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**(2019) 10 PAT CK 0083**

**In the Patna High Court**

**Case No : Letters Patent Appeal No. 543 Of 2019**

Dinesh Kumar Ram

APPELLANT

Vs

State Of Bihar And Ors

RESPONDENT

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**Date of Decision : 24-10-2019**

**Acts Referred:**

**Citation : (2019) 10 PAT CK 0083**

**Hon'ble Judges : Amreshwar Pratap Sahi, CJ;Ashutosh Kumar, J**

**Bench : Division Bench**

**Advocate : Kishore Kumar Thakur, Braj Kishore Singh, Rajesh Kumar, Md. Nazir Ansari, Prabhat Kumar Verma, Prafull Chandra Jha**

**Final Decision : Allowed**

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## **Judgement**

1. This is an intra-court appeal relating to the appointment as a Vikas Mitra and continued engagement on the post at a particular place in the District of Madhubani.

2. The appellant/Dinesh Kumar Ram was selected and appointed and his selection and appointment was protested by the respondent-petitioner/Ram Prasad Ram before the District Magistrate, Madhubani in terms of the guidelines promulgated by the Bihar Maha Dalit Vikas Mission Circular dated 1st of February, 2010, copy whereof has been filed along with the counter affidavit by the respondent/State in the writ petition.

3. The process of selection is based on merit through a panel prepared after calculating the marks obtained in matriculation or equivalent examination. The process shall be dealt with hereinafter, but suffice it to say, at this stage, the selection process is to culminate with the finalization of the select list through a duly constituted Committee of which the Sub-Divisional Officer (Anchal Adhikari) is the Chairman. During the selection process, according to Clause-IX(6), objections can be received and decided by the said Officer, whereafter the selections are finalized.

4. After the selections are finalized and held, any irregularity or complaint with regard to selection can be undertaken by the District Magistrate of the District or the Officer of the Mission under Clause-XII.

5. Thus, there are two stages of filtering the selection process.

6. The merit list which has to be prepared is provided for in Clause-III(6) of the said guidelines.

7. The selection process in the present case was notified by the Chairman of the Mission where the schedule indicates that applications were to be received between 22nd of February, 2010 to 3rd of March, 2010, objections were to be received between 05.03.2010 and 10.03.2010, and the same had to be resolved by the Sub-Divisional Officer between 16th of March, 2010 and 20th of March, 2010. The final list had to be published thereafter and by 24th of March, 2010, the Vikas Mitra so selected had to be engaged.

8. There is no dispute about the fact that both the appellant and the respondent-petitioner had applied for the said post. The dispute was raised by the appellant which, was registered with the Sub-Divisional Officer. According to him in his supplementary counter affidavit filed before the writ court on 10th of March, 2010 followed by a representation in writing on 15th of March, 2010. This has been refuted by the respondent-petitioner contending that if the merit list itself was prepared on 12th of March, 2010, there was no occasion for registering any protest.

9. Be that as it may, the last date of objections on the merit list was 10th of March, 2010 and it is therefore evident that even assuming that the appellant had protested in writing on 15th of March, 2010, the said protest in writing was after the last date of the filing of the objections as prescribed in the time schedule hereinabove.

10. The contention of the appellant on merits is that as a matter of fact by wrongly calculating the marks that was required to be done as per the rules of Vikas Mitra, even though the appellant was higher in merit than the respondent-petitioner, his name was eliminated in the provisional list dated 12.03.2010 and it was only the name of the respondent-petitioner that was included.

11. To substantiate this submission, learned counsel for the appellant has invited the attention of the Court to the contents of paragraphs 7 to 11 of the counter affidavit of the State that is extracted hereinunder:-

"7. That the entire guidelines and the schedule for selection of Vikash Mitra is being brought on record for the kind perusal of this Hon'ble Court. Accordingly, the petitioner and one Dinesh Kumar Ram applied for the post of "Vikash Mitra".

8. That thereafter a provisional merit list was prepared on 12.03.2010 in which the name of petitioner appeared and he was called for counseling on 15.03.2010.

9. That thereafter counseling was conducted on 15.03.2010 in which the

petitioner appeared and thereafter selection list was prepared in which the name of the petitioner appeared at Sl. No. 16 (Annexure-2, Page-12 of the writ petition).

10. That it is stated and brought to the notice of this Hon'ble Court that after preparation of final selection list, objection with respect to the selection of the petitioner was received, in so much as that the marks of additional subject was also considered to prepare the merit list.

11. That in accordance with the schedule and norms fixed for appointment of Vikas Mitra, the objection was considered and thereafter a revised merit list was prepared on 21.03.2010, in which the respondent no. 8 got the highest percentage of marks after excluding the additional subjects."

12. It is on the strength of such averments that it is urged that the appellant was called for counseling on 21st of March, 2010 and declared selected on 23rd of March, 2010.

13. The respondent-petitioner immediately objected to the same by filing a protest petition/objection before the District Magistrate, but of no avail.

14. However, the appellant contends that as a matter of fact, the enquiry had been set into motion and according to the counter affidavit of the State, a letter was dispatched on 1st of December, 2010 to the Sub-Divisional Officer, Sadar, Madhubani with the information that the complaint was processed whereafter it was found that the appellant stood higher in merit and he was selected. This information was again replenished by the Block Development Officer in his letter dated 22nd of November, 2011 dispatched to the District Welfare Officer, Madhubani.

15. It is therefore submitted that the complaint had been processed and the concerned authority was informed about the same.

16. Nonetheless, the respondent-petitioner having failed to get any relief from the authorities filed the writ petition giving rise to the present controversy in the year 2010 itself, praying for setting aside the selection of the appellant and for a direction that he should be appointed on the post in question.

17. The respondent-petitioner came up with a case firstly that by adding the marks of the additional/optional subject, he stood higher in merit as against the appellant.

18. We may clear this mist at the outset that as it has engaged a considerable time of the Court since yesterday to understand the mode of calculation of marks for the purpose of preparation of merit. We had formalized the query in this regard in a detailed order passed yesterday (23rd of October, 2019) which is extracted hereunder:-

"We have heard the matter at length and after having gone through the documents on record as well as the Regulations, we find that the calculation of

percentage and division as provided for by the Bihar Sanskrit Shiksha Board in the relevant Rules has been brought on record as P-4 to the review application filed by the appellant. Rule 13 in its penultimate paragraph provides for exercising an option of an additional subject apart from the compulsory subjects. It is further provided that the marks obtained in the optional/additional subject would be added only for the purpose of projecting the division in which a candidate has passed the examination, namely as to whether first, second or third division. The addition of marks is also to be calculated by reducing 30 marks from the marks obtained in the additional paper. Thus, for the purpose of projecting the division of the candidate the above mentioned marks as calculated would be added to the total number of marks in order to calculate the percentage on the basis whereof the division will be announced. Consequently, the limited purpose for such calculation is only for indicating division of the candidate and not for any other purpose relating to the results of the candidate which is also obvious from the recital contained in the Rule that if a candidate fails in the additional subject it will not have any adverse effect on the results of the examination.

In view of above, the total number of marks of the compulsory subjects and the total number of marks obtained in such subjects would be the basis of the declaration of the result. This is a matter pertaining to appointment of Vikas Mitra and as has been pointed out by the learned counsel for the appellant the same is governed by the Guidelines, a copy whereof has been filed along with the writ petition and clause III (6) of the said Guidelines indicates a chart on the basis whereof the merit list of candidates would be prepared. The 5th column mentions total number of marks and the sixth column mentions the marks obtained. The 7th column indicates the percentage on the basis thereof.

The aforesaid chart, therefore, nowhere indicates either inclusion or otherwise of the marks obtained in an additional subject or for carrying out a calculation in that regard.

It is undisputed and which is also evident from the report of the Bihar Sanskrit Shiksha Board dated 12.09.2018 which has been made the basis for a decision by the learned Single Judge, that the appellant Dinesh Kumar Ram had appeared in an examination in the year 1998 with 9 compulsory subjects of 100 marks each and had obtained 436 marks in the said examination. He had also appeared in a 10th additional paper in which he had obtained 45 marks and, therefore, in order to calculate his division, 30 marks were reduced and 15 marks were added for the purpose of declaration of division.

Simultaneously so far as the writ petitioner Ram Prasad Ram is concerned, he appeared in the examinations in the year 2006 with 7 compulsory subjects and obtained 330 marks. In addition thereto, he opted for an 8th additional subject, where he obtained 56 marks and, accordingly, after deducting 30 marks, 26 marks were added for calculating his division.

On the basis of the said facts which have already been brought on record and are not disputed, the marks obtained in the compulsory subjects by the respective candidates indicates that the appellant having obtained 436 marks out of 900 brings about a percentage of 48.44%, whereas the respondent Ram Prasad Ram has obtained 330 marks out of 700 marks and therefore the same comes to 47.14%.

Learned counsel for the respondent No.8 prays that he may be permitted to study the matter further and assist the Court.

Put up tomorrow.

19. On the submissions made today, we are satisfied that our apprehension has been found to be correct and the marks which are to be taken into consideration as per Clause-III(3) & (6) of the guidelines, require the preparation of merit only on the basis of marks obtained and not the marks obtained after adding the marks of additional or optional subject.

20. This error in the calculation of marks had been objected to by the appellant which came to be rectified and then the select list was finalized selecting the appellant as he had obtained higher percentage of marks as against the respondent-petitioner as stand recorded in the order extracted hereinabove.

21. We are therefore convinced that as per the guidelines, the calculation without adding the marks of optional/additional subjects leans in favour of the appellant as he was higher in merit as against the respondent-petitioner.

22. The respondent-petitioner then came up with a case that as a matter of fact, the appellant had not appeared in the counselling as prescribed in the time schedule nor had he filed any objection in time, and therefore his claim stood eliminated which stands supported by the information received under the Right to Information on 22nd of March, 2010, copy whereof is Annexure-2 to the writ petition.

23. It is also the contention of the respondent-petitioner that after all such information had been tendered, the appellant, in connivance with the officials started preparing documents in his favour and therefore the attempt made by the appellant to get himself selected was an outcome of such manipulation.

24. We are unable to agree with the aforesaid contention on behalf of the respondent-petitioner for the reason that the information given under the Right to Information is with regard to the solitary application said to have been tendered by the respondent-petitioner and its receipt on 15th of March, 2010 for the purpose of counselling. The information nowhere states that the appellant was either invited for counselling or he was given an opportunity or even that he had not filed any objection. The said information therefore does not conclude or establish a voluntary absence of the appellant in the counselling.

25. To the contrary, the circumstances as indicated above stand explained in the

counter affidavit of the State in paragraphs 7 to 11 that have been extracted hereinabove.

26. According to the said averments, it is clear that it is admitted by the State that the appellant had applied and his application was received within time, whereafter a provisional merit list was prepared on 12th of March, 2010. This provisional merit list eliminated the appellant and his name was not in the said list on account of incorrect calculation of marks that has been referred to hereinabove. It is for this reason that the appellant raised his objections contending that had the marks been correctly calculated, he would have been in the provisional list and since he was not in the provisional list, he was not given the opportunity of appearing in the counselling. This offer and opportunity of counselling therefore came to be offered to the appellant after his objection was received on 15th of March, 2010.

27. The contention of the respondent-petitioner is that the dates and the schedule had already been notified and according to the said notified dates, it was the appellant himself who did not voluntarily appear for counselling.

28. We are unable to accept this in as much as once the State has admitted that the name of the appellant was not in the provisional list then there was no occasion for the appellant to have tendered his documents for counselling as his name stood eliminated in the provisional list which was prepared on 12th of March, 2010 on account of incorrect calculation of marks. This therefore resolves the second issue and we find that the objection of the appellant was rightly entertained and taken into consideration as it is in conformity with the rules.

29. There are some more facts which are required to be mentioned at this stage in as much as additional facts were collected as mentioned in the orders passed when the matter was pending before the learned Single Judge. In the writ petition, an order came to be passed on 17th of July, 2018 to the following effect:-

"The learned counsel for the parties i.e. the petitioner herein, the respondent no.8 herein and State are in agreement that the two mark-sheets of the petitioner and the respondent no.8 herein respectively, which are at Page-22 and 25 of the writ petition, be sent to the Bihar Sanskrit Shiksha Board, Patna so that the Chairman, Bihar Sanskrit Shiksha Board, Patna can inform this Court by submitting his report that as per the said mark sheets what is the percentage of marks obtained by the said candidates.

It is made clear that the said percentage of marks indicated by the Chairman, Bihar Sanskrit Shiksha Board, Patna, will be the deciding factor, for the purposes of appointment on the post of Vikash Mitra.

The Registry to take steps to send the aforesaid two mark-sheets for the aforesaid purposes to the Chairman, Bihar Sanskrit Shiksha Board, Patna within a period of one week from today with a request to the Chairman to submit his

report within a period of one week thereafter.

List this case after four weeks at the top of the list."

30. The report from the Bihar Sanskrit Shiksha Board dated 12th of September, 2018 was tendered and the same is on record. The details of the said information tendered have already been indicated in the order extracted hereinabove dated 23rd of October, 2019.

31. Another order came to be passed on 6th of December, 2018 to the following effect:-

"The present petition has been filed seeking a direction to the respondent authorities to appoint the petitioner in place of Respondent No. 8 on the post of "Vikash Mitra" under Sarara Sonapatahi Gram Panchayat, in the district of Madhubani.

The aforesaid prayer has been made by the petitioner on the strength of his having obtained higher marks in matriculation and having appeared in the counselling on 15.03.2010.

It has further been submitted on behalf of the petitioner that Private-respondent no. 8 did not ever appear in the counselling on the aforesaid date (15.03.2010) and also had lesser marks in the matriculation examination.

It has, therefore, been urged by the petitioner that he has wrongly been shut out from that post and Respondent No. 8 has, in an unauthorized manner, been appointed.

While the case was being argued on other occasion, a Bench of this Court vide order dated 17.07.2017 directed that the mark-sheets of the petitioner as well as Respondent No. 8 be sent to the Bihar Sanskrit Shiksha Board for the Chairman to send a report as to the percentage of marks obtained by them respectively.

This order was passed on the consent of the petitioner as well as the Respondent No. 8.

Pursuant to the aforesaid direction dated 17.07.2018, passed by a Bench of this Court, today a report has been submitted under sealed cover which has been opened in Court and has been made part of the record.

The report of the Chairman, Bihar Sanskrit Shiksha Board indicates that the petitioner has obtained 50.86 per cent, whereas Respondent No. 8 has obtained 50.11 per cent marks, which is lesser than the percentage of marks obtained by the petitioner.

Mr. Prafull Kumar Jha, learned counsel for the petitioner, therefore, has submitted that one aspect of the claim of the petitioner for being appointed as "Vikash Mitra" in the concerned Gram Panchayat has been settled with the finding of the Chairman of the Board that he has obtained higher percentage of marks.

With respect to the other issue that the Respondent No. 8 did not appear for counselling on 15.03.2010, it would be necessary for this Court to hear the stand of the Respondent No. 8.

The Respondent No. 8 is not present today, though, he has appeared through an Advocate and has put in his response.

To enable the learned advocate appearing for Respondent No. 8 to press his cause, this case is adjourned to 13.12.2018.

Renotify this case on 13.12.2018."

32. It is thereafter that the learned Single Judge proceeded to allow the writ petition but while proceeding to do so, the learned Single Judge did not deal with the stand taken by the respondent-petitioner regarding the absence of the appellant in counselling. No finding was recorded and we find that the same has a direct bearing on the issue, as such the judgment of the learned Single Judge is deficient on that count.

33. The main thrust, on the basis whereof the learned Single Judge formed his final opinion was with regard to the indication of marks in the information tendered by the Bihar Sanskrit Shiksha Board, Patna. In this regard, we may clarify that the position with regard reflection of marks has already been noticed by us in our order dated 23rd of October, 2019 but we may reiterate that for the purpose of calculation of merit, it is only the total marks obtained in the compulsory subjects which are relevant and which appears to be the intention in the guidelines of the Bihar Maha Dalit Vikas Mission, referred to hereinabove. The only relevance of additional marks is for the purpose of declaring the division of a candidate by the Bihar Sanskrit Shiksha Board in which a candidate passes the examination and for no other purpose. This is evident from Regulations of 1994 that have been filed on record as contained in Bihar Sanskrit Shiksha Board Act, 1981. Chapter-2, Regulation-13 is extracted hereinunder:-

13. परीक्षा के विषय ।

मध्यमा परीक्षा में कुछ दस पत्र होंगे जिसमें आठ अनिवार्य, एक ऐच्छिक तथा एक अतिरिक्त पत्र होगा।

प्रत्येक पत्र का पूर्णांक 100 और उत्तीर्णांक 33 होगा।

प्रथम श्रेणी में उत्तीर्ण होने के लिए 540 अंक, द्वितीय श्रेणी के लिए 405 अंक तथा तृतीय श्रेणी के लिए 297 अंक होंगे।

अनिवार्य विषय

नाम

द्वितीय पत्र

व्याकरण

तृतीय पत्र

संस्कृत साहित्य

चतुर्थ पत्र

सामान्य संस्कृत

पंचम पत्र

भारतीय भाषा (हिन्दी)

षष्ठ पत्र

हिन्दी साहित्य

सप्तम पत्र

इति० भूगोल स० अ०

अष्टम पत्र

सामान्य गणित।

ऐच्छिक / अतिरिक्त विषय की सूची -

(क) अंग्रेजी

(ख) अर्थशास्त्र

(ग) सामान्य विज्ञान

(घ) गृह विज्ञान

(ङ) कृषि

(च) वाणिज्य

उपर्युक्त विषयों में से कोई एक विषय ऐच्छिक तथा एक विषय अतिरिक्त के रूप में ग्रहण किये जा सकेंगे। अतिरिक्त पत्र में प्राप्त अंक में से 30 अंक घटाकर योगांक में जोड़ते हुये श्रेणी घोषित की जायेगी परन्तु अतिरिक्त विषय में अनुत्तीर्ण होने पर परीक्षाफल पर कोई प्रभाव नहीं पड़ेगा।

34. Thus, the addition of any marks to the total of an optional/additional subject has a bearing only on the division of a candidate for the purpose of results to be declared by the Bihar Sanskrit Shiksha Board and not for the purpose of calculation of merit under the guidelines of Vikas Mission.

35. In our considered opinion, the impugned judgment cannot be sustained for all the aforesaid reasons; firstly because there is no finding with regard to the issue of counselling and which we have found to have been explained by the State in its counter affidavit as recorded hereinabove and; secondly that the calculation of merit had been rightly made in favour of the appellant which stands reflected in the counter affidavit of the State as well as the communication referred to hereinabove.

36. Accordingly, we allow the appeal and set aside the impugned judgment dated 8th of January, 2019 passed in C.W.J.C. No. 13647 of 2010 as well as the order passed in Civil Review No. 37 of 2019 dated 27th

37. The appellant had been selected and he had worked on the post till he came to be removed pursuant to the order of the learned Single Judge after almost nine years.

38. The appellant shall stand restored to his status as Vikas Mitra and he shall be entitled to all consequential benefits.

39. The appeal stands allowed.