

Mukesh Kumar Singh Vs. the State of Bihar and ors.

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Court : Patna

Decided On : Jan-30-2009

Judge : Navin Sinha, J.

Acts : Sale of Goods Act; [Constitution of India](#) - Article 14

Appeal No. : CWJC No. 11858 of 2008

Appellant : Mukesh Kumar Singh

Respondent : The State of Bihar and ors.

Advocate for Def. : P.K. Shahi, Adv. General, Lalit Kishore, Sr. Adv., Satyabir Bharti, Sanjay Pandey and Vikash Kumar Advs.

Advocate for Pet/Ap. : Rajendra Prasad Singh, Dinesh Singh Sr. Advs., Chakradhari Sharan Singh, Rajeev Kumar Singh, Aditya Narayan Singh-1, Sunil Kumar, Manish Kumar, Sanjeev Kumar, Mahesh Narayan Parbat, Sanjay Kumar Jha,

Disposition : Application allowed

Prior history : Navin Sinha, J. 1. Heard learned Counsel for the petitioners, 37 in all in the six writ applications and the learned Advocate General appearing on behalf of the Bihar Public Service Commission (hereinafter referred to as 'the BPSC'). 2. Advertisement No. 4 of 2007 was published on 6.11.2007 by the BPSC for conducting of a preliminary test (hereinafter referred to as 'PT') of combined

competitive examination for the 48 to 52nd batches in the year 2008. Those who succeeded in the preliminary test

Judgement :

Navin Sinha, J.

1. Heard learned Counsel for the petitioners, 37 in all in the six writ applications and the learned Advocate General appearing on behalf of the Bihar Public Service Commission (hereinafter referred to as 'the BPSC').

2. Advertisement No. 4 of 2007 was published on 6.11.2007 by the BPSC for conducting of a preliminary test (hereinafter referred to as 'PT') of combined competitive examination for the 48 to 52nd batches in the year 2008. Those who succeeded in the preliminary test held on 25.5.2008 and result published on 19.9.2008 were only to be invited for appearing at the main written examination. The answer sheets of the PT were in the OMR format (optical marker reader) to be read by a programmed computer software, in an objective type answer sheet.

3. The petitioners aggrieved by non publication of their names in the list of successful candidates have preferred this batch of writ applications on a common ground. They have therefore been heard together and are being disposed by this common order. The facts have primarily been taken from the pleadings of the parties in CWJC No. 11858 of 2008.

4. Learned Counsel for the petitioners submitted that the question paper was to consist of 150 questions only in chronological order. The same question was to be printed in English and Vernacular. The question papers given to the petitioners consisted of more than 150 questions i.e. 157/158. The questions were not in chronological order inasmuch as after question No. 46 in the English version in place of question No. 47 the chronological number again starts from 43 and continues till 112. Thereafter it again commences from 110. Likewise in the Vernacular format the last question at Page 11 is 41 and instead of continuing from 42 in chronological order it commences from serial 35. A chronological counting reveals questions in excess of 150. It was next submitted that question

No. 104 at Page 28 becomes question No. 103 at Page 29 in its Vernacular reproduction and that the English and the Vernacular questions were not the same but were different question in the same question paper. Likewise question No. 109 at Page 28 became 107 in the Vernacular reproduction at Page 29 with the questions again being different in English and Vernacular. Question No. 1 to 8 at Page 2 of the question paper has been repeated at serial 88 to 95 in its Vernacular reproduction at Page 25 of the question paper. The question at serial 36 in Vernacular at Page 13 of the question paper has been repeated at serial 128 at Page 35 of the question paper. The questions at serial 42 to 46 at page 12 of the question paper instead of commencing from serial 47 at page 14 commences from serial 43. There is no correspondence between the questions at serial 42 to 46 in English and those in the Vernacular on the corresponding page. The questions are entirely different in Vernacular apart from the fact that the serial number of the question in English and Vernacular also do not correspond. It is submitted that these are only illustrative of the nature of fundamental defects in the question paper and which defects similar and more in number have been described in Paragraph 9 to 13 of the second supplementary affidavit filed on behalf of the petitioner in CWJC No. 11858 of 2008 on 20.1.2009.

5. The instructions attached to the question paper itself acknowledges defects in the question paper and required the candidates to first check the question paper and if defects were to be found to ask for replacement. The petitioners did ask for replacement but it was denied. After the examination but before publication of results they did submit a representation, on 3.6.2008 annexed in CWJC No. 11858 of 2008 at Annexure 5 under receipt with no result. In CWJC No. 16462 of 2008 enclosing a copy of the final PT result, the attention of the Court was drawn to item 6 inviting applications/grievances on the results both from the successful and unsuccessful candidates. It was submitted that inviting objections from unsuccessful candidates was itself acknowledgement of awareness on part of the respondents with regard to errors in the holding of the PT test on basis of defective question papers.

6. Learned Advocate General appearing on behalf of the Commission strenuously urged that one lac seventy-six thousand nine hundred eighty-four candidates had

appeared at the PT test. A perceived grievance of defective question papers has been raised only by six petitioners. The number was miniscule and merited no consideration. These six candidates did not make any grievance of defective question papers and never asked for replacements. The instructions annexed to the question paper required them to do so and if they did not understand the instructions and ask for replacement they were not even fit to be considered for appointment in government service. They were raising grievances only after they have failed to compete in the PT test. The candidates were allowed to take the question papers out of the examination hall and therefore the possibility that they may have purposely mixed up the pages of the question paper and presented it in a twisted manner before this Court cannot be ruled out. None of these six petitioners have attempted beyond 150 questions. It was therefore purely a conjecture and surmise that some of the question papers bore more than 150 questions. The Commission was itself conscious of its responsibilities and on receipt of grievances had referred the same to an expert committee of five; persons who have given their report at Annexure 'D' to the counter affidavit on behalf of respondents 3 to 5 filed on 25.11.2008, that the objections sought to be raised by the candidates merited no consideration. Thereafter the matter becomes one of disputed facts. This Court should therefore not entertain a writ petition raising disputed facts in writ jurisdiction.

7. The examination was a public competitive examination for appointment in government service. The job scenario in this country is not very upward more particularly in the State of Bihar. A major part of the population is young and aspiring. A challenge to a public competitive examination therefore cannot be lightly rejected on the premise that they had appeared at the examination when it is questioned not simpliciter as a failed candidate. A candidate was required to answer 150 questions in 120 minutes which gave a candidate only 48 seconds per question. A candidate entering an examination hall, more particularly a public competitive examination for employment where lakhs of candidates appear, enters the examination hall with his own level of stress and anxiety. He is required to maintain a certain balance of calmness in answering the questions more particularly when they are of the objective type and that too in the OMR format. As soon as he receives the question paper his anxiety escalates and is reflected in

his performance leading to selection or rejection. When the respondents distributed the question paper a presumption attaches of it being in order. But it is a re-buttable presumption. A candidate will generally scan through the question paper in minutes in order to save time for answering and thinking when he is racing against time to complete the answer sheet. Some may immediately start answering the questions in their anxiety to complete the answers within time. To expect calmness from the candidate, at this stage, of a level, when he scrutinises the question paper for errors as distinct from glancing through them and then to throw the burden on him that he was negligent in not noticing the defects in the question paper is a proposition which this Court finds very difficult to accept. The principle of 'caveat preemptor', buyer beware, under the Sale of Goods Act cannot be applied to an examinee at a public examination. At best, what may be noticed by such an examinee is a torn question paper, mutilated or smudged question etc. This does absolve the respondents of their basic duty to provide correct question papers.

8. Once the respondents acknowledge the possibility of errors in the question papers the onus shifts to them for justifying the sanctity of the examination, more so when the errors are not minor in number or of a nature not to vitally affects the result of a candidate. The answer sheets were in the OMR format. This required the candidate to mark the correct answer with a blue black ink ball point pen which could not be erased or changed. The computer software is then programmed to identity the specified markings from a model answer sheet. If more than one answer is given by a candidate the software will reject it refusing to recognize even the correct answer leading to loss of marks. Likewise, if there are errors in the question paper with regard to the contents of the questions, the serial number of the questions, repetition of questions, difference in questions between the English and Vernacular version, the candidate may answer them as per his own understanding which shall then be at complete variance with the model answer sheet prepared on basis of what may be the correct but another question paper leading to the programmed software refusing to recognize the answers given by a candidate with a defective question paper.

9. The argument of the respondents that none of the six petitioners have answered more than 150 questions does not impress the Court. There are 37 petitioners in all. If the question paper given to them carried more than 150 questions, the fact that in totality they may have answered only 150 questions loses its significance. What if the last two or three questions are in between the serial 151 to 157. These are all issues which impair the sanctity and fairness of the examination and cannot be dismissed purely as conjecture and surmises when as a matter of fact the question paper brought on record has not been challenged or questioned by the respondents as a fabricated, restructured document. This is obviously not so in view of their own acknowledgement in the enquiry report at Annexure 'D' to the counter affidavit of the correctness of the allegation of defective question papers. To this Court it is an argument in desperation to urge that the petitioners have presented truncated/restructured question papers before the Court.

10. It has been noticed above that in CWJC No. 11858 of 2008 the candidate did submit a representation with regard to details of the illegality in the question paper on 3.6.2008 before the publication of the result on 19.9.2008. He filed the present writ application on 8.8.2008 before publication of the result on 19.9.2008 apprehensive of justice being denied to him. The enquiry committee report at Annexure 'D' at serial 20 dismisses these objections on the premise simpliciter that he gave his objection after the examination was over therefore while acknowledging receipt of the representation dated 3.6.2008 rejects consideration of the same irrespective of the merit only on the ground that allegedly he did not ask for replacement in the examination hall. This assumes great significance in view of his pleadings in paragraph 13 of the writ petition that he did demand a replacement in the examination hall which was denied to him, reiterated in the representation dated 3.6.2008 and not denied by the respondents in their counter affidavit.

11. To this Court the very fact that the respondents were required to set up a five men committee to examine allegation of defects in the question paper is a very serious issue by itself on the issue of the fairness and sanctity of the examination. To uphold their action on basis of any such enquiry shall be giving an advantage to them for what was essentially their own wrong. In : [1999]1SCR419 (M.K. Shah

Engineers and Contractors v. State of M.P.), the Supreme Court at paragraph 17 of the judgment allowing the Special Leave Petition against the respondent held that no one can be permitted to take advantage of one's own wrong. A defence cannot be permitted to be set up by a party at fault itself and that it shall be a travesty of justice if the appellants for the fault of the respondents are denied the right. The party at fault could not be permitted to set the bar of non performance of a pre-requisite obligation so as to exclude its own obligation.

12. The conduct of the respondents inviting objections from failed candidates after publication of results itself provides a cause of action to the writ petitioners and is evidence of the uncertainty of the respondents with regard to the correctness of their own action. No objections are entertained from those unsuccessful in an examination in the blanket manner sought to be done. The only option available to such a candidate is as provided for in the regulations. It is the respondents who have opened the Pandora's box voluntarily. Annexure 'D' to the counter affidavit reveals large scale irregularities.

13. The submission that from one lakh seventy-six thousand nine hundred eighty-four candidates only the present six petitioners were objecting and that they formed an irrelevant minority, is difficult to accept. Objections were filed by 94 candidates (Annexure 'D' to counter affidavit) including the 37 petitioners. That all of them may not have come to Court is irrelevant. This Court under the [Constitution of India](#), has a solemn duty to protect the right of the citizens against the arbitrariness of the State. It cannot be accepted that the arbitrariness though there affected a few only. That shall be the realm of a dictatorship State and not a democratic State. It is the solemn duty of the Court to step in and undo injustice whether the sufferer be an individual or a large majority. Every day individuals are wronged. The argument can have dangerous portends.

14. This Court has already noticed in detail from the submission of the petitioners of the large scale defects in the question paper, the consequences in the assessment of the mark sheet in the OMR format and defenseless argument of the respondents that notwithstanding the errors that they may have committed the petitioners were partners in the error and which gives legality to what is otherwise

illegality on part of the respondents. Elimination by supply of defective question papers cannot be a mode of selection.

15. The above discussion has qualified the errors pointed out in the question papers as illustrative and that the petitioners in CWJC No. 11858 of 2008 in his second supplementary affidavit (filed on 20.1.2009) from paragraph 9 to 13 has set out elaborately the defects in the question papers in the pattern as discussed above. The respondents have filed their second supplementary counter affidavit in response thereto on 27.1.2009. The basic fact of the illegalities urged in the aforesaid paragraphs has not been denied and the only defence is that it was for the petitioners to ask for a change of the question paper. To this Court there are no disputed facts or materials to hold that the grievances were based on surmises and conjectures. The facts speak eloquently.

16. This Court on basis of the aforesaid discussion has no hesitation in holding that the very sanctity, purity and fairness of the process of examination has been affected. Whether it is questioned by one or many is inconsequential. It cannot make the challenge any lighter or heavier but the challenge shall retain the same gravity. A large amount of time and money has been spent by the respondents from the tax payers expense. That is irrelevant where the individual has been wronged. It is for the respondents to find the answer to this wasteful expenditure and recovery of the same. Accountability shall have to be there. Article 14 of the [Constitution of India](#) provides that the State shall not deny to any person (emphasis mine) equality before the law or the equal protection of the laws. It does not say that this protection is available only when persons as a group seek relief. The individual is paramount.

17. In view of the aforesaid conclusion, this Court does not consider it necessary to deal with the other issues with regard to the incorrect answers of certain questions in the model answer sheet, the deletion of such wrong questions by the State from assessment and the contention of the petitioners that the excluded question include those with correct answers or there were more question with wrong answers than that suggested by the State.

18. In conclusion, this Court holds that the entire PT test conducted in pursuance of Advertisement No. 4 of 2007 is vitiated. It is accordingly set aside. The respondents are directed to hold a fresh preliminary test on modalities to be decided by them and proceed afresh from that stage in accordance with law expeditiously.

19. The writ applications are allowed.

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