

[2016] 8 S.C.R. 815

ASHOK KUMAR & ANR

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v.

STATE OF BIHAR & ORS

(Civil Appeal No. 9092 of 2012)

OCTOBER 21, 2016

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**[T. S. THAKUR, CJI, A. M. KHANWILKAR AND
DR. D.Y. CHANDRACHUD, JJ.]**

Service Law: Bihar Civil Court Staff (Class III and Class IV) (Amendment) Rules, 2001 – rr.5,6,7,10 – Promotion through selection – Selection Criteria – Eighty five marks allocated for written examination and fifteen for interview – Select list not approved – Fresh selection process with allocation of marks for written exam and interview in the ratio of 90:10 – Appellants participated in the fresh process of selection but were unsuccessful and subsequently, they challenged the selection process – Propriety – Held : Appellants appeared in an examination without any objection to process of selection – They cannot subsequently turn around and contend that the selection process was unfair or that there was a lacuna therein, merely because result is not palatable – Principle of estoppel would operate – Constitution of India – Art. 309 – Principle of estoppel.

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Applications were invited for promotion to Class III posts from amongst Class IV employees of the Civil Court. Eighty five marks were fixed for the written examination and fifteen for the interview. Appointment committee submitted list of selected candidates to High Court. High Court declined to approve the select list and issued a communication requiring holding of fresh written examination carrying ninety marks and interview of ten marks. Appellants participated in the fresh process of selection but were unsuccessful and subsequently, they challenged the selection process.

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Disposing of the appeal, the Court

HELD: 1. The appellants participated in the fresh process of selection. If the appellants were aggrieved by the decision to hold a fresh process, they did not espouse their remedy. Instead, they participated in the fresh process of selection and it was only upon being unsuccessful that they challenged the result in the writ petition. This was clearly not open to the appellants. The

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- A principle of estoppel would operate. In the present case, the fact that the appellants were clearly on notice, when the fresh selection process took place that written examination would carry ninety marks and the interview, ten marks. The appellants participated in the selection process. Moreover, two other considerations weigh in balance. There was an element of vagueness about whether Rule 6 which dealt with promotion merely incorporated the requirement of an examination provided in Rule 5 for direct recruitment to Class III posts or whether the marks and qualifying marks were also incorporated. Moreover, no prejudice was established to have been caused to the appellants by the 90:10 allocation. [Paras 11, 13][822-H; 823-A; 825-E-G]

2. In the facts and circumstances of the case, to meet the ends of justice, it was directed that in the event that there is any existing vacancy, appellant may be allowed to work on Class III post in which he is currently working on the provisional basis until the next round of selection process takes place. The appellant would be at liberty to participate in the selection process that may be held in future and in the event he is declared successful, he would be at liberty to make a representation to the competent authority for consideration of the period spent by him on the Class III post for the purpose of fixation of seniority. [Para 16][826-C-E]

Raj Kumar v. Shakti Raj (1997) 9 SCC 527–distinguished.

- Marripati Nagaraja v. The Government of Andhra Pradesh* (2007) 11 SCC 522 : 2007 (11) SCR 506; *Dhananjay Malik v. State of Uttaranchal* (2008) 3 PLJR (SC) 271; *Amlan Jyoti Borrooah v State of Assam* (2009) 3 SCC 227 : 2009 (1) SCR 593; *Chandra Prakash Tiwari v Shakuntala Shukla* (2002) 6 SCC 127 : 2002 (3) SCR 948; *Union of India v. S. Vinodh Kumar* (2007) 8 SCC 100 : 2007 (10) SCR 41; *Munindra Kumar v. Rajiv Govil* (1991) 3 SCC 368 : 1991 (2) SCR 812; *Rashmi Mishra v. M.P. Public Service Commission* (2006) 12 SCC 724 : 2006 (7) Suppl. SCR 708; *Manish Kumar Shah v. State of Bihar* (2010) 12 SCC 576; *Vijendra Kumar Verma v. Public Service*

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Commission (2011) 1 SCC 150; 2010 (12) SCR 944;
Ramesh Chandra Shah v. Anil Joshi (2013) 11 SCC
 309 : 2013 (5) SCR 687; *Chandigarh Administration*
v. Jasmine Kaur (2014) 10 SCC 521 : 2014 (9)
 SCR 1122; *Pradeep Kumar Raiv. Dinesh Kumar*
Pandey (2015) 11 SCC 493; 2015 (6) SCR 825;
Madras Institute of Development v. S.K. Shiva
Subaramanyam (2016) 1 SCC 454 – referred to.

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Case Law Reference

2007 (11) SCR 506	referred to	Para 7	
(2008) 3 PLJR (SC) 271	referred to	Para 7	C
2009 (1) SCR 593	referred to	Para 7	
2002 (3) SCR 948	referred to	Para 12	
2007 (10) SCR 41	referred to	Para 12	
1991 (2) SCR 812	referred to	Para 12	D
2006 (7) Suppl. SCR 708	referred to	Para 12	
(2010) 12 SCC 576	referred to	Para 12	
2010 (12) SCR 944	referred to	Para 12	
2013 (5) SCR 687	referred to	Para 12	E
2014 (9) SCR 1122	referred to	Para 12	
2015 (6) SCR 825	referred to	Para 12	
(2016) 1 SCC 454	referred to	Para 12	F
(1997) 9 SCC 527	distinguished	Para 14	

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 9092
 of 2012.

From the Judgment and Order dated 16.12.2011 of the High Court
 of Judicature at Patna in LPA No. 1991 of 2010.

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Amit Pawan, Akshat Shrivastava, Suryodaya Prakash Tiwari,
 Gaurav Singh, Advs. for the Appellant.

Nagendra Rai, Sr. Adv., Ms. Prerna Singh, Shashank Saurav, T.
 Mahipal, Gopal Singh, Shlok Chandra, Advs. for the Respondents.

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A The Judgment of the Court was delivered by

DR. D. Y. CHANDRACHUD, J. 1. This appeal arises from a judgment and order of a Division Bench of the High Court of Judicature at Patna dated 16 December 2011 which allowed a Letters Patent Appeal instituted by the ninth to fourteenth respondents. The Division Bench set aside the judgment and order of the learned Single Judge dated 9 November 2010 by which selections made by promotion from Class IV posts to Class III posts in the District Court of Muzaffarpur were quashed. The Division Bench has held that the original petitioners who succeeded before the learned Single Judge in challenging the process of promotion were estopped from doing so, having unsuccessfully participated in the selection process.

2. On 2 December 2003, the office of the District and Sessions Judge, Muzaffarpur issued General order No. 204 of 2003 inviting applications for promotion to six Class III posts from amongst Class IV employees of the Civil Court at Muzaffarpur. The selection was to be made on the basis of a fresh written test and interview. Twenty seven candidates appeared in the written examination which was conducted on 20 April 2004 of whom fourteen qualified. These candidates were interviewed on 7 July 2004. Eighty five marks were fixed for the written examination and fifteen marks for the interview. The appointment committee selected six candidates on the basis of merit for appointment to the six Class III posts by promotion. The select list was submitted to the High Court on 26 July 2004. The High Court declined to approve the select list on the ground that the marks allotted for the written examination were not in accordance with the Court's General letter No. 1 of 1995 and the Rules of 1992, 1998 and 2001 covering Bihar Civil Court Staff. By a letter dated 19 August 2004, the Registrar (Administration) directed the District and Sessions Judge, Muzaffarpur to hold a fresh examination fixing ninety marks for the written examination by treating the qualifying marks as forty five.

3. Accordingly, a fresh General order (171 of 2004) was issued by the District and Sessions Judge on 8 October 2004. The General order specifically adverted to the communication dated 9 August 2004 of the High Court and stipulated that a fresh written examination comprising ninety marks would be held (with qualifying marks of forty five) which would be followed by an interview carrying ten marks. Pursuant to this, a written test was held on 7 November 2004 followed

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by an interview on 12 December 2004. Results were declared on 31 December 2004 and the ninth to fourteenth respondents were appointed on Class III posts. All the appellants participated in the process of selection. A

4. The two appellants and four other unsuccessful candidates then filed a Writ Petition before the High Court in order to challenge the General order dated 8 October 2004 and the order of appointment dated 31 December 2004. The primary ground was that the appointment process was vitiated, since under the relevant rules, the written test was required to carry eighty five marks and the interview, fifteen marks. Counter affidavits were filed in response to the Writ Petition by the Registrar of the Civil Court at Muzaffarpur, the Registrar General of the High Court and by the selected candidates. The High Court on the administrative side defended its action by placing reliance on its General letter bearing No.1 of 1995 (Civil) dated 22 November 1995 which stipulated a written examination comprising of ninety marks (with qualifying marks of forty five) followed by an interview carrying ten marks for promotion from Class IV to Class III posts. The High Court submitted in its counter affidavit that this General letter continued to hold the field. Moreover, it was urged that Rule 6 of the Bihar Civil Court Staff (Class III and Class IV) (Amendment) Rules, 2001 stipulates that promotion from Class IV to Class III posts shall be made by an appointment committee on the basis of merit cum seniority. While the Rules of 2001 also stipulated the mode of appointment by promotion, the procedure for promotion was governed by General Letter No.1 of 1995. This, it was urged, has been reiterated in the administrative instructions issued by the High Court on 20 December 2007. B C D E

5. The learned Single Judge of the High Court allowed the writ petition and quashed the appointment made by the District and Sessions Judge, Muzaffarpur. The learned Single Judge held that under Rule 6 of the Bihar Civil Court Staff (Class III and Class IV) (Amendment) Rules, 2001, the written examination was to carry eighty five marks and the interview fifteen marks (instead and in place of the earlier requirement of ninety marks and ten marks respectively). In the view of the learned Single Judge, once the rules, which have been made under Article 309, were amended in 2001, the earlier rules would stand superseded and the General letter of the High Court would not have the effect of overriding the statutory rules. The examination, it was noticed was held after the F G H

A new rules had come into force in July 2001. In consequence, the learned Single Judge held that the notification fixing eighty five marks for the written examination and fifteen marks for the interview had been correctly issued by the District and Sessions Judge, Muzaffarpur who as a result, was directed to declare the results of all those who had participated in the first selection examination.

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6. After the order of the learned Single Judge, a direction was issued by which six persons who had been appointed to Class III posts were reverted to their original Class IV posts on 30 November 2010. They filed a Letters Patent Appeal in order to challenge the judgment and order of the learned Single Judge. In the meantime, an order was issued by the District and Sessions Judge by which six persons who were successful in the first selection process were promoted to Class III posts. The candidates included both the appellants and four other candidates. These four candidates were also successful in the previous result. As a consequence, two persons were excluded.

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7. The Division Bench of the High Court by a judgment and order dated 16 December 2011 allowed the Letters Patent Appeal filed by the ninth to fourteenth respondents and, while setting aside the judgment and order of the learned Single Judge, restored the original order of appointment dated 31 December 2004. The Division Bench agreed with the construction placed by the learned Single Judge on the Rules of 2001. However, while interfering with the judgment of the learned Single Judge, the Division Bench took the view that the appellants had in pursuance of the notification issued by the District and Sessions Judge participated in the selection process without any protest. Having failed to raise any objection to the selection process, it was held that the appellants were estopped from turning around and challenging the selection once they were declared unsuccessful. In taking this view, the Division Bench has relied upon the judgments of this Court in: (i) **Madhupati Nagaraja v. The Government of Andhra Pradesh**¹; (ii) **Dhananjay Malik v. State of Uttaranchal**²; and (iii) **Amlan Jyoti Borrooah v. State of Assam**³.

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8. Now at the outset, it would be necessary to advert to the

¹ (2007) 11 SCC 522

² (2008) 3 PLJR (SC) 271

³ (2009) 3 SCC 227

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provisions of the Bihar Civil Court Staff (Class III and Class IV) (Amendment) Rules, 1998. Rule 6 provides for the mode of recruitment of Class III employees through a centralized written examination and oral interview. Rule 6(ii) earlier provided that the written test shall consist of ninety marks while ten marks shall be allotted to the interview. Rule 7 deals with appointment by promotion. Rule 7(i) stipulates that appointments from Class III to Class IV posts on promotion shall be made by the appointment committee on the basis of merit cum seniority. Rule 7(iii) is in the following terms:

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“for promotion in terms of the preceding rule, the Appointment Committee shall hold a separate examination of the eligible candidates and call for interview only such candidates who obtain the qualifying marks in the written examination.”

9. The Bihar Civil Court Staff (Class III and Class IV) (Amendment) Rules, 2001 were notified with effect from 11 July 2001. Rules 5 to 12 were substituted. Rule 5(iv) governs the mode of recruitment of Class III employees. Rule 5(iv)(d) provides for a written test of eighty five marks and an interview consisting of fifteen marks, totally aggregating to one hundred marks. The qualifying marks for the written examination are to be forty five. Rule 6 provides for appointment by promotion in the following terms :

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“Appointment by Promotion-(i) The appointments to Class III posts by promotion from Class IV posts shall also be made by the Appointment Committee on merit-cum-seniority basis;

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(ii) Twenty percent of vacant Class III posts shall be made reserved for promotion from Class IV employees who possess the minimum educational qualification and have three year experience in the post held by them;

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(iii) For promotion in terms of the preceding rule, the Appointment Committee shall hold a separate examination of the eligible candidates and call for interview only such candidates who obtain the qualifying marks in the written examination.”

Under Rule 7(iv), all appointments are subject to such directions

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A as may be issued by the High Court from time to time. Rule 10 enables
the High Court to qualify or supplement the rules by issuing a general or
special direction from time to time. The amended Rules of 2001, as
noted above provide for the recruitment of Class III employees in Rule
5(iv) and for appointment by promotion from Class IV to Class III posts
in Rule 6. Rule 6 (iii) stipulates that for promotion in terms of the preceding
B rule, the appointment committee shall hold a separate examination of the
eligible candidates and call for interview only such candidates who obtain
the qualifying marks in the written examination. The learned Single Judge
held that in consequence, Rule 6 incorporates the requirement which is
provided in Rule 5 of a written examination consisting of eighty five
C marks, an interview of fifteen marks and qualifying marks of forty five
in the written test. The Division Bench on adverting to the provisions of
Rules 5 and 6 of the Rules, 2001 noticed that there was some scope for
interpretation on account of vagueness of the rules. However, on the
balance, the Division Bench was not inclined to differ with the view of
the learned Single Judge on the interpretation of the rules.
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10. The basic issue that was addressed by the Division Bench
was that the appellants having participated in the fresh round of selection
could not be permitted to assail the process once they were declared
unsuccessful. On this aspect, a brief recapitulation of the facts would be
in order. In the original process of selection, following the issuance of
E General order No. 204 of 2003 by the District and Sessions Judge,
Muzaffarpur on 2 December 2003, a written examination was held on 20
April 2004 consisting of eighty five marks followed by an interview on 7
July 2004 consisting of fifteen marks. The High Court declined to approve
of the selection list and issued through its Registrar (Administration), a
communication dated 19 August 2004 requiring the holding of a fresh
F written examination carrying ninety marks in which the qualifying marks
would be regarded as forty five in terms of its General letter No.1 of
1995. Pursuant thereto, a circular was issued in the form of a new General
order bearing No.171 of 2004 on 8 October 2004 which stipulated that in
terms of the directions issued by the High Court on 19 August 2004, a
G fresh written examination would be held carrying ninety marks (with
qualifying marks as forty five) followed by an interview of ten marks.
Candidates who had applied earlier were not required to apply afresh.

11. The appellants participated in the fresh process of selection.
If the appellants were aggrieved by the decision to hold a fresh process,
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they did not espouse their remedy. Instead, they participated in the fresh process of selection and it was only upon being unsuccessful that they challenged the result in the writ petition. This was clearly not open to the appellants. The principle of estoppel would operate. A

12. The law on the subject has been crystalized in several decisions of this Court. In **Chandra Prakash Tiwari v. Shakuntala Shukla**⁴, this Court laid down the principle that when a candidate appears at an examination without objection and is subsequently found to be not successful, a challenge to the process is precluded. The question of entertaining a petition challenging an examination would not arise where a candidate has appeared and participated. He or she cannot subsequently turn around and contend that the process was unfair or that there was a lacuna therein, merely because the result is not palatable. In **Union of India v. S. Vinodh Kumar**⁵, this Court held that: B C

“18. It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same... D

(See also **Munindra Kumar v. Rajiv Govil**⁶ and **Rashmi Mishra v. M.P. Public Service Commission**⁷).”

The same view was reiterated in **Amlan Jyoti Borroah** (supra) where it was held to be well settled that candidates who have taken part in a selection process knowing fully well the procedure laid down therein are not entitled to question it upon being declared to be unsuccessful. E

In **Manish Kumar Shah v. State of Bihar**⁸, the same principle was reiterated in the following observations: F

“16. We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the Petitioner is not entitled to challenge the criteria or process of selection. Surely, if the Petitioner’s name had appeared in the merit list, he would not have even dreamed G

⁴(2002) 6 SCC 127

⁵(2007) 8 SCC 100

⁶(1991) 3 SCC 368

⁷(2006) 12 SCC 724

⁸(2010) 12 SCC 576

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- A of challenging the selection. The Petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the Petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition. Reference in this connection may be made to the Judgments in *MadanLal v. State of J. and K.* MANU/SC/0208/1995 : (1995) 3 SCC 486, *Marripati Nagaraja v. Government of Andhra Pradesh and Ors.* MANU/SC/8040/2007: (2007) 11 SCC 522, *Dhananjay Malik and Ors. v. State of Uttaranchal and Ors.* MANU/SC/7287/2008 : (2008) 4 SCC 171, *AmlanJyotiBorooah v. State of Assam* MANU/SC/0077/2009 : (2009) 3 SCC 227 and *K.A. Nagamani v. Indian Airlines and Ors.* (supra).”
- D In **Vijendra Kumar Vermav. Public Service Commission**⁹, candidates who had participated in the selection process were aware that they were required to possess certain specific qualifications in computer operations. The appellants had appeared in the selection process and after participating in the interview sought to challenge the selection process as being without jurisdiction. This was held to be impermissible.
- E In **Ramesh Chandra Shah v. Anil Joshi**¹⁰, candidates who were competing for the post of Physiotherapist in the State of Uttrakhand participated in a written examination held in pursuance of an advertisement. This Court held that if they had cleared the test, the respondents would not have raised any objection to the selection process or to the methodology adopted. Having taken a chance of selection, it was held that the respondents were disentitled to seek relief under Article 226 and would be deemed to have waived their right to challenge the advertisement or the procedure of selection. This Court held that:
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- G “18. It is settled law that a person who consciously takes partin the process of selection cannot, thereafter, turn around and question the method of selection and its outcome.”

In **Chandigarh Administration v. Jasmine Kaur**¹¹, it was held

⁹ (2011) 1 SCC 150

¹⁰ (2013) 11 SCC 309

H ¹¹ (2014) 10 SCC 521

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that a candidate who takes a calculated risk or chance by subjecting himself or herself to the selection process cannot turn around and complain that the process of selection was unfair after knowing of his or her non-selection. In **Pradeep Kumar Raiv.Dinesh Kumar Pandey**¹², this Court held that:

“Moreover, we would concur with the Division Bench on one more point that the appellants had participated in the process of interview and not challenged it till the results were declared. There was a gap of almost four months between the interview and declaration of result. However, the appellants did not challenge it at that time. This, it appears that only when the appellants found themselves to be unsuccessful, they challenged the interview. This cannot be allowed. The candidates cannot approbate and reprobate at the same time. Either the candidates should not have participated in the interview and challenged the procedure or they should have challenged immediately after the interviews were conducted.”

This principle has been reiterated in a recent judgment in **Madras Institute of Development v. S.K. Shiva Subaramanyam**¹³.

13. In the present case, regard must be had to the fact that the appellants were clearly on notice, when the fresh selection process took place that written examination would carry ninety marks and the interview, ten marks. The appellants participated in the selection process. Moreover, two other considerations weigh in balance. The High Court noted in the impugned judgment that the interpretation of Rule 6 was not free from vagueness. There was in other words no glaring or patent illegality in the process adopted by the High Court. There was an element of vagueness about whether Rule 6 which dealt with promotion merely incorporated the requirement of an examination provided in Rule 5 for direct recruitment to Class III posts or whether the marks and qualifying marks were also incorporated. Moreover, no prejudice was established to have been caused to the appellants by the 90:10 allocation.

14. The decision in **Raj Kumar v. Shakti Raj**¹⁴(which was relied

¹² (2015) 11 SCC 493

¹³ (2016) 1 SCC 454

¹⁴ (1997) 9 SCC 527

A upon by the appellants) involved a case where government was found to have committed glaring illegalities in the procedure. Hence, it was held that the principle of estoppel by conduct or acquiescence had no application. The decision is distinguishable.

B 15. In this view of the matter, the Division Bench cannot held to be in error in coming to the conclusion that it was not open to the appellants after participating in the selection process to question the result, once they were declared to be unsuccessful. During the course of the hearing, this Court is informed that four out of six candidates, who were ultimately selected figured both in the first process of selection as well as in the subsequent selection. One candidate is stated to have retired.

C 16. The apprehension now is of the remaining candidate being reverted as a result of the judgment of the Division Bench of the High Court. In our view, it would be appropriate if the equities are duly adjusted by a suitable direction. We are of the view that the ends of the justice would be met by a direction that in the event that there is any existing vacancy, appellant who has still continued in service, may be allowed to continue to work on the Class III post in which he is currently working on a provisional basis until the next round of selection process takes place. The appellant would be at liberty to participate in the selection process that may be held in future and in the event he is declared
D successful, he would be at liberty to make a representation to the competent authority for consideration of the period spent by him on the Class III post for the purpose of fixation of seniority.
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F 17. Subject to the above direction, the judgment of the Division Bench and the High Court is affirmed. The appeal shall accordingly stand disposed of in the above terms. There shall be no order as to costs.