Prakash Chandra Agarwal vs State Of Bihar And Ors on 26 August, 1985

Equivalent citations: 1985 AIR 1709, 1985 SCR SUPL. (2) 693, AIR 1985 SUPREME COURT 1709, 1985 LAB. I. C. 1887, 1985 UJ (SC) 917, (1985) 2 LAB LN 831, (1985) PAT LJR 58, 1985 SCC (L&S) 947, 1985 (4) SCC 105

Author: E.S. Venkataramiah

Bench: E.S. Venkataramiah, R.B. Misra

PETITIONER:
PRAKASH CHANDRA AGARWAL

Vs.

RESPONDENT:
STATE OF BIHAR AND ORS.

DATE OF JUDGMENT26/08/1985

BENCH:
VENKATARAMIAH, E.S. (J)
BENCH:
VENKATARAMIAH, E.S. (J)
MISRA, R.B. (J)

CITATION:
1985 AIR 1709 1985 SCR Supl. (2) 693
1985 SCC (4) 105 1985 SCALE (2)377

ACT:
Bihar Civil Service (Judicial Branch) Recruitment Rules, 1955, Rules 15 and 19 - Selection by State Service Commission Qualifying marks for being called for interview fixed at 40% in consultation with High Court - Later on Commission refixed the marks at 38% in consultation with High Court - Candidate obtaining 38.8% marks called for interview but not appointed Whether justified.

HEADNOTE:
The Bihar Civil Service (Judicial Branch) (Recruitment) Rules, 1955 vests the Bihar Public Service Commission by clause (a) of Rule 15 the power to fix the qualifying marks in any or all the subjects at the written examination for the posts of Munsiffs in the Bihar Judicial Service but

before doing 80 the Commission has to consult the High Court. Rule 17 of the Rules provides that if a candidate has secured less than the prescribed qualifying marks as required under Rule 15 he would not be eligible for the viva voce test, while under rule 19 the marks obtained at the viva voce test are to be added to the marks obtained at the written examination.

The appellant appeared at the 19th Competitive Judicial Service Examination and obtained in all 416 marks including the marks obtained at the viva voce test. However, he secured only 38.8 per cent marks at the written examination. At the first instance, 83 candidates were appointed as Munsiffs. Later on, the commission submitted another list of 38 candidates to the Government for being appointed as Munsiffs, but it did not iuclude the name of the appellant even though it had included at Serial Nos. 36, 37 and 38 of the names of candidates who had secured lower marks than what the appellant had obtained. Aggrieved by the non-inclusion of his name in the list of successful candidates, he filed a writ petition in the High Court which was dismissed.

The appellant contended in his appeal before the Supreme Court that the Commission hat in exercise of its discretion fixed 38 per cent marks in the written papers as the qualifying marks

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under Rule 15(a) after consultation with the High Court and the exclusion of his name from the list of successful candidates prepared under Rule 19 was, therefore, contrary to the Rules. The respondent, however, argued that the name of the appellant was not included in the list of successful candidates prepared under Rule 19 on the ground, that he hat obtained less than 40 per cent marks in the written papers which were the qualifying marks fixed under Rule 15 (a).

Allowing the appeal,

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HELD: 1. The entire approach adopted by the High Court is wrong. The High Court should have first decided the question whether the Commission had fixed 40 per cent marks as qualifying marks or 38% as it is claimed by the appellant and then it should have proceeded to decide whether the name of the appellant has been properly excluded from the li-t prepared under Rule 19 of the rules or not. It was in error in holding that the Commission hat fixed the qualifying marks at 40 per cent merely because it had not included the names of any candidates who hat secured less than 40 per cent qualifying marks in the list prepared under rule 19. Such non-inclusion by itself and without more does not amount to a decision made by the Commission. The Commission did not actually plead that it hat made any such fresh determination. It appears to be a new case mate out by the High Court to support the action of the Commission which has contrary to its own decision fixing the qualifying arks

at 38 per cent. It may be that, in fact, there was no candidate belonging to the unreserved category who bad secured less than 40 per cent marks in the written papers amongst the first batch of 83 candidates but what is relevant is the standard which was applied when the said list was prepared. That list must have been prepared without any doubt in the light of the qualifying marks fixed by the Commission at 38 per cent for the unreserved category on the basis of which the viva voce test of all the candidates belonging to both the batches including the appellant had been held. That standard could not be varied when the next list was prepared. The High Court has failed to appreciate this aspect of tho case. [703 A,E-F, 704 A-C]

2. The Commission had fixed 38 per cent as the qualifying marks under Rule 15 (a) of the Rules for the candidates belonging to the unreserved category. Having fixed 38 per cent as the qualifying marks, it was not open to the Commission to exclude the name of a candidate who had secured 38.8 per cent marks in the written examination only because the High Court had earlier

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recommended that 40 per cent marks should be the qualifying marks when it was consulted by the Commission. As long as fresh determination is made, every candidate who has secured 38 per cent marks and above in the written examination would be entitled to appear at the viva voce test and to be included in the list prepared under Rule 19 of the Rules in the order of merit on the basis of the aggregate marks obtained in the written examination and in the viva voce test. [703 B-E]

In the instant case, admittedly the two candidates whose names are shown against Serial Nos. 36 and 37 had secured 415 marks in the aggregate and the candidate shown against Serial No. 38 had secured 413 marks while the appellant had secured 416 marks. The name of the appellant should have, therefore, been included in the list submitted by the Commission to the Government under Rule 19 by placing it above the name of the candidate at Serial No.36. By not doing 80 the Commission had violated the Rules and also Articles 14 and 16 of the Constitution. Therefore, the decision is directed to submit to the Government a revised list showing the name of the appellant above serial No.36 and the State Government is directed to consider the case of the appellant for appointment as Munsiff under Rule 21 of the rules as if his name had been shown above the candidate whose name is shown against Serial No.36. It is further ordered that on his appointment, the appellant shall be placed above the candidate shown against Serial No.36 in the seniority list and he shall be given all increments etc. as if he had been appointed on the date on which the candidate at Serial No.36 was appointed. 704 D, F-G]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4011 of 1985.

From the Judgment and Order dated 16.4.1985 of Patna High Court in C.W.J.C. No. 1449 of 1984.

Petitioner in person.

Jaya Narain and U.S. Prasad for the Respondent. The Judgment of the Court was delivered by VENKATARAMIAH, J. This is an appeal by special leave filed against the judgment of the High Court of Patna in Civil Writ Jurisdiction Case No. 1449 of 1984 dated April 16, 1985 by which the High Court declined to grant the prayer of the appellant for the inclusion of his name in the list of successful candidates at the 19th Competitive Judicial Service Examination held in December 1979 by the Bihar Public Service Commission (hereinafter referred to as 'the Commission'). The facts of the case are briefly these. Pursuant to an advertisement issued by the Commission in the month of October, 1979 calling for applications from eligible candidates to fill up the posts of Munsiffs in the Bihar Judicial Service, the appellant filed his application before the Commission within time. He appeared at the Competitive Judicial Examination held in the month of December, 1979, the Roll No. allotted to him being 388. Thereafter on July 27, 1981 he appeared at the viva voce test held by the Commission. The appellant obtained in all 416 marks including the marks obtained at the viva voce test. He, however, did not receive any order of appointment although a candidate who had secured in the aggregate lower marks than what he had secured had been appointed as Munsiff. Aggrieved by the non-inclusion of his name in the list of successful candidates he filed the above said Writ Petition in the High Court of Patna under Article 226 of the Constitution which ultimately came to be dismissed as mentioned above. This appeal by special leave is filed against the judgment of the High Court.

At the first instance, the Government had decided to appoint 83 candidates as Munsiffs. Later on, it was decided to appoint in all 139 candidates as Munsiffs. After the list of successful candidates was submitted by the Commission, the Government appointed on September 16, 1982, 83 candidates as Munsiffs. Later on by its order dated May 3, 1983, 14 more candidates who belonged to the 'Most Backward Classes' were appointed. These 14 appointments were challenged by some of the candidates in two Writ Petitions filed before the High Court, i.e., C.W.J.C. 1868/l983 and C.W.J.C. 2209/1983. The High Court allowed these petitions, quashed the appointments of the said 14 candidates on the basis of reservation and directed the Commission to forward the names of successful candidates in accordance with the Rules. Then a further list containing names of 18 candidates was submitted by the Commission. After a petition for contempt was filed in M.J.C. No. 600 of 1983 before the High Court, another list containing names of 20 candidates was submitted. In the consolidated list of these 38 candidates the Commission did not include the name of the appellant even though it had included at serial Nos. 36, 37 and 38 the names of candidates who had secured lower marks than what the appellant had obtained. In this appeal we are called upon to examine whether the exclusion of the name of the appellant from that list was justified or not.

The recruitment to the Judicial Branch of the Bihar Civil A Service is regulated by the Bihar Civil Service (Judicial Branch) (Recruitment) Rules, 1955 (hereinafter referred to as 'the Rules') promulgated by the Governor of Bihar under Article 234 of the Constitution of India after consultation with the High Court of Judicature at Patna and the Commission. Rule 2(a) of the Rules provides that the recruitment to the posts of Munsiffs shall be made in accordance with the Rules. Rule 3 of the Rules requires the Governer to decide in each year the number of vacancies in the cadre of Munsiffs to be filed by appointments to be made on a substantive basis or on a temporary basis or both. On such determination being made the Commission is required by rule 4 of the Rules to announce in each year, in such manner as it thinks it, the number of vacancies to be filled that year by direct recruitment on the results of a competitive examination. The Commission is required by the Rules to invite applications from candidates eligible for appointment as Munsiffs. The competitive examination is required to be conducted by the Commission. The qualifications which a candidate for the post of Munsiff should possess are set out in rule 6 of the Rules. The competitive examination is to be held in accordance with the syllabus specified in Appendix 'C' to the Rules. The relevant part of Appendix 'C' to the Rules reads as follows:

Subjects		Marks
1.	Compulsory-	
(1)	General Knowledge (including current affairs)	150
(2)	Elementary General Science	100
(3)	General Hindi	100

This compulsory paper will be a qualifying subject in which all candidates shall be required to secure a minimum of 30 marks but the marks secured in this paper will not be added for the purpose of determination of merit.

2. Optional.- Candidates must appear in subject No. 4 and select any three out of the remaining five subjects-

(4)	Law of Evidence and Procedure	150
(5)	Constitutional Law of India and England	150
(6)	Hindu Law and Muhammadan Law	150
(7)	Law of Transfer of Property and Principles of Equity including Law of Trusts and Specific Relief.	150
(8)	Law of Contracts and Torts	150
(9)	Commercial Law	150
3.	Viva Voce test	200

Rule 15 of the Rules which 18 material for the purpose of this case reads a follows:

> "15. (a) The Commission shall have discretion to fix the qualifying marks in any or all the subjects at the written examination in consultation with the Paten High Court.

(b) The minimum qualifying marks for candidates belonging to the Scheduled Castes and the Scheduled Tribes shall not be higher than 35% unless the number of such candidates qualifying at the written test according to the standards applied for other candidates is considerably in excess of the number of candidates required to fill all the vacancies reserved for the Scheduled Castes and the Scheduled Tribes;

Provided that in determining the suitability of a particular candidate for appointment, the total marks obtained at the written examination and not the marks obtained in any particular subject or subjects, shall be taken into consideration.

(c) There shall be no qualifying marks for the viva voce test."

Clause (a) of rule 15 of the rules vests with the Commission the power to fix the qualifying marks in any or all the subjects at the written examination but before exercising its discretion in this regard the Commission has to consult the Patna High Court. We are not concerned with clause (b) of rule 15 of the Rules in this case. Clause (c) of rule 15 provides that there shall be no qualifying marks for the viva voce test. Rule 17 of the rules reads thus:

"17. On the basis of the marks obtained at the written examination, the Commission shall arrange for viva voce test of the candidates who have qualified at the written examination according to rule 15:

Provided that in exceptional circumstances and with the prior approval of Government, the Commission may, at their discretion, admit candidates of the Scheduled Castes and the Scheduled Tribes to the viva voce test even though they may not have obtained the minimum qualifying marks at the written test.

It is clear from rule 17 of the Rules that if a candidate has secured less than the marks prescribed as the qualifying marks under rule 15 he would not be eligible for the viva voce test. Rule 19 of the Rule lays down the procedure to be followed in the preparation of the final list of successful candidates to be submitted by the Commission to the Governor. It reads thus: "19. The marks obtained at the viva voce test shall be added to the marks obtained at the written examination. The names of candidates will then be arranged by the Commission in order of merit. If two or more candidates obtained equal marks in the aggregate, the order shall be determined in accordance with the marks secured at the written examination. Should the marks secured at the written Examination of the candidates concerned be also equal then the order shall be decided in accordance with the total number of marks obtained in the optional papers. From the list of candidates 80 arranged the Commission shall nominate such number of candidates as may be fixed by the Governor in order of their position in the list. The nominations so made shall be submitted to the Governor by such date in each year as the Governor may fix.

In the instant case it is not disputed that the appellant had secured 38.8 per cent marks at the written examination and that he had also appeared at the viva voce test conducted by the Commission. It is stated that his name was not included in the list of successful candidates prepared under rule 19 of the Rules on the ground that he had obtained less than 40 per cent marks in the written papers which according to the High Court were the qualifying marks fixed under rule 15 (a). The case of the appellant, however, is that the Commission had in exercise of its discretion fixed 38 per cent marks in the written papers as the qualifying marks under rule 15 (a) after consultation with the High Court and the exclusion of his name from the list of successful candidates prepared under rule 19 was contrary to the Rules. m e decision in this case, therefore, turns on the answer to the question whether the Commission had fixed 40 per cent as mini = qualifying marks under rule 15 (a) of the Rules or 38 per cent as it is claimed by the appellant. In Paragraphs 5, 6 and 8 of the counter-affidavit filed by Nilamani Prasad Srivastava, an Assistant in the office of the Commission before the High Court it is stated as follows:-

> "5. That the Bihar Civil Service (Judicial Branch)(Recruitment) Rule 15 (a) provides that the Commission shall have discretion to fix qualifying marks in any or all the subjects at the written examination in consultation with the Patna High Court.
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> 6. mat in view of the above rule the Commission consulted Hon'ble Patna High Court for fixing qualifying marks for the written Examination of 19th Judicial Service Examination, Patna High Court vide their letter No. 14265 dated 8th Oct. 80 said among other things that the qualifying marks for viva voce test for the Scheduled Caste and Scheduled Tribe candidates should be 30% and for the rest 40%. The High Court also did not accept various categories for reservation meant for the candidates belonging to the Backward Classes.
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> .....
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> 8. That since the Government did not revice the number of vacancies fixed earlier category wise including various categories of Backward Classes the Commission ultimately had to fix the following as qualifying marks at the written examination for calling the candidates for interview, in accordance with law.
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> The qualifying marks as fixed by the Commission are indicated as follows:-

Unreserved	38%
Backward Class	38%
Most Backward Class	25%
Economically Weaker (Ladies)	25%
Economic Backward Class (Non-SC/Non-SC/Non-MBC)	25%
S.T.	25%
S.C.	25%

It is seen from the above extract of the counter- affidavit filed on behalf of the Commission that the High Court had no doubt stated that the qualifying marks for candidates other than the candidates belonging to the Scheduled Castes and the Scheduled Tribes should be 40 per cent when it was consulted by the Commission as required by the Rules but the Commission had ultimately fixed the qualifying marks at 38 per cent for the unreserved class of candidates after taking into consideration the opinion of the High Court. We are not concerned in this appeal with the cases of candidates belonging to the other classifications referred to in Paragraph 8. The appellant was no doubt treated as a Backward Class candidate but such classification did not find favour with the High Court in one Of the judgments rendered by it. But having secured 38.8 per cent marks in the written papers the appellant was eligible to appear at the viva voce test as a candidate BELONGING to the unreserved category as he satisfied the qualifying marks PRECLUDED for the candidates belonging to that category. The Commission having fixed 38 per cent marks as the qualifying marks after consulting the High Court it was not permissible for the commission refuse to follow that decision and to decline to include the name of the appellant in the list of candidates which was forwarded by it to the Government under rule 19. Dealing with the above contention of the appellant in the course of its judgment the high Court has observed thus:

"learned counsel for the petitioner Submitted that the expression 'consultation' occurring in rule 15 does not mean concurrence. In other words, the Commission is not bound by the advice given by High Court in respect of fixation of qualifying marks at the written examination. In support of this contention learned counsel purported to refer to different cases of the Supreme Court where the expression "consultation"

has been examined. In my opinion, in the facts and circumstances of the present case there is no necessity of examining the scope of rule 15 as to whether the Commission has to set according to the advise of the high Court while fixing the qualifying marks at the written examination. That question could have arisen if the Commission did not according to the advice of the High Court. In the instant case, the Commission has acted according to advice given by the High Court. Merely because the candidates having secured less than 40% marks were called for interview, in my view, it shall not clothe them with any right to be selected for appointment. I have already pointed out that in the counter-affidavit it has been explained as to why at that stage the Commission had decided to call for interview even the candidate who had secured 38% marks. But while recommending the names for appointment, a list of successful candidates had been prepared ret strictly in accordance with Rules 19 and 20 of the Rules. Learned counsel appearing for the petitioner had to admit that no candidate has been recommended for being appointed by the Commission who had secured less than 40% marks at the written examination. In that view of the matter there is no scope for an agreement that the petitioner has been discriminated in any manner."

The High Court, with great respect, has tried to avoid the question which squarely arose Before it. The High Court has observed that on the facts and in the circumstances of the present case there was no necessity for examination the scope of rule 15 of the Rules as to whether the Commission had

to act according to the advice of the High Court while fixing the qualifying marks at the written examination and that the said question would have arisen if the Commission had not acted according to the advice of the High Court. The High Court has further observed that merely because the Commission had interviewed candidates who had secured less than 40 per cent marks the appellant would not be entitled to claim any right to be selected for the appointment. The High Court has further upheld the action of the Commission by observing that since the Commission had not recommended any candidate who had secured less than 40 per cent marks at the written examination there was no scope for the contention that the appellant had been discriminated against. With great respect, the entire approach adopted by the High Court is wrong. The Court should have first decided the question whether the Commission had fixed 40 per cent marks as qualifying marks or 38% as it is claimed by the appellant and then it should lave proceeded to decide whether the name of the appellant has been properly excluded from the list prepared under rule 19 of the Rules or not. It is admitted in the counter-affidavit filed on behalf of the Commission that the Commission had fixed 38 per cent as the qualifying marks under rule 15(a) of the Rules for the candidates belonging to the unreserved category. Having fixed 38 per cent as the qualifying marks, it was not open to the Commission to exclude the name of a candidate who had secured 38.8 per cent marks in the written examination only because the High Court had earlier recommended that 40 per cent marks should be the qualifying marks when it was consulted by the Commission. In the counter-affidavit there is no reference to any fresh fixation of qualifying marks made by the Commission after it had once taken the decision to fix 38 per cent marks as the qualifying marks in regard to the candidates belonging to the unreserved category at the 19th Competitive Judicial Service Examination. As long as such fresh determination is not made every candidate who has secured 38 per cent marks and above in the written examination would be entitled to appear at the viva voce test and to be included in the list prepared under rule 19 of the Rules in the order of merit on the basis of the aggregate marks obtained in the written examination and in the viva voce test. The High Court was in error in holding that the Commission had fixed the qualifying marks at 40 per cent merely because it had not included the names of any candidates who had secured less than 40 per cent qualifying marks in the list list prepared under rule 19. Such non- inclusion by itself and without more does not amount to a decision made by the Commission. The Commission did not actually plead that it had made any fresh determination. It appears to be a new case made out by the High Court to support the action of the Commission which was contrary to its own decision fixing the qualifying marks at 38 per cent.

The acceptance of the view of the High Court would also lead to the anomalous result of prescribing two different qualifying marks at two different stages in respect of the same examination. i.e. One for the first batch of 83 candidates appearing in the same examination who were appointed on September 16, 1982 before any dispute arose about the appointments in question and another for the next batch of 38 candidate whose names were forwarded to the Governor after the judgement in the Writ Petitions C.W.J.C. No. 1868 of 1983 and C.W.K.C.. NO. 2209 of 1983. This INCONGRUITY cannot be allowed to remain in existence. It may be that in fact there was no candidate belonging to the unreserved category who had secured less than 40 per cent marks in the written papers amongst the first batch of 83 candidates but what is relevant is the standard which was applied when the said list was prepared. The list must have been prepared without any doubt in the light of the qualifying marks fixed by the Commission at 38 per cent for the unreserved category on the basis of which the

viva voce test of all the candidates belonging to both the batches including the appellant had been held. That standard could not be varied when the next list was prepared. The High Court has failed to appreciate this aspect of the case.

Having regard to the material before us we hold that the Commission had fixed 38 per cent as the qualifying marks for the unreserved category and had not subsequently altered it. Admittedly the two candidates whose names are shown against Serial Nos. 36 and 37 had secured 415 marks in the aggregate and the candidate shown against Serial No. 38 had secured 413 marks while the appellant had SECURED 416 marks. The name of the appellant should have, therefore, been included in the list submitted by the Commission to the Government under rule 19 by placing it above the name of the candidate at Serial No. 36. By not doing so the Commission had violated the Rules and also Articles 14 and 16 of the Constitution.

The Judgments of the High Court is, therefore, liable to be set aside and we accordingly set it aside. We direct the Commission, to submit to the Government a revised list showing the name of the appellant above Serial No. 36 and we further direct the State Government to consider the case of the appellant for appointment as Munsiff under rule 19 of the Rules as if his name had been shown above the candidate whose name is shown against Serial No.36. On his appointment, the appellant shall be placed above the candidate shown against Serial No. 36 in the seniority list and he shall be given all increments etc. as if he had been appointment on the date on which the candidate at Serial No. 36 was appointed.

The appeal is accordingly allowed. The respondents 1 and 2 are directed to comply with the above directions within one month. The appellant is entitled to the costs which we quantify at Rs. 3,000.

M.L.A.