

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.5506 of 2013

=====

Dr. Surendra Kumar S/O Sri Buchan Yadav R/O Village- Rauhi Narendrapur,
Police Station- Andhra Math, District- Madhubani

.... Petitioner/s

Versus

1. The State Of Bihar

2. The Principal Secretary Department Of General Administration, Govt. Of Bihar,
Patna

3. The Principal Secretary Department of Health And Medical Education, Bihar,
Patna

4. The Chairman, Bihar Public Service Commission, Patna

5. The Secretary Null Bihar Public Service Commission, Patna

.... Respondent/s

=====

Appearance:

For the Petitioner/s : Mr. Bindhyachal Singh
Mr. Satya Prakash

For the Respondent-State: Mr. Nutan Sahay, A.C. to G.A.-5

For the Respondent-BPSC: Mr. Manish Kumar

=====

CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY

ORAL JUDGMENT

Date: 28-03-2016

1. Heard learned counsel for the petitioner and learned
counsel for the State.

2. In the present case, the petitioner is seeking relief for
quashing the letter No.6027 dated 12.02.2013 (Annexure-13),
whereby the petitioner has been informed that he does not possess the
requisite experience of three years as Senior Resident and therefore,

he has been disqualified and not included in the merit list pursuant to the Advertisement No.17 of 2011 and further relief has been sought to issue a writ of mandamus, commanding the respondents to produce the decision before this Court, by which the petitioner has been declared to be disqualified.

3. The Primary question in the present matter is involved that the petitioner has performed the duty as Senior Resident not in a substantive manner, but was allowed to perform the duty for three years on deputation/ad-hoc/officiating, will be sufficient experience for the consideration of his case as requisite qualification for the appointment to the post of Assistant Professor.

4. The short facts of this case are that the petitioner was appointed as a Medical Officer on 06.10.1990 and was transferred to Primary Health Centre, Chakmeshi, Kalyanpur, Samastipur in the year 2000. He was posted at D.M.C.H., Cardio-therapy in the department of surgery on 11.10.2006 and thereafter, the petitioner was deputed as Senior Resident in the unit of D.M.C.H. on 30.04.2007. It appears from the certificate dated 27.5.2011 issued by the Superintendent of D.M.C.H. that the petitioner has worked as Senior Resident on deputation basis from 30.04.2007 to 09.05.2011. In paragraph No.7 of the writ application, the petitioner has specifically stated that the

petitioner was permanently posted to the post of Senior Resident, Department of Surgery D.M.C.H. and was working on the said post till the filing of the present writ application.

By way of oral submission, it is submitted that the petitioner has been appointed on contract basis as an Assistant Professor in Betiah Medical College.

5. An advertisement was published on 09.07.2011 for the appointment of Assistant Professor in different stream/departments including Surgery department, where 20 posts have been shown to be vacant, giving details of number of vacancies of different categories, in which two vacancies have been identified for the backward class category-II. As the petitioner belongs to backward category-II he applied against the said vacancy. The petitioner and others participated in the interview, but the petitioner could not be selected on the ground that he does not possess the experience of three years as a Senior Resident.

6. It is not in dispute that the petitioner was allowed to participate in the interview, but the learned counsel for the Commission submits that the petitioner was provisionally allowed to appear in the said interview.



7. When the petitioner was not selected, he tried to find out the reason for his non-selection and he came to know that two persons namely, Prem Prakash and Ramanand Prasad Sinha have been selected, they have possessed 10 marks and 12 marks respectively whereas the petitioner has obtained 12 marks but his candidature was rejected by the respondents on the ground that he does not possess the experience of three years as a Senior Resident.

8. Learned counsel for the Commission has submitted that so far the factual part is concerned, the Commission has not disputed the fact that the petitioner has discharged the duty of Senior Resident on deputation but only point is left for consideration to this Court is as to whether the period the petitioner has discharged his duties on deputation as Senior Resident would be counted as an experience for the purposes of selection to the post of Assistant Professor or not? Basically the thrust has been made that as there is no substantive appointment of Senior Resident, his candidature cannot be treated to be valid.

9. In support of his submission, he placed reliance on certain provisions of 2008 Rules, especially clause 6(b), where it has been provided that any person, if appointed to any tenure post can hold the post of one term only. There can not be any appointment on

the same tenure post for more than one term.

10. Learned counsel for the Commission has also placed reliance on the proviso, which states that provided that Senior Resident/Tutors already appointed and working in any State Medical Colleges prior to coming into force of these rules shall be deemed to have completed their tenure on completion of four years counted from the date of joining the post of Senior Resident/Tutor.

11. He further placed reliance on the Criteria (i) which states that the panel shall be prepared every year for the tenure posts subject-wise by the BCECE Board or any other organization decided by the Govt. in accordance with the time schedule as decided in Dr. Rita Sinha's case being CWJC No.9462 /1989 and duly adopted by the State Govt. under Health Department Resolution No.968(17) dated 31.10.1990.

12. Learned counsel for the petitioner in support of his submission that the period the petitioner has discharged his duties on deputation as Senior Resident will be counted for experience for the purposes of essential qualification for selection to the post of Assistant Professor in Surgery, has relied on the judgments in ***Dr. Asim Kumar Bose vs. Union of India and Others***, reported in ***AIR***



1983, S.C., 509, in Dr. S.K. Verma vs. The State of Bihar and Ors., reported in *1992(1) PLJR, 657* and the judgments passed in *L.P.A. No.930 of 1998 and L.P.A. 931 of 1998*, there in all cases it has been held that if a person performs the duty even on ad-hoc/deputation that period will be considered as valid experience for the consideration for the appointment or promotion to the next higher post.

13. In contra, learned counsel for the Bihar Public Service Commission (hereinafter mentioned as “Commission”) has placed reliance on the judgment in *Dr. Anil Kumar Sinha vs. The State of Bihar and Others*, reported in *1990(1) P.L.J.R, 124*, which was considered by the Hon’ble Supreme Court in *1998 (2) P.L.J.R., 12 (S.C.)*, paragraph No.3, where the Hon’ble Supreme Court has approved the judgment of this Court and held that unless appointed in regular and substantive basis will not be valid experience for selection or promotion but made observation in positive in favour of the petitioner taking into considerations earlier action of the State of Bihar.

14. The second limb of argument on behalf of learned counsel for the state is that the post has already been filled up and even if any post is left vacant for any reason, the same would go to succeeding year and would not be basis for giving relief to the

petitioner. He has placed relied on the judgment in *Subodh Kumar vs. the State of Bihar and Ors.*, reported in 2012(2), *PLJR*, page- 647 and in *Dr. Punam Kumari vs. The State of Bihar and ors.* reported in 2011 (1) *PLJR* 283.

15. In reply, learned counsel for the petitioner has submitted that if any post is not filled up on any ground the same may be filled up from the panel of the selected candidates. He has further submitted that in the present case the petitioner has wrongly been deprived of selection so much so out of two selected candidates one namely, Prem Prakash, selected but did not join the post. As per the learned counsel for the petitioner the said post is still vacant where the petitioner would be a proper candidate for filling up the said post, but learned counsel for the Commission submitted that the Commission has not received any information from the State whether the post is still vacant on account of one candidate refused to join the said post.

16. Having considered the rival contentions of the parties, this Court has to decide as to whether the petitioner, who had not discharged the duty of Senior Resident on substantive basis, but on deputation, will be considered to be valid experience for the purpose of appointment to the post of Assistant Professor. Another point has to be dealt with by this Court when a post is vacant on account of non-



joining whether the petitioner can be accommodated to that post as the learned counsel for the Commission has placed reliance on Resolution dated 06.07.2007 wherein it has been mentioned that if the vacancy could not be filled up on any ground and has been left out, the said vacancy will be carried forward to the subsequent recruitment year and the person who is standing in the panel will not have any claim for his consideration and accommodation on the left over vacant post.

17. For proper adjudication, it will be relevant to consider the Rule of 2008, dealing in what manner the Assistant Professor, Professor and Professor including Principle in Medical Colleges to be appointed. Before framing of Rule, the service condition of doctor attached to the teaching were governed by executive instructions, issued from time to time, the Government had framed the Cadre Post Rule-1997, but after the enforcement of 2008 Rule, earlier Rule stood repealed. In the present case, 2008 Appointment and Promotion Rule will be relevant for the purposes of arriving to a final conclusion superseded Administrative instructions will no longer govern the field in the matter of appointment of teachers connected with the medical education. The 2008 Appointment and Promotion Rule specifically mentions that the Rule has been framed in exercise of Article 309 of the Constitution of India and Chapter-1 mentions General provisions



states Rule shall be called as Senior Resident, Tutor, Bihar Medical Education Service Cadre Recruitment, Appointment and Promotion Rules, 2008. It shall extend the whole State of Bihar and the Rule shall come into effect from the date of publication of Notification in the Bihar Gazette and also provides definitions of different words used in the Rule.

18. Chapter-2 of the 2008 Rule provides the structure and constitution of the Bihar Medical Education service cadre comprises following posts in Bihar Medical Education Service Cadre are Assistant Professor, Associate Professor, Professor, Medical College Hospital Superintendent, Principle and in any other post, which may be included in the cadre by issuance of notification by the Government from time to time. The Post of Director-Medical College, Deputy Director-Administration, Deputy Director-Training, Additional Director-cum-Controller of the examinations, Director (Medical Education) are the cadre posts. The first cadre post is Assistant Professor, in terms of Chapter-4 which deals with the permanent entry into the Bihar Medical Education Service shall be on the post of Assistant Professor as per the condition and criteria laid down by the State Government from time to time. The State Government shall make appointments with this post from panel

prepared by the Bihar Public Service Commission in accordance with the procedure laid down in Annexure-B to this Rule.

19. Rule-7(ii) provides that the time schedule in respect of preparation of panel by the Commission and validity of the period of panel *vis-a-vis* the vacancy to be filled up the Government will be strictly followed as laid down in Annexure-C to this Rule. Rule-7 sub Rule-III (a) deals with specific qualification for consideration to the post of Assistant Professor in the following term:-

“For appointment to the post of Assistant Professor, it shall be essential for the candidates to have P.G. Degree in specified subject and three years teaching experience as Senior Resident or Tutor in specified subject after post graduation”.

20. On reading the aforesaid provision, it is clear that two qualifications has been made essential; first, the person must possess the P.G. Degree in the specified subject and second, three years teaching experience, as Senior Resident or Tutor. In the present case, there is no dispute that the petitioner is P.G. Degree holder has acquired the experience of three years as Senior Resident, as it is apparent from the undisputed fact as mentioned hereinabove. The question only lies in a narrow compass as to whether the duty discharged as Senior Resident on officiating basis, extended from



time to time, especially whenever there was a visit of M.C.I. for the purposes of recognition of the Medical Colleges, the petitioner was called and he discharged the duty of Senior Resident. The regular Senior Resident is appointed in terms of the Rule framed by the State of Bihar, but in the present case admittedly, the petitioner was not appointed as regular Senior Resident in terms of the Rule framed by the State of Bihar. So, the question remains as to whether the service rendered by the petitioner from time to time on deputation, officiating and ad-hoc basis, will be treated to be the sufficient essential qualification for the purpose of consideration for the post of Assistant Professor.

21. This issue has been considered by the Hon'ble Supreme Court in the case of *Asim Kumar Bose vs. Union of India, reported in 1983 (S.C.), page 509*, in that case the question with respect to the appointment to the post of Professor was under consideration and in that case one of the point was whether Asim Kumar Bose has sufficient experience for the purposes of consideration to the post of Professor. It has been recorded as a matter of fact that after the successful academic career as teacher of post graduate course in the Christian Medical College & Hospital, Vellore, Mr. Bose, was appointed as a Lecturer in Radiology under the West Bengal Health



Scheme and during the period as a Lecturer in Medical College, Calcutta, he had privileged of teaching Post Graduate classes, while discharging that duty, he was asked by Christian Medical College, Vellore, to organize the newly installed Tele-Cobalt Therapy Unit in the Colombo Plan Aid. Again he was appointed as a Lecturer in radiology in Maulana Azad Medical College, New Delhi. Thereafter, again he was appointed as Radiologist in the Irwin Hospital in cadre-C post of the Central Health Service. Mr. Bose made a representation for appointment to the post of Professor, the Government of India has communicated that he cannot be appointed to the post of Professor of Radiology department as he did not possess the minimum essential qualification of five years' teaching experience as Reader/Assistant Professor as required under the Rule. The Hon'ble Supreme Court after considering the arguments of both the sides held that the recruitment Rule nowhere provides that the teaching experience gained by a Specialist in a teaching Hospital in the capacity of an Associate Professor shall not be counted towards the requisite teaching experience. There is no provision made in the Rules that teaching experience must be gained through regular appointment. It will be relevant to quote paragraph No. 29 of the said judgment, which reads as under:-

“29. It is necessary to emphasis that the recruitment



rules nowhere provide that the teaching experience gained by a specialist in a teaching hospital in the capacity of an Associate Professor (ex-officio) shall not count towards the requisite teaching experience. There is no provision made in the rules that the teaching experience must be gained on a regular appointment. There is hardly any difference so far as teaching experience is concerned whether it is acquired on regular appointment or as Specialist in a teaching hospital with the ex-officio designation. As the statutory rules do not provide that the teaching experience gained in an ex-officio capacity shall not count towards the requisite teaching experience, the teaching experience gained by the appellant while holding the post of Radiologist-cum-Associate Professor of Radiology (ex-officio) in the Irwin Hospital cannot be ignored in determining his eligibility for appointment as Professor of Radiology in Maulana Azad Medical College.”

22. This issue with regard to acquiring the essential experience was under consideration before this Court in the case of ***Dr. Anil Kumar Sinha vs. State of Bihar and Ors.***, reported in ***1990(1) P.L.J.R., page 124***, there the petitioner was appointed as Assistant Surgeon on 07.07.1962. An order was issued in the year 1971, whereby he was posted as Demonstrator in the Physiology Department at Darbhanga Medical College Hospital was transferred



from that post and was posted in the Paediatrics Department of the same hospital on supernumerary duty. Accordingly, he joined the Paediatrics Department and placed on supernumerary duty. By another order, permission was granted to the petitioner to discharge the duty of Resident Medical Officer in the Paediatrics Department of the Darbhanga Medical College Hospital, where he was posted on supernumerary duty. Accordingly, he acquired the teaching experience in the Paediatrics Department from 19.01.1971 to 21.04.1978. The question came for consideration before the Court whether this period will be treated as requisite experience for granting consideration for promotion to the post of Assistant Professor. The Court has considered the decision of Dr. Asim Kumar Bose (*supra*) and in paragraph No.6 it has been held as under:-

“6. In the aforesaid Government order dated 7.9.1973, which has been issued in the name of the Governor, it has been said that in past teaching experience had been given to Medical Officers who had not been posted against the regular teaching posts but had been posted on supernumerary duty which had affected the future prospect of more meritorious medical Officers who had been posted against regular teaching posts; for examining that problem a Committee under the Chairmanship of the Chief Secretary was constituted which submitted its recommendation. After taking into



consideration the recommendation of the said Committee, a decision had been taken by the State Government that except the orders issued before 24.11.1971 recognizing teaching experience of Medical Officer posted on supernumerary duty, no teaching experience shall be given to Medical Officers posted against supernumerary duty after 24.11.1971. It was reiterated that teaching experience shall be given only to such Medical officers who had been posted against regular teaching posts. That order was published in the Bihar Gazette also.”

23. The Court on the basis of the aforesaid executive instructions held that any person who has not been appointed on regular post the experience gained on supernumerary post or on ad-hoc basis or on deputation will not be considered for the purposes of counting the experience of the candidate. The Court also held that in absence of statutory Rules framed by the State Government, the State Government has jurisdiction to issue an administrative order regarding the principle to be followed in the matter of promotion and selection of the Officer concerned by placing reliance on the decision of *Sant Ram Sharma vs. State of Rajasthan and Others* (AIR 1967 S.C. 1910) and *Union of India vs. K.P. Joseph and Others* (AIR 1973 SC, 303), there the Hon'ble Supreme Court held that if the Rules are silent on any particular point the Government can fill up the gap and



supplement the Rule and issue instructions not in consistent with the Rules already framed. The same has been reiterated in K.P. Joseph's case (*supra*), but in the present case this Court is of the view that after framing Appointment and Promotion Rule, 1997, and later on, 2008 Rule, whatever the administrative instructions was there will be deemed to have been superseded in view of specific Rule framed for the appointment of Assistant Professor.

24. From a bare reading of 2008 Rules, it does not qualify in what manner the experience gained by a person has to be counted, who applied for the post of Assistant Professor and the experience gained through the regular appointment is essential qualification is completely silent. The said judgment came up before the Hon'ble Supreme Court and the Hon'ble Supreme Court decided the matter in *Anil Kumar Sinha vs. State of Bihar and Ors. reported in 1998 (2) PLJR 12 (S.C.)* where the Court has held in absence of statutory Rule the executive instructions will govern the field with regard to the appointment, selection and promotion of the Government employees, but looking to the facts of that case, the Hon'ble Supreme Court has opined that State Government should reconsider as the petitioner has actually discharged the duty. The Hon'ble Supreme Court has taken note of the fact that the State Government itself issue orders granting



teaching experience to the other employees, even given the benefit to retired employees, as the issue was not raised before the High Court, the Hon'ble Supreme Court has not rejected the claim of Anil Kumar Sinha and refused to interfere with the order of this Court, but for the ends of justice, direction was given to the State Government to consider the case of the appellant and the service rendered by him for the period from 19.10.1971 till 21.4.1978 would be counted towards the teaching experience. So by and large the Hon'ble Supreme Court was of the view that if a person has actually performed the teaching duty, he cannot be deprived from taking benefit of the experience while claiming the appointment to the higher post. For the convenience, it will be relevant to quote paragraph No.4 of the said judgment.

“4. In course of hearing, however, Mr. Saran, learned counsel appearing for the appellant brought to our notice several instances where the State Government itself have issued orders granting teaching experience to the employees even in case of retired employees, as would be apparent from Annexures 7 and 8 to this appeal. An averment to that effect also has been made in paragraphs 18 and 21 of the Special Leave Petition. Though the State of Bihar has entered appearance but no counter-affidavit has been filed. Mr. Pramod Swarup, Learned counsel appearing for the State of Bihar contended before us that



such a question had not been raised before the High court as would appear from the judgment of the High Court. This may be true as contended by Mr. Swarup, but in the Writ Petition that was filed before the High Court such a ground appears to have been taken. In that view of the matter we are not inclined to reject the contention of the appellant out right on that score. The appellant in the meantime has also retired form the Government service. In the aforesaid premises, while we are not interfering with the impugned judgment of Patna High Court but we think that ends of justice require a direction to be given to the State of Bihar to consider the case of the appellant as to whether the services rendered by him for the period 19.10.1971 till 21.4.1978 can at all be counted towards teaching experience. This has to be done by considering the cases of others in whose favour such orders have been issued, as indicated by the appellant, and the nature of services rendered by the appellant as compared to those services rendered by other persons who according to the appellant are similarly situated. We make it clear that we express no opinion on the same and the Appropriate Authority will take a decision depending upon the nature of duties discharged by the appellant while working as Resident Medical Officer in the Department of Paediatrics in Durbangha Medical College. Be it be stated that the Competent Authority should be satisfied that infact the appellant h as been teaching the students and on such satisfied that infact the appellant h as been teaching the students and on such satisfaction being arrived at an



appropriate order can be issued. If the Competent Authority issues such an order in favour of the appellant then the appellant's case for getting any higher promotion from any anterior point of time on the basis of such teaching experience may be re-considered. If the appellant fails to get any order from the Competent Authority that the services rendered for the Period October 1971 to April 1978 would be counted towards teaching experience, then any further exercise is not necessary."

25. Identical issue came up for consideration before this Court in ***Dr. S.K. Verma vs. the State of Bihar and Ors.*** reported in ***1992(1) PLJR, page.657***, there Dr. S.K. Verma was deprived of promotion in view of Government Resolution dated 07.09.1973 on the ground that he does not possess the essential teaching experience was under consideration before this Court. In that case, admittedly the petitioner had gained the teaching experience and discharged the supernumerary duty for the period from 15.02.1971 to 15.12.1976. This Court has also considered the judgment of Asim Kumar Bose's case (*supra*) and held that the Government order dated 09.07.1973 is binding in nature would be doubtful in view of Hon'ble Supreme Court's judgment. The Court also held in a very clear term that there is no difference as to whether teaching experience is acquired on a regular appointment or gained teaching experience on officiating or ad-hoc basis. In substance, the experience acquired in teaching will be

treated to have acquired the necessary experience of teaching and the Court held that the duty performed by S.K. verma would be taken into consideration for promotion.

26. It will be relevant to quote paragraph No.8 of the said decision, which reads as under:-

“8. In the case of Dr. Asim Kumar Bose (supra), the Supreme Court held as follows:-

“...the recruitment rules nowhere provide that the teaching experience gained by a specialist in a teaching hospital in the capacity of an Associate Professor (ex-officio) shall not count towards the requisite teaching experience. There is no provision made in the rules that the teaching experience must be gained on a regular appointment. There is hardly any difference so far as teaching experience is concerned whether it is acquired on regular appointment or as Specialist in a teaching hospital with the ex-officio designation...”

From the aforesaid it is clear that the Supreme Court has laid down the law that there is no difference as to whether a teaching experience is acquired on a regular appointment or as Specialist in a teaching hospital with ex-officio designation. In substance, in the present case, the only objection appears to be that the petitioner did not acquire the teaching experience on regular appointment in



accordance with the government resolution (Annexure C) and, therefore, not entitled to the said period for consideration of his case for promotion. The fact that the petitioner acquired the actual teaching experience in a teaching hospital has not been disputed. We are therefore, of the view that applying the principle laid down by the Supreme Court in the above case the petitioner is entitled to count the actual teaching experience acquired by him.”

27. In view of the aforesaid discussions, now it is very clear that the State is placing reliance on executive instructions, which was issued in the year 1973 and the Court has held that in absence of statutory Rule the executive instructions issued by the State of Bihar will govern the field for the purpose of selection and promotion of the government employees, but the situation has changed the Government of Bihar in exercise of the power under Article 309 has first framed the Rule in the year 1997 and that Rule has been superseded by enforcement of another Rule of 2008, which deals with appointment and promotion in the teaching cadre of medical services of the State of Bihar. Rule-7 deals with the manner of selection to the post of Assistant Professor does not envisage that the experience gained in the regular manner will be the sole consideration for determination of experience for the purposes of selection to the post of Assistant Professor.



28. In such view of the matter, the judgment that has been delivered in Anil Kumar Sinha's case (*supra*) does not apply in view of the new development or formation of Rule by the State of Bihar and as such, admittedly, the petitioner has discharged the duty of teaching by way of officiating / deputation at different places, which has not been disputed by the learned counsel for the Commission.

29. In such view of the matter, the ground assigned by the Commission that the petitioner does not have a requisite experience/ qualification or experience is not sustainable and the same is rejected and the contention raised by the petitioner that the petitioner holds the essential experience is affirmed and the services rendered by him on the teaching post is satisfied in terms of Rule-7(3) of the Cadre Rule, 2008.

30. Another question that has been raised by the petitioner is that the petitioner obtained 12 marks whereas two persons namely Prem Prakash and Ramanand Prasad Sinha, who possessed 10 marks and 12 marks respectively have been selected and Prem Praksh did not join the post.

31. Learned counsel for the Commission has placed reliance on the Resolution dated 06.07.2007, which has been issued on the



direction of the Governor of Bihar where Clause-16 of the said resolution provides that if any selected candidate does not give its joining or not joined the post on account of any other reason, in such a situation, the said vacancy will be carried forward to the subsequent recruitment process. In support of his contentions, he placed reliance on the judgment of the Apex Court in the case of ***Dr. Punam Kumari vs. the State of Bihar & Ors.***, reported in ***2011(1) PLJR, page 283***, where the Court has taken a view that once appointments are made on the recommendation of the selection committee, the process comes to end and the select list cannot be treated to be as reservoir. However, this judgment does not deal with in situation when a person does not join the post after selection and whether that vacancy would be filled up or it will go to the subsequent appointing years. So this judgment is not very much relevant for the present case.

32. Learned counsel for the Commission has relied upon another judgment of this Court in ***Subodh Kumar vs. The State of Bihar and Ors.*** reported in ***2012(2) PLJR, page 647***, there the Court has considered the administrative instructions dated 17.06.1977 and Government Resolution dated 16.7.2007 which provide that when a vacancy remaining unfilled due to non-joining of the selected candidate, the same shall be carried forward to the next recruitment



process. In that case, the Court has distinguished the judgment of *Ashutosh Kumar Vinayak and Ors. vs. The State of Bihar and Ors* [2000(3) PLJR, 495] and *Niraj Kumar Singh and Another, vs. The State of Bihar and Ors.*[2007(3) PLJR, 702], where the Court has taken a view that in case of non-joining of any selected candidate and the post remained vacant, the person who is in panel list will be entitled to be appointed on the said vacant post. The Court has held that the matter was related to the appointment to the post of Assistant Public Prosecutor, there the memorandum was issued in respect of combined Common Competitive Examination and the fact was different in the case of Subodh Kumar (*supra*). The Court has relied on the judgment of *Manish Kumar Sahi vs. The State of Bihar and Ors.* [2008(4) PLJR, 93], *Alok Kumar vs. The State of Bihar and Ors.* [2009(2) PLJR, 123] and *Ranjit Rana & Ors vs. The State of Bihar and Ors.* [C.W.J.C. No.14648 of 2010] in which, I was also a member and the Court has held that Neeraj Kumar and others do not set out a correct law and held *per incurium* in view of the judgment of *Bihar Electricity vs. Suresh Prasad & Ors.* [(2004)2 SCC 681]. In subodh Kumar case (*supra*) there was no rule and regulations framed for the purposes of appointment of Officers of the Labour Department and in absence of the Rule the Court has held that the executive instructions will hold the field, but in the present case already Rule has been



framed, but certainly the Rule does not deal with the situation when a selected candidate did not join the post, the effect or consequence has not be dealt with, but in the case of *State of J & K and Others, vs. Vijay Sharma and Others, reported in [2005) 13 SCC 403]*, the Hon'ble Supreme Court has found that the vacancies were still lying vacant and many of the posts were not filled up due to want of candidates and non-joining and therefore, the Hon'ble Supreme Court has directed that it would be just and proper to direct that the remaining unfilled posts be filled up by candidates who had secured more than the cut-off marks.

33. In the present case, the petitioner has only made a submission that one of the person namely Prem Prakash did not join the post but the learned counsel for the Commission has submitted that they have not received any such information from the State of Bihar and there is no specific material has been brought by the petitioner to show that the post has remained unfilled. Therefore, this Court has no positive information and no material on record to show that Prem Praksh had not joined the post.

34. In such view of the matter, this Court cannot give direction for appointment of the petitioner on the said post. However, in future if the vacancy is advertised by the State of Bihar for Assistant Professor

the experience gained by the petitioner will be treated to be requisite experience for the purposes of selection of Assistant Professor.

35. With these observations and directions, this writ petition is disposed of.

(Shivaji Pandey, J)

pawan/-

U			
---	--	--	--