

DEPARTMENT OF POST  
BIHAR CIRCLE

COURT FEE

AUTH NO. 3185 DT. 16/12/2008



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JUDICIAL

14.12.2010

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IN THE HIGH COURT OF JUDICATURE AT PATNA  
CWJC No 7725 of 2003

Akhaury Dadan Prasad, son of late Akhaury Govind Prasad, Incharge  
Assistant Mechanical Engineer (Sub Divisional Officer) Public Health  
Engineering Department, present on deputation, Patna Jal Parishad

Petitioner

Versus

- 1 The State of Bihar
- 2 The Commissioner -cum- Secretary, Public Health Engineering Department,  
Government of Bihar, Patna
- 3 The Engineer-in-Chief -cum- Special Secretary, Public Health Engineering  
Department, Government of Bihar, Patna
- 4 The Chief Engineer (Mechanical), Public Health Engineering Department,  
Government of Bihar, Patna
- 5 Bihar Public Service Commission through its Chairman, Bailey Road, Patna

Respondents

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For the petitioner : Mr Bipin Kumar Sinha, Advocate

For B P S C : M/s K B Nath & S C Jha, Advocates

For the State : M/s Mahesh Prasad, SC 8 & R K Sinha,  
AC to SC 8

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13.12.2010

It appears that during pendency of the writ petition, an amendment petition was filed. Opportunity was granted to the respondents to file further counter affidavit. The same has been filed. Heard. Amendment petition is allowed.

As the pleadings are complete, the case has been heard for final disposal at this stage itself with consent of parties.

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Petitioner was selected as Junior Engineer (Mechanical) and upon confirmation of his service in regular establishment, on 26.02.1980, he was made Incharge, Assistant Engineer (Mechanical), Nawada. While so, State published the final gradation list of Junior Engineers (Mechanical) in the Department of Public Health and Engineering (PHED). The petitioner found that his junior was shown as his senior in the gradation list which was wrongly prepared by the State. This led to litigation as between the petitioner, the said junior and the State and the matter ultimately travelled to the Apex Court. The Apex Court, by the judgment and order dated 04.12.2001 passed in Civil Appeal No 8425 of 1997, set aside the judgment of learned Single Judge and Division Bench of this Court and allowed the appeal in favour of the petitioner holding that the petitioner was senior to the said Vishwanath Jha. Upon petitioner's filing representation, a revised gradation list was published in which now the petitioner was shown at serial No 2. This gradation list was ultimately published on 03.12.2002. Petitioner, in the meantime, has been seeking his regular promotion which was due over 20 years back. At the cost of repetition, it may be stated that the petitioner had already been made Incharge, Assistant Engineer (Mechanical) in 1980 itself. After having won the long battle against the State, one expected that petitioner would be given his due credit but again that was not to be. For some reason, even though petitioner was upgraded in the final gradation list as per directive of the Apex Court, the matter of recommending petitioner's name for promotion was kept pending on one pretext or the other and on one pretence or the other till petitioner ultimately superannuated on

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31.07.2003 and, thereafter the matter of promotion was sent to Bihar Public Service Commission (BPSC) excluding the name of petitioner on the lame plea that he had since retired.

Petitioner's grievance is two folds. Firstly, for the period he worked on the post of Assistant Engineer (Mechanical) which post carries additional and higher responsibility than Junior Engineer, he must be paid accordingly for the higher post. It was not a stop gap arrangement for a short time but for over 23 years, without granting him due promotion, he was made to work on a lower pay scale on a higher post involving higher responsibilities. His second grievance is that even though he had retired, he was still entitled to promotion from due date as he cannot suffer because the State slept over the matter for over two decades. For this, reliance has been placed in the case of *All India Groundnut Syndicate Limited -Versus- Commissioner of Income Tax, Bombay City, AIR 1954 Bombay 232*.

Learned counsel for the BPSC submits that BPSC is not at fault. BPSC, on its own, does not call for empanelled candidates for granting promotion. It considers the cases as are sent to it by the Department and as and when they are sent. In my view, learned counsel is correct in submitting that the name of the petitioner, not having been sent to the BPSC, BPSC committed no wrong in not considering the case of the petitioner.

Now we come to the State. State has not denied the basic facts. It has not denied that petitioner, being found fit otherwise for promotion, was made Incharge, Assistant Engineer (Mechanical) in the

PHED in the year, 1980 itself. There being dispute created by the State with regard to inter se seniority which was ultimately settled by the judgment of the Apex Court in the year 2001, stand of the State is that promotions could not be considered and by the time when promotions were to be considered, the petitioner had superannuated. Thus, State exploited the situation for its advantage by first making the petitioner, who was a Junior Engineer work for 23 years as an Assistant Engineer denying petitioner the due remuneration for the post of Assistant Engineer and then when the controversy was set at rest by the Supreme Court, State did everything to deny the regular promotion to the petitioner which ordinarily should have been given two decades back. State's misconceived plea is also that once the petitioner had superannuated, his case for promotion was not to be considered even though it ought to have been considered two decades back.

Having considered the matter, in my view, the writ petition must succeed on both counts. Firstly, one must keep in mind the provisions of Rule 89 which is subject to Rule 103 of the Bihar Service Code. These are Rules made pursuant to proviso to Article 308 of the Constitution of India and, thus, statutory in nature. These Rules provide that where because of, inter alia, exigency of service a person holding an inferior post is made to work/officiate on a higher post, he would not be entitled to remuneration of the higher post unless the higher post involves greater and higher responsibility. This Rule, in my view, safeguards the right of an employee against exploitation by the State. A junior person, thus, cannot be made to work at a higher post involving greater

responsibility unless State is made to pay for it otherwise as has happened in the present case, a Junior Engineer is made to work as an Assistant Engineer for over two decades without being paid for the higher responsibility and the post he held. Thus, I find that from the day petitioner was made to work as an Assistant Engineer (Mechanical), the post being a higher post with a higher responsibility, he became entitled to the full remuneration of the higher post of Assistant Engineer (Mechanical). State would give the same to the petitioner. It must be kept in mind that for over two decades, this incharge or ad hoc position continued. Petitioner was not to be blamed. States raises a lame excuse of pending litigation. It meanwhile exploited the situation to the full to its advantage and disadvantage of the petitioner. That cannot be permitted.

Now coming to the second relief. The State has nowhere pointed out in the counter affidavit or the supplementary counter affidavit that petitioner was not entitled to be considered for promotion on any date earlier than his superannuation. To the contrary, the conduct of the State is to treat the petitioner as qualified and competent to be promoted to the post of Assistant Engineer over two decades back but, on the lame excuse of pending litigation, failed to finalise the gradation list and sent the cases to the BPSC for consideration for grant of promotion. It did so after two decades and then even it omitted the name of petitioner on the pretext that petitioner has since superannuated. In nutshell, what the State has done is because the State failed to act within the time, it has now denied the right of promotion to the petitioner. In other words, State wants to benefit from its own fault. This can never be permitted. Learned counsel for the

petitioner has rightly relied on what Chief Justice Chagla said more than five decades back in the case of *All India Groundnut Syndicate Limited - Versus- Commissioner of Income Tax, Bombay City, AIR 1954 Bombay 232* :

*"But the most surprising contention is put forward by the Department that because their own officer failed to discharge his statutory duty, the assessee is deprived of his right which the law has given to him under sub-section (2) of S 24. In other words, the Department wants to benefit from and wants to take advantage of its own default. It is an elementary principle of law that no person - we take it that the Income-tax Department is included in that definition - can put forward his own default in defence to a right asserted by the other party. A person cannot say that the party claiming the right is deprived of that right because "I have committed a default and the right is lost because of that default."*

Thus, even though petitioner superannuated, his right to be considered for promotion was very much alive from the date it was originally due. It was for BPSC then to consider whether petitioner was qualified for grant of promotion or not. In normal course, promotion should have been given almost two decades back but was wrongly withheld by the State. State does not save the situation by saying that in the twenty years, no one was granted promotion because it goes ill with the State to deny promotion where promotions were due except upon very compelling reasons. There were none in the present.

Thus, I hold and direct that the State would send the name of petitioner and his like for consideration of grant of promotion from the date it was originally due with all consequential benefits and BPSC would give its recommendation including the due date from which promotions

ought to be granted within three months thereafter. It shall be the responsibility of the respondent-Engineer-in-Chief -cum- Special Secretary, PHED, Government of Bihar, Patna to see the due compliance of orders of this Court.

The writ petition, thus, stands disposed of.

M.E.H./

*Sd/-*  
(Navaniti Prasad Singh), J.

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*[Signature]*  
For Joint Registrar (J) 14-12-20  
Patna High Court  
Established 11.5.70 (Am.) of 1978

*Sunil Kumar*  
14-12-20

23-V-9V32