

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No 5590 of 2021

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LAL DEO YADAV S/o Tulsi Yadav R/o Village- Larpur, P.o.- Bhadep, P.s.-
Bodh gaya, District- Gaya

... .. Petitioner/s

Versus

1. Bihar Staff Selection Commission through the Secretary
2. The Secretary of the Bihar Staff Selection Commission, Patna, At and Post-
Veterinary College, Patna-14
3. The Principal Secretary Govt. of Bihar, Urban Development and Housing
Department

... .. Respondent/s

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Appearance :

For the Petitioner/s : Mr Sarva Deo Singh, Advocate
For the Respondent/s : Mr.Lalit Kishore (Ag)

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CORAM: HONOURABLE MR JUSTICE MADHURESH PRASAD

CAV JUDGMENT

Date : 29-06-2022

Heard learned counsel for the parties.

2 This writ petition has been filed with the following
prayer:-

“For issuance of an appropriate writ/order/direction to the respondents to publish the result of City Manager under the Urban Local Bodies of Government of Bihar by adding the marks of four wrong model answers. However, the Commission has already deleted the two model answers, serials No 13 and 14.

The petitioner further prays for to consider the case of this petitioner for declaration of result and publish the same in the light of Government notification which contain in Memo No 24 dated 05.01.2015 and Advertisement No 21010116 by the Staff Selection Commission dated 15.11.2016.



For any other relief/reliefs for which the petitioner may be found entitled.”

3 The Urban Development and Housing Department, Government of Bihar issued a notification bearing Memo No 24 dated 05.01.2015 containing the Rules for regulating the recruitment, promotion and other service conditions to the post of City Manager under the Urban Development and Housing Department. The Rule contemplates appointment to the posts by direct recruitment (written examination) on the recommendation of the Bihar Staff Selection Commission (for brevity, *the Commission*). Total 100 marks are to be determined for direct recruitment. The break up has been prescribed in the Rules. The break up, as per the Rules, is 70 marks out of 100 marks to be determined for the written examination, 10 marks for every year for experience working on contractual basis, subject to a maximum of 30 marks.

4 The process of recruitment has been prescribed in Rule 5 of Bihar City Manager Cadre (Appointment and Service Condition Rules (for brevity, *the Rules*), 2014 which reads as follows:

5. Process of recruitment, appointment and procedure of Recruitment:-

(i) Appointment to the basic category of these posts in this cadre, will be by direct recruitment (written examination) on



the recommendation of the Commission. Total 100 marks will be determined for direct recruitment.

Out of total 100 marks, 70 marks will be determined for the written examination. 10 marks for experience for every year and a maximum 30 marks shall be given for the appointment to the post of City Manager working on contract basis.

Determination of subjects for written examination will be determined by the Commission in consultation with the Department.

(ii) Notwithstanding anything contained in these Rules, where any post in the cadre is vacant due to unavailability of suitable candidate or where any post is vacant due to leave of anyone or is vacant on temporary basis, in the interest of work that post may be filled up by suitable qualification holder person by deputation/contract basis.”

5 The Rules also provided for reservation, age limit, educational qualification and other matters, which for the present controversy, are not relevant.

6 The Commission has issued Advertisement No 21010116 inviting applications for registration between 21.11.2016 to 19.12.2016 for appointment to the post of City Manager. The Advertisement specifically provides for a written examination with weightage of 70 marks and maximum 30 marks to be awarded for experience (10 marks for each year of experience gained while working on contractual basis as City Manager).

7 Petitioner is an applicant and appeared in the written examination held on 01.09.2018. After conduct of the written



examination, the Commission issued notice dated 30.10.2018 declaring the Model Answers which had been uploaded on the website of the Commission. Accordingly, objections were invited from the candidates.

8 There is no averment in the writ petition that the petitioner had filed any objection. Petitioner, on the contrary, has relied upon an objection dated 15.11.2018, purportedly filed by another candidate, namely, Amarjit Kumar, who is not a party to the instant proceedings. Six of the Model Answers have been objected to by the said Amarjit Kumar.

9 The final list of successful candidates was published on 17.07.2019 under Memo No 1692. After considering the marks in the written examination along with marks awarded for experience, only four candidates were invited for counselling, as per the petitioner's case.

10 The petitioner was unsuccessful in the process of recruitment and sought details of marks awarded to him in the written test and his Optical Mark Recognition (for brevity, *OMR*) sheet from the Commission. Copy of OMR sheet and marks were issued to the petitioner on 08.12.2020 (Annexure 6). From perusal of Annexure 6, it is apparent that the petitioner had obtained 24.150 marks out of 70 marks in written examination, whereas



qualifying marks for the backward class category to which the petitioner belongs is 25.55 marks. The petitioner was, thus, unsuccessful in the written examination itself and, accordingly, was not called for counselling. Only 4 successful candidates have been recommended to the Requisitioning Department, i.e., Urban Development and Housing Department, Government of Bihar after the process of selection was completed.

11 Copy of the Model Answers to Questions No 1 to 100 of the Test Booklet shows that 2 questions, namely, Questions No 13 and 14 were deleted from the process of evaluation. The petitioner, however, raises a grievance that the Model Answer of questions at Serials No 9 and 25 are also wrong and ought to have been deleted. The petitioner, thus, claims that benefit of 4 questions be given to the petitioner. Petitioner has attempted 62 questions, out of which 40 are correctly answered and 22 questions are wrong. It is submitted by the petitioner's counsel that each question is worth 0.7 marks since the written examination is for 70 marks and there are 100 questions altogether. Accordingly, it is submitted that if the petitioner is awarded 0.7 marks for the 40 questions, which he has correctly answered, he ought to be awarded at least 28 marks. Since the cut off for backward class category, as communicated by the respondents is 25.55 marks, the



petitioner should have been declared as qualified in the written examination.

12 Other submissions advanced by the petitioner's counsel are that there is no basis for fixing a cut off mark in the written examination and for exclusion of candidates, like the petitioner, for not obtaining the cut off marks. The Rule contemplates assessment/evaluation of the competing candidates on the basis of total 100 marks which includes marks obtained in the written examination out of 70 marks and marks obtained for experience which has been allocated as 10 marks of every year subject to maximum of 30 marks. The evaluation is, therefore, to be done on the basis of the marks obtained in the written examination as well as experience and, therefore, there is no basis for fixing a cut off mark merely based on result of the written examination by excluding the marks for experience. Petitioner's counsel asserts that since he is working as City Manager since 2010, i e, more than 3 years, he is entitled to full 30 marks for experience.

13 The petitioner has also made a specific averment in paragraph 10 of the writ petition that since one Amarjit Kumar has filed an objection that 6 Model Answers, published by the Respondent-Commission, were incorrect. The authorities were



under legal obligation to appoint experts to have the objections examined, but the same has not been done. In support of his submission that the objections were required to be examined by an expert body, he has placed reliance on a decision of the Apex Court in the case of *Richal & Others -Versus- Rajasthan Public Service Commission & Others*, reported in (2018) 8 Supreme Court Cases 81.

14 It is also submitted that the authorities have not specifically denied the averments made in the writ petition. In paragraph 8 of the counter affidavit, the only reason assigned is that the petitioner was not called for counselling since the petitioner had obtained marks lesser than the cut off for his category (Backward Class), he was considered to be unsuccessful, and not called for counselling.

15 Submission of the petitioner's counsel that petitioner could not have been declared unsuccessful, based on marks obtained in the written examination being below the cut off marks, this Court would observe that the minimum marks for written examination have clearly been specified in the Advertisement (Annexure 2 to the writ petition). For the petitioner's category (backward class category), the minimum marks have been prescribed at 36.5% of 70 marks, which would be 25.55 marks as



per the advertisement. Petitioner has applied in response to the Advertisement with open eyes and without raising any objection to the prescription of cut off marks. Having participated in the selection process knowing fully well that he is required to obtain minimum marks/cut off marks 36.5%, being 25.55 marks, it is not open to the petitioner to turn round and challenge the prescription of minimum qualifying percentage marks. The petitioner cannot be permitted to approbate and reprobate at the same time.

16 Submission regarding there being no specific denial in the counter affidavit to the case set out by the petitioner in the writ petition is being noted only to be rejected. The counter affidavit clearly states the reasons in support of the petitioner being declared unsuccessful in the process of selection. This Court does not find any deficiency in the counter affidavit. As regards there being no expert to meet the objection raised by one Amarjit Kumar, this Court would observe that submission in this regard is clearly untenable in the eyes of law. The petitioner has not raised any objection after the Model Answers were published by the Respondent-Commission. He has failed to avail the opportunity of making objections and is estopped from raising any objection to the Model Answers. The objection of Amarjit Kumar, if at all, was required to be pursued by him. The said Amarjit Kumar is not



before this Court. He has also not been made party to the instant proceedings. It is, therefore, not possible for this Court to enter into this aspect whether the objection of Amarjit Kumar has been considered or not? What was the merits of the objection raised by Amarjit Kumar, and how far he wanted to pursue the same is an issue which only Amarjit Kumar is in a position to say. He, however, is not before this Court. The petitioner cannot be permitted to raise an objection on behalf of the third person who is not a party to the instant proceeding. Since the petitioner cannot be permitted to make an issue based on the objection filed by a third person (Amarjit Kumar), he cannot derive any benefit from the decision of the Apex Court in the case of *Richal & Others (supra)*, which would not be applicable.

17 The stand of the Respondent's counsel, on the other hand, is that the petitioner has obtained 24.150 marks. Since the petitioner was a backward class category candidate for which qualifying marks was 25.55, i e, higher than the marks obtained by the petitioner, there was no question of declaring him successful in the written examination. As per the information supplied to the petitioner under the Right to Information Act (Annexure D to the counter affidavit), it appears that the Commission admits to have



deleted Questions No 13 and 14 from the evaluation process, after consideration of objections invited from the candidates.

18 Petitioner has also questioned the award of 24.150 marks to him on the ground that at least 2 more questions (Questions at Serials No 9 and 25) ought to have been deleted from the process of evaluation since the Model Answers to the said questions were wrong. If these two questions are deleted, the qualifying marks, as also the marks awarded to the petitioner would substantially change altering the entire evaluation, undoubtedly in favour of the petitioner. If the qualifying marks are brought down by deleting these two questions, then the petitioner is sure to succeed in the written examination. Since the above noted two questions have not been deleted and evaluation has been done, based on wrong Model Answers, grave prejudice has been caused to the petitioner and he has wrongly been deprived of the recruitment. The petitioner, thus, has been treated arbitrarily in the process of recruitment. The marks should be rectified and qualifying marks as well as marks obtained by the petitioner be reassessed, based on such reassessment, which is bound to be favourable to the petitioner, and he is entitled to be declared selected.



19 Since the petitioner's case hinges entirely on the alleged wrong Model Answers for questions at Serials No 9 and 25, this Court would refrain from interfering in the matter since the petitioner has chosen not to make any objection to the Model Answers when they were published, and participated in the selection process without any demur.

20 No objection whatsoever has been raised by the petitioner either to the prescription of minimum qualifying marks in the Advertisement, or to the Model Answers which were published. It is only when result has been declared that he has challenged the process of selection on the ground that there could be no prescription of minimum qualifying marks in the Advertisement; and also alleging that certain Model Answers were wrong.

21 The question whether after participating in a process of selection and appearing at the examination for selection without any objection whatsoever a candidate can be permitted to challenge the process or not, is no longer res integra. The law is settled that such candidate is precluded from challenging the process of selection on being declared unsuccessful, merely because the result is not to his liking. The petitioner, therefore, is estopped from raising the issues, which have been raised in the



instant writ proceedings. While concluding so, this Court would refer to the decision of the Apex Court in the case of *Ashok Kumar & Another -Versus- State of Bihar & Others*, since reported in (2017) 4 Supreme Court Cases 357, paragraphs 13 to 18 of which is relevant for the instant case and is considered useful to be reproduced for quick reference:

13. *The law on the subject has been crystallised in several decisions of this Court. In Chandra Prakash Tiwari v. Shakuntala Shukla [Chandra Prakash Tiwari v. Shakuntala Shukla, (2002) 6 SCC 127 : 2002 SCC (L&S) 830] , 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 [Union of India v. S. Vinodh Kumar, (2007) 8 SCC 100 : (2007) 2 SCC (L&S) 792] , 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 [Munindra Kumar v. Rajiv Govil, (1991) 3 SCC 368 : 1991 SCC (L&S) 1052] and Rashmi Mishra v. M.P. Public Service Commission [Rashmi Mishra v. M.P. Public Service Commission, (2006) 12 SCC 724 : (2007) 2 SCC (L&S) 345].)”*

14. *The same view was reiterated in Amlan Jyoti Borooah [Amlan Jyoti Borooah v. State of Assam, (2009) 3 SCC 227 : (2009) 1 SCC (L&S) 627] 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 [Manish Kumar Shahi v. State of Bihar, (2010) 12 SCC 576 : (2011) 1 SCC (L&S) 256], the same principle was reiterated in the following observations : (SCC p. 584, para 16) “16. We also agree with the High Court [Manish Kumar Shahi v. State of Bihar, 2008 SCC OnLine Pat 321 : (2009) 4 SLR 272] 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 [Madan Lal v. State of J&K, (1995) 3 SCC 486 : 1995 SCC (L&S) 712] , Marripati Nagaraja v. State of A.P. [Marripati Nagaraja v. State of A.P., (2007) 11 SCC 522 : (2008) 1 SCC (L&S) 68] , Dhananjay Malik v. State of Uttaranchal [Dhananjay Malik v. State of Uttaranchal, (2008) 4 SCC 171 : (2008) 1 SCC (L&S) 1005 : (2008) 3 PLJR 271], Amlan Jyoti Borooah v. State of Assam [Amlan Jyoti Borooah v. State of Assam, (2009) 3 SCC 227 : (2009) 1 SCC (L&S) 627] and K.A. Nagamani v. Indian Airlines [K.A. Nagamani v. Indian Airlines, (2009) 5 SCC 515 : (2009) 2 SCC (L&S) 57] .”

16. In Vijendra Kumar Verma v. Public Service Commission [Vijendra Kumar Verma v. Public Service Commission, (2011) 1 SCC 150 : (2011) 1 SCC (L&S) 21] , 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 [Ramesh Chandra Shah v. Anil Joshi, (2013) 11 SCC 309 : (2011) 3 SCC (L&S) 129] , 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.”

18. In Chandigarh Admn. v. Jasmine Kaur [Chandigarh Admn. v. Jasmine Kaur, (2014) 10 SCC 521 : 6 SCEC 745] , it was held that a candidate who takes a calculated risk or chance by subjecting himself or herself to the selection process cannot turn around and complain that the process of selection was unfair after knowing of his or her non-selection. In Pradeep Kumar Rai v. Dinesh Kumar Pandey [Pradeep Kumar Rai v. Dinesh Kumar Pandey, (2015) 11 SCC 493 : (2015) 3 SCC (L&S) 274] , this Court held that : (SCC p. 500, para 17) “17. Moreover, we would concur with the Division Bench on one more point that the appellants had participated in the process of interview and not challenged it till the results were declared. There was a gap of almost four months between the interview and declaration of result. However, the appellants did not challenge it at that time. This, it appears that only when the appellants found themselves to be unsuccessful, they challenged the interview. This cannot be allowed. The candidates



cannot approbate and reprobate at the same time. Either the candidates should not have participated in the interview and challenged the procedure or they should have challenged immediately after the interviews were conducted.”

This principle has been reiterated in a recent judgment in Madras Institute of Development Studies v. K. Sivasubramaniyan [Madras Institute of Development Studies v. K. Sivasubramaniyan, (2016) 1 SCC 454 : (2016) 1 SCC (L&S) 164 : 7 SCEC 462] .

22 This writ application is thus devoid of merit and is dismissed accordingly.

(Madhuresh Prasad, J)

M.E.H./-

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