

Anil Kumar and ors. Vs. State of Bihar and ors.

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Court : Patna

Decided On : Apr-23-1993

Judge : S.B. Sinha, J.

Appeal No. : C.W.J.C. No. 1470 and 8400 of 1991

Appellant : Anil Kumar and ors. and Dayanand and ors.

Respondent : State of Bihar and ors.

Disposition : Application Dismissed

Prior history : S.B. Sinha, J. 1. These two writ applications involving common questions of Law and fact were, with the consent of the parties, taken up for hearing together and are being disposed of by this common judgment. 2. In C. W. J. C. No. 1480 of 1991, the petitioners have prayed for quashing of an advertisement bearing No. 22 of 1990 as contained in Annexure-14 thereto whereby applications were invited for filling up 21 posts of Drug Inspectors and also for a direction to the Bihar Public Service Com

Judgement :

S.B. Sinha, J.

1. These two writ applications involving common questions of Law and fact were, with the consent of the parties, taken up for hearing together and are being

disposed of by this common judgment.

2. In C. W. J. C. No. 1480 of 1991, the petitioners have prayed for quashing of an advertisement bearing No. 22 of 1990 as contained in Annexure-14 thereto whereby applications were invited for filling up 21 posts of Drug Inspectors and also for a direction to the Bihar Public Service Commission to send the merit list along with the recommendations for appointment of the petitioners thereof, pursuant to the advertisement No. 6 of 1977 in terms of the direction of the Supreme Court dated 6th August, 1986, as contained in the State Government letter dated 13th April, 1989.

3. The petitioners in both the writ applications have prayed for their appointment as Drug Inspectors as they hold the requisite qualifications therefor. The petitioners of C. W. J.C. No. 1470 of 1991 obtained a degree of Bachelor of Pharmacy from Birla Institute of Technology, Mesra. The petitioners 1, 4 and 5 allegedly also possess the preferential qualification of Food Inspector Training for the post of Drug Inspector, as stipulated in the Advertisement No. 6 of 1977. Admittedly, the appointments in the post of Drug Inspectors have to be made with the concurrence and recommendations of the Bihar Public Service Commission.

4. In 1975, twelve persons whose names appear in paragraph 6 of the writ application, were appointed as Drug Inspectors for a period of six months without selection and recommendations through the Commission. By reason of an advertisement bearing No. 90 of 1955 issued in October, 1975, 21 posts of Drug Inspectors were sought to be filled up. However, the State by a letter dated 21st July, 1976 as contained in Annexure-A to the counter affidavit filed on behalf of Respondents 4 and 5 requested the Commission to postpone the interview which was scheduled to be held on 22nd, 23rd and 27th July, 1976. On 3-1-1977, the Government sent fresh requisition for 23 posts of Drug Inspectors in pursuance whereof, in February, 1977, advertisement No. 6 of 1977, as contained in Annexure 1 to the writ application was issued. The petitioners of C. W. J. C. No. 1470 of 1991 also applied for appointment in the said post in response to the aforementioned advertisement. The Bihar Public Service Commission held interview of the candidates from 24th to 26th August, 1977, as would be evident

from Annexure-2 to the writ application. According to the petitioners, merit list of 42 candidates was prepared and they were at Serial Numbers 25, 30, 32, 35 and 37 respectively. However, out of the 42 candidates 11 candidates were having the degree of B. Pharma from B. I. T., Mesra.

5. On 19th September, 1977, the Commission sent its recommendations in respect of 18 candidates by excluding those persons whose names appeared at Serial Numbers 1, 6, 10, 11, 12 and 21 on the ground that they have obtained the said degree from B.I.T. Mesra which was not recognised. The State of Bihar, however, by a letter dated 20th September, 1977 sent an information to the effect that the degree of B. Pharma of those candidates who had passed from B. I. T, Mesra was recognised and requested that revised recommendations should be sent. By a letter dated 5th October, 1977, however, the said request of the State Government was turned down by the Commission. In 1978 more Drug Inspectors were appointed on ad hoc basis by the State Government without selection and recommendations of the Bihar Public Service Commission. On or about 1st of July, 1978, the Commission opined that the posts of Drug Inspectors should be re-advertised for consideration of the cases of the candidates who held B. Pharma degree from B. I. T., Mesra. On 12th July, 1979, in terms of a requisition by the State, an advertisement was issued for filling up 24 posts of Drug Inspectors by the Commission being advertisement No. 86 of 1979 and pursuant thereto the petitioners also applied. The legality of the said advertisement was questioned by the ad hoc Drug Inspectors in this Court which was registered as C. W. J. C. No. 1779 of 1976.

6. By a judgment dated 19th May, 1980, this Court disposed of the said writ application holding that degree of B. Pharma granted by B.I.T., Mesra is a recognised one. Interview letters were issued by the Commission in view of the advertisement No. 86 of 1979 fixing 25-7-1980 as the date on interview of eligible candidates including the petitioners as would appear from Annexure 5 to the writ application. However, in the meanwhile, the writ petitioners of C. W. J. C. No. 1779 of 1979 filed an application for grant of special Leave to appeal before the Supreme Court of India. An interim order restraining the Bihar Public Service Commission from holding interview for selection of the candidate in terms of the

advertisement No. 86, of 1979 was passed in the said application. The Supreme Court later on granted Special Leave to Appeal which was numbered as Civil Appeal No. 791 of 1981.. In the meanwhile, one Vijay Kumar also filed a writ application under Article 32 of the Constitution of India before the Supreme Court which was marked as Writ Petition No. 35 of 1981 and the same was directed to be heard analogously with Civil Appeal No. 791 of 1981. In the said petition, the candidates from B. I. T., Mersa who filed application for their appointment pursuant to advertisement No. 6 of 1977 also filed an application for intervention therein which was allowed,

7. By an order dated 6th August, 1986, the Supreme Court disposed of the said matters inter alia, holding as follows:

Having heard counsel for all the parties and perused the papers we are of the opinion that in view of subsequent events brought to our notice that the Ranchi University has recognized degrees in Pharmacy of the students who had successfully completed the course at the Birla Institute of Technology, Mesra and the Chancellor has conferred degrees upon them, the judgment and order of the High Court from which it is appealed must be modified. We, therefore, accordingly allow the appeal and the writ petition partly and direct as follows in modification of the order passed by the High Court;

The Bihar Public Service Commission will consider for appointment of Drug Inspector, names of the candidates who were considered and recommended by the Public Service Commission on the list, vide its letter dated 19-9-77 along with those candidates who obtained degrees in Pharmacy from the Birla Institute of Technology which was subsequently recognized by the University of Ranchi and who had appeared for the interview. On such consideration the Government will take decision for appointment in accordance with law. The selection that have to be made must be on the basis of the advertisement No. 6/77 issued in 1977. The appeals as well as writ petition are disposed of accordingly. Parties shall bear their own costs.

Intervention application in the above appeal is also disposed of in terms of above order.

8. The State of Bihar by a letter dated 5th September, 1980 as contained in Annexure-7 to the writ application requested the Commission to send the entire merit list in view of the judgment of the Supreme Court aforementioned along with the brief synopsis of all the applications and opinion with regard to the availability of reserved candidates in the merit list and the categories of the applications. On or about 7th October, 1986, as contained in Annexure-8 to the writ application, the Commission sent its further recommendations in respect of only six candidates of the B. I. T. Mesra and a list of 24 candidates. On or about 4th December, 1986 the Commission in response to a query made by the State Government informed that original applications of the recommended candidates were not available.

9. The Governor of Bihar, thereafter, promulgated an ordinance being Ordinance No. 32 of 1986 in terms whereof the services of 17 ad hoc Drug Inspectors were regularised. Thereafter, an application was filed for initiation of a contempt proceeding against the Commission which was registered as Civil Misc. Petition No. 31253 of 198/. By letter dated 9th February, 1988, the Commission was requested to send information with regard to the total number of vacancies in the posts of Drug Inspectors and steps taken by it in relation to recommendation of 24 candidates. The Government had been making repeated requests to send the entire merit list. The State of Bihar, by reason of a letter dated 22nd February, 1978 as contained in Annexure-9 to the writ application informed the Commission that there existed 20 vacancies in the post of Drug Inspectors and out of 24 candidates 13 have not been appointed because of non-availability of original applications and/or details of their addresses. The Commission was further informed that out of Artcom-mended candidates services of some have been regularised on the basis of ad hoc appointment in terms of the order of Civil Misc. Case No. 31253/87. The State further informed the Commission regarding pendency of contempt matter in the Supreme Court,

10. By a letter dated 29th February, 1988, the Commission informed (the Government that original applications received pursuant to advertisement No. 6 of 1977 were not available and necessary informations regarding 24 candidates have also been sent and thus, the Commission is not responsible for delay in appointment. In March, 1988, the State issued a fresh notice inviting 13

candidates, who were recommended for the appointment, to be present in the Health Department on 11th April, 1988. The petitioners filed their representations for consideration of their cases for appointment by a letter dated 8th April, 1988. On 11th April, 1988, however, only five persons out of the aforementioned 13 candidates appeared before the Health Department for obtaining their letters of appointment. The petitioners again filed a representation for their appointment. The Health Department, however, upon screening all the candidates on or about 1988 (Annexure-D to the counter affidavit) appointed only four out of the aforementioned four candidates one Sri J. N. Pandit did not join. By letter dated 13th April, 1989, on examination of the representations of the petitioners, the Government took a decision to call for the entire merit list of advertisement No. 6 of 1977 and it again requested the Commission to send the entire merit list along with the recommendations indicating that there were still 20 vacancies in the post of Drug Inspector. Paragraph 3 of the aforementioned letter dated 13th April, 1989, reads thus:

Aushadhi Nirikshakon ke rikt pad par nityukti hetu abtak bharti Niyamawali Adhisuchit nahi ho saki hai. Naye sire se vigyapan Prakashit kar nityukti Adhisuchit karne mein kafi samay lagne ki sambhawana hai. Rajya Aushadhi Niyamtran prasasan ko gatishil banane hetu rikt padd'n ko tatkal bharne kr apksha 'hai. Is disha mein sarkar dwara yah nirniya liya gaya hai ki Bihar Lok Sewa Ayog ke Prasangadhin Vigyapan Sankhya 6/77 ke Adhar Anukram sthiti se mang kar Prakrtiyanusar Dinank 11-6-1988 ki Adhisucharia Dwara Aushadhi Nirikshakon ki nityukti Bhi usi tarah jitni Ummidwaron ki, Nityukti Shighra kar li jaye.

On or about 3rd May, 1989, however, the Commission requested the Government to re-advertise the post of Drug Inspectors in terms whereof the Government sent a requisition for 21 posts of Drug Inspector on 23rd October, 1989 (Annexure-C to the counter affidavit).

11. On or about 21st September, 1989, the State in exercise of its power conferred upon it under the proviso to Article 309 of the Constitution of India framed rules known as 'Recruitment and Service Condition Rules for Drug Inspectors' in terms whereof provisions were made for holding both written test and viva voce and a

copy of the said rules had also been sent to the Commission. On 5th November, 1990, an advertisement was issued for 253 posts of Drug Inspectors out of which 236 posts were in respect of allopathy medicine including four permanent post.

12. The petitioners made a protest regarding the proposed filling up of 21 sanctioned and permanent posts. Thereafter on 22nd May, 1990, the Commission advertised 25 posts of Drug Inspectors bearing advertisement No. 22 of 1990 and the qualification prescribed therefor 'was as per the afore-mentioned Recruitment Rules.

In the first week of June, 1990, the petitioners filed a representation before the Government protesting against the said advertisement dated 22nd May, 1990. On 22nd February, 1991, interview letters were issued by the Commission as would appear from Annexure-15 to the writ application filed 5th March, 1991, as the date for holding interview of the candidates who had applied in response to the advertisement No. 22 of 1990, C.W.XC. No. 1470 of 1991 was filed in this Court on 25th November, 1991, and an interim order was passed by this Court on 27th November, 1991 to the effect that the Commission would not send recommendations on the basis of the interview to be held. On 26th November, 1992, the Government has sent a fresh requisition for 215 posts of Drug Inspectors to the Commission which were to be filled up in terms of the Recruitment Rules, 1989-

13. The Bihar Public Service Commission held interviews of the candidates in between 5-3-1991 and 8-3-1991 who applied for being appointed in response to the advertisement No. 22/90 but the result thereof has not been published in view of the aforementioned interim order dated 27th November, 1991.

14. Mr. Mihir Kumar Jha, learned Counsel appearing on behalf of the petitioners in C W. J. C. No 1470 of 1991 submitted that as 20 posts were vacant the same could have been filled up in terms of the advertisement No. 12 of 1977 and the Commission could not refuse sending the entire merit list pursuant to the request made by the State Government which had been issued in consonance with the direction of the Supreme Court, as contained in Annexure-6 to the writ application.

15. It has been submitted that the action of the Commission in not sending the entire list to the State is mala fide as in the matter of appointment of Doctors and Engineers such lists had been sent, as would be evident from Annexure-17 to the writ application as also from letter dated 15-6-1987. It has also been submitted that there has been no regular appointment since 1975 and there does not appear to be any plausible reason as to why the Commission sent the names of only six persons (Annexure-8 to the writ application) although the State by its letter dated 25-9-1986 had asked for the entire panel.

16. Learned Counsel further submitted that the opinion of the Commission' that the posts should be advertised is mala fide and as would appear from Annexure-B to the counter affidavit filed by the Commission that no reason has been assigned in support thereof.

With regard to the first ground taken by the Commission to the effect that interviews were taken 12 years back, it has been pointed out that the matter had been pending for two years in the High Court and six years in the Supreme Court. It has further been pointed out that the Commission did not send the list even in the year 1987. With regard to the second ground taken by the Commission that the applications forms are not available, it has been submitted that the forms should have been preserved. In this connection, my attention was drawn to the fact that three persons were appointed on 1-6-1968 as would be evident from Annexure-D to the counter affidavit filed on behalf the respondents.

17. So far the 3rd ground taken by the Commission to the effect that no suitable candidate is available, it has been pointed out that the persons securing up to 35 marks were found suitable whereas the petitioner who secured 34 marks, have not been found suitable. It has been pointed out that no minimum eligibility criteria was fixed and those persons whose names appear at serial Nos. 29 to 34 could not have been considered to be put off. According to the learned Counsel, the said ground is also non-est and incorrect.

18. With regard to the fourth ground appearing in Annexure-B to the effect that in terms of the letter dated 13-4-1989 (Annexure-11 to the writ application) fresh advertisement should be issued, it was submitted that the Commission failed to

take into consideration that the vacancies which are required to be filled up were old vacancies.

19. Mr. Jha further submitted that two gradation lists ; one in the year 1991 as contained in Annexure-19 and Anr. in the year 1990 as contained in Annexure-19-A were prepared and the other persons were appointed on regular basis on 26-4-1973 and thus 246 posts are still vacant. According to learned Counsel, therefore, in 1977 there were 20 vacancies which having not been controverted in the counter affidavit, the said old vacancies should be filled up from amongst the candidates appearing in the merit list prepared pursuant to advertisement No. 6 of 1977. My attention was further drawn to the fact that even according to the newspaper publication as contained in Annexure-10 to the writ application, although the Health department called 13 persons named therein to appear before the health department but only four appeared and out of them only 3 were appointed and thus there are ten vacancies. It was further submitted that in any event, the candidates who had submitted their applications for appointment pursuant to the new advertisement dated 22nd May, 1990 (Annexure-14 to the writ application) seven were selected by the Commission only upon following the recruitment and service condition Rules i.e. for appearing in the written test as also viva voce.

20. Learned Counsel in support of his contention relied upon the decision in Dr. M. C. Bindal and Ors. v. JR. C. Singh and Ors. reported in : AIR 1987 SC358 ; in Miss Neelima Sangla v. State of Haryana and Ors. reported in : AIR 1987 SC167 and an unreported decision of this Court in C.W.J.C. No. 2052 of 1991 disposed of on 17-5-1991 in which a decision of the Supreme Court in A. V. Bhogeshwarudu v. Andhra Pradesh Public Service Commission and Anr. reported in 1989 Vol. (4) Judgment Today, 130 has been followed.

21. Mr. Swaraj Ghosh, learned Counsel appearing on behalf of the Commission, however, has submitted that in terms of Supreme Court's order dated 6th August, 1986 (Annexure-6) it had not been directed to the Commission to recommend the names of even those persons who were found unsuitable. Learned Counsel pointed out that the direction of the Supreme Court has been fully complied with

inasmuch as the names of those persons who held degree from B. I. T., Mesra and found suitable had been recommended. It has been submitted that the Commission recommended the names of only those persons who secured the minimum marks of 35 and in support of this contention, the merit list obtaining in the file of the Commission, was produced before me. Mr. Ghosh submitted that Annexure-2 is not the merit list but merely the list of people who had appeared in interview. It has been further submitted that as per practice the Commission destroys the records of those candidates whose names are not recommended.

22. My attention was further drawn to the letter dated 13-4-1989 as contained in Annexure-B to the counter affidavit filed by respondent No. 4 where in a request had been made that as only 2 posts were advertised by the advertisement No. 6 of 1977, but in view of a large number of vacancies in the interest of justice, new advertisement should be issued. It has further been pointed out that according to the Commission no other candidate was found suitable out of the applicants who applied, in response to advertisement i.e. of 1977. Mr. Ghosh further submitted that it is incorrect to contend that in the case of Engineers and Doctors the entire list was submitted but according to learned Counsel only further recommendations had been made which had been asked for keeping in view a large number of existing vacancies as would be evident from Annexures-D and E to the counter affidavit. According to Mr. Ghosh, as further recommendations had been asked for from the Commission by the State, the same was complied with and names of only those persons who were found suitable for filling up the said posts were sent,

23. Mr. G. P. Sahi, learned G. P. No. 7 submitted that it is admitted that the State had tried to obtain the recommendations of the Commission, in terms of the decision of the Supreme Court but in view of the stand taken by the Commission, fresh advertisement had been issued. Learned Counsel further submitted that in view of the fact that recruitment Rules came into force two months after the process of selection began and since the State sent requisition to the Commission, the action on the part of the Commission to hold interview only for the purpose of selection of candidates cannot be said to be illegal. Learned Counsel in this connection has relied upon a decision of the Supreme Court reported in : (1983)ILLJ502SC A, A. Calton v. Director of Education. It has further been pointed

out that the State had asked the Commission by letter as contained in Annexure-A to the counter affidavit not to proceed further in the matter of selection of candidate pursuant to advertisement No. 26 of 1990. It was further submitted that ad hoc posts were created on 1-1-1992.

24. Mr. Shahi has further drawn my attention to the effect that the posts mentioned in advertisement No. 26 of 1990 are separate posts.

25. Mr. Shyama Prasad Mukherjee, learned Counsel on behalf of the intervenors in C.W.J.C. No. 1470 of 1991 and petitioners of C.W.J.C. No. 8400 of 1991, inter alia has submitted that C.W.J.C. No. 1470 of 1991 should be dismissed on the following grounds:

(i) this Court does not issue a futile writ.

(ii) A disputed question of fact has been raised after a lapse of several years.

(iii) At the petitioners failed to make out a clear case, this Court should not exercise its discretion.

(iv) The persons who have been found unsuitable by the Bihar Public Service Commission, cannot be directed to be considered for appointment by this Court.

Learned Counsel pointed out that from a perusal of Annexure-I to C.W.J.C. No. 1470 of 1991 it would appear that advertisement was issued for filling up 21st posts out of which 5 were to be appointed from reserved categories but no candidate from reserved category was found suitable and in this view of the matter, this Court cannot issue a writ to fill up the said posts. It has further been submitted that 16 posts have already been filled up.

26. Mr. Mukherjee in support of C.W.J.C. No. 8400 of 1991 submitted that 232 posts had been created and sanctioned pursuant to the recommendations of the Sub-Committee appointed by the Cabinet as would be evident from Annexures-3 and 3/1 to the writ application. Further request was made by the health department to the Commission on 1-1-1990 and the advertisement had been issued in daily news papers for appointment of 732 posts of Drug Inspectors in the pay scale of

1800-3300 it was further submitted that on 25-2-VQ the State again issued an advertisement through Bihar Public; Service Commission for filling up 21 posts of Drug Inspectors pursuant whereof an advertisement dated 22-5-1990 (Annexure-2 to the writ application) had been issued inviting applications from eligible candidates. Learned Counsel further drew my attention to the fact that the Central Government by its letter dated 8-8-199J agreed to provide 50 per cent expenditure which the State may have to incur for appointment of additional Drug Inspectors on the recommendation of the Task Force and only on that basis the State has requested the Commission to issue a fresh advertisement as would be evident from Annexure-B to the counter affidavit filed on behalf of the State.

27. Learned Counsel in support of his contention also relied upon a recent decision of this Court in C.W.J.C. No. 839 of 1991 disposed of on 6-3-1991 as also a Division Bench in the Secretariat Assistant Successful Examinees Union and Ors. v. State of Bihar and Ors. reported in 192 (2) PLJR

28. A supplementary affidavit was filed on 20-1-1993 on behalf of the petitioners wherein it has been contended that upon an inquiry having been made from the department of Health of the State of Bihar, it was gathered that all the 21 posts advertised for appointment in terms of advertisement No. 6 of 1977 have been filled up. However, subsequently in the light of the direction of the Supreme Court, Janardan Prasad, Subhash Kumar and Vijay Kumar were appointed to the posts of Drug Inspectors. It was further contended that two other candidates who had worked on the post of Drug Inspectors on ad hoc basis have been regularised in terms of the Ordinance No. 32 of 1986. It has therefore been contended that all the 16 posts in the general category have been filled up and only 5 posts reserved for Scheduled Caste and Scheduled Tribes have not been filled up. The intervenor respondents therefore, contended that as the petitioners are not the candidates of the reserved category they cannot be appointed in the said posts of Drug Inspectors.

29. It has further been contended that from a perusal of Annexure-2 to the writ application, it would appear that the position of petitioner No. 1 is at serial No. 25, the position of petitioner No. 2 is at serial No. 30, the position of petitioner No. 3 is

at serial No. 32, the position of petitioner No. 4 is at serial No. 35 and that of petitioner No. 5 is at serial No. 37 and as such they have no legal right to be appointed in terms of the aforementioned advertisement No. 6 of 1977. It has been contended that the petitioners cannot be permitted to block appointment of other persons who acquired a qualifications after 1977 in view of Article 16 of the Constitution of India

30. A supplementary affidavit has been Sled on behalf of the petitioner on 15-2-1993 wherein it has been contended that an application has been filed wherein a point has been sought to be raised as to whether the vacancies are old vacancies or not and this context it has been submitted that the cadre of Bihar Pharmaceutical Control Service has been found to be equivalent to the post of Drug Inspector and Chief Hospital Pharmasist. In the said supplementary affidavit it has further been contended as follows:

It is stated that before the issuance of the advertisement No. 6/77 there were only 17 Drug Inspectors who were appointed on the basis of recommendation of the Commission as would be evident by the gradation list dated 28-10-1980 which is made Annex-use-;9 to this supplementary affidavit.

That the aforesaid position further becomes clear when the tentative gradation list of the cadre of post of Drug Inspector dated 16-11-1987 is taken into consideration. In the aforesaid tentative gradation list it has been once made clear that 17 Drug Inspectors were regularly appointed upto April, 1973 and, thereafter, in the year 1975, 10 Drug Inspectors were appointed on ad hoc basis whose services were later on regularised in 1987 in view of the Ordinance/Act promulgated by the State Government regarding regularisation of ad hoc officers. Similarly, 7 Drug Inspectors appointed in the year 1979 on ad hoc basis who were also regularised in the same manner as other Drug Inspectors of the year 1975 and, therefore, even taking into consideration the ad hoc appointment made in the year 1975 and 1979 there were clearly 23 vacancies on the post of Drug Inspector which were advertised by advertisement No. 6/77 and have been again now sought to be filled up by the impugned advertisement. Thus the petitioners while enclosing the tentative gradation list dated 16-11-1987 as Annexure-0 to this

supplementary affidavit do hereby assert and say that the vacancies advertised by the impugned advertisement are all old vacancies which are lying vacant since 1077 and in that view of the matter the intervenes cannot be now permitted to make out a third case at the stage of final hearing.

31. There cannot be any doubt that at the initial stage the persons who obtained degree of B. Pharma from Birla Institute of Technology, Mesra were excluded illegally. However from a perusal of the judgment of the Supreme Court of India, dated 6-8-1986 passed in Civil Appeal No. 791 of 1981, it is evident that no direction had been given to appoint Drug Inspectors from the panel prepared pursuant to the advertisement No. 6 of 1977. It is admitted that after the decision of the Supreme Court, the Bihar Public Service Commission sent an additional list recommending the names of those persons who obtained degree B. Pharma from Birla Institute of Technology Mesra,

From a perusal of Annexure-2 to the writ application as also the statements made in counter affidavit filed by the Commission it is evident that the Commission recommended the names of only such persons who had obtained 35 marks,

32. In C.W.J.C. No. 1779 of 1979 Ashutosh Gupta and Ors. v. State of Bihar and Ors. a subsequent advertisement being advertisement No. 86/79 which was contained in Annexure-6 thereto was questioned. In that case the High Court clearly held that degrees of B. Pharma of those persons who had studied at Birla Institute of Technology, Mesra were valid and they were entitled to be considered for appointment.

33. The Supreme Court in C. A. No. 791 of 1981 and Writ Petition No. 3 791 confirmed that decision but it merely modified the order of the High Court to the effect that the cases of all persons including those who obtained B. Pharma degree conferred upon them by the Ranchi University should also be considered.

34. Petitioner No. 1 obtained 34 marks. Petitioner Nos. 2 and 3 obtained 32 marks whereas petitioner Nos. 4 and 5 obtained 28 marks.

35. The Bihar Public Service Commission, however, had taken the stand, as would appear from its letter addressed to Joint Secretary to the State of Bihar (Annexure-B to the counter affidavit) and reply of the petitioners to the counter affidavit dated 13-4-1989 as contained in Annexure-11 to the writ application that it refused to send the entire merit list and made recommendations for issuing a fresh advertisement inter alia on the ground that no suitable candidate was available for appointment from the panel of candidates prepared in terms of advertisement No. 6 of 1977.

36. It is not disputed that appointment should be made only upon the recommendations of the Commission. If the commission was of the opinion that its recommendations should be confined to those candidates who had obtained 35 marks, the same cannot be said to be an arbitrary act on its part. The State, has appointed the Commission for finding out the suitability of the candidates and thus it cannot appoint a person whose name had not been recommended. It is true that the petitioner No. 1 obtained 34 marks. As noticed hereinbefore Mr. Jha has contended that there does not appear to be any justifiable reason as to why the Commission had excluded the name of the petitioner No. 1 who obtained 34 marks and not recommended his name. In my opinion, it is for the Commission to fix a cut off mark. If the contention of Mr. Jha is accepted, in that event, two other persons namely, Sri S.K. Sheshagiri and D. Goswami who had obtained 32 marks may also contend that their names should have also been recommended by the Commission and in this way, the process will continue.

It is not the case of the petitioners that any person obtaining less than 35 marks had been recommended by the Commission. Had it been so, the action of the Commission could have been questioned on the ground of arbitrariness.

37. Equality amongst is the central theme of Article 14 of the Constitution of India. Unless and until the decision of the Commission is held to be arbitrary, discriminatory or mala fide, it being the expert body and having been constituted for selecting suitable candidates, it must be permitted to lay down norms for making recommendations for appointment in the posts for which: such recommendations have been sought for by the State of Bihar.

38. The High Court in exercise of its writ jurisdiction cannot direct appointment of person who has not been found suitable by the Commission. The State of Bihar had appointed the Commission for finding out the suitability of the candidates and the said function cannot be usurped by the High Court.

39. It is now well known, in view of the various decisions of the Supreme Court of India that a person does not have any right of appointment but has merely a right to be considered for appointment.

This aspect of matter has recently been considered by me in *Neelima Verma v. State of Bihar and Ors.* being C. W. J. C. No. 2296 of 1991 disposed of on 5-3-1993 wherein this Court had taken into consideration the decisions of the Supreme Court of India in *Shankarsan Dash v. Union of India* reported in : (1992) 111 LLJ 18 SC and 1993 (1) SC 154, *Union Territory of Chandigarh v. Dilbagh Singh and Ors.* : (1973) 111 LLJ 266 SC and : [1986] 3 SCR 785 .

40. The Supreme Court also directed the Bihar Public Service Commission to consider for appointment of Drug Inspectors, the names of those candidates who were recommended by the Public Service Commission along with other candidates who obtained degree in Pharmacy from Birla Institute of Technology. The State of Bihar was directed to take a decision on such recommendation in accordance with law.

41. It is, therefore, clear that even in terms of the decision of the Supreme Court of India, the petitioners merely acquired right to be considered for appointment but they do not have any right of appointment.

42. If the names of the petitioners were not recommended by the Commission for appointment, this Court in exercise of its jurisdiction under Article 226 of the Constitution of India cannot issue a writ of or in the nature of mandamus directing the State to appoint the petitioners.

43. In *Dr. M.C. Bindal and Ors. v. R.C. Singh and Ors.* reported in : AIR 1987 SC 358 the facts of the matter were completely different and in fact the same militates against the contention of the petitioners.

In that case the petitioner thereof was initially qualified for appointment to the post of Drug Controller. The Commission in recommending his name was justified but it was held that the action of the Council of Ministers approving appointment of Dr. Bindal was not a bona fide exercise of power.

The Supreme Court in that decision merely observed that the post of Food and Drug Controller is a sensitive one and the incumbent holding the best position may do the function and duty and in that view of the matter it cannot be said that the Commission cannot fix a cut-off marks for the purpose of judging the suitability of the candidates in order to recommend their names to the State for their appointment.

44. In *Neelima Sangla v. State of Haryana* reported in : [1986]3SCR785 , it has been held that duty of the Public Service Commission is to make available to the State a complete list of bona fide candidates arranged in order of merit and thereafter the Government is to make selection strictly in accordance with law in order of merit in which they have been placed in the list as a result of the examination. It has further been held that the Government and the High Court may not appoint all persons from the said list as it may think that though 55 per cent is the minimum qualifying marks but in the interest of higher standard no person securing less than 60 per cent should be appointed. In that case, however, the Commission initially published the result and sent names of only 7 candidates belonging to general category although many more were found to be qualified. It was in this context it had been held that in terms of rules of recruitment in Subordinate Judicial Service in Haryana, the Public Service Commission being not concerned with the number of vacancies, it was not entitled to withhold the full list of successful candidates only on the ground that limited number of vacancies are available.

Such is not the position here. The Commission as noticed hereinbefore initially sent the names of 18 persons and later on in terms of the decision of the Supreme Court of India sent an additional list of 6 persons who had obtained 35 marks and above.

45. It is admitted that out of the vacancies of 21 posts advertised in terms of advertisement No. 6 of 1977, 17 posts were to be filled up from the general category and the rest from the reserved category. Thus, in my opinion, the action on the part of the Commission cannot be and to be arbitrary.

46. The other reasons assigned by the Commission in its letter as contained in Annexure-B to the counter affidavit also cannot be said to be wholly non est.

47. So far as the first ground is concerned, it is true that eight years' time elapsed owing to the pendency of the litigation in High Court and Supreme Court.

The delay in making appointment from the said old list although may not be by itself a justifiable ground but the decision of the Commission that interview had been held 12 years back, in the peculiar facts and circumstance of the case, cannot be said, to be wholly arbitrary.

48. So far the second ground is concerned, it has been noticed that the Commission had specifically taken the stand that the applications of those candidates who had not been selected, are destroyed. It has not yet been contended that the practice adopted by the Commission is not in vogue.

49. So far the third ground is concerned, it is true that the vacancies in terms of the direction of the Supreme Court were to be filled up from advertisement No. 6 of 1977 and the vacancies are old vacancies but if the old vacancies are not filled up for one reason or the other, in my opinion, it will be justified to recommend fresh advertisement for the vacant posts as by then many years have elapsed when the posts fell vacant which are sought to be filled up as in the meanwhile many more candidates have become eligible for consideration for appointment.

50. In any event, as noticed hereinbefore, the petitioners do not have any legal right for appointment and it is for the State and the Commission to finalise as to how the vacancies including the old vacancies should be filled up. Article 16 of the Constitution of India envisages that each citizen of India is entitled for consideration for appointment if they are qualified therefor.

51. In *A. V. Bhogeshrudu v. Andhra Pradesh Service Commission and Anr.* reported in 1989 Vol: (4) Judgment Today; 130, the Supreme Court did not lay down any law within the meaning of Article 141 of the Constitution of India, It appears to be an order passed in terms of Article 142 of the Constitution of India whereby merely a direction has been given that number of vacancies to be filled up on the ground of non-joining of the selected candidates shall be out of the present list. On the other hand the Supreme Court recently in *Rakesh Ranjan Verma and Ors. v. he State of Bihar and Ors.* reported in : [1992]2SCR516 has clearly held that a person could not have any legal right to be appointed after the lapse of life of the panel.

In *C. W. J. C. No. 2296/91 Neelima Verma v. State of Bihar*, it has been noticed that in terms of the policy decision of the State of Bihar a panel for appointment remain valid for one year only.

52. The State also in its counter affidavit has taken its stand which has not been controverted by the petitioners that Bihar Public Service Commission is the only authority to decide the merit of the candidates and to send its recommendations for appointment. It has also been accepted by the State that five posts out of 23 posts was reserved which was the subject-matter of advertisement No. 6 of 1977. It is also apparent from the records of the case that four names had been sent for appointment out of the general candidates in five reserved posts category, as no qualified person was found for the purpose of recommendation from the reserved category.

53. It is true that the State keeping in view the emergency appointed various persons on ad hoc basis whose services were lateron regularised in terms of Ordinance No. 32 of 1986. It is also true that two persons who were not recommended by the Commission were also appointed on ad hoc basis but in this writ application, their appointments cannot be cancelled in their absence. In any event it must be held that as process of recruitment for appointment on ad hoc basis being different and in view of the fact that appointment of ad hoc persons have been regularised by reason of a Statute, the validity whereof is not questioned in this writ application, it must be held that those ad hoc appointees

formed a class by themselves.

54. It is true that the State of Bihar in terms of its letter dated 13-4-1989 asked the Commission to send the entire list.

55. According to Mr. Jha whereas the State Government's request in the instant case was not complied with by the Commission but in case of Doctors and Engineers the entire list had been sent. From a perusal of a true copy of the letter dated 14-2-1990 as contained in Annexure-17 to the supplementary affidavit filed in reply to the counter affidavit filed on behalf of Respondents 3 and 4 it appears that the Commission sent the names of 3100 persons against the vacancies of 962 posts by its letter dated 13-8-1990 (Annexure 17A), From Annexure 17/1 it appears that there were 3100 vacancies but names of 2241 candidates were recommended, As no candidate for appointment from the reserved category of Schedule Caste and Schedule I Tribe was available and so far the reservation in respect of most backward is concerned, out of 3100 candidates only 15 candidates were found suitable. However, from the said list itself it appears that the application of only six persons were sent whose names had been recommended.

56. The Commission, however, in its supplementary counter affidavit denied that the Commission recommended or furnished the total list of candidates who had appeared in written test for the health services examination. It is stated that the Commission after completion of its selection procedure recommended the names of 2241 candidates out of the revised request of 3100 posts. In support of this contention the Commission has annexed a copy of letter dated 13-8-1991 which is contained in Annexure-D to the said supplementary counter affidavit. With regard to the case of Engineers, a letter dated 15-6-1987 has been annexed, from a perusal whereof it appears that the Commission had sent the entire list of 2862 candidates although request was made for appointment of only 25. However, the Commission has brought on record the letter dated 11-2-1988 which is contained in Annexure-E to the rejoinder to the reply of the petitioner to its counter affidavit, from a perusal whereof it appears that the State had asked the Commission to send recommendations of persons from the general category in view of the fact

that candidates in reserved category were not available. In that letter it was further requested to the Commission to send the names of 100 more persons as from the past experience it had been found that at least 10 per cent of the candidates do not joint their posts. It is, therefore, clear that it is not correct to say that even in the case of Engineers and Doctors the entire panel had been sent so as to enable the State to make appointment out of the same,

As noticed hereinbefore, it is the admitted stand of the parties that the appointments by the State can be made only in respect of those candidates whose names have been recommended by the Commission.

57. For the reasons aforementioned, it must be held that no relief can be granted to the petitioners of C. W. J. C. No. 1470 of 1991.

58. So far the petitioners of C. W. J, C. No. 8400 of 1991 is concerned their grievance is merely to direct the State to complete the process of recruitment. Admittedly, the Council of Ministers in its meeting dated 16-11-1989 created and sanctioned 232 posts, A request was sent by the Health Department to the Bihar Public Service Commission to issue advertisement for selection 232 candidates by letter dated 11-4-1990. Thereafter an advertisement dated 8-2-1990 was issued as contained in Annexure-1 to the writ application. Another advertisement was issued by the State through Bihar Public Service Commission dated 22-5-1990 for appointment of 21 posts of Drug Inspectors on regular basis.

59. However, by a letter dated 13-8-1990 the State requested the Commission to suspend the process of appointment for which the requisition was sent by it in terms of its letter dated 11-1-1990. Interview of the candidates had been held by the Bihar Public Service Commission in between 5-3-1991 and 8-3-1991 but the results thereof had not been published because of the interim order passed by this Court in C. W. J. C. No. 1470 of 1991, Admittedly, the State of Bihar has framed rules known as Bihar Rajya Aushadhi Niyamtran Seva (Bharti and Sevasart) Niyamabali.

60. The said notification was issued on 21st December, 1989; which was published in Gazette dated 8th August, 1990.

61. By an order dated 27-2-1990 passed in-C. W. J. C. No. 1470 of 1991 this Court directed that the Commission shall not make any recommendation pursuant to the interview which was going to be held from 3rd March, 1991. The said interim order was passed by a Division Bench on 13-2-1992 while admitting the writ application.

62. The contention of the petitioners in this writ application is that as the process of selection have already started, the said rules will have no application in this case. Admittedly in terms of the said rules, the candidates are required to appear at written examination as also interview.

63. The State in its counter affidavit, however, submitted that appointment of 253 posts of Drug Inspectors on ad hoc basis was published on 6-2-1991 indifferent local newspapers. Out of 253 posts 3 were new and 21 were old posts. By letter dated 11-1-1990 which is contained in Annexure-A to the counter affidavit, the State requested the Bihar Public Service Commission to proceed for appointment of 232 posts of Drug Inspectors on regular basis. However, by letter dated 13-8-1990, the Commission was requested not to proceed in this regard as due to paucity of fund, the Government order for creation of 232 posts of Drug Inspectors had not been issued. The fund was allegedly became available and 174+58 total 232 posts were created by Order 1241 (15) and 1242 (15) which are contained in Annexures-C and D to the counter affidavit.

64. It has been contended that the applications obtained for appointment of 232 posts of Drug Inspectors have been sent to Personnel and Administrative department and as soon as clearance was obtained request for appointment on those 232 post was sent to the Bihar Public Service Commission. It has been Contended in the said counter affidavit that 232 posts are available from 1-1-1992 and offer to fill up the said posts including the departmental suggestions and consequent roster clearance has been started but the same has not been finalised.

65. There cannot be any doubt that once the process of selection starts, appointments have to be made in accordance with the rules existing at that time. The Supreme Court in P. Mahendran v. State of Karnataka reported in : AIR 1990

SC405 has held that rules are clearly prospective unless it is set aside or by necessary implications made to that effect. The Supreme Court in that case followed its earlier decision in *A. A. Calton v. Director of Education* reported in : (1983)ILLJ502SC . However, in Calton's case by reason of a subsequent act the authority of Board of Director to make appointment had been taken away. In P. Mahendran's case the eligibility criteria for appointment, when the old rules were in force, was diploma in Automobile Engineering or Mechanical Engineering and thus the candidates were eligible for appointment in the said posts as interview took place in August, 1984

The State however, in that case amended the recruitment rule by notification dated 4-5-1987 which was published in the Gazette dated 14-5-1987 dropping the qualification of diploma in Mechanical Engineering for the post of Motor Vehicle Inspector,

66. In this case, however, facts are absolutely different Mr. Mukherjee submitted that posts were created but only the funds had not been made available. He further submitted that the State or other respondents cannot support its stand by bringing additional materials by way of counter affidavit. In the facts and circumstances of the case the submission of Mr. Mukherjee cannot be accepted.

67. The petitioners of C.W.J.C. No. 8400 of 1991 have made a prayer to issue a writ commanding upon the respondents to make the process of recruitment to the post of Drug Inspectors as per the advertisement dated 6-2-1990 whereby the State of Bihar invited applications for filling up the posts of Drug Inspectors on ad hoc basis. It is, therefore, clear that advertisement dated 6-2-1990, according to the petitioners, itself was advertised for filling up the posts of Drug Inspectors on ad hoc basis. From the letter dated 23-10-1989 as contained in Annexure-C to the counter affidavit filed in C.W.J.C. No. 1470 of 1991, it is evident that 21 posts were old posts. Out of the said 21 posts 2 were reserved posts. On 11-1-1990 the Health department of the State of Bihar requested the Secretary of the Bihar Public Service Commission to take steps for filling up all the posts of 232 posts of Drug Inspectors (Annexure-A to the counter affidavit). In paragraph 2 of the said letter some decisions of the Cabinet had been referred to, On 5-2-1990 the State

of Bihar itself had issued an advertisement both for the new and old post as is evident from Annexure-B to the counter affidavit of C.W.J.C. No. 1470 of 1991. However, the State by its letter dated 13-8-1990 requested the Bihar Public Service Commission that no steps be taken for making advertisement for filling up 232 posts of Drug Inspectors-The said letter was issued allegedly on the ground of unavoidable reason which has been clarified in the counter affidavit to be the financial strigencies on the part of the State. The Commission, however, issued an advertisement only with regard to 21 posts as is evident from Annexure-14 thereto. The Commission, therefore, evidently did not make any advertisement with regard to the aforementioned 232 posts. On 13-8-1990 the requisition sent by the Government to the Commission was withdrawn. From Annexures-C and C/1 appended to the counter affidavit in C. W. J. C. No. 8400 of 1991, it appears that the Government granted sanction with regard to 232 posts only for a period of two months i, e. for the period 1-1-1992 to 29-2-1992. For t as self same period sanction was granted for 52 other posts. Actual requisition was issued only on 26-1-1992 as is evident from Aunexure-18 to the writ application. From paragraph 1 of the said latter, it appears that the Government created the said posts only on 26-8-1991. It is admitted that the petitioners of C.W.J. C, No. 8400 of 1991 appeared before the Interview Board of Bihar Public Service Commission, It has been noticed hereinbefore that the Commission merely issued an advertisement for 21 posts which were old vacancies and not the new vacancies and for that no advertisement had been issued by the Bihar Public Service Commission but by the State Government itself.

68. From the facts aforementioned, it is dear that the process of selection had not begun before issuance of the aforementioned letter dated 29-11-1992 (Amex.ure-18;. Thus, there cannot be any doubt that the new Recruitment Rules were applicable in the instant case.

69. It is therefore, clear that in this case the posts became available from 1-1-1992 but the advertisement had been issued even prior to that. As the advertisement itself was issued before creation of any posts, the State was not bound to fill up the same.

70. It has been noticed by this Court in many cases that advertisements are directed to be issued by an Officer of the rank of Secretary of the department in anticipation of creation of the posts. Although, later on the State did not take any action for creating posts with retrospective effect, it is not proper for the State to ask the Bihar Public Service Commission to issue an advertisement and start process of selection although either in law or in fact, no post exists. If the posts had become available only with effect from 1-1-1992, it would be violative of Article 14 of the Constitution of India, if the persons who have become eligible in the meanwhile are excluded from consideration. In this view of the matter, the Bihar Public Service Commission should issue a fresh advertisement in terms of the requisition dated 29-11-1992 but the petitioners of both the applications who had already filed applications need not apply again. The entire process of appointment, in view of the emergent situation, should be done as early as possible. The Bihar Public Service Commission may proceed to hold written examination and hold interview of all the candidates including the petitioners in terms of the new Rules.

71. I hope and trust that the State shall also consider the applications for appointment of the petitioners of C. W. J. C. No. 1470 of 1991 if they file applications in this regard. The State shall also consider the desirability of relaxation of age bar in the event such order is required to be passed in relation to any particular candidate.

72. For the reasons aforementioned, these applications are dismissed subject to observations and directions made hereinbefore. There shall however be no orders as to costs.