

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.459 of 2013

=====

1. The State Of Bihar
2. The State Transport Commissioner, Nirman Bhawan, Bailey Road, Patna
3. The Joint Commissioner (Transport), Nirman Bhawan, Bailey Road, Patna
4. The Secretary, Personnel And Administrative Reforms Department Govt. Of Bihar, Main Secretariat, Patna

.... Appellant/s

Versus

1. Md. Sadique Zafar ,S/O Late Md. Israil R/O Mohalla- Alamganj, P.S.- Alamganj, District- Patna, at Present Working as Clerk, M.V.I. Office, Gaya
2. The Secretary Bihar Karamchari Chayan Aayog, Bihar, Patna

.... Respondent/s

=====

Appearance :

For the Appellant/s : M/S Anil Kumar Sinha,Adv., G.A.-9
& Amaresh Kumar Sinha,Adv.,A.C. to G.A.9

For the Respondent/s : M/S Devendra Prasad Sinha, Adv.& Rajesh Sinha

=====

CORAM: HONOURABLE MR. JUSTICE NAVANITI PRASAD SINGH

and

HONOURABLE JUSTICE SMT. NILU AGRAWAL

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE NAVANITI PRASAD SINGH)

Date: 12-04-2016

The State is in intra-Court Appeal against the final order dated 22-2-2012 passed in C.W.J.C.No.15370 of 2005 by the learned Single Judge of this Court, whereby the learned Single Judge directed to consider the case of the writ-petitioner, for his promotion and appointment to the post of Enforcement Sub-Inspector, in the Transport Department of the Government, in the light of the Rules notified by Executive Order dated 31-3-1991, and in terms similar to the earlier order of the Court passed in C.W.J.C.No. 10720 of 2006, disposed of on 3-12-2010(Dinesh Paswan Vs. State of Bihar and others). The writ- petitioner is the sole contesting respondent, and has appeared through Sri Devendra Prasad Sinha.

2. Heard the parties and with their consent this Letters Patent Appeal is being disposed of at this stage itself.

3. It appears that in the Transport Department there were



posts of Enforcement Sub-Inspector. They were as per the Executive Instructions issued on 31-3-1991. These posts were to be filled up by promotion from Class-III employees of the Transport Department on seniority-cum-merit basis. In 1997 a selection process was undertaken in respect of 16 posts of Enforcement Sub-Inspector that were available to be filled up. Accordingly, out of these 16, as per the Roster, 12 were for General Category candidate, 3 for Scheduled Caste and one post for Scheduled Tribe. In the selection process a panel was created. The writ- petitioner was also there at serial no.24 belonging to General Category. It may be noticed that Dinesh Paswan was at serial no.5 in the Scheduled Caste category. Upon selection process being finalized, the first twelve General Category candidates were promoted and appointed as Enforcement Sub-Inspector, and three persons from the Scheduled Caste category were appointed in the three vacancies that were available. There was no Scheduled Tribe candidate available, which was kept vacant. Three years later in the year 2000 upon bifurcation of the State of Bihar and creation of State of Jharkhand, one person from Scheduled Caste, who was at serial no.4 in the selection panel was allotted Jharkhand cadre. Thus, Dinesh Paswan became the fourth candidate. It is under these circumstances that Dinesh Paswan subsequently in the year 2006 filed writ petition stating that considering the carry-forward rule in respect of reserved seats in 1997, there being a post for Scheduled Tribe and none being available in the next three years, that post reserved for Scheduled Tribe would accordingly get transferred to the quota of Scheduled Caste, and upon such transfer the said Dinesh Paswan being the senior most Scheduled Caste candidate, he ought to have been promoted and appointed as Enforcement Sub-Inspector. The writ petition being C.W.J.C. No.10720 of 2006, accepting his contention,



was thus allowed by judgment and order dated 3-12-2010. Let it be noted that the Division Bench of this Court and the Apex Court having been moved by the State, did not interfere with the said order. We have noted these proceedings because the writ- petitioner in the present proceeding has been directed to be treated in similar fashion by the learned Single Judge by the order under Appeal. We have noted in detail those facts to distinguish the case from the case, as pleaded by the writ- petitioner in the present case.

4. So far as the writ-petitioner is concerned, as noted above, he was at serial no.24 in the panel of General candidates. For 1997 promotion exercise, only 12 vacancies being there in General category, the first 12 persons were appointed in his category and he was the 24th person. The State for whatever reasons did not consider any further promotional appointment to the post of Enforcement Sub-Inspector after 1997. Unfortunately, the writ-petitioner, who had a right to be considered for promotion against the vacancies that could have been accruing, could take no steps to assert his right. On 24-9-2003 the State in exercise of powers under Article 309 of the Constitution of India framed Bihar Transport(Enforcement Wing) Cadre Rules, 2003. Now, for the first time three categories in the Bihar Transport(Enforcement Wing) Cadre were made. Rule 3 defined the category. The entry post to the cadre was Enforcement Sub-Inspector, and the total number of posts in the cadre in this respect was 23. The promotional posts were that of Enforcement Inspector and Enforcement Officer. These are three posts different in number and different in pay-scales. Rule 4 gave power to the State to amend the number of posts by creating additional posts or decreasing the number of posts. Rule 24(b) of the aforesaid Cadre Rules, inter alia, provides that those persons, who had been promoted and

appointed as Enforcement Sub-Inspectors prior to 2003 Cadre Rules, would get seniority from the date of their appointment over the direct recruits, who are now to be made. Let it also be noted that now these posts of Enforcement Sub-Inspector were being filled up entirely by direct recruitment to be done through Staff Selection Commission.

5. The grievance of the writ-petitioner was that he had a right to be considered for promotion and appointment to the post prior to 2003 Rules. Instead of promoting and appointing the writ petitioner, in 2005 an advertisement was being issued for filling up 47 posts of Enforcement Sub-Inspector through direct recruitment, thus denying him the right of being considered for promotion.

6. The stand of the State is that after 1997 selection process, the State did not consider it appropriate to fill up any of the vacant posts of Enforcement Sub-Inspector. In 2003 the State took a policy decision and created a separate cadre for Enforcement Sub-Inspectors in the Enforcement Wing of the Transport Department, and from coming into force the said Rules, with effect from 24-9-2003, the cadre posts were now to be filled up only by direct recruitment. The persons, who had already been selected pursuant to promotion and appointment as Enforcement Sub-Inspectors, were taken into this cadre. It appears that in 2003 upon a cadre being formed, a requisition was made for 9 vacancies in the cadre, but before that could be acted upon, in February 2004, the State increased the cadre strength of Enforcement Sub-Inspector from 23 to adding further 36 i.e., 59. As noticed earlier, upon creation of 23 posts, 9 vacancies were advertised, and now there were 36 more posts created with total now comes to 45. There were further two vacancies and accordingly the total vacant posts added to $45+2=47$. This is what was advertised in the year 2004 from which the writ petitioner wanted his selection and



appointment. The learned Single Judge by the judgment and order under Appeal directed the State to treat the writ-petitioner similar to that of Dinesh Paswan. In our view, the direction is not correct. We have already noticed the case of Dinesh Paswan in some detail above, to show that he was to be considered for the reserved Scheduled Tribe category, which fell to the share of Scheduled Caste, and he being the next candidate, was entitled to get the said post in the selection process of 1997 itself. His claim was based on the selection process of 1997 and was allowed by this Court. So far as the writ- petitioner of the present proceeding is concerned, he was considered in the 1997 selection process, but could not make it to a final merit list for want of vacancies. That selection process so far as General category is concerned, was exhausted. Once that selection process was exhausted, the petitioner had a right to be considered for promotion in 2003 when the new Rules came in existence, but unfortunately he did not assert his right. The right is not for promotion, but the right is for being considered for promotion. Had the State taken steps to fill up the vacancies prior to 2003 Rules, the writ petitioner could surely have a right to be considered, but the State did not take any steps nor the writ-petitioner moved the Court for the said consideration. In the meantime, with effect from 24-9-2009 new Rules came into being, which new Rules now provide that any vacancy in the cadre of Enforcement Sub-Inspector only to be filled up by direct recruitment through Staff Selection Commission. Now, it would be too late in the day for the writ-petitioner to urge that the selection process to be now carried out after 2003 Rules, ignoring the same, and grant him promotion to the post that was vacant, due to be filled up prior to 2003. Even though the petitioner had a right at that material time, he never asserted his right. The Rules came into being, changing the

rights and creating a cadre. That cadre would now be governed by the Cadre Rules. Unless it provides and protects the right that had accrued to a person prior to Cadre Rules, the Cadre Rules would not protect the right of such persons. Thus, by delay in moving the Court to assert the right, the right has got defeated by virtue of the Rules coming into being in the Enforcement Wing of the Transport Department. We, therefore, find that the order of the learned Single Judge is not sustainable on both the aforesaid grounds.

7. For the reasons aforesaid, this Appeal by the State is allowed, and the judgment and order dated 22-2-2012 passed in C.W.J.C.No. 15370 of 2005 is set aside, and the writ petition is dismissed.

B.K.Roy/- AFR

(Navaniti Prasad Singh, J)

(Nilu Agrawal, J)

U			
---	--	--	--