prospective, to save the same from the unconstitutionality arising out of its retrospective application.

(Emphasis added)

24. In the result, we allow the two writ petitions and hold that the appointments shall be made in the proportion indicated in the said Resolution dated 10.11.1978. It, therefore, follows that the State Government is obliged to fill up from the present selection process, like number of vacancies by candidates of the general category as have been filled up by candidates of the reserved categories. Let the Commission send a supplementary list of the candidates in accordance with the directions indicated hereinabove within a period of two months from the date of receipt and/or production of a copy of this judgment. The fresh appointees shall be entitled to their seniority in accordance with the merit list and consequential benefits.