

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.14684 of 2008

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Madhu Devi wife of Suman Prasad, Resident of village Motihari 'D', Ward No. 9 ,
P.S. Bairiya, District West Champaran

.... Petitioner

Versus

1. The State of Bihar through the Chief Secretary, Old Secretariat, Bihar, Patna - 15
2. The Divisional Commissioner, Tirhut Range, Muzaffarpur, Bihar
3. The District Magistrate, West Champaran, at Bettiah
4. The Block Development Officer, Bairiya Block, West Champaran.
5. The Child Development Project Officer, at Bairiya, District West Champaran.
6. The Mukhiya, Gram Panchayat Raj Tumkariya, P.S. Bairiya, District West Champaran.
7. The Panchayat Secretary, Tumkariya Gram Panchayat Raj, District West Champaran.
8. Anupma Devi wife of Niraj Prasad, Resident of village Motihari 'D', Ward No. 9, P.S. Bairiya, District West Champaran

.... Respondents

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Appearance:

For the Petitioner : Mr. Rajendra Narain, Sr. Advocate

Mr. Akhileshwar Kr. Shrivastava, Advocate

For the State : Mr. Sanjay Kumar, AC to AAG 4

For Respondent No. 8: Mr. Bashistha Narayan Mishra

Mr. Sachida Nand Rai, Advocates

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CORAM: HONOURABLE MR. JUSTICE VIKASH JAIN

ORAL JUDGMENT

Date: 07-07-2017

The present writ petition has been filed for quashing the order dated 11.08.2008 (Annexure-8) passed in Appeal No. 210 of 2008 by the Divisional Commissioner, Tirhut Range, Muzaffarpur (respondent no. 2) by which the appeal filed by the private respondent no. 8 has been allowed, setting aside the order of the District Magistrate, West Champaran by which appointment of respondent no. 8 had been cancelled for the post of *Anganwari Sevika* for Centre No. 60 under Gram Panchayat Raj Tumkadia, District West Champaran; and for a direction to the respondents to consider appointment of the petitioner



on the said post.

2. The material facts, according to the petitioner, are that being eligible for the post of *Anganwari Sevika*, she applied for appointment in Gram Panchayat Tumkadia, Ward No. 9 village Motihari Dih. She had passed the Matriculation examination from Bihar School Examination Board, Patna and had secured aggregate 473 marks out of total 900 marks, i.e. 52.55 %. In addition, the petitioner had also taken an optional paper (non-compulsory) in which she had secured 57 marks, thereby bringing her aggregate to 530 marks out of 1000 marks i.e. 53%. As against this, the respondent no. 8, who had also applied for the post, had passed the *Madhyama* Examination conducted by the Bihar Sanskrit Shiksha Board, Patna in which she was awarded an aggregate of 459 marks, which included 54 marks in the optional paper (compulsory), out of total 900 marks i.e. 51%. The respondent no. 8 had also taken an additional paper (non-compulsory) in which she had secured 52 marks, out of which 22 marks were added to her aggregate, bringing it to 481 marks out of 1000 marks (48.10%). A merit list was prepared in which the petitioner was shown as having secured 473 out of 900 marks i.e. 52.55% whereas the respondent no. 8 was shown as having secured 481 out of 900 marks i.e. 53.44%. The petitioner filed a complaint before the concerned authority on the ground that she had secured higher percentage of marks than the respondent no. 8 and as such the latter had wrongly been selected by giving her the benefit of marks secured in the additional (non-compulsory) paper but at the



same time, treating the total marks as 900 instead of 1000 marks. Owing to inaction on the part of the respondents, the petitioner moved this Court in CWJC No. 6948 of 2007 along with analogous cases which were disposed of on 16.07.2007, directing the District Magistrate to consider and dispose of the complaints/objections. It appears that an enquiry report vide letter no. 223 dated 28.07.2007 came to be submitted by the Sub-Divisional Officer, Bettiah Sadar to the District Welfare Officer, West Champaran, Bettiah who had conducted enquiry in pursuance of an earlier order of the District Magistrate, West Champaran dated 22.05.2007, in which it was opined that irregularity had been committed in the selection process and that the petitioner's claim appeared to be proper on the basis of the marks secured in the Matriculation examination. As against this, respondent no. 8 had secured only 459 marks excluding the optional (non-compulsory) paper. Pursuant to the order dated 16.07.2007 passed in the writ petition, a notice dated 28.09.2007 was issued by the District Programme Officer, Bettiah calling for documents to be furnished to the District Magistrate to enable disposal of the matter. The file was then placed before the District Magistrate under the signature of the District Welfare Officer, Bettiah dated 04.12.2007, *inter alia*, taking note that whereas the marks in the non-compulsory paper in the case of the Bihar School Examination Board were not to be added in the aggregate marks, the marks obtained in excess of 30 marks in the non-compulsory paper of Bihar Sanskrit Shiksha Board were required to be



added. It, was therefore, observed that the petitioner had secured 473 out of 900 marks whereas the respondent no. 8 had secured 481 out of 900 marks. On 22.12.2007, the District Magistrate endorsed the said note "as proposed". It would transpire that further notings made in the file culminated in the note dated 07.04.2008 placed by the Additional Collector in which it was observed, *inter alia*, that the selection of the respondent no. 8 was fit to be cancelled as she had secured only 459 out of 900 marks i.e., 51% but which had incorrectly been shown as 481 out of 900 marks i.e. 53.44%. The petitioner had secured 473 out of 900 marks i.e. 52.55% which was higher than 51%. A proposal was accordingly made therein for cancellation of selection of respondent no. 8 and to make appointment of the person entitled for the same and also to initiate action against the respondent nos. 6 and 7, namely, Mukhiya and Panchayat Secretary, respectively. This proposal was duly endorsed by District Magistrate on 18.04.2008, leading to cancellation of the selection of respondent no. 8 in terms of letter no. 171 dated 24.04.2008 (Annexure-7). The appeal filed by the respondent no. 8 against such cancellation was allowed by the Divisional Commissioner, Muzaffarpur by order dated 11.08.2008 which is subject matter of challenge in the present writ petition.

3. Apart from the issue relating to the marks, there was some controversy with regard to eligibility of the petitioner in her selection as it was alleged that she was not a resident of the concerned area. In the minutes of the meeting of the *Aam Sabha* (Annexure-A/1) held on



29.03.2007 it was noted that the petitioner was a permanent resident of Bettiah according to the voter list. This aspect of the matter has been noticed by the Divisional Commissioner in his impugned order as well.

4. Mr. Rajendra Narain, learned senior counsel appearing for the petitioner, submits that the impugned order is wholly arbitrary and malafide in law, having been passed without due regard to the facts in proper perspective. It is submitted that a consistent effort has been made right from the start to deny the petitioner her rightful claim to the post of *Anganwari Sevika*. The *Aam Sabha* in its minutes of the meeting had erroneously recorded that the respondent no. 8 had secured 481/900 marks i.e. 53.44%, which is more than the marks secured by the petitioner being 473 out of total 900 marks i.e. 52.55%. He invites attention to the mark sheet of respondent no. 8 (Annexure-2) the penultimate column of which itself shows that the respondent no. 8 had secured 459/900 marks and it was only after the addition of 22 marks [being the excess over the pass marks of 30 from the 52 marks secured in the additional paper (non-compulsory) constituting a total of 100 marks] that she had secured an aggregate of 481 marks. These marks have thus been secured out of a total of 1000 marks. The *Aam Sabha* had therefore committed a patent error on the face of it. Comparison of marks between two candidates should be done on equal basis i.e. either out of 900 marks or out of 1000 marks for both the candidates. The enquiry report dated 28.07.2007 had rightly found that irregularity had been committed in the selection process but,



however, the District Welfare Officer in his note dated 04.12.2007 (Annexure-6) again committed a similar error by stating at paragraph 8 that the respondent no. 8 secured 481 marks out of total 900 marks and thus her marks were higher than that of the petitioner. In turn, the Divisional Commissioner has fallen into the same error and has proceeded on the basis that the petitioner had secured 52.55% marks as against 53.44 % marks obtained by the respondent no. 8.

5. On the issue relating to the place of residence, learned counsel for the petitioner submits that this controversy was never considered before the District Magistrate but was raised and decided for the first time in appeal. Learned counsel for the petitioner invites attention to the residence certificate issued on 20.07.2006 issued by the Sub-Divisional Officer (Annexure-9) according to which the petitioner was a permanent resident under Thana Bairiya, Motihari, District West Champaran. It is submitted that the *Aam Sabha* proceeded on mere hear-say without any objective material available as only a vague observation is made in the minutes of the meeting that according to some unidentified villagers, the petitioner was a permanent resident of Bettiah and her name appeared in the concerned voter list of that place. The identity of such villagers was not made known and also no copy of the voter list of Bettiah appears to have been made available with the *Aam Sabha*. It is stated that though the petitioner's name did appear in the voter list of 2004 at Bettiah, on subsequent verification her name was struck off from the said voter list by the Election



Department. Her name was then incorporated into the voter list of the concerned Panchayat and still continues there. It is stated that on the date of application i.e. 16.02.2007 the petitioner was residing within the said Panchayat and her name figured in the concerned voter list of the Panchayat. The residential certificate dated 20.07.2006 (Annexure-9) was issued by the Sub-Divisional Officer after due enquiry about the place of her residence and such certificate was issued prior to the meeting of *Aam Sabha* held on 29.03.2007. In any event, it is submitted that there is no bar to a person being resident of two places, and even if the name of the petitioner appeared in the voter list of Bettiah, such fact could not preclude her from being appointed to the *Anganwari Centre* in Gram Panchayat Raj Tumkadia.

In this connection, learned counsel for the petitioner relied on an order dated 25.07.2013 passed by this Court in CWJC No. 14613 of 2008 *Smt. Anita Devi Vs. The State of Bihar & others* along with analogous case, in which it has been observed as follows —

“... What is being urged is that the Election Commission of India stipulates that for the purpose of enrolment in the voter list a person can be resident of one place. I am unable to appreciate the stand. The very purpose of the Election Commission and the voter list is entirely different from the Anganbari Sevika. For the purpose of selection the entire election is based on adult franchise on a single vote. By showing an electorate a resident of a particular place a purpose is served the person in the same election cannot vote number of times. So far as Anganbwari Sevika is concerned, or for that mater even otherwise, a person



can have more than one residence. No law prohibits the same."

6. Mr. Bashisth Narayan Mishra, learned counsel for the respondent no. 8, appears and vehemently opposes the writ petition, submitting that no fault can be found with the order of the Divisional Commissioner. It is submitted that addition of the marks in excess of 30 marks in the additional (non-compulsory) paper to the aggregate is completely in accordance with letter no. 1560 dated 19.07.1976 issued by the Education Department, Government of Bihar, according to which the marks secured in excess of 30 marks in the additional paper (non-compulsory) may be added. This has been appropriately followed and given effect to by the *Aam Sabha* and also in the note of the District Welfare Officer dated 04.12.2007 which was later approved on 22.12.2007 by the District Magistrate. It is therefore evident that the respondent no. 8 was entitled to addition of extra 22 marks while computing her aggregate marks and hence she had secured 53.44 % which was higher than the 52.55 % awarded to the petitioner.

7. It is submitted that the petitioner has sought to create some confusion while referring to the enquiry report dated 28.07.2007 which is in her favour, but the same was prepared pursuant to the District Magistrate's direction in his letter no. 737 dated 22.05.2007 being prior to disposal of CWJC No. 6948 of 2007 by order dated 16.07.2007 of this Court and hence such enquiry report was of little relevance. On the other hand, after disposal of CWJC No. 6948 of 2007,



a notice dated 28.09.2007 (Annexure-4) was issued to the petitioner calling for documents to be furnished to enable the District Magistrate to dispose of the matter and it is only thereafter that the note dated 04.12.2007 was prepared by the District Welfare Officer.

8. It is thus submitted that it was this note dated 04.12.2007 which was required to be considered and was rightly endorsed by the District Magistrate on 22.12.2007. Accordingly, the order of this Court in CWJC No. 6948 of 2007 was duly given effect to and the District Magistrate became *functus officio* thereafter. The petitioner, however, in connivance with some officials, managed to have the matter reopened for which there was neither provision nor warrant. It is submitted that if at all the petitioner was aggrieved by the endorsement of the District Magistrate dated 22.12.2007 approving the note of the District Welfare Officer dated 04.12.2007, she ought to have filed an appeal against the same which was not done. Instead she managed to get the matter reopened and succeeded in getting the proposal forwarded by the Additional Collector, dated 07.04.2008, in her favour which was then approved by the District Magistrate on 18.04.2008. Such subsequent decision in the petitioner's favour is wholly without authority and without any force. The same was challenged in appeal which was duly allowed by the Divisional Commissioner.

9. On the issue of residence of the petitioner, it is submitted on behalf of the respondent no. 8 that the petitioner was found to be not a



resident of Ward No. 9, Gram Panchayat Raj Tumkariya as required under the guidelines of 2006 relating to selection and appointment of Anganwari Sevika, but such finding was never challenged by the petitioner before any authority. Moreover, the voter list of Bettiah clearly showed that the petitioner was a resident of Bettiah and hence she could not be a resident of the *Poshak* area situated in Ward no. 9, Gram Panchayat Raj Tumkariya, West Champaran. The selection of the petitioner has rightly been set aside by the appellate authority.

10. Learned counsel for the respondent no. 8 relies on two decisions of the Division Bench of this Court reported in *Mohammad Khurshid Alam vs. The State of Bihar and Others*, 2017(1) PLJR 530; and in *Tufail Ahmad Khan vs. The State of Bihar and Others*, 2012(3) PLJR 323 respectively, to submit that the marks of the extra paper would be taken into account while calculating the percentage of marks obtained by the respondent no. 8.

11. Learned counsel for the State has made submissions on the same lines as the respondent no. 8. He has further stated that after the matter was decided in terms of the endorsement of the District Magistrate dated 22.12.2007 noticing that the respondent no. 8 had been awarded higher marks, the petitioner in collusion with the office staff of the Welfare Department suppressed material facts and got the matter enquired into once again by the Additional Collector who took a decision contrary to the earlier one. Upon coming to know of the situation, the new District Magistrate has taken action against the staff



of the Welfare Department.

12. In reply, learned counsel for the petitioner refers to note of the District Welfare Officer dated 04.12.2007 and endorsed by the District Magistrate on 22.12.2007, submitting that the same was prepared in course of the ongoing proceeding. It is evident from the file pagination of the proceeding (Annexure-6) which starts from page 4, with the first endorsement of the District Magistrate appearing at page 6, that the proceeding continued upto the final endorsement of the District Magistrate at page 16 of the file. The respondent-State in its supplementary counter affidavit has enclosed the same document but has sought to split up the same into two parts, the first upto the endorsement of the District Magistrate on 22.12.2007 (Annexure-C) and the second upto the endorsement of the District Magistrate on 18.04.2008 (Annexure-D) in an attempt to make out a case that they were separate proceedings, only in order to mislead the Court.

13. It is pointed out that except for extracting certain portions from the order of this Court in CWJC No. 6948 of 2007, and observing that in the light of the Department's letter no. 1560 dated 19.07.1976, some marks in the additional paper were required to be added in the case of the examinees of Bihar Sanskrit Shiksha Board, and that, accordingly, the respondent no. 8 had secured higher marks than the petitioner, no proposal whatsoever was placed for approval of the District Magistrate in the note dated 04.12.2007 of the District Welfare Officer. On the contrary, the note was placed with the request that



appropriate decision be taken and an order be passed by the District Magistrate. No proposal or decision was put up for approval of the District Magistrate, and the question of the issue having been decided in favour of the respondent no. 8 therefore cannot arise. The order of this Court in CWJC No. 6948 of 2007 specifically required the District Magistrate to pass a speaking order on the objections/complaints. However, the endorsement of the District Magistrate dated 22.12.2007 was neither a speaking order nor was it communicated to the petitioner. It is thus submitted that the endorsement of the District Magistrate dated 22.12.2007 was of little consequence. The petitioner has taken a categorical stand (in paragraphs 7 and 8 of the reply to the supplementary counter affidavit filed on behalf of the respondent nos. 3 to 5) that when no order was communicated to have been passed on the petitioner's representation, she then filed an application under the Right to Information Act to know about the outcome of her earlier application. It is specifically stated in the petitioner's reply that the same District Magistrate, namely, Sri Mihir Kumar Singh, then issued directions for the enquiry, and accordingly the Additional Collector had enquired into the matter and concluded that the selection of respondent no. 8 was illegal. It is submitted that the allegation that the petitioner acted in connivance with the staff of the Welfare Department after a change of incumbent in the office of the District Magistrate, is completely thus false. On the contrary, recommendations were made by the Additional Collector for cancellation of the selection of the



respondent no. 8, and for taking criminal/disciplinary action against the Mukhiya and Panchayat Secretary for having suppressed facts in the preparation of the merit list. It was this proposal, duly approved by the District Magistrate, which amounted to an order, giving effect to the order of this Court. It is further pointed that even though the District Magistrate by letter no. 292 dated 29.07.2008 (Annexure-12) had duly placed the facts before the Appellate Authority as required under letter no. 2/0/08 2105 dated 24.05.2008, these were completely ignored by the Divisional Commissioner, and virtually a one-sided order came to be passed by him.

14. Learned counsel for the petitioner also invites attention to the residential certificate dated 20.07.2006 (Annexure-9) which showed that the petitioner was a resident of the *Poshak* area. This certificate predates the meeting of the *Aam Sabha* held on 29.03.2007. However, the *Aam Sabha* relying on the versions of the unidentified villagers who are said to have stated that the petitioner was a resident of Bettiah, took that view. It is submitted that the genuineness of the residential certificate dated 20.07.2006, and thus the fact of her residence within the *Poshak* area, has not been contradicted by the respondents in any of their counter affidavits and such fact, therefore, has not been denied.

15. Having heard learned counsel for the parties and on careful consideration of the materials available on record, I find considerable merit in the writ petition. To begin with, the *Aam Sabha* in the minutes



of the meeting has recorded that the respondent no. 8 secured 481/900 marks i.e. 53.44% which was higher than the marks of secured by the petitioner being 473/900 i.e. 52.55%. However, the mark sheet of the respondent no. 8 (Annexure-2) itself discloses in the penultimate column thereof that out of total 900 marks she secured only 459 marks which comes to 51%.

16. This Court has held in the case of ***Tufail Ahmad Khan Vs. The State of Bihar & ors. reported in 2012 (3) PLJR 570*** that marks obtained in a non-compulsory paper are not relevant for selection purposes but are only relevant for better future prospects. Learned counsels for the respondents were unable to point out from the letter no. 1560 dated 19.07.1976 of the Education Department that extra marks obtained (above 30 in the present case) in the additional (non-compulsory) paper were required to be added for the purpose of selection to the post. I am accordingly of the view that such extra marks (22 in the present case) could not have been added to the aggregate marks obtained by the respondent no. 8 treating such marks to have been obtained out of the total of 900 marks being the full marks of the compulsory papers. By way of illustration, if *Madhayma* be the qualification for eligibility, the addition of extra marks of the non-compulsory paper would result in a disadvantage to another candidate taking only the compulsory papers, both the candidates having passed from Bihar Sanskrit Shiksha Board. Further, candidates from Boards which did not offer non- compulsory papers and thus



lacking even the choice of taking the same would always be at a disadvantage compared to candidates from Boards where additional non-compulsory papers were offered. To place all candidates on a level playing field, the marks from additional non-compulsory papers should not be taken into consideration in matters of selection to a post.

17. The submission of the respondents that the decision of the *Aam Sabha* was final as it had not been challenged by the petitioner, does not also appear to be correct. The petitioner had in fact filed a complaint before the District Magistrate against the decision of the *Aam Sabha*, during pendency of which, the petitioner had also filed a writ petition in CWJC No. 6948 of 2007 which was disposed of on 16.07.2007 directing the District Magistrate to dispose of the complaint. In this view of the matter, there was no occasion for the petitioner to file any appeal against the endorsement of the District Magistrate dated 22.12.2007 as it was not a final order and had not even been communicated to the petitioner. However, the Divisional Commissioner in the impugned order has not taken this aspect of the matter into account and has also completely ignored the facts narrated by the District Magistrate in his letter no. 292 dated 29.07.2008, which has not even been noticed in the appellate order.

18. I am also in agreement with the submission of learned counsel for the petitioner that endorsement of the District Magistrate dated 22.12.2007 (Annexure-6) did not dispose of the proceeding in absence of any proposal or decision having been put up for approval,



and also in absence of any communication of such endorsement to the petitioner. The pagination of the file itself shows that the proceeding continued upto the second endorsement of the District Magistrate dated 18.04.2008. The allegation of connivance on the part of the petitioner is also difficult to accept, considering that the earlier endorsement of the District Magistrate dated 22.12.2007 was on the file when second endorsement was made and, as such, the question of suppression of the earlier part of the proceeding thus could not arise. Splitting up the proceeding into two parts, namely, (Annexure-C) and (Annexure-D) in the supplementary counter affidavit of the State-respondent does on the other hand create a doubt, moreso because page 7 of the file has been struck off in an attempt to break the continuity of the pagination. A specific stand has been taken by the petitioner that it was upon/under the direction on the same District Magistrate, namely, Sri Mihir Kumar Singh, that the Additional Collector again enquired into the matter and concluded the matter in the petitioner's favour in his proposal dated 07.04.2008. This has not been denied by the respondents. It is another matter that by this time a new incumbent had joined in the office of the District Magistrate, and it was he who accepted the proposal of the Additional Collector on 18.04.2008. This decision was communicated to the Child Development Project Officer, Bairiya by letter no. 171 dated 24.04.2008 (Annexure-7) along with a copy to the Mukhiya for making selection of *Aganwari Sevika* in accordance with the orders/endorsement dated 18.04.2008



of the District Magistrate as aforesaid.

19. On the issue of the place of residence of the petitioner, the *Aam Sabha* appears to have proceeded on the basis of the statements said to have been made by some unidentified villagers, and there is nothing to show that the voter list showing the petitioner to be a resident of Bettiah was placed before it. Be that as it may, the residence certificate issued by the Sub-Divisional Officer on 20.07.2006 (Annexure-9) showing the petitioner to be resident of Bhairiya has at no stage been disputed by any of the respondents. This Court in CWJC No. 14613 of 2008 and analogous case referred to above has already explained the scope of a voter list as far as selection of an *Anganwari Sevika* is concerned. The petitioner has adequately explained the circumstances in which her name appeared in the voter list at Bettiah in 2004 and that subsequently, after enquiry and verification, she was duly granted her residential certificate showing her to be resident of *Poshak* area prior to the meeting of the *Aam Sabha*.

20. As regards the two judgments of the Division Bench of this Court relied upon by the respondent no. 8, these do not come to her aid. The decision in Ruma Jha's case (*supra*) is wholly inapplicable in the present case as in that case the Court was considering the question of grant of grace marks under Regulation 11(c) of the Regulations and Scheme for the B. Tech Examination in respect of carry over paper in one subject of second year examination in which the candidate had not qualified. The other decision in Mohammad Khurshid Alam's case



(supra), rather than helping the case of the respondent no. 8, lends support, if at all, to the petitioner. That decision was rendered in the context of Bihar Panchayat Elementary Teachers (Employment and Service Conditions) Rules, 2006 in relation to Maulvi examination. In any event, the contention of the appellant therein was that if the marks obtained in the extra papers taken by him in the Intermediate Examination were taken into account, his percentage would come to 67.22. From para 7 of the judgment, it transpires that the appellant had admittedly got 60.66 per cent marks (546/900) in the Intermediate Examination excluding vocational and optional subjects. It is therefore, clear that even in that case, this Court has excluded the marks obtained in the optional subjects from consideration while computing the percentage of marks.

21. In the above circumstances, the impugned order dated 11.08.2008 passed by the Divisional Commissioner in the appeal filed by the respondent no. 8 is hereby set aside. The authorities are directed to proceed accordingly.

22. The writ petition stands allowed.

(Vikash Jain, J)

B.T/Chandran

AFR/NAFR	AFR
CAV DATE	N.A.
Uploading Date	21.07.2017
Transmission Date	N.A.

