
(2001) 11 PAT CK 0028

In the Patna High Court

Case No : Letters Patent Appeal No. 329 of 2000

Ram Naresh Sharma and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 07-11-2001

Acts Referred:

Citation : (2001) 11 PAT CK 0028

Final Decision : Allowed

Judgement

Nagendra Rai, J.—The appellants have filed the present appeal against the order of the learned Single Judge dated 18th January, 2001 passed in CWJC No. 925 of 1998 by which he has quashed the decision taken by the Establishment Committee dated 15th December, 1997 (Wrongly mentioned as 5th December, 1997 in the order) granting promotions to the appellants and others as Head Warder. Copy of the said decision of the Establishment Committee was not annexed with the writ application but was annexed as Annexure-A to the counter-affidavit filed by respondent Nos. 6 to 19 and 21 to 29 to the writ application (appellants and others).

2. The facts necessary for disposal of the present appeal lie in a narrow compass. The writ petitioners and respondents 6 to 29 to the writ application (out of whom, nine have filed the present appeal and will be referred to hereinafter as appellants) were appointed on the post of Warders on different dates in accordance with the provisions contained in the Bihar Jail Manual which has a statutory force. There were 36 sanctioned posts of Head Warder out of which 21 posts were vacant and 3 were likely to be vacant within one year, that is to say, there were 24 total posts vacant. The Superintendent of Aadarsh Central Jail, Beur, Patna issued Memo No. 4580 dated 16-10-1997 inviting application for filling up 24 posts of Head Warder from amongst the eligible Warders. A copy of the said advertisement has been annexed as Annexure-1 to the writ application. It was mentioned in the advertisement that for promotion to the post of Head Warder, drill test, written test and interview will be held on 25-10-1997 to

27-10-1997. The writ petitioners and the appellants applied in terms of the advertisement. For the purpose of selection, a Committee consisting of three person, namely, Superintendent, Central Jail, Beur, Patna. Superintendent, Phulwarisharif Camp Jail and the Superintendent, District Jail, Bihar Sharif was constituted and the Committee considered the cases of all the eligible candidates, awarded marks with regard to individual candidates and thereafter, selected the appellants to the post of Head Warder.

3. The writ petitioners challenge the promotion of the Head Warders on the ground that the promotion has not been made in terms of the Bihar Jail Manual contained in Rules 198, 281, 282 and 283. The mode of selection is seniority-cum-merit, but the same has not been followed in breach of the Rules. Subsequently, the writ petitioners filed a petition annexing executive instruction issued by the Inspector General (Prisons) dated 15th June, 1988 making provision for constitution of the Committee for the purpose of considering the promotion to the post of Head Warder. It was provided therein that the Selection Committee or the Establishment Committee shall consist of Superintendent, Central Jail as the Chairman and the seniormost Superintendent of three Jails falling within the circle. In the present case, the Selection Committee have consisted of only three persons and as such the constitution of Selection Committee was illegal and accordingly, the promotion granted by it vitiated in law.

4. Three sets of counter-affidavits were filed on behalf of the respondents to the writ application, one by the Superintendent Adarsh Central Jail, Beur, Patna, other by Superintendent, District Jail Bihar Sharif and 3rd by the appellants. Their stand is that the mode of appointment of Head Warder from the Warder is merit-cum-seniority as evident from reading of Rules 198, 281, 282 and 283 of the Bihar Jail Manual. The Rules itself provide for holding of drill test and other tests for judging the efficiency and accordingly written test, drill test and interview were held and selection has been made purely on the basis of merit. With regard to Constitution of the Committee in terms of the executive instruction dated 15th June, 1988 is concerned, no reply was given to the said fact in the counter-affidavit filed on behalf of the Superintendent of Jails for the obvious reason that the said document was brought on record after filing of the counter-affidavit by them. However, the appellants in their counter-affidavit stated that the Establishment Committee or the Selection Committee was constituted of three persons only because the 4th Officer of the rank of Superintendent, District Jail was not available on account of the post being vacant and Sri Ghanshyam Ram, Superintendent, Phulwarisharif Camp Jail who was one of the members of the Committee, was also officiating as Superintendent of Patna City Sub-Jail and Danapur Sub-Jail. In other words, the stand was that due to non-availability of the 4th member, the Committee was constituted of three members only.

5. The learned Single Judge after having heard learned Counsel for the parties allowed the writ application on two grounds. Firstly, the constitution of the

Establishment Committee was in breach of the guidelines or executive instruction contained in letter dated 16th June, 1988 issued by the Inspector-General (Prisons) and as such the said Committee has no jurisdiction to make recommendation for promotion. In support of the said conclusion, he relied upon a decision of a Division Bench of this Court in the case of Sakaldip Prasad and others being CWJC No. 891 of 1993 disposed of on 29th July, 1993. Secondly, seniority-cum-merit rule was followed which was contrary to the Rules 198, 281 and 282 of the Bihar Jail Manual.

6. The learned Counsel appearing for the appellants submitted the authority to promote the Warder to the Head Warder is the Superintendent of Central Jail and by Executive instruction dated 16th June, 1988 (Annexure-4 to the writ application) a selection committee was constituted for making recommendation for appointment to the post of Head Warder. According to the same, the Selection Committee for promotion from the post of Warder to that of Head Warder should consist of three Superintendents of Jails and the Superintendent of Central Jail shall be the Chairman of the Committee. As the post of Superintendent of Jails were vacant in two Jails, the Superintendent of Phulwarisharif Camp Jail was the Incharge of the other two Sub-Jails, namely, Patna City Sub-Jail and Danapur Sub-Jail, and as such the committee consisted of only three members including the Superintendent, Central Jail, Beur, Patna. In such a situation, the absence of fourth member could not be ground to hold that the Constitution of the Committee was not proper. It was further submitted that in any view of the matter, the majority of the members were present and their decision cannot be faulted on the ground of absence of one member. The writ petitioners had participated in the process of selection and they did not raise any objection as to the constitution of Selection Committee at the initial stage and after being unsuccessful, they cannot be allowed to challenge the constitution of the Committee. He further submitted that the relevant rules of Bihar Jail Manual provide the merit-cum-seniority as the basis for selection. Rule 283 provides that only those Warders who are efficient in drill and can read and write and have knowledge of arithmetic shall be promoted to the grade of Head Warder and to find out the same holding of written test, drill test and interview were held. In other words, as the mode of selection has a merit-cum-seniority, the said tests were held to Judge the merit of the candidates. The learned Single Judge was not right in holding that the seniority-cum-merit was followed in selection and not the merit-cum-seniority as provided under the rules. He further submitted that the writ petitioners in the writ petition claimed promotion by seniority. They at no point of time asserted in the writ application that promotion is to be made on the basis of merit-cum-seniority and the learned Single Judge ignored the aforesaid statement made in the writ application while deciding the matter.

7. The learned Counsel appearing for the writ petitioners/respondents on the other hand contended that the Constitution of the Committee was not proper as out of four members which was required to be member of the Committee, only three were in the Committee and as such entire process of selection is vitiated in

law. He also submitted that the provisions of the Rules were not followed while considering the promotion from the post of Warder to the post of Head Warder.

8. Before advertizing to the aforesaid submissions advanced at the Bar, it will be useful to refer certain provisions of the Bihar Jail Manual which admittedly has a statutory force.

9. Rule 2 of the Jail Manual provides that there shall be four types of Jail, Central Jails, District Jails, subsidiary Jails at the headquarters of sub-divisions and Special Jails. Thus, whenever the word "Jail" is used, it includes all types of Jails including Sub-Jails. Rules, 198, 281, 282 and 283 of the Bihar Jail Manual are the rules dealing with the question of promotion from the post of Warder to the post of Head Warder. The said Rules are as follows:

Rule 198. A classified list of Jailors, assistant and probationary assistant Jailors, clerks and sub-assistant surgeons and a similar list of the head warders and warders of each circle shall be published half-yearly on the 1st of April and 1st of October of each year for general information.

It must be distinctly understood that promotion in the different grades and appointments will be made, as far as possible by merit and not by seniority.

Rule 281. The Superintendent of the Central Jail shall publish every six months a circle list containing the names, circle numbers and other particulars of every head warder and warder of the circle arranged in order of seniority. Superintendents should scrutinize this list with respect to the warder establishment of their Jails and affiliated subsidiary Jails, and should draw the attention of the Superintendent of the Central Jail to any inaccuracy that may be discovered. Two copies of this list shall be sent to the Inspector-General.

Rule 282. Whenever for any reason the appointment of a head warder falls vacant either temporarily or substantively, the Superintendent of the Central Jail shall from the whole of the warder staff of the circle, promote to the vacancy the most deserving, literate warder, giving preference by seniority only when two or more warders are equally deserving, and shall order such transfer of head warders and warders as may be necessary to adjust the warder establishment of each district to the sanctioned scale.

Rule 283. No warder shall be promoted to the grade of head warder unless he is efficient in drill, can read and write satisfactorily and has some knowledge of arithmetic; any head warder found to be inefficient in these respects is liable to be reduced temporarily or permanently.

10. A combined reading of the aforesaid Rules show that the promotion is to be made on the basis of merit and not on the basis of seniority alone. While considering the question of promotion, most deserving literate warder has to be selected. Only in a case when two or more warders are equally deserving, preference to seniority is to be given. Rule 283 clearly provides that promotion shall be denied to the warder unless he is efficient in drill, can read and write

satisfactorily and have some knowledge of arithmetic. Thus, the mode of selection is merit-cum-seniority and not seniority-cum-merit. The merit has primary role to play whereas the seniority has a secondary role to play. The greater emphasis is led on the merit and ability. The seniority has to be given weightage only when the merit and ability are equal among the two and more claimants. Where selection has to be made on the basis of merit-cum-seniority, the selection committee has a choice to select best talent from amongst the eligible candidates by adopting the reasonable criteria as provided under the rules. Rule 283 as stated above clearly mention about testing the merit of the candidate in different fields. The merit with regard to matters as enumerated in the rules cannot be tested without holding test with a view to find out with regard to knowledge in arithmetic, knowledge in writing as well as drill test for judging the efficiency. Thus, the holding of test by the Committee was with the sole object to judge the merit of the candidates and the procedure adopted by the Committee cannot be said to be on the basis of seniority rather it was on the basis of merit. Annexure-A to the counter-affidavit filed in the writ application on behalf of the appellants clearly mention the marks obtained by the candidates in the test on the basis of which selection has been made. Thus, no fault can be found to the selection made by the Committee.

11. According to the Rules, the Superintendent of Central Jail is the authority to promote the Warder to the post of Head Warder. The Rules are silent with regard to procedure that is to be followed. The executive instruction has been issued under the signature of Inspector-General (Prisons) constituting the Selection Committee consisting of four members, the Superintendent of Central Jail as the Chairman and Superintendent of three Jails as members. As Rules are silent with regard to constitution of the Selection Committee, the said provision only supplement the provision of the Rules and thus, the said executive instruction cannot be held to ultra vires.

12. It is well settled that rules with regard to service condition of the Government servant can either be made by the appropriate State Legislature or the rule made under Article 309 of the Constitution or by means of executive instruction issued under Article 162 of the Constitution. If the law made by the Legislature or the Rules are silent on certain matters with regard to same, then the same can be supplemented by executive instruction. Only in a case when there is conflict between the law and the Rules on the one hand and the executive instruction on the other, then the law made by the Legislature or the Rules as the case may be, will prevail over the executive instruction. See Sant Ram Sharma Vs. State of Rajasthan and Another, State of Orissa and Others Vs. Mamtarani Sahoo and Another,

13. Thus, the submission advanced on behalf of the appellant that the executive instruction dated 16th June, 1988 has no statutory force has to be rejected and it has to be held that the said instructions have supplemented the rules under the Jail Manual and accordingly, they cannot be declared as ultra vires of the

Rules.

14. The aforesaid executive instruction provides constitution of a selection committee of four members as stated above. Admittedly, three members have participated in the selection. It was asserted in the counter-affidavit filed in the writ application by the appellants which fact has not been controverted by the writ petitioner that only three members were available at the time of selection. As the post of Superintendent of two Sub-Jails as mentioned above were vacant, the Superintendent of Phulwarisharif Camp Jail who was one of the members of the Committee, was made incharge of two Sub-Jails. In such a situation, composition of Committee consisting of three persons only cannot be said to be invalid in law especially when majority of the members have participated. The decision which has been relied upon by the learned Counsel for the writ petitioner in the case of Sakaldip Prasad and others (Supra) is not applicable. In that case, apart from the Chairman only two members were invited and in that context it was held that the Committee was not properly constituted, but in this case as stated above as the posts of Superintendents were vacant in other Sub-Jails, the Superintendents available constituted the committee.

15. Admitted fact is that the writ petitioner had knowledge of the constitution of Committee. They appeared and took the chance of selection. In such a situation now they cannot be allowed to raise the question regarding illegality in the constitution of the Selection Committee after having been unsuccessful in the selection process. In this connection-reference may be made to the unreported judgment of Supreme Court in the case of Abdul Samad v. Sri Kant Prasad Srivastava, being Civil Appeal No. 2529-2530 of 1998 disposed of on 29-4-1998 wherein it was held by the Apex Court that where the person participates in the selection process with knowledge of the ground of invalidity he cannot subsequently turn around and challenge it. Similar view was expressed by a Division Bench of this Court in the case of Ganesh Prasad Yadav and Ors. v. State of Bihar and Ors. 1995(2) PLJR 170, wherein it was held that candidates having appeared before the Selection Committee having full knowledge of the constitution of the same and taking chance of having favourable recommendation, cannot challenge the recommendation of the Selection Committee after becoming unsuccessful.

16. Thus, learned Counsel for the appellants is right in submitting that both the grounds given by the learned Single Judge for setting aside the order of promotion is not tenable in law. Accordingly, the Order passed by the learned Single Judge is set aside and the appeal is allowed.

P.N. Yadav, J.

17. I agree.