

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.741 of 2023

1. Rishi Bhushan S/o Binod Kumar Sinha, Resident of Village- Near Maa Shyama Studio, Jagdishpur, Bhagalpur.
2. Srimant Kumar S/o Banmali Chandra Benarjee, Resident of Village- Brahamantola, Dumrama, Amarpur Banka.
3. Rajkamal S/o Rajesh Kumar, Resident of Village- Anadipur, Colgong, Bhagalpur.
4. Manish Kumar S/o Triveni Prasad, Resident of Village- Piribasti, Post- Piribazar, Thana- Piribazar, Losghani Piri Bazar, Lakhisarai.
5. Nirmala Kumari D/o Aatm Narayan Mandal, Resident of Village- Karharwan, Belahi, Bhawanipur, Madhubani, Belhi Bhawanipur.
6. Avinav Kumar S/o Uday Kumar, Resident of Village- Ward -03, Mauji Hari Singh, Begusarai.
7. Bharti Kumari C/o Ravishankar Prasad, Resident of Village- Shkati Nagar Post- Polytechnic, Purnea, Purnia.

... .. Petitioner/s

Versus

1. The State of Bihar through the Additional Chief Secretary, Health Department, Government of Bihar, Patna.
2. The Joint Secretary, Department of Health, Government of Bihar, Patna.
3. The Additional Secretary, Health Department, Government of Bihar, Patna.
4. The Director in Chief, Health Service, Health Department, Government of Bihar, Patna.
5. The Secretary, Bihar Technical Service Commission, 19, Harding Road, Patna.
6. The Deputy Secretary, Bihar Technical Service Commission, 19, Harding Road, Patna.
7. The Special Secretary, Bihar Technical Service Commission, 19, Harding Road, Patna.

... .. Respondent/s

Appearance :

For the Petitioner/s : Mrs. Nivedita Nirvikar, Sr. Advocate
Mr. Arya Achint, Advocate
Mr. Rajkumar Rajesh, Advocate



	Ms. Supragaya, Advocate
	Mrs. Shashi Priya, Advocate
For the Respondent/s :	Mr. Miytabaul Haque, GP-12
	Mr. Pranoy Kumar, AC to GP-12
For the BTSC :	Mr. Nikesh Kumar, Advocate

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

Date : 06-09-2024

The controversy arises insofar as the shifting stance regarding requirement for admission to the Ophthalmic Assistants Diploma Course; a para medical course carried out in the State of Bihar and the eligibility condition for appointment as Ophthalmic Assistants, in the Health Department of the State.

2. An advertisement No. 1 of 2021 was brought out, produced as Annexure-7, which invited applications for appointment as Ophthalmic Assistants in 236 posts. The essential qualification required was Immediate/10+2 with Physics, Chemistry and Biology as also English. The petitioners herein are persons, who had acquired the qualification of Ophthalmic Assistants Diploma Course from Government Colleges but with an Intermediate/10+2; without Biology, but with Mathematics. The petitioners claim that the



Government had provided different stipulations over the years for admission to the Ophthalmic Assistants Diploma Course and appointment to the public posts; at one time provided for appointment to even persons who had Intermediate/10+2 with Mathematics.

3. We heard Smt. Nivedita Nirvikar, learned Senior Counsel for the petitioners, Sri Miytabaul Haque, GP-12 for the State and Sri Nikesh Kumar, learned Advocate appearing for the Bihar Technical Service Commission.

4. The learned Senior Counsel appearing for the appellants argued that earlier in the year 2005, the Diploma Course in Ophthalmic Assistants admitted persons with 10+2 having the subject Mathematics also. In 2011, there was a major change in stance which restricted the admissions to Intermediate/10+2 with Physics, Chemistry and Biology. The petitioners were persons who had applied for admissions to the Diploma course and got admission through an entrance examination. The petitioners have qualified in the Diploma course but by reason only of the prescription in the advertisement, in consonance with the rules for appointment to the post of Ophthalmic Assistants, which were modified in 2011; they were dis-entitled from applying for the post since



they did not read Biology in the Intermediate/10+2 classes.

5. In fact, in 2021, the stipulation with respect to persons who studied Mathematics in Intermediate/10+2 has been brought back. The petitioners are persons who were admitted to Government Colleges and they cannot now be denied consideration for selection to the public posts of Ophthalmic Assistants in the Government. Reliance is placed on Annexure-8 judgment which frowned upon the sorry state of affairs in which the Department is functioning, by reason only of the shifting stance with respect to eligibility requirements. The learned Senior Counsel asserts that by virtue of the aforesaid judgment, the petitioners have to be given the benefit of applying under the post.

6. The learned Counsel appearing for the respondent-Commission pointed out that the advertisement was of 06.04.2021 and the result was declared on 04.07.2022. All the petitioners were persons who acquired the Ophthalmic Assistants Diploma Course qualification after the year 2011. In fact, they should not have been given admission since the requirement, as is clear from the Rules of 2011 indicates the essential eligibility condition to be Intermediate/10+2 with Physics, Chemistry and Biology. Only one of the petitioners,



i.e. petitioner No.7 had obtained the Diploma qualification prior to 2011 when even a student who had read Mathematics in Intermediate/10+2 was admitted to the Diploma course. However, the 7th petitioner is a fence-sitter since, at the time of advertisement or before the last date of application stipulated therein, there was no challenge made. An application was made which was rejected by the Commission which also was not challenged. The writ petition is an after-thought and none of the other petitioners also applied under the advertisement.

7. At the outset, we have to notice that there is no averment that the petitioners applied under the advertisement. The advertisement, itself was dated 06.04.2021 and the last date of application was 05.05.2021. We specifically requested the learned Senior Counsel to show us the averment as to an application having been made within the last date by any of the petitioners. The learned Senior Counsel was unable to show us any such averment and conceded that it was not there. The learned Senior Counsel also did not dispute the fact that the 7th respondent though applied had neither challenged the stipulation, before the last date of application, nor challenged the rejection of her application.



8. Annexure-8 was a judgment based on the challenge made to the essential qualification stipulated; by the petitioners therein who were all persons who acquired the Diploma before 2011; i.e. when students having Intermediate/10+2 in Physics, Chemistry and Maths could also seek admission to the Ophthalmic Assistants Diploma Course. The petitioners Nos.1-6 are persons who had qualified after 2011; when they were obviously not entitled to be admitted to the Diploma Course. The petitioners Nos.1-6 having not applied and the 7th petitioner having not challenged the rejection of her application, are fence-sitters, who have come to this Court after the judgment passed in Annexure-P/8. Annexure-P/8 was passed on 18.10.2022 and the writ petition was filed on 17.01.2023. The learned Counsel for the respondent-Commission has pointed out that the results were declared as early as on 04.07.2022. On this short ground, the writ petition has to be rejected.

9. For completeness, we would deal with the contentions raised on merits too. Annexure-P/8 judgment, vigorously relied upon by the petitioners herein; as we noticed, are on the distinct facts of the diplomates who had obtained such admission to the course, as per the eligibility



conditions existing prior to 2011. The writ petition also directed only the petitioners who were admitted in the diploma course in Ophthalmic Assistants before framing of the Recruitment Rules, 2011, to be eligible for consideration for appointment to the post of Ophthalmic Assistants. The said eligibility was found, also on the basis of the direction issued by this Court to accept the application forms of candidates who had Intermediate (Science) with Physics, Chemistry, English and Mathematics; having been admitted to the course prior to 2011, when they were eligible to be admitted. The direction to prepare merit list treating the petitioners therein to be eligible for appointment to the post of Ophthalmic Assistants was a direction in *personam* and not in *rem*.

10. Be that as it may, from the decision, it is clear that the prospectus of 2006 and 2010 issued by the Bihar Combined Entrance Competitive Examination Council indicated the eligibility criteria for admissions to the diploma course in Ophthalmic Assistants as Intermediate (Science) with Physics, Chemistry, English and Mathematics or Biology. The advertisement for appointment to the post of Ophthalmic Assistants also was issued with the said eligibility



conditions. It is by Bihar Ophthalmic Assistants Cadre (Recruitment And Service Conditions) Rules 2011, that the eligibility was confined to those persons having Intermediate (Science) with Physics, Chemistry and Biology; thus excluding Mathematics and the students who read it in the Intermediate studies from being considered as eligible for admission to the diploma course.

11. The petitioners are students who were admitted after 2011 by an entrance examination; which itself is an illegality. The learned Counsel for the petitioners had argued that at least the fact that Government Institutions had admitted the petitioners to the diploma course, should weigh with this Court to permit the petitioners to be considered for selection. We are unable to accede to the same for multiple reasons; that there is considerable delay occasioned in approaching this Court; that the trite principle is that this Court cannot perpetrate an illegality and also the principle laid down by the decision of the Hon'ble Supreme Court in ***Zonal Manager, Bank of India v. Aarya K Babu and Another; (2019) 8 SCC 587***; which we will deal with, in detail, a bit later.

12. Annexure-1 series is the Diploma-Certificate



Entrance Competitive Examination, 2006 brought out by the Bihar Combined Entrance Competitive Examination Board, Government of Bihar. Therein, the eligibility for admission to the diploma in Ophthalmic Assistants course includes Mathematics in the Intermediate Course. Even, Annexure-2 series, by the very same agency, for the year 2021, includes Mathematics also as the eligibility condition. In the interregnum, there was exclusion of students who did not read Biology in their Intermediate Science course. It is during this period that the petitioners, except the 7th petitioner was admitted to the course and qualified, as is evident from the certificates produced as Annexure-3 series. Insofar as the 7th petitioner is concerned, we have already held that she failed to challenge the rejection of her application and did not participate in the selection which dis-entitles her to claim relief in the present writ petition. The very same ground of not approaching the Court at the appropriate time dis-entitles the other petitioners also but insofar as their case is concerned, their wrongful admission to the Diploma course militates against them and it is further fortified by the fact that the advertisement for appointment to the post of Ophthalmic Assistants, specifically prescribed the eligibility condition as



the Diploma course in Ophthalmic Assistants along with Intermediate/10+2 in Physics, Chemistry, Biology and English. The petitioners obviously are not persons who had qualified Intermediate, as required in the advertisement.

13. Insofar as the shifting stance, we see that the Division Bench in Annexure-P/8 had frowned upon the same. However, the declaration therein that *'once admission to candidate passing Intermediate (Science) with Biology or Mathematics have been permitted to appear in competitive examination for admission in Diploma course of Ophthalmic Assistants and after successfully completing the diploma course and getting diploma certificate in Ophthalmic Assistant, State cannot deny them opportunity of appointment on the post of Ophthalmic Assistants and denial of opportunity for appointment on the post of Ophthalmic Assistants is arbitrary, unreasonable and discriminatory and offends Article 14 and 16 of the Constitution of India'* (sic), was in the factual context of the claim raised therein. The writ petitioners therein were students validly admitted to the Diploma Course; when Mathematics students were also permitted admittance. The declaration can apply only to the petitioners therein, who were all admittedly enrolled in the



course prior to 2011, as per the rules existing then, regulating eligibility for admission to the Diploma course. This cannot apply to the petitioners, who were admitted wrongfully after the rules were altered. The Court, at the earlier instance was also not considering the case of the petitioners who were wrongfully admitted to the Diploma course.

14. We also garner support from the decision in *Aarya K Babu (supra)* which was on almost similar facts. Therein, the notification for selection to the post of Agricultural Field Officer (Scale 1) was issued depicting qualification *inter alia* of degree in Agro-Forestry. There was no BSc. in Agro-Forestry conducted by any academic institution within the country. The respondents there, who were graduates in BSc. Forestry on the date of notification, though not eligible as per the qualification prescribed, applied and got selected. The challenge raised before the High Court was against their termination finding their qualification to be not in accordance with the notification for appointment. The High Court noticed that (i) there is no 4 year degree program offered in the country for Agro-Forestry; (ii) the information furnished by the Indian Council of Agricultural Research (for brevity 'ICAR') indicated that the syllabus of Agroforestry is



akin to Agriculture; (iii) the Ministry of Agriculture and Farmers Welfare as also the Ministry of Finance took note of the error that there is no 4 year course in Agro-Forestry in the country and the said subject is covered comprehensively in the Indian Council of Agricultural Research approved syllabus of BSc. Forestry. The subsequent notification issued by the Bank for the very same post also included the qualification of BSc. Forestry as an eligible qualification. We extract paragraph 12 of the aforesaid judgment hereunder:-

12. Though we have taken note of the said contention we are unable to accept the same. We are of such opinion in view of the well-established position that it is not for the Court to read into or assume and thereby include certain qualifications which have not been included in the notification by the employer. Further the rules as referred to by the learned counsel for the respondents is pointed out to be a rule for promotion of officers. That apart, even if the qualification prescribed in the advertisement was contrary to the qualification provided under the recruitment rules, it would have been open for the candidate concerned to challenge the notification alleging denial of opportunity. On the other hand, having taken note of the specific qualification prescribed in the notification it would not be open for a candidate to assume that the qualification possessed by such candidate is equivalent and thereby seek consideration for appointment nor will it even be open for the employer to change the requirements midstream during the ongoing selection process or accept any qualification other than the one notified since it would amount to denial of opportunity to those who possess the qualification but had not applied as it was not notified.

We are fortified in our view that the petitioners are not



competent to apply under the advertisement or to be considered for selection for appointment; by the binding precedent of the Hon’ble Supreme Court, as dealt with above.

15. For all the reasons stated above, we reject the contentions raised and dismiss the writ petition, also on the ground of delay occasioned in challenging the stipulation in the advertisement.

(K. Vinod Chandran, CJ)

(Partha Sarthy, J)

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CAV DATE	
Uploading Date	11.09.2024
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