

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**Civil Writ Jurisdiction Case No.18203 of 2021**

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Poonam Kumari wife of Awadhesh Kumar Mishra, resident of Mohalla-Ramkrishn, Post-Bhagwan Bazar, P.S. Bhagwan Bazar, District-Saran at Chapra.

... .. Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar, Patna.
2. The Principal Secretary, Education Department, Government of Bihar, Patna.
3. The Director, Primary Education, Education Department, Government of Bihar, Patna.
4. The Regional Deputy Director of Education, Purnea Division, Purnea.
5. The District Education Officer, Purnea, District-Purnea.
6. The District Programme Officer (Establishment), Purnea, District-Purnea.

... .. Respondent/s

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**Appearance :**

For the Petitioner/s : Mr.S.B.K.Manglam, Advocate  
For the Respondent/s : Mr.Rajesh Kumar Sinhya, AC to GP 23

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**CORAM: HONOURABLE MR. JUSTICE PURNENDU SINGH**  
**ORAL JUDGMENT**

**Date : 22-04-2025**

Heard Mr. S. B. K. Manglam, learned counsel appearing on behalf of the petitioner and Mr. Rajesh Kumar Sinha, learned AC to GP-23 for the State.

2. The State Government in compliance of order and direction of the Hon'ble Supreme Court of India proceeded to fill up 34540 vacancies of Assistant Teachers in the Elementary Schools of Bihar available for appointment on the date of judgment of this Hon'ble Court passed in the case of *Nand Kishore Ojha Vs.The State of Bihar & Ors.* reported in (2004) *3 PLJR 782*. For the said purpose, the Rule, namely Bihar Special Elementary Teachers Appointment Rules, 2010 was framed. The petitioner, having all the qualifications, was also



called for, vide Memo No.1163 dated 30.2019 for filling up her option for the post of Assistant Teacher and the petitioner had opted for district of Muzaffarpur, Saran and Vaishali on 06.08.2010. In spite of her option and the terms of the advertisement No. SSC-210/2010 dated 02.01.2010, the folder of the petitioner was sent to the District Education Officer, Purnea, vide letter No.1136 dated 30.08.2019 issued by respondent no.3 (Director, Primary Education) and in compliance of the direction of respondent No.3, the District Programme Officer (Establishment), Purnea (respondent no.6) informed the petitioner, vide letter dated 26.09.2019 to appear on 11.10.2019 in the campus of Aarakshi Madhya Vidyalaya, Purnea for her counseling. The petitioner appeared on the date and time fixed on 11.10.2019 and produced all her testimonials for verification. The petitioner was shocked that she had opted for the district Muzaffarpur, Saran and Vaishali but instead her folder has been sent to Purnea. She made her representation dated 24.10.2019 before the Director, Primary Education and requested for change of the district of her posting, as per the option.

3. On these grounds, the learned counsel appearing on behalf of the petitioner would submit that the petitioner is



running from the pillar to post for ventilating her grievance and the stand of the respondents that the petitioner has remained absent from her duty can not be sustained in view of the fact that the respondents have admitted in Paragraph no.10 of the counter affidavit that in spite of the fact that the petitioner had opted for three other districts of her choice in terms of the advertisement, the petitioner can not be denied from being considered to work in the district of her choice.

4. The request of the petitioner for change of the district was accepted by the Director, Primary Education and accordingly, vide letter no.635 dated 14.07.2021, he directed the District Education Officer, Purnea (respondent no.5) to take appropriate steps in view of the request of the petitioner. In compliance of letter dated 14.07.2020, the District Education Officer, Purnea took a conscious decision, vide letter dated 25.08.2020 contained in Memo No.640, wherein it has been informed that the petitioner had not opted for Purnea yet the folder was sent to Purnea district for further action but no action was taken and the petitioner was forced to file a representation dated 03.09.2021, which is pending till date and no action has been taken.

5. A counter affidavit has been filed on behalf of



respondent nos. 2 & 3 in which they have accepted that vide Letter no. 640 dated 25.08.2020, the District Education Officer, Purnea had sent a letter addressed to the Director, Primary Education that the folder of the petitioner was sent to Purnea. However, a contradictory statement has been made in Para-9 of the said counter affidavit that without giving any prior information, the petitioner remained absent on 05.11.2019 and in absence of any reason given by the petitioner, the issue of sending folder wrongly to Purnea has been accepted, but her absence is recorded as willful in Para-10 and waived her right. Paragraph no.10 is as under :-

“It is relevant to state here that even if it is presumed that the folder was wrongly sent to the Purnea district, the date and place for appointment and selection of school i.e. 05.11.2019 was duly communicated to the petitioner but the petitioner without any prior information, well versed with the consequence of her absence wilfully didn't turned up and made her candidate liable to be cancelled. It goes without saying that such an inaction on the part of the petitioner makes it apparent that she herself has waived her right for consideration of appointment as she could have participated in the said process of selection of school with protest and, if not, then also at least could have given an prior information to the authority concerned. Thus, the instant writ petition of the petitioner is devoid of any merit and is fit to be rejected.”

6. Heard the parties.

7. The Hon'ble Division Bench of this Court in the



case of ***Kranti Kanak & Ors. Vs. The State of Bihar & Ors.***

passed in ***LPA No.1699 of 2013*** has held *inter alia* in Paragraph no.12 as follows :

“We are only reminded what Chief Justice Chagla said more than half a century back in the case of ***All India Groundnut Syndicate Limited -Versus- Commissioner of Income Tax, Bombay City, AIR 1954 Bombay 232*** :

“But the most surprising contention is put forward by the Department that because their own officer failed to discharge his statutory duty, the assessee is deprived of his right which the law has given to him under sub-section (2) of S 24. In other words, the Department wants to benefit from and wants to take advantage of its own default. It is an elementary principle of law that no person -we take it that the Income-tax Department is included in that definition -can put forward his own default in defence to a right asserted by the other party. A person cannot say that the party claiming the right is deprived of that right because “I have committed a default and the right is lost because of that default.”

8. It is well settled law that no man can take advantage of his own wrong and I find it apt to reproduce Paragraph Nos. 18 and 19 of the judgment dated ***09.05.2024*** passed by the Apex Court in the case of ***Municipal Committee Katra & Ors. vs. Ashwani Kumar [Civil Appeal No(s) 14970-71 of 2017]***, as follows :

“18. The situation at hand is squarely covered by the latin maxim ‘*nullus commodum*



*capere potest de injuria sua propria*’, which means that no man can take advantage of his own wrong. This principle was applied by this Court in the case of **Union of India v. Maj. Gen. Madan Lal Yadav** observing as below :

"28....In this behalf, *the maxim nullus commodum capere potest de injuria sua propria* meaning no man can take advantage of his own wrong-squarely stands in the way of avoidance by the respondent and he is estopped to plead bar of limitation contained in Section 123(2).

*In Broom's Legal Maxim (10th Edn.) at p. 191* it is stated:

"... it is a maxim of law, recognised and established, that no man shall take advantage of his own wrong; and this maxim, which is based on elementary principles, is fully recognised in courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure."

The reasonableness of the rule being manifest, we proceed at once to show its application by reference to decided cases. It was noted therein that a man shall not take advantage of his own wrong to gain the favourable interpretation of the law. In support thereof, the author has placed reliance on another maxim *frustra legis auxilium invocat quaerit qui in legem committit*. He relies on *Perry v. Fitzhowe* [(1846) 8 QB 757:15 LJ QB 239].

At p. 192, it is stated that if a man be bound to appear on a certain day, and before that day the obligee puts him in prison, the bond is void. At p. 193, it is stated that "*it is moreover a sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned*". At p. 195, it is further stated that "*a wrong doer ought not to be permitted to make a profit out of his own wrong*". At p. 199 it is



observed that *"the rule applies to the extent of undoing the advantage gained where that can be done and not to the extent of taking away a right previously possessed"*.

*"19. It is beyond cavil of doubt that no one can be permitted to take undue and unfair advantage of his own wrong to gain favourable interpretation of law. It is a sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned. To put it differently, 'a wrong doer ought not to be permitted to make profit out of his own wrong'. The conduct of the respondent-writ petitioner is fully covered by the aforesaid proposition."*

9. In the case of **Pulin Behari Lal v. Mahadeb Dutta & Ors.**, reported in (1993) 1 SCC 629, the Apex Court in paragraph no.6 has held as under:

*"6. ... .. Waiver is a question of fact which depends on the facts and circumstances of each case. In the case of waiver of any provisions of the statute it is necessary to prove that there was conscious relinquishment of the advantage of such provisions of the statute. ... .."*

10. Further, in this regard, I would like to refer to paragraphs no.8 and 9 of the decision rendered in case of **Bibi Amna Khatun & Ors. v. Zahir Hussain & Anr.**, reported in AIR 1981 Patna 1, which is as under:

*"8. In my opinion, simply because the second part of Section 11A is mandatory in nature, will not rule out the application of the principle of "waiver", if once the correct scope of this maxim is appreciated and understood. Although the desired assistance was not rendered at the Bar, I have taken some pains to examine the proposition in its true*



perspective with reference to the facts of the present case.

9. The essence of waiver is “estoppel” and where there is no “estoppel”, there can be no “waiver”, the connection between “estoppel” and “waiver” being very close. But in spite of that, there is an essential and fundamental difference between the two and that is that whereas estoppel is a rule of evidence, waiver is a rule of conduct. The accepted connotation of “waiver” is that to constitute waiver there must be an intentional relinquishment of a known right or the voluntary relinquishment or abandonment of an existing legal right and a conduct which warrants an inference of the relinquishment of a known right or a privilege (see AIR 1959 SC 149).

11. In this context, I would also like to refer paragraphs no.9 and 10 of the decision taken in case of **Krishna Bahadur v. Purna Theatre**, reported in (2004) 8 SCC 229, which is as under:-

“9. The principle of waiver although is akin to the principle of estoppel; the difference between the two, however, is that whereas estoppel is not a cause of action; it is a rule of evidence; waiver is contractual and may constitute a cause of action; it is an agreement between the parties and a party fully knowing of its rights has agreed not to assert a right for a consideration.

10. A right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein. Whenever waiver is pleaded it is for the party pleading the same to show that an agreement waiving the right in consideration of some compromise came into being. Statutory right, however, may also be waived by his conduct.”

12. The Apex Court in case of **Babulal**



**Badriprasad Varma v. Surat Municipal Corpn.**, reported in **(2008) 12 SCC 401**, in paragraphs 28 and 29 has held as follows:-

“28. We would, however, assume that it was obligatory on the part of the State to serve a special notice upon the appellant. The question, however, would be: what would be the consequence of non-compliance therewith vis-a-vis the conduct of the appellant himself ?”

“29. A person may waive a right either expressly or by necessary implication. He may in a given case disentitle himself from obtaining an equitable relief particularly when he allows a thing to come to an irreversible situation.”

13. The principle of waiver connotes issuance of notice and non-response thereto. Everyone has a right to waive an advantage or protection, which law seeks to give him/her. Undoubtedly, in the present case in response to the clear information of the District Education Officer in his letter dated 25.08.2020, the petitioner had filed her representation before the respondent no.3 (the Director, Primary Education), which will not amount to waiver of the right but will be considered as the dilatory conduct of the respondent in not disposing the representation dated 03.09.2021.

14. Considering the facts and circumstances of the case, the Director, Primary Education is directed to take immediate steps to call for the entire particulars in respect of the



petitioner from the office of the District Education Officer/District Programme Officer (Establishment), Purnea forthwith, if already not received in the office of the Director, Primary Education and take a conscious decision in view of the grievance of the petitioner, which has been raised in the present writ petition by disposing of the representation of the petitioner in accordance with law expeditiously without any further delay.

15. In case, no action is taken by the Director, Primary Education, the petitioner is at liberty to take legal action against the Director, Primary Education.

16. The Director, Primary Education must consider that a handicapped candidate must not be forced to face situation, which deprives her from her right of employment.

17. With the above observation and direction, the present writ petition stands disposed of.

**(Purnendu Singh, J)**

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