

(1997) 09 PAT CK 0082
In the Patna High Court
Case No : C.W.J.C. No. 3901 of 1997

Dayanand Bhagat

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 15-09-1997

Acts Referred:

Citation : (1997) 2 PLJR 667

Hon'ble Judges : Aftab Alam, J

Bench : Single Bench

Advocate : Ram Balak Mahto and S. Kishore, for the Appellant; Basudeo Prasad and Rajiv Sinha for Respondent No. 6 P.K. Shahi and S.K. Ghosh, for Commission, for the Respondent

Final Decision : Allowed

Judgement

Aftab Alam, J.—The Petitioner came to this Court originally making the grievance that though he was fully eligible, the concerned authorities has not included his name in the list of the candidates sent to the Bihar Public Service Commission ("the Commission", here-in-after) for consideration for appointment to the posts of Director, Agriculture and Addl. Director, Agriculture. Having thus represented his case, he obtained an order from this Court on 28.4.1997 which though permitting the Respondent authorities to proceed with the selection process restrained them from making any appointments till further order by the Court. Shortly thereafter the State Government and some of the private Respondents appeared in this case and filed Interlocutory Application making a prayer for vacating the order of stay. In those Interlocutory Applications, it was clearly shown that the State Government had forwarded to the Commission a list of 20 persons who were to be taken into consideration for appointment to the posts of Director/Addl. Director, Agriculture. The name of the Petitioner was at serial No. 11 in this list. It was, therefore, quite incorrect to say that the name of the Petitioner had not been forwarded to the Commission for consideration. It also came to light that the process of appointment to the two posts had been

undertaken pursuant to earlier orders by this Court directing the concerned authorities to fill up the posts of Director and Addl. Director, Agriculture by making regular appointments within a specified time frame. Accordingly, this Court by order dated 21.5.1997 recalled the interim direction given on 28.4.1997 and left it open to the Respondent authorities to make the appointments in accordance with the earlier directions of this Court. This Court also suitably punished the Petitioner by imposing on him a cost of Rs. 3000/- payable to the Patna High Court Council of Legal Aid and Advice. However, on a prayer made on his behalf, it was left open to the Petitioner to file any amendment petition(s) in this case. The relevant portion of the order dated 21.5.1997 is as follows:

In view of the facts coming to light from I.A. Application, Mr. Mahto makes a prayer for filing an amendment petition in this case. It will be open to the Petitioner to file an amendment petition which if and when filed will be considered on its own merits.

2. Following the aforesaid order two amendment petitions were filed by the Petitioner; in the first amendment petition which" was registered as I.A. No. 2845/1997, the Petitioner challenged the recommendations made by the Commission on the plea that though his name was forwarded, it was not considered by the Commissioner while making recommendations for appointment to the posts. He further challenged the appointment of Respondents 4 to 7 on the posts of Addl. Director (Agriculture) on the basis of the Commission's recommendations and sought quashing of notification No. 2279, dated 21.5.1997 by which the appointments in question, were made.

3. Consequent upon the appointment of Respondents 4 to 7 to the posts of Addl. Director (Agriculture), further notifications were issued concerning their postings. This led to the Petitioner's removal from the post of Director (Agriculture) (which till then he occupied as Incharge) and to his posting as Director, Seed Testing Agency, Bihar, Patna. The Petitioner filed the second amendment petition being I.A. No. 3070/97 challenging the posting notifications and his removal as Incharge Director, Agriculture.

4. This case was finally heard in the light of the two amendment petitions filed on behalf of the Petitioner after opportunity was given to the Respondents to file their rejoinder affidavits.

5. From the counter affidavit filed on behalf of Respondents 1 and 2, (the Agriculture Production Commissioner and the Secretary, Department of Agriculture) it comes to light that there were three vacancies in the post of Addl. Director and its equivalent posts, namely, (1) Addl. Director, Agriculture (Extension Project), (2) The Director, Soil Conservation and (3) the Director, P.P.M., Bihar, Patna. Applying the reservation roster to the three available vacancies the Personnel and Administrative Reforms Department found and accordingly advised that the 1st and the 3rd vacancies would be available for the general candidates while the 2nd vacancy should be reserved for a. candidate

belonging to the scheduled caste. For filling up these vacancies, the department of Agriculture after having finalised the promotion of officers of the Bihar Agriculture Service Class I in the Super time scale of pay against the sanctioned posts of Joint Director sent to the Commission for its consideration the names of 20 officers eligible for appointment to the post of Asstt. Director, Agriculture vide letter No. 1656, dated 2.4.1997. The Petitioner's name was also included in the list of the names sent by department to the Commission and it figured at serial No. 11 of that list.

6. It thus no longer remains deniable that the Petitioner's name was duly sent by the department for consideration before the Commission. This, however, does not seem to have done any good to the Petitioner as it transpires that eventually his name was in fact not considered by the Commissioner for appointment to the two posts in the non-reserved category. In the counter affidavit filed on behalf of the Commissioner it is unequivocally stated that the Departmental Promotion Committee did not consider the Petitioner's name. For the D.P.C.'s omission to consider the Petitioner the counter affidavit tries to put the blame on the government and it is stated that the Petitioner's name could not be considered because the list of the names of the eligible candidates sent by the Government was not in the correct order of seniority. According to the Commission the D.R.C. started considering the names from the top of the list and found that the candidates at serial Nos. 1, 3 and 4 were suitable for the two vacancies available for the non-reserved category. The D.P.C., therefore, had no occasion to consider any candidates for the non-reserved vacancies below serial No. 4 including the Petitioner who was at serial No. 11 in the list. It will be useful here to reproduce the relevant passages from paragraphs 5 and 7 of the counter affidavit filed on behalf of the Commission:

5. That it is humbly submitted that the Commissioner in the meeting of Departmental Promotion Committee do act and recommend the names on the basis of the information/documents made available to it by the concerned department. If any information/document is not correct, and/or is incomplete the concerned Department is responsible for that. However, it is true that the name of the Petitioner could not be considered by the Departmental Promotion Committee, (D.R.C.) due to the misleading seniority list of officers made available to the Commission by the concerned department. This shall be evident from the facts stated herein below.

7. That in response to the said requisition of the Agriculture department, the Respondent commission convened the meeting of the Departmental Promotion Committee on 9.4.97. It was attended by the officers of the agriculture department. It is humbly submitted that in the said meeting dated 9.4.97, the officials of the agriculture department made to believe the Promotion Committee that the names of the officials proposed to be considered for promotion by the department, were arranged in order of their respective seniority. The first name in the list was of Sri Madan Bihari Sharan, who had already retired on 31.3.97. In

compliance of the order dated 31.3.97 passed in C.W.J.C. No. 1440/97 by this Hon'ble Court, the said Sri Madan Bihari Sharan, SI. No. 1, was record mended for promotion upto 31.3.97 i.e. the date of his retirement.

The second name in the said list sent by the department was of Sri Ishwar Ram. Since, he had already retired " on 31.1.97, his name was not considered for promotion by the Committee. The name of Sri Arjun Prasad Mishra was at SI. No. 3 of the said seniority list, who was recommended for promotion. Similarly, the fourth name in the said alleged seniority list was of Sri Amar Nath Mishra, he too was found suitable and as such his name was also recommended by that promotion committee. Since there were only two posts available for the genets category, the names of the remaining officials in the list were not considered Both General Posts were available after 31.3.1997. For the only remaining post reserved for the Scheduled Caste, the name of Sri Shiva Poojan Baitha, SI No. 14, was considered and recommended by the Promotion Committee.

In the above facts and circumstances, the name of the Petitioner Daya Nand Bhagat, SI. No. 1 who belongs to the S.T. Category, was not considered even against the posts available for the general category candidates. It is humbly submitted that due to the wrong informations given by the department regarding seniority, the name of the Petitioner could not be considered by the promotion committee.

8. In reply to the Commission's accusation the State Government, in its counter affidavit, has sought to justify the order in which the names were sent to the Commission.

9. In my view this controversy i.e. the Commission, blaming the Government for not sending the names in the correct order of seniority and the State Government justifying the order in which the names were sent appears to be quite irrelevant and besides the point. From the materials bought on record it becomes evidence that the posts of Director and Additional Director Agriculture are non-cadre be filed up by appointment on the basis of selection. It was therefore incumbent candidates upon the commission to consider all eligible candidates regardless of there seniority and the order in which their names were included in the list and to find out the two most suitable candidates two available vacancies.

10. In the regard, it may be noted that their counter affidavit filed on behalf of the Commission itself brings on record a letter 7.4.1997 written by the Additional Secretary to the Government to the Officer on special Duty, Bihar. Public Senior Commission on the question of appointment to the posts of Addl. Agriculture. Clause 8 of this letter categorically stated that the post to be filled up by appointment on the basis of selection. It is thus evident material irregularity in not considering all eligible candidates in order to judge their respective merits and to find out the most from amongst them. The D.P.C. acted quite erroneously in only considering the first four candidates from the top of the list and having

found three of them "Suitable" for the posts stopping out the remaining from any consideration.

11. In fact when this case was earlier heard on 26.8.1997 Mr. Anil Kumar Tiwary, Advocate who was appearing on that date on behalf of the Commission clearly stated that the Commission's D.P.C. committed a mistake in not considering the Petitioner and Ors. and confining the selection to Respondents 5 and 7 alone because the selection was not to be made on the basis of seniority-cum-merit but the most suitable candidates were to be selected.

12. However, on 11.9.1997 when the case was heard for final disposal Mr. S.K. Ghosh (who on this date represented the Commission) tried to explain the action of the D.P.C. by submitting that the Commission was misled by the use of the word "promotion" in the subject of the letter dated 7.4.97 as indicated at its top. I do not find the explanation at all convincing because the instruction/advice conveyed by a letter has to be gathered from its contents and not from the brief indication of the subject at its top. As noted above, Clause 8 of the letter made it explicitly clear that the three posts being outside the cadre were not to be filled up by promotion but by appointment on the basis of selection.

13. Further, a complete answer to the submission made by Mr. Ghosh is to be found in the decision of the Supreme Court in Dr. Jai Narain Misra Vs. State of Bihar and Others, . In paragraph 5 of the judgment it was held as follows:

5. The post of Director of Agriculture is admittedly an ex-cadre post. The selection to that post is made solely on the basis of merit. Merely because the Government in its letter to the Commission used the word "Promotion", the High Court should not have treated the case as one of "Promotion". The word "Promotion" used in the Government's letter was an inappropriate word; what the Government really meant was selection of a person to be posted as the Director. The nature of the post cannot be changed by the Government's using the word "Promotion". The post remains to be a selection post.

14. Mr. P.K. Shahi, learned Counsel appearing on behalf of Respondents 5 and 7 submitted that in case it, was held that the post of Additional Director, Agriculture was outside the cadre and was to be filled up by appointment on the basis of selection then it would necessarily follow that the- D.P.C. acted erroneously in not considering all the candidates in the list forwarded to it by the government. He, however, made a feeble attempt to suggest that the post of Additional Director was within the cadre and was to be filled up on the basis of promotion. Learned Counsel submitted that in Dr. J.N. Mishra's case the Supreme Court considered the post of Director of Agriculture in the light of rules 16 and 17 of the Rules Regulating, the Bihar and Orissa Agriculture Service, Class I promulgated on April 11, 1935 which specifically stated that the post of Director of Agriculture shall remain outside the cadre of service. According to him there was no rule stating that the post of Director of Agriculture shall remain outside the cadre of service. According to him there was no rule stating that the

post of Additional Director, Agriculture will be outside the cadre.

15. I am unable to accept the submission which appears to me to be founded on mere surmise. Nothing has been brought to my notice to indicate that the post of Additional Director is within the cadre. On the contrary there is the letter dated 7.4.1997 (Annexure C/1) which specifically states that the post was outside the cadre. Moreover, Mr. R.B. Mahto, learned Counsel for the Petitioner brought to my notice the provisions of the Bihar Agricultural Service Act, 1982 (Bihar Act 4 of 1982). According to Schedule I of this Act the cadre of Class I Bihar Agricultural Service ends at the level of the Deputy Director of Agriculture and all posts above that must, therefore, be deemed to be outside the cadre.

16. It must, therefore, be held that the post of Additional Director of Agriculture was outside the Cadre, to be filled up by appointment on the basis of promotion. The D.RC. adopted a wrong criterion for selection and committed a serious error in not considering the Petitioner and other eligible candidates. The material irregularity committed by the D.RC. wholly vitiated the recommendations made by the Commission and the appointments made on that basis.

17. At this stage, Mr. Basudeo Prasad, learned senior counsel appearing on behalf of Respondent No. 6 submitted that Respondent No. 6 was a Scheduled Caste candidate and was appointed against the second vacancy reserved for the Scheduled Caste candidates. Mr. Prasad further submitted that the Petitioner was a Scheduled Tribe candidate and in this case he was raising his claim in respect of the two non-reserved vacancies. In any event he had no claim against the post reserved for the Scheduled Caste candidates. The appointment of Respondent No. 6 could not therefore be assailed in this writ petition and accordingly should be left undisturbed. In support of his submission Mr. Prasad relied upon a Supreme Court decision in Rai Shivendra Bahadur Vs. The Governing Body of the Nalanda College, .

18. The submission is not acceptable to me. It may be noted that Respondent No. 6 was at serial No. 14 in the list of eligible candidates forwarded to the Commission. He was the first Scheduled Caste candidate in the list. The D.P.C. considered him, found him suitable for the only vacancy reserved for that category and then, on its own showing, did not consider the candidates at serial Nos. 16, 18 and 20 who too belonged to the Scheduled Castes. Therefore, the recommendation of the Commission in respect of the second vacancy reserved for the Scheduled Caste also suffers from the same irregularity and is unsustainable for the same reason.

19. If the contention of Mr. Prasad is accepted it would lead to an anomalous situation; on the one hand the recommendation of the Commission, in respect of the non-reserved vacancies would be set aside but on the other hand the recommendation in respect of the vacancy for the Scheduled Caste, suffering from the same irregularity would be allowed to stand. I am, therefore, unable to accept the submission made by Mr. Prasad and I am of the view that the

recommendation made in favour of Respondent No. 6 and his appointment made on that basis must also be interfered with.

20. I, accordingly, set aside the recommendations made by the Commission and the appointments of Respondent Nos. 4 to 7 on the post of the Additional Director Agriculture made on the basis of that recommendation. The notification bearing No. 2279, dated 21.5.1997 (Annexure-18 to I.A. No. 2845/97) is hereby quashed.

21. It is to be regretted that the whole exercise which was initiated pursuant to repeated directions by this Courts has been brought to naught because of the illegal procedure adopted by the Commission but in the facts and circumstances of the case as discussed above it is not possible to legally sustain the recommendations and the appointments made on those basis.

22. Having regard to the facts and circumstances of this case the State Government is directed to send to the Commission a fresh list of the candidates eligible for appointment to the posts in question within one month from today. On receipt of the list, the Commission will make a selection in accordance with law and in the light of observations made in this judgment. The Commission may also, consider making the selection on the basis of interview but the selection process must be completed and recommendations must be made within two months from the date of receipt of the list, of the eligible candidates. Within one month from the date of receipt of the Commission's recommendations the State Government will issue necessary notification and complete the formalities for making regular appointment to the post of Additional Director, Agriculture.

23. In the result, this application is allowed with the aforesaid observations and directions. No order as to costs.