REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5699 OF 2000

SUPREME COURT OF INDIA

JUDGMENT

The High Court of Judicature for Rajasthan .. Appellant(s)

-versus-

Veena Verma and another .. Respondent (s)

And

Civil Appeal No. 5702 of 2000
Civil Appeal No. 5700 of 2000

Civil Appeal No. 5701 of 2000

J U D G M E N T

MARKANDEY KATJU, J.

C.A. Nos. 5699/2000, 5702/2000 & 5700/2000

1. These appeals are directed against the judgment & order of the Rajasthan High Court dated 30.4.1999 in D.B. Special Civil Appeal No. 410/1998. CA No. 5699/2000 is filed by the High Court of Rajasthan, C.A. No.5702/2000 is by State of Rajasthan and C.A. No. 5700 is by a promotee Judicial Officer.

2. An advertisement dated 31.10.1994 was published by the High Court inviting applications for being considered for appointment in the RHJS against 7 vacancies including the two vacancies reserved for candidates belonging to Scheduled Castes and one vacancy for a candidate belonging to Scheduled Tribe. It was also stipulated in the advertisement that the number of posts could be increased.

3. Civil Writ Petition No. 4580/1996 was filed in the Rajasthan High Court by Ms. Veena Verma, (first respondent in CA No. 5699/2000) an Advocate practicing in Ajmer, who was a candidate for direct recruitment in the Rajasthan Higher Judicial Service ('RHJS' for short). She stood 8th in the merit list of the selection. In her petition she claimed that she was

entitled to be declared selected and appointed as on a correct calculation, the vacancies for direct recruitment in the RHJS in accordance with the applicable rules came to 10 and not 7, and the petitioner being the 8th selected candidate was entitled to appointment against the post. The learned Single Judge dismissed the petition by judgment dated 30.3.1998. But by the impugned judgment dated 30.4.1999, the Division Bench of the High

Court has set aside the judgment of the learned Single Judge of the High Court and directed the High Court to determine the number of vacancies as on 31.10.1994, and if the vacancies were more than seven, then consider Veena Verma for the post in RHJS.

CA No. 5701/2000

4. Vide a Notification dated 21.12.1996, applications were invited for appointment to eleven posts of RHJS by direct recruitment. The appellant and certain other Chief Judicial Magistrates filed WP No. 139 of 1997 for quashing the said notification dated 21.12.1996 on the ground that the said number of posts were not available for direct recruitment. They contended that ad hoc and temporary posts were being counted and added to the

sanctioned strength of RHJS service to create more posts for direct recruits. The said writ petition was heard along with DB(C) Special Appeal No. 410/1998. The said writ petition was dismissed on 30.4.1999 in view of the judgment dated 30.4.1999 rendered in DB(C) Special Appeal No. 410/1998. The said order is challenged in this appeal.

5. The recruitment to RHJS is governed by Rajasthan Higher Judicial Service Rules 1969 ("the Rules" for short), as amended from time to time. Rule 6 of the Rules provides for the strength of the service and also provides for varying the strength from time to time. Rule 9 of the Rules provides that the number of persons appointed to the Service by direct recruitment shall at no time exceed one third of the total strength of service.

It is also provided that subject to the aforesaid limit every fourth person, after three persons appointed by promotion in the service, has to be a direct recruit as far as possible. Respondent No. 1 Veena Verma contends that on a correct application of the aforesaid rules the correct number of vacancies in RHJS at the relevant time came to 10 and not 7. She, therefore, submitted that if the vacancies had been correctly calculated by the High

Court she would have been among the 10 selected candidates and, therefore, would have been appointed as a result of the selection.

6. The appellants, on the other hand, contended that the writ petitioner (Veena Verma) had no legal right to maintain a writ petition for getting herself declared to be selected or appointed. According to the appellants,

the vacancies had been correctly calculated on a proper interpretation of the rules and the appellant had no right to challenge the calculation of vacancies as she could not compel the authorities to advertise more posts or to appoint more persons than the authorities decided to do.

7. The learned Single Judge, after examining the rival contentions, came to the conclusion that on a correct interpretation of rule 6 of the Rules, the cadre strength can only be changed by orders passed under sub-rule (2) of Rule 6. According to the learned Single Judge the cadre strength is as specified in Schedule-I to the Rules, and it can only be changed by an order under Rule 6 (2). The plea of Veena Verma that there were ten vacancies on

a proper calculation on the correct interpretation of the Rules did not find favour with the learned Single Judge. The learned Single Judge found that the selection was for a definite number of posts viz. 7 as advertised, though the advertisement mentioned that the vacancies could be increased. The learned Single Judge observed that no increase in the vacancies was ordered or effected by the High Court and, therefore, when there were only 28

vacancies in the RHJS, 7 was the maximum posts that could be filled by direct recruitment. Hence, the writ petition of Veena Verma was rejected as she was 8th in the merit list.

8. Veena Verma challenged the order of the learned Singh Judge in DB. (C) Special Appeal No. 410/1998. The Division Bench held that posts created beyond the number specified in Schedule I to the Rules should be

treated to be an increase in strength under Rule 6(2). It referred to the number of posts manned by members of RHJS as under:

> "We had directed the learned counsel for the High Court to submit before us date-wise charts showing the vacancy position from time to time. The position which emerges is that at the relevant time, the number of posts in the RHJS mentioned in Schedule I to the Rules was 89 only against which factually more than 200 persons were holding posts which were expected to be manned by

members of the RHJS. On 31.7.1992, 17 direct recruits and 66 promotees were occupying posts in RHJS on substantive basis whereas a total of 167 officers were working in the posts of RHJs level including those appointed on substantive basis, officiating basis and ad hoc basis. On the date of the advertisement the position was that 20 direct recruits and 63 promotees were working in the RHJS on substantive basis whereas the total number of officers manning the posts of RHJS level was 204. The statistics produced by the High Court further shows that on 31.7.1992, 31 Courts of District

and Sessions Judges, 56 Courts of Addl. District and Sessions Judges and 23 Courts, which have to be manned by Officers of the level of members of RHJS were available in the State. The total courts available for members of RHJS officers were 110. Besides this, there were 5 family courts and 18 other Tribunals and Courts expected to be manned by RHJS officers available. Also besides this, three posts were available on deputation either at the High Court Registry or the State government and other autonomous bodies. Thus, the total courts available for being manned by the RHJS Officers by

31.7.1992 were 176. It is true that so far as deputation on posts which are not to be exclusively manned by the members of RHJS, the Government or autonomous bodies are not obliged to take members of the RHJS on deputation and, therefore, sending of officers to such posts on deputation depends upon their acceptance. Such posts, therefore, cannot be counted while counting the strength of service. Even otherwise, such posts are not created by the Governor in consultation with the court under Rule 6 (2) so that they can be taken to be variance of the strength of the service under Rule 6

(2) of the Rules. However, this is not the case with the posts for which qualification for appointment itself is being a member of the judicial service. Such posts cannot be taken to the posts which are not reckoned for the purpose of determining vacancies for direct recruitment. The position as on 31.10.1994, when the vacancies were advertised was that, 32 courts of District Judges, 30 posts of Courts of Addl. District and Sessions Judges, 30 posts of RHJS level, 5 Consumer fora, 21 posts in Tribunals and Boards, 39 posts for deputation to the Registry and the State Government, 32

> posts in consumer fora, totalling 219 were available, 167 officers were posted to man them. Similarly, when 219 posts, which could be filled in by appointment from the member of the RHJS were available as on 31.10.1994, only 203 officers were posted to man them."

The Division Bench concluded that in such a situation, not to count such posts as are required to be manned by officers of the level of RHJS, for the

purpose of direct recruitment on the specious excuse that they were temporary posts outside the cadre for temporary periods would not be justified. The High Court concluded that whenever a court is created, whatever be the nature or tenure of the post stated in the order creating it, irrespective of whether Rule 6 (2) is mentioned therein or not, posts will have to be deemed to be created under Rule 6 (2) of the Rules enhancing the

cadre strength. It therefore allowed the appeal holding that when the advertisement gave the number of posts as seven, but also stated that the 'number of vacancies are likely to be increased', no finality could be attached to the number mentioned in the advertisement and the writ petitioner should be given appointment, if the number of vacancies were actually more than seven.

9. The said order is under challenge in these appeals. The State of Rajasthan and the promotee Judicial Officer contend that in the absence of an order under Rule 6(2) varying the strength of service, notifications or orders creating courts cannot be treated as increasing the strength of the

service. On the other hand, the High Court of Rajasthan in its appeal supports the finding of the Division Bench that any order creating a court ought to be deemed as creating a post under Rule 6(2). The High Court's challenge is limited to be direction to increase the advertised vacancies from seven. On the contentions urged, the points arising for decision are : (1) what would be cadre strength on correct interpretation of the Rules? (2)

whether the High Court correctly calculated the vacancies for direct recruitment at the relevant time?; (3) whether the writ-petitioner (Ms. Veena Verma) could compel the High Court to increase the vacancies to the maximum permissible limit under the restrictions provided by the rule and to appoint or consider appointment of the appellant-petitioner to a post in the RHJS?

10. Rule 6 of the Rules provide for the strength of the Service. It reads as under :-

"6. **Strength of the Service :**

(1) The strength of the service shall, until orders varying the same have been passed under sub-rule (2), be as specified in Schedule I.

(2) The strength of the service may be varied by the Governor from time to time, in consultation with the court.

(3) Notwithstanding anything contained in sub-rules (1) and (2), the Governor may, in consultation with the Court, hold any appointment to the service in abeyance

> for such time as he deems fit, without thereby entitling any person to compensation."

11. Rule 7 of the Rules provides that for the purpose of recruitment to the Service the principles and procedures of recruitment and promotion laid down shall be followed.

12. Rule 8 provides that recruitment to the Service shall be made; (i) by promotion from amongst the members of the Rajasthan Judicial Service or (ii) by direct recruitment from the advocates practicing in the court or courts subordinate thereto for a period of not less than seven years.

13. Rule 9 provides for appointment to the Service. It reads as under:

"9. <u>Appointment to the service</u>:-

(1) Subject to the provisions of these rules, appointment of persons to the service shall be made by the Governor on the recommendation of the court made from time to time;

Provided that the number of persons appointed to the service by direct recruitment shall at no time exceed one

third of the total strength of the service.

(2) Subject to the provisions of sub-rule (1), after every three persons appointed by promotion, the fourth person shall, as far as possible, be appointed by direct recruitment. If a suitable person is not available for appointment by direct recruitment, the post may be filed by promotion from amongst the members of the Rajasthan Judicial Service."

14. Rules 6, 7, 8 and 9 provide the scheme of recruitment. The proportion of promotees and direct recruits in the RHJS has to be maintained in accordance with rule 9. Rule 9 provides two things: (i) the number of persons appointed to the Service by direct recruitment shall at no time exceed one third of the total strength of the service. Thus, a maximum limit of one third at any given point of time is provided for appointment of

direct recruits in the Service in the RHJS; (ii) after every three persons appointed by promotion, the fourth person shall, as far as possible, be appointed by direct recruitment. The proportion has to be maintained keeping in view the total strength of the service.

15. The strength of the service as per Rule 6(1) is that specified in Schedule-I until orders varying the same are passed under sub-rule (2). Sub-rule (2) of rule 6 provides that the strength of the service may be varied by the Governor from time to time in consultation with the Court. The question arises as to whether the strength of the service can be taken to be varied by the Governor creating courts of Addl. District Judges or naming

the places where such courts are to be established, in consultation with the Court without specifically varying the strength of the service under Rule 6(2). In our opinion the answer has to be in the negative.

16. The writ-petitioner contended that neither an amendment of the Schedule to the Rules, nor an order under Rule 6(2) was necessary, and by

creation of courts or posts, the strength of the service is deemed to be varied. The promotees, however, submitted that the proper and correct construction to be put on Rule 6 would be that mere orders creating posts in the RHJS exceeding the number of posts mentioned in the Schedule cannot be taken to be orders passed under sub-rule (2) of Rule 6 varying the strength of the service.

17. It was pointed out on behalf of the respondents that the term 'member of the Service' has been defined in Rule 3 (f) of the Rules to mean a person appointed in a substantive capacity to a post in the service. It was also pointed out that Rule 22 provides for temporary or officiating appointment of a person from amongst the persons who are eligible for appointment to

the Service by promotion under clause (1) or under rule 8 when temporary or permanent vacancies occur.

18. It was submitted on behalf of Veena Verma, the writ petitioner, that in the advertisement in question, though 7 posts were mentioned it was also stipulated that the posts advertised may be increased. Hence it was

submitted that the advertisement was not for 7 posts only. It was further submitted that the respondents wrongly advertised only 7 posts and, in fact, 10 posts should have been advertised.

19. It was submitted that the direct recruits have a quota of 33% in the total cadre strength. In the schedule to the Rules, the cadre strength has

been specified as 89, out of which only 19 posts were held by the direct recruits. In fact, 33% of 89 posts is around 30 since 19 posts were held by the direct recruits. Hence it was contended that at least 10 more direct recruits were required to be taken in the cadre of RHJS. It is submitted that this was precisely the reason why although seven posts were mentioned in the advertisement, a rider was put that the posts advertised may be

increased. After the selections were held, in which the petitioner also appeared, a list of selected candidates was prepared and the list prepared by the Selection committee was placed before the Full Court.

20. The writ-petitioner asserted that in the select list prepared by the Selection Committee, her name finds place at serial No. 8. The Full Court

considering that only seven posts were to be filled, considered the case of the first seven candidates in the merit list and recommended them for appointment to the Governor. The writ-petitioner further contended that the petitioner is being denied appointment on wrongful interpretation of Rule 6 of the Rajasthan Higher Judicial Service Rules, 1969.

21. The appellant contested the writ petition filed by the petitioner and strenuously urged that the writ petitioner had applied knowing fully well that the selections were limited to seven posts only. The mere inclusion of the words in the advertisement that "the number of posts is likely to increase" does not mean that she can take it for granted that a selection

which was advertised for seven posts, was intended for more posts. We agree with this contention. Since only 7 posts were advertised only 7 appointments could be made. However, even assuming that more than 7 appointments could be made, since the Full Court of the High Court recommended only 7 persons the Government could not appoint more than 7.

22. The practice followed by the authorities in recruitment was that vacancies in the RHJS were determined for filling every fourth post by direct recruitment and these were advertised. At the relevant time, when the vacancies were advertised in the quota of direct recruits, there were 28 vacancies, therefore seven posts were advertised for direct recruitment in

RHJS. Hence in our opinion advertisement of seven vacancies was rightfully done. The Selection Committee was called upon to make the recommendation for seven posts. The list forwarded by the Selection Committee was considered and all the seven persons who were recommended by the Selection Committee were recommended by the Full Court to be appointed.

23. It may be noted that Rule 9 prescribes the maximum quota for direct recruits, but there is no minimum quota. It is entirely in the discretion of the authorities concerned to decide how much percent of the total vacancies in RHJS will be allotted to direct recruits, provided the maximum prescribed is not exceeded.

24. As regards the process of selection and the provision for keeping a list ready for appointment on the fourth post, in our opinion the writ-petitioner had no right to get appointment since the advertisement was only for seven posts and the writ-petitioner has not challenged the advertisement. We extract below the resolution of the full court of the High Court

recommending seven candidates for appointment to RHJS:

> "Having considered the recommendations of the Committee constituted under Rule 20 (2) of the Rajasthan Higher Judicial Service Rules, 1969, resolved to accept unanimously the recommendations and to send the names of the following selected candidates, arranged in order of merit to the Governor for appointment to the Rajasthan Higher Judicial Service :

1Shri Bulaki Das Saraswati (Bikaner)
2Shri Shashital Gupta (Dholpur)
3Smt. Usha Dube, (Udaipur)
4Shri Mahendra Kumar Maheshwari (Ajmer)
5Shri Vishnu Kumar Mathur (Jaipur)
6Miss Anuradha Sharma (Bhilwara)
7Shri Sukhpal Bundel (SC) (Dausa)."

The writ-petitioner's name was not in list of candidates recommended by the Full Court.

25. The appellants also point out that the advertisement only stated that the number of posts could be increased, but no such increase in fact was made. We are of the opinion that the Court cannot issue a mandamus to increase the posts. The High Court had appointed a Committee to determine the vacancies for the period 1.8.1991 to 31.7.1992. The Committee reported

that 28 vacancies had occurred during the said period. On the recommendation of the said Committee, the Full Court of the High Court resolved on 29.9.1993 that 7 vacancies were to be filled by direct recruits. The said resolution is extracted below:

> "Having considered the report of the promotion committee, resolve that seven vacancies are determined for direct recruitment to the RHJS cadre keeping reservation for Schedule Castes/Scheduled Tribes as per rules".

26. It is evident that the selection was only for 7 posts. In the Full Court Resolution it was nowhere mentioned that the posts were likely to increase. Subsequent ad hoc promotions were for subsequent vacancies and for that

there was a fresh advertisement. In our opinion, the writ petitioner could not have any claim to be appointed against future vacancies in view of the decision in **Shankarsan Dash** vs. **Union of India** AIR 1991 SC 1612, wherein it was observed:

> "We, therefore, reject the claim that the appellant had acquired a right to be appointed against the vacancy arising later on the basis of any of the rules"

27. We cannot agree with the view of the Division Bench of the High Court that creation of posts beyond the cadre strength mentioned in Schedule-I automatically implies increase in the strength in service under

sub-rule (2) of Rule 6 of the Rules. It may be noted that under sub-rule (2) of rule 6, the strength of the service may be varied by the Governor from time to time in consultation with the High Court. No such order has been passed under sub-rule (2) of Rule 6. Without such an order it cannot be said that the strength of the service has been increased. It may be mentioned that posts can be created de hors the cadre of a service, and these are known

as ex cadre posts. The posts created without a specific order under Rule 6(2) are ex cadre posts. Hence in our opinion the temporary or permanent vacancies or posts created beyond the number of posts in Schedule-I without a specific order under Rule 6(2) varying Schedule-I to the Rules are only ex cadre posts, and can only be filled in by promotees, and not by direct recruitment.

28. It may be noted that Rule 9(2) uses the words 'as far as possible'. In our opinion, this means that there is no hard and fast rule that after every three persons appointed by promotion, the fourth person has to be appointed by direct recruitment. In our opinion, the Division Bench of the High Court has given a wrong interpretation of Rule 9(2) of the Rules by observing "it

does not give a licence to the respondents to refuse to appoint every fourth person by direct recruitment on the ground that it was not possible for any other reason than the maintenance of the limit of one third of the total strength imposed by sub-rule (1) of Rule 9 on direct recruitment". In our opinion this is a wrong view taken by the Division Bench of the High Court as is evident from the words 'as far as possible' in Rule 9(2). These words

give a discretion to the authorities, and the Court cannot interfere with this discretion, unless it is palpably arbitrary.

29. In our opinion, the Division Bench of the High Court erred in law in holding that for the purpose of direct recruitment the temporary or permanent posts created outside the cadre without amending Schedule-I

were also to be included while calculating the strength of the service.

30. The Division Bench also erred in holding that whenever posts are created, the strength of the service is deemed to have been automatically increased although there is no order under Rule 6(2) in this connection amending Schedule-I. In our opinion, there has to be a specific order under

Rule 6(2) amending Schedule-I otherwise it cannot be said that the strength of the cadre has been increased. Hence, in our opinion, the temporary or permanent posts created outside the cadre cannot be taken into consideration for determining the strength of the cadre.

31. For the reasons given above, CA No. 5699, 5702 and 5700 of 2000

are allowed. The impugned judgment of the High Court is set aside and the order of the learned Single Judge dismissing the writ petitions filed by Veena Verma stands restored. There shall be no order as to costs.

32. Consequently, CA No. 5701/2000 is also allowed. As the High Court dismissed WP No. 139/1997 without examining the case on merits, in

view of its judgment in the case of Veena Verma, the order dated 30.04.1999 in WP No. 139/1997 is set aside and the writ petition is remanded to the High Court for disposal on merits in accordance with law.

.....J.

SUPREME COURT OF INDIA

JUDGMENT

(R. V. Raveendran)

.....J.
(Markandey Katju)

New Delhi;
07 July, 2009

JUDGMENT