

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.612 of 2021

In

Civil Writ Jurisdiction Case No.14008 of 2021

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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 - Jehanabad.
 4. Md. Neyaz Anwar, Son of Md. Nasim, Resident of Near Sikander Pan Dukan, Mahendru, 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 - Ghazipur (Uttar Pradesh).
 8. Md. Ajmal Hussain, Son of Md. Aamir Hasan, Resident of Ward No. 6, Ankhauli, P.S. - Katra, District - Muzaffarpur.

... ... Appellant/s

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.

... ... Respondent/s

Appearance :

For the Appellant/s	:	Mr. S.D. Sanjay, Sr. Advocate
For the State	:	Mr. P.K. Verma, AAG-3
For the B.P.S.C	:	Mr. Lalit Kishore, Sr. Advocate



CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE PARTHA SARTHY
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE PARTHA SARTHY)

Date : 17-07-2023

1. Heard Mr. S.D. Sanjay, learned senior counsel for the appellants, Mr. Lalit Kishore, learned senior counsel for the Bihar Public Service Commission (BPSC) and learned counsel for the State of Bihar.

2. The instant appeal has been preferred by the writ petitioners-appellants against the judgment dated 14.09.2021, passed in CWJC No. 14008 of 2021.

3. The case of the writ petitioners-appellants in brief is that the BPSC came out with an advertisement dated 09.11.2017, bearing Advertisement Nos. 02/2017, 03/2017 and 04/2017 for appointment on the posts of Assistant Engineer (Civil), Assistant Engineer (Mechanical) and Assistant Engineer (Civil) respectively wherein it was mentioned that persons with disability of 40% or more will get reservation as per the provisions. The General Administration Department, Government of Bihar came out with a resolution dated 12.10.2017, published in the Bihar Extraordinary Gazette dated 13.10.2017, wherein, it was resolved that in place of 3%, 4% horizontal reservation in service would be given to persons with



disabilities. The said resolution also provided that in case the person suffering with disability under the specific category is not available or for any other reason the vacancy is not filled up, then that vacancy shall be filled up by a person with disability from the other category after interchanging it. Further, in case the vacancy cannot be filled up, then the vacancy shall be filled up by appointment of any other person and the vacancy shall not be carried forward to another year or subsequent selection process.

4. Learned senior counsel appearing for the appellants submits that the appellants filed applications against Advertisement No. 02/2017 hoping to get horizontal reservation irrespective of their falling under any category of disability. The appellants being under the category of disabled persons having disability of being Orthopedically Handicapped (OH) applied for appointment to the post of Assistant Engineer (Civil).

5. The BPSC published the result for the preliminary examination on 30.01.2019 and the appellants were declared successful. Subsequent thereto, the Assistant Engineer (Civil) mains (written) competitive examination was conducted wherein also the appellants appeared and were declared successful.

6. The General Administration Department,



Government of Bihar came out with a resolution published in the Bihar Extraordinary Gazette on 25.01.2021, wherein, it was provided that as per section 34(2) of the Rights of Persons with Disabilities Act, 2016 ('the Act' in short), in case a vacancy for a particular appointment year cannot be filled due to non-availability of suitable person with benchmark disability or for any sufficient reason then such vacancy should be carried forward in the succeeding recruitment year and if even in the succeeding recruitment year suitable person with benchmark disability is not available, then the vacancy may be filled up by interchanging among the categories. Further, only if no person with disability is available for the post, then only the vacancy can be filled up by appointment of a person other than the person with disability.

7. Further case of the appellants was that they appeared in the interview and final result was published on 14.07.2021. However, the names of the appellants were missing in the merit list of the successful candidates. Learned senior counsel for the appellants submits that the appellants were surprised to find that even though the nature of disability of the appellants was mentioned in the mark-sheet but they were shown to have been considered in the general category. It was



further mentioned in the final result that seventeen vacancies under the category of disabled persons were left vacant due to their non-availability. The reason of the posts in the category of disabled persons being left vacant was in view of the resolution dated 22.01.2021 of the General Administration Department, Government of Bihar. Not having been selected, the appellants moved this Court by filing the writ application ie CWJC No. 14008 of 2021 praying therein for the following relief(s) :-

“1. (i) For a direction to the Respondents to declare the results of the Petitioners under the category of persons with benchmark disabilities by extending the benefit of reservation as provided by the Resolution dated 12.10.2017 of General Administration Department, Government of Bihar for the advertisement No. 02 of 2017 for appointment of the Assistant Engineer, Civil Competitive;

(ii) For a direction to the Respondents to declare the results of the Petitioners under the category of persons with benchmark disabilities by extending the benefit of reservation as mentioned in Assistant Engineer (Civil) Preliminary Competitive Examination Result dated 31.01.2019 and the Notification dated 06.02.2019 for filling of forms for Mains (Written) Competitive Examination;

(iii) For a direction to the Respondents to declare the results of the Petitioners under the category of persons with benchmark disabilities by extending the benefit of reservation as extended to the Applicants of the Advertisements Nos. 03/2017 and 04/2017



dated 09.11.2017 published in the same Notification alongside the Advertisement No.02/2017;

(iv) For issuance of an appropriate Writ directing the Respondents to revisit the Results of the Petitioners and grant them the benefit of reservation by interchangeability of candidates among the different categories of Disabled Persons to fill up the 17 number of posts which has been left vacant on the ground of non-availability of Disabled Persons in particular categories;

(v) For issuance of an appropriate direction to the Respondents not to keep 17 posts vacant and to consider the case of the Petitioners as they have obtained higher cut-off marks in the category of Disabled Persons other than their own category;

(vi) For issuance of an appropriate writ for grant of stay on any further action by the Respondents for filling up the 17 vacancies for the post of Assistant Engineer Civil either by carrying forward in the subsequent selection process during the pendency of the present Writ Application and/or for any other relief(s) for which the Petitioner may be found entitled to in the facts and circumstances of the present case.”

8. By Judgment dated 14.09.2021, the learned Single Judge not finding any merit in the writ application was pleased to reject the same. It is against this judgment that the instant appeal has been preferred.

9. Counter affidavits have been filed on behalf of the



respondent-State of Bihar as also on behalf of the BPSC.

10. It was submitted by learned senior counsel appearing for the appellants that the advertisement in question having been published in the year 2017 itself, the rules of the game could not be changed midway in the process of selection. So far as the judgment dated 12.12.2019, in the case of **Atul Ranjan vs. The State of Bihar & Ors. (CWJC No. 17528 of 2019)** is concerned, the mains examination in the selection process had already been conducted on 21.08.2019 and there was no question of its applicability. It was submitted that the learned Single Judge failed to consider that the candidates under the disabled category would become overage by the time the next vacancies were published and so far as the applicability of the resolution dated 22.01.2021 and the judgment in the case of **Atul Ranjan (supra)** are concerned, they should not have been made applicable to the ongoing process of selection but to future selection processes. It was submitted that the Rights of Persons with Disabilities Act, 2016 was a beneficial legislation and the same had been legislated to confer benefit of reservation on persons with disability and not to deprive them by keeping the vacancies unfilled. It was also contended that the prescription to interchange the vacant posts to other categories in the same



recruitment year was a conscious decision of the State Government quite realizing the fact that, in the State of Bihar recruitments are not carried out in every year and those entitled under the disability category for the recruitment year would be deprived of an opportunity by the time the next recruitment takes place for reason only of their having crossed the maximum age limit.

11. Learned senior counsel appearing for the appellants relied on the judgments in the cases of **Nair Service Society vs T.Beermasthan & Ors [(2009) 5 SCC 545]**, **Bedanga Talukdar vs Saifudaullah Khan & Ors. [(2011) 12 SCC 85]** and **Tar Babu Yadav vs The State of Bihar & Ors [2011 (4) PLJR SC 185]** in support of his contentions.

12. Mr. Lalit Kishore, learned senior counsel appearing for the BPSC submitted that pursuant to the requisition from the concerned department, the BPSC published Advertisement No.02 of 2017 on 03.03.2017, inviting applications for appointment on the posts of Assistant Engineer (Civil). Preliminary examination for the same was held on 15.09.2018 and result thereof published by the BPSC on 30.01.2019. Thereafter, the written (mains) examination was held and the result was published on 24.01.2021. Interviews



were conducted from 22.02.2021 to 19.04.2021 and again from 25.06.2021 to 27.06.2021. The appellants appeared in the interview but were not declared successful as they secured lesser marks than the cut of marks in their category. The final result was published by the BPSC on 14.07.2021, declaring 1240 candidates to be successful.

13. Learned senior counsel appearing for the BPSC further submitted that the BPSC and the State of Bihar acted in light of the observations and directions made in the case of **Atul Ranjan** (*supra*), wherein, this Court taking note of various provisions under the Rights of Persons with Disabilities Act, 2016 had held clause 2(ix) of the resolution dated 12.10.2017 to be illegal being in conflict with section 34(2) of the Act. It was for this reason that the BPSC departed from the earlier reservation policy as notified on 12.10.2017 and adopted the reservation policy as contained in resolution dated 22.01.2021. It was submitted that the appellants participated in the selection process and only after being declared unsuccessful that they have challenged the same.

14. Having heard learned counsel for the parties, the relevant facts in the instant case are that on requisition by the concerned departments of the Government of Bihar, the BPSC



published Advertisement No. 02/2017 on 03.03.2017, inviting applications for appointment on the posts of Assistant Engineer (Civil). The preliminary examination was held on 15.09.2018 and the result of the same published on 30.01.2019. The BPSC published the advertisement for the written (mains) examination on 06.02.2019, the mains examination were held from 27.03.2019 to 31.03.2019 and the result thereof published on 24.01.2021, in which 3167 candidates including the appellants were declared successful. Thereafter, the interview was conducted from 22.02.2021 to 19.04.2021 as also from 25.06.2021 to 27.06.2021 and the final result selecting 1240 candidates was published by the BPSC on 14.07.2021.

15. As is evident, from the facts and submissions stated herein above, the case of the appellants is that the process of selection having commenced in the year 2017, the BPSC should have proceeded with the selection in terms of notification dated 12.10.2017 and should not have followed the notification dated 22.01.2021, as by then the selection process had almost come to an end; since it would amount to changing the rule of the game midway.

16. At this stage, it would be relevant to mention that section 34 of the Rights of Persons with Disabilities Act, 2016



provides for reservations of not less than 4% in every government establishment with persons with benchmark disabilities as provided in the said section. For ready reference section 34 of the Act is quoted herein below:-

*“34. **Reservation.**- (1) Every appropriate Government shall appoint in every Government establishment, not less than four per cent 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, one per cent. each shall be reserved for persons with benchmark disabilities under clauses (a), (b) and (c) and one per cent. for persons with benchmark disabilities under clauses (d) and (e), namely:-*

(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.

(2) Where 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 dis- ability 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:

Provided 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.

(3) The appropriate Government may, by notification, provide for such relaxation of upper age limit for employment of persons with benchmark disability, as it thinks fit.”

(emphasis supplied)

17. It may be mentioned here that the State



government came out with resolution dated 12.10.2017 (published in the Bihar Gazette on 13.10.2017), clause 2(ix) of which provided that where in any recruitment year any vacancy cannot be filled up because of non-availability of suitable persons with disabilities or for any other reason, it shall be filled by interchange among the four 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.

18. It may be mentioned here itself that Clause 2(ix) of the resolution dated 12.10.2017, was clearly in the teeth of section 34(2) of the Act which provided 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 was to be carried forward to the succeeding recruitment year and only thereafter if once again in the succeeding recruitment year also suitable person with benchmark disability was not available, the same could be filled up by interchange among the five categories and only when there was no person with disability available for the post in that year, the employer was to fill up the vacancy by appointment of a person other than a person with disability.



19. The issue of Clause 2(ix) of the resolution dated 12.10.2017 being in breach of section 34(2) of the Act came up for consideration of this Court in the case of **Atul Ranjan** (*supra*) wherein the Court observed and held as follows:-

“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 बीच 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 करके रिक्ति को भरेगा, वहां ऐसी रिक्ति अगले वर्ष में अग्रणीत नहीं की जायेगी।”

10. Following is the near translation of the said part of the resolution:-

“Where in a recruitment year the vacancy is not filled up due to unavailability of the aforesaid disabled person or any other sufficient reasons against any vacancy, under Section 34 of Rights of Persons with Disabilities Act, 2016, it shall be filled up by mutual change among all the four sub categories of disability in the same transaction, but only when no disabled person is available



for the post in that year, the employer shall fill up the vacancy by appointing person other than disabled person (Differently abled) but in that case such vacancy shall not be carried forward in the next year.

11. He contends that whereas the law mandates carrying forward, of unfilled vacancies due to non-availability of persons with benchmark disability, the State Government has taken a decision not to carry the vacancies forward for subsequent processes of selection, which is illegal and against clear mandate of law.

.....
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 Comission) 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.”

20. Subsequent to the order dated 12.12.2019, in the case of **Atul Ranjan** (*supra*) the State of Bihar came out with the resolution dated 22.01.2021 (published in the Bihar Gazette on 25.01.2021). Hence the notification though brought out midway to the selection was not a change in rule brought about by the government; but was a consequence of a judicial order and a change made to bring the reservation and consequent selection in tune with the central legislation mandating such reservation. A bare perusal of the said resolution would show that the clause 2(ix) of the earlier resolution dated 12.10.2017, which was in the teeth of section 34(2) of the Act was removed and this resolution was consistent with the provisions of the Act. The BPSC, thereafter, came out with the results of the main examination on 24.01.2021, wherein, the appellants were declared successful and after holding interview came out with



the final results 14.07.2021.

21. So far as the judgments relied upon on behalf of the appellants are concerned, in the opinion of the Court they are of no assistance to the appellants. Learned senior counsel for the appellants has referred to and placed reliance on paragraph no.56 of the judgment in the case of **Nair Service Society** (*supra*) which provides that different State governments may have different methods of providing reservations and in the opinion of the Hon'ble Supreme Court, the rules made by the State government did not suffer from any infirmity or illegality. In the case of **Bedanga Talukdar** (*supra*), learned senior counsel has referred to paragraph nos. 29 to 32 thereof, wherein, the Hon'ble Supreme Court held that the High Court committed an error in directing that the condition with regard to the submission of the disability certificate either along with the application form or before appearing in the preliminary examination could be relaxed in the case of respondent no.1. Lastly, in the case of **Tar Babu Yadav** (*supra*) learned senior counsel has referred to paragraph no.10 thereof wherein, a Division Bench of this Court held that where the advertisement specifies a last date or filing of supporting or other documents, any document received after such date is to be rejected by the



selecting authority and in appropriate case where the selecting authority is of the view that the time for furnishing of documents should be extended, it may grant such extension by issuing a public notice so that all the candidates may get the benefit of such extension.

22. In the opinion of the Court, none of these judgments relied upon on behalf of the appellants have any application or are of any assistance to the appellants' case herein.

23. So far as the facts of the instant case are concerned, the advertisement for selection was first published on 03.03.2017. On perusal of the Advertisement nos. 02/2017, 03/2017 and 04/2017 dated 09.11.2017 brought on record as Annexure-1 to the writ application, in the very first paragraph it clearly mentions that pursuant of the order passed in **CWJC no. 5799/2017 (Kumud Ranjan Prabhat and Ors. vs The State of Bihar and Ors)**, in the Advertisement nos. 02/2017, 03/2017 and 04/2017 as the cut-off date for the minimum age has been changed from 01.8.2016 to 01.8.2017, as such the last date for filing application is fixed as 5 pm on 06.12.2017 and the new vacancies which have occurred in the meantime are also being included in this advertisement.



24. Further the notification on which great reliance is being placed by the appellants came on 12.10.2017. As already discussed above Clause 2(ix) of the resolution dated 12.10.2017 clearly being in the teeth of section 34(2) of the Act as has also been held in the case of **Atul Ranjan** (*supra*), the respondents came out with a resolution dated 22.01.2021. It was subsequent thereto that the result of the mains examination wherein the appellants were also successful was published on 24.01.2021 and after holding of interview the final result of the interview was published by the BPSC on 14.07.2021.

25. Having considered all these materials, the learned Single Judge by his judgment dated 14.09.2021 rejected the writ application filed by the appellants. The Court finds no illegality in the judgment of the learned Single Judge and no merit in the instant appeal.

26. The appeal is dismissed.

(K. Vinod Chandran, CJ)

(Partha Sarthy, J)

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CAV DATE	N/A
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