

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.16240 of 2015

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1. Radha Pandey son of Late Baleshwar Pandey, Resident of village- Dariapur, P.S.- Parasa Bazar, District- Patna
 2. Nilambar Thakur, son of Late Uttam Narayan Thakur, Resident of Sisawa, P.S.- Pandaul, District- Madhubani
 3. Sugambar Prasad son of Shri Bhagwan Harijan, Resident of village- Pattar, P.S.- Aswan, District- Siwan
 4. Mohan Rajak, Son of Shyam Lal Rajak, Resident of village- Rasalpur, P.S.- Jehanabad, District- Jehanabad
 5. Sudisht Narayan Singh son of Shiv Dayal Singh, Resident of village- Sikandarabad, P.s.- Baikunthpur, District- Gopalganj
 6. Dinesh Prasad Son of Mishri Raut, Resident of Village- Amanaur, P.S.- Chapra, District- Saran at Chapra
 7. Parasnath Singh son of Narayan Singh Resident of village- Mahauri, P.S.- Siwan, District- Siwan
 8. Muzaffar Imam Khan, son of Abdul Zafar Khan, Resident of village- Chika Patti, P.S. - Motihari, District- East Champaran
 9. Vishwanath Tiwary, Son of Sahdeo Tiwari, Resident of village- Parwwan, P.S.- Sikarganj, District- East Champaran

.... Petitioner/s

Versus

1. The State of Bihar
2. The Area Development Commissioner cum Chairman, Gandak Area Development Agency, Muzaffarpur
3. The Secretary, Gandak Command Area Development Agency, Muzaffarpur
4. The Secretary Water Resources Department, Bihar, Patna

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Kamala Kant Tiwary, Advocate
For the Respondent No. 2 &3 : Mr. Prasoon Sinha, Advocate

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CORAM: HONOURABLE MR. JUSTICE MADHURESH PRASAD

ORAL JUDGMENT

Date: 19-04-2018



Since it is agreed between the parties that the issue raised in the instant writ petition will also govern the decision in the case of **Suresh Thakur & Ors vs. the State of Bihar and others** which is listed today before this Court under the heading 'For Hearing' therefore, with consent of the parties, the instant case is being taken up for consideration and disposal.

2. Heard learned counsel for the petitioners and the respondent authorities as well as the State.

3. The petitioners who were working as Treasure Guard in the respondent authority came in the regular employment of the authority on 03.12.1990. They had approached this Court by filing a writ petition bearing C.W.J.C. No. 8156 of 1995 raising a grievance that other Treasure Guard/peon who were actually in lower scale were granted promotion to the post of clerk ignoring the legitimate claim of the petitioners.

4. This Court by order dated 19.06.2013 considering the entire gamut of issue directed that the petitioners be promoted to the post of clerk with effect from 11.02.1982, being the date on which five other persons allegedly juniors to the petitioners had been promoted as clerk. The respondent authority challenged the said order by filing LPA No. 359 of 2014. The Division Bench after considering the issue came to a conclusion that the writ Court could not have



given a specific direction to promote the petitioners from a specified date being 11.02.1982 and that at best a direction could have been given for considering the petitioners' claim for promotion in accordance with rules. Accordingly, the L.P.A. No. 359 of 2014 was partly allowed and the writ Court's order was modified. The relevant extract of the order passed in LPA No. 359 of 2014 dated 02.04.2015 is being reproduced herein below .

"For all practical purposes, the Learned Single Judge took note of the fact that the appointment of the Respondents has been on regular basis. We also agree with the finding of the Learned Single Judge. Once the appointment of the Respondents is to be treated as on regular basis, they are naturally entitled to be promoted. However, a distinction needs to be drawn between the right to be considered for promotion on the one hand, and the right to be promoted on the other hand. An employee can claim the former and not the latter. If after consideration of the matter of an employee, the employer refuses promotion, the reasons that weighed with him are subject to judicial scrutiny.

In the instant case, the order of rejection of promotion was without any reason. Obviously, because of that the Learned Single Judge has set aside the same. What becomes important is the purport of the direction that can be given thereafter. The recognition of right of the Respondents to be considered for promotion should have simply resulted in a direction to the appellant to consider the case of the Respondents by treating their appointment as on regular basis. However, the direction issued by the Learned Single Judge not only that the Respondents must be promoted to a higher post but also with effect from a particular date, and for payment of arrears of salary cannot be sustained in law. Time and again, the Hon'ble Supreme Court held that even in a writ of mandamus, no specific direction for appointment or promotion



can be given and at the most direction could be given for considering the case for appointment or promotion.

We, therefore, partly allow this Appeal by modifying the order passed by the Learned Single Judge to the effect that the appellant shall consider the case of the Respondents 1 to 10 for promotion to the next higher category in accordance with Rules within three months from today. If the Respondents are not satisfied with the nature of benefit that is extended to them, it shall be open for them to pursue their remedies.

The Interlocutory Application, if any, shall stand disposed of. There shall be no order as to costs."

5. Pursuant to disposal of the said Letters Patent Appeal, the petitioners again filed a representation before the authorities. The same is dated 18.04.2015. Once again the petitioners have raised the issue regarding other five persons who were promoted as clerk with effect from 11.02.1982.

6. The case of the petitioners' is that since they were in the higher scale on the date when the promotions were granted to the other five persons, they too should have been promoted with effect from that date. The representation came to be finally decided by the authority under order dated 28.06.2015. The same is Annexure 9 to the writ petition wherein the authorities have considered their claim with reference to the other five persons.

7. It is undisputed position that the other five persons had been appointed as Treasure Guard/Peon in between 1975-1978



whereas the instant petitioners were appointed to the said post in between 1980-1984. The respondent authority has therefore, considered the fact that any other person junior to the petitioners have not been allowed the benefit of promotion. Such consideration is to be found in paragraph 13 of the order dated 28.06.2015 disposing of the petitioners' representation. The respondent authority has also relied upon the fact that since their resources are limited and their operation has decreased substantially the State Government has imposed a bar on any further appointment or promotion other than appointment by way of compassionate ground. By citing these reasons the claim of the petitioners have been rejected by order dated 28.06.2015 which is impugned in the instant writ petition.

8. It is submitted by the learned senior counsel for the petitioners that perusal of paragraph 12 of the impugned order would show that in fact the State Government has relaxed the embargo on the respondent authority and has given a specific direction that petitioners' claim for promotion may be considered in accordance with rules.

9. This Court had in light of the said submissions on behalf of the petitioners called upon the State to place its stand with reference to the petitioners' claim. The State Government has filed its counter affidavit and the specific stand has been taken therein that



ever since the authority has come within the purview of the Water Resources Department, the Department has restricted all such agencies from taking any decision with regard to appointment and promotion due to financial burden on the public exchequer without permission of the State Government. Reference has been made to letters dated 17.02.2004 and 19.05.2008. It has specifically been stated that the department has reiterated its decision to the authority to keep the post vacant in dormant condition and the only exception that has been allowed is appointment by way of compassionate appointment. The plea of financial crunch seems to be substantiated in view of the stand taken by the State Government.

10. The other submission made on behalf of the petitioners with reference to paragraph 4 of their representation and relying upon the seniority Rule which has been decided under Government letter dated 22.10.1975 which is placed on record by way of rejoinder at Annexure 16, is that the petitioners had better claim than the other five persons who were promoted with effect from 11.02.1982 since the petitioners were working on a higher pay scale.

11. In support of such submission reliance is placed on Clause 3(iv) (ga). The same provides that while working on the lower post those who are having lower scale would be considered junior for the purpose of promotion and as such since the petitioners were



admittedly on a higher scale than the five persons who were granted promotion with effect from 11.02.1982, they had a superior claim if not at par with those five persons and as such they could not have been denied their promotion to the Grade 3 post from the post of Treasure Guard, at least with effect from 11.02.1982.

12. Two issues arise for consideration, based on submissions advanced on behalf of the counsel for the respondent authority. One is that the promotion granted to the other five persons way back in the year 1982, cannot be objected to, moreso when there is no specific challenge to the promotion granted to the said five persons nor have they been impleaded as party to the instant writ petition.

13. The other submission advanced in relation to the said claim of the petitioners is that the said letter of 22.10 1975 Annexure 16 of the writ petition is a letter regarding determination of *inter se* seniority between employees. Clause 3 (iv) (Ga) cannot be read in isolation and can only be read harmonious with Clause 3 (Ga) (ii) which provides the precondition for invoking the principles contained in Clause 3 (iv) (Ga) which is being relied upon by the petitioners. The condition/qualification that is required for claiming seniority on the basis of pay scale which is provided in Clause 3 (Ga) (ii) is that the *inter se* determination must be in respect of persons who were



appointed by way of direct recruitment under the same transaction. Admittedly that is not the case in the instant writ petition in as much as the petitioners have been appointment in between 1982-1984 and those five persons with whom they are claiming parity or superiority have been appointed much earlier, i.e., in between 1975-1976.

14. The submission on behalf petitioners with reference to the letter of 22.10. 1975 therefore, appears to be unsustainable and no relief can be granted on the basis of the same.

15. Whether on the basis of financial crunch and embargo imposed by the State Government, the petitioners' claim for promotion can be rejected or even otherwise they have to be granted promotion, no submissions have been advanced on behalf of the petitioners, other than contending that paragraph 12 of the rejection order itself suggests that there has been relaxation in case of the petitioners in light of the LPA order. The State has already responded that no specific relaxation has been granted as in the counter affidavit they have reiterated their stand regarding bar on any further appointment or promotion by the authority other than on compassionate ground.

16. Having considered the submissions of the parties and in view of the findings hereinabove, this Court comes to a conclusion that the claim of the petitioners has been considered by the authorities



under the order dated 28.06.2015. Such consideration appears to be bonafide with reference to the financial condition and referring to the seniority of the petitioners with the other five persons with whom they claim parity or superiority. The rejection does not warrant any interference by this Court.

18. The writ petition is dismissed.

(Madhuresh Prasad, J)

Prakash/-

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CAV DATE	
Uploading Date	
Transmission Date	

