

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.1021 of 2016

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1. Anurag Son of Sri Pramod Kumar Verma R/o Mohalla -
Takkichak, Colony Salehpur Road, P.S. Habibpur, Dist. -
Bhagalpur
 2. Amitabh Mishra Son of Sri Nityanand Mishra R/o Mohalla -
Charuchandra Mukharjee Road, Sudama Bhawan, P.S.
Adampur, Distt. - Bhagalpur, At Present Address C/o Sri
Amresh Kumar, House No.66, Montessori School Lane Opposite
Karlo Automobiles, Boring Road, Patna, P.S. S.K. Puri, Distt. -
Patna

.... Appellants

Versus

1. The State of Bihar through Chief Secretary, Government of
Bihar, Patna
2. The Chief Secretary, Government of Bihar, Patna
3. The Principal Secretary, General Administration Department,
Government of Bihar, Patna
4. The Principal Secretary, Social Welfare Department,
Government of Bihar, Patna
5. The Director, Social Welfare Directorate, Old Secretariat, Bihar,
Patna
6. Bihar Staff Selection Commission through its Secretary,
Veterinary College, Patna 800014
7. The Chairman, Bihar Staff Selection Commission, Veterinary
College, Patna 800014
8. The Secretary, Bihar Staff Selection Commission, Veterinary
College, Patna 800014

.... Respondents

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Appearance :

For the Appellants	:	Mr. Dinu Kumar, Advocate
For the State	:	Mr. Dhurjati Kumar Prasad, GP 14
For BSSC	:	Mr. K. K. Upadhyay
		Mr. C. B. Das

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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: 04-10-2016

The short issue, which the present appeal, preferred under Clause 10 of the Letters Patent of this Court, involves is as to how, under a selection process based on a competitive examination for appointment to a public post, vacancies, which remained unfilled, because of non-joining of the candidates, ought to be filled up.

2. The present matter relates to a process of selection held by the Bihar Staff Selection Commission (hereinafter referred to as 'the Commission') for various posts, including the post of *Secretariat Assistant*, based on an advertisement issued in the year 2010. Through the said advertisement, applications were invited from eligible candidates for the purpose of making selection, based on "1st Graduate Level Combined Competitive Examination, 2010" and making recommendation for filling up of 3285 vacancies falling under 21 posts having different nomenclature. From the said advertisement, it transpires that recommendation was to be made by the Commission for appointment against various posts on the basis of "Merit -cum- Choice". The selection process was in two parts, i.e., Preliminary Test and Mains Examination. The appellants cleared the Preliminary Test and appeared in the Mains Examination. In their online applications for the Mains Examination, they gave the choice of *Secretariat Assistant* in the Department of General Administration, Government of

Bihar, as their first preference and Accountant –cum- Cashier (State Level) as their second preference.

3. The appellant No. 1 secured 432 marks and appellant No. 2 secured 424 marks and they secured 567th and 960th rank respectively in the list of unreserved category of candidates. It is not in dispute that the last candidate, in the unreserved category, whose name was recommended for the post of *Secretariat Assistant*, had secured 432 marks and ranked 560.

4. The appellants were recommended for the post of Accountant –cum- Cashier under Social Welfare Directorate, Government of Bihar, and they were accordingly appointed by order, dated 04.01.2014.

5. There is specific statement, made in paragraph 28 of the writ application, that though there were 1100 vacancies of *Secretariat Assistant* to be filled up on the basis of the selection process, in question, the Commission had recommended the names of only 1067 candidates for appointment against the said posts. Out of 1067 candidates, who were recommended to be appointed to the posts of *Secretariat Assistant*, 30 persons did not join. It is accordingly the case of the appellants that their candidature ought to be considered for appointment on the basis of their merit position against the posts of *Secretariat Assistant*, which remained

unfilled either because of non-joining of the candidates or because the recommendations could not be made by the Commission.

6. In the counter affidavit filed on behalf of the State of Bihar and the Commission, the said specific averment that 30 candidates out of 1067 candidates, recommended for appointment as *Secretariat Assistant*, did not join, has not been controverted. However, on the question of not making recommendation against 33 vacant posts, the Commission, in its counter affidavit, has stated that those 33 posts were reserved for *disabled category of candidates*. It has further been stated that the Commission has sent recommendation to the concerned Department against the said 33 vacant post of *Secretariat Assistant* under the *disabled category*.

7. It would be apt to refer to paragraph 15 of the counter affidavit filed, on behalf of the Commission in the writ proceedings, which shows as to how a decision was taken to absorb the services of the appellants against such posts of Assistant –cum- Storekeeper, which were, in fact, not advertised. Paragraph 15 reads:

"15. *That thereafter Social Welfare Department again initiated steps for appointment of the petitioners to the post of Accountant –cum- Store Keeper and by order dated 20.02.2015, as contained in memo no. 327, the petitioner*

no. 1 was absorbed against the vacant and sanctioned post of Cashier at the Social Welfare Directorate, Hqr. and petitioner no. 2 Shri Amitabh Mishra was absorbed against the vacant and sanctioned post of Accountant cum Store Keeper at the Supervision Home, Patna."

8. Coming back to the recommendation made in favour of the appellants for their appointment as Accountant – cum Cashier, it is admitted that after they had joined the post, the Director, Social Welfare Directorate, came out with an order, dated 30.04.2014, returning back the appellants to the Commission along with their application forms on the ground that the post of Accountant –cum- Cashier was not sanctioned in the Directorate and instead, one post of Accountant, one post of Cashier and one post of Accountant –cum- Store Keeper were sanctioned under the Directorate. The Commission responded to the order of the Director, Social Welfare Directorate, through a communication, dated 26.06.2014, mentioning therein that requisition for 3 (three) posts of Accountant –cum- Cashier was sent by the Social Welfare Directorate through its letter No. 1214, dated 07.06.2010.

9. The status of these appellants continued oscillating between the Directorate of Social Welfare and the Commission, for quite some time, since, apparently, the posts against which they were recommended for appointment did not

exist.

10. In the mean while, the appellants filed writ application, giving rise to CWJC No. 17798 of 2014, on 15.10.2014, seeking a direction from this Court to appoint them against the post of *Secretariat Assistant* on the plea, *inter alia*, that certain posts of *Secretariat Assistant* had remained unfilled, because of non-joining of the candidates.

11. The Chief Secretary of Bihar filed an affidavit in the said case stating therein that while making requisition to the Commission by the Department of Social Welfare, Government of Bihar, an unintentional omission had occurred, which could not be detected initially. It has been stated by the Chief Secretary, in his counter affidavit filed in the writ proceedings, that the controversy, so arisen, was taken up by the General Administration Department and as advised by the General Administration Department, the Directorate of Social Welfare issued fresh appointment letters and posted appellant No. 1 as Cashier in the Office of the Directorate of Social Welfare, Patna and appellant No. 2 as Accountant -cum- Store Keeper, in Observation Home, Patna.

12. On the question of the claim of the appellants for their appointment as *Secretariat Assistant*, it has been stated, in the said counter affidavit, that the matter had been discussed with the Principal Secretary, General Administration



Department, and the Secretary of the Commission, and on the ground that the appellants ranked below the last unreserved candidate recommended for the post of *Secretariat Assistant*, it was felt that their names cannot be recommended for the said posts. In paragraph 10 of the counter affidavit filed by the Chief Secretary, it has been averred that the Commission objected to the claim of the appellants for their recommendation by the Commission for appointment against the vacant posts of *Secretariat Assistant* precisely on the ground that the process of recruitment had already been completed and recommendation for all the posts had been sent to the concerned departments as per their requisition and the Commission, therefore, cannot take any action regarding recommendation for any other posts.

13. The learned single Judge, recording his satisfaction that the respondents-State authorities did their level best to accommodate the appellants against available vacancies, depending on their rank and position, dismissed the writ application, placing reliance on a Supreme Court's decision, in the case of **Union of India v. Bikash Kumar**, reported in **(2006) 8 SCC 192**. The learned single Judge noted that it was a case of honest mistake in the matter of posting of these appellants in the Social Welfare Department. The learned single Judge further observed, in the order under appeal, that

the appellants might either accept the offer, so given by the State Government by allowing them to join as Accountant – cum- Store Keeper/Cashier or they could try their luck afresh.

14. Mr. Dinu Kumar, learned Counsel, appearing on behalf of the appellants, has submitted that it was impermissible for the Commission to have made recommendation and the Welfare Department to have made appointment against posts, which were not advertised. He has contended that if there was any mistake in sending the requisition by the Welfare Department, the Commission, after noticing the mistake, could have made revised recommendation on the basis of merit position of the appellants and preferences given in their application forms. He has also submitted that since it was known to the General Administration Department that the vacancies against the posts of *Secretariat Assistant* had remained unfilled, because of non-joining of selected candidates, steps ought to have been taken to fill up those posts on the basis of merit position. He has further submitted that the General Administration Department wrongly yielded to the stand of the Commission that no further recommendation could be made after recommendations had already been made against all the posts of *Secretariat Assistant* knowing well that certain posts had remained unfilled, because of non-joining of candidates as also for some other reasons.



15. Mr. Dinu Kumar has referred to a communication, dated 09.10.2013, made by the Secretary of the Commission addressed to the Principal Secretary, Revenue and Land Reforms Department, Government of Bihar, in respect of filling up of 266 posts of Circle Inspectors and equivalent grades mentioning therein specifically that their being possibility of the posts remaining vacant, because of non-joining of candidates, the Commission is preparing a wait list on the basis of the same selection process. The said letter also mentions that in the event any requisition was sought, the Commission shall make recommendation.

16. Referring to various communications made by the Revenue and Land Reforms Department, which had been brought on record by way of annexures to the reply to the counter affidavit filed on behalf of the respondent Nos. 6 to 8, Mr. Dinu Kumar, learned Counsel, has submitted that at least, 56 candidates, recommended for appointment as Circle Inspector, under Bihar Revenue Services, did not submit their joining report and the Department, accordingly, had requested, through letter, dated 23.08.2014, the Commission to recommend names of 56 candidates from the wait list. Similarly, the Co-operative Department, Government of Bihar, informed the Secretary of the Commission that, at least, 88 candidates, recommended for appointment as Co-operative

Extension Officers, did not submit their joining report. In addition thereto, 59 candidates did not turn up for verification of their certificates and accordingly requested the Commission to recommend names for appointment.

17. Learned Counsel, appearing on behalf of the respondents-State of Bihar, has submitted that after having detected the mistake in sending the requisition to the Commission by the Department of Social Welfare, Government of Bihar, and noticing that no post of Accountant –cum- Cashier was sanctioned under the Directorate, it was decided to adjust these appellants against such posts, in the Department, having equivalence in grade and pay scale and, accordingly, appointment letters have been issued. It is his plea that the interest of the appellants cannot be said to have been adversely affected since they have been given the pay scale, which they would have been entitled to, had they been appointed against the posts advertised other than the post of *Secretariat Assistant*. He has also submitted that the posts, which were advertised and remained unfilled, because of non-joining of candidates, shall be filled up on the basis of future selection process.

18. In view of the facts, which have been taken note of, as above, we are, primarily, required to deal with the stand taken on behalf of the Commission that when once the

Commission made its recommendation against all the posts, so advertised, can it not make recommendation against vacancies, which remained unfilled, because of non-joining of the candidates.

19. There cannot be any quarrel over the rule that there is no bar on the part of the Commission to make recommendation against the posts advertised, which remained vacant, because of non-joining of the candidates. This is a settled law that the process of selection begins with the issuance of advertisement and culminates with the filling up of notified vacancies. We can refer to the Supreme Court's decision, in this regard, in **Rakhi Ray v. High Court of Delhi**, reported in **2010 (2) SCC 637**, which lays down the law to this effect. It is also true that inclusion of a candidate, in the select list, does not confer any indefeasible right on the candidate to be appointed and such inclusion can, at best, be considered as condition of eligibility unless the service rules lay to the contrary. Still, there has to be a valid reasonable decision taken in public interest not to fill up the vacancies, which remained unfilled, because of non-joining of the candidates, if the Government decides not to fill up the posts.

20. From the pleadings on record, we have noticed that when the mistake, committed by the Social Welfare Directorate, came to light to the effect that the posts against



which the appellants were appointed on the basis of recommendation of the Commission pursuant to the selection process in question, did not, in fact, exist and requisition made to the Commission by the Directorate itself was wrong, the Principal Secretary, General Administration Department, had held discussion with the Secretary of the Commission and it appears that the Secretary of the Commission declined to recommend the names of the appellants against any other post despite desirability shown by the Department on the reasoning that recommendations against all the posts having already been made, no further recommendation could be made. Both, the Commission and the Government, were aware of the fact that certain posts had remained vacant, because of non-joining of the candidates against various posts including the post of *Secretariat Assistant*. It appears that because of denial by the Commission to make recommendation afresh in favour of the appellants, it was decided to adjust the appellants against such posts, which were vacant and existing under the Directorate with similar scale of pay.

21. If we consider the situation from the angle that the posts under the Directorate of Social Welfare, which were advertised, did, in fact, not exist, the recommendations, made in favour of the appellants for their appointment against such non-existent posts by the Commission itself, were illegal.

Subsequent adjustment of the appellants sought to be made against the posts of Cashier/Accountant –cum- Store Keeper is apparently without any valid recommendation by a Selection Committee in this regard.

22. Further, there is statutory rule governing the recruitment and service conditions of service of Accountant – cum- Store Keeper, under the control of Social Welfare Directorate, called “**Accountant –cum- Store Keeper (Recruitment and Conditions of Service) Rules, 2014**”. The Rules came into force much after issuance of the advertisement and publication of the result of the examination in question. The Rules prescribed for appointment to the said post on the basis of recommendation made by the Commission. In such circumstances, it would be illegal for the respondents to ask the appellants to join as Accountant –cum- Store Keeper or the post of Cashier, which were not advertisement.

23. By virtue of their merit position, category and the preference given by them, the appellants had a right to be considered against the existing vacancies, which were advertised through the advertisement, in question.

24. Learned Counsel for the appellants has rightly placed reliance on the Supreme Court’s decision, in the case of **Manoj Manu and Another v. Union of India and Others**, reported in **(2013) 12 SCC 171**, paragraph 9 of which reads

as under:



"9. *It can be clearly inferred from the reading of the aforesaid that it is not the case where any of these persons initially joined as Section Officer and thereafter resigned/left/promoted, etc. thereby creating the vacancies again. Had that been the situation viz. after the vacancy had been filled up, and caused again because of some subsequent event, position would have been different. In that eventuality UPSC would be right in not forwarding the names from the list as there is culmination of the process with the exhaustion of the notified vacancies and vacancies arising thereafter have to be filled up by fresh examination. However, in the instant case, out of 184 persons recommended, six persons did not join at all. In these circumstances when the candidates in reserved list on the basis of examination already held, were available and DoPT had approached UPSC "within a reasonable time" to send the names, we do not see any reason or justification on the part of UPSC not to send the names."*

25. We may not lose sight of a Supreme Court's decision, in the case of **Bihar State Electricity Board v. Suresh Prasad and Others**, reported in **(2004) 2 SCC 681**, wherein the Supreme Court did not uphold the decision of this

Court, leading to direction to the Board to offer posts to the candidates of the wait list against such posts, which remained unfilled, because some of the candidates had failed to turn up and did not join, despite recommendation in their favour. Relevant part of the said decision from paragraph 7 is being extracted herein below:

"7. We are not shown any statutory recruitment rules, which require the appellant Board to prepare a waiting list in addition to the panel. The argument advanced on behalf of Respondents 1 to 7 was in effect that when 18 candidates failed to turn up the appellant was bound to offer posts to candidates in the waiting list. No such rule has been shown to us in this regard. In our view, the judgment of this Court in the case of Shankarsan Dash v. Union of India, reported in (1991) 3 SCC 47, squarely applies to the facts of this case. Further there was no infirmity in the judgment of this Court delivered on 4-12-1998 and in our view with respect there was no need to recall the said judgment."

26. However, there is distinguishable feature in the present case inasmuch as the appellants of this case are sought to be appointed/adjusted against the posts, which were not advertised. In our considered view, this cannot be allowed.

The appellants had a right to be considered for appointment against the posts advertised keeping in view their merit position and preference given in their application forms.

27. In the facts and circumstances of the present case, we are of the considered view that these appellants deserve to be appointed against available vacancies.

28. We, accordingly, direct the Principal Secretary, General Administration Department, Government of Bihar, to send vacancy position of various posts, so advertised, to the Commission, which have remained unfilled, because of non-joining of the candidates within a period of 15 days from the date of the present judgment and order.

29. The Secretary of the Commission is, in turn, directed to recommend the names of these appellants for their appointment against available vacancies on the basis of their merit position within a period of one week thereafter.

30. Once the recommendations are made, the concerned Department(s) shall be required to proceed accordingly and issue appointment letters in favour of the appellants in accordance with law.

31. We further direct that the respondents shall not compel the appellants to join the posts of Accountant –cum– Store Keeper/Cashier, as the case may be, and their candidature shall not be cancelled by the respondents on the

basis of their non-joining on the said posts.

32. Before we part with, we have felt it appropriate to observe that the present selection process began in the year 2010 with the issuance of advertisement in question, through which altogether 3285 posts were sought to be filled up. For one reason or the other, it took 4 (four) years for the system to come out with the result. A merit list has been prepared, which is available. There is nothing to show that the panel so prepared has lapsed with lapse of time.

33. This is an admitted fact that several posts, which were advertised in the year 2010, could not be filled up, because of non-joining of candidates. Holding competitive examination for selection to fill up posts under the State Government's Departments is apparently a mammoth exercise, which the authorities carry out. While, on the one hand, the Departments lack sufficient hand for their smooth functioning, on the other, because of delay in the completion of the process of selection, the posts remained unfilled. Lack of human resources in the Departments adversely affects public interest. The Courts, exercising jurisdiction under Article 226 of the Constitution of India, may not compel the State-respondents to fill up the advertised posts on the basis of panel prepared by the Commission for the purpose of filling up of those posts. It is, at the same time, trite that it is within the domain of the

Executive to take a decision on this aspect if the rules do not forbid.

34. Should the State-respondents not rise to the occasion and take a policy decision in public interest to fill up such posts, which were advertised and have remained unfilled, because of non-joining of the candidates on the basis of merit list prepared by the Commission? We make it clear that a policy decision to this effect, if taken, cannot be unreasonable or arbitrary on the touchstone of Articles 14 and 16 of the Constitution of India; rather, it may be in public interest.

35. With these observations, this appeal stands allowed. The judgment and order under appeal, dated 30.03.2016, passed in CWJC No. 17798 of 2014, stood accordingly set aside.

36. 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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