
(2001) 01 PAT CK 0021

In the Patna High Court

Case No : C.W.J.C. Nos. 8655 and 11341 of 2000

Narayan Das Sharma and Others, etc.

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 24-01-2001

Acts Referred:

Citation : (2001) 01 PAT CK 0021

Final Decision : Allowed

Judgement

S.N. Jha, J.—As same point is involved in these two writ petitions, they have been heard together and are disposed of by this common order. The dispute relates to filling of the vacancies meant for the Scheduled Tribes in the Bihar Subordinate Judicial Service. C.W.J.C. No. 8655/2000 relates to 24th Judicial Service Examination while C.W.J.C. No. 11341/2000 relates to the 25th Examination. In the former, the petitioners seek quashing of the decision of the State Government to keep the vacancies in question reserved for three years in terms of Sub-section 6(a) of Section 4 of the Bihar Reservation of Vacancies in Posts and Services (For Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1992 (Act 3 of 1992)(in short "Reservation Act"). The said decision of the Government is contained in para 2 of letter No. 6749 dated 18.8.2000 of the Deputy Secretary, Personnel and Administrative Reforms Department. In the other case, i.e., C.W.J.C. No. 11341/2000, the petitioner seeks quashing of the decision of the Bihar Public Service Commission (in short "the Commission1) to keep the unfilled posts in the Scheduled Tribes category vacant on account of non-availability of eligible candidates. In both the cases, the petitioner seek consequential direction to fill the vacancies as per the procedure laid down in Rule 20 of the Bihar Civil Service (Judicial Branch) Recruitment Rules, 1955 (in short "the Recruitment Rules"), and to consider them for appointment against those vacancies.

2. There is no dispute about the factual aspects of the case. The salient facts may be noted from C.W.J.C. No. 8655/2000 as under. In 1990, advertisement

was issued by the Commission inviting applications for the 24th Judicial Service Examination for appointment in the Bihar Judicial Service. The petitioners, who are practising advocates in this Court, submitted applications. The written examination was held in April 1991. The result thereof was published on 18.4.94. In the meantime, the Ordinance was promulgated in 1991 providing for reservation in posts and services for other backward classes, besides scheduled castes and scheduled tribes, which was later replaced by the Reservation Act in 1992. The applicability of the said Ordinance/Act in vis-a-vis the subordinate judicial service was challenged in this Court in C.W.J.C. No. 7619/91. The writ petition was allowed on 6.8.93. It was held that the Reservation Ordinance/Act does not apply to recruitment in the Judicial Service and the same was ultra vires Article 234 of the Constitution/The State of Bihar preferred SLP (Civil) No. 16476/93 in the Supreme Court. During pendency of the SLP, as mentioned above, result of the written examination was published on 18.4.94. Thereafter, interview of the successful candidates was held and the final result was published on 14.5.94. However, no appointment was made pursuant to the interim order passed by the Supreme Court a day earlier on 13.5.94. The said interim order was later modified on 16.11.95. The Court clarified that if selection process is over, the selectees may be appointed subject to the result of the SLP and further subject to the seniority that may be required to be adjusted if reservation is upheld and the candidates in the reserved slots are selected any time hereinafter and become entitled for appointment. The SLP, however, was eventually dismissed on 14.3.2000 along with Civil Appeal No. 9072 of 1996 preferred by the State against another decision of this Court relating to appointment in the Bihar Superior Judicial Service. The Supreme Court held that Section 4 of the Reservation Act does not apply to recruitment in the Bihar Subordinate Judicial Service or Bihar Superior Judicial Service, which are governed by the statutory rules framed under Article 234 of the Constitution namely Bihar Civil Services (Judicial Branch)(Recruitment) Rules, 1955 and Bihar Superior Judicial Service Rules, 1951, respectively. The said judgment entitled State of Bihar and Another Vs. Bal Mukund Sah and Others, . In the light of the said decision of the Supreme Court, the Deputy Secretary, Personnel and Administrative Reforms Department, Government of Bihar, wrote the impugned letter No. 6749 dated 18.8.2000 to the Commission conveying its decision regarding filling up the vacancies in the reserved categories. In these cases, we are concerned with the vacancies meant for the scheduled tribes category alone and the direction of the Government in that regard. As indicated at the outset, the State Government directed the Commission to reserve 23 posts in the scheduled tribes category for three years on account of non-availability of suitable candidates, under Sub-section 6(a) of Section 4 of the Reservation Act. It may be mentioned here that 24 vacancies were earmarked for the scheduled tribes candidates against which only one candidate was recommended by the Commission as no other candidate was found suitable.

3. The Commission has filed counter-affidavit stating that the function of the

Commission is limited to holding examination and recommending the names of successful candidates in different categories, it has no say in matters relating to number of vacancies, categories under which recommendations are to be made, nor it has any say in the matter relating to de-reservation of any reserved vacancy. The State Government has also filed counter-affidavit, sworn by the author of the impugned letter, namely, Shri Kunj Bihari Das, Deputy Secretary, Personnel and Administrative Reforms Department, stating that pursuant to the decision of the Supreme Court, by the impugned letter dated 18.8.2000, the Commission has been asked to recommend candidates of general category against the vacancies meant for the candidates of OBC category and the recommendations of the Commission with respect to OBC candidates sent earlier have been returned to it. As already indicated above, in this case we are not concerned with the reservation/ de-reservation of vacancies meant for the OBC candidates. The only thing which may be said to be relevant for the purpose of this case has been stated in para 7 of the affidavit to the effect:

Rule 20 of 1995 Rules is not clear regarding preparation of supplementary list by the B.P.S.C. It does not provide whether the supplementary list may contain the names of general category candidates also or not.

4. Although I do not propose to state the facts of C.W.J.C. No. 11341/ 2000, as C.W.J.C. No. 8655/2000 has been treated as the representative case; also because there is not dispute regarding the facts, I consider it proper to mention that in the counter-affidavit filed by the Commission in that case a plea has been taken that:

In view of the proviso to Rule 17 as quoted above, the Commission was under the bona fide impression that prior to complying with Rule 20, it would be proper for it to seek approval of the Government to exercise their discretion to call for the candidates belonging to the scheduled caste and scheduled tribes category.... In case, the State Government refuses to accord its approval to the said intention of the Commission in terms of Rule 17 the question of complying with Rule 20 will come into play only thereafter.

In this case also, the State Government has filed counter-affidavit sworn by the Under-Secretary of Personnel and Administrative Reforms Department but nothing significant has been stated therein.

5. At this stage before examining the correctness or otherwise of the stand of the State Government and/or the Commission, it would be apposite to quote the relevant provisions of the Bihar Civil Service (Judicial Branch)(Recruitment) Rules, 1955:

17. On the basis of the marks obtained at the written examination, the Commission shall arrange for viva voce test of the candidates who have qualified at the written examination according to Rule 15:

Provided that in exceptional circumstances and with the prior approval of

Government, the Commission may, at their discretion, admit candidates of the Scheduled Castes and the Scheduled Tribes to the viva voce test even though they may not have obtained the minimum qualifying marks at the written test.

19. The marks obtained at the viva voce test shall be added to the marks obtained at the written examination. The names of candidates will then be arranged by the Commission in order of merit. If two or more candidates obtained equal marks in the aggregate, the order shall be determined in accordance with the marks secured at the written examination. Should the marks secured at the written examination of the candidates concerned be also equal then the order shall be decided in accordance with the total number of marks obtained in the optional papers. From the list of candidates so arranged, the Commission shall nominate such number of candidates as may be fixed by the Governor in order of their position in the list. The nominations so made shall be submitted to the Governor by such date in each year as the Governor may fix.

20. The Commission shall, while submitting their recommendations under Rule 19, consider the claims of qualified candidate belonging to the Scheduled Castes and the Scheduled Tribes. If the list of nominees submitted under Rule 19 does not contain an adequate number of candidates belonging to the Scheduled Castes and the Scheduled Tribes who may be appointed to the vacancies reserved for them, the Commission shall submit a supplementary list nominating a sufficient number of such candidates as in their opinion attain the required standard of qualifications and are in all respects suitable for appointment to the Service.

6. The question as to how the unfilled vacancies meant for scheduled tribes candidates (or, for that matter, scheduled castes candidates also) are to be filled up, having regard to the provisions of Rule 20 of the Recruitment Rules, is not res integra. The decision of the apex Court in *Surendra Narain Singh and Others Vs. State of Bihar and Others*, fully answers the question. The dispute in that case had arisen on account of appointment of general category candidates against the vacancies which were earmarked for the reserved category candidates after converting the unfilled vacancies in the reserved categories into general vacancies. An argument was made that the supplementary list required to be prepared under Rule 20 of the Recruitment Rules refers to only SC/ST candidates. Rejecting the argument the Court observed (at Page 1847 of the Report):

Upon careful consideration of the rival contentions on interpretation of Rule 20, we are of the considered view that the expression "such candidates" in Rule 20 cannot be given in restricted meaning to include only SC/ST candidates in the supplementary list. The merit list prepared by the BPSC nominating 33 candidates therefrom unmistakably indicated that the BPSC prepared the merit list of 241 candidates who were qualified under Rule 19 of Home only 15 candidates of SC/ST could be nominated. No other qualified candidate of SC/ST was available in the said merit list. There is no provision under the Rules which enables the BPSC to recall or hold fresh written examination and viva-voce test

and any exercise in that behalf would be contrary to 1955 Rules. Despite the proviso to Rule 17, no SC/ST candidate would qualify by securing the minimum marks of 30% prescribed by the BPSC in consultation with the High Court. In the facts and circumstances of the case, the expression "such candidates" in Rule 20 would be referable to the candidates who figure in the merit list prepared by the BPSC and out of this merit list a supplementary list of candidates under Rule 20 was required to be prepared who in the opinion of the BPSC have attained the required standard of qualifications and are in all respects suitable for the appointment of service. This may even include SC/ST candidates. Any other construction would result into keeping the 33 posts reserved for SC/ST vacant and consequently there would have been shortage of munsifs to man the Judiciary. It is not the contention of the appellants that SC/ST candidates were available in the merit list who fulfil the qualifying marks yet they were not nominated in a supplementary list. It must be remembered that Judiciary being a vital organ to administer the law, any future relaxation may cause a damage to the institutional structure. For these reasons, in our considered opinion, the expression "such candidates" appearing in Rule 20 cannot be given restricted meaning. The supplementary list has to contain the names of the candidates from the merit list. Once the merit list, is prepared, the same cannot be modified and the same has to remain in force until the supplementary list is prepared to fill in the advertised post but without any compromise as regards merit. While submitting the supplementary list the BPSC shall nominate sufficient number of such candidates, i.e., candidates from the merit list who, in its opinion, have attained the required standard of qualifications and are in all respects suitable for appointment to the service. In this view of the matter, we must hold that 33 candidates nominated by the BPSC in a supplementary list drawing from the merit list could not be assailed on any ground.

7. In view of the clear enunciation of the scope of Rule 20, there is no scope for any doubt, as averred by the State in its affidavit in C.W.J.C. No. 8655/2000, that if the list of recommendees submitted under Rule 19 does not contain adequate number of candidates in the SC/ST categories who may be appointed against the vacancies reserved for them, the Commission has no option but to submit a supplementary list from the merit list prepared without treating them to be reserved. Thus, the vacancies cannot be kept pending or carried forward for the next year/years. The "carry forward" aspect of the matter was also considered by the Apex Court in the aforementioned case. Repelling the contention to that effect, the Court observed as under (at Page 1847:

It was then urged that the BPSC and the State Government have no power to convert 33 vacancies of SC/ST into General Category. These vacation posts according to the learned Counsel for the appellants ought to have been carried forwarded. This submission does not appeal to us for the reason that there is no provision under 1955 Rules to carry forward the vacancies/ posts reserved for SC/ST. In the absence of any such provision under 1955 Rules, it was not permissible for the BPSC or the State Government to adopt such course.

8. In view of above clear exposition of law the impugned direction of the State Government contained in its letter dated 18.8.2000 directing the Commission to carry forward 23 unfilled vacancies in the scheduled tribes category for next three years cannot be said to be in accordance with law. The direction to that effect has been issued in terms of Section 4(6)(a) of the Reservation Act but in view of the decision of the Supreme Court in *State of Bihar and Another Vs. Bal Mukund Sah and Others*, , it is now settled that the Reservation Act does not apply to recruitment to the Bihar Subordinate/Superior Judicial Service which is governed by the respective recruitment Rules framed under Article 234 of the Constitution. For the same very reasons the decision of the Commission to keep the unfilled posts in the scheduled tribes category, which were subject-matter of the 25th Examination, vacant vide Clause 4 of the Note appended to the result of the successful candidates published on 6.8.2000, cannot be said to be in accordance with law. From bare perusal of the above clause of the Note, it is manifest that unfilled posts (described as "seats") in the scheduled tribes category have been kept vacant "for non-availability of eligible candidates in ST(03) category", but as already indicated above, if eligible/suitable candidates in the scheduled tribes category are not available, as per Rule 20 of the Recruitment Rules, the Commission is required to submit a supplementary list of candidates from the merit list already prepared under Rule 19. Thus, the vacancies which remained unfilled on account of non-availability of eligible/suitable candidates conforming to the required standard can neither be kept "vacant" as decided by the Commission with respect to the vacancies of 25th examination nor can be "carried forward" as directed by the State Government with respect to the vacancies of 24th examination. The decision of both the State Government and the Commission to this effect must be set aside.

9. Before I conclude, I must deal with the contention of Shri Ashok Kumar Choudary, counsel for the Commission, based on Rule 17 of the Recruitment Rules. As indicated above, in its counter-affidavit filed in C.W.J.C. No. 11341/2000, the Commission has taken the plea that Rule 17 enables the Commission to relax the minimum qualifying marks in the case of SC/ST candidates with the prior approval of the Government, under proviso to Rule 17. Rule 20 comes into play thereafter. The plea is based on wrong interpretation of Rule 17 and must be summarily rejected. Proviso to Rule 17, no doubt, enables the Commission to admit candidates of SC/ST categories even though they have not obtained the minimum qualifying marks at the written test, that is to say, relax the minimum qualifying marks with the prior approval of the Government, but it is apparent from bare perusal of the Rule that such relaxation is for the purpose of viva voce test alone. It may be mentioned here that under Rule 15(b) the minimum qualifying marks for the candidates belonging to SC/ST category has been fixed at "not higher than 35%" unless the number of such candidates qualifying at the written test according to standards applied for other candidates is considerably in excess of the number of candidates required to fill all the vacancies reserved for the SC/ST. Thus, while under Rule 15(b) if the number of

SC/ST candidates qualifying at the written test is considerably in excess of the number of candidates required to fill the vacancies in those categories, the minimum qualifying marks can be raised. If number of candidates obtaining the minimum qualifying marks is less, under proviso to Rule 17 the minimum qualifying marks can be reduced/relaxed with prior approval of the Government. The relevant stage for such reduction/relaxation of the qualifying marks is at the stage of viva voce test. This is evident from the words "the Commission shall arrange for viva voce test"..."the Commission may at their discretion admit candidates of the Scheduled Castes and the Scheduled Tribes to the viva voce test" in Rule 17. Where the viva voce test has been held and the final results have been published, that is to say, the merit list has been prepared, there is no question of invoking the provisions of Rule 17. In the view of the matter, reference to Rule 17 as being the basis or justification for keeping the posts vacant before submitting the supplementary list under Rule 20, is totally misplaced and the plea totally frivolous.

10. I may also mention in this connection that though in the counter-affidavit filed in C.W.J.C. 8655/2000, as indicated above/the Commission has taken its stand that it is bound by the decision of the State Government in the matters of number of vacancies, etc., it is clear that the decision to keep the unfilled posts meant for scheduled tribes candidates vacant with respect to the 25th Examination was its own. Not only because of the plea taken in the counter-affidavit in that case but also because the decision to keep the posts vacant was taken prior to 6.8.2000 when the final result was published containing such stipulation. The direction of the State Government regarding "carry forward" of the vacancies came later on 18.8.2000.

11. In the result, both the writ petitions are allowed. The impugned direction of the State Government contained in para 2 of the letter dated 18.8.2000 regarding "carry-forward" of the 23 vacancies in scheduled tribes category as well as the decision of the Commission to keep the posts in the scheduled tribes category vacant with respect to 24th and 25th Judicial Service Examinations respectively are quashed. The Commission is directed to proceed in accordance with the provisions of Rule 20 of the Recruitment Rules, i.e., prepare a supplementary list of the successful and suitable candidates from the merit list prepared under Rule 19 and recommend them to the Government for appointment against such vacancies. This should be done within six weeks of the receipt/production of a copy of this order. There will be no order as to costs.