

State of Bihar and Another Vs. Madan Mohan Singh and Others

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Court : Supreme Court of India

Decided On : Oct-13-1993

Reported in : AIR1994SC765; 1994LabIC469; 1993(4)SCALE194;
1994Supp(3)SCC308; [1993]Supp3SCR242; 1994(1)SLJ153(SC);
1994(1)LC321(SC)

Judge : Kuldeep Singh,; K. Ramaswamy and; K. Jayachandra Reddy, JJ.

Acts : [Constitution of India](#) - Article 16 and 233

Appeal No. : Civil Appeal Nos. 4561-62 of 1992

Appellant : State of Bihar and Another

Respondent : Madan Mohan Singh and Others

Advocate for Def. : Jayanarayan, ; S.S. Javali, ; D.P. Gupta, ;

Advocate for Pet/Ap. : Shanti Bhushan,; B.B. Singh and; Pramod Swarup, Advs

Prior history : From the Judgment and Order dated 16.12.1991 in C.W.J.C. No. 945 of 1991 and 5806 of 1991

Judgement :

ORDER

K. Jayachandra Reddy, J.

1. The State of Bihar, questioning the judgment of the High Court in respect of selection of Additional District & Sessions Judges, had filed these appeals. The Government of Bihar issued an advertisement on 29.9.1989 which was published in the newspapers inviting applications for appointment to the posts of Additional District & Sessions Judges. Quite a number of applications were received and as envisaged in the notification, a written test was held on 9.9.90. As many as 129 candidates who were successful in the written test, were called for viva-voce test which was held in November, 1990. On the basis of the marks secured in the written test as well as in the viva-voce test, 32 candidates out of 129 candidates were selected against the existing vacancies and the High Court recommended the names of 32 candidates in order of merit with necessary particulars for their appointment as Additional District & Sessions Judges in the quota of direct recruits in the Bihar Superior Judicial Service. On 5.2.91 the selected candidates were asked to appear for medical test. The High Court again by letters dated 4.3.91 and 3.6.91 also requested the Government to appoint the candidate at Serial No. 33 since one more vacancy had occurred due to the retirement of one of the officers. On 24.11.90, the Full Court of the Patna High Court passed a resolution deciding that any further vacancy in the quota of the direct recruits from the Bar within the period of one year would be filled up from the merit list prepared by the High Court. The concerned Joint Secretary of the Government wrote on 17.7.91 to the Registrar informing him that the Government has decided to advertise the vacancies afresh because the vacancies of earlier year had exhausted. Three of the candidates from out of the merit list of 129 candidates, who were not selected, filed two writ petitions in the High Court seeking a writ of mandamus directing the Government to fill up 1/3rd vacancies of the sanctioned strength of the service by direct recruitment from amongst candidates in the merit list prepared by the High Court on the basis of written test and viva-voce test held. In other words, they sought a direction that 1/3rd or the existing vacancies of the quota of direct recruits should be filled up from the said existing panel prepared by the High Court, the validity of which panel would expire after November, 1991. It was also contended that until the expiry of the said merit list which was valid till November, 1991, no fresh advertisement for any such vacancies should be made. The High Court holding that the list of 129 candidates prepared by it was to remain valid till

November, 1991, accepted the contentions of the writ petitioners and directed the State Government and its authorities to consider the appointment of the writ-petitioners and others to the posts of Additional District and Sessions Judges out of the said merit list and accordingly allowed the writ petitions. As against the said judgment, the present appeals are filed by the State of Bihar. Questioning the judgment of the High Court on the same grounds, Bihar Judicial Service Association through its Secretary has filed S.L.P.(C) No. 1782/93.

2. Shri Shanti Bhushan, learned senior counsel appearing for the appellants contended that only 32 vacancies were there and that advertisement was limited In only those vacancies and that out of the candidates who appeared for the qualifying written examination, the first 129 candidates on the basis of merit in the ratio of 1:4 i.e. four candidates against each vacancy, were called for interview and that on the basis of the marks obtained in the written test as well as vivo-voce test, a combined list was prepared and the first 32 candidates on the basis of the merit list were selected and were recommended to the Government for being appointed in the existing 32 vacancies which were meant to be filled up by direct recruitment from the Bar. learned Counsel further submitted that the list of 129 candidates after the said selection lapsed and the question of filling up the vacancies that arose later from that list does not arise and that the High Court erred in holding that the strength of the direct recruits in the cadre had to be 82 posts on the erroneous assumption that the Bihar Superior Judicial Service included permanent as well as temporary posts. learned Counsel for the respondents, on the other hand, submitted that the cadre of Bihar Superior Judicial Service includes both permanent and temporary posts and on that basis the strength of the direct recruits would be 83 posts and in view of the resolution passed by the Full Court, the said list of 129 candidates would be valid till end of November, 1991 and therefore the High Court was justified in issuing the writ as prayed for by the respondents.

3. During their respective arguments, the learned Counsel incidentally raised many other points touching upon Article 233 and on ordinance promulgated by the Government on 25th September, 1991 reserving 50% seats in the Government appointment for backward classes, scheduled casts and scheduled tribes. But it

may not be necessary to consider these submissions in the view we are ultimately taking. A perusal of the advertisement shows that it was not mentioned there that a panel would be prepared which would be valid for one year. As per the merit list prepared on the basis of the written test, 129 candidates were called for interview and of them 32 were selected and recommended to the Government and they are already appointed. The question whether the further vacancies should be filled up from amongst the remaining candidates in the list of 129 candidates would arise provided the advertisement and the selection pursuant to the same were meant not only for filling up the 32 vacancies but also to fill up the other vacancies that may arise from out of that list. If, on the other hand, the advertisement and the selection process were strictly meant only to fill up those 32 vacancies and if on that basis the selection was made, then there is no basis whatsoever for keeping that list subsisting for the purpose of filling up other vacancies.

4. learned Counsel appearing for the respondents, however, submitted that the advertisement does not indicate that the applications were called for from the members of the Bar only to fill up 32 vacancies and that on the other hand the advertisement simply reads that the applications are invited for the appointment to the higher judicial service and that number of vacancies would be communicated later and that the High Court has rightly calculated the number of vacancies to be 83 belonging to the quota of direct recruits on the basis that the cadre includes both permanent and temporary posts. learned Counsel for the appellants submitted that from the beginning the advertisement and the selection process were meant only to fill up 32 permanent vacancies by direct recruitment and on that basis they called 129 candidates for interview i.e. four time of the number of vacancies. He also submitted that as the last two persons had the same marks, the number came to 129. It is also submitted that rest of vacancies came later on and that a perusal of the High Court records would clearly show that the said selection process was meant to fill up only 32 vacancies.

5. Before we advert to this crucial question, we would like to consider the reasoning of the High Court. The High Court has noted that 129 candidates were called for interview and a merit list was prepared and out of them 32 candidates were appointed. The High Court, however, proceeded to state that since 1979 no

appointments were made from the Bar and that taking temporary posts also into consideration the strength of the service as on that day was 251 and that should be the cadre and 1/3rd of the same should be filled up by direct recruitment. Then the High Court took into consideration the resolution of the Full Court which was to the effect that any further vacancy in the quota of direct recruits shall be filled by within a period of one year from the date of the resolution dated 24.11.90. Thereafter, having considered the rival contentions and also the scope of Article 16, the High Court reached the conclusion that the remaining vacancies should be filled up from among the list of 129 candidates. The High Court also took the view that the letter of the Joint Secretary dated 17.7.91 intending to call for fresh applications was a decision without necessary consultation with the High Court. It was contended before the High Court on behalf of the State Government that there was no rule permitting the list to be kept valid for one year and that the selection process was meant to fill up 32 vacancies and that in respect of future vacancies another selection is to take place since there may be more persons available and eligible for those appointment and they should also get an opportunity to compete. The High Court rejected this contention holding that the decision of the Government not to fill up the vacancies from among the candidates of the merit list was arbitrary.

6. As rightly contended on behalf of the appellant State of Bihar, there was no advertisement that a panel would be prepared which will be valid for one year and there was not rule also to that effect. There was only a resolution passed by the High Court to fill up the vacancies from out of that list of 129 Candidates. As a matter of fact, the High Court initially recommended only 32 names in order of merit. learned Counsel for the respondents, however, submitted before us that the stand taken by the appellants namely that the High Court on its administrative side had called for interview the candidates, four times of the number of vacancies that were existing and that accordingly when there were 32 vacancies, a total of 129 candidates were called for and that there was no panel existence, is not supported by any material. The High Court in its reply affidavit dated 1.9.93 stated that on that date 32 vacancies were available and it was resolved by the Full Court in its meeting dated 15.9.90 that four times of the number of vacancies i.e. 128 candidates in order of merit should be called for interview and that as the last

person namely 128th candidate and the next person thereunder had the same marks, they were also called and altogether 129 candidates were called for interview and that the rest of the vacancies of Additional District & Sessions Judges came later on and as such the High Court on 24.11.90 recommended 32 candidates out of the list but, however, decided that the further vacancies in the quota from the Bar should be filled up from among the remaining candidates in order of merit and therefore the list amounted to a subsisting panel from out of which further vacancies should be filled.

7. Having carefully considered the advertisement and the various averments in the affidavits and the counter-affidavits, we are of the view that the crucial question is whether in fact the advertisement and the initial decision of the High Court were meant to fill up only 32 vacancies and whether accordingly the High Court called only 129 candidates from the list, who appeared for the written test in the ratio of 1:4 and whether consequently the whole selection process was confined to fill up only those 32 vacancies? If the answer is in the affirmative then the question of the same list subsisting for one more year for filling up the subsequent vacancies did not arise in spite of the resolution of the High Court dated 24.11.90. As noted above in the reply affidavit, the Registrar of (he High Court categorically stated that 32 vacancies were available and to fill up the same, 129 candidates were called for interview namely four times of the number of vacancies and that the rest of the vacancies arose later on. To satisfy ourselves, we have also called for the relevant record from the High Court and the same is placed before us in a sealed cover. A perusal of the records shows that in the Full Court meeting on 5.5.90 it was resolved that on the basis of the result of the preliminary screening test, four times of number of candidates to be selected for appointment be called for interview. From the proceedings of another Full Court meeting held on 15.9.90 it is clear that it was resolved that 128 candidates alone in order of merit should be called for interview. The proceedings of the Full Court meeting dated 24.11.90 would show that the Full court finalised the selection for filling up 32 vacancies only and sent a list of 32 candidates in order of merit. However, a further resolution was passed that if any further vacancy in the quota of the direct recruits was required to be filled up within a period of one year the same be filled up by recommending the candidates in order of merit from amongst the remaining candidates in the merit

list. It is therefore crystal clear that the advertisement and the whole selection process that ensued were meant only to fill up 32 vacancies. learned Counsel for the respondents relying on the decisions of this Court in *Kailash Chandra Sharma v. State of Haryana and Ors.* [1989] Suppl. 2 S.C.C. 696 and *O.P. Garg and Ors. etc. etc. v. State of U.P. and Ors.* : [1991]2SCR424 , contended that when there are temporary vacancies, the direct recruits should have their share of quota in respect of temporary vacancies also. As noted above, the temporary vacancies arose subsequently but even otherwise in the view we are taking namely that the particular advertisement and the consequent selection process were meant only to fill up 32 vacancies and not to fill up the other vacancies, the merit list prepared on the basis of the written test as well as the viva-voce will hold good only for the purpose of filling up those 32 vacancies and no further because the said process of selection for those 32 vacancies got exhausted and came to an end. If the same list has to be kept subsisting for the purpose of filling up other vacancies also that would naturally amount to deprivation of rights of other candidates who would have become eligible subsequent to the said advertisement and selection process.

8. During the pendency of the writ petition before the High Court, the State of Bihar issued an Ordinance on 3.11.91 known as 'The Bihar Reservation of Vacancies in Courts Service (For Scheduled Castes, Scheduled Tribes and other Backward Classes) Ordinance, 1991'. This Ordinance provides for percentage of reservation for those classes. The writ petitioners before the High Court challenged this Ordinance with an additional prayer that the same may be declared as not applicable to the direct appointment of Additional District & Sessions Judges from the Bar and by way of abundant caution they challenged the validity of the Ordinance so that it may not be applied to the petitioners in case the writ petitions were to be allowed. The High Court, having noted that the Ordinance has been promulgated during the pendency of the writ petitions, declared that the said Ordinance would not be applicable to the appointments to be made from out of the remaining candidates in the list of 129 candidates which as per the decision of the High Court should be valid and subsisting till November, 1991. We need not go into the question of validity of the Ordinance since we are setting aside the order of the High Court as a result of which the question of making more appointment for the vacancies other than the 32 vacancies already filled up, does not arise. To fill

up the other vacancies, consequently a fresh advertisement has to be issued. The applicability of the Ordinance to such a selection to be made on the basis of the fresh advertisement need not be gone into at this stage. Therefore we do not express any opinion on the validity of the Ordinance.

9. We are told that a number of vacancies have arisen and it is necessary that they should be filled up as early as possible. Therefore we direct the State of Bihar to issue a fresh advertisement calling for the applications and complete the selection process as early as possible. Accordingly the appeals are allowed. In the view we are taking in the appeals filed by the State of Bihar, no further orders are necessary in S.L.P.(C) No. 1782/93 as well as I.A. Nos. 7-8/93 and they are accordingly disposed of. There will be no order as to costs.

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