

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.14008 of 2021

1. Lalit Kumar Son of Surya Dev Ray Resident of Dhubauli Sube, Muzaffarpur, P.S. Gayghat, District Muzaffarpur.
2. Nilmani Son of Chintamani Prasad Resident of Near Govt Basic School, Harnatanr, P.S. Laukariya Thana, District- West Champaran.
3. Abhijeet Kumar Son of Nonu Sharma Resident of Village Khalkochak, Makhdumpur, P.S. Makhdumpur Thana, District- Jahanabad.
4. Md. Neyaz Anwar Son of Md. Nasim Resident of Near Sikander Pan Dukan, Madhendru, P.S. Sultanganj Thana, District- Patna.
5. Asif Seraj Son of Seraj Uddin Resident of House No. 421 A, New Karimganj, P.S. Civil Lines Karimganj, District- Gaya.
6. Om Prakash Singh Son of Agam Lal Singh Resident of Nayabari, Rasia, Kishanganj, P.S. Pauwakhali, District- Kishanganj.
7. Angad Yadav Son of Shri Ram Yadav Resident of Uchauri, Mubarakpur, P.S. Shadiabad, District- Gazipur (Uttar Pradesh).
8. Md. Ajmal Hussain Son of Md. Aamir Hasan Resident of Ward No. 6, Ankhauli, P.S. Katra, District- Muzaffarpur.

... .. Petitioners

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar, Patna.
2. The Principal Secretary, Department of General Administration, Government of Bihar, Patna.
3. The Additional Chief Secretary, Department of Social Welfare, Government of Bihar, Patna.
4. The Bihar Public Service Commission through its Secretary, having its office at 15, Jawaharlal Nehru Marg, Bailey Road, Patna.
5. The Chairman, Bihar Public Service Commission, 15, Jawaharlal Nehru Marg, Bailey Road, Patna.
6. The Secretary, Bihar Public Service Commission, 15 Jawaharlal Nehru Marg, Bailey Road, Patna.

... .. Respondents

Appearance :

For the Petitioners	:	Mr.S.D. Sanjay (Senior Advocate) with
	:	Ms.Parul Prasad (Advocate)
	:	Ms.Priya Gupta (Advocate)
	:	Mr.Mohit Agrawal (Advocate)
For the State	:	Mr.N.H. Khan (SC 1)
For the B.P.S.C.	:	Mr.Lalit Kishore (AG) (Senior Advocate) with
	:	Mr.Sanjay Pandey (Advocate)

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH
ORAL JUDGMENT



Date : 14-09-2021

This matter has been taken up for hearing online because of COVID-19 pandemic restrictions.

2. Sub-Section 1 of Section 34 of the Rights of Persons with Disabilities Act, 2016 (in short Act) obligates every appropriate Government within the meaning of Section 2(b) of the Act to appoint in every Government establishment, not less than 4% of the total number of vacancies in the cadre strength in each group of posts meant to be filled with persons with benchmark disabilities of which, 1% each shall be reserved for persons with benchmark disabilities under Clauses (a), (b) and (c) and 1% for persons with benchmark disabilities under Clauses (d) and (e). The nature of disabilities in Clauses (a) to (e), as referred to in Sub-Section 34, are as under:-

“(a) blindness and low vision;

(b) deaf and hard of hearing;

(c) locomotor disability including cerebral palsy, leprosy cured, dwarfism, acid attack victims and muscular dystrophy;

(d) autism, intellectual disability, specific learning disability and mental illness;

(e) multiple disabilities from amongst persons under clauses (a) to (d) including deaf-blindness in the posts identified for each disabilities:

Provided that the reservation in promotion shall be in accordance with such instructions as are issued by the appropriate Government from time to time:

Provided further that the appropriate Government, in consultation with the Chief Commissioner or the State Commissioner, as



the case may be, may, having regard to the type of work carried out in any Government establishment, by notification and subject to such conditions, if any, as may be specified in such notifications exempt any Government establishment from the provisions of this section.”

3. Sub-Section (2) of Section 34 of the Act further mandates that in case in any recruitment year any vacancy cannot be filled up due to non-availability of a suitable person with benchmark disability or for any other sufficient reasons, such vacancy shall be carried forward in the succeeding recruitment year and if in the succeeding recruitment year also, suitable person with benchmark disability is not available, it may first, be filled by interchange among the five categories, as noted above, and only when there is no person with disability available for the post in that year, the employer shall fill up the vacancy for appointment of a person, other than a person with disability.

The *Proviso* to Sub-Section (2) of Section 34 reads that if the nature of vacancies in an establishment is such that a given category of person cannot be employed, the vacancies may be interchanged among the five categories with the prior approval of the appropriate Government. A plain reading of Sub-Section (1) and Sub-Section (2) of Section 34 of the Act leaves no room for doubt that the provisions are mandatory. This is also for the reason that Sub-Section (3) of Section 34 uses the word ‘may’ and thus enables the appropriate Government to provide for such relaxation



of upper age limit for employment of benchmark disability, as it thinks fit. The use of expression 'shall' in Sub-Section 1 and Sub-Section (2) of Section 34 of the Act read with clear language of the said provisions, clearly indicates the legislative intent that the said provisions are unambiguous and are mandatory in nature.

The State Government of Bihar had issued a resolution dated 12.10.2017 published in Bihar Gazette on 13.10.2017 in relation to providing reservation in appointment in the State Government services and in admission in educational institutions under the provisions of the Act. Sub Clause (IX) of Clause (2) of which provided that where in any recruitment year any vacancy cannot be filled up because of non-availability of suitable person with disability or for any other reasons, it shall be filled by interchange among the 4 categories and if there is no person with disability available for the post in that year, the employer shall fill up the vacancy by appointment of a person other than a person with disability. Such vacancy shall not be carried forward for the next recruitment year, the notification stipulated. The difference between the statutory mandate under Sub-Section (2) of Section 34 of the Act and Sub-Clause (IX) of Clause (2) of the State Government notification dated 12.10.2017 is to the effect that whereas Sub-Section (2) of Section 34 of the Act mandates that the vacancy shall be carried forward in succeeding recruitment year, if



in any recruitment year any vacancy cannot be filled up due to non-availability of suitable person and only in succeeding recruitment year, if a suitable person with benchmark disability is not available, it may first, be filled by interchange among the 5 categories and only when there is no person with disability available for the post in that year, the employer may fill up the vacancy for appointment of persons other than those with disability; Sub-Clause (IX) Clause (2) of the notification dated 12.10.2017 on the contrary proscribes carrying forward the vacancy in succeeding recruitment year, apparently in conflict with the requirement under Sub-Section (2) of Section 34 of the Act. The State Government has issued another notification published in Bihar Gazette on 25.01.2021 vide resolution dated 22.01.2021, Clause 9 of which is now in tune with the requirement under Sub-Section (2) of Section 34 of the Act and provides for carrying forward the vacancies in succeeding recruitment year, if in any recruitment year, any vacancy cannot be filled up due to non-availability of suitable persons with benchmark disability. The interchange among the five categories has now been stipulated in the said notification published on 25.01.2021.

4. Be it noted that both the notifications published on 13.10.2017 and 25.01.2021 which are in the nature of executive



instructions have been issued for implementation of the provisions of the Act.

5. The short question which has emerged in the present writ application is: can Sub-Clause (IX) of Clause 2 of the executive instructions dated 12.10.2017, which on the face of it does not conform to the mandatory requirement under Sub-Section (2) of Section 34 of the Act be permitted to prevail in the matters relating to appointments in the services under the State Government of Bihar?

6. The notification dated 12.10.2017 (Annexure 2) is the sheet anchor of the petitioners who claim to be 'orthopedic handicapped' (OH), apparently falling under the category (c) of Sub-Section (1) of Section 34 of the Act viz. 'Locomotor Disability' and are aspirants for the post of Assistant Engineer (Civil)/Assistant Engineer (Mechanical) against Advertisement No. 02/2017, 03/2017 and 04/2017 published by the Bihar Public Service Commission (in short B.P.S.C.) on 09.11.2017. The said advertisements stipulated reservation for persons with disability in the process of selection.

7. The advertisement prescribed that main written examination would be conducted for selection of suitable candidates and those who qualify in the written test shall be invited for interview. The advertisement further prescribed that the



final merit list would be prepared on the basis of marks scored in the written examination and interview taken together. Furthermore, it provided that the B.P.S.C. might conduct a preliminary test in case of exceeding number of aspirants.

It is the petitioners' case that relying upon the representation and promise of the State Government in its notification dated 12.10.2017 and in the advertisement they applied for the posts advertised with a reason to believe to get benefit of horizontal reservation 'irrespective of their falling under any category of disability'. A preliminary test was conducted. The petitioners were declared successful in the result published by the B.P.S.C. on 30.01.2019, which mentioned that 4% of horizontal reservation had been provided for candidates with benchmark disability. Thereafter, a notification dated 06.02.2019 was published for filling up forms of the main (written examination), which too specifically provided that 4% horizontal reservation shall be provided for candidates with disability. Reliance has also been placed on Sub-Clause 5 of Clause 6 of the notice for main (written) examination (Annexure 4) which provided that during the process of selection there would not be any change or correction in reservation category. The petitioners participated in the mains examination and were declared successful in the result published on 24.01.2021. In the said result, it was mentioned that horizontal



reservation as stipulated vide notifications no. 13062 and 962 dated 12.10.2017 and 22.01.2021 had been taken into account. Knowing well that the B.P.S.C. had taken into account the subsequent notification dated 22.01.2021; the petitioners participated in the interview. In the final result was published on 14.07.2021 the petitioners could not find their place. It has been mentioned in the final result that seventeen vacancies under the category of disabled persons have been left vacant due to their non-availability. The said posts have not been filled up in the light of the resolution of the General Administration Department, Government of Bihar dated 22.01.2021.

8. In the aforesaid background of the facts, Mr. S.D. Sanjay, learned Senior counsel appearing on behalf of the petitioners has submitted that the respondent B.P.S.C. has wrongly applied the resolution of the State Government dated 22.01.2021 in the present selection process which had begun initially in 2017 when the earlier notification dated 12.10.2017 was operative. He has contended that at each and every stage of the process of selection before publication of result of main examination, the B.P.S.C. had represented that provisions under notification dated 12.10.2017 shall apply for the recruitment process in question. He has contended that it was impermissible for the B.P.S.C. to have changed the very process of selection in the midst of selection



which has resulted into adverse consequences vis-à-vis the petitioners. He has heavily relied on the stipulation in the notice for main examination issued by the B.P.S.C. which had mentioned that no correction or change in reserved category would be allowed during the process of selection. He has further submitted that the subsequent notification issued by the State Government on 22.01.2021 could not have been applied in the present process of selection, initiated much before issuance of the said notification, which is apparently prospective in nature and came into force with effect from the date of its publication in official gazette. He has contended that had the B.P.S.C., in conformity with the resolution dated 12.10.2017, allowed interchange in case of non-availability of suitable candidates in one of the categories of candidates having benchmark disability, the petitioners of OH category would have been selected. He has contended that applying the said resolution, the B.P.S.C. ought not to have carried forward the vacancies and instead ought to have filled up the vacancy by the petitioners by applying the rule of interchange. He has further contended that the action of the B.P.S.C. is hit by the doctrine of promissory estoppel and legitimate expectation. He has relied on following Supreme Court's decisions to bolster his contention:-

1. *State of Bihar and Ors.v. Suprabhat Steel Ltd. and Ors.* reported in (1999) 1 SCC 31,



2. *State of Punjab v. Nestle India Ltd. and Anr.*

reported in **(2004) 6 SCC 465**, and

3. *Manuelsons Hotels Pvt. Ltd. v. State of Kerala and*

Ors. reported in **(2016) 6 SCC 766**.

9. He has submitted that the petitioners had changed their position by responding to the representation made by the B.P.S.C. to the effect that horizontal reservation shall be provided to candidates falling in various categories under Section 34 (1) of the Act in accordance with the stipulation made in the notification dated 12.10.2017, by submitting application their forms. The B.P.S.C., according to him, is now estopped from reverting back from the promise made in the advertisement by adopting a notification issued subsequently on 22.01.2021.

This submission in the Court's opinion is preposterous and is wholly untenable in the facts and circumstances of the present case, and is accordingly rejected.

10. Mr. Lalit Kishore, learned Senior counsel appearing with Mr. Sanjay Pandey for the B.P.S.C. has relied on a co-ordinate Bench decision of this Court dated 12.12.2019 rendered in C.W.J.C. No. 17528 of 2019 (***Atul Ranjan v. The State of Bihar and Ors.***) wherein this Court, taking note of various provisions under the Act has held Sub-Clause (IX) of Clause (2) of the resolution dated 12.10.2017 to be illegal being in conflict with



the mandatory statutory provision under Sub-Section (2) of Section 34 of the Act. He has submitted that the State of Bihar and the B.P.S.C. have acted in the light of the observations and direction made in case of *Atul Ranjan* (supra) by issuance of subsequent notification dated 22.01.2021. In compliance of the observations made in case of *Atul Ranjan* (supra), the B.P.S.C. has published the result, which cannot be put in question by the petitioners who had participated in the process of interview knowing well the publication of notification dated 22.01.2021.

11. In reply, Mr. S.D. Sanjay, learned Senior counsel for the petitioners has submitted that the said decision in case of *Atul Ranjan* (supra) cannot not have retrospective effect and should be treated to have prospective effect only. He has urged that if any change was essentially required in the process of selection for any reason including violation of the provisions under the Act, the advertisement itself ought to have been cancelled. He has commented that this Court in case of *Atul Ranjan* (supra) could have quashed the advertisement itself instead of asking the B.P.S.C. to change the selection procedure, as prescribed in the advertisement. He has further argued that said judgment in case of *Atul Ranjan* (supra) is in a different context where the challenge was denial of reservation by the State to the candidates under the multiple disability categories in breach of the provision under the



Act. He has then contended that the basic question which had arisen in case of ***Atul Ranjan*** (supra) was as to whether the respondents had defied the statutory requirement under Section 34 of the Act. Referring to certain observations made in case of ***Atul Ranjan*** (supra), he has submitted that this Court, despite noticing similar defect in the results of 63rd and 64th Combined Competitive Examination with respect to reservation for multiple disability category, refused to interfere with the outcome of the said two examinations. He has further urged that the question of carrying forward was neither raised nor was in issue in case of ***Atul Ranjan*** (supra) and, therefore, this Court had no occasion to decide the issue in that case .

12. This Court in case of ***Atul Ranjan*** (supra) has expressly held in paragraph 15 which reads as under:-

“15. Further, I find substance in the submission made on behalf of the petitioner that clause (ix) of the resolution dated 12.10.2017 (Annexure-C to the counter affidavit of Commission) to the extent it prohibits carrying forward the vacancies for subsequent selection process, if the persons suffering with disabilities are not available, is in clear breach of Section 34 (2) of the Act, which mandates that in the event in any recruitment year, any vacancy could not be filled up



due to non-availability of a suitable person with benchmark disability or for any other sufficient reasons, such vacancy shall be carried forward in the succeeding recruitment year and if in the succeeding recruitment year also suitable person with benchmark disability is not available, vacancies may be filled up by interchange among the five categories and only if there is no person with disability is available for the post in the subsequent year, the appropriate Government shall fill up the vacancy by appointment of a person, other than a person with disability. Clause (ix) of the resolution dated 12.10.2017, in my view, is not legally sustainable and, therefore, this Court has no other option but to declare the same illegal and consequently stands struck down. The respondents, as consequence thereof will have the obligation to proceed, in letters and spirit and in accordance with the prescription under sub-section (2) of Section 34 of the Act.”

13. In view of the law, as interpreted by this Court in case of **Atul Ranjan**(supra), the entire claim of the petitioners based on the resolution dated 12.10.2017 fails.



14. Mr. S.D. Sanjay, learned Senior counsel for the petitioners is incorrect in his submission that the issue of the vacancies being carried forward was not raised in case of **Atul Ranjan** (supra). It appears that he has missed to see paragraph 9 of the said decision which reads as under:-

“9. There is another grievance, which has been raised on behalf of the petitioner. It is his case that sub-section (2) of Section 34 of the Act mandates that if in any recruitment year any vacancy cannot be filled up due to non-availability of a suitable person with benchmark disability or for any other sufficient reasons, such vacancy shall be carried forward in the succeeding recruitment year and if in the succeeding recruitment year also suitable person with benchmark disability is not available, it may first be filled by interchange among the five categories and only when there is no person with disability available for the post in that year, the employer shall fill up the vacancy by appointment of a person, other than a person with disability. Heavy reliance has been placed by Mr. Bindhyachal Singh, learned petitioner’s counsel on the language of the proviso to sub-section (2) of the Act which states that if the nature of vacancies in an establishment is such that a given category of a



person cannot be employed, the vacancies may be interchanged among the five categories with the prior approval of the appropriate Government. He has submitted that in utter disregard to the provision in sub-section (2) of Section 34 of the Act, which requires unfilled vacancies because of non-availability of suitable person with benchmark disability to be carried forward, the General Administration Department, Government of Bihar has taken a contrary decision, as contained in the resolution dated 12.10.2017, paragraph (ix) whereof reads thus:-

“(ix) “जहाँ किसी भर्ती वर्ष में दिव्यांगजन अधिकार अधिनियम, 2016 की धारा -34 के अधिन किसी रिक्ति के विरुद्ध उपर्युक्त दिव्यांग व्यक्ति की अनुपलब्धता के कारण या किन्हीं अन्य पर्याप्त कारण से भरा नहीं जा सकता है, तो इसे उसी समव्यवहार में चारों प्रवर्गों के बिच परस्पर परिवर्तन द्वारा भरा जा सकेगा और केवल तभी जब वर्ष में पद के लिए कोई दिव्यांग व्यक्ति उपलब्ध नहीं है, नियोजक दिव्यांग व्यक्ति से भिन्न किसी अन्य व्यक्ति की नियुक्ति कर के रिक्ति को भरेगा, वहां ऐसी रिक्ति अगले वर्ष में अग्रणीत नहीं की जाएगी I”

15. The Supreme Court decisions relied on by Mr. S.D.

Sanjay, learned Senior counsel for the petitioners are not at all applicable in the present facts and circumstances of the case, as noted above, firstly for the reason that those decisions deal with



commercial transactions. In my opinion, mere participation of the petitioners in the process of selection in response to the so called promise made by the B.P.S.C. does confer upon them any right on the petitioner, requiring the B.P.S.C. or the Government of Bihar to commit illegality and act contrary to law. In any event, the doctrine of principle of promissory estoppel or legitimate expectation do not operate against law. As has been discussed in case of *Atul Ranjan* (supra), relevant portion of which has been quoted above, the notification dated 12.10.2017 on which the petitioners have placed reliance has been held to be contrary to mandatory statutory provisions under the Act.

16. The submission made by Mr. S.D. Sanjay that the effect of the said decision in case of *Atul Ranjan*(supra) should be held to be prospective and not retrospective, is in the Court's opinion, not at all tenable. The Court in case of *Atul Ranjan*(supra) has simply interpreted the provisions of the Act which came into force from 27.12.2016. Various provisions under the Act were the basis for decision in case of *Atul Ranjan*(supra). It will have a disastrous consequence if a Court while interpreting statutory provisions holds the judgment to be prospective, as that will have the effect of reading the enactment as read by the Court in its judgment from the date of judgment.



17. Such submission in the Court’s opinion is wholly unreasonable and is accordingly rejected.

18. For the reasons aforesaid, I do not find any merit in this application.

19. This application is accordingly rejected.

(Chakradhari Sharan Singh, J)

AKASH/-

AFR/NAFR	NAFR
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