

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.7872 of 2013

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1. The Bihar State SC/ST Advocates Union, Through its President Sri Sadanand Paswan, Advocate S/O Late Rajkumar Paswan, Patna High Court, Resident Of Chitkoha Shivpuri Nahar, P.O- Anishabad, P.S- Gardanibagh, District- Patna.
 2. The Bihar State Chouharmal Lok Adhikar Morcha, Through its Chief Patron, Shri Yogendra Paswan S/O Late Parbhu Paswan, Resident of Awadhpuri, UCO, Bank Colony, East Gola Road, Nearby St. Karens School, Danapur, P.S- Rupaspur, District- Patna- 801503
 3. Chandra Bhushan Verma S/O Sri B.N. Verma, Chairman, Ram Sevak Seva Sansthan (Having its Registered Under Societies Registration Act, 1960), Nand Bhawan, Mohalla- New Jakkanpur, P.O- G.P.O,P.S- Jakkanpur, District- Patna.
- Petitioners

Versus

1. The State of Bihar Through The Chief Secretary, Govt. of Bihar, Patna.
 2. The Law Secretary, Law Deptt. Govt. of Bihar, Patna.
 3. The Advocate General Bihar, Patna.
 4. The Registrar General in The High Court of Judicature at Patna.
- Respondents

WITH

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Civil Writ Jurisdiction Case No. 22552 of 2013

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Binod Yadav, Son of Late Suresh Yadav, Member of Bharat Mukti Morcha, Regd. No. S256 of 2011, Resident of Village - Punabar, Police Station - Risiap, District – Aurangabad

.... Petitioner

Versus

1. The State of Bihar Through Its Chief Secretary, Government of Bihar, Patna
 2. The Law Secretary, Law Department, Government of Bihar, Patna
- Respondents

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Appearance :

(In CWJC No. 7872 of 2013)

For the Petitioner/s : Mr. Basant Kumar Choudhary, Sr. Advocate
Mr. Satish Kumar Sinha, Advocate
Mr. Mundrika Ram, Advocate

For the State : Mr. Lalit Kishore, PAAG

For Patna High Court : Mr. Bindhyachal Singh

(In CWJC No. 22552 of 2013)

For Petitioner/s : Mr. Basant Kumar Choudhary, Sr. Advocate
Mr. Satish Kumar Sinha, Advocate
Mr. Mundrika Ram, Advocate

For the State : Mr. Lalit Kishore, PAAG

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**CORAM: HONOURABLE THE ACTING CHIEF JUSTICE
AND
HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH**

**CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)
Date: 23-09-2015**

In these two writ applications filed under Article 226 of the Constitution of India, in the nature of Public Interest Litigation, the petitioners, in effect, have sought for quashing of notice, dated 08.03.2013, issued from the office of the Advocate General, Patna, Bihar, inviting willingness from the advocates, who are desirous of inclusion of their names in the panel for selection and appointment as Additional Public Prosecutor for the High Court. By the notice, those Additional Public Prosecutors, who are working at present, have also been requested to submit their willingness for inclusion of their names in the panel for selection.

2. With the help of this Public Interest Litigation, the petitioners seek issuance of a writ, in the nature of mandamus, directing the respondents to make provisions for 16% reservation for Scheduled Castes and 1% for Scheduled Tribes in the process of said appointment as Additional Public Prosecutor inasmuch as posts of Additional Public Prosecutor, according to the petitioners, with respect to which notice has been issued, fall within the meaning of "*posts and services under the State of Bihar*" in "*Bihar Reservation of*



Vacancies in Posts and Services (for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1991" (hereinafter referred to as 'the Act'). In this Public Interest Litigation, the petitioners claim that it is statutory obligation upon the State Government of Bihar to provide for reservation against vacancies in posts and services including the posts of Additional Public Prosecutor inasmuch as Section 4 of the Act prescribes 16% of reservation for scheduled castes and 1% for scheduled tribes against the vacancies.

3. Thus, the lone issue, which has been raised in both the writ applications, is as to whether the engagement, as Additional Public Prosecutor, for conducting criminal cases, in a High Court, can be said to be an appointment against "*vacancies in posts and services*", within the meaning of the Act.

4. Before we advert to the brief foundational facts of the present writ applications and the rival submissions made on behalf of the parties, it would be apt to mention at this stage itself that the engagement of advocates as Additional Public Prosecutors, in question, is, admittedly, covered by Section 24 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code') and not Section 25 of the Code.

5. We have heard Mr. Basant Kumar

Choudhary, learned Senior Counsel, appearing for the petitioners, Mr. Lalit Kishore, learned Principal Additional Advocate General, appearing for the State of Bihar/Office of the Advocate General, Bihar, and Mr. Bindhyachal Singh, learned counsel, for the Patna High Court.

6. Petitioner No.1 of CWJC No. 7872 of 2013 has been described as Bihar State SC/ST Advocates Union through its President, Sri Sadanand Paswan, whereas petitioner No.2 as Bihar State Chouharmal Lok Adhikar Morcha through its Chief Patron, petitioner No.3 is described as the Chairman of Ram Sevak Seva Sansthan; whereas petitioner of CWJC No. 22552 of 2013 has described himself as member of Bharat Mukti Morcha, a society registered under the Societies Registration Act, 1860, it is their case that under Section 4 of the Act, 50% of all vacancies, under the State, are required to be filled up from the candidates belonging to various reserved categories, which has not been taken care of in the impugned notice and, therefore, it is in the teeth of the provisions of the Act, and not sustainable.

7. Mr. Basant Kumar Choudhary, learned Senior Counsel, appearing on behalf of the petitioners, has contended that the engagement of the nature, sought to be made through the notice issued by the office of the Advocate General, is, in substance, filling of the vacancies in posts and



services in an establishment under the State of Bihar, though such appointments are to be made from amongst the practising advocates. He has submitted that with changing time, such engagements are required to be treated as services under the State Government or its establishment and if the persons, belonging to various reserved categories including scheduled castes and scheduled tribes, are not given preference by affirmative action, the State's act will be in violation of Article 16(4) of the Constitution of India read with provisions of the Act. He has also submitted that preferential treatment to the class of people, who are, otherwise, disadvantaged in the matter of public employment, is a recognized method and means to achieve constitutional goal of equality as embodied under Articles 15(4) and 16(4) of the Constitution of India. He has further submitted that all establishments, including the office of the Advocate General, are bound by the provisions of the Act and, in the absence of any provision for reservation as per Section 4 of the Act, the selection and engagement, in question, cannot be allowed to be continued.

8. Mr. Lalit Kishore, learned Principal Additional Advocate General, appearing on behalf of the respondent Nos. 1 to 3, has submitted, on the other hand, that the selection/engagement, in question, is not covered by the



provisions of the said Act, which are not applicable for the posts of Public Prosecutors or Additional Public Prosecutors to be appointed for the High Court inasmuch as the persons, holding such posts, are neither Government servants nor are they in Government service. According to Mr. Lalit Kishore, a State Government engages an advocate, including Additional Public Prosecutors, to act as an advocate on behalf of the State and, hence, the persons, so appointed, retain their status as advocates under the Advocates Act, 1961, and carry out their professional work as Additional Public Prosecutor.

9. It is submitted by Mr. Lalit Kishore, learned Principal Additional Advocate General, that Additional Public Prosecutor is not paid salary; rather, he is paid fees, either by way of retainer fee or fee for each day appearance in respect of case/cases conducted by them and an Additional Public Prosecutor, thus, remains free to carry on with his legal profession and take up such cases, which are not adverse to the interest of the State of Bihar.

10. It is submitted by learned Principal Additional Advocate General that while making selection for engagement as an Additional Public Prosecutor, due care is taken to ensure that adequate representation is made available to every class and strata of society without, however, compromising the merit, requisite for such post, though the

Act is not applicable to the selection and appointment of Additional Public Prosecutor.

11. Since the main submission made on behalf of the petitioners is focused on Section 4 of the Act read with Section 2(f) of the Act, we consider it apt to quote hereinbelow the relevant provisions of Section 4 and Section 2(f):-

"2. Definitions. – *In this Act, unless the context otherwise requires –*

....

(f) "Reservation" means reservation of vacancies in posts and services for Scheduled Castes/Scheduled Tribes and Other Backward Classes"

... ..

"4. Reservation for direct recruitment. – *All appointments to services and posts in an establishment which are to be filled by direct recruitment shall be regulated in the following manner, namely:-*

(1) *The available vacancies shall be filled up -*

(a) *from open merit category .. 50%*

(b) *from reserved category .. 50%*

.....

(2) *The vacancies from different categories of reserved candidates from amongst the 50% reserved categories shall, subject to other provisions of the Act, be as follows:-*

(a) *Scheduled Castes .. 16%*

(b) Scheduled Tribes .. 01%
(c) Extremely Backward Class.. 18%
(d) Backward Class .. 12%
(e) Woman of Backward Classes . 03%
Total ...50%

Provided that the State Government may by notification in the Official Gazette, fix different percentage for different districts in accordance with the percentage of population of Scheduled Castes/Scheduled Tribes and other Backward Classes in such districts:

Provided further that case of promotion, reservation shall be made only for Scheduled Caste/Scheduled Tribes in the same proportion as provided in this section.

(3) A reserved category candidate who is selected on the basis of his merit shall be counted against 50% vacancies of open merit category and not against the reserved category vacancies.

(4) Notwithstanding anything contained to the contrary in this Act or in any other law or rules for the time being in force, or in any judgment or decree of the Court, the provision of sub-section (3) shall apply to all such cases in which all formalities of section have been completed before the 1st November, 1990, but the

appointment letters have not been issued.

(5) The vacancies reserved for the Scheduled Caste /Scheduled Tribes and other Backward Classes shall not be filled up by the candidates not belonging to Scheduled Caste /Scheduled Tribes and Other Backward Classes except as otherwise provided in this Act.

(6) (a) In case of non-availability of suitable candidates from the Scheduled Castes and Scheduled Tribes for appointment and promotion in vacancies reserved for them, the vacancies shall continue to be reserved for three recruitment years and if suitable candidates are not available even in the third year, the vacancies shall be exchanged between the Scheduled Caste /Scheduled Tribes and the vacancies so filled by exchange shall be treated as reserved for the candidates for that particular community who are actually appointed.

(b) In case of non-availability of suitable candidates from the Extremely Backward Classes and Backward Classes the vacancies so reserved shall continued to be reserved for them for three recruitment years and if suitable candidates are not available even in the third year also, the

vacancies shall be filled by exchange between the candidates from the extremely Backward and Backward Classes and the vacancies so filled by exchange shall be treated as reserved for the candidates of that particular community who are actually appointed.

(c) In case of non-availability of suitable candidates for the vacancies reserved for the women of backward classes; the vacancies shall be filled in order of preference as follows:-

(i) by the candidates from the Scheduled Caste;

(ii) by the candidates from the Scheduled Tribes;

(iii) by the candidates from extremely Backward Classes;

(iv) by the candidates from Backward Classes.

The vacancies so filled in the transaction shall be treated as reserved for the candidates of that particular community who are actually appointed.

(d) If in any recruitment year, the number of candidates of Scheduled Castes/Scheduled Tribes, extremely Backward and Backward Classes and are less than the number of vacancies reserved from even after exchange formula the remaining backlog vacancies may be filled by general

candidates after deserving them but the vacancies so deserved shall be carried forward for three recruitment years.

(e) If the required number of candidates of Scheduled Castes, Scheduled Tribes and Extremely Backward and Backward Classes and Women of Backward Classes are not available for filling up the reserved vacancies, fresh advertisement may be made only for the candidates belonging to the members of the Scheduled Castes, Scheduled Tribes and Extremely Backward and Backward Classes and Women of Backward Classes, as the case may be, to fill the backlog vacancies only.

(f) Notwithstanding anything contained to the contrary in the Act or in any other law or rule for the time being in force, or in any judgment or decree of the Court, the provisions of Section 4 shall apply to all such cases in which all formalities of selection have been completed before 28th April, 1993 but the appointment letters have not been issued."

12. As has been noted above, the sole question, which has arisen for determination in the present proceedings, is as to whether the selection process/engagement, in question, is subject to "reservation"

within the meaning of the Act and whether the vacancies against which the engagements are sought to be made can be said to be "*appointments in posts and services*".

13. It is not in dispute that the appointments, which are sought to be made through notice, in question, are being made under Section 24 of the Code which provides that the Central Government or the State Government shall, after consultation with the High Court, appoint a "Public Prosecutor" and one or more "Additional Public Prosecutors" for conducting, in High Court, any prosecution, appeal or other proceeding on behalf of the Central Government or State Government, as the case may be. There is another class of Assistant Public Prosecutors, who are appointed under Section 25 of the Code. The mode of appointment of Public Prosecutor and Additional Public Prosecutor/Special Public Prosecutor under Section 24 of the Code and mode of appointment of Assistant Public Prosecutor under Section 25 of the Code are substantially different. There is significant difference in role and position of the Public Prosecutor (including Additional Public Prosecutor and Special Public Prosecutor) and Assistant Public Prosecutor.

14. If we look to Section 2(u) of the Code, which defines Public Prosecutor, we find that it refers to only such persons, who are appointed under Section 24 and includes any person acting under the direction of such Public



Prosecutor and it does not include Assistant Public Prosecutor appointed under Section 25 of the Code. The post of Assistant Public Prosecutor, as referred to under Section 25 of the Code, has been held to be a civil post within the meaning of West Bengal Assistant Public Prosecutors (Qualifications, Method of Recruitment and Conditions of Service) Rules, 1974, in the case of ***Samarendra Das, Advocate v. State of West Bengal***, reported in **(2004) 2 SCC 274**. The Supreme Court, in case of ***State of U.P. vs. Johri Mal***, reported in **(2004) 4 SCC 714**, had occasion to draw distinction between appointment of Public Prosecutor/ Additional Public Prosecutor/Special Public Prosecutor within the meaning of Section 24 of the Code and that of Assistant Public Prosecutor under Section 25 of the Code. Dealing therewith, the Supreme Court held, in ***Johri Mal*** (supra), that the holder of office of Public Prosecutor does not hold a civil post and by holding such post, no status is conferred on the incumbent. The Supreme Court held. in ***Johri Mal*** (supra), at paragraphs 38 and 39, as follows:

"38. *A distinction is to be borne in mind between appointment of a Public Prosecutor or Additional Public Prosecutor, on the one hand, and Assistant Public Prosecutor, on the other. So far as Assistant Public Prosecutors are concerned, they are employees of the State. They hold*

civil posts. They are answerable for their conduct to higher statutory authority. Their appointment is governed by the service rules framed by the respective State Governments.

39. *The appointment of Public Prosecutors, on the other hand, is governed by the Code of Criminal Procedure and/or the Executive instructions framed by the State governing the terms of their appointment. Proviso appended to Article 309 of the Constitution of India is not applicable in their case. Their appointment is a tenure appointment. Public Prosecutors, furthermore, retain the character of legal practitioners for all intent and purport. They, of course, discharge public functions and certain statutory powers are also conferred upon them. Their duties and functions are onerous but the same would not mean that their conditions of appointment are governed by any statute or statutory rule."*

15. In subsequent and comparatively recent decision in the case of ***Centre of Public Interest Litigation vs. Union of India [(2012(3) SCC 117]*** , the Supreme Court has held that in appointment of Public Prosecutor, the principle of master-servant does not apply and such appointment is not an appointment to a civil post. For the

benefit of quick reference, paragraph 27 is being extracted hereinbelow:-

"27. *In the appointment of Public Prosecutor, principle of master-servant does not apply. Such an appointment is not an appointment to a civil post."*

16. This has not been disputed at the Bar, in course of rival submissions, that the persons engaged as Public Prosecutor, while conducting cases in the High Court, retain their professional status as an Advocate under the Advocates Act, 1961, and are subject to disciplinary control by the State Bar Council or Bar Council of India, whereas no such disciplinary control is exercised by the appropriate Government/establishment on those persons, which may have appointed as Additional Public Prosecutor. They are certainly not employees under the State Government or its establishment.

17. In our view, therefore, the post of Additional Public Prosecutor/Public Prosecutor for which willingness has been sought from the advocates through impugned notice does not fall within the meaning of "*services and posts in an establishment*" as envisaged under Section 4 of the Act. Consequently, the posts of Public Prosecutor and Additional Public Prosecutor are, we hold, not subject to reservation under the Act.

18. Because of what have been discussed and

pointed out above, we are clearly of the view that no case for issuance of any writ, in the nature of *mandamus*, has been made out inasmuch as the petitioners have failed to make out any case of infringement of legal or constitutional right.

19. In the result and for the foregoing reasons, the writ applications stands dismissed.

20. However, there shall be no order as to costs.

(Chakradhari Sharan Singh, J.)

I. A. Ansari, ACJ. : I agree.

(I. A. Ansari, ACJ.)

Mrl/AFR

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