

(2000) 04 PAT CK 0030
In the Patna High Court
Case No : C.W.J.C. No. 2876 of 1998

Maresh Chandra Prasad

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 04-04-2000

Acts Referred:

Bihar Panchayat Samiti and Zila Parishad Act, 1961 — Section 75
Bihar Panchayat Samitis and Zila Parishads (Conditions of Service) Rules, 1964 — Rule 7(4), 7(5), 7A

Citation : (2001) 1 PLJR 617

Hon'ble Judges : A.K. Ganguly, J

Bench : Single Bench

Advocate : Rajendra Prasad Singh, Arvind Kumar Singh, Alok Kumar Singh and Arun Kumar, for the Appellant; Maqbool Ahmad, for Respondent Nos. 5 and 6 and P.K. Shahi, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Ganguly, J.—This writ petition has been heard at considerable length at the admission stage and as such is being disposed of by this order.

2. This writ petition has been filed challenging the order dated 3.1.1998 issued by Respondent No. 5, the Deputy Development Commissioner-cum-Chief Executive Officer, Sitamarhi by which Respondent No. 7, Sri Mahesh Kumar Choudhary, has been promoted to the post of Assistant Engineer in Zila Parishad, Sitamarhi according to his seniority.

3. Some relevant facts are noted below.

Both the Petitioner and Respondent No. 7 were engaged on daily wage basis by an order dated 22.2.1988 by Respondent No. 5 and thereafter there was a regular appointment of both the Petitioner and Respondent No. 7 on the basis of an order dated 17.4.1989. By the said order dated 17.4.1989 both the Petitioner and Respondent No. 7 were directed to join the post of Junior Engineer within a

period of one week from the date of the order and the case of the Petitioner is that he joined the post on 19.4.1989 whereas Respondent No. 7 joined the said post on 20.4.1989. Since then both the Petitioner and Respondent No. 7 are continuing as Junior Engineer in Zila Parishad, Sitamarhi. Thereafter one Radhey Shyam Pandey, who was the senior most engineer in Zila Parishad superannuated from service on 31.1.1997 and the post became vacant. In the said vacant post of Assistant Engineer, Respondent No. 7 was promoted. This is the subject matter of challenge in this writ petition..

4. The Petitioner has challenged the said promotion of Respondent No. 7 to the post of Assistant Engineer, Zila Parishad, Sitamarhi on the following grounds:

(i) The Petitioner is senior to respondent No. 7. As such he should have been appointed to the said post.

(ii) For making promotion to the said post the Respondents authorities have not at all considered the case of the Petitioner and without consideration of his case, the promotion has been made.

(iii) The promotion was given by a Committee which is not formed in accordance with the relevant rules and regulations. As such the promotion of Respondent No. 7 is bad in law.

(iv) There are charges against Respondent No. 7. As such he should not have been promoted to the post of Assistant Engineer, Zila Parishad ignoring the case of the Petitioner who was senior an against whom there is no charge.

5. In this matter affidavits have been filed both by Respondent No. 7 as also Respondent Nos. 5 and 6. Both the learned Counsel for the Respondents controverted the aforesaid four grounds urged by the learned Counsel for the Petitioner. Learned Counsel for the Respondents submitted that there is no question of seniority of the Petitioner over Respondent No. 7 inasmuch as both wets] appointed, admittedly, in one transaction namely, by order dated 17.4.1989 to the post of Junior Engineer. There is no seniority list of Junior Engineers showing (sic) Petitioner senior to Respondent No. 7.

6. Apart from that it has been stated (sic) in matters of promotion to the post of (sic) Engineer under the relevant seniority will come last and merit will be the first consideration. Therefore the of such promotion is merit-cum-(sic). It has been further urged by the learned Counsel for the Respondents and is not disputed by the learned (sic) for the Petitioner that the Petitioner is a Diploma holder Engineer whereas Respondent No. 7 is a degree holder Engineer. As such in matters of appointment to the post of Assistant Engineer the person holding degree in Engineering should be preferred.

7. So far as the charges against Respondent No. 7 is concerned it has stated on affidavit that there is no 3 against him. Merely a show cause was issued in 1993 asking Respondent No. 7 why charge will not be framed (sic) to the said notice. Respondent gave reply and thereafter the Respondents have not proceeded at

all. Therefore, there is no chargesheet issued to the Petitioner in any proceeding. As such the said allegation has no basis.

8. Learned Counsel for the Petitioner has placed reliance on an unreported judgment by a Division Bench of this Court in the case of Ramjee Prasad Sharma v. The State of Bihar and Ors. rendered in C.W.J.C. No. 3039 of 1991 disposed of on 17.9.1992. Relying on the said judgment dated 17.9.1992 learned Counsel for the Petitioner submitted that the learned Judges of the Division Bench of this Court interfered with the appointment on the post of Assistant Engineer which was made in favour of Respondent No. 7 in that case who was admittedly junior to the Petitioner in that case. In the said judgment the learned Judges held that the appointment of Respondent No. 7 to the post of Assistant Engineer was made without following the provisions of the statutory rules and the said promotion was given by the State Government. The learned Judges held that the appointment was to be made by Zila Parishad and not by the State Government as the State Government is only to create the post and not to give appointment. It has also been stated in the said judgment that after creation of the post of Assistant Engineer, there is nothing on the record to show that any decision was taken by the competent authority to fill up the post by direct recruitment. It is merely a case of adjustment of Respondent No. 7 on the post of Assistant Engineer without following the provisions of the rules and as such the same was quashed.

9. Relying on the said judgment learned Counsel for the Petitioner submitted that the said judgment of the Division Bench should be followed in this case and in view of the said judgment in this case also the appointment of Respondent No. 7 should be quashed. These being the rival contentions of the parties, this Court proposes to deal with the same as follows:

10. On the question of seniority, this Court does not find that there is any determination of seniority inter se between the Petitioner and Respondent No. 7. On the other hand, it appears clearly that the Petitioner and Respondent No. 7 were appointed by the same order. Apart from the fact that the Petitioner is senior in age, there is no other ground to show that the Petitioner is admittedly senior to Respondent No. 7.

11. But in matters of such promotion to the post of Assistant Engineer, the admitted principle under the relevant rule is merit-cum-seniority. Reference in this connection may be made to the relevant rules which admittedly govern the cases of such promotion. The said rule is Sub-rule (5) of Rule 7 of the Bihar Panchayat Samiti and Zila Parishad Service Condition Rules, 1964 (hereinafter called the said Rules). The said Rules are statutory, having been framed u/s 75 of the Bihar Panchayat Samiti and Zila Parishad Act, 1961. The relevant proviso to Sub-rule (5) of Rule 7 of the said Rules is set out below:

Parantu puronnati hetu chayan ke liye pratham vichar gun-avgun, takniki aharta (yogyata) aur gyan tatha sanyanistha par kiya jayega. Variyata par inke baad hi

vichar kiya jayega.

12. It is clear from the aforesaid proviso to Sub-rule (5) of Rule 7 of the said Rules that the basis of such promotion is merit-cum-seniority. Merit being the predominant condition, here the fact that Respondent No. 7 is possessing a degree in Engineering is certainly a factor in his favour to be considered at the time of granting promotion to the post of Assistant Engineer. So this Court cannot accept the point urged by the learned Counsel for the Petitioner.

13. So far as the second point is concerned that the Petitioner's case has not been considered at all by the authorities is also not borne out from the records of the case. From Annexure-B to the counter affidavit which has been filed in this case by the said Zila Parishad, it appears that the case of the Petitioner was considered by the appropriate authority and they found that the Petitioner is a diploma holder Engineer whereas Respondent No. 7 is the only degree holder engineer in the said Zila Parishad. As such he was considered fit for promotion to the post of Assistant Engineer. While making such consideration the Respondents authorities have also considered the merit and other ability of Respondent No. 7. Therefore, annexure-B to the counter affidavit does not support the allegation of the Petitioner that his case has not been considered at all, Since his case does not stand on the same footing as that of Respondent No. 7, who is a degree holder Engineer, the Respondents have, in my opinion, rightly promoted as a person with better educational qualification on the post of Assistant Engineer. It has been repeatedly held by the Apex Court that better educational qualification is a relevant factor for determination of the question of eligibility for, promotion to a higher post and the said criteria has been followed in this case for the purpose of promoting Respondent No. 7 to the post of Assistant Engineer since" he has the qualification of a degree in Engineering. Such consideration is also in consonance with the proviso to Sub-rule (5) of Rule 7 of the said rule which lays emphasis on merit rather than seniority. This Court apparently does not find any error in such consideration.

14. It is well known that the authorities granting promotion and making a consideration of the case of the candidates are not expected to write like Judicial Officers and may not disclose; detailed reasons but the basis of such consideration has been disclosed in Annexure-B to the counter affidavit and from] the recitals in Annexure-B, it is clear that the consideration has a reasonable basis, Therefore, the second contention of the learned Counsel for the Petitioner cannot be upheld.

15. The third contention is on the eligibility of the Committee. In connect with the said contention, learned Counsel for the Petitioner referred to the requirement of such committee being formed in, accordance with Sub-rule (A) of Rule 7 of the said Rules and submits that since the committee has not been constituted in accordance with the said sub-rule, the promotion of Respondent No. 7, by an incompetent committee, the same is bad.

16. Learned Counsel further submitted that in the instant case the Committed was headed by Respondent No. 5 and the decision was taken to promote Respondent No. 7 on 3.1.1998 when the said Respondent No. 5 was to superannuate (sic) on 31.1.1998. This Court does not find anything wrong on the part of Respondent No. 5 to pass an order of promotion on 3.1.1998 even though he retires on 31.1.1998. No mala fide allegation has been made in the pleadings against Respondent No. 5 nor has Respondent No. 5 been made a party by name. Therefore, this Court cannot act on the basis of (sic) allegations aired by the learned Counsel for the Petitioner in course of his submission.

17. Now coming to the constitution of the said Committee this Court finds that in the instant case the Committee was a broad based one consisting of (1) Deputy Development Commissioner-cum-Chief Executive Officer, Sitamarhi District, (2) Director, Self Employment and Accounts officer, (3) The District Welfare Officer, (4) District Indigenous Medical Officer and (5) Executive Engineer, National Rural Employment Programme. According to the Petitioner, the said Committee is not a committee in accordance with Sub-rule (4) of Rule 7 of the said Rules. This Court on perusal of Sub-rule (4) of Rule 7 of the Old Rules finds that the Committee under Sub-rule (4) of Rule 7 of the said rules is not possible inasmuch as Zila Parishad has been superseded and there cannot be any Chairman, Vice Chairman of such Zila Parishad nor there can be any person who can be nominated by the Chairman. Therefore, the direction of the composition of the Committee which is mentioned in Sub-rule (4) of Rule 7 of the said Rules must be construed to be director inasmuch as a Committee of the persons named in Sub-rule (4) of Rule 7 of the said Rules cannot be constituted in any Zila Parishad where the Governing Body or the Managing Committee has been superseded and in most of the Zila Parishads the governing body/managing committee has been superseded. So if the requirement of the said Committee is to be strictly adhered to, then in any Zila Parishad no appointment or promotion can be made. Therefore, the Court has to take into account whether the Committee which has been formed is a representative committee or not or whether the said committee is a broad based one or not or whether such committee consisted of responsible Officers. Going by the aforesaid test, this Court finds that the instant committee consists of responsible Officers and they have come to a unanimous decision about the promotion of Respondent No. 7 and such decision rests on a very valid and cogent ground. Therefore, this Court does not find any merit in the third point raised by the learned Counsel for the Petitioner.

18. So far as the fourth ground is concerned, this Court finds that it has also got no merit. Annexure-5 was issued on 2.12.1993 which was merely a notice calling upon Respondent No. 7 to show cause. While dealing with the said notice to show cause, in the counter affidavit filed by Respondent No. 7, it has been stated in detail in paragraph 8 that he has been given a reply to the show cause notice and no further action thereafter was taken. As such it cannot be said that there was any proceeding pending against the Petitioner at the time of his selection.

Therefore, none of the contentions raised by the learned Counsel for the Petitioner can be sustained.

19. Learned Counsel for the Petitioner has relied on a judgment of the Supreme Court in the case of State of Mysore and Another Vs. Syed Mahmood and Others, . Reliance has been placed on paragraph 4 of the said judgment. In paragraph 4 of the said judgment the principle which has been laid down is that where promotion is based on seniority-cum-merit, the Officer cannot claim promotion as a matter of right by virtue of his seniority alone and it has been further stated that if he is found unfit to discharge the duties of higher post, he may be passed over and an Officer junior to him may be promoted. This principle laid down in the said judgment run counter to the argument of the learned Counsel for the Petitioner. First of all in this case the basis of promotion is not seniority-cum-merit rather it is merit-cum-seniority. Therefore, in such cases, the merit is the predominant condition and it is obvious that Respondent No. 7 has higher educational qualification which is a positive merit vis-a-vis the Petitioner. But even in the case of seniority-cum-merit the principle as laid down in paragraph 4 of the aforesaid judgment is inconsistent with the pleas raised by the Petitioner. Therefore, this Court is unable to appreciate the applicability of the ratio of the said judgment to the facts of this case.

20. So far as the un-reported judgment in the case of Ramjee Prasad Sharma (supra) is concerned, the same is factually distinguishable. In the said unreported judgment the learned Judges of the Division Bench basically decided that the State Government is not the competent authority to direct absorption but appointment has to be made by the Zila Parishad. In that case before the Division Bench since the absorption was directed by the State Government, the learned Judges of the Division Bench, if I may say so, rightly interfered with the said direction but the present case is factually totally different. Apart from that in the aforesaid case, the absorption was directed of a Junior Engineer working on daily wage basis on the higher post of Assistant Engineer. The same is also not the position here. That apart, from the aforesaid decision it appears that in that case the case of the writ Petitioner was not at all considered at the time of directing such absorption and only the case of Respondent No. 7 was considered.

21. But in the instant case, as noted above, the case of the Petitioner was considered as would appear from annexure-B to the counter affidavit but as his qualification was found wanting and therefore, on a valid and cogent ground his case was not favoured and the promotion was rightly granted to Respondent No. 7.

22. Therefore, considering the case from all possible angles this Court does not find that any order can be passed in favour of the Petitioner. This writ petition is, therefore, dismissed. But in the facts of this case, there will be no order as to cost.