
(2011) 07 PAT CK 0271
In the Patna High Court
Case No : CWJC No. 5649 of 2008

Arun Prasad and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 08-07-2011

Acts Referred:

Citation : (2011) 07 PAT CK 0271

Final Decision : Allowed

Judgement

V.N. Sinha, J.—Heard learned counsel for the Petitioners and the State.

2. Petitioners are the members of Bihar Engineering Service Class-I, II serving in the Water Resources, Road Construction Department of the State Government. They have filed this writ petition challenging the instructions of the State Government bearing letter No. 745 dated 5.2.2008, Annexure-1 issued from the Personnel and Administrative Reforms Department of the State Government, whereunder Principal Secretary, Water Resources, Road Construction Department of the State Government have been instructed to draw fresh seniority list of the members of the Engineering Service in the light of the 85th Constitutional Amendment as also, the instructions contained in the resolution of the Personnel and Administrative Reforms Department bearing No. 213 dated 7.6.2002. In the writ petition resolution No. 213 dated 7.6.2002 has not been annexed but counsel for the State has brought the same on record as Annexure-A to the counter affidavit. Perusal of resolution No. 213 dated 7.6.2002 would indicate that thereunder instruction was issued to protect the seniority of SC/ST members of the different services of the State in the light of the provisions of Article 16(4-A) of the Constitution and the instruction of the Govt. of India dated 21.1.2002 so that the general and OBC members of the different services of the State who earn promotion later than the SC/ST members of the service is not allowed the benefit of catch up Rule, as was directed by the Hon'ble Supreme Court in the case of Union of India v. Virpal Singh Chauhan and Others referred to in the resolution dated 7.6.2002. It appears vires of Article 16(4-A) of the Constitution

was challenged, Hon"ble Supreme Court in the case of M. Nagaraj and Others v. Union of India and Others, reported in (2006)8 Supreme Court Cases 212, upheld the validity of Article 16(4-A) holding the provision to be an enabling one empowering the State to grant benefit of reservation in promotion to SC/ST members of the different services of the State provided in the opinion of the State on the basis of quantifiable data the SC/ST members of the society are backward and their representation in the different services of the State is not adequate keeping in view efficiency of the services as is required under Article 335 of the Constitution. While upholding the vires of the enabling provision the Hon"ble Supreme Court also gave directions to determine the extent of backwardness of the SC/ST members of the society and inadequacy of their representation in the different services of the State with reference to quantifiable data. In the light of the judgment of the Hon"ble Supreme Court in the case of M. Nagaraj (supra) the Govt, of India issued instructions to the Chief Secretaries of the different States under letter No. 36036/2/2007 dated 29.3.2007, Annexure-3 quoting various paragraphs of the said judgment with request to bring the contents of letter to the notice of all concerned in the State. In paragraph 3 of the said letter it is stated that observations of the Hon"ble Supreme Court in the case of M. Nagaraj (supra) regarding creamy layer amongst the Scheduled Castes and Scheduled Tribes are mere obiter dicta per incurium and do not flow from and cannot be reconciled with the nine Judge Bench judgment of the Hon"ble Supreme Court in the case of Indra Sawhney (supra). The impugned letter of the Personnel and Administrative Reforms Department dated 5.2.2008, Annexure-1 require the Principal Secretary, Department of the Water Resources, Road Construction to redraw the seniority list of the members of the Engineering Service(s) of the State in the light of the 85th Amendment and the instructions of the Personnel and Administrative Reforms Department contained in resolution No. 213 dated 7.6.2002.

3. From the counter affidavit it does not appear that any exercise was done by the State Authorities to collect quantifiable data before issue of resolution No. 213 dated 7.6.2002 showing backwardness, inadequacy of the representation of the SC/ST members in the different services of the State keeping in mind maintenance of efficiency of the service both in terms of quality and quantity as indicated by Article 335 of the Constitution and held by the Hon"ble Supreme Court in the case of M. Nagaraj (supra). In paragraph 8 of the counter affidavit it has been stated that the consideration of backwardness, inadequacy of representation and administrative efficiency of the SC/ST members of the Engineering Service(s) is within the jurisdiction of the State Government and the Government having taken a practical approach is of the view that SC/ST members of the Engineering Service(s) are not adequately represented at every level of the service. For ensuring adequate representation of SC/ST members in the Engineering Service, it is necessary to grant benefit of reservation to SC/ST members of the service at every level of service and not only in the basic grade.

4. Petitioners have disputed the aforesaid averment made by the State

Government about the backwardness, inadequate representation of SC/ST members in the Engineering Service(s). It is further submitted that State Government never made any objective exercise to collect quantifiable data showing backwardness, inadequacy of representation of the SC/ST members in the Engineering Service(s) of the State keeping in mind maintenance of efficiency of service either before or after the issue of the impugned instruction. To support the aforesaid submission Petitioners have relied on a chart, Annexure-5 to submit that after grant of accelerated promotion with protected seniority to the SC/ ST members of the Engineering Service(s) there is overwhelming clogging of only SC/ ST members in the promoted grade more particularly from the level of Superintending Engineer and above. Reliance in this regard is also placed on the submission made in paragraph 9 of the petition.

5. From the pleadings made by the State Respondents itself, it is evident that Government did not undertake any exercise to objectively collect quantifiable data showing backwardness, inadequacy of representation of the members of SC/ ST in the Engineering Service(s) of the State keeping in mind efficiency of the Engineering Service(s) as is required under Article 335 of the Constitution either before or after issue of the impugned instruction dated 5.2.2008, Annexure-1. The Government having not assessed the backwardness, inadequacy of representation of the SC/ST members in the Engineering Service(s) of the State keeping in view the requirement of Article 335 of the Constitution by collecting quantifiable data before granting reservation in promotion to the SC/ST members of the Engineering Service(s) with protected seniority including the fact that after grant of reservation in promotion with protected seniority the SC/ST members of the Engineering Service(s) are overwhelmingly clogging the grade from the level of Superintending Engineer and above, leading to violation of the extent of reservation together with the ceiling limit of 50% (quantitative limitation) and thereby disturbing the post specific roster.

6. The State Government without objectively assessing the backwardness, inadequacy of the representation of the SC/ ST members in the Engineering Service(s) of the State keeping in view the requirement of Article 335 of the Constitution by collecting quantifiable data issued instruction contained in letter dated 5.2.2008, Annexure-1 directing the Water Resources/ Road Construction Department of the State Government to grant the SC/ST members of the Engineering Service(s) not only accelerated promotion but also to protect their seniority with effect from 17.6.1995 which is contrary to the provisions of Article 16(4-A) of the Constitution as interpreted by the Hon''ble Supreme Court in the case of Suraj Bhan Meena and Another Vs. State of Rajasthan and Others, respectfully following the aforesaid ratio laid down by the Hon''ble Supreme Court, the impugned letter dated 5.2.2008, Annexure-1 is quashed with observation that in the event, State proposes to grant reservation in promotion to SC/ST members of the Engineering Service(s) with protected seniority, State must first objectively find out level of backwardness, inadequacy of representation of the SC/ST members of the Engineering Service(s) by collecting

quantifiable data keeping in view the requirement of Article 335 of the Constitution and if the SC/ST members, in the opinion of the State are backward and not adequately represented in the Engineering Service(s) then to grant them reservation in promotion with protected seniority, as is envisaged under Article 16(4-A) of the Constitution.

7. The writ application is, accordingly, allowed.