

(1971) 02 PAT CK 0016
In the Patna High Court
Case No : C.W.J.C. No. 955 of 1968

Sheo Nath Prasad

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 01-02-1971

Acts Referred:

Constitution of India, 1950 — Article 311, 311(2)

Citation : (1971) PLJR 236

Hon'ble Judges : S.N.P. Singh, J;Kanhaiyaji, J

Bench : Division Bench

Advocate : Radha Raman, Amirchand Nirankar, Dayanand Singh and Manmohan, for the Appellant; Lal Narain Sinha, C.B. Belwariar and Shreenath Singh, for the Respondent

Final Decision : Allowed

Judgement

Kanhaiyaji, J.—The petitioner, Sheo Nath Prasad, has challenged the validity of the order of the Government dated the 8th may, 1967 (Annexure "V"), which is to the following effect:

Nirdesanusar adhohastachhari ko suchit karna hai ki Adhichhan Abhiyanta dwara kiye gaye aspastikaran yukti sangat nahin hai. In sabhi bato par bichar karke Sarkar dwara Sri Jamuna Prasad, dwitiya shreni prarupak ko pratham shreni prarupak ke pad par pro-unnati ke adesh vibhagiya Geyap Sankheya 4500 dinank 16.3.67 ke dwara diya gaya tha. Atah Adhichhan Abhiyanta Kripaya adesh ka palan karen tatha anupalan partivedan turat bheje.

The facts may be briefly stated. The petitioner worked as Draftsman, Grade II In investigation and Project Circle, Patna, from the 30th April, 1958, to the 20th February, 1965. In the year 1964, a Tube-well Circle was created in the Irrigation Department, and nominations were invited by the Superintending Engineer, Tube-well Circle, Patna (respondent no. 2) from all other circles of the Irrigation Department to fill up the post of a Draftsman, Grade I, and also for several other

posts. The petitioner was nominated from the circle in which he was working for the aforesaid post of Draftsman, Grade I. A Selection Board consisting of the Superintending Engineer, Tube-well Circle, Patna, Executive Engineer, Lift Irrigation Division, Arrah, and Executive Engineer, Lift Irrigation Division, Patna, was constituted which interviewed all the nominees of the different circles and, finding the petitioner suitable for the job, selected him for appointment to the post of Draftsman, Grade I. The petitioner was appointed to the post of Draftsman, Grade I, in the scale of Rs. 100-5-130-EB-6-190, replacement scale 160-7-202 EB-7-244-9-280 (Maximum 253), as given in Annexure "IV", plus usual allowances on probation for six months. The appointment letter dated the 10th February, 1965, for the above post was issued by the Superintending Engineer, Tube-well Circle, Patna; a copy whereof is Annexure "I" to the writ application. The petitioner was then relieved from the post of Draftsman, Grade II, under the Superintending Engineer, Investigation and Project Circle, Patna, to join his new post; a copy of the relieving letter is Annexure "II" to the application. The petitioner joined the post of Draftsman, Grade I, on the 20th February, 1965, and was confirmed to the post of Draftsman, Grade I, by an order of the Superintending Engineer, Tube-well Circle, Patna (respondent no. 2), through his memo no. 3738; a copy whereof is Annexure "III" to the writ application. The petitioner was also granted the annual increment in the replacement scale of pay with effect from the 21st February, 1966, according to memo no. 2983 dated the 14th June, 1966; a copy of which is Annexure "IV" to the application. Through memo no. 4500 dated the 16th March, 1967, the State of Bihar (respondent no. 1) in the Irrigation Department directed appointment of Sri Jamuna Prasad (respondent no. 3) to the post of Draftsman, Grade I, held by the petitioner after demoting the petitioner to the post of Draftsman, Grade II. This information was sent to the petitioner through memo no. 3374 dated the 19th May, 1967; a copy of which is Annexure "V" to the writ application. The petitioner submitted a representation to the Hon"ble Minister, Irrigation Department, Government of Bihar through proper channel on the 18th May, 1967; a copy of which is Annexure "VI" to the application. When the petitioner received no reply or order upon his representation, he submitted a fresh representation on the 4th September, 1968 to the Advisor to the Governor of Bihar through proper channel. A copy of the said representation is Annexure "IX" to the writ application. The petitioner thereafter received memo no. 4789 dated the 24th September, 1968, informing him that his prayer for maintenance of status quo with regard to the post of Draftsman, Grade I, had been rejected. A copy of the same is Annexure "X" to the writ application.

2. Learned counsel for the petitioner in support of the application contended that the petitioner held the post of Draftsman, Grade I, as a direct recruit for more than two and a half years and that he was also confirmed to the post after his performance was found satisfactory. He held no lien on his previous post inasmuch as he was given the starting salary of a Draftsman, Grade I, and also increment. His demotion and reduction in rank had been made without any cause

of legal basis superseding all canons of justice. It was urged that due to demotion and reduction in rank the petitioner would suffer a huge financial damage, great mental torture and unwarranted humiliation without any fault on his part.

That the impugned order is mala fide and arbitrary, and it has violated the provisions of Article 311(2) of the Constitution.

3. The impugned order has been sought to be justified on behalf of the State of Bihar (respondent no. 1) on the ground that it was issued validly as there had been a mistake in the appointment of the petitioner. In the counter-affidavit filed on behalf of the State of Bihar, it is stated that the order of appointment of the petitioner to the post of the Draftsman, Grade I, was temporary inasmuch as the post of Draftsman, Grade I, itself was a temporary post and the petitioner was also thus a temporary employee. It is denied that the petitioner has been demoted or that his rank has been reduced. Further, the petitioner was not entitled to any show cause as the impugned order had been passed not by way of punishment or as a result of any enquiry against him. The petitioner was a temporary Draftsman, Grade II, and therefore, he had no right to hold the post of Draftsman, Grade I, which was itself a temporary post. In Paragraph 5 of the counter-affidavit, it is stated that while filling up the post of Draftsman, Grade I, after the creation of the Patna Circle in 1964, although nominations were called for, but the name of Sri Jamuna Prasad (respondent no. 3) was not sent, and, so he represented his case before the Chief Engineer, Irrigation, Bihar, against the injustice done to him. Sri Jamuna Prasad claimed that he was a permanent Draftsman, Grade II, having an experience of eleven years, whereas the petitioner, on the other hand, was a temporary Draftsman, Grade II, junior to him. The Chief Engineer called for a report from the Superintending Engineer and examined the relevant facts and placed the whole matter before the Government in Irrigation Department with his recommendations. Since Sri Jamuna Prasad was ignored and the petitioner was a temporary servant working on a temporary post, so no illegality was committed by passing the impugned order to rectify the mistake.

4. A counter-affidavit has also been filed on behalf of Sri Jamuna Prasad, respondent no. 3. In this counter-affidavit, the action of the Superintending Engineer inviting nominations even before the sanction of the Government was given has been challenged. The constitution of the Selection Board and the procedure adopted by it have also been stated to be illegal. It is stated that the appointment of the petitioner to the post of Draftsman, Grade I, was also illegal due to the fact that the minimum experience required for that post was at least of seven years as Draftsman. The petitioner having not worked for seven years as Draftsman, his appointment was completely illegal and against the rules. In support of this, a copy of Circular No. 1952 dated the 25th January, 1955, issued from the office of the Chief Engineer, Irrigation Department has been annexed to the counter-affidavit as Annexure "B". It was submitted on behalf of this

respondent that since the appointment of the petitioner was not in conformity with the rules, therefore, the Government passed the necessary and appropriate orders on the representation of Sri Jamuna Prasad and allowed him to join as Draftsman, Grade I.

5. It appears that originally there was only one circle in South Bihar of the Irrigation Department known as "Sone Circle and Tube-wells, Arrah". On the increase of the work-load, this circle was split up into two circles known as (1) Sone Circle, Arrah, and (2) Tube-well Circle, Patna, vide Government order dated the 16th December, 1964. The two existing divisions, namely, (1) Lift Irrigation Division, Arrah, and (2) Lift Irrigation Division, Patna, were put under the control and supervision of the newly created tube-well circles at Patna, of which the Superintending Engineer, Tube-well Circle, Patna, was made incharge. It is stated in the counter-affidavit of Sri Jamuna Prasad that he was working under the Superintending Engineer of Tube-well Circle, Patna, who had actually called for the nominations, and it was for him alone to recommend his name for the consideration of the Selection Board.

6. Learned Advocate General, appearing for the State of Bihar, respondent no. 1, contended that the petitioner had been appointed by mistake and it was open to the employer to rectify the mistake and relieve another employee of the injustice meted out to him due to that mistake. I am not convinced that the petitioner had been appointed by mistake. In support of my view, I would refer to a letter no. 2175 dated the 31st March, 1967, written by Shri S.M. Jamal, Superintending Engineer, Tube-well Circle, Bihar, Patna, to the Deputy Secretary to the Government, Irrigation Department, Bihar Patna, in connection with the application of Sri Jamuna Prasad, respondent no. 3. The contents of the letter, which is Annexure "VII" to the application, are as follows:--

In reference to your Memo no. 4500 dated 16.3.67, I have to state that Shri Sheo Nath Prasad, 2nd Grade D/man, Investigation and Project Circle was appointed as 1st grade Draftsman of the newly created Tubewell Circle, after observing all the formalities required under rules for such appointment as detailed below:--

1. The Tubewell Circle was created vide Government orders in Irrigation Department No. 25922 dated 17.12.64, placing all the Divisions including divisions of the North Bihar within the control of this Circle.

2. In order to give wide publicity and to pick up best among the lot, it was felt unavoidably necessary to invite nomination from Irrigation Circle of North and South Bihar.

3. Subsequently, nomination was invited from almost all the existing circle of Irrigation Department, Viz., (1) I & P Circle, Patna, (2) Central Design Circle, Patna, (3) South Bihar Waterways Circle, Patna, (4) Construction Circle, Gaya, (5) Sone Circle and Tube-wells, Arrah, (6) Waterways Circle, Darbhanga, (7) Gandak Circle, Muzaffarpur, (8) Flood Investigation Circle, Muzaffarpur, (9) Chotanagpur

Waterways Circle Ranchi, and (10) South Bhagalpur Construction Circle, Bhagalpur, as per this office no. 31 dated 21.8.68.

4. Nomination was also invited from the Superintending Engineer, Sone Circle and Tube-wells, Arrah, under whose administrative control, L.I. Division, Arrah was then. No nomination from S.W., Sone Circle, was received. That eventually pointed out the incapability of Shri Jamuna Prasad, 2nd Grade Draftsman, L.I. Dn., Arrah. The S.E. Sone perhaps did not find him a suitable candidate for being nominated for the post of 1st Grade Draftsman, in Tubewell Circle.

5. The selection of 1st Grade Draftsman was made, out of nomination received from the following Circles, viz., F.I. Circle, Muzaffarpur, Waterways Circle, Darbhanga, Unified Minor Irrigation Circle, Patna and Investigation and Project Circle, Patna, by a duly constituted Board, comprising of E.E.L.I. Dn., Patna and E.E.L.I. Dn., Arrah, under the Chairmanship of Superintending Engineer, Tubewell Circle, Patna.

It would, therefore, appear from the foregoing paras that selection of Shri Sheonath Prasad, as 1st Grade Draftsman was made after due deliberation, by the Selection Board. The question of seniority of a particular candidate, whether he be within the circle or outside, was not considered feasible when appointment was based on nomination. The claim of Shri Jamuna Prasad, 2nd Grade Draftsman, L.I. Dn., Arrah, may be considered when next such vacancy occurs for promotion as 1st Grade Draftsman when he could compete in other ways too.

7. It is admitted in the counter-affidavit filed on behalf of Sri Jamuna Prasad, respondent no. 3, that the writer of the letter, Sri S.M. Jamal was holding the post of the Superintending Engineer at the relevant time. It is not denied by the respondents that the petitioner had been appointed by the Selection Board after holding an interview of all the nominees of different circles on finding him suitable for the job. The only mistake complained of on behalf of the State of Bihar, respondent no. 1, is that the claim of Sri Jamuna Prasad (respondent no. 3) was ignored while filling up the post of Draftsman, Grade I. It has already been shown that perhaps Sri Jamuna Prasad, respondent no. 3, was not nominated by the Superintending Engineer as he was not found a suitable candidate.

8. Assuming that it was a case of mistake, the question arises whether the petitioner could have been removed from the post of Draftsman, Grade I, without following the constitutional procedure. The petitioner was confirmed to the post of Draftsman, Grade I, although this post continued to remain in temporary cards and the draftsman a temporary employee. It is well known that in absence of a contract to the contrary, the petitioner could have continued as Draftsman Grade I till the post was abolished. Article 311 does not, in terms, say that the protection of that Article extends only to persons who are permanent members of the services or who hold permanent civil posts. In the next place, Clause (2) of Article 311 refers to such persons as aforesaid, and this reference takes us

back to Clause (1) of that Article which speaks of a person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State. If a civil servant has got a right to continue in the post, then unless the contract of employment or the rules provide to the contrary, the person concerned cannot be dismissed or removed or reduced in rank except after following the constitutional procedure of Article 311(2). A reduction in rank may be by way of punishment or it may be an innocuous thing. If the Government servant has right to a particular rank, then the very reduction from that rank will operate as a penalty, for he will then lose the emoluments and privileges of that rank. The test has been laid down by their Lordships of the Supreme Court in (1) *Parshotam Lal Dhingra Vs. Union of India* (UOI), in the following words:

The real test for determining whether the reduction in such cases is or is not by way of punishment is to find out if the order for the reduction also visits the servant with any penal consequences. Thus if the order entails or provides for the forfeiture of his pay or allowances or the loss of his seniority in his substantive rank or the stoppage or postponement of his future chances of promotion, then that circumstance may indicate that although in form the Government had purported to exercise its right to terminate the employment or to reduce the servant to a lower rank under the terms of the contract of employment or under the rules, in truth and reality the Government has terminated the employment as and by way of penalty.

9. In this case, it must be held that the petitioner had right to hold the post of Draftsman, Grade I, and by degradation in rank he would suffer a huge financial damage. The petitioner will have reduction in pay and pension. Therefore, this reduction from the post of Draftsman, Grade I, to Draftsman Grade II, will be deemed to be by way of penalty, and Article 311(2) will be attracted.

10. Mr. Belwariar, learned counsel appearing for Jamuna Prasad, respondent no. 3 strongly contended that the appointment of the petitioner to the post of Draftsman, Grade I, was illegal, because he had put in only six years of service as Draftsman, Grade II. In this connection, he referred to a letter bearing no. 1952 dated the 24th/25th January, 1955, from the Chief Engineer, Irrigation Department; a copy whereof is Annexure "B" to the counter-affidavit filed on behalf of Sri Jamuna Prasad. It is stated therein that for the post of Draftsman Grade I, the candidate must have worked as Grade II Draftsman for not less than seven years. Learned counsel further pointed out that the procedure adopted by the Selection Board was illegal as it did not hold any written test. Annexure "A" to the counter-affidavit on behalf of Sri Jamuna Prasad contains the procedure for selection of candidates to Government service. In Clause (4), it is stated that selection of candidates for all post and services except those belonging to Grade IV should be made after holding a written test. Where there is a viva-voce test as well as a written test the appointing authority should be assisted by two Officers while holding the viva-voce test. The instruction contained in the letter

(Annexure "B") written by the Chief Engineer is only a direction. Therefore, the appointment of the petitioner as Draftsman, Grade I, who had worked for more than six years in Grade II, cannot be said to be illegal. It was open to the Selection Board to disqualify the petitioner on this ground. There is nothing to show that the members of the Selection Board were not aware of the instruction contained in the said letter. In view of the fact that the minutes of the Selection Board are not before us, it is not clear as to what procedure was followed by the Selection Board when the interview of the nominees for the post of Draftsman, Grade I, was held. In this connection, it is material to remember that in the counter-affidavit filed on behalf of the State of Bihar, respondent no. 1, no such irregularities or illegalities have been alleged. For these reasons, I do not find any force in the contentions raised on behalf of Sri Jamuna Prasad, respondent no. 3.

11. Therefore, in my opinion, the reduction in rank of the petitioner was illegal and unjustified. However, if the claim of Sri Jamuna Prasad was considered, in any way, to have been ignored, Sri Jamuna Prasad (respondent no. 3) should have been considered for the next vacancy, or, he should have been provided with the post of Draftsman, Grade I, somewhere else. For the foregoing reasons, I hold that a writ in the nature of certiorari should be issued to quash the order of the Government of Bihar dated the 8th May, 1967, contained in Annexure V to the application. I would, accordingly, allow this application with costs payable by the State of Bihar, respondent no. 1, to the petitioner; hearing fee is assessed at Rs. 150/- (one hundred and fifty) only.

S.N.P. Singh, J.

I agree