
(1995) 12 PAT CK 0054
In the Patna High Court
Case No : C.W.J.C. No. 7211 of 1995

Subodh Kumar and Others

APPELLANT

Vs

Bihar Public Service Commission and Others

RESPONDENT

Date of Decision : 11-12-1995

Acts Referred:

Citation : (1995) 12 PAT CK 0054

Final Decision : Dismissed

Judgement

B.L. Yadav, J.—Whether the provisions of Rules 4 and 5 of the Bihar Civil Service (Executive Branch) and the Bihar Junior Civil Service (Recruitment) Rules, 1951 (for short the Rules) are mandatory or directory and whether the Bihar Public Service Commission (for short the Commission) could have made the advertisement only after indicating the number of vacancies in each services to be filled up, are the short but significant questions for our determination in the instant writ petition filed by Subodh Kumar and 40 others (who have appeared at the preliminary test conducted by the Commission) against the Commission, Bailey Road, Patna, including the members of the Commission and the State of Bihar (for short the State) with a prayer that a writ in the nature of certiorari or any appropriate writ be issued quashing the result of the Preliminary Test of the 40th Combined Competitive Examination conducted by the Commission for appointment to the various posts and services in the State, and further for declaration that the Preliminary test held pursuant to the advertisement dated 23rd April, 1995 is null and void and for issuance of a writ of mandamus commanding the Respondents-Commission to hold the said Preliminary Test afresh and to allow the Petitioners to appear at the said examination.

2. The factual matrix of the case lies in a narrow compass. The Commission issued advertisement dated 23rd April, 1995, published in daily newspaper "Aaj" for holding 40th Combined Competitive Examination (Preliminary) for appointment to the various posts and services in the State including the Bihar Administrative Services and Bihar Finance Services etc. as stated in para-4 of the

petition (vide Annexure-1). This Preliminary Examination was of qualifying nature and the successful candidates were to appear again at the main final examination. The marks obtained in the Preliminary Examination were not to be added in the final examination. It was the examination to short list or to eliminate the unmanageable number of candidates, so as to permit such candidates to appear at the final examination, who obtained higher marks and were covered within 10 times of the actual number of vacancies, or 1/10th of the number of the candidates appeared at the Preliminary Test. According to the Petitioners the number of seats was not declared in the advertisement. The actual grievance of the Petitioners is that without communicating the actual number of vacancies to be filled up as required by Rules 4 and 5 of the Rules and Condition No. 5 of the advertisement (Annexure-1) the declaration of the result of the Preliminary Test was arbitrary and against the specific provision of law and the Commission has failed in its duty enshrined under Article 320 of the Constitution.

3. The counter affidavit has been filed by the Commission and also by the State. In para-19 of the additional counter affidavit filed on behalf of the Commission and Respondents 2 and 3 it has been stated that the number of vacancies for 40th Combined Competitive Examination was 164 and was communicated on different dates to the Commission but before the publication of result of the Preliminary Test. The various communications by the State have been filed as Annexures R-1/G and R-1/C. We wanted to know the original order of communication of the vacancies before the publication of the Preliminary Test. We accordingly directed on 7.12.1995 Shri Ganga Prasad Roy, the learned Additional Advocate General No. III, to obtain the same and produce it on 8.12.1995 before us. Mr. Roy was sincere enough to furnish the original communication in respect of actual number of vacancies to the Commission. We have verified the dates on which the Communication was made to the Commission by the State and the same was found to be correct after having compared from the original. In substance the case of the Commission is that since before the final publication of the result of the Preliminary Test, the vacancies have been communicated, hence substantial compliance was made of the requirements under Rules 4 and 5 of the Rules and Condition No. 5 of the advertisement published on 23rd April, 1995 (in Aaj daily) and the Rules. 4 and 5 and Condition No. 5 of the advertisement are directory in nature and not mandatory and no prejudice was caused to the Petitioners.

4. Mr. Basudeo Prasad, learned Senior Counsel appearing for the Petitioners, contended that Rules 4 and 5 of the Rules and Condition No. 5 in the advertisement dated 23.4.1995 (Annexure-1) were mandatory and actual number of vacancies not having been communicated prior to the date of advertisement, hence the commencement of the Preliminary Test was vitiated. The basic principle is that if a thing has to be done in a particular manner, in that event, it has to be done in that way and in no other way. It cannot be said that since Petitioners have appeared at the Preliminary Test, they have submitted to

the jurisdiction of the Commission, and having been unsuccessful they cannot later on challenge the same. He leaned heavily on *A. A.S.T. Arunachalam Pillai Vs. Southern Roadways (Private) Ltd., ; State of Uttar Pradesh Vs. Singhara Singh and Others*, (at page 361 para-7); *C. Channabasavaiah Vs. State of Mysore and Others*, and *B.S. Vadera Vs. Union of India (UOI) and Others*,

5. Mr. B.C. Ghosh, learned Senior Counsel appearing for the Respondents, refuted the submissions of the learned Counsel for the Petitioners and urged that the provisions of Rules 4 and 5 of the Rules and Condition No. 5 of the advertisement (Annexure-1) were directory in nature, keeping in view the Communication of the actual number of vacancies much before the announcement of the result of the Preliminary Test. In view of para-19 of the Second Additional Counter Affidavit on behalf of Respondents 1 to 3, and Annexures R-1/G and R-1/C the number of vacancies in all were 164, which were communicated on different dates including 1.8.95 at serial No. 4 and similarly on other dates it has been communicated including 28.7.95 and 2.8.95 and so on. Much thereafter the result of the Preliminary Test was published and candidates more than 10 times of the actual number of vacancies were declared successful at Preliminary Test. In this way the substantial compliance of Rules 4 and 5 and also of Condition No. 5 of the advertisement has been made. In other words, 1740 candidates have qualified for the final test which was more than 10 times of the actual number of vacancies, but the Petitioner's names did not find place even in that list. Consequently the Petitioners have no legal right to challenge the procedure adopted by the Commission which was the supreme body for holding such examinations in view of the plenary powers of the Commission provided under Article 320 of the Constitution. Rule 5 of the Rules has been amended by notification and the same has been published in the Bihar Extraordinary Gazette dated 17.11.1995. Reliance was placed on *Madhya Pradesh Public Service Commission Vs. Navnit Kumar Potdar and another, Madan Lal and Others Vs. State of Jammu and Kashmir and Others*, and on a Division Bench decision of this Court in *Ganesh Prasad Yadav and Others Vs. The State of Bihar and Others*

6. After having scrutinised the respective submissions on behalf of the parties, the short but significant questions that fall for our determination are whether Rules 4 and 5 of the Rules and Condition No. 5 of the advertisement are mandatory or directory, of course keeping in view the principle that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and in case substantial compliance was made what would be its consequence.

7. As regards first question there is nothing denying the fact that the principle is that when doing of anything in a particular manner is sanctioned by law, then the thing cannot be done in a different way, is based on an old Latin Maxim "ACTUS LEGITIME NON RECIPIUNT MOMDUM" and the earliest case based on that maxim was *Taylor v. Taylor* (1878) 1 Ch. D. 426; and Jessel M.R. observed as follows:

When a statutory power is conferred for the first time upon a Court and the

mode of exercising it is pointed out, it means that no other mode is to be adopted.

This was followed by the Privy Council in *Nazir Ahmad v. The King Emperor* (1936) 36 Ind. App. 372. Subsequently it was followed in *State of Uttar Pradesh Vs. Singhara Singh and Others*, But in the instant case primary question is whether the provisions of Rules 4 and 5 and Condition No. 5 of the advertisement are mandatory, or directory in nature.

8. EX ABUNDANTI CAUTELA the Rules 4 and 5 are set out:

4. The Commission shall announce in each year in such manner as they think fit, the number of vacancies in each service to be filled by direct appointment on the result of a competitive examination and shall invite applications from candidates eligible for appointment under Rules 6 and 7. The competitive examination will be conducted by the Commission and will normally be held between the months of November and February unless otherwise notified.

5. The Commission may fix a limit in any particular year as to the number of eligible candidates to be admitted to the examination and if the number of candidates exceed the limit fixed, the Commission may make a preliminary selection of candidates to be admitted to the written examination on the basis of their academic records.

9. Condition No. 5 of the advertisement was to the effect that candidates 10 times in number of the actual number of vacancies, or 1/10th of the number of candidates appeared in the Preliminary Test, would qualify to appear at the final test. In fact 164 was the actual number of vacancies, communicated by the State to the Commission before the publication of the result of the Preliminary Test. No doubt Rules 4 and 5 are couched in a language having very wide sweep, and we are conscious of the Latin Maxim "*VERBIA LEGIS NON RECEDENDUM EST*" which connotes that from the words of a statute there need not be any departure. Both the Rules 4 and 5 as they stand have to be read together along with Articles 320 of the Constitution. Although under Rule 4 the word "shall" has been employed by the legislature to convey the presumption that it was imperative in meaning. But this prima facie inference may be rebutted by other considerations such as object and scope of the provisions, public interest, and the consequences flowing from such construction. The elementary Rule of interpretation of the expressions "shall" and "may" is well settled by now. The word "shall" raises a presumption of mandatory nature and "may" indicates directory but that itself is not final. It is the context in which these expressions have been employed are to be looked into and the expression "shall" itself is not conclusive that it is of mandatory character. The factors, that have to be taken into account before giving a final verdict as to whether the word "shall" is directory or mandatory, are the scope of the provisions and public interest coupled with the injurious effect of non-compliance with the provisions are relevant considerations. In case the public interest and injurious effect of non-compliance is scrutinised it is obvious that

expression "shall" under Rule 4 is an enabling word conferring the discretionary power on the Commission to hold the examination by communicating the number of vacancies, to be filled up by direct appointment as a result of the competitive examination held by inviting applications for that purpose. Holding a Preliminary Test is just commencement of the process of examination. The actual examination is held after the results of the Preliminary Test has been declared. The object of holding the Preliminary Test is to eliminate the unmanageable number of candidates. In case the actual number of vacancies have been declared before publication of the Preliminary Test, that is in our view sufficient compliance of Rule 4 of the Rules. The Commission has to hold so many examinations and if vacancies were not received from the State before issuing advertisements (Annexure-1) that was immaterial. In case the object of the legislature would have been to make it mandatory, the Rule 4 would have been in different words as follows:

No examination can be held by the Public Service Commission by inviting applications to select candidates on basis of merit and efficiency, unless the actual number of vacancies to be filled up in that year have been announced before the commencement of the Examination.

Keeping in view the object of legislature and the public interest, with no consequences having been provided by not following the Rule 4 in our considered opinion Rule 4 is directory, and expression "shall" has to be interpreted as "may".

10. It is within the discretion of the Commission to act according to the powers given under Article 320 of the Constitution (See *Yasbant Singh Mathura Singh v. Ahmedabad Municipal Corporation* (1992) Suppl. (1) S.C.C. 5 , *The Municipal Corporation of Greater Bombay Vs. M/s. New Standard Engineering Co. Ltd.*, The present context, the expression "number of vacancies in each services to be commenced and to be filled up by direct appointment" is hedged with the expression "in such manner as they think fit". This obviously indicates that wide discretion has been given to the Commission to commence the examination in such manner as it thinks fit. Rule 5 employs expression "may" and it is directory. This rule indicates that in case the number of candidates exceeds the limits the Commission has to make Preliminary Selection of the candidates on the basis of their academic records. But as indicated above, this rule has been later on amended and substituted by Rule 5 as published in the Bihar Extraordinary Gazette dated 17.11.1995. In our considered opinion, Rules 4 and 5 and condition No. 5 of the advertisement (Annexure- 1) are directory in nature and as indicated above the number of vacancies to be filled up being 164 have already been indicated by the Government well before publication of the result of the Preliminary Test.

11. There is another aspect of the matter. The candidates selected in the Preliminary Test. (i.e. 1740) are more than 10 times of the actual number of vacancies (i.e. 164). We have got sympathy with the Petitioners but the difficulty is that they could not qualify to be called for the final test even within the limits

of 1740 candidates, more than 10 times of the actual number of vacancies. In our opinion, no prejudice under these circumstances, has been caused to the Petitioners as they could not qualify within the limits of more than 10 times of the actual number of vacancies. As the number of vacancies were communicated subsequent to the holding of the Preliminary Test but before the publication of the result, hence it cannot be said that Rule 5 or Condition No. 5 of the advertisement has been totally violated. There is slight variation and we are conscious that in such matter the "doctrine of necessity", comes in play. Certain amount of allowance has to be made in favour of the working of the Government, keeping in view the dictum of their Lordships of the Apex Court about process of Govt. working in this country as enunciated in Union of India (UOI) and Others Vs. Satish Chandra Sharma, at page 603, bottom of para 11) quoted as follows:

The description of Govt. and its processes, as prevalent in the days of Lord Curzon, holds good today. Here are his impatient words dipped in pungent ink:

...the administration had become ponderous like an elephant, very stately, very powerful, with a high standard of intelligence, but with a regal slowness in its gait.

Round and round, like the diurnal revolution of the earth, went the file, stately, solemn, sure and slow : and now, in due season, it has completed its orbit, and I am invited to register the concluding stage.

12. Reverting to the cases cited at the Bar, on behalf of the Petitioners, A.S.T. Arunachalam Pillai Vs. Southern Roadways (Private) Ltd., Paragraph 5 was a case where it was held by the Apex Court that even though the Respondent in that case had submitted to the jurisdiction of the Regional Transport Officer and had not taken the objection before the High Court that the Officer had no jurisdiction to vary the conditions of a permit, and it was indicated that the High Court was right in allowing the Respondent to urge that the Regional Transport Officer had no jurisdiction. In other words even after submitting to the jurisdiction, the lack of jurisdiction can be taken. But the Apex Court has taken a different view in other cases. In the instant case as the Petitioners have submitted to the jurisdiction of the Commission, but subsequently on being unsuccessful, have challenged the result and examination of Preliminary Test. But in Madan Lal and Others Vs. State of Jammu and Kashmir and Others, the Apex Court (under para 9) ruled that where a candidate takes chance to get selected, but later on, on being unsuccessful, cannot challenge the result.

13. State of Uttar Pradesh Vs. Singhara Singh and Others, (supra) at page 361, was a case where the principle was emphasised that where a particular manner was sanctioned, it has to be done in that way or not, but that principle has to be read in relation to the particular facts of a case. This Rule has got exceptions also. This Rule of procedure, however, is not by itself an end but it is meant to achieve the ends of justice. These rules are just tools to achieve the ends of justice. An interpretation which furthers the ends of justice is to be preferred. To

put it differently, the rules of procedure are hand maid to justice.

14. C. Channabasavaiah Vs. State of Mysore and Others, (supra) was a case based on unique and startling facts where selection of those obtaining less number of marks than those who had obtained higher marks was done only on the basis of the viva-voce test and later on some compromise was arrived at, but that was deprecated by the Apex Court. That was a case based entirely on different facts.

15. B.S. Vadera Vs. Union of India (UOI) and Others, was a case dealing with the power to give retrospective effect of the rules and also laying down principles of interpretation of the provisions of the Constitution, but the facts in the petition at hand are entirely different. No rule is sought to be given retrospective effect. This case is of no assistance to the Petitioners.

16. Reverting to the cases cited by Mr. Ghose, learned Senior Advocate appearing for the Respondents, Madan Lal and Others Vs. State of Jammu and Kashmir and Others, was a case where role of the Bihar Public Service Commission was emphasised and there unsuccessful candidates at the viva-voce test had challenged the result and the merit list. It was emphasised at page 1093 (para 9) that where the candidates who take a chance to get selected, cannot later on challenge the assessment of merit by an expert committee, in our opinion, the rules of justice and the propriety require that the Petitioners, who appeared at the Preliminary Test with a view to succeed but could not obtain sufficient marks, would not be justified to challenge the procedure adopted by the Commission about non-declaration of the actual number of vacancies before the advertisement being issued. The ratio of that case under paragraph 9 is set out:

Therefore, the result of the interview test on merit cannot be successfully challenged by a candidate who takes a chance to get selected at the said interview and who ultimately finds himself to be unsuccessful. It is also to be kept in view that in this petition we cannot sit as a Court of appeal and try to re-assess the relative merit of the concerned candidates who had been assessed at the oral interview nor can the Petitioners successfully urge before us that they were given less marks though their performance was better. It is for the interview Committee which amongst others consisted of a sitting High Court Judge to judge the relative merits of the candidates who were orally interviewed in the light of the guideline laid down by the relevant rules governing such interview. Therefore, the assessment on merits as made by such an expert committee cannot be brought in challenge only on the ground that the assessment was not proper or justified as that would be the function of an appellate body and we are certainly not acting as a Court of appeal over the assessment made by such an expert committee.

17. Madhya Pradesh Public Service Commission Vs. Navnit Kumar Potdar and another, was a case where it was pointed out that statutory criteria for selection to the post of Presiding Officer of the Labour Courts was five years practice at the

bar (vide Section 8(3)(c) of the M.P. Industrial Relations Act, 1960 (for short "the Act"), but with a view to short listing of the eligible candidates at the Preliminary Test, it was later on provided by the Commission that only those candidates would be permitted, who have completed 7 1/2 years of practice, instead of calling for interview those who have put in five years of practice at the Bar. It was held by the Apex Court that even taking a, different procedure than the procedure u/s 8(3)(c) of the Act the Commission was justified.

18. In the present case nothing abnormal about changing of actual qualification as happened in that case *Madhya Pradesh Public Service Commission Vs. Navnit Kumar Potdar and another*, was done, rather the actual number of the vacancies which were 164, were not indicated and announced prior to issuance of the advertisement (Annexure 1), rather the same was communicated by the Government much prior to the announcement of the result of the Preliminary Test. In that view of the matter, in our opinion, no illegality has been committed, nor the Petitioners who are unsuccessful candidates at the Preliminary Test can be said to have been prejudiced in any way, as Rule 4 of the Rules and Condition No. 5 of the advertisement, being directory in nature, have been substantially complied with.

19. *Ganesh Prasad Yadav and Others Vs. The State of Bihar and Others* was a case where Hon'ble Brother Nagendra Rai, J. (for whom I have got profound regards), speaking for the Bench, ruled that even though there were certain questions in the objective test which were somewhat misleading and there were some mistaken answers, nevertheless same questions were misleading for all the candidates including the successful and unsuccessful candidates. Consequently the unsuccessful candidates having appeared in the said Preliminary Test and taken their chance in the selection, process, cannot be allowed to challenge the holding of the Preliminary Test by the Commission. We agree with the dictum laid down in that case. In our considered opinion the question on the point is as to whether the Petitioners at the Preliminary Test could challenge the result once they having appeared with the hope of getting success, but later on could not get success. Our answer is that the unsuccessful candidates would not be justified in challenging the Preliminary Test and the procedure adopted therein by the Commission once they have appeared in the said test and were declared unsuccessful. Our opinion finds support from the dictum laid down by their Lordships of the Supreme Court in *Madan Lal and Others Vs. State of Jammu and Kashmir and Others*, para 9 (*supra*).

20. Even at the cost of repetition, reverting to the last question about the provisions of Rules 4 and 5 of the Rules and Condition No. 5 of the advertisement (Annexure 1) in the light of the powers of the Commission under Article 320 of the Constitution, suffice, it to say that the Commission is an important institution created by the Constitution of India and entrusted a very important task of selecting persons with the duty of running administration of the State and also of the Union of India at pivotal place. No doubt, in our opinion, the administration

of the State depends on the fair play off the Commission. The Commission is as independent body created under the Constitution with a view to ensure selection of best available candidates for appointment to the post under the State or Union. This has necessitated with a view to avoid arbitrariness and nepotism in the matters of appointments. It is accordingly manned by persons of the high dignity, calibre, integrity and efficiency. At the same time, in the instant case the Commission is assisted by the experts of the subject. This is an Expert Body having primary powers in the matters of appointments to the different services in the State and to hold examinations in accordance with the rules. It has also got power to modify the mode of selection or to prescribe fresh conditions in the advertisement at the initial stage. This Court in the exercise of its equitable jurisdiction under Article 226/227 of the Constitution does not act as a Court of Appeal. Against a particular procedure adopted by the Commission in holding an examination, or against a result declared, the scope of enquiry by this Court is very limited.

21. In *Madhya Pradesh Public Service Commission Vs. Navnit Kumar Potdar and another*, (supra) it was ruled by the Apex Court that even in the process of short listing of the candidates for Preliminary Test, Section 8(1)(c) of the Act prescribed five years practice at the Bar as qualification for the candidates applying for the post of Presiding Officer of the Labour Court, but later on that condition was changed by the Commission, while holding Preliminary Test. The Commission called for interview only those candidates who have got 71 years practice and experience at the Bar. It was challenged that the Commission cannot change the requisite conditions and qualification provided u/s 8(1)(c) of the Act, but the Apex Court ruled that with a view to short listing of the candidates and to avoid unmanageable number of candidates, the Commission would be justified to lay down different criterion to be applied in calling for the interview, and in doing so, the Commission would be justified in acting within its power as given under Article 320 of the Constitution.

22. In view of the plenary powers of the expert body like the Bihar Public Service Commission it shall have power to change even the requisite qualifications with a view to short listing of the candidates. In this view of the matter also Rules 4 and 5 of the Rules and Condition No. 5 of the Advertisement are directory and not to be implemented in its letter and spirit. In such fact situation the condition indicated could be modified by the Commission and even without announcing the actual number of the vacancies at the time of issuing advertisement even the result of the Preliminary Test could be published, there was no illegality nor the Petitioners were prejudiced, and the principle that it has to be done in a particular way was a general principle and it has to be modified in accordance with the particular provisions of the relevant rules and the fact situation.

23. Even at the cost of repetition our answers to the questions posed are that Rules 4 and 5 of the Rules and also Condition No. 5 of the advertisement are directory and the Commission has plenary power to hold examination and it shall

have power even to modify the procedure or to lay down different guidelines in case it is faced with certain difficult fact situation. But the course adopted must not be arbitrary or unreasonable.

24. Before closing with the case the justification for the relief of writ of certiorari and writ of mandamus may be examined. The operation of a writ of certiorari is extended to control proceedings of bodies which cannot be said to be Courts of justice. Whenever any body or person or any authority required to determine the questions affecting the rights of the citizens and having duty to act in a quasi judicial manner in excess of their legal authority, in that event it is subject to the jurisdiction of this Court in a writ of certiorari. But before issuing a writ of certiorari it has to be ascertained whether the Petitioners have got legal right or subordinate body exercising jurisdiction, has acted beyond jurisdiction, it is equitable and discretionary remedy and need not be issued as a matter of right or as a matter of course. Whether the substantial justice has been done or if the Petitioners are not prejudiced, in that event this Court would not be justified in issuing equitable remedy of a writ of certiorari. In the present case we are satisfied that neither the Petitioners have legal right to challenge the Preliminary Test held by the Commission nor they can challenge the procedure adopted by the Commission. As the number of the vacancies were actually declared and communicated to the Commission by the State much before the result of the Preliminary Test was published, there was no illegality. The matter can be angulated in a different perspective, more than ten times of the actual vacancies were declared successful at the Preliminary Test. In fact the Preliminary Test was not the actual examination where the candidates are selected to fill up the actual number of the vacancies, rather it was just commencement of the process of the examination. Non-communication of the number of actual vacancies just before commencement of the Preliminary Test has not caused any prejudice to the Petitioners. Before issuing a writ of certiorari the Court should weigh equitable realities of the situation. The present is not a fit case, in our opinion, where a writ of certiorari can be issued.

25. A writ of mandamus is issued only when an inferior authority or the tribunal has declined to exercise its jurisdiction. Object of mandamus is not to review or control action of the authority but to compel it to do or to abstain from doing an act. The duty that may be enjoined by mandamus may be one imposed by the Constitution, an Act or the Rules and if that person or body refrains from doing the act or refuses to exercise its jurisdiction, where under the law it is bound to perform its duty, and in case an application has been made but has not been considered, in that event only this writ of mandamus can be issued. In the present case, however, we have examined all the aspects of the matter and we do not find that the Commission has refused to exercise its jurisdiction or has acted against the provisions of the law or the rules or has acted in an arbitrary or unreasonable manner. In this view of the matter it is not a fit case where a writ of mandamus can be issued.

26. In view of the premises aforesaid and applying the Aristotelian and Baconian methods of reasoning's we do not find any merit in this writ petition and consequently the same is hereby dismissed, but without any order as to costs.

S.K. Singh, J.

27. I agree.