

(1990) 11 PAT CK 0035

In the Patna High Court

Case No : C.W.J.C. No. 6582 and 6700 of 1990

Dr. Amar Nath Singh and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 01-11-1990

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 16, 233, 35
Criminal Procedure Code, 1973 (CrPC) — Section 24, 25

Citation : (1991) 1 BLJR 645 : (1991) 2 PLJR 509

Hon'ble Judges : S.B. Sanyal, J;Aftab Alam, J

Bench : Division Bench

Judgement

S.B. Sanyal, J.—Both these writ petitions are directed against the procedures of selection of direct recruits of Additional District and Sessions Judge, as envisaged under Article 233(2) of the Constitution of India. Since the two petitions challenge the process of selection for oral interview, which is to commence from 3rd November 1990, they are disposed of at the stage of admission itself after hearing both the parties.

2. In C.W.J.C. No. 6582 of 1990 petitioner Nos. 1 to 4 claim to be the applicants for the post of Additional District and Sessions Judge pursuant to an advertisement dated 8.2.1985 (Annexure-1), and petitioner Nos. 5 and 6 are non-applicants for the aforesaid post. Petitioner No. 2, also claims to be a member of the backward class under Annexure-II.

In C.W.J.C. No. 6700/90 the petitioner, who is an advocate of this Court and not an applicant for this post, assails the advertisement dated 8.2.1985 (Annexure-1) and the advertisement dated 20.9.1989 (Annexure-2) by way of Public interest litigation on the ground that there has been no reservation made in favour of backward classes, economically weaker classes and for women candidates, inasmuch as the Government has taken a decision on 10th November, 1978, in exercise of powers conferred under Articles 15(4) and 16(4) of the Constitution of India to reserve 8% for other backward classes, 12% for

extremely backward classes, 3% for women candidates and 3% for economically weaker section of the society for appointment in State Services.

3. In C.W.J.C. No. 6582/90 Mr. Rajendra Prasad Singh, learned Counsel appearing on behalf of the petitioners pressed the following six points only.

(I) Some Assistant Public Prosecutors appointed u/s 25 of the Code of Criminal Procedure are not advocates and those who are enrolled as advocates cannot count their period of Government service towards fulfilling the requirement of seven years practice, but such, persons have also been called for interview.

Further, they are debarred from being considered in view of Article 233(2) of the Constitution, as they are in the service of the Union or of the State.

It has been stated that more than 15 Assistant Public Prosecutors appointed u/s 25(1) Cr.P.C. have been called for interview having qualified in the written test, out of whom Sri Birendra Kumar Sharma, Sri Rajendra Pd. Mishra and Sri Jitendra Prasad Sinha were never enrolled as advocates in any Bar Council and/or under the Advocates Act.

(II) The examination of the answer books through the Computer has resulted in non-appraisal of many answer books of the candidates, who have not filled up the six squares at the bottom of the answer books, resulting in non-acceptance of the answer sheets by the Computer. There was no warning of this imperativeness, either on the question paper or in the answer book. The evaluation of answer-sheets, therefore, should have been done manually and not by Computer in order to prevent such gross injustice.

(III) In adopting the selection process the Court have violated the law laid down by a Full Bench of this Court in the case of K.P. Verma v. State of Bihar 1989 PLJR 1031 for the reasons:

(a) The court did not frame new Rules for selection nor it followed the old Rules.

(b) The respondents acted illegally in clubbing the vacancies of 1985 and 1989 and holding a composite test for all the vacancies.

(c) In issuing the interview letters the respondents ought to have maintained the ratio of 26 posts into 4 for vacancies of 1985 and 6 into 4 for vacancies of the year 1989, In short, 104 candidates ought to have been allowed to be interviewed from 1985 applicants and 24 candidates from 1989 applicants; whereas 129 candidates have been called for interview ignoring the year of vacancy. The clubbing of the vacancies, therefore, has caused grave injustice and inequality.

(IV) Those candidates who became only eligible in the year 1987, under no circumstance can be considered for the vacancies of earlier years since they were not eligible for earlier vacancies.

(V) The written test held by the respondents is unreasonable as it has not hid

down any minimum qualification for the written test.

(VI) The advertisements pursuant to which the selection is sought to be effected are ultra vires Articles 14, 15 and 16 of the Constitution, as they have not made provision for reservation of backward classes.

4. In C.W.J.C No. 6700/90 Mr. Ranna Pratap Singh, learned Counsel for the petitioner, pressed only the question of reservation. According to the learned Counsel can the High Court ignore State policy altogether being a recommendary body and the State is bound to effect such recommendation by making appointments.

5. Before I embark upon to consider the contentions of the learned Counsel for the parties, the scope of Article 233 of the Constitution is to be borne in view as laid down by the Supreme Court in the case of Chandra Mohan v. State of Uttar Pradesh AIR 1966 SC 1987 Satya Narain Singh and Others Vs. High Court of Judicature at Allahabad and Others, and State of Kerala Vs. Smt. A. Lakshmikutty and others, .

6. Article 233 of the Constitution envisages two sources of appointment to the post of District Judge which includes Additional District Judge, namely, (1) who are already in the judicial service of Union or of the States i.e. by promotion and (2) by direct recruitment of an advocate, of not less than seven years standing and has been recommended for appointment by the High Court. The words, in the service of the Union or of the State "in Article 233(2) mean" Judicial Service and not other services. The State Executive has no power to appoint anyone outside the panel of names recommended by the High Court for appointment as District Judge.

7. Coming to the first submission, there could be no shade of doubt that a candidate for the post of Additional District Judge must be enrolled as an Advocate. Mr. Advocate General appearing on behalf of the respondents stated that all candidates summoned for oral interview have been directed to produce in original, apart from their matriculation certificate the certificate of Law Degree, enrolment Certificate, Practice certificate granted by the District Judge or the Registrar of the concerned High Court. Learned Advocate General states if there be any candidate who is not enrolled as an advocate, he will be excluded from consideration.

8. The next aspect of the question is whether an Advocate Assistant Public Prosecutor who has not put in seven years practice in the Bar, but got appointed u/s 25, Cr.P.C. whether the period for which he has worked as Assistant Public Prosecutor can be counted towards experience of seven years as an Advocate. This question directly fell for consideration in the case of Gobind Chandrayan v. State of Bihar 1976 BBCJ 554 while considering the question of appointment of a Muusif requiring one year standing in the Bar. It was held on consideration of Rule 44 of the Bar Council of India Rules, 1975, Chapter V of the State Bar Council Rule and Section 25 of the Code of Criminal Procedure, 1973 that an

Advocate appointed as an Assistant Public Prosecutor does not cease to practice as an Advocate. There is an additional reason why the Assistant Public Prosecutor appointed u/s 25, Cr.P.C. can count his period of service towards his experience as an advocate because of the provision of Section 24(9) of the Code of Criminal Procedure, which was earlier not noticed. This provision makes it abundantly clear that for the purpose of seven years practice for being appointed as Additional Public Prosecutor and 10 years practice as Special Public Prosecutor u/s 24, Cr. P. C. the period for which the Assistant Public Prosecutor has rendered service shall be deemed to be the period during which such person has been in practice of an Advocate.

9. For all these reasons I hold that Advocates appointed as Assistant Public Prosecutors u/s 25, Cr.P.C. are entitled to count their period of service as Assistant Public Prosecutor as carrying on practice as Advocate. The Advocate-Assistant Public Prosecutors of seven years standing as such are eligible for consideration for being appointed as District Judge. Our attention has been drawn to the case of Mallikarjuna Sharma and Others Vs. The State of A.P. and Others, . In that case the petitioner wanted to count the period rendered as judicial officer as practice as an Advocate for fulfilling the requirement of Section 24(6), C.P.C. Reliance on this case is wholly misplaced as the case is clearly distinguishable.

10. In reply to the second submission of non-appraisal of some answer sheets by the Computer, learned Advocate General after having obtained clear instruction submitted that all answer papers have been evaluated by the Computer and not a single answer book remains unappraised by the Computer. There is, therefore, no substance in this submission. The point appears to have been taken merely on surmise and conjecture.

11. The third and fourth submissions are taken up together, as they are somewhat interlinked. The main thrust of the submission is that clubbing of vacancies upto the year 1985 numbering 26 and those which arose subsequently is bad and against the direction of Shamsul Hasan J. (as he then was) as contained in paragraph No. 18 of the judgment. In paragraph No. 18 of the said decision Shamsul Hasan, J. directed that the direct appointees of the 26 vacancies which arose upto the year 1985 should rank senior to those who have been promoted earlier to fill up those vacancies since the vacancies meant for recruitment from amongst the Advocates, should never have been filled up by the promotees even on the ground that the posts are lying vacant due to the delay caused by the appointment procedure.

The further observation in the said paragraph which is the heart of the argument of the learned Counsel for the petitioners reads.

...I am proceeding on the basis that for the present 26 vacancies have to be filled up straightway and four more will have to follow after advertisement. The reason for separating the two is that I feel that some vacancies must be kept

reserved for those who have now become eligible after 1985. These four vacancies will be treated to be of the year in which they became vacant with the aforesaid consequences.

12. The specific direction of seniority and allotment of the year to the applicants 1985 and 1989 by Shamsul Hasan, J. is not shared by the other two Hon^{ble} Judges, and the operative portion is different except the Selection of direct recruitment should be made at an early date. In paragraph No. 45 of the judgment P.S. Mishra, J. (as he then was) directed that "all existing vacancies are filled up within six months from the date of the delivery of the judgment. In no case, however, the respondent-state or the High Court shall fill up the vacancies meant for direct recruits by promotion or vice-versa and continue the party until altered by due process of law. "It is manifest from this direction that P.S. Mishra, J. treated all the vacancies as an existing one. The other judge S.B. Sinha, J. in paragraph No. 86 has made it expressly clear by observing.

...It is now a well settled principle of law that a person gets seniority only from the date he enters into the service. Although, as noticed herein before, the career of many persons who could have been appointed from the Bar had been affected as no direct recruitment was made after 1979 so as to fill up the existing vacancies.

13. From all these, I conclude that the majority view of the Full Bench is to treat the vacancies whenever arose as existing vacancies. The concept of allotment of the year to the particular candidate for the purpose of seniority in absence of rules and regulation is inapplicable to direct recruitment. The employment opportunities must be allowed to be exploited by all eligible candidates when the vacancy is sought to be filled up. Note 3 of the advertisement of the year W89 (Annexure 2) clearly states that those who have applied pursuant to the advertisement of 1985, they need not again (Punah) apply to the second advertisement. In none of the two advertisements the number of posts has been indicated This clearly manifests that the second advertisement adopted the first one for the convenience of the candidates. The old rules which have been found to be intra vires in the case of K.P. Verma (supra) do not prescribe any modality of filling up the vacancies and/or allotment of the year when the vacancies arose. The old Rules left it to the discretion of the High Court to fill up the vacancies. The modality adopted by the High Court does not appear to be irrational and arbitrary. All existing vacancies may mean the vacancies that have accumulated upto the completion of the selection process, Advisedly the advertisements do not disclose the number of vacancies.

14. The submission that the respondents having not provided for qualifying mark for the written test vitiates the entire process of selection does not appear to be well-founded in the facts and circumstances of this case. We are told that more than 2000 candidates participated in the written test and the respondents called four candidates per vacancy, but since nine candidates obtained the same mark in the written test, 129 candidates have been called for interview. Laying down of

qualifying mark in the written test is no doubt one of the modalities of selection. Can it be said that merely because the minimum qualifying mark has not been provided, the whole process of selection is unreasonable. 129 candidates will be interviewed by the Full Court and more than 30 judge will evaluate the performance of the candidates in the oral interview. Therefore, the minimum qualifying mark in the instant case will be the marks obtained by the 120th candidates. The ratio of one to four obviates the necessity of minimum qualifying mark. Previously, the High Court used to take only oral interview, but in view of largeness of the number of Candidates and Judges constituting the Full Court, the process of written test was adopted to screen out the best out of more than 2000 candidates for approximately 30 or 32 vacancies. As such, there is no unreasonableness in the process of selection.

15. Coming to the question of reservation, Mr. Rana Pratap Singh strenuously argued that the appointments are to be made by the Governor who is the executive head of the State. The State Government has formulated reservation in State Services, as would be evident from Annexure-3 series-8% for other backward classes, 12% for economically backward classes 3% for women candidates and 3% for economically weaker Section provided the family income of these sections is not above the Income Tax exemption limit in a year. The carry forward rule has been limited to three years only. This being a decision of the State in exercise of the powers conferred under Articles 15(4) and 16(4) of the Constitution of India, the two advertisements ought to have provided for reservations according to state policy. The State Government is not bound to implement the recommendation as it ignores the policy of the State in the matter of reservation of jobs. As such, the two advertisements are lit to the quashed.

16. From a mere reading of Annexure-3 series it appears firstly that it is the Resolution of the Government and secondly the services to which it applies have been expressly stated in paragraph No. 8 of the Resolution, namely, State Government service, District Board, Municipality, Semi Government Institutions, University and Public Undertaking. Paragraph No. 10 expressly excludes its application to the High Court, Legislative Assembly and Legislative Council till such time consent is obtained from the Chief Justice, Speaker of the Legislative Assembly and Chairman of the Legislative Council. It is not averred that consent has been received from Hon'ble the Chief Justice with respect to the concerned Resolution for reservation. Learned Counsel for the petitioner submits that paragraph No. 10 speaks about Karamchari i.e. Class III and Class IV persons and, therefore, its application extends to the appointment of District Judges and those who are superior to "Karamchari Though the argument is attractive, I find no substance in the argument. Firstly, this is only a Resolution of the Government and not a mandate of the Legislature or of the Constitution. Secondly, if the Resolution is not applicable to the employees of the High Court, it is more the reason why it will not apply to the superior judicial service which is governed by Article 233(2) of the Constitution and the discretion as to the process of selection has been completely left to the High Court. The High Court,

however, has to bear in view the mandate of Article 35 of the Constitution of India in this regard which casts a duty on the High Court to consider the claim of the members of the Scheduled Caste and Scheduled Tribe consistently with the maintenance of efficiency of administration in the making of appointment to the services. In short bearing in view the maintenance of efficiency, every thing being equal, preference should be given to the Scheduled Caste and Scheduled Tribe candidates. I find this has been borne in view, as would be evident from the interview letter wherein in paragraph No. 3 it has been stated that the candidates who claim to be belonging to Scheduled Caste and Scheduled Tribe community shall bring with them in original the caste certificate granted by the District Magistrate, Additional District Magistrate or Sub-divisional Magistrate.

17. As already noticed, the State Government must confine the appointments out of the panel of names recommended by the High Court and not otherwise. As such, the executive head of the State is required to implement the recommendation under the scheme of Chapter VI of the Constitution of India. Bihar Superior Judicial Service Rules 1946 which are in operation, do not provide for any reservation. No new Rules have been framed giving effect to the Government Resolution of reservation for superior judicial service. I do not, therefore, find any substance in this submission of the learned Counsel for the petitioner.

18. Further, there is a long delay in assailing the advertisements i.e. in October 1990, whereas the advertisements are dated 8.2.1985 and 20.9.1989. In C.W.J.C. No. 6582 of 1990 the petitioners are candidates, who have not been called for interview, though participated in the written test. They allowed the Examination to be held without protest pursuant to the Advertisements. It is, therefore, too late for them to turn round and assail the advertisements, (see *Om Prakash Shukla Vs. Akhilesh Kumar Shukla and Others*,) *Om Prakash Shukla v. Akhilesh Kumar Shukla*. It is true that in C.W.J.C. No. 6700 of 1990 the petitioner did not participate in the examination, but; even in a public interest litigation delay will not be allowed when parties have changed their respective position and more than two thousand candidates have participated in the examination. This would cause hardship to the candidates called for interview.

19. No other submission has been made by the learned Counsel for the parties.

20. That writ petitions are, accordingly, dismissed.

21. I may, however, observe that we have occasion to deal with the selection process for the appointment of Additional District Judges before the examination was held in C.W.J.C. No. 5682 of 1990 disposed of on 6.9.1990. Since then as a member of the Standing Committee I refrained from the deliberations of the Standing Committee relating to the instant appointments. We have again occasion to consider the matter now after the conclusion of the examination. I, therefore, in the best tradition of the Court think it prudent, not to participate in the oral interview notified to be held by the Full Court from 3rd November, 1990

to 18th November, 1990.

Sd/- S.B. Sanyal.

Aftab Alam, J.

I agree that two applications are fit to be dismissed. However, without dwelling upon the different aspects of the case already dealt with by my learned brother I would like to add a few words of my own.

23. C.W.J.C. No. 6700 of 1990 seeks the quashing of the two advertisements, published in newspaper, dated February 8, 1985 and September 20, 1989, inviting applications for appointment to the posts of Additional District and Sessions Judges by direct recruitment. The petitioner, a practising advocate is himself not a candidate and yet challenges the selection process, currently underway, professedly in public interest. The challenge is based on the plea that the selection is being made in disregard of certain executive decisions making certain reservations in government employments in favour of (i) other Backward Classes (ii) "Economically Weaker Sections" and (III) Women. The petitioner does not belong to any of these groups either. The application has been filled after the written test is over and on the basis thereof 129 candidate, out of more than 2000 appearing for the written test, have been called for the final interview. The interview is to commence from 3rd November, 1990. It was plain and evident from the impugned advertisements that they did not take into account any reservations, as envisaged in the executive decisions in question. The only preference, in terms of the impugned advertisements is available to a member of the Scheduled Castes or the Scheduled Tribes in case he was found equal in merit to a general candidates. The delay of more than one year in raising this challenge is quite inexplicable. The answer by Mr. Rana Pratap Singh, learned Counsel appearing on behalf of the petitioner, that it was open to him to challenge the advertisements till the selection process was finalised, does not really meet the issue. In a given situation it might be open to challenge the advertisements and the selection process even after the selections are over. But the belated filing of the present writ application, when the selection process is entering into the final stage, only casts a doubt that the real object behind the challenge transcends the professed public interest. On this score also I would refrain from interfering in exercise of the writ jurisdiction.

24. C.W.J.C. No. 6582 of 1990 has been filed by six persons, all practising advocate. Petitioners 1 to 4 were applicants who sat for the written test but have not been called for the final interview, petitioners 5 and 6 are not even applicants and their locus standi to maintain this application is not quite clear.

25. The factual aspect of the matter relating to the Assistant Public Prosecutors (appointed u/s 25 of the Code of Criminal Procedure) having been called for the interview is stated in paragraph 8 of the Supplementary affidavit. This is reproduced below.

(8) That more than 15 Assistant Public Prosecutors appointed u/s 25(1) Cr.P.C. by the State Government were called for interview, namely, Shri Ram Nath Modi, Shri Jai Prakash Singh, Shri Birendra Kumar Shrama, Shri Rajendra Prasad Mishra, Sri Jitendra Kumar Sinha and others, out of which Shri Birendra Kumar Sharma, Shri Rajendra Prasad Mishra and Shri Jitendra Prasad Sinha were never enrolled with the State Bar Council or Bar Council of India as an Advocate under the Advocates Act. Another example is Sl. No. 1325/85 Shri Vidya Pati Singh, APP Patna City who was never enrolled as an Advocate and appeared in the Test for the instant post.

26. Learned Advocate General, appearing on behalf of the High Court, stated that the averments were not factually accurate. According to him only 4 of the 129 candidates called for interview were Assistant Public Prosecutors and in case any one of them fail to produce the enrolment certificate as an Advocate he would be excluded from consideration for appointment. He further stated that the names given in the aforequoted statement also did not fully tally with the names appearing in the High Courts records. I find it unfortunate that affidavits have been filed without much concern for factual accuracy.

27. The other aspects of the case have been adequately dealt with by my learned brother with whom I fully agree.

28. I am in further agreement with my learned brother in deciding not to sit on the Full Court for interviewing the candidates for these appointments.