

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.6246 of 2022

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1. Prakash Kumar, S/o Ramakant Ram, R/o Jagdamba Colony, Sanchi Patti, Hajipur, Vaishali-844101.
 2. Aryan Raj, S/o Lalan Prasad, R/o Chintamanpur, East Champaran-845416.
 3. Abhishek Anand, S/o Rajesh Kumar Singh, R/o Sukoon, Ward No.-7, Bhardwaj Tola, Semaria, Begusarai-851126.
 4. Kapildeo Kumar, S/o Rameshwar Singh, R/o Sukoon, Bahuria Bigha, Riur, Aurangabad-824112.
 5. Piyush Kumar, S/o Santosh Kumar, R/o 11/d, Vyapar Mandal, Near Ragni Sinha Hospital, East Mohan Bigha, Dehri, Rohtas-821307.
 6. Rakesh Prakash, S/o Chandra Bhushan Prakash, R/o Hilsa, Nalanda 801302.
 7. Pinki Kumari, D/o Shriram Chandra Prasad, R/o Village Haribela, Ward No.-12, Harri, Sitamarhi-843317.

... .. Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar.
2. The Bihar Public Service Commission through its Chairman, 15 Jawahar Lal Nehru Marg, Bailey Road, Patna-800001.
3. The Secretary, Bihar Public Service Commission, 15 Jawahar Lal Nehru Marg, Bailey Road, Patna-800001.
4. The Additional Chief Secretary, Prohibition, Excise and Registration Department, Government of Bihar.
5. The Additional Chief Secretary, General Administration Department, Government of Bihar, Patna.
6. The Excise Commissioner-cum-IG, Registration, Prohibition, Excise and Registration Department, Government of Bihar, Patna.
7. The Joint Secretary, Prohibition, Excise and Registration Department, Government of Bihar, Patna.
8. The Joint Commissioner, Prohibition, Excise and Registration Department, Government of Bihar, Patna.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Dhananjay Kumar, Advocate Mr. Kumar Amit, Advocate
For the Respondent/s	:	Mr. P.K. Shahi, Advocate General Mr. Vikash Kumar (SC-11)

CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE RAJIV ROY
CAV JUDGMENT



(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 24-01-2024

The petitioners, directly appointed 'Inspectors, Prohibition' pursuant to the 63rd Combined Competitive Examination (for brevity 'CCE') conducted by the Bihar Public Service Commission (for brevity 'BPSC') are aggrieved with the alleged downgrading of the post from gazetted to non-gazetted. The petitioners contend that the advertisement for the 63rd 'CCE' was under the Bihar Excise Service (Recruitment and Service Conditions) Rules, 2009 (hereinafter referred to as 'Rules of 2009'). After the advertisement issued on 09.11.2017, the 7th Pay Commission recommended restructuring of the cadre of Bihar Excise Service.

2. Considering the policy of Prohibition having been implemented within the State, there was also rechristening of the department as 'Prohibition, Excise and Registration Department'. Based on the recommendation of the 7th Pay Commission, the post of 'Inspector, Excise' which was the entry cadre under the 'Rules of 2009' was made non-gazetted and the same included under the Bihar Non-Gazetted Excise Officers (Recruitment and Service Conditions) Rules, 2017. These rules, after the rechristening of the department, were renamed as the Bihar Non-Gazetted Excise Officers (Recruitment and Service



Conditions) Rules, 2017 (hereinafter referred to as the 'Rules of 2017').

3. The 'Inspector, Prohibition', the erstwhile 'Inspector, Excise' was made a promotional post at the top of the hierarchy among the non-gazetted posts. For the gazetted service, Bihar Prohibition Service (Recruitment and Service Conditions) Rules, 2018 (for short 'Rules of 2018') was brought in. Therein, the 'Superintendent, Prohibition' was made the entry cadre, which was earlier the promotional post of an 'Inspector, Excise'; both of which belonged to the gazetted ranks, as per the 'Rules of 2009'. The petitioners challenge the down-gradation of the post to which applications were called for, after the advertisement and before the appointments. The petitioners further challenge the 'Rules of 2017' downgrading the post of 'Inspector, Excise' as a non-gazetted post and seek for protecting the interest and seniority of all directly appointed 'Inspector, Prohibition' on the basis of the 63rd 'CCE'.

4. Learned counsel for the petitioners submitted that the rules of the game should not be changed mid-way and the down gradation of the post was arbitrary and illegal. The petitioners had a legitimate expectation to be appointed as a gazetted officer while the appointment was made to a non-



gazetted post. In fact, the persons who were appointed pursuant to the 67th 'CCE' as 'Superintendent, Prohibition' have stolen a march over those appointed as 'Inspectors, Prohibition' under the 63rd 'CCE'. The petitioners also seek upgradation of the persons appointed under the 63rd 'CCE' as Superintendent, Prohibition. The petitioners rely on *P. Mahendran and others v. State of Karnataka and others; (1990) 1 SCC 411* and *I.J. Divakar and others v. Government of Andhra Pradesh and another; (1982) 3 SCC 341*.

5. Shri Vikash Kumar, learned Government Advocate argues that there can be no allegation of 'change in rule mid-way', since the selection process continued based on the advertisement and there was no change in the procedure of selection as prescribed in the advertisement. The petitioners were appointed to the post which was advertised; which in the interregnum had been made the highest hierarchical post in the non-gazetted cadre. The petitioners could not have objected to such restructuring of cadre and in any event, the petitioners accepted the appointment and joined without demur. The petitioners also continued therein and the present writ petition was filed long after; alleging that the persons who were appointed under the 67th 'CCE' were seniors to them. The



persons under the 67th 'CCE' were appointed to the post of 'Superintendent, Prohibition', the entry level at the gazetted rank as per the new rules.

6. The petitioners were appointed after selection based on the advertisement produced as Annexure-2. When the advertisement was issued in the year 2017, specifically on 09.11.2017, the cadre rules were that of 2017 and the post of Excise Inspector was not an entry cadre in the gazetted rank. The 'Rules of 2009' were amended by the 'Rules of 2017', which came into force on 28.07.2017 even before the advertisement was issued on 09.11.2017. Further, as has been argued by the learned Government Advocate, the petitioners accepted the appointment without demur, with open eyes, knowing that they were appointed to the non-gazetted cadre. The petitioners have now sought for an upgradation of the post, challenging the 'Rules of 2017', in the year 2022 on the ground that the persons appointed under the 67th 'CCE', though juniors would be deemed seniors to the persons appointed earlier.

7. The argument of the petitioners, discounts the fact that there has been a total cadre restructuring in the department. The advertisement was to the post of Excise Inspector which even if was in the gazetted cadre, before the advertisement, by



the time the advertisement was issued and the appointment was carried out, the cadre was restructured. The post to which the selection was conducted was made a non-gazetted post and it was placed at the top of the hierarchy of non-gazetted posts. The restructuring of the cadre resulted in the 'Superintendent, Prohibition' being made the entry level post. The petitioners could not have been appointed to the entry level since it was a higher post which had a higher scale of pay also. In fact, there was a restructuring of posts and not a redesignation. As noticed above, the petitioners had accepted the appointment and joined the service without demur. Those who were appointed under the 67th 'CCE' were appointed to the post of 'Superintendent, Prohibition', a higher post than that of 'Inspector, Prohibition'.

8. **P. Mahendran** (supra) was relied on by the learned counsel for the petitioners. Therein, the issue was whether the selection carried out as per the earlier rules was proper or not. In the cited decision, the rules regarding qualification for eligibility was amended, during continuance of the process of selection. This would have disqualified persons who were eligible as per the advertisement brought out on the basis of the earlier rules. The selection procedure was completed under the old rules and select-list finalized accordingly. It was held that the selection is



not vitiated by the amendment to the rules. The amendment made was to the very qualification of the candidates who are eligible to apply and this would have definitely prejudiced the persons who applied under the old rules, some of whom would have been disqualified based on the amendment to the rules. This is the circumstance under which the Hon'ble Supreme Court upheld the selection carried out as per the old rules. The prescription as to '*there can be no change in the rules after the game has commenced*' applies to the selection process and not to the post to which appointment is made.

9. When a selection is carried out to a post which was gazetted at the time of advertisement, which post was made a non-gazetted post in the course of the selection process, the appointing authority has two courses open to it, either to make appointments to the lower post or shelve the entire selection process so as to facilitate a fresh selection based on the new rules and the cadre restructuring. In the present case, the Government adopted the first course only because in the selection process a lot of effort and money would have been invested.

10. The appointees who were aware of the cadre restructuring could have refused to take such appointment or at



least challenged the appointment immediately on the ground of the restructuring being bad. In any event, we are not convinced that there is a flaw in the Government having appointed the persons to the post advertised, the cadre in which it was included was restructured, even before the advertisement was issued.

11. Reliance was also placed on *I.J. Divakar* (supra). The aforesaid judgment does not aid the petitioners and goes against the very contention of the petitioners. The Hon'ble Supreme Court held that there is no right to a post till the selection is finalized. The Public Service Commission, in the cited case, invited applications for direct recruitment and also carried out the *viva-voce* test of the candidates. However, prior to the finalization of the select-list, a Government order was issued excluding recruitment to the aforesaid post from the purview of the Public Service Commission. It was held that inviting applications for a post does not by itself create any right to the post in the candidate, who in response to the advertisement makes an application. The candidate only gets eligible for being considered for the post and as has been noticed by us, the candidate could have refused to take appointment on the restructuring made to the cadre.



12. The candidate definitely would have the argument of anyone offered an employment not being in a position to refuse it. Considering the prevalent dearth of employment opportunities, none could afford such refusal. The Government on the other hand, as we noticed, has the compelling argument of having invested considerable time, effort and money in the selection process, which persuaded them to take the option of offering appointment to the persons selected, without any obligation on such persons offered appointment to take up the appointment. Otherwise there would be occasioned further delay in appointment, since the entire exercise would have to be commenced, continued and concluded.

13. Learned counsel for the petitioners also relied on the recommendation of the Fitment Committee and the 7th Pay Commission, produced as Annexure-4. The recommendation as found in Annexure-4 is that due heed should be paid to the interests of the personnel appointed directly to the post of Inspector. The caution was expressed, since the post of Inspector was the entry level post for the Bihar Excise Service before transformation of the cadre, by which direct recruitment took place at the level of Superintendent. The said observation or recommendation is only applicable to the existing 'Inspectors,



Excise’ and not to those persons recruited subsequently. The Rules admittedly were brought out in 2017 and the appointments were made as per Annexure-3 on 19.02.2020.

14. The writ petition is devoid of merit and dismissed.

(K. Vinod Chandran, CJ)

Rajiv Roy, J: I agree.

(Rajiv Roy, J)

P.K.P./-

AFR/NAFR	
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