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(P. H. C. Sch. II-D-21)

25th Judicial

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From
Joint Registrar (J) of the High Court of Judicature at Patna

To
The Chairman, R.P.C., Patna
21/12

The Chairman, R.P.C., Patna

Dated Patna, the 10/12/2004

In continuation of the Court Memo No.

dated the

200 . I am directed to send herewith the paper noted

below and to request you to be so good as to acknowledge the receipt

of the same.

Particulars of paper sent.

Three copies of Judgments by sitting
dated - 7-12-04 attached
herewith
with the order no. 11827/00 attached
herewith

Yours faithfully

Joint-Registrar (J)

Mad Press, Patna-20 8000

1036/25
21/12/04

CWJC No. 11527 of 2000

In the matter of an application under Article 226
of the Constitution of India.

Bihar State Scheduled Caste/Scheduled Tribes
Advocate Union Petitioner

Versus

The State of Bihar & ors Respondents

For Petitioner: Mr Shyama Prasad Mukherji,
Sr. Advocate, with Mr Arun Kumar
No. 1, Advocate

For High Court: Mr R.K. Dutta SC IV
Mr Purnendu Singh, Mr Piyush Lall,
Mr Gopal Krishna, Advocates

For BPSC : Mr Mukteshwar Singh, Advocate

P R E S E N T

THE HON'BLE MR JUSTICE NAVIN SINHA

Navin Sinha, J. Heard Shri Shyama Prasad Mukherjee
learned Senior Counsel appearing for the
petitioner, Shri R.K. Dutta for the High Court and
Shri Mukteshwar Singh the learned Counsel for the
Bihar Public Service Commission.

2. The present writ application
preferred on behalf of an unregistered
association, is essentially the grievance of the
singular petitioner, Sadanand Paswan who was one
of the unsuccessful applicants in the Scheduled
Caste Category in the 25th Judicial Service
Examination.

3. The records of this case would
reflect that by an order dated 20.12.2000, the
present application was directed to be heard along
with CWJC No. 8655/2000. The latter writ
application however came to be disposed on
24.1.2001 sans the present application. The

issues falling for consideration and decision in the present writ application are almost similar to the contentions raised and already decided in the aforesaid CWJC No. 8655/2000.

4. The original prayer in the writ application was for a certiorari setting aside the entire results of the 25th Judicial Service Examination for reasons of alleged irregularities and illegalities in the selection process. It was urged that fixation of 200 marks for the viva voice process was excessive and contrary to law laid down by the Supreme Court in this regard. The requisite number of candidates were not called for interview in proportion to the vacancies and that there was lack of effective consultation with the High Court as mandated by Article 234 of the constitution of India. The consequential prayer was for a mandamus directing the respondents to fill the 13 vacant seats of the Scheduled Tribe category from the sufficiently available candidates of the scheduled Caste category in excess of the 21 seats allocated to the Scheduled caste category already filled up.

5. This Court in the circumstances specifically put the question to the Counsel for the petitioner that if the entire results be interfered with by this Court and in the likelihood of the same being set aside the question of considering his candidature as a Scheduled Caste candidate for appointment against vacancies in the Scheduled Tribe category as sought for in the writ application, simply did not

arise. Learned Counsel for the petitioner realising the inconsistent nature of the pleas destructive of each other gave up the challenge to the selection process and his prayer for setting aside the results of the entire examination. Learned Counsel confined his submissions to the grant of relief for appointment of successful Scheduled Caste candidates, like him, against vacant Scheduled Tribe category seats on the basis of exchangeability.

6. The respondent Commission on 19.3.1999 published an advertisement inviting applications from eligible candidates to appear at the 25th Bihar Judicial Service Competitive Examination 1999 for filling up 152 declared vacancies in the post of Munsif. The petitioner was also one of the applicants in the Scheduled Caste category. The qualifying marks for Scheduled Caste/Scheduled Tribe candidates in the written examination was fixed at 30%. Out of the total 152 vacancies, 116 belonged to the general category, 21 were reserved for Scheduled Caste and 15 were reserved for Scheduled Tribes. Based on the selection process 21 Scheduled Caste candidates were appointed. Only 2 Scheduled Tribe candidate could make the grade and therefore 12 seats of the Scheduled Tribe category remained vacant.

7. The only question falling for determination in the present case and on the basis of which submissions have been made is whether the respondents can be directed to consider for

appointment such Scheduled Caste candidates who secured qualifying marks of 30 % in the written test for appointment against un-filled Scheduled Tribe category seats on the principle of exchangeability and the interpretation of Rule 20 of the Bihar Judicial Services Recruitment Rules, 1955 sought to be put by the petitioner.

8. The petitioner completed successfully in the written test, having secured the written qualifying marks of 30%, failed to make the grade within the 21 seats of the Scheduled Caste Category at the viva voice stage.

9. Learned Counsel for the petitioner submitted that Rule 20 of the Bihar Judicial Service Recruitment Rules 1955 in essence contemplates interchangeability/exchangeability of seats of Scheduled Caste and Scheduled Tribe. In other words, in the event of successful candidates of either category not being available, the candidates of the other reserved category could be considered for appointment on unfilled reserved seats. It was submitted that the words "such candidates" as mentioned in Rule 20 requiring the Supplementary List to be prepared really meant the reserved candidates of the other category. The unfilled seats of one of the reserved category could not have been released to the general category unless the candidates from the other reserved category be not available. In the present case, since 13 Scheduled Tribe category seats remained unfilled and Scheduled Caste candidates such as the petitioner remained

available for appointment having competed in the written test, they were eligible to be considered for appointment again Scheduled Tribe vacancies before the same could be released to the general category. It was further submitted on behalf of the petitioner that Section 4(6)(a) of the Bihar Reservation of Vacancies in Posts and Services (For SC, ST and other BC) Act 1992 (hereinafter referred to as the Bihar Reservation of Vacancies Act) stipulated the carrying forward of unfilled reserved vacancies for three years whereafter it was to be filled up on the basis of the principle of exchangeability from the candidates of the other reserved category in the event of non-availability of candidates from the original reserved category. Therefore in any event, the unfilled vacancies could not have been released to be filled by the general category candidates. Reliance for this purpose was placed upon a judgement of the Supreme Court reported in 1997 (2) SCC 33 (Malkhan Singh Vrs Union of India & ors).

10. Countering these submissions learned Counsel appearing for the High Court and the BPSA submitted that the issue in controversy stands decided and settled by the judgements of the Apex Court as also by a Bench of this Court. Learned Counsel for the High Court submitted that Rule 20 of the Bihar Judicial Services Recruitment Rules 1955 did not contemplate any exchangeability of seats between the reserved category of Scheduled Caste and Scheduled Tribe. The submission on

behalf of the High Court was that the words "such candidates" in Rule 20 of the Bihar Judicial Services Recruitment Rules 1955 did not bear any restrictive meaning as was sought to be contended by the petitioner.

11. Strong reliance was placed on the pronouncement on the issue by the Supreme Court in the judgement of Surendra Narain Singh & ors Vrs State of Bihar, reported in AIR 1998 SC 1841, for the true meaning, scope and purport of the words 'such candidates' in the preparation of the Supplementary List in the context of Rule 20 of the Bihar Judicial Services Recruitment Rules 1955. The Supreme Court having held that in the event of non-availability of sufficient number of candidates against reserved vacancies, the Rule contemplated the creation of a Supplementary List of 'such candidates' meaning thereby general category candidates against what was originally a reserved vacancy. Learned Counsel further submitted that there was no provision in the Recruitment Rules for either exchange of seats of reserved category or for carry forward of vacancies. The latter aspect also being noticed in the judgement aforesaid of the Supreme Court. It was lastly submitted that reliance upon the Bihar Reservation of Vacancies Act 1992 was completely misconceived in view of the judgement of the Supreme Court reported in 2000 (4) SCC 640 (state of Bihar Vs Bal Mukund Sah & ors) holding that the aforesaid Act did not apply to appointments in Judicial Service vis a Vis the

Bihar Judicial Services Rules 1955 in view of Article 234 of the Constitution.

12. Learned Counsel for the Commission relied upon a single Bench judgement of this Court in CWJC Nos. 8655 along with 11341 of 2000 wherein a similar plea with regard to unfilled seats of the Scheduled Tribe category candidates was canvassed unsuccessfully. It was submitted that this Court held therein that the matter stood settled by the judgement of the Supreme Court in AIR 1998 SC 1841 (Supra) and that such unfilled reserved category seats would revert to the general category under Rule 20 of the Bihar Judicial Services Recruitment Rules 1955. There being no provision for carrying forward of vacancies or exchangeability, and the Bihar Reservation of Vacancies Act being not applicable.

13. To enable proper consideration of the issue in controversy it would be appropriate to set out Rules 19 and 20 of the Bihar Judicial Services Recruitment Rules 1955 for better appreciation.

"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 Government 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 candidates 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."

14. This Court on consideration of the rival submissions for the parties and the authoritative pronouncements of the Supreme Court on the issue in controversy, as also considered by a Bench of this Court, finds that the issue raised in the present writ application already stands conclusively settled. The occasion for this separate reiteration of the law may not have arisen if the present application had been heard along with CWJC No. 8655 of 2000 as directed by order dated 20.12.2000, noticed earlier.

15. In the judgement reported in AIR 1998 SC 1841), undoubtedly there were no successful reserved category candidates available. Nonetheless, the Supreme Court interpreting Rule 20 of the Bihar Judicial Services Recruitment Rules arrived at the conclusion that the term "such candidates" with reference to the supplementary list would mean only general category candidates. The judgement also clearly

held that there was no provision for carry over of vacancies and therefore the question of keeping the unfilled vacancies available simply did not arise. The relevant extract of the judgement at para 17 and 18 proceeded to hold as follows:

"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 the 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 whom only 15 candidates of SC/ST could be nominated. No other qualified candidates 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 candidates 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 lay, any further 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 posts but without any compromise as regard 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"

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 vacant posts according to the learned counsel for the appellants ought to have been carried forward. 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. It is true that the BPSC after submitting the original list of 152 candidates from General Category, 10 from SC and 5 from ST Categories corresponded with the State Government to convert these 33 vacancies/posts of SC/ST to General Category and in that process, Government ultimately took a decision converting these 33 vacancies/posts of SC/ST to General Category in 1976 and only thereafter the BPSC submitted that supplementary list of 33 candidates from the merit list to the [Date Government for appointment as Munsifs. In the absence of any provision under 1955 Rules to carry forward the SC/ST vacancies/posts and in view of mandate of Rule 20, the BPSC was obliged to nominate the candidates from the merit list to the vacant posts reserved for SC/ST. The nominations and appointments of respondent Nos. 3 to 34 (32) candidates was delayed till 1976 because a supplementary list was not prepared because of some misconception of law for which these respondents cannot be blamed....."

16. The next judgement relied upon by the respondents reported in 2000 (4) SCC 640 (State of Bihar & anr Vs Bal Mukund Sah & ors) with regard to the applicability of Bihar Reservation of Vacancies Act 1992 completely seals the argument of the Counsel for the petitioner on this issue. It has been clearly held therein in para 59 that in view of provisions of Article 234 of the Constitution of India the said Act would have no application to judicial appointments.

" It must, therefore be held that the impugned Section 4, as existing on the statute book, if allowed to operate as it is for controlling recruitment to the post of District Judges as well as to the posts in Judiciary subordinate to the District Courts, would directly conflict with the scheme of Article 233 and 234 and has to be held as ultra vires the said constitutional scheme."

17. A similar question fell for consideration by a Bench of this Court in CWJC No. 8655 and 11341 of 2000. In context of the 25th Judicial Services examination, the challenge was to the government decision to keep vacant the unfilled Scheduled Tribe vacancies (13 in number) on account of non-availability of eligible candidates in view of Section 4(6)(a) of the Bihar Reservation Act 1992.

18. This Court in para 2 of the judgement noticed the inapplicability of the provisions of the Bihar Reservation of Vacancies Act, 1992 to judicial appointments in view of law in this regard laid down on the issue by the Apex

Court in the judgement reported in 2000(4) SCC 640. The conclusion thus arrived at therein at para 8 was as under:

".....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."

19. Thus on a consideration of the previous judicial pronouncement on the issue the submission made on behalf of the parties and the discussions hereinbefore this Court rejects the submissions made on behalf of the petitioner and holds that the words "such candidates" referred to in context of the Supplementary List envisaged under Rule 20 of the Judicial Services rules does not envisage the limiting thereof to candidates of the other reserved category only. The supplementary list of "such candidates" would necessarily mean that the unfilled reserved category seats fall to the general category, there being no provision for carrying forward of unfilled reserved vacancies further confirms the issue.

20. The judgement reported in 1997(2) SCC 33 relied upon by the petitioners has no

relevance and applicability to the issue falling for determination presently. In the present case there being no statutory provision for carrying forward of unfilled reserved vacancies, the judgement as aforesaid came to be rendered in the background of the relevant rules and instructions which itself provided for carrying forward of vacancies and exchangeability of the reserved vacancies in the third year of the carry forward as apparent from para 6 and 8 of the judgement. It was in that background that the aforesaid judgement came to be delivered. In the present case as noticed earlier, there is no provision in the Bihar Judicial Services Recruitment Rules 1955 for carrying forward of vacancies far less providing for exchangeability of reserved category vacancies. On the contrary the specific judicial verdict being that for reason of non-availability of reserved category candidates, a supplementary list of successful candidates of the general category was required to be proposed and the vacancies filled up.

21. This Court accordingly finds no merit in the present writ application. The same is accordingly dismissed. There shall be no orders as to costs.

(NAVIN) *Navin Sinha*