

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.21461 of 2018

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1. Sudhanshu Shekhar, Son of Mahendra Kumar Das, Resident of Village + P.O.- Bhachhi, P.S.- Madhubani, District- Madhubani.
 2. Abhinaw Anand, Son of Ramanand Singh, Resident of Village- Sion, P.S.- Bhabua, District- Kaimur.
 3. Abid Akhtar, Son of Nayeem Akhtar, Resident of Village- Mushkipur, P.S Jamalpur Gogri, District- Khagaria.
 4. Kashi Nath Singh, Son of Kanhaiya Singh, Resident of C- 21/65, B-11, Nagar Mahapalika Colony, P.S.- Chetganj, District- Varanasi U.P..

... .. Petitioner/s

Versus

1. The State of Bihar through the Principal G.A.D. Secretary, Government of Bihar, Patna
2. The Principal Secretary, Human Resources Development Department, Govt. of Bihar, New Secretariat Building, Bailey Road, Patna-800001
3. The Principal Secretary, Rural Development Department, Govt. of Bihar, Old Secretariat Building Patna-800015
4. The Bihar Public Service Commission through its Secretary, Bailey Road, Patna.
5. The Chairman, Bihar Public Service Commission, Bailey Road, Patna.
6. The Joint Secretary, cum Examination Controller, Bihar Public Service Commission, Bailey Road, Patna

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Dinu Kumar, Advocate
For the BPSC	:	Mr. Sanjay Pandey, Advocate
For the State	:	Mr. Prabhu Narayan Sharma, AC to AG

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

ORAL JUDGMENT

Date : 23-09-2019

A common 56th, 57th, 58th and 59th Combined
Competitive Examination for various vacant Class-II posts
(Gazetted) in the State Cadre Service under the State Government
of Bihar was held by the Bihar Public Service Commission
(hereinafter referred to as ‘the BPSC’) on the basis of an



advertisement issued on 01.09.2014. The petitioners had applied pursuant to the said advertisement and were declared successful in the preliminary test as well main (written) examination. They had participated in the interview. A final result was published on 18.08.2018, based on which the BPSC made recommendations for appointment in October, 2018. Appointments have been made on the basis of the said recommendation made by the BPSC. Petitioners were admittedly not declared successful and, therefore, their names were not recommended. They claim that petitioners no. 1, 3 and 4 have secured 848 marks which was fixed cut-off marks for general category for open merit candidates. Petitioner no. 2, who belongs to BC-2 category, had secured 847, which, according to the petitioners, was the cut-off for BC-2 category candidates.

2. It is their case that many of the candidates selected by the BPSC on the basis of the said competitive examination have not joined. They have a grievance that despite the fact that the vacancies advertised had remained unfilled because of non-joining of candidates, the State Government has not taken steps for filling up the said vacancies by the candidates who figure in the merit-list just below the last candidate recommended for appointment.



3. In the above background, the petitioners have sought the following reliefs :-

“(A) For issuance of a writ in the nature of mandamus commanding the respondents to publish the result in favour of the petitioner as successfully candidates against the advertisement published by Bihar Public Service Commission of 56th, 57th, 58th and 59th of combined competitive examination as contained in Annexure-2 mainly on the reason the petitioners have also secured their cut off marks against their respective categories fixed by the Bihar Public Service Commission, Patna.

(B) Also for commanding the respondents to fill up the vacancies against the non joining posts against advertisement published by Bihar Public Service Commission of 56th, 57th, 58th and 59th of combined competitive examination as contained in Annexure-2 mainly on the reason the petitioners have also secured their cut off marks against their respective categories fixed by the Bihar Public Service Commission, Patna

(C) Also for necessary relief/reliefs, order/orders, direction/directions for which the petitioner is entitled in the eye of law as well as on the facts of the case.”

4. This is to be noted at the outset that nowhere it is the claim of the petitioners that any candidate with inferior merit has been selected and recommended by the BPSC and has been appointed by the State Government on the basis of the said competitive examination.



5. A counter affidavit has been filed on behalf of the BPSC making following statement in paragraph-9 :-

“9. That it is stated that the petitioners-(1) roll no. 469123, Sudhanshu Shekhar, reservation category-General (01), merit position-542; (2) roll no. 503902, Abhinav Anand, reservation category-BC (05), merit position-563; (3) roll no. 154194, Abid Akhtar, reservation category-General (01), merit position-543; and (4) roll no. 159932, Kashinath Singh, reservation category-General (01), merit position-541 having 848, 847, 848 and 848 marks equal to the cut off marks 848 and 847 in their respective reservation categories, i.e., General (01) and BC(05) could not be declared successful finally because they are on lower merit position in the merit list (542, 563, 543 and 541 respectively) and vacancy in General (01) and BC (05) category exhausted in merit position 538 and 554 respectively.”

6. It has further been stated in the counter affidavit that as per the norms of the BPSC, if two candidates are found to have secured same aggregate, the candidate, who has obtained higher marks in the written examination, is placed higher in the merit. Further, in case marks in the written examination are also same, a candidate, who has secured higher marks in optional subjects, is placed higher in the merit-list and in case the marks of optional subjects are also same, the merit position is determined with the



date of birth of a candidate. A candidate, who is elder, is placed higher in the merit-list. When dates of birth are also same, then the merit is decided as per the decision taken by the BPSC according to first letter of the name of the candidate in alphabetical order of the *Devanagari* script. The said norm has been adopted by the BPSC in the light of the Supreme Court's decision in case of ***Bihar Public Service Commission vs. Pandey Venktesh Prasad Sinha and Anr.*** rendered on 15.01.1998 in ***Civil Appeal No. 3497 of 1998*** whereby a Division Bench decision of this Court laying down the norms was held to be 'eminently reasonable' and was accepted. A copy of the said decision dated 15.01.1998 has been brought on record by way of Annexure-A to the counter affidavit.

7. This is ostensible reason why the petitioners figure below the cut-off merit position, in the result published by the BPSC.

8. A reply to the counter affidavit has been filed in September, 2019. It has been stated in paragraph-15 of the rejoinder that petitioner no. 3 has been appointed and petitioner no. 2 does not want to pursue the present case. It has been stated that it was incumbent upon the respondents to have disclosed the names/list of candidates who did not join, despite appointment letters having been issued in their favour. A reference has been



made in the rejoinder to the counter affidavit to an order of this Court dated 04.10.2016, passed in LPA No. 1021 of 2016 (Anurag & Anr. vs. The State of Bihar & Ors.) to submit that a Division Bench of this Court had directed the State Government of Bihar to fill up the posts which had remained unfilled.

9. Mr. Dinu Kumar, learned counsel appearing on behalf of the petitioners has placed heavy reliance on the Division Bench decision in case of *Anurag* (supra) and has submitted that it is a fit case where this Court exercising writ jurisdiction under Article 226 of the Constitution should issue necessary directions to recommend names of the candidates on the basis of their respective merits against such vacancies which was advertised but remained unfilled because of non-joining of candidates.

10. Mr. Sanjay Pandey, learned counsel appearing on behalf of the BPSC, on the other hand, has submitted that the petitioners do not have any right to be appointed against the said posts. According to him, there was no waiting list prepared and even the candidates, whose names are included in the waiting list, cannot claim as of right to be appointed against unfilled posts. In support of his submission he has placed reliance of Supreme court decision in case of *Raj Rishi Mehra and others vs. State of Punjab and another* reported in (2013) 12 SCC 243. He has



further submitted that, in any event, any claim of the petitioners on the basis of common combined competitive examination no more survives in view of the subsequent development because subsequent selection process under 60th to 62th Common Combined Competitive Examination is also over and further, result of main (written) examination of 63rd Combined Competitive Examination has been declared.

11. Mr. Prabhu Narayan Sharma, learned AC to AG appearing on behalf of State of Bihar has adopted the arguments advanced on behalf of BPSC and has contended that this writ application has become infructuous in view of the subsequent developments as noticed above.

12. The facts in the present case are not at all in controversy. The merit-list prepared on the basis of 56th to 59th Common Combined Competitive Examination is not under challenge. It is the case of the petitioners that had the vacancies, which remained unfilled because of non-joining of candidates, been filled up, the petitioners would have been appointed. The moot question is, whether they can claim their selection/ recommendation/ appointment against the posts which remained vacant because of non-joining of candidates. It is a well-established rule after Constitution Bench decision of the Supreme



Court in case of ***Shankarsan Dash vs. Union of India*** reported in ***(1991) 3 SCC 47*** that a candidate does not have an indefeasible right to be appointed on the basis of merit-list. The said decision has been followed in numerous decisions by the Supreme Court and this Court. Paragraph-7 of the Supreme Court's decision in case of ***Shankarsan Dash*** (supra) has laid down the law as follows :-

“7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court and we do not find any discordant note in the decisions in State of Haryana



v. Subhash Chander Marwaha, Neelima Shangla v. State of Haryana, or Jatendra Kumar v. State of Punjab.”

13. Mr. Pandey, learned counsel for the BPSC has rightly relied on Supreme Court’s decision in case of **Raj Rishi Mehra** (supra), paragraph-15 of which reads thus :-

“15. The question whether the candidates whose names are included in the waiting list are entitled to be appointed against the unfilled posts as of right is no longer res integra and must be answered in negative in view of the judgments of this Court in Union of India v. Ishwar Singh Khatri, Gujarat State Dy. Executive Engineers’ Assn. v. State of Gujarat, State of Bihar v. Secretariat Asstt. Successful Examinees Union 1986, Prem Singh v. Haryana SEB, Ashok Kumar v. Banking Service Recruitment Board, Surinder Singh v. State of Punjab, Madan Lal v. State of J&K, Kamlesh Kumar Sharma v. Yogesh Kumar Gupta, State of J&K v. Sanjeev Kumar, State of U.P. v. Rajkumar Sharma, Ram Avtar Patwari v. State of Haryana and Rakhi Ray v. High Court of Delhi.”

14. I have, therefore, no hesitation at all in rejecting the claim of the petitioners to be appointed against unfilled vacancies because of non-joining of the candidates recommended for appointment. The Division Bench decision of this Court in case of **Anurag** (supra) is based on different set of facts. The appellants of that case were recommended for appointment against the posts of



Accountant-cum-Cashier under Social Welfare Directorate in the State of Bihar on the basis of process of selection held by Bihar Staff Selection Commission. The cases of appellants of that case were, however, returned back to the Commission along with their applications on the ground that the post of Accountant-cum-Cashier was not sanctioned in the Directorate and one post of Accountant, one post of Cashier and one post of Accountant-cum-Cashier was sanctioned under the Directorate. The Commission in that case had responded to the Social Welfare Directorate saying that the Department had requisitioned three posts of Accountant-cum-Cashier. In the aforesaid background, since the status of those appellants continued oscillating between the Directorate of Social Welfare and the Commission for quite sometime, apparently, for the reason that the posts against which they had been recommended did not exist, the appellants of that case had filed a writ application seeking direction for their appointment against the posts of Secretariat Assistant, which were also advertised and some of which had remained unfilled because of non-joining of candidates. In peculiar facts and circumstances of that case, the Court had held in paragraphs 26 and 27 as follows :-

“26. However, there is distinguishable feature in the present case inasmuch as the appellants of this case are sought to be appointed/adjusted against the posts, which



were not advertised. In our considered view, this cannot be allowed. The appellants had a right to be considered for appointment against the posts advertised keeping in view their merit position and preference given in their application forms.

27. In the facts and circumstances of the present case, we are of the considered view that these appellants deserve to be appointed against available vacancies.”

15. The said decision does not at all support the case of the petitioners.

16. Secondly, the merit-list prepared on the basis of 56th to 59th Common Combined Competitive Examination loses its significance altogether after subsequent recommendations made by the BPSC on the basis of 60th to 62nd Common Combined Competitive Examination.

17. The relief, which the petitioners is seeking, in the aforesaid background, cannot be granted. The writ application is accordingly dismissed. No order as to costs.

(Chakradhari Sharan Singh, J)

Rajesh/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	12.10.2019
Transmission Date	NA

