REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. OF 2024
(Arising out of SLP(C)Nos. 9656-9657 of 2023)

BIHAR STAFF SELECTION COMMISSION & ANR. **...APPELLANT(S)**

VERSUS

HIMAL KUMARI & ANR. ETC. **...RESPONDENT(S)**

Selection and Appointment---Constitution of India---Article 309---Bihar City Manager Cadre (Appointment and Service Conditions) Rules, 2014---Rule 5, 11---written examination conducted by the Appellants for appointment to 152 posts of City Managers in the State of Bihar wherein Respondent No. 1 participated but was declared unsuccessful as she did not obtain the minimum qualifying marks of 32%--- Respondent no-1 secured 22.5 marks out of 70 in the written test and as she had no prior work experience, she achieved 0 marks out of 30 for the work experience---respondent no. 1 contended that the minimum requirement of 32% mentioned in the advertisement is just for the written test as per a simple textual interpretation and she has achieved 22.5 marks out of 70, which comes to 32.14%, above the minimum qualifying marks of 32%---Writ Court decided in favour of Respondent no-1 holding that the minimum qualifying marks is relatable to only written test and once the candidates qualified in the written test he is entitled to be considered for preparation of merit list----decision of Single Judge confirmed by the Division Bench---Hence the present appeals.

Held: The required minimum qualifying marks are concerned with marks obtained in the written test only, as is evident from the Rules 2014 as also the advertisement, and it has no relevance so far as for the final preparation of the merit list---criteria for minimum qualifying marks mentioned in the Rules 2014 and the advertisement states that 32 % for women is the minimum qualifying marks for the written test (70 marks) and not out of 100 marks as interpreted by the appellants---Executive Order dated 16.07.2007 is in no way clarificatory or explanatory with respect to the Rules of 2014---impugned judgment affirmed---appeals dismissed. **(Para 8, 11, 17, 19, 21)**

(2022) 11 SCC 392 …….**Referred to.**

2024 INSC 531

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J U D G M E N T

VIKRAM NATH, J.

1. Leave Granted
2. The appeals under consideration challenges the validity of the judgment dated 20 December 2022 (Corrected on 22 February 2023) passed by the Patna High Court in L.P.A. No's 412 and 109 of 2021 arising out of C.W.J.C. No. 7051/2020, whereby the Division Bench of the High Court dismissed both the appeals and refused to interfere with the judgment and order dated 15.10.2020 passed by the Single

Judge.

3. The issue pertains to the selection and appointment to the post of City Manager under the Urban Development and Housing Department, Govt.of Bihar. The said post is governed by the Bihar City Manager Cadre (Appointment and Service Conditions) Rules, 2014[1], which were framed under Article 309 of the Constitution of India.

4. For the present case, it is relevant to reproduce Rule 5 and Rule 11 of Rules 2014, which reads as follows:

> *"Rule 5 - Process of Recruitment, appointment and procedure of Recruitment:- (1) Appointment to the basic category of these posts in this cadre, will be by direct Recruitment (written examination) on the recommendation of the Commission. Total 100 marks will be determined for direct Recruitment.*
>
> *Out of total 100 marks, 70 marks will be determined for the written examination. 10 marks for experience for every year and a maxi-mum 30 marks shall be given for the appointment to the post of City Manager working on contract basis.*
>
> *Determination of subjects for written examination will be determining by the Commission in consultation with*

[1] Rules, 2014

the Department.

(ii) Not withstanding anything contain in these Rules, where any post in the cadre is vacant due to unavailability of suitable candidate or where any post is vacant due to leave of anyone or is vacant on temporary basis, in the interest of work that post may be filled up by suitable qualification holder person by deputation/ contract basis.

Rule 11 - Residual matters.- Rules, regulations and orders of the State Government for employees of suitable level will apply for members of this cadre with regard to the matters particularly not covered in these Rules or any regulations made under these Rules."

5. Appellants issued an advertisement dated 15.11.2016 under Rules, 2014, for appointment to 152 posts of City Managers in the State of Bihar. The advertisement contained the required information regarding the vacancies, eligibility, criteria etc. and the selection procedure to be followed for the appointment.

6. In the advertisement, the sub-heading of the *'Selection Process'* states,

"The commission will prepare a merit list on the basis of written examination and experience (for candidates

working on the post of City Manager on contract) after receiving online applications submitted by eligible candidates. Total 100 marks will be determined for direct Recruitment. The written examination will be conducted of 100 questions and each question carrying 0.70 marks. 0.70 marks will be given for the correct answer and 0.70/4 marks will be deducted for the wrong answer.

Similarly, out of total 100 marks, 70 marks will be determined for written examination. Candidates working on contract basis on the post of City Manager will be given 10 marks per year and maximum 30 marks for their experience."

7. The sub-heading of the *'Qualifying marks'* states

"The minimum qualifying marks for the candidates for the written test are as follows:-
General Class - 40%
Backward Class - 36.5%
Most Backward Class - 34%
SC/ST - 32% Female - 32%".

8. Under the said advertisement, Respondent No. 1, who had no prior work experience, participated in the written examination conducted by the appellants for the said post. She achieved 22.575 marks out of 70 in the written examination. The

appellants declared her unsuccessful vide communication dated 27.12.2019. The reason for declaring respondent no. 1 as unsuccessful was that she did not obtain the minimum qualifying marks of 32% as she had secured 22.5 marks in the written test and as she had no prior work experience, she achieved 0 marks out of 30 for the work experience. In totality, she has achieved 22.5 marks out of 100, below the minimum requirement of 32%. Meanwhile, respondent no. 1 contends that the minimum requirement of 32% mentioned in the advertisement is just for the written test as per a simple textual interpretation. She has achieved 22.5 marks out of 70, which comes to 32.14%, above the minimum qualifying marks of 32%.

9. Dissatisfied with the result communicated to her, she approached the High Court by filing a writ petition registered as C.W.J.C. No. 7051/2020, praying therein for issuance of an appropriate

writ/order/direction to the appellants to call her for counselling as she was qualified as per the advertisement and secured more marks than the qualifying marks prescribed for the written test. She further prayed for quashing the letter dated 27.12.2019 and also for issuing directions for giving her appointment.

10. The Single Judge allowed the Writ Petition vide judgment dated 15.10.2020. The operative part of the judgment in favour of respondent No. 1 reads as under:

> *"Considering the submission of the parties and also on consideration of the advertisement which contains the qualifying marks, the Court is of the considered view that the minimum qualifying marks is relatable to only written test and once the candidates qualified in the written test he is entitled to be considered for preparation of merit list and those candidates who qualified in the written test cannot be excluded from consideration zone on the ground that the candidates failed to obtain qualifying marks over and above qualifying marks in the written test. Not only written examination but also 40%, 36.5%, 34%, 32% and 32% in General, BC, E.B.C., SC/ST and female categories*

on the basis of total 100 marks which includes written test as well as experience. Accordingly, the writ petition is disposed of with direction to the respondents to consider the case of the Petitioner and alike for appointment against the post of City Manager on the basis of qualifying marks in the written test and prepare merit list. The entire exercise in this regard must be completed by the respondents at the earliest preferably within a period of three months from the date of receipt/production of a copy of this order."

11. Aggrieved by the judgment, the appellants filed L.P.A. No. 412/2021 before the Division Bench. Some candidates also preferred an L.P.A. No. 109/2021 against the judgment of the Single Judge because despite having experience and more marks than Respondent No. 1 they would be adversely affected by the above judgment.

12. The appellant Commission was relying on an Executive Order dated 16.07.2007, which stated

"Uniform determination of minimum qualifying marks for various competitive examinations has been done by Resolution Nos. - 15838 dated 22.12.90 and 10258 dated 05.08.91 in the following form:-
General Category -40%

Backward Class -36.5%
Backward Class Annexure 1- 34%
SC/ST & Women Class-32%
The determination of minimum qualifying marks in the above form will be equally applicable to all written examinations (objective/subjective) for various reservation categories for competitive examinations of all services/cadres. Wherever applicable, it will be mandatory to obtain above minimum qualifying marks in the interview"

13. The Division Bench specifically dealt with the Executive order dated 16.07.2007 and dismissed the said L.P.A.'s for the reasons recorded which are reproduced hereunder:

"Heard learned counsels for the respective parties. Core issue involved in the present lis is whether Commission has committed error in taking note of criteria laid down in the executive order issued under Article 166 of the Constitution dated 16.07.2007 as one of the criteria for the purpose of City Manager post or not? First respondent was candidate for Recruitment to the post of City Manager and she was un-successful, therefore, she has approached this Court. Her grievance is that having regard to the merit read with the number of vacancies she is entitled to selection and appointment to the post of City Manager and further submitted that if Women Reservation (Horizontal

Reservation) is given effect even in such circumstances the first respondent is entitled. The post of City Manager is governed by Rules, 2014. Perusal of Rule 5 read with Rule 11 there is no adoption of Government order dated 16.07.2007 in so far as criteria in other words addition to what-ever the procedure prescribed in Rule-5 and Rule 11 of Rules, 2014 is relating to the present selection and appointment procedure & applicability of various Rules & Government Orders in so far such of those persons enter the cadre & it is not related to selection procedure. On the other hand if any Government order subsequent to Rules, whatever the government order and Rules are applicable to the City Manager Cadre Post. Rule 11 cannot be read with Rule 5 so as to read additional criteria for the purpose of selection and appointment to the post of City Manager. Supplant by any material information by means of executive order without tinkering the original rule could be issued however, in the present, case executive order is dated 16.07.2007 on the other hand Rules is of the year 2014 there cannot be a supplant of Government order dated 16.07.2007 to Rules, 2014.

In the light of these facts and circumstances, the appellant have not made out a case so as to interfere with the order of the learned Single Judge…."

14. Aggrieved by the impugned judgment and order dated 20.12.2022 (Corrected on 23.02.2023), Appellants have approached this Court by filing the present appeals.

15. Upon thoroughly examining all the records and arguments presented, we find that the impugned judgment is justified and correct. The judgment warrants no interference. The Division Bench has rightly confirmed the judgment passed by the Ld. Single Judge.

16. A conjoint reading of the Rules, 2014 in particular rules 5 and 11, with the advertisement and giving it a pragmatic and harmonious construction, what emerges is that 32% in the written examination would make a candidate eligible and qualified to be placed in the consideration zone. However, the merit list would be prepared after taking into consideration the marks obtained on account of experience. Thus, a candidate similar to respondent no.1 would be eligible to be considered for appointment having scored 32% marks (22.5 marks out of 70) in the written examination even though having no experience. Whereas another candidate who has scored 32% marks in the written

with three years experience will have scored a total of 22.5 plus 30 a total of 52.5 marks out of 100. Such a candidate will stand much higher in the merit list. The candidate with just qualifying 32% marks in the written (22.5 out of 70) with no experience will stand almost at the bottom of the merit list, but still she will be eligible and qualified to be appointed provided the merit list goes as low as 22.5 marks out of 100. Another example may be referred where a candidate has three years of experience (30 marks) but scores only seven marks out of 70 in the written test (10% marks in the written test) even though the total obtained would be 37 marks but would not be eligible or qualified to be considered as the minimum required marks in the written test i.e. 32% has not been obtained by the said candidate.

17. The required minimum qualifying marks are concerned with marks obtained in the written test

only, as is evident from the Rules 2014 as also the advertisement, and it has no relevance so far as for the final preparation of the merit list. The conduct of the appellants by not including respondent no. 1 in the merit list is not in consonance with the said advertisement.

18. The merit list was prepared in terms of Rule 5, read with Rule 11 of Rules 2014, which has been presented at the beginning of the judgment. Rules 5 and 11 deal with the process of Recruitment, appointment, recruitment procedure, and Residual matters. Nowhere in such rules there is mention of any minimum qualifying marks required out of a total of 100 marks.

19. The appellants have argued that doubts and ambiguities in Rules 2014 can be successfully cleared using an Executive Order without tinkering with the original Rule. In the present case, the Executive Order is dated 16.07.2007 which is much earlier to the Rules which are of 2014. Therefore, the

Executive Order of 2007 is in no way clarificatory or explanatory with respect to the Rules of 2014. The Division Bench rightly discarded the applicability of the Executive Order dated 16.07.2007. The only criteria for minimum qualifying marks have been mentioned in the Rules 2014 and the advertisement, which states that 32 % for women is the minimum qualifying marks for the written test (70 marks) and not out of 100 marks as interpreted by the appellants.

20. The judgment in the case of **Employees' State Insurance Corporation** vs. **Union of India & Ors.**[2], relied upon on behalf of the appellants has no application in the facts of the present case. In the above judgment one of the issues was whether the executive decision will prevail or the statutory regulations. This Court, relying upon the settled law, held that the statutory regulations will prevail. In

[2] (2022) 11 SCC 392

the present case the view taken by the High Court is also giving primacy to the Rules 2014 as compared to an earlier executive decision dated 16.07.2007. In fact the above judgment helps respondent no.1.

21. Respondent no. 1 received 22.5 marks out of 70, 32.14 per cent, above the minimum qualifying marks of 32 per cent as per the advertisement. Therefore, the appellants were not right by denying her a place on the merit list. Impugned judgement does not warrant any interference.

22. Accordingly, these appeals are dismissed.

.....J.
(VIKRAM NATH)

.....J.
(PRASANNA BHALACHANDRA VARALE)

NEW DELHI

JULY 16, 2024