

SUPREME COURT OF INDIA

Arup Das

Vs.

State of Assam

(Altamas Kabir and Surinder Singh Nijjar JJ.)

27.01.2012

JUDGMENT

ALTAMAS KABIR, J.

1. A short but interesting question of law arises in these Special Leave Petitions, as to whether appointments can be made in Government service beyond the number of vacancies advertised.

2. An advertisement dated 4th November, 2006, was published by the Director of Land Records and Survey, Assam, inviting applications for selection for admission in the Assam Survey and Settlement Training Institute in respect of 160 seats. About 12,000 candidates applied for the said advertised seats and a written test was conducted which was followed by a viva voce examination. The viva voce test was limited to only 560 candidates. The restriction of the vive voce test to only 560 candidates was challenged before the Gauhati High Court in W.P.(C)No.3419 of 2007, which was dismissed and Writ Appeal No.413 of 2007 preferred from the Order of the learned Single Judge was also dismissed. The Director of Land Records and Survey, Assam, published a select list of 160 candidates and sent the candidates for training.

Subsequently, the Director sent three more lists, hereinafter referred to as the second, third and fourth lists, but the same were not approved by the Government. The Government's refusal to approve the second, third and fourth lists against the seats available, was again challenged in Writ Petition Nos.3812 of 2010 and 2279 of 2011 on the ground that when vacancies were available, there was no bar in the same being filled up from the Select List of 560 candidates.

3. The aforesaid case sought to be made out on behalf of the Petitioners was contested by the Respondents on the ground that even if there were vacant seats available, the same could not have been filled up beyond the number of seats advertised as such action would be contrary to the law laid down by this Court relating to deviation from the contents of the advertisement.

4. The submissions made on behalf of the Writ Petitioners were rejected by the learned Single Judge upon holding that if any appointment was to be made beyond the number of seats advertised, the Director was required to publish a fresh advertisement for selecting the next batch of candidates in accordance with Rule 20 of the Rules in this regard. The learned Single Judge also observed that it was evident from the judgment and order dated 29th January, 2010 passed in W.P. (C) No.3909 of 2009, as well as the order dated 1st December, 2007 passed in Writ Appeal No.413 of 2007, that 560 candidates were called for the viva voce test for the 160 seats which had been advertised and if other candidates from the second, third and fourth lists were to be admitted, it would amount to depriving other candidates, who had not been called for the viva voce test because of the Government's decision to limit the number of candidates in the written test, of an opportunity of being selected. Some of the candidates may have, in the meantime, acquired the eligibility to undergo such training. Relying on the decision of this Court in *Union of India Vs. Ishwar Singh Khatri Ors.* [(1992) Supp.3 SCC 84] and several other judgments expressing the same view, the learned Single Judge held that filling up of vacancies over and above the number of vacancies advertised would be contrary to the provisions of Articles 14 and 16 of the Constitution. On the basis of the above, the learned Single Judge dismissed the said Writ Petitions.

5. The decision of the learned Single Judge was challenged by the Writ Petitioners in Writ Appeal No.132 of 2011 before the Division Bench of the Gauhati High Court, along with Writ Appeal No.151 of 2011, which were dismissed by the Division Bench of the Gauhati High Court by the judgment impugned herein dated 16.9.2011. Agreeing with the views expressed by the learned Single Judge, the Division Bench dismissed the Writ Appeals against which these Special Leave Petitions have been filed.

6. Appearing in support of the Special Leave Petitions, Mr. Joydeep Gupta, learned Senior Advocate, submitted that both the learned Single Judge and the Division Bench of the High Court had proceeded on the wrong premise that despite available vacancies, selection could not be made against the seats available beyond those mentioned in the advertisement. Mr. Gupta submitted that the legal position to the contrary had been clarified by this Court in Civil Appeal No.3423 of 1996,

Prem Singh Ors. Vs. Haryana State Electricity Board Ors. [(1996) 4 SCC 319], where the following two questions fell for consideration, namely,

- (i) Whether it was open to the Board to prepare a list of as many as 212 candidates and appoint as many as 137 out of that list when the number of posts advertised was only 62?
- (ii) Whether the High Court was justified in quashing the selection of all the 212 candidates and appointment of 137?

7. While deciding the matter, this Court referred to various earlier decisions in which the view expressed by this Court that appointments or selections could not be made beyond the number of posts advertised, was reiterated. One of the decisions which was relied upon was the decision rendered by this Court in Madan Lal Vs. State of JK [(1995) 3 SCC 486], where one of the questions which fell for consideration was whether preparation of a merit list of 20 candidates against 11 advertised vacancies was bad. The learned Judge observed that this Court had held that the said action of the Commission by itself was not bad, but at the time of giving actual appointments, the merit list was to be so operated that only 11 vacancies were filled up. It was further observed that the reason given for such a finding was that as the requisition was for 11 vacancies, the consequent advertisement and recruitment could also be for 11 vacancies and no more. The learned Judges went on to quote a passage from the decision in Madan Lal's case (supra) which is extracted hereinbelow :- It is easy to visualise that if requisition is for 11 vacancies and that results in the initiation of recruitment process by way of advertisement, whether the advertisement mentions filling up of 11 vacancies or not, the prospective candidates can easily find out from the Office of the Commission that the requisition for the proposed recruitment is for filling up 11 vacancies. In such a case a given candidate may not like to compete for diverse reasons but if requisition is for larger number of vacancies for which recruitment is initiated, he may like to compete. Consequently the actual appointments to the posts have to be confined to the posts for recruitment to which requisition is sent by the Government. In such an eventuality, candidates in excess of 11 who are lower in the merit list of candidates can only be treated as wait- listed candidates in order of merit to fill only the 11 vacancies for which recruitment has been made, in the event of any higher candidate not being available to fill the 11 vacancies, for any reason. Once the 11 vacancies are filled by candidates taken in order of merit from the select list that list will get exhausted, having served its purpose.

8. Referring to the observations made in the aforesaid extract, the learned Judges went on to state that while making the aforesaid observations, this Court had agreed with the contention that while sending a requisition for recruitment to posts, the Government can keep in view not only actual vacancies then existing, but also anticipated vacancies. Based on its aforesaid findings, the learned Judges went on to observe as follows:-

25. From the above discussion of the case-law it becomes clear that the selection process by way of requisition and advertisement can be started for clear vacancies and also for anticipated vacancies but not for future vacancies. If the requisition and advertisement are for a certain number of posts only the State cannot make more appointments than the number of posts advertised, even though it might have prepared a select list of more candidates. The State can deviate from the advertisement and make appointments on posts falling vacant thereafter in exceptional circumstances only or in an emergent situation and that too by taking a policy decision in that behalf. Even when filling up of more posts than advertised is challenged the court may not, while exercising its extraordinary jurisdiction, invalidate the excess appointments and may mould the relief in such a manner as to strike a just balance between the interest of the State and the interest of persons seeking public employment. What relief should be granted in such cases would depend upon the facts and circumstances of each case.

26. In the present case, as against the 62 advertised posts the Board made appointments on 138 posts. The selection process was started for 62 clear vacancies and at that time anticipated vacancies were not taken into account. Therefore, strictly speaking, the Board was not justified in making more than 62 appointments pursuant to the advertisement published on 2-11-1991 and the selection process which followed thereafter. But as the Board could have taken into account not only the actual vacancies but also vacancies which were likely to arise because of retirement etc. by the time the selection process was completed it would not be just and equitable to invalidate all the appointments made on posts in excess of 62. However, the appointments which were made against future vacancies -- in this case on posts which were newly created -- must be regarded as invalid. As stated earlier, after the selection process had started 13 posts had become vacant because of retirement and 12 because of deaths. The vacancies which were likely to arise as a result of retirement could have been reasonably anticipated by the Board. The Board through oversight had not taken them into consideration while a requisition was made for filling up 62 posts. Even with respect to the

appointments made against vacancies which arose because of deaths, a lenient view can be taken and on consideration of expediency and equity they need not be quashed. Therefore, in view of the special facts and circumstances of this case we do not think it proper to invalidate the appointments made on those 25 additional posts. But the appointments made by the Board on posts beyond 87 are held invalid. Though the High Court was right in the view it has taken, we modify its order to the aforesaid extent. These appeals are allowed accordingly. No order as to costs.

9. Mr. Gupta urged that in view of the fact that this Court had approved the right of the State to deviate from the advertisement published and to make appointments to posts falling vacant thereafter in exceptional circumstances only or in an emergent situation, the Director of Land Records and Survey, Assam, had not committed any illegality in publishing the second, third and fourth lists for the purpose of making appointments therefrom against the total number of known vacancies numbering 690. Mr. Gupta submitted that both the Single Judge and the Division Bench of the High Court had completely misconstrued the decision in Prem Singh's case (supra), although the same had been cited before them. Accordingly, the decisions, both of the Single Judge as well as of the Division Bench, were liable to be set aside with appropriate directions to the State Government and its authorities to take steps to fill up the total number of vacancies from the second, third and fourth lists published by the Director, Land Records and Survey, Assam.

10. Having carefully considered the submissions made on behalf of the Petitioners, we are unable to accept Mr. Gupta's submissions, since the issue raised by him is no longer res integra and has been well settled by a series of decisions of this Court after the decision in Prem Singh's case (supra). Even in Prem Singh's case, which has been strongly relied upon by Mr. Gupta, the proposition sought to be advanced by him does not find support. It is well-established that an authority cannot make any selection/appointment beyond the number of posts advertised, even if there were a larger number of posts available than those advertised. The principle behind the said decision is that if that was allowed to be done, such action would be entirely arbitrary and violative of Articles 14 and 16 of the Constitution, since other candidates who had chosen not to apply for the vacant posts which were being sought to be filled, could have also applied if they had known that the other vacancies would also be under consideration for being filled up. In fact, in the decision rendered in Ishwar Singh Khatri's case (supra) which was referred to by the High Court, this Court while considering the preparation of panel of 1492 selected candidates as against the 654 actual vacancies notified, recorded the fact that after filling up the notified number of vacancies from the panel, no further

appointments were made therefrom and instead fresh advertisement was issued for further appointment. Since a promise had been made in the minutes of the meeting of the Selection Board that the panel would be valid till all the candidates were offered appointments, this Court held that the Selection Board had taken into consideration anticipated vacancies while preparing the panel. It is on such basis that this Court had observed that it had to be concluded that the Selection Board had prepared the panels containing 1492 candidates, as against the then available vacancies, and, accordingly, the selected candidates had a right to get appointment. It is in such circumstances that further appointments from the published panel of 1492 candidates, as directed by the Tribunal, were upheld.

11. In a recent decision rendered by this Court in *State of U.P. Vs. Raj Kumar Sharma* [(2006) 3 SCC 330], this Court once again had to consider the question of filling up of vacancies over and above the number of vacancies advertised. Referring to the various decisions rendered on this issue, this Court held that filling up of vacancies over and above the number of vacancies advertised would be violative of the fundamental rights guaranteed under Articles 14 and 16 of the Constitution and that selectees could not claim appointments as a matter of right. It was reiterated that mere inclusion of candidates in the Select List does not confer any right to be selected, even if some of the vacancies remained unfilled. This Court went on to observe further that even if in some cases appointments had been made by mistake or wrongly, that did not confer any right of appointment to another person, as Article 14 of the Constitution does not envisage negative equality and if the State had committed a mistake, it cannot be forced to perpetuate the said mistake.

12. Even the decision in *Prem Singh's case* (supra), which had been strongly relied upon by Mr. Joydeep Gupta in support of his claim that the State had a right to deviate from the advertisement published by it, has to be considered in the light of the circumstances in which the same was made. While holding that if the requisition and advertisement are for a certain number of posts only, the State cannot make more appointments than the number of posts, this Court went on to hold that the State could deviate from the advertisement and make appointments in posts falling vacant thereafter in exceptional cases or in an emergent situation, and, that too, by taking a policy decision in that behalf. The said finding cannot possibly be interpreted in the manner in which it has been done by Mr. Gupta that the advertisement could be deviated from by the State, even in the present circumstances, which, in our view, were neither exceptional nor emergent. The fact that 690 seats were available is not a relevant consideration for application of the aforesaid principle. It is in such situation that a fresh advertisement is required to

be published for filling up the remaining number of vacancies after the vacancies advertised are filled up. The latter portion of paragraph 25 of the said decision in Prem Singh's case (supra) deals with a situation where posts in excess of those advertised had been filled up in extra-ordinary circumstances. In such a case it was observed that instead of invalidating the excess appointments, the relief could be moulded in such a manner so as to strike a just balance, if it is in the interest of the State and in the interest of the person seeking public employment, to the facts of such case. The facts of that case are different from the facts of the instant case, in that no extra-ordinary and/or exceptional circumstances exist in the present case requiring the filling up of the vacant seats available after filling up the 160 seats advertised. The decision in Prem Singh's case (supra) has to be read in such a context and cannot be said to be the rule, but rather the exception.

13. We, therefore, are not inclined to accept Mr. Gupta's submissions, which deal with the exception and not the rule and, accordingly, the Special Leave Petitions are dismissed. Consequently, the application filed by the Petitioner Nos.4 to 58 for permission to file the Special Leave Petition is rejected.

14. There will, however, be no order as to costs.