
(2000) 09 PAT CK 0105
In the Patna High Court
Case No : C.W.J.C. No. 4361 of 1998

Bihar State Agriculture Market Committee Employees
Association

APPELLANT

Vs

The Bihar State Agriculture Marketing Board and Others

RESPONDENT

Date of Decision : 13-09-2000

Acts Referred:

Bihar Agricultural Produce Markets Act, 1960 — Section 2(1), 20(1)
Bihar Agricultural Produce Markets Regulations — Regulation 56, 63, 64
Bihar Agricultural Produce Markets Rules, 1975 — Rule 64, 66
Constitution of India, 1950 — Article 14, 16(1), 311

Citation : (2001) 1 PLJR 114

Hon'ble Judges : R.M. Prasad, J

Bench : Single Bench

Advocate : Narendra Prasad and Ratan Pd. Sinha, for the Appellant; K.P. Yadav, for Marketing Board and Ram Janam Ojha, for Respondents Nos. 4 to 12, for the Respondent

Final Decision : Allowed

Judgement

R.M. Prasad, J.—Initially Petitioners challenged the validity of the order contained in Annexure-2 posting Respondent Nos. 4 to 12 as Market Secretary. Grievance of the Petitioners who are Market Supervisors is that the post of Market Secretary is higher post and the said Respondents who are junior to them have been given posting of the said higher responsibility without considering their case.

2. This Court vide order dated 31.3.2000 recorded the assurance given by the Managing Director that performance of the Incharge Marketing Secretary shall be reviewed within a period of fortnight and a decision will be taken strictly on merit whether to continue the said Marketing Secretary or not. Pursuant to it a decision has been taken which have been brought on record by filing Annexures-A, B and C to the first supplementary counter affidavit. By way of amendment bearing I.A. No. 4106 of 2000 Petitioners besides challenging the validity of the said orders Annexures-A, B & C also challenged the validity of the order contained in

Annexures-C, E, F and F/1 in so far as it relates to Respondent Nos. 4, 6, 7, 9, 10, 11, & 12 and further sought for a mandamus to the Respondents to consider the deputation of Market Secretary on the basis of seniority of Market Supervisors in the gradation list. This Court after hearing the learned Counsel for the parties on I.A. No. 5013 of 2000, in which prayer was made to add some of the Applicants of the said petition as co-Petitioner Nos. 2 to 4 in the main writ petition and the said I.A. No. 4106 of 2000 seeking for amendment of the writ petition, vide order dated 29.8.2000 allowed thorn.

3. In short, the relevant facts are that since after 1974 the vacancy position of Market Secretary has not been declared by the Respondent-Board. Out of 45 vacant posts of Market Secretary, 20 posts of Market Secretary have been filled up through O.O. No. 935 dated 5.12.1997 (Annexure-2) by which Junior Market Supervisors have been deputed to work on the higher post of Market Secretary by pick and choose method as alleged. On 28.10.1997 Petitioners filed representation that after 1988 no promotion has been granted on the post of Market Secretary while the posts were lying vacant since long and accordingly a prayer was made that in place of Incharge Market Secretary regular promotion may be given on the basis of seniority in the gradation list as provided under Rule 64(c) of the Bihar Agricultural Produce Marketing Rules. On 5.12.1997 office order No. 935 was issued through which 20 Market Supervisors were deputed to work on the post of Market Secretary vide Annexure-3 out of which, according to the case of the Petitioner, serial Nos. 2 to 10 (Respondent Nos. 4 to 12) are Junior Market Supervisors in the gradation list and the claim of Senior Market Supervisors have been ignored. A gradation list of Market Supervisors have been annexed as Annexure-4. It is stated that some Junior Market Supervisors, who have been deputed to work as Market Secretary have become controlling and disciplinary authority of their seniors of the gradation list. The senior persons, who were facing humiliation, filed representation on 7.1.1998 followed by reminder dated 10.2.1998, but no action was taken and on the contrary remaining vacant posts of Market Secretary are also going to be filled up by the same pick and choose method. Hence, the Petitioners filed the present writ application.

4. It appears from the supplementary counter affidavit filed on behalf of the Respondent Nos. 1 to 3 that the Establishment Sub-Committee of the Marketing Board considered the performance of the Incharge Market Secretary in its meeting dated 15.4.2000 purported to be in pursuance of the aforementioned assurance given by the Managing Director. It is stated that after due consideration the work of six Market Supervisors working as Incharge Market Secretary were not found satisfactory. It has, thus, been decided in the meeting that they be removed from the post and be posted as Market Supervisor. With respect to the rest Market Supervisor working as Incharge Market Secretary they have been allowed to continue in their place of posting in the light of the collection of revenue made by them and further that these Market Supervisors be posted as Incharge Market Secretary in place of those who have been removed

from the said post. Accordingly, S/Shri Arun Kumar Jha, Laxmi Kant Jha, Sukhdeo Prasad and Surendra Prasad Saha have been posted as Incharge Market Secretary after having passed the proficiency test. Photostat copy of the said proceeding is Annexure-A.

5. It is stated that in compliance of the order dated 31.3.2000 of this Court, the Managing Director of the Marketing Board has passed the order dated 15.4.2000 on the basis of the decision of the Establishment Sub-Committee removing the said six Incharge Market Secretaries and posting them in Headquarter as Market Supervisors and further posting the aforementioned six persons in their place. Photostat copy of the said order has been annexed as Annexure-B. Order regarding continuance of the remaining 19 Market Supervisors as Incharge Market Secretary has also been issued by the Managing Director on 15.4.2000. A photostat copy whereof has been annexed as Annexure-C. According to the case of the Respondents, their posting as Incharge Market Secretary is on the basis of their seniority and academic qualifications. Photostat copy of the said order has been annexed as Annexure-D. The order of posting of S/Sri Laxmikant Jha, Shukhdeo Prasad and Surendra Prasad Saha who are all Graduate Assistants issued by the Managing Director have been annexed as Annexures-E, F and F/1.

6. Petitioners challenged the validity of the said orders by way of amendment petition which has been allowed vide order dated 29.8.2000.

7. Learned Counsel for the Respondents have brought to the notice of this Court that the question regarding appointment of regular Market Secretary is pending consideration by a Division Bench in C.W.J.C. No. 871 of 1999. It is submitted by the learned Counsel for the Respondents that on account of pendency of the said writ petition, the case for regular promotion to the post of Market Secretary is not being considered, though learned Counsel for the Respondents have failed to show that any such interim order has been passed in the said writ petition. However, without going into the said question as to whether they can make regular appointment or not on account of pendency of the said writ petition, learned Counsel for the Petitioner has submitted that the Respondents have illegally and arbitrarily made the concerned Respondents Incharge Market Secretary completely ignoring the claim of the Senior Market Supervisor, so much so that some of the senior persons have to work under the disciplinary control of his junior. It has been submitted that the impugned orders are malafide, arbitrary and violative of Articles 14 & 16 (1) of the Constitution of India, besides ultra vires proviso to Rule 64(c) of the Bihar Agricultural Produce Market Rules.

8. Learned Counsel for the Respondents has submitted that the present writ petition is not maintainable inasmuch as the Petitioners have assailed the validity of the orders of mere posting as Incharge and not orders granting regular promotion to the concerned Respondents. According to the learned Counsel, it is purely for the administrative arrangements that such postings have been done, as no regular promotion can be granted till the principle is decided by the

Division Bench of this Court in the aforementioned case. It has further been submitted that according to Regulation 56 promotions are to be based on qualification and efficiency and the seniority has only relevance where the two persons are found equal in merit. According to learned Counsel under Regulation 56 merit has been recognised as basis for promotion and seniority has to be considered only between persons of equal merit, and Regulation 63 for promotion indicates primacy of knowledge (Gyan) and suitability in higher posts.

9. According to Mr. Yadav, learned Counsel appearing for the Board, the clause relating to non-consideration of qualification in the matter of promotion has been dropped in the amended provision and recognition of training in Agricultural Marketing has been provided instead of said qualification. It is submitted that the Board can appoint Officers and employees in the interest of efficient and better work. It is submitted that the Establishment Sub-Committee of the Board on 5.12.1997 decided to make 20 Market Supervisors as Incharge Market Secretary on the basis of special qualification and seniority purely on temporary basis with the condition that the Market Supervisor will work in their own pay scale; they will not get any benefit in the seniority nor it will be considered to be a promotion; this will not form basis of their claim on the post of Market Secretary; their working shall be reviewed on every six months and only then the period of their continuance as Market Secretary shall be extended; the order will depend as per the final judgment passed by this Court in such matter and the deputation can be cancelled any time. According to him, the Market Supervisors who have been made Incharge Market Secretary are more qualified as would be evident from the details mentioned in the counter affidavit. It is submitted that pursuant to the decision of the Board of Directors, proficiency test were held for promotion to the post of Market Secretary as well as Assistant Market Secretary Grade "A", but no promotion could be granted as the matter is sub-judice in this Court.

10. It has also been submitted by Mr. Yadav that under Regulation 56 merit has to be recognised as basis for promotion and seniority has to be considered only between persons of equal merit and under Regulation 63 primacy of knowledge (Gyan) and suitability in higher post are to be considered for promotion. According to the learned Counsel Rule 64(i)(c) upon which reliance has been placed by the learned Counsel for the Petitioner has been amended and as per the new provision the clause relating to non-consideration of qualification in the matter of promotion has been dropped, and the Board has been given power to appoint officers and employees in the interest of efficiency and better working irrespective of their seniority.

11. This Court is unable to accept the submission of the learned Counsel for the Respondents. Clause (s) of Section 2(1) of the Bihar Agricultural Produce Markets Act, 1960 defines "Secretary", according to which it means the persons appointed as such under Sub-section (1) of Section 20 and includes an officiating or acting Secretary. Under Sub-section (1) of Section 20 every Market Committee is to have a person as Secretary appointed by the State Government

or the Board on such terms and conditions as may be prescribed. Rule 64 of the Bihar Agricultural Produce Market Rules, 1975, hereinafter referred to as "the Rules", deals with the terms and conditions of the service of Secretary and staff of the Market Committee. Under Sub-clause (c) of Clause (i) no person can be appointed as Secretary unless he is Graduate in Arts, Commerce and Science of a recognised University and 25% of the vacancies are to be reserved for the Graduate of Agriculture. It appears that earlier under proviso to Clause (c) in the case of appointment by promotion, educational qualification was not to be a bar if the records of service are otherwise satisfactory. According to the case of the Respondents, the said proviso has now been deleted. Under Sub-clause (a) of Clause (ii) the Market Committee has been vested with the power to employ such Officers or servant as would be necessary for its proper and efficient working. Under Sub-clause (b) such officers and servants are to be divided into superior and inferior classes and under Sub-clause (c) the category, number of posts in each category and terms and conditions of service of such staff and servant are to be determined by the Market Committee with the approval of the Board, and they shall function under overall control and superintendence of the Board and shall be transferable from one Committee to other within the State. Under Sub-clause (d) appointment of superior staff are to be made by the Committee subject to the prior approval of the Board, any dismissal, removal or reduction in the rank of any staff are subject to the approval of the Board and under Sub-clause (e) the Market Committee is required to send a report of all appointments to the Board within a month. Regulation 56, original of which has not produced, but sought to be relied upon the typed copy of it produced on behalf of the Respondents only provides that a Sub-Committee appointed by the duly constituted Board shall consider the matter of promotion and from time to time such matter shall be regulated by the general orders issued by the Board and the appointment shall be made by the Appointing Authority as per the recommendation of the Sub-Committee. Clause (ii) of Regulation 56 provides that all such appointments made on the basis of proficiency and Regulation 63 (gha)(ii) which has been referred on behalf of the Respondents only provides that promotion to any higher post on which knowledge of high level or physical efficiency are required shall be made on that basis.

12. This Court fails to appreciate as to how the so-called Regulation 56 or 64 have any relevance for consideration of the cases for promotion to the post of Market Secretary especially in the facts and circumstances of the present case, where the question is not of regular promotion, but posting of the concerned Respondents to a higher post with higher responsibility and control over their seniors. Moreover, after deletion of proviso to Sub-clause (c) of Rule 64 as claimed by the Respondents, no Rule remains for consideration of the cases for promotion to the post of Market Secretary except that by implication it can be said that no person can be appointed/promoted as Secretary under Sub-section (1) of Section 20 unless he is Graduate in Arts, Commerce and Science of a recognised University, which is the qualification prescribed under Sub-clause (c)

of Rule 64 for appointment as Secretary and the word appointment in service jurisprudence includes promotion. Insofar as the reservation of 25% of the vacancies reserved for the Graduate of Agriculture as provided in Sub-clause (c) it is obviously referable to the direct recruitment and cannot be said to be in the matter of promotion so long any such Rule or Regulation is not framed and decision is taken by the Board with respect to promotion to the post of Market Secretary.

13. This Court fails to appreciate as to how Clause (ii) of Rule 64 has any application or relevance to the present case. The said provision only deals with the power of the Market Committee to employ such other officers and servant as may be necessary for its proper and efficient working and has nothing to do with the appointment of Market Secretary which is covered by Clause (i) of Rule 64, in absence of any specific Rule providing for the criteria for grant of promotion. It is by now well settled that in the absence of specific Rule relating promotion the general Rule of length of service is the criteria subject to fulfilment of requisite qualification, if any. Here as I have already noticed above that after deletion of proviso at best the interpretation of Clause (c) can be extended to include the minimum qualification mentioned therein for the purpose of promotion.

14. Counsel for the Respondents also led great stress that the present writ petition is not maintainable as the Respondents have only been made Incharge and have not been granted any regular promotion creating any right in them and thereby affecting any right of the Petitioner. According to the learned Counsel for the Respondents, in the said circumstances, Petitioners cannot maintain this writ petition and ask for interference at this stage. Learned Counsel for the Petitioner has argued that the jurisdiction of this Court is not confined to the case where only regular promotion is involved or where permanent appointment is made. The provisions of Articles 14 & 16 of the Constitution are attracted even to an appointment which is temporary or ad hoc. Learned Counsel has relied upon para 86 of the decision of the Apex court in the case of E.P. Royappa Vs. State of Tamil Nadu and Another, , wherein it has been observed that the ambit and reach of Articles 14 & 16 are not limited to cases where a public servant affected has right to a post. Even if a public servant is in officiating position he can complain of violation of Articles 14 & 16 if he has been arbitrarily or unfairly treated or subjected to malafide exercise of power by the State machinery. It has been pointed out in the said case that it is not answer to the charge of infringement of Articles 14 & 16 to say that the Petitioner has no right to the post of Chief Secretary. That aspect might have been relevant for the purpose of Article 311 but not Articles 14 & 16.

15. Learned Counsel for the Respondents relied upon a Division Bench judgment of this Court also in the case of Umashankar Prasad Srivastava and Ors. v. The State of Bihar and Ors. (C.W.J.C. No. 604 of 1974 disposed of on 17th September, 1974) wherein this Court applying the said principle decided by the Apex Court held that the argument on behalf of the Respondents to the effect

that the petition must fail in this case as they have not established any right to the post of Overseer/S.D.O. cannot be accepted, and that the application of Articles 14 & 16 are not depending upon the nature of appointment to the post in question. It has also been held by the Division Bench that one of the grounds on which the impugned order can be interfered with as stated in the case of E.P. Royappa, is arbitrariness. The Court, however, observed that "It is true that if an order of such a posting is made in the exigency of public administration, no objection can be taken. The permanent incumbent of a post some times falls ill or has to go on leave suddenly and authorities cannot be expected to decide immediately the inter se seniority of the other officers before passing an order of posting to the vacant post. Such an order is not open to attack under Articles 14 and 16 of the Constitution. It has, therefore, to be seen whether the impugned orders passed have been so passed on account of exigency of public administration or for extra administrative considerations which have no relevance. If orders have been passed on considerations which are wholly irrelevant, they are certainly vulnerable.

16. In the present case, it is not the case of the Respondents that posting of the concerned Respondents is on account of falling ill of permanent incumbent or having gone on leave suddenly and the question of inter se seniority cannot be decided immediately. On the contrary, in the instant case the seniority has already been determined and the gradation list of Market Supervisors has been annexed as Annexure-4. It is not the case that the Senior Market Supervisors are not qualified for their promotion on the post of Market Secretary. It is also not disputed that Senior Market Supervisors have to work under their Juniors who have been deputed to work on the post of Market Secretary by the impugned orders and have become controlling and disciplinary authority of their seniors in the gradation list. As per definition of the Secretary as mentioned above, means and includes officiating Secretary and as per Rule 66 framed under the Act, he is the controlling authority and disciplinary authority and is head of the establishment. As such, it cannot be even suggested that the Petitioners are not adversely affected by the impugned orders so as to maintain this writ petition. Under such circumstances, in my opinion, the impugned orders are wholly arbitrary and violative of Articles 14 & 16(1) of the Constitution of India and are fit to be quashed.

17. In the result, the writ application is allowed and the impugned orders contained in Annexures-2, A, B, C, E, F and F/1 are quashed. The official Respondents are directed to consider the case of the Petitioners along with other eligible candidates for posting to the post of Market Secretary afresh in the light of the above decision within two weeks of the receipt/production of a copy of this judgment/order.