

24/11/2000

(24)

(15)

32

CIVIL WRIT JURISDICTION CASE NO 8655 OF 2000
WITH
CIVIL WRIT JURISDICTION CASE NO 11341 OF 2000

in the matter of an application under Article 226
of the Constitution of India

SHARAYAN DAS BHARMA & ORS. Petitioners
(In C.W.C. 8655/2000)
RASHID RAIS Petitioners
(In C.W.C. 11341/2000)
Versus
THE STATE OF BIHAR & ORS. Respondents

For the Petitioners : - M/S. Liya Ram Shahi
Sanjiv Kumar
For the BPSC : - M/S. Anil Kumar Tiwary
Ashok Kumar Choudhary
For the State : - Mr. Maya Nand Jha, JC LG 200-2

P R E S E N T

THE HON'BLE MR JUSTICE SACHCHIDANAND JHA

As same point is involved in these two writ
petitions, they have been heard together and
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.C. No. 8655/2000 relate to 24th Judicial
Service Examination while C.W.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 ex dated
16.8.2000 of the Deputy Secretary, Personnel and
Administrative Reforms Department. In the other
case i.e. C.W.C. No. 11341/2000, the petitioner
seeks quashing of the decision of the Bihar Public
Service Commission (in short 'the Commission') to

150

80
31

keep the unfilled posts in the Scheduled Tribes category vacant on account of non-availability of eligible candidates. In both the cases the petitioners 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 CSJC No. 8655/2000 as under. In 1990 advertisement was issued by the Commission inviting applications for the 14th Judicial Service Examination for ~~xxxxxxx~~ 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 vis-a-vis the subordinate judicial service was challenged in this Court in CWC 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

149
BT
30

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 Bihar 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 judgement, entitled 'State of Bihar Vs. Bal Mukund Sah and others' is reported in (2000) 4 SCC 540. 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 of 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.

118

32
29

-141-

meant for the Scheduled tribes category alone and in 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.

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 Sihar Das, Deputy Secretary, Personnel and Administrative Services 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

28
C

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 1955 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."

Although I do not propose to state the facts of CWC No 11341/2000, as CWC No. 8655/2000 has been treated as the representative case; also because there is no 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 bonafide 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.

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

146

37
27

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 19, 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 ~~xxx~~ their position in the list. The nomination 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 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 ~~xxx~~ the required standard of qualification and are in all respects suitable for appointment ~~ix~~ to the service.

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 Vrs State of Bihar, AIR 1998 SC 1841 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 can not 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 referably 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 BPSV 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 judges to man the Judiciary. It is not the contention of the appellants that SC/ST candidates were available in the merit list who fulfill 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 or 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 BPC 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 BPC in a supplementary list drawing from the merit list could not be assailed on any ground".

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 case no. 655/2000, that if the list of recommendations 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 BPC 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

143

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 UPSC or the State Government to adopt such course."

6. 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 x 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 Vs. Bal Mukund Sah (2000) 4 SCC 640 (supra), it is now settled that the Reservation Act does not apply to ~~xxxx~~ 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 tribe 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 'vacant' 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, per rule 20 of the recruit rules, the Commission

11010
is required to submit a supplementary list of
candidates from the merit list already prepared
under rule 13. 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 Sri Ashok Kumar Choudhary, counsel
for the Commission, based on Rule 17 of the
recruitment rules. As indicated above, in the
counter affidavit filed in CWJC 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

-11-

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 19 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 tests..... 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 that view of the matter reference to Rule 17 as being the basis of justification for keeping the posts vacant before admitting the supplementary list under Rule 20, is totally misplaced and the plea totally frivolous.

10. I would also mention in this connection that though in the counter affidavit filed in OWC No. 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 steps 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 directions of the State Government regarding 'carry forward' of the vacancies came later on 10.8.2000. In the result, both the writ petitions are allowed. The impugned direction of the State Government contained in para 2 of the letter dated 10.8.2000 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 Examination 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.

sd/- S.N.Jha

Katna High Court
The 24th January 2001
Sukumar/- (NAFR)