
(2007) 05 PAT CK 0127
In the Patna High Court
Case No : CWJC No. 14385 of 2006

Niraj Kumar Singh and Another

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 15-05-2007

Acts Referred:

Citation : (2007) 3 PLJR 702

Hon'ble Judges : Mridula Mishra, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Mridula Mishra, J.—Heard the counsel for the parties. Petitioners have filed present writ application for quashing Advertisement No. 1 of 2006 issued by the Bihar Public Service Commission on 31.1.2006 inviting applications for appointment to 422 posts of Assistant Engineers (Civil) in the Road Construction Department, Public Health Engineering Department and the Irrigation Department. Advertisement has been published in the daily newspaper, on the requisition received from the Road Construction Department, Government of Bihar. Out of 422 advertised posts, 206 posts are meant for general category. Petitioners' grievance is that 206 posts meant for general category also includes 9 non-joining seats of previous advertisement being Advertisement No. 25 of 1999 against which the petitioners are claiming their appointment. Petitioners' prayer is for exclusion of 9 posts in general category posts, advertised by way of Advertisement No. 1 of 2006.

2. Petitioners' case is that the Road Construction Department, Government of Bihar, had earlier requisitioned to the Bihar Public Service Commission for appointment on 129 posts of Assistant Engineer (Civil). On such requisition, Bihar Public Service Commission published Advertisement No. 25 of 1999 inviting applications for appointment of 129 Assistant Engineers (Civil) under the Road Construction Department, Government of Bihar. Petitioners and other eligible candidates applied for their appointment. Preliminary tests were held and the

result was published. Out of 129 posts, 100 posts were meant for general category candidates. The Bihar Public Service Commission sent recommendation for 127 successful candidates. Petitioners' name were also included in the list of recommended candidates. Petitioner No. 1 was at serial No. 87 and petitioner No. 2 was at serial No. 86. Out of 127 recommended candidates, notification was issued for appointment of 82 candidates only. In spite of recommendation, no steps was being taken for left over candidates. Petitioners filed C.W.J.C. No. 4000 of 2004 which was disposed of vide order, dated 10.1.2005 in terms of C.W.J.C. No. 9605 of 2003. The ground taken by the State for not making appointment of rest candidates was that during the pendency of the selection process Bihar Reorganization Act, 2000, came into existence and on account of bifurcation, 1/3rd vacancy out of requisitioned and recommended list of the Bihar Public Service Commission were allocated to the State of Jharkhand. The Jharkhand State was not obliged to appoint candidates who were recommended by the Bihar Public Service Commission. Finally the writ applications were disposed of with a direction to appoint rest of the candidates as there were more vacancies than the number of candidates still awaiting for appointment. It was also held that even after lapse of time the recommendation made by the Bihar Public Service Commission is valid and needs no revalidation for appointment. The direction was to complete entire process of appointment within three months from the date of the order. Petitioners were at serial Nos. 87 and 86 in the list of recommended candidates but not well within 2/ 3rd vacancies allocated to the State of Bihar, on account of bifurcation of State of Jharkhand State. There were 16 candidates who were still waiting for appointment, which included 13 general category candidates, as such, vide notification No. 2592(s), dated 11.5.2005 fresh appointment orders were issued against 16 non-joining seats as per the recommendation made by the Bihar Public Service Commission. Out of 16 recommended candidates, 9 candidates did not join. A press communiqu? was published asking those non-joining candidates to give joining by 12.8.2006, failing which their appointments will be cancelled, still some of the candidates, whose names have been mentioned in paragraph 18 of the writ application, did not join. Number of such persons were four. Though these recommended candidates did not join, posts were not declared vacant. On account of non-joining of these candidates the petitioners came within 2/3rd vacancies, and they could have been appointed even after bifurcation of the State. Considering non-joining of recommended candidates, file was sent to the Secretary, Road Construction Department, Chief Secretary and the Chief Minister for approval of petitioners appointment against non-joining posts. Approval of the Departmental Minister as well as Chief Minister was also obtained, but subsequently the Reforms (sic) gave an opinion that the posts meant for non-joining candidates should be carried forward as per memo No. 11018, dated 17.6.1977.

3. Petitioners are aggrieved on account of this opinion of the Personnel and Administrative Reforms Department based on memo No. 11018, dated 17.6.1977, due to which the non-joining posts have been carried forward and

advertised for fresh appointment through Advertisement No 1 of 2006.

4. Counsel for the petitioner submits that the opinion of the Personnel and Administrative Reforms is based on 1977 Circular which is only an executive instruction and not a Rule which has become redundant due to its" non implementation. Petitioners have placed reliance on a decision reported in The Direct Recruit Class-II Engineering Officers" Association and others Vs. State of Maharashtra and others, where it has been held that "if the quota Rule is prescribed by an executive instruction, and it is not followed continuously for a number of years, the inference is that the executive instruction has ceased to remain operative". Executive instruction or even Rule if not being executed for years, loses its force. Memo No. 11018 of 1977 has never been followed and after lapse of so many years on the basis of an inoperative executive instruction, non-joining posts cannot be carried forward for fresh appointment. Counsel for the petitioners has further contended that the clause under 1977 Circular which has been relied upon by the respondents for not appointing the petitioners against non-joining posts is contrary to other clause mentioned in the same 1977 Circular. The Circular of 1977 is specific on this point that once the vacancies have been advertised, it can not be altered. The Department of the Road Construction Department by not appointing the petitioners against non-joining vacancies is also acting in contradiction to its own earlier decisions. Earlier the Department of Road Construction vide memo No. 5641, dated 25.8.1997, appointed 72 candidates on the basis of an advertisement, subsequently non-joining candidates were appointed vide memo No. 2643, dated 20.4.1998, against 24 non-joining posts. Thereafter, again vide memo No. 400, dated 15.1.1999, 16 more candidates were appointed against non-joining posts. This appointment process reached its finality when last 13 candidates were appointed against the non-joining seats vide memo No. 4862, dated 24.6.1999. The period during which candidates were allowed to join against non-joining posts, memo No. 11018, dated 17.6.1977, was in existence. If earlier the non-joining posts were not carried forward in spite of 1977 Circular there is no reason for not appointing remaining recommended candidates against non-joining posts of Advertisement No. 25 of 1999

5. Non-joining post should not have been carried forward placing reliance on 1977 Circular, which was earlier never implemented by the Department. Counsel for the petitioners has also placed reliance on a decision reported in (2005) 13 S.C.C., 403 (State of J&K & Ors. vrs. Vijay Sharma & Ors.) where it has been held that "it is just and proper to direct that out of the notified vacancies, if any of the posts are remaining unfilled, either due to want of candidates or non-joining duties, these vacancies shall be filled up by candidates out of the petitioners who have secured more than the cut off marks secured in the 1977 selection and they be appointed according to the marks secured in the selection. This exercise shall be completed within a period of four months and the appointments shall be affected by the respondent State within this period. This is also clarified that in case any of the candidates have become over age by this

time, that criterion shall not stand in the way of their appointment".

6. Counter affidavit has been filed on behalf of respondents 1 and 2 and also on behalf of respondents 6 to 9 (Bihar Public Service Commission and its authorities). Respondents 6 to 9 have stated that the Commission is only a recommending body and acts upon a requisition made by the Government Departments. On the requisition of the Road Construction Department, Advertisement No. 1 of 2006 has been published for appointment to 422 post of Assistant Engineer (Civil). The writ application against the Bihar Public Service Commission is not maintainable.

7. In their counter affidavit respondents 1 and 2 have not denied the statement made in most of the paragraphs of the writ application, it has been submitted by the counsel appearing for the State that against the judgment and order passed in C.W.J.C. No. 9609 of 2003 and analogous cases the Road Construction Department has filed L.P.A. No. 867 of 2005. L.P.A. has been referred by the Division Bench to a larger Bench which is still pending for final adjudication. The statement of the petitioners in paragraphs 18 and 19 of the writ application where reference of five recommended candidates who did not join on the posts, has been replied and stated that one of them, Jitendra Prasad, has joined on 11.9.2004. So far the other vacancy due to non-joining is concerned, it has been included in Advertisement No. 1 of 2006 in the light of letter No. 11018, dated 17.6.1977, of Department of Personnel and Administrative Reforms.

8. What I find, relevant for consideration is the statement made in paragraph 21 of the writ application giving instances of candidates joining against non-joining posts which has not been denied by the respondents rather a vague statement has been given that as per decision of the Department of Personnel and Administrative Reforms non-joining posts were not considered for appointment and carried over in next vacancies. Admittedly, letter No. 11018, dated 17.6.1977 was not being implemented in past in case of appointments against non-joining posts. Reference of which has been given in paragraph 21 of the writ application. It is sufficient to show that letter No. 11018, dated 17.6.1977, was never being implemented in past. Though this letter was in existence, it was never in practice, as such, it became redundant. Suddenly when the case of the petitioners' appointment was approved, even by the Chief Minister against non-joining vacancies, the Personnel and Administrative Reforms gave its opinion relying on letter No. 11018, dated 17.7.1977, just to frustrate the direction of this Court in the earlier writ application.

9. Counsel for the petitioners has rightly pointed out that if letter No. 11018, dated 17.6.1977, is being relied upon in that case Clause 13 of the letter should also have been considered which envisages that number of vacancies once communicated to the commission shall not be altered.

10. Considering the statement made in paragraph 21 of the writ application, I am of the view that the executive decision of the Department of Personnel and

Administrative Reforms, dated 17th June 1977 is inoperative resolution. This can not be a ground for carrying forward non-joining posts for the next year or next advertisement, specially when there is specific direction of this Court for appointing the petitioners against the non-joining posts and the vacancies were existing. So far the pendency of L.P.A. No. 867 of 2005 is concerned, it can not be a hurdle in appointment of the petitioners against non-joining posts as no order of stay has been passed.

11. The respondents are directed to exclude non-joining seats of previous advertisement, i.e., Advertisement No. 25 of 1999 from Advertisement No. 1 of 2006. Respondents are further directed to complete exercise of petitioners appointment against vacant non-joining posts which has been stopped on account of the opinion of the Department of Personnel and Administrative Reforms. This exercise must be completed within four weeks from the date of presentation/communication of this order. Accordingly, this application is allowed.