

(2006) 08 PAT CK 0047
In the Patna High Court
Case No : C.W.J.C. No. 8741 of 2003

Nagendra Mishra and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 17-08-2006

Acts Referred:

Citation : (2006) 08 PAT CK 0047

Final Decision : Allowed

Judgement

Ramesh Kumar Datta, J.—Four interlocutory applications for intervention in support of the petitioners in this case have been filed, namely, I.A.No. 4668/03, I.A, No. 4922/03, I.A.No. 5302/03 and I.A.No. 5540/03. The stand of the applicants is similar to that of the petitioners and they are similarly affected by the inaction / refusal of the State Government to appoint them. The prayers for "intervention" are allowed.

2. Heard Mr. Ganesh Prasad Singh, learned Senior, counsel for the petitioners, Mr. Ram Balak Mahto, Senior Counsel, Mr. Binay Kumar, Advocates appearing for the intervenor petitioners, learned Government Advocate No. 10 for the State and Mr. S.H.H. Quadir, learned Counsel for the Bihar Public Service Commission.

3. The petitioners seek a direction upon the respondents to consider, take a decision and appoint the petitioners by way of promotion on the post of Assistant in the Secretariat in pursuance of the recommendation made by the Bihar Public Service Commission vide letter No. 188 dated 1.3.2002 and further to hold, if need be, that the Government's circular issued from the Department of Finance bearing No. 8826 dated 20.12.2000 will have no application to the petitioners' case.

4. The petitioners are employees of the State Government and working on the posts of Head Typist, Routine Clerk, Bill Clerk. Head Clerk, Cashier and clerks in the Secretariat or in the Muffasil offices. Except petitioner No. 30 who is in the scale of Rs. 3050 - 4590, all the other petitioners are enjoying a higher pay scale

going up to the scale of Rs. 5000 - 8000.

5. Earlier the appointments in the Secretariat and the attached offices were made as per the Secretariat Instructions, 1952 and subsequently by resolution/circular dated 10.7.1987 it was decided that the selection will be made by Limited Competitive Examination of the candidates like the petitioners by the Bihar Subordinate Service Selection Board. With effect from 30.8.1988, by the Assistants of the Secretariat and Attached Offices Joint cadre Act, 1989 the assistants of the Secretariat and its attached offices came under a single cadre in which basic post was that of the Assistant and the promotional avenue went up to the Deputy Secretary. Under the said Act, Rules were framed, namely, the Assistants of the Secretariat and Attached Offices Joint Cadre Rules, 1992 which were notified in the Gazette dated 1.6.1992 but made applicable with effect from 30.8.1988. It is the admitted position that the said rules have not been superceded till date and continue to be in operation.

6. Rules 3 and 6 of the said Rules provide that the lowest level in the cadre shall be the post of Assistant which will be filled up by open Competitive Examination or by limited Competitive Examination by the Board/Commission. All the other posts up to that of Deputy Secretary will be filled up by promotion from the immediately lower post. Schedule II of the Rules lays down that appointment on the post of Assistant shall be made on the requisition of the State Government through the recommendation of the selection Board/Bihar Public Service Commission and on the basis of competitive examination 50% of the posts shall be filled up by direct recruitment and 50% shall be filled up on the basis of limited competitive examination by direct recruitment. In the limited competitive examination the ministerial employees of the Secretariat and its attached offices and of the Mufassil offices shall be eligible to appear in the examination to be conducted by the Board/Bihar Public Service Commission and 25% of the posts shall be filled up by ministerial employees of the Muffasil offices and 25% for the ministerial staff of the Secretariat and its attached offices. By resolution contained in Memo No. 317 dated 3.9.1992 of the Personnel and Administrative Reforms Department a decision of the State Government was communicated that with respect to appointment made through the limited competitive examination, the weightage for seniority and merit shall be given in the ratio of 60 : 40, and the merit shall be determined on the basis of marks obtained in the limited competitive examination. For every year of satisfactory service 13 1/2 marks shall be given subject to a maximum of 450 marks and to it shall be added the marks obtained in the limited competitive examination which shall be for a total of 300 marks and accordingly the results shall be prepared and the merit lists shall be published.

7. Subsequently by advertisement No. 1135(A)/96 applications were invited for the Assistants of the Secretariat Limited Competitive Examination, 1996 stating that 25% posts were reserved for ministerial employees of the Secretariat and its attached offices and 25% posts for employees of the muffasil offices. In the said

advertisement also reference was made to the Government resolution bearing Memo No. 317 dated 3.9.1992 and it was stated that the seniority and merit shall be given weightage in the ratio of 60:40. The petitioners applied and appeared in the said examination but when the results were not published even after a lapse of two years after the directions of this Court by order dated 17.4.1999 and 18.4.1999, a writ petition being C.W.J.C. No. 12351 of 2001 was filed by some of the candidates, namely, Shri Ramanuj Singh and Ors. v. State of Bihar and Ors. seeking a direction to publish result of the said examination. By order dated 9.10.2001 this Court directed the B.P.S.C. to take necessary steps as noted in the said order and after completing the process, to publish result within two months from the date of receipt of a copy of the order. It may be pointed out that in the said case although the order was passed on 9.10.2001 but no stand was taken on behalf of the Government that the result cannot be published in view of the new policy decision of the government taken and communicated vide Letter No. 8826 dated 20.12.2000. Thereafter the results were published by the B.P.S.C. on 9.1.2002. Subsequently by letter No. 188 dated 1.3.2002 sent by the B.P.S.C. to the Personnel and Administrative Reforms Department Government of Bihar, the names of 202 persons out of 203 for the employees of the Secretariat cadre and 194 posts out of 203 posts for employees of the Muffasil cadre were recommended in order of merit to the government.

8. However, even after the recommendation of the said names no appointment was made even though several representations were filed by the petitioners. It is stated by the petitioners that the matter was delayed due to unnecessary correspondence between the Personnel and Administrative Reforms Department and Finance Department. In this respect reference has been made of letter No. 8826 dated 20.12.2000 issued by the Finance Department, in which it has been stated that on the recommendation of the Fitment. Committee the Government had decided to reorganise certain posts including the cadre of Assistants in the Secretariat and the earlier amalgamated posts of Assistant would now be trifurcated into that of Lower Division clerk in the pay scale of Rs. 3050 - 4590. Upper Division Clerk in the Scale of Rs. 4000 - 6000 and that of the Assistants in the pay scale of Rs. 5500 -9000. In paragraph 5 of the said letter it is stated that after the demerger the direct recruitment would be made on the juniormost post of lower division clerk; further, if there is any proposal for appointment on the higher post then even though the selection has been made, the process will be cancelled and the said candidates will be given an opportunity to appear in the fresh process of selection without payment of any further fee on the lowest level post.

9. Learned Counsel for the petitioners submits that the rights of the present petitioners are covered by statutory rules contained in the Assistants of the Secretariat and Attached Offices., Rules, 1992 and the said rights cannot be overridden by executive instructions. Moreover, it is submitted that once the process of selection to the vacancies in existence has been taken on the basis of the said rules at the time of advertisement then it is to be completed on the basis of the

said rules. Any amended rule can have application only with respect to the fresh vacancies that arise after the said rule is made. With respect to the Government letter dated 20.12.2000 learned Counsel for the petitioners submits that the same is only in the nature of executive instruction which cannot have any overriding effect in derogation of the statutory rules which cover the rights of the petitioners.

10. It is further submitted that even after more than 5 years since the Government decision was communicated on 20.12.2000, the Statutory rules of 1992 relating to the appointment of the assistants are still continuing in force and, thus, the respondents are wholly unjustified in not taking decision with regard to the appointment of the petitioners after the recommendation has also been made by the Bihar Public Service Commission, that too, pursuant to the specific direction given by this Court vide order dated 9.10.2001 passed in C.W.J.C. No. 12351/2001 in which no such plea regarding the changed circumstance has been taken.

11. Learned Counsel for the intervenor petitioners supported the stand of the learned Counsel for the petitioners and have practically pressed the same arguments.

12. Learned Counsel for the State relies upon the stand taken in the counter affidavit that while the selection of the petitioners was in process the Government in the department of Finance came out with a policy decision to demerge the said post of Assistants and after the said decision direct recruitment to the post of Assistants of the Secretariat has already been stopped much prior to the recommendation of the B.P.S.C. and in view of the said decision taken by the Government much prior to the recommendation of B.P.S.C. the Department could not give effect to the recommendations made by the B.P.S.C. It is further submitted that the present is not a case of promotion rather it is a case of direct recruitment and as such the direct recruits cannot claim for appointment on the post of Assistants merely on the basis of getting so selected. It is settled principle of law that merely selection to any post does not vest any indefeasible right to a person for appointment. It is submitted that in view of the said policy decision only the posts of Lower Division Clerk can be filled up to way of direct recruitment. It is further stated on the basis of the counter affidavit that the proposal for relaxation of Finance Department's Letter No. 8826 dated 20.12.2000 was moved by the Personnel and Administrative Reforms Department but the Finance Department did not agree to the proposal.

13. Learned Counsel for the State has further strongly relied upon the order dated 10.5.2002 passed by a Division Bench of this Court in L.P.A. No.109 of 2002; The State of Bihar v. Sanjeev Kumar and Ors. In the said case the petitioners were successful candidates for appointment in process of direct recruitment to the 50% posts by open competitive examination conducted by the B.P.S.C. and their names were also recommended by the B.P.S.C. but the appointment letters had not been issued in terms of the decision contained in

Circular No. 188 dated 1.3.2002. Earlier the writ petition being C.W.J.C. No. 10627/01 was allowed by order dated 10.9.2001 of this Court with a direction to the respondent authorities to issue appointment letters to the petitioners and other eligible candidate for the post of Assistant in the Secretariat within a period of a fortnight which was challenged before the L.P.A. Bench. The said order was set aside on the ground that the State Government has already taken a decision to demerge the posts of Assistant on the basis of adoption of pay structure of the Central Government by the State Government, as a result of which the post of Assistant now is not available for direct recruitment and the only point of entry is the post of Lower Division Clerk and in view of the changed circumstances, no direction can be issued to appoint the writ-petitioners to the said post because the said post is no longer an entry point in the service rather on the other hand it has become a promotional post. It was accordingly ordered that the State Government shall now be obliged to consider the question of appointment, of the empanelled candidates to the post of L.D.C. on the said 2/3rd vacancies which had fallen in the share of the state of Bihar after reorganisation.

14. From a consideration of the aforesaid stand of the parties it is evident that the sheet anchor of the submission of the learned Counsel for the State is the decision vide order dated 10.5.2002 passed in L.P.A. No. 109/02. However, it must be remembered that the said decision cannot be automatically applied to the case of petitioners since the same related to direct recruitment of fresh candidates who were of in Government service on the basis of open competitive Examination. In such case it may be open to the State Government to act in terms of the decision of the Supreme Court in the case of Shankarsan Dash Vs. Union of India, in which it was laid down that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, even then the successful candidate did not acquire an indefeasible right to be appointed which cannot be legitimately denied and the State is under no legal duty to fill up all or any of the vacancies. However, even in such case a clear condition laid down by the Supreme Court was that the mere possession of such power by the State does not give a license of acting in an arbitrary manner and decision not to fill up the vacancy has to be taken bona fide for appropriate reasons.

15. On a consideration of the Constitution Bench decision as well as the case relied upon therein it is evident that all the said cases related to matters of direct recruitment of fresh Government servant.

16. So far as the petitioners are concerned they are government employees already in service and with respect to them the other 50% of vacancies on the post of Assistant as per statutory rules have been reserved for appointment on the basis of a limited competitive examination as well as the basis of the seniority while they were in Government service, and greater weight of 60% is to be attached to seniority then to performance in the limited competitive examination.

17. The stand of the State that it is a case of appointment and not of promotion is not justified. Learned Counsel for the petitioners has relied upon similar provisions of appointment by promotion contained in the regulations with respect to All India Services like, Indian Administrative Service, Indian Police Service, etc. where the officials of the State Government are given entry in the said All India Service Cadre on the basis of appointment by promotion regulations. For the said reasons it must be held that the decision of this Court in the order dated 10.5.2002 passed in L.P.A. No. 109 of 2002 does not apply to the case of the present petitioners since they are already in Government service.

18. Once it is held that the 1992 Statutory Rules created rights of appointment by promotion as Assistants in favour of the petitioners then their vested right at the time of advertisement issued in 1996 cannot be taken away by mere executive instructions which the circular dated 20.12.2000 of the State Government is. The said circular does not permit any one to deal with the case of such persons who are already State Government employees and are entitled to be appointed by promotion as Assistants on the basis of seniority coupled with performance in the limited Competitive Examination. It cannot be over-emphasised that 60% weightage was to the seniority of the petitioners and only 40% on the basis of their performance in the Limited Competitive Examination. Thus, the present process cannot be equated with the direct recruitment of fresh outsiders which is subject to the terms of the statutory rules or Government instructions issued from time to time relating to entry in Government service. The petitioners, on the other hand, have vested right to be considered for promotion on the existence and advertisement of the vacancies. The counter-affidavit does not deny that there were sufficient number of vacancies in 1996 when the process of appointment by promotion was started and the said position remained right up to 14.11.2000 when the reorganisation of the State took place and even thereafter.

19. It has been rightly pointed out by the learned Counsel for the petitioners that on the basis of data supplied by the Personnel and Administrative Reforms Department to the State Advisory Committee, the total strength of cadre of assistants on the date of bifurcation of the State was 4547 and out of the same 2989 has been allocated to the State of Bihar on the basis of ratio fixed for division of cadres. As against the same the working strength of the Assistants prior to the reorganisation was 2936 and out of them 1930 have been allocated to the successor State of Bihar. Thus, on their own showing as per the records of the State Government, even on 15.11.2000 there were as many as 1059 vacancies in the cadre of assistants. If 50% of the vacancies are to be treated as available for appointment by promotion of the present petitioners then the same, would come to 529 and would be more than sufficient to accommodate the 396 persons recommended by the B.P.S.C. to the State Government.

20. On the question of vacancies a stand has been taken in the rejoinder filed by the State respondents that in view of the new proposal to trifurcate the earlier

cadre of assistants, the total sanctioned strength of Assistants of 2989 after States? reorganisation alongwith the strength of Bill Clerk, Routine Clerk and Typist of 1486 in the Secretariat is to be trifurcated in equal strength among the Assistant, U.D.C. and L.D.C. and, thus, the post available for each would be 1492, 1491 and 1492 respectively. It is further stated that in view of the present working strength of Assistants of 1764 in the Secretariat and attached offices the Department of Finance has provisionally agreed with the strength of 1764 assistants, 1355 U.D.C. and 1356 L.D.C. From the said statement of the respondent authorities it is evident that there is nothing sacrosanct in the proposed equal strength of the three new cadres on bifurcation of the State, Since the present working strength of assistants at 1764 are to be accommodated. On the same reasoning the petitioners and others recommended for appointment by promotion can also be accommodated as Assistants and the strength of U.D.C. and L.D.C. can be correspondingly fixed at a lower level for the present.

21. It should also be kept in mind that the statutory rules regarding general cadre of Assistant framed in the year 1992, from which the right of the petitioners for appointment by promotion as assistants flowo has not been amended even today, more than 5 1/2 years after the government decision dated 20.12.2000.

22. In that view of the matter right of the petitioners to be appointed by promotion as Assistant in the scale of Rs. 5500 - 9000 continues on the basis of the said statutory rules and it is not possible or this Court to accept the contention of the State Respondents that a mere circular dated 20.12.2000, which has not been followed - up by the respondent authorities by making necessary amendments in the statutory rules can stand in the way of the petitioners" appointment by promotion as assistants.

23. There is another reason while the order Hated 10.5.2002 of this Court in L.P.A. No. 109/2002 cannot be applied to the case of the present petitioners. In the said order the direction issued to the State authorities was to consider the question of appointment of the empanelled candidates to the post of Lower Division Clerk. The said post carries a pay Scale of Rs. 3050 - 4590 where as barring a single case of petitioner No. 30 all the petitioners and nearly all the other candidates recommended for appointment carry higher pay scales than the same and, thus, no such direction can be issued in their favour.

24. In view of the aforesaid facts and circumstances this Court holds that the petitioners having duly qualified on the basis of their seniority coupled with their performance in the limited competitive examination and further having been recommended by the B.P.S.C. after directions were issued by this Court vide order dated 9.10.2001 passed in C.W.J.C. No. 12351 of 2001 in which no opposition was made by the Respondent State on the basis of the policy decision dated 20.12.2000, entitles the petitioners to be appointed by promotion on the post of assistants. The State respondents are directed to issue appointment

letters to the petitioners and other eligible candidates for the post of Assistants in the Secretariat and attached offices within two months from today.

25. In the result, the writ petition is allowed with the aforesaid directions. But in the facts and circumstances of the case there shall be no order as to costs.