

(1974) 01 PAT CK 0003

In the Patna High Court

Case No : Civil Writ Jurdn. Case No's. 1500 and 1503 of 1971

Sheo Dayal Sinha and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 25-01-1974

Acts Referred:

Bihar Agricultural Service Class I and II Recruitment Rules, 1945 — Rule 12
Constitution of India, 1950 — Article 14

Citation : AIR 1974 Patna 249 : (1974) 7 PLJR 373

Hon'ble Judges : Sarwar Ali, J;Anwar Ahmad, J

Bench : Division Bench

Advocate : Radha Raman and Dinesh Chandra Sinha, for the Appellant; Uday Sinha, Standing Counsel No. 3 and Prabhu Nath Roy, Jr. Counsel to Govt. Pleader No. 1 and Balabhadra Prasad Singh, Advocate-General and C.B. Belwariar, for the Respondent

Final Decision : Dismissed

Judgement

Sarwar Ali, J.—This judgment will govern both the writ applications, namely, C W. J. C. Nos. 1503 of 1971 and 1500 of 1971, which were heard one after the other.

2. In these writ applications the petitioners pray for quashing the appointments of certain respondents (respondents 5 to 9 in the two cases). They further pray that a direction may be issued to the State and Its officers to reconsider the whole matter and consider the cases of the petitioners, along with those of respondents, in relation to the posts to which the said respondents have been promoted. The petitioners and the aforesaid respondents thereafter referred to only as "respondents" for the sake of convenience) were formerly members of the Bihar Agricultural Service Class IT. Subsequently, they were promoted to Class I. Before the impugned promotions, all of them were in Class I of the Bihar Agricultural Service (hereinafter referred to as the "Service"). By the impugned annexures, the respondents have been appointed to posts in the grade of Rs. 900-1400 for a period of six months on ad hoc basis. The concurrence of the

Bihar Public Service Commission is being sought in respect of these appointments.

3. Rules relating to Bihar and Orissa Agricultural Service Class I were made in the year 1935 (At that time Bihar and Orissa were not separate Provinces). Part II of the rules aforesaid give the sanctioned strength of Class I posts as 10 only. In the year 1953 the number of posts had increased considerably. This will be clear from a letter of the Deputy Secretary to Government of Bihar, Development Department (Agricultural Section), to the Director of Agriculture, Bihar, on the 13th August, 1953, being letter No. D/- AG-232/53-Agri. R-149. A copy of this letter is annexure 1 to C. W. J. C. No. 1503 of 1971--although the different categories referred to in that letter, have not been mentioned there. Before stating the policy contained in this letter, it may, however, be stated that in the year 1945, in exercise of the powers conferred by Clause (b) of Sub-section (1) of Section 241 of the Government of India Act, 1935, the Governor framed certain rules. These rules relate to the regulation of recruitments to the Bihar Agricultural Service -- Class I, the Bihar Agricultural Service -- Class II, the General Provincial Service and Special Posts outside these classes. It will be necessary to refer to these rules in some detail later. I have already referred to the letter of the Government, dated the 13th August, 1953. This related to the confirmation of officers in Class I and Class II of the Service. It appears that the practice that was being followed in the Agriculture Department at that time was to confirm officers in individual posts in the Service, as distinct from their confirmation in the Service itself. This was considered to be irregular. Necessary directions were, therefore issued that, in future, officers should not be confirmed in specified posts, but in Class I or Class II of the Service, as the case may be. The letter also gave a statement showing the groups of interchangeable posts both in Class I and Class II of the Service. It also mentioned that promotions of officers of Class II would be ordinarily confined only to the corresponding groups of posts in Class I as shown in the statement annexed. Eight categories have been mentioned therein. It is not necessary to give the details thereof. But it appears that by and large, the categories related to different groups or branches of work in connection with the Department. For instance, in Category I, we find posts of Deputy Director of Agriculture, Cane Development Officer, Professor of Agriculture and Agronomist. In Category II, we find only two posts, namely, those of Agricultural Engineer and Agricultural Engineer Research (if sanctioned). In Category VII, for instance, there is only one post of Horticulturist. It may be stated that I have mentioned only Class I posts in the different categories. It appears that in the Department there are posts of various kinds, some of them may be described as general list posts, others relate to research and some of the posts are for special branches in Agriculture or Horticulture. The State Government has sanctioned a number of posts in the scale of Rs. 900-1400 in the Agriculture Department Some of these are by upgrading of the posts that were in Class I of the Service. The impugned appointments have been made after consideration of the cases of those officers who were in Category I of Class

I of the Service. The grievance of the petitioners is against this Order. It is the admitted position in these writ applications that Government decision is that the appointments to these posts would be confined to officers who were at the relevant time serving on one of the posts in Category I.

4. The contention raised on behalf of the petitioners is basically two-fold. It is contended that the recruitment or appointment to the impugned posts had to be made in accordance with the rules framed u/s 241(1)(b) of the Government of India Act, 1935, as printed in Government Notification No. 1923-D, dated the 9th July, 1945. The other contention is that the State Government is discriminating against the petitioners in the matter of promotion by confining the choice to the officers in Category I of Class I of the service.

5. I propose to deal with the first contention rather briefly, for, in order to succeed in these writ applications, the petitioners have to establish that they have a right of consideration for appointment to the posts covered by the impugned annexures; if they do not have such a right, the question whether the rules do apply or not cannot be raised at their instance. So far as these rules are concerned, they regulate the recruitment to the Service Class I the General Provincial Service and Special Posts outside these cadres. The contention of the petitioners is that these posts are covered by the expression "special posts outside these cadres" and, as such, when appointments to these posts are being made, the rules aforesaid have to be followed. The contention raised on behalf of the respondents is that the posts in question are selection posts and, as such, the rules do not apply. Selection posts, it is contended on the basis of the decision in *Dr. J. N. Mishra v. State of Bihar*, (ATR 1971 SC 1318), are not promotional posts, and since the relevant rules contained in Part III of the rules relate to promotions or transfers of officers already in service of Government, they have no application. At this stage, I would only like to mention that, without finally deciding the question, I am inclined to think that the posts in question cannot be deemed to be selection posts in the sense in which the learned Counsel for the respondents is suggesting. The State affidavit only states that they are ex-cadre posts. Ex-cadre posts can be filled up by promotion. As to what is the criterion for appointment to those posts is a different matter. It may be seniority-cum-merit, or merit-cum-seniority. The emphasis in the two cases will be different. Nevertheless, even where the predominant feature is merit, it does not necessarily mean that the post is not a promotional post. From the materials on record it does not appear that the State Government has treated these posts to be non-promotional posts. In fact, in one case a paper promotion has been given to one of the officers because officers junior to him have been promoted. If it was a pure and simple case of selection like the selection envisaged for the post of Director of Agriculture, the question of paper promotion to any officer would not arise. I, therefore, do not propose to consider the question in any greater detail at this stage and, if necessary, reference will again be made to this aspect of the matter after I have dealt with the main submission in the case.

6. The main question for consideration, therefore is whether the Government decision to confine the appointments to the officers of Category I is discriminatory and violates the fundamental rights of the petitioners guaranteed to them under Arts. 14 and 16 of the Constitution. Learned counsel for the petitioners says that the Government decision is clearly discriminatory. The contention of the respondents and the State, on the other hand, is that it is not so. It is further contended that the onus to establish discrimination is on the petitioners and in these cases the onus has not been discharged. Dealing with the question of onus first I may state that the question has been considered in several cases of the Supreme Court, including a very recent decision of that Court in the *The State of Jammu and Kashmir Vs. Shri Triloki Nath Khosa and Others*, . It has been observed by Chandrachud, J. in paragraph 24 of the judgment (page 9) that the burden is on the person asserting discrimination to set out facts necessary to sustain the plea of discrimination and to adduce "cogent and convincing evidence" to prove those facts, for there is a presumption that every factor which is relevant or material has been taken into account in formulating the classifications. There is a reference in this judgment to the observations of Subba Rao, C. J. (as he then was) in *Govind Dattatray Kelkar and Others Vs. Chief Controller of Imports and Exports and Others*, , where his Lordship observed "unless the classification is unjust on the face of it, the onus lies upon the party attacking the classification to show by placing the necessary material before the Court that the said classification is unreasonable and violative of Article 16 of the Constitution." It is in the light of these observations that the contention has to be examined. So far as the main petition is concerned, I do not find any clear averment regarding discrimination. The main emphasis in the case is that this Court has held in *G. S. Prasad v. State of Bihar* 1971 BLJR 555) that the statutory rules of recruitment do not permit any division of categories in the cadre of the Service. In the rejoinder of the petitioners to the counter-affidavit filed on behalf of the State in C. W. J. C. No. 1503 of 1971, there is a general statement that the promotion to posts carrying higher pay on the administrative side cannot be confined to any category exclusively and that the attitude of the Government is highly discriminatory. General assertion of discrimination is made at several other places. In para. 3 of the aforesaid rejoinder, it has been stated that appointments are made in the cadre, and not to the category. Certain instances have been given where promotions, transfers and postings of officers of one category to another had taken place previously. It would thus appear that there is considerable force in the argument put forth on behalf of the respondents that the writ applications do not give sufficient materials on the basis of which discrimination could be held to have been established in this case. I, however, do not propose to rest the decision on this aspect of the matter and like to consider the question in some detail.

7. Before I do so, I must notice one other argument raised on behalf of the petitioners. It is contended, that the basis of the appointment or selection is the

Government decision that the appointments are to be confined to the officers of Category I. This, it is contended, could not be done, because it is contrary to the rules of the year 1945. Any executive decision or order, which is against, or in conflict with the rules, it is contended, cannot be allowed to stand. The correct position in law, as I conceive, is that, if there are rules in relation to appointments in question, then any executive instruction or Government policy decision, which is contrary to or in conflict with the rules, cannot be held to be valid. But, if there is no conflict, then it is possible for the Government to lay down certain standards or policy which may be deemed to be supplemental to the rules, always remembering that they should not be contradictory to or in conflict with the rules. This has been so held in *Lalit Mohan Deb and Others Vs. Union of India (UOI) and Others*, . Examining the matter from this point of view, a reference may be made to Rule 12. This rule authorises the Director of Agriculture to nominate officers for promotion. It does not lay down any standard or give any guidance in the matter of selection. I am, therefore, of the view that standards can be laid down and guidance can be given by executive instructions which would not, in the circumstances, be held to be contradictory to or in conflict with the rules.

8. So far as the argument regarding discrimination is concerned, the contention of the learned Counsel for the petitioners is that there are a number of officers who are all officers in Class I. They, at the time of their appointments, would, presumably, have identical qualifications. The minimum qualification, it was contended, was a graduate's degree in Agriculture. It was just a matter of chance that some of them were appointed in different categories where posts were available. In those circumstances, there is no rational basis for excluding those officers from appointment to the higher posts in the grade of Rs. 900-1400. It was further contended that, having been promoted to Class I service, the officers in categories II to VIII would have the door of further promotion closed for ever. It was only Category I officers who had all opportunities to reach higher posts. This itself was discriminatory. As an illustration, it was pointed out that whereas Professor of Agriculture, who is in Class I, will have sufficient opportunity of promotion, the Professor of Agricultural Chemistry in category III, will have no such opportunity. There was, it has been contended, no rational basis for the same.

9. It would, perhaps, be better at this stage to consider the circumstances under which the Court will be justified in striking down any Government action as discriminatory. Proper guidance for the purpose is again available from the decision in *The State of Jammu and Kashmir Vs. Shri Triloki Nath Khosa and Others*, . It would be pertinent to quote a few observations from the judgment. In paragraph 26 it was observed :

"But we cannot sit in appeal over the legislative judgment with a view to finding out whether on a comparative evaluation of rival theories touching the question of promotion, the theory advocated by the respondents is not to be preferred.

Classification is primarily for the legislature or for the statutory authority charged with the duty of framing the terms and. conditions of service; and if. looked at from the standpoint of the authority making it, the classification is found to rest on a reasonable basis, it has to be upheld."

In paragraphs 37 and 38, it was observed:--

"37.....Classification, therefore, must be truly founded on substantial differences which distinguish persons grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved.

38. Judicial scrutiny can therefore, extend only to the consideration whether the classification rests on a reasonable basis and whether it bears nexus with the object in view. It cannot extend to embarking upon a nice or mathematical evaluation of the basis of classification, for were such an inquiry permissible it would be open to the courts to substitute their own judgment for that of the legislature or the rule-making authority on the need to classify or the desirability of achieving a particular object."

Still another observation of Justice Holmes was also approved in paragraph 42 where Justice Holmes said :--

"We must remember that the machinery of Government would not work if it were not allowed a little play in its joints."

It is in the light of these principles that the matter has to be further examined.

10. Let me first refer to some of the statements as made in the counter-affidavit filed on behalf of the State. In paragraph 4 of the counter-affidavit in C. W. J. C. No. 1503 of 1971, it is stated:--

"Government has categorised different posts of Agriculture Department on the basis of different branches of Agricultural Science. Officers of particular category have to perform duties conforming to the sphere of the subject of the Agricultural Science of particular category. Thus the officers of particular category are suitable to perform the duties of any post of that very category and not of other categories."

In paragraph 8 it is asserted that the nature of duties of the posts of Joint Director of Agriculture etc. "are akin to that of Deputy Directors of Agriculture or District Agriculture Officers which are in category I." It has further been asserted that, taking into consideration the nature of the duties of the vacant posts and considering the suitability of the officers of category I, the appointments have been made. In the counter-affidavit filed in C. W. J. C. No. 1500 of 1971, in paragraph 5 it is stated that for a very long time the Service has been divided, into several categories according to the nature of work and that the general administration falls in category I.

11. Posts which are mentioned in Classes I and II of Category I may be

mentioned here.

Category I

"Class I Bihar Agricultural Service. Class II Bihar Agricultural Service.

1. Dy. Director of Agriculture. 1. Asstt. Director of Agriculture.
2. Cane Development Officer. 2. Dist. Agrl. Officers.
3. Professor of Agriculture. 3. Asstt. Professors of Agriculture.
4. Agronomist. 4. Agronomist or Asstt. Agronomist
5. Dy. Director of Extension Service. 5. Field Agronomist.
6. Chief Instructors I/C. Extension Training Centres. 6. Agrl. Extension Officer.
7. Agriculturists."

These posts, generally speaking, do appear to be posts of general nature and many of these posts are posts connected with general administration. Of course, there is also a teaching post, namely, that of Professor of Agriculture. But this post is not confined to any particular branch or section of Agriculture. The post of Agronomist is, perhaps, a post which may be deemed to be connected with research. So far as the other categories are concerned, it would be noticed that they are not posts where experience of general administration would be available. The research posts are confined to a particular specialisation. Even a teaching post like that of Professor of Agricultural Chemistry is confined to only one subject. It is in the background of this distribution or categorisation of work that the matter has to be further examined. This categorisation, which was held in G. S. Prasad's case 1971 BUR 555 (supra) to be only an administrative arrangement, was found to be on scientific basis, and not violative of Article 16 of the Constitution.

12. After these preliminary observations, it may be pertinent to refer to the Manual of the Department of Agriculture, Bihar (1959 edition), on which reliance was placed on behalf of the State. In order to explain the nature and duties of the work connected with the post of Deputy Director of Agriculture, reference was made to the enumeration of duties as given at page 3. Reference was also made to the various duties as given in this Manual in relation to other posts. It is not necessary to give a detailed analysis thereof, or to quote the duties from this Manual in this judgment in relation to duties of the Sub-Divisional Agricultural Officer and the Additional Sub-Divisional Agricultural Officer. Reference was also made to the Farm Manual, 1962 edition. All this was done to show that the nature of duties which have to be performed by most of the officers in Category I are of a general administrative nature and the experience that is required for those posts will not be available to the specialists or those who have experience, even though administrative, of a particular branch. It may further be stated that the posts of Deputy Director of Agriculture, which were in Category I of Class I,

have been upgraded to those of Joint Directors.

13. It is in the light of these materials that the question has to be examined and decided. It is not for this Court to sit in judgment on matters of executive decision or policy. If, on the materials that are available, it is possible to hold that a view could be formed that the posts in question should be manned by only those who have gained particular experience, the Court will not be entitled to declare such a decision as constitutionally invalid. It is only where the decision is such that it has no reasonable nexus to the object which is sought to be achieved, or the classification is such that no reasonable person could make the classification, that the Court will be entitled to interfere.

14. From what has been stated in the counter-affidavit of the State and the other materials placed in the course of arguments, to which reference has been made, the underlying idea in the Government decision appears to be to stream-line the field administration. It is to appoint persons, who, being in a category, have gained, sufficient expertise and experience, to carry out the work in the higher post, that the appointments have been made. On the materials that have been adduced, it is difficult to hold that there is no nexus between the object sought to be achieved and the decision that has been taken. It is also clear that the classification, for the purposes of promotion, is based on substantial difference, distinguishing officers of Category I from the officers of other categories. It is also not such a decision which no reasonable person could take. I may at this stage refer to annexure 9, which is contained in the rejoinder of the petitioners to counter-affidavit of the State in C. W. J. C. 1503 of 1971. There it has been stated that some of the persons appointed in Class II in one category were transferred to the other category. It has also been mentioned there that some persons who were not in Category I have been appointed to posts which appear to be on the statement made by the State in its counter-affidavit, connected with that category. It has thus been contended that Government had not been following in the past what it has now decided to do. Apart from the fact that this annexure has been given in the rejoinder to the counter-affidavit and the Rules of this Court do not envisage any reply to the rejoinder, it is clear that there is no clear assertion with respect to at least items 12 to 14 whether the higher appointments were by promotion or by direct recruitment. So far as item No. 15 is concerned the appointment of Dr. Shastri was in Category VIII. The first promotion mentioned in column 5 appears to be of the same category. So far as transfer is concerned, we do not know under what circumstances the transfer did take place. So far as the other items are concerned, it does appear from this annexure that there was change of categories in certain cases. But we do not know what were the circumstances in which the change took place. Government decision of the year 1953 speaks that categorisation has to be adhered to ordinarily. There may be special circumstances warranting change of category. In any event, this material, in my view, is not such as to lead to the conclusion that the State has not generally adhered to the policy made in the year 1953. I find in the counter-affidavit of the State that it has been stated that even in the past the

same policy had been followed as has been done in the case of the impugned appointments. Learned Counsel for the petitioners referred to some portions of the judgment of G.S. Prasad's case 1971 BLJR 555 (supra). In that case at one place it appears to have been mentioned, in summarising the counter-affidavit of the State, that it is wrong to say that the posts in the scale of Rs. 900-1400 were filled up by promotion from officers on the administrative side only. From this, learned Counsel tried to infer that there has been a change in the policy. I have looked into the counter-affidavit filed in that case. It is not clear as to which paragraph of the counter-affidavit was in the mind of the Bench in making the aforesaid observation. I have very carefully examined the counter-affidavit. I do not find that the stand taken in that case was contrary to or inconsistent with what has been taken in the present cases. There also in the counter-affidavit it was stated that the promotions had been made from officers of Category I. There is thus no inconsistency between the stand in G. S. Prasad's case and the present cases.

15. I am thus of the view that, on the materials on the record, it is not possible to hold that the decision of the Government to confine the impugned appointments to the officers of Category I was discriminatory. It, however, appears that there is some substance in the grievance of the petitioners, who really represent the officers who may be termed to be specialists or having experience only in a particular branch, that, whereas avenues are open to officers who have served in Category I, so far as the rest of the categories are concerned, the door of further promotion or rise appears to be at present closed for ever for Class I officers. As I have already pointed out, this could not be, in the circumstances of the case, a basis for interference by this Court on the ground of discrimination. Whether such a policy is just to the officers or not using the expression in the larger sense, is a matter, which the State has to decide. The petitioners, if they have any grievance, should approach the State for the redress of their grievances, which would naturally be considered on its merits.

16. In the result, I do not find any scope for interference in the exercise of writ jurisdiction of this Court. These applications are, accordingly, dismissed, but without costs.

Anwar Ahmad, J.

I agree.