
(2007) 05 PAT CK 0144
In the Patna High Court
Case No : CWJC No. 15050 of 2005

Lakshmi Prasad Sahu

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 17-05-2007

Acts Referred:

Citation : (2005) PLJR 413

Hon'ble Judges : Mridula Mishra, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Mridula Mishra, J.—Petitioner's prayer is for a direction to the respondents to give him regular promotion as Deputy Director (Mines), Additional Director (Mines) and Director (Mines) with effect from the date it became due, which despite vacancies has not been given to him on completion of required Kalawadhi and seniority in the cadre. Further prayer is for quashing the impugned Notification No. 2049/M dated 28.10.2005, issued by the Deputy Secretary (Mines) directing the petitioner to handover charge of Patna Circle to the persons named in the notification. Subsequently by notification No. 2055 petitioner was directed to handover charge to persons who is ex-cadre Geologist as such prayer is for quashing this notification also. Further prayer is for quashing the notification No. 236/M dated 11.11.2005 whereby without considering the representation of the petitioner, he was directed to join at Gaya, failing which departmental actions would be taken against him. Petitioner's prayer is also for quashing Notification No. 2145/M dated 11.11.2004 whereby persons posted vide Notification No. 2055/M has been confirmed as Deputy Director (Mines), Muzaffarpur. One more prayer is for quashing the notification No. 2225/M dated 22.11.2005 cancelling officiating promotion of petitioner as Additional Director (Mines) without cancelling the order of officiating promotion of the petitioner on the post of Deputy Director (Mines). The Directorate of Mines and Geology was bifurcated in the year 1964 and independent Directorate of Mines was created.

Hierarchy of posts in the Directorate of Mines consists of Mines Inspector, Assistant Mining Officer, District Mining Officer, Deputy Director (Mines), Additional Director (Mines) and Director (Mines).

2. The post of District Mining Officer is filled 50% by promotion by feeder grade of Assistant Mining Officer who had put in required Kalawadhi and 50% from the direct recruit. Minimum Kalawadhi for promotion to the post of Deputy Director (Mines) from the post of District Mining Officer is 8 years. Four years Kalawadhi is for promotion to the post of Additional Director (Mines). Two years for the post of Director (Mines). Petitioner being a Mining Engineering graduate with M. Tech. degree was directly appointed as District Mining Officer through Notification No. A/A14092/ 86-6739 dated 3.12.1988. Petitioner joined on the post of District Mining Officer on 27.4.1989 and after completing 8 years Kalawadhi became entitled for being promoted to the post of Deputy Director (Mines). State Government through Finance Department Notification No. 1082/F dated 22.2.1988 has taken a policy decision that if no regular promotion could be made within time and higher posts were required to be filled up, eligible persons of the lower posts should be allowed to officiate on such higher post, strictly in accordance with law, on the basis of seniority-cum-eligibility. In compliance of this policy decision the petitioner was promoted to the post of Deputy Director (Mines) by Memo No. 3385/M dated 22.8.1998. On completion of four years Kalawadhi the petitioner was promoted on ad hoc basis to higher post of Additional Director (Mines). Petitioner has already completed two years Kalawadhi on 27.4.2008 (sic) for being promoted to the post of Director (Mines).

3. Petitioner's case is that being senior most Officer in the cadre and posts being vacant he should be given regular promotion on the post of Deputy Director (Mines), Additional Director (Mines) and Director (Mines) with effect from due date he became entitled for the same. Regarding the availability of vacancy on this post it has been submitted that on or before 15.11.2000 11 posts of Deputy Director (Mines), four posts of Additional Director (Mines) and one post of Director (Mines) were available as cadre post in the Directorate of Mines and all these posts were to be filled by promotion. On 15.11.2000 after bifurcation of the State of Bihar and Jharkhand, six posts of Deputy Director (Mines), two posts of Additional Director (Mines) and one post of Director (Mines) have been allocated to the State of Bihar. All promotional posts are lying vacant for long time but no regular promotion is being given. The Directorate is being run by giving ad hoc promotion/ working arrangement basis. When the petitioner was waiting for his regular promotion, by the impugned notification he was transferred to Gaya. Further case of the petitioner is that on several occasions he had represented before the respondents to consider his claim for regular promotion from due date against the post of Deputy Director (Mines), Additional Director (Mines) as well as Director (Mines).

4. On account of bifurcation of the State the Central Government finalised the cadre division. Petitioner was allocated to the cadre of Jharkhand State and one

S.I. Minz was allocated Bihar State. The petitioner as well as S.I. Minz both represented and requested for interchange of cadre for which there is provision. Interchange of cadre on mutual basis is possible if both the employees are in the same service and cadre as well as in the same pay scale and original residents of concerned State for which option is being exercised. Petitioner and S.I. Minz both fulfilled all these criteria for the purposes of interchange of cadre. S.I. Minz being the resident of State of Jharkhand has finally been allocated State of Jharkhand and the Home Special Department, Government of Bihar considering the request of the petitioner and S.I. Minz for interchange of cadre has also granted approval of the same and final allocation of petitioner to Jharkhand State was stayed through its Memo No. 2585 dated 20.4.2005. In spite of the dispute relating to cadre division is settled, petitioner is not being given his regular promotion when petitioner's regular promotion was pending for consideration, all on a sudden Annexure-13 bearing Memo No. 2060/M dated 20.4.2005 was issued. The petitioner was directed to join as Deputy Director (Mines) at Gaya and to handover charge to a person who was ex-cadre Geologist. Subsequently another notification was issued whereby petitioner's ad hoc promotion to the post of Additional Director (Mines) has been cancelled and the petitioner has been compelled to join after being demoted on the post of Joint Director (Mines).

5. I.A. No. 2218 of 2006 has been filed by one Sri Lakhan Ram to be added as party respondent in this case stating that he is necessary and proper party, as claim of the petitioner that he is senior most person to be considered for promotion to the post of Deputy Director (Mines) and Additional Director (Mines) if allowed will affect his claim of seniority. Intervenor respondent's claim is that he is senior to the petitioner, any order passed in the writ application will have bearing on the promotional prospect of the intervenor respondent as such he should be impleaded as party. I.A. was allowed and Lakhan Ram has been impleaded as Respondent.

6. Promotion was due to the petitioner in the next promotional post i.e. Deputy Director (Mines) but due to delay in finalization of regular promotion the petitioner was made Incharge Deputy Director (Mines) on 30.6.1997. This order was passed considering the compulsion of the Government not to keep the post vacant as well as considering the seniority of the petitioner and his service records. Similarly he was made Incharge Additional Director (Mines) on 22.6.2004 (sic) on the recommendation of the duly constituted Departmental Establishment Committee.

7. Counter affidavit has been filed on behalf of respondents admitting the fact that the petitioner was asked to officiate as Deputy Director (Mines) and Additional Director (Mines) in work interest. It has been stated that the petitioner has been transferred to Gaya Division in compliance of the order passed in CWJC No. 4757 of 2003 dated 14.7.2005 whereby the respondents were directed to transfer all such officers/staffs who have completed more than five years at a

particular place. So far the prayer of the petitioner regarding quashing certain notifications, it has been stated that those have been issued in work interest as well as according to resolution No. 5464 dated 27.8.1998 and Resolution No. 1547 dated 12.4.1999, in all these resolution provision has been made to depute the officers of the Geologist cadre against the vacant post of Mining cadre. The claim of the petitioner in view of these resolutions is not maintainable. Regarding the claim of the petitioner for his regular promotion on all three promotional posts in the cadre, the stand of the respondent is that after bifurcation of the State of Bihar and Jharkhand, the petitioner has been allocated Jharkhand cadre. He has represented to retain his service in Bihar on mutual basis, which is not finalised. During the pendency of cadre division and to avoid further complication the claim of petitioner's promotion is yet to be implemented.

8. Considering the pleadings of the parties and the submissions of their counsels I find that the respondents have not denied the availability of the vacancies seniority, qualification, eligibility and competence of the petitioner for being promoted to the post of Deputy Director (Mines), Additional Director (Mines) and Director (Mines). It has also been admitted that being otherwise eligible for regular promotion, petitioner has continuously worked as Deputy Director (Mines) from 1997 to 2004 and discharged the duty of the post of Additional Director (Mines) since 23.6.2004 till the issuance of the impugned orders. Only reason assigned by the respondents for not passing regular order of promotion is the pendency of cadre division of petitioner vis-a-vis S.I. Minj. It has also been admitted in the counter affidavit that both petitioner and S.I. Minz are officers of Schedule Tribe quota fulfills all criteria for interchange of cadre on mutual basis. Though it has not been admitted by respondents, but the fact is that S.I. Minz, has finally been allocated Jharkhand State and accordingly cadre allocation of petitioner has also been settled in a way.

9. Respondents case is that at a juncture when cadre allocation is unsettled, if any promotional order is passed, that will further complicate the matter. Stand taken by the respondents cannot be appreciated. Admittedly the petitioner was allowed to discharge the work of Deputy Director (Mines) from 1997 to 2004, at that time petitioner had already completed his kalawadhi of eight years. Promotion was due to him and post was also vacant but he was not promoted regularly. Considering the delay in process of promotion, in the work interest and exigency of work considering the eligibility the petitioner was allowed to work as Deputy Director (Mines) by the Establishment Committee. Again by a Government order dated 23.6.2004, petitioner was allowed to function on the post of Additional Director (Mines) against a vacant post and the petitioner was also eligible for promotion, completing his kalawadhi. Petitioner was entitled for regular promotion as Director but he was simply asked to discharge the duties of the post of Additional Director (Mines). In the year 2005 when the petitioner was entitled for promotion to the post of Director (Mines), ignoring his seniority and to the prejudice of his claim for regular promotion he was reverted back to the post of Deputy Director (Mines) and at his place another person of Geologist

cadre was placed to function as Additional Director (Mines). Reasons assigned by respondents for issuance of the impugned notification is not at all convincing. Plea taken by respondent is that unless matter relating to cadre division is settled, promotion cannot be decided. This plea is also not correct as informed by the petitioner's counsel. It has been submitted by the petitioner's counsel that already an order has been passed allowing the petition for allocating him Bihar cadre and Jharkhand cadre to S.I. Minz on the basis of mutual consent. In this circumstance the respondents have no other reason for ignoring the claim of the petitioner for regular promotion, with effect from the due dates to the post of Deputy Director (Mines), Additional Director (Mines) and Director (Mines). Now the petitioner is not going to Jharkhand State as S.I. Minz has already been allowed to retain Jharkhand State as a consequence the petitioner will also be allowed to retain his Bihar cadre.

10. The respondents No. 1 and 2 are directed to take the matter of regular promotion immediately. Petitioner should be allowed regular promotion(s) to the post of Deputy Director (Mines), Additional Director (Mines) and Director (Mines) with effect from the dates petitioner became entitled for such promotion with all consequential benefits. The order must be passed within 8 weeks from the date of receipt/ communication of this order.

11. Another prayer of the petitioner is with regard to payment of salary of the promotional post against which he has discharged his duty under the Government orders. It has been submitted by the petitioner's counsel that petitioner is entitled for payment of salary of the promotional posts as decided by the Apex Court in the case of Secretary-cum-Chief Engineer, Chandigarh vs. Hari Om Sharma and Others [1998(5) S.C.C. 87]. in this decision. it has been held that the pay of promotional post cannot be denied even if the promotion is an officiating or stop-gap arrangement. If a person is promoted to the higher post or put to officiate on that post he cannot be denied the benefit of salary or other attendant benefits. The Supreme Court has held that in case of denial of higher salary and other attendant benefits, it will be contrary to law and also against public policy. In the counter affidavit this claim of the petitioner has not been dealt with. Neither it has been admitted or denied as such it will amount to an admission on the part of respondents.

12. Accordingly respondents are also directed to make payment of arrears of 20% of salary of the promotional posts with effect from the dates from which the petitioner has worked on the promotional post in the light of the circular of the Finance Department dated 24.12.2005 contained in Memo No. 7020. The order with regard to payment of arrears of 20% of salary of the promotional posts must be passed as well as payments be made within eight weeks from the date of receipt/communication of this order.

13. So far the claim of the intervenor respondents regarding seniority in comparison to the petitioner is concerned that will also be considered and decided by the respondents while passing the order for regular promotion to the

petitioner. Accordingly this application is allowed. By the impugned notification No. 2225/M dated 22.11.2005 officiating promotion of the petitioner as Additional Director (Mines) has been cancelled on the ground that the post of Additional Director (Mines) is two scales above the substantive post of the petitioner. Petitioner's case is that this notification has been issued just to frustrate the petitioner's claim for regular promotion to the post. I find substance in this submission. Accordingly the notification No. 2225/M dated 22.11.2005 is quashed. The respondents are directed to restore petitioner's ad hoc promotion to the post of Additional Director (Mines) forthwith till the date petitioner is given regular promotion.