

(2011) 03 JH CK 0155

In the Jharkhand High Court

Case No : Writ Petition (S) No. 2872 of 2009

Pravas Kumar Singh and Others

APPELLANT

Vs

The State of Jharkhand and Others

RESPONDENT

Date of Decision : 07-03-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 16(1)
Jharkhand Superior Judicial Service (Recruitment, Appointment and Conditions of Service) Rules, 2001 — Rule 25

Citation : (2011) 2 JCR 483

Hon'ble Judges : Bhagwati Prasad, C.J;D.N. Patel, J

Bench : Division Bench

Judgement

1. Heard learned Counsel for the parties.

The learned Counsel for the petitioners in this petition has challenged the appointment of Fast Track Judges in the State of Jharkhand. Learned Counsel for the petitioners has submitted that an advertisement was issued by the High Court of Jharkhand on 23rd May, 2001 whereby the posts of Additional District Judges were advertised. This advertisement was pursuant to the Jharkhand Superior Judicial Service (Recruitment, Appointment and Conditions of Service) Rules, 2001 (hereinafter referred to as the Rules of 2001). According to the learned Counsel, the advertisement was meant exclusively for appointment in terms of the Rules of 2001 and no posts outside these Rules could have been made the subject matter of appointment.

The appointment of the Fast Track Judges (Respondents) as direct recruits to the Fast Track Court have been made from the selection which was pursuant to this advertisement. Since this advertisement was meant only for the regular Additional District Judges, the Fast Track Judges could not have been appointed pursuant to this advertisement.

Learned Counsel for the petitioners further argued that the advertisement was issued in the month of May, 2001 and for the first time the State of Jharkhand

sanctioned the posts of Additional District Judges for Fast Track Court in November, 2001. The argument of the learned Counsel for the petitioners is that in 2001 when there were no posts available, by no stretch of imagination it can be said that the appointment could be made on the posts of Fast Track Judges pursuant to this advertisement. In that view of the matter, learned Counsel urges that any appointment made from the list prepared from a selection made pursuant to the advertisement issued in the month of May, 2001 cannot be considered to be valid, because is this de hors the Rules. The appointment made on the posts which were not contemplated on the date of issue of this appointment could not be made. It could not even be considered to be a future vacancy as on the day of issuance of notice they were not in existence and also were not the vacancy under the Rules of 2001. Any appointment on the post of such vacancy is against the law as has been held by the Hon"ble Supreme Court in the case of Prem Singh and Others Vs. Haryana State Electricity Board and Others, .

According to the learned Counsel the posts which can be filled in by a particular advertisement are the posts already existing or contemplated and not the future vacancy. Learned Counsel further submitted that since the posts have come into being only in the month of November, 2001, they can not fall even the category of future vacancy as on the day of issuance of advertisement they were not as sanctioned posts rather they were never the sanctioned posts under the Rules of 2001. Therefore the appointments were invalid right from the beginning.

Learned Counsel for the petitioners submitted that the selection process for the advertised post i.e. Additional District Judge comes to an end no sooner the appointments were made for the advertised posts. Any appointment made from the left out list of candidates on an altogether another post viz. Fast Track Judges which are sanctioned subsequently, will not have the sanction of law and therefore invalid. Though the other grounds have also been urged in the writ petition, but, the arguments were not heard on those grounds because aforesaid ground itself appeared to be so important that the respondents were called up on to answer.

2. Learned Counsel for the respondents Mr. P.K.Prasad assisted by Miss Deolina Sen, submitted that the petitioners have no locus standi to challenge the appointment of the respondents. He further submitted that the necessary parties to the writ petition have not been joined therefore, the writ petition is bad on account of nonjoinder of parties.

Learned Counsel for the respondents further urged that since the Finance Commission had already sanctioned these posts, the process was going on and the Central Government has made recommendation and the State Government was actively considering the same, so these can be considered to be contemplated posts and in that view of the matter, the appointments are valid.

3. Learned Counsel Mr. Anil Kumar Sinha appearing for few of the respondents

submitted that the Rules of 2001, speaks of only appointment on the post of Additional District Judge and this should mean the temporary posts as well and since the respondents were appointed against the temporary posts of A.D.J., Fast Track Courts, they should be considered to be valid as the selection was made pursuant to the advertisement issued in May, 2001. He further emphasized that in Rule 25 of the Rules, 2001 the temporary appointment has been referred and at best it can be said that his clients are the temporary appointees and therefore they should be regularized in terms of Rule 25. The Rule is quoted hereinbelow for ready reference :

25. Notwithstanding anything to the contrary contained in these rules, an Additional District Judge appointed on temporary basis shall be eligible for permanent appointment to the service without there being any upper age limit subject to the conditions that :

- (i) he has completed two years of service from the date of his first appointment.
- (ii) he has passed such tests as may from time to time be prescribed in the Departmental Examination Rules, if any, and
- (iii) he is recommended by the High Court for such permanent appointment.

Learned Counsel further emphasized that those future vacancies should be treated as contemplated vacancies and since the process was going on for seeking appointment of the Fast Track Judges, therefore, it should be deemed that the posts were covered by the advertisement issued.

4. Mr. Ananda Sen, learned Counsel for the High Court was not in a position to submit anything lawful except his counter affidavit in paragraph 20 which reads as under :

20. That with regard to the statement made in paragraph 10, it is submitted that since there was a panel of successful candidate available by exhausting the similar examination process as enumerated in Para 9 above, if a candidate from that select list was chosen, there is no arbitrariness and/or illegality. 30 posts of FTC were notified in Jharkhand to start with in the year 2001, for a fixed period of five (5) years. Considering the said exigency and the time lag required to complete another selection process, the candidates selected in similar selection process, just recently were taken to fill up the immediately required number of officers of FTC, so that the very purpose, object and scheme of the F.T.C. may not be frustrated.

5. We have heard the learned Counsel and have given our thoughtful consideration. The appointment which was offered to the members of the Bar pursuant to the advertisement (Annexure4 dated 23.05.2001) meant for a particular selection i.e. for Additional District Judges. On that day whatever posts were existing or contemplated could have been made, the subject matter of the selection. As far as the post of Fast Track Judges are concerned, on that day there was no sanction from the State Government for these posts. Since there

was no sanction for these posts it cannot be said, by any stretch of imagination, that these posts were contemplated vacancies which can be covered by the advertisement in question because the process of sanctioning posts is a lengthy process and one cannot estimate the time to be consumed by the Government for final sanction of these posts. Therefore on the day which the High Court issued the 23rd May, 2001 advertisement, said posts could not have been considered to be in contemplation by the High Court. Rather, it can be said that as and when this advertisement was issued, the authority issuing the advertisement was not even in the knowledge of the fact that there would ever be any such posts available to them for being considered for appointment. In that view of the matter, any appointment made pursuant to the advertisement issued on 23rd May, 2001 cannot be considered to be a valid appointment. The advertisement pertains to some other kind of posts i.e. regular Additional District Judge and the Additional District Judges for the Fast Track Court are neither regular nor a kind of cadre which can be said to be the creation of the statute i.e. Rules of 2001. This was an excadre post created for a temporary purpose and for a temporary period for an entire different objective which was not the dominant object of Rules of 2001. In that view of the matter, an appointment which was required to be made for an entirely different purpose could not have been considered as an appointment under these Rules.

6. No vacancy can be filled up from the existing unexhausted select list, which arose subsequent to issue of advertisement. Once the selection of candidates for the advertised post is over, rest of the list of candidates cannot be used as reservoir, or as infinite stock to fill up future vacancy. The facts of the present case is that the advertisement was given in the month of May, 2001 for the post of Additional District Judge. The posts for Fast Track Courts were sanctioned in November, 2001. The Additional District Judges were already selected after taking the written test as well as oral test. Qualifying marks for interview was reduced subsequent to the written test and ten Fast Track Court Judges were appointed after appointment of 17 regular Additional District Judges. Thus, from the unexhausted select list for the post of Additional District Judge, those who were remained unsuccessful from them, ten Fast Track Court Judges were appointed, without there being any advertisement. Not only this, but again out of unsuccessful candidates for the post of regular Additional District Judges, 15 more Fast Track Court Judges were appointed. Thus, advertisements were given for the post of Additional District Judges on 23.05.2001. The written test was conducted for the post of Additional District Judge, interviews were also taken for the post of Additional District Judge. Eighty nine posts for Fast Track Court Judges were created on 29.11.2001. Seventeen Additional District Judges were appointed from the successful candidates and from unsuccessful candidates for the post of Additional District Judges twice the appointments were made. Firstly, ten Fast Track Court Judges were appointed and again from the list of unsuccessful candidates for the post of Additional District Judges fifteen more Fast Track Court Judges were appointed. Thus, for the vacancies which were not

in existence the appointments have been made from the list of unsuccessful candidates for the post of Additional District Judges. Had there been a public advertisement for subsequently created vacancies as per Rules 14 and 16(1) of the Constitution of India prospective candidates would have preferred an application. Their right to get public employment is being violated. Here the advertisement was given for the post of "A" and after 6 appointment of the candidates, from the list of unsuccessful candidates, vacancies for the post of "B" have been filled up. This is gross violation of Articles 14 and 16(1) of the Constitution of India.

7. It has been held by the Hon"ble Supreme Court in the case of Rakhi Ray and Others Vs. The High Court of Delhi and Others, in paragraphs 11 and 12 as under:

11. In Mukul Saikia v. State of Assam this Court dealt with a similar issue and held that "if the requisition and advertisement was only for 27 posts, the State cannot appoint more than the number of posts advertised." The select list " got exhausted when all the 27 posts were filled." Thereafter, the candidates below the 27 appointed candidates have no right to claim appointment to any vacancy in regard to which selection was not held. The "currency of select list had expired as soon as the number of posts advertised are filled up, therefore, appointments beyond the number of posts advertised would amount to filling up future vacancies" and said course is impermissible in law.

12. In view of above, the law can be summarised to the effect that any appointment maid beyond the number of vacancies advertised is without jurisdiction, being violative of Articles 14 & 16(1) of the Constitution of India, thus, a nullity, inexecutable and unenforceable in law. In case the vacancies notified stand filled up, the process of selection comes to an end. Waiting list, etc. cannot be used as a reservoir, to fill up the vacancy which comes into existence after the issuance of notification/advertisement. The unexhausted select list/waiting list becomes meaningless and cannot be pressed in service any more.

(Emphasis supplied)

8. It has been held by the Hon"ble Supreme Court in the case of Surinder Singh and Others Vs. State of Punjab and Another, in Paragraphs 14 & 16 as under:

14. 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.

16. Exercise of such power has to be tested touchstone of reasonableness.... It is not as a matter of course that the authority can fill up more posts than advertised.

(Emphasis supplied)

9. It has been held by the Hon''ble Supreme Court in the case of Rakhi Ray and Others Vs. The High Court of Delhi and Others, in Paragraph 22 as under:

22. In view of the above, we do not find any force in the submissions that the High Court have filled vacancies over and above the vacancies advertised on 19.05.2007, as per the directions issued by this Court in Malik Mazhar Sultan case. More so, no explanation could be furnished by Shri Ranjit Kumar, learned Senior Counsel for the appellants as to why the appellants could not challenged the advertisement itself, if it was not in conformity with the directions issued by this Court in the said case."

(Emphasis supplied)

10. It has been held by the Hon''ble Supreme Court in the case of Prem Singh and Others Vs. Haryana State Electricity Board and Others, in Paragraphs 23 to 26 as under:

23. In State of Bihar v. Madan Mohan Singh this Court has in terms held that if the advertisement and the consequent selection process were meant only to fill up a certain number of vacancies then the merit list will hold good for the purpose of filling up those notified vacancies and no further. In that case 32 vacancies were advertised but a select list of 129 candidates were prepared. A question arose whether more candidates could be appointed on the basis of the said select list. This Court held that once the 32 vacancies were filled up the process of selection for those 32 vacancies got exhausted and came to an end. It was further held that 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.

24. One of the questions which fell for consideration in Madan Lal v. State of J and K was whether preparation of merit list of 20 candidates was bad as the vacancies for which the advertisement was issued by the Commission were only

11 and the requisition that was sent by the Government for selection was also for those 11 vacancies. This Court held that the said action of the Commission by itself was not bad but at the time of giving actual appointments the merit list had to be so operated that only 11 vacancies were filled up. The reason given by this Court was that as the requisition was for 11 vacancies the consequent advertisement and requirement could also be for 11 vacancies and no more. This Court further observed:

It is easy to visualise that if requisition is for 11 vacancies and that results in the initiation of recruitment process by way of advertisement, whether the advertisement mentions filling up of 11 vacancies or not, the prospective candidates can easily find out from the office of the Commission that the requisition for the proposed recruitment is for filling up 11 vacancies. In such a case a given candidate may not like to compete for diverse reasons but if requisition is for larger number of vacancies for which recruitment is initiated, he may like to compete. Consequently the actual appointments to the posts have to be confined to the posts for recruitment to which requisition is sent by the Government. In such an eventuality, candidates in excess of 11 who are lower in the merit list of candidates can only be treated as waitlisted candidates in order of merit to fill only the 11 vacancies for which recruitment has been made, in the event of any higher candidate not being available to fill the 11 vacancies, for any reason. Once the 11 vacancy are filled by candidates taken in order of merit from the select list that list will get exhausted, having served its purpose.

It may also be stated that while making the aforesaid observations this Court agreed with the contention that while sending a requisition for recruitment to posts the Government can keep in view not only actual vacancies then existing but also anticipated vacancies.

25. From the above discussion of the case law it becomes clear that the selection process by way of requisition and advertisement can be started for clear vacancies and also for anticipated vacancies but not for future vacancies. If the requisition and advertisement are for a certain number of posts only the State cannot make more appointments than the number of posts advertised, even though it might have prepared a select list of more candidates. The State can deviate from the advertisement and make appointments on posts falling vacant thereafter in exceptional circumstances only or in an emergent situation and that too by taking a policy decision in that behalf. Even when filling up of more posts than advertised is challenged the Court may not, while exercising its extraordinary jurisdiction, invalidate the excess appointments and may mould the relief in such a manner as to strike a just balance between the interest of the State and the interest of persons seeking public employment. What relief should be granted in such cases would depend upon the facts and circumstances of each case.

26. In the present case, as against the 62 advertised posts the Board made appointments on 138 posts. The selection process was started for 62 clear

vacancies and at that time anticipated vacancies were not taken into account. Therefore, strictly speaking, the Board was not justified in making more than 62 appointments pursuant to the advertisement published on 02.11.1991 and the selection process which followed thereafter. But as the Board could have taken into account not only the actual vacancies but also vacancies which were likely to arise because of recruitment etc. by the time the selection process was completed it would not be just and equitable to invalidate all the appointments made on posts in excess of 62. However, the appointments which were made against future vacancies in this case on posts which were newly created must be regarded as invalid. As stated earlier, after the selection process had started 13 posts had become vacant because of recruitment and 12 because of deaths. The vacancies which were likely to arise as a result of recruitment could have been reasonably anticipated by the Board. The Board through oversight had not taken them into consideration while a requisition was made for filling up 62 posts. Even with respect to the appointments made against vacancies which arose because of deaths, a lenient view can be taken and on consideration of expediency and equity they need not be quashed. Therefore, in view of the special facts and circumstances of this case we do not think it proper to invalidate the appointments made on those 25 additional posts. But the appointments made by the Board on posts beyond 87 are held invalid. Though the High Court was right in the view it has taken, we modify its order to the aforesaid extent. These appeals are allowed accordingly. No order as to costs.

(Emphasis supplied)

11. In view of the aforesaid decisions also the appointments of the respondents 5 to 26 is against the law and deserves to be quashed and set aside.

12. In that view of the matter, we do not think that the appointment of Respondent Nos. 5 to 26 was an appointment made in accordance with law. However, parting with this matter, we would say that these persons have been working since 2002 and their appointment is going to come to an end by the end of this month therefore, for expediency, we would permit the effect of this order to take place on 31st March, 2011. However, their appointments are declared invalid. The appointment notification is quashed subject to the above rider.

13. It would be pertinent to mention here that question of locus standi loses significance as the Respondents were not legally selected candidates. The question of nonjoinder of parties is also not relevant as the nonjoined parties have no stake to lose or gain by the order in question.

14. With these observations, the writ petition stands disposed of.