

(2019) 02 PAT CK 0030

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 20119 Of 2018

Anjani Parashar And Anr

APPELLANT

Vs

State Of Bihar And Ors

RESPONDENT

Date of Decision : 22-02-2019

Acts Referred:

Constitution Of India, 1950 — Article 226

Citation : (2019) 2 PLJR 407

Hon'ble Judges : Amreshwar Pratap Sahi, CJ;Anjana Mishra, J

Bench : Division Bench

Advocate : Manan Kumar Mishra, Vishwajeet Kumar Mishra, Sanjay Kumar Pandey, Ashutosh Tripathi, Bal Govind Sharma, Saroj Kumar Sharma, Peeyush Lal

Final Decision : Dismissed

Judgement

Heard Mr. Manan Kumar Mishra, learned Senior Counsel, Mr. Vishwajeet Kumar Mishra, Mr. Sanjay Kumar Pandey, Mr. Ashutosh Tripathi, Mr. Bal Govind Sharma, learned counsels appearing for the petitioners, Mr. Saroj Kumar Sharma, learned AC to AAG-3 appearing for the State and Mr. Peeyush Lal, learned counsel appearing for the Patna High Court.

The two petitioners have sought a direction for the Appointment and Selection Committee of the Patna High Court to review, revise and re-evaluate the original answer-books of Theory Paper-I and Theory Paper-II of the petitioners by adopting moderation in relation to the Main (written) Examinations for selection to the post of District Judge (Entry Level) direct from the Bar held pursuant to Advertisement No. BSJS/1 of 2016 dated 22nd August, 2016.

The preliminary examinations were held on 23rd July, 2017. The results were declared on 24th August, 2017 and the main written examinations were conducted on 8th October, 2017, the results wehereof were published on 20th December, 2017. The final results were uploaded on 21st March, 2018. The petitioners being dissatisfied with the award of marks to them in both the

papers, sought information about their answer-books under the Right to Information Act that was supplied to them in May, 2018.

The petitioners on 13th September, 2018 represented before the High Court pointing out and alleging discrepancies with regard to the process of evaluation in the main written examinations contending that they have been unsuccessful on account of interpolation and over-writings in the answer-sheets while awarding marks by the examiners.

Their main grievance appears to be that a large number of candidates have appeared and the answer-books had been distributed amongst various examiners, the award of marks and evaluation was diverse, as some examiners may have been liberal and some may have been strict.

The respondent-High Court filed a counter-affidavit on 22nd January, 2019 controverting the said allegations. The petitioners also moved an Interlocutory Application on 29th January, 2019 raising the plea of getting the answer-sheets evaluated after adopting the procedure of moderation as per the ratio of the judgment in the case of Sanjay Singh and Anr. vs. U.P. Public Service Commission, Allahabad and Anr. reported in (2007) 3 SCC 720. A rejoinder to the counter affidavit was filed by the petitioners and in the rejoinder affidavit the plea was reinforced with the aid of another judgment of the Supreme Court in the case of Sujasha Mukherji vs. The Hon'ble High Court of Calcutta through Registrar and others reported in (2015) 11 SCC 395. The petitioners have tried to point out discrepancies for the award of marks in Paragraph 9, 10 and 11 of the rejoinder affidavit alleging that the representation which has been rejected by the High Court does not record any reason or take into account the aforesaid discrepancies. It has further been urged that the aforesaid judgments have further been reiterated in the case of Centre for Public Interest Litigation vs. Registrar General of the High Court of Delhi reported in (2007) 11 SCC 465 and again in the case of Taniya Malik vs. Registrar General of the High Court of Delhi reported in 2018 SCC Online 226. To further substantiate as to why moderation was necessary, paragraphs 19 and 20 of the rejoinder affidavit have been placed to contend that the same deserves to be noticed in order to appreciate the aforesaid submissions.

It has further been submitted by Sri Manan Kumar Mishra that with regard to individual discrepancies the dismissal of CWJC No. 17768 of 2018 (Shashank Shekhar Sinha vs The State of Bihar and Ors.) by this Bench on 8th January, 2019 does not in any way affect the cause of the petitioners inasmuch as the plea raised in the present petition is distinct therefrom.

Consequently with the aforesaid position of law expounded by the Apex Court the respondent-High Court has committed an error in not proceeding to adopt the system of moderation, and had this system been adopted, the variation in marks could have been considerably reduced that would have favoured the petitioners. Thus, the avoidance of such procedure in spite of the directions of the Supreme

Court in the judgments referred to above, a mandamus deserves to be issued in order to re-evaluate the answer-sheets through moderation and the results of the main examinations should be revised accordingly.

Countering the said submissions, learned counsel for the High Court, Mr. Peeyush Lal has urged that the issue of re-evaluation on the basis of allegations which are unfounded and not borne out as alleged cannot be a matter of judicial review keeping in view the judgment of the Apex Court in the case of Pramod Kumar Srivastava vs. Chairman, Bihar Public Service Commission, Patna and Others reported in (2004) 6 SCC 715, the judgment of the Apex Court in the case of Himachal Pradesh Public Service Commission vs. Mukesh Thakur and Anr. reported in (2010) 6 SCC 759 and the judgment of a Division of this Court in the case of Ravindra Kumar Singh vs. the High Court of Judicature at Patna through its Registrar General and ors. reported in 2016 (1) PLJR 865. On the basis of the status report available on the website of the Supreme Court, SLP (C) No. 004601 of 2016 registered on 15.02.2016 is stated to have been dismissed on 23.02.2016 by a two Judges Bench.

Sri Peeyush Lal, learned counsel for the High Court then contended that the petitioners have participated in the selection process as per the Bihar Superior Judicial Service Rules, 1951 and the advertisement in pursuance thereof, without challenging the same and they cannot now turn around to criticize the High Court for which reliance is placed on Ramesh Chandra Shah and Others vs. Anil Joshi and Others reported in (2013) 11 SCC 309. Sri Peeyush Lal, learned Counsel for the High Court has urged that the prayer for moderation of marks to be adopted for evaluating the answer-books of the two petitioners in relation to theory papers, written examinations in question is contrary to the law laid down in the case of Umesh Chandra Shukla vs. Union of India and Ors. reported in (1985) 3 SCC 721 as reaffirmed in the case of Jamaluddin vs. State of Jammu & Kashmir and Others reported in (2011) 14 SCC 725. It is contended that since there is no such provision of moderation in the rules or in the advertisement the contention raised on behalf of the petitioners is unacceptable.

Distinguishing the judgment in the case of Sujasha Mukharji (supra), it is urged that in the said case though moderation was adopted by the examining body itself, but since it had not been observed in the terms of the judgment in the case of Sanjay Singh (supra) therefore the Supreme Court had interfered in the matter. Learned counsel submits that in the present case no system of moderation was adopted at all nor was required to be adopted in the absence of any such rules therefore the judgment in the case of Sujasha Mukherji (supra) cannot be made applicable. He has then urged that the decision in the case of Sunil Kumar and Others vs. Bihar Public Service Commission and Others reported in (2016) 2 SCC 495 is that if the Commission had adopted the system of moderation instead of scaling, the same could not be said to be arbitrary. He further submits that the Court even assuming that the Bihar Public Service Commission had erred or acted in a less responsible manner, the same could not

be a ground of judicial review.

In addition to the above submissions Sri Lal has ultimately cited the order passed in Civil Appeal No. 10870 of 2016 and two others (Navdeep Singh Suhag & Ors. vs. The State of Haryana and Anr) where the Apex Court having noticed the judgment in the case of Sanjay Singh (supra) and Sunil Kumar (supra) by a three judges decision appears to have approved, the ratio of the judgment in the case of Sunil Singh (supra) holding that the three Judges' decision in the case of Sanjay Singh (supra) did not decide that in an examination, where the papers are common the system of moderation must be applied and on the other hand in an examination where the papers are different it has been held that scaling is not the only available option. It is, therefore, urged that the said judgment which has been rendered by a three Judges' Bench on 13th November, 2017 would hold the field explaining the judgment in the case of Sanjay Singh (supra). The judgment and order in the case of Navdeep Singh Suhag (supra) is extracted hereinunder:-

"Though these matters were listed for early hearing yet on the consent of learned counsel for the parties, we have finally heard the appeals. The present appeals assail the order dated 05.09.2016 passed by the Division Bench of the High Court of Punjab and Haryana at Chandigarh in LPA No.1681/2016 (O&M) whereby it has affirmed the decision of the learned Single Judge in CWPNo.16217/2016 (O&M). The prayer before the learned Single Judge was that the Haryana Public Service Commission should have adopted procedure of moderation. The same was rejected by the learned Single Judge holding inter alia that it was not necessary in the facts of the case. The Division Bench of the High Court concurred with the same. Learned counsel for the appellants has placed heavy reliance on a decision of this Court in Sanjay Singh and another vs. U.P. Public Service Commission, Allahabad and another, (2007) 3 SCC 720. Learned counsel for the respondent-State has placed reliance on a decision rendered by this Court in Sunil Kumar and others vs. Bihar Public Service Commission and others, (2016) 2 SCC 495. He has drawn our attention to para 19 of the said judgment, which reads as under:

"19.The entirety of the discussion and conclusions in Sanjay Singh (supra) was with regard to the question of the suitability of the scaling system to an examination where the question papers were compulsory and common to all candidates. The deficiencies and shortcomings of the scaling method as pointed out and extracted above were in the above context. But did Sanjay Singh (supra) lay down any binding and inflexible requirement of law with regard to adoption of the scaling method to an examination where the candidates are tested indifferent subjects as in the present examination? Having regard to the context in which the conclusions were reached and opinions were expressed by the Court it is difficult to understand as to how this Court in Sanjay Singh (supra) could be understood to have laid down any binding principle of law or directions or even guidelines with regard to holding of examinations; evaluation of papers and declaration of results by the Commission. What was held, in our view, was that

scaling is a method which was generally unsuitable to be adopted for evaluation of answer papers of subjects common to all candidates and that the application of the said method to the examination in question had resulted in unacceptable results.

Sanjay Singh (supra) did not decide that to such an examination i.e. where the papers are common the system of moderation must be applied and to an examination where the papers/subjects are different, scaling is the only available option. We are unable to find any declaration of law or precedent or principle in Sanjay Singh (supra) to the above effect as has been canvassed before us on behalf of the appellants. The decision, therefore, has to be understood to be confined to the facts of the case, rendered upon a consideration of the relevant Service Rules prescribing a particular syllabus."

Be it noted that as far as 2014 examination is concerned, the recruitment process is closed and the candidates have been appointed and they have not been made parties. So, we need not advert to the controversy which was raised before the High Court. However, we may say that the Haryana Public Service Commission shall proceed with the procedure of moderation in accordance with law. Needless to say, the procedure of moderation is not to be adopted for the asking. If an opinion has to be sought from the expert body, it may say that there is a necessity for moderation, and the Haryana Public Service Commission shall be absolutely objective in this regard. The appeals are disposed of accordingly. There shall be no order as to costs.

.....CJI.

(DIPAK MISRA)

.....J.

(A.M. KHANWILKAR)

.....J.

(Dr. D.Y. CHANDRACHUD)

NEW DELHI; NOVEMBER 13, 2017."

As stated above, reliance has been placed by the petitioners on the two orders passed by the Apex Court in the case of Centre for Public Interest Litigation vs. Registrar General of the High Court of Delhi reported in (2017) 11 SCC 456 decided on 2nd November, 2015 where it was noted that since the examination papers in that case evaluated initially by six examiners, the answer-books were directed to be re-evaluated by a former Supreme Court Judge. Suggestions made by the counsel for providing certain information was accepted in paragraphs 25, 26 and 27. The Apex Court observed as under:-

"25 Mr. Prashant Bhushan, learned counsel and Mr. Sanjay Hegde, learned Senior Counsel, have given certain suggestions for future. The said suggestions were

handed over to Mr. Maninder Singh, learned Additional Solicitor General and Mr. A.D.N. Rao, learned counsel, appearing for the Registrar General of the High Court of Delhi. Be it noted, six suggestions have been given and out of six, two suggestions have been accepted by the respondent. The suggestions which have been accepted, are:

"(a) In the preliminary exams, the OMR sheets be ordered to be filled up in pen and not pencil;

* * *

(d) The candidates be provided a copy of their answer scripts under RTI and as per two Supreme Court judgments of *CBSE v. Aditya Bandopadhyay* and *Kerala Public Service Commission v. State Information Commission*.

26. In Course of hearing, the acceptability of the other suggestions have been considered. Having heard the learned counsel for the parties, apart from the suggestions that have been accepted by the High Court, we think the following suggestions should be followed by the High Court. They are:

(I) In the preliminary examination, the names of successful candidates be mentioned.

(ii) In checking of the mains papers, the procedure laid down in *Sanjay Singh v. U. P. Public Service Commission*, *Prashant Ramesh Chakkarwar v. UPSC* and *Sujasha Mukherji* shall be kept in view.

We are sure that the High Court, while conducting examinations in future, shall keep the aforesaid suggestions in view.

27. Before parting with the case, we may state the suggestions have been given so that the candidates, who participate in the examination must have intrinsic faith in the system of examination and simultaneously, they must also appreciate that a candidate, while appearing in an examination, has his/her own limitation. Faith in an institution and acceptance of individual limitation are the summum bonum of a progressive civilised society. We say no more on this score."

The petitioners have also relied on the judgment in the case of *Taniya Malik vs. Registrar General of High Court of Delhi* reported in (2018) 14 SCC 129 to contend that the process of moderation has been reiterated. Paragraphs 13, 14 and 15 of the report are dedicated to the said issue and in that case it was found that since only one examiner had evaluated the same part of one question, the question of moderation did not arise. The Court also appreciated the judgment in the case of *Mukesh Thakur (supra)* and held in paragraph 17 of the report that in absence of provision for re-evaluation the same could not be resorted to.

We have considered the submissions raised and we find that no exception was taken to the method of evaluation of answer-books by the petitioners before the main examinations were held. The writ petition has been filed after the declaration of the final results. The material which has been pleaded in the writ

petition does not in any way establish or demonstrate that in the absence of the process of the moderation having been adopted, any prejudice has been caused to the candidates who are either successful or unsuccessful. As a matter of fact no specific instance has been pleaded.

Sri Manan Kumar Mishra, learned counsel for the petitioners while advancing his submissions clearly stated that he does not want the Court to go into the errors in the evaluation or for re-evaluation or for the individual re-evaluation of the answer-books of the petitioners. His main contention is that the High Court ought to have compulsorily adopted the method of moderation keeping in view the directions and observations of the Supreme Court in the judgment of Sanjay Singh (supra), the judgment of Sujasha Mukherji (supra) and in the case of Centre for Public Interest Litigation (supra). The contention is that the High Court having not adopted the said method of moderation the holding of the main examinations is vitiated.

At the outset, we may point out that the results have been finally declared long back and the appointments have also been made pursuant whereunto the postings have also been carried out by the High Court. None of the successful candidates have been made party respondents in the present writ petition. In our opinion, their interest would be directly affected in the event any relief sought for by the petitioners for carrying out the entire evaluation process once again is directed. This would neither be appropriate nor it would be permissible in law in the absence of any affected party.

As already stated above the plea taken in the rejoinder in paragraphs 19 and 20 is extracted hereinunder:-

"19 That the total marks awarded to the candidate bearing Roll No. 10021 in the written examination in both papers is 118 (59%). The same candidate has been awarded 7.40 marks (14.80%) in the interview conducted by the interviews board consisting of Hon'ble Judges of this Hon'ble Court. In similar manner candidate bearing Roll No. 10781 was awarded 123 marks (61.5%) in written examination but was awarded only 3.40 (6.80%) in the interview. 20. That non adoption of moderation process has given effect to award of lesser marks to some candidates than their merit. For example candidate bearing Roll No. 15867 was awarded only 98 (49%) marks in written examination but has been awarded 34 marks (68%) in interview. Likewise candidate bearing Roll No. 13749 was awarded only 95 marks (47.5%) in written examination but has been awarded 31.00 marks (62%) in interview. If moderation process would have been adopted such sharp variation would have been adopted such sharp variation would not have occurred." By the aforesaid averments, the petitioners wanted to demonstrate that this variation in the award of marks in the written examination and interview necessitates the adoption of moderation. We are unable to accept any such submission inasmuch as in the instant case the issue of moderation raised is viz-a-viz different sets of examiners having evaluated the answer-books in the main written examinations in respect of a large number of

candidates. Consequently, any variation in the award of marks in the theory papers of the main examination with that of the interview as compared in the pleadings quoted above carries no sense so as to lay a foundation for raising a challenge to the action of the High Court. The petitioners have not been able to establish any prejudice on account of the moderation system having not been adopted by the High Court causing prejudice to any examinees interest in respect of evaluation of written answer-sheets of the main examination.

The issue of individual marking and the discrepancies as alleged have not been pressed into service by Sri Mishra as already noted above and therefore to that extent if there is any grievance the same would stand covered by our judgment in the case of Shashank Shekhar Sinha (*supra*).

Over and above there is yet another recent judgment of the Apex Court in the case of High Court of Tripura through the Registrar General vs. Tirtha Sarathi Mukherjee & Ors. (Civil Appeal No. (s) 1264 of 2019) decided on 06.02.2019 where the Apex Court has after noticing all the judgments referred to hereinabove in the matter of re-evaluation has observed that the High Court is not denuded of its powers under Article 226 of the Constitution of India while it exercises its jurisdiction but should not be construed as giving a permission to re-evaluate in a routine manner. It has been observed that the Court may permit re-evaluation only if it is demonstrated very clearly without any inferential preference of reasoning or by professional rationalization and only in rare or exceptional cases. Paras 18 to 21 of the report are extracted hereinunder:-

"18. We have noticed the decisions of this Court. Undoubtedly, a three Judge Bench has laid down that there is no legal right to claim or ask for revaluation in the absence of any provision for revaluation. Undoubtedly, there is no provision. In fact, the High Court in the impugned judgment has also proceeded on the said basis. The first question which we would have to answer is whether despite the absence of any provision, are the courts completely denuded of power in the exercise of the jurisdiction under Article 226 of the Constitution to direct revaluation? It is true that the right to seek a writ of mandamus is based on the existence of a legal right and the corresponding duty with the answering respondent to carry out the public duty. Thus, as of right, it is clear that the first respondent could not maintain either writ petition or the review petition demanding holding of revaluation.

19. The question however arises whether even if there is no legal right to demand revaluation as of right could there arise circumstances which leaves the Court in any doubt at all. A grave injustice may be occasioned to a writ applicant in certain circumstances. The case may arise where even though there is no provision for revaluation it turns out that despite giving the correct answer no marks are awarded. No doubt this must be confined to a case where there is no dispute about the correctness of the answer. Further, if there is any doubt, the doubt should be resolved in favour of the examining body rather than in favour of the candidate. The wide power under Article 226 may continue to be available

even though there is no provision for revaluation in a situation where a candidate despite having giving correct answer and about which there cannot be even slightest manner of doubt, he is treated as having given the wrong answer and consequently the candidate is found disentitled to any marks.

20. Should the second circumstance be demonstrated to be present before the writ court, can the writ court become helpless despite the vast reservoir of power which it possesses? It is one thing to say that the absence of provision for revaluation will not enable the candidate to claim the right of evaluation as a matter of right and another to say that in no circumstances whatsoever where there is no provision for revaluation will the writ court exercise its undoubted constitutional powers? We reiterate that the situation can only be rare and exceptional.

21. We would understand therefore the conclusion in paragraph 30.2 which we have extracted from the judgment in *Ran Vijay Singh & Ors. Vs. State of UttarPradesh & Ors.* 2018 (2) SCC 357 only in the aforesaid light. We have already noticed that in *V.S. Achuthan vs Mukesh Thakur's* case reported in 2010 (6) SCC 759, a two Judge Bench in paragraph 26 after survey of the entire case law has also understood the law to be that in the absence of any provision the Court should not generally direct revaluation."

In our opinion, the present is also not a case of the said category, moreso, when the learned counsel for the petitioners has not pressed the point relating to the allegations about marks being incorrectly awarded in the answer-books of the petitioners during the course of argument. It is also not disputed that there is no rule for re-evaluation.

Coming to the main limb of the argument of Sri Mishra about adopting the procedure of moderation as per the directions of the Apex Court, we find that the three Judges' decisions in the case of *Navdeep Singh Suhag* (supra) has clarified that the judgment in the case of *Sanjay Singh* (supra) as explained in the case of *Sunil Kumar* (supra) did not lay down any such law for universal application. In the present case, when the examinations are over and the appointments have already been made, then in the absence of the affected parties or even for the reasons stated herein above, we do not find any reason for interfering with the selection and appointment process in question.

Sri Manan Kumar Mishra has ultimately pleaded that there are two petitioners left and out of ninety nine vacancies for which the examinations were held, four vacancies are still available and, therefore, the claim of the petitioners may be considered for accommodating them. This relief, in our opinion, cannot be granted inasmuch as the request for re-evaluation of the answer-books by the petitioners has been considered and rejected on the administrative side which has the approval of the Chief Justice. This has been categorically stated in paragraphs 16 and 18 of the counter-affidavit of the High Court. Accordingly, once the results of the petitioners cannot be altered on the grounds as pleaded it

will not be appropriate for this Court to issue any mandamus for re-consideration of the candidature of the petitioners on any ground.

Before parting with the case, we may observe that it will be open to the High Court to take any such steps for adopting any method of moderation in case so desirable in future for which a decision will have to be taken by the Full Court.

With the aforesaid observations, the writ petition stands dismissed.