

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.16563 of 2011

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Bateshwar Sharma S/O Late Ram Baleshwar Sharma R/O Flat No. 1102N,
Uday Giri Apartment, Budhmarg, Police Station - Kotwali, District - Patna

... .. Petitioner/s

Versus

1. The State Of Bihar
2. The Principal Secretary, Water Resources Department, Government Of Bihar
3. The Joint Secretary, Establishment, Water Resources Department, Govt. Of Bihar
4. The Bihar Public Service Commission, Through Its Chairman, Bihar Public Service Commission, Patna
5. The Controller Of Examination Cum Additional Secretary, Bihar Public Service Commission, Patna

... .. Respondent/s

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Appearance :

For the Petitioner/s : Mr.Siya Ram Shahi

For the Respondent/s : Mr. Amresh Kumar Sinha, AC to G.A. 1

For the BPSC : Mr. Kaushal Kumar Jha, Advocate

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CORAM: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH

ORAL JUDGMENT

Date : 01-10-2020

Heard learned counsels for the petitioner, respondent-
State and learned counsel for the Bihar Public Service
Commission (hereinafter referred to as the Commission).



The present writ application has been filed for issuance of a writ for quashing the letter no.3243 dated 11.3.2011 issued under the signature of Respondent no. 5, the Controller of Examination-cum-Additional Secretary, Bihar Public Service Commission, whereby the decision of the Departmental Promotion Committee dated 28.2.2011 has been communicated to the petitioner, whereby and whereunder the claim of the petitioner for promotion to the post of Chief Engineer has been rejected. Further prayer is for direction to the respondent Water Resources Department to consider the grant of promotion to the petitioner to the post of Chief Engineer with effect from 1.12.1995 with all consequential benefits. The relief prayed for in paragraph 1 of the writ application, reads as follows:

“i. For issuance of an appropriate writ in quashing the letter no. 3243 dated 11.3.2011 issued under the signature of Respondent no. 5. Whereby the Departmental Promotion Committee in its meeting dated 28.2.2011 has rejected the claim of the petitioner for promotion to the post of Chief Engineer, contained in Annexure -6.

ii. For issuance of an appropriate writ commanding the respondents Water Resources Department to consider the petitioner grant of promotion to the post of Chief Engineer w.e.f. 1.12.1995 with consequential benefits.



iii. For any other relief or reliefs for which the petitioner is entitled under law as well as on facts.”

The factual matrix of the case is that the petitioner was appointed as Assistant Engineer in Irrigation Department of the Government of Bihar in the year 1962. He joined the said post on 20.8.1962. The petitioner was promoted to the post of Executive Engineer (Class I) in the year 1977 and since then worked as such.

A Departmental Promotion Committee in its meeting dated 29.8.1988 prepared a panel of Executive Engineers for promotion to the post of Superintending Engineers after verifying the service records. The petitioner's name figured in the said panel at sl. no. 6. The Commission also recommended the name of the petitioner, when 27 Executive Engineers were promoted to the post of Superintending Engineers but the name of the petitioner did not find place in the list of approval by the government. On enquiry, the petitioner came to know that on the ground of proposed sanction for prosecution, the promotion of the petitioner was withheld. The petitioner while being posted as Executive Engineer in the Western Koshi Canal Camp-Khutauna Division, Sirisia, was subjected to a criminal case registered



under Sections 409, 311, 347 and 379 of the Indian Penal Code. With respect to the said criminal case, the order of cognizance was challenged in Cr. Misc. No. 7716 of 1989 and the same was allowed by this Court vide order dated 20.9.1989. On the basis of the same, the order of suspension of the petitioner dated 14.6.1989 was revoked and thereafter the process of giving promotion to the petitioner to the post of Superintending Engineer again initiated. Consequently, in pursuance to the Cabinet decision of the government dated 9.1.1990, the petitioner was given promotion to the post of Superintending Engineer on ad hoc basis. Thereafter, the petitioner was subjected to the departmental proceeding but finally in pursuance to the order passed in SLP(Civil) No. 14349 of 2008, the Water Resources Department cancelled the charges vide order issued under the signature of the Deputy Secretary dated 15.2.2009 and then the petitioner claimed his regular promotion to the post of Superintending Engineer w.e.f. 17.1.1989 and Chief Engineer w.e.f. 1.12.1995, but it was not given, which culminated into filing of the writ application being CWJC No. 13413 of 2009.

In the said writ application, the department took specific stand in paragraph 12 of the counter affidavit that the petitioner is entitled to promotion on the substantive post of Superintendent



Engineer and Chief Engineer with effect from 12.01.1989 and 01.12.1995, respectively, and recommendation has been made to the Commission to the effect. In that view of the matter, the respondent-State and the Commission was directed to decide the issue within a period of three months. Relevant portion of the order reads as follows:

“The counter affidavit on behalf of respondents at paragraph -12 specifically states that the petitioner is entitled to promotion on the aforesaid post with effect from 17.1.1989 and 1.12.1995 respectively and, therefore, the matter had already been forwarded to the B.P.S.C. for appropriate consideration and orders.

In that view of the matter, the writ petition is disposed of with direction to the respondent State of Bihar and the Commission to pass appropriate orders in accordance with law for the promotion of the petitioner on the post of Superintending Engineer and Chief Engineer inclusive of legitimate consequential benefits within a maximum period of three months from the date of receipt/production of a copy of this order before them individually.”

Consequently, vide notification no. 1321 dated 19.8.2010, as contained in Annexure 4 to the writ application, the petitioner was given regular promotion to the post of Superintending Engineer w.e.f. 17.1.1989, but was not given



promotion to the post of Chief Engineer, which led to the filing of the contempt application being MJC No. 3999 of 2010 on 15.9.2010. Considering the show cause of B.P.S.C. and Water Resources Department to the effect that the Commission rejected the claim of the petitioner since adverse entry was recorded in A.C.R., the contempt application was disposed of with a liberty to the petitioner to challenge the issue of adverse entry into a fresh writ application. Hence, the present writ application. s

The petitioner claims in paragraph 22 and 27 of the present writ application that the adverse entry of the years 1992-93 was never communicated to him.

Mr. Siyaram Sahi, learned counsel for the petitioner submits that specific case of the petitioner is that an adverse entry was neither communicated and specific averment has been made in paragraph nos. 22 and 27 of the writ application. As per instructions under the Bihar P.W.D. Code with regard to appointment and promotion, Clause (a) specifically suggests that the report of the Superintending Engineer will be recorded by the Chief Engineer. In the present case, the report was recorded by the Principal Secretary, Water Resources Department but the department has not brought on record any proof with regard to the service of the said adverse entry to the petitioner. It is further



submitted that the petitioner is entitled for being promoted to the post of Chief Engineer w.e.f. 1.12.1995 and for the consequential benefits arising out of such promotions. The petitioner has already superannuated w.e.f. 31.1.1996.

It is submitted by learned counsel for the respondent nos. 1 to 3, relying upon their counter affidavit, that the issue of promoting the petitioner to the post of Chief Engineer was placed before the Commission in its meeting of the Departmental Promotion Committee dated 28.2.2011 but it was not approved by the Commission since there was adverse entry recorded for the year 1992-93. The proceeding of the Departmental Promotion Committee has been brought on record as Annexure A to the counter affidavit. It has further been submitted that so far as arrears for the post of Superintending Engineer is concerned, the same has already been paid. The adverse entry was recorded in the ACR of the petitioner by the Principal Secretary and it was duly communicated to the petitioner vide letter no. 384 dated 25.3.1994, Annexure A to the counter affidavit. Moreover, the instructions issued by the Personnel Department as contained in letter no. 7444 dated 30.4.1979 in its Clause 22(i) stipulates that the remarks against Class I officer of the State Government will be communicated by the Principal Secretary. The same has been



brought on record as Annexure C to the counter affidavit and Clause 23 of the said Circular stipulates that the representation against the adverse entry has to be made within six weeks of the communication but no representation was made and hence, the petitioner is not entitled for the promotion.

It is submitted by learned counsel for the respondent nos. 4 and 5, the Commission, that since the required ACR for the relevant order was not produced, hence he was not found fit for promotion. The letter no.10570 dated 24.10.2007 issued by the Personnel and Administrative Reforms Department stipulates that no promotion can be given in absence of required ACR of the relevant period and as per the said circular promotion of the petitioner was not considered.

Having heard learned counsels for the parties, the main issue involved in the present writ application is whether the adverse entry has been communicated to the petitioner or not, or whether, despite non-communication of adverse entry, promotion to the post of Chief Engineer could have been denied to the petitioner?

From perusal of the confidential report of the petitioner for the years 20.8.1992-31.3.1993, it appears that the Principal Secretary has recorded the entry to the effect - "Ye Ek vivadgrast



padadhikari hai aur sandeh ke ghere me pare hue hai. Inki kirti achhi nahi hai.”

The above mentioned adverse entry was communicated by the Joint Secretary to the petitioner vide Memo no. 384 dated 25.3.1994. However, there is nothing on record to suggest that it was actually communicated. However, when this communication, as contained in Annexure A to the counter affidavit, was brought on record, the petitioner filed rejoinder denying the fact that it was ever served upon him. Moreover, it is the claim of the petitioner that as per instructions under P.W.D. Code the report has to be recorded by the Chief Engineer and this fact has not been denied by the respondent-State that for Class I post under the Irrigation Department, P.W.D. Code will not apply or general instructions by the Personnel and Administrative Reforms Department will apply.

The inconsistent stand of the respondent-State further gets reflected from the fact, that the case of the respondent nos. 4 and 5 is that since ACR was not sent or produced during meeting of D.P.C. and in absence of the same, circular of the Personnel and Administrative Reforms Department does not permit the consideration of promotion hence the petitioner's case could not be considered for promotion. The stand of the Commission is



stipulated in paragraph nos. 4, 5 and 6 of their counter affidavit, which reads as follows:

“4. That in this context it is to be noted that on receipt of the Govt. proposal for promotion to the post of Chief Engineer vide the Water Resources Department, Bihar’s letter no. 139 dt. 02.02.2011 it was considered in the meeting of the Departmental Promotion Committee held on 28.02.2011 and the proceeding of the meeting regarding 29 officers including the Petitioner were sent to the Adm. Deptt. Vide the Commission’s letter no. 3243 dt. 11.03.2011. It is further to be noted that in the meeting of the Departmental Promotion Committee the Adm. Department could not produce the required A.C.R. of the Petitioner and therefore he was not found fit for such promotion.

5. That it is pertinent to note that the Bihar Public Service Commission is a recommending body. Its recommendation is based on the materials and information provided by the Department concerned which are examined and discussed in the meeting of the Departmental Promotion Committee and after analysing all the aspects the recommendation for promotion is made in the light of Govt. Rules and Regulations. In the matter of the Petitioner’s promotion the decision of the Departmental Promotion Committee has been taken in the light of the letter no. 10570 dt. 24.10.2007 issued by the personnel & Adm. Reforms Deptt. Bihar according



to which no promotion can be given in the absence of required ACRS of the relevant period. It is hereby mentioned that in the meeting of the Departmental Promotion Committee the Adm. Deptt. Has provided only one year's ACR of the Petitioner for the year 1990-91 and for the rest period it is said either non-available or 'Pratikul Sansuchit' for the year 1992-93."

The inconsistent stand taken by the Commission further suggests that the adverse entry gives edge to draw inference in favour of the petitioner. Moreover, with regard to the communication of the adverse entry, statement has been made in paragraph 7 of the counter affidavit but in paragraph 26 of the counter affidavit of the respondent-State, it has been mentioned that the contents of this affidavit are true to the knowledge of the deponent. Paragraph 26 of the counter affidavit reads as follows:

"That I have gone through the contents of this Affidavit and have understood the same and I say that they are true to my knowledge belief."

Moreover, it does not satisfy the conscience of the Court that if any employee is communicated adverse entry, particularly, Class I officer, he will not represent against that.

This allows the Court to infer with regard to the non-communication of the adverse entry of the petitioner. The



relevance of swearing affidavit in a writ proceeding has been noticed by the Apex Court in the case of Amar Singh Vs. Union of India reported in (2011) 7 SCC 69 wherein it has been observed that the affidavits in the writ proceeding has to conform to the requirements of Order XIX of the Code of Civil Procedure. The relevance and minimum requirement of a valid and admissible affidavit has been considered in paragraph 18 to 28 of the aforesaid judgment. As per decision of the Hon'ble Supreme Court the affidavit should disclose categorically and in unequivocal terms, as to what statements made in the pleadings are referable to the knowledge of the deponent and what statement is referable to the records of the case. The slipshod affidavits specially in the writ proceedings when cause is decided on the basis of affidavits filed, is to be avoided. The communication of adverse entry to the petitioner has been claimed by the respondent in affidavit as derived from knowledge which strengthens the contention of the learned counsel for the petitioner.

The issue of non communication of adverse entry was under consideration by the Supreme Court in the case of Dev Dutt Vs. Union of India and Ors., reported in (2008) 8 SCC 725 wherein it has been held that the adverse entry must be



communicated since it has twin purpose – firstly, that the public servant would know about the assessment of the work and conduct by the superior which will enable him to improve his performance in future and secondly – it will give him opportunity to represent against such adverse entry. Paragraph 17 of the judgment reads as follows:

“17. In our opinion, *every entry in the ACR* of a public servant must be communicated to him within a reasonable period, whether it is a poor, fair, average, good or very good entry. This is because non-communication of such an entry may adversely affect the employee in two ways: (1) had the entry been communicated to him he would know about the assessment of his work and conduct by his superiors, which would enable him to improve his work in future; (2) he would have an opportunity of making a representation against the entry if he feels it is unjustified, and pray for its upgradation. Hence, non-communication of an entry is arbitrary, and it has been held by the Constitution Bench decision of this Court in *Maneka Gandhi v. Union of India* [(1978) 1 SCC 248 : AIR 1978 SC 597] that arbitrariness violates Article 14 of the Constitution.”

Non-communication of the adverse entry amounts to violation of the principle of fairness which is the soul of natural justice as has been held in paragraph 18 of the said judgment



which reads as follows:

“18. Thus, it is not only when there is a benchmark but in all cases that an entry (whether it is poor, fair, average, good or very good) must be communicated to a public servant, otherwise there is violation of the principle of fairness, which is the soul of natural justice. Even an outstanding entry should be communicated since that would boost the morale of the employee and make him work harder.”

The Hon’ble Supreme Court has categorically held in the case of *Gurdial Singh Fijji Vs. State of Punjab and Ors.* (1979) 2 SCC 368 that to adhere to the principle of natural justice, an adverse report in confidential roll cannot be acted upon to deny promotional opportunities unless it is communicated to the person concerned. Paragraph 17 of the judgment reads as follows:

“17. The principle is well-settled that in accordance with the rules of natural justice, an adverse report in a confidential roll cannot be acted upon to deny promotional opportunities unless it is communicated to the person concerned so that he has an opportunity to improve his work and conduct or to explain the circumstances leading to the report. Such an opportunity is not an empty formality, its object, partially, being to enable the superior authorities to decide on a consideration of the explanation offered by the person concerned, whether the adverse report is justified. Unfortunately, for one reason or another,



not arising out of any fault on the part of the appellant, though the adverse report was communicated to him, the Government has not been able to consider his explanation and decide whether the report was justified. In these circumstances, it is difficult to support the non-issuance of the integrity certificate to the appellant. The chain of reaction began with the adverse report and the infirmity in the link of causation is that no one has yet decided whether that report was justified. We cannot speculate, in the absence of a proper pleading, whether the appellant was not found suitable otherwise, that is to say, for reasons other than those connected with the non-issuance of an integrity certificate to him.”

In view of the inconsistencies of the stand between the Commission and the respondent-State and failure on the part of the respondent-State to bring a documentary proof with regard to service of adverse entry to the petitioner, this Court has no option but to accept that the adverse entry was never communicated to the petitioner. Since the petitioner has already retired in 1996, it is expected from the respondent State and the Commission to consider the notional promotion of the petitioner on the post of Chief Engineer w.e.f. 1.12.1995 within a period of three months. It is needless to say that the consequential benefits should also be paid to the petitioner within the aforesaid



stipulated period.

Accordingly, the writ application is allowed.

(Dinesh Kumar Singh, J)

Ashwini/anil/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	
Transmission Date	NA

