

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.16989 of 2007

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1. Rajnish Kumar Choudhary son of late Deo Choudhary, resident of Village - Punaichak, P.S. Shastrinagar, District Patna.
 2. Arjun Paswan, son of late Mahabir Paswan, resident of village- Bairamchak, P.O. Nadaul, District - Patna.

....Petitioners

Versus

1. The State of Bihar through Secretary, Planning and Development Department, Bihar, Patna.
2. Secretary, Planning and Development Department, Bihar, Patna.
3. Commissioner cum Secretary, Personnel and Administrative Reform Department, Old Secretariat Bihar, Patna.
4. Director, Statistical and Evaluation Department, Old Secretariat, Bihar, Patna.

....Respondents

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Appearance :

For the Petitioners : Mr. Sourendra Pandey
Mr. Nalin Vilochan Tiwary, Advocates.
For the State : Mr. Prabhat Kumar, AC to GA-XI

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CORAM: HONOURABLE MR. JUSTICE VIKASH JAIN

ORAL JUDGMENT

Date: 11-07-2017

Heard learned counsel for the petitioners and learned counsel for the respondents.

2. The present writ petition has been filed for quashing the office order no. 07-209 dated 02.07.2007 passed by the Secretary, Planning and Development, whereby and whereunder representation of the petitioners has been rejected, resulting in denial of their promotions as claimed.

3. The short facts of the case according to the petitioners are that they belong to the reserved category of Scheduled Caste, and were entitled to promotion to the post of Assistant Director/District



Statistical Officer/Sub-Divisional Statistical Officer, and that their names were recommended for such promotion in the meeting of the Departmental Promotion Committee held on 20.12.1994. The petitioners were earlier promoted to the post of Assistant Statistical Officer (Junior Selection Grade) by office order dated 28.12.1991 (Annexure-3) with retrospective effect from 01.04.1986. They were given the benefit of Senior Selection Grade by subsequent order dated 30.03.1992 (Annexure-4) with retrospective effect from 01.04.1991 and were also granted Super Time Selection Grade with effect from 24.08.1993 and 07.08.1995 respectively.

4. The Departmental Promotion Committee in its meeting held on 20.12.1994 recommended the names of 7 persons, out of which one person was recommended on the basis of his belonging to the reserved category, while the remaining 6 persons including the petitioners were recommended on the basis of their seniority. It is stated that there were 7 clear vacancies against the recommendation of 7 names as per the roster points. Subsequently, the Departmental Establishment Committee in its meeting held on 25.09.1995 decided that only 5 persons could be promoted as 2 persons (not petitioners) had already superannuated. In view of the delay in the matter of promotion, the petitioners filed representations dated 25.07.2001 and 21.08.2001 respectively. In due course, both the petitioners retired on 30.11.2002 and 31.12.2002 respectively. As no relief was forthcoming,



they approached this Court in C.W.J.C. No. 1037 of 2002 which was disposed of by order dated 02.05.2005 as follows —

“ Heard learned counsel for the petitioners and Mr. Dutta, learned Standing Counsel No. IV appearing for the State.

Learned counsel for the petitioners has based his claim for accelerated promotion of the petitioner by competing with the general category on the basis of Eighty Fifth Amendment of the Constitution amending Article 16 by adding Article 16(4-A).

Learned counsel for the parties have submitted that the validity of the said amended provision of the Constitution has been challenged and is pending consideration before the Supreme Court and in some cases the Apex Court has also passed some interim order.

In that view of the matter, this writ petition is disposed of with the direction that the principle decided in the cases pending before the Apex Court shall also govern the case of the petitioners and their claim shall be considered within two weeks of the decision of the Apex Court.”

5. Upon disposal of the cases pending before the Apex Court and in view of the order dated 02.05.2005 passed in C.W.J.C. No. 1037 of 2002 extracted above, the impugned order dated 02.07.2007 (Annexure-1) came to be passed rejecting the representations of the petitioners, citing the following three reasons: (a) the decisions relied upon by the petitioners do not contain any direction for grant of retrospective promotion after superannuation. Further, Rule 58 (the



reference to Rule 48 is clearly an inadvertent error) of the Bihar Service Code provides that promotional benefit can be granted only with effect from the date when the Government Servant assumes the duties of the post. The petitioners having superannuated could not assume their duties, and hence they could not be granted promotion; (b) There was only one post of Scheduled Caste Category against which there were two other persons who were senior to the petitioners; and (c) No other persons junior to the petitioners had been granted the benefit of promotion retrospectively from a date prior to their superannuation and hence the petitioners could not claim such promotion on the basis of their seniority.

6. Learned counsel for the petitioners submits that the impugned order passed by the Secretary, Planning and Development Department (respondent no. 2) is wholly misconceived, arbitrary and unsustainable. The denial of promotion with retrospective effect is contrary to the spirit of the order of this Court passed in C.W.J.C. No. 1037 of 2002. The petitioners admittedly superannuated in the year 2002, before the order dated 02.05.2005 was passed by this Court directing consideration of the case of the petitioners within two weeks of the decision of the Apex Court. This order having been passed subsequent to the superannuation of the petitioners, it is implicit in the said order itself that this Court had contemplated consideration of retrospective promotion to the petitioners.



7. Further, Even though the petitioners belong to the reserved category of Scheduled Castes, the promotion in question was being claimed by the petitioners on the basis of their seniority and not with respect to the category to which they belonged. Their names had been approved by the Departmental Promotion Committee on that basis as the petitioners had fulfilled all the requisite qualifications essential for such promotion. It is submitted that there is no bar to a person belonging to the Scheduled Castes category being promoted on the basis of his seniority on the roster point meant for a General Category candidate. In this regard, it is submitted that in the year 2001, while the petitioners' promotion was under consideration, Article 16 (4-A) of the Constitution of India was amended by the 85th Amendment with retrospective effect from 17.06.1995. In effect, this amendment contemplated consequential seniority to any class of posts in making provision for reservation. It is therefore submitted that the petitioners became eligible for promotion on the basis of their seniority on this ground as well.

8. The observation that the right of the petitioners had not been affected as no person junior to them had been granted retrospective promotion from a date prior to their superannuation, is misplaced. It is not the claim of the petitioners that they had suffered discrimination in the matter of promotion, rather their claim was based on their own eligibility independent of others.



9. Learned counsel for the respondents opposes the writ petition with reference to the counter affidavit. It is submitted that recommendations of the Departmental Promotion Committee remain valid for one year only. In the instant case, the recommendation was made on 20.12.1994 and as such its validity expired on 20.12.1995. The next meeting of the Departmental Promotion Committee did not take place even until the retirement of the petitioners in the year 2002. It is therefore submitted that the recommendation of the Departmental Promotion Committee could not be acted upon.

10. It has further been submitted by the respondents that the decision to recommend the promotion of the petitioners was taken by the Departmental Promotion Committee on 20.12.1994. On the other hand, the amendment to Article 16(4-A) was introduced subsequently in the year 2001 with retrospective effect from 17.06.1995. Such amendment could not come to the aid of the petitioners as it would not apply to the process of promotion which had already been set into motion prior to the date when the amendment came into force.

11. Having heard the parties and on consideration of the materials on record, this Court finds merit in the writ petition. It is a matter of record that the petitioners retired in the year 2002 whereas the order in C.W.J.C. No. 1037 of 2002 came to be passed subsequently on 02.05.2005 directing the case of the petitioners to be considered on



the basis of the principle decided in the cases pending before the Apex Court. It is therefore evident that this Court was mindful that such consideration of promotion would have retrospective effect. The respondents do not appear to have raised any objection on this issue at the time of disposal of C.W.J.C. No. 1037 of 2002 and hence the reasons contained in the impugned order against grant of retrospective promotion cannot be sustained.

12. The objection on behalf of the respondents with regard to the petitioners' claim based on the amendment in Article 16(4-A) of the Constitution of India, that such amendment would not apply to the case of the petitioners whose recommendation had been made prior to such amendment, cannot be accepted. It is a matter of record that the petitioners were being considered for promotion and during this time, the amendment in question took effect. Moreover, the respondents have stated in paragraphs 25 and 26 of their counter affidavit that after receipt of the recommendation, the Department was unable to take final action as there were conflicting views on the issue of applicability of reservation in matters of promotion. If delay in decision regarding the petitioners' promotion was attributable to the respondents, the petitioners could not be made to suffer on that account. The claim of the petitioners that they were entitled for promotion based on seniority and not against Scheduled Caste Category, which is also the basis for recommendation for promotion by



the Departmental Promotion Committee, has not been controverted in the counter affidavit. Equally, the observation in the impugned order that the petitioners have not been prejudiced as no person junior to them has been promoted with retrospective effect, also appears to be misconceived and irrelevant. The petitioners never sought to contend on the basis of any discrimination suffered, rather they have been claiming promotion on their basis of their own eligibility and seniority.

13. That apart, the objection of the respondents with regard to non-applicability of the Constitutional amendment also cannot be considered at this stage as no such reason was assigned by the respondent no. 2 while passing the impugned order. It is well settled that the validity of an order has to be tested only on the grounds on which it is passed and the reasons therein cannot be supplemented subsequently by affidavits.

14. In the above view of the matter, the impugned order dated 02.07.2007 passed by the Secretary, Planning and Development Department, Bihar, Patna (respondent no. 2) as contained in Annexure-1 to the writ petition is hereby set aside. The respondent no. 2 shall accordingly consider the matter afresh and pass orders in the matter of grant of promotion to the petitioners, with due regard to the judgment in (2006) 8 SCC 212, *M. Nagaraj & Ors. Vs. Union of India & Ors.*, the order dated 02.05.2005 passed in C.W.J.C. No. 1037 of 2002 as well as the observations contained hereinabove. It is expected that the matter



would be disposed of by the respondent no. 2 expeditiously and in any event preferably within a period of three months from the date of receipt/ production of a copy of this judgment.

15. The writ petition stands allowed.

(Vikash Jain, J)

Md. Ibrarul/BT

AFR/NAFR	NAFR
CAV DATE	N.A.
Uploading Date	19 .07.2017
Transmission Date	N.A.

