

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.3883 of 1998

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1. Kamta Prasad son of Sri Heman Prasad
 2. Kanhaiya Lal Bari son of Late Suraj Ram Bari
 3. Mohan Kumar Sharma son of Sri Abhimanyu Sharma
 4. Bharat Prasad son of Late Ram Briksha Prasad
 5. Ajay Kumar son of Sri Hira Lal Jaiswal
 6. Siya Ram Singh son of Sri Ram Bujhawan Singh
 7. Asha Ojha widow of Late Mithilesh Ojha
 8. Pratap Prasad son of Sri Bishun Mahto

.... Petitioners

Versus

1. The State of Bihar
2. The District Magistrate/ Collector, Gaya
3. The Deputy Collector (Establishment), Gaya
4. Sri Ramashray Singh, Assistant, Establishment Section, Collectorate, Gaya

.... Respondents

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Appearance :

For the Petitioners : Mr. Rajendra Kumar Jain, Advocate
Mr. Pradeep Kr. Sinha, Advocate
For the Respondents: Mr. S. Arshad Alam, SC 3
Mr. F. Ali Ahmand, AC to SC 3

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CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

ORAL JUDGMENT

Date: 13-02-2015

The sole question which the present writ application involves is as to whether reservation policy could be applied for promotion to class-III posts from class-IV posts in the office of District Magistrate, Gaya and the petitioners could be denied promotion by reserving the post, for the purpose of promotion.

2. The facts are not at all in dispute.

3. The petitioners are eight in number. They were appointed against class-IV posts under the Gaya Collectorate. Petitioner No.1 and 5 were appointed on 08.01.1983 whereas others

were appointed in the year 1985 and 1988. They became eligible for promotion to class-III posts. There were 101 class-III posts sanctioned under the Collectorate out of which 50% were required to be filled up by direct recruitment and rest by appointment through promotion from amongst eligible class-IV employees. A written test was held in which the petitioners participated and, accordingly, a merit list was prepared on the basis of their marks in the written test. The merit list has been brought on record as annexure-1 to the writ application. Followings are the respective merit positions of the petitioners in the merit list:-

Petitioners No.	Position in merit list
1	39
2	67
3	57
4	45
5	46
6	51
7	71
8	91

4. It appears that after publication of the result, it was decided at the Government level vide some resolution dated 06.12.1995 that the selection for appointment through promotion shall



be made by the Bihar Public Service Commission. Class-IV employees, who had participated in the written test held by the selection committee, approached this court by filing CWJC No. 6736 of 1996 seeking quashing of resolution dated 06.12.1995. They also sought for a direction to the respondents to appoint them on the basis of merit list so prepared, which is contained in annexure-1 to the writ application. The said CWJC No. 6736 of 1996 was allowed by an order dated 17.09.1997 with a direction to the respondents to consider the cases of the petitioners of that case and other eligible persons on the basis of merit list prepared for appointment against 50% of class-III posts and to complete the formalities by issuing order of appointment within a period of one month from the date of receipt/production of a copy of that order. The said order of this court dated 17.09.1997 has been brought on record by way of annexure-2 to the present writ application. In the light of the said order of this court dated 17.09.1997 (supra), the office of the District Magistrate, Gaya came out with the order No. 17/97-98, appointing altogether 34 persons. The petitioners in the present writ application raise a grievance that there were altogether 51 posts to be filled up by promotion and the respondents were intending to fill up only 34 posts out of 51. In the background of these facts, the petitioners sought a direction from this court to grant them promotion to class-III posts on

the basis of merit list.

5. The State of Bihar have filed a counter affidavit wherein they explained the reasons why out of 51 posts, only 34 were being filled up by order No. 17/97-98. In view of controversy involved, I consider it appropriate to quote relevant paragraphs of the counter affidavit which read thus:-

“9. That it is respectfully stated that keeping in view the reservation policy, seniority in service and marks obtained in the written test, a merit list was prepared in which these writ petitioners got place at Sl. No. 39, 67, 57, 45, 46, 51, 71 and 91 respectively.

It is further submitted that out of the total 101 vacancies, 51 are to be filled up through promotion of IVth grade employees and rest are to be filled by direct recruitment.

The position of 51 vacancies are as follows:-

- (i) For General Category- 26 posts*
- (ii) For Scheduled Caste- 21 posts*
- (iii) For Scheduled Tribe- 03 posts*
- (iv) For B.C.I. category- 01 post.*

10. That it is respectfully stated that these 8 petitioners do not belong to Scheduled caste, hence they only could be promoted against the 26 vacancies available for General Category, but their position in the merit list is beyond serial No. 26, therefore they have not been promoted/appointed.

11. That with respect to statement made in paragraph no.8 of the writ application, it is stated that the detail of vacancies are already explained in paragraph no. 8 of this counter affidavit.

It is further submitted that appointment on 26 posts of general category, 7 of Scheduled Caste and 1 of B.C. category total 34 posts have been made.

It is relevant to mention here that unfilled 17 vacancies are for reserved categories (S.C & S.T) for which no candidates are available in the merit list in question”.

6. Learned counsel appearing on behalf of the petitioners has submitted that the respondents wrongly denied the petitioners promotion to class-III posts giving benefit of reservation in service to reserved category candidates. He has submitted that such reservation in promotion is impermissible in view of various pronouncements of Supreme Court and has relied upon Supreme Court decision reported in **(2006) 8 SCC 212 (M. Nagraj v. Union of India)**.

7. Learned counsel appearing on behalf of the State, on the other hand, has placed reliance upon a Supreme Court decision in case of **Commissioner of Commercial Taxes, A.P., Hyderabad & anr. V. Sethumadhava Rao & Ors reported in AIR 1996 SC 1915** in order to submit that the State is empowered to make provisions for reservation in grant of promotion.

8. Apparently, the process of selection for appointment through promotion to class-III posts in the Collectorate of Gaya, which is in question in the present writ application, started much before the Constitution (77th amendment Act, 1995), introducing Article 16(4A), which came into being from 17.06.1995. There is no controversy on the issue nor there can be that Article 16(4) of the

Constitution of India was confined to reservation at the stage of initial appointments only and could not be extended to provide reservation in the matter of promotion. Article 16 of the Constitution reads thus:-

“16. Equality of opportunity in matters of public employment-(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office [under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory] prior to such employment or appointment.

(4) Nothing, in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the service under the State.

[(4A) Nothing in this article shall prevent the State from making any provision for reservation [in matters of promotion, with consequential seniority, to any class] or classes of posts in the services under the State in favour of the Scheduled Castes and Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.]

(Emphasis Mine)

[(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4A)

as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies of the shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent, reservation on total number of vacancies of that year.]

(5) Nothing in this article shall effect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.”

9. The law to this effect has been laid down in case of ***Indra Sawhney v. Union of India reported in AIR 1993 SC 477*** in no uncertain terms and in no circumstance the respondents could have granted reservation in the matter of promotion while considering the cases of these petitioners and other similarly situated persons, in the present facts of the case.

10. It is well settled that a process of selection by appointment has to be completed in terms of the procedure/ law as it existed when the selection process began. Needless to say that selection process begins after issuance of the advertisement followed by submission of applications etc. which, in the present case, took place much before 77th amendment in Constitution. Reference may be made in this regard to the case of ***Y. V. Rangaiah & Ors v. J. Sreenivasa Rao & Ors reported in AIR 1983 SC 852*** and ***AIR 1990***

SC 405 (P. Mahendran & Ors. v. State of Karnataka & Ors.).

Further in case of ***A. A. Calton v. Director of Education & anr. (AIR 1983 SC 1143)*** the Supreme Court laid down that the selection process has to be completed on the basis of law/ rules in force at the time of commencement of selection process.

11. In such circumstance, the respondents acted in breach of Article 14 and 16 of the Constitution of India while giving benefit of reservation to various categories in the matter of promotion to class- III posts from class-IV posts. This is one aspect of the matter.

12. 77th amendment of Constitution does not *ipso facto* provide for reservation to various classes. The said provision merely enables the State and rather it does not prevent the State from making any provision for reservation in the matter of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of Scheduled Castes and Scheduled Tribes, if in the opinion of the State, they are not adequately represented in service under the State. Before giving the benefit of reservation, in the matter of promotion, in my opinion, it is mandatory for the State, within the meaning of article 12 of the Constitution of India, to form an opinion that a particular class or classes of posts in the service under the State are not adequately represented by members of Scheduled Castes and Scheduled Tribes. Before providing for such



reservation, the State will have to make a reference in terms of the provision under Article 16(4A) of the Constitution of India. Nothing has been brought on record by the respondents that the State Government formed any opinion for making provision for reservation in the matter of promotion in favour of the members of the Scheduled Castes and Scheduled Tribes on the ground that they are not adequately represented.

13. In such view of the matter, the procedure adopted by the respondents of giving reservation to the members of the Scheduled Castes and Scheduled Tribes for promotion to class-III posts from class-IV posts is in violation of Articles 16, 16(4) and 16(4A) of the Constitution of India. In my opinion, all the posts meant to be filled up through promotion in the Collectorate of Gaya on the basis of selection process in question have to be filled up on the basis of respective merit and seniority of the candidates without providing any reservation.

14. Learned counsel for the petitioners is correct in his submission that the respondents wrongly kept the posts unfilled on the ground that eligible candidates belong to Scheduled Castes and Scheduled Tribes category were not available. These posts were certainly required to be filled up on the basis of merit.

15. I would have quashed the appointments of such

persons who were granted promotion to class-III posts by giving them benefit of reservation but since such candidates have not been impleaded as parties, their appointments cannot be cancelled in the present proceeding.

16. In the facts and circumstances of the case, I direct the District Magistrate, Gaya to consider appointment of these petitioners strictly on merits against the posts which are vacant for which the petitioners had applied for promotion. A decision in this regard must be taken by the District Magistrate, Gaya within a period of six months from the date of receipt/ production of a copy of this order. The petitioners shall be entitled to seniority as per merit list from 29.12.1997, being the date on which persons below in the merit list have been granted promotion.

This writ application is allowed with a cost of Rs. 5000/-.

(Chakradhari Sharan Singh, J)

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