SUPREME COURT OF INDIA

Govt.of Bihar & Ors.

Vs.

Dayanand Singh

C.A.No.9921-9923 of 2016

(J.Chelameswar and Abhay Manohar Sapre,JJ.,)

29.09.2016

ORDER

SLP (Civil) No.10163-10165 of 2015

1. Leave granted.

2. These appeals are preferred aggrieved by a common judgment dated 10.11.2014 passed in a batch of writ petitions by the High Court of Judicature at Patna. Civil Appeals arising out of SLP (C) Nos. 10163-10165/2015 are filed by the State of Bihar. Other Civil Appeals arising out of SLP(C) No.11365/2015 etc. are filed by various parties to the above-mentioned batch of petitions, i.e. petitioners and other respondents therein.

3. The controversy in these appeals is with respect to the authority of the State of Bihar to provide for reservation in favour of persons belonging to various backward classes of citizens contemplated under Article 16(4) of the Constitution such as SC/ST/OBC etc. in the superior and subordinate judicial services of the State of Bihar (hereafter collectively referred to as JUDICIAL SERVICES).

4. We are informed that prior to 1991 under the relevant service rules applicable to JUDICIAL SERVICES, certain posts were reserved in favour of citizens belonging only to SC and ST categories, the details of which may not be necessary at this juncture. In the year 1991, the State of Bihar made an enactment called Bihar Reservation of Vacancies in Posts and Services (for scheduled castes, scheduled tribes and other backward classes) Act, 1991. The said Act provided for reservation of certain percentage of posts in favour of various specified classes of citizens in various services under the State. Question arose whether the said Act would apply and the benefit of reservation provided therein would extend to the JUDICIAL SERVICES. Eventually, the question was examined by this Court in *State of Bihar & Another v. Bal Mukund Sah & Others*[1], This Court, on a literal construction of the Act, opined that the application of the Act extended even to the JUDICIAL SERVICES.

"27 It is difficult to appreciate this line of reasoning on the express language of the relevant provisions of Section 4 read with the definition provisions. It becomes obvious that the term any office of the Judiciary of the State of Bihar would naturally include not only ministerial staff but also officers, including Presiding Officers of courts comprised in the Judiciary of the State. Once that conclusion is reached on the express language of the relevant provisions of the Act, it cannot be held that the thrust of Section 4 would not apply to govern reservation for direct recruitment to the posts of Presiding Officers in the District Courts as well as courts subordinate thereto, as all of them will form part and parcel of the Judiciary of the State of Bihar and will have to be treated as holders of offices in the State Judiciary."

However, this Court further held that such a construction of the Act would render the Act unconstitutional. The reason for such a conclusion is that having regard to the scheme of the Constitution of India dealing with the JUDICIAL SERVICES, the State Legislature would be incompetent to make any law dealing with the appointment of judicial officers. Appointment of judicial officers is to be made only in accordance with the prescription contained in Article 233 and 234.

"36. It becomes, therefore, obvious that no recruitment to the post of a District Judge can be made by the Governor without recommendation from the High Court. Similarly, appointments to Subordinate Judiciary at grass-root level also cannot be made by the Governor save and except according to the rules framed by him in consultation with the High Court and the Public Service Commission. Any statutory provision bypassing consultation with the High Court and laying down a statutory fiat as is tried to be done by enactment of Section 4 by the Bihar Legislature has got to be held to be in direct conflict with the complete Code regarding recruitment and appointment to the posts of District Judiciary and Subordinate Judiciary as permitted and envisaged by Articles 233 and 234 of the Constitution. Impugned Section 4, therefore, cannot operate in the clearly earmarked and forbidden field for the State Legislature so far as the topic of recruitment to District Judiciary and Subordinate Judiciary is concerned. That field is carved out and taken out from the operation of the general sweep of Article 309."

5. This Court further held that it is open to the Governor of Bihar to make appropriate rules providing for reservation of persons in JUDICIAL SERVICES in accordance with law and in consultation with the High Court.

"37 it is only the Governor who is entrusted with the said task which he has to undertake after consultation with the High Court and by framing appropriate rules for recruitment to Judiciary at grass-root level as enjoined by Article 234 and can only act on recommendation by the High Court for direct recruitment from the Bar for being appointed as District Judges as laid down by Article 233 sub-article (2)."

It goes without saying that the Governor while making such provision for reservation is bound by the various principles of law regulating the exercise of such power. The relevant principles are enunciated in I*ndra Sawhney case*[2] etc.

6. On 25th June, 2009, the State of Bihar amended the Rules framed under the proviso to Article 309 known as (i) Bihar Superior Judicial Service Rules, 1951, (ii) Bihar Civil Services (Judicial Branch) (Recruitment) Rules, 1965 by introducing Rule 4A and Rule 3A respectively providing for reservation of posts in favour of various backward classes of citizens. Both the newly introduced Rules are ***substantially similar***[3]**.**

7. The above mentioned two Rules came to be challenged in a batch of writ petitions in which the judgment under appeal came to be rendered. By the judgment under appeal, the High Court quashed the two ***notifications*** [4] of the State of Bihar by which the impugned Rules were made. The decision rested mainly on the finding that the amendments were not preceded by appropriate consultation with the High Court contemplated under Articles 233 and 234.

> "In my view, the correspondence relied upon by the State Government can hardly be said to be consultation in the real sense of the word. Writing letters and displaying the earnestness of the Government for providing desired reservation in Judicial Services cannot be said to be consultation. The State Government was required to pay attention to the opinion of the High Court keeping in view the general representation of different classes, the total strength of the judicial officers and the maintenance of the high standards in respect of dispensation of justice."

8. Apart from that, the High Court made various other observations in the judgment regarding the manner in which the amendments were made and the desirability of such amendments. Such observations, in our opinion, are not warranted in the context of the issue before Court. The High Court ought to have kept in mind that it was the legislative decision of the State which was the subject matter of dispute before it, while the High Court undoubtedly has the jurisdiction to determine the constitutionality of the 'law' the motives behind the law and the wisdom of the legislative body are not amenable to the judicial review.

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[3] *"4A – the Bihar Reservation of Vacancies in Post and Services (for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act 1991, (as amended from time to time shall also apply to direct recruitment to the post Additional District and Sessions Judge."*

"3A – The Bihar Reservation of Vacancies in Post and Services (for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act 1991, (as amended from time to time) shall also apply to direct recruitment to the post Civil Judge (Junior Division)."

[4]*. "The impugned Notification No.6067 dated 25th June 2009 issued in respect of the Bihar Civil Services (Judicial Branch) (Recruitment) Rules, 1955, and the Notification No.6069 dated 25th June 2009 issued in respect of the Bihar Superior Judicial Service Rules, 1951 are quashed and set aside. Legal consequences shall follow."*

9. We have heard learned Additional Solicitor General appearing for the State of Bihar, learned senior counsel appearing for the High Court and the learned counsel appearing for various contesting parties in detail. We have also perused the correspondence that took place between the State Government and the decisions taken by the High Court on administrative side and the material relied upon by the High Court for such decisions.

10. We agree with the conclusion recorded by the High Court that the consultation which preceded the amendments certainly fell short of the requisite standards of consultation necessary in the context. We do not see any reason to interfere with the conclusion of the High Court that the two impugned Rules are required to be declared illegal and unconstitutional. We accordingly confirm the conclusion.

11. However, 25 years passed by in the process of this prolonged litigation. The first round commenced sometime in the year 1991 with writ petitions which eventually culminated in Bal Mukund case. The second round with the amendment to the Rules governing the JUDICIAL SERVICES in the year 2009. However, during the said quarter century, steps were taken from time to time to fill up vacancies that arose in the JUDICIAL SERVICES of the State of Bihar. For the present, we are only concerned with the steps taken in the years 2009 and 2012.

12. In the year 2009, the State of Bihar initiated proceedings for filling up 217 posts and in the year 2012, for filling up of another 118 posts of the subordinate judicial service.

13. Insofar as the recruitment process initiated in the year 2009 for filling up 217 posts is concerned, it is agreed (on all hands) before us that the process is complete and the posts are filled up. Insofar as 2012 recruitment for 118 posts is concerned, though the selection process is complete, only 88 successful candidates have been appointed (because of various orders, whether interim or final of the High Court and this Court). We are also informed that appointment orders in favour of 92 successful candidates were issued but only 88 have in fact joined and other 4 did not join the service.

14. We are informed that, in the interregnum, on 13.1.2016, another advertisement calling for applications from eligible candidates for filling up of 206 posts of Junior Civil Judges came to be issued by the State of Bihar. We are informed that preliminary examination for shortlisting the candidates eligible for taking the final examination for the recruitment process has already been conducted. But in view of the pendency of the present litigation, the process is put on hold. We are also informed that subsequent to the above-mentioned notification, some more vacancies arose either by creation of new posts or otherwise. In all, as on today, 406 posts of junior civil judges are lying vacant and appropriate steps are required to be taken to fill up such posts. In substance, a large number of posts in the JUDICIAL SERVICE are vacant.

15. From the submissions made before us, it is clear from the stand of the Government of Bihar that as a matter of policy there is a need for providing appropriate reservations in

favour of the various backward classes of citizens even in the JUDICIAL SERVICES of the State of Bihar. However, under the scheme of the Constitution, the Executive is not the only authority to formulate such policy or to give effect to. The Executive is under a constitutional obligation to consult the High Court both for framing and giving effect to such policy of providing reservations in the JUDICIAL SERVICES. The legal position in this regard is made clear on more than one occasion by this Court. In the context of the State of Bihar, the law is declared in Bal Mukund case (supra).

16. This Court observed in Bal Mukund case that a constitutional body like the High Court cannot be believed to be oblivious to "the need for a scheme of reservation".

> "32 It is not as if that the High Courts being constitutional functionaries may be oblivious of the need for a scheme of reservation if necessary in appropriate cases by resorting to the enabling provision under Article 16(4)."
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> The assessment of the existence of the need for providing reservation and matters incidental thereto is essentially the function of the Legislature or the Executive, as the case may be, and in the realm of policy choice. But the power to frame the policy is structured by certain constitutional imperatives and limitations. They are (i) the identification of the existence of backward classes in the State, (ii) the formation of the opinion that such classes are not adequately represented in the JUDICIAL SERVICES of the State, (iii) the determination of the question as to what would be the appropriate percentage of reservation required to be made with reference to the JUDICIAL SERVICE consistent with the obligation to maintain the efficiency of the JUDICIAL SERVICES. Such assessments are required to be made on objective and rational considerations consistent with the constitutional obligations of both the Executive and Judicial branches of the State.

17. We, therefore, hold that the State of Bihar is entitled to initiate the process of consultation by furnishing necessary information on its own assessment regarding the need to provide reservation in favour of specified backward classes in the JUDICIAL SERVICE of the State of Bihar. The existence of backward classes in the State of Bihar and their identity is not in dispute. The State should also furnish its own assessment regarding the inadequacy of representation of the backward classes in the JUDICIAL SERVICES of the State and the desirable percentage of reservation in the JUDICIAL SERVICES and the relevant material on the basis of which the assessment is made. The High Court should thereupon consider the material furnished by the State, make an appropriate assessment of the correctness of the proposal made by the State and convey its opinion and the reasons for such opinion to the State. If there is a consensus of opinion between the State and the High Court, the State would be at liberty to make the appropriate rules providing for reservation. In the event of any difference of opinion, the Government must record reasons for its inability to accept the conclusions communicated by the High Court and proceed to amend the Rules in accordance with law keeping in mind the various constitutional principles governing the exercise of such

power. Such an exercise is required to be undertaken "... not to determine who between them is entitled to greater importance or is to take the winners prize at the end of the debate. The task (before us) has to be performed with this perception".[5]

18. In view of the existence of huge number of vacancies in the JUDICIAL SERVICES, it is desirable that the whole exercise must be completed expeditiously preferably by the 1st of January, 2017. Thereafter, the process for filling up of the vacancies in the judicial service shall be taken up expeditiously by all concerned and completed by 30th June, 2017.

19. We are left with a delicate problem. Some of the candidates[6] belonging to certain backward classes would have been entitled to get appointed pursuant to the 2012 notification, if the Rule 3A (referred to supra) were to be valid. In view of the fact that the rule itself is declared to be illegal, they are not entitled as of right to be appointed against any reserved quota. Having regard to the facts that (i) a large number of vacancies exist in the JUDICIAL SERVICE, (ii) the question of reservation is lingering for a quarter century, (iii) the remoteness of the possibility of the State completely failing to establish the need to provide for reservations in JUDICIAL SERVICES, we deem it appropriate to direct that these candidates be appointed to the service against the vacancies which arose subsequent to the 2012 notification (seeking to fill up 118 vacancies). Their appointment shall be appropriately adjusted against the vacancies which are the subject matter of recruitment under the notification dated 13.01.2016 (referred to supra) and the vacancies which arose thereafter. The candidates appointed pursuant to the above directions would take their place after the 118 candidates (some of whom are already appointed and other to be appointed without reference to Rule 3A) for all purposes. The appeals are accordingly disposed of.

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20. It is agreed that in view of the above order passed in Civil Appeals arising out of SLP(C) No.10163-10165 of 2015, nothing survives in these special leave petitions. These petitions are disposed of accordingly.

SLP (C) No. 22190/2015

21. Delay condoned.

22. The petitioner (an Advocate) appeared in person before us. In the judgment under appeal, certain adverse observations are made against the petitioner. The petitioner, we are informed, appeared before the High Court in one of the matters and made certain submissions before the High Court.

23. Having regard to the fact that the observations are made regarding the conduct of the petitioner in the High Court, we deem it appropriate not to examine the matter but leave it open to the Petitioner to approach the High Court with an appropriate application praying that the observations be expunged. It is open to the High Court to consider such application in accordance with law.

24. The special leave petition stands disposed of accordingly.

Judgment Referred.

[1]*(2000) 4 SCC 0640*
[2]*(2000) 1 SCC 0168*
[5] *Supreme Court Advocates-on-Record Association & Others v. Union of India, (1993) 4 SCC 441, para 438*
[6]*Their exact number is not very certain - it is something between 20 or 23*