

Serial No. of Order	Date of Order	ORDER WITH SIGNATURE	Office notes as to action (If any) taken on order
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IN THE HIGH COURT OF JUDICATURE AT PATNA

C.W.J.C.NO.10942 OF 1998
 PRAVIN KUMAR THAKUR AND ORS VS STATE OF BIHAR & ORS.

- For the petitioners: Mr Abhay Kumar Singh, Sr. Advocate
 Mr Binod Shankar Tiwary.
- For the Intervenor : Mrs Sujata Mukherji
 Mr Subodh Kumar Jha.
- For the Intervenor : Mr Ram Balak Mahato, Sr. Advocate.
 Respondents Mr Chittaranjan Sinha Ho.I.
 Mr Dinu Kumar
- For the State : Mr A.K.Choudhary, G.P.VIII.
 Mr Shekhar Singh, J.C.
- For the B.P.S.C. : Mr Anil Kumar Tiwary.

O R D E R

This writ petition was filed for quashing the result of the written test held for appointment to the post of Drug Inspectors, which was published on 27.11.1998 by the Bihar Public Service Commission (In short 'BPSC') in the daily newspaper "AAZ", a copy of which is Annexure 16 to the writ petition and to declare that the criteria adopted by the State Government for appointment to such posts was in conflict with the statutory rules made under Article 309 of the Constitution. A copy of such rule is Annexure 15 to the writ petition.

2. I have heard the learned Advocates for the parties, therefore, this writ petition is disposed of at this stage itself.

3. Before coming to the crucial contention of the parties, it would be apt to

Shed Press, Patna-20 - notice a few facts.

As would appear from the facts brought on record, on 19.10.1997, vide Annexure 6, an

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Date of Order	ORDER WITH SIGNATURE 2	Office notes as to action (If any) taken on order
	<p>advertisement was published by the Bihar Public Service Commission inviting applications from the intending candidates for appointment of Drug Inspectors. Thereafter, on 14.8.1998 by a notification contained in Annexure 7, syllabus etc were prescribed for the written test and interview. The total number of vacancy was worked at 215 on the day of advertisement. Altogether 384 candidates appeared at the test out of whom 39 candidates were declared successful on the relaxed standard which would be evident from the result published on 27.11.1998, as contained in Annexure 16. The main prayer in this case is for cancellation of the result and examination conducted by the BPSC.</p> <p>4. Since a grievance has been raised about the criteria prescribed by Annexure C/1 to the counter affidavit, the resolution dated 22.12.1990, introducing provisions to grant reservation to the Backward Classes and further relaxation of percentage ^{of marks} to the Scheduled Caste & Scheduled Tribe is alleged to be in conflict to the statutory rules of the State Government, framed under Article 309 of the Constitution, a copy of which is Annexure 15, dated 21.12.1989, it would be apt to notice certain relevant provisions of the rules and the procedures prescribed by Annexure C/1.</p> <p>5. As per rule six, 100 marks were</p>	

of Order

ORDER WITH SIGNATURE

Office notes as to action

(If any) taken on order

3

provided for each of the papers. It further provides that a candidate of the general category securing 40% marks and the candidates belonging to Scheduled castes and Scheduled Tribes securing 35% would be qualified to appear at the interview. No provision was made to extend benefit for reservation to any other class. But rule 15 of the said Rules provides that the BPSC while recommending names of the candidates was required to extend benefit of reservation and other relaxation etc in terms of the rules of reservation framed by the Government from time to time.

6. Mr Singh, learned counsel for the petitioners, contended that as would appear from the advertisement and the statutory rules, framed by the Government, as contained in Annexure 15, since no provision was made to extend the benefit of reservation to the backward classes nor there was any provision to relax the percentage of the qualifying marks, it was not open to the State authorities to extend such benefits to these classes or to relax the qualifying marks by virtue of the resolution dated 22.12.1990, as contained in Annexure C/1 to the counter affidavit. Because it is well settled that by virtue of the executive instruction, no subtraction or

alteration can be made to the provisions prescribed under statutory rules framed under

Serial No. of Order	Date of Order	ORDER WITH SIGNATURE 4	Office notes as to action (if any) taken on order
		<p>Article 309 of the Constitution.</p> <p>7. On the other hand, Mr Mahato, appearing for the intervenor respondents, contended that as would appear from rule 15 of the statutory rules, the respondent Commission while recommending the names of the candidates was also required to extend the benefit of reservation to the members of the Scheduled Caste and Scheduled tribe and other backward classes on the basis of the rules of reservation prescribed by the State Government from time to time. This is also not in dispute that by virtue of the Bihar Reservation of Vacancies in Posts and Services (for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1991 (The Bihar Act 3, 1992) of 1992, the State Government had extended the benefits of reservation to the members of the Scheduled Caste and Tribe and other backward classes. Therefore, there is nothing wrong if by virtue of the resolution dated 22.12.1990, contained in Annexure C/1, a request was made to the Commission that while making recommendations against such vacancies, steps should also be taken to extend benefit to the candidates belonging to the Scheduled Caste and Scheduled Tribe and other backward classes.</p>	

8. In my view, the submission of Mr Mahato, as noticed above, appears

Date of Order	ORDER WITH SIGNATURE	Office notes as to action (If any) taken on order reference to
	<p>justified. Because from a bare rule 15 of the statutory rules, there cannot be any dispute that the Commission while recommending names of the candidates was required to grant benefits of reservation to the members of the Scheduled Castes, Scheduled Tribes and backward classes. This also cannot be disputed that by virtue of the Bihar Act 3 of 1952, the benefit of reservation was already made to these classes. Therefore, it would not be proper to allege that the resolution of the Government contained in Annexure C/1 to extend benefit of reservation to these classes is in conflict to the provisions of the statutory rules.</p> <p>9. But a question may further arise whether in absence of any provisions under the statutory rules to relax or reduce the qualifying marks of the candidate, it will be open to the statutory authorities to relax such criteria by virtue of the impugned resolution (Annexure C/1). It would appear from rule 12 as well as advertisement in question that a candidate of general category securing 40% marks and the candidates of Scheduled Caste and Tribe securing 35% marks would be qualified to appear at the interview. But no provision was made for relaxation of the qualifying criteria. It is</p>	

Sl. No.
of Order
Date

Date of Order

ORDER WITH SIGNATURE

Office notes as to action
(If any) taken on order

Instruction cannot amend or supersede the statutory rules by adding some thing therein as has been observed by the apex Court in the case of Sant Ram Sharma vs. The State of Rajasthan (AIR 1967 SC 1910). Similar was the view expressed in the case of P.D. Arwal vs state of UP (AIR 1987 SC 1670). True it is if the rule is silent on a particular subject, Government can fill up the gap by appropriate instructions. But in this case, as noticed, specific provision was already made in the rule prescribing qualifying marks. Therefore, the Government resolution dated 22.12.1990 (Annexure C/1) to the extent it has relaxed and reduced the qualifying marks to the candidates of the scheduled caste and tribe and other backward classes ^{may} ~~leave~~ to be declared ^{not} illegal arbitrary since it is in direct conflict to the provisions of the statutory rules.

10. Mr Singh then contended that the criteria adopted by the respondents for selection of the candidates is also illegal because as per the provisions enumerated in the statutory rules and the terms of the advertisement, a candidate was required to possess experience of work on such side at least for a period of 18 months but there are certain candidates against Roll Nos. 79 and 327, who have been selected even without

Order	ORDER WITH SIGNATURE 7.	Office notes as to action (If any) taken on order
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having any experience.

11. A similar grievance, as aforesaid, was also made that subjects mentioned in the advertisement for holding written test were beyond the syllabus prescribed for this purpose. Because, as would appear from the averments made in the writ petition questions were given from such subjects which were completely beyond the syllabus. But in spite of the objections raised before the Commission, no attempt was made to hold a fresh test.

12. Mr Mahato and the learned counsel for the respondent Commission on the other hand, contended that from the statements made in the counter affidavit, it would appear that all the questions prescribed at the time of examination were strictly in accordance with the syllabus prescribed and published by the Government. But when the petitioners have been declared unsuccessful, they have started raising such grievance without any basis.

13. In my view, undisputedly, the petitioners appeared at the written test as was organised by the respondent Commission. It is also not disputed that out of 384 candidates only 39 were declared successful. Rest of them including the petitioners were

not found qualified, as they could not get the minimum qualifying marks. Therefore, in the

Serial No. of Order	Date of Order	ORDER WITH SIGNATURE	Office notes as to action (If any) taken on order
		<p>facts and circumstances, a question may arise whether the petitioners can be allowed to approbate and reprobate to challenge the validity of the examination and its result.</p> <p>Because, by virtue of several decisions, the apex Court has held that a candidate having taken chance to appear at the examination, selection process, cannot be allowed to challenge the procedure and criteria after being declared unsuccessful. In the case of I.L.Honnegouda v The State of Karnataka and others (AIR 1978 SC 28) the appellant had applied for the post of Accountant under the relevant rules and appeared before the recruitment committee constituted under the said rule. But later, he challenged the constitutionality of the rules. The Court held that the appellant having taken a chance in the selection cannot be allowed to challenge the rule.</p> <p>In the case of Om Prakash Shukla v. Akhilesh Kumar Shukla and others (AIR 1986 SC 1043) the petitioners had appeared at the written examination with protest. He filed a petition after realising that he would not succeed in the examination. The apex Court set aside the judgment of the High Court holding that no relief should be granted to such a petitioner who had taken a chance to appear at the examination.</p>	

No. of Order

ORDER WITH SIGNATURE

Office notes as to action

(If any) taken on order

Yet a reference in this regard can also be made to another decision of the apex Court in the case of University of Cochin vs. N.S. Kanjoonjamma and Others (AI 1997 SC 2083). In that case, a question relevant for consideration was with respect to a resolution adopted by the Syndicate and approved by the University whereby certain benefits were extended for special recruitment to the scheduled caste and scheduled tribe. The appellant appeared at the written test and interview before the Selection Committee but was found unsuccessful. But the Court held that such a candidate was estopped from challenging the correctness of the procedure and criteria prescribed under the advertisement. Similar view was also taken by this Court in the case of Ganesh Prasad Yadav and ors v. State of Bihar & Ors v [1995(2)PLJR 170] and the reliefs sought for on behalf of the petitioners to that extent was rejected holding that certain mistakes in question papers will not be a ground to cancel examinations.

14. Mr Singh lastly contended that in view of the judgment of the apex Court in the case of Indr³a Sawhney v. Union of India [1992 Suppl(3) SCC 217] and a later judgment

in the case of Ashoka Kumar Thakur v. State of Bihar & Ors. [(1995)5 SCC 403], the decision

Serial Number	Date of Order	ORDER WITH SIGNATURE 10	Office notes as to action (if any) taken on order
---------------	---------------	----------------------------	--

of the Government to extend benefit of reservation to the candidates of Backward Classes is against the mandate of the apex Court. Because such a privilege cannot be granted unless there is specific identification and exclusion of the affluent and "creamy layer" amongst the Backward classes. In other words, unless there is distinct identification of a creamy layer, disparities are bound to occur in the class itself.

15. It has to be noticed that undisputedly, the State Government having the command of the apex court in the case of "Indra Sawhney" (supra) had fixed a criteria for identification of creamy layer vide an Ordinance called, "The Bihar Reservation of Vacancies in Posts and Services (for Scheduled castes, Scheduled Tribes and Other Backward Classes) (Amendment) Ordinance, 1995 (V of 1995). But the said criteria for identification of "creamy layer" adopted by the State Government was found violative of Art. 15(4) of the Constitution as wholly arbitrary and against the law laid down in Mandal's case and, therefore, was struck down by the apex court in the case of "Ashok Kumar Thakur" (supra).

16. It would further appear while striking down the criteria, the State

Order	No. of Order	ORDER WITH SIGNATURE	Office notes as to action (if any) taken on order
		<p>Government was also directed that unless and until, a fresh criteria is fixed, the criteria laid down by the Government of India for the relevant academic year i.e., 1995-96 shall be followed. Nothing has been brought before me by the State Government to show that any fresh criteria was laid as directed by the apex Court. Because, having regard to the consistent views expressed by the Supreme Court, as noticed above, it was proper for the State Government to identify creamy layer amongst the backward classes to extend the benefit of reservation to such classes which remains after exclusion. I have already noticed that faced with such a situation, the apex Court in the case of Ashok Kumar Thakur (supra), has not only declared the Ordinance (5 of 1995) violative of Articles 14 and 16 of the Constitution, rather had issued specific direction to the Government to adopt the criteria laid down by the Central Government for the relevant academic year 1995-96. Unfortunately, till this day, no such criteria has been laid down. I, therefore, direct the State Government to come forward with such a criteria positively within six months from the date of receipt/production of the order before the Chief Secretary relating</p>	
		<p>which appointments made in contravention of the decisions of the apex Court can be</p>	

declared illegal and arbitrary.

17. But having regard to various decisions, as noticed above, petitioners having taken a chance to appear at the examination and on being declared unsuccessful, cannot be allowed to challenge the defects of prospectus or any other decisions of the respondents to relax the experience etc.

18. But in the facts and circumstances of the case, as ^{the} relaxation of qualifying marks prescribed by Government resolution contained in Annexure C/1 has been declared illegal, since it is in direct conflict to the criteria prescribed under the statutory rules, the respondent Commission will have to redetermine the merit list of the candidates on the basis of the qualifying marks prescribed under the statutory rules before taking any steps for recommendation of the names.

19. With the above direction/observation, this writ application is thus disposed of.

Sd/- N. K. Bandyopadhyay

CERTIFIED TO BE TRUE COPY
For Joint Registrar (I) *[Signature]*
Patna High Court
26/9/79
Enacted by 76 Act I of 1971

[Signature]
26.9.79
E.S.