

IN THE HIGH COURT OF JHARKHAND AT RANCHI

L.P.A No. 167 of 2014

1. **Surjeet Mukherjee**
2. **Shashi Bhushan Singh**
3. **Pradeep Kumar** Petitioners/Appellants

Versus

State of Jharkhand through its Principal
Secretary, Department of Personnel,
Administrative Reforms and Official
Language, Govt. of Jharkhand & Ors.... .. Respondents/Respondents

**CORAM: HON'BLE MR. JUSTICE VIRENDER SINGH, CHIEF JUSTICE
HON'BLE MR. JUSTICE D.N. PATEL**

For the Appellants: M/s Pandey Neeraj Rai
For the Respondents: M/s

07/Dated 13th November, 2014

Per D.N. Patel, J.

1. This letters patent appeal has been filed against the judgment and order dated 21st March, 2014 passed by the learned Single Judge in W.P. (S) No. 4603 of 2012, which was filed by these appellants.
2. Counsel for the appellants submitted that these appellants are the original petitioners who have challenged the action of the respondent State denying promotion to these appellants from the post of Assistant to the post of Section Officer in July, 2010. It is submitted by the counsel for the appellants that some of the Assistants were promoted in July, 2010, whereas these appellants, who were also Assistants at par with those promoted in the month of July, 2010, though recommended by the Departmental Promotion Committee, were left to be promoted to the post of Section Officer much later, i.e. in the month of November, 2012, though there were enough vacancies/posts of Section Officer to accommodate all these appellants in July, 2010 itself. As a result of this segregation, i.e. giving promotion to one group of Assistants in the month of July, 2010 and the other (present appellant were among them) in the month of November, 2012 on the post of Section Officer, further progress of the present appellants in their service career were affected and therefore, a prayer is made before this Court through this Letters Patent Appeal for notional promotion to the present appellants from July, 2010 so that they may

become at par with other similarly situated persons, who have been granted promotion in July, 2010. The present appeal is confined only to this argument and nothing more. This has been clarified by counsel for the appellant because they were aggrieved only by that part of the impugned order which is related to the aforesaid prayer for grant of promotion notionally from July, 2010.

3. Counsel of the appellant relies upon following decisions rendered by the Hon'ble Supreme Court in the following two cases:

i) C.O. ARUMUGAM AND OTHERS vs. STATE OF TAMIL NADU AND OTHERS reported in *1991 supp (2) Supreme Court Cases 199*

ii) UNION OF INDIA AND OTHERS vs. N.P. DHAMANIA AND OTHERS reported in *1995 Supp (1) Supreme Court Cases 1*

4. We have heard counsel appearing for the respondent State who has submitted that there is no legal obligation on the part of the State to fill up all the promotional posts. The recommendation of the Departmental Promotion Committee (D.P.C.) did not give these appellants indefeasible right to promotion. Recommendation of the D.P.C. is only a recommendation to the State that the candidates who have been recommended for promotion from the post of Assistant to the post of Section Officer are qualified and there is no civil or criminal enquiry pending against them and taking into consideration their confidential reports they are fit to be promoted. When it comes to the policy decision, it has to be taken by the State whether to fill up all the posts or not and it being the policy decision of the State not to grant promotion to these appellants, rightly the learned Single Judge did not interfere into it while passing the impugned order in the writ petition and hence, in this Letters Patent Appeal also this ground may not be entertained.

5. Having heard counsel for both sides and looking to the facts and circumstances of the case, we see no reason to entertain this Letters Patent Appeal mainly for the following facts, reasons and judicial pronouncements:-

(I) It appears that present appellants are the original petitioners, who had preferred writ petition being W.P.(S) No. 4603 of 2012, which was decided by the learned Single Judge vide order dated

21st March, 2014. These appellants are aggrieved by part of the said order of the learned Single Judge to the extent that these appellants should have been promoted by the Govt. of Jharkhand from the post of Assistant to the post of Section Officer with effect from July, 2010.

(II) It is stated by the counsel for the appellants that there were enough vacancies for the post of Section Officer to accommodate all these appellants because they were recommended by the Departmental Promotion committee for their promotion and the state has filled up few of the posts of Section Officer in July, 2010 and thereafter, appellants have been promoted in the month of November, 2012 to the same post, i.e. the post of the Section Officer and therefore, these appellants may be given promotion with retrospective effect from July, 2010 so that they become at par with the Section Officers (who were promoted in July, 2012) for further promotion to the posts higher to the post of Section Officers.

(III) The question that arises before this court is as to whether there is any legal obligation on the part of the respondent State to fill up all the promotional posts (in the present case promotional post is of Section Officer) whenever there are vacancies. **We see no reason to agree with the contention raised by this appellant mainly for the following reasons:**

In absence of a specific directory statute to that effect, there is no legal duty on the part of the State Employer to fill up all the vacancies.

Unless there is legal obligation of the State there can not be any corresponding legal right vested in these appellants.

Mere existence of vacancies does not mean that the State Employer has to fill them up at a time even if there are adequate number of candidates found fit for the promotion.

Even if the candidates are recommended by promotion committee, empanelled or their name figure in the select list, they do not acquire a indefeasible right to promotion to be granted by the State Employer.

In absence of a director statute promotional matter is the policy decision of the State employer and it has the power to take

decision so far it is not unfair, unreasonable and malafide.

a) It has been held by Hon'ble the Supreme Court in the case of ***State of Haryana v. Subash Chander Marwaha*** reported in (1974) 3 SCC 220 in paragraph 10 and 11 as under:

“10. One fails to see how the existence of vacancies give a legal right to a candidate to be selected for appointment. The examination is for the purpose of showing that a particular candidate is eligible for consideration. The selection for appointment comes later. It is open then to the government to decide how many appointments shall be made. The mere fact that a candidates name appears in the list will not entitle him to a mandamus that he be appointed. Indeed, if the State Government while making the selection for appointment had departed from the ranking given in the list, there would have been a legitimate grievance on the ground that the State Government had departed from the rules in this respect. The true effect of Rule 10 in Part C is that if and when the State Government propose to make appointments of Subordinate Judges the State Government (i) shall not make such appointments by travelling outside the list, and (ii) shall make the selection for appointments strictly in the order the candidates have been placed in the list published in the Government Gazette. In the present case neither of these two requirements is infringed by the Government. They have appointed the first seven persons in the list as Subordinate Judge. Apart from these constraints on the power to make the appointments, Rule 10 does not impose any other constraint. There is no constraint that the Government shall make an appointment of a Subordinate Judge either because there are vacancies or because a list of candidates has been prepared and is in existence.

*11. It must be remembered that the petition is for a mandamus. This Court has pointed out in *Dr. Rai Shivendra Bahadur v. Governing Body of the Nalanda College* that in order that mandamus may issue to compel an authority to do something, it must be shown that the statute imposes a legal duty on that authority and the aggrieved party has a legal right under the statute to enforce its performance. Since there is no legal duty on the State Government to appoint all the 15 persons who are in the list and the petitioners have no legal right under the rules to enforce its performance the petition is clearly misconceived.”*

(Emphasis supplied)

From the aforesaid decision it is clear that there is no constraints that the State employer has to fill up the posts only

because there is a vacancies or name of the candidates figure in the select list unless there is a statute that imposes a legal duty upon and employer and the employee has a corresponding right.

b) It has been held by the Hon'ble Supreme Court in the case of ***RAI SHIVENDRA BAHADUR (DR.) v. NALANDA COLLEGE*** reported in **1962 Supp (2) SCR 144 in paragraph 5**, as under:

“5. A great deal of controversy was raised before us as to whether the statutes framed by the University under Section 20 of the University of Bihar Act have or have not the force of law and whether a writ under Article 226 of the Constitution can issue against the Governing Body of the College i.e. whether the appellant has a legal right to the performance of a legal duty by the respondents. In order that mandamus may issue to compel the respondents to do something it must be shown that the statutes to enforce its performance. It is However, wholly unnecessary to go into or decide this question or to decide whether the statutes impose on the Governing Body of the College a duty which can be enforced by a writ of mandamus because assuming that the contention of the appellant is right that the College is a public body and it has to”

(Emphasis supplied)

Thus, from the aforesaid decisions it appears that some statute must be there under which a legal obligation is on the part of the State and a legal right vested in the aggrieved party and because of that statute a court can direct or compel the employer to fill up the vacancies.

In the facts of the present case, nothing specific is shown which imposes a legal obligation on the part of the State and a corresponding right vested with the appellants to be appointed as Section Officer only on the ground that there are enough vacancies to accommodate them and they have been recommended by the Departmental Promotion Committee for promotion.

c) It has been held by Hon'ble the Supreme Court in the case of ***Shankarsan Dash v. Union of India*** reported in **(1991) 3 SCC 47 , para 7**, as under:

“ 7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed

which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies.....”

Thus, as per the aforesaid decision, though there are candidates found fit and successful for the promotion and there are enough vacancies available to accommodate them, there is no legal obligation on the part of the State to fill up all the promotional posts/ vacancies.

d) It has been held by the Hon'ble Supreme Court in the case of **All India SC & ST Employees' Assn. v. A. Arthur Jeen**, reported in **(2001) 6 SCC 380 in Paragraph No. 10** as under:-

“10. Merely because the names of the candidates were included in the panel indicating their provisional selection, they did not acquire any indefeasible right for appointment even against the existing vacancies and the State is under no legal duty to fill up all or any of the vacancies as laid down by the Constitution Bench of this Court, after referring to earlier cases in Shankarshan Dash v. Union of India.....”

e) It has been held by the Hon'ble Supreme Court in the case of **Food Corp. of India v. Bhanu Lodh** reported in **(2005) 3 SCC 618** in paragraphs 3 and 14 as under:-

“3. In our view, there is no manner of doubt that the two directives in question were clearly within the power of the Central Government under Section 6 (2) of the Act. In Shankarsan Dash v. Union of India a Constitution Bench of this Court laid down that there is no absolute right in favour of a candidate whose name is included in the selection list to.....

14. Merely because vacancies are notified, the State is not obliged to fill up all the vacancies unless there is some provision to the contrary in the applicable rules. However, there is no doubt that the decision not to fill up the vacancies, has to be taken bona fide and must pass the test of reasonableness so as not to fail on the touchstone of Article 14 of the Constitution. Again, if the vacancies are proposed to be filled, then the State is obliged to fill them in accordance with merit from the list of the selected candidates. Whether to fill up or not to fill up a post, is a policy decision, and unless it is infected with the vice of arbitrariness, there is no scope for interference in judicial review.....”

Thus, view of the aforesaid decisions, it appears that even if the candidates who are empaneled indicating their provisional selection, they never acquire any indefeasible right to appointment even against the existing notified vacancies and there is no legal duty of the State to fill up all the vacancies. In the facts of the present case also merely because these appellants were recommended by the Departmental Promotion Committee for their promotion from Assistant to the post of Section Officer and merely because there are enough vacancies to accommodate them on post of Section officer it does not mean that these appellants have the right to be promoted. The right to promotion vested in the employee should correspond to a legal obligation on the part of the State employer and as stated hereinabove, there is no legal duty on the part of the State to fill up all the promotional posts of Section Officer in the facts of the present case.

f) It has been held by Hon'ble the Supreme Court in the case of ***State of M.P. v. Sanjay Kumar Pathak***, reported in ***(2008) 1 SCC 456*** in paragraphs 18 as under:

“18. The tribunal as also the High Court did not call for the documents pertaining to the selection process. No finding of fact has been arrived at that the respondents herein were bound to be selected and consequently appointed. Whether all of them had fared better than the other candidates who had not approached the Tribunal had not been found. As the selection process itself was not complete, there was nothing before the Tribunal as also the High Court to indicate that they had acquired legal right of any kind whatsoever. Even where, it is trite, the names of the persons appeared in the select list, the same by itself would not give rise to a legal right unless the action on the part of the State is found to be unfair, unreasonable or mala fide. The State, thus, subject to acting bona fide as also complying with the principles laid down in Articles 14 and 16 of the Constitution of India, is entitled to take a decision not to employ any selected (sic candidate) even from amongst the select list furthermore, we have noticed hereinbefore, that selections were made in four phases. It is not the contention of the respondents that the State Government acted mala fide.....”

(Emphasis supplied)

In view of the aforesaid decision, it appears that even if the name of the candidates are appearing in the select list, it would not give a legal right to them for appointment unless the action of

the State is found unfair, unreasonable or malafide. Merely because names of the candidates are included in the selection panel there is no right vested in them to be appointed.

III) So far as the decisions referred to by learned counsel for the appellants are concerned, taking into consideration facts of the present case the ratio of the aforesaid two decisions are not applicable herein, mainly for the reason that though some similarly situated Assistants were promoted earlier, i.e. in July, 2010, these appellants have also been promoted later, i.e. in November, 2012 and there is no legal duty of the State to fill up the available vacancies at a time. Promotional posts can be filled up in phase-wise and stage-wise manner also.

IV) Thus, State is not obliged to fill up all the vacancies unless there are directory rules to that effect and in the facts of the present case there are no directory rules. Therefore, it is neither the duty of the Govt. of Jharkhand to fill up all the promotional posts nor the appellants have alleged and much less established that there was lack of bonafide on the part of the State in the facts of the present case in not filling up the vacancies. It ought to be kept in mind that the decision of the State to fill up the vacancies up to a particular stage depends upon several factors like availability of infrastructure, necessity of manpower, availability of other co related staff, financial burden on the exchequer etc.

V) Not to fill up posts despite there being enough vacancies, adequate candidates being recommended by the D.P.C., in absence of a directory statute ensuring legal obligation on the part of the State and corresponding right vested with the candidates, is a policy decision of the State Employer in the facts of the present case and in our view, the writ court has rightly not interfered with this policy decision of the State in exercise of its jurisdiction under Article 226 of the Constitution of India, i.e. writ jurisdiction. There is a vast difference between existence of the vacancies and actual promotion. Even if vacancies are available, it all depends upon the State whether to fill them up looking to several factors as stated herein above.

5. As a cumulative effect of the aforesaid facts, reasons and judicial pronouncements, we see no reason to entertain this Letters Patent Appeal, hence the same is, accordingly, dismissed.

(Virender Singh, C.J.)

(D.N.Patel, J.)

s.m.