

(2000) 06 PAT CK 0016
In the Patna High Court
Case No : L.P.A. No. 1119 of 1999

Ashutosh Kumar Vinayak and Others	APPELLANT
Vs	
The State of Bihar and Others	RESPONDENT

Date of Decision : 26-06-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 25(3)

Citation : (2000) 3 PLJR 495

Hon'ble Judges : Nagendra Rai, J; D.P.S. Choudhary, J

Bench : Division Bench

Advocate : Ganesh Prasad Singh, Sanjeev Kumar, Sanjay Kumar, in L.P.A. No. 1119 of 1999, Rajendra Prasad Singh, Raghvendra Sharan Pandey and Arvind Kumar Singh, in L.P.A. No. 1125 of 1999, for the Appellant; Ramesh Kumar Dutta and Shambhu Kumar for High Court, for the Respondent

Final Decision : Dismissed

Judgement

Nagendra Rai, J.—Both the appeals filed by the appellants are directed against the order dated 17.8.1999 passed by a learned Single Judge of this Court in CWJC No. 9138 of 1998 by which the prayer made on behalf of the Appellants to fill up 123 posts of Assistant Public Prosecutor (hereinafter referred to as the APP) from the panel prepared by the Bihar Public Service Commission (hereinafter referred to as the Commission) pursuant to Advertisement Nos. 1 and 2 of 1996 has been rejected.

2. As the same order has been challenged in both the appeals, they have been heard together and are being disposed of by the common judgment.

3. Appellant No. 1 in both the appeals along with others filed a writ application for a direction to the Respondent-State to send requisition to the Commission for sending recommendation for filling up 123 posts of AP Ps which were lying vacant in the State. During the pendency of the writ application, an intervention application was filed on behalf of the intervenors praying therein that they may be also heard at the time of hearing of the writ application because their interest

are the same as that of the writ Petitioners and accordingly they were also heard and thereafter the writ application was finally disposed of.

4. The facts which are not in dispute are that u/s 25 of the Code of Criminal Procedure, the State Government has been vested with a power to appoint one or more AP Ps in every district for conducting prosecution in the Court of Magistrates. The State Government has appointed AP Ps to conduct prosecution in the Court of the Magistrates. Sufficient number of AP Ps were not appointed. The Free Legal Aid Committee, Jamshedpur filed a writ petition (S.L.) No. 1344 of 1981 before the Apex Court and the Apex Court having noticed the statement made in the affidavit filed on behalf of the State that against 562 Courts of Magistrate, only 257 AP Ps were working, directed the State Government by order dated 9th January, 1990 to create posts of AP Ps as many as necessary to meet the short-fall and in the meantime, the District Magistrates were directed to take steps u/s 25(3) of the Code of Criminal Procedure to provide the services of a counsel to act as APP in each court so that no single trial is adjourned for want of AP Ps.

5. It appears that in pursuance of the aforesaid direction of the Apex Court, 562 posts of AP Ps were created, but all the posts were not filled up. Then writ applications being CWJC Nos. 2650, 4169 and 4216 of 1996 were filed before this Court for a direction to the State Government to fill up the existing posts of AP Ps. This Court noticed that against the sanctioned 562 posts of AP Ps, only 434 were working. This Court also found that 712 Courts of Magistrates were holding courts in the State and accordingly directed to create posts of APP equivalent to the number of courts functioning in the State. Later on as evident from order dated 12.9.1996 passed in the aforesaid writ applications, which has been annexed as Annexure-12 to LPA No. 1125 of 1999, that 150 additional posts of AP Ps were also created. Thus the State Government created 712 posts of APP. This Court thereafter issued direction in the said cases to the State Government to fill up the remaining sanctioned posts of AP Ps.

6. As only 434 AP Ps were working against the total sanctioned strength of 712, the State Government sent three requisitions to the Commission to fill up the remaining 278 posts. Thereafter the Commission issued an advertisement, which was published in the daily "Aaj" on 31st July, 1996, inviting application for appointment to the post of AP Ps. The said advertisement contained advertisement Nos. 1 and 2 of 1996. Advertisement No. 1 of 1996 invited application only from the Scheduled Tribe candidates to fill up 30 posts of AP Ps specially reserved for them and Advertisement No. 2 of 1996 invited application to fill up 48 vacancies from all the categories including 9 of the Scheduled Tribe. Later on a corrigendum was issued with regard to advertisement No. 2 of 1996 wherein it was provided that the total vacancies under all the categories are 246 as detailed in the said corrigendum and the last date for filing the application with regard to vacancies under advertisement No. 2 of 1996 was extended up to 30th November, 1996.

7. In pursuance of the advertisement, the Appellants and other eligible candidates applied. The Commission held written test as well as viva-voce test and prepared a panel of successful candidates and thereafter the Commission recommended the names of only 255 candidates against the notified vacancies of 278. Some of the vacancies reserved for Scheduled tribe remained vacant due to non-availability of candidates under the said category. The State Government thereafter made appointment to the said post.

8. The Appellants' case is that 123 posts of Munsif were created vide notification dated 30.11.1995 i.e., prior to the last date of filing of the application for appointment to the post of AP Ps and out of said 123 posts of Munsif, 110 were vested with the powers of Judicial Magistrate of Second Class by a notification issued by the High Court on 28.12.1996. In view of the direction of the Apex Court, the State Government has to provide one APP for each court and as such direction may be issued to the State Government to make requisition for filling up the aforesaid posts of APP from the list of the successful candidates prepared for appointment of AP Ps in terms of the Advertisement Nos. 1 and 2 of 1996.

9. The stand of the State on the other hand is that only 712 posts of APP were sanctioned against the same number of Courts of Magistrate existing in the State of Bihar and out of that 434 AP Ps were working. Accordingly, the State Government took steps to fill the remaining 278 posts of AP Ps and sent requisition to the Commission. The Commission thereafter invited application, conducted examination and recommended the names of 255 candidates only and did not recommend the names of candidates under Scheduled Tribe category due to non-availability of candidates under the said category. The said advertisement was issued only to fill up the notified vacancies and the said notified vacancies have been filled up and therefore no fresh appointment can be made from the said panel. So far as the appointment of AP Ps for the newly created Courts of Magistrate are concerned, the State Government will take a decision to create additional posts of AP Ps and in case the posts are sanctioned then fresh process of recruitment is to be taken to fill up the aforesaid posts. The Appellant cannot claim appointment on the basis of earlier advertisement which was only issued with regard to notified vacancies.

10. The stand of the Commission is that on the basis of the requisition made by the State, Government, the Commission issued advertisement and thereafter conducted examination and recommended the names of the candidates in terms of the requisition made by the State Government. 21 posts of AP Ps under Scheduled Tribe category remained unfilled as no qualified candidates were available under the aforesaid category.

11. The only question to be determined in this appeal is as to whether a direction is to be issued to the State Government to send requisition to the Commission to recommend the names of successful candidates from the select list prepared in terms of Advertisement Nos. 1 and 2 of 1996 to fill up 123 posts of AP Ps for newly created Courts of Munsif, out of which 110 were vested with the power of

Magistrate of 2nd Class.

12. After completion of the selection process for filling up the post in the public offices, a panel/selection list is prepared consisting the names of the successful candidates. In cases where the number of vacancies are notified in the advertisement then the appointment from the said panel/select list is to be made to the extent of the vacancies notified in the advertisement, and no appointment in excess of the posts advertised is to be made from the said panel/select list. In cases of non-joining of any candidates appointed against notified vacancies, a person from the said panel which becomes waiting list is to be appointed, but no appointment can be made from the said panel or waiting list in excess of the posts advertised unless the rules or the policy decision provide so or the State Government takes a policy decision to meet certain extreme or urgent situation. Waiting list is not a perennial source of recruitment and no person as a matter of right can claim appointment to the vacancies arising in excess of the notified vacancies only on the basis of inclusion of his name in the panel which does not give any such right. If the select list/waiting list is to be remained inoperative for indefinite period, it will deprive an opportunity to participate in the selection process to those who become eligible subsequent to the said advertisement. If the vacancies are not notified in the advertisement, in that situation the vacancies existing at the time of advertisement and anticipated vacancies may be filled up from the select list or waiting list.

13. The question raised in this case is no longer *res integra* and has been decided by the Apex Court in catena of cases. In the case of *State of Bihar and another Vs. Madan Mohan Singh and others*, , an advertisement was issued for filling up of 32 vacancies of Additional District and Sessions Judges against direct recruitment quota. The selection process was also followed to fill up only 32 posts of Addl. District and Sessions Judges and the High Court prepared a merit list and out of that merit list recommended the names of 32 candidates for appointment and the State Government appointed the same. Later on, the Full Court of the High Court passed a resolution that any further vacancy in the quota of direct recruits from the Bar within the period of one year to be filled up from the list prepared by the High Court. The Government did not agree with the proposal and decided that fresh advertisement should be issued because the vacancies of earlier year had exhausted. Some of the candidates who were in the merit list filed two writ applications in the High Court for a direction to the Government to fill up 1/3rd vacancies of the sanctioned strength of the service by direct recruitment from amongst candidates in the merit list prepared by the High Court. The High Court allowed the writ petitions. Against that the State Government moved before the Apex Court and the Apex Court held that the particular advertisement and the consequent selection process were meant only to fill up 32 vacancies and not to fill up the other vacancies and as such the merit list prepared by the High Court will hold good only for the purpose of filling up 32 vacancies and no further because the said process of selection for those 32 vacancies got exhausted and came to an end. If the same list has to be kept

subsisting for the purpose of filling up other vacancies also that would naturally amount to deprivation of rights of other candidates who would have become eligible subsequent to the said advertisement and selection process.

14. In the case of Gujarat State Dy. Executive Engineers" Association Vs. State of Gujarat and Others, the Apex Court held that a waiting list is a list of eligible and qualified candidates in order of merit and they are placed below the last selected candidates. How a waiting list will operate and what is its nature may be governed by the rules. A waiting list is operated only for the contingency that if any of the selected candidates does not join then the person from the waiting list may be pushed up and be appointed in the vacancy so caused or if there is some extreme exigency the Government may as a matter of policy decision pick up persons in order of merit from the waiting list, but the person cannot be appointed from the waiting list only on the ground that the vacancies have not been worked out properly. It is relevant to quote paragraphs 8 and 9 of the aforesaid judgment:

Coming to the next issue, the first question is what is a waiting list?; can it be treated as a source of recruitment from which candidates may be drawn as and when necessary?" and lastly how long can it operate? These are some important questions which do arise as a result of direction issued by the High Court. A waiting list prepared in service matters by the competent authority is a list of eligible and qualified candidates who in order of merit are placed below the last selected candidate. How it should operate and what is its nature may be governed by the rules. Usually it is linked with the selection or examination for which it is prepared. For instance, if an examination is held say for selecting 10 candidates for 1990 and the competent authority prepares a waiting list then it is in respect of those 10 seats only for which selection or competition was held. Reason for it is that whenever selection is held, except where it is for single post, it is normally held by taking into account not only the number of vacancies existing on the date when advertisement is issued or applications are invited but even those which are likely to arise in future within one year or so due to retirement etc. It is more so where selections are held regularly by the Commission. Such lists are prepared either under the rules or even otherwise mainly to ensure that the working in the office does not suffer if the selected candidates do not join for one or the other reason or the next selection or examination is not held soon. A candidate in the waiting list in the order of merit has a right to claim that he may be appointed if one or the other selected candidate does not join. But once the selected candidates join and no vacancy arises due to resignation etc. or for any other reason within the period the list is to operate under the rules or within reasonable period where no specific period is provided then candidate from the waiting list has no right to claim appointment to any future vacancy which may arise unless the selection was held for it. He has no vested right except to the limited extent, indicated above, or when the appointing authority acts arbitrarily and makes appointment from the waiting list by picking and choosing for extraneous reasons.

A waiting list prepared in an examination conducted by the Commission does not furnish a source of recruitment. It is operative only for the contingency that if any of the selected candidates does not join then the person from the waiting list may be pushed up and be appointed in the vacancy so caused or if there is some extreme exigency the Government may as a matter of policy decision pick up persons in order of merit from the waiting list. But the view taken by the High Court that since the vacancies have not been worked out properly, therefore, the candidates from the waiting list were liable to be appointed does not appear to be sound. This practice, may result in depriving those candidates who become eligible for competing for the vacancies available in future. If the waiting list in one examination was to operate as an infinite stock for appointments, there is a danger that the State Government may resort to the device of not holding an examination for years together and pick up candidates from the waiting list as and when required. The constitutional discipline requires that this Court should not permit such improper exercise of power which may result in creating a vested interest and perpetrate waiting list for the candidates of one examination at the cost of entire set of fresh candidates either from the open or even from service.

15. The same principle has been reiterated by the Apex Court in the case of *Surinder Singh and Others Vs. State of Punjab and Another*, and it has been held that waiting list cannot be used as a perennial source of recruitment for filling up the vacancies not advertised. The candidates in the waiting list have no vested right to be appointed except to the limited extent that when a candidate selected against the existing vacancy does not join for some reason and the waiting list is still operative. The candidates included in the waiting list cannot claim appointment on the ground that the vacancies were not worked out properly.

16. Reference in this connection may also be made to the judgments of the Supreme Court reported in *Sanjoy Bhattacharjee Vs. Union of India and others*, . *Hindustan Steel Works Construction Ltd. Vs. State of Kerala and others*, *State of Haryana and Others Vs. Miss Ajay Walia*, .

17. Thus the law is well settled that in case the vacancies are notified in the advertisement then the appointment from the select list is to be made to the extent of vacancies notified in the advertisement and no appointment is to be made in excess or the post advertised except to fill up the posts available due to non-joining or some exceptional or emergent situation as stated above. So far as the present case is concerned, the first Advertisement was issued on 31st July, 1996 notifying only 30 and 88 vacancies of AP Ps. It was stipulated in the said advertisement that there may be change in the number of vacancies. Thereafter a corrigendum was issued giving the number of posts to be filled up in pursuance of the advertisement. Thus the exact number of posts of AP Ps to be filled up were notified in the advertisement. The advertisements were issued in pursuance of requisitions made by the State Government giving therein specific number of posts of AP Ps to be filled up as stated above. Selection process was also carried

out to fill up those vacancies. Accordingly, the Commission recommended the names of candidates in terms of the advertisement except those vacancies which could not be filled up due to non-availability of candidates under Scheduled tribe category. It is clear that advertisement was issued to fill up the notified vacancies and in that view of the matter from the panel/select list/waiting list the appointment could be made only to the extent of the posts advertised and not beyond that. In case some of them could not join then the said vacancies are to be filled up from the said list, but no future vacancies arising after the aforesaid advertisement could be filled up from the select list/waiting list even if the vacancies arise either prior to the last date of filing of application or before the last date of interview held for selection of AP Ps. It is for the State Government to take a policy decision to create or sanction a post. The Apex Court, as stated above, has already directed the State Government to create post of AP Ps to the extent of courts of Magistrate functioning in the State of Bihar. After creation of additional Courts of Magistrate in excess of 712, it is the duty of the State Government in view of the order of the Supreme Court to sanction extra posts of AP Ps for the newly created courts of Magistrate and to take steps for appointment by making fresh advertisement. Additional Courts of Magistrate do not confer any right to the Appellant to claim appointment on the basis of inclusion of their names in the list of successful candidates prepared in pursuance of advertisement to fill up the notified number of vacancies.

18. In the result, I find no merit in these two appeals and the same are dismissed. In the facts and circumstances of the case, there shall be no order as to costs.

D.P.S. Choudhary, J.

19. I agree.