IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.8820 of 2014

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1. The Union of India through the Comptroller and Auditor General, New Delhi.
2. The Principal Accountant General (Audit), Bihar Indian Audit and Accounts Department, Birchand Patel Marg, Patna.
3. The Sr. Audit Officer (Administration). O/o the Principal Accountant General (Audit), Bihar, Indian Audit and Accounts Department, Birchand Patel Marg, Patna.

.... Petitioners

Versus

1. Susheel Kumar Son of Sri Ram Nandan Singh, Resident of Mohalla - Shivpuri (Rama Lane) P.O. Shastri Nagar, District - Patna.
2. Meraj Ahmad Son of Late Badruddin Ahmad, Resident of Mohalla Lal Kothi, P.O. and P.S. Danapur, District Patna.
3. Akhilesh Kumar Son of Sri J.P. Tiwari, Resident of Mohalla New Saket Nagar (Hinoo) P.O. Dorando, District - Ranchi.
4. Sunil Tiwari Son of Sri Mithilesh Tiwari, Resident of Mohalla P.C. Colony, Near Gayatri Mandit, Lohia Nagar, Kankarbagh, District - Patna.
5. Bablu Kumar Son of Sri Bachchu Prasad, Mohalla - Sanjay Gandhi Nagar, Road No. - 2 Kankarbagh, District - Patna.
6. The Accountant General (Accounts and Entitlement), Bihar, Patna.
7. The Principal Director, Audit, EC Railway, Hajipur.

... . Respondents

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Appearance :

For the Petitioners :	Mr. Madhuresh Prasad, Advocate
For Private Respondent 1 to 5:	Mr. Puskar Narain Shahi, Sr. Advocate Mr. Patanjali Rishi, Advocate
For official respondent no. 6 :	Mr. L.P.K. Rajgirhar, Advocate
For official respondent no. 7 :	Mr. Arun Kumar Arun, Advocate

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CORAM: HONOURABLE MR. JUSTICE NAVANITI PRASAD SINGH

And

HONOURABLE JUSTICE SMT. NILU AGRAWAL

ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE NAVANITI PRASAD SINGH)

Date: 28-07-2015

The present writ application has been filed on behalf of Comptroller cum Auditor General, Government of India and its officials being aggrieved with the judgment and order of the Central Administrative Tribunal (hereinafter referred to as the "Tribunal") Patna Bench, Patna, passed in O.A. No. 459/2012 being order dated 15.01.2014.

In substance, the Tribunal has directed the Union of India to consider the case of the five applicants before it for appointment to the post of Multi Tasking Staff (in short the "MTS").

We have heard learned counsel for the Union of India and learned counsel for the private contesting respondents and with their consent the writ petition is being disposed of at this stage itself.

In the year 2009, a policy decision was taken that all casual employees working in Grade-D (Class – IV) for two years or more be given an opportunity to be regularized as against sanctioned post available. We are concerned with 176 notified vacancies for these MTS. An advertisement was issued on

09.04.2009 and the process started. Different marks were to be allotted for various fields i.e. work experience, educational qualification and interview. Now, while this process was going on, Union Government in the Ministry of Personnel, Public Grievance and Pensions, Department of Personnel and Training (in short the "D.O.P.T.") issued an office memorandum on 12th May 2010, that henceforth, in respect of non-technical Group-C post, the selection would be done through Staff Selection Commission (in short the "SSC"), unless they are so exempted. This office memorandum having been issued in May, 2010, and as the aforesaid selection process was already in advance stage, no cognizance was taken of this office memorandum and the process continued. Ultimately, the result were published on 20.10.2011 in respect of 176 vacancies as had been advertised. The last i.e. 176th candidate had secured 75% marks. These applicants, on coming to know that they were the next five persons after 176 and six persons to whom appointment letters have been issued, have not joined, asked the department to process their cases and permit them to join. There being no favourable response, They moved before Central Administrative Tribunal. Before the Central Administrative Tribunal, on behalf of Comptroller cum Auditor General, first, a plea was taken that 75% marks was a cut-off marks and the said five applicants had got marks between 74 to 69, therefore, they could not make it to the merit list. They were, accordingly, not selected. The applicants challenged this position and, accordingly, the Tribunal passed a specific order directing the Comptroller cum Auditor General to file an affidavit explaining the position with reference to documents. An affidavit was then filed before the Tribunal. It was categorically admitted that there were no cut-off marks, but 75% was the marks obtained by the last candidate who had been selected. It was also not disputed that six persons to whom appointment letters were issued did not turn to join, as such, six vacancies remained unfulfilled.

It may be noted here that out of six, there were five vacancies for general category candidates and the applicants, all five of them, are next in seriatim, all belonging to general category. A stand was taken that it was decided that non-fulfilled vacancies would henceforth be taken up and filled up through the SSC and, therefore, the applicants having not figured in the select list initially, and, subsequently, the decision having been taken not to fill up the vacancies, the applicants had no right to claim appointment. The Tribunal did not accept this contention. The Tribunal relied upon the judgment of the Apex Court in the case of **Manoj Manu and another Versus Union of India and others** since reported in **2013 (12) SCC 171** and held that there being six vacancies in respect of persons who did not join, it was incumbent upon the Department to call next six competent persons and offer appointment to them. It is this part that the writ petitioners are aggrieved with.

When we took up the matter we passed a detailed order on 07.07.2015 noticing the controversy and directing the writ petitioner i.e. the Union of India through Comptroller cum Auditor General to bring on record the materials to substantiate the stand that a policy decision was taken not to fill up the vacancies through the said recruitment process and to refer the same to SSC. A supplementary affidavit has been filed on behalf of the writ petitioners. To say the least, it is an apology for the stand taken, which we shall show.

From the facts noted which are not in dispute, it is clear that advertisement was issued in the year 2009, the recruitment process was started, the decision of D.O.P.T. came in May 2010. The recruitment process was consciously not abandoned as it was already in process. The recruitment was for 176 vacancies. The first 176 candidates were selected and notified for appointment. Six persons of general category did not join, but, five applicants, who are the five respondents in this writ petition, were general category candidate after 176. In spite of this position being there, the Department did not take any step to call these five persons and offer appointment to them. They slept over the matter.

A so called "policy decision" is an office note in the file and that to of 18.05.2012 in the office of C.A.G., wherein it is noted that in various zones recruitment process has been completed. Any further vacancies would be dealt with by the SSC. Two things are clear, first, in the year 2011 when appointments were being made and when people did not join, there was no such a decision. The authorities, in respect of non-fulfilled vacancies, took no step to fill up the vacancies. Now they are being told that we ought to have taken steps to fill them up, but, now that we have slept you have lost your right. Thus seen, it is incorrect to say that there existed any policy decision not to fill up those six or more where people had not joined.

On behalf of Comptroller cum Auditor General, it is submitted, with reference to two judgments of the Apex Court, being **State of A.P. and others Versus D. Dastagiri** since reported in **AIR 2003 SC 2475** and in case of **Bihar State Electricity Board Versus Suresh Prasad and others** since reported in **(2004) 2 SCC 681;** that no person has a right to claim appointment. Once the process is over and a policy decision is taken, the persons who were not selected having no enforceable right, no mandamus could be issued in this regard. It is further submitted that once appointment letters were issued and a policy decision was taken to end the appointment process nothing could be done thereafter.

We have considered the decisions. In the case of **Manoj Manu (supra)** the Apex Court has clearly held that vacancies in course of recruitment process is of two types, (1) where people joined and for some reason either resign or withdrew and (2) where people are offered appointment but they do not join at all. In the first case, the position exhausts, but, in the second case the process remains incomplete. In the second case, it would be incumbent upon the authority to continue with the process to fill up the vacancies being the legitimate expectation of a person seeking employment.

On behalf of writ petitioners, it is correctly submitted that to get an appointment is not a right and rightly reliance has been placed on the two decisions in **AIR 2003 SC 2475** and **(2004) 2 SCC 681;** that it is the prerogative of the employer to take a decision or not with regard to filling up the post. To us, the rational is that there has to be a conscious decision not to fill up the posts and this right is an inalienable right of the employer. But, as to the facts we have found above, there was no such policy decision taken at that time. There is no explanation as to why for almost a year people not having joined no steps were taken to fill up those posts from the next eligible candidate. It is in this situation that the case of **Manoj Manu (supra)** comes into operation and becomes applicable.

What we are now told is that the Department should have acted promptly. He did not. It slept over the matter. Now, when the persons eligible approached, they are being told that since we slept over the matter, your right is extinguished. Our reply to this is what Chief Justice Chagla said in the case of ***All India Groundnut Syndicate Limited -Versus- Commissioner of Income Tax, Bombay City, AIR 1954 Bombay 232 :***

> "But the most surprising contention is put forward by the Department that because their own officer failed to discharge his statutory duty, the assessee is deprived of his right which the law has given to him under sub-section (2) of S 24. In other words, the Department wants to benefit from and wants to take advantage of its own default. It is an elementary principle of law that no person - we take it that the Income-tax Department is included in that definition - can put forward his own default in defence to a right asserted by the other party. A

> person cannot say that the party claiming the right is deprived of that right because "I have committed a default and the right is lost because of that default."

Thus, to conclude, we find no error in the order of the Tribunal. This writ petition merits no further consideration and is, accordingly, dismissed.

The Department is given four weeks time to comply with the orders of this Court and the Tribunal.

(Navaniti Prasad Singh, J.)

(Nilu Agrawal, J.)

Rajeev/N.A.F.R.

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