
(2011) 12 PAT CK 0113
In the Patna High Court
Case No : LPA No. 1991 of 2010

Anurag Verma

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 16-12-2011

Acts Referred:

Citation : (2012) 2 PLJR 18

Hon'ble Judges : Shivaji Pandey, J; Shiva Kirti Singh, J

Bench : Division Bench

Advocate : Pushkar Narain Sahi, Sanjeet Kr. Singh, Patanjali Rishi and Mr. Piyush Lal For the High Court, for the Appellant; Basant Kr. Choudhary, Sanjeev Kumar and Mr. Saurabh Nath For the State, for the Respondent

Judgement

Shiva Kirti Singh, J

1. Parties have been heard for the purpose of final disposal of this appeal preferred under Clause 10 of the Letters Patent of this Court. By the order under appeal dated 9.11.2010, writ petition bearing C.W.J.C. No. 1866 of 2005 preferred by six petitioners was allowed. Annexure-5 which is an appointment order bearing no. 47 of 2004 whereby the District and Sessions Judge, Muzaffarpur after seeking approval of the High Court promoted and appointed six Class- IV employees to six vacant posts of Clerk in Class-III, was quashed. The District and Sessions Judge has been directed to declare the result of those candidates who had participated in an earlier examination and interview on the basis of 85 marks in the written examination and 15 marks in the interview.

2. The facts relevant for deciding the case are not in dispute. All the writ petitioners (respondents 5 to 10 herein) as well as the six appellants whose promotion has been quashed are/were Class-IV employees of Civil Court, Muzaffarpur. The writ petitioners prayed for quashing of promotions of appellants on Class-III posts of Clerk on the ground that the promotions are in violation of Rule 6 of the Bihar Civil Courts Staff (Class-III and Class-IV) (Amendment) Rules, 2001 (hereinafter referred to as the Amendment Rules, 2001). Through a

notice issued in the form of General Order bearing no. 204 of 2003 dated 2.12.2003, the District and Sessions Judge, Muzaffarpur invited applications from eligible Class-IV employees of Civil Court, Muzaffarpur for promotion to six Class-III posts on the basis of written test followed by interview. The writ petitioners applied and took the written examination on 20th April, 2004. The written examination was for a total of 85 marks. After publication of result, interview was held on 7.7.2004. It was for 15 marks. The final results were, however, not declared because the High Court through a letter dated 19.8.2004 directed for holding of fresh written examination for 90 marks as full marks and 45 marks as the qualifying marks, as per provisions contained in Court's general letter dated 22.11.1995 and the relevant Rules of 1992, 1998 and 2001.

3. The District and Sessions Judge, Muzaffarpur issued another General Order No. 171/2004 dated 8.10.2004, wherein it was clearly indicated that in view of directions of the High Court through letter dated 19.8.2004 and resolution of Appointment Committee, Civil Court, Muzaffarpur, a fresh written examination would be taken for promotion from Peons/Process Server to clerk for six vacant posts, fixing 90 marks as full marks, 45 marks as the qualifying marks and 10 marks for interview. Fresh applications were, accordingly, invited from eligible candidates with a relaxation that those who had applied earlier need not apply again. Fresh written examination was held on 7th November, 2004 followed by interview on 12.12.2004. On the basis of performance and merit six appellants were granted promotion vide order dated 31.12.2004. That order, as noted earlier was challenged by the writ petitioners through writ petition under consideration, filed on 8.2.2005. Since the writ court has quashed that order, the appellants have come in appeal.

4. Learned counsel for the appellants tried to persuade us that the Amendment Rules 2001 are silent so far as full marks for written examination provided under Rule 6 is concerned and therefore, the general order issued by the High Court earlier was rightly applied and fresh written examination was held with 90 marks as full marks. In this regard the writ court has extracted not only Rule 6 indicated above but also Rule 5(iv)(d) under which for general recruitment to Class-III posts written examination of 85 marks and viva-voce/personality test and interview for 15 marks is envisaged. The issue arising for determination is whether Rule 6 which is confined to appointment by promotion incorporates within itself a mandate to hold a separate examination but with the same full marks for written and interview as prescribed in Rule 5 for general recruitment or not. This issue is material only for the present case because prior to Amendment Rules, 2001 the written test and interview were to be for 90 marks and 10 marks respectively and the same position has been restored in the Bihar Civil Courts Staff (Class-III and Class IV) Rules, 2009 which is presently in force.

5. According to learned counsel for the appellants and learned counsel for High Court representing the respondents 2 to 4, since there was no change in Rule 6 in the Amendment Rules 2001, the earlier general order of the Court remained

relevant and such order could be issued under Rule 7(iii) and (iv). They also highlighted Rule 10 under which the High Court has power to issue general or special directions from time to time to make the rules regarding appointment more effective or to clarify or supplement the same. It was further submitted that the wording of Rule 6(3) of the Amendment Rules, 2001 are vague and inappropriate in referring to the preceding rule which is Rule 5 and is confined to appointment of Class-III and Class-IV employees and is not at all related to promotion. As per submissions, at best, only the provision for holding a separate examination and interview was adopted out of the preceding Rule 5 but not the entire provisions specifying the full marks for written examination and interview or the qualifying marks or even the eligibility of the candidates. Hence, according to appellants the general order of the High Court and the provisions in the rules were properly construed while directing for a fresh written examination and interview.

6. On going through the provisions in Rule 5 and Rule 6 of the Amendment Rules, 2001, we find that although there is some scope of interpretation on account of vagueness but in effect the relevant terms of Rule 5 have been adopted for holding a separate examination and interview for the purpose of appointment to Class-III posts by promotion. Hence, we are not inclined to differ from the views of the writ court on this issue.

7. The other contention raised on behalf of appellants is to the effect that the writ petitioners have acquiesced and accepted without demur the General Order No. 171/2004 dated 8.10.2004 whereby the District and Sessions Judge, Muzaffarpur gave a general notice which had the effect of cancelling the earlier written test and interview and invited fresh applications for holding a fresh recruitment process for appointment by promotion to the same six vacant posts of clerk. As per submissions, instead of challenging the said order which provided for fresh examination fixing 90 marks in full for the written examination and 10 marks for interview, the writ petitioners took the fresh examination and a chance to get selected and hence they cannot be permitted to turn back and challenge the advertisement/selection process after they were unsuccessful. In support of this proposition, learned counsel for the appellants has relied upon a judgment of the Supreme Court in the case of University of Cochin, Rep., by its Registrar, University of Cochin Vs. N.S. Kanoonjamma and others, in which it was held that since the petitioners of that case had participated in selection, they were estopped from challenging the selection process. In that case the Supreme Court found that although there was some omissions in the advertisement in not mentioning that it was for special recruitment for reserved candidates, it was held to be of no significance because the power to make such recruitment was available with the concerned authority.

8. On behalf of writ petitioners who are respondents herein it was submitted that since the provisions of Rule 6 of the Amendment Rules, 2001 were of statutory nature, there could be no estoppel questioning this appointment on the ground

that the selection process is in violation of statutory provisions.

9. In our view, there can be no quarrel with the settled proposition of law that there can be no estoppel against statute. But we are also of the view that it is not strictly the principle of estoppel which is applicable in the present situation rather the issue involved is more basic and fundamental for exercising discretionary writ jurisdiction in a situation where a party has accepted the terms of notices or advertisement and has taken his chance of success without any protest and then seeks exercise of discretionary writ jurisdiction to challenge the terms of advertisement/notice. In such a situation the Courts have held that the proper and lawful course for the affected persons is to challenge the violation of rules or law apparent from the notice or advertisement, instead of accepting the terms without any demur and then raising a grievance on being unsuccessful in the selection process. In such a situation, the Apex Court has clearly laid down the law that such petitioner should not be permitted to succeed in his challenge to the terms of advertisement/notice inviting applications. No doubt, there are exception to this rule such as a case where the authorities commit illegality in the selection process contrary to law but without there being any sanction for their such conduct in the terms of advertisement. In the case of *Amlan Jyoti Borooah Vs. State of Assam and Others*, the law has been discussed in paragraphs 29 to 36 with due reference to earlier cases also for coming to the conclusion in paragraph-32 which is in the following words:- In view of the law laid down by the Apex Court noticed above, we are of the considered view that writ petitioners who had taken the chance of success by accepting the order for fresh examination with full marks of 90 for the written examination cannot be permitted to turn round and challenge the recruitment process after being unsuccessful. On this ground the writ petition must be dismissed. We order accordingly. The appeal stands allowed. There shall be no order as to costs.

The appellant, in our opinion, having accepted the change in the selection procedure sub silently, by not questioning the appointment of the 169 candidates, in our considered opinion, cannot now be permitted to turn round and contend that the procedure adopted was illegal. He is estopped and precluded from doing so.

The same issue was involved in the case of *Dhananjay Malik vs. State of Uttaranchal*; 2008(3) PLJR (SC)271. The Supreme Court not only approved an earlier judgment in the case of *Marripati Nagaraja and Others Vs. The Government of Andhra Pradesh and Others*, but also made a succinct exposes of the law in paragraphs in following terms:-

It is not disputed that the writ petitioners-respondents herein participated in the process of selection knowing fully well that the educational qualification was clearly indicated in the advertisement itself as B.P.E. or graduate with diploma in physical education. Having unsuccessfully participated in the process of selection without any demur they are estopped from challenging the selection criterion inter alia that the advertisement and selection with regard to requisite

educational qualifications were contrary to the Rules.