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Letters Patent Appeal Nos.1283 & 1349 of 1999
with
Miscellaneous Judicial Case No.3864 of 2000

Against the order dated 16.9.99 passed in CWJC No.10942 of 1998.

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

Uendra Narayan Pandit & ors. .. Appellants
(in LPA 1283/99)

Rajesh Kumar Gupta & anr. .. Appellants
(in LPA 1349/99 & MJC 3864/2000)

Versus

The State of Bihar & ors. .. Respondents

For the Appellants : Dr.S.N.Jha and M/s Amit Prakash
and Soni Srivastava (in LPA No.
1283/99)
M/s Ganesh Pd.Singh, Manish Kumar
& S.K.Pandey (in LPA 1349/99 and
MJC 3864/2000)

For the State : Mr.Ashok Kumar Choudhary, GP8

For the Commission : Mr.Mukteshwar Singh

P R E S E N T

THE HON'BLE MR.JUSTICE SACHCHIDANAND JHA

THE HON'BLE MR.JUSTICE P.N.YADAV

S.N.Jha, J. These two letters patent appeals by the intervenors arise from the judgment and order of a learned Single Judge in CWJC No.10942/98 directing the Bihar Public Service Commission (in short, 'the Commission') to re-determine the merit list of the candidates on the basis of the qualifying marks prescribed under the statutory rules and not on the basis of the resolution dated 22.12.90. Certain interim orders were passed in the appeals, by one of which dated 2.3.2000 in LPA No.1328/99 (disposed of earlier as not pressed) the Court had observed that

the successful candidates may be appointed in accordance with law. The MJC has been filed for clarification of the term "successful candidates".

2. The dispute relates to appointment on the post of Drug Inspector. The facts of the case, briefly stated, are that on 19.10.97 an advertisement was published by the Commission inviting applications for appointment on 215 posts of Drug Inspector. On 14.8.98 by notification as contained in Annexure-7 to the connected writ petition, syllabus etc. were prescribed for the written test and viva voce test. It may be mentioned here that in terms of the recruitment rules titled "Bihar State Drug Inspectors Service (Recruitment and Conditions of Service) Rules, 1989 (in short 'the Rules'), recruitment on the post is to be made on the basis of competitive test comprising of written and viva voce tests. 384 candidates in all appeared at the written test out of whom 39 candidates were declared successful vide result published in the newspapers on 27.11.98. It is for quashing of the said result of the written test that the connected writ petition, CWJC No.10942/98, was filed by Pravin Kumar Thakur and others. According to the writ petitioners, the result of the so called successful candidates was prepared on the basis of the qualifying marks fixed under resolution dated 22.12.90, contrary to the statutory rules. Whereas under the rules, vide Rule 12, only such of the candidates securing 40% marks in General category and 35% marks in the Scheduled Caste/Scheduled Tribe category are to be called for the viva voce test.

under the said resolution dated 22.12.90 qualifying marks of 30.5% in the Backward Class category and 34% in the Backward Class (Annexure-1) category was fixed. It was on that basis that the candidates of the Backward Class category were declared successful at the written test and called for the viva voce test. According to the writ-petitioners the qualifying marks having been fixed by statutory rules framed under Article 309 of the Constitution, the State Government should not have fixed lower marks which amounted to reduction of the qualifying marks fixed under statutory rules by an executive order. The writ petitioner raised certain other contentions as well which were rejected by the learned Single Judge. The learned judge held, inter alia, that the petitioners having participated in the selection could not be allowed to assail the result of selection after being unsuccessful at the written test. The learned Single Judge also rejected the contention of the writ-petitioners that as no provision had been made in the recruitment rules or advertisement, benefit of reservation could not be extended to the candidates of Backward Class category. The learned Judge noticed the provisions of the Bihar Reservation of Vacancies in Posts and Service (For Scheduled Caste, Scheduled Tribe and Other Backward Classes) Act 1991 (in short 'the Reservation Act') and held that the State Government was competent to extend the benefit of reservation to the candidates of not only Scheduled Caste or Scheduled Tribes but also Backward Classes. The learned Judge in this connection also noticed the

provisions of Rule 15 of the Recruitment Rules in terms of which while recommending the names of the candidates the Commission is required to take into consideration the reservation rules applicable from time to time. Since, the learned Judge observed, by virtue of the provisions of the Reservation Act the benefit of the benefit of the reservation has already been extended to the Backward Classes, it would not be correct to contend that the government resolution dated 22.12.90 extending the benefit of reservation to them was in conflict with the statutory rules.

4. Having thus rejected the contentions of the writ petitioners and accepted those of the intervenors the learned Judge observed, "But a question may further arise whether in absence of any provision under the statutory rules to relax or reduce the qualifying marks of the candidate, it will be open to the statutory authorities to relax such criteria by virtue of the impugned resolution..... It is well known that an administrative order or instruction cannot amend or supersede the statutory rules by adding some thing therein..... True it is if the rule is silent on a particular subject, Government can fill up the gap by appropriate instructions. But in this case, as noticed, specific provision was already made in the rule prescribing qualifying marks. Therefore, the Government resolution dated 22.12.90 (Annexure C/1) to the extent it has relaxed and reduced the qualifying marks to the candidates of the scheduled caste and tribe and other backward classes has to be declared illegal and arbitrary since it is

in direct conflict with the provisions of the statutory rules".

Having made the above observations, while virtually dismissing the writ petition, the learned Single Judge directed the Commission to "re-determine the merit list of the candidates on the basis of the qualifying marks prescribed under the statutory rules before taking any steps for recommendation of the names", as already mentioned above.

4. It is against the aforesaid part of the judgment that the intervenors have come up in these appeals. It may be mentioned here that though as seen above, 39 candidates were initially declared successful at the written test and called for the viva voce test, pursuant to the above direction of the learned Single Judge, only 19 candidates found successful in terms of the rules i.e. having secured the qualifying marks prescribed in the rules, were recommended by the Commission.

5. We heard the submissions of the learned counsel on behalf of the intervenor-appellants, the State and the Commission. None appeared on behalf of the writ petitioners. Apparently, their challenge to the result of the written test having gone in vain, they have lost interest in the outcome of these appeals. The stand of the State and the Commission being the same as the intervenor-appellants, the hearing was a one-sided affair.

6. Learned counsel for the appellants submitted that in terms of Rule 15 of the Recruitment Rules the Commission is obliged to take into account

The reservation rules as applicable from time to time while making recommendations under Rule 14. And since Reservation Act provides for reservation in posts and vacancies for the Backward classes the Commission was under mandate to extend the benefits of the reservation to such candidates treating them as a separate class. Unfortunately, in rule 12 of the Rules no qualifying marks had been fixed for the candidates belonging to the Backward Classes. In the circumstances, the prescription as to the qualifying marks under resolution dated 22.12.90 cannot be said to be in derogation of the statutory rules. The learned Single Judge, therefore, was not right in holding that fixing of a different qualifying marks - lower than the marks fixed in the Rules - was illegal and arbitrary so far as the candidates of the Backward Class category are concerned. It was stated that no scheduled caste candidate had qualified in the written test and the only scheduled tribe candidate having secured more than the qualifying marks fixed under the Rules, it is only the candidates of the Backward Class category who are affected by the above order of the learned Single Judge.

7. After hearing the counsel for the appellants, the State and the Commission, I find that the contentions are well founded and must be accepted.

8. Section 4 of the Reservation Act provides that all appointments to service and posts in an establishment by direct recruitment shall be filled up from the reserved category to the extent of 50% in the ratio of 14% for the scheduled caste, 10% for the

scheduled tribes, 12% for the Extremely Backward Class, 8% for the Backward class, 3% for the Economically Backward Women and 3% for the Economically Backward. Section 12 prescribes that if any appointing authority makes an appointment in contravention of any of the provisions of this Act he shall be punishable with fine which may extend to Rs.1000/- or imprisonment for three months or both. Section 16 which confers over-riding effect on the Act may be quoted as under:-

"Notwithstanding anything contrary in any other law and Rules for the time being in force, any judgment or decree of court, any order, notification, circular, scheme, rule or resolution made or issued, the provisions of this Act shall have effect:

Provided that any other law or rule for the time being in force, any order, notification, circular, scheme, resolution made, issued or passed prior to this Act, so far as it is not inconsistent with this Act shall continue to be in force and shall be deemed to have been made, issued or passed under this Act."

It may be mentioned that the Reservation Act was preceded by an Ordinance, namely, Bihar Ordinance No.33/91. In terms of the repeal and saving clause contained in section 17 of the Act, notwithstanding the repeal of the Ordinance anything done or any action taken in exercise of any power conferred by it under the said Ordinance shall be deemed to have been done or taken in exercise of the powers conferred by or under the Act as if the Act were in force on the day on which such thing or act was done or taken.

9. It is to be kept in mind that when the Recruitment Rules were framed, under notification

dated 21.12.89 published in the Bihar Gazette on 8.8.90, the Reservation Act had not come into existence and, therefore, understandably, no provision was made fixing separate qualifying mark for the candidates of Backward classes which means that except the candidates in the scheduled caste and scheduled tribe categories all other candidates were treated at par with the candidates of the General category candidates for whom qualifying marks had been fixed at 40%. Though it depends on the wisdom of the executive, where the qualifying marks are fixed under executive instructions, to fix the qualifying marks with which the Court cannot interfere unless it is found to be contrary to some law or arbitrary and, therefore, theoretically the candidates of the Backward classes category could be treated at par with the candidates of the General category. But if that is done, it would amount to virtually depriving them of the benefit of reservation. It is clear that anybody and everybody securing the qualifying marks fixed for the General category candidates qualifies for the viva voce test on the basis of merit and not by virtue of reservation. It is well settled that it is open to the executive or the legislature, as the case may be, to fix different qualifying marks for candidates of different categories, and thus a lower qualifying marks can be fixed for candidates of the reserved categories including Backward class category. The object underlying reservation in vacancies for candidates of reserved category, in my opinion, cannot be fully achieved unless different qualifying marks

are fixed for them - as may be considered proper. By merely reserving certain percentage of vacancies and posts for them - otherwise treating them at par with the candidates of the General category in the matter of standards, may not be sufficient for achieving the object.

10. In the case of recruitment of Drug Inspectors, however, only two sets of qualifying marks were fixed - one for the General category at 40% and the other for the SC/ST category at 35%. It is in the above context that the effect and validity of the resolution dated 22.12.90 has to be considered. It may be mentioned that the said resolution dated 22.12.90 contains a policy decision in respect of all appointments on the basis of different competitive examinations conducted by the Bihar Public Service Commission and the then Bihar State Subordinate Services Selection Board, since abolished. By the resolution minimum qualifying marks have been fixed superseding the marks fixed earlier under resolution no.12892 dated 29.10.88. While for the General category the qualifying marks has been fixed at 40%, for the Backward classes, Backward class (Annexure-1) and SC/ST and Female categories, the qualifying marks has been fixed at 36.5%, 34% and 32% respectively.

11. So far as the recruitment rules is concerned, as noticed above more than once, Rule 15 of the Rules mandates the Commission to make recommendation in accordance with the reservation

rules applicable from time to time. Considering the importance of the provision, the rule may be quoted as under:-

The Commission while sending its recommendation under Rule 14 recommend for appointment candidates of the reserved categories (like, scheduled caste, scheduled tribe, extremely backward class etc.), in accordance with the reservation rules of the State Government applicable from time to time.
(Translation from Hindi by me)

At this stage, it may also be mentioned that while Rule 12 of the Rules provides for a competitive examination comprising written test and viva voce test, Rule 14 lays down that the marks secured at the viva voce test shall be added to the marks secured at the written test and then the names of the candidates shall be arranged in order of merit. From the list of the candidates so prepared, the Commission shall forward the name of such number of candidates for appointment as determined by the government.

12. From conjoint reading of the provisions of the Rules and the Reservation Act it is clear that the Commission is required to make category-wise recommendation for different categories of candidates including candidates of the Backward classes, which is evident from the words "like" (Jaise in Hindi) and "etc." (Aadi in Hindi) in rule 15 (supra) while specifying the reserved categories. If the Commission has thus to make separate recommendation for Backward classes category, a question would arise whether giving them a different treatment in the matter of being called for viva voce test on the basis of lower qualifying marks as fixed in the resolution dated

22.12.90 was illegal or arbitrary. In my opinion, the action of the Commission in declaring the intervenors as successful for the viva voce test was in accordance with the resolution dated 22.12.90. As observed above, the full benefit of reservation may not be available to candidates of the reserved categories unless a different standard is laid down for them. Treating them at par with the General candidates in the matter of qualifications and standard may not be ^{enough} sufficient.

13. The learned Single Judge has held that fixing lower qualifying marks for the Backward classes over-rides and supersedes the recruitment rules. But it is to be kept in mind that in the Rules no separate qualifying marks had been fixed for candidates of the Backward classes and, therefore, there is no question of reducing or relaxing the qualifying marks as observed by the learned Judge. As noticed by the learned Judge himself, in the well known case of Sant Ram Sharma v. State of Rajasthan, AIR 1967 Supreme Court 1910, while the government cannot amend or supersede the statutory rules by executive instructions if the rules are silent on a particular point, the government can fill up the gap and supplement the rules and issue instruction not inconsistent with the rules already framed. In my opinion, in context, the resolution dated 22.12.90 only filled up the gap in the Rules by making provision for candidates of the Backward classes. The provision was in accordance with the spirit of the reservation for the Backward classes and, indeed,

Article 16(4) of the Constitution. The order of learned Single Judge directing the Commission to re-determine the merit list of the candidates on the basis of qualifying marks prescribed in the Rules, that is, on the basis of 40% qualifying marks - in the case of candidates of the Backward classes like General candidates amounts to taking off the label which candidates of the Backward classes are entitled to wear. If they are treated at par with the General candidates and accordingly such of them who secured 40% marks at the written test alone are treated as successful for the viva voce test the result would be that they would be deprived of the benefit of reservation which they are otherwise entitled to because in that event they would be called for viva voce test, or get finally selected, on the basis of merit and not by virtue of any reservation. If they are to be treated as a separate class - as they have to be - at the time of sending of recommendation under Rule 15, the object would be frustrated by depriving them the benefit of qualifying marks fixed in the resolution dated 22.12.90 at the stage of viva voce test itself. In the above premises, I am of the view that the impugned direction of the learned Single Judge is not in accordance with law.

14. In *Haridas Parsedia v. Urmila Shakya*, (2000) 1 SCC 81, the Recruitment Rules prescribed 50% qualifying marks for appointment on the post of Transport Sub-Inspector in the State of Madhya Pradesh for the departmental candidates of general as well as reserved categories. There was no provision for any

relaxation in the case of SC/ST candidates. There was, however, a policy decision of the Government to grant relaxation of 10% in the qualifying marks to the SC/ST candidates. The Supreme Court held that the above policy was in conformity with Article 16(4) of the Constitution and 10% relaxation was rightly granted to the SC/ST candidates even though there was no specific provision in the Rules. The decision, in my opinion, supports the view which I have taken hereinabove.

15. As noticed above, even though 39 candidates initially qualified for the viva voce test against total 215 vacancies, by virtue of the direction of the learned Single Judge only 18 of them were declared successful and accordingly recommended for appointment. The names of such of the candidates (except one S.T. candidate) who secured less than 40% marks were left out. It is thus clarified that by virtue of the present judgment of this Court, having secured the qualifying marks as fixed in the resolution dated 22.12.90 the remaining candidates too would be ~~declared~~ treated as successful for the viva voce as test, ^{as} already was done. Subject to the result of the viva voce test and as per rule 14 of the Rules, they may be recommended to the government for appointment.

16. In view of the above discussions and conclusion reached, it is not necessary to discuss separately the prayer in the MJC which has simply been filed for clarification of the interim order, as stated above.

17. In the result, the impugned direction of the learned Single Judge to the Commission to re-determine the merit list on the basis of the qualifying marks prescribed under the statutory rules is set aside and the appeals are allowed to this extent. The MJC stands disposed of. There will be no order as to costs.

P.N. Yadav, J.

I agree.

sdl- sachchidamand Jha.

sdl- P.N. yadav, J

PATNA HIGH COURT

The 16th May, 2002.

N.A. AER

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Mangal Singh

For Joint Registrar MT 3-6-2002

Patna High Court

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Arjun Kumar Singh (typist)

03-06-2002

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