

Durga Singh and ors. Vs. State of U.P. and ors.

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Court : Allahabad

Decided On : Jul-24-2002

Reported in : 2002(4)AWC2814; (2002)3UPLBEC2550

Judge : G.P. Mathur and ;N.K. Mehrotra, JJ.

Acts : [Constitution of India](#) - Articles 16 and 226

Appeal No. : C.M.W.P Nos. 25021, 35806 and 39553 of 1999

Appellant : Durga Singh and ors.

Respondent : State of U.P. and ors.

Advocate for Def. : Sudhir Agarwal, Adv. and ;Shiv Kumar, S.C.

Advocate for Pet/Ap. : Chandrama Prasad Srivastava, ;Anil Bhushan and ;V.K. Shukla, Advs.

Disposition : Petitions dismissed

Judgement :

G.P. Mathur, J.

1. The controversy raised in all the three writ petitions is identical and, therefore, they are being disposed of by a common order. Writ Petition No. 25021 of 1999 Durga Singh and Ors. v. State of U. P. and Ors., shall be treated as the leading

case.

2. The relief claimed in the writ petition is that a writ of mandamus be issued directing (a) the U. P. Public Service Commission to forward the entire list of candidates, who had appeared in U. P. Nyayik Sewa (Junior Division) Examination, 1997, and have secured minimum qualifying marks fixed by the Commission to the State Government (b) the State Government to consider the petitioners for making appointments against total number of vacancies which have fallen vacant in the years 1991 to 1997 being 198 (or 214, on the basis of cadre strength) ; (c) to calculate and fill up the vacancies which have been caused due to compulsory retirement, death or termination of service of officers and also 'creation of new posts of Civil Judge by the State Government during the relevant years ; and (d) not to fill up the vacancies which have fallen vacant during the years 1991-1997 by any subsequent advertisement.

3. The case of the petitioners, as set forth in the writ petition, in brief is that the vacancies on the post of Civil Judge (Junior Division) upto the recruitment year 1990 were filled up on the basis of examination held by the U. P. Public Service Commission (hereinafter referred to as the Commission) in the year 1991 and, thereafter, no competitive examination was held till 1996. The Commission issued an advertisement for holding an examination for making appointments in the U.P. Nyayik Sewa Civil Judge (Junior Division) in December, 1997 (for short, 1997 examination), in which all the vacancies for the earlier periods were advertised. In the said advertisement, it was mentioned that examination would be held for filling in 93 vacancies. The petitioners appeared in the examination and having qualified in the same were called for interview. The Commission after declaration of result forwarded a list of 93 candidates only to the State Government and in the said list the names of petitioners were not included. The case of the petitioners further is that the cadre strength of Civil Judge (Junior Division) was 717 and before the advertisement was issued, only 503 officers were working on the said post and thus there was shortage of 214 officers in the cadre. According to the petitioners, the High Court had not intimated the correct number of vacancies to the State Government and the requisition sent by the State Government to the Commission whereby it was required to select candidates only for 93 vacancies was also

wrong. The petitioners contend that the State Government should have sent requisition for all the available vacancies and the Commission should have sent the select list for the same, namely, all the available vacancies and its action in forwarding the list of 93 candidates only was illegal.

4. In the counter-affidavit filed on behalf of the High Court (Respondent No. 3), it is pleaded that the vacancies arising upto 31.12.1997 were calculated for making recruitment to U.P. Nyayik Sewa Civil Judge (Junior Division) and it was found that the number of available vacancies, which were likely to arise and had to be filled up, was 100. The proposal for making recruitment on 100 posts had been approved by the Hon'ble the Chief Justice on 24.9.1996. Accordingly, a letter was sent to the State Government on 4.10.1996 asking it to take appropriate steps for making recruitment on the aforesaid vacancies and several reminders were also sent in that regard. By the end of December 1997, the total number of clear vacancies excluding the leave reserve and deputation reserve were 93.

5. In the counter-affidavit filed on behalf of the State Government, it is averred that the High Court had made a request for making recruitment on 100 vacancies. A clarification was sought from the High Court from which it was revealed that only 93 clear vacancies were available upto December, 1997. These vacancies had occurred between the period 1991 to 1997. Since the number of clear vacancies available was only 93, therefore, the Commission was asked to hold the selection for the aforesaid number of vacancies which were clearly available and not for 100 vacancies.

6. In the counter-affidavit filed on behalf of the Commission, it is averred that as per the requisition received from the State Government, an advertisement was issued for making selection for 93 posts. After holding the written examination and interview, a merit list was prepared by the Commission and the names of successful candidates arranged in order of merit with regard to the number of vacancies mentioned in the requisition made by the Government was forwarded. It is also pleaded that the petitioners have no legal right to claim that the Commission should have forwarded the entire list of those candidates who had secured the minimum qualifying marks.

7. Sri V.K. Shukla, learned counsel for the petitioner, has submitted that the last advertisement for making recruitment on the post of Civil Judge (Junior Division) was issued by the Commission in the year 1993 and the examination was held in February, 1993. In the said advertisement, vacancies available upto the recruitment year 1990 were advertised. Thereafter, no examination was held in subsequent years and finally an advertisement was issued in December, 1997, in which it was mentioned that the examination will be held for making recruitment for 93 posts. This advertisement did not reflect the correct position as at the relevant time cadre strength of Civil Judge (Junior Division) was 717 and out of which only 503 officers were working and, thus, there was a shortage of 214 officers. According to the learned counsel, the advertisement should have been issued for filling in the entire shortfall of 214 vacancies in the cadre. It has also been urged that the Registrar of the High Court had sent a letter to the State Government on 4.10.1996 for making selection for 100 posts, yet the State Government sent a requisition to the Commission for making selection for 93 posts. The submission is that the State Government was legally bound to send a requisition to the Commission for the aforesaid 100 posts as informed by the High Court and the action of the Commission in not sending the select list of atleast 100 candidates and that of the State Government in not making appointment of the said number of persons is clearly illegal.

8. The affidavits filed by the parties show that the Hon'ble the Chief Justice had by his order dated 24.9.1996 approved the proposal for making recruitment for 100 posts of Civil Judge (Junior Division). Thereafter, the Registrar of the High Court has sent a letter to the State Government on 4.10.1996 requesting it to make recruitment on the aforesaid 100 posts, and a reminder was also sent on 1.5.1997. The total number of vacancies available upto the end of December, 1997, after excluding the leave reserve and deputation reserve, was 93. The State Government sought clarification and it was informed that the number of clearly available vacancies upto the end of December, 1997, was only 93. It was, in these circumstances, that the State Government sent a requisition to the Commission to make selection of 93 candidates.

9. The main question which requires consideration is whether an aspirant of a post has any legal right to contend that the number of vacancies advertised is not correct and that greater number of vacancies should have been advertised or that all the available vacancies in a cadre should be filled in by the State Government.

10. The question whether a writ of mandamus can be issued commanding the appointing authority to make appointment of a person who has been selected by the examining body and has secured a rank which is well within the total number of vacancies advertised, has been considered and examined in several decisions of the Apex Court. In *State of Haryana v. Subhash Chandra Marwaha and Ors.*, AIR 1973 SC 2216, an advertisement was issued for making recruitment on 15 vacancies in Haryana Civil Services (Judicial Branch). The State Government appointed only 7 candidates in order of their merit. The candidates who had secured 8, 9 and 13 rank, which were well within the total number of vacancies advertised, filed writ petition seeking a writ of mandamus to the Government to issue an appointment order in their favour. It was held that the competitive examination is for the purpose of showing that a particular candidate is eligible for consideration and the selection and appointment comes later. It is open to the Government to decide how many appointments shall be made and the mere fact that the candidate's name appears in the list does not entitle him to be appointed. In *Jatinder Kumar and Ors. v. State of Punjab and Ors.*, AIR 1984 SC 1850, it was held that it is open to the Government to decide how many appointments will be made. The process for selection and selection for the purpose of recruitment against anticipated vacancies, does not create a right to be appointed to the post which could be enforced by a mandamus. This question was again examined by a Constitution Bench in *Shankarsan Dash v. Union of India*, AIR 1991 SC 1612, where the law on the subject was stated as under, in Paragraph 7 of the reports :

'It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection, they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal

duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in *State of Haryana v. Subhash Chander Marwaha*, AIR 1973 SC 2216 ; *Miss Neelima Shangla v. State of Haryana*, AIR 1987 SC 169 and *Jitendra Kumar v. State of Punjab*, AIR 1984 SC 1850.'

11. In view of the above quoted pronouncements of the Supreme Court, there cannot be any doubt that if certain number of vacancies are notified, a successful candidate who has secured a rank which is well within the aforesaid number, does not acquire any indefeasible right to be appointed on the post. It is upto the State Government to make the appointment and while doing so, it cannot pick or choose but is bound to respect the comparative merit of the candidate.

12. It is not the case of the petitioners that they have secured ranks which are within first 93 and they have been denied an appointment. What the petitioners contend is that the State Government did not send requisition for the total number of vacancies which were notified by the High Court and all the available vacancies, according to cadre strength, had not been advertised. As mentioned earlier, the High Court had initially requested the State Government to make recruitment on 100 posts, but on clarification, it was informed that only 93 clear vacancies were available upto the end of December, 1997. In such circumstances, the State Government sent a requisition to the Commission for making recruitment on 93 vacancies only. The petitioners being mere aspirants for the posts have no legal right to contend that the appointing authority, namely, the State Government was bound to make recruitment on all the available vacancies and should have accordingly sent a requisition to the Commission for making selection on all such vacancies. The petitioners have, thus, absolutely no legal right to claim that the selection should have been held for all the available vacancies or that the State Government was bound to make recruitment and fill in all such vacancies. The

principle on which a writ of mandamus can be issued is well-settled. The petitioner applying for such a writ must show that he has a legal right to compel the performance of some statutory duty cast upon the respondents. The petitioners having failed to establish that they have any legal right to claim that greater number of vacancies should have been advertised or should have been filled in, no such writ as prayed can be issued at their instance.

13. For the reasons mentioned above, all the writ petitions lack merit and are hereby dismissed.

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