
(2018) 12 JH CK 0117
In the Jharkhand High Court
Case No : Writ Petition (S) No. 2630 Of 2018

Badri Prasad

APPELLANT

Vs

State of Jharkhand And Ors

RESPONDENT

Date of Decision : 20-12-2018

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 16(1)

Citation : (2018) 12 JH CK 0117

Hon'ble Judges : S.N. Pathak, J

Bench : Single Bench

Advocate : Akash Deep, Anuj Kumar, Sameer Sahai

Final Decision : Disposed Off

Judgement

The petitioner has approached this Court with a prayer for a direction upon the respondents to consider and grant regular promotion to the petitioner to the post of Deputy Director and subsequently as Additional Director from respective due date, after granting the benefits of 1 year relaxation in Kalwadhi in terms of the Government Policy in this regard with all consequential benefits of Seniority, pay, Continuity in service etc., in accordance with law.

The facts as derived from the writ petition are that the petitioner was initially appointed as Assistant Mining Officer on 03.02.1989 and subsequently, passed Hindi Noting and Drafting Examination on 21.02.1992. The petitioner having requisite qualification and otherwise eligible, participated in the process of direct recruitment for the post of District Mining Officer and on recommendations of the Bihar Public Service Commission, was appointed as District Mining Officer on 20.08.1998. On cadre bifurcation, the services of the petitioner was allocated to the State of Jharkhand and subsequently, he was posted as Incharge Deputy Director (Mines) where he joined on 03.07.2006 and was discharging duties and responsibilities of the said post, continuously and without interruption till date. It is further stated that as per requirement for grant of promotion to next higher grade, he had completed 8 years of services on 20.08.2006. However, in view of

the fact that he belongs to Extremely Backward Category and also as per the Govt. Policy to grant relaxation of one year in qualifying length of service, the petitioner became entitled for grant of promotion to the post of Deputy Director Mines on 20.08.2005 itself. It is further stated that petitioner completed the qualifying service of 4 years for promotion to the post of Additional Director (Mines) w.e.f. 20.08.2009 itself, subject to availability of vacancy of Additional Director (Mines). In the seniority list of District Mining Officer dated 21.06.2003, the petitioner was placed at Sr. No.15 and persons standing at Sr. No. 1 to 5 and 11 to 13 have already retired from services, whereas services of the person standing at Sr. No.6 was finally allocated to State of Bihar. Thus, in final seniority list published by the Govt. of Jharkhand vide Memo No. 2517 dated 21.08.2006, the petitioner was standing at Sr. No.6. It is stated that in the year, 2008, Government resolved to create additional posts within the mining cadre and in view thereof 3 Additional posts of Deputy Director (Mines) were created making the total vacancies for promotion as 8.

It is further the case of the petitioner that while he was posted as District Mining Officer, Sahebganj, he was placed under suspension on 06.09.1999 and memo of Charges were issued on 17.02.2001, initiating a Departmental Proceeding. Aggrieved thereto, the petitioner challenged the same before this Hon'ble Court in CWJC No. 1142 of 2001 which was finally disposed of vide order dated 23.03.2001 with a direction to conclude the Departmental Proceeding within six weeks, even ex parte, failing which the Departmental Proceeding including the order of suspension would stand automatically quashed. It is further the case of the petitioner that as the Departmental Proceeding was not completed within the stipulated time granted by this Hon'ble Court vide order dated 23.03.2001 in CWJC No. 1142 of 2001, departmental proceeding as against the petitioner automatically stands quashed. However, unfortunately for the petitioner, before any formal notification could have been issued, the petitioner was again falsely implicated and arrested on 09.05.2001, in connection with Hajipur PS Case No. 20 of 2000. The petitioner was admitted to the privilege of Bail by the Hon'ble Apex Court in Cr. Appeal No. 176/2004. The petitioner was ultimately acquitted, on merits, of all charges levelled against him in light of judgment and order dated 15.11.2017 passed in Sessions Trial No. 577 of 2002.

It is specific case of the petitioner that in the year, 2008-09, for the first time, matter of promotion to different posts within the mining cadre was undertaken by the State of Jharkhand and persons standing at Sr. No.1 to 4 of the final seniority list, were granted regular promotion to the next higher post of Deputy Director (Mines) from their respective dues dates i.e. 15.11.2000 and person standing at Sr. No.5 of the final seniority list was granted regular promotion as Deputy Director (Mines) w.e.f. 20.08.2006 through Notifications issued vide Memo No. 729/M dated 28.05.2009, against 5 out of 8 available vacancies. Though the petitioner has requisite qualification and has completed the qualifying tenure on 20.08.2005 itself, but his case was not even considered despite existence of sufficient number of vacancy as well as ignoring the fact that

petitioner had been discharging the duties and functions of the said post since 03.07.2006 itself. Aggrieved by the same, the petitioner has represented before the respondents-authorities on 03.07.2006, but the same was not considered. The petitioner again represented before the respondent on 23.06.2009, but no heed was paid to said representation also. Subsequently, though the said representation of the petitioner was pending for consideration before the respondents, two persons namely, Mr. B.B. Singh and S.I. Minz were granted further promotion as Additional Director (Mines) w.e.f. 15.11.2004 through Notification issued vide Memo No. 1969 dated 23.12.2009. It is stated that in view of the aforesaid promotion, 2 more vacancies of Deputy Director (Mines) became available w.e.f. 15.11.2004 in addition to the 3 newly created posts in 2008. However, despite availability of vacancies, eligibility of petitioner as well as the fact that petitioner had been discharging the duties and functions of the post of Deputy Director (Mines) since 03.07.2006 itself, the petitioner was kept denied and deprived of his right of being considered for regular promotion as Deputy Director (Mines), that too when persons appointed along with the petitioner, through the same notification, were granted the benefits of regular promotion. As the petitioner was discriminated at the hands of the respondents and matter of regular promotion was pending inordinately, several persons including juniors to the petitioner were granted the benefits of ACP/MACP from their respective due dates vide Memo No. 127 dated 02.02.2016, without considering the case of the petitioner. Aggrieved by the same, the petitioner again represented before the respondents on 11.04.2018 with a request to consider his case for regular promotion as Deputy Director (Mines) and subsequently as Additional Director (Mines) from respective due dates. Despite repeated requests and reminder, the case of the petitioner was not considered for regular promotion though he is senior most District Mining Officer, discharging full duties and responsibilities attached with the post of Deputy Director (Mines) since 03.07.2006. Hence, the petitioner has been constrained to knock the door of this Court for redressal of his grievances.

Mr. Akash Deep, learned counsel appearing on behalf of the petitioner assisted by Mr. Anuj Kumar, strenuously urges that the case of the similarly situated persons have been considered, though the petitioner was entitled for promotion in the year, 2005 itself, but the respondents have illegally and arbitrarily denied the same. Learned counsel further argues that petitioner is going to superannuate on 28.02.2019 and has not been granted even a single promotion, including benefits of ACP/MACP though, the persons junior to the petitioner have been granted the same. The main contention of the learned counsel for the petitioner is that non-consideration of the case of the petitioner for promotion by DPC despite eligibility and being in the zone of consideration, amounts to denial of Fundamental Right enshrined under article 16 (1) of the Constitution of India. A direction be given upon the respondents for holding a review DPC in light of fact that the name of petitioner was at Sl. No. 3 in the DPC held on 25.04.2009 and in view thereof to consider the case of the petitioner for regular promotion as Deputy Director

(Mines) from due date as has been done in case of other similarly situated persons and subsequently to the next higher post of Additional Director (Mines). Right has accrued to the petitioner as he was officiating on the said post for a long period and also the as petitioner is going to retire on 28.02.2019, the respondents be directed to hold a DPC for consideration of his case for regular promotion. Lastly, learned counsel argues that in view of celebrated Judgment of Hon'ble Apex Court in case of Union of India Vs. K. V. Jankiraman, reported in (1991) 4 SCC 109, the respondents ought to have considered the case of the petitioner even if criminal case was pending and an order regarding fitness of the petitioner for promotion was supposed to be kept in a sealed cover which also find strength from the Govt. Circular which says that the pendency of the criminal case cannot be a bar for consideration of case an employee for regular promotion.

Per contra, counter-affidavit has been filed. Mr. Sameer Sahai, learned counsel appearing on behalf of the respondents vehemently opposes the contention of the learned counsel for the petitioner and submits that a criminal case was pending against the petitioner since 2003 and it was only in the year, 2017, the petitioner was acquitted and as such, the case of the petitioner could have only been considered in the year, 2017 and not before the order of acquittal. Referring to several paragraphs of the counter-affidavit particularly 7 to 15, learned counsel submits that though the Government of Jharkhand created 3 posts of Deputy Director (Mines) and total number of post of Deputy Director (Mines) rose to 8 but, roaster Clearance obtained from Department of Personnel in the year, 2006 was for 5 posts only. Admittedly, at the time of DPC, 8 posts of the Dy. Director were available but roster clearance for 5 posts were received from Department of Personnel which is evident from the very first line of proceeding of DPC dated 25.04.2009 and accordingly, only 5 persons were given promotion in DPC held on 25.04.2009. Learned counsel further argues that both Mr. B.B.Singh and S.I. Minz were promoted as Deputy Director, Mine in the DPC under reference and their names appeared in the Proceeding of aforesaid DPC, and they were later on promoted to the post of Additional Director, Mines with effect from respective due dates. The petitioner was implicated in criminal case and was under custody for a considerable period from 09.05.2001 to 04.03.2004 and accordingly was put under suspension. The petitioner was relieved by Govt. of Bihar to join Jharkhand State on 01.04.2005 as suspended District Mining Officer, However, the suspension of the petitioner was revoked on 27.03.2006. Learned counsel further argues that even if roaster clearance for 3 additional newly created posts, and 2 vacancies arising out of promotion of Mr. B.B. Singh and S.I. Minz to next higher post is made available, the case of the petitioner for promotion could not be taken at that time. Learned counsel lastly argues that the Department has already initiated procedure of promotion and file for Roaster Clearance has already been sent to Department of Personnel Administrative Reforms and Rajbhasa, and as soon as it is received from Department of Personnel, the matter of the petitioner along with others will be put before DPC

for consideration for promotion as per Rules and Regulations.

Be that as it may, having gone through the rival submissions of the parties, this Court is of the considered view that the case of the petitioner needs consideration. Admittedly, the DPC was held for the first time only in the year, 2009, although year-wise panel was to be prepared for year-wise vacancies, but all the vacancies were clubbed together and 5 persons were considered by the DPC held in the year, 2009. The petitioner being the 6th in order of seniority and well within the zone of consideration was not considered by the said DPC. It is an admitted fact that since 15.11.2000, there were only 5 vacancies, but only four eligible persons within the Cadre were granted regular promotion in the year, 2009 w.e.f. 15.11.2000. Out of said 4 persons, 2 were further promoted to the next higher post in 2009 itself w.e.f. 15.11.2004, resulting into availability of 2 Additional vacancies in the year, 2004 and as such, in the year, 2006, when the petitioner and one Mr. S.K. Sinha acquired eligibility for promotion, there were 3 clear-cut vacancies available since 15.11.2004. But only 1 vacancy was taken into account and promotion was granted to Mr. S.K. Sinha in the year, 2009 w.e.f. 2009. The petitioner who was well within the zone of consideration, was not considered by the DPC, even against the 2 subsequent vacancies arising out of promotion given to two persons to next higher level with effective from the year, 2004. The other eligible persons have also been granted financial upgradation on account of grant of ACP/MACP with respective due date, but the petitioner was denied even financial upgradation under the said Scheme. From perusal of the extract of the Departmental File being File No.17/2008, which has been brought on record and obtained by RTI by the petitioner, it appears that steps for promotion from the due date, were initiated in 2007-2008 itself and vigilance clearance as well clearance from Lokayukt was obtained for the petitioner along with others on 14.06.2008 and 24.06.2008 respectively. Although it was admitted that the petitioner being eligible and 6th in order of seniority, was well within the zone of consideration, but the name of the petitioner was not placed before the DPC, which is evident from the self-contained note dated 21.07.2008, 22.09.2008 and 25.04.2009, which formed the basis for recommendations of DPC. Therefore, it is admitted fact that although the petitioner was eligible and well within the zone of consideration, the petitioner was denied and deprived of his fundamental right of being considered by the DPC.

It is also admitted fact regarding the vacancies that apart from 01 vacancy of the year, 2000, 2 additional vacancies of Deputy Director were available on account of promotion of Mr. B.B.Singh and Mr. S.I. Minz as Additional Director in 2004, but DPC considered only 5 vacancies of the year, 2000 and 2 vacancies of the year, 2004, were not taken into consideration in the DPC dated 25.04.2009. In view of the factual aspect, the petitioner was entitled to be considered and promoted against one of the aforesaid vacancies from due date as has been done in case of others. Law is well settled and not to be disputed that right to be considered for promotion flows from the Constitutional Rights Guarantee under

Articles 14 & 16 to the Constitution of India. In case of C.O. Arumugam and others Vs. the State of Tamil Nadu and Others, reported in (1991) (Supp.) 2 SCC page 129 the Hon'ble Apex Court made it clear that consideration for promotion can only be postponed on reasonable ground. In the instant case, no reasonable ground has been shown as to why the case of the petitioner for promotion has not been considered.

Further, the Hon'ble Patna High Court in case of Chittaranjan Kumar Buernevey Vs. Bihar State Electricity Board, reported in 1997 (2) PLJR 731 has held in para Nos. 28 & 29, which is reproduced hereinbelow:-

28. Therefore, the question is whether an employer is free to defer at its sweet will the consideration of an incumbent's case of promotion when the vacancy occurs and when the person whose case is ripe for consideration is making repeated representations for such consideration of his case. If the answer is given by this Court in affirmative then an employer would be put in the position of being an 'imperium in imperio.' Under the constitutional set up no body can claim that position. On the other hand, the Apex Court is constantly harping on the fact that the governmental authorities in keeping with the concept of a Welfare State should act as a model employer. Acting as a model employer, implies that persons who are entitled to be considered for promotion at the time when the vacancy occurs ought to be so considered in accordance with law and they must know where they stand. Therefore, a fair consideration of case for promotion implies a timely consideration and not a belated one or at any time when the employer thinks it fit. As the employee has a fundamental right of having his case for promotion considered fairly, similarly the employer has an obligation to do it objectively. There is no scope for a subjective approach in this area. So the authority must remember that in considering an employee's case for promotion, it is undertaking an exercise in the context of certain constitutional imperatives. And it is expected that the authority must act with a due sense of responsibility and in an objective manner and in such cases always there is an accountability attached to its action. So the authority cannot take the stand, as it has taken in the impugned order that it will consider the case for promotion 'when it thinks fit'. The impugned order thus betrays a clear lack of perception on the part of the authorities about its duties in this respect.

29. This Court is of the view that discipline in public service is not a one way traffic. If the authorities expect discipline and dedication from the employees, they must also adhere to some discipline in the discharge of duties and obligations and as a model employer one such obligation is to consider the eligible employees for promotion in accordance with the rules and within a reasonable time when vacancies in the promotional post occur.

As far as Departmental Proceedings and Criminal Proceeding against the petitioner is concerned, as per the direction of this Court in CWJC No.16415/2004 on 03.02.2011, the department proceeding along with suspension as directed in Case No. 1142/2001 stood quashed and the petitioner

was acquitted in the year, 2017 by the learned Court below in Sessions Trial Case No. 24/2000 as it would be evident from perusal of the Court's order. Therefore, it can be very comfortably said that no departmental proceeding was pending against the petitioner on the date of DPC when others were considered for promotion. It was only due to pending criminal case, the case of the petitioner was not considered.

From perusal of the records, it is also clear that petitioner completed the required qualifying period of 8 years of service on 20.08.2006 as a member of the Extremely Backward Class, which is a reserved category. The petitioner was eligible for promotion as Deputy Director (Mines) on 20.08.2005 itself in view of the relaxation of 1 year in qualifying period by the Government Policy and also completed the qualifying service of 4 years for promotion to the post of Additional Director (Mines) w.e.f. 20.08.2009 itself, subject to availability of vacancy of Additional Director (Mines). Thus the fact remains that there was nothing against the petitioner, which could be taken into account by the Departmental Promotion Committee when it conveyed on 2009. So, non-consideration of the case of the petitioner was manifest error on the face of the record, at least his case ought to have been considered and kept in sealed cover.

The Hon'ble Apex Court in case of R.K.Singh Vs. State of U.P. & Ors. 1991 Supp (2) SCC 126 and in the matter of Bank of India & Anr. Vs. Degala Suryanarayan, reported in 1993 (3) PLJR 83 has clearly held that a promotion takes effect when it becomes due. In both the cases, the aspect was not dissimilar to the present case. In the case of Bank of India Vs. Degala Suryanarayana (supra), there was an issue of a departmental enquiry. Once the incumbent had been cleared from the adverse entry or a pending departmental enquiry, as the case may be, the view of the Hon'ble Supreme Court is that the promotion ought to be given effect from when it falls due.

As a minimum qualifying period 8 years have been completed much earlier and the petitioner had already worked in that capacity when the vacancies have occurred, the case of the petitioner is in teeth of K.V. Jankiraman Vs. Union of India, reported in (1991) 4 SCC 109 though a criminal case was pending, his case ought to have been considered on the date of DPC and kept in sealed cover, but the same was not done, which is manifest error apparent from the records. The respondents have very fairly averred in para 17 to the counter-affidavit that 'the department has already initiated procedure of promotion. File for Roaster Clearance has already been sent to Department of Personnel Administrative Reforms and Rajbhasa and as soon as it is received from Department of Personnel the matter of the petitioner along with others will be put before DPC for consideration for promotion as per rules and regulations. Therefore, the respondents are directed to complete the entire exercise for promotion by holding a DPC, within a period of six weeks from the date of receipt a copy of this order as the petitioner is going to superannuate in the month February, 2019 itself. Needless to say, if the petitioner is found entitled for promotion, the same

shall be extended to him with all consequential benefits, from the date of his entitlement.

With the aforesaid observations and directions, writ petition stands disposed of.