

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.9273 of 2014

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Santosh Kumar Son of Shankar Sah Resident of Village - Parsauni Khirodhar, P.S.
Parsauni, District - Sitamarhi

.... Petitioner

Versus

1. The Union of India through Secretary Ministry of Defence, New Delhi
2. Defence Secretary, Army Headquarters Danapur, Patna
3. ARO Muzaffarpur through Col. Host Dir, ARO Muzaffarpur

.... Respondents

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Appearance :

For the Petitioner/s : Mr. Devendra Kumar

For the Respondent/s : Mr. N. A. Shamsi (A.S.G.)

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CORAM: HONOURABLE MR. JUSTICE MIHIR KUMAR JHA

ORAL JUDGMENT

Date: 14-10-2015

Heard learned counsel for the parties.

2. The prayer of the petitioner in this writ application reads
as follows:

“That this writ application is being filed for issuance of appropriate writ/ writs by commanding the respondents authorities to call for the records in respect of selection process of the petitioner in SOL CLK/SKT BIHAR and further direct the respondents to re-evaluate the mark sheet of the petitioner as the candidates, who have secured lesser marks than the petitioner have been declared successful and the petitioner is declared unsuccessful in the written test of SOL CLK/SKT BIHAR held on 24.11.2011 at HQ RTG ZONE DANAPUR and for any other relief/ reliefs for which your Lordships may deem fit and proper.”

3. Learned counsel for the petitioner has submitted that the very fact that the candidates having secured lesser marks than the



petitioner have been selected for appointment on the post of Clerk in Indian Army in the selection process undertaken and completed by the Army authorities at Danapur, Patna leaving out the petitioner will be itself a good ground for issuance of direction for also declaring the petitioner eligible for appointment. In this regard he has cited the instance of one Gaurav Kumar, who according to the petitioner, had secured only 81 marks and yet was declared successful, whereas the petitioner securing 84 marks has been declared unsuccessful will go to show that the petitioner was subjected to hostile discrimination in the matter of selection and appointment on the post of Clerk in the Army establishment.

4. In this case a counter affidavit has been filed by the respondents wherein it has been explained that in the selection test for the post of Clerk the written test was to be held in two papers each of 100 marks and the candidates had to secure minimum of 32 marks in each of the paper and 80 marks in aggregate in order to qualify in the written test. It has also been explained that the petitioner had secured 64 marks in the 1st paper and only 18 marks in the 2nd paper and as such when he had failed to secure minimum qualifying marks in the 2nd paper being 32 he was declared to have failed in the examination. The respondents have also explained that the case of Gaurav Kumar was clearly distinguishable, inasmuch as he had secured 40 marks in

the 1st paper and 39 marks in the 2nd paper and therefore, had secured the minimum qualifying marks 32 in both the papers as well as since all the candidates were given 2 extra marks by way of grace, Gaurav Kumar had secured in all 81 marks and thus, above 80 which had enabled him to be declared successful.

5. These aspects in fact have been also explained in paragraphs no. 4, 5 and 6 of the counter affidavit, which reads as follows:

“4. That in reply to the statement made in paragraph no.11 of the writ petition, it is submitted that the question papers administered to Soldier (Clerks/ Store Keeper Technical) considered of two section (Section ‘A’ and Section ‘B’). Both the sections are compulsory.

The maximum marks for each section ‘A’ and ‘B’ is 100 marks totaling to 200 marks. A candidate has to score minimum of 32 marks each in section A and B separately and minimum of 80 marks in total to qualify in the exam.

5. That it is submitted that the petitioner has secured 64 marks out of 100 marks in Part 1 (Section A) and only 18 marks out of 100 in Part II (Section B). The petitioner failed to obtain minimum qualifying marks of 32 in Part II. As two marks was given as grace marks to all candidates, the petitioner obtained $18+2=20$ marks in Part II but still could not get qualifying marks of 32 in this section. Since the petitioner has obtained only 20 marks as against qualifying marks of 32, the petitioner has been declared fail in said examination.



6. That it is relevant to mention here that Gaurav Kumar at serial no. 576 of merit list has secured only 81 marks but was declared pass. It is to submit that Gaurav Kumar has obtained 40 marks in Part I (Section 'A') and 39 marks in Part II (Section 'B'). Two marks were allotted to all candidates across the board for Part II, hence Gaurav Kumar had obtained 41 marks (39+2) in Part II (Section 'B'). Gaurav Kumar obtained 40 marks in Part I and 41 marks in Part II qualifying separately with more than 32 marks and aggregate more than 80 marks and said Gaurav Kumar qualified for the examination.

It is stated that said Gaurav Kumar has got 81 marks in total which is less than petitioners marks of 84, still he was declared successful in the examination as he has secured minimum qualifying marks in both parts unlike the petitioner who failed to secure minimum qualifying marks in Part II."

6. This Court also on perusal of the instruction in the written test for the Common Entrance Examination would find that the same itself had clearly envisaged the mandatory requirement of securing of minimum 32 marks in each of the two papers described as Section A and Section B. To that extent Annexure 'A' to the counter affidavit containing following instruction by itself is a complete answer to the submission of the learned counsel for the petitioner.

"Question paper consists of two sections (Section A and Section B). Both the sections are compulsory. Section A consists of TWO Parts (Part I and Part II). Both parts are compulsory. Answers to this section will be marked only on



the OMR Sheet. Section B consists of Subjective questions of ENGLISH. Separate answer booklet issued by Exam centre will be used for answering the question paper. Candidates will not use question paper to answer the question. Candidate has to score min of 32 marks each in section A and B separately and a min of 80 marks in total to qualify in the exam.”

7. The respondents in fact have also produced the merit list of successful candidates, who had appeared in the selection test for the post of Clerk/ Store Keeper held on 24.11.2013 at the Headquarter Recruiting Zone, Danapur which goes to show that out of 32 candidates only 2 had passed, one being Vijay Kumar Verma, who had secured 48 marks in Part I, 36 marks in Part II and with grace marks he had secured 86. Thus, he had not only secured more than 32 in both the parts but also in aggregate more than 80. The second candidate, who had been declared successful is Gaurav Kumar, who as noted above had secured 40 marks in Part I and 39 marks in Part II and thus, had cleared minimum qualifying marks of 32 in each of the two parts and with 2 marks given grace he had secured 81 and therefore, above 80 in aggregate.

8. As a matter of fact among 30 of 32 candidates, who had declared to have failed either on account of not securing 32 each in two parts or less than 80 in aggregate, there were others alike the petitioner including one Ratnesh Kumar, who had secured 44 marks in



Part I and 32 marks in Part II and thus, clearing both the parts and yet securing 78 in aggregate even after giving 2 grace marks. Similarly, one Deepak Kumar had secured 40 marks in Part I and 34 marks in Part II and thus, clearing both the parts on account of having secured minimum 32 in each of the part and yet being declared fail on account of his securing 76 marks and thus, short by 4 of the aggregate 80 marks. In fact there is exactly a similar case and in fact better case of one Lokesh Kumar, who had secured 56 marks in Part I and 27 marks in Part II and with total grace marks of 2 he had secured 85 and yet declared fail on account of his securing less than 32 in Part II. Thus, the petitioner, who had secured only 84 marks, as explained earlier, was not the only candidate who was declared to have failed on account of not securing the minimum qualifying marks in both the parts.

9. As a matter of fact the issue of minimum cut-off in each paper, which as noted above was the part of the instruction of the examination in hand was also gone into by the Apex Court in the case of Sanchit Bansal & Anr. Vs. Joint Admission Board and Ors reported in 2012(1) SCC 157 wherein it was held as follows:-

“31. The appellants next contended that the first appellant had obtained 231 marks and he had been found to be unsuitable whereas candidates who got 154 were found suitable, this was absurd and illogical. There is nothing illogical about the



process. The minimum aggregate cut-off was 154. The minimum cut-off for individual subjects was 37, 48 and 55 for Maths, Physics and Chemistry. If a candidate had secured the minimum in the three subjects and had also secured the minimum of the aggregate which was only 154, he becomes eligible, whereas a candidate who got 231 in the aggregate but does not get the minimum cut-off marks in one of the subjects (as for example the first appellant who got only 52 which is less than the cut-off of 55), naturally cannot be qualified. Even in standard traditional examinations, if total maximum marks was 600 (in six subjects) and minimum marks in each of the six subjects was 35 out of 100, a candidate who may secure 482 marks (that is, 90% in five subjects, but secures only 32 marks in one subject, will be considered as failed, whereas a person who secures only 210 marks (that is, 35 marks in all the six subjects) will be considered as passed. Where minimum performance in all the subjects is also relevant, a person who fails to get the minimum cut-off marks in one subject, cannot contend that he had secured very high marks in the other two subjects and therefore injustice has been done. All procedures when standardized, result in some kind of injustice to some or the others. That cannot be helped.”

10. More recently this Court in the case of Brajesh Kumar & ors. Vs. State of Bihar and Anr. reported in 2013(3) PLJR 936 relating to recruitment on the post of Junior Engineer had held that requirement of passing in the two subjects of competitive examination namely (i) General Knowledge and (ii) Paper of Engineering separately could not be met by securing aggregate passing marks of

both the subjects together. This Court infacts had also summarized the law in the following words:-

23. The evaluation of merit of a candidate appearing in the written competition examination has to be essentially assessed on the basis of their marks secured in all the subjects and, therefore, once a minimum cut-off marks of the written examination is prescribed, that has to be essentially obtained by all the candidates otherwise it may lead to an absurd situation resulting into appointment of incompetent and meritless candidates.

24. The minimum cut-off, therefore, prescribed in the government resolution dated 22.12.1990 in the written examination cannot be read as an aggregate for all the subjects in which case a candidate securing 80 out of 100 in General Knowledge and even 0 in a subject of Engineering could claim selection and appointment on the post of Junior Engineer. When, the government resolution dated 22.12.1990 fixes the minimum qualifying marks in the written examination to be conducted by the Bihar Public Service Commission and Bihar Staff Selection Commission it essentially envisages that the candidate must secure the minimum cut-off marks in each of the subject of the written examination. If, therefore, the Commission has ultimately understood the scope of the government policy brought into force by its resolution dated 22.12.1990, this Court would be absolutely loathe in making a judicial review of it, inasmuch as, the Apex Court has repeatedly held that the courts are not concerned with the practicality or wisdom of the policy but only

illegality. In the case of ***Directorate of Film Festivals & Ors. Vs. Gaurav Ashwin Jain & Ors.*** reported in **2007(4)SCC 737** the Apex Court in this regard had held as follows:-

“16. ... Courts do not and cannot act as appellate authorities examining the correctness, suitability and appropriateness of a policy, nor are courts advisors to the executive on matters of policy which the executive is entitled to formulate. The scope of judicial review when examining a policy of the Government is to check whether it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution, or opposed to any statutory provision or manifestly arbitrary. Courts cannot interfere with policy either on the ground that it is erroneous or on the ground that a better, fairer or wiser alternative is available. Legality of the policy, and not the wisdom or soundness of the policy, is the subject of judicial review.”

25. In fact, this very aspect of the matter with regard to fixation of cut-off marks in each of the subject relating to a similar rule of obtaining 50% marks in the written examination was also gone into by the Apex Court in an exactly identical case of ***Director General, Telecommunication & Anr. Vs. T.N. Peethambaram*** reported in **(1986)4 SCC 348**, wherein it was held as follows:-

“Fails” in one subject, but “passes” the examination! It is not a tongue-in-the-cheek remark, for, passing an examination does not mean passing or securing

the minimum passing marks in each subject or item of examination provided the candidate secures the minimum passing marks in aggregate, and he is entitled to be declared as having passed the examination according to the Central Administrative Tribunal (Tribunal hereafter), Hyderabad, which has upheld the aforesaid proposition canvassed by the respondent. The validity of this view is in focus before this Court in the present appeal by special leave.

2. Rule 2 in Appendix III of the Telegraph Engineering Service (Group „B“) Recruitment Rules, 1981, for Limited Departmental Qualifying Examination, in the context of which the controversy has arisen, reads thus:-

2. Limited Departmental Competitive Examination:

(i)(a) Advanced Technical Paper —

General . . 100 marks

(b) Advanced Technical Paper —

Special . . 100 marks

(c) General Knowledge and Current Affairs . . 50 marks

(d) Assessment of Confidential Reports . . 75 marks

(ii)(a) The minimum pass marks in the examination shall be 50 per cent for general candidates and 45 per cent for Scheduled Castes and Scheduled Tribe candidates.

This rule was interpreted by the concerned department as requiring the candidates to secure 50 per cent minimum pass marks for the general candidates and 45 per cent minimum pass marks for Scheduled Castes and



Scheduled Tribes in “each” of the four subjects or items
The Tribunal has taken the view that the department was wrong in so interpreting the Rule and has formed the opinion that on a true interpretation, the requirement as regards securing minimum pass marks in the examination by the candidates concerned is referable to “aggregate” marks and not to each of the four subjects or items of the examination. It has been overlooked by the Tribunal that the “rule” does not employ the expression “aggregate”, and that it is impossible to inject the said word in the Rule in the guise of interpretation, as it would lead to absurd results. An illustration will make the “obvious” point “more obvious”. The illustration might be viewed in the scenario of a medical degree examination. Can one who secures zero, say in surgery, but secures high marks in the other papers, so that the minimum aggregate standard is attained, be declared to have passed the examination? Such an interpretation would result in havoc and have catastrophic consequences. Examining the examination rule in the present context, the nihilist result is equally conspicuous. Say, a candidate secures zero in the first paper of Advanced Technology (General), or second paper of Advanced Technology (Special), but secures full marks in the rest of the subjects (or items). He would be securing (0 plus 100 plus 50 plus 75) or (100 plus 0 plus 50 plus 75) (equal to 225 i.e. 56.25 per cent) minimum passing marks and would be entitled to be declared as having passed and having become entitled to the outflowing preferential treatment. Similar would be the outcome also in a



casewhere a candidate's Confidential Record is bad and he earns no point in that item. Such an interpretation would thus be self-defeating and lead to absurd results, and accordingly, would be contrary to well established canons of construction, not to speak of a common-sense-oriented approach. Since the Rule does not specify a different passing standard for “each” subject, the prescribed minimum passing standard must be the yardstick to apply to each of the subjects or items. Minimum must mean a minimum in each, as much as, minimum in aggregate. The Tribunal should not have therefore upset the decision of the concerned department and imposed on the department the mistaken interpretation propounded by it. In the result, the decision of the Tribunal must be reversed.

(Underlining for emphasis)

11. Having thus regard to the admitted position that the petitioner did not secure the qualifying marks in both the parts of the examination which has been explained in detail in the counter affidavit, part of which has already extracted in this judgment and has also not been controverted by the petitioner by filing any rejoinder affidavit, this Court will have no option but to hold that the petitioner on account of not securing qualifying marks in Paper II was correctly declared to be ineligible despite his securing more than 80 marks in aggregate.

12. As with regard to prayer of re-evaluation the respondents have relied on a circular dated 9th October, 2012 which clearly prohibits re-evaluation by laying down that “re-evaluation of the answer sheet or supplementary answer sheet will not done”.

13. This circular being Annexure ‘C’ to the counter affidavit, therefore being the rule, the petitioner had to make out a case for seeking a direction to the respondents to carry out re-evaluation. The petitioner however has miserably failed in doing so inasmuch as not a word has been said about the petitioner being under marked in Part-II in which he had failed to secure the minimum qualifying marks. The limited scope of judicial review therefore will also not permit this Court to do so. Reference in this connection may be made to the judgment of the Apex Court in the case of Directorate of Film Festivals v. Gaurav Ashwin Jain, reported in (2007)4 SCC 737, wherein it was held as follows:

“16. ... Courts do not and cannot act as appellate authorities examining the correctness, suitability and appropriateness of a policy, nor are courts advisors to the executive on matters of policy which the executive is entitled to formulate. The scope of judicial review when examining a policy of the Government is to check whether it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution, or opposed to any statutory provision or manifestly arbitrary. *Courts cannot interfere*

with policy either on the ground that it is erroneous or on the ground that a better, fairer or wiser alternative is available. Legality of the policy, and not the wisdom or soundness of the policy, is the subject of judicial review.”

14. The same view was also reiterated by the Apex Court in the case of Sanchit Bansal (supra) in the following terms :-

“27. Thus, the process of evaluation, the process of ranking and selection of candidates for admission with reference to their performance, the process of achieving the objective of selecting candidates who will be better equipped to suit the specialized courses, are all technical matters in academic field and the courts will not interfere in such processes. The courts will interfere only if they find all or any of the following: (i) violation of any enactment, statutory rules and regulations; (ii) mala fides or ulterior motives to assist or enable private gain to someone or cause prejudice to anyone; or where the procedure adopted is arbitrary and capricious.

28. An action is said to be arbitrary and capricious, where a person, in particular, a person in authority does any action based on individual discretion by ignoring prescribed rules, procedure or law and the action or decision is founded on prejudice or preference rather than reason or fact. To be termed as arbitrary and capricious, the action must be illogical and whimsical, something without any reasonable explanation. When an action or procedure seeks to achieve a specific objective in furtherance of education in a bona fide manner, by adopting a process which is uniform and non-discriminatory, it cannot be described as arbitrary or capricious or mala fide.”

15. Thus, for the reasons indicated above, this application being devoid of any merit must fail and is, accordingly, dismissed. There would be however no orders as to costs.

(Mihir Kumar Jha, J)

Patna High Court
Dated the 14th October 2015
N.A.F.R./surendra/-

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