

(30) Hence, the conviction and sentence of all the accused is changed from Section 302 to Section 304(1) read with Section 149 IPC, and instead of life imprisonment all of them shall undergo ten years rigorous imprisonment each and shall pay a fine of Rs. 500 each in default of which shall undergo further rigorous imprisonment for six months each. The other convictions and sentences for the offences under Sections 148, 326 and 324 read with Section 149 recorded by the trial court against the accused are upheld.

(31) With the above modification in conviction and sentence the appeal stands dismissed.

R.N.R.

Before Amarjeet Chaudhary & N. C. Khichi, JJ.

KAMAL SINGH SINGHMAR,—Petitioner.

versus

THE STATE OF HARYANA AND OTHERS,—Respondents.

C.W.P. 9074 of 93.

23rd August, 1996.

Constitution of India, 1950—Art. 226—Selection beyond advertised vacancies is impermissible—Two posts of District Attorney advertised, however, additional requisition for two more posts sent to the recruiting agency before the selection—Such additional appointments can be made—Condition in the advertisement that the number of posts are subject to variation to any extent has to be limited to requisitions sent prior to selection and not beyond—Purpose of waiting list is simply to fill up vacancies caused due to non-joining of candidates and not to fill up the anticipated vacancies—Selection beyond advertised and additional notified vacancies quashed.

Held, that it is not in dispute that the Commission had advertised two posts of District Attorneys but in view of condition in the advertisement that the number of posts are subject to variation to any extent, it can be assumed that variation can be before the selection and in public interest, keeping in view the exigency of the service and immediately succeeding the closing date. If the additional requisition is sent to the recruiting agency after the closing date, as is apparent in this case from the letter dated 16th March, 1992, the terms of advertisement that number of posts are subject to variation can be stretched to that extent only and we deem it proper to give benefit of the same to that extent only in the present case. So far

as selection/appointment of respondents 7 & 8 is concerned, the same is not supported either by law or by any public interest inasmuch as there was no additional requisition to that extent.

(Para 10)

Further held, that the object of waiting list is simply to fill up the vacancies causing due to non-joining of candidates from the main selection list and not to fill up the anticipated vacancies, which may arise in the near future except for provisions in the Recruitment Rules or Executive Instructions.

(Para 11)

Further held, that laying down such a clause in the advertisement does not clothe even the Government or the recruiting agency to recruit arbitrarily and such a clause can be restricted to the limited extent of additional vacancies occurring in near future of the closing date and before the selection.

(Para 13)

Further held, that the ends of justice will be well met if the persons responsible for sending/recommending the candidates over and above the posts and making selection and appointment of respondents 7 & 8 are burdened with costs which are quantified at Rs. 10,000 to be shared equally by the functionaries of respondents 1 & 2. The costs are to be deposited in the Haryana State Legal Air Fund within two months.

(Para 15)

R. K. Jain, Advocate, for the Petitioner.

D. R. Trikha, DAG, Haryana.

H. N. Mehtani, Advocate.

Jai Veer Yadav, Advocate, for respondent No. 5.

Aman Dahiya, Advocate, for respondent No. 6.

D. S. Bali, Sr. Advocate with Anil Walia, Advocate for respondent No. 7.

JUDGMENT

Amarjeet Chaudhary, J.

(1) The question for our determination in this petition filed under Articles 226/227 of the Constitution of India, filed by the

petitioner, who was serving as Assistant District Attorney, is two fold i.e. (i) as to whether the application submitted by the petitioner for the post of District Attorney received by respondent No. 2. Haryana Public Service Commission (hereinafter referred to as the 'Commission') was complete and within time and whether the petitioner was entitled to be considered for the advertised posts along with other candidates and (ii) whether the action of respondent No. 1 in selecting and appointing six candidates as District Attorneys against two advertised posts is legally sustainable or not ?

(2) Unshorn of necessary details, the brief facts of the case are that the Commission,—*vide* advertisement No. 11, dated 11th January, 1992 which appeared in the Tribune had advertised two posts of District Attorneys. The relevant portion of the advertisement reads thus :—

“Two District Attorney (Group-A) Prosecution Department, Haryana (one post is reserved for S.C. of Haryana only) Pay Scale Rs. 3,000—5,000 + Rs. 300 Special Pay. Age 30—40 years on 11th February, 1992. E.Q. (i) degree of Bachelor of Law from recognised University, (ii) Should have practised as an Advocate for a period of not less than seven years (iii) Hindi upto Matric standard.

In the advertisement, however, it was mentioned that *the number of posts are subject to variation to any extent.* (Emphasis added). Besides this, it was also mentioned in Note II at the end of said advertisement that incomplete application forms i.e. without fee, proof of age and minimum required qualifications will be **straight-away rejected** without entering into correspondence. The petitioner, who at the relevant time was serving as Additional District Attorney, was required to send his application through proper channel. The petitioner is stated to have applied for the advertised posts through proper channel on 21st January, 1992 and have sent an advance copy of application to the Commission directly on 22nd January, 1992. The petitioner was informed by the Commission,—*vide* letter dated 10th September, 1992 that it was not feasible to call him for interview for the reason that his application form was received after the **closing date.** Copy of the same is Annexure P-5 to the writ petition. However, objections, if any, were to be submitted within fifteen days. The objections were submitted by the petitioner on 17th September, 1992, copy Annexure P-7 to the writ petition. The Commission after considering the objections filed by the petitioner rejected the same

on the ground that the prescribed fee of Rs. 10 was not sent along with the application sent to the Commission directly and the application sent through proper channel was received late by the Commission. The decision was communicated to the petitioner,—*vide* letter dated 22nd October, 1992, copy of which is Annexure R-1 to the written statement. Before the finalisation of selection, the Financial Commissioner and Secretary to Government, Haryana, sent a requisition for two additional vacancies for direct recruitment of District Attorneys, which were likely to occur in near future. The requisition was sent,—*vide* memo No. 6215 dated 17th March, 1992. The Commission conducted the interview of eligible candidates from 22nd June, 1993 to 24th June, 1993 at Shimla and from 29th June, 1993 to 2nd July, 1993 at Chandigarh and recommended six candidates for appointment to the posts of District Attorneys (Group-A) against the two initially advertised posts and two against additional requisition,—*vide* letter dated 20th July, 1993. The names of the recommended candidates are as under :—

1. Shri Banwari Lal.
2. Shri Samai Singh Chahal.
3. Shri Chetan Dass (S.C.).
4. Shri Mohinder Singh Sihag
5. Shri Subash Chander Bajaj.
6. Shri Jesraj Gurva (S.C.).

The above said persons were impleaded as respondents 3 to 8 in the writ petition, who joined in the last week of July, 1993. The petitioner filed Civil Writ Petition on 28th July, 1993 in which the private respondents were not impleaded as respondents. The Motion Bench while issuing notice of motion for 10th August, 1993 ordered that in the meantime, the selection/appointment of the candidate appointed against the second post, shall be subject to the final decision of writ petition,—*vide* order dated 29th July, 1993. Subsequently, the petitioner moved an application for impleading the selected candidates as party to the writ petition, which was allowed and all the respondents are before the Court.

(3) The State of Haryana, the Commission and the private respondents have filed written statements in which they have resisted the claim of the petitioner on various counts.

(4) The petitioner in order to controvert the stand taken in the written statement of respondent No. 2 filed replication.

(5) Learned counsel for the parties were heard and on our direction, the State counsel has produced the record.

(6) Undisputed position which emerges from the record is that the petitioner applied for the post of District Attorney through proper channel on 21st January, 1992 and sent an advance copy to the Commission directly on 22nd January, 1992. Though the petitioner had applied yet he could not get any benefit for the reason that the closing date for submitting the application was 11th February, 1992 and as per advertisement incomplete applications submitted without fee etc. were to be rejected straightaway. Admittedly, the application sent by the petitioner through proper channel was received late by 53 days by the Commission and the application sent directly to the Commission was not accompanied by the requisite fee and there was no proof attached by the petitioner to show that he had sent postal order of Rs. 10 alongwith the application sent directly to the Commission. As per own showing of the petitioner, he was having only a counter foil of postal of Rs. 5. Moreover, the Commission afforded an opportunity to the petitioner to make representation,—vide letter dated 11th September, 1992. The petitioner submitted the representation on 17th September, 1992, which was duly considered by the respondents. The said representation was rejected by passing a detailed order dated 22nd February, 1992, copy of which is Annexure R-1 to the written statement. The petitioner has not even impugned the same in the present writ petition. The position explained by the Commission in order dated 22nd February, 1992 is deemed to have been accepted by the petitioner. The petitioner, therefore, cannot succeed on first count as canvassed in the writ petition and as such is decided against him by holding that the application submitted by the petitioner, which was required to be sent through proper channel was received by the Commission after 53 days of the last date of submission of application and the application sent directly to the Commission was not accompanied by the prescribed fee and in view of terms of advertisement, the petitioner was not entitled to be called for interview for the post of District Attorney.

(7) Now coming to the second aspect of the matter, which according to us is most contractuous i.e. whether respondent No. 2 can make selection and appointment of the candidates over and above the notified vacancies, Mr. R. K. Jain, learned counsel appearing for the

petitioner has cited two judgments of the Apex Court rendered in *Hoshiar Singh v. State of Haryana* (1) and *Madan Lal v. State of Jammu and Kashmir* (2), and has argued that the recommendation beyond the notified vacancies was not permissible and selection/appointment over and above the notified vacancies are liable to be quashed.

(8) On the other hand, learned counsel for the respondents have supported the selection/appointment on the ground that in the advertisement itself it was specifically mentioned that the number of posts are subject to variation to any extent and it was before the selection that the State of Haryana had sent a requisition for two additional vacancies of District Attorneys for direct recruitment i.e. one post reserved for scheduled caste and one for general category,— vide letter dated 16th March, 1992 and two candidates i.e. respondents 7 and 8 were kept on the waiting list. It was also argued by the respondents that the selection in question was challenged by Madan Lal and others in C.W.P. No. 13150 of 1993 which was dismissed by a Division Bench of this Court on 8th March, 1994. Respondents have also relied upon another Division Bench judgment of this Court rendered in C.W.P. 18577 of 1994 (*Shamsher Singh v. State of Haryana and others*) on 17th July, 1995 and urged that the writ petition deserves to be dismissed in view of the judgments cited above.

(9) We have given thoughtful consideration to the arguments advanced by the counsel for the parties and have perused the record. We are of the considered view that the petitioner cannot succeed so far as the selection/appointment of respondents 3 and 4 and two more candidates is concerned, who have been selected and appointed as a result of additional requisition sent prior to the selection. However, we find merit in the contention of learned counsel for the petitioner *qua* selection/appointment of respondents 7 and 8, which cannot be justified at all and we see no reason for not quashing their selection and appointment for the reasons given below :—

(10) It is not in dispute that the Commission had advertised two posts of District Attorneys but in view of condition in the advertisement that the number of posts are subject to variation to any

(1) J.T. 1993 (5) S.C. 63.

(2) J.T. 1995 (2) 291.

extent, it can be assumed that variation can be before the selection and in public interest, keeping in view the exigency of the service and immediately succeeding the closing date. If the additional requisition is sent to the recruiting agency after the closing date, as is apparent in this case from the letter dated 16th March, 1992, the terms of advertisement that number of posts are subject to variation can be stretched to that extent only and we deem it proper to give benefit of the same to that extent only in the present case. So far as selection/appointment of respondents 7 and 8 is concerned, the same is not supported either by law or by any public interest inasmuch as there was no additional requisition to that extent. The Commission was required to recommend/send the names of four candidates i.e. two candidates for initially advertised posts and two for additional requisition. The proposition of law is well settled that the selecting authority can not recommend the candidates over and above the notified vacancies for the reason that the selection/recommendation of large number of persons. i.e., number of posts for which requisition is sent would deprive the candidates who were not eligible for appointment to the posts on the last date of submission of application and had become eligible for appointment thereafter. Opportunity of being considered for appointment on the additional posts because the additional posts are advertised subsequently and those who became eligible for appointment subsequently would be entitled to apply for the same. This view of us is fortified by the judgment of Supreme Court in *Hoshiar Singh's case* (supra). The contention of the respondents that the candidates on the waiting list also have a right to be appointed is not legally sustainable in view of the ratio of law laid down by the Supreme Court in *Ashok Kumar and others v. The Chairman, Banking Service Recruitment Board and others* (3), *inter alia* laying down that every citizen has a fundamental right to be considered for appointment to a post under the State. Vacant posts or expected vacancies should be notified. Vacancies arising subsequently cannot be filled up by appointing candidates in the waiting list. Vacant posts or expected vacancies arising subsequently should be notified so as to afford an opportunity of being considered to all those who became eligible after the advertisement and before the occurrence of said additional vacancies.

(11) We have also considered the judgment relied upon by the respondents rendered in *Madan Lal's case* (supra). We are of the considered view that the respondents cannot derive any benefit from

the said judgment inasmuch as none of the petitioner had applied for the posts of District Attorneys in that case. As such, they had no *locus standi* to challenge the selection. The judgment rendered in *Ashok Kumar's case* (supra) has squarely covered the controversy involved in this case i.e., no selection/appointment can be made from the waiting list. The object of waiting list is simply to fill up the vacancies causing due to non-joining of candidates from the main selection list and not to fill up the anticipated vacancies, which may arise in the near future except for provisions in the Recruitment Rules or Executive Instructions. In the case in hand, no such Rule or Instructions were brought to our notice. The judgment of another Division Bench rendered in Civil Writ Petition No. 18577 of 1994, on 17th July, 1995 is prior to the judgment of *Ashok Kumar's case* (supra), which is dated 9th November, 1995. Moreover, the point of additional vacancies and waiting list was not an issue in that case. In the present case, the requisition of additional vacancies was sent immediately after the closing date and there was no request for recommending the candidates for the waiting list.

(12) The contention of the respondents that in view of the advertisement, the number of posts are subject to variation to any extent cannot be accepted as such wide powers cannot be allowed to be exercised by the Selection Authorities of the Government so as to clothe itself with the powers to *undo* that what is required to be done by the mandate or judicial pronouncements of the Supreme Court having binding effect on all Courts subordinate thereto and all the authorities by virtue of provisions of Article 141 of the Constitution of India. If the contention of respondents is accepted, it will nullify the judicial pronouncement and lead to arbitrariness and favouratism as has happened in the present case.

(13) We are of the considered view that laying down such a clause in the advertisement does not clothe even the Government or the recruiting agency to recruit arbitrarily and such a clause can be restricted to the limited extent of additional vacancies occurring in near future of the closing date and before the selection.

(14) In view of the reasons discussed above, we find no justification in the selection/appointment of respondents 7 and 8 which is not supported by law rather it is in derogation of law settled by the Supreme Court. As such, we quash the selection of respondents 7 and 8 and direct the respondents 1 and 2 to renotify the said posts and fill up the same in accordance with lay by inviting applications

and by considering the eligible candidates. If respondents 7 and 8 also applies and are found eligible, they may also be considered for the same.

(15) Since the State Government and the Commission have acted in violation of law laid down by the Supreme Court and have extended undue benefit to respondents 7 and 8 by making their selection and appointment and had deprived the other candidates thereby violating the fundamental rights enshrined in constitution of India, a duty is cast upon the State, being protector of rights of citizens, to make fair and free selection and appointment. We are of the considered view that the ends of justice will be met if the persons responsible for sending/recommending the candidates over and above the posts and making selection and appointment of respondents 7 and 8 are burdened with costs, which are quantified at Rs. 10,000, to be shared equally by the functionaries of respondents 1 and 2. The costs are to be deposited in the Haryana State Legal Aid Fund within two months.

(16) Writ Petition is allowed partly in the manner indicated above.

R.N.R.

Before M. L. Koul, J.

M/S KARNATAKA VIDYUT KARKHANA LTD. BANGLORE
AND ANOTHER,—*Petitioners.*

versus

HARYANA STATE ELECTRICITY BOARD,
PANCHKULA,—*Respondent.*

C.R. No. 2712 of 1995.

October 14, 1996.

Arbitration Act, 1940—S. 39—Code of Civil Procedure, 1908—S. 115—Appealable orders—Application for removal of arbitrator filed under provisions of Ss. 5 & 33 of the Act—Order passed on application is not appealable—Revision competent.

Held, that in order to find out whether the said order purporting to have been passed by the Sub Judge under section 5 read with