

**(2013) 08 PAT CK 0013**

**In the Patna High Court**

**Case No :** Civil Writ Jurisdiction Case No. 15423 of 2011

Krishna Singh and Others

APPELLANT

Vs

The Bihar Public Service Commission, The Secretary, Bihar  
Public Service Commission, The State of Bihar and The  
Principal Secretary, General Administration Department

RESPONDENT

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**Date of Decision :** 06-08-2013

**Acts Referred:**

Constitution of India, 1950 — Article 13(1), 14, 16, 16(1), 16(4)

**Citation :** (2013) 3 PLJR 961

**Hon'ble Judges :** Navaniti Prasad Singh, J

**Bench :** Single Bench

**Advocate :** Chakrapani and Sanjay Kumar Singh, for the Appellant; Prahlad Kumar Bhagat, G.P. 13, Mr. Binay Kumar, A.C. to G.P. 13 for the State, Mr. Lalit Kishore Mr. Satyavir Bharti, Sanjay Pandey for B.P.S.C., Mr. Prabhat Kumar Singh and Mr. Lalan Kumar Singh for Intervenor, for the Respondent

**Final Decision :** Disposed Off

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## Judgement

Navaniti Prasad Singh, J.—By this writ petition the four petitioners challenged the preliminary test result (PT) of 53rd to 55th Combined Competitive Examination held by Bihar Public Service Commission. Their challenge is that while publishing the result of preliminary test, the Bihar Public Service Commission could not give effect to reservation. In other words, the challenge is that in so far as preliminary test is concerned, the test being for deciding eligibility, reservation, which is applicable for appointment cannot be made applicable. It would further be the submission of the petitioners that in case the cut off mark is lowered for the reserved category candidate then it must be lowered generally for all. Providing for reservation at this stage and not lowering the cut off mark for all would be violative of Article 14 and Article 16 of the Constitution of India. During the pendency of the writ petition petitioner No. 3, who was a reserved category candidate passed the main examination. He is as such not contesting this writ petition.

2. During the pendency of the writ petition two interlocutory applications were filed. In the first interlocutory application a prayer has been made to stay the reservation in preliminary test result and in second interlocutory application a prayer has been made to stay the declaration of the main examination result and not to publish the main examination. No order has been passed on those interlocutory applications as yet. In view of the fact that the writ petition has been heard at length and is being finally disposed of, no order need be passed on those interlocutory applications.

3. Counter affidavit and rejoinder have been filed. Pleadings being complete with the consent of the parties the writ petition has been heard for final disposal at this stage itself.

4. Considering the urgency of the matter as the main examinations have already been held and the interviews thereafter have already been conducted but as per undertaking given by Principal Additional Advocate General, final result has been withheld awaiting the decision of the Court.

5. To begin with one must refer to Article 16(1) of the Constitution of India, which reads as follows:

16. Equality of opportunity in matters of public employment-(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

6. But this has exceptions in Article 16 itself that is Article 16(4) and Article 335 of the Constitution of India. It is in pursuance to these exception clauses the Bihar Reservation of Vacancies in Posts and Services (For Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1991 was enacted. Section 4 provides for reservation for direct recruitment which, inter alia, provides that all appointments to services and posts in the State Government shall be regulated by making provisions for appointment of persons from various reserved category totaling to 50% as provided in Sub-section 2 of Section 4 thereof. From the above, it would be seen that the Constitution and the law envisage reservation at the stage of appointment. This is of significance. The law nowhere contemplates reservation in any process by which the selections on basis of eligibility are to be made which, after another examination on merit, may ultimately result in appointment. It is on basis of this that the learned counsel for the petitioners urges that preliminary test being not to judge the merit of the candidate but to judge his eligibility for the main examination, reservation cannot be provided. At this stage the process is more of elimination than of selection. On the other hand, Mr. Lalit Kishore, learned Principal Additional Advocate General, on behalf of Bihar Public Service Commission submits that unless adequate number of reserved category candidate get through in the preliminary stage for the main examinations granting reservation at the stage of appointment might become illusory. It is the balancing of two conflicting stands that have to be done by the Court.

7. Principally both the stands are correct. In my view one need not go into this question because this question has been squarely dealt with by two High Courts. First the question came up for consideration before the Division Bench of Andhra Pradesh High Court in the case of S. Jafeer Saheb and others -v- Secretary, G.A.D., Secretariat, Hyderabad and others since reported in 1985 Labour and Industrial Cases 1349 then recently the decision of Rajasthan High Court in the case of Sangeeta Yadav -v- State of Rajasthan and another since reported in Sangeeta Yadav Vs. State of Rajasthan and Another, Both these judgments have consistently held that the preliminary examinations were necessitated because of large number of applicants for few posts. For example for about 1000 posts, which were to be filled up there were about 1,33,000 applicants before BPSC this time. Thus, the number of applicants was over hundred times per post. Thus, the preliminary test is to see as to who would be eligible for the main examination where quality selection would be made for the purpose of appointment. At this stage all are equal and must be treated as equal. Thus seen all the courts consistently held that at this stage discrimination amongst equal cannot be made on ground of reservation. This is not the stage of appointment. I would respectfully follow the same.

8. Before proceeding further it may be useful to quote from the two judgments aforesaid. I first quote certain relevant portion from the judgment of the Division Bench of Andhra Pradesh in the case of S. Jafeer Saheb (supra)-

9. No preferential treatment is permitted under the scheme for admission to the main examination. It is so because the question of reservation of posts does not arise at that stage. Every candidate, whether he is a S.C. or B.C., is equally competing with all others for all posts in open competition. All are equals at that stage and should be treated alike. Compensatory preference or compensatory discrimination to historically disadvantaged classes can only be done without forsaking the commitment for merit and even handedness. A balance must be maintained between competing commitments to formal equality and compensatory justice.

11. The purpose of holding a screening test is to ensure the basic standard of eligibility of the candidates and even at the stage of admission to the main examination the rule of reservation of posts cannot be applied. Reservation for applicants is not permissible under Art. 16(4).

13. ....Thereby the right to equality of opportunity for employment enshrined in Arts. 14 and 16 is denied by the denial of admission to the main examination to a candidate who secured 95 marks while admitting a candidate who secured 85 marks or less (69) while both are competing for a post in the open competition.

14. ....Lowering of standards for the purpose of compensatory discrimination is limited to competing commitments to efficient administration.

15. ....No such separate qualifying marks are prescribed-it cannot be prescribed under any valid law for admission to the main examination. Therefore, admission

to the main examination should only be on the ranking secured in the preliminary examination, irrespective of the caste or backwardness of the candidates appearing for the examination, because all of them are competing for posts in the open competition also. The procedure adopted by the service commission for admission to the main examination is illegal and violative of Arts. 14 and 16 of the Constitution.

17.....In case sufficient number of candidates belonging to Scheduled Caste and Scheduled Tribe are not found eligible for admission to the main examination, then the Service Commission at its discretion may go further down in the merit list of preliminary examination until the required number of Scheduled Caste and Scheduled Tribes candidates are available. In such a case, all the candidates, who are placed above such Scheduled Caste and Scheduled Tribe candidates in the merit list, shall also be admitted to the main examination.

9. Now from the judgment of Sangeeta Yadav (supra) of the Rajasthan High Court

9. (44).....The Supreme Court held that the object of screening test is to eliminate unduly long number of persons to appear for Main Examinations and if more candidates are called by declaring result in preliminary examinations, the object of Rule 13 would be frustrated.

11. It is necessary to understand difference between preliminary examination and the main examination to find out as to whether principle as envisaged under Article 16(4) of the Constitution of India applies to all spheres of selection. This Court considered the issue even in the case of Bhawani Singh Kaviya and Others Vs. State of Rajasthan and Another, Therein, meaning of word "general category" was considered. Various judgments of the Supreme Court are referred in paras 18, 19, 20 and 21 of the judgment. It was found that general category means category of candidates who acquired position in order of their merit irrespective as to whether they belong to open or reserve category. The principle evolved by this Court in the case of Bhawani Singh Kaviya (supra) is based on the judgment of the Supreme Court, however, reservation does not apply for short listing. If reservation does not apply for short listing then meaning of the word "general category" cannot be applied rather to be applied when reservation is to be given. It was considered and decided by the Division Bench of this Court in the case of Dharmveer Tholia ( 2001 Lab IC 1292 (Raj) (supra) and, for that purpose, interpretation of Rule 15 of the Rules of 1999 has been given. It was held therein that Article 16(4) of the Constitution for reservation does not apply to every sphere of selection and the same view was taken even by this Court in the case of Vijay Kumar Gehlot (supra), which is by the Larger Bench.

16. In the background aforesaid, reservation applies while making appointment and not at every stage of selection, more so when preliminary examination is meant for short listing.

17.....The reservation policy is meant for recruitment only and there is no other reservation policy for short listing in examination.

10. Here I may also note one important aspect. It appears that after the judgment of the Division Bench of Andhra Pradesh High Court in the case of S. Jafeer Saheb (supra), the Andhra Pradesh Public Service Commission amended the Recruitment Rules in conformity with the said judgment. Subsequently and much later when another examination was being conducted, that was challenged by some reserved category candidates seeking reservation at the preliminary stage of examination. Notwithstanding the earlier Division Bench judgment in the case of S. Jafeer Saheb (supra), the Andhra Pradesh High Court took a different view, which forced the Andhra Pradesh Public Service Commission to move the Apex Court. The judgment of the Apex Court is reported as the case of A.P. Public Service Commission Vs. Balaji Badhavath and Others, The appeal was allowed and the judgment of Andhra Pradesh High Court was set aside. While doing so their Lordships extensively noticed the case of S. Jafeer Saheb (supra). They did not disapprove the view. The Apex Court, inter alia, held thus:

29. Indisputably, the preliminary examination is not a part of the main examination. The merit of the candidate is not judged thereby. Only an eligibility criterion is fixed. The papers for holding the examination comprise of general studies and mental ability. Such a test must be held to be necessary for the purpose of judging the basic eligibility of the candidates to hold the tests. How and in what manner the State as also the Commission would comply with the constitutional requirements of Article 335 of the Constitution of India should ordinarily not be allowed to be questioned.

30. The proviso appended to Article 335 of the Constitution, to which our attention has been drawn by Mr. Rao, cannot be said to have any application whatsoever in this case. Lowering of marks for the candidates belonging to the reserved candidates (sic categories) is not a constitutional mandate at the threshold. It is permissible only for the purpose of promotion. Those who possess the basic eligibility would be entitled to appear at the main examination. While doing so, in regard to General English whereas the minimum qualifying marks are 40% for OCs, it would be 35% for BCs and 30% for SC/STs and physically handicapped persons. However, those marks were not to be counted for ranking.

(emphasize supplied)

31. We have noticed hereinbefore, that candidates belonging to the reserved categories as specified in the notification are not required to pay any fee. Their age is relaxed up to five years. It is, therefore, not correct to contend that what is given by one hand is sought to be taken by another. They can, thus, appear in the examination for a number of times. Indisputably, the right conferred upon the respondent-writ petitioners in terms of Rules 22 and 22-A of the Andhra Pradesh State and Subordinate Service Rules, 1996 was to be protected. The extent of relaxation has been recognized. By reason of such a provision, the right to be considered has not been taken away.

32. Judging of merit may be at several tiers. It may undergo several filtrations.

Ultimately, the constitutional scheme is to have the candidates who would be able to serve the society and discharge the functions attached to the office. Vacancies are not filled up by way of charity. Emphasis has all along been made, times without number, to select candidates and/or students based upon their merit in each category. The disadvantaged group or the socially backward people may not be able to compete with the open category people but that would not mean that they would not be able to pass the basic minimum criteria laid down therefor.

11. The result would be that the declaration of preliminary test result as made by the Bihar Public Service Commission making provision for reservation would be clearly ultra vires the Constitution. It cannot be justified, but there is caveat. Learned Principal Additional Advocate General points out that there may be a situation wherein through this process of elimination or testing the eligibility for the main examination the number of reserved candidate succeeding may be very few. Thus when we come to the main examination that number would have further shrunk and by the time there is final result, adequate number of candidates may not be available. Keeping these in mind there must be some way to ensure that reserved category candidates have adequate representation so that they have a chance to reach the end of ladder. The argument is not new, inasmuch as it was made before the Division Bench of Andhra Pradesh High Court in the case cited above and partly accepted also. Andhra Pradesh High Court in the case of S. Jafeer Saheb (supra) said that to ensure adequate number of reserved category candidate to reach the main examination, the cut off mark may be lowered but that lowering will have to be done for every body. What was propounded there was if by lowering the marks to certain level the requisite or adequate representation of reserved category is achieved then all general candidate up to that level also must be deemed to have got through in the preliminary examination.

12. Theoretically this principle cannot be questioned for its correctness but when we come to practical application it would make preliminary test meaningless in some cases. I say this because the learned Principal Additional Advocate General clearly pointed out that adequate representation could be achieved in the present examination by lowering the marks of the reserved category candidate to 83 as against General Candidate of 100 but if General Category Candidate between 100 and 83 are permitted to appear for main examination then as against the total number of about 20,000 candidates appearing in the main examination at present the number of total candidate would become 46,000. The whole purpose of preliminary examination would thus be vitiated where 46,000 applicants would be appearing for less than 1,000 posts in the main examination.

13. What BPSC has done after giving effect to reservation for the preliminary result is in the table hereinafter provided:

14. From the aforesaid it would be seen that in order to have adequate representation of different reserved classes, mark in relation to that classes has

been lowered. When it came to General Candidate the cut off was 100. When it came to Scheduled Caste the cut off 83 in order to get adequate representation but there are two obvious flaws in this. The first flaw being that the Meritorious Reserved Candidate (MRC) who were above 100 cut off marks have not been separated. The result is that with the object to get adequate representation of reserved classes the Meritorious Reserved Candidate were ignored. They had to be taken out and clubbed with other reserved candidates of that category to see whether adequate representation was achieved or not. If that was done, the greater number of general candidate would have qualified while maintaining adequate representation for the reserved category and the cut off marks for reserved categories would thus not be required to be lowered to that extent. If what has been done by Bihar Public Service Commission is taken into account then the reserved category would have more than adequate representation. That cannot be permitted. It must be kept in mind that in the preliminary examination MRC could ultimately end claiming the benefit of reservation because he has to sail through the main examination and the interview and then for final appointment and selection to the post. The Apex Court in a recent Constitution Bench Judgment in the case of Union of India (UOI) Vs. Ramesh Ram and Others etc., has clearly held that all persons availing benefit of reservation irrespective of their position in the merit list will be taken out and counted towards the reserved quota. At the level of preliminary examination, this cannot be worked out with certainty because availing of benefit would come at the stage when appointment is made. Therefore, at this stage what is necessary is only adequate representation and thus, in my view, adequate representation would be representation as a whole whether in the general merit list or otherwise. The second flaw would be that whereas for general category the cut off is 100 but for certain reserved category the cut off would be as low as 83. This is an impermissible disparity.

15. To that extent the result, as declared, even keeping in view the concept of adequate representation at this stage is not correct. What BPSC has done is that the reserved candidate who qualified along with general candidates were ignored to be counted as qualified for mains. Obviously the representation would be not adequate but more than adequate or above, which is impermissible.

16. In my view the adequate representation for the main examination of reserved category candidate is not a term of mathematical exactitude. It does not have to be exactly proportionate to the scheme of reservation as provided for the ultimate appointment. All that is required is that there should be adequate representation of the reserved category in the main examination. For example, where finally 1,000 appointments have to be made thereby 500 General Candidates and 500 various reserved category candidates have to be selected, it is not necessary that as a consequence of preliminary test result, candidates exactly in the same proportion must be selected for the main examination. As pointed out earlier the cut off marks generally have to be lowered so that there is adequate number of reserved category candidates. Here, for example, for

selection of 1000 candidates for final selection, the number, who would be interviewed would be about 3,000 and those, who would be required to sit for the main examination would be about 15,000. The cut off marks have to be lowered for the preliminary test to ensure that at least 1,500 reserved category candidates appear for the main examination for 500 vacancies in their quota. That would be adequate. What BPSC has done that it has ensured that about 10,000 reserved candidates qualified for the main examination by lowering only their individual cut of marks. Thus, giving rise to great disparity. General candidates are cut off at 100 but Scheduled Caste category, the cut off marks is reduced to 83. This cannot be justified at this stage.

17. Thus, the result giving effect to reservation at the preliminary test stage, as published by BPSC cannot be held to be valid. It is constitutionally imperfect.

18. Having thus held that the result, as published by BPSC is constitutionally invalid, the question that immediately arises is what the relief that should be granted is in the present case. I am conscious of the rights and duty of this Court exercising jurisdiction under Article 226 of the Constitution. It is to protect, inter alia, the fundamental rights of the citizens, which in this case is Article 14 and Article 16(1) of the Constitution but at the same time the Court has to keep in mind that there exists Article 16(4) and Article 335 of the Constitution as well. These rights have been balanced leading to the decision above. The Court cannot ignore the fact that the examinations have already been conducted up to the final stage. Final interviews have been conducted. What remained was only declaration of final result. BPSC rightly has delayed the said declaration because of pendency of this writ petition. The Court has to keep in mind that while granting relief or declaring result of the litigation, the Court must not create an administrative chaos. As far as possible the Courts are obliged to avoid administrative chaos but at the same time the Court must keep in mind that laws and action of the State and State instrumentality in-conflict with the fundamental rights are void ab-initio in view of Article 13(1) of the Constitution.

19. If I was to declare the result, as prepared for the preliminary test examination to be void and cancel the same, the result would be that the main examination would have to be held all over again, which will not only delay the already delayed selection but would create chaos wherein some people, who had taken the main examination would be thrown out and some people, who had not taken the main examination would now be required to take main examination and a large part would be required to re-appear for the main examination. The result inevitably would be an administrative chaos.

20. Even so far petitioners are concerned, as noted above, petitioner No. 3 has already qualified for main examination and as such he is not contesting the writ petition. So far as petitioner No. 1 is concerned, he being a General category candidate secured 96 marks. Petitioner No. 4 is also a General candidate, who secured 91 marks. Petitioner No. 2, who secured 91 marks, belongs to Backward community. They are all much below the cut of marks. If they are to be

permitted to be included for any supplementary main examination then along with them, as noted above, almost 10,000 to 15,000 more would have to be permitted and that would not be desirable at this stage.

21. In such a situation, even though what BPSC did is constitutionally not correct but in view of the fact that the race have reached the finishing point, it would not be proper for this Court to set aside the result or permit such a large for supplementary main examination.

22. I, therefore, hold that this judgment would only operative prospectively and will have no effect on this 53rd to 55th Combined Competitive Examination conducted by BPSC. It will apply to all examinations where main examinations are yet to be held or preliminary examinations are yet to be announced or held. With the aforesaid observations and directions, the writ petition is disposed of.