A

JAI NARAIN MISRA

v.

STATE OF BIHAR & ORS.

September 15, 1970

B

[J. C. SHAH, K. S. HEGDE AND A. N. GROVER, JJ.]

Civil service—Selection Post—Director of Agriculture—Method of filling up.

The Director of Agriculture in the respondent-State having retired the State Government wrote to the Public Service Commission requesting them to select one of the 14 officers shown in the list accompanying the letter for being *promoted* as Director. The letter stated that the question of seniority among those officers was still under consideration and that the list was not arranged in accordance with seniority. The pay scale of some of the officers in the list was Rs. 900 to Rs. 1,400 and others Rs. 1,200 to Rs. 1,700. The selection was to be on the basis of merit and suitability. After examining the records, the Commission recommended the name of the appellant. The third respondent filed a writ petition and the High Court held that the third respondent was senior to the appellant and had greater merit. The pay scale of both the appellant and the third respondent was Rs. 1,200 to Rs. 1,700.

C

D

In appeal to this Court,

HELD: (1) The post of Director of Agriculture is a selection post and an ex-cadre post. Selection to it is made solely on the basis of merit and the question of seniority was not relevant. It is for the State Government to select the most suitable officer and for discharging that responsibility, it was open to the Government to seek the assistance of the Public Service Commission. The use of the word *promoted* in the letter was inappropriate but the nature of the post cannot be changed by the Government using that word. Therefore, the High Court was not justified in going into the question of seniority, especially when there was no complaint of *mala fides* either on the part of the Government or the Commission.

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[393 H; 394 B-C, E-F]

(2) Rule 16 of the Rules regulating the Bihar and Orissa Agricultural Services Class I promulgated on April 11, 1935 is not superseded by the 1945 Rules which apply to Bihar Agricultural Service Class I, Bihar Agricultural Service Class II, General Provincial Service and special posts outside these cadres. The 1935 Rules do not come in the way of the Government making its selection to the post of Director, and R. 12 of 1945-Rules is not applicable. [395 F, G; 396 B]

G

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 477 of 1970.

H

Appeal from the judgment and order dated February 12, 1970 of the Patna High Court in Civil Writ Jurisdiction Case No. 1067 of 1969.

A *S. V. Gupte* and *U. P. Singh*, for the appellant.

H R. Gokhale and *R. C. Prasad*, for respondent Nos. 1 and 2.

D. P. Singh, for respondent No. 3.

B The Judgment of the Court was delivered by

Hegde, J. The appellant and the third respondent are serving in the Agricultural Department of the Bihar Government. Till February 1968 Mr. B. N. Sinha was the Director of the Agriculture in that State. He retired in February of that year. On November 25, 1967, the State Government of Bihar wrote to the C Public Service Commission requesting the Commission to select one of the fourteen officers shown in the list accompanying that letter for being promoted as Director of Agriculture. The pay scale of some of those officers was Rs.. 900-1400 and others Rs. 1200-1700. In that letter the Government stated that the question of seniority of those officers is still under consideration D and the list sent was not arranged in accordance with seniority. The Commission wrote to the Government on April 29, 1968 asking the Government to determine the seniority of those officers before it is asked to recommend one of them for being appointed as Director of Agriculture. The Government wrote back to the Commission on September 23, 1969 stating that the question of seniority of those officers cannot be easily settled as there were F some complications and the Commission should proceed to select one of the officers mentioned in the list solely on the basis of merit and suitability.

After examining the records of all the officers concerned, the Commission recommended the name of the appellant. Immediately F thereafter the third respondent approached the High Court with a petition under Art. 226 of the Constitution praying that the recommendation of the Commission may be quashed and the Government asked to make the appointment in accordance with the rules. The High Court came to the conclusion that the third respondent is senior to the appellant and has greater merit than the appellant. Hence under the rules he was entitled to be promoted. This is an G appeal, by certificate against that discussion. Thereafter the Government appointed the third respondent to officiate as Director of Agriculture. It appears that the third respondent is superannuated on the 1st of this month but he has been given a month's extension.

It was not disputed before us that the post of Director of Agri- H culture is a selection post. Therefore the question of seniority was not relevant in making the selection. It is for the State Government to select such officer as it considers as most suitable. In this view we think the High Court was not justified in going into

the question of seniority nor will we be justified in going into that question. It may be noted that at the time the Commission made this recommendation the pay scale of both the appellant as well as the third respondent was Rs. 1200-1700. A

So far as the question of suitability is concerned, the decision entirely rested with the Government. In other words the Government is the sole judge to decide as to who is the most suitable candidate for being appointed as the Director of Agriculture. For discharging that responsibility it was open to the Government to seek the assistance of the Public Service Commission. In our judgment the High Court was not justified in calling for the records of the Public Service Commission and going through the notings made by various officers in the Commission as well as the correspondence that passed between the Commission and the Government. The High Court overlooked the fact that the Government sought the assistance of the Commission and not that of the High Court for finding out the most suitable candidate. In this case there was no complaint of *mala fides* either on the part of the Government or the Commission. That being so the interference of the High Court in the matter of selection made by the Government was not called for. B C D

The post of Director of Agriculture is admittedly an ex-cadre post. The selection to that post is made solely on the basis of merit. Merely because the Government in its letter to the Commission used the word "promotion", the High Court should not have treated the case as one of "promotion". The word "promotion" used in the Government's letter was an inappropriate word. What the Government really meant was selection of a person to be posted as the Director. The nature of the post cannot be changed by the Government's using the word "promotion". The post remains to be a selection post. E F

The High Court was also not right in opining that the recommendation made by the Commission was not in accordance with the rules. The two rules referred to by the High Court are (1) Rules regulating the Bihar and Orissa Agricultural Service, Class I promulgated on April 11, 1935 and (2) The Rules regulating the recruitment to Bihar Agricultural Service Class I, the Bihar Agricultural Service Class II, the General Provincial Service and special posts outside these cadres promulgated on July 9, 1945. The High Court has come to the conclusion that 1935 rules were by implication though not specifically repealed by the 1945 rules. 1935 rules make it clear both in its preamble as well as by the definition of the word "The service" that those rules do not apply G H

A to the appointment to the post of Director of Agriculture. Further Rule 16 of those rules reads :

> "The post of the Director of Agriculture shall remain outside the cadre of the service, but subject to the provision of rule 17 below it may be filled at the discretion
B of the local government by a member of the service."

Rule 17 says :

> "None but a member of the Indian Agricultural Service borne on the cadre of the Bihar and Orissa shall be appointed to the post of the Director of Agriculture
C so long as any such member is available for appointment to the post and who has not been held by the Government of Bihar and Orissa to be permanently unfit to hold such post,
>
> Provided that whenever the local Government consider that no officer of the Indian Agricultural Service
D borne on the cadre of Bihar and Orissa is fit for the post of the Director, the assistance of the Government of India shall be sought with a view to procuring a suitable selection from among the members of the Indian Agricultural Service in other provinces before any other person is appointed to the post."

E From a reading of rules 16 and 17 of the 1935 rules, it is clear that the 1935 rules did not come in the way of the Government making its selection.

Now coming to the 1945 rules, it is clear from its preamble that those rules apply only to (1) the Bihar Agricultural Service
F Class I; (2) the Bihar Agricultural Service Class II and (3) the General Provincial Service and special posts outside these cadres. The reference to the posts outside the cadres of Class I and Class II Services, it was contended on behalf of the appellant as well as on behalf of the State Government refers to posts in Class I and Class II in addition to cadre posts and not to selection posts. It is not
G necessary for our present purpose to decide that question. It is clear from rule 12 of the 1945 rules that these rules do not apply in the matter of filling up the post of the Director of Agriculture. That rule reads :

> "Whenever the Governor decides that a vacancy shall be filled by promotion or transfer of an officer already
H in the service of Government, a reference shall be made to the Commission to advise on such selection. The Commission shall be supplied with the records of the officer nominated for promotion by the Director of Agri-

culture, together with the records of officers, if any, who are senior to the nominated officer."

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We are unable to visualise that any service rule could have provided for the nomination of his successor by an officer who is about to be superannuated. In our judgment rule 16 of the 1935 rules is not superseded by the 1945 rules.

B

In the result this appeal is allowed and the writ petition dismissed. Taking into consideration the fact that the third respondent is already superannuated we make no order as to costs in this appeal.

V.P.S. *Appeal allowed.*