
(1999) 01 PAT CK 0010
In the Patna High Court
Case No : C.W.J.C. No. 19 of 1989

Krishna Murari Sharan and Others	Vs	APPELLANT
The State of Bihar and Others		RESPONDENT

Date of Decision : 29-01-1999

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (1999) 3 PLJR 158

Hon'ble Judges : Nagendra Rai, J;M.L. Visa, J

Bench : Division Bench

Advocate : S.N. Jha, Ashok Kumar Jha and Asim Jha, for the Appellant; A.P. Jittu, Mukesh Kumar for State, A.K. Choudhry, for B.P.S.C. and Jaynandan Singh, for Intervenor, for the Respondent

Final Decision : Dismissed

Judgement

Nagendra Rai, J.—Both the writ petitions are connected matters and as such they have been heard together and are being disposed of by this common judgment.

2. The four Petitioners in C.W.J.C. No. 19/89 and the sole Petitioner in C.W.J.C. No. 9920/89, have filed the present writ applications for a direction to the Respondents to consider their cases for appointment to the posts of Assistant Public Prosecutor on the basis of the marks obtained by them in the written test and interview held by the Bihar Public Service Commission (hereinafter referred to as "the Commission") in terms of an advertisement dated 27.3.1985.

3. So far as the Petitioners of C.W.J.C. No. 19/89 are concerned, all of them were selected in the Bihar Judicial Service and have joined the same. One Shambhu Sharan Singh has filed an intervention application in the said writ application on 23.11.1989 and this Court, by order dated 11.7.1990, ordered that the said intervention application would be considered at the time of hearing. As all the four Petitioners in C.W.J.C. No. 19/89, having joined the Bihar Judicial Service, have no interest left in the said case as stated at the Bar, their cases are not

being considered, but the case of the intervenor is being considered. It is to be mentioned here that in both the writ applications, the matter relates to the appointment of Assistant Public Prosecutor under general category.

4. The facts, which are not in dispute, are that an advertisement was published in a newspaper, namely, Indian Nation on 37.3.1985 by the Commission inviting applications for appointment on the posts of Assistant Public Prosecutor in the pay scale of Rs. 1,000/ - to 1,820/ - A copy of the said advertisement has been annexed as Annexure-1 in both the writ applications. It was provided in the said advertisement that the total numbers of seats to be filled up were 100, out of which 50 seats were for general category candidates and remaining 50 seats were for the candidates of the reserved category. The written test was held in October, 1985 and the result whereof was published on 21.5.1987, a copy of which has been annexed as Annexure 2 in both the writ applications.

5. It is asserted that all the five Petitioners as well as the intervenor were successful in the written test and they were called for interview, which was to be held from 8.6.1987 to 11.6.1987 and 15.6.1987 to 18.6.1987. They appeared on the dates fixed for their interview.

6. The sole Petitioner of C.W.J.C. No. 9920/89, was supplied with a marksheet on 17.7.1987 showing that no marks were allotted for interview and he was shown as "over-age". He filed C.W.J.C. No. 5572 of 1987 in this Court for a direction to count the marks obtained by him in the viva voce as the same was wrongly not counted on the ground of his being over-age. The said writ application was allowed against which the Commission filed SLP (Civil) No. 6206 of 1988, which was dismissed on 8.3.1989 and the Commission was directed to publish the result of viva voce of the aforesaid Petitioner as early as possible not later than two weeks from the date of passing of the order. A copy of the said order has been appended as Annexure 4 to C.W.J.C. No. 9920/89. Thereafter, the said Petitioner was interviewed on 10.4.1989 and was given 25 1/2 marks. He was informed by a letter dated 11.4.1989 (Annexure 5) that he had secured 34 ? marks in written and interview and he was placed in the merit list at serial No. 100.

7. On 18.6.1987, the Director, Prosecution, Bihar, Patna, wrote a letter to the Secretary, Home (Police) Department, that the total number of vacant posts till the last date of the interview was 134 and as such the Commission might be requested to recommend the names of 134 candidates. Thereafter, the result of successful candidates was published in the daily news-paper on 8.7.1987 and the names of 63 candidates under general category were recommended for selection by the Commission. There were certain mistakes, which were later on clarified. A copy of the result sheet has been appended as Annexure-5 in C.W.J.C. No. 19/89. The names of the Petitioners and the intervenor did not find place in the aforesaid list. Subsequently, by notification dated 12.4.1988, issued by the Government, 64 persons were appointed as Assistant Public Prosecutors, out of them 30 persons were of the general category and 34 persons were of the

reserved category. A copy of the said notification has been appended as Annexure 8 in C.W.J.C. No. 19/89. Again the State Government, by another notification dated 10.6.1988, appointed 13 persons as Assistant Public Prosecutors, out of which 11 persons were of general category and two persons were of reserved category.

8. It is also an admitted position that out of 41 candidates, who were appointed in general category, one did not join and so only 40 posts in the general category were filled up. Later on, twelve candidates out of the aforesaid general category candidates joined the Bihar Judicial Service and as such only 28 persons remained in service and 22 posts, out of the general category, remained vacant on the basis of the vacancies advertised in the aforesaid advertisement (Annexure-1).

9. Materials on the record further show that the last candidate selected under general category had secured 357 marks, whereas, Petitioner No. 1 of C.W.J.C. No. 19/89 had secured 353 marks, Petitioner 2, 329 marks, Petitioner Nos. 3, 338 ? marks, Petitioner Nos. 4, 349 marks and the intervenor had secured 333 marks and the Petitioner of C.W.J.C. No. 9920/89 had secured 340 ? marks.

10. There were 345 sanctioned posts of Assistant Public Prosecutor in the State of Bihar in the year 1989, only 266 Assistant Public Prosecutors were working including the persons appointed in terms of the advertisement of the year 1985. The Government made two requisitions to fill up the remaining 79 posts. First requisition was made on 20.9.1989 for filling up 68 posts and the second requisition was made on 28.11.1989 for filling up 11 posts. It appears that writ petitions being Criminal Misc. No. 1344 of 1981 and Cr. Misc. No. 1940 of 1990 were filed before the apex court by Free Legal Aid Committee, Jamshedpur, for a direction to fill up the posts of Assistant Public Prosecutors. In the said writ petitions, the Apex Court directed for creation of 217 more posts of Assistant Public Prosecutor by March, 1990 and the State Government created the posts and, thereafter, on 20.4.1990, the Apex Court directed to complete the recruitment of 562 Assistant Public Prosecutors by 30.6.1990 and in pursuance of that, the State Government made a requisition to the Commission to recommend the names for appointment of 296 Assistant Public Prosecutors, which included. 217 newly created posts and 79 posts, for which requisitions were made in 1989. The said requisitions were sent to the Commission vide memo No. 3567 dated. 11.5.1990, a copy of which has been appended as Annexure "D" to the counter-affidavit filed on behalf of Respondent No. 3 in C.W.J.C. No 19/89. Thereafter, the Commission sent recommendation of 253 persons for appointment as Assistant Public Prosecutors against the requisitions for filling up 296 posts. The Commission also informed that as no candidate of Scheduled Caste, Scheduled Tribe and Ladies categories was available, no recommendation was made with regard to the candidates for appointment under the said categories. Thereafter, the appointments were made on the said posts in September, 1980.

11. The stand of the Petitioners is that the total number of posts in general category were 50 and out of that only recommendations were made for 41 seats, out of which one person did not join. As such, since no recommendation was made for 10 seats and 12 seats became vacant due to joining of 12 persons in Bihar Judicial Service, the said 22 seats should be filled up from the eligible candidates, who have applied in pursuance of the advertisement of the year 1985. Accordingly, direction may be issued to the Commission to recommend the names of the Petitioners and the intervenor for appointment against the said vacancies and the Government may be directed to make appointment. Further stand of the Petitioner in C.W.J.C. No. 9920/89 is that a person, namely, Sri Arun Kumar Gupta, having secured lesser marks of 309, has been appointed, whereas, the Petitioner having secured higher marks of 340 ? has not been appointed. It is also the further stand of the Petitioners that many candidates, having not faced the interview, have been selected and appointed and as such their appointments be cancelled.

12. The stand of the Commission as well as the State Government is that no post at present is vacant as all the posts of Assistant Public Prosecutor in general category have been filled up in terms of the direction issued by the Apex Court. It is also asserted that the last candidate appointed in general category has secured 357 marks and, admittedly, the Petitioners and the intervenor having secured lesser marks, they are not entitled to be appointed on the said posts, specially when it is not the case of the Petitioners and the intervenor that even if those posts were filled up, they would fall within the zone of consideration for appointment. It is also asserted that the question raised by the Petitioners has already been considered by a Division Bench of this Court in C.W.J.C. No. 7081 of 1989 and the writ application, filed by the persons similarly situated has been dismissed on 3.1.1990. Their further stand is that appearing in the interview was not mandatory and the appointment was to be made on the basis of the total marks secured by the candidates and as some of the candidates have secured good marks in the written test, they were appointed even without interview. Said Arun Kumar Gupta was appointed as a reserved category candidate and not as a general category candidate and as such on that basis the Petitioners and the intervenor cannot claim their appointment.

13. Both the writ applications were placed before a learned single Judge of this Court and before him, the Petitioners relied upon a judgment of the Supreme Court in the case of A.V. Bhogeshwarudu v. Andhra Pradesh Public Service Commission reported in judgment Today 1989 (4) SC 130, in support of their contention that the vacancies not filled up due to non-joining of the candidates recommended for appointment-should be filled up out of the same merit list, from which the names of the candidates were recommended. Counsel for the Commission and the State Government relied upon a Division Bench decision of this Court in C.W.J.C. No. 7081 of 1989 Ravi Ranjan Chaturvedi v. State of Bihar and Ors. wherein similar prayer was dismissed by this Court, a copy of which has been appended as Annexure "A" to the counter-affidavit filed on behalf of the

State in C.W.J.C. No. 19/89. The learned Single Judge, thereafter, referred the matter to a Division Bench and that is how the matter has been placed before us.

14. Learned Counsel appearing for the Petitioners submitted that as the Commission had recommended 41 names and only 40 candidates joined pursuant to the aforesaid recommendation, there were ten clear vacancies and this apart, 12 vacancies fell vacant due to resignation of 12 candidates by virtue of their joining in the Bihar Judicial Service and as such the aforesaid 22 posts should have been filled up from the same very merit list, from which the recommendations were made. In support of his submission, he relied upon the judgments of the Supreme Court in the case of *Jai Narain Ram Vs. State of U.P. and others*, . He also submitted that as other candidates having secured more marks than the Petitioners have not approached this Court and the Petitioners have approached this Court, a direction might be issued to consider the cases of the Petitioners for their appointment and no general direction should be issued for considering the cases for appointment of all the candidates in order of merit in the merit list. In this connection, reliance was placed on the decisions of the Supreme Court in the case of *Ashok alias Somanna Gowda and Another Vs. State of Karnataka by its Chief Secretary and Others*, and *Miss Neelima Shangla, Ph. D. Candidate Vs. State of Haryana and Others*, . It was further contended that the persons, who had not even faced the interview, have been selected and one candidate, namely, *Arun Kumar Gupta* having secured lesser marks than the Petitioners and the intervenor, has been selected and as such the Petitioners and the intervenor deserve their appointments to the posts of Assistant Public Prosecutor.

15. Learned Counsel appearing for the Commission, on the other hand, submitted that it was not incumbent upon the Government to fill up all the posts advertised and in these, cases, 40 candidates recommended were appointed. Later on 12 persons left their service. Taking into consideration the number of the vacancies, it was decided to fill up the said posts by fresh advertisement as period of more than four years had passed from the date of the advertisement and, accordingly, requisitions were made in 1989 for filling up the remaining posts and, thereafter, directions were issued by the Apex Court to create more posts and more posts were created and requisitions were made to fill up all the remaining vacant posts and, thereafter, the Commission recommended the names and all the posts under general category have been filled up and as such at present there is no post vacant for appointment of any candidate in that category. It was further submitted by the learned counsel for the Commission that the viva voce was not compulsory. The candidates, who were selected even without interview, have secured good marks in the written test and the marks obtained by them in the written tests were more than the candidates having obtained marks both in the written tests and interview and on the basis of the same, they were selected. With regard to *Mr. Arun Kumar Gupta*, it was submitted that he was appointed as a reserved category candidate.

16. The law is well-settled that unless the relevant rule provides, the State is not

bound to fill up all the vacancies notified for appointment. A Constitution Bench of Supreme Court in the case of Shankarasan Dash v. Union of India reported in Judgments Today 1991 (2) SC 380, held as follows:

It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so judicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bonafide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test and no discrimination can be permitted.

17. Thus, only because the vacancies were 50 and only 40 vacancies were filled up and some vacancies remained unfilled, the Petitioners and the intervenor cannot claim as a matter of right that the aforesaid posts should be filled up unless it is shown that the said posts were not being filled up by the State on arbitrary and malafide grounds. No arbitrariness or malafide has been shown on behalf of the Petitioners, on the other hand, the materials on the record show that the advertisement was made in 1985 and appointments were made in 1988. Thereafter, the State Government decided to fill up the vacant posts, numbering about 79, by fresh advertisement, this obviously appears to have been done with a view to provide opportunity to the candidates, who became eligible after 1985. In other words, to provide opportunities to the candidates having become eligible after 1985 in consonance with the requirement of Articles 14 and 16 of the Constitution of India, the State took a decision to send requisition to the Commission for the said posts and, thereafter, as stated above, all the posts as well as the newly created posts pursuant to the direction of the apex court, were filled up by the Commission. Thus, the decision of the State Government not to fill up the aforesaid vacancies cannot be said to be either arbitrary or malafide.

18. The decision relied upon by the Petitioners in the case of A.V. Bhogeshwarudu (supra) does not help their cases: In the said case, a Bench consisting of two learned Judges has issued direction for filling up the remaining posts having fallen vacant due to non-joining of the persons. This decision is not an authority that in all cases, all the posts advertised should be filled up. In the facts of that case, the direction was issued to fill up the remaining vacancies. Similarly, in the case of Jai Narain Rai (supra), a Bench consisting of two learned Judges of the apex court directed to fill up the posts from qualified candidates, which were vacant due to non-joining of the selected candidates.

19. In the present cases, due to lapse of long period after an advertisement, the State Government decided to fill up the remaining posts by fresh advertisement

and, thereafter, the posts were filled up as stated above and as such no direction can be issued to the Respondents to consider the cases of the Petitioners and intervenor for their appointments. As no case for issuance of directions for appointment of the Petitioners and the intervenor is made out, the question of issuing direction for only considering the cases of the Petitioners and the intervenor and not of the other eligible candidates in the merit list does not arise.

20. As stated above, one Ravi Ranjan Chaturvedi and others having secured 345, 332 and 302 Marks, filed a writ application (C.W.J.C. No. 7081 of 1989) making the same prayer, which has been made by the Petitioners of these cases and a Division Bench of this Court taking note of the fresh advertisement issued as well as the direction of the apex court to fill up the posts of Assistant Public Prosecutors and also the marks obtained by the Petitioners of that case, dismissed the writ application by order dated 3.1.1990. I fully agree with the view taken by the Division Bench in that case. In my view, the Petitioners' case is fully covered by the aforesaid decision. As stated above, the last candidate selected from the general category secured 357 marks, whereas, the Petitioners and the intervenor have secured lesser marks as indicated above. Mr. A.K. Gupta was appointed as Assistant Public Prosecutor under reserved category and as such on that ground, the Petitioners and the intervenor cannot claim their appointment as general category candidates. Viva voce was not compulsory in terms of the advertisement and as such even if some candidates, not having appeared in the interview, have been selected because of their marks in the written test only, the same cannot be questioned. This apart, the aforesaid selected persons have not been added as party in the writ applications and as such no adverse order can be passed behind their back. All the posts under the general category were filled up in pursuance of the direction issued by the apex court as indicated above and the Petitioners and the intervenor cannot have a claim for a direction for their appointments only on the ground that an interim order was passed by this Court directing the Commission to keep certain posts of A.P.P. vacant.

21. In the result, I find no merit in these applications and they are, accordingly, dismissed.

M.L. Visa, J.

22. I agree.