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**(2014) 05 PAT CK 0084**  
**In the Patna High Court**  
**Case No : CWJC No. 18194 of 2011**

Kamlesh Kumar

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

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**Date of Decision :** 05-05-2014

**Acts Referred:**

Constitution of India, 1950 — Article 14, 16

**Citation :** (2015) 2 PLJR 532

**Hon'ble Judges :** Chakradhari Sharan Singh, J.

**Bench :** Single Bench

**Advocate :** Shantanu Bhattacharjee, for the Appellant; Anand Kumar Ojha, for the Respondent

**Final Decision :** Allowed

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## Judgement

Chakradhari Sharan Singh, J.?I.A. No. 905 of 2013 has been filed by the petitioner seeking amendment in the cause title of the writ application as well as in the body of the writ application on account of dissolution of Bihar State Electricity Board, Patna (hereinafter referred to as the Board) and its succession by the Bihar State Power Holding Company Limited (hereinafter referred to as BSPHCL) during the pendency of the writ application. The petitioner had sought relief against the Bihar State Electricity Board which stood dissolved during the pendency of this writ application and there is no dispute that Bihar State Power Holding Company Limited has succeeded Bihar State Electricity Board after dissolution. There is no opposition to this application. In the counter affidavit, the concerned respondents have described themselves as "Board (Now BSPHCL)". The said Bihar State Power Holding Company Limited has been duly represented by its Counsel Mr. Anand Kumar Ojha, learned Counsel. Accordingly, I.A. No. 905 of 2013 is allowed. Let "Bihar State Power Holding Company Limited" be treated to have been substituted and read in place of "Bihar State Electricity Board" in the cause title and pleading on record of present proceeding. The writ application has been filed challenging selection of Respondent Nos. 9 and 10 against the

post of Junior Electrical Engineer against Other Backward Class (OBC) category in the erstwhile Bihar State Electricity Board and seeking a direction to the respondents to declare the petitioner successful for appointment to the said post on the basis of criteria adopted by the Board for such selection and appoint him against the post.

2. Facts are not much in dispute. There is a dispute raised by the Bihar State Electricity Board/BSPHCL as to whether the petitioner had presented himself for the purpose of selection or not, which I shall deal later but I must refer to the facts which are not in dispute, first.

3. The Joint Secretary of the erstwhile Bihar State Electricity Board, Patna vide his letter dated 24.2.2011 addressed to the Placement Coordinator, Training and Placement Cell, Department of Science & Technology, Patna intimated that the Board was facing acute shortage of Officers at various levels and accordingly it had been decided by the Board that for meeting the emergent requirement of Junior Engineers, the campus selection of students from the Government Polytechnics of the State should be done. He made a request that a list for top 30 ranked final year students of Electrical and Civil branch of unreserved category and top 15 ranked students from every reserved category of each Government Polytechnic (On the basis of performance upto pre-final year) may be sent to the Board, for facilitating further needful action. To be discreet, as the issue in the present writ application revolves around the manner of preparation of merit list, relevant paragraph of the said letter dated 24.2.2011 is being quoted hereinbelow which has been brought on record by way of Annexure-C/2 to the supplementary counter affidavit filed on behalf of the respondent/BSPHCL-

"In this connection it is requested that the list of top 30 ranked final year students of Electrical and Civil branch of unreserved category and top 15 ranked students from every reservation category of each Government Polytechnic (on the basis of performance upto pre-final year) may be sent to the Board for facilitating further needful action from our end in this regard."

4. Subsequently by another letter dated 4.3.2011 the Secretary of the erstwhile Board requested the Principal Secretary, Science and Technology Department, Government of Bihar to direct all Government Polytechnic in the State of Bihar to send a merit list of final year students of Electrical Engineer for their appointment as Junior Engineers in the Board on the basis of their pre-final year result. The Secretary of the Board reiterated in his letter dated 4.3.2011 that because of the emergent situation the Board had decided to make appointment of Junior Electrical Engineers on the basis of campus interview, relevant portion of the said letter dated 4.3.2011 is again being quoted hereinbelow for ready reference:--

5. From bare reading of these two letters dated 4.3.2011 it would be apparent that campus interview was decided to be done from amongst the final year students pursuing their studies in State Government Polytechnics of Bihar on the

basis of merit list of students as indicated in the said letters and such merit list was to be prepared on the basis of their pre-final year result.

6. The petitioner belongs to other backward class category and does not fall within the creamy layer. As per his case, he scored a total of 1475 marks in pre-final year examination (Part-II Diploma). He has brought on record his mark-sheet of Part-II diploma in Electrical Engineering Annual examination 2010 as Annexure-3. From perusal of the said mark-sheet issued by the State Board of Technical Education, Bihar the aggregate in Part-II Diploma is calculated on the basis of total score in Part-II Diploma Examination which is the pre-final year examination plus 40% of the marks scored by a student in Part-I examination. He has also brought on record his mark-sheet of Part-III Diploma in Electrical Engineering Annual Examination, 2011 which shows that the aggregate marks is calculated on the basis of total score in Part-III Diploma plus 40% of the aggregate of Part-II examination. 40% of Part-II examination i.e. pre-final year examination has been shown in case of the petitioner to be 590 out of 840 in the mark-sheet of Part-III (Final) Diploma Examination. Mark-sheets of Diploma Part-III Annual Examination 2011 with respect to respondent Nos. 9 and 10 have also been brought on record by the petitioner as Annexure-5 and Annexure-6 to the writ application respectively. 40% of Part-II examination marks of respondent No. 9 has been shown to be 586 whereas in case of respondent No. 10 it has been shown to be 580 out of 840 (40% of 2100). This fact is also not in dispute. The petitioner's case is that as per the result declared the State Board of Technical Education, Bihar, the petitioner scored more marks in Part-II examination (Pre-final year examination). This fact is also not in dispute.

7. As has been indicated above, the Board had required the Government Polytechnics to send merit list of their final year students on the basis of their result up to pre-final. year examination. The petitioner was studying in final year in Government Polytechnic, Saharasa which sent the merit list as prepared by them. However, the Government Polytechnic, Saharsa prepared the merit list on the basis of average percentage of marks scored by the candidates in the first year examination and second year examination, which fact is not in dispute: - Here lies petitioner's grievance. According to him, pre-final year mark-sheet prepared by the State Board of Technical Education, Bihar on the basis of adding 40% of the marks scored by the candidates in the Part-I Examination to the marks scored by them in the Part-II examination which is pre-final year examination should have been the basis for preparation of merit list.

8. The petitioner has therefore, the grievance that respondent Nos. 9 and 10 who had admittedly scored less marks than the petitioner up to Part-II Diploma examination as per the result prepared by the State Board of Technical Education, Bihar have been wrongly appointed, ignoring the petitioner's claim. According to him action of the respondent is in breach of Articles 14 and 16 of the Constitution of India.

9. There is no dispute up to this stage so far as the facts are concerned. The

erstwhile Board filed a counter affidavit in which they have not denied the plea that merit list was wrongly prepared by Government Polytechnic, Saharasa and that it should have been prepared on the basis of the result prepared by the State Board of Technical Education, Bihar. There is no reply in the counter affidavit to the petitioner's plea that respondent Nos. 9 and 10 scored less marks than that of the petitioner up to pre-final year as well as final year in Diploma course in Technical Branch and both belonged to the same category.

10. There is only one dispute in the pleadings. The petitioner in the writ application has stated that the campus interview was held at Patna Planetarium on 24.3.2011 where the petitioner was given a Form to be filled up by him and he had filled up the prescribed Form. However, after some time the petitioner was told that all the vacancies were filled up prior to his turn came. According to him, he learnt only after seeing the website of the Board that the persons who were selected in OBC category had scored less marks than the petitioner. In the counter affidavit the respondent-Board/BSPHCL on the other hand have taken the stand that the petitioner did not participate in the interview. In support of such statement it has been stated in paragraph 9 of the counter affidavit filed on behalf of the respondent-Board that in the interview total 42 students of the Institute participated and further students participating in campus interview were directed to make their attendance in the register kept for that purpose. As per the counter affidavit the fact that the petitioner did not participate in the interview, would be evident on perusal of the attendance record brought on record as Annexure-C/1 of the said counter affidavit. As have been indicated above, so far the facts are concerned, this is the only point of dispute as to whether the petitioner's non-selection was on account of his absence at the time of campus interview or for other reasons.

11. A reply to the counter affidavit has been filed by the petitioner, denying such statement in the counter affidavit. It has been stated that the respondent-Board had directed all the Government Polytechnic to prepare merit list of the students on the basis of marks obtained by them upto pre-final year but the Principal Government Polytechnic, Saharsa did not prepare the merit list as per direction of the Board, rather he prepared the merit list on the basis of average marks obtained in the first and the second year. It has further been stated that all students whose names figured in the defective said list were present in the seminar hall at Patna Planetarium which was the venue for counselling or interview for Selection Board on 23.4.2011. All of them were given a form which was described as format of applicants Bio-data. This form was filled up by the students and was to be submitted only when his name was called out. Only such students whose names were called out were asked to put their signature on a register and thereafter their certificates were verified on the stage of Seminar Hall and after verification of certificates the interview was taken. It has specifically been pleaded that names of students were called out in order of their merit position in the list prepared by the Principal in which petitioner's name figured at serial No. 32 but name of students figuring up to 31 only were called

out. There is specific averment that when the petitioner went to enquire about his turn he was told that the vacancies were full prior to his turn. It has also been stated in the said reply to the counter affidavit that 25 candidates from the top were treated as candidates of general category irrespective of which they belonged to. Thereafter, candidates from serial Nos. 26 to 31 were called for BC categories as there were only six vacancies in the said category and the name of the petitioner was at serial No. 32 i.e. 7th in the category due to defective merit list prepared by the Principal Government Polytechnic and therefore his name was not called out despite he having scored higher marks in terms of the criteria fixed for selection by the respondent-Board.

12. A supplementary counter affidavit has been filed by the BSPHCL wherein the plea that the petitioner did not present himself for the interview has been reiterated on the basis of the attendance sheet showing attendance of the candidates for interview. In addition, a plea has been taken that the validity of campus selection conducted by the Board/BSPHCL had been approved by a Division Bench of this Court by an order dated 26.7.2011 passed in CWJC No. 7200 of 2001 reported in 2011(4) PLJR 214 (Pravin Kumar v. State of Bihar).

13. Counter affidavits have also been filed by respondent Nos. 9 and 10. Respondent No. 9 has brought on record the mark-sheet issued by the State Board of Technical Education, Bihar for Part-II Diploma annual examination according to which he scored 1465 out of 2100, which is admittedly less than the marks scored by the petitioner in Part-II examination (pre-final year examination) i.e. 1475 out of 2100.

14. Respondent No. 10 has also filed a counter affidavit taking a plea that the selection process having been upheld by the Division Bench of this Court in case of Pravin Kumar (supra) no interference is warranted by this Court at this stage. It has been stated that the petitioner failed to appear before the interview Board and therefore, he could not raise any grievance as raised in the writ application. According to respondent Nos. 9 and 10, they ranked higher by taking average of marks obtained by them in the first year examination and second year examination than the petitioner and they were rightly selected and appointed.

15. From the pleadings as noted above two points of dispute emerge; Firstly whether it can be said that the petitioner did not participate in the interview on the basis of the document annexed as Annexure-C/1 to the counter affidavit filed on behalf of the Board. The said Annexure-C/1 contains list of 41 candidates and a 42nd candidate has been added subsequently. This is not in dispute that first 25 candidates were considered for unreserved vacancies whereas candidates from serial Nos. 26 to 31 belonged to BC category. Candidates from serial Nos. 32 to 36 (five in number) belonged to extremely backward class category and persons from serial No. 37 to 41 belonged to SC category. In one of the supplementary affidavits filed by the petitioner it has been stated that 42nd candidate Amit Kumar was allowed to participate as he belonged to physically handicapped category. In course of hearing, this Court wanted to know as to

whether the attendance sheet disclosed attendance of any candidate whose name figured below in the list sent by the Government Polytechnic, the answer was in negative. From the merit list prepared by the Government Polytechnic, Saharsa which has been brought as Annexure-9 to the writ application, it would appear that it contained much more names than those finally selected. The candidates whose names figured in Annexure-C/1 are those who have been selected for appointment. This is not the list of such candidates who were in attendance. Annexure-C/1 cannot be treated as attendance register, had that been so the respondents could have maintained a register and marked presence/absence of the eligible candidates whose names were sent by respective Polytechnics. Evidently, the petitioner was not called for document verification or interview because he was wrongly placed at serial No. 32 of the merit list sent by the Government Polytechnic. The plea taken by the Board/BSPHCL in their counter affidavits to the effect that the petitioner could not be selected because he did not participate in the campus interview is apparently a false statement. Conduct of the deponents Mithilesh Kumar Upadhyay and Madan Kumar of the said counter affidavit reprehensible is strongly deprecated. This Court issues a note of caution to them to be careful and cautious in future as such conduct may have serious consequences which amounts to perjury and contempt of Court.

16. The second question is as to whether Government Polytechnic was right in preparing the merit list by taking average of the marks scored in Part-I examination and Part-II examination. From the communications by the Board, asking the Principals of Government Polytechnics to prepare merit list it would be evident that they were asked to prepare merit list on the basis of performance of student up to pre-final year examination. Final examination being Part-III examination, evidently Part-II examination was the pre-final examination. In my opinion, the Principal of Polytechnic was not required to apply his own yardstick, formula or method of preparing of calculating the marks for the purpose of preparation of the merit list. The mark-sheet issued by the State Board of Technical Education, Bihar for (Pre-final) Part-II Diploma examination takes into account the performance of candidates in Part-I Diploma examination also for calculating aggregate marks. The aggregate marks awarded by the State Board of Technical Education, Bihar in Part-II Diploma examination should have been the basis for preparing the merit list by the Government Polytechnic, Saharsa. The method adopted by the Government Polytechnic, Saharsa resulted into placing the petitioner at lower merit position than what he deserved and it finally resulted into denial of his claim which was certainly higher than respondent Nos. 9 and 10 to be appointed against the post of Junior Electrical Engineer in Bihar State Electricity Board/BSPHCL.

17. Mr. Anand Kumar Ojha, learned counsel appearing on behalf of the Board/BSPHCL has vehemently contended that once Division Bench of this Court upheld the process of selection by campus interview, the entire selection is to be treated to have been approved by a Division Bench of this Court and there should be no interference by this Court as the final selection has got the seal of a Division

Bench of this Court in its judgment in case of Pravin Kumar (supra). In support of his submission he has relied upon a judgment of the Supreme Court reported in Forward Construction Co. and Others Vs. Prabhat Mandal (Regd.), Andheri and Others, to contend that Division Bench judgment of this Court (sic- Court?) would operate as res judicata as a challenge to the process of selection by campus interview was negated by the Division Bench in case of Pravin Kumar v. State of Bihar and Others. The submission has been advanced to be rejected. Firstly, for the reason that the Division Bench was in that case testing validity of the mode and manner of recruitment of Junior Engineers from a class of persons who were final year students of Government Polytechnics in the State of Bihar. This was the limited issue before the Division Bench. Rejection of such plea by the Division Bench would not amount to approving every action taken by the respondent in course of the process of selection. More so, when the petitioner has been able to demonstrate before this Court and satisfy this Court that his fundamental right under Articles 14 and 16 of the Constitution of India has been infringed as the persons inferior merit have been given preference to his right to be appointed against the post of Junior Electrical Engineer. The question of preparation of merit list was neither directly nor substantially in issue before the Division Bench in that case. Secondly, petitioner was not a party in the said writ proceedings before the Division Bench.

18. Learned Senior Counsel appearing on behalf of the respondent No. 9 and learned counsel appearing on behalf of respondent No. 10 have also made their submissions and have strenuously submitted that selection of respondent Nos. 9 and 10 cannot be faulted with in the facts and circumstances of the case and that the respondents rightly prepared the merit list taking average of the performance in Part-I and Part-II examination of Diploma course. I do not find any force in such submission for the reason as indicated above.

19. I accordingly, direct the Respondent-BSPHCL to consider the petitioner's case for his appointment as Junior Electrical Engineer treating him above Respondent Nos. 9 and 10 in the merit list sent by Government Polytechnic, Saharsa and appoint him thereafter, accordingly within a period of one month from the date of receipt/production of a copy of this order. I have taken into account the fact that the final select list was prepared on the basis of marks obtained by candidates upto pre-final year of Diploma course and there was no other consideration like preference in interview, as would be evident from Annexure-2, the select list. Selection and appointment of Respondent No. 10, being the last candidate in OBC category is set aside. Till the petitioner's case is finally considered and necessary orders are issued in light of the present order, selection and appointment of Respondent No. 9 shall be kept in abeyance in terms of the order dated 5.3.2013 passed by this Court in this case. This order will, however, not preclude the BSPHCL from considering the case of Respondent No. 10 for adjusting him against a post which might have remained vacant, and could have been filled up through the same selection process.

20. Before I part with, I reiterate my observations that conduct of the respondent-Board/BSPHCL in making false statement on oath that the petitioner could not be selected because he did not participate in the process of selection is highly reprehensible. I accordingly, allow this application with a cost of Rs. 10,000/- (ten thousand) to be paid by the respondent-BSPHCL to the petitioner. The cost must be paid to him within two months from the date of the present order.