

IN THE HIGH COURT OF JUDICATURE AT PATNA

**Letters Patent Appeal No.863 of 2014
IN
Civil Writ Jurisdiction Case No. 7159 of 2013**

Pradip Kumar S/o Late Chhotan Ram, resident of Mohalla-Shivcharan Lane,
Manpur, Post Office- Buniyadganj, Police Station-Buniyadganj, District-Gaya.

.... Appellant/s

Versus

1. The State of Bihar through the Chief Secretary, Bihar, Patna.
2. The Principal Secretary, Finance Department, Government of Bihar, Patna.
3. The Principal Secretary, General Administration Department, Government of Bihar, Patna.
4. The Joint Secretary, General Administration Department, Government of Bihar, Patna.
5. The Deputy Secretary, General Administration Department, Government of Bihar, Patna.
6. The Bihar Public Service Commission through its Secretary, Bailey Road, Patna.
7. The Chairman, Bihar Public Service Commission through its Chairman, Bailey Road, Patna.
8. The Secretary, Bihar Public Service Commission through its Chairman, Bailey Road, Patna.
9. Dharmvir Prasad, son of Shri Baiju Sahu, resident of village-Salempur, Post Office-Salempur, Police Station-Benipatti, District-Madhubani.

.....Respondent 1st Set.

.... Respondent

with

**Letters Patent Appeal No. 1267 of 2014
IN
Civil Writ Jurisdiction Case No. 6805 of 2012**

1. The State of Bihar through the Principal Secretary, Department of General Administration, Government of Bihar, Patna.
2. The Principal Secretary, Department of General Administration, Government of Bihar, Patna.

.... Respondents-Appellant/s

Versus

1. Dharamvir Prasad son of Sri Baiju Sahu, resident of village - Salempur, P.O. Salempur, P.S. Benepatti, District - Madhubani, presently posted as Assistant Department of Animal Husbandry, Government of Bihar, Patna.
2. Rakesh Kumar son of Sri Rajendra Prasad Yadav, resident of village – Shristi Villa Bhagwat Nagar, P.S. Agamkuan, Kumahrar, District - Patna - 6, presently posted as Assistant Department of Animal Husbandry, Government of Bihar, Patna
3. Binod Kumar son of Late Arbind Kumar Mandal, resident of Saguna, P.O. + P.S. Danapur, District – Patna.
4. Sumanjay Kumar son of Late Satrugan Rawat, resident of Ram Jaipal Road, Arpana Colony, Danapur, P.S. Danapur, District – Patna.
5. Rajiv Kumar son of Late Kameshwar Prasad resident of House of Dr. G.P. Singh, Professor Colony, Patna, P.S. Shashtri Nagar, District – Patna.
6. Sri Kabindra Kumar son of Sri Upendra Mandal, resident of village -

Chamgarh, P.S. Murliganj, District - Madhepura, presently posted as Assistant Department of Agriculture, Government of Bihar, Patna.

7. Ras Bihari Upadhyay son of Late J. Upadhyay, resident of Mangaon, P.S. Kankhhawa, District – Rohtas.

8. Baldeo Choudhary son of Late Ram Pyare Chaoudhary, resident of village & Post Office - Behsagar, P.S. Karakat (Goran), District – Rohtas.

9. Sanjay Kumar son of Late Ram Prasad Yadav, resident of village & Post office Siswa Barahi, Via - Phulparas, District – Madhubani.

.....Petitioners-Respondents

10. The Bihar Public Service Commission, through its Secretary, Bailey Road, Patna, Bihar.

11. The Chairman, Bihar Public Service Commission, Bailey Road, Patna, Bihar.

12. The Secretary, Bihar Public Service Commission, Bailey Road, Patna, Bihar.

.... Respondents-Respondents.

with

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Letters Patent Appeal No. 1013 of 2014

IN

Civil Writ Jurisdiction Case No. 18870 of 2012

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1. Awadhesh Nandan Sinha S/o Sri Dev Sharan Sinha, resident of House No. 41, Road No. 10, Mohalla Indrapuri, Police Station Patliputra Patna, District Patna.

2. Amarjeet Prasad S/o Sri Rampriti Prasad, resident of Nagla Main Road Malsalami, Police Station Malsalami Patnacity, District-Patna.

3. Ashok Kumar Singh S/o Late B.N. Singh Resident of Flat No. 201 (B), Girja Garden Apartment, Punaichak Patna, Police Station-Shastrinagar, District-Patna.

.... Petitioners /Appellants

Versus

1. The State of Bihar through Chief Secretary, Government of Bihar, Patna.

2. The Principal Secretary, Department of General Administration (Earlier Personnel and Administrative Reforms), Government of Bihar, Old Secretariat, Patna.

3. The Bihar Public Service Commission through its Secretary, Bailey Road, Patna.

4. The Chairman, Bihar Public Service Commission, Bailey Road, Patna.

5. The Examination Controller, Bihar Public Service Commission, Bailey Road, Patna.

5A. The Joint Secretary, Department of General Administration, Government of Bihar, Old Secretariat, Patna.

.....Respondents 1st Set

6. Dharamveer Prasad S/o Sri Baiju Sahu, resident of village- Salempur, Post Office- Salempur, Police Station- Benipatti, District- Madhubani, present posted as Assistant, Department of Animal Husbandry, Government of Bihar, Vikash Bhawan, Patna.

.....Respondent 2nd Set /Representative Capacity/Respondent

7. Amiya Ranjan Pushp son of Late Nityadeo Prasad, resident of Mohalla-Janakpur, Buniyadganj, Police Station-Gaya Muffasil, District-Gaya.

.... Petitioner/ Performa Respondent

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Appearance :

(In LPA No. 863 of 2014)

For the Appellant/s : Mr. Navendu Kumar, Adv.
For the Pvt. Respondent/s : Mr. Chitranjan Sinha, Sr. Adv.
Mr. Anand K. Ojha, Adv.
Mr. Ashok K. Karna, Adv.
Mr. Ratnakar Jha, Adv.
For the State : Mr. Sanjay Mandal, AC to SC-6
For the B.P.S.C. : Mr. Sanjay Pandey, Adv.
Mr. Satyabir Bharti, Adv.

(In LPA No. 1267 of 2014)

For the Appellant/s : Mr. Anjani Kumar, AAG-6
For Pvt. Respondent/s : Mr. Chitranjan Sinha, Sr. Adv.
Mr. Anand K. Ojha, Adv.
Mr. Ashok K. Karna, Adv.
For the B.P.S.C. : Mr. Sanjay Pandey, Adv.
Mr. Satyabir Bharti, Adv.

(In LPA No. 1013 of 2014)

For the Appellant/s : Mr. Jitendra Kumar Roy
For Pvt. Respondent no.7 : Mr. Chitranjan Sinha, Sr. Adv.
Mr. Anand K. Ojha, Adv.
Mr. Ashok K. Karna, Adv.
For the State : Mr. Binay Kr. Pandey, AC to GA-3
For the B.P.S.C. : Mr. Sanjay Pandey, Adv.

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE SHIVAJI PANDEY

ORAL JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date: 08-04-2015

These Letter Patent Appeals are preferred against the common order dated 5th June, 2014 rendered in C.W.J.C. No. 6805 of 2012 and analogous cases.

While L.P.A. No.1267 of 2014 is filed by the State, the other two appeals are preferred by the unsuccessful writ petitioners in C.W.J.C. No. 18870 of 2012 and C.W.J.C. No.7159 of 2013.

The relevant facts are as follows:

For the post of Section Officer in the Secretariat of



Bihar Assistant is one of the feeder categories. Section 14 of the Bihar Secretariat Service Act, 2007 (hereinafter referred to as “the Act”) provides for filling up of 80 % posts of Section Officers by way of promotion and the balance, 20% of posts are to be filled, through a limited competitive examination, to be held by the Bihar Public Service Commission (for short, the Commission). Assistants, with service of 5 years are eligible for this category, irrespective of their seniority.

The vacancies of Section Officer were not filled for quite some time. On 13th May, 2010 an Advertisement No. 12 of 2010 was issued by the Commission proposing to select candidates to fill, 20% vacancies of Section Officers. For one reason or the other, the written examination could not be held for more than an year. On 4th November 2011 a corrigendum to the advertisement was issued to the effect that the qualifying service of five years for the candidates will be reckoned from 1.8.2008. Some of the Assistants who have already submitted applications, but were facing disqualification on account of that, filed C.W.J.C. No.6805 of 2012. An interim order was passed on 30.4.2012 to the effect that candidates shall be permitted to appear in the examination without reference to the stipulated cut off date. Thereafter the Government itself issued second corrigendum dated 14.7.2012, withdrawing the first one. That was challenged in C.W.J.C. No.18870 of 2012 and

C.W.J.C. No. 7159 of 2013, by the appellants herein.

The appellants pleaded that 20% of vacancies of Section Officer must be reckoned each year, because, the expression 'candidates of each year' has been employed in Regulation 3(1) of the Bihar Secretariat Service (Appointment through Limited Competitive Examination to the grade of Section Officer), Regulations, 2009 (hereinafter referred to as "Regulations") and there was absolutely no basis for non-stipulation of cut off date, for the posts. It was also their case that after realizing its lapses, the Government issued a corrigendum on 4.11.2011 but the same was withdrawn on 14.7.2012 without there being any basis. They pleaded the eligibility criteria of 5 years of service prescribed under Section 14 of the Act, it was not implemented properly and the result was that large number of ineligible Assistants were permitted to appear in the limited competitive examination. They have advanced other contentions also.

During the pendency of the writ petitions the Government issued Notification dated 27.6.2013 in which an attempt was made to apply rule of reservation for filling 20% vacancies of Section Officers. That was also challenged.

The petitioners in C.W.J.C. No.6805 of 2012 opposed other two writ petitions. Their plea was that the stipulation of cut

off date was not provided in the Act, Rules and Regulations and the Government went on changing the procedure from time to time. It was also pleaded that once the selection process has commenced through issuance of advertisement, there was no basis for the Government to change its stand thereafter.

Learned Single Judge allowed C.W.J.C. No.6805 of 2012 and dismissed other writ petitions. While the contention of the appellants in L.P.A. No. 1267 of 2014 is that the cut off date ought to have been stipulated, the stand of the Government is that memo dated 13.6.2005 ought not to have been set aside by the learned Single Judge.

We have heard the argument in detail advanced by the learned counsel for the appellants, the State and the private respondents. They reiterated their respective stands taken in the writ petition.

The appointment to the post of Section Officer is to be made in two different procedures. Section 14 of the Act provides that 80% of the post be filled up by way of promotion and remaining 20 %, on the basis of limited competitive examination. The provision reads as follows:

“14. Appointment to the grade of Section Officer.- (1) Appointment to the grade of Section Officer shall be made as follows:-

(a) Eighty per cent of the posts in the grade of Section Officers shall be filled by promotion from the grade of Assistants on the

recommendation of the Departmental Promotion Committee.

(b) The remaining twenty per cent of posts shall be filled through a Limited Competitive Examination conducted by the Bihar Public Service Commission from amongst the Assistants who are confirmed in the service and have rendered continuous service more than five years in the grade of Assistants.

(2) The procedure, syllabus etc. for the Limited Competitive Examination shall be determined by the Cadre Controlling Authority according to Rules/regulation in consultation with the Bihar Public Service Commission.

(3) Persons appointed and working as Section Officers of the Joint Cadre of Assistants of the Secretariat and attached officers on the appointed day shall be deemed to be automatically included in this grade.”

Other relevant provisions which became relevant in this behalf are Rules 10 and 11 of the Bihar Secretariat Service Rules, 2010 (hereinafter referred to as “the Rules”) which run as follows:

“10. Promotion in different grades of service.- (1) The promotion to the different grades in the service shall be admissible from the date of vacancy of the post of concerned grade.

(2) The procedure for promotion shall be made so reasonable that whole procedure of promotion shall be completed before probable vacancy. For this purpose, calculation of expected vacancies for next year due to retirement etc. as well as clearance of roster, minimum qualifying period i.e. Kalawadhi, updating of confidential remarks, updating the register regarding clearance etc. will be completed at the beginning of each year and recommendation of departmental promotion committee shall be obtained in time and advance panel shall be prepared.

(3) The principle for eligibility of

candidates for promotion in the service shall be 'seniority-cum-merit.'

(4) The criterion of eligibility for candidates of Scheduled Caste and Scheduled Tribe shall be determined along with the candidates of general category at the time of promotion, meaning thereby the criteria of eligibility for all candidates shall be similar.

(5) The promotion in different grades of service shall be given on the recommendation of departmental promotion committee constituted by State Government.

(6) The minimum qualifying service i.e. Kalawadhi for such promotion shall be as determined by the Personnel and Administrative Reforms Department from time to time.

11. Promotion/Appointment to the grade of Section Officer.- (1) In accordance with Section 14 of the Act, 80% of the posts in the grade of Section Officer shall be filled by promotion from the grade of Assistant on the recommendation of departmental promotion committee and remaining 20% of posts shall be filled through a limited competitive examination conducted by Bihar Public Service Commission amongst such Assistants who are confirmed in the service and have rendered continuous service of more than five years.

(2) Bihar Public Service Commission will organize and conduct the limited competitive examination in accordance with a regulation for this purpose notified by Cadre Controlling Authority. Cadre Controlling Authority shall determine the procedure, syllabus etc for the limited competitive examination through a regulation notified in consultation with the Bihar Public Service Commission.

(3) There shall be a Departmental Promotion Committee with following members to recommend to fill up the 80% post of Section Officers by promotion from the grade of Assistants.

(A) Principal Secretary/Secretary, General Administration department or the officer not below the rank of Joint Secretary authorized by Principal Secretary- Chairman

(B) The officer of Finance Department not below the rank of Joint Secretary – Member

(C) Senior Officer in charge of establishment of Secretariat Service – Member

(D) Officer of Scheduled Caste/Scheduled Tribes nominated by General Administration Department – Member.

(4) Persons appointed and working as Section Officer of Joint Cadre of Assistant of Secretariat and Attached Offices on the appointed day shall be deemed to be automatically included in this grade.”

The Regulation is to the effect that the vacancy must be reckoned with reference to 1st April every year. It reads :

“3. Appointment through Limited Competitive Examination.- (1) According to the provisions contained in clause (b) of sub-section (1) of Section 14 of the Act, 20% of posts in the grade of Section Officer of this service shall be filled through Limited Competitive Examinations from the Assistant grade according to the recommendation of the Commission on the basis of a Limited Written Competitive Examination held by the Commission for this purpose.

(2) For this purpose, Personnel and Administrative Reforms Department shall calculate the vacancies on the basis of vacancies reported by different departments available on 1st April every year and reservation category wise requisition shall be sent to the Commission by 30th April.”

However from the provisions it is difficult to come to the conclusion that if for any reason the recruitment or appointment to the post of Section Officer did not take place for a particular year, that year would alone be relevant for the purpose of determination of eligibility or qualification, when the process is taken up in the

subsequent years.

Learned counsel submits that it is for the State to make a rule or to provide for any cut off date and one cannot object to it. However, neither in the Act nor in the Rules, or for that matter in the Regulations, we find any such stipulation. The Government went on changing its stand in this behalf, and came forward with as many as four versions, ever since the advertisement was issued. Ultimately, the Court had to resolve the issue on the basis of the relevant provisions of law. Once no cut off date is stipulated under the provisions, every one will have to fall back on last date of receipt of application, to determine the length of qualifying service.

Much argument has been advanced to differentiate between the appointment on the one hand and promotion on the other. It has also been argued that since filling the post of Section Officer against 20% vacancies is appointment, the rule of reservation must be applied. Almost an argument in opposite direction was advanced by the same parties, to the effect that the process must be treated as true one of promotion so that Rule 10(1) of the Rules gets attracted, and as a result the date of vacancy becomes relevant.

The lack of consistency in this behalf is writ large. We have also noticed that the words, “appointment”, “promotion” and “recruitment” are employed at certain places in the Act and the



Rules almost interchangeably. There is some lack of clarity in which the word “appointment” must be understood vis-à-vis the provisions of the Act, Rules and Regulations. The word ‘appointment’ is used to cover all the categories of induction into service; or enabling entry of an individual into Government service. This takes in its fold, not only the direct recruitment, but also the promotion or the accelerated promotion or even appointment by way of transfer. By and large, (a) direct recruitment is a process through which persons inducted into service, for the first time, (b) promotion is process where a person holding a post in service, is superior in an organization, move to a post in the same organization on account of seniority, (c) “accelerated promotion” takes place where a person in a lower category in service is enabled to compete for a superior post in the same service, otherwise than on the basis of seniority alone, subject to certain conditions, and (d) appointment by transfer occurs where a person from one service is appointed in another service or from one division of the same service to another division.

Reverting to the facts of the case appointment against 20% vacancies of Section Officer is virtually a hybrid direct recruitment on the one hand and promotion on the other. It resembles promotion i.e. a person who is in the feeder cadre is permitted to move in the higher category in the same service.

However, it is not promotion because it is not on the basis of seniority alone. It resembles recruitment in the sense that the candidate is chosen on the basis of competitive examination. However, it is not recruitment simpliciter because participation is limited to the employees of the feeder category. Either way, it does not make much difference.

The effort of the appellants to treat the process as promotion, to bring it within the purview of Rule 10 of the Rules which is to the effect that irrespective of date of actual promotion, a higher post must be filled with effect from the date on which the vacancy has arisen. In this context, Sub-Rules (1) and (2) of Rule 10 of the Rules need to be read together. While Sub-Rule (1) is almost a directive, to ensure that no individual is promoted to a higher post with effect from any date, before vacancy has arisen, Sub-Rule (2) exhorts the authorities to undertake the process of preparing the list of candidates, for promotion well in advance.

It will lead to absurd results – if a candidate is deemed to have been promoted, the day, on which that vacancy has arisen irrespective of the date on which the promotion has been effected.

Further one cannot derive any support from Rule 10 of the Rules for the proposition that the eligibility of a candidate must be reckoned with reference to the date on which vacancy has

arisen. If that were to be so, each and every vacancy will have its own date of eligibility and for every vacancy, the cut off date would be different.

The State, intends to treat the appointment against 20% vacancies as appointment, meaning thereby, one of the direct recruitment and proposes to apply rule of reservation. Section 8 of the Act needs to be taken note of in this context. It reads:

“8. **Reservation.**- The provisions of reservation determined by the State Government from time to time shall remain in force in the recruitment/promotion in this service.”

It is an enabling provision and by itself, it does not provide reservation to any particular category or post. Secondly the State could have taken a policy decision to provide the reservation in promotion, if otherwise permissible in law. Assuming that there exists adequate power with the Government to provide reservation or promotion also, there would have been justification for that if only it was for the entire cadre of Section Officers, including 80 % of the vacancies. There is no justification for the State to make an attempt to provide reservation only in respect of 20 % of the vacancies, simply because, the process of appointment is different.

We have already taken the view that filling of post of 20% vacancies of Section Officers cannot be treated as

appointment simplicitor and it is hybrid process of appointment and promotion.

Learned Single Judge has analyzed the relevant provisions of law and, in our view, has arrived to the correct conclusion.

Accordingly these appeals are dismissed.

Before parting with the case, we are compelled to observe that the recruitment to the post of Section Officer in the Secretariat which are important in handling the files of entire set up was held up and was not taken up by the Government for a few years and thereafter it remained incomplete almost for half a decade. The result is that the work has suffered a serious set back.

It is hoped that the selection process will be completed within four weeks from today. This shall take place irrespective of stay order passed by the Single Bench, not by the Division Bench.

(L. Narasimha Reddy,CJ)

(Shivaji Pandey, J)

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