

(2000) 02 PAT CK 0129

Patna High Court

Case No: C.W.J.C. No. 3251 of 1997 with 7746 of 1998

Indradeo Narain Singh (in 3251),
Jhansi Ram (in 7746)

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision: Feb. 29, 2000

Citation: (2000) 3 PLJR 117

Hon'ble Judges: B.P. Singh, J

Bench: Single Bench

Advocate: Vinod Kanth and Mukul Sinha in 3251, Mr. R.B. Mahto in 7746, for the Appellant; Ajay Bihari Sinha, Pankaj Kumar Singh and Sashi Sekhar Prasad Singh for State and M/s. Dr. S.N. Jha and Anil Kumar Tiwary for B.P.S.C., for the Respondent

Final Decision: Allowed

Judgement

B.P. Singh, J.

These two writ petitions have been heard together since they involve a common question, and in both the writ petitions the petitioners claim a right to be considered for appointment to the post of Engineer-in-Chief in the Road Construction Department of the Government of Bihar.

C.W.J.C. No. 3251 of 1997 2. In this writ petition petitioner Indradeo Narayan Singh, who held the Sub-stantive post of Chief Engineer and was required to discharge the duties of Engineer-in-Chief while holding the substantive post of Chief Engineer, has prayed for quashing of the Notification (Annexure-1) issued by the Joint Secretary, Government of Bihar, Road Construction Department on 24.2.1997. By the aforesaid Notification (Annexure-1) the services of respondent no. 5 Sri P.K. Parwal were placed at the disposal of the Cabinet (Vigilance) Department for being posted as Engineer-in-Chief, even though he was junior to the petitioner in the cadre of Bihar Engineering Service Class I, The petitioner has also challenged Annexure-2 dated 27.2.97, the order of promotion issued pursuant to Annexure-1. The petitioner has also prayed that he may be considered for promotion to the post of

Engineer-in-Chief.

2. The facts of the case are that there are 10 posts of Chief Engineer in the Road Construction Department. There are four posts of Engineer-in-Chief which are ex-cadre posts. Those officers of Bihar Engineering Service who belonged to Scheduled Caste and Scheduled Tribe category were granted accelerated promotions and consequent seniority on the basis of reservation. Some of them were also allowed to function as Chief Engineer without being regularly appointed or promoted to the post of Chief Engineer. This was being done purely as a working arrangement. In the year 1991 respondent no.5 Sri. P.K. Parwal was allowed to function as Incharge Chief Engineer as purely a working arrangement. This was challenged in a writ petition being C.W.J.C. No. 1151 of 1991 and analogous cases. Ultimately, that writ petition was allowed by judgment and order dated 6.4.95, and the functioning of respondent no. 5 and others against the post of Chief Engineer was held to be illegal. Despite the judgment and order of the Court respondent no.5 was allowed to function as Chief Engineer, and this led to the filing of another writ petition being C.W.J.C.No.5408 of 1995. Ultimately the writ petition was allowed by judgment and order dated 13.12.95 and this Court directed the Government to stop their illegal functioning as Chief Engineer latest by 20th January, 1996. A Letters Patent Appeal filed against the aforesaid judgment was also dismissed. The State Government, however, did not act to implement the judgment and order of this Court and applied for extension of time. By its order dated 13.2.96 this Court refused extension of time and ordered that respondent no.5 shall be deemed to have been relieved. Ultimately, by issuance of order Annexure-4 dated 20th February, 1996, respondent no.5 was reverted to his substantive post of Superintending Engineer.

3. On 11.5.1996 respondent no.5 was again promoted to the post of Chief Engineer, but the order of promotion was stayed by order of this Court dated 24.5.96 in M.J.C. No. 1235 of 1995. Later the order of this Court was modified and respondent no.5 was finally promoted as Chief Engineer on 26.8.1996.

4. The case of the petitioner is that he was regularly promoted to the post of Chief Engineer in April 1996. Before issuance of the impugned Notification (Annexure-1) dated 24.2.97 three persons held the post of Engineer-in-Chief as a purely temporary working arrangement of whom only one Sri S.C. Verma belonged to the general category, whereas two others, namely, Sri Ram Autar and Sri Indradeo Prasad Choudhary belonged to the Scheduled Tribe and Scheduled caste respectively. Earlier, against the four posts one Sri Rajaram Prasad was functioning who belonged to the Scheduled Caste category, but upon his being appointed as a member of the Bihar Public Service Commission in August 1996, that post fell vacant.

5. It is the case of the petitioner that in the latest gradation list dated 11.12.92 of the Bihar Engineering Service Class I the position of the petitioner is at serial no.75,

whereas the position of respondent no.5 is at serial no. 93. This is despite the fact that respondent no.5 has always enjoyed the benefit of accelerated promotion and seniority on the basis of roster. The further grievance of the petitioner is that even if the principle of reservation is applied, only one post of Engineer-in-Chief, out of four, should be reserved for members belonging to reserved category. The petitioner, was therefore, expecting that he shall be considered for promotion to the post of Engineer-in-Chief since two of the posts were already held by members belonging to reserved category. By the impugned notification (Annexure-1) dated 24.2.97 respondent no.5 was also promoted, which meant that three out of four posts of Engineer-in-Chief were held by the members belonging to reserved category.

6. It is averred by the petitioner that a meeting of the Departmental Promotion Committee took place on 17.6.96 and its proceeding (Annexure-3) would show that the Departmental Promotion Committee was also of the view that only one post could be kept reserved. Despite that Sri Indradeo Prasad Choudhary, who was not recommended by the Committee continued to function as Engineer-in-Chief.

7. In its counter-affidavit the State averred that the posts of Engineer-in-Chief were ex-cadre posts and, therefore, the rules of seniority were not strictly applicable. The Government called for names from the three Decadents, namely, Road Construction Department Public Health Engineering Department and Water Resources Department. Each of the Departments recommended three names and thereafter a selection was made. Three names had been received from the Road Construction Department but that did not include the name of the petitioner, though the name of respondent no.5 was recommended.

8. On 17.7.1998 the petitioner filed a supplementary affidavit as also two inter-locutory applications being I.A. Nos of 1998 and 7716 of 1998. In the supplementary affidavit filed on behalf of the petitioner it was averred that during the pendency of the writ petition three posts of Engineer-in-Chief had fallen vacant. On 28.11.97 the name of the petitioner been sent to the Bihar Public Service Commission for consideration for promotion to the post of Engineer-in-Chief by the Road Construction Department. On 4.12.97 the petitioner was also asked to discharge the duties of the office of the Engineer-in-Chief in addition to his own responsibilities as Chief Engineer. The petitioner averred that the action of the Chairman of Bihar Public Service Commission Sri Laxmi Rai was actuated by malice and ill-will towards the petitioner and he was deliberately delaying the proceeding, so that the petitioner may retire in due course. The averments in the supplementary affidavit were to the effect that the Bihar Public Service Commission with a view to delay matter had asked for several documents on 31.12.97. All those documents were made available to the Bihar Public Service Commission on 21.3.98, and the Vigilance report dated 17.2.98 was also sent to the Commission as would be apparent from Annexures 10 and 10/1. It was emphasised by Department that the

matter being urgent, early steps should be taken by the Commission. However, on 15.4.98 the Commission asked for some documents and further asked for the Government Notification constituting the Departmental Promotion Committee. By letters dated 18.4.98 and 16.5.1998 the Department replied that all documents had been sent and requested for early action. The Departmental Promotion Committee was to meet on 13.6.98, but the meeting was abruptly postponed and on 16.6.98 the Commission again complained that all the documents required by it had not been made available to it and further that the Departmental Promotion Committee had not been properly constituted. In this manner it was alleged that the action of the Commission, particularly its Chairman, was motivated by malafide.

9. In I.A. No.7715 of 1998, the petitioner prayed for adding the Chairman of the Bihar Public Service Commission Sri Laxmi Rai as a party respondent, since the petitioner was to superannuate on 30.10.98 and the Chairman acting malafide intended to delay the proceeding. In I.A. No. 7716 of 1998 the petitioner prayed for a direction to hold a meeting of the Departmental Promotion Committee.

10. On 11.8.1998 when the matter came up before this Court, counsel appearing for the Commission stated that a meeting of the Departmental Promotion Committee was to be held within a week. The Court, therefore, directed that the matter be put up on 18.8.98 and in the meantime the Departmental Promotion Committee shall hold a meeting and take a decision in the matter of recommendation of the petitioner's name for the post of Engineer-in-Chief. On 18.8.98 the Court directed the Chairman of the Bihar Public Service Commission to file an affidavit as to whether meeting of the Departmental Promotion Committee had been held, and if so, the decision taken on the meeting. In case no meeting was held and no decision taken, the Chairman was required to explain the reason for not holding the meeting or taking the decision as directed by order dated 11.8.98. On 19.3.98 the matter came up before this Court and the learned Judge was pleased to pass an order that until further orders no further action shall be taken in the matter of promotion, either by the Bihar Public Service Commission, or the State Government.

11. On 26.8.98 the court rejected the application for intervention filed by one Jhansi Ram, petitioner in the connected writ petition, but gave him liberty to move the appropriate forum for redressal of his grievances.

12. It appears from the record that on 26th August, 1998 Bengali Ram, added respondent no.6 herein filed two interlocutory applications which came up for orders before this Court on 31.8.98. I.A. No. 9714 of 1998 was for intervention. The said application for intervention was allowed and Bengali Ram, respondent no.6 was permitted to intervene in the writ petition as a respondent. I.A. No. 9713 of 1998 filed by the aforesaid Bengali Ram for modification of the interim order dated 19.8.98 staying further action by the B.P.S.C. and the State of Bihar was directed to be considered along with the main writ petition.

13. The matter then came up before the Court on 16.9.98. This Court was informed that the Departmental Promotion Committee had ultimately met on 17th and 18th August, 1998, to consider the cases of the officers concerned for promotion to three vacant posts of Engineer-in-Chief. The record of proceeding of the said Committee was placed before the Court as Annexure C/9. From the record of proceeding it appears that the Departmental Promotion Committee was presided over by the Chairman of the Bihar Public Service Commission. He made his recommendation in clear terms and in his opinion Sri S. C. Verma belonging to the general category, and Sri Pradeep Kumar Parwal and Sri Bengali Ram, both belonging to the reserved category, were found fit for promotion. Sri Indradeo Prasad Choudhary was also recommended by him. It appears from the dissenting notes of the remaining three members of the Committee that they were of the opinion that the benefit of officiation against the post of Chief Engineer held by some of the candidates by way of working arrangement, while drawing the salary in their own pay-scale, should not be given to the concerned candidates because the service rendered in such capacity cannot be counted for the purpose of computing the working experience (Kalawadhi). This Court was of the opinion that though the remaining three members of the Committee had recorded their dissent, they had not made any recommendation as to who in their own opinion were fit for promotion. The Court, therefore, directed that a meeting of the Departmental Promotion Committee shall be held and the members should record their opinion and make a clear recommendation if they found any of the candidates to be eligible and suitable for promotion in the light of the relevant rules, regulations, notifications etc. governing the matter, it was directed that the Departmental Promotion Committee should meet as soon as possible preferably before 23rd September, 1998, so that the proceeding of the Departmental Promotion Committee could be made available to this Court on 24th September, 1998 on which date the matters were to come up for further hearing. This order was passed in presence of counsel for the parties including counsel for Bihar Public Service Commission.

14. When the matter came up before the Court on 16.10.1998 a grievance was made on behalf of the petitioner that the Bihar Public Service Commission had flouted the orders of this Court and no meeting of the Departmental Promotion Committee was held as directed by the order of this Court. In reply counsel for Bihar Public Service Commission stated that earlier than the passing of the order on 16.9.98 a meeting of the full commission had already been held and the commission had taken a decision on 19.8.98. It was explained that since the Departmental Promotion Committee could not take a clear decision on 18.8.98, the Chairman of the Commission had referred the matter to the Commission for consideration by all members of the commission. The Commission had held a meeting on 19.8.98 at 11 A.M. finding three candidates suitable for appointment to the posts of Engineer-in-Chief. Commission took the view that for the purpose of computing Kalawadhi, experience gained while working on ad-hoc basis was also to be taken into account and,

therefore, the Commission took the view that those working on ad hoc basis for the requisite period became eligible for promotion to the post of Engineer- in-chief.

15. This Court was surprised by the stand taken on behalf of the Commission because if such a decision had been taken by the Commission on 19.8.98, there was no reason why this fact was not brought to the notice of this Court on 26.8.98, 31.8.98 and lastly on 16.9.98 when this Court passed a long order directing a reconvening of the meeting of the Departmental Promotion Committee to enable dissenting members to record their recommendation. The petitioner, on the other hand, submitted that perhaps such a meeting never took place on 19.8.98 and that no reliance could be placed on the record of proceeding of the Commission dated 19.8.98. This Court was surprised that after the Commission had passed a resolution on 19.8.98, that fact was never brought to the notice of this Court. Since a serious suspicion arose as to whether the Commission had really held its meeting on 19.8.98, the Chairman of the Bihar Public Service Commission was directed to place all relevant records before the Court to satisfy the Court that such a meeting was actually held on 19.8.98. The Chairman of the Bihar Public Service Commission was also asked to explain to the Court the circumstances under which the meeting of the Departmental Promotion Committee was not held in compliance with the order of this Court. It is not necessary to dilate on this aspect of the matter because in the affidavit affirmed by the Chairman of the Bihar Public Service Commission on 18.9.98 it is stated that the decision of the Commission was not communicated to any one in obedience to the Court's order dated 19.8.98. The position, therefore, is that though the Commission had held a meeting and taken a decision, it has not proceeded further and has not made a recommendation to the State Government.

16. In the light of these facts the question which arises for consideration in this writ petition is whether the benefit of officiation against the post of Chief Engineer held by some of the candidates by way of working arrangement, while drawing the salary in their own scale should be given to the concerned candidates by reckoning such period of officiation for the purpose of computing working experience (Kalawadhi).

17. Before I proceed to consider the above question I may clarify that the order of this Court dated 16.9.98 does record the fact that the record of proceedings of the Departmental Promotion Committee held on 17th and 18th August, 1998, was placed before this Court, from which it appears that the Chairman had referred the matter for consideration by the Bihar Public Service Commission and its members, instead of Departmental Promotion Committee. Reliance has been placed by the Commission on the resolution dated 27th November, 1976, published in the Bihar Gazette on 22nd December, 1976, under the orders of Governor of Bihar in which it is provided that the recommendation of the Departmental Promotion Committee in which the Bihar Public Service Commission is associated need not be submitted to the Commission for approval unless the Chairman or a member of the Commission sitting in the meeting specially desires a particular case to be considered by the

Commission as a whole. It was, therefore, submitted that the Chairman of the Bihar Public Service Commission was within his rights to place the case for consideration by the Commission as a whole. Having regard to the aforesaid Resolution published under the orders of Governor of Bihar one cannot find fault with the action of the Chairman of Commission referring the matter for consideration by the Commission as a whole.

18. The question still arises as to whether the period during which an officer has been holding charge of a higher post in addition to the responsibilities of his own post, can be added to his work experience for the purpose of computing Kalawadhi. The prescription as to the minimum length of service for promotion cannot be said to be arbitrary or unreasonable because it is with a view to ensure competence and efficiency in service, and the length of service is one of the conditions of service for promotion. In the instant case the petitioner was promoted to the post of Chief Engineer in the month of April 1996. Respondent no.6 Bengali Ram was ultimately promoted to the post of Chief Engineer on 28.7.97. It is not disputed before us that in the gradation list the petitioner is shown as senior to respondent nos. 5 and 6. Respondent no.5 while incharge of the post of Chief Engineer was reverted to his substantive post of Superintending Engineer on 20.2.96 but was again promoted to the post of Chief Engineer with effect from 26.8.96.

19. The Government of Bihar has prescribed a Kalawadhi for the purpose of promotion by prescribing a minimum working experience on the lower post for promotion to the higher post. In the instant case the Kalawadhi prescribed for promotion to the post of Engineer-in-Chief from the post of Chief Engineer is four years. The Commission is of the view that if a person has officiated as Chief Engineer in addition to the responsibilities of his substantive post of Superintending Engineer, the period so spent while officiating as Chief Engineer as a part of working arrangement, shall be counted as working experience on the post of Chief Engineer. On the other hand, the petitioner in both the writ petitions contend that this is not permissible.

20. In normal circumstances no difficulty arises because the actual experience gained while working as Chief Engineer in a substantive capacity is to be taken into account for computing the Kalawadhi. Difficulties arise when a person is not promoted to the post of Chief Engineer but as a working arrangement is required to perform the duties of the office of Chief Engineer in his own scale of pay, and in addition to his own responsibilities as a Superintending Engineer. It is not as if such working arrangement is made on any consideration of merit or seniority since such working arrangements are made having regard to the exigencies of the situation. It may be that a person holding charge of a higher post may be entitled to an officiating allowance in addition to the pay and allowances to which he is entitled. This, however, does not amount to a promotion to the higher post of Chief Engineer. The fact that a particular officer has been asked to perform the duties of a

higher office does not mean that he has been selected for such officiating post on his merit or seniority. Such officiation on higher post is purely fortuitous. It would be unreasonable to confer any service benefit upon an officer who derives a benefit from the fortuitous circumstance of his being asked to hold charge of a higher office in addition to his own substantive post. If any service benefit is given to an officer based on such an event, which is purely fortuitous, it would be clearly unreasonable and arbitrary. The officiating arrangement made is not governed by any rules, and a junior officer may be lucky enough to get an opportunity to officiate against a higher post. If such officiation confers upon him a benefit in the matter of promotion to a higher post, it would be clearly unreasonable inasmuch as persons senior to him would be deprived of such benefit for no fault of theirs. In [Ramakant Shripad Sinai Advalpalkar Vs. Union of India and others](#), the Court held:

9. The third contention is that appellant's in-charge arrangements in the higher post had continued for so long a period that a determination of equivalence on the basis of his lower substantive post would become arbitrary. This contention ignores the fact that an in-charge" arrangement is not a recognition of or is necessarily based on seniority and that, therefore, no rights, "equities or expectations could be built upon it". The third contention is also unmeritorious.

21. I am, therefore, of the view that the Commission is not right in its contention that the period of service rendered by an officer against a higher post as a purely working arrangement in addition to his own responsibilities of the lower post, can be reckoned in the matter of computation of his working experience (Kalawadhi). Such arrangement does not create any right in his favour nor does it give rise to any equities or expectations in his favour. The arrangement being purely fortuitous no rights flow therefrom either in the matter of seniority or promotion. For the purpose of computing Kalawadhi the period of officiation against a higher post as a purely working arrangement, in addition to the responsibilities of his own office, must be ignored. Only that period must be taken into account for the purpose of kalawadhi during which the officer concerned held the post in a substantive capacity.

22. There remains one other matter to be considered. Questions arise as to the procedure to be followed in cases where sufficient number of officers with the requisite Kalawadhi are not available for filling up the promotional posts. So far as the State of Bihar is concerned, several resolutions of the Government on this subject were published from time to time but the resolution of the Government of Bihar in the Department of Personel and Administrative Reforms dated 20th October, 1982 is applicable to the parties before us. By the said resolution several earlier resolutions enumerated in the resolution were superseded and in accordance with the decision taken by the Cabinet on 19th October 1982 a procedure was prescribed. According to the notification dated 20th October 1982 while considering promotion at any level, the cases of those officers who have requisite minimum prescribed working experience (Kalawadhi) at the level just

below the post to which they are sought to be promoted, shall be considered first. After doing so, the first transaction shall be considered to be closed.

23. After the first transaction if vacancies still remain to be filled up by promotion, then the prescribed minimum working experience may be relaxed to such an extent that the number of candidates who come within the zone of consideration are not more than three times the number of posts which remain vacant. While granting such relaxation in work experience, candidates belonging to Scheduled Caste, Scheduled Tribe category shall be granted relaxation which shall be one year more than the relaxation granted to members of general category. For granting such relaxation so as to bring the candidates within the zone of consideration in the second transaction, the concerned Department shall first get the approval of the Minister of the Department and thereafter obtain the consent of the Chief Minister through the Personnel Department.

24. In the facts of this case, therefore, if sufficient number of Chief Engineers with the prescribed minimum work experience are not available, selection has to be made in accordance with the aforesaid resolution dated 20th October, 1982.

25. In the light of the above discussion this writ petition is partly allowed and the Bihar Public Service Commission is directed not to proceed further with its resolution dated 19.8.98(Annexure C/11). The Bihar Public Service Commission is directed to consider the matter afresh and to take a final decision in the matter in accordance with the directions contained in this order. In computing the Kalavadi (work experience) of the Chief Engineers who are being considered for promotion to the post of Engineer-in-Chief, the period during which they held additional charge of the office of the Chief Engineer as a purely working arrangement while holding the substantive rank of Superintending Engineer and discharging the responsibilities of that office in the pay-scale of Superintending Engineer, shall be excluded. If sufficient number of Chief Engineers are not found eligible for promotion to the posts of Engineer-in-Chief having regard to their work experience (Kalavadi) relaxation may be granted in terms of the Government resolution dated 20th October, 1982 aforesaid.

25. It is clarified that all officers who were being considered initially by the Departmental Promotion Committee on 17/18th August, 1998 and whose cases were later considered by the Commission at its meeting held on 19th August, 1998 shall be considered for promotion to the post of Engineer-in-Chief, even though they may have retired from service in the meantime. In such cases they shall be granted notional promotion and consequential monetary benefits thereof. The Commission shall consider their cases within a period of two months from today and make their recommendation to the Government which shall take a final decision in the matter within two weeks from the date of receipt of the recommendation of the Commission.

26. In this case petition Jhansi Ram is aggrieved by the decision taken by the Departmental Promotion Committee on 18.8.98. The petitioner belongs to the reserved category His claim is that his name in the gradation list stands at serial no.3 while that of Bengali Ram at serial no.8. The recommendation of the Departmental Promotion Committee proceeds on the basis that Bengali Ram was entitled to count his service for the purpose of Kalawadhi, which he rendered, while discharging the duties of the office of the Chief Engineer as a working arrangement, in addition to his own responsibilities as Superintending Engineer, and drawing the scale of pay admissible to Superintending Engineer. He has also challenged the principle adopted by the Departmental Promotion Committee and later by the Commission. This matter has been dealt with in connection with C.W.J.C. No. 3251 of 1997 Needless to say that his case is also covered by the judgment in the aforesaid writ petition and his case shall also be considered along with the cases of other candidates, treating him as a candidate belonging to reserved category, for promotion to the post of Engineer-in-Chief. This writ petition is also allowed to the extent indicated above.