

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.4834 of 2019

=====

Dr. Arbind Kumar Jha S/o Shri Narnath Jha, R/o Brahampur PS Phulpras,
District Madhubani, at present reader.

... .. Petitioner/s

Versus

1. The State of Bihar through Principal Secretary, Health, New Secretariat Patna.
2. The Principal Secretary, Health New Secretariat Patna.
3. The Secretary, Health Department, New Secretariat Patna.
4. The Bihar Public Service Commissioner through its chairman, 15, Jawaharlal Neharu Marg, Bailey Road Patna.
5. The Chairman, Bihar Public Service Commissioner 15, Jawaharlal Neharu Marg, Bailey Road Patna.
6. Dr. Anish Kumar S/o Dr. A.Kumar Alok, Saraswati Nagar Near Baireya Bus Stand Muzaffarpur, District Muzaffarpur.

... .. Respondent/s

=====

Appearance :

For the Petitioner/s : Mr.Chandra Kant
For the Respondent/s : Mr.Rajeshwar Singh (Ga10)

=====

CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH
ORAL JUDGMENT

Date : 14-03-2019

The present writ petition has been filed for quashing column 1 of advertisement no. 47/2017 to 58/2017 dated 31.8.2017 by which more than 50% seats have been reserved for the SC/ST/OBC candidates as also for directing the respondents to publish the result after applying 50% reservation.

2. At the outset, the learned counsel for the respondent Bihar Public Service Commission has raised a preliminary objection with regard to the maintainability of the present writ petition on the ground that once the petitioner has participated in the selection process consciously and has failed, he cannot thereafter turn around and challenge the matter of selection and its outcome. The learned counsel for the Bihar Public Service Commission has relied on the judgment rendered by the Hon'ble Apex Court, reported in (2017)4 SCC 357



[**Ashok Kumar & Ors. vs. The State of Bihar & Ors.**], paragraphs no. 12, 13, 14, 15, 16, 17, 19 and 21 are reproduced herein below:-

“12. The appellants participated in the fresh process of selection. If the appellants were aggrieved by the decision to hold a fresh process, they did not espouse their remedy. Instead, they participated in the fresh process of selection and it was only upon being unsuccessful that they challenged the result in the writ petition. This was clearly not open to the appellants. The principle of estoppel would operate.

13. The law on the subject has been crystallised in several decisions of this Court. In *Chandra Prakash Tiwari v. Shakuntala Shukla*⁶, this Court 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 and participated. 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. In *Union of India v. S. Vinodh Kumar*⁷, this Court held that: (SCC p. 107, para 18)

“18. It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same. (See *Munindra Kumar v. Rajiv Govil*⁸ and *Rashmi Mishra v. M.P. Public Service Commission*⁹.)”

14. The same view was reiterated in *Amlan Jyoti Borooah*⁵ wherein it was held to be well settled that the candidates who have taken part in a selection process knowing fully well the procedure laid down therein are not entitled to question it upon being declared to be unsuccessful.

15. In *Manish Kumar Shahi v. State of Bihar*¹⁰, the same principle was reiterated in the following observations: (SCC p. 584, para 16)

“16. We also agree with the High Court¹¹ that after having taken part in the process



of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the petitioner is not entitled to challenge the criteria or process of selection. Surely, if the petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition. Reference in this connection may be made to the judgments in *Madan Lal v. State of J&K*¹², *Marripati Nagaraja v. State of A.P.*³, *Dhananjay Malik v. State of Uttaranchal*⁴, *Amlan Jyoti Borooah v. State of Assam*⁵ and *K.A. Nagamani v. Indian Airlines*¹³."

16. In *Vijendra Kumar Verma v. Public Service Commission*¹⁴, candidates who had participated in the selection process were aware that they were required to possess certain specific qualifications in computer operations. The appellants had appeared in the selection process and after participating in the interview sought to challenge the selection process as being without jurisdiction. This was held to be impermissible.

17. In *Ramesh Chandra Shah v. Anil Joshi*¹⁵, candidates who were competing for the post of Physiotherapist in the State of Uttarakhand participated in a written examination held in pursuance of an advertisement. This Court held that if they had cleared the test, the respondents would not have raised any objection to the selection process or to the methodology adopted. Having taken a chance of selection, it was held that the respondents were disentitled to seek relief under Article 226 and would be deemed to have waived their right to challenge the advertisement or the procedure of selection. This Court held that: (SCC p. 318, para 18)

"18. It is settled law that a person who consciously takes part in the process of selection



cannot, thereafter, turn around and question the method of selection and its outcome.”

19. In the present case, regard must be had to the fact that the appellants were clearly on notice, when the fresh selection process took place that written examination would carry ninety marks and the interview, ten marks. The appellants participated in the selection process. Moreover, two other considerations weigh in balance. The High Court noted in the impugned judgment¹ that the interpretation of Rule 6 was not free from vagueness. There was, in other words, no glaring or patent illegality in the process adopted by the High Court. There was an element of vagueness about whether Rule 6 which dealt with promotion merely incorporated the requirement of an examination provided in Rule 5 for direct recruitment to Class III posts or whether the marks and qualifying marks were also incorporated. Moreover, no prejudice was established to have been caused to the appellants by the 90 : 10 allocation.

21. In this view of the matter, the Division Bench cannot be held to be in error in coming to the conclusion that it was not open to the appellants after participating in the selection process to question the result, once they were declared to be unsuccessful. During the course of the hearing, this Court is informed that four out of six candidates, who were ultimately selected, figured both in the first process of selection as well as in the subsequent selection. One candidate is stated to have retired”.

3. The learned counsel for the petitioner, in reply to the aforesaid submission made by the learned counsel for the Bihar Public Service Commission, has submitted that the case of the petitioner is covered by the judgment rendered by the Hon’ble Apex Court in the **Indra Sawhney** case, reported in 1992 Suppl. (3) SCC 217 hence, the respondents could not have reserved more than 50% seats for the SC/ST/OBC candidates. It is further submitted that the petitioner had



earlier approached this Court by filing a writ petition bearing CWJC no. 22362 of 2018, however, a co-ordinate Bench of this Court by an order dated 27.11.2018 had dismissed the writ petition as withdrawn, hence, now being the opportune moment, the petitioner has again approached this Court for grant of appropriate reliefs.

4. I have heard the learned counsel for the parties and perused the materials on record. A bare perusal of the earlier order dated 27.11.2018, passed by a co-ordinate Bench of this Court, in the earlier round of litigation, at the behest of the petitioner herein, would show that the only argument raised by the petitioner was that in view of the provisions contained in Rule 13(d) of the Indian Medicine Central Council (Minimum Standards of Education in Indian Medicine) Amendment Regulations, 2016, the petitioner, who is qualified in the concerned subject, is required to be given preferential treatment in the matter of selection over and above the applicants who are qualified in the allied subject, however, a co-ordinate Bench of this Court was of the view that since the selection process was still going on, the petitioner had no occasion to raise any tenable grievance and the entire argument was being made on assumption, thus the petitioners of that case had withdrawn the writ petition with liberty to file a fresh writ petition. This Court finds that the issue of reservation had not been raised during the course of the argument in the earlier round of litigation, which is apparent from the fact that though the said issue was germane at that moment of time and could have been dealt with by a co-ordinate Bench of this Court, but there is no whisper of such argument having been made at that point of time. Moreover, a co-ordinate Bench of this Court has merely dismissed the writ petition of the petitioner including the petitioner herein as withdrawn, however, without any further liberty. Nonetheless, this Court finds that the issue of reservation of more than 50% seats for the SC/ST/OBC candidates was very well within the knowledge of the petitioner, but still the petitioner had consciously with open eyes participated in the selection process, however, the petitioner



has now sought to challenge the advertisement itself after he has been declared unsuccessful, which is not permissible in law since the petitioner cannot approbate or reprobate at the same time. The petitioner either should have not participated in the pre- selection process and instead challenged the advertisement or should have challenged the advertisement prior to the issuance of the result. Thus, this Court finds that the petitioner herein, having taken a chance for selection, is disentitled to seek relief under Article 226 of the Constitution of India and would be deemed to have waived his right to challenge the advertisement or the procedure of selection, in view of the settled law to the effect that a person, who has consciously taken part in the selection process cannot thereafter turn around and question the process of selection and its outcome especially when such a person has been declared unsuccessful.

5. Having regard to the facts and circumstances of the case and considering the reasons discussed herein above, this Court finds that the present case is liable to be dismissed, in light of the principles enunciated by the Hon'ble Apex Court in the case of **Ashok Kumar & Ors.** (supra).

6. Accordingly, the writ petition stands dismissed.

(Mohit Kumar Shah, J)

Tiwary/-

AFR/NAFR	NAFR
CAV DATE	N/A
Uploading Date	30.05.2019
Transmission Date	N/A

