

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.1271 of 2013
IN
Civil Writ Jurisdiction Case No. 15423 of 2011

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Rakesh Kumar S/O- Sri Jageshwar Prasad Yadav R/O Village- Kasaha, P.O.-
B.T.P.S., District- Begusarai, State- Bihar, Pin- 851126

.... Appellant

Versus

1. Krishna Singh S/O Yadupati Singh R/O Vill. Bindwara, Bharghar Tola, P.O. Munger, P.S.- Kasim Bazar, District- Munger
 2. Sujeet Kumar S/O Damodar Mahto R/O Vill. Garib Nagar, P.O. Kawadpur, P.S. Surajgarh, Distt. Lakhisarai
 3. Rakesh Kumar S/O Ram Keshwar Yadav R/O Vill. P.O. Pansalla, P.S. Chiriabariyarpur, District- Begusarai
 4. Deepak Kumar Jha S/O Narendra Jha R/O Vill. + Post- Garhbaruari, P.S.- Supaul, District- Supaul
-Petitioners / Respondents
5. The Bihar Public Service Commission Through Its Secretary, Bailey Road, Patna
 6. The Secretary, Bihar Public Service Commission, Bailey Road, Patna
 7. The State Of Bihar Through Its Chief Secretary, Government Of Bihar, Patna
 8. The Principal Secretary, General Administration Department, Government Of Bihar, Patna

.... Respondent/s

with

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Letters Patent Appeal No. 1272 of 2013

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1. The Bihar Public Service Commission through its Secretary, Bailey Road, Patna
2. The Secretary, Bihar Public Service Commission, Bailey Road, Patna

.... Appellant/s

Versus

1. Krishna Singh S/O Yadupati Singh R/O Vill. Bindwara, Bharghar Tola, P.O. Munger, P.S.- Kasim Bazar, District- Munger
 2. Sujeet Kumar S/O Damodar Mahto R/O Vill. Garib Nagar, P.O. Kawadpur, P.S. Surajgarh, Distt. Lakhisarai
 3. Rakesh Kumar S/O Ram Keshwar Yadav R/O Vill. P.O. Pansalla, P.S. Chiriabariyarpur, District- Begusarai
 4. Deepak Kumar Jha S/O Narendra Jha R/O Vill. + Post- Garhbaruari, P.S.- Supaul, District- Supaul
-Petitioners / Respondents 1st set
5. The State of Bihar through its Chief Secretary, Govt. of Bihar, Patna
 6. The Principal Secretary, General administration Department, Government of Bihar, Patna

.... Respondents/ Respondents 2nd set

with

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Letters Patent Appeal No. 1282 of 2013
IN
Civil Writ Jurisdiction Case No. 15423 of 2011

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Sudhir Kumar, Son Of Late Saryug Singh Resident Of Muharla Kurjee Kothiya,
Ps Digha District Patna Pin- 800010

.... Appellant

Versus

1. Krishna Singh S/O Yadupati Singh R/O Vill. Bindwara, Bharghar Tola, P.O. Munger, P.S.- Kasim Bazar, District- Munger
2. Sujeet Kumar S/O Damodar Mahto R/O Vill. Garib Nagar, P.O. Kawadpur, P.S. Surajgarh, Distt. Lakhisarai
3. Rakesh Kumar S/O Ram Keshwar Yadav R/O Vill. P.O. Pansalla, P.S. Chiriabariyarpur, District- Begusarai
4. Deepak Kumar Jha S/O Narendra Jha R/O Vill. + Post- Garhbaruari, P.S.- Supaul, District- Supaul
5. The Bihar Public Service Commission Through Its Secretary, Bailey Road, Patna
6. The Secretary, Bihar Public Service Commission, Bailey Road, Patna
7. The State Of Bihar Through Its Chief Secretary, Government Of Bihar, Patna
8. The Principal Secretary, General Administration Department, Government Of Bihar, Patna

....Petitioners/Respondents

.... Respondents

with

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Letters Patent Appeal No. 1595 of 2013
IN
Civil Writ Jurisdiction Case No. 15423 of 2011

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1. The State of Bihar Through Its Chief Secretary, Government Of Bihar, Patna
2. The Principal Secretary, General Administration Department, Government Of Bihar, Patna

.... Appellants

Versus

1. Krishna Singh Son Of Yadupati Singh Resident Of Village - Bindwara, Bharghar Tola, P.O. Munger, P.S. Kasim Bazar, District - Munger
2. Sujeet Kumar Son Of Damodar Mahto Resident Of Village - Garib Nagar, P.O. Kawadpur, P.S. - Surajgarha, District - Lakhisarai
3. Rakesh Kumar Son Of Ram Keshwar Yadav P.O. Pansalla, P.S. Chiriabariyarpur, District - Begusarai
4. Deepak Kumar Jha Son Of Narendra Jha Resident Of Village + Post Garh Baruari, P.S. - Supaul, District - Supaul
5. The Bihar Public Service Commission Through Its Secretary, Bailey Road, Patna
6. The Secretary, Bihar Public Service Commission, Bailey Road, Patna

.... Respondent/s

with

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Letters Patent Appeal No. 604 of 2014
IN
Civil Writ Jurisdiction Case No. 2351 of 2013

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1. Mohan Kumar S/O Sri Ram Suresh Tiwari, Resident of Ashok Nagar, Road No. 12, Kankarbagh, P.S. - Kankarbagh, District - Patna

2. Pramod Kumar Singh S/O Kamla Kant Singh Resident of Vill + P.O. - Paneari, P.S. - Nasriganj, District - Rohtas (Bhabhua)

.... Appellants/Petitioners

Versus

1. The State of Bihar Through Its Chief Secretary, Government of Bihar, Old Secretariat, Patna.

2. The Principal Secretary, General Administration Department, Government of Bihar, Old Secretariat, Patna.

3. The Principal Secretary, Department of Home, Government of Bihar, Old Secretariat, Patna

4. The Bihar Public Service Commission Through Its Secretary, Bailey Road, Patna.

5. The Chairman, Bihar Public Service Commission, Bailey Road, Patna.

6. The Secretary, Bihar Public Service Commission, Bailey Road, Patna.

.... Respondents/Respondents

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Appearance :

(In LPA No. 1271 of 2013
LPA No. 1272 of 2013 and
LPA Nos. 1595 of 2013)

For the Appellant/s :	Mr. Lalit Kishore, Sr. Advocate Mr. Satyabir Bharti, Advocate
For the State :	AC to AAG I
For the Respondents (Private) :	Mr. Chakrapani, Mr. Sanjay Kumar Singh Mr. Dipak Kumar

(In LPA No. 604 of 2014)

For the Appellant/s :	Mr. Chakrapani, Mr. Sanjay Kumar Singh Mr. Dipak Kumar, Mr. Madhuresh Singh
For BPSC :	Mr. P N Shahi, Sr. Advocate
For the State :	Mr. , AC to GP 27

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CORAM: HONOURABLE THE ACTING CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE HEMANT GUPTA

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE HEMANT GUPTA

Date: 27 -04-2016

This order shall dispose of LPA Nos. 1271, 1272,
1282, 1595 of 2013 and 1282 of 2013 directed against
common judgment of the learned single Bench of this Court,

dated 6.8.2013, as also LPA No. 604 of 2014 directed against an interim order, dated 16th January, 2014, passed by the learned single Judge in terms of the order passed in CWJC No. 2351 of 2013, now subject matter of LPA No. 1271 of 2013 and connected cases, but posted the writ application for hearing after the decision in SLP (Civil) No. 23713 of 2009 or LPA No. 1271 of 2013.

2. Since the issue is common in both sets of appeal, the same have been taken up for hearing together. For the facility of reference, the facts are being taken from LPA No. 1271 of 2013 (1st set of appeals).

3. The respondents have invoked the writ jurisdiction of this Court claiming a writ of *certiorari* for quashing the result of *Preliminary Test* (PT) of 53rd to 55th Combined Competitive Examination, held/published by Bihar Public Service Commission (for short, 'the Commission'), on 19th October, 2012, so as to recast the candidates on the basis of their merit without taking into consideration the category to which the candidates belong. In LPA No. 604 of 2014 (2nd set of appeal) the challenge was to the *Preliminary Test* held for appointment to the posts of Assistant Prosecution Officers advertised vide Advertisement No. 39 of 2009. The grievance was that in publication of the result of the *Preliminary Test*, the Commission should not give effect to the reservation, i.e., as is available for appointments at the stage of *preliminary examination*.



4. The Commission published an Advertisement for holding 53rd, 54th and 55th Combined Preliminary Examination, 2011. The Advertisement contemplated that 40% marks for General Category, 36.5% marks for Backward Class Category, and 34% for Extremely Backward Class, and 32% marks for Scheduled Castes and Scheduled Tribes would be necessary for passing out the preliminary examination. The writ petitioners are candidates from General Category as well as reserved categories.

5. In the counter affidavit filed on behalf of the State, it is pointed out that the petitioners have secured less marks than the cut-off marks in General/reserved category. However, in pursuance of an order, dated 04.01.2012, passed in CWJC No. 13022 of 2011, additional number of 5442 candidates have been declared successful for appearing in the *Main Examination*. But only one candidate, i.e., the petitioner, Shri Rakesh Kumar, became successful. It is also mentioned that the State Government has provided reservation for different categories, vide Notification, dated 3rd September, 2002. The *Preliminary Test* is initial process to shortlist reasonable number of candidates for the *Main Examination* on the basis of merit from amongst the members of appearing candidates. The Commission, vide Notification, dated 15th July, 1995, had resolved that *Preliminary Test* would be merely a test to select candidates for the *Main Examination* and would have nothing to do with the merit of the *Main Examination*.

The number of candidates for the *Main Examination* should be either ten times of the reported total number of vacancies or ten percent of the total number of candidates, who have actually taken the *Preliminary Test*.

6. It is also pointed out that short listing is made keeping in view minimum percentage of marks obtained by the candidates representing different reserved categories. Thus, the Commission short listed the candidates for the *Main Examination* to maintain adequate *ratio* of representation of each reserved category. It is stated that unless and until such short listing is made, it is not possible for the Commission to give effect to the reservation policy of the State Government at later stage of the selection process, because less number of candidates of reserved category, if selected on the basis of *Preliminary Test*, will eventually affect the selection process of *Main Examination* as well.

7. It is further pointed out that the total number of candidates, who had appeared in the *Preliminary Test* was 133694 and 10% of the appearing candidates were required to be selected. Such candidates, i.e., 13694 in number, could be short listed having obtained 99 marks, which has become cut-off marks. Whereas, the candidates from the reserved category were not adequately represented and, therefore, to give representation to them, the cut off marks for such category were reduced.

8. The learned single Bench allowed the writ

application holding that the declaration of the *Preliminary Test* making provisions for reservation would be *ultra vires* the Constitution. Accepting that there can be a situation that number of reserved category succeeding may be few after the *Main Examination*, the Court found that cut-off marks may be lowered, but that lowering of marks will have to be done for everybody including General Category candidate. The Court found the action of the Commission to lower the cut-off marks of the reserved category candidates unjustified as it was found to be leading to great disparity. It may be pointed out that the cut-off marks for each of the category as noticed by the learned single Judge, is as under:-

<u>Category</u>	<u>PT cut off marks</u>	<u>Number qualified</u>
General	100	11,829
BC	96	2,070
EBC	89	3,144
ST	83	156
SC	83	2,914

Total: 20,582		

Thus, the learned single Judge directed that all candidates, who have obtained 83 marks or more, should be allowed to appear in the examination. Such direction would make almost 46,000 candidates eligible for the *Main Examination*.

9. The learned Counsel for the appellants argued that the learned single Judge has erred in law in lowering the cut-off marks for all categories relying upon the Division Bench

judgment of Andhra Pradesh High Court in the case of **S.Jaffer Saheb vrs. State of Andhra Pradesh [1984 (O) AIJ-AP 430686]**. The benefit of reservation is an enabling provision, which cannot be claimed as a matter of right. But once the Commission has decided to lower the percentage of marks of the reserved category, it cannot be said to be illegal, unwarranted or against the provisions of the Constitution. The facts, in the case of **S.Jaffer Saheb** (supra) or in the case of **Andhra Pradesh Public Service Commission vs. Baloji Badhabhath [(2009) 5 SCC 1]**, were altogether different and the principles laid down therein are in no way applicable to the facts of the present case. The appellant referred to the judgment of a Division Bench of Punjab & Haryana High Court in LPA No. 1053 of 2011, decided on 8th September, 2011, whereby in somewhat similar circumstances, the preparation of different list of reserved categories for the purposes of appearing in *Main Examination* was upheld.

10. On the other hand, the learned Counsel for the writ applicants relied upon the judgment of **S. Jaffer Saheb's** case (supra) and also of the **Baloji Badhabhath's** case (supra) contending that there cannot be any lowering of cut-off marks for the reserved category candidates and, therefore, the direction of the learned single Judge is legal and proper.

11. We have heard learned Counsel for the parties and found that the order passed by the learned single Bench is not sustainable in law. Firstly, one undisputed fact is that the



State Government, while sending requisition to the Commission to recommend candidates for the posts, had not specified any process of short listing of the candidates. The recommendation, which is available in LPA No. 604 of 2014 dated 11th October, 2006, is to make recommendation for 106 posts and by applying the reservation policy as specified therein. There is no process of short listing of candidates mentioned therein. In pursuance of such recommendation, the Advertisement published by the Commission does not specify how the candidates will be short listed, though in the first set of appeals, the condition, in the Advertisement, is that candidates must obtain minimum marks to qualify for the *Main Examination*. The marks required to be obtained for the reserved category are less than the General Category candidates.

12. In the judgment in **S. Jaffer Saheb's** case (supra), the Andhra Pradesh High Court was considering the G.O.Ms. No. 300 dated 18th May, 1983, issued by the State Government in consultation with the Public Service Commission. The condition was that candidates, equal to 15 times of the total number of vacancies, will be called upon to appear in the *Main Examination*. It was a decision of the State Government before the process of selection was initiated. The reservation given to different reserved category calling upon the candidates of reserved category was not accepted, it being against the criteria finalized earlier.

13. In **Baloji Badhabhath's** case (supra), the Government Order GOMs No.570, dated 31st December, 1997, and Notification, dated 27th December, 2007, were the subject matter of consideration, wherein the candidates were decided to be short listed in the *ratio* of 1:50 to the total number of vacancies available at the preliminary time "irrespective of community". The decision was taken by the State Government and was categorical that there should be no lower cut-off marks for the reserved category. The Court found that there cannot be lowering of cut-off marks for the reserved category.

14. Firstly, the issue, which was under consideration before the Supreme Court in **Baloji Badhabhath's** case (supra), was materially different, that is, based upon the decision of the State Government that the candidates will be short listed for the purposes of *Main Examination* irrespective of communities, whereas there is no such stipulation or condition in the requisition sent by the State Government to the Commission. The Commission, in the 1st set of appeals, has specified different minimum percentage of marks to qualify in the *preliminary examination*. The candidates of the reserved categories were required to obtain less number of minimum percentages of marks than the marks meant for General Category candidates. Therefore, the intent of the Commission to short list the candidates, in the *Main Examination* on different qualifying marks, was made evident in the Advertisement itself.

15. The Commission in the Notification, dated 15th July, 1995, had specified two options, either to call 10 times the candidates of the vacancies to be filled up or to call 10% of the candidates, who had appeared in the *preliminary examination*. The Commission has opted for the second option, i.e., to call 10% of the total candidates appearing in the examination. Having called 10% of the total candidates for the written examination, the Commission, in order to give adequate representation to the candidates of the reserved category, lowered the marks so that reasonable number of candidates, belonging to reserved categories, are available for appearing in the *Main Examination* and *viva-voce* test. It cannot be said to be an illegal process. Even the Supreme Court, in **Baloji Badhabhath's** case (supra), held to the following effect:-

"18. The Constitution of India lays down provisions both for protective discrimination as also affirmative action. Reservation of posts for the disadvantaged class of people as also seats in educational institutions are provided for by reason of Articles 15 and 16 of the Constitution of India. Reservation made for the members of the Scheduled Castes, scheduled Tribes and Other Backward Classes would, however, be subject to Article 335 of the Constitution of India. Concededly, no citizen of India can claim reservation as a matter of right. The provisions contained in Articles 15 and 16 of the Constitution of India are merely enabling provisions. No writ of or in the nature of mandamus, thus, could be issued."

16. A perusal of the above observations of the Supreme Court shows that reservation cannot be claimed as a

matter of right and that provisions, contained in Articles 15 and 16, are enabling provisions meaning thereby that if the State or the Commission decides to grant the benefit of reservation, it cannot be said to be an illegal process inasmuch as it satisfies the constitutional mandate under Articles 15 and 16 of the Constitution of India.

17. In another judgment, in the case of **Chattar Singh vs. State of Rajasthan [(1996) 11 SCC 742]**, the rule of competitive examination was framed by the State Government granting relaxation of 5% marks to the candidates belonging to Scheduled Castes and Scheduled Tribes. The other backward classes claimed benefit of reservation, which was not found to be tenable for the reason that the rule itself contemplated relaxation only in respect of Scheduled Castes and Scheduled Tribes. The Supreme Court observed as under in paragraph- 14 of the judgment:-

"14.The object is to eliminate unduly long list of candidates so that opportunity to sit for *Main Examination* should be given to candidates numbering 15 times the notified posts/ vacancies in various services; in other words for every one post/vacancy there should be 15 candidates. There would be wider scope to get best of the talent by way of competition in the examination. The ultimate object is to get at least three candidates or as is prescribed, who may be called for viva voce. Therefore, the lowest range of aggregate marks as cut-off for general candidates should be so worked out as to get the required number of candidates including OBCs, Scheduled Castes and Scheduled Tribes. The lower range would, therefore, be worked out in such a way that candidates numbering 15 times the notified posts/vacancies would be secured so as to afford an opportunity to the candidates to compete in the *Main Examination*."



18. Somewhat similar issue arose before the Division Bench of the Punjab & Haryana High Court, wherein the candidates of the reserved categories challenged the short listing of candidates. The argument was that reserved category candidates, who have obtained higher marks than the last of general category short listed, should be considered in general category, by applying the principle of reservation. The argument was that if such candidates are considered as general category candidates, more candidates of reserved category would become eligible for short listing to appear in the *Main Examination*. Considering the said argument, the Court observed to the following effect:-

“ In view of the judgments referred to above, we find that the policy of reservation for the purposes of short-listing of candidates for the purpose of *Main Examination* is not applicable, it being an eligibility test. Therefore, the action of the Commission in not applying the principle of reservation at the stage of preliminary examination cannot be said to be illegal, arbitrary or unjust in any manner, which may warrant any interference in appeal.”

19. The said observations are in the context of applying the principle of reservation so as to exclude reserved category candidates, who have obtained more marks than the general category candidates from the list of short listed candidates for the purposes of *Main Examination*.

20. Thus, we find that there was no decision of the State Government and/or the Commission, in **S.Jaffer**



Saheb's case (supra), to lower the marks for the reserved category. It is the Court, which intervened to lower the marks. The act of lowering the qualifying marks for the reserved category did not find favour by the Supreme Court in the case of **Baloji Badhabhath's** case (supra). In **Baloji Badhabhath's** case (s) also, the Andhra Pradesh High Court lowered the marks for the reserved category. It was not the decision of the State or the examining body to lower the cut-off marks. The State and/or the examining body is within its jurisdiction to lower the marks for reserved category; but no writ can be claimed to lower such qualifying marks for appearing in the *Main Examination*.

21. In the present case, the Commission has rightly short listed 10% of the total candidates to appear in the *Main Examination*; but since adequate number of scheduled castes, scheduled tribes and backward classes were not represented, the Commission rightly lowered the percentage of marks to have a reasonable pool of the reserved category candidates to give effect to the reservation policy of the State Government. Such a process cannot be said to illegal or unwarranted.

22. We find that the view, taken by the learned single Bench to reduce the cut-off marks for all categories, defeats the very purpose of short listing of candidates for the purposes of *Main Examination*. It violates the policy decision of the Commission notified in the order, dated 15th July, 1995,

itself. The lowering of the cut-off marks by the Commission is not contradicting any notification, rule or instructions of the State Government or any of its policy decision, but is to give effect to the reservation policy of the State Government. Therefore, it cannot be said to be unjustified or unconstitutional in any manner.

23. Consequently, the order of the learned single Judge is set aside. The present appeals are allowed. The writ petitions are dismissed.

(Hemant Gupta, J)

I A Ansari, ACJ : I agree.

(I A Ansari, ACJ)

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