**(2007) 01 PAT CK 0125**

**In the Patna High Court**

**Case No :** CWJC No. 1846 of 2000

Syed Mozammil Ashraf — APPELLANT

Vs

The State of Bihar and Others — RESPONDENT

**Date of Decision :** 04-01-2007

**Acts Referred:**
Miscellaneous Rules of the Board of Revenue, Bihar, 1958 — Rule 156, 157

**Citation :** (2007) 1 BLJR 619 : (2007) 1 PLJR 438

**Hon'ble Judges :** S.N. Hussain, J

**Bench :** Single Bench

**Advocate :** Devendra Kr. Sinha and Anil Kr. Singh, Shashi Bhushan Kumar, SC 16 and Vijaya, JC to SC 16, Siya Ram Shahi and S.M. Ashraf, for the Appellant; Arvind Kumar Tiwary and Subhash Kumar, for the Respondent

## Judgement

S.N. Hussain, J.—Heard learned Counsel for the petitioner and learned Counsel for the respondents.

2. This writ petition has been directed against office order of the Road Construction Department, Govt. of Bihar, issued vide memo No. 11256 (S) dated 29.12.1999 (annexure-7) under the signature of Under Secretary of the Department. The petitioner has also sought promotion to the post of Senior Accounts Clerk with effect from 01.05.1999 with all consequential benefits as at the time of filing of the writ petition, he was working as Junior Accounts Clerk in the Office of Executive Engineer, Advance Planning National Highway, Division, Lakhisarai.

3. Learned Counsel for the petitioner submitted that as per the gradation list issued by the department on 15.06.1990 (annexure-1), the petitioner was at serial No. 2 among the Junior Accounts Clerk and thereafter Sri Vidyapatti Sinha, who was at serial No. 1 of the said list retired on 30.04.1999, whereafter the petitioner became the senior most Junior Accounts Clerk. He further averred that earlier the petitioner had filed CWJC No. 2365 of 1994 for directing the respondents to grant promotion to him in accordance with law and the said writ

 

petition was disposed of on 09.03.1995 (armexure-2) with a direction to the petitioner to file a comprehensive representation before the Superintending Engineer, Advance Planning, Road Construction Department, Bhagalpur and the said authority was directed to hear the petitioner and pass a speaking order within three weeks from the date of filing of such representation without being prejudiced by the earlier orders and if the claim of the petitioner is found to be genuine, necessary appropriate order was directed to be passed forthwith. Learned Counsel for the petitioner also stated that on the basis of the said order, the petitioner filed his representation, but when the order of this Court was not complied, he filed a petition for initiating a proceeding of contempt against the authorities concerned bearing MJC No. 1533 of 1995 which was dropped on 02.04.1996 (annexure-4) as in the meantime, the authority concerned had passed order dated 17.07.1995 (annexure-3) and this Court directed that the Chief Engineer shall examine the said order of the Superintending Engineer and take appropriate action.

4. Learned Counsel for the petitioner submitted stated that in his order dated 17.07.1995 (annexure-3), the Superintending Engineer specifically mentioned that there was only one post of the Senior Accounts Clerk vacant on which post Sri Vidyapatti Sinha, who was Senior-most Junior Accounts Clerk, was given promotion, and hence as soon as any post of Senior Accounts Clerk falls vacant, the petitioner will be promoted. Hence in view pf the said order of the Superintending Engineer and the observations of this Court when the said Vidyapatti Sinha, Senior Accounts Clerk retired on 30.4.1999, the petitioner filed applications before the Superintending Engineer on 02.07.1999 and 29.12.1999 (annexures 5 and 5/A) requesting that he should be promoted to the said post as per the aforesaid earlier orders and also because he was now seniormost Junior Accounts Clerk and was doing the work of the Senior Accounts Clerk.

5. Learned Counsel for the petitioner also stated that inspite of the aforesaid facts and circumstances, the Executive Engineer, National Highway, Division, Lakhisarai sent a letter dated 01.12.1999 (Annexure-6) to the Secretary, Road Construction Department, Govt. of Bihar, Patna, stating that there was an immediate requirement of Accounts Clerk in the Division and requesting Sri Varendu Bhushan Chaturvedi (respondent No. 7) to be sent to fill that post and on that letter, the impugned office order was issued by the Road Construction Department vide No. 11256(S) dated 29.12.1999 (annexure-7) under the signature of Under Secretary of the Department posting the said respondent No. 7 on the vacant post of Accounts Clerk in the Circle without even considering the claim of the petitioner. Learned Counsel for the petitioner further averred that the said respondent No. 7 was illegally placed above him in the department, although he was brought from outside the cadre and would always be junior to the persons already in the cadre, including the petitioner who was the seniormost.

6. Learned Counsel for the petitioner thus averred that the Executive Engineer

 

had no authority to ask for a particular person to be posted on any vacant post, nor the higher authority was justified in accepting such illegal request. In this regard, learned Counsel for the petitioner submitted that on the orders of the Chief Engineer dated 07.01.2000 (annexure-8), another person, namely Rajnandan Singh, was brought from outside the cadre as Accounts Clerk, but it was mentioned in that order that he will rank junior to the persons already in that cadre, hence the petitioner has got no grievance against the said order dated 07.01.2000.

7. The respondents-authorities have filed their counter affidavit stating that the Chief Engineer, National Highway Wing, Road Construction Department, Govt. of Bihar has already decided vide his order dated 19.02.2002 (Annexure-A) that since the petitioner has not passed Accounts Examination final level, which is the requirement laid down in Rules 156 and 157 of the Bihar Board Miscellaneous Rules and Finance Department Circular No. 2132(F) dated 01.04.1980, his promotion to the post of Senior Accounts Clerk cannot be given. It is further stated that even thereafter the last departmental Accounts Examination for the accounts was conducted subsequently by the Water Resources Department, whereas now it has been resolved that the Accounts Examination will be conducted by the Board of Revenue, Patna. It is further stated by him that only one post of Senior Accounts Clerk was available due to superannuation of Sri Vidyapatti Sinha on which respondent No. 7 was working and in the said circumstances, no such promotion, as claimed by the petitioner, can be given to him. Learned Counsel for the State also averred that the names of the persons transferred from or into the cadre are excluded or included and accordingly gradation list is revised and hence no illegality has been committed by the authorities concerned in posting of respondent No. 7.

8. Learned Counsel for respondent No. 7 submitted that the gradation list of 1990 (annexure-1) was issued by the Advance Planning, Circle, Road Construction Department, Bhagalpur and the same was not applicable to the National Highway Division which has been created later in 1999 and till date no gradation list has been prepared or issued for National highway Division. He further averred that respondent No. 7 has been transferred directly from Road Construction Division, Munger to National Highway Division, Lakhisarai on the basis of his efficiency in official work in the department. He also stated that he has been throughout in Accounts Section and due to his efficiency, he has been transferred to the National Highway Division, Lakhisarai by the order of the Government and hence there is no question of malafide or illegality. He also stated that there is no such rule that the vacant post of Senior Accounts Clerk has to be filled up by promotion only which could be also filled up by transfer of competent person from one Division to another as there is no illegality in such transfer. He also relied upon a Full Bench Decision of this Court in case of Maheshwar Prasad Singh and Others Vs. The State of Bihar and Others, .

9. After hearing the learned Counsel for the parties and after perusing the

 

materials on record as well as the provisions of law and the case laws, it is quite apparent that the main contention of the respondents is that the petitioner cannot be legally promoted to the post of Senior Accounts Clerk as he had not fulfilled the requirement laid down in Rules 156 and 157 of the Bihar Board Miscellaneous Rules, according to which the Finance Department Circular No. 2132 (F) dated 01.04.1980 was issued. On a hare perusal of the said circular of the Finance Department dated 01.04.1980 shows that the said circular with reference to Rules 156 and 157 of the Bihar Board Miscellaneous Rules clarified about passing of Accounts Examination for the purpose of crossing of efficiency bar. It nowhere provides that passing of Accounts Examination for the purpose of consideration of cases for promotion from one grade of Clerk to other grade of Clerk was mandatory. Apart from that learned Counsel for the respondents has failed to show any provision either under the provision of Bihar Board Miscellaneous Rules or even as per the Government Decision that for promotion from one grade of Clerk to another grade passing of Accounts Examination is even directory much less mandatory as claimed in the counter affidavit. This view finds support from a decision of this Court in case of Magadh Construction Works Vs. State of Bihar and Others, .

10. So far the reliance placed by the respondents on a decision of this Court in case of Maheshwar Prasad Singh (supra) is concerned, it is clear that the said decision is with respect to crossing of efficiency bar and not with respect to substantive promotion from the post of Junior Amounts Clerk to the post of Senior Accounts Clerk. Hence, the said decision is not applicable to the facts and circumstances of this case. Furthermore, it is not in dispute that the petitioner has finally passed in Accounts Paper Nos. I and II and also preliminarily cleared Paper No. III as far back as in 1998 (annexure-10), whereafter he appeared in the other examination of final Accounts Paper No. III in the examination held in the year 2000, but later on the whole examination was cancelled by the authorities concerned for reasons best known to them and thereafter no examination has been conducted till date. It is, thus, clear that, fault lies with the department for not holding such examinations regularly and even cancelling the entire examination held in the year 2000 without holding any re-examination.

11. Apart from the aforesaid facts and circumstances, the respondents authorities were themselves aware that passing of the Accounts Examination was not mandatory for granting promotion as they had themselves filed a show cause in MJC No. 1533 of 1995 annexing memo of the Superintending Engineer dated 17.07.1995 (annexure-3) as Annexure-C giving an undertaking that as and when the post of Senior Accounts Clerk will be vacant, the petitioner will be promoted and on the basis of the said undertaking the Contempt matter was dropped, but instead of complying the said undertaking when the post of Senior Accounts Clerk fell vacant on the retirement of Sri Vidyapatti Sinha on 30.04.1999, the authorities started dilly dallying the matter making out a new case that the petitioner has not passed the Accounts Examination which does not appear to be justified. It is also clear from the averments made on behalf of the respondents

 

that the only ground for assuming the petitioner to be not eligible was non-passing of the Accounts Examination.

12. It is also very strange that inspite of the retirement of the aforesaid Senior Accounts Clerk on 30.04.1999 and also inspite of petitioner''s petition filed before the authorities concerned on 02.07.1999 (annexure-5), the Department issued an office order dated 29.12.1999 (annexure-7) posting respondent No. 7 as Senior Accounts Clerk merely on the basis of a recommendation made by the Executive Engineer on 01.12.1999 (annexure-6) directly to the Secretary, Road Construction Department. Firstly, it is highly improper and violative of the executive norms that an Executive Engineer will send his recommendation directly to the Secretary of the Department without any reference either to the Chief Engineer or any other head of the Department in the circle. It is also very improper and against the norms of executive business that the State Government would pass an office order merely on the recommendation of an Executive Engineer without considering the legality or otherwise of the said recommendation, and would place a person from outside the cadre on the head of persons already working in the cadre.

13. Furthermore, no valid reason or necessity could be shown either by the respondents- authorities or by the private respondent for transferring respondent No. 7 to the post concerned. Furthermore, it is a well established principle that when a person from outside the cadre is brought in the cadre, he will be junior to persons already in the cadre. Hence, if respondent No. 7 was at all to be brought from outside the cadre to the cadre in question, he should have been placed below the persons already working in the said, cadre, but instead of that he had been placed above the seniormost person in the cadre, namely the petitioner, from whom even the work of Senior Accounts Clerk was being taken earlier. This is also apparent from the fact that another person, namely Rajnandan Singh, had been brought in the cadre from outside and as per the said principle he was placed below the persons already working in the cadre. No valid reason could be shown by the respondents for such special treatment to respondent No. 7, nor any legal justification for the same has come forward, although it is not in dispute that the vacant post of Senior Accounts Clerk has to be filled up from eligible Junior Accounts Clerk who fulfilled the requisite qualification on the basis of merit-cum-seniority in the said cadre.

14. In the aforesaid facts and circumstances, the impugned office order of the Department vide memo No. 11256(S) dated 29.12.1999 (annexure-7) is hereby quashed and this writ petition is allowed with a direction to the respondent-concerned to reconsider the case of the petitioner and issue necessary notification regarding his promotion from the post of Junior Accounts Clerk to the post of Senior Accounts Clerk with effect from the date on which he became entitled to be promoted with all consequential benefits as per the undertaking of the respondents given in MJC No. 1533 of 1995 (annexure-4) in view of the memo of the Superintending Engineer dated 17.07.1995 (annexure-3) sent to

 

the Chief Engineer with respect thereto. The said notification must be issued within two months from the date of receipt/production of a copy of this order before the Under Secretary, Road Construction Department, Govt. of Bihar, Patna (respondent No. 3).

15. Let a copy of this order be handed over to the learned Counsel for the State for necessary action