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Court : Patna

Decided On : Apr-06-1995

Judge : N. Pandey and S.K. Singh, JJ.

Appeal No. : C.W.J.C. Nos. 9874 of 1989 and 1151 and 7009 of 1991

Appellant : Bijoy Kumar Sinha and ors.

Respondent : State of Bihar and ors.

Disposition : Application Allowed

Prior history : N. Pandey, J. 1. Petitioners are the members of the Bihar Engineering Service (Class-1) in the Public Works Department (Road Construction), State of Bihar. By means of these writ-applications, they have challenged the validity of the decision of the State Government dated 21st March, 1991 as contained in Annexure-1 to C.W.J.C. No. 7009 of 1991, whereby, the respondent-authorities were directed to continue Roster System for filling up the posts through promotion, even the representations of the

Judgement :

N. Pandey, J.

1. Petitioners are the members of the Bihar Engineering Service (Class-1) in the Public Works Department (Road Construction), State of Bihar. By means of these

writ-applications, they have challenged the validity of the decision of the State Government dated 21st March, 1991 as contained in Annexure-1 to C.W.J.C. No. 7009 of 1991, whereby, the respondent-authorities were directed to continue Roster System for filling up the posts through promotion, even the representations of the candidates, belonging to reserved category, i.e. Scheduled Castes and Scheduled Tribes, had reached the legally permissible limit of 24% of the strength of the particular cadre.

The further prayer is that in case, it is found that promotions against the concerned posts were given beyond the permissible limit, the respondent-authorities be directed to treat such number of posts vacant and take steps for promotion in terms of Rules 17 and 24 of Bihar Engineering Service Class 1 Rules, 1939 (in short the Rules'). Since the impugned decision was communicated during pendency of C.W.J.C. No. 9874 of 1989, therefore, this petitioner also by filing supplementary petition has joined hands with the petitioners of other two cases.

2. The petitioner's claim is that once the posts, earmarked for the Scheduled Castes/Tribes on the Roster, are filled, the representation is complete. The respondents are, therefore, stopped to operate Roster any further. Thereafter, any post falling vacant due to retirement etc. in the cadre, has to be filled up from the candidates, belonging to general category.

3. In order to elucidate the nature of controversy, it would be essential to have a brief survey of some of the facts. It appears, the State Government in order to give proper representation to the members of the Scheduled Castes and Scheduled Tribes, by a resolution dated 29th May, 1971, contained in Annexure-3, decided to fix 24% of the strength of a cadre in all the departments of the State of Bihar, in ratio of 14% for the members of Scheduled Castes and 10% for the Scheduled Tribes.

4. Admittedly, there are 16 sanctioned posts of Chief Engineers in the Road Construction Department of P.W.D. Therefore, according to the petitioners, even 25 % of such vacancies are allotted to the candidates, belonging to Scheduled Castes and Scheduled Tribes, such candidates would only be entitled for four posts, But at the time when the writ application were filed 5 posts were allotted to

these candidates and steps were being taken to allot more vacancies on the basis of reservation.

5. It has been contended that on the other, the State Government in the department of Personnel and Administrative Reforms by its notification dated 5.8.1993, as contained in Annexure-9, communicated its decision that when the representation of the members of Scheduled Castes and Scheduled Tribes is complete to the permissible limit of 24% the Roster shall remain suspended, so long a vacancy is created within that limit. But in spite of such decision, the respondents are taking a different stand with respect to the department in question.

6. There can not be any dispute that candidates, belonging to reserved category, either at the stage of initial appointment or in some cases at the stage of promotion are entitled for preferential treatment. It is well known that this preferential treatment is not because of a concession or privilege. In fact, it is in recognition of their undisputed fundamental right of equality in discharging constitutional obligation on the State to secure social and economical justice. Therefore, in these backgrounds, the Supreme Court while examining the scope and extent of reservation in the case of *Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India and Ors. : (1981)ILLJ209SC* , held that every lawful method is permissible to secure due representation of the candidate, belonging to reserved category. But it can not be undermined that guarantee contained in Article 16(1) of the Constitution, has to be applied for ensuring equality of opportunity to all citizens in the matters, relating to employment in the State services.

7. In these circumstances, question falls for consideration whether the decision of the State Government, as contained in Annexure-1 to keep the Roster operative even 24% of the vacancies are filled up by the candidates, belonging to Scheduled Castes/Tribes. If such decision is allowed to sustain, whether it would stand the test of constitutional bar under Article 16(2) of the Constitution to safeguard discrimination on the ground of race, religion or caste. A question has also been posed whether the post of Chief Engineer is required to be filled up merely on the

ground of seniority or in terms of the provisions of Rules 17 and 24 of the Rules.

8. All the questions except the last one, as indicated above, can be taken up together for consideration. Though I have formulated the first and second grounds of challenge as distinct and separate, but really in substance they are based on the principles of Articles 14 and 16 of the Constitution, to the extent that there should be equality of opportunity to all the citizens in the matters, relating to employment. It is well known that Articles 14 and 16 of the Constitution strike at the arbitrariness in State action and ensure fairness and equality of treatment. Therefore, where the State action is found to be discriminatory and beyond the object, it is hit by the provisions of Articles 14 and 16 of the Constitution. In other words, if these provisions command to do a thing in a particular manner, the State has no option but to act in the same manner. Any arbitrary or discriminatory action of the State can not stand the test of Articles 14 and 16 of the Constitution. I am tempted to quote a relevant passage from a judgment of the Supreme Court in the case of *E.P. Royappa v. State of Tamil Nadu and Anr.* : (1974)ILLJ172SC .

Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situated and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to malafide exercise of power and that is hit by Articles 14 and 16. Malafide exercise of power and arbitrariness are different lethal radiations emanating from the same vice; in fact the latter comprehends the former. Both are inhibited by Articles 14 and 16.

9. In the background of the facts, stated above, it has to be examined whether this was permissible to the State Government to direct the respondent-authorities to continue Roster, alive even after the earmarked quota of 24% in the cadre was filled up? It would be appropriate to notice that recently in the case of *R.K. Sabharwal and Ors. v. State of Punjab and Ors.* bearing Writ Petition (Civil) No. 79

of 1979 the Supreme Court, while examining identical question, held that the moment posts, earmarked for Scheduled Castes/Tribes on the Roster, are filled, the representation is complete. In other words, when all the roster points in a cadre are filled up, the required percentage of reservation is fully achieved. Therefore, the moment total cadre had full representation of the Scheduled Castes/Tribes in accordance with the reservation policy, the vacancies arising thereafter in the cadre, are to be filled up from amongst the category of persons, to whom respective vacancies belong. It was clarified that operation of a Roster for filling up the cadre strength by itself ensures that the reservation remains within 50% of limit. For a better appreciation, it would be relevant to quote the findings of the Supreme Court on this issue from the judgment in Writ Petition-(Civil) No. 79 of 1979 (supra) here-under:

It is thus obvious that when recruitment to a cadre starts then 14 posts earmarked in the roster are to be filled from amongst the members of the Scheduled Caste. To illustrate, first post in a cadre must go the Scheduled Caste and thereafter the said class is entitled to 7th, 15th, 22nd and onwards upto 91st post. When the total number of posts in a cadre are filled by the operation of the roster then the result envisaged by the impugned instructions is achieved. In other words, in a cadre of 100 posts when the posts earmarked in the roster for the Scheduled Castes and the Backward Classes are filled the percentage of reservation provided for the reserved categories is achieved. We see no justification to operate the roster thereafter. The 'running account' is to operate only till the quota provided under the impugned instruction is reached and not thereafter. Once the prescribed percentage of posts is filled the numerical test of adequacy is satisfied and thereafter, the roster does not survive.

10. In the aforesaid judgment, while clarifying the expressions 'posts' & 'vacancies', it was held that concept of vacancy has no relevancy in operating the percentage of reservation. The cadre-strength is always measured by the number of posts comprising the cadre. Right to be considered for appointment can only be claimed against the post in the cadre. It would be also useful to notice a passage of the judgment hereunder:

The expressions 'posts' and 'vacancies', after used in the executive instructions providing for reservations, are rather problematical. The word 'post' means an appointment, job, office or employment. 'Vacancy' means an unoccupied post or office. The plain meaning of the two expressions make it clear that there must be a 'post' in existence to enable the 'vacancy' to occur. The cadre-strength is always measured by the number of posts comprising the cadre. Right to be considered for appointment can only be claimed in respect of a post in a cadre. As a consequence the percentage of reservation has to be worked out in relation to the number of posts which form the cadre-strength. The concept of 'vacancy' has no relevance in operating the percentage of reservation.

11. From a bare reference to the aforementioned judgment, it would appear that the decision of the State Government to keep the Roster alive to make appointment or promotion although, the required vacancies i.e. 24 percent are filled up is highly unjustified. Besides this lacuna, such decision was also discriminatory. I have already noticed the circular of the 'Personnel and Administrative Reforms Department' that the moment 24% of vacancies are filled up, the Roster shall be kept suspended.

12. Learned Counsel appearing on behalf of the respondents could not challenge the ratio, laid down by the Supreme Court in the aforementioned case, nor they could cite any authority to justify the decision of the State Government, to keep the Roster alive for appointment, even the required limit of vacancies are filled up by the candidates, belonging to reserved category.

13. However, it was contended that from the notifications dated 8th April, 1986 and 23rd September, 1986, contained in Annexures A and B of C.W.J.C. No. 1151 of 1991, as also dated 13.1.1987, contained in Annexure-C to the said writ petition, it would appear that respondent Nos. 6, 7 and 8 were given ad hoc promotion and subsequently, confirmation to the posts of Superintending Engineer much before the petitioners. Therefore, as per the law, laid down by the Supreme Court, the seniority has to be counted from the date of continuous officiation. It was contended if the respondents are senior to these petitioners in the cadre of Superintending Engineer, they were entitled for promotion on the basis of their

seniority.

14. It was further contended, if the seniority of these respondents were not challenged at the relevant stage and they were promoted to higher posts on the basis of such seniority at this stage the petitioners are stopped from challenging their seniority or promotion to the rank of Chief Engineers. In support of such contention, reliance was placed over a decision in the case of The Direct Recruit Class-II Engineering Officers' Association and Ors. v. State of Maharashtra and Ors. : [1990]2SCR900 . to show that once an incumbent is appointed to a post according to Rule, his seniority has to be counted from such date. A relevant passage from the report is reproduced hereunder:

Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.

15. In the aforesaid background, it is stated since the respondents were already promoted even on reservation to the posts of Superintending Engineers before the petitioners' promotion, their seniority can not be questioned at this stage and therefore, they are entitled to count their seniority from the date of their promotion as Superintending Engineers.

16. It was next contended assuming as per the judgment of the Supreme Court in Writ Petition (Civil) No. 79 of 1979, the required strength is full, with regard to the existing vacancies, the State Government has to take steps to grant promotion as per the provisions of Rules 17, 20 and 24 of the 'Rules' and there can not be any other criteria on which petitioners can claim out-turn promotion.

17. It would be useful to notice that apart from the general submission, what has been noticed above, learned Counsel appearing for the petitioner in C.W.J.C. No. 9874 of 1989 also submitted that simply because some of the respondents were promoted as Superintending Engineers on the basis of reservation, they would not be entitled to count their seniority for promotion to the rank in question. Because

for promotion to the post of Superintending Engineers and Chief Engineers, the seniority is not the only criteria. A bare perusal of the provisions of the Rule 24 of the 'Rules' would indicate that such promotion has to be made by selection and seniority alone shall not confer a claim for promotion. He further stated that the 'Rule' does not provide any provision for promotion on reservation, therefore, it was not open to the State to introduce such a provision by the impugned decision.

18. In these backgrounds, I am called upon to examine whether a promotion to the post of Bihar Engineering Service Class 1 is required to be filled up merely on the basis of seniority or as per the provisions, prescribed under Rule 24 of the Rules, would be relevant to notice Rule 24 of the Rules hereunder:

24. Promotion to Administrative grade-Promotion to the posts of Superintending Engineer and Chief Engineer shall be made by selection and seniority alone shall confer no claim.

19. It would also be useful to notice Rule 27, which prescribes a mode on which the seniority in the services has to be determined. It would be appropriate to notice Rule 27 of the Rules hereunder:

27. Seniority.-Seniority in the service shall be determined by the date of the officer's substantive appointment to the service irrespective of the pay drawn by him provided that a member of the service who holds a superior post substantively shall always be deemed senior to an officer who holds an inferior post substantively. The seniority of officers appointed on the same date shall be determined according to the order of merit in which they were placed at the time of their selection for appointment.

20. From a bare reference to the abovementioned provisions, it would appear that for promotion to the posts of Superintending Engineer or Chief Engineer, there can not be any doubt, that such promotion has to be made by selection and seniority alone shall not confer any claim. But there appears no dispute on this question because learned Counsel appearing on behalf of the respondents also very fairly accepted that such promotion has to be made in terms of these Rules. Therefore, I am not required to detain myself further on this issue.

21. So far the main questions are concerned, I have already indicated that applying the principle, laid down by the Supreme Court in the Writ Petition (Civil) No. 79 of 1979 (Supra), all the vacancies beyond 24% in the cadre have to be filled up by the general procedure in accordance with the 'Rules' and not on the basis of Roster, therefore, it is not necessary to adjudicate other claims of the petitioners including inter se seniority for promotion.

22. With reference to different materials on the record it has been established that by allotting four posts to the candidates, belonging to Scheduled Castes/Tribes, out of total sixteen in sanctioned strength, all the Roster points in the cadre are full, therefore, the

numerical test of adequacy is satisfied. The Roster would cease to operate unless there is a vacancy on these points. Any vacancy beyond such strength available in the cadre has to be filled up from amongst the category of persons to whom respective vacancies belong.

23. For the reasons stated above, the impugned decision of the State Government dated 21.3.1991 to keep the Roster alive even after the representation of Scheduled Castes/Tribes are complete, can not sustain. Therefore, any promotion beyond the permissible limit of 24% in the cadre, if any, shall be treated as illegal and without jurisdiction.

24. In result, the impugned decision of the State Government dated 21.3.1991 is hereby quashed and all the writ applications are allowed to the extent, indicated above. But in the circumstances of the case there shall be no order as to costs.

S.K. Singh, J.

25. I agree.