

(1983) 08 PAT CK 0032

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 980 of 1983

Indu Bhusan and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 11-08-1983

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226, 309

Citation : (1984) PLJR 302

Hon'ble Judges : S. Sarwar Ali, Acting C.J.;Prabha Shankra Mishra, J

Bench : Division Bench

Advocate : Sarojendu Mukherjee and Sunil Kumar Singh in CWJC No. 980/83 and Basudeo Prasad, Karuna Nidhan Keshava, Onkar Nath Sinha, Anil Kumar and Navin Sinha in CWJC No. 1090/83, for the Appellant; Ram Balak Mahto, Additional Advocate General, for the Respondent

Judgement

Prabha Shankra Mishra, J.—The petitioner in C.W.J.C No. 980 of 1983 who hold B.Sc. (Engineering) degree and qualify for appointment as Assistant Engineers (Civil) in the Public Works Department of the Government of Bihar, have moved this court under Article 226 of the Constitution of India for quashing the notice issued under the authority of the Additional Secretary, Department of Road and Building Construction. Government of Bihar (Respondent No. 2), dated 4.3.1983 (Annexure 5). Under this notice candidates who applied in response to an advertisement published in the year 1979 but were not considered for selection because they had not qualified at the time of the interview were called for interview for selection for appointment as Assistant Engineer (Civil) in the Department of Road and Building Construction. They have also prayed for a rule in the nature of mandamus commanding the respondents to consider their cases for appointment as Assistant Engineers (Civil) in the Public Works Department (Department of Road and Building Construction). The petitioners in C.W.J.C. No. 1090 of 1983, who are also graduates in Engineering have questioned the validity of the letter of interview dated 24.2.1983 (Annexure 5) inviting left over candidates of the year 1979 advertisement to appear before the Chief Engineer,

National Highway (Wing), Technical Secretariat, Patna, on 18.3.1983. They have however prayed that the appointment should be made from the panel earlier prepared in February, 1980, after selecting the candidates as a result of the interview held pursuant to the advertisement of the year 1979 and no person not selected in February, 1980 and included in the panel could be considered for interview. Since these applications relate to the appointment of the Assistant Engineers (Civil) and have most of the facts in common, they have been heard together. Basic facts which are common to both the writ applications in brief are that in the year 1979, the State Government decided to fill up some posts of Assistant Engineers (Civil) by direct recruitment through public Service Commission, but apprehending delay the department decided to make ad hoc appointments departmentally. Accordingly, an advertisement was published in the daily news-papers published from Patna on 22.11.1979 (Annexure-1) inviting applications from the candidates who were eligible for appointment as Assistant Engineers (Civil) having degree of B.Sc. (Engg.). The last date for making the application shown in the said advertisement was 5.12.1979. It stated that the appointments were to be made only for six months and the services of the candidates recruited could be regularised if recommended by the Public Service Commission. On 9.12.1979 a corrigendum (Annexure-2) was published stating that those who had already completed their B.Sc. (Engg.) Examination and were awaiting publication of their results could also apply but they would be considered only if their results were published before the interview and they would produce their results and mark sheets at the time of interview. The date of making the application was extended upto 15.12.1979. On 28.1.1980 a notice (Annexure-3) was published in the News-papers calling the candidates for interview commencing from 4.2.1980 who had already applied in pursuance of the advertisement dated 22.11.1979 and corrigendum thereof dated 9.12.1979 and had obtained at least 60% of marks at their B.Sc. (Engg.) Examinations. Interview commenced from 4.2.1980 and concluded on 15.2.1980. All the candidates who had applied and who had obtained more than 60% of marks in the examination participated in the interview and produced their results and mark-sheets before the Interview Board for verification. After the conclusion of the interview and verification of the certificates etc. a panel was prepared. Appointments in instalments were made from the said panel and the last instalment of appointment was made on 12.11.1981. Although these appointments were made on adhoc basis for a period of six months only the respondents extended the appointments and those appointed from the panel prepared in February, 1980, are still continuing in their respective appointments.

2. It was clearly understood that applications were to be made for appointment as Assistant Engineer (Civil) by persons who had already completed their B.Sc. (Engg.) examinations by 9.12.1979, but were awaiting publication of their results and only such candidates were to be considered whose results were published before the interview was held. Examinations conducted by the Patna University for the students of Bihar College of Engineering were, however, held from

22.12.1979 to 28.4.1980. Results of the candidates who appeared in the said examinations were published on 25.5.1980. In the Bhagalpur University which conducted examinations for the students of Bhagalpur College of Engineering, examinations were held in April, 1980 and results were published even thereafter. Students of Binar College of Engineering and Bhagalpur College of Engineering, however, although their examinations had not been concluded and results had not been published, applied. As the results of their examinations were not published before the interview was held they naturally were not interviewed and not considered for selection by the Interview Board and their names were not included in the panel prepared in February, 1980. A notice (Annexure-5), however, was issued stating that those who had applied in the year 1979-80 but whose results were published after the interview/preparation of the panel i.e. after 15.2.1980, but before the end of the year 1982, and obtained 60% or more of marks in B.Sc. Engineering (Civil) examination were to be interviewed for selection for appointment in the posts of Assistant Engineers (Civil) (Annexure-5).

3. When the petitioners in C.W.J.C. No. 980 of 1983 moved this Court and the rule nisi calling upon the respondents to show, cause was issued, this Court by an interim order restrained the respondents from making any appointments.

4. The petitioners in C.W.J.C. 980 of 1983 have asserted that there were 298 posts in all available for direct recruitment as on 15.12.1979, which was the last date fixed for making the application by the candidates eligible for appointment under Annexures 1 and 2. The same number of posts were available when the concerned department submitted a memorandum (Annexure 9) to the Council of Ministers on 18.8.1980 and all these posts have been filled up by the candidates interviewed in February, 1980, from the panel of the selected candidates and are still occupied by them. Learned counsel for the petitioners in C.W.J.C. No. 1090 of 1983 contested this fact but could show nothing to dispute the specific statement as contained in the memorandum dated 18.8.1980 (Annexure 9). Learned Additional Standing Counsel appearing for the respondents, however, did not dispute the fact that a total number of 298 posts available until 18.8.1980 have been filled up but relied upon the assertion in their return that the advertisement as contained in Annexure-1 was not with regard to specified number of posts rather it was for the purpose of preparation of panel for adhoc appointments to fill up the vacancies available in Bihar Engineering Service, Class II, to be regularised in due course on the basis of the recommendation of the Bihar Public Service Commission. As to the reason for inviting the persons who had applied, although their examinations had not concluded on or before 15.12.1979 and their results had not been published on or before the interview was held in February, 1980, the stand taken on behalf of the respondents is that the students of the Patna University and Bhagalpur University who were appearing in the examination or had appeared in the examination in the year 1979, but their results were not published by the last date of interview i.e. 15.2.1980, could not be considered by the Selection Committee; they

represented before the Government after publication of their results in June, 1980 that they had secured very high marks, much more than the persons who had been put in the panel; they were not at fault if there was delay on the part of the University in holding the examinations and publishing the results; and as appointments were still going on they demanded that their cases also should be taken into consideration as, although they had applied their claims could not be considered in February, 1980. The State Government considering that their grievances were genuine decided to call them for interview. Accordingly, the notice, as contained in Annexure 5, has been issued.

5. Mr. Sarojendu Mukherji, learned counsel appearing for the petitioners in C.W.J.C. No. 980 of 1983 and Mr. Basudeva Prasad, learned counsel appearing for the petitioners in C.W.J.C. No. 1090 of 1983, are one in attacking the validity of the notice, as contained in Annexure-5. According to Mr. Mukherji, there is no intelligible differentia which on rational grounds can justify the special treatment extended to ineligible candidates who applied and rightly not considered for selection for appointment. Those who did not apply because they were not qualified in accordance with the conditions of the advertisement will be denied their constitutional right under Articles 14 and 16 of the Constitution if they are not considered in accordance with law to day as they have also qualified by December, 1982. The notice as contained in Annexure 5 causes hostile discrimination attracting the Constitutional inhibition and the doctrine of equality before law and equal protection of laws and unquality of opportunity in the matter of employment enshrined in Articles 14 and 16 of the Constitution. Mr. Prasad has, however, maintained that the petitioners of C.W.J.C. No. 980 of 1983 who being eligible were empanelled and constitute a class of selected candidates have a preferential claim for appointment over any other person who qualified subsequently. Taking help from the stand of the respondents in C.W.J.C. No. 980 of 1983, he has submitted that the panel has been prepared for appointment in the posts that were available before the interview was held as also in the posts which subsequently became available.

6. In the case of Ramesh Prasad Singh Vs. State of Bihar and Others, the Supreme Court has observed:

The doctrine of equality before law and equal protection of laws and equality of opportunity in the matter of employment and promotion enshrined in Articles 14 and 16 of the Constitution which is intended to advance justice by avoiding discrimination is attracted only when equals are treated as unequals or where unequals are treated as equals. The guarantee of equality does not imply that the same rules should be made applicable in spite of differences in their circumstances and conditions. Although Articles 14 and 16 of the Constitution forbid hostile discrimination, they do not forbid reasonable classification and equality of opportunity in matters of promotion means equality as between members of the same class of employees and not equality between members of separate independent classes.

In the case of *Ganga Ram and Others Vs. The Union of India (UOI) and Others*, , it has been held by the Supreme Court:

Mere production of inequality is not enough to attract the constitutional inhibition because every classification is likely in some degree to produce some inequality. The classification need not be scientifically perfect or logically complete. The matter has to be considered in a practical way without whittling down the equality clause. The classification must however be founded on intelligible differentia which on rational grounds distinguishes persons grouped together from those left out, and it must bear a just and reasonable relation to the object sought to be achieved.

The twin test of intelligible differentia based on rational grounds and reasonable relation to the object sought to be achieved are reiterated in a catena of decisions of the Supreme Court.

7. Mr. Mukherji has, however, placed strong reliance, and in my opinion lightly, on a decision of the Supreme Court in the case of *State of U.P. and Another Vs. Ram Gopal Shukla*, . In the State of U.P. posts of Naib Tehsildars are filled through a competitive examination held by the State Public-Service Commission as also by promotion. Ram Gopal Shukla, who was a Kanungo, was promoted as Naib Tehsildar and confirmed in the said post in the year 1962. As Naib Tehsildar, he was eligible for promotion as Tehsildar. He was appointed to officiate as Tehsildar in the year 1963. However, when a regular selection was made in the year 1965 and the U.P. Public Service Commission selected 148 persons for substantive appointment as Tehsildars" and 300 other persons for temporary and officiating appointment as Tehsildars during the coming years, he was not selected and his name was not included in either of the two lists described as List-A and List-B. Under the relevant rule the select list (List-B) was valid only for one year or until such time a review was made at the following selection. The rules which were in force in the year 1966 were modified to some extent in the year 1970 but in no way affected the life of the select list. By a notification issued in July, 1972, however, a provision was made to rearrange the names in the select list in accordance with the seniority and to make appointments against substantive vacancies in preference to any candidate selected in accordance with the provisions of the rules. Ram Gopal Shukla moved the Allahabad High Court which declared the said rule ultra vires Articles 14 and 16 of the Constitution. The State of U.P. moved the Supreme Court in appeal. Speaking for a Division Bench, Mishra, J. has said:

The only basis for grouping the 300 persons in one category is that they were included in the Select List of 1966 and that they were officiating. The respondent in the instant case could not be selected in the selection of 1966 on account of an adverse entry which, as stated earlier, was subsequently impugned. His position in the seniority list was also corrected but because no selection took place after 1966, the respondent could not be included in the list for no fault of his. If there had been a selection and the list had been revised every year as is

the requirement of the rules, the respondent, and like him many others, would have been included in the list. For example, some candidates who had not completed seven years could not be eligible for promotion and could not be included in the Select List of 1966 but after a lapse of time they became eligible and they might have been selected if selection had taken place. But, the door for promotion had been foreclosed for the respondent and many others like him by Rules 7-A and 7-B for no fault of theirs.

The Court considered some of the documents showing that the amended rule of 1972 served no purpose but to accommodate the 300 persons included in the Select List of 1966 and pronounced:

There appears to be no rational basis for such a departure from the ordinary operation of the 1970 Rules which envisaged the preparation of a new list every year and for singling out one particular list for according preferential treatment to the persons whose names were contained therein. The classification in this case therefore cannot be said to be a reasonable classification based on intelligible differentia having a nexus to the object sought to be achieved.

8. No doubt, in Ram Gopal Shukla's case (*supra*) there was a statutory determination of the life of the Select List. There is no such statutory determination of the life of the panel of this case prepared in February, 1980. The respondents have advanced a specific plea that the panel was not limited either to any period of time or to any specified number of posts. But, can it be said that the State could predetermine the candidates by empanelling those selected in an interview in February, 1980 for any future vacancies, thus keeping all such vacancies confined strictly to those who were eligible by February, 1980, excluding consideration of any and every eligible candidate, who, for one reason or the other, could not apply and/or became eligible after February, 1980? In my opinion any such act of the State will constitute an infringement of the right guaranteed under Article 14 and 16 of the Constitution of India. True, it is within the executive power of the State under Article 162 of the Constitution or its legislative power under the proviso to Article 309 to decide how to make recruitments to a service. But the act to empanel once for recruitment in a service until the panel is exhausted cannot be said to be founded on intelligible differentia and can have no reasonable relation to the object of recruiting meritorious candidates in technical and skilled services. In Ram Gopal Shukla's case the Supreme Court found fault with the rule of 1972 not on the ground that the State was not competent to frame the rule but on the ground that a preferential treatment to a group of persons selected at one stage denying opportunity to be considered for appointment to persons becoming eligible after the preparation of the Select List will be violative of the doctrine of equality resulting in a hostile discrimination inhibited under Articles 14 and 16 of the Constitution.

9. What should then reckon the limitations on the States discretion in preparing a panel of eligible candidates for appointment in a service? Answer to this will

depend upon a variety of circumstances and special facts of each service and each case. In the present case, however, it is obvious that the decision to invite applications from the eligible candidates was taken on account of the fact that there were specified number of posts available to which immediate recruitment was necessary and as a regular recruitment through the Bihar Public Service Commission was likely to be delayed, it was decided to make adhoc appointments. Posts which were likely to be created or to become available on account of retirement of the incumbents or otherwise were not in contemplation for consideration when the advertisement inviting applications was published on 22.11.1979 or corrigendum was issued on 9.12.1979. The Board/Committee which prepared the panel could only know of the vacancies existing upto the date of finalising the panel. Any attempt to visualise the future vacancies could/can only be speculative and could/can have no reasonable basis. Vacancies available upto the date of the preparation of panel must conclude the number of posts which could/can be filled up by the candidates selected at the interview held in February, 1980. Vacancies occurring after the interview and after the preparation of the panel must remain available to all eligible candidates for a fresh and further recruitment. If there is time limit like a period of one year or so far the validity of the panel number of vacancies may not matter. But if no time limit is fixed for the life of the panel to end, in my opinion, the only reasonable course is to limit the appointments from the panel to the vacancies available up to the date of the preparation of the panel. Vacancies becoming available subsequently should be left open for all eligible candidates.

10. Reverting to the facts of this case, it has to be accepted that the students of the Bihar College of Engineering and Bhagalpur College of Engineering were not eligible to apply or to participate in the interview. They were rightly not empanelled in February, 1980. It is unfortunate as has been stated at the Bar that the students of 1975-79 batch of Birla Institute of Engineering, Mesra and Bihar Institute of Technology, Sindri, qualified for being selected in the interview held in February, 1979, because their results were published before they were interviewed but even 1974-78 batch students of the Bihar College of Engineering and the Bhagalpur Colleges of Engineering could not be considered because their results were not published before the interview was held. But, inviting those who applied, although they were not eligible for interview, as if, they constitute a special class, is obnoxious and unreasonable. It cannot be ruled out that a student of Bihar College of Engineering or Bhagalpur College of Engineering and/or of some other Colleges of the batch of 1974-78 did not apply because he found that he was not qualifying in accordance"s with the requirements of the advertisement and the corrigendum. He committed no mistake if he did not apply. Those who applied had no business to do so, if they were not qualified. The notice (Annexure-5) has not excluded a person who appeared in the examination held in 1980 and failed and again appeared in 1981 and/or 1982 and passed, from being interviewed if he had applied in response to the advertisement and the corrigendum (Annexures 1 and 2 respectively). Apart

from the fact that the notice (Annexure 5) is an attempt to create eligibility retrospectively in favour of the persons who applied in response to an advertisement under which they were not qualified, it discriminates substantially for the reason of it excluding even the students of 1974-78 batch of Bihar College of Engineering, Bhagalpur College of Engineering and other colleges who did not apply as they did not qualify. The notice contained in Annexure-5 is so unreasonable that it cannot be allowed to be acted upon.

11. Since the vacancies which were available upto the date of interview and quite a few vacancies becoming available even thereafter have been filled up from the panel prepared in February, 1980, it will be unfair to permit further appointments to be made from that obsolete panel. It will be unreasonable to ask the State Government to appoint in the vacancies/posts becoming available after 15th of February, 1980, from the panel prepared on 15.2.1980. No mandamus, in my opinion can issue for this purpose. In view of my conclusions above, C.W.J.C No. 980 of 1983 is allowed and the notice as contained in Annexure-5 is hereby quashed; C.W.J.C. No. 1090 of 1983 is allowed in part and the notice as contained in Annexure-5 is hereby quashed. Let a writ in the nature of certiorari be accordingly issued. The respondents are directed to fill up the vacancies now available by direct recruitment and/or promotion in accordance with law. The respondents are further restrained from making any further appointment from the panel prepared on 15.2.1980. Let a writ in the nature of mandamus be accordingly issued. On the facts and in the circumstances of the case, there shall be no order as to costs.