

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.468 of 2016

IN

Civil Writ Jurisdiction Case No. 17624 of 2015

- =====
1. Shivanand Son of Sone Lal Baitha, Resident of Bandh Vihar Colony, East of Bahadurpur Housing Colony, Nayatola, Police Station- Agam Kuan, District- Patna.
 2. Satyendra Kumar Sinha, Son of Late Vishwanath Prasad, Resident of Village and Post Office- Gopalbad, Police Station- Samera, District- Nalanda.

.... Appellants

Versus

1. Development Commissioner- Cum - Chairman of Board of Director, Bihar State Building Construction Corporation Ltd., Government of Bihar, Patna.
2. The Principal Secretary, Building Construction Department, Government of Bihar, Patna.
3. The Managing Director, Bihar State Building Construction Corporation Ltd., Government of Bihar, Patna.
4. The Chief General Manager-cum-Chairman, Selection Committee, Bihar State Building Construction Corporation Ltd., Government of Bihar, Patna.

.... Respondents

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Appearance :

For the Appellants	:	Mr. Y. V. Giri, Senior Advocate Mr. Uday Chand Prasad, Advocate
For the Respondent/s	:	Mr. Tej Bahadur Singh, Senior Advocate Mr. Brisketu Sharan Pandey, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE

AND

HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

JUDGMENT AND ORDER

C.A.V.

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date: 18-10-2016

This appeal, under Clause X of the Letters Patent of this Court, arises out of judgment and order, dated 09.02.2016, passed by a learned single Judge of this Court, in CWJC No. 17624 of 2015, whereby the writ application, filed by

the present appellants, under Article 226 of the Constitution of India, has been dismissed.

2. The appellants had sought for a direction in the said writ proceeding to the respondents to declare them successful for their appointment on the post of Deputy General Manager (Technical), in Bihar State Building Construction Corporation Limited (in short, 'BSBCCL'), on the basis of a process of selection held pursuant to an advertisement published on 04.05.2015.

3. Short point, which the present appeal involves in the present appeal, is, if in the aprocess selection to a post in a Public Sector Undertaking, no minimum qualifying marks for interview is prescribed in the Advertisement nor declaration prescribing minimum qualifying marks for interview is made prior to the date of interview, would it be permissible for the selection body or the appointing authority to declare an aspirant, for a post, unsuccessful, on the basis of his performance at the interview?

4. In order to appreciate the issue involved in the present appeal, as noted above, with reference to the grievance of these appellants, it would be appropriate to take note of relevant admitted facts, which are as under:

(i) The BSBCCL, Patna, which is a Government of Bihar Undertaking, came out with an advertisement, on

04.05.2015, inviting applications for selection/appointment against 5 (five) posts of Deputy General Manager (Technical) on deputation/contractual basis.

(ii) From the advertisement, in question, it appears that several other posts, namely, General Manager (Technical), Assistant General Manager (Technical), Junior Engineer (Civil) and others posts were also advertised. Out of 5 (five) posts of Deputy General Manager (Technical), 2 (two) posts were kept reserved for Extremely Backward Castes candidates and 1 (one) post for Schedule Caste candidates.

(iii) The appellant No. 1 belongs to Schedule Caste category; whereas, the appellant No. 2 belong to Extremely Backward Castes category. Both of them fulfilled the criteria prescribed in the advertisement inviting applications, and had applied in response to the said advertisement.

(iv) Clause 9 of the said advertisement is crucial for the adjudication of the present appeal, which reads thus:

“9. Only shortlisted candidates will be called for written test/interview. **Selection for any post will be based on written test and interview. Only those candidates who would secured minimum 30 % marks in written test would be called for interview.”**

(Emphasis is Supplied)

(v) For the post, in question, upon scrutiny of

applications, 22 candidates, including these two appellants, were called for written test. The appellants are the only two persons, who could qualify in the written test and they were, accordingly, called for interview.

(vi) The appellants were, accordingly, called for interview before a Board, consisting of 11 (eleven) members. By way of Annexure-8 to reply on behalf of the appellants to the counter affidavit filed on behalf of the BSBCCL, the appellants brought on record the details of marks scored by respective candidates in the written test and *viva voce*, which they had obtained under the Right to Information Act.

(vii) From the said chart (Annexure-8), it appears that appellant No. 1 had secured 22.50 marks and appellant No. 2 had secured 18.50 marks, out of total marks of 50, in the written test. Both of them scored 05 marks each, out of 30, in the Interview.

(viii) We have also noticed from the said chart that no other candidate had secured more than 5 marks in the written test, except these appellants. It, further, appears that appellant No. 1 secured 09 marks and appellant No. 2, 08 marks, out of total 10 marks, against educational qualification.

(ix) Both the appellants secured 10 marks out of 10 against marks allotted for experience. However, in the remarks column, the appellants have been declared as 'not fit

for the post (इस पद हेतु अयोग्य पाये गये).

(x) The BSBCCCL declared the result on 30.05.2015, which has been brought on record, by way of Annexure - 4 to the writ application, which shows that no one was declared successful for appointment against the post of Deputy General Manager (Technical).

5. In the background of the facts, as noted above, raising a grievance against denial of their appointment despite fulfilling the requisite criteria, as prescribed in the advertisement, and having successfully cleared the written and *viva voce* tests, the appellants filed the writ application, which gave rise to CWJC No. 17624 of 2015, seeking direction from this Court to the BSBCCCL to declare them successful and appoint them against the post, which they had applied for.

6. We have heard Mr. Y. V. Giri, learned Senior Counsel, appearing on behalf of the appellants, and Mr. Tej Bahadur Singh, learned Senior Counsel, appearing for the respondents.

7. It is the case of the appellants that they had approached the BSBCCCL against denial of their claim to be selected on the basis of their performance, in the written test and interview but of no avail.

8. A counter affidavit was filed on behalf of the BSBCCCL in the writ proceeding, stating therein that after



considering the marks of the written test and interview, obtained by the appellants, they were not found fit for their appointment to the post of Deputy General Manager (Technical) and consequently both of them were declared "disqualified for the post of Deputy General Manager (Technical)". It has also been stated in the counter affidavit that because of non-performance of the appellants in the interview, they had been declared disqualified. It has been reiterated that the interview board did not find the appellants fit to handle the post, they had applied for.

9. The learned single Judge, by judgment and order under appeal, dismissed the writ application, mainly on the ground that mere participation in the process of selection does not create right in their favour, especially when the BSBCL had decided not to fill up the post since they felt that none of the participants meet the expectation which they had in mind with regard to the kind of candidates they were looking for to fill up the post for the level of Deputy General Manager (Technical).

10. Assailing the judgment and order, passed by the learned single Judge, Mr. Y. V. Giri, learned Senior Counsel, appearing on behalf of the appellants, has submitted, with reference to Clause 9 of the Advertisement, as noted above, that there was no mention in the Advertisement that



there would be any minimum marks required to be secured in the *viva voce* test to be declared successful. He has also submitted that there was clear indication that preparation of merit list will be on the basis of marks secured in the written test and interview. He has submitted that action of the respondents in not selecting the appellants, in the facts and circumstances of the case, is arbitrary, whimsical and discriminatory.

11. Mr. Tej Bahadur Singh, learned Senior Counsel, appearing on behalf of the State-BSBCCL, on the other hand, while defending the judgment and order under appeal, has submitted that the interview board, which was headed by the Chief General Manager of the BSBCCL found the appellants not fit to be selected for appointment keeping in mind the high post against which they were required to be selected. He has submitted that the decision not to declare the appellants successful was taken in the interest of the BSBCCL and has added that in any event, the appellants cannot claim any indefeasible right of their selection and appointment on the basis that they had scored qualifying marks in the written test and no other person could secured the said minimum qualifying marks.

12. As has been noticed, at the very outset, the question, which requires determination in the present appeal,

is as to whether the appellants could have been declared *अयोग्य*, i.e., unfit, undeserving, unsuitable or disqualified, on the ground that they scored 5 out of 30 marks in the *viva voce* test, when there was no minimum marks prescribed for the said test.

13. In course of submissions being made, the Court had put to learned Senior Counsel, appearing on behalf of the BSBCCCL, a question as to how much marks, appellants ought to have secured at the interview, which could have been sufficient for them to have been declared successful. Learned Senior Counsel, apparently, looked clueless inasmuch as he failed to point out to the Court any decision of the interview board or the BSBCCCL taken at any stage as to what would have been the cut off marks for interview.

14. On another query being made by the Court, learned Senior Counsel could not demonstrate any material to show that any decision, fixing qualifying marks, was taken by the interview board or the BSBCCCL, before the interview was held.

15. Admittedly, thus, neither it was prescribed in the advertisement inviting applications that there would be minimum qualifying marks for interview nor at any stage subsequent thereto i.e. before the interview was going on to be held/ at the time of interview/ after the interview was held,

any decision was taken as to what would be or what should be the minimum score in *viva voce* for declaring a candidate successful if he had, otherwise, qualified.

16. In that background, in our view, it was not permissible for the BSBCCCL to have declared the appellants as not qualified because of their performance in the *viva voce* test.

17. It is true that keeping the high post proposed to be filled up through the advertisement, in question, in the BSBCCCL, in mind, a decision could have been taken fixing minimum qualifying marks in the interview, as was done for the written test. It was open for the BSBCCCL to have prescribed in the advertisement itself as regards minimum qualifying marks for interview.

18. On the basis of the subjective satisfaction of the Board/BSBCCCL that the appellants cannot handle the post on the basis of their performance at the interview, declaring them disqualified for the post, in our view, will be an arbitrary decision not conformity with Articles 14 and 16 of the Constitution of India.

19. If this is allowed to be done on subjective satisfaction of the competent authority, in a recruitment process, a candidate may be declared to be qualified/disqualified for a post, which will be a dangerous situation and

will open scope for arbitrariness in the matter of selection.

20. In our opinion, the case of the appellants is squarely covered by the Supreme Court's decision, in the case of **K. Manjusree v. State of Andhra Pradesh and Another**, reported in **(2008) 3 SCC 512** and **Hemani Malhotra v. High Court of Delhi**, reported in **(2008) 7 SCC 11**.

21. In the case of **K. Manjusree** (supra), the Supreme Court observed that if the rules do not prescribe for minimum marks, still the selection committee may prescribe minimum marks, if the selection committee wants to prescribe minimum marks for the interview but it could do so before commencement of selection process. The Supreme Court held, in no uncertain terms, that if the selection committee prescribed minimum marks only for written examination, before commencement of selection process, the Committee cannot, either during selection process or after selection process, add an additional requirement that candidate should also secure minimum marks in the interview. The Supreme Court held the action of the respondents, in the case of **K. Manjusree** (supra), in the case of **K. Manjusree** (supra), in fixing minimum marks for interview after the entire selection procedure, to be illegal.

22. Paragraph 33 of the decision, in the case of **K. Manjusree** (supra), is relevant for the present purpose, an extract of which is being reproduced hereinbelow: -

"33.Where

the rules do not prescribe any procedure, the Selection Committee may also prescribe the minimum marks, as stated above. But if the Selection Committee wants to prescribe minimum marks for interview, it should do so before the commencement of selection process. If the Selection Committee prescribed minimum marks only for the written examination, before the commencement of selection process, it cannot either during the selection process or after the selection process, add an additional requirement that the candidates should also secure minimum marks in the interview. What we have found to be illegal, is changing the criteria after completion of the selection process, when the entire selection proceeded on the basis that there will be no minimum marks for the interview."

23. In subsequent decision, in the case of **Hemani Malhotra** (supra), the Supreme Court, reiterated the view taken in the case of **K. Manjusree** (supra), held, in paragraph 14, as follows:-

"14. From the proposition of law laid down by this Court in the abovementioned case it is evident that previous procedure was not to have any minimum marks for viva voce. Therefore, prescribing minimum marks for

viva voce was not permissible at all after the written test was conducted."

24. In yet another decision, in the case of **Barot Vijaykumar Balakrishnan and Others v. Modh Vinaykumar Dasrathlal and Others**, reported in **(2011) 7 SCC 308**, the Supreme Court had occasion to consider the earlier two decisions, in the case of **K. Manjusree** (supra) and **Hemani Malhotra** (supra), in slightly different context. In the case of **Barot Vijaykumar Balakrishnan** (supra), though the rules provide that there should be minimum qualifying marks, each for written test and *viva voce*, but cut off marks was not specified in the advertisement. In that background, the Commission had decided to fix cut off marks for interview and had notified the candidates about fixing of the cut off marks before they were called for interview. In that circumstance, the Supreme Court held, in paragraph 38, in the case of **Barot Vijaykumar Balakrishnan** (supra), as follows:-

"38. Now coming back to the facts of the case in hand, though the Rules framed Article 309 of the Constitution governing the selection process mandated that there would be minimum qualifying marks each for the written test and the oral interview, the cut off mark for viva voce was not specified in the advertisement. In view of the omission, there were only two courses open. One, to



carry on with the selection process and to complete it without fixing any cut off mark for the viva voce and to prepare the select list on the basis of the aggregate of marks obtained by the candidate in the written test and the viva voce. That would have been clearly wrong and in violation of the statutory rule governing the selection. The other course was to fix the cut off mark for the viva voce and to notify the candidates called for interview about it. This is the course that the Commission followed. This was in compliance with the Rules and it did not cause any prejudice to any candidate either. We, thus, see no illegality at all in the selection process.”

25. It is amply clear from the three decisions of the Supreme Court, as noted above, that if there was to be a minimum qualifying marks for interview, the same ought to have either been mentioned in the advertisement itself or the candidates ought to have been notified in this regard before they were allowed to participate in the *viva voce* test.

26. Declaring the appellants disqualified on the basis of their performance in the interview without there being any stipulation in the advertisement or in the interview letter, in our view, does not satisfy the test of reasonableness and fair play on the part of the BSBCCCL, which is State, within the meaning of Article 12 of the Constitution of India.

27. We are, accordingly, of the view that the decision of the BSBCCCL to declare the appellants disqualified on the basis of their performance in the interview cannot be sustained.

28. Situated thus, we hold that the appellants cannot be said to have been disqualified on the basis of the selection procedure, in question, for the post of Deputy General Manager (Technical) on the ground that they did not do well in the interview.

29. We may hasten to add and clarify that since the posts, in question, are managerial posts requiring managerial capability of human resources, the BSBCCCL may not, for the reasons to be recorded, in writing, appoint the appellants if the BSBCCCL find the appellants not suitable for the posts, which the appellants had applied for. The BSBCCCL shall, thus, remain at liberty not to make appointments provided that reasons, good and valid, for such a decision, are, as indicated hereinbefore, recorded, which obviously can be challenged by the appellants in accordance with law.

30. The respondent No. 3, the Managing Director, BSBCCCL, is directed to proceed accordingly.

31. CWJC No. 17624 of 2015 stands, accordingly, allowed. The judgment and order under appeal, dated 09.02.2016, passed in CWJC NO. 17624 of 2015, is set aside.

32. In the result, this appeal stands allowed.

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

(Chakradhari Sharan Singh, J.)

I. A. Ansari, CJ.: I agree.

(I. A. Ansari, CJ.)

Prabhakar Anand/-

AFR/NAFR	AFR
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