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Court : Patna

Decided On : Sep-25-2001

Judge : Narayan Roy, J.

Appeal No. : C.W.J.C. Nos. 11652 12086 of 1999 and 9733 of 2000

Appellant : Ranjendra Pathak and ors.

Respondent : State of Bihar and ors.

Disposition : Application Allowed

Prior history : Narayan Roy, J. 1. Heard Counsel for the parties. 2. All these three writ applications have been filed by the petitioners for common cause, and, therefore, they have been heard together and are being disposed of by this order. 3. Petitioners of these writ applications are said to be applicants pursuant to communication vide letter No. 2378 dated 29-5-1999, issued by the Secretary-cum-State Transport Commissioner, respondent No. 2, for their appointment to the post of District Transport Officer

Judgement :

Narayan Roy, J.

1. Heard Counsel for the parties.

2. All these three writ applications have been filed by the petitioners for common cause, and, therefore, they have been heard together and are being disposed of by this order.

3. Petitioners of these writ applications are said to be applicants pursuant to communication vide letter No. 2378 dated 29-5-1999, issued by the Secretary-cum-State Transport Commissioner, respondent No. 2, for their appointment to the post of District Transport Officer (Junior), which are to be filled up by promotion from amongst the Staticians and Senior Clerks in the Department of Transport, Government of Bihar, Patna.

4. The grievance of the petitioners is that though they have applied for appointment to the post of District Transport Officer (Junior) pursuant to communication vide letter No. 2378 dated 29-5-1999, their cases are not being considered for promotion by the State authorities without any rhyme or reason.

5. Learned Counsel appearing on behalf of the petitioners submitted that there are certain earmarked posts of District Transport Officer (Junior) to be filled up by promotion from amongst the Staticians/Senior Clerks in the Department of Transport, Government of Bihar, pursuant to Cabinet decision of the State Government by Government Order No. E1 -109/70-342 Transport dated 10-1 - 1972 and for such posts applications were invited from the eligible candidates, as referred to above. It is further submitted that pursuant thereto the petitioners applied for their appointment/ promotion to the posts of District Transport Officer (Junior) and the matter was processed by the State Government, but till date the petitioners have not been appointed on the posts aforesaid. Learned Counsel appearing on behalf of the petitioners further submitted that once the process of selection had started the appointment/promotion was required to be completed by the State Government as per the existing Government decisions. It is also submitted at the bar by learned Counsel appearing on behalf of the petitioners that while the petitioners had legitimate expectation for their appointment/promotion to the posts in question on the basis of existing criteria, they have come to know that the respondent authorities are trying to come out with some Rules for appointment/promotion to the posts of District Transport Officer (and on that

account, their cases for promotion are not being considered. Mr. Ram Balak Mahto, learned senior Counsel appearing on behalf of some of the writ petitioners, submitted that it is well-settled that once process of selection has been initiated, it has to be based on Rules, regulation or executive instructions in force on the date of commencement of the process of selection and since the process of selection was initiated on 29-5-1999 pursuant to the communication of the State Government, as referred to above, any change in policy or change in Rule relating to promotion would and cannot affect the cases of the petitioners, who are applicants for consideration of promotion to the posts of District Transport Officer (Junior). In support of these propositions, learned Counsel has placed reliance in the case of Sant Ram Sharma v. State of Rajasthan and Ors. : (1968)IILLJ830SC and in the case of Y.B. Rangaiah and Ors. v. J.C, Sreenivasa Rao and Ors. : (1983)IILLJ23SC and also in the case of N. T. Bevin Katti and Ors. v. Karnataka Public Service Commission and Ors. : (1990)IILLJ456SC .

6. Counter affidavits and supplementary Counter affidavits have been filed on behalf of respondent Nos. 2 and 3 stating therein that the duties and responsibilities of District Transport Officer Junior grade and senior grade are one and the same, and, therefore, the Government decision taken in the year 1972 has become unworkable, as several changes have taken place by efflux of time. It is further stated in the Counter affidavit that in absence of proper and Specific Service Rules selection for appointment by promotion to ex-cadre post would lead to discrimination, and, in that view of the matter, the State Government is taking steps to frame Rules for the same. Mr. Alamdar Hussain, learned Standing Counsel No. 6, appearing on behalf of the State respondents, submitted that in absence of Specific Rule governing the service condition of the District Transport Officer, any appointment/promotion made on the post as such would negate the mandate of Articles 14 and 16 of the Constitution.

7. It would be pertinent to mention here that this Court while hearing these matters at the stage of admission itself vide order dated 10-5-2001 wanted to know as to whether any Rule has' been framed by the State Government governing the services of the District Transport Officer and, thus, directed the learned State Counsel to bring on record all Government Orders, circulars, instructions, etc.

issued from time to time relating to appointment/promotion to the posts of District Transport Officer. Though a supplementary counter-affidavit has been filed on behalf of the State after order dated 10-5-2001, nothing has been said as to whether necessary Rules have been framed. Mr. Hussain, learned Standing Counsel No. 6, however, submitted that the State Government is contemplating to frame Rules and it may take some time.

8. From the pleadings of the parties, it appears that the posts of District Transport Officer (Junior) are being filled up from time to time by way of promotion and till date Specific Rules have not been framed by the State Government under Article 309 of the Constitution governing the matters relating to appointment/promotion to the posts of District Transport Officer (Junior).

9. It is not in dispute that the process of selection to fill up the posts of District Transport Officer (Junior) by way of promotion has already started as per the existing circular/instruction of the State Government.

10. It is settled by various decisions of the apex Court that in absence of any Specific Rules framed under Article 309 of the Constitution, the vacancies should be filled up as per the existing circulars/instructions of the State Government. In the case of Sant Ram Sharma v. State of Rajasthan and Ors. : (1968)IILLJ830SC , the Constitutional Bench of the Supreme Court held as follows:

(7) We proceed to consider the next contention of Mr. N.C. Chatterjee that in the absence of any Statutory Rules governing promotions to selection grade posts the instructions and such administrative instructions cannot impose any restrictions not found in the Rules already framed. We are unable to accept this argument as correct. It is true that there is no specific provision of Junior or Senior grade officers to selection grade posts. But that does not mean that till Statutory Rules are framed in this behalf the Government cannot issue administrative instructions regarding the principle to be followed in promotions of the officers concerned to selection grade posts. It is true that Government cannot amend or supersede Statutory Rules by administrative instructions, but if the Rules are silent on any particular point Government can fill up the gaps and supplement the Rules and issue instructions not inconsistent with the Rules already framed.

(8) In *B.N. Nagarajan v. State of Mysore* : (1967)ILLJ698SC , it was pointed out by this Court that it is not obligatory under the proviso to Article 309 of the Constitution to make Rules of recruitment, etc. before a service can be constituted or a post created or filled, and secondly, the State Government has executive power, in relation to all matters with respect to which the Legislative of the State has power, to make laws. It follows from this that the State Government will have executive power in respect of Schedule 7. List II, Entry 41, State Public Services, and there is nothing in the terms of Article 309 of the Constitution which abridges the power of the executive to Act under Article 162 of the Constitution without a law.

11. In the case of *Y.B Rangaiah and Ors. v. J. Sreenivasa Rao and Ors.* : (1983)ILLJ23SC it was held by the Supreme Court that the vacancies, which occurred prior to the amended Rules would be governed by the old Rules and not by new Rules. Again in the case of *A.A. Calton v. The Director of Education and Anr.* : (1983)ILLJ502SC , the apex Court while dealing with the similar question held as follows:

5. It is no doubts true that the Act was amended by U.P. Act 26 of 1975 which came into force on August 18,1975 taking away the power of the Director to make an appointment under Section 16-F (4) of the Act in the case of minority institutions. The amending Act did not, however, provide expressly that the amendment in question would apply to pending proceedings under Section 16-F of the Act. Nor do we find any words in it which by necessary intendment would affect such pending proceedings. The process of selection under Section 16-F of the Act commencing from the stage of calling for applications for a post up to the date on which the Director becomes entitled to make a selection under Section 16-F(4) (as it stood then) is an integrated one. At every stage in that process certain rights are created in favour of one or other of the candidates. Section 16-F of the Act cannot, therefore, be construed as merely a procedural provision. It is true that the Legislature may pass laws with retrospective effect subject to the recognised constitutional limitations. But it is equally well-settled that no retrospective effect should be given to any statutory provision so as to impair or take away an existing right, unless the statute either expressly or by necessary implication directs that it

should have such retrospective effect. In the instant case admittedly the proceedings for the selection had commenced in the year 1973 and after the Deputy Director had disapproved the recommendations made by the Selection Committee twice the Director acquired the jurisdiction to make an appointment from amongst the qualified candidates who had applied for the vacancy in question. At the instance of the appellant himself in the earlier writ petition filed by him the High Court had directed the Director to exercise that power. Although the Director in the present case exercised that power subsequent to August 18, 1975 on which date the amendment came into force, it cannot be said that the selection made by him was illegal since the amending law had no retrospective effect. It did not have any effect on the proceedings which had commenced prior to August 18, 1975. Such proceedings had to be continued in accordance with the law as it stood at the commencement of the said proceedings. We do not, therefore, find any substance in the contention of the learned Counsel for the appellant that the law as amended by the U.P. Act 26 of 1975 should have been followed in the present case.

12. In the case of N.T. Bevin Katti and other v. Karnataka Public Service Commission and Ors. : (1990)IILLJ456SC , the apex Court dealing with almost the similar question held as follows:

11. There is another aspect of the question. Where advertisement is issued inviting applications for direct recruitment to a category of posts, and the advertisement expressly states that selection shall be made in accordance with the existing Rules or Government Orders, and if it further indicates the extent of reservations in favour of various categories, the selection of candidates in such a case must be made in accordance with the then existing Rules and Government Orders. Candidates who apply, and undergo written and or viva voce test acquire vested right for being considered for selection in accordance with the terms and conditions contained in the advertisement, unless the advertisement itself indicates a contrary intention. Generally, a candidate has right to be considered in accordance with the terms and conditions set out in the advertisement as his right crystallises on the date of publication of advertisement, however, he has no absolute right in the matter. If the recruitment Rules are amended retrospectively

during the pendency of selection, in that event selection must be held in accordance with the amended Rules. Whether the Rules have retrospective effect or not, primarily depends upon the language of the Rules and its construction to ascertain the legislative intent. The legislative intent is ascertained either by express provision or by necessary implication, if the amended Rules are not retrospective in nature the selection must be regulated in accordance with the Rules and orders which were in force on the date of advertisement. Determination of this question largely depends on the facts of each case having regard to the terms and conditions set out in the advertisement and the relevant Rules and orders. Lest there be any confusion, we would like to make it clear that a candidate on making application for a post pursuant to an advertisement does not acquire any vested right for selection, but if he is eligible and is otherwise qualified in accordance with the relevant Rules and the terms contained in the advertisement, he does acquire a vested right for being considered for selection in accordance with the Rules as they existed on date of advertisement. He cannot be deprived of that limited right on the amendment of Rules during the pendency of selection unless the amended Rules are retrospective in nature.

13. From the pleadings of the parties and the discussions aforesaid, it is manifest that the petitioners applied for their appointment/promotion to the posts of District Transport Officer (Junior) pursuant to the communication vide letter No. 2378 dated 29-5-1999 and the process of selection thus started as per the existing circulars/ instructions/decisions of the State Government. It is also manifest from the pleadings of the parties that till date no Specific Rule has been framed under Article 309 of the Constitution relating to appointment/promotion to the post of District Transport Officer (Junior), and, therefore, in view of the legal propositions, as referred to above, I am of the opinion that the process so started for filling up the posts of District Transport Officer (Junior) by way of promotion should be completed as per the existing circulars, instructions and decisions of the State Government and the petitioners thus do acquire a vested right for being considered for selection as such in accordance with the circulars and decisions of the State Government, as they existed on the date of their applications pursuant to the Government communication, as referred to above.

14. In the result, these applications are allowed and the concerned respondents are directed to consider the cases of the petitioners for their appointment/promotion to the post of District Transport Officer (Junior), for which they have applied pursuant to notification/advertisement vide letter No. 2378 dated 29-5-1999, within a period of three months from the date of receipt/production of a copy of this order. No order as to costs.

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