

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.2345 of 2019

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1. Arti Kumari Singh, wife of Dwijendra Singh, resident of Mashi, P.S.- Bhagwanpur, Dist- Bhabhua at Kaimur, Presently Posted as Additional District & Sessions Judge, Gaya
 2. Dhirendra Mishra, son of Rampher Mishra, resident of Paharpur Kalan, P.S.- Karauli Kalan, Dist- Sultanpur, U.P. Presently posted as Additional District & Sessions Judge, Jehanabad
 3. Dhananjay Mishra, son of Late Jagdish Mishra, resident of Village- Manjhigawa, P.S.- Rohtas, Dist- Rohtas, Presently Posted as Additional District & Sessions Judge, Patna
 4. Manoj Kumar Ray, son of Ram Naresh Prasad Ray, resident of Village- Sonahula, P.S.- Gopalpur, Dist- Gopalganj, Presently posted as Additional District & Sessions Judge, Jehanabad.

... .. Petitioner/s

Versus

1. The Patna High Court, through the Registrar General, Patna High Court
2. The Registrar Appointment, Patna High Court, Patna
3. The District & Sessions Judge, Araria through In-charge Administration, Araria
4. The District & Sessions Judge, Aurangabad, through In-charge Administration, Aurangabad
5. The District & Sessions Judge, Banka through In-charge Administration, Banka
6. The District & Sessions Judge, Begusarai, through In-charge Administration, Begusarai
7. The District & Sessions Judge, Bhagalpur through In-charge Administration, Bhagalpur
8. The District & Sessions Judge, Bhojpur at Ara through In-charge Administration, Bhojpur at Ara
9. The District & Sessions Judge, Buxar through In-charge Administration, Buxar
10. The District & Sessions Judge, Darbhanga through In-charge Administration, Darbhanga
11. The District & Session Judge, East Champaran at Motihari through In-



charge Administration, East Champaran

12. The District & Sessions Judge, Gaya through In-charge Administration, Gaya
13. The District & Sessions Judge, Gopalganj through In-charge Administration, Gopalganj
14. The District & Sessions Judge, Jamui through In-charge Administration, Jamui
15. The District & Sessions Judge, Jehanabad through In-charge Administration, Jehanabad
16. The District & Sessions Judge, Kaimur at Bhabhua through In-charge Administration, Kaimur at Bhabua
17. The District & Sessions Judge, Katihar through In-charge Administration, Katihar
18. The District & Sessions Judge, Khagaria through In-charge Administration, Khagaria
19. The District & Sessions Judge, Kishanganj through In-charge Administration, Kishanganj
20. The District & Sessions Judge, Lakhisarai through In-charge Administration, Lakhisarai
21. The District & Sessions Judge, Madhepura through In-charge Administration, Madhepura
22. The District & Sessions Judge, Madhubani through In-charge Administration, Madhubani
23. The District & Sessions Judge, Munger through In-charge Administration, Munger
24. The District & Sessions Judge, Muzaffarpur through In-charge Administration, Muzaffarpur
25. The District & Sessions Judge, Nalanda at Biharsharif through In-charge Administration, Nalanda
26. The District & Sessions Judge, Nawada through In-charge Administration, Nawada
27. The District & Sessions Judge, Patna through In-charge Administration, Patna
28. The District & Sessions Judge, Purnea through In-charge Administration, Purnea
29. The District & Sessions Judge, Rohtas at Sasaram through In-charge



Administration, Rohtas at Sasaram

30. The District & Sessions Judge, Saharsa through In-charge Administration, Saharsa
31. The District & Sessions Judge, Samastipur through In-charge Administration, Samastipur
32. The District & Sessions Judge, Saran at Chapra through In-charge Administration, Saran at Chapra
33. The District & Sessions Judge, Sheikhpura through In-charge Administration, Sheikhpura
34. The District & Sessions Judge, Sheohar through In-charge Administration, Sheohar
35. The District & Sessions Judge, Sitamarhi through In-charge Administration, Sitamarhi
36. The District & Sessions Judge, Siwan through Incharge Administration, Siwan
37. The District & Sessions Judge, Supaul through In-charge Administration, Supaul
38. The District & Sessions Judge, Vaishali at Hajipur through In-charge Administration, Vaishali at Hajipur
39. The District & Sessions Judge, West Champaran at Bettiah through In-charge Administration, Bettiah, West Champaran
40. The Director, Bihar Judicial Academy, Gaighat, Patna
41. The Member Secretary, Bihar State Legal Services Authority, Budh Marg, Patna
42. The Principal Secretary, Department of Housing and Urban Development, Government of Bihar, Patna
43. The Principal Secretary, Department of Labour Resources, Government of Bihar, Patna
44. The Principal Secretary, Department of Revenue and Land Reforms, Government of Bihar, Patna
45. The Principal Secretary, Department of Health, Government of Bihar, Patna
46. The State of Bihar through the Secretary, Department of Law, Government of Bihar, Patna
47. The Principal Secretary, Department of General Administration, Government of Bihar, Patna
48. Md. Rustam, son of Noorul Zoha, posted as Sub-Judge-cum-ACJM, Civil



Court, Bhabhua Dist- Kaimur at Bhabhua

49. Uday Pratap Singh, son of Sri Satya Narayan Singh, presently posted as Sub-Judge-cum-ACJM, Vaishali at Hajipur, Civil Court, Vaishali Sadar, Hajipur
50. Pranaw Shankar, son of Binay Kumar Sharma, presently posted as Sub-Judge-cum-ACJM, Ara, Civil court, Ara, Sadar Bhojpur at Ara
51. Brijendra Kumar Rai, son of Daya Shankar Singh, presently posted as Sub-Judge-cum-ACJM, Sasaram, Civil Court, Sasaram, P.S.- Sadar, Dist- Sasaram
52. Rakesh Kumar-III, son of Shiv Shankar Prasad Yadav, presently posted as Sub-Judge-cum-ACJM, Ara, Civil Court, Ara, P.S.- Sadar, Dist- Bhojpur
53. Ashutosh Kumar Upadhyay, son of Saroj Kumar Upadhyay, presently posted as Sub-Judge-cum-ACJM, Aurangabad, Civil Court, Aurangabad P.S.-Sadar, Dist- Aurangabad
54. Raja Ram Santosh Kumar, son of Ramashray Singh, presently posted as Sub-Judge-cum-ACJM, Barh, Civil Court, Barh, P.S.- Barh, Patna
55. Neeraj Kumar, son of S.N.P. Singh, presently posted as Sub-Judge-cum-ACJM, Gaya, Civil Court, Gaya, P.S.- Civil Lines, Dist- Gaya
56. Kheyati Singh, wife of Praveen Singh, presently posted as Law Officer, Department of Health, Government of Bihar, Patna
57. Bhupendra Singh, son of Munni Singh, presently posted as Sub Judge, Civil Court, East Champaran at Motihari, Dist- East Champaran at Motihari
58. Suvesh Chandra Sharma, son of Late Binod Sharma, presently posted as Sub Judge, Civil Court, Gopalganj, P.S. Town, Dist- Gopalganj
59. Anandita Singh, wife of Deepak Kumar Singh, presently posted as Sub-Judge -cum-ACJM, Civil Court, Aurangabad, P.S.Town, Dist- Aurangabad
60. Prabhat Krishna, son of N.N. Choudhary, presently Posted as Sub-Judge-cum-ACJM, Civil Court, Hajipur, P.S. Sadar, Dist- Vaishli at Hajipur
61. Neeraj Kumar-II, son of Sohan Prasad Agrawal, presently Posted as Sub-Judge-cum-ACJM, Civil Court, Udakishunganj, P.S.-Udakishunganj, Dist- Madhepura
62. Awdesb Kumar, son of Sheopujan Prasad Gupta, presently Posted as Sub-Judge-cum-ACJM, Civil Court- Purnea, P.S.- K Hat, Dist- Purnea
63. Sanjeev Kumar Pandey, son of Janardan Pandey, presently Posted as Sub-Judge-cum-ACJM, Civil Court, Muzaffarpur East, Civil Court, Muzaffarpur, Sadar, Dist- Muzaffarpur



64. Namita Singh, daughter of Surendra Pratap Singh, presently Posted as Sub-Judge- cum-ACJM, Civil Court, Patna, P.S.- Pirbahore, Patna
65. Abhijit Kumar, son of Sri R.K. Sinha, presently Posted as Sub-Judge-cum ACJM, Civil Court, Patna, P.S.- Pirbahore

... .. Respondent/s

Appearance :

For the Petitioner/s : Mr. Abhinav Shrivastava, Advocate
Mr. Arbind Kumar Singh, Advocate

For the Respondent/s : Mr. Y.V. Giri, Sr. Advocate
Mr. Raju Giri, Advocate
Mr. Santosh Kumar Mishra, Advocate

For the State : Mr. Piyush Lall, Advocate

CORAM: HONOURABLE THE CHIEF JUSTICE

And

HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 18-10-2019

The petitioners, Judicial Officers who have now been promoted to the post of District Judges (Entry Level) through promotion under 65 percent quota, have approached this Court for quashing the letter dated 27.11.2018 issued by the Registrar (Appointment) of the High Court of Judicature at Patna, seeking an option from 248 Judicial Officers, including the petitioners, for



appearing at the limited competitive examination for filling-up the vacancies in the cadre of District Judges (Entry Level) against 10 percent quota for the year 2017-18, along with a list of such Officers, on the ground that majority of them, at the relevant time, did not have the requisite experience of three years as Civil Judge(Senior Division).

2. An additional prayer has been made in the writ petition to consider only those Judicial Officers who have completed three years of service in the cadre of Civil Judge (Senior Division) as on 31.03.2018 as per the rules prescribed in the Bihar Superior Judicial Service Rules, 1951, for the vacancies of the year 2017-18 under the 10 percent quota for promotion to the cadre of District Judges (Entry Level) through limited examination and during the pendency of the application, stay the process of promotion in that category.

3. When this writ petition was heard, eighteen successful candidates under the aforesaid category have



already been notified and appointed.

4. It has been submitted on behalf of the petitioners that only those Judicial Officers who had completed three years of their tenure as Civil Judge (Senior Division) could have been allowed to sit in the limited competitive examination and any administrative decision of the High Court, relaxing the aforesaid experience criterion is impermissible as it would be in breach of the specific provision contained in the Bihar Superior Judicial Service Rules, 1951. It has been asserted that respondent Nos. 48 to 65, who were selected for appearing in the limited competitive examination for being promoted under the 10 percent quota did not qualify for being considered for promotion.

5. Rule 5(C) and Clause-1 of Appendix-B of the amended up-to-date Bihar Superior Judicial Service Rules, 1951 is being extracted below for appreciating the contention of the writ petitioners.

" 5(c). The recruitment shall be made, as



far as possible, on yearly basis, in the following manner:-

(i) 65 percent of the posts shall be filled by promotion from amongst the Civil Judges (Senior Division) on the principles of merit-cum-seniority subject to suitability parameters as indicated in Appendix-'A'.

(ii) 10 percent of the post shall be filled on the basis of merit through Limited Competitive Examination conducted by Patna High Court, Patna from amongst officers having not less than 3 years service as Civil Judge (Senior Division). Selection shall be as per the procedure and examination as specified in Appendix-'B'.

(iii) Remaining 25% of the posts shall be filled by direct recruitment from amongst the eligible Advocate on the basis of the written and viva-voce test conducted in accordance with decision, direction of the High Court of Judicature, Patna. The High Court may decide to hold screening test with a view to short listing the candidates. The marks obtained in the screening test will be relevant for determining eligibility to appear at the written test. Such marks will not be counted for determination of comparative merit of the



candidates. Candidates approximately ten times the number of vacancies of appointment, will be called for written test on the basis of the marks obtained in screening test, if held. The candidates, approximately three times the number of vacancies for appointment, will be called for viva-voce test on the basis of the marks obtained in written test.

The screening, written and viva-voce test will be conducted in accordance with decision/direction of the High Court as per details specified in Appendix-'C'.

Accordingly the following appendix-'A', 'B' and 'C' shall be added to the Bihar Superior Judicial Service Rules, 1951 and shall be the part of the said Rules.

(iv) If for any reason, the posts meant for direct recruitment falling in Clause 5(c)(iii) are not filled, in any year of recruitment, then the High Court may fill such vacancies from amongst the Civil Judge (Senior Division), on the principle of merit-cum-seniority from amongst eligible officers of Civil Judge (Senior Division), but such promotion shall be ad-hoc till such time their term matures for regular promotion, when they will be considered for



promotion in terms of Rule 5(b).

Provided that in the next recruitment year, the vacancy, so filled, will be added back to the quota of direct recruits.

"APPENDIX-'B'

(1) Number of vacancies and list of eligible officers shall be placed before the Selection Committee of the High Court before 31st March of each year. After approval it shall be circulated to all the eligible officers through the District and Sessions Judge for seeking them option and application forms for the said examination by 30th April of the concerned year."

6. From the perusal of Rule 5(C) as well as Appendix-B, it would appear that the process of appointment/recruitment to the post of District Judges (Entry Level) is in three steps. 65 percent of the post is to be filled-up from amongst Civil Judges (Senior Division) on merit-cum-seniority basis and subject to the parameters set-forth in Appendix-A. 10 percent of the post is to be filled-up through limited competitive examination from amongst such Civil Judges (Senior



Division) who have spent three years in that tenure and the process shall be as set-out in Appendix-B. The remaining 25 percent of the post is to be filled-up through direct recruitment.

7. Appendix-B, which is relevant in the present set of facts, deals with the process by which vacancies and list of eligible Officers shall be placed before the Selection Committee of the High Court before 31st of March of each year. After the approval of such vacancies and the list of Officers, options shall be taken from the desirous Judicial Officers for appearing in such limited competitive examination and that the examination shall be held by 30th of April of the concerned year.

8. The High Court Administration in the Appointment Section, taking the contents of Clause-I of Appendix-B of 1951 Rules to be only the procedure of selection for promotion under the 10 percent quota and not a mandatory prescription for taking the cut-off date for determination of eligibility of three years of service



as Civil Judge (Senior Division) as on 31st of March of the concerned year, extended the cut-off date to 31.08.2018 in order to have a larger pool of Judicial Officers for selecting candidates for promotion to the post of District Judges (Entry Level) under the 10 percent quota from amongst Civil Judges (Senior Division) as the cut off date of 31.03.2018 had attracted only a small number of eligible Judicial Officers to appear for limited competitive examination under the 10 percent quota.

9. The stand of the High Court in the present litigation is that the Rules of 1951 do not provide for 31st of March of the concerned year as the cut-off date for calculating the minimum service period in the cadre of Civil Judge (Senior Division) but it only provides for a calendar to be followed.

10. What is of relevance, according to the High Court Administration, is that no person ought to be appointed under the aforesaid 10 percent quota who has



not completed three years of service as Civil Judge(Senior Division). The basis and the logic of the High Court Administration in reading Rule 5 (C) and Clause-1 of Appendix-B of the Rules of 1951 is that the number of vacancies and the list of eligible Officers are required to be placed before the High Court before 31st of March of each year and the examination ought to be taken by 30th of April of the concerned year. Such phraseology is though couched in mandatory terms with the usage of the word 'shall', nonetheless the tenor of the Clause clearly stipulates that such cut-off date is only for the purposes of giving an example and therefore only directory.

11. It has further been contended on behalf of the High Court that for the year 2017-18, there were 196 vacancies; out of which 170 vacancies had to be filled-up under 65 percent quota and 261 posts had to be filled-up under the 10 percent quota. The experience of the High Court Administration in the past was that



only 10 Civil Judges, Senior Division were found to have completed three years of service as on 31.03.2017 and when the date was extended to 31.12.2017, 115 such Judicial Officers became eligible.

12. Thus, a proposal was placed by the Registry before the Selection & Appointment Committee of the High Court for extending the cut-off date for 65 percent quota to 31.12.2017 which was accepted and ratified vide Resolution dated 04.01.2018. Such Resolution of the Selection & Appointment Committee was endorsed and approved by the Standing Committee of the High Court vide its Resolution dated 16.01.2018.

13. It further appears that thereafter again the Selection & Appointment Committee found that it would not be proper to include such candidates who had acquired the eligibility of three years of service after 31.03.2018 and based on that decision, recommended 94 Civil Judges, Senior Division for promotion under 65 percent category. This was approved by the Standing



Committee vide its Resolution dated 22.11.2018. Later, the Government issued notification, promoting those 94 Judicial Officers to the cadre of District Judges (Entry Level) including the four petitioners (Notification No. 16111 dated 10.12.2018) under the 65 percent category.

14. With respect to the promotion under the 10 percent quota, the initial cut-off date was fixed at 31.03.2018 as in case of 65 percent of quota, but later, vide minute dated 02.08.2018, the Selection & Appointment Committee extended it to 31.08.2018. This extension of date, as has been noted earlier, was approved by the Standing Committee vide its minutes dated 10.09.2018. The purpose for such extension, it was reiterated, was only to enlarge the number of eligible candidates and such extension of date attracted 248 Judicial Officers.

15. It has also been brought to the notice of this Court that there still exists 136 vacancies in the cadre of



Superior Judicial Service. The purpose for not extending the cut-off date beyond 31.03.2018 for 65 percent quota promotion was that the process for evaluation in that category was completed by 31.03.2018 and any change would have amounted to change the rules of the game mid-way. The date was extended for 10 percent quota as the process in that category had not begun and no option till then had been taken from the Judicial Officers.

16. As has been communicated to this Court, 20 Judicial Officers were interviewed and a final result of 18 Judicial Officers was prepared and placed before the Selection & Appointment Committee in a sealed cover which was later published on the website of the High Court on 29.01.2019.

17. The other contention of the petitioners that the respondents who have been promoted out of turn under the 10 percent quota would be placed above such Judicial Officers who have been promoted under 65



percent quota as the roster system to determine the *inter-se* seniority between the promotees of 65 percent and 10 percent quota respectively has been provided for in Rule 16(e) of the 1951 Rules which specify that the seniority between the promotees and direct recruits shall be fixed by roster points prepared on the basis of posts irrespective of the fact as to when a person was appointed and that roster point shall be prepared including all the posts available in the cadre has been negatived on the ground that the promotees under the 10 percent quota would occupy the roster point No. 7 and 15 out of 20 points roster of the cadre which has been provided for in the explanation appended to Rule 16(e) of the 1951 Rules and neither any seniority list has till now been prepared nor the rule governing such roster point for *inter-se* seniority has been challenged.

18. The respondent Judicial Officers who have been declared successful and have been appointed on the post of District Judges (Entry Level) have sought to



defend the aforesaid process of appointment through limited competition under the 10 percent quota on primarily two grounds which are in *pari materia* with the stand of the High Court. According to them, the 1951 Rules do not specify for the cut-off date for calculating eligibility of Officers for 10 percent promotional quota as 31st of March of the year of the vacancy but only aims at fixing such criterion of experience for being eligible for promotion either under the 65 percent quota or by way of limited examination under the 10 percent quota. The cut-off date which is sought to be read literally by the petitioners in Rule 5 (C) of 1951 Rules only provides for a particular date for example and such date is not by way of any mandatory prescription.

19. The other ground on which the appointment process is sought to be defended is that petitioner Nos. 3 and 4 did not participate in the limited competitive examination by not giving their willingness whereas petitioner Nos. 1 and 2 participated but failed to obtain



the minimum qualifying marks. Under the aforesaid circumstances, the petitioners could not have challenged the selection/promotion process in view of a large number of decisions of this Court as well as of the Supreme Court (refer to ***Manish Kumar Shahi versus State of Bihar & Ors (2010) 12 SCC 576; Union of India versus C. Girija & Ors 2019 SCC (online) SC 187; Ashok Kumar & Ors versus State of Bihar & Ors (2017) 4 SCC 357; B. Srinivasa Reddy versus Karnataka Urban Water Supply and Drainage Board Employees' Association & Ors (2006) 11 SCC 731***).

20. It was also urged that the Supreme Court in ***Rubber House versus Excelsior Needle Industries (P) Limited (1989) 2 SCC 413*** has held that the word 'shall' in its ordinary import is obligatory; nevertheless, the word 'shall' need not be given such connotation in each and every case and the provisions can be interpreted as directory instead of mandatory, depending



upon the purpose which the legislature intended to achieve as disclosed by the object, design, purpose and scope of the statute. While interpreting the provisions concerned, regard must be had to the content, subject matter and object of the statute in question (also refer to ***Dr. Ram Deen Maurya versus State of U.P. & Ors (2009) 6 SCC 735***).

21. The contention on behalf of the petitioners thereafter veered around the proposition that there can no waiver of any right founded on Article 14 and 16 of the Constitution and that when a statute provides for a thing to be done in a particular manner, then it has to be done in that manner alone and in no other way (refer to ***Dipak Babaria & Anr versus State of Gujrat & Ors (2014) 3 SCC 502; Ramana Dayaram Shetty versus The International Airport Authority of India AIR 1979 SC 1628; State of UP & Anr versus Johri Mal (2004) 4 SCC 714 and Dr. Sarwan Jain versus State of Kerela 2011(1) KLT 888 (F.B.)***).



22. We have given our anxious consideration to the issues involved and contentions raised in the present writ petition. We have also carefully examined the 1951 rules, specially 5(C) and Clause-1 of Appendix-B as well as the minutes of the Selection & Appointment Committee and the Standing Committee of the High Court.

23. Section 5(C) of the Bihar Superior Judicial Service Rules, 1951 clearly specify the manner of recruitment to the post of District Judge (Entry Level) from amongst Civil Judges (Senior Division) under two modes viz. 65 percent of the quota for promotion on the merit-cum-seniority and 10 percent on the basis of merit through limited competitive examination. Under both the quotas, the concerned Judicial Officer is required to have completed three years service as Civil Judge (Senior Division). There is no reference of any cut-off date with respect to the aforesaid eligibility of three years of service as Civil Judge (Senior Division).



24. Appendix-A which deals with 65 percent quota does not specify any cut-off date for the experience of three years as Civil Judge(Senior Division). In Appendix-B, which sets out the procedure for promotion by merit through limited competitive examination under the 10 percent quota enjoins that the number of vacancies and the list of eligible Officers be placed before the Selection & Appointment Committee of the High Court before 31st of March every year and after approval, examination be taken by 30th of April of the concerned year.

25. This cannot be said to be the cut-off date but as canvassed by the High Court only a calendar with an example.

26. If the vacancy and the list of eligible Officers are formalized by 31st of March of each year, the examination ought to be taken within one month i.e. by 30th of April of the concerned year. The use of the word 'shall' in Appendix-B does not at all reflect or indicate



that 31st of March is compulsorily to be taken as the cut-off date for fixing the eligibility of three years service Civil Judge (Senior Division). The eligibility of three years as Civil Judge (Senior Division) before the consideration for such promotion.

27. In this context, it would be relevant to look at the statute/body of rules to find out whether a particular rule is directory or mandatory. If it is mandatory, then it must be strictly followed and any breach thereof would render the subsequent action invalid. That would not be the case, if it is found that the rule is directory.

28. Section 5(C) of the 1951 Rules does not specify/prescribe any cut-off date.

29. Appendix-A which is meant for promotion under the 65 percent quota also does not specify any cut-off date. In that event, a procedure set out in Appendix-B for promotion under the 10 percent quota by way of limited examination on merit wherein the



schedule for intimating the vacancy and list of eligible candidates has been provided for, mentioning of a date of that particular year viz. 31st of March cannot be taken to be a mandatory prescription. The examination has to be taken on an yearly basis and what is relevant is that the examination ought to be taken within one month of the approval of the vacancy and the list of eligible candidates and the eligibility is the experience of three years as Civil Judge (Senior Division) before such consideration.

30. It has categorically been held in Rubber House (supra) that under all circumstances, the word 'shall' need not be understood as a mandatory prescription and whether such condition is mandatory or directory would be dependent on various factors and the same could be adjudged by looking at the object, purpose and scope of the statute.

31. Having examined the rules, we are of the considered view that for fixation of the eligibility criterion



for promotion under the 10 percent quota, there is no mandatory rule of calculating such experience by 31st of March of the year in which the recruitment/process of promotion is to be undertaken. We have also noted that petitioner Nos. 3 and 4 did not exercise the option of appearing the competitive examination whereas petitioner Nos. 1 and 2 though participated, but failed.

32. In ***Manish Kumar Shahi (supra)***, which case also related to the appointment of Civil Judges (Junior Division), a challenge was raised with respect to the fixation of marks for *viva-voce* which, according to the petitioner, who was a participant in the recruitment process, was excessive, the Supreme Court, after referring to various decisions held that the petitioner therein had invoked the jurisdiction of the High Court under Article 226 of the Constitution of India only after he had failed in the examination and therefore his conduct clearly dis-entitled him from questioning the selection process (also refer to ***Madan Lal & Ors***



versus The State of Jammu & Kashmir & Anr (1995) 3 SCC 486; Marripati Nagaraja & Ors versus The Government of Andhra Pradesh (2007) 11 SCC 522; Dhananjay Malik & Ors versus State of Uttaranchal & Ors (2008) 4 SCC 171; Amlan Jyoti Barooah versus State of Assam (2009) 3 SCC 227 and K.A. Nagamani versus Indian Airlines & Ors (2009) 5 SCC 515).

33. Similarly, in ***Ashok Kumar versus State of Bihar (2017) 4 SCC 357***, the Supreme Court, after referring to several earlier judgments had laid down the principle that when a candidate appears at an examination without objection and is subsequently found to be not successful, a challenge to the process is precluded. The question of entertaining a petition, challenging an examination would not arise where a candidate has appeared, participated and failed. He or she cannot subsequently turn around and contend that the process was unfair or that there was a lacuna therein



merely because the result is not palatable (also refer to ***Chandra Prakash Tiwari & Ors versus Shakuntala Shukla & Ors (2002) 6 SCC 127; Munindra Kumar & Ors versus Rajiv Govil & Ors (1991) 3 SCC and Kumari Rashmi Mishra versus Madhya Pradesh Public Service Commission (2006) 12 SCC 724***).

34. It would also be apposite to refer to the facts of **Dr. Sarwan Jain (supra)**. In the aforesaid case, the decision of the State of Kerala to create a preference in the matter of admission to the super specialty courses conducted by the medical colleges run by the State of Kerala, was under question. The appellant therein had participated in the selection process but could not secure admission to anyone of the super specialty courses, which failure was attributed to the preference created by the State of Kerala viz. MBBS or MD/MS from medical colleges in Kerala. Such a preference was alleged to be violative of the fundamental rights under Article 14 and 15 of the



Constitution of India as also the violation of the regulations made by Medical Council of India and the incompetence of the State to make such a stipulation regarding preference.

35. The issue before the Supreme Court was whether the appellants could be non-suited on the ground of estoppel. The Supreme Court, after examining the legal position with respect to estoppel and taking into account the judgment in ***Basheshar Nath versus The Commissioner of Income Tax AIR 1959 SC 149*** and several other cases, came to the conclusion that there is a distinction between non-suiting of the petitioner approaching the legal forum on the ground of either waiver of a legal right or estoppel by conduct and declining to interfere in the matter where the jurisdiction is discretionary on some well recognized principle governing such exercise of discretionary jurisdiction.

36. The decisions which were referred to in the aforesaid case was held to be an authority for the



propositions that the *bona fides* of the petitioners are a relevant factor in deciding the question whether the Court should exercise its discretionary jurisdiction.

37. In the aforesaid case, the Supreme Court was of the view that the right to seek educational opportunity in an Institution run by the State does not depend upon the prospectus issued by the Institution and everyone is entitled for such opportunity unless such a right is restricted by an otherwise constitutionally permissible law.

38. In the present set of circumstances, the petitioners are not being non-suited only for their having either failed to pass the test or refuse to participate in the process of selection but on other grounds as well.

39. The contentions raised on behalf of the petitioners are not acceptable for the reason that from a composite reading of the Rules of 1951, no mandatory requirement of fixing the eligibility criteria before a particular date can be gleaned. In that event, the



extention of date for fixing the eligibility criterion for the purposes of attracting more number of Judicial Officers cannot be faulted with. More so, when there has been complete transparency in the decision making process adopted by the Selection & Appointment Committee of the High Court and approved by the Standing Committee of the High Court.

40. Apart from this, the petitioners now stand promoted to the Superior Judicial Service and no seniority list is stated to have been finalized. The *inter-se* seniority shall be determined in accordance with Rule 16 of the 1951 rules which is not under challenge. In this background, the unwillingness of petitioner Nos. 3 and 4 to participate in the limited examination and petitioner Nos. 1 and 2 not being successful assumes significance as their *bona fides* in approaching this Court becomes highly suspect.

41. We have also taken note of the fact that the Supreme Court in Malik Mazhar Sultan (Civil Appeal No.



1867 of 2006) has been continuously issuing directions for filling up the vacancy in the Superior Judicial Service and there still remains vacancies in the Superior Judicial Service in the State of Bihar.

42. For the aforesaid reasons, we are of the considered opinion that the writ petitioners have not made out any case for warranting any interference with the process of appointment/appointment of the respondents.

43. There is no merit in the writ petition and the same is therefore dismissed.

44. Cost easy.

(Amreshwar Pratap Sahi, CJ)

(Ashutosh Kumar, J)

Shageer/-

AFR/NAFR	AFR
CAV DATE	23/09/2019
Uploading Date	18/10/2019
Transmission Date	

