

Ashok Kumar and Others Vs. the State of Bihar and Others

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Court : Patna

Decided On : Mar-14-2014

Judge : Mihir Kumar Jha

Appeal No. : Civil Writ Jurisdiction Case No. 10337 of 2012

Appellant : Ashok Kumar and Others

Respondent : The State of Bihar and Others

Judgement :

In this writ application, the prayer of the petitioners reads as follows:-

œ1. That this application is directed against letter no. 257 (4) dated 17.03.09 issued by the Director in chief, Health Services, Government of Bihar, Patna where under and whereby vacancy for the post of Pharmacist arising out of advertisement no. 22/Pharma-01/99 has wrongly been calculated and roaster has wrongly been applied by the health department due to which several qualified candidates could not have been appointed despite availability of vacancy. Further for a direction to grant appointment letters to the petitioners as œPharmacist? who are also applicants of Adv. No. 22/Pharma-01/99 after re-formulating and recalculating vacancies existing against the advertisement by adopting and observing proper roaster points in the light of prevailing roaster circulars and rules issued by the State Government time to time.?

2. As noted above, the grievance of the petitioners in this writ application relates to the Advertisement No. 22/Pharma/-1/99 published in the daily newspaper on 25.1.2000. The petitioners claim that it was on account of the wrong calculation of vacancies of the post of Pharmacist and the roster that they stand deprived of being recommended pursuant to their appearance in the selection process conducted by the Bihar Staff Selection Commission (hereinafter to be referred to the Commission).

3. The facts giving rise to this writ application lie in a narrow compass. The petitioners claim that in the State of Bihar, regular appointment was not made on the post of Pharmacists ever since 1990. In fact, they in order to this fact have brought on record an order of this Court dated 21.7.1999 passed in CWJC No. 4302 of 1998 to show that the eligible Pharmacy Diploma holders having the requisite qualification for the post of Pharmacist had approached this Court seeking direction for filling up of the vacant post of Pharmacists after undergoing the selection. It is on record that this Court had also issued a direction on 21.7.1999 in CWJC No. 4302 of 1998 directing the State Government to take a decision for filling up the vacant post of Pharmacist and pursuant thereto, the Advertisement No. 22/Pharma/-1/99 was published in the newspaper on 25.1.2009 for filling up the 1059 posts both of General Category and Reserved Category. The advertisement, however, remained inconclusive, inasmuch as, no selection procedure was undertaken though the direction of this Court was to complete the appointment within a period of one year i.e. by July, 2000.

4. It appears that on account of the bifurcation of the erstwhile State of Bihar with effect from 15.11.2000, the number of vacancy on the post of Pharmacist had to be cut down but for no justifiable reasons any action was taken by the State Government of Bihar in the Health Department for next ten years on the one ground or other and ultimately, when this Court had issued another direction in CWJC No. 6722 of 2006 for filling up the post advertised on 25.1.2000 by holding interview and had accordingly quashed the decision taken by the Government and the Commission for holding of the written test that a revised recommendation was sent to the Commission on 17.3.2009 under the signature of Director-in-Chief of the Health Services wherein the vacancy of 1059 posts on the advertisement

dated 25.1.2000 was curtailed to 771 shown to be existing in the truncated State of Bihar.

5. The petitioners actually are aggrieved by this revised requisition of vacancy dated 17.3.2009 in this writ application. In order to appreciate the grievance of the petitioners, it would be useful to produce the number of vacancies as it was originally advertised on 25.1.2000 and was sought to be revised on 17.3.2009 and tabular form, which is as follows:-

	Sl. No.	Category	Advertisement dated			Revised vacancies in letter dated 17.3.2009
			25.1.2000	Existing	Backlog	
1	General	530	325	Nil	325	
2	Backward	106	65	Nil	65	
3	Backward Female)	21	13	8	21	
4	Most Backward	148	91	24	115	
5	Schedule Caste	106	65	44	109	
6	Schedule Tribe	148	91	45	136	
		1059	771			

6. It would be also necessary to complete the narration of rest of the events before coming to the issue raised in this writ application, inasmuch as, after such vacancy were revised, the Commission had conducted interview in between 24.10.2011 to 9.12.2011 and all the petitioners with others in all 1567 candidates had participated in the interview but, their names did not find place in the provisional list published by the Commission on 10.5.2012, whereafter, the present writ application has been filed on 14.6.2012.

7. Let it be noted that a series of other writ applications have been filed challenging the said provisional selection list published by the Commission on other grounds such as non-consideration of a number of candidates on account of their being declared over-aged as also on the ground of fatal infirmity in the selection process. Though all the writ applications were heard together along with this writ application which incidentally is the main case in which all the relevant affidavits have been filed by the respondents State of Bihar and the Commission but, for the sake of clarity, 22 writ applications in all having separate issue are being disposed of by a separate judgments and therefore this one is confined to only issue of the result declared by the Commission to be bad on account of violation of the roster in the revised vacancy as per the impugned requisition dated 17.3.2009.

8. Learned counsel for the petitioners has basically concentrated on the aspect that though the petitioners do not dispute to number of reduced vacancies from 1059 to 771, which was the fall out on account of the rest of the vacancies going to the State of Jharkhand but, then, the entire roster and reservation had to be worked out as per the existing policy which was in force on the date of issuance of the first advertisement i.e. 25.1.2000. In this regard, he has submitted that had the existing rules of reservation of the year 1999-2000, when the first advertisement was issued followed, the general candidates out of 771 being entitled for 50% of the vacancy were to get 386 posts whereas in the revised vacancies, they have been given only 325 posts. In this regard, they have also explained with the plea of backlog in 771 posts by giving 45 posts to Schedule Caste, 44 posts to Schedule Tribe, 24 posts to Most Backward Category and 8 posts to Female Backward Category, in all 121 posts has led to reduction of the post shown to be existing vacancies limiting it to be 650 and, thereby, giving only 325 posts to General Category. In this regard, a specific averment has been made in paragraph no.11 of the writ application that on the basis of the information required by the petitioners from the Health Department in file no. 221(legal)8-116/98, they had found that there was no backlog vacancy as regarding Advertisement No. 22/Pharma/-1/99 had been issued and published on 25.1.2000 in the newspaper and, therefore, the entire concept of backlog was a bogey.

9. In this case, initially a counter affidavit was filed on behalf of the respondent no.3 sworn by the Deputy Director of health Services wherein it was reiterated that the total number of vacancy after bifurcation of the State of Bihar was only 771 out of which there was backlog in different categories with respect to 121 vacancies and, therefore, the revised requisition sent by the State of Bihar was correct. In the said counter affidavit, it was also explained that if the number of backlog vacancy is left out, the existing vacancy shown in the revised recommendation either with regard to General Category of 325 of the vacancy in the Reserved Category as per percentage fixed in the government rules was justified. In this regard, it would be relevant to quote paragraph no.11 of the counter affidavit, which reads as follows:-

œ11. That it is submitted that the roster was prepared after calculation of vacancies with back log as prevailing established rules and circulars of the Govt. and settled as per the reservation rules in vogue in 1999 as mentioned below:-

Sl.	Category	Percentage	No. of vacant post	No. of post vacant (Back log)
1.	General Category	50	325	0
2.	Schedule Caste	14	91	45
3.	Extremely Backward Class	14	91	24
4.	Backward Class	10	65	0
5.	Schedule tribe	10	65	44
6.	Ladies for Backward Class	02	13	8

	Total		650	121
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It is submitted after deducting the back log number 121 out of 771 the formula was adopted as same as in 1999.?

10. The respondents in justification of the backlog 121 vacancy have also taken a categorical stand that for 771 posts which were left out in the truncated State of Bihar, a fresh reservation roaster had been prepared and 121 vacancies being backlog vacancies were deducted from the total of 771 vacancies and the rest of 650 posts were prepared and sent to the Commission. It would thus be relevant to also quote paragraph no.16 of the counter affidavit, which reads as follows:-

œ16. That after deducting 121 vacancies as back as from 771 vacancies remaining 650 vacancies were allotted according to reservation rules which was in 1999. In the previous roaster at the time of advertisement the vacancies for the Schedule Tribe was counter 106 posts which is 10% of the total number of vacancies 1059 and same ratio has also been adopted now at this time. Therefore counting shown in para-12 does not sustain according to prevailing reservation rule before 202.?

11. In support of the aforesaid stand, the respondents have also relied on the circular of the Personnel and Administrative Reforms Department dated 11.3.1994, which is Annexure-D to the counter affidavit.

12. The petitioners in reply to the counter affidavit have not only questioned the existence of 121 backlog vacancies by ascertaining that there was no such backlog in the year 2000 when the original advertisement was published on 25.1.2000 and, therefore, the respondent authorities of the Health Department could not have allocated 121 posts as backlog in the revised recommendation dated 17.3.2009.

13. In view of the only issue arising out of the pleadings as with regard to existence of any backlog vacancy in the year 2000 which was not shown in the advertisement dated 25.1.2000, this Court had directed the authorities to file a supplementary counter affidavit and the Director-in-Chief of the Health Services on 5.8.2013 had filed supplementary affidavit, wherein, the details of 771 posts were

given but without any backlog vacancies. Such details being annexure-F and referable to paragraph no. 4 of the supplementary counter affidavit, being relevant for the purpose of this writ application, is extracted hereinbelow:-

œ4. That so far as number of vacancies and observance of roster is concerned it is submitted that the total number of advertised posts was initially 1059 (Undivided Bihar). The post of Pharmacist was of District cadre that time as such these posts were not to be divided in the ratio of 1/3 after bifurcation of the State of Bihar and the creation of the State of Jharkhand. Accordingly, information of vacancies was sought from all Districts of Bihar. On the basis of which a consolidated list was prepared.

A photo copy of the list of vacancies above said is annexed herewith and marked as Annexure-F to this supplementary counter affidavit.

œ(LANGUAGE)?

14. The petitioners in reply to the aforesaid stand taken by the respondents have brought on record the original computed statement from the File No. 22/Legal/2/98 which they had obtained under the Right to Information Act from the Health Department and have made a categorical statement that the total number of sanctioned post in the existing State of Bihar in the year 1999 was 1118 and the working strength was 344 and thus, the vacancy in the year 1999 was 774 so far it related to the post of Pharmacist in the district now falling within the truncated State of Bihar.

15. This Court, having regard to the dispute with regard to backlog vacancies, had directed the respondent State of Bihar to file their supplementary counter affidavit and had made it clear that even if the supplementary counter affidavit as with regard to showing backlog vacancies was not filed, the government file no. 20/legal/8-----/98 should be produced. Pursuant thereto, Mr. D.K. Sinha, learned AAG-II, appearing on behalf of the State, has produced the government file.

16. As noted above, the aforesaid government file, which was opened on 15.8.1998, does not contain any material to show that there were 121 backlog

vacancies till the posts were advertised on 25.1.2000. This would become more apparent from the roaster kept at page-46/C wherein the total number of sanctioned post as also the number of vacancies were worked out district-wise in relation to the entire old State of Bihar showing 1059 vacant post. Let it be noted that while doing so, no backlog vacancy was shown and in fact, the same could not have been shown for a simple reason because the total number of vacancies therein were only worked out after subtracting the number of working hands on the post of Pharmacist. This would become more clear by an example in the Patna district where 126 posts of Pharmacist were shown to have sanctioned and against which 81 were shown to be working on the date of preparation of roaster. On that day, out of 81 persons working on the post of Pharmacist, only 23 had belonged to the General Category whereas 40 were belonging to the category of MBC and of the remaining 18 posts, 16 were occupied by the candidates of Backward Category, 1 of the Scheduled Caste Category and 1 of the Scheduled Tribe Category. Thus, the entire roaster which was prepared with regard to 1059 posts was based on the government rules and circular regarding roaster by giving 50% to the General Category, 14% to Schedule Caste Category, 14% to Extremely Backward Caste, 10% to the Backward Caste, 10% to the Schedule Tribe and 2% for the Backward Female Category by computing the numbers of 530, 148, 148, 106, 106 and 21 respectively.

17. As noted above, neither in the counter affidavit nor in the government file, there is any trace of backlog vacancy much less of 121 post. This infact would become more clear on perusal of the chart at page 267 wherein again the number of vacancies after bifurcation of the State of Bihar was worked out only on the basis of sanctioned post and the working strength against them. The file, in question, which contains both notes and correspondence up to the month of 8.7.2009 i.e. even after issuance of the impugned order dated 17.2.2009, therefore, does not give any inkling of the backlog vacancies.

18. This Court has examined the matter from even another angle, inasmuch as, from the file, in question, as also the document brought by the petitioners on record in their supplementary affidavit, it becomes very clear that for computation of 771 posts as vacant posts of Pharmacist in the year 1999, when a calculation

was made, it was found that there were in all 1118 sanctioned posts and of them, 344 were working out of which 92 alone as against prescribed 172 being 50% of total 344 meant for general category were working. Thus, to say that there was no backlog for general category even when there were 80 short in the general category would be infact contrary to the materials on record. It is in this regard that this Court would find it necessary to reproduce the complete computation of the 771 posts found to be vacant of the lot of sanctioned 1118 posts deduced from the chart of vacancies kept at page 45/c and 46/c of the government file as also placed on record by the petitioners in supplementary affidavit with a clear averment made in paragraph no. 4 of the supplementary affidavit enclosing the copies of the aforesaid chart and its computation as contained in Annexure-6 series which reads as follows:-

œThat it is stated that petitioners are in possession of the vacancies existing on the date of advertisement in year 1999 extracted from file no. 22/legal/8-116/98 [which petitioners have obtained under right to information from the health department] which shows the district wise status of total sanctioned and working strength of pharmacists and existing roaster wise vacancies in each district of erstwhile state of Bihar according to which on calculation it appears that total sanctioned strength in the present state of Bihar comes to 1118 in year 1999 and the working strength comes to 344 whereas vacancies existing in the present state of Bihar comes to 774 in year 1999.

The vacancy position on the part of pharmacist of 774 thus at the time of advertisement issued on 25.1.2000 in the different offices in truncated State of Bihar (leaving those in the offices of the State of Jharkhand is as follows:-

œ(LANGUAGE)?

19. The aforesaid computation being based of the records in the government file produced before this Court and filed by the petitioners as Annexure-6 series to the supplementary affidavit has also not been controverted by the Respondents and is not at all in dispute and, therefore, the plea of backlog is not established from any government record much less from the counter affidavit filed by the Respondents. As a matter of fact, there was no backlog vacancy taken into account while

advertising the post of Pharmacist in the year 2000 and, therefore, when the vacancies got curtailed on account of the bifurcation of the State of Bihar, the remaining vacancies, as they were available prior to the bifurcation of the State of Bihar in each of the district, had to be worked out for giving the entire roster and reservation as per the Rules and Policy which was in force as on 25.1.2000, the date on which posts of Pharmacist was advertised.

20. The aforesaid view that this Court has taken also finds support from the judgment of the Apex Court in the case of State of U.P. and Ors. Vs. Sangam Nath Pandey and Ors. reported in 2011 AIR SCW 1132 wherein it has been held as follows:-

œ19. A harmonious construction of sections 2(d), 3(2) and 3(5) would lead to the conclusion, as stated by the Division Bench, that only those vacancies can be declared backlog vacancies, within the reserved category, which were subject-matter of advertisement but remained unfilled because of non-availability of suitable candidates, within the reserved category, after selection. It is only in respect of such vacancy that the procedure qua backlog vacancy can be adopted. Any vacancy, which has not been subjected to a complete process of selection, even though vacant, cannot be treated as backlog vacancy.?

21. Admittedly, in the present case, no recruitment was made after 1990 and whatever vacancies were available in the year 1999 were advertised in which the General Category had been given 50% of the total vacancies total 1059 vacancies i.e. 515. Thus, when those 1059 vacancies after being curtailed on account of the creation of the State of Jharkhand, were sought to be filled up, limiting it to 771, the roster of 50% for the General Category could not have changed for reducing the vacancies to 325 out of 650 in the name of there being 121 backlog vacancies. First of all, there is no backlog vacancy as has been held by this Court on analysis of materials on record. Secondly, it cannot be said that these 121 posts were earlier made subject matter along with other posts before issuance of any advertisement and had remained unfilled because of non-availability of suitable candidates within the reserved category after selection.

22. In that view of the matter, this Court will have no difficulty in holding that 121 vacancies in the impugned order showing to be backlog and thus reducing the total vacancy to 650 for its being computed for the General Category and/or reserved category is unsustainable both on fact and in law.

23. In the result, this application is allowed and the impugned order as contained in Annexure-4 dated 17.3.2009 as also the consequential notification issued by the Commission for filling up 771 posts on the basis of the aforesaid impugned requisition of the State Government is hereby quashed and the respondent State of Bihar and the Commission are hereby directed to fill up 771 posts as per the earlier existing roster which was prevailing as on 25.1.2000 i.e. 50% for General Category, 14% for Scheduled Caste Category, 10% for Scheduled Tribe Category, 14% for Most Backward Category, 10% for Backward Category and 2% for Backward Female Category which in turn would mean that the 386 candidates of General Category, 108 candidates of Scheduled Caste Category, 108 candidates of Most Backward Category, 77 candidates of Backward Category, 77 candidates of Scheduled Tribe Category and 15 candidates of Backward Category Female would be entitled to be recommended and appointed for the post of Pharmacist in terms of the advertisement dated 25.1.2000.

24. Since the Commission had already declared its result on 9.5.2012 by way of provisional selection list of 468 candidates based on the earlier requisition, the same is also quashed. The Commission is directed now to revise its result and the select list in terms of the direction given above with regard to category-wise post for filling up the total number of 771 posts of Pharmacist.

25. This exercise must be completed by the Commission as early as possible preferably within a period of one month of holding the last interview of the over-aged candidates for which a separate direction has been issued by this Court in the judgment delivered today in the batch of fifteen writ applications.

26. This writ application is accordingly allowed. There would be however no order as to costs.