
(2004) 04 PAT CK 0029
In the Patna High Court
Case No : L.P.A No. 329 of 2004

Dr. (Mrs.) Chinta Kumari Verma

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 07-04-2004

Acts Referred:

Citation : (2004) 04 PAT CK 0029

Final Decision : Dismissed

Judgement

Nagendra Rai, J.—The appeal is barred by limitation.

2. After having heard learned Counsel for the parties and taking into consideration the averments made in the limitation petition we are satisfied that sufficient ground has been made out to condone the delay in filing this appeal. Accordingly, the delay in filing this appeal is condoned.

3. The sole Appellant is aggrieved, by order dated 17.12.2003 passed by the learned Single Judge dismissing the writ application being CWJC No. 14122 of 2002 filed by her challenging the order dated 22.4.2002 (Annexure-14 to the writ application) rejecting her claim for promotion to the post of Director, Health, Medical Education and Family Welfare Department, Government of Bihar with effect from 18.7.1998 as well as the order dated 2.8.2002 (annexure-17 to the writ application) rejecting her prayer to review the earlier order dated 22.4.2002.

4. The controversy in this case lies in a narrow compass. Admittedly, the Appellant superannuated on 30.9.1999 and her prayer is only to grant her notional promotion to the aforesaid post of Director, Health, Medical Education and Family Welfare Department, Govt, of Bihar with effect from 18.7.1998 on which date her junior Dr. Akhouri Ramesh Chandra Sinha was promoted to the said post. It is also admitted fact that the Appellant and Dr. Akhouri Ramesh Chandra Sinha was appointed as Civil Assistant Surgeon in the Bihar Health Services and the Appellant was senior to the aforesaid Dr. Akhouri Ramesh Chandra Sinha. Dr. Akhouri Ramesh Chandra Sinha and others who were junior

to the Appellant were granted junior selection grade and senior selection grade superseding her claim. The Appellant was granted junior selection grade later on. She challenged the same by filing CWJC No. 7996 of 1992. In the said case, a counter affidavit was filed on behalf of the State stating therein that the entire matter is being reviewed and accordingly, this Court disposed of the writ application on 10.2.1994 (Annexure-1 to the writ application) directing the Respondent-State to proceed with the review matter concerning grant of junior selection grade and senior selection grade in accordance with law within the period specified therein. Thereafter final gradation list was published on 15.7.1993 in which the Appellant was also shown senior to aforesaid Dr. Akhouri Ramesh Chandra Sinha. However, the State Government did not decide the matter in terms of the directions issued by this Court in the aforesaid writ application. Thereafter MJC application being MJC No. 1430 of 1994 was filed by the Appellant. During pendency of the MJC application on 15.5.1996, the government issued a notification granting ad hoc promotion to the Appellant on junior selection grade and senior selection grade with effect from 1.4.1975 and 1.4.1981 respectively, but no consequential benefit was given. The said contempt proceeding was dropped on 20.5.1996 (Annexure-2/2 to the writ application) with a direction that the consequential benefits in terms of the notification should be given to the Appellant without any delay. In the meantime, the date of grant of junior selection grade and senior selection grade granted to Dr. Akhouri Ramesh Chandra Sinha was shifted to back date without giving the said benefit to the Appellant and consequential benefits as undertaken by this Court were also not granted. The Appellant filed another MJC application being MJC No. 1243 of 1997. In the meantime, Dr. Akhouri Ramesh Chandra Sinha was given next promotion to the post of Additional Director (Health) with effect from 23.12.1997 and that was also brought to the notice of the Court in the said contempt application by filing an Interlocutory application. The State took plea that her promotion to the post of Addl. Director has been kept in abeyance on account of inquiry pending against her and the same had been completed and the final order will be passed very soon and in case the matter is decided in favour of the Appellant she will be entitled to get the same benefit of promotion as was given to her junior Dr. Akhouri Ramesh Chandra Sinha and, accordingly, the contempt application was dropped (Annexure-3/1 to the writ application).

5. The Appellant thereafter filed CWJC No. 2003 of 1998 challenging her supersession to the post of Additional Director, Health Services. In the meantime final decision was taken in the departmental proceeding initiated against the Appellant by order dated 18.1.1999 imposing punishment of break in service from 30.6.1991 to 1Q.1.1993. The Appellant challenged the same by filing another writ application being CWJC No. 1931 of 1999. The order of punishment was quashed by this Court on 27.8.1999 which has been annexed as Annexure-4 to the writ application. This Court however gave liberty to the authorities to proceed further in the matter as the proceeding was quashed on technical ground. While disposing of the matter this Court observed that:

In the present case as the Petitioner is to superannuate on 30th of September, 1999 it has been pointed out by the learned counsel for the Petitioner that Petitioner has already been harassed to a great extent due to the pendency of the departmental proceeding, and as Petitioner has already explained her absence, this chapter should now be brought to an end and the Petitioner should be allowed to retire peacefully. In this regard reliance has been placed on a judgment of the Division Bench of this Court reported in 1974, BLJR, page-6.

I hope and trust that the authorities of the Health Department before initiating any further action will take into consideration the aforesaid observation and direction.

The writ application is accordingly disposed of with the aforesaid observation and direction.

6. Thereafter the State Government on 3.12.1999, vide Annexure-5 to the writ application, cancelled the order of punishment in terms of the order issued by this Court.

7. So far the writ application being CWJC No. 2003 of 1998 filed by the Appellant challenging the promotion granted to Dr. Akhouri Ramesh Chandra Sinha to the post of Addl. Director (Health) superseding her claim is concerned, Dr. Akhouri Ramesh Chandra Sinha was further promoted to the post of Director, Health, Medical Education and Family Welfare Department, Govt. of Bihar by notification dated 18.7.1998 which was also challenged by filing Interlocutory application by the Appellant. The Appellant was also given notional promotion to the post of Addl. Director (Health) with effect from 4.4.1990 and super time scale with effect from 1.2.1996. The said case was disposed of on 15.3.1990 vide Annexure-6 to the writ application. This Court having taken note of the subsequent development found that the main relief as prayed for in the writ application was allowed as the Appellant has been promoted to the post of Addl. Director (Health) and the only question that was left, was for consideration of her case for promotion to the post of Director, Health, Medical Education and Family Welfare Department, Govt. of Bihar, from the date when her junior Dr. Akhouri Ramesh Chandra Sinha was promoted and accordingly directed the Appellant to file a representation before the Commissioner-cum-Secretary, Health, Medical Education and Family Welfare Department, Govt. of Bihar within a period of one month along with a copy of the order raising her grievance who in turn was directed to provide an opportunity of hearing to the Appellant and to consider her case and if she is found due for promotion to the post of Director, Health, Medical Education and Family Welfare Department, Govt. of Bihar from the date when her junior Dr. Akhouri Ramesh Chandra Sinha was promoted, then she would be given notional promotion from the relevant date and shall also pass specific order for granting pensionary benefit for which she would have been entitled, had she retired from the post of Director, Health, Medical Education and Family Welfare Department, Govt. of Bihar. If the Commissioner-cum-Secretary, Health, Medical Education and Family Welfare Department comes to some other conclusion, he

shall pass a reasoned order specifying the same within a period of two months from the date of filing of the said representation. Thereafter, the Commissioner-cum-Secretary, Health, Medical Education and Family Welfare Department considered the matter and by order dated 22.4.2002 rejected the claim of the Appellant for promotion to the post of-Director, Health, Medical Education, Family welfare Department, Govt, of Bihar (Annexure-14 to the writ application). Thereafter, the Appellant again filed an application for review of the same which has also been rejected on 2.8.2002 (Annexure-17 to the writ application).

8. The case of the Appellant is that once the punishment awarded in the departmental proceeding has been set aside by this Court and the allegation against the Appellant is wiped out, the same could not form the basis for rejecting her claim for promotion to the post of Director. The post of Director is a cadre post and the mode of promotion is seniority-cum-merit and the Appellant being senior to Dr. Akhoury Ramesh Chandra Sinha, she was entitled to promotion to the said post and she was wrongly denied promotion to the said post because of pendency of a departmental proceeding which in law is non est in view of the quashing of the order of punishment by this Court.

9. The State has neither challenged nor produced any material to show that the mode of promotion to the post of Director is different than what is asserted by the Appellant. Thus, it is admitted position that the promotion to the post of Director is to be made on the basis of seniority-cum-merit.

10. However, the stand of State is that a departmental proceeding was initiated against the Appellant and in the same she was awarded major punishment of break in service. However, the said notification was set aside by this Court in CWJC No. 1931 of 1999 on 27.8.1999. While disposing of the said writ application, this Court directed for initiation of a fresh proceeding as the punishment was set aside on technical ground but at the same time observed that authority before initiating any further action will take into consideration that the Appellant was going to superannuate shortly. In view of the observation made by this Court in the said writ application, the State Government did not proceed further with the departmental proceeding though the Appellant was found to be on unauthorised leave from 30.6.1991 to 28.2.1994. She should have been punished but no action was taken in view of the aforesaid observation. The promotion to the post of Director cannot be claimed as a matter of right. It requires a lot of positive qualities which are lacking in the case of the Appellant in view of her behavior of remaining on unauthorised leave for a long period.

11. Learned Counsel appearing for the Appellant submitted that mode of promotion to the post of Director is seniority-cum-merit and as such the Appellant being senior to Dr. Akhoury Ramesh Candra Sinha she should have been granted promotion. The factum of her unauthorised absence cannot be taken as a ground for denying her promotion. In this connection, he drew out attention that the promotion was due from 18.7.1998 whereas the punishment was awarded on 18.1.1999 and as such on the basis of the subsequent fact, the

promotion could not have been denied. He further submitted that rules of executive business has not been followed by sending the matter to the concerned authority for considering the case of promotion to the post of Director. In other words, the Com-missioner-cum-Secretary, Health, Medi"ca! Education and Family Welfare Department Govt, of Bihar was not competent to decide the matter. Lastly, he submitted that without affording an opportunity of hearing to the Appellant, the orders as stated above have been passed. In support of his submission, he relied upon certain judgments of the Apex Court which will be referred to while dealing with the submissions.

12. Learned Counsel appearing for the State on the other hand submitted that even if the promotion is to be made on the basis of seniority-cum-ment, it cannot be claimed as a matter of right. The performance, conduct and other relevant factors are to be considered while considering the case for promotion to the higher post. The Appellant was on unauthorised leave, but the State did not proceed further in the departmental proceeding in view of the observations made by this Court in CWJC No. 1931 of 1999 but the fact remains that she was on unauthorised leave and taking into consideration the overall performance and the aforesaid conduct of the Appellant she was not granted notional promotion on the post of Director, Health. Medical Education and Family Welfare Department, Govt. of Bihar, Patna.

13. In a case of semority-cum-ment promotion, the seniority has to be given an important role to play, but it is well settled that even where the promotion is based on seniority-cum-merit, the incumbent cannot claim promotion as a matter of right and the authority has to consider the fitness of the candidate to discharge the duties of the post and if he is found unfit to discharge the duties of the higher post, he may be passed over. In this connection, reference may be made to the case of State of Mysore v. Syed Mahmood, reported in AIR 1908 SC 1113 wherein it was held that promotion to the higher post even on the basis of seniority-curn-merit promotion cannot be claimed as a matter ot right by virtue of his seniority alone and if he is found unM to discharge the duties of the higher post, then his claim can be passed over.

14. In the case of B.V. Sivaiah and Others etc. Vs. K. Addankl Babu and Others etc., it was held that even in a case of seniority-cum-merit, the minimum necessary merit can be ascertained by making appraisal of performance on the basis of service record etc. Paragraph 18 of the said judgment runs as follows:

we thus arrive at the conclusion that the criterion of "seniority-cum-merit" in the matter of promotion postulates that given the minimum necessary merit requisite for efficiency of administration the senior, even though less meritorious, shall have priority and a comparative assessment of merit is not required to be made. For assessing the minimum necessary niierit the competent authority can lay down the minimum standard that is required and also prescribe the mode of assessment of merit of the employee who is eligible for consideration for promotion. Such assessment can be made by assigning marks on the basis of

appraisal of performance on the basis of service record and interview and prescribing the minimum marks which would entitle a person to be promoted on the basis of seniority-cum-merit.

15. Thus, the learned Counsel for the Appellant is not right in saying that in case of seniority-cum-merit promotion, nothing has to be looked into except seniority.

16. In support of the submission that the promotion was due in the year 1998 whereas the punishment was awarded in the year 1999 and as such the same should not have been taken into consideration, the learned Counsel for the Appellant relied upon a judgment of the Supreme Court in the case of Bank of India and Another Vs. Degala Suryanarayana, wherein it was held that when the case for promotion was being considered and no departmental proceeding was pending, sealed cover procedure could not have" been resorted to nor could the promotion be withheld for the departmental proceedings initiated later.

17. The said proposition of law has no application in the present case. In this case that situation does not arise. As stated above, in this case, admittedly a departmental proceeding was initiated against the Appellant and punishment was awarded but the same was quashed on technical ground and thereafter in view of the observations made by this Court, the proceeding was not continued further but after considering the relevant factors, promotion has been denied.

18. Learned Counsel appearing for the Appellant in support of his submission that once the departmental proceeding has come to an end, the charges cannot be taken into consideration and it will be treated that the Appellant was not subjected to any disciplinary proceeding, has relied upon a judgment of the Supreme Court in the case of Delhi Jal Board Vs. Mahinder Singh, It appears that in that case sealed cover procedure was adopted during pendency of the disciplinary proceeding and the said proceeding ended in favour of delinquent employee and in the meantime another disciplinary proceeding was initiated. Dealing with such situation the Apex Court held that once the sealed cover procedure was adopted during pendency of the first departmental proceeding and the same ended in favour of the delinquent employee, he will be entitled to get the benefit of the same and initiation of another inquiry would not come in the way of giving him the benefit of the assessment by the first Departmental Promotion Committee in his favour in the anterior selection.

19. There is no dispute about the legal proposition that if promotion is withheld on account of pendency of a departmental inquiry and the proceeding has been decided in favour of the delinquent, then promotion cannot be denied on the basis of the punishment awarded in the said proceeding. But here the situation is quite different as indicated above. The State Government in view of the observations made by this Court did not proceed with the departmental inquiry further but the fact is that she was on unauthorised leave and as such the said fact cannot be ignored while considering the case for promotion which as stated above requires the authorities to consider the administrative capability and other

requirement for promotion to the post of Director, Health, Medical Education and Family Welfare Department, Govt, of Bihar.

20. This Court directed the Commis-sioner-cum-Secretary, Health, Medical Education and Family Welfare Department, Govt, of Bihar to consider the matter and thereafter he has decided the matter. Now at this stage, the Appellant cannot be allowed to raise the question that the matter was not decided in terms of the rules of executive business specially when the said stand taken by the State before the learned Single Judge was withdrawn on the objection raised by the Appellant.

21. The last submission raised on behalf of the Appellant regarding non affording an opportunity of hearing to her before passing the orders, annexures-14 and 17 to the writ application, is concerned, is also devoid of substance. From perusal of Annexures-13 and 14 to the writ application it appears that opportunity was given to the Appellant. She had appeared once and thereafter inspite of valid service of notice she did not appear and subsequently, the order was passed. She filed an application to review the order and on consideration of her representation, the Commissioner-cum-Secretary did not find any cogent reason to reconsider the matter and pass the order as contained in Annexure-17 to the writ application. From perusal of the impugned order it is clear that all relevant materials have been considered by the Respondent-authority and thereafter, promotion has been denied.

22. In our view, the learned Single Judge has rightly dismissed the writ application.

23. Accordingly, there is no merit in this appeal and the same is dismissed.

Navin Sinha, J.

I agree.