

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.4108 of 2019

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Anil kumar Son of Sri Ram Sharan Singh, Resident of Banshi Bigha, P.O. Kawa, P.S.- Hilsa, District- Nalanda, At present resided at Ward No. 5, P.O. and P.S.- Hilsa, District- Nalanda

... .. Petitioner/s

Versus

1. The State of Bihar and Ors Bihar
2. The Additional Chief Secretary, Department of Education, Bihar, Patna.
3. The Principal Secretary, Education Department, Government of Bihar, Patna.
4. The Secretary, Department of Education, Bihar, Patna.
5. The Director, Secondary Education Department , Government of Bihar, Patna.

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr.Amit Srivasatava, Sr. Adv. Mr.Girish Pandey, Adv. Mr.Rakesh Kumar, Adv.
For the Respondent/s	:	Mr.Subhash Chandra Mishra (Sc16)

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CORAM: HONOURABLE MR. JUSTICE ANJANI KUMAR SHARAN
CAV JUDGMENT

Date :19-03-2024

Heard learned counsel for the petitioner and learned counsel for the State.

2. The present writ application has been filed for a direction to the respondents to appoint the petitioner on the post of Teacher in Biology Subject in Secondary School pursuant to recommendation made by Vidyalaya Sewa Board vide Advertisement no.1/88 and 1998 under 1/95 for which special rule of appointment in the year 2013 was framed out in compliance of the different order of the Hon'ble Court.



3. The respondents may further be directed to take appointment on available posts which are vacant due to availability of reserved category non candidates and also due to non appearance and non-joining of un-reserved category candidates and the posts are lying vacant.

4. The short fact of the case is that in the year 1988, an advertisement no.1/88 was published by the Vidyalaya Sewa Board, predecessor of Bihar State Sub ordinate Service Commission, for appointment of 12 subject teacher in Nationalized Secondary Schools and Project Schools. The Board after selection, recommended names of selected candidates in all subjects and recommended candidates of eight subjects were appointed and they joined their respective posts. However due to one or another reasons, recommended candidates of Mathematics and Biology subjects could not be appointed by the Education Department for almost five years. In the meantime Government brought new reservation policy for appointment of teachers, as such in the year 1995, in continuance to the earlier advertisement, another advertisement no. 1/95 was published by Vidalaya Sewa Board in view of such changes. The Vidayalaya Sewa Board recommended the name of 1056 and 552 candidates in Biology and Mathematics subject on 8.10.98 and 21.5.99



respectively. Though on recommendation made by Board, all teachers recommended for different subjects were appointed, but appointment of Biology and Mathematics subjects teachers remained pending for one or another reasons. The Education Department did not issue appointment letters till the year 2000 and the petitioner is also one among selected and recommended candidates for Biology teachers by the Vidyalaya Sewa Board and is at serial no.710 of the merit list having Roll no.1379. Due to delay in issuing appointment letters, selected candidates of Biology and Mathematics subject including petitioner approached this Hon'ble Court in different writ petitions which were registered as CWJC No.2994/2000, 7732/2000, 8926/2000 and 9259/2000, 12625/2000, 3920, 752 and 3773 all of 2001. These writ petitions were allowed by order dated 15.2.2001 with observation, to calculate up-to-date vacancies and appoint within three months. The order of Hon'ble Court is reported in **2001 (2) PLJR 110**.

5. The State Government being aggrieved by the order of Hon'ble Single Judge dated 15.2.2001 challenged the same in LPA No. 439,445, 446, 447, 1347,1354,1360 and 1435 of 2001. The appeals filed by the State were finally dismissed on 16.12.2004 and the respondents had been directed to appoint



petitioner and others as per the direction of Hon'ble Single Judge. Once again respondent State approached the Hon'ble Apex Court in SLP (Civil) No.6369-6376/2005 challenging the order of the Division Bench of the Hon'ble Court dated 16.12.2004. While the case was pending for hearing in appeal before Hon'ble Supreme Court, the State Government has brought changes in teachers appointment rules by introducing Panchayat Teachers appointment Rules, 2006. The respondent took ground before the Hon'ble Apex Court that appointment could not be given to the petitioner as the appointment rules got changed and now appointments are being made by Panchayati Raj under Appointment Rule 2006. Without complying the direction of the Hon'ble Court, the respondents State without keeping such number of posts vacant for the petitioner and others, had transferred all the vacant post to the panchayat Raj and subsequently more than 3000 post of Biology teachers were advertised under new rule. The Hon'ble Apex Court rejected the grounds taken by the State respondents and directed them to appoint the petitioners as the appointment had already undergone a long delay. The said SLP's were dismissed by order dated 28.08.2012. After direction of the Hon'ble Apex Court, the State respondents did not issue appointment letters to the selected



candidates and did not comply the court's order, upon which, the recommended candidates filed several contempt petitions in the year 2012 before this Hon'ble Court for penalizing the respondents for non-compliance of the order of the Courts.

6. The respondents in order to comply court's order came out with new appointment rules, particularly for appointment of teachers from these recommended candidates of advertisement no. 1/88 and 1/95 but this rule was limited only to 329 posts of Biology teachers and 312 post of Mathematics teachers. This rule came to be known as "The Bihar Nationalized Secondary School Teacher's Special Appointment Rule 2013." The number of post created was 329 in Biology and 312 in Mathematics and the same was erroneous calculation and actual vacant posts were not calculated as well as vacancies in project schools were not taken into consideration. As per the Special Rule, the newly created cadre of Biology and Mathematics teachers were made dying cadre with one time appointment process as such there would not be any further advertisement and specially created vacancies are specially meant for petitioner and similarly situated recommended candidates. Even after non-appearance and non-joining of appointed candidates out of Special created 329 posts, respondents did not issue further appointment to



remaining recommended candidates against those seats which remained vacant even after direction of the Hon'ble court. Then in contempt proceeding when this question was raised then the respondents submitted that they are taking steps in four weeks which is apparent from order dated 6.1.16 passed in MJC No.-1376/15.

7. Learned counsel for the petitioner submits that on the one hand the cadre was made dying cadre and there was no provision of further appointment to this cadre and on the other hand 30% post were carved out and kept reserved for appointment from class III employees as per 1983 appointment rules. The respondents after deducting 30% vacancies reduced the number of post to 329 and 312 for Biology and Mathematics respectively. It is relevant to state here that after 1983 Rules of appointment of Secondary teacher, new Rules came in 1997 and thereafter again in 2004 wherein in both subsequent rules 30% quota has been abolished but the respondents have carved out 30% from the vacancies. In contempt proceeding the stand of the respondent was not accepted on the point of calculation of vacancies and indulgence was given to recalculate actual vacancies. The respondent after issuing appointment letters to 329 and 312 candidates of both referred subject in phase manner



once again came out with some more vacancies.

8. At this juncture it is stated that the advertisement for appointment made in the year 1988 are now being given appointment letters after 25 years. Under such extra ordinary circumstances several posts remained vacant due to non appearance or due to non-joining of candidates. Several reserved categories posts also remained vacant due to non availability of such candidates. The following are breakup of the appointments.

1. Biology subject candidates given appointment on 22.06.2013- 329.
Candidate joined - 226.
2. In the year 2016, appointment in Biology subject given - 103.
Candidate joined - 81.
3. Post remained vacant due to non availability of S.T. Candidates-22.

9. The Hon'ble Court by order dated 28.9.16 has also directed to make available those 30% reserved vacancy which was carved out for appointment from Class III employee but no appointment is going to be made against those post. It is further stated that due to extra ordinary delay in appointment, most recommended candidates crossed their appointment age for selection in any other job. In view of the observation made by the Hon'ble Court respondents have further calculated the vacancies of 407 and notified the same vide memo no.128 dated 21.8.2017. Pursuant to the fresh calculation of vacancies



appointment letters were issued on 22.8.2017 to 28.8.2017 to 300 candidates instead of 407 since candidates of SC, ST and BC-1 were not available in the remaining merit list. Thus due to non availability of candidates of reserved quota (107 posts) and due to non-joining of some candidates, 28 posts remained vacant as such total 135 Special created posts of Biology teacher remained vacant up till now. In Mathematics subject teachers, the whole recommended list has been exhausted and there is none left to be appointed but in the Biology subject about 100 teachers from merit list are still waiting for appointment and on the other hand 135 posts are vacant due to non availability of reserved candidates and non joining of candidates. Since the posts created by the Special rule are only meant for the recommended candidates of Advertisement no.1/88 and 1/95 only, non other persons can be appointed nor can fresh advertisement for appointment be published. It is submitted that 107 posts of Biology teachers are vacant due to non availability of reserved candidates which were called for counseling for three times and about 28 posts remained vacant due to non-joining of recommended candidates. Thus 135 vacancies are lying vacant.

10. Section 4(6) of the Bihar Reservation of vacancies in post and services (for SC, ST and other Backward Classes) Act, 1991



deals with the exchange of reserved vacancies in case of non availability of reserved categories candidates. In the present matter appointment are to be made in special cadre on one time basis for advertisement no.1/88 and 1/95 with dying cadre therefore, there is no provision of another advertisement. The Authority has given three opportunities of counseling but reserved candidates were not available as such those post may be filled up by the general candidates from the panel of candidates recommended for Biology subject as per rule. If such exercise is taken, then the remaining candidates of Biology teachers would be appointed and adjusted. There would be no justification of keeping the post vacant as the process of appointment is only one time process for the present cadre and no fresh exercise for appointment is permissible under the special rule. One of the candidates have approached the respondent for grant of appointment but by order dated 20.3.2018 contained in Memo no.84 (Vidhi) has been denied without considering the factual position that the special rule is one time appointment process and without considering the provision of sec. 4 of the reservation Act 1991. The representation dated 7.9.2017 has been filed by similarly situated candidates before respondent no.1 but still the grievances of the petitioner and others have not been redressed.



11. A supplementary affidavit has been filed on behalf of the petitioner to bring the prayer sought by the petitioner in one place by way of I.A. No.1/2019, which was allowed to bring the following prayer as amended:-

“For a direction to the respondents to appoint petitioner on the post of Teacher in Biology subject in Secondary school pursuant to recommendation made by Vidyalaya Sewa Board in the year 1998 under Advertisement no.1/88 read with 1/95 for which Special rule of appointment in the year 2013 was framed out in compliance of the different order of the Hon’ble Court. The respondents may further be directed to take appointment on available posts which are vacant due to non availability of reserved category candidates and also due to non appearance and non-joining of non reserved category candidates and the post lying vacant.

and, for issuance of appropriate writ/ writs for quashing of memo no.84 dated 20.03.2018 passed by Principal Secretary, Education Department, Bihar, Patna whereby post of Biology teacher which remained vacant due to non-availability of reserved category candidates has been rejected for appointment from remaining candidates of the post of Biology teacher on the ground that the post would be dereserve only after advertisement three consecutive year for



appointment and non availability of the reserved candidates post would have to dereserved.”

12. In the year 2013, 226 candidates have been appointed vide memo no.438 dated 22.06.13 in Biology subject and 103 seats remained vacant due to non-availability of reserved category candidates/non-appearance of SC, ST and BC/candidates. Again, in the year 2016, 80 candidates have been appointed vide memo no.27 dated 05.01.2016, memo no.458 dated 29.2.2016 and memo no.849 dated 18.04.2016 in the Biology Subject and 60 seats remained vacant due to non-availability of reserved category candidates/non-appearance of SC, ST, BC I candidates. Again, in the year, 2017, 300 candidates have been appointed vide different memo no. from 22.08.2017 to September 2017 in the Biology Subject and 107 seats remained vacant again due to non-availability of reserved category candidates/ non-appearance of SC, ST and BC I candidates, therefore, total 270 seats still remained vacant till date. Since the authorities has provided thrice time opportunity to fill the reserved category post but due to non-availability of reserved candidates, the same posts remained vacant till now. The Authorities after providing three opportunities are now required to consider remaining successful candidates of other categories against those vacant posts but they



are not taking steps on the ground that after three advertisement only posts could be dereserved.

13. Learned counsel for the State filed a detailed counter-affidavit and submits that in the Biology subject the vacancies which were calculated as per the direction of the Hon'ble High Court was 789 and all the 50% vacancies which were allotted for the general category have been filled up by appointing the candidates of general category who came within the zone of merit position of the panel. Similarly the vacancies made available for the candidates belonging to backward category were also filled up by appointing the candidates of this group who came within the zone of merit position. All vacancies/posts of general and backward category have already been filled up by appointing the candidates who came within the zone of appointment. It is further submitted that the name of the petitioner has been mentioned at serial no.710 and he belongs to B.C. category and in this category, the appointments have been made up to serial no.619 of the merit list. Therefore the petitioner's position in the merit list was not within the zone of appointment and accordingly, he was not appointed against the posts/vacancies allocated for the B.C. Candidates. As per the aforesaid direction of the Hon'ble Court the matter of vacancies



of OBC category which could not be filled up due to non appearance of candidates for the purposes of verification of certificates were duly considered. After due consideration it revealed that as per the provision of Bihar Reservation Act-1992 for the purposes of de-reserved of rest vacancies advertisement shall be published for the purposes of filling up the vacancies in three consecutive requirement year, and thereafter in case of non-availability of candidates, the vacancies shall be de-reserved. In this regard it was also found that the appointment from the panel of Biology subject have been made by creating new posts with the condition that these posts shall not exist after the retirement or death, of the appointment teacher as per the provision made in special Appointment Rules 2013 and 2017. The appointment in Biology subject has been made against the dying posts as one time appointments. After due consideration the claim for dereserving the rest vacancies of the aforesaid reserved category has been rejected vide memo no.84 dated 20.03.2018, which is enclosed at Annexure-A of the counter-affidavit.

14. In view of the aforesaid fact the claim of the petitioner to appoint him from the Biology subject panel is baseless and the writ application is fit to be rejected. It is submitted that the claim



of the petitioner is not justified and tenable in the eyes of law as well as on facts for the reason that the order passed by the Principal Secretary vide letter no.84 dated 20.03.2018 is an order passed in light of the order dated 25.08.2017 passed by the Hon'ble Court in M.J.C. No.1376 of 2015. The Principal Secretary while issuing the said order has duly considered the matter of dereserving the vacancies in light of the provisions of Bihar Reservation Act, 1992. But during such consideration, it revealed that after the enforcement of Niyojan Niyamawali, 2006, the posts of Assistant Teachers in regular scale ceased to exist and the post of regular scale teacher of nationalized and project schools were converted into the post of fix salary scale. Accordingly, in compliance of the order of this Hon'ble High Court and Hon'ble Apex Court, new posts were created for the appointment of the said candidates and as a result Special Appointment Rules, 2013 and 2017 were framed. The posts of Assistant Teachers created under Special Appointment Rules, 2013 and 2017 are dying posts i.e. these posts shall cease to exist after the retirement or death of the newly appointed teachers. In other words, the appointment made under Special Appointment Rules, 2013 and 2017 was one time appointment as in future no vacancies could be made available in regular scale of teachers.



The appointments being one time appointment made under Special Appointment Rules, 2013 and 2017, the same could not be advertised as per the provisions of Bihar Reservation Act, 1992 which provides that the vacancies which could not be filled up due to non-availability of candidate shall be advertised for three consecutive years and thereafter in the case of non-availability of the candidates under reserve category, the vacancies shall be de-reserved and shall be kept in back log but in the present case, the same being an one time measure/appointment, the same could not be advertised for three consecutive years and as such there arises no question of de-reserving the remaining vacancies as the three years consecutive advertisement is a prime sine qua non for the purpose of de-reservation of reserved seats. Therefore, the order dated 20.03.2018 passed by the Principal Secretary, rejecting the Claim of de-reservation is a well reasoned order which has been passed after duly considering all the aspects of the matter both on law as well as on facts.

15. Considering the argument of the parties and perusal of the record, it is admitted fact that the said vacancy was already vacant due to non-availability of the SC/ST and BC-1 candidate and it was an one time advertisement. It is admitted fact that 135



posts are vacant due to non-availability of the reserved category candidates and non-joining of the candidates. The appointment being an one time appointment made under the Special Appointment Rule, 2013 and 2017, the same could not be advertised as per the provision of the Bihar Reservation Act, 1992, which provides that the vacancy which could not be filled up due to non-availability of the candidate shall be advertised for three years and thereafter, in case of non-availability of the reserved category candidates, the vacant post of reserved category shall be de-reserved and shall be kept in back log but in the present case, the same being an one time measure, the vacancy cannot be advertised for three consecutive years and as such, there arises no question of de-reserving the remaining vacancies as the three years consecutive advertisement is a prime sine qua non for the purpose of de-reserving the reserved seats.

16. Considering the aforesaid facts and circumstances, the memo no.84 dated 20.03.2018 passed by the Principal Secretary, Education Department, Bihar, Patna, rejecting the claim for dereserving the rest vacancies of the reserved category is not in accordance with law. The memo no.84 dated 20.03.2018 is quashed and set aside.

17. The petitioner is directed to file a detailed representation



before the Principal Secretary/Additional Chief Secretary along with a copy of this order, within a period of four weeks from the date of receipt of a copy of this order and the Principal Secretary/Additional Chief Secretary, Education Department, Government of Bihar, Patna (respondent no.3) is directed to take appropriate decision on the representation filed by the petitioner after personally hearing him or his counsel within a period of eight weeks from the date of filing of the representation of the petitioner.

18. Needless to say that, if the representation of the petitioner is not disposed of within the stipulated period, the respondent no.3 shall be personally held liable for non-compliance of the order of this Court.

19. With the aforesaid directions and observation, this writ application is hereby allowed.

(Anjani Kumar Sharan, J)

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AFR/NAFR	NAFR
CAV DATE	04.03.2024
Uploading Date	19.03.2024
Transmission Date	N.A.

