
(2009) 05 PAT CK 0040

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 9980 of 1996

Braj Bhushan Sahay

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 06-05-2009

Acts Referred:

Citation : (2009) 05 PAT CK 0040

Final Decision : Allowed

Judgement

S.K. Sinha, J.—The petitioner, a Forester working under the Respondent-Corporation is primarily aggrieved due to his non-promotion to the post of Range Officer. The prayer is for issuance of a writ or order in the nature of writ of Mandamus commanding the respondents to consider his case for promotion as per the guidelines of the promotion policy in its correct perspective and grant regular promotion to him on the post of Range Officer with effect from his due date i.e. 6th September, 1987 or at least with effect from the date his junior were granted promotion. Further prayer is for issuance of a writ or order in the nature of writ of certiorari quashing the office order No. 3140 dated 14.08.1996 as contained in Annexure-19, whereby the petitioner on being reverted from the charge of In-charge Range Officer and posted as Forester under respondent No. 8, junior to him as forester, however promoted as Range Officer in the legal cell of the respondent Corporation having its Head Quarter at Patna, superseding the petitioner on untenable grounds.

2. Besides the writ application and the counter affidavit several affidavits have been filed on behalf of the parties by way of supplementary affidavits/ Supplementary counter affidavits.

3. The stand of the petitioner on summarizing the affidavits filed on his behalf appears to be as follows:

(i) As per the seniority list of the foresters vide Memo No. 4029 dated 28.11.1988 (Annexure-7) petitioner is admittedly senior to all the private

respondents who were later promoted as Range Officer through different office orders issued by the Corporation with effect from their due date of promotion.

(ii) The petitioner claimed to be eligible as per the eligibility criteria in terms of the laid down guidelines of the promotion policy in respect of foresters for their promotion as Range Officer vide Memo No. 1315 dated 13.02.1975 read with the correction slip vide memo No. 326 dated 28.04.1975 as contained in Annexure-G to the counter affidavit.

(iii) The petitioner, being senior to the private respondents and having no disqualification as on his due date of promotion i.e. 6th September, 1987 either by way of any disciplinary proceeding or undergoing any punishment, was entitled to be promoted to the post of Range Officer before the Private respondents could have been promoted.

(iv) As per the aforesaid laid down guidelines for promotion in question besides seniority taking into consideration academic qualification, service record, character roll, the Board constituted at the Circle level awarded 66 marks out of the total marks of 90 comprising different heads prescribed in the promotion policy (Annexure-G) vide detailed chart sent by the Circle Board as contained in Annexure-28. The Head quarter Board of Chief Conservator of Forest, however, reduced the marks to 56 and further deducted 7 marks bringing down the total marks to 49 allegedly due to the order of punishment of censure and recovery of certain amount by way of disciplinary action vide memo No. 3716 dated 07.11.1991 (Annexure-A/1) in a disciplinary proceeding initiated in terms of memo No. 32 dated 09.11.1989 i.e. long after the due date of promotion.

(v) As per the laid down guidelines for promotion as contained in Annexure-G a forester in order to be eligible for promotion to the post of Range Officer, must obtain 60 per cent of the total marks of 90 against different heads as indicated in Clause 9 of the aforesaid guidelines.

5. Similarly on perusal of the counter affidavit and the supplementary counter affidavit the stand of the official respondents are as follows:

(i) The petitioner was required to obtain 60 per cent of the total 90 marks as per the guidelines for promotion, the Head Quarter Board of Chief Conservator of Forests being the competent authority for granting the promotion in question finally awarded 49 marks after deduction of 7 marks on account of the punishment by way of disciplinary action whereby the petitioner was inflicted with two punishment (a) censure & (b) recovery of pecuniary loss of Rs. 102823.99 Vide memo dated 07.11.1991 (Annexure-A/1). On account of the above deduction of seven marks the final marks awarded to the petitioner was only 49 marks which was below the 60 per cent of the required marks of 90 in order to make him eligible for consideration, as such he became ineligible.

(ii) The foresters who were eligible on due date i.e. September, 1987 for promotion to the post of Range Officer were finally considered by Head Quarter

Board of Chief Conservator of Forester on 25.01.1992 and on said date of consideration petitioner was undergoing the rigour of punishment, therefore, he was found not eligible for the promotion in question on the date of consideration.

(iii) During the pendency of the writ application due to reorganization of the State of Bihar in terms of the Bihar Reorganisation Act, 2000 the State of Bihar was divided and a separate State of Jharkhand was carved out w.e.f. 15.11.2000, the petitioner since presently working in the State of Jharkhand, is not entitled to the relief prayed for against the official respondents.

6. Mr. Narendra Prasad, Sr. Advocate, appearing on behalf of the petitioner submits that it is not in dispute that the petitioner was senior to the private respondents as on the due date of promotion when the private respondents were allowed promotion with effect from the said date through different office orders. It is submitted that it is also not in dispute that on his due date for promotion i.e. 6th September, 1987 neither any disciplinary proceeding was pending against the petitioner nor he was undergoing any rigour of punishment, and as such, the alleged disqualification attributed against the petitioner disentitling him from promotion on account of subsequent initiation of disciplinary proceeding was not permissible in law to take into consideration and disqualify him from promotion in question. Besides the above, it is submitted that the said order of punishment was stayed vide order contained in memo No. 2213 dated 11.11.1992 (Annexure-25). Therefore the order of punishment was not in operation while the cases for promotion were considered in the year 1993. Learned senior counsel also submits that the appeal filed by the petitioner is still pending and has been kept pending mainly to harass and deprive the petitioner from his just and legal right to get him considered for promotion, similarly subsequent disciplinary proceeding was initiated as per the office order No. 104 dated 01.04.1991 (Annexure-B) and even though the petitioner had submitted his show cause soon thereafter the said proceeding is still kept pending even after the lapse of more than 17 years which itself is sufficient to show the vindictiveness and arbitrariness on the part of the respondents to harass him and keep him deprived of his rightful claim of promotion to which he remained all along entitled. As regards the marks awarded to him by the Circle Board and thereafter by the Head Quarter Board, the learned Counsel submits that on perusal of Annexure-28, the chart submitted by the Circle Board showing the marks obtained by the petitioner in different heads, it would appear that the petitioner was awarded 30 marks out of the total marks of 50 against the head of character roll for the last five years vide Annexure-31, whereas on perusal of Annexure-A to the counter affidavit filed by the Corporation the Chart prepared by the Head Quarter Board of the Chief Conservator of Forest it would appear that 30 marks was reduced to 20 marks without any rhyme and reason save and except the remark that the Character roll with respect to the petitioner was not available for the period 1986-87 and 1987-88. It is submitted that the remark on account of non-availability of the relevant record for the said two years average marks were given for those two years does not stand to any reason in law in absence of any

material brought by the respondents on record to substantiate the reduction of marks from 30 to 20. Moreover, as per the promotion policy it would appear that Head Quarter Board was to consider the marks given by Circle Board and in appropriate cases enhance the marks so that the candidate may become eligible and not to reduce vide Clause 12 of the promotion policy (Annexure-G). Therefore the action on the part of the Head Quarter Board was absolutely illegal, arbitrary and contrary to the promotion policy. As regard the deduction of 7 marks, 1 mark for censure and 6 marks for punishment of recovery, it is submitted firstly that since the punishment was inflicted on petitioner on 07.11.1991 i.e. after the due date of promotion, the same could not have been taken into consideration as the eligibility or ineligibility was to be considered as on the due date of promotion i.e. on completing ten years of service i.e. 6th September, 1987 and on said date admittedly neither there was any order of punishment nor any disciplinary proceeding pending against the petitioner. Secondly, it is submitted that operation of the above punishment was, however, stayed and as such on this ground as well the petitioner could not have been disqualified in the year 1993 when promotion matter was again considered. Therefore, petitioner ought to have been also promoted from his due date like his juniors.

7. Mr. J.P. Shukla, senior advocate appearing for the respondent-Corporation submits that the Circle Board is only the recommendatory authority and the final authority vests with the Head Quarter Board of Chief Conservator of Forest and it is the marks awarded by the Head Quarter Board really matters for consideration in order to make a candidate eligible or ineligible. The Head Quarter Board awarded 49 marks to the petitioner which was below 60 per cent of 90 marks as required under Clause 9 of the promotion policy for such promotion vide Annexure-G. The petitioner having secured marks less than 60 per cent became ineligible for promotion. Mr. Shukla further submits that although there was no disqualification on due date, but later on petitioner acquired disqualification on the date of first consideration i.e. on 25.01.1992. The petitioner was undergoing the rigour of punishment awarded to him, as such he became ineligible and rightly disqualified for promotion in question. As regard the second proceeding initiated against the petitioner as per the office order No. 104 dated 01.04.1991 (Annexure-B), it is submitted that the same is still pending, and as such, while the second time when the promotion was being considered in the year 1993 the petitioner could not have been considered on account of pendency of the said disciplinary proceeding.

8. Petitioner in reply to the above reiterates that admittedly keeping a proceeding initiated on 01.04.1991 pending against the petitioner even after lapse of more than 17 years in it itself sufficient to show the element of biasness and arbitrariness on the part of the respondents in their action against the petitioner depriving his consideration for the promotion in question which was due to him with effect from September, 1987 along with the private respondent, who were junior and got promotion from their respective due date whereas the

petitioner was deprived illegally and on grounds impermissible in law. The petitioner besides the above as asserted that the alleged grounds of pendency of disciplinary proceeding against the petitioner disqualifying him from promotion is absolutely illegal and after thought as it is not in dispute that the respondents No. 7 & 8 were considered and granted promotion even though the disciplinary proceedings were pending against them whereas on the alleged pendency of the disciplinary proceeding which kept pending for more than 17 years, the Corporation adopted a different yardstick in case of those two respondents who were also directly recruited as Foresters of the same batch as would be apparent on perusal of the order of promotion vide office order as per Memo No. 613 dated 01.10.2005 (Annexure-43) the authorities granted promotion to them with a rider that in case the disciplinary proceeding results in awarding punishment the above respondents would be reverted to their original post of foresters and shall be liable to refund back the amount paid to them on the promoted post vide office order as per memo No. 613 dated 01.10.2005 vide Annexure 43 as well as office order as per memo No. 507 dated 08.02.1995 (Annexure-F/1) whereas same yardstick was not adopted in the case of the petitioner although a proceeding kept pending for about 17 years without any progress became stale. To sum up the petitioner submits that the authorities deserves to be directed to consider the case of the petitioner for promotion on the basis of the materials as available on record as on due date of his promotion i.e. 6th September, 1987 and issue necessary order for promotion. In the meantime, the authority deserves to be directed that the petitioner be allowed to discharge the duty of In-charge Range Officer as performed by him prior to the impugned order dated 14.08.1996 (Annexure-19).

9. Upon perusal of the pleadings of the respective parties and their submissions, it is not in dispute that the petitioner as per the seniority list of foresters vide Annexure-7 is senior to all the private respondents. The petitioner's case that as on the due date of promotion there was neither any disciplinary proceeding nor any order of punishment was operative is also not in dispute. The serious controversy, however, is that as per the Circle Board constituted for recommending the case for promotion of the petitioner awarded 66 marks out of total 90 whereas the Head Quarter Board on receiving the recommendation reduced the marks to 49 vide Annexure-A/3. The circle Board had awarded 30 marks whereas the Head Quarter Board awarded 20 marks against the character roll for the last five years, however, no specific reasons were assigned for such reduction, except the remarks mentioned in the remarks column that for two years i.e. 1986-87 and 1987-88, the character roll were not available with respect to the case of the petitioner, and as such average marks were given. It is not on record as to what were the remarks in the character roll of the petitioner for rest three years which were taken into consideration while awarding average marks for two years in respect of which character rolls were not available since as per the guidelines (Annexure-G) as modified by correction slip different marks have to be allotted against different remarks i.e. very bad, bad, fair, good,

excellent. In absence of any material on record to show as to what were the remarks for the year 1983-84, 1984-85 & 1985-86, this Court is unable to find any justification for reducing the mark from 30 to 20 which brought the total reduction of marks from 66 to 56. Even then 56 marks if sustained the petitioner would become eligible for his consideration for promotion since 60 per cent marks out of total of 90 marks comes to 54 only. Besides the above there is no provision/procedure in the laid down guidelines for awarding average marks vide Annexure-G. In my opinion the Head Quarter board could have taken into consideration the character roll of the available preceding two years in the facts and circumstances of the case. In some what similar circumstances the Apex Court in the case of K.S. Sundarayan Chettian v. M.R. Ram Chandra Naidar reported in, AIR 1994 SC 2128 held to the effect that in such situation the character roll of the available previous period could be taken as a due compliance of the guidelines. Now with regard to deduction of 7 marks for the punishment of recovery and censure vide memo dated 07.11.1991 (Annexure-A/1) it appears that the operation of the order of punishment was stayed by order dated 11.11.1992 (Annexure-25). Therefore, the competent authority having stayed the operation of punishment what justification the corporation can have for using the same while considering the case of the petitioner for promotion on subsequent occasion in the year 1993 when petitioner was again not considered for being said to be disqualified on account of pendency of the disciplinary proceeding initiated against him as per memo No. 104 dated 01.04.1991 (Annexure-B). I am afraid the legality of such proceeding which is kept pending for more than 17 years without any progress and result which may not be sustained in law. It appears that the Corporation was never serious in the logical conclusion of the said proceeding since after issuing the charge sheet on 01.04.1994 and filing of the reply by the petitioner, the enquiry did not proceed any further as nothing has been brought on record. To sum up in the above facts and circumstances and for the reasons discussed above, in my opinion, the denial of legal consideration of the case of the petitioner for promotion from his due date cannot be approved in law for being wholly illegal and unjustified in law. The representations of the petitioner equally remained unattended/unconsidered. Accordingly, the respondent Nos. 1 to 4 are, hereby, directed to consider the case of petitioner afresh for his promotion to the post of Range Officer in accordance with law (considering his eligibility as on the due date i.e. September 6th, 1987 in light of the relevant material available on record and the laid down guidelines (Annexure-G) expeditiously preferably within a period of four months on receipt/production of the certified copy of the present order. It is further directed that in case such consideration for promotion finds favour with the petitioner for his promotion from due date, all the consequential benefits be allowed within the same period. However, in case such consideration goes against the petitioner, the same be disposed of by a reasoned order indicating the reasons in support thereof, which shall be communicated to the petitioner by registered post soon thereafter.

10. The writ application is allowed to the extent indicated above.