

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.16049 of 2016

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1. Arwind Kumar son of Late Deodhari Singh at Flat No. B-102, Sapna Apartment, Ramnagri Road, P.O.- Ashiana Nagar, P.S.- Rajivnagar, Dist- Patna- 800025.
 2. Dhananjay Kumar son of Sri Surya Dev Singh resident of Village + P.O.- Ramnagar, P.S.- Khudwan, District- Aurangabad, presently residing at Narayan Sadan, Kharanja Road, Saguna More, Danapur Cantt.
 3. Nawal Kishore Singh Son of Late Ramjee Prasad Singh resident of Village + P.O.- Daudpur, P.S.- Shahpur, District- Patna.
 4. Pramod Kumar Rai son of Sri Taluk Raj Rai resident of Village + P.O.- Pipra (Mardanrai), P.S.- Kargahar, District- Rohtas at Sasaram.
 5. Manoj Kumar son of Late Bangali Chaudhary resident of Village + P.O.- Aat, P.S.+ District- Nalanda at Biharsharif, Pin- 803114.
 6. Bhupendra Kumar Srivastava son of Late Tarkeshwar Prasad resident of Village + P.O.- Auarai, P.S.- Dawat, District- Rohtas (Sasaram).
 7. Sanjiv Kumar son of Sri Dasrath Rajak At Vikasnagar, P.O.- Government Polytechnic, Purnea, District- Purnea- 854303.
 8. Binod Bihari son of Late Ishwar Nath Sah At Azad Gali, Boulia Road, Noorangganj, Sasaram, District- Rohtas at Sasaram.
 9. Munindra Thakur son of Sri Ram Bahadur Thakur resident of Village- Jhitaki, P.O.- Bhangama, P.S.- Narhiya, District- Madhubani- 848108.
 10. Karunesh Kumar Singh son of Sri Ambika Prasad Singh resident of Village + P.O.- Sugia, P.S.- Sheohar, District- Sheohar- 843329.
 11. Alok Kumar son of Sri Ganauri Prasad Mandal At New Sheopuri Colony, Near Airport, Tilkamanjhi, P.S.- Kotwali, District- Bhagalpur- 812001.
 12. Krishnanand Singh son of Late Ram Sevak Singh Village + P.O.- Eghara, P.S.- Meyari Bazar, District- Rohtas at Sasaram, Pin-802217.
 13. Nawal Kishore Pandit son of Sri Ram Prakash Pandit resident of Village- Hathauri, P.S.- Narma, District- Muzaffarpur- 843129.
 14. Narayan Das son of Late Krishna Deo Prasad Gupta resident of Village + P.O.- Ratani Bazar, P.S.- Ratani Bazar, District- Jehanabad- 804421.
 15. Sanjay Kumar Gupta son of Late Laxmi Prasad resident of village + P.O.- Mathiya, P.S.- Lauria, District- West Champaran- 845453.
 16. Saket Kumar Raushan son of Sri Potan Ram resident of Village- Harnichak, Near IOC- Pipeline, P.S.- Anisabad, District- Patna- 800002.
 17. Tulsi Prasad son of Sri Sheomurat Ram resident of Village- Dhanihan, P.O.- Durgawah, District- Kaimur at Bhabhua, Pin- 821105
 18. Shiv Shankar Prasad son of Sri Laxmi Sahu resident of Village + P.O.- Kotiya, P.S.- Jhanjharpur, District- Madhubani- 847404.
 19. Rajesh Kumar son of Sri Ram Padarath Singh resident of Village + P.O.- Meghaul, District- Begusarai- 848202.
 20. Arbind Kumar Sinha son of Late Gaya Ram resident of Village- P.O.- Gundi, P.S.- Krishnagarh Saraiya District- Bhojpur at Ara, Pincode- 802313.
 21. Ranjay Kumar son of Sri Rajendra Singh resident of Village- Sabalpur, P.O.+ P.S.- Rajgir, District- Nalanda- 803116
 22. Vijay Kumar son of Sri B.P. Singh resident of Village- Veena Bhawan, Son of - 3/19, Purnendu Nagar, Phulwarisharif, District- Patna- 801505.
 23. Birendra Kumar Singh son of Bindeshwari Singh resident of Village + P.O.- Indrar, Disrict- Aurangabad- 824101.
 24. Surendra Narayan son of Late G.N. Singh resident of Village + P.O.- Sikrahta,



District- Bhojpur at Ara.

25. Ramashankar Prasad son of Late Radhakishun Prasad resident of Village-
Meghwar, P.O.- Sarari, P.S.- Jamo Bazar, District- Siwan- 841434.

.... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Road Construction Department, Government of Bihar.
2. The State of Bihar through Principal Secretary, Rural Works Department, Government of Bihar.
3. The Deputy Secretary, Road Construction Department, Government of Bihar.
4. Engineer in Chief -cum- Additional Commissioner -cum- Special Secretary, Road Construction Department, Government of Bihar.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Y.V. Giri, Sr. Advocate with
Mr. Pranav Kumar, Advocate
For the Respondent/s : Mr. Niraj Kumar Sinha, AC to PAAG-2

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN

ORAL JUDGMENT

Date: 15-03-2017

The petitioners herein pray for an appropriate writ in the nature of mandamus commanding the respondents to shift back their respective date of promotion on the post of Assistant Engineer granted vide Memo No.4853(S) dated 1.4.2010 with effect from the due date of their respective eligibility for being promoted against the post of Assistant Engineer together with consequential benefits.

With the consent of the parties the writ petition has been heard with a view to its final disposal at the stage of Admission itself.

Facts of the case briefly stated is that the petitioners herein were appointed as Junior Engineer in the year 1999 following a selection process conducted by the Bihar Public Service Commission (hereinafter referred to as the 'BPSC'). According to



the petitioners, all of them have acquired the qualification of A.M.I.E. (Associate Membership of Institution of Engineers) or equivalent qualification before joining the service and/or during their service period.

The Road Construction Department of the Government of Bihar passed a resolution on 22.7.1998, whereby special incentives were given to those of the Junior Engineers who during the service period enhanced their qualification by acquiring the A.M.I.E. degree, or its equivalent qualification. Under the resolution these Junior Engineers were found entitled for promotion to the post of Assistant Engineer on the basis of such acquired qualification under 10% quota allotted in this regard. Clause 4(τ) of the resolution dated 22.7.1998, a copy of which is enclosed at Annexure-1 to the writ petition inter alia provides that only such of the Junior Engineers who possessed such qualification of A.M.I.E. or equivalent prior to the joining of service or those who had acquired such qualification during their service period and had rendered 5 years service in the cadre of Junior Engineer, were eligible for such promotion. Clause 4(τ) of the stipulation was subsequently amended vide resolution bearing Memo No.2475(S) dated 21.2.2008 and the distinction between the Junior Engineer who had acquired the qualification before coming into service or after coming into service was creased out and each of such category



of the Junior Engineers who had acquired such qualification with 5 years minimum service on the post of Junior Engineer were held eligible for such consideration.

An advertisement was published in the newspaper on 18.3.2004, a copy of which is placed at Annexure-2, whereby applications were invited from the Junior Engineers holding A.M.I.E. qualification or its equivalent, for promotion against the vacancies of the year 2003 and 2004. It is following the advertisement that vacancies were notified vide Notification No.3665(S) dated 27.5.2004 and in so far as the issue at hand is concerned i.e. promotion of the Junior Engineers holding A.M.I.E. qualification or its equivalent, of the 17 vacancies notified, 11 were earmarked for the State of Bihar while 6 was reserved for the State of Jharkhand. A copy of the notification dated 27.5.2004 is annexed at Annexure 3.

The respondents thereafter sat over the matter and came up with another notification dated 17.3.2009 present at Annexure-4, revising the vacancies which had occurred in the meanwhile and until December, 2008. A perusal of the notification would show that by passage of time, the vacancies on the post of Assistant Engineers, in so far as the 10% quota reserved for Junior Engineers holding 'A.M.I.E.' qualification or its equivalent is concerned, was enhanced to 52, of which, 27 posts were earmarked for general



category, 24 was reserved for Scheduled Castes and one post for Schedule Tribes category.

On 24.9.2009 a seniority list was published by the Road Construction Department of the Government of Bihar containing the names of the Junior Engineers who were found eligible for promotion to the post of Assistant Engineer against 10% A.M.I.E. qualification quota as until 2008. While the petitioner no.13 was found eligible for promotion in the year 2002 and petitioner no.8 in 2003, most of remaining petitioners have been found eligible for promotion in the year 2004 except petitioner no.16 who has been found eligible in the year 2007 and the petitioner no.20 whose name does not figure in the extracted seniority list present at Annexure-5.

In other words, the seniority list acknowledges that the petitioners were qualified for promotion in between the period 2002 to 2007. The matter was considered by the 'BPSC' and who vide letter dated 3.3.2010 recommended the petitioners for promotion under 10% quota reserved for Junior Engineers possessing A.M.I.E. qualification or its equivalent and following which the notification of promotion bearing No.4853(S) dated 1.4.2010 was issued granting promotion to the petitioners from the date of its issuance.

The grievance of the petitioners is that they should have been granted the promotion from the date they were found eligible for promotion on the vacancies so notified. The petitioners filed



their representations, copies of which are placed at Annexure-9 series relying upon the past precedents followed by the department, of shifting the date of promotion with effect from the date on which the incumbent was found eligible for such promotion in reference to the orders passed by this Court. Even though the representations were acted upon by the respondents as manifest from the file notings, the extract of which has been enclosed at Annexure-10 series but ultimately the department showed helplessness in the matter simply on grounds that similar relief would be claimed by other engineers as well. A noting to such effect is appearing at page 124 of the writ proceedings. The petitioners feeling aggrieved are before this Court.

Mr. Y.V. Giri, learned senior counsel has argued for the petitioners with the assistance of Mr. Pranav Kumar while the State is represented by Mr. Niraj Kumar Sinha, learned Assisting Counsel to Principal Additional Advocate General No.2.

While it is the argument of Mr. Giri, learned senior counsel for the petitioners that the laches attributable to the respondents in the matter of grant of promotion to the petitioners with effect from the date the vacancies became available and the petitioners acquired A.M.I.E. qualification for such promotion, cannot act to their prejudice, such argument has been contested by the learned State Counsel on grounds that a mere eligibility for



promotion or possessing the requisite qualification would not entitle the petitioners to a grant of promotion unless they could show any prejudice being suffered in the form of promotion of juniors. Mr. Giri in support of his submission has referred to the file notings present at Annexure-10 to submit that while on principles, the department has practically accepted the claim of the petitioners and that they have extended similar benefits to some others who have approached this Court as evident from Annexures- 7, 7/A and 8 to the writ petition but they have refused to act in the present case.

Learned senior counsel has referred to a Bench decision of this Court reported in **1997(2) PLJR 731 (Chittaranjan Kumar Buernevey Vs. Bihar State Electricity Board)** and with a particular reference to the opinion of the Bench present at paragraphs 25 and 28 he submits that the legal position has been settled in this regard. Mr. Giri has also referred to a Bench decision of this Court reported in **2014(1) PLJR 25 (Prantosh Kumar Das Vs. State of Bihar)** and with reference to the opinion present at paragraph 4 he submits that the respondents cannot be permitted to take the advantage of their own folly because once they have initiated the process of promotion as back as in 2004 vide Annexure-2 and even the vacancies have accordingly been notified, a mere delay in completion of process cannot act prejudice to the rightful claim of the petitioners.



A five page counter affidavit was initially filed by the Deputy Secretary, Management Cell and by simply enclosing an order dated 16.6.2016 passed by the Secretary, Road Construction Department in the case of one Nawal Kishore Prasad, it was canvassed that the opinion expressed for rejecting the claim of Nawal Kishore Prasad would govern the case of the petitioners as well as regarding their claim for shifting back the date of their promotion.

When the respondents were confronted by learned senior counsel for the petitioners in relying upon an order which had already been quashed by a Bench of this Court, that a supplementary counter affidavit was filed by the same gentleman extending apology for placing incorrect fact before this Court. Mr. Sinha, learned Assisting Counsel to Principal Additional Advocate General No.2 while admitting to the faux pass committed by the respondents in relying upon an order of the Secretary passed in the case of Nawal Kishore Prasad which had already been quashed by a Bench of this Court in CWJC 13594 of 2016 (Nawal Kishore Prasad vs. The State of Bihar), has renewed the apology on behalf of the respondents and referred to paragraphs 8 and 9 of the supplementary counter affidavit as to the stand of the respondents. It is his submission that a mere eligibility possessed by the petitioners is not enough for admissibility to a promotion because it



requires fulfillment of certain other requirements. It is further his case that since none of the juniors has been promoted, the petitioners cannot raise any grievance.

I have heard learned counsel for the parties and I have perused the records.

The petitioners have already been granted promotion against 10% quota on the basis of their qualification of A.M.I.E. degree or its equivalent vide order bearing Memo No.4853(S) dated 1.4.2010.

The grievance of the petitioners is that since the respondents had initiated a process of promotion vide advertisement published on 18.3.2004 notifying the vacancies available in the year 2003 and 2004, which have been enhanced vide notification dated 17.3.2009 by including vacancies which had arisen until December, 2008, thus there is no dispute on the vacancies and the only relevant factor for consideration would be the date on which the incumbents had acquired qualification of A.M.I.E. or its equivalent. According to the petitioners it is the date on which such qualification had been acquired by the petitioners which would be the relevant consideration for fixing the date on which the incumbents were to be promoted subject to the availability of vacancies in that particular year.

In my opinion the argument advanced on behalf of the



petitioners does hold substance and the reasons for such opinion, is reflected from the action of the respondents themselves which I shall demonstrate hereinafter.

Annexures-1 and 1/A are the resolutions dated 22.7.1998 and 21.02.2008 respectively of the State Government in its Road Construction Department prescribing the quota reserved for Junior Engineers who possessed the A.M.I.E. qualification or its equivalent which was increased from 3% to 10%.

Annexure-2 is an advertisement published on 18.3.2004 notifying vacancies of the year 2003 and 2004 for being filled up by way of promotion from the Junior Engineers possessing A.M.I.E. qualification or its equivalent. Applications were invited through the advertisement from all such Junior Engineers who possessed such qualification.

Annexure-3 is the notification dated 27.5.2004 reiterating the position that the vacant posts were to be filled up by way of direct recruitment or by way of promotion and the promotional quota earmarked 17 posts for such of the Junior Engineers possessing A.M.I.E. qualification or is equivalent. Of the 17 posts, 11 is meant for the Junior Engineers posted in the State of Bihar.

These documents do confirm that process had been initiated for promotion of Junior Engineers under 10% quota reserved for such Junior Engineers possessing A.M.I.E.



qualification or its equivalent for vacancies occurring in the year 2003 and 2004. Having initiated the process the respondents sat back in the matter for five years but thereafter came up with a notification dated 17.3.2009 placed at Annexure-4 enhancing the vacancies for being filled up by promotion or by way of direct recruitment. This time the respondents have taken into consideration all vacancies which have arisen until December, 2008. In so far as 10% quota reserved for the Junior Engineers possessing the I.M.I.E. or its equivalent qualification is concerned, 27 posts were reserved for general category, 24 for Scheduled Casts and 1 for Scheduled Tribes category,

Annexure-5 is a letter of the Engineer-in-Chief –cum- Additional Commissioner –cum- Special Secretary of the Road Construction Department addressed to the other authorities of the Road Construction Department and other departments giving the details of the Junior Engineers as regarding their eligibility for promotion to the post of Assistant Engineer against the promotion quota on the basis of possessing A.M.I.E. or its equivalent qualification. The chart very clearly shows at column no.9 the date on which each of such Junior Engineers have been found eligible/entitled for promotion. It is rather surprising that even when exercise in such detail had been carried out, when the crunch time arrived i.e. when the promotional order was to be passed vide



Annexure-6, all the Junior Engineers were put in one basket to be granted promotion from the date of issuance of the promotion order bearing No.4853(S) dated 1.4.2010 irrespective of the date on which each one of them had acquired eligibility.

In my opinion this very action of the respondents in classifying all the Junior Engineers possessing A.M.I.E. qualification or its equivalent as one, irrespective of the date on which each one of them had acquired the eligibility for such promotion, is a discriminatory act. In other words unequals have been treated as equals even when the respondents are conscious as regarding the eligibility date of each of the Junior Engineers which stands confirmed from the list enclosed at Annexure-5. The grievance so raised is genuine and I am rather surprised that when attention was drawn of the respondents they have also acted thereupon which is confirmed from the file notings present at Annexure-10 series except that since according to the respondents, it would open a Pandora box, hence they decided it otherwise.

The discussions above does confirm one thing and i.e. that there were vacancies available over the period ranging 2003 to 2008 and these petitioners had also been found qualified for promotion under 10% quota meant for Junior Engineers possessing the A.M.I.E. qualification or its equivalent over such period but despite such position all of them have been clubbed together for



being promoted with effect from 1.4.2010 instead of the date on which each one of them was found eligible for such promotion subject to availability of vacancies on the posts earmarked against 10% quota of promotion. A rather peculiar stand has been taken in the counter affidavit in which it is mentioned that a mere acquiring of qualification is not itself sufficient for promotion which requires consideration of other requirements as well. The respondents are not of target in making such submissions, which is the normal rule but the situation is otherwise herein. In the present case it is the respondents themselves who have initiated the process by notifying vacancies of the year 2003 and 2004 as back as in the year 2004 and thereafter revising the vacancies in the year 2009 by including all vacancies which had arisen over the period ending December, 2008. The respondents were also not clueless when they prepared the seniority list present at Annexure-5 by classifying each of the Junior Engineers as per their date of eligibility over the period. Until the preparation of the seniority list present at Annexure-5, the respondents were proceeding in absolute correct direction and even the promotional order present at Annexure-6 would suffer no infirmity except that it clubs all the Junior Engineers together irrespective of their eligibility date of promotion. A Junior Engineer who acquired eligibility in 2003 has been treated at par with the one acquiring such qualification in 2008.



In my opinion even if the order of promotion was issued on 1.4.2010, the effective date of promotion of each of the Junior Engineers mentioned therein has to be in reference to the date on which, each of them acquired eligibility subject to the vacancies available against 10% quota. The respondents having initiated the process of promotion in the year 2004 by earmarking vacancies arising in each year beginning from 2003 for being filled up from the Junior Engineers possessing A.M.I.E. qualification or its equivalent against 10% quota reserved for them, the completion of such process in issuance of promotional order also had to be in terms of the vacancies so notified vide advertisement dated 18.3.2004 present at Annexure-2 , the notification dated 27.5.2004 at Annexure-3 and its revision vide notification dated 17.3.2009 vide Annexure-4.

In the circumstances so discussed it is rightly argued by Mr. Giri, learned senior counsel appearing for the petitioners that the delayed action on the part of the respondents cannot prejudice the case of the petitioners and their respective promotions have to be considered with effect from the date each of the petitioners have acquired such qualification subject to availability of vacancies. The submission is well taken and has to be upheld.

Paragraph 25 to 29 of the judgment relied upon by Mr. Giri rendered in the case of **Chittaranjan Kumar Buernevey**



(supra) would be an answer to the present situation as well which runs as under:

“25. In the impugned order the Board is quite right in saying that there cannot be any automatic filling up of the post by promotion as soon as it falls vacant. But one thing is far too well settled to be disputed that right to be considered for promotion flows from the constitutional guarantee under Articles 14 and 16 to the Constitution. Against that background the other assertion in the impugned order that the Board ‘thought it fit’ to consider the case of the petitioner for promotion from 28th April, 1986 without giving any justification by the petitioner should not be considered for promotion earlier and with effect from the date of occurring of the vacancy especially when the petitioner’s eligibility for such consideration is not disputed in the impugned order does not satisfy the test of either reason or relevance.

2. In C.O. Arumugam and others vs. The State of Tamil Nadue and others reported in (1991) (Supp.) 2 SCC page 129, the Apex Court made it clear that consideration for promotion can only be postponed on reasonable ground. Here no reasonable ground has been shown in the impugned order why the petitioner’s case for consideration for promotion to the post of Under Secretary was postponed.

27. So in the absence of any cogent reason in the impugned order, this Court cannot sustain the same. The attempt of the learned counsel for the Board to improve the impugned order on the basis of additional reasons not mentioned in it also cannot be accepted for the well settled legal position discussed here-in-above.

28. Therefore, the question is whether an employer is free to defer at its sweet will the consideration of an incumbent’s case of promotion when the vacancy occurs and when the person whose case is ripe for consideration is making repeated representations for such consideration of his case. If the answer is given by this Court in affirmative then an employer would be put in the position of being an ‘*imperium in imperio*’. Under the constitutional set up no body can claim that position. On the other hand the Apex Court is constantly harping on the fact that the governmental authorities in keeping with the concept of a Welfare State should act as a model employer. Acting as a model employer, implies



that persons who are entitled to be considered for promotion at the time when the vacancy occurs ought to be so considered in accordance with law and they must know where they stand. Therefore, a fair consideration of case for promotion implies a timely consideration and not a belated one or at any time when the employer thinks it fit. As the employee has a fundamental right of having his case for promotion considered fairly, similarly the employer has an obligation to do it objectively. There is no scope for a subjective approach in this area. So the authority must remember that in considering an employee's case for promotion, it is undertaking an exercise in the context of certain constitutional imperatives. And it is expected that the authority must act with a due sense of responsibility and in an objective manner and in such cases always there is an accountability attached to its actions. So the authority cannot take the stand, as it has taken in the impugned order that it will consider the case for promotion 'when it thinks fit'. The impugned order thus betrays a clear lack of perception on the part of the authorities about its duties in this respect.

29. This Court is of the view that discipline in public service is not a one way traffic. If the authorities expect discipline and dedication from the employees, they must also adhere to some discipline in the discharge of duties and obligations and as a model employer one such obligation is to consider the eligible employees for promotion in accordance with the rules and within a reasonable time when vacancies in the promotional post occur."

In the circumstances discussed, the petitioners are found entitled to the relief so prayed in this writ petition.

The respondent authorities concerned including the Principal Secretary, Road Construction Department are directed to consider the claim of the petitioners for promotion with effect from the date on which each of them have been found fit for promotion



in terms of the list so issued dated 24.9.2009 present at Annexure-5 subject to availability of vacancies in that particular year earmarked for such promotion and pass appropriate orders in accordance with law within a period of three months from date of receipt/production of a copy of this order.

The writ petition is allowed.

Let a writ of mandamus issue accordingly.

(Jyoti Saran, J)

SKPathak/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	23-03-2017
Transmission Date	NA

