

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No. 5925 of 2015

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1. Dr. Bibhuti Anand son of Shree Chandra Prakash Jha, resident of Mohalla-Mithila Colony, Road No.14A, Rajiv Nagar, P.O.Keshri Nagar, P.S. Rajiv Nagar, District- Patna.
 2. Dr. Pramod Prakash Singh son of Sri Niwas Singh, resident of village & P.O. Laheri, P.S. Kochas, District- Rohtas, Sasaram.
 3. Dr. Prabhat Kumar son of Sri Vijay Narayan, resident of village- Sahora Chak, P.O. Chandhan, P.S. Makhdupur, District- Jehanabad.
 4. Dr. Pritee Yadav @ Pritee Yadav daughter of Sri Radhey Krishna Prasad, resident of Mohalla- Bara Telpa, P.O. Chapra, P.S. Chapra Nagar, District- Saran.
 5. Dr. Ravi Prakash son of Sri Jagdish Singh, reasident of Canal Road, Dehri-on-Sone, P.O. & P.S. Dehri-on-Sone, District- Rohtas, Sasaram.

.... Petitioner/s

Versus

1. The State of Bihar through Principal Secretary, Department of Health, Government of Bihar, Patna.
2. The Principal Secretary, Department of Health, Government of Bihar, Patna.
3. Bihar Public Service Commission through the Joint Secretary-cum-Examination Controller, Jawahar Laal Nehru Marg, Bailey Road, Patna.
4. The District Magistrate-cum-Chairman, District Health Society, Rohtas.
5. Civil Surgeon-cum-Secretary, District Health Society, Rohtas.

.... Respondent/s

with

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Civil Writ Jurisdiction Case No. 6300 of 2015

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1. Dr. Indu Kumari wife of Mr. Mirtunjay Giri, C/o Aakash Dental Clinic, Choudhary Market, Raja Bazar, Opp. HMRI, Patna- 800014

.... Petitioner/s

Versus

1. The State of Bihar through Principal Secretary, Department of Health, Government of Bihar, Patna
2. The Principal Secretary, Department of Health, Government of Bihar, Patna
3. Bihar Public Service Commissioner through the Joint Secretary-cum-Examination Controller, Jawahar Lal Nehru Marg, Bailey Road, Patna
4. The District Magistrate-cum-Chairman, District Health Society, Rohtas
5. Civil Surgeon-cum-Secretary, District Health Society, Rohtas

.... Respondent/s

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Appearance :
(In CWJC No. 5925 of 2015)

For the Petitioner/s : Mr. Y. V. Giri, Sr. Advocate
For the Respondent/s : Mr. SC33-Ritesh Kumar
For the B.P.S.C. : Mr. Sanjay Pandey

(In CWJC No. 6300 of 2015)

For the Petitioner/s : Mr. Y. V. Giri, Sr. Advocate
For the Respondent/s : Mr. Shailesh Kumar
For the B.P.S.C.: Mr. Sanjay Pandey

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CORAM: HONOURABLE MR. JUSTICE AJAY KUMAR TRIPATHI
ORAL JUDGMENT
Date: 25-06-2015

02. 25.06.2015

Both the writ applications have been heard together as common question of fact and law has been raised, seeking similar, if not identical, relief, therefore, they are disposed off also by a common order.

2. The petitioners are applicants as well as candidates who have responded to the advertisement no. 5 of 2015, issued by Bihar Public Service Commission (hereinafter referred to as "B.P.S.C." for short) for filling up the post of Dental Doctors on a permanent basis. The advertisement is Annexure-5. They seem to be aggrieved by clause 3 (kha) and 5 (ii) and (iii) of the advertisement and they want the same to be struck-down as violative of Article 14 and 16 of the Constitution of India.

3. In addition to that they also want a direction upon the B.P.S.C. to treat the petitioners to have been working in a government hospital as a Dental Doctor w.e.f. 24.06.2011 as also to award marks accordingly as

per clause 5 (iii).

4. The said date of 24.06.2011 has significance, because the petitioners would like that date to be the date of their appointment and not treat the date of their joining as the date of their initial appointment. Even though it may have been done on the basis of a decision rendered in L.P.A. No. 1246 of 2011, dated 08.10.2012 (Annexure-4 to the writ application).

5. The facts as rendered and pleaded in C.W.J.C. No. 5925 of 2015 is that in the year 2011, the District Magistrate-cum-Chairman, District Health Society, Rohtas at Sasaram had issued an advertisement to appoint Dental Doctors in the district of Rohtas on contractual basis. The said advertisement is Annexure-1 to the writ application.

6. The Civil Surgeon-cum-Secretary of the District Health Society, Rohtas published a select list of 17 Dental Doctors on 18.06.2011. Name of these petitioners figured in the said select list. This fact is corroborated by perusal of Annexure-2.

7. The petitioners waited for issuance of an order of posting, which did not materialize. Though vide a notification dated 24.06.2011, contained in Annexure-3, five persons were given orders of posting, but these



petitioners were left out as their name did not figure in the said list.

8. Perplexed by such a decision of the respondents, petitioner no. 1 approached the High Court by filing C.W.J.C. No. 3296 of 2012. Similar writ application was filed by other petitioners, which was numbered as C.W.J.C. No. 6855 of 2012. Both the writ applications were dismissed by the Learned Single Judge against which an appeal was preferred, which was registered as L.P.A. No. 1246 of 2012. The decision rendered in the said LPA, dated 08.10.2012 is Annexure-4 to the writ application.

9. A reading of the Division Bench's decision would indicate that these petitioners were left out of the initial notification for posting, because of absence of Dental Chairs being available to utilize their services. The Division Bench, therefore, gave a direction giving liberty to some of the candidates to procure and provide Dental Chairs on their own as also if there were Dental Chairs available it should be made available on priority for candidates falling under the reserved categories.

10. Since despite the order of the Division Bench, nothing came to be done for a while, a contempt application, namely, M.J.C. No. 745 of 2013 was filed.



During the pendency of the contempt application, joining letters were issued on 14.07.2014 and 30.07.2014. They have continued to render services thereafter uninterrupted.

11. The grievance of these petitioners is that instead of regularizing their service, a fresh advertisement, dated 26.03.2015 (Annexure-5) came to be issued by B.P.S.C. This advertisement invited applications for regular appointment against 558 sanctioned posts of Dental Doctors.

12. These petitioners have serious apprehension with regard to clause 3 (kha) and clause 5 (ii) and (iii), because they treat those provisions with suspicion as it is deliberately loaded against them and will come in their way of selection, if not appointment viz-a-viz other candidates.

13. Learned senior counsel for the petitioners submits that if the appointment is required to be made on the basic grade of a Dental Doctor why should weightage be given to post-graduate degree holders, because degree of BDS should be good enough for eligibility and consideration. They apprehend that majority of the vacancies may be cornered by Post-graduate degree holders.





14. The other apprehension expressed by learned Sr. Counsel with regard to clause 5 (ii) and (iii) again relates to award of marks to post-graduate degree holders as well as award of marks for the period of experience. Learned Sr. Counsel submits that award of 10 marks to post-graduate would be allowing them to steal a march against BDS degree holders and, secondly, under the background under which they came to be appointed after a protracted legal battle, they shall be unnecessarily losers when it comes down to award of marks for experience.

15. It is their stand that for all practical purposes since the petitioners were selected and notified by a common select list on 18.06.2011 (Annexure-2). Since a limited notification by giving posting to only 5 persons from the list was issued leaving out these petitioners on 24.06.2011 (Annexure-3), they should be treated at par for the purposes of awarding of marks for experience. If not, then the said provision should be struck down as discriminatory and violative.

16. The stand of the B.P.S.C. is that they are guided by the requisition which is sent by the State of Bihar, Department of Health. The terms and conditions of the advertisement are based on the requisition. They

have annexed the requisition dated 27.02.2015, as Annexure-A and it is their case that they have not deviated from the said requisition. Attempt has also been made to justify the provisions and the clause which are under attack.

17. State too has filed a counter affidavit. They take a stand that there is no ambiguity or illegality in the advertisement and the clauses under challenge. Weightage can be given and is required to be given for higher qualification in matters of recruitment. The same cannot be said to be discriminatory or arbitrary. Award of weightage or preference to people with higher qualification is only giving encouragement to merit.

18. To that extent the stand of the respondents seems to be correct. An employer does have the prerogative to lay down the criteria in matter of selection and if they can get more qualified people for a particular job, it cannot be said to be violative of Article 14 and 16 of the Constitution of India. Respondents are fortified in taking such a stand by placing reliance on a decision rendered by a ***Division Bench in C.W.J.C. No. 855 of 2015, which was the case of Dr. Dharmbir Kumar & Others versus State of Bihar & Another***, where clause 7, sub-clause (ii) thereof Bihar Dental Service Rules, 2014

came under attack. This clause also envisaged award of marks for experience. The Division Bench order is Annexure-B to the counter affidavit of the State and this Court is tempted to quote the relevant portion of what the Division Bench opined on the issue:

“Basically, it is for the recruiting agency to stipulate the procedure for selecting the candidates. It is only when the procedure is found to be patently illegal, that the Court would interfere. For selecting candidates, written test can certainly be treated as a good method, but there is nothing in law which mandates that written test is the only method to select the candidates.

Awarding of marks for experience is not uncommon. The candidates who have been engaged on contractual basis served the Government Hospitals at a time when their other colleagues have been pursuing their green pastures. The State can certainly recognize the service of such candidates, subject, of course, to certain limits.”

19. In view of the above, the challenge of these petitioners as well as the grievance not to award marks to post-graduate degree holders do not have legal support or legs to stand on. Such provision therefore is not required to be struck down or interfered with.

20. Similarly award of marks for experience in view of the ratio of the Division Bench rendered in the case of Dr. Dharmbir Kumar (supra) also does not

require any interference, since it does not suffer from any vice or discrimination or violation of Article 14 and 16 of the Constitution of India. The advertisement, therefore, stands as it is.

21. One matter, however, which does require consideration, is whether these petitioners can also be given marks for experience w.e.f. 24.06.2011, i.e., the date on which some of the selected candidates got a place of posting and these petitioners despite making it to the select list were left out by not offering a place of posting.

22. This issue does require judicial intervention since the Division Bench in L.P.A. No. 1246 of 2012 did hold and declare that the non-joining and posting of the appellants was arbitrary and discriminatory. It was only after a contempt application was moved that the respondents decided to post and accept joining of these petitioners. By virtue of the above conduct of the State two different dates for joining with regard to the same set of selected candidates have come into existence. There is no dispute that a dichotomous situation has been created by the respondents for no fault of these petitioners.

23. Absence of dental chairs or infrastructure

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should have been taken into consideration before the exercise for selection was initiated by issuance of an advertisement and the exercise of actual selection. Once the candidates were successful and came to be notified by a common select list, contained in Annexure-2, they did acquire a right to be posted along with the other selected candidates. Non-posting of these petitioners for reasons given by the respondents before the Division Bench was found to be erroneous. One class of people should be treated similarly and the conduct of the respondents in not posting these petitioners did not have judicial approval whatever be the reasons or justification offered. If that be so, then notionally and for all practical purposes these petitioners should be treated as having been appointed w.e.f. 24.06.2011 for the purposes of award of marks of experience. If it is not done, then for no justifiable reason these petitioners would be discriminated viz-a-viz other candidates, who succeeded in getting a notification for posting and joining in terms of Annexure-3.

The writ application is allowed on a limited point to the extent that for purposes of award of marks for experience, these petitioners joining will also be deemed to be w.e.f. 24.06.2011 and not from the actual

date of joining facilitated by virtue of the Division Bench decision, contained in Annexure-4. Other challenge as thrown and mentioned above with regard to the various clauses of the advertisement is hereby rejected.

(Ajay Kumar Tripathi, J.)

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