

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.3952 of 2020

Swati Chaturvedi, aged about 29 years (Female), Daughter of Atal Bihari Chaturvedi, resident of N 1 / 23, Panchkoshi Road, P.S.- Lanka, District-Varanasi (U.P.). At present resident of Village + P.O.- Sahbajpur, P.S.- Mohania, District- Kaimur (Bhabhua).

... .. Petitioner

Versus

1. The State of Bihar through the Chief Secretary, Govt. of Bihar, Patna.
2. The Bihar Public Service Commission through its Chairman.
3. The Chairman, Bihar Public Service Commission.
4. The Joint Secretary-cum-Examination Controller, Bihar Public Service Commission.
5. The High Court of Judicature of Patna in its Administrative Side through the Registrar General, Patna High Court, Patna

... .. Respondents

Appearance :

For the Petitioner/s	:	Mr. Kumar Brijnandan, Advocate
For the State	:	Mr. Sheo Shankar Prasad, SC-8
For the B.P.S.C.	:	Mr. D.K. Sinha, Senior Advocate
		Mr. Anil Kumar Singh, No.1, Advocate
For the High Court	:	Mr. Piyush Lall, Advocate

CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY
And

HONOURABLE MR. JUSTICE PARTHA SARTHY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE SHIVAJI PANDEY)

Date : 01-03-2021

Heard learned counsel for the petitioner, learned counsel for the High Court, learned counsel for the State and learned Senior counsel for the Bihar Public Service Commission.

2. In the present case, the petitioner is seeking appointment against the post advertised vide Advertisement



No.06 of 2018 as having claimed that she secured identical marks of 517 as that of last candidate, who has been selected under the unreserved category. It has further been submitted that six persons under the unreserved category did not join the post and as such, the petitioner being next one in the merit list having secured 517 marks to be appointed on that post.

3. The facts of this case are that an Advertisement No.06 of 2018 was issued by the Bihar Public Service Commission for the appointment of 349 candidates on the posts of Civil Judge (Junior Division). The petitioner applied and appeared in the examination but, could not get her place in the final select list. Sri Amit Kumar Singh, who is the last candidate selected on the post of Civil Judge (Junior Division) having secured 517 marks. It has been brought to our notice that about six candidates under the unreserved category did not join the post, which is apparently clear from the Notification issued by the State Government vide Memo no.3339 dated 03.03.2020 whereby the recommendation of Pankaj Kumar Srivastava, Ashwani Kumar Upadhyay, Nawnit Kashyap and Sandeep Mani, have been cancelled as they failed to join the post and vide memo no.11698 dated 10.012.2020 the appointment of three persons namely, Abhishek Kumar, Suman Grewal and



Rakesh Kumar have been cancelled. Out of seven candidates, six candidates belong to unreserved category.

4. The petitioner has brought to our notice that she sought information from the State Government under the Right to Information Act to give the name of last person who has been appointed on the post of Civil Judge (Junior Division) as also the names of persons who have secured same marks i.e. 517. The petitioner got information that altogether 10 persons have secured 517 marks and her position is below to Anita Kumari, as although she secured 517 marks but, she obtained 457 marks in the written examination whereas, the petitioner obtained 452 marks in the written examination, so Anita Kumari secured higher place in the merit list than that of the present petitioner. However, it has been pointed out by learned counsel for the petitioner that Anita Kumari belongs to Backward Category and she has been appointed in that category, so after Anita Kumari, the present petitioner would be the next candidate to be adjusted against remaining six vacancies.

5. Learned counsel for the petitioner has placed reliance on the judgment of Hon'ble Supreme Court rendered in the case of *Malik Mazhar Sultan (3) and Anr. vs. Uttar Pradesh Public Service Commission* reported in (2008) 17 SCC



703 and submits that the petitioner is entitled to be adjusted against vacant post under the unreserved category.

6. Counter affidavits have been filed by the Bihar Public Service Commission, High Court as well as the State. The respondents have not disputed that the present fact but, learned counsel for the State has made submission that as there is a Government Resolution dated 15.07.2007, in which it has been decided that if any candidate fails to join the post, the said post will go to the next recruitment year. On that basis, learned counsel for the State submits that the posts not filled-up on account of non-joining of the selected candidates will be added in next requisition for recruitment.

7. Learned counsel for the Bihar Public Service Commission submits that the duty of the Commission is to recruit the persons and to make panel of selected candidates and that has been done by the Commission and if there is no direction from the State Government or the High Court for furnishing the names below the last recruited candidate, the Commission is not obliged to recommend further name or names, inasmuch as, the Commission has not prepared wait list.

8. Learned counsel for the High Court submits that



earlier identical question came for consideration before this Court in the case of ***Kislay Chaubey vs. The State of Bihar and Ors. (C.W.J.C. No.7104 of 2008)*** and the Division Bench of this Court vide judgment and order dated 17.09.2008 placing reliance on the Circular of 1977 has held that if any vacancy could not be filled up on account of non-joining of selected candidate, the same will go to the next recruitment year. He further submits that the judgment relied upon by learned counsel for the petitioner in the case of ***Malik Mazhar Sultan (3) and Anr. vs. Uttar Pradesh Public Service Commission*** reported in ***(2008) 17 SCC 703*** with respect to giving direction for preparation of the wait list is not in general context.

9. Learned counsel for the petitioner has strongly placed reliance on the judgment of ***Malik Mazhar Sultan case (supra)*** as in that case the Hon'ble Supreme Court was in *seisin* of the matter of recruitment of Judicial Officers at different branches viz. filling up of vacancies in the cadre of District Judge, filling up of vacancies in the cadre of Civil Judge (Senior Division) to be filled up by promotion and for filling up the post of Civil Judge (Junior Division) by direct requirement, which is subject matter at hand. In Clause-1 of paragraph no.7(D) of the aforesaid judgment, it has been provided that in what manner



the vacancies to be calculated, which speaks that ‘(a) existing vacancies (b) future vacancies that may arise within one year due to retirement (c) future vacancies that may arise due to promotion, death or otherwise, say ten per cent of the number of posts. Item No.11 thereof speaks in the manner “declaration of final select list and communication to the appointing authority (a) result may be put on the website and also published in the newspaper (b) select list be published in order of merit and should be double the number of vacancies notified. Clause-12 thereof speaks in the manner “issue of appointment letter by the competent authority for all existing vacant posts as on date. Paragraph no.14 of the said decision says that select list prepared for all categories of officials shall be valid till the next select list is published and paragraph no.15 says that ten per cent of unforeseen vacancies would be in respect of sanctioned posts and not vacancies occurring in a particular year. It appears that Patna High Court was a party to the proceeding, which is apparently clear from paragraph no.11 of the said judgment.

10. It also appears that the same matter again came for consideration before the Hon’ble Supreme Court for modification of earlier order dated 04.01.2007, which is reported in *(2009) 17 SCC 24 (Malik Mazhar Sultan and*



Another vs. Uttar Pradesh Public Service Commission and Others) wherein certain portion of directions are under consideration before the Hon'ble Supreme Court, which has been explained in paragraph no.2 of the said decision, which reads as under:-

“2. It has been pointed out by the counsel appearing for the various High Courts that 10% of the sanctioned posts are notified in some States. A large number of posts are to be notified whereas there was corresponding number of vacancies to be filled if the candidates are selected in the select list. There may be an expectation for such candidates to get appointment and this creates unwanted litigation by the candidates and it is prayed that the existing vacancies alone be notified along with the anticipated vacancies that may arise in the next one year and some candidates also be included in the wait list prepared by the High Courts/ PSCs.

Ultimately, in paragraph no.3 of the said decision the Hon'ble Supreme Court passed the following order:-

“3. In supersession of the order passed by this Court on 04.01.2007, this Court directs that in future the High Courts / PSCs shall notify the existing number of vacancies plus the anticipated vacancies for the next one year and some candidates also be included in the wait list. To this extent earlier order is



modified.”

So, the Hon’ble Supreme Court made it clear to what extent the earlier order has been modified.

11. Learned counsel for the High Court submits that the aforesaid modification is in the context of paragraph no.02 of the earlier judgment, but from the said order, it appears that direction has been issued in context of para-15 of the earlier judgment, which speaks that ten per cent of unforeseen vacancies would be in respect of sanctioned posts and not vacancies occurring in a particular year. However, this paragraph cannot be read in isolation but, it has to be read in entirety.

12. Learned counsel for the State has placed reliance on Government resolution but, the Government resolution is not applicable in the Judicial Service but, it may be applied to the general service in view of specific consideration and directions of the Hon’ble Supreme Court in the case of ***Malik Mazhar Sultan case (supra)***. Further, the Government resolution which has been placed reliance by the State contending that vacant posts cannot be of any avail in favour of petitioner, is required to be refuted as resolution has no statutory force as it is neither an enactment or rule as is fortified from the judgment of Hon’ble



Supreme Court in the case of *State of Jharkhand vs. Jitendra Kumar Srivastava* reported in *2013(3) PLJR 458 (S.C.)*.

13. Further plea has been taken by the High Court that in *Kislay Chaubey vs. The State of Bihar and Ors. (C.W.J.C. No.7104 of 2008)*, the Circular of 1977 has been taken into consideration but, the aforesaid Circular of 1977 has lost its force in view of decision rendered in *Malik Mazhar Sultan case (supra)*. Furthermore, identical matter came for consideration before this Court in *Manoj Kumar Tiwari vs. The State of Bihar and Ors. (C.W.J.C. No. 14921 of 2019)*, that matter relates to direct recruitment of District Judge (Entry Level) Direct from the Bar. The petitioner of that case had obtained identical marks as that of the last candidate selected on the post and certain persons did not join the post, so the post remain unfilled. The Division Bench of this Court after considering the rival contentions of the parties has given direction for appointment of the petitioner. It will be relevant to quote paragraph nos. 9 and 10 of the aforesaid judgment, which are as follows:-

“9. Consequently, we allow the writ petition and issue a mandamus to the High Court to consider the claim of the petitioner; if he is otherwise eligible in the light of what has been stated



above for his selection in the District Judge (Entry Level), Direct from Bar Quota viz-a-viz the advertisement and the examination of 2016 in question within a period of one month from today for which necessary administrative instructions may be issued as directed hereinabove.

10. *It is further clear that the petitioner shall be declared to have been selected if he otherwise fulfills the other terms and conditions of the advertisement.”*

14. Learned counsel for the High Court has not disputed that petitioner of that case namely, Manoj Kumar Tiwari has been appointed nor the High Court has challenged the order rendered in that case before the higher Court, so this order has now become final order for the purposes of consideration of this Court.

15. Learned counsel for the High Court has placed reliance on Rule-19 and 21 of the Bihar Civil Services (Judicial Branch) (Recruitment) Rules, 1955, and submits that it depends upon the nomination of the candidates comes from the Bihar Public Service Commission. However, all the rules has to be read down in terms of the ratio laid down in the decision of *Malik Mazhar Sultan (supra)*.



16. Learned counsel for the B.P.S.C. has placed reliance on a decision of Hon'ble Supreme Court in the case of ***Public Service Commission, Uttaranchal vs. Mamta Bisht and Others.*** reported in ***(2010) 12 SCC 204***, paragraph nos. 8 and 9, wherein the Hon'ble Supreme Court has decided that if certain select candidates have joined and whereafter some of the candidates tendered resignation or died, in such circumstance, that vacancies would be treated to have been filled up but, it is not the facts of the present case. Hence, this decision will not apply to the facts of the present case.

17. Learned counsel for the B.P.S.C. has placed reliance on another decision of Hon'ble Supreme Court rendered in the case of ***State of Orissa & Anr. v. Rajkishore Nanda & Ors.***, reported in ***AIR 2010 SC 2100*** which deals with the situation that future vacancies cannot be notified, it can only be confined to the present and anticipated vacancies but, in the present case, vacancies are not the future vacancies, admitted position is that six posts are still vacant due to non-joining of selected candidates and the present petitioner is the next candidates having the identical marks of 517 as that of last candidate who has been selected under the unreserved category.

18. In view of the reasons discussed hereinabove as



also in light of the decision rendered in the case of *Malik Mazhar Sultan (supra)* and the order passed in *Manoj Kumar Tiwari (C.W.J.C. No.14921 of 2019) (supra)*, we are of the considered view that the petitioner is entitled for the relief as sought by him. Accordingly, we direct the State Government to send the requisition for one post for the present petitioner and in turn, the Bihar Public Service Commission will recommend the name of the present petitioner for appointment on the post of Civil Judge (Junior Division). Thereafter, the matter will be referred to the High Court on administrative side and the High Court on administrative side will appoint the petitioner on the post of Civil Judge (Junior Division) at suitable place. All the process must be completed within three months from the date of receipt / production of a copy of this order.

19. With the aforesaid observations and directions, this writ petition is allowed.

(Shivaji Pandey, J)

(Partha Sarthy, J)

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AFR/NAFR	N.A.F.R.
CAV DATE	N/A.
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