

(2008) 01 PAT CK 0044
In the Patna High Court
Case No : LPA No. 633 of 2006

The State of Bihar and Others

APPELLANT

Vs

Janardan Prasad Singh

RESPONDENT

Date of Decision : 30-01-2008

Acts Referred:

Constitution of India, 1950 — Article 309, 320, 320(3)

Citation : (2008) 2 PLJR 45

Hon'ble Judges : Mihir Kr. Jha, J; Chandramauli Kr. Pd., J

Bench : Division Bench

Advocate : Lalit Kishore and Shailendra Kumar Singh, for the Appellant; Ganesh Prasad Singh and Manish, for the Respondent

Final Decision : Allowed

Judgement

Chandramauli Kr. Pd. and Mihir Kr. Jha, JJ.—State of Bihar and its Officers, aggrieved by the order dated 20th June, 2006 passed by a learned Single Judge of this Court allowing the writ application, have preferred this appeal under Clause X of the Letters Patent. Shorn of unnecessary details, facts giving rise to the present appeal are that the writ petitioner-respondent (hereinafter referred to as the petitioner) joined as Instructor of Physical Education, a post belonging to Subordinate Education Service in the year 1973. By notification dated 31st of December, 1996 he was transferred and posted as Divisional Superintendent, Physical Education, Saran Division, a post belonging to Bihar Education Service Class II in his own scale of pay. The petitioner in pursuance of the said notification joined at the transferred place on 3rd of July, 2000. Case of the petitioner for promotion to the Bihar Education Service Class II was considered and the file was sent to the Bihar Public Service Commission for its concurrence. However, before the Bihar Public Service Commission (hereinafter referred to as the Commission) could take any decision, the same was recalled purportedly on the ground that in view of notification dated 9th May, 2003, concurrence of the Commission is not required. Ultimately by notification dated 17th of November,

2003 the petitioner was appointed and promoted to the post of Assistant Director, a post in the Bihar Education Service Class II in the scale of pay of Rs. 6500-200-10500. Writ petitioner worked on the promoted post for a period of less than two years but thereafter by notification dated 20th of July, 2005 his promotion to the Bihar Education Service Class II was cancelled on the ground that notification dated 9th May, 2003 of the Personnel and Administrative Reforms Department mandates consultation with the Commission, but the writ petitioner was promoted without any such consultation.

2. Writ petitioner aggrieved by the same preferred the application before this Court. The learned Single Judge by the impugned order has quashed the notification cancelling his promotion on the ground that there is no necessity of obtaining concurrence of the Commission.

3. Mr. Lalit Kishore. Additional Advocate General No. III, appearing on behalf of the appellants, submits that in view of the notification dated 9th of May. 2003 as also the rule, namely. Bihar Education Service Class I and Bihar Education Service Class II Recruitment Rules, 1973, a" rule framed under Article 309 of the Constitution of India, the concurrence of the Commission is sine qua non and the view to the contrary taken by the learned Single Judge is unsustainable in law.

4. Mr. Ganesh Prasad Singh, Senior Advocate, appearing on behalf of the writ petitioner-respondent, however, contends that in view of the notification dated 9th of May, 2003 issued under Article 320(3) of the Constitution of India, the consultation with the Commission is not necessary for appointment to the basic grade of any of the State services.

5. Rival submissions necessitate examination of the Bihar Education Service (Class I) and Bihar Education Service (Class II) Recruitment Rules, 1973 (hereinafter referred to as the Rules) and Bihar Public Service Commission (Limitation of the Functions) Regulations, 1957 (hereinafter referred to as the Regulation).

6. Rule 3 of the Rules reads as follows:

3 Source of recruitment.-The Bihar Educational Service (Class I) and the Bihar Educational Service (Class II) shall be recruited-

(a) By direct recruitment through combined competitive examination in accordance with the rules in Part II, and/or

(b) By open advertisement in accordance with the rules in Part III, and/or

(c) By promotion in accordance with the rules in Part IV, and/or

(d) By direct recruitment (special recruitment) in accordance with the rules in Part V.

7. Thus rule 3 of the Rules provides for source of recruitment to the Bihar Education Service Class I and Class II and rule 3(c) thereof provides for filling up

the post in those services by promotion in accordance with the procedure prescribed in Part IV of the Rules. Part IV of the Rules deals with promotion of Officers already in Government Service. Rule 35 of the Rules provides for the procedure for promotion and Rule 35(b) provides for the Constitution of the Selection Committee for promotion to the Bihar Education Service Class II. Rule 36 contemplates recommendation by the selection committee for promotion to the Bihar Education Service Class II in order of merit. Rule 42 inter alia provides for sending of the recommendation of the selection committee by the State Government to Commission. Under rule 43 the Commission is obliged to advise in respect of the names recommended and thereafter the promotion is to be granted. All these rules form part of Part IV of the Rules.

8. Thus under the scheme of the rules for appointment to the Bihar Education Service Class II by promotion, the recommendation has to be made by the selection committee, which the State Government is obliged to forward to the Commission and the Commission in turn is to make recommendation for appointment and only thereafter the appointment can be made. Undisputedly in the present case, writ petitioner has been promoted to the Bihar Education Service Class II without the consultation or concurrence of the Commission.

9. In view of the aforesaid conclusion, the next question which falls for consideration is as to whether the notification dated 9th of May, 2003 dispenses with the requirement of the consultation for appointment to the basic grade of Bihar Education Service Class II.

10. Mr. Singh points out that the Governor of the State in exercise of the power conferred under Article 320(3) of the Constitution of India had by notification dated 24th of January, 1989 inserted Rule 7(c) below Rule 7(a) and (b) of the Regulations.

11. Rule 7 of Regulation as existed before the amendment reads as follows:-

"7. When appointment to a service or a post is made by promotion or transfer from another service it shall not be necessary to consult the Com-mission unless it is proposed, by such promotion or transfer, to fill-

(a) Permanent post substantively, or

(b) a permanent post or a temporary post or an officiating or temporary basis for a period exceeding six months:

Provided that, if an appointment is made for a period not exceeding six months, and it is subsequently proposed to extend the period so that it will exceed six months in all the Commission shall be consulted."

12. Rule 7(c)(i) of the Regulation referred to above, inter alia, provides that consultation with the Commission shall not be necessary excepting appointment/promotion to the basic grade of the State services/cadres besides appointment and promotion in certain services and categories.

13. He points out that later on the Governor of the State in exercise of the power under the proviso to Article 320(3) of the Constitution of India made amendment in the Regulation and substituted Rule 7(c) of the Regulation.

14. Rule 7(c) of the Regulation as substituted by notification dated 9th of May, 2003 provides as follows:-

15. From a plain reading of the aforesaid provision it is evident that consultation with the Commission shall not be necessary, excepting appointment to the basic grade of the State services/cadres.

16. Accordingly Mr. Singh contends that petitioner has been promoted to the basic grade of the Bihar Education Service and not appointed to the said service and in that view of the matter his promotion cannot be said to be illegal on the ground that it was effected without the consultation of the Commission. He emphasizes that consultation with the Commission has been waived in case of promotion to the basic grade of the State services and the grade, which would be evident from the fact that before the amendment by notification dated 9th May, 2003, Rule 7(c) of the Regulation waived the requirement of consultation in case of appointment and promotion both but Rule 7(c) of the Regulation as existing today and applicable in the case of the petitioner waives requirement of consultation excepting in case of appointment.

17. I do not find any substance in the submission of the learned Counsel. Article 320(3) of the Constitution of India, inter alia, provides for consultation with the Commission on the suitability of the candidate for appointment, promotion to civil services and posts and the proviso thereto confers power on the Governor to make Regulation specifying the matter in which it shall not be necessary to consult the Commission. Therefore, under the mandate of the Constitution the Commission has to be consulted on the suitability of a candidate for appointment to civil services and only by making Regulation the Governor can specify the matters in which it shall not be necessary for Commission to be consulted. Rule 7(c) of the Regulation as inserted by notification dated 9th of May, 2003 exempts consultation with the Commission in matters other than appointment to the basic grade of the State services/cadres.

18. It is well settled that one can be appointed to the service either by direct recruitment or by promotion. Such promotion to a service in the basic grade is nothing but appointment and as such the requirement of consultation with the Commission has not been waived by Rule 7(c) of the Regulation as inserted by notification dated 9th of May, 2003.

19. I am of the opinion that the Rule 7(c) of the Regulation as amended on 9.5.2003 nowhere provides that consultation with the Commission for promotion to the Bihar Education Service Class II shall not be necessary. As a matter of fact. Rule 7(c), being a later amendment has to be read alongwith the earlier provisions of Rule 7(a) and (b) from which it would be clear that wherever the framers to the Rules wanted to distinguish appointment from promotion, they

have invariably used the word appointment in isolation as in rule 7(c)(i) whereas when the intention was to include both appointment/promotion under the same, has also been clearly provided as in Rule 7(c)(ii) & (iii). Thus, in this background when Rule 7 is to be interpreted it has to be held that the said Rule 7 did not envisage the relaxation of the recommendation of the Commission in the grant of promotion to the Officer under Bihar Education Service. Such interpretation would also be in keeping with the mandatory provision of Rule 3(c). In coming to the aforesaid conclusion, I am also conscious of the position in law that an expression in a Statute in a particular used at two places cannot convey two separate meaning and thus the expression "NIYUKTI" as used in Rule 3 and Rule 7 must be given the same and the restricted meaning of its being referable to direct appointment alone and not for promotion.

20. The matter in fact can be viewed from yet another angle inasmuch as respondent-writ petitioner belong to Subordinate Education Service (SES) and once he was to be promoted in the Bihar Education Service (SES), for him the appointment in Bihar Education Service Class-II could have been only by way of promotion as envisaged under rule 3(c) of the Rules. Any promotion to be effected in the Bihar Education Service even in the basic grade as per the provisions in Rule 3(c) automatically requires approval of the Commission and thus both under the Service rules of the Bihar Education Service and as also in terms of Article 320 of the Constitution of India, the mandatory requirement of consulting with the Commission cannot be avoided/relaxed. Thus, the view taken by the learned Single Judge is not sustainable both on facts and in law. As the writ petitioner was admittedly appointed by promotion to the Bihar Education Service Class-II in breach of the rules framed under proviso to Article 309 of the Constitution of India and the regulations framed in exercise of power under proviso to Article 320(3) of the Constitution of India, his promotion was rightly cancelled by the State Government. It is further held that the said notification dated 9th May, 2003 making amendment in rule 7(c) of the regulations as a matter of fact has not waived and/or relaxed the necessity of consultation with the Commission in cases of promotion in terms of Rule 3(c) of the Rules.

21. While I have found no error in the decision of the State Government canceling the promotion of the respondent-writ petitioner on the ground of not consulting the Commission in the matter of his promotion, I am of the view that as his promotion was cancelled only on this ground alone, it would be in the interest of justice to consider the case of the respondent-writ petitioner afresh and if the State Government deems it necessary, the case of the respondent-writ petitioner as also other eligible candidates for promotion in the Bihar Education Service be decided after consulting with the Commission. Such an exercise in accordance with law must be completed within a period of four months from the date of receipt/production of a copy of this order. In the result, the appeal is allowed, impugned judgment of the learned Single Judge is set aside and the writ application stands dismissed with the direction aforesaid.