
(2004) 04 PAT CK 0090

In the Patna High Court

Case No : MJC 503 of 2001 with CWJC No. 11841 of 2003

Kameshwar Mahto and Others and Ram Surat Singh and
Another

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 08-04-2004

Acts Referred:

Citation : (2004) 2 BLJR 1007 : (2004) 3 PLJR 37

Hon'ble Judges : Radha Mohan Prasad, J

Bench : Single Bench

Advocate : Sanjeev Kr. Mishra and Sanjay Kr. Mishra, in MJC 503/2001 and Mukul Sinha, in CWJC 11841/2003, for the Appellant; R.J. Ojha, in MJC 503/2001 and CWJC 1184/2003, K.P. Yadav in MJC 503/2001, Hemendra Pd. Singh, in CWJC 11841/2003 and Bhupendra Kr., JC to SCVI, for the Respondent

Final Decision : Dismissed

Judgement

Radha Mohan Prasad, J.—In the M.J.C. application, prayer is to initiate contempt proceeding against the Opposite parties, namely,

Managing Director of Bihar State Agriculture Marketing Board (hereinafter referred to as "the Board") for alleged wilful violation of the order

dated 24.10.2000 passed in the connected CWJC No. 317 of 2000, contained in Annexure-1.

2. Two of the petitioners of the said M.J.C. application, namely, Ram Surat Singh (Petitioner No. 4) and . Sudama Sharma (Petitioner No. 5) have

filed aforementioned writ petition seeking direction to the Respondents to consider their case for promotion to the post of Assistant Engineer in the

Board and grant the same with effect from the due date (1994) as directed by this Court in the aforesaid CWJC No. 317 of 2000, against the

available quota of 50% required to be filled up by promotion from amongst Junior Engineers. In view of the fact that writ case referred to above was pending for interpretation of the regulation relating to promotional quota, this Court vide order dated 17.12.2003, passed in the M.J.C. case directed for hearing of the M.J.C. application along with the said writ case and under the orders of Hon"ble the Chief Justice both the matters have been listed before this Bench for hearing/disposal.

3. Petitioners are Junior Engineers in the service of the Respondent-Board and are placed at a quite high position in the gradation list. According to

their case, Annexure-2, which is the Bihar State Agriculture Marketing Board (Service, Recruitment, Promotion and Cadre) Rules, provides for

mode of appointment and its clause C which deals with class II posts provides that 50% of all these posts will be filled up by promotion and 50%

by direct recruitment. According to them, the avenue of promotion of Junior Engineer is Assistant Engineer, which is Class II post and, thus,

according to the petitioners, 50% of the vacancy in the post of Assistant Engineer have to be filled up by promotion. It is contended that petitioners

are entitled for promotion against the vacancies available since 1994. In fact, according to them, steps were also initiated in 1995 itself and in the

meanwhile, they were allowed to discharge the function of Assistant Engineer on incharge basis, but, when the matter regarding their promotion

came to this Court in CWJC No. 12260 of 2001 and subsequently, in CWJC No. 13590 of 2001, the Respondents got the matter disposed of on

both the occasions by mis-leading this Court that the matter is still under consideration and final order is yet to be passed. However, now their

claim have been mala fide rejected by order dated 16.11.2002/ 27.11.2002 (Annexure-10) wherein the Respondents have held that Junior

Engineers are entitled for 38% quota only in the grade of Assistant Engineer, which is in violation of Regulation 2 (c) of the Regulation, contained in

Annexure-2, and arbitrary.

4. Initially, the Board also relied upon the Regulation (Annexure-2) and contended that for the purpose of efficient management, recruitment and

promotion, the Board constituted mainly five cadres i.e. (A) Marketing, (B) Office, (C) Engineering, (D) Architecture and Planner, (E) Accounts

Section and according to them under the heading "Engineering" the qualification

and mode of promotion is to be same as approved for appointment in the Public Works Department of the State Government." In the counter-affidavit it is contended that in every category/cadre for filling class II posts percentage of quota for promotion has been spelt out and while dealing category (C) and (D) / cadre it has been indicated that mode of promotion shall be the same as approved for appointment in corresponding department of the State Government. According to the Board, the expression "mode of promotion" has not been defined in the Regulation, and, therefore, it has been understood according to Webster's dictionary "mode" means measure, manner and mode of promotion, therefore, in the present context means measure of promotion i.e. extent of promotion. It is stated that for promotion to Class II post unlike in the State Government, where appointment in Class II post are through the process of Public Service Commission, there is specific provision that promotion or recruitment to Class II posts would be through the Committee headed by the Chief Secretary and in this view of the matter also mode of promotion means the measure of promotion i.e. extent of quota of promotion and years of service in next lower grade. In paragraph 9, it is stated that promotion matter was considered by the said Appointment Sub-Committee headed by the Chief Secretary which held that extent of promotion is 35% only in the post of the Assistant Engineer and as per regulation the recommendation/decision of the Appointment Sub-Committee is binding on the Board of Directors in the matter of promotion and in terms of decision of the said Sub-Committee the Board has already given promotion to the extent of 35% and it is unkind on the part of the petitioners to attribute motives. According to the Respondents, the decision has been taken in most bona fide manner in public interest.

5. In the writ petition bearing CWJC No. 317 of 2000 a grievance was raised by the petitioners that the Board absorbed Mr. Pankaj Kumar, a daily wager working as Junior Engineer against the post of Assistant Engineer, whereas the claim of the petitioners, who were in regular service as Junior Engineer since much before the said Pankaj Kumar has been arbitrarily ignored. In paragraph 11 of the counter-affidavit, it is stated that the petitioners mala fide joined the case of Pankaj Kumar Singh, who, in fact, was appointed as direct recruit. However, this Court without going into

the said grievance, vide order dated 24.10.2000 (Annexure-1, to the M. J.C. application), disposed of the writ petition with a direction to the Board and its Managing Director to consider their cases for promotion on the post of Assistant Engineer with effect from the due date with all consequential benefits in accordance with law and dispose it of by a reasoned order within three months of the receipt/production of a copy of the said order. However, when no decision was taken, the present M.J.C. No. 503 of 2001, was filed for initiating contempt. The Court also took notice of the submission that in the case of Panchu Ram v. Bihar State Agriculture Marketing Board, (CWJC No. 524/1987) disposed of on 25th April, 1997, the Court held that the respondent-Board is a statutory body and competent under the Act for taking decision for appointment/promotion, fixing terms and conditions of service or for creation of cadre and there is no need of approval of the Government under the provisions of the Act, which, learned counsel for the Board was not able to resist.

6. After several adjournments granted in the M.J.C., it appears that the said direction of this Court was not complied within the stipulated time and, thus, vide order dated 11.12.2003, this Court initiated contempt proceeding against the Managing Directors of the Board (Opposite party Nos. 2, 3 and 4) and directed them to personally appear and file their show cause on 15.12.2003. However, in the supplementary show cause filed by the Managing Director on 16.12.2003 while reiterating unqualified apology, brought on record photostat copy of the resolution dated 15.12.2003 of the Board (Annexure-D) purported to have been passed in compliance of the order of this Court in CWJC, No. 317 of 2000. In the said resolution, it is reiterated that the case of Pankaj Kumar Singh was not the case of promotion and was different from the claim of the petitioners. Further, they after noticing that under Regulation 7 (c) there is provision that the Rules applicable in the case of Engineers of Road Construction department of Government of Bihar shall be enforced and that the Managing Director apprised them that there is total 33 posts of Assistant Engineer (Civil) created in the Board, decided that as against 33 posts following the quota of 35% for promotion applicable in Road Construction Department 12 posts may be filled up by promotion. Further, having noticed that out of this 33 posts are reserved and remaining 9 are unreserved,

and, further, that as against 9 posts, 7 were already filled up since before resolved to confirm the appointment of two persons, namely, S/Shri

Kameshwar Mahto and Suresh Prasad Singh against the remaining two posts on the basis of recommendation of the Sub-Committee in the order

of seniority and rejected the case of the remaining four petitioners for want of vacancy. In paragraph 6 of the counter-affidavit, it is stated that the

question, therefore, arises whether the general provision of 50% as claimed by the writ petitioners would prevail over the special provision of going

by mode of promotion in the Public Works Department of the State Government and contended that law is well settled in the maximum ""generalia

specialibus non-derogant"" meaning that special provision would prevail over the general provision.

7. However, Mr. Ojha, learned Senior Counsel appearing for the Respondent-Board contended that the regulation contained in Annexure-2, was

never approved by the State Government, and, as such, it is not in force. He contended that it is true that Annexure-2, has been followed, but, not

as law or regulation. According to him, Bihar State Agriculture Marketing Board Employees Service Regulation, 1978, which has approval of the

State Government and enforced from 1st October, 1978 is the regulation, which governs the case of the petitioners. He submitted that Regulations

55 and 56 of 1978. Regulation provides mode for promotion and under Regulation 56, the promotion is to be made by the Board on the

recommendation of the Sub-Committee constituted by the Board. He contended that all promotions under the said regulation are to be done on

the basis of efficiency and merit-cum-seniority. As such, according to him, the Sub-Committee headed by Chief Secretary vide Annexure-B,

decided to adopt the mode and quota being followed for such promotion in the Road Construction Department of the State Government, which

provides for 35% promotional quota and, thus, according to him, there is no illegality or arbitrariness as alleged by the petitioners. According to

him, the decision has been taken in most bona fide manner in public interest.

8. On the other hand, learned counsel for the petitioners contended that it is not in dispute that Recruitment Regulation, contained in Annexure-2

has been framed by the Board and, according to the decision of this Court in the Case of Panchu Ram v. Bihar State Agriculture Marketing Board

and Ors., CWJC No. 525 of 1987, the Respondent-Board is a statutory body and has power to make appointment and to take disciplinary action

against its employees. In the said decision this Court also held that ""there is nothing to show that the Board is required to obtain approval from the

State Government for appointment/promotion, fixing terms and conditions of service for constituting cadre of officers and other servants employed

by it,"" and further that ""there is no provision under the Act, or Rules, for obtaining approval from the State Government for appointment/ promotion

or fixing terms and conditions of service."" The Court held that""..... the Respondent-Board is a statutory body and competent under the Act for

taking decision for appointment/promotion, fixing terms and conditions of service or for creation of cadre and there is no need of approval of the

Government under the provisions of the Act."" Judgment of learned Single Judge in CWJC No. 524 of 1987, stands affirmed by the order of the

Division Bench by disposal of L.P.A. No. 763 of 1997, which on hearing of parties and on the prayer made on behalf of the Board after some

argument was permitted to be withdrawn vide order dated 21.1.1998. Learned counsel contended that the said decision was relied upon on behalf

of the petitioners in GWJC No. 317 of 2000, in which learned counsel for the Respondent-Board was not able to resist that there is none except

the Respondent-Board which is statutory body and competent to take decision for appointment/promotion. This Court considering the above

directed the Managing Director to consider the case of the petitioners for promotion to the post of Assistant Engineer with effect from the due date

with all consequential benefits in accordance with law, but, the Managing Director failed to comply the said direction by mis-representing the facts

before the Board and mis-interpreting Clause C, of the Regulation framed by the Board, contained in Annexure-2. Learned counsel also

contended that, in fact, the Division Bench in the case of Sanjeev Kr. Bimal and Ors. v. Bihar State Agriculture Produce Marketing Board,

(CWJC No. 2035 of 1989 (R) disposed of on 9.3.1990 held that the State Government has nothing to do with the appointment of employees and

no permission from the State Government is required to be taken for making appointment which also stands affirmed by the dismissal of SLP

bearing SLP (Civil) No. 1 of 1990 dismissed on 30.12.1990 by the Apex Court. He, thus, contended that, in fact, the Managing Director has

committed gross contempt by not placing the aforementioned facts and, rather, misrepresenting the facts before the Board which resulted in

arbitrary rejection of the claim of the petitioners for consideration of their case as against the quota of 50% meant for promotion in the rank of

Assistant Engineer by the Board by the resolution, contained in Annexure-D.

9. I find substance in the submission of the learned counsel for the petitioners. In fact, the action of the Managing Director in the present case has

not been fair and he, rather acted in gross violation of the decisions/orders of this Court by not correctly presenting the facts before the Board as is

evident from agenda No. 5, photostat copy of which has been produced by the learned counsel for the Respondent-Board and is kept on the

record. In the said agenda it is mentioned that a meeting of the Sub-Committee constituted for the purpose of appointment/ promotion pursuant to

the Board's letter No. 2519 dated 15.6.2001 and 81 (go) dated 21.6.2001, was called and meeting of Promotion Sub-Committee took place on

29.6.2001 and 21.6.2001. It is stated that in the said meeting after considering the cases for promotion in the light of the relevant rules and

directions names of two Junior Engineers, namely, S/Shri Kameshwar Mahto and Suresh Prasad Singh have been recommended and in the light of

the direction of this Court in CWJC, No. 317 of 2000, in which time was fixed, order of promotion of the said two Junior Engineers, have been

issued in anticipation of approval of the Board. Accordingly, post facto approval has been sought for and on that the Board took the

aforementioned decision, contained in Annexure-D. It was the duty of the Managing Director to refer to the Regulation framed by the Board,

contained in Annexure-2, and the earlier decision of this Court by virtue of which the said Regulation attained finality, but, he suppressed the said

facts and just referred to Regulation 58 of "1978 Regulation" and the decision of the Sub-Committee. From perusal of the decision of the Sub-

Committee, a photostat copy whereof has been produced by the learned counsel of the Board and is kept on the record of this case, shows that

the facts before the Sub-Committee, was not placed properly. The Sub-Committee, nowever, considering that under the Recruitment Regulation

of the Board for Engineering cadre the provisions relating to eligibility, age and promotion applicable in Public Works Department of the State

Government is enforced and, accordingly, relied upon the circular of the Public Works Department letter No. 2549 dated 24.5.1990, which

provides for promotion of the Junior Engineers on the basis of seniority-cum-merit against 35% quota proceeded to consider the case of Junior

Engineers working in the Board.

10. Thus, it is evident that the Promotion Sub-Committee also relied upon the Recruitment Regulation, contained in Annexure-2, as no other

regulation providing similar provision referred to above has been brought to my notice by the learned counsel for the Board. The Managing

Director, the Sub-Committee and the Board apparently omitted to even take notice to Regulation 2(c) of the Recruitment Regulation (Annexure-2)

which provides that 50% of all Glass II posts will be filled up by promotion and 50% by direct recruitment. In fact, similar provision like Regulation

58 of "1978 Regulation" is there in the Recruitment Regulation (Annexure-2) which provides that the Board shall have two Appointment Sub-

Committees consisting of following members for recruitment of posts noted against them :

(i) (a) Chief Secretary, Government of Bihar Chairman

(b) Chairman of the Bureau of Public Enterprises Member

(c) Development Commissioner Member

(d) Principal Secretary of the Administrative Department Member

(d) Chairman of the Bihar State Agricultural Marketing Board Member

(f) Deputy Secretary in charge for Scheduled Caste and

Scheduled Tribes in the Personnel Department Member

(g) Subject matter specialist

Special Invitee

(ii) (a) Secretary to the Board For all categories

(b) Director of vigilance of posts falling

(c) Director Marketing under (i)

And Regulation 4 provides that the said Sub-Committee will recommend the candidates for direct recruitment and for promotion. Regulation 58 of

"1978 Regulation" does not provide for fixation of any quota. Regulation 56 of "1978 Regulation" though provides for procedure for promotion on

the recommendation of the Sub-Committee, but, it does not provide for as to what will be the quota. In fact, proviso to sub-regulation (iv) of

Regulation 56 of 1978 Regulation provides that the decision of the Board with respect to fixation of quota for direct recruitment and promotion

shall be final and that the Board shall lay down the principle for constitution of the cadre and inter se seniority of the employees of the particular

cadre. Now admittedly the Board framed recruitment regulation, contained in Annexure-2, and Regulation 2 (c) specifically provides for the quota

for promotion and direct recruitment of Class II post. According to the said provision 50% of all Class II posts will be filled up by promotion and

50% by direct recruitment.

11. I have already noticed above that it has been held in the decisions referred to above that the Board is a statutory body and competent under

the Act to take decision with appointment/promotion, fixing terms and conditions of service or for creation of cadre and there is no need of

approval of the Government under the provisions of the Act. As such, in my opinion, Regulation 2 (c) of the Recruitment Regulation (Annexure-2)

framed by the Board providing quota for promotion and direct recruitment is a valid piece of subordinate legislation and applicable to the Class II

posts in the Board. Learned counsel for the Board, however, has submitted that reading of other provisions dealing with different class II posts

would show that there are changes made in respect of quotas for promotion and the provision contained in Regulation 2 (c) of Annexure-2, has not

invariably been followed. Learned counsel submitted that even if the recruitment regulation (Annexure-2), framed by the Board, but, not approved

by the Government up-till-now applies, the Regulation 16C which deals with the Engineering cadre, qualification and mode of promotion are to be

the same as approved for appointment in Public Works Department of the State Government and as the Sub-Committee has relied upon the

Government decision for fixing quota for promotion in the Road Construction Department, there is nothing wrong in the decision either of the Sub-

Committee or of the Board in promoting only two persons as against the said 35% quota.

12. I am unable to accept the said submission of the learned counsel for the Board. It may be true that for some posts like Market

Supervisor/Price Reporter 75% quota is provided for direct recruitment and 25% for promotion and for some posts like Market Intelligence

Inspector no quota is prescribed for direct recruitment and only the vacancies are to be filled by promotion. It is, however, not evident that the said

posts are also Class II posts, and in any case the provisions relating to the said posts specifically provides about the quota and, as such, may not

be governed by the general provision, contained in Regulation 2(c). Insofar as the Engineering cadre is concerned, Regulation 16C only provides

that the qualification and mode for promotion shall be same as approved for appointment in the Public Works Department of the State

Government. The qualification obviously cannot mean quota and according to Chambers English Dictionary mode means manner of acting, doing,

happening or existing and, thus, where the regulation specifically provides for quota for promotion to Class II posts in the Engineering cadre the

general provision contained in Regulation 16 C, of the Recruitment Regulation would apply only with respect to any other mode if need be to be

adopted as provided for appointment in Public Works Department of the State Government in absence of any decision of the Board under proviso

to Regulation 56 (iv) of "1978 Regulation" referred to above. This view also stands supported by the fact that for all other Class II posts the

Regulation provides for filling up 50% of the vacancy by promotion and no valid justification has been shown to deprive Engineering cadre of the

said benefit on the face of the Regulation 2 (c) of the Recruitment Regulation (Annexure-2). Further, this Court finds that the action of the

Managing Director in presenting the fact before the Promotion Sub-Committee and the Board has not been fair and proper in the light of the

direction of this Court.

13. In the result, writ application is allowed. The decision of the Board, contained, in Annexure-D, is quashed. The Respondents are directed to

consider the case of the petitioners for promotion against 50% vacancies of the Assistant Engineer from the due date in the light of the earlier order

and take final decision within four weeks. However, having regards to the facts and circumstances, the apology tendered by the Managing Director

is accepted and contempt proceeding drawn against them is dropped. M.J.C. application is, thus, dismissed.