

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No. 21075 of 2019

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Raghwendra Kumar S/o Sh Jitendra Singh Resident of Village Nagwan, P.S.-
Guruua, District- Gaya, Bihar- 824219.

... .. Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar, Patna.
2. The Chairman-cum- Managing Director, Bihar State Power (Holding) Company Ltd. Jawahar Lal Nehru Bhawan, Bailey Road, Patna.
3. The Principal Secretary, Energy Department, Govt. of Bihar, Patna.
4. The Director (Human Resources and Administration) Bihar State Power (Holding) Company Ltd. JawaharLal Nehru Bhawan, Bailey Road, Patna.
5. The General Manager, (Human Resources and Administration), Bihar State Power (Holding) Company Ltd., Jawahar Lal Nehru Bhawan, Bailey Road, Patna.
6. Mr. Arvind Kumar S/o Mr. R.S. Shah then Under Secretary, Section 6, Bihar State Power (Holding) Company Ltd., Jawahar Lal Nehru Bhawan, Bailey Road, Patna. At present Under Secretary, Company HQ, SBPDCL, Patna, R/o Flat No. 304, Shanti Shakuntala Apartment, Shekhpura, Patna.
7. Ms. Chinmayee D/o Shiv Ganga Prasad Singh R/o Village Niru Niwas, Salimpur Ahra, Gali No. 1, Kadam Kuan, Patna- 800003.

... .. Respondent/s

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Appearance:

For the Petitioner/s : Mr. Amarnath Singh, Advocate
Mr. Anish Kumar, Advocate
For the Respondent/s : Mr. Abbas Haider (SC-6)
For the Respondent-Company : Ms. Soni Shrivastava, Advocate

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CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH

CAV JUDGMENT

Date : 04-09-2021

The instant case has been taken up for consideration
through the mode of Video conferencing in view of the



prevailing situation on account of COVID 19 Pandemic, requiring social distancing.

2. The present writ petition has been filed for quashing the order dated 30.07.2009 issued by the Under Secretary, Bihar State Power Holding Company Limited i.e. the respondent no. 6, whereby and whereunder the claim of the petitioner for appointment on the post of Assistant Personnel Officer, has been rejected on the ground that the petitioner is younger in age than the candidate last shortlisted though the said candidate as also the petitioner have secured the same marks. The petitioner has further prayed to direct the respondents to appoint the petitioner on the post of Assistant Personnel Officer against the vacant post published vide employment notice no. 10 of 2018, by the respondents.

3. The brief facts of the case are that the petitioner was initially appointed as Junior Accounts Clerk and he is at present working as Account Assistant in the Bihar State Power Holding Company Limited since 10.05.2013. An advertisement bearing employment notice no. 10/2018 (internal) was published, inviting online applications for appointment on various posts including that of Assistant Personnel Officer, from the eligible employees who have been working in the regular establishment



for minimum five years in the Bihar State Power Holding Company Limited and its four subsidiaries companies. The petitioner had applied for being appointed on the post of Assistant Personnel Officer. It is the case of the petitioner that he was surprised to find that his name has not figured in the list of shortlisted candidates for the said post of Assistant Personnel Officer, despite having secured the cut off marks in the unreserved category. In fact the petitioner is stated to have secured same marks as that of the last selected candidate, namely Rajeev Kumar. It is also submitted that the minimum service length of an employee to qualify for appointment on the aforesaid post of Assistant Personnel Officer was reduced from five years to three years vide corrigendum dated 30.01.2018 in order to favour the private respondent no. 7 herein. The aforesaid employment notice no. 10/2018 (internal) envisaged 13 vacant posts of Assistant Personnel Officer and as far as the petitioner's category is concerned, i.e. the unreserved category, five vacant posts had been advertised. Under clause-11 of the employment notice no. 10 of 2018, it has been stipulated that the candidates would be shortlisted on the basis of marks obtained in paper based written exam (OMR based) and the minimum qualifying marks for the test shall be 40 % for the



unreserved category. The learned counsel for the petitioner has submitted, by referring to clause-7 of the *Karmik Seva Samvarg Nimayawali*, 2015 (hereinafter referred to as the 'Rules, 2015') that the post of Assistant Personnel Officer is the entry level post of the personnel cadre and 5 % of the total sanctioned post of Assistant Personnel Officer is to be filled by way of internal appointment from the merit list prepared on the basis of limited written competitive examination, in which those employees or staff who have completed 5 years of service with the company/ Board shall be eligible to appear. Thus, it is submitted that since the respondent no. 7 namely Ms. Chinmayee had not completed five years of service as on the date of filing of the application, she was not eligible to be considered for appointment on the post of Assistant Personnel Officer, nonetheless, her name figures at serial no. 6 in the list of shortlisted candidates for the post of Assistant Personnel Officer, although it is yet another aspect of the matter that the respondent company, by a corrigendum dated 30.10.2018, has amended the terms and conditions of the employment notice no. 10 of 2018, by relaxing the required minimum service length from five years to three years, though in the original advertisement bearing employment notice no. 10 of 2018, the required minimum service length was



prescribed as five years, for the purposes of filing online application. It is also submitted that no merit list has been published, as is postulated under Rule 7 of the Rules, 2015, hence the entire process of recruitment and the consequent appointment on the post of Assistant Personnel Officer stands vitiated in the eyes of law. It is further submitted that only three shortlisted candidates have joined on the post of Assistant Personnel Officer, hence vacancy still exists, thus the petitioner can be accommodated.

4. The learned counsel for the petitioner has further submitted that the petitioner had filed a representation before the Director as also before the General Manager, HR of the respondent company but the case of the petitioner has been rejected on the ground that the last selected candidate under the unreserved category on the post of Assistant Personnel Officer had obtained 51 marks, hence a decision was taken, considering the date of birth and since the date of birth of the said candidate namely Shri Rajiv Kumar is 11.10.1984 and he is elder to the petitioner, whose date of birth is 20.10.1984, the said candidate, namely Rajiv Kumar has been selected.

5. The Ld. counsel for the petitioner has referred to a judgment rendered by the Hon'ble Apex Court in the case of



Bibhudatta Mohanty vs. Union of India, reported in (2002) 4

SCC 16, paragraph no. 14 whereof is reproduced herein below:-

“14. Further, the Tribunal is not right in ignoring the averment in the counter-affidavit of the official respondents, extracted above, that the appellant was selected on merit and erred in holding that the selection was made solely on the ground that amongst all the candidates he was the senior most in age. It is thus clear that the selection of the appellant was on merit and not solely on the ground of being senior in age. It cannot be disputed that a selection solely on the basis of being senior in age is vitiated by extraneous consideration. But when, as in this case, the selection is on the basis of merit, merely because the seniority in age of the candidate is also taken into consideration, it would not be right to invalidate the selection.”

6. Per contra, the learned counsel for the respondent Company Ms. Soni Shrivastava has submitted that the cut off marks for the post of Assistant Personnel Officer was fixed as 51 marks and the petitioner had also obtained 51 marks but since one other candidate having 51 marks was elder in age to the petitioner, the said candidate has been selected. It is further submitted that it is a settled principle of law that in case two candidates obtain equal marks, age factor is taken into consideration and the person who is senior in age is given priority for employment. It is also submitted that once the merit



list has been prepared, the selection procedure comes to an end, thus if any post remains vacant the same is carried forward to the next year. It is contended that clause-7 of the Cadre Rules, 2015 has been diluted/modified by the competent authority of the respondent company and the required length of service has been reduced from five years to three years, for which the competent authority of the company is empowered. It is also contended that after the written examination had been held, the list of shortlisted candidates i.e. the merit list/select list was prepared in the ratio of 1:1 and then the selected candidates were called for document verification, whereafter, considering the remarks of the document verification committee, a selection committee was constituted vide office order dated 12.02.2019, which recommended the names of the eligible candidates against the employment notice no. 10/2018 (internal). It is also categorically stated that no recruitment panel exists save and except the aforesaid select list. The learned counsel for the respondent company has referred to a judgment reported in **(2011)8 SCC 115 (DP Das vs. The Union of India & Ors.)**, to demonstrate that age is the only valid and fair basis to determine seniority of candidates, similarly situated.

7. I have heard the learned counsel for the parties and



gone through the materials on record from which it is apparent that the rules of the game have been changed midway inasmuch as after the advertisement was published bearing employment notice no. 10 of 2018 (internal) prescribing therein that the posts in question would be filled from amongst the eligible employees who have been working in the regular establishment of the respondent company and its four subsidiary companies for a minimum period of five years, the respondents had subsequently, by a corrigendum dated 30.10.2018, amended the terms and conditions of the employment notice no. 10 of 2018, by relaxing the required minimum service length from five years to three years. Thus this Court finds that the respondent company has erred on this score. Nonetheless, this Court finds that since the petitioner, instead of challenging the said corrigendum dated 30.10.2018, had voluntarily participated in the selection process without any demur and protest, he cannot now be permitted to challenge the entire selection process on the said ground, especially when he has failed in the selection process. In this regard, it would be relevant to refer to a judgment rendered by the Hon'ble Apex Court in the case of *Madan Lal and others vs. The State of J & K and others*, reported in (1995) 3 SCC 486.



Moreover, the petitioner has also not challenged the aforesaid corrigendum dt. 30.10.2018, whereby and whereunder the respondent company has amended the terms and conditions of the employment notice no. 10 of 2018, by reducing the required minimum service length from five years to three years, as such the petitioner's contention that the entire selection process stands vitiated since the rules of the game have been changed midway, holds no water, hence is fit to be rejected.

8. The other issue raised by the learned counsel for the petitioner is regarding the illegal decision taken by the respondent company to declare another applicant as a successful candidate, instead of the petitioner, although both of them had secured the same marks, merely on the basis that the said candidate is senior in age to the petitioner, inasmuch as, neither the advertisement nor the Rules, 2015 provide for such a mechanism. In this regard, the learned counsel for the respondent Company has failed to show, from the Rules, 2015, that any such procedure exists whereby a similarly situated candidate, who has though obtained same marks as the other candidate, can be declared to be a successful candidate, merely on account being elder in age to the other candidate. But then while the learned counsel for the respondent-Company has



relied on a judgment rendered by the Hon'ble Apex Court in the case of **DP Das** (supra), the learned counsel for the petitioner has relied on a judgment rendered by the Hon'ble Apex Court in the case of **Bibhudatta Mohanty** (supra). This Court thus finds that that the judgment relied upon by the learned counsel for the petitioner takes into account a situation where not only the seniority in age of a candidate has been taken into consideration but selection has been made on the basis of the merit of such candidate as well, nonetheless, the said judgment also states that a selection made solely on the basis of being senior in age is vitiated by extraneous consideration. On the other hand, the judgment relied upon by the respondent-Company, rendered in the case of **DP Das** (supra), though speaks about age being the only valid and fair basis for determination of seniority of the officers who were recommended on the same day but the said judgment does not deal with a selection process and instead pertains to determination of seniority.

9. Having regard to the facts and circumstances of the present case, this Court is of the view that in order to iron out the equities and put a quietus to the dispute in question, both from the point of view of the respondent-company as also from the petitioner's perspective and taking into account the fact that



the action of the respondent company in the aforesaid selection process cannot be said to be free from procedural infirmities/ inconsistencies, as has been detailed at length herein above, apart from the glaring infirmity to the effect that though a select list appears to have been prepared but no merit list, as envisaged under the Rules, 2015, has been brought on record of this case, I deem it fit and proper to direct the Chairman-cum-Managing Director, Bihar State Power Holding Company Limited to consider the case of the petitioner for appointment on the post of Assistant Personnel Officer, in view of the fact that vacancies still exist. It is needless to state that appropriate decision shall be taken in this regard within a period of six weeks of receipt/ production of a copy of this order.

10. The writ petition stands disposed off on the aforesaid terms.

(Mohit Kumar Shah, J)

S.Sb/-

AFR/NAFR	NAFR
CAV DATE	30.07.2021
Uploading Date	08.09.2021
Transmission Date	

