

(1972) 04 PAT CK 0011

In the Patna High Court

Case No : Civil Writ Jur. Case No. 1651 of 1971

Shyam Sundar Sen

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 19-04-1972

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : AIR 1972 Patna 441

Hon'ble Judges : S. Akbar Husain, J;N.L. Untwalia, J

Bench : Division Bench

Advocate : Shyama Prasad Mukherji, Ganga Prasad Roy and Ram Shankar Badhan, for the Appellant; T.K. Jha, Standing Counsel No. 2, K.N. Keshava, Shyam Kishore Pd. II, Surendra Prasad Sinha II, Deogovind Prasad and I.T. Gour, for the Respondent

Final Decision : Allowed

Judgement

Untwalia, J.—Sri Shyam Sundar Sen is the sole petitioner in this writ application under Articles 226 and 227 of the Constitution of India. The State of Bihar is respondent No. 1. The then Minister-in-Charge, Public Health Engineering Department, Government of Bihar, by name, is respondent No. 2. The Secretary and the Deputy Secretary of the Department are respectively respondents Nos. 3 and 4. The Secretary, Board of Revenue, is respondent No. 5 Sri Sachida Nand Prasad Singh, Sri Devendra Bahadur Singh, Sri Kanhaiya Prasad Sinha and Sri Jagdish Prasad are respectively respondents 6, 7, 8 and 9. The petitioner has obtained a rule against the respondents to show cause why the order of respondent No. 2 contained in Annexure "4" be not quashed and why respondents 1 to 4 be not directed to give effect to the order contained in Annexure "2" and consequently respondent No. 5 should be directed to modify the order of the Board contained in Annexure "9". A counter-affidavit has been filed on behalf of respondents 1 to 4 and another on behalf of respondent No. 8 and by none else. Hereinafter reference will be made to the counter-affidavit of respondents 1 to 4 as "the counter-affidavit." An affidavit in reply has been filed

by the petitioner to the counter-affidavit. At the time of the hearing of the writ application respondents 7 and 8 were separately represented by their counsel.

2. The relevant facts which may be stated with reference to the petitioner's case from his writ application are these. The petitioner was appointed as a lower division assistant in the year 1955. He was confirmed to that post in the year 1958 (the year "1956" is a mistake in paragraph 2). He was promoted to the post of upper division assistant in the year 1962, vacancies in the Bihar Junior Civil Service are filled up by direct recruitments as also by promotion giving chances to non-Gazetted Government servants of all departments.

The State Government takes a decision as to how many vacancies would be filled up by promotion of the non-Gazetted staff. Such a decision was taken in the year 1971 that 48 vacancies in the Bihar Junior Civil Service would be filled up by nomination of the candidates, whose names would be recommended by the Heads of Department. A letter to this effect was written by the Appointment Department on the 7th of August, 1971. A copy of this letter is Annexure "1" to the writ application and Annexure "A" to the counter-affidavit. This letter was written to the Secretary, Board of Revenue. The Board upon receipt of the letter issued a letter dated the 1st of September, 1971, to all heads of Department inviting nominations after fixing their respective quotas. A copy of this letter is Annexure "B" to the counter-affidavit. The quota fixed for the Public Health Engineering Department, of the Government of Bihar out of 48 was 3, 2 for general and and 1 for a member of the Scheduled caste or tribe. In pursuance of the letter (Annexure B) the Chief Engineer of the said Department recommended the names of the petitioner and respondent No. 6, in order of preference, placing the petitioner as first and the said respondent as second, and recommended the name of respondent No. 9 to the special quota of the scheduled caste and tribe- His recommendation is dated the 12th of October, 1971, and a copy of it is Annexure "2" to the writ application. The Deputy Secretary of the Department gave his note on the 13th of October, 1971, and suggested the adding of the name of respondent No. 8 in the general quota, and, keeping in view the respective seniority, he recommended that the third place in general quota may be assigned to respondent No. 8. The Secretary of the Department by his note dated the 13th of October, 1971, agreed with the suggestion of the Deputy Secretary. A copy of these notes is Annexure "3" to the writ application.

3. Annexure "5" is a copy of the letter dated the 14th of October, 1971, written by two members of the Bihar Legislative Assembly to the then Minister-in-charge of the Department. In this letter they purported to advocate the cause of respondent No. 7 and thereupon respondent No. 2, the ex-Minister-in-charge made an order on the 26th of October, 1971, a copy of which is Annexure "4". By his order he directed to send the names of five persons and indicated the preference as follows: (1) respondent No. 6, (2) respondent No. 7, (3) the petitioner, (4) respondent No. 8, and (5) respondent No. 9. The petitioner filed a representation before the Minister. A copy of this representation is Annexure "6".

On the margin of this representation the same Minister (respondent No. 2) made an order on the 2nd of November, 1971, that recommendation of all the five persons may be made indicating the preference in order of seniority. There appears to be a note of the Chief Engineer dated the 6th of November, 1971, which is contained in Annexure "4", indicating that he had exactly done so in his note given previously, I am narrating the facts seriatim in a bit detailed manner as they are so telling. If the order of the Minister passed on the 2nd of November, 1971, on the representation of the petitioner, supported as it was by the note of the Chief Engineer dated the 6th of November, 1971, would have been followed, the petitioner would have retained his position contained in Annexure "2" and he would have been shown as the first nominee in order of preference, the second place going to respondent No. 6.

But then as it appears, respondent No. 7 had pulls and his pulls were in operation. After the order of the Minister dated the 2nd of November, 1971, a very curious thing happened as would be apparent from the note dated the 13th of November, 1971, of the Private Secretary to the Minister. This note recites that the writer had conversation with the Minister, who was at Dhanbad on that date, at 9-30 a.m. and he was directed to say that no nomination paper should be sent to the Board and the Minister had expressed the desire that if in this connection he had sent any note to the Department that should be returned to him so that it may be annulled because he did not want to make any amendment in his previous order. It however, appears from Annexure 8, a copy of the note of the Secretary dated the 16th of November, 1971, that he was of the opinion that the names in order of preference should be on the basis of seniority when all of them were being nominated as found fit for the purpose. But it appears that what was recommended finally was the order of the Minister dated the 26th of October, 1971, contained in Annexure "4". Thereupon the Board of Revenue in their letter dated the 30th of November, 1971, written by the Secretary of the Department to the Deputy Secretary, Public Health Engineering Department, accepted the names of respondents 6 and 7 for the two general seats and respondent No. 9 for the special seat as having been validly nominated for the purpose of giving them chances of promotion to the Bihar Junior Civil Service. A copy of this letter is Annexure "9" to the supplementary affidavit filed by the petitioner. The petitioner has prayed for the quashing of the order contained in Annexure "4" as also in Annexure "9" chiefly on two grounds, namely (1) that the Minister of the Department had no power or authority to interfere with the recommendations of the Chief Engineer, Deputy Secretary and Secretary of the Department; and (2) that the order of the Minister is arbitrary and mala fide.

4. The counter-affidavit was filed On the 17th of February, 1972. The affidavit is sworn by the Registrar of the Public Health Engineering Department, who says in the last paragraph of the counter-affidavit:

"I have read the counter-affidavit which is true to my knowledge which has been drawn from the records of the department."

In the main, the defence is that the order is just and proper; neither it is arbitrary nor mala fide and the Minister had power to make this order. Some of the details I will have to refer during the course of my judgment. It is not necessary to refer to the counter-affidavit of respondent No. 8 which was filed on the 14th of April, 1972.

5. Before I proceed further, I may make a pointed reference to one fact here. In paragraph 13 of the writ application it is stated that respondent No. 7 is much Junior to the petitioner in service and further he (respondent No. 7) did not have a dean record of service. Earlier in paragraph 9 the petitioner had stated that he Had a clean record of service. The statement in paragraph 9 of the writ application was dealt with in paragraph 7 of the counter-affidavit. The fact that the petitioner had a clean record of service was not denied. While dealing with his assertion in paragraph 13, it was stated in paragraph 8 of the counter-affidavit that "It is also incorrect to say that respondent No. 7 has no clean record of service". In his affidavit in reply, which was filed by the petitioner on the 10th of March, 1972, the petitioner stated with reference to paragraph 8 of the counter-affidavit that an adverse entry in the character roll of respondent No. 7 had been made and" his service record was not clean. The said respondent had filed an application dated the 5th of October, 1971, before the Chief Engineer of the Department praying to him that the adverse entry in his character roll may be expunged. The Chief Engineer after considering the aforesaid application rejected the prayer of respondent No. 7 and the said respondent himself did not move further in the matter by filing any appeal, representation or memorandum before respondent No, 2. What happened, however, was, as stated in paragraph 9 of the affidavit in reply, that a member of the Bihar Legislative Council wrote a letter to the Minister-in-charge (respondent No. 2) complaining about the allegedly illegal and unjustifiable adverse entry made against respondent No. 7. Upon this the order of the Minister dated the 17th of November, 1971, was to put up the connected file within a week. The petitioner has annexed a copy of the letter dated the 16th of November, 1971, written by the member of the Bihar Legislative Council to the Minister which is Annexure "10".

In the counter-affidavit, which was filed, as stated, on the 17th of February, 1972, no facts were stated to show as to what was the adverse entry in the character roll of respondent No. 7 under what circumstances and when it was deleted but what I find from the statements in paragraph 9 of the affidavit in reply is that the petitioner says that the adverse remark was expunged after he had filed the writ application. The writ application was filed on the 6th of December, 1971. Whether the fact that the expunction of the remark was after the filing of the writ application is quite accurate or not, one thing is certain that the expunction of the remark was tried to be obtained at the instance of a member of the Legislature about three weeks after the impugned order (Annexure 4) was made by the Minister. It is, therefore, manifest that the position which stood on the 26th of October, 1971, when the Minister made the impugned order was like this. The petitioner was an upper division assistant,

respondents 6 and 7 were lower division assistants. The petitioner obviously and undoubtedly was senior to them. His service record was clean while that of respondent No. 7 was not clean on that date. In this background of facts, I now proceed to consider the validity of the order dated the 26th of October, 1971, contained in Annexure 4.

6. Our attention was rightly drawn by the learned Standing Counsel No. 2 to the contents of the letter of the Appointment Department (Annexure 1 as also Annexure A and the letter of the Board of Revenue Annexure B). On reading these two letters it would be clear that ordinarily and generally those who would be appointed as Sub-Deputy Collectors on promotion to the Bihar Junior Civil Service would be required to work as Anchal Adhi karis, Assistant Settlement Officers and the like, mostly in fields and villages. Therefore, a special indication was given in those letters to nominate such persons who may be amply suited for those purposes. There can be no gainsaying the fact that while working in the Public Health Engineering Department the petitioner as well as respondents 6 to 9 were working under the supervision of the Chief Engineer or within vision or personal knowledge of the Deputy Secretary and the Secretary of the Department. The Minister may be hardly concerned with their day-to-day working. It may be stated here that it appears from the facts of some of the annexures in this case that respondent No. 7 worked as a Private Secretary to a Minister who was in charge not of this Department but of the Health Department, which is different from the Public Health Engineering Department. He had also worked in the past as a Private Secretary to another Minister of State, who again was not in charge of the Public Health Engineering Department but was in charge of the Jail Department.

It is clear from Annexure B that the Board required the departments to send only two names for the general seat and one for the special seat. The Board asked them to recommend the best persons indicating the order of preference. The Chief Engineer thought the petitioner and respondent No. 6 to be the two best persons and surely he was justified in calling the senior one out of the two as a better person and giving him the first place of preference. Somehow or other the Deputy Secretary, with whom the Secretary agreed, thought that respondent No. 8 also was a fit person to be nominated for the purpose. They, however, on account of his being junior to the petitioner and respondent No. 6, could not persuade themselves to give him a higher place, although on the basis of the letter (Annexure B), if respondent No. 8 was more qualified in their opinion, he could be given a higher place. The question of seniority was not very relevant or pertinent if there was appreciable difference between the qualities of the persons who were being nominated. The qualities being similar, surely one who was senior had to be given preference over the one who was junior. The Chief Engineer, therefore, gave his reasons in his note as to why he was not recommending the other two persons who were senior to the petitioner. It is not quite clear why the Deputy Secretary and the Secretary added a third name without deleting either of the two recommended by the Chief Engineer. Be that

as it may, this much is clear that the departmental officials who were the best persons to know the respective qualities and merits of the office assistants who were being nominated for the purpose had consistently given the first place to the petitioner.

7. Then comes the letter dated the 14th of October, 1971 (Annexure 5) signed by two members of the Bihar Legislative Assembly. In this letter they pleaded that respondent No. 7 when he was Private Secretary to the Minister, the Minister was pleased with his work. He had recommended his name for giving promotion in future. His name was recommended to the Appointment Department but then recommendations were asked for by that department through the Board of Revenue. Stating in the last paragraph of this letter that respondent No. 7 possessed all the qualifications for the post, they pleaded that his name should be recommended to the Board of Revenue, I would venture to make a few comments here. In the set up of the democratic Government run under our Constitution powers of the three limbs of the State, namely, legislative, executive and judiciary, are in separate compartments. Undoubtedly the power of the judicial limb is different and distinct from the power of the executive and legislative limbs of the State. Since, however, our democracy is being run on the Parliamentary system of Government, the Ministers for their executive actions are jointly responsible to the legislature. That way the members of the Legislative Assembly and the Legislative Council come to have their say in the matter of administration. A question does arise as to whether it is legitimate and proper for the members of the Legislature to interfere with the day-to-day administration of the Government as the two members purported to inter-meddle by their letter dated the 14th of October, 1971. At the nascent stage of our democracy after independence such attempts had been made by the members of the Legislature to interfere with the judiciary but this Court had to deal with such matters with a strong hand and by and large it succeeded in putting a stop to the interference of executive or the legislature with the judicial work of the State. Out of many cases, reference may be made in this connection to only one case of the *The King Vs. K.N. Chachan*, .

I am not prepared to go so far as to say that interference by the members of the Legislature with the day-to-day administration of the Government will be committing any contempt. It may be difficult to say that it is illegal but surely I think I shall be justified in saying that it does not seem proper to do so. What after all was said by the two members of the legislature for advocating the cause of the seventh respondent? They merely said that the Minister under whom the said respondent worked as Private Secretary was satisfied with his work. They could not say and they did not say from their personal knowledge of any of the files dealt with by the said respondent that they were satisfied that he possessed all the qualifications. In such a situation does not this letter smack of pleading a cause for the seventh respondent going out of way? Is such interference a healthy or proper one? The letter was written directly to the Minister. Is it proper to ignore what has been said by the Supreme Court in *A. Sanjeevi Naidu*, etc. *Vs.*

State of Madras and Another, ? Hegde, J. delivering the judgment on behalf of the Court has said:

"In very well-planned administration, most of the decisions are taken by the civil servants who are likely to be experts and not subject to political pressure. The Minister is not expected to burden himself with the day-to-day administration. His primary function is to lay down the policies and programmes of his ministry while the council of Ministers settle the major policies and programmes of the Government."

The wordings of the questions posed by me above suggest the answer and I need not give then) in specific terms.

8. What then happened upon the pleading of the cause of the seventh respondent in Annexure 5? The Minister's order dated the 26th of October, 1971, comes. In the first paragraph of the order it is stated that some letters-received from another Hon'ble Minister and Hon'ble members of the Legislature have been put up with the file which would show that the name of Sri Devendra Bahadur Sinha was recommended by the Ex-Minister to the Appointment Department. Now because the names are being asked for by the Board of Revenue, therefore, recommending his name is proper. Thereafter the Minister says that in the following order the names may be recommended:

1. Sri Sachidanand Prasad Sinha,
2. Sri Devendra Bahadur Sinha,
3. Sri Shyam Sundar Sen,
4. Sri Kanhaiya Prasad Sinha,
5. Sri Jagdish Prasad in reserved seat.

9. On reading the impugned order it is clear that the only ground which the Minister gave for recommending the name of respondent No. 7 is the information given to him by the other Minister and members of the Legislature that his name had been previously recommended. It appears that he has not cared to examine as to whether his name was rightly recommended or whether it was fit to be recommended: nor is there any statement before us to show that on receipt of the information aforesaid, he made any query from the officials of the department. The reason given in paragraph 1 of the impugned order by the Minister, in my opinion, is irrelevant; rather it shows that he did not apply his mind as to whether respondent No. 7 was fit to be nominated and whether his name should be recommended to the Board. It is a clear abdication of his function. Even assuming that the first paragraph justified the sending of the name of respondent No. 7, there is absolutely no reason given in the impugned order for giving him the second place and for giving respondent No. 6 the first place.

In the context of the requirement of the letter dated the 1st of September, 1971,

of the Board, it is plain that the Minister directed the sending of the names of respondents 6 and 7 as the first and second and the names of the petitioner and respondent No. 8 as third and fourth, not being oblivious of the fact that in the general quota only two names were asked and not four but deliberately with a view to exclude the petitioner without any rhyme or reason. In that view of the matter, his order is arbitrary. I have no hesitation in concluding on the facts stated so far that the order was mala fide in the sense that the Minister proceeded to interfere with the recommendation of the officials not with the object of recommending the best persons in order of preference but with the dominant and ulterior object of displacing the petitioner to make room for respondent No. 7 because some Minister and members of the Legislature, as it appears, going out of their way were pleading his cause. The deponent of the counter-affidavit has said in effect that the statements contained therein are based upon information derived from the record which probably he believed to be true. In the last sub-paragraph of paragraph 71 of the counter-affidavit he said:

"Thus it would appear that nomination was made after consideration of all the facts and no favour was done to anybody."

He does not claim to have stated this fact upon information received from respondent No. 2. He has not cared to place any record before the Court to show as to what facts were considered by the Minister to upset the recommendation of the officials. There is nothing to indicate that the Minister examined the character rolls and found the character roll of the petitioner inferior to that of respondent No. 5 or respondent No. 7. There is nothing to indicate in the records that the Minister made any other enquiry regarding the fitness of respondent No. 7; nor does he say that he personally knew that respondent No. 7 in suitability and quality was superior to the petitioner. I have, therefore, no doubt in my mind that the impugned order dated the 26th of October, 1971, was made by the Minister arbitrarily and mala fide.

10. In *N.P. Mathur and Others Vs. State of Bihar and Others*, in my separate but concurrent judgment I had the occasion to consider with reference to leading cases and authoritative texts as to under what circumstances an executive order can be said to be mala fide and struck down as such. Keeping these principles aptly and squarely in mind, I have unhesitatingly, though painfully, come to the conclusion that the impugned order in this case must be struck down as having been made arbitrarily and mala fide by respondent No. 2. The way in which the matter proceeded thereafter by the Minister's order dated the 2nd of November, 1971, contained in Annexure 6, and his Private Secretary's note dated the 13th of November, 1971 contained in Annexure 7, further strengthens my conclusion aforesaid. It appears that even the Secretary's note thereafter dated the 16th of November, 1971 (Annexure 8) was not heeded to and in an arbitrary manner the names as directed by the Minister in his impugned order dated the 26th of October, 1971, were recommended. That led to the achievement of the ulterior object which is apparent from the Board's letter dated the 30th of November,

197T (Annexure 9). The Board was not to judge whether the persons nominated by the department concerned were the best ones in terms of either Annexure A or Annexure B. The Board was not to sit in appeal over the decision of the Department.

11. I may note here that there is no substance in the first point urged on behalf of the petitioner. Under the rules of business as also in view of what has been said by, the Supreme Court in A. Sanjivee Naidu's case reported in AIR 1970 SC 3102, the Minister is the departmental head. He has undoubtedly a right to disagree with the views of the officials of his department and to take his own decision if oak relevant considerations of the matter and with the object or in any event the dominant object of sending the names of best persons he would have taken a decision, this Court undoubtedly would not have been in a position to substitute its own views in place of the Minister's. But surely the Minister had no power even in regard to purely administrative matters to go astray and make an order of the kind as he had clone in the background of the facts and circumstances narrated above.

12. It is very interesting and curious to find in this case that even in November 1971 respondent No. 7 moved in the matter of getting the adverse remarks in his character roll expunged not directly but through a member of the legislature. This was perhaps necessitated because the Minister in his order dated the 26th of October, 1071, had directed the sending of copies of the character rolls. It seems to me that at that time possibly respondent No. 2 was not aware of an adverse entry in his character roll. But the difficulty was later on felt and some member of the Legislature was made to move in the matter. The Minister again gave way to the pressure of the member and directed the expunction of the remark. The facts are coercively telling to invite the remark that respondent No. 7 instead of doing work in the office to the satisfaction of his own office bosses was out to please some Minister and members of the Legislature and sought their help to pull him out of the ditch in which he found himself on the opinion of his bosses, namely, the Chief Engineer, the Deputy Secretary and the Secretary. In such a state of affairs I have a strong feeling that I shall be failing in my duty if I do not allow this application with some comments and set aside the impugned order.

13. For the reasons stated above, the writ application is allowed, the impugned order dated the 26th of October, 1971, contained in Annexure 4, is set aside and the Public Health Engineering Department of the State Government is directed to reconsider the matter and send two names for the general quota on relevant considerations and in the light of Annexures A and B. I think it will be neither legitimate nor proper for us to direct the said Department to send the recommendation as contained in Annexure 2. That prayer of the petitioner is, therefore, not allowed. It is to be made clear that there does not seem to be any dispute in regard to the name of respondent No. 9 recommended for the reserved seat. The action taken by the Board as per their letter dated the 30th of

November, 1971 (Annexure 9) will automatically fall and will have to be followed, when fresh recommendations for the two general seats will be made by the Public Health Engineering Department. In the circumstances there will be no order as to costs.

Akbar Hussain, J.

14. I agree.