
(2003) 04 JH CK 0071

In the Jharkhand High Court

Case No : Writ Petition (S) No. 2299 of 2001

Ajay Kumar Pandey and Others

APPELLANT

Vs

State of Jharkhand and Others

RESPONDENT

Date of Decision : 02-04-2003

Acts Referred:

Citation : (2003) 2 JCR 433

Hon'ble Judges : Tapen Sen, J

Bench : Single Bench

Advocate : Amrendra Sharan and P.K. Prasad, for the Appellant; B.S. Lall, Addl. A.G., Sadanand Jha, A. Allam and A.K. Mehta, for the Respondent

Final Decision : Dismissed

Judgement

1. The petitioners herein have prayed for quashing Annexure-1 which is the final gradation list issued on 14.2.2001 as also Annexure-4 which is the Notification dated 2.5.2001 by which several Assistant Engineers who were junior to the Petitioners have been promoted and posted in the current charge of Executive Engineers without separation of cadre. The petitioners have also prayed for a direction upon the State of Bihar (Respondent No. 1) to prepare the final gradation list of Assistant Engineers appointed on 25.1.1979 in the Bihar Engineering Service Class II posts as per their age on account of the fact that they have entered into service on the same day and also on account of the direction issued by the Patna High Court vide Annexure-2 which, according to the petitioners, was affirmed upto the Supreme Court. They have further made a prayer that their cadre should be separated in accordance with law.

2. By an Amendment Application, the Petitioner have stated that this Writ Petition was filed on 7.6.2001 and was placed for admission on 8.6.2001. On the same day, i.e. 8.6.2001, the respondent No. 2 (State of Jharkhand) issued Notification No. Irrigation/Establishment/57/2001/1348 dated 8.6.2001 (Annexure-5 to the said Amendment Petition) purporting to be in compliance of Annexure-4, whereby and whereunder the Assistant Engineers were posted in

different places at Jharkhand. Consequently, the Petitioners also pray for quashing the said Notification as contained at Annexure-5.

3. According to the Petitioners, on 25.1.1979, 1158 (One Thousand One Hundred Fifty Eight) Degree-holder Civil Engineers were directly appointed on ad hoc basis. The Petitioners were also appointed as Assistant Engineers in the Bihar Engineering Class-II posts in the Irrigation Deptt. (Now Deptt. of Water Resources). They were deputed in the Bihar State Construction Corporation Limited.

4. As against this, the Respondent No. 1 has stated that in the year 1978, the State Government had taken a decision to appoint Engineers in the Irrigation and the Power Deptts. and the criteria was decided by the Labour and Employment Department, Government of Bihar. Accordingly, on 8.1.1979, vide Annexure-A, a Cabinet Memorandum was sent to the Cabinet Secretariat for approval on 9.1.1979 and by letter dated 28.2.1979 issued by the Department of Labour and Employment, as contained at Annexure-B, it was informed that approval had been given by the Cabinet on the said day, i.e. on 9.1.1979.

5. In the light of the criteria so fixed, appointments of Assistant Engineers were made on 25.1.1979 and the criteria was as follows :--

(a) Points for Merit : Percentage of marks obtained in the final year of B.E.- considered upto 3 digits of decimals points;

(b) Weightage for unemployment : 3 points per year for unemployment from the date of passing the final year of Bachelor of Engineering Exams subject to a limit of 20 Marks in the following manner :--

Year of Passing Weightage 1978 0 1977 3 1976 6 1975 9 1974 12 1973 15 1972 18 1971 and earlier 20 (Maximum)

6. On 26.3.1979, the Associate Members of the Institution of Engineers, (hereinafter referred to for the sake of brevity as the "AMIE") Degree holders were appointed as Assistant Engineers. These appointments were made from amongst the AMIE degree holders, who were already working as Junior Engineers as per the policy to the effect that 5% quota in such appointments would be fixed for the appointment of Assistant Engineers.

7. The Petitioners have stated that on 30.12.1986, 964 such engineers who were appointed on 25.1.1979, were regularized as per the provisions of the "Bihar Gazetted Officers ad hoc appointments Regularization Ordinance, 1986". On 25.4.1988 the Joint Secretary, Deptt. of Water Resources issued a letter stating that the inter se seniority of direct recruits of 1979 had been determined in accordance with the letter dated 28.2.1979 of the Deptt. of Labour and Employment, Govt. of Bihar.

8. On the other hand, the Respondent No. 1 has stated, with reference to Annexures C and C/1 of their counter affidavit that on the basis of the

aforementioned criteria, the Gradation List of Asst. Engineers appointed in 1979 was tentatively published on 25.4.1988. It was very precise and scientific. Objections were called for and after receipt of objections and upon consideration thereof, prepared an integrated provisional Gradation List of those Asst. Engineers in the period between December, 1978 and June, 1991 vide Ann-3 to the Writ Petition.

9. They have further argued that since the integrated provisional Gradation List included new names of promotee Asst. Engineers having AMIE (Associate Members of the Institution of Engineers) Degrees and of the direct recruit Asst. Engineer Degree holders, therefore objections were again called for and after receipt of objections and upon consideration thereof, prepared an integrated final Gradation List vide Ann-1 to the Writ Petition.

10. According to these Respondents, this Final Gradation List Includes Asst. Engineers appointed or promoted between 27.12.1978 and February, 1990 and also includes the names of 16 persons of the year 1976-75.

11. The Respondent No. 1 has further stated that while preparing the final gradation list, the following norms which were fixed by the Personnel and Administrative Reforms Deptt. were followed :--

(a) Date of Seniority of Direct Recruits were taken as their order of Merit decided by the Deptt. or even conferred by the BPSC;

(b) In case of Promotees and Direct Recruits of the same transaction, promotees were kept above the Direct Recruits because the Rules in this regard are that :--

WHERE OFFICERS ARE RECRUITED BY PROMOTION, BY DIRECT RECRUITMENT OF THE SAME TIME then :--

(i) the promotee Officer shall take precedence over the Officers directly recruited;

(ii) promoted officers shall keep the position inter se which they held in service from which they have been promoted;

(iii) regarding promoted Assistant Engineers of AMIE/Degree their inter se seniority has been kept as per the panel made by the Deptt.

(c) the AMIE/Degree holder Engineers, whose Notification for promotion was notified on 26.3.1979, have been kept above the directly recruited Assistant Engineers of 25.1.1979 for the following reasons :--

(i) Their quota of AMIE/Degree had been notified on 17.1.1979 and they opted for promotion against this quota though they were also directly recruited on 25.1.1979.

(ii) It is a Government Decision that "if promotion and recruitment takes place in the same transaction, then the promoted officers shall take precedence over the officers directly recruited."

12. Hence, according to these Respondents, the Assistant Engineers who are AMIE/Degree holders and although their notification for promotion was notified on 26.3.1979, were kept above those Direct Recruit Assistant Engineers of 25.1.1979 because their promotion and recruitment were in the same transaction.

13. The Respondents have also submitted that so far weightage in terms of their date of birth for fixing seniority, the same will firstly be in violation of the Cabinet decision dated 8.1.1979 (Annexure-A Page 117) and secondly, if more than one person obtained equal points, then they were arranged according to their dates of birth, which is evident from SI Nos. 23 and 24 of the Provisional Gradation List of 1988 (Annexure-C Page 124). Both got 85.350 Points and their respective dates of birth were 23.1.1952 and 14.7.1952 and so, the elder was placed above the younger. Similarly, persons at SI Nos. 120, 121 and 122 were arranged according to their dates of birth.

14. The Petitioners, on the other hand, have submitted that the entire process was illegal and in fact amounted to violation of the Order/Judgment of the High Court. They have stated that for the same and identical matter, a Writ Petition bearing CWJC No. 4246 of 1985 was filed at Patna and on 5.7.1989, by Annexure-2, the said Court delivered its judgment and while dealing with inter se seniority, the Patna High Court, directed the State of Bihar to fix seniority of persons who had entered into service on the same day on the basis of their respective dates of Birth, Meaning thereby that if more than one person was appointed on the same day, the person elder in age would rank senior to the person younger in age. Instead of doing so, the Respondents regularized the services of the remaining Engineers on 28.6.1990 whereafter on 16.4.1992, by Annexure-3, a Provisional Gradation List of the Promotee Asst. Engineers (having AMIE Degree) and of the Degree Holder Asst. Engineers was issued and objections invited. Several persons including the petitioners filed objections and requested that the seniority list be prepared on the basis of the judgment dated 5.7.1989 passed in CWJC No. 4246/1985 and other analogous cases by the Patna High Court (Annexure-2) and as per the law settled therein vis-a-vis the Direct Recruits.

15. The Petitioners have complained that in the said Provisional Gradation List, the inter se seniority of the direct recruits was made on the basis of the letter dated 28.2.1979, which is contrary to law as also contrary to the judgment of the High Court. This letter was issued by the Deptt. of Labour and Employment. This letter according to them does not set out the criteria for determining inter se seniority. On the contrary, this letter gives the basis for giving employment after 28.2.1979 and therefore it could not have been applied in relation to the recruitments made in the year 1979.

16. Moreover, in the said Provisional Gradation List, the promotee Engineers who had been appointed on 26.3.1979, were shown as senior to the direct recruits on the ground that notwithstanding their appointments having been made on

26.3.1979, yet as per their quota, vacancy existed for them since 17.1.1979. If this be held to be proper then their appointments would be treated from retrospective effect and the promotees would be deemed to have been appointed on 17.1.1979.

17. The petitioners have therefore stated that by reason of the aforesaid, the appointees having AMIE Degrees on 26.3.1979 were placed above the direct recruits although they (i.e. the Direct Recruits) were appointed earlier, i.e. on 25.1.1979.

18. The petitioner have further stated that although the respondent No. 1, vide Memo No. 2818 dated 14.7.1992, revised the Gradation List of 1985 following the directions of the High Court made in Annexure-2 (which was also upheld by the Supreme Court) yet, surprisingly, the Provisional Gradation List was finalised contrary to the said Directions, notwithstanding filing of objections by issuance of the Final Gradation List on 14.2.2001 (Annexure-1).

19. According to the petitioners, the respondents did not consider the objections and finally, the provisional gradation list of the year 1992, was converted into a Final Gradation List by memo No. 365 dated 14.2.2001 issued by the Special Secretary, Water Resources Department, Patna.

20. Apart from the aforesaid irregularities including placement of these AMIE Degree holders above the Direct recruits between SI Nos. 2399, 2415, the petitioners have also complained that the respondents did not even follow the Judgment of the High Court. Additionally, in the Final Gradation List, it is stated that the Provisional Gradation List had been prepared on the basis of merit, which according to the petitioners, is not true because it was prepared on the basis of marks obtained in the final year, Engineering Course. Even in the provisional Gradation List and upon perusal thereof, it would be apparent that weightage was given to the period of unemployment. Moreover, against some of the appointees, no marks were given and yet, they have been given percentage.

21. The petitioners have argued and submitted that it is well settled that seniority is always counted from the date of appointment and not from the date when quota was fixed or created or vacancy existed. Moreover, there is no law that says that vacancy would be treated retrospectively.

22. Returning to facts, the petitioners have stated that on 2.5.2001, vide Annexure-4, the Joint Secretary, Deptt. of Water Resources issued a Notification whereby and whereunder 60 Assistant Engineers were given current charge of Executive Engineers and in the said list, SI Nos. 1-16 are promotee Junior Engineers while SI Nos. 17-25 are Jr. Engineers having AMIE Degrees and SI Nos. 26-60 are the Direct Recruit Asst. Engineers. In this Notification, only 12 persons who have been given current charge of Executive Engineers in Jharkhand, are senior to the petitioner while 7 are junior according to age. In view of such glaring irregularities, the petitioners have prayed that the respondents should be directed to prepare the Gradation List of inter se seniority

between the direct recruits considering the criteria the criteria of age as per the judgment and that they be also directed to relegate the Junior Engineers having AMIE Degrees below the Direct Recruits and till the gradation list is finalized, the Notification dated 2.5.2001 should not be given effect to at Jharkhand, not only because of irregularities stated above but also because till separation of cadre, the action is illegal, arbitrary, whimsical, mala fide and without jurisdiction.

23. The Intervenor Applicants have also pleaded more or less the same things and have further stated that their seniority list are at SI Nos. 2433, 2407 and 2520 making them senior to the petitioners. The Intervenor Applicants have also brought on record the same Cabinet Memorandum dated 9.1.1979 vide Annexure-1. R/A. They have also brought on record the letter dated 28.7.1979 vide Annexure-I. R/B.

24. They have also stated that thousands of appointees as Civil and Mechanical Engineers and Junior Engineers in the Works Deptt. have been given their seniority position as per norms and guidelines fixed by the Cabinet Memorandum (Annexure-A). With the passage of time, many Assistant/ Junior Engineers have got their regular promotions and in some cases, even two promotions have been conferred.

25. The respondent No. 2 (State of Jharkhand) in their Counter Affidavit at Paragraph 4 have stated that the Water Resources Department, of the Government of Bihar has issued the Notification dated 2.5.2001 by which the total 60 Assistant Engineers have been appointed as Executive Engineers in "current charge" and the Gradation List has also been issued by the said Government of Bihar. As such, the respondent No. 2 is not in a position to reply the averments of the petitioners but has to implement the Notification dated 2.5.2001 since cadre has not yet been finally decided. They have further stated that the memo No. 365 dated 14.2.2001 (i.e. the Final Gradation List) itself clarifies that all objections which were received after the provisional Gradation List of 1992 has been considered while issuing the same. These respondents have not stated much.

26. The respondent No. 3 has also brought on record the Memorandum dated 8.1.1979 (which is Annexure-A to the Counter Affidavit of the respondent No. 1) and has also marked this as Annexure-A. The respondent No. 3 has adopted the arguments of the respondent No. 1. This respondents has however further stated that the Cabinet Memorandum (Annexure-A), was communicated by the Labour and Employment Deptt. by their Letter dated 28.2.1979 (Annexure-B to his Counter Affidavit). Later on thousands of appointees as Civil and Mechanical Engineers and Junior Engineers in the Works Department were given their seniority position as per norms and guidelines fixed by the said Cabinet Memorandum (Annexure-A) and with the passage of time, many other Assistant/ Junior Engineers also got their regular promotions and in some cases, even two promotions. He has further stated that he has already joined on 14.7.2001 vide Annexure-C to his affidavit (Page 186).

27. From what has been taken note of in the preceding paras, it is evident that the State of Bihar, in 1978, had taken a decision to absorb all unemployed Degree and Diploma-holder Engineers of the State of Bihar. The said decision was taken at the highest level of the Government.

28. The criteria for appointment of Assistant Engineers was decided by the Labour and Employment Department of the Government of Bihar and the same was sent to the Cabinet Secretariat on 8.1.1979 vide letter dated 8.1.1979 for approval.

29. This letter is already on record as Annexure-A to the counter affidavit filed by respondent No. 1. In the said letter, it was mentioned that in the matter of appointment of Assistant Engineers for the relevant period the criteria should be efficiency oriented and not age oriented.

30. In relation to the application of yardstick for appointment to the gazetted post of Engineers, final decision was taken and notified by the Labour and Employment Department, Government of Bihar vide its letter dated 28.2.1979 and the said letter explains in detail the yardstick applicable in the matter of appointment of the Assistant Engineers. The said letter is Annexure-B to the counter affidavit filed on behalf of Respondent No. 1 (State of Bihar).

31. For the appointment of Assistant Engineers (Class II Service), there is a Statutory provision in the Bihar PWD Code. The appointment process includes the appointment of Direct Recruits through the Bihar Public Service Commission or by the Departmental Committee.

32. The other method is by promotion on these posts from the post of Over seer/ Junior Engineers etc. As per Rule in the matter relating to the appointment on the post of Assistant Engineers, the list made for Direct Recruitment, the Commission sends its recommendation of the selected candidates which are arranged in order of preference.

33. So far as filling of the posts by promotion of officers who are already in Government service, the Rule in this case provides that any vacancy or vacancies which has to be filled up by promotion, the Chief Engineer will give, his nomination for such promotion of officers from Bihar who are in service. Such nomination is to be made both on the basis of seniority as well as merit but importance will be attached to merit.

34. Thus, it is clear that the primacy in the matter of appointment on the post of Class II Assistant Engineer whether by direct recruitment or by promotion, is always on merit and/or list of candidates selected by the BPSC/Departmental Committee on the basis of merit.

35. Therefore, what actually has happened in the instant case in the matter of appointment, is that the said procedure of merit has been changed and what has been done is that the candidates who had passed the Engineering Examination and were not appointed because there was no appointments made from 1971 to

1978, certain marks were given to them on the basis of 3 (three) marks for every year of waiting after passing the final Engineering examination upto their appointment in the year 1979. This has been explained fully in Annexure-B of the counter-affidavit filed on behalf of the respondent State.

36. The Principle of determination of inter se seniority of candidates appointed on the same date is also well settled. Persons who are recommended by the Service Commission and/or by the Department Selection Committee having same marks can be given seniority in various ways. For example, in some cases in Government Departments, the procedure is that if two or more-candidates have obtained equal marks on merit, then their seniority shall be considered on the basis of the first letter of name in the English Alphabet and if, even thereafter, the two persons have the same name in English Alphabet then seniority is to be assigned on the basis of their dates of birth. In other cases, the service Rule itself provides that if there are two or more candidates having the same merit position then seniority shall be reckoned on the basis of date of birth.

37. The appointment of the Assistant Engineers on the basis of yardstick laid down in Annexure-B to the counter affidavit of the State Government is on the basis of merit. What has been done only is that for determination of the merit, marks obtained in the final Engineering Examination, has been added by 3 (three marks) for every year of waiting until their appointment in the year 1979.

38. The reliance of the petitioners on the basis of the judgment of the Hon'ble Patna High Court given in the case of Parmeshwar Prasad and Ors. v. The State of Bihar and Ors., (enclosed as Annexure-2 to the writ petition) is therefore wholly misconceived and cannot be relied upon for the determination of the present case. In this connection it is stated that the Division Bench in paragraph 8 observed as follows:--

"It need not be pointed out that, while making appointment of the petitioners and some of the respondents to the post of Engineer Assistants, a hybrid procedure was followed which can neither be said to be appointment by process of direct recruitment nor by promotion. In spite of repeated queries neither the counsel for the petitioners nor for the respondents could point out as to by what process the Engineer Assistants or the Overseers working in different work charge establishments were selected for appointment afresh, as Engineers Assistants. No satisfactory reply was given except that the committee aforesaid had taken a decision to absorb such Engineer Assistants and Overseers working in different work charge establishment by issuing fresh orders of appointments. In this background it was rightly pointed out on behalf of the respondents that if the prayer made on behalf of the petitioners is accepted, then fresh orders of appointment have to be issued in respect of the petitioners and some of the private respondents with reference to the dates of their appointments in different work charge establishments which is not permissible in law. I do not understand as to how after seventeen to eighteen years fresh orders of appointments as Engineers Assistants in respect of the petitioners and the respondents can now

be issued only after verifying from the records of different work charge establishments, their dates of appointments."

39. The Hon"ble Court subsequently noticed and observed as follows :--

"It was suggested on behalf of the Petitioners as well as the respondents including the State of Bihar that, in the facts and circumstances of this case, it will be only just and proper to determine the seniority of the Petitioners vis-a-vis the respondents with reference to the date of their entry in Bihar Engineering Service Class II i.e. Since the date of their appointment as Assistant Engineers. It was suggested that the State Government be directed to prepare the gradation list of Assistant Engineers strictly with reference to the date of their entry in that service either by promotion or by process of direct recruitment. In that connection it was also pointed out that as the appointment against the posts of Assistant Engineers has been made according to the statutory rules, on the basis of the recommendation of the Commission, no one should make any grievance if the seniority is fixed with reference to the dates of their entry into the service and if more than one person have entered into service on the same date, then the seniority should be determined with reference to the age. one who is elder in age should rank senior to the other. This appears to be a reasonable stand."

40. It was thus in the special facts and circumstances of the case as details/criteria were not available for their appointment, the High Court in that case, came to the conclusion that if more than one person entered into the service on the same date then seniority should be determined with reference to the age, one who is elder in age should rank senior to others. As stated earlier, the case at hand stands altogether on a different pedestal. In the case in hand the names of Direct Recruits through the process of selection by a departmental committee and marks obtained by them, were calculated on the yardstick as given in Annexure-B of the counter affidavit of the State. In other words, reliance to the aforesaid case of Shri Parmeshwar Prasad (Annexure-2 of the writ petition) is not applicable in the facts of this case and the same is wholly misconceived.

41. Consequently, the sole age principle for the determination of seniority inter se between the Assistant Engineers appointed in the year 1979 is inapplicable. In this connection it may be pointed out that the respondents have, in their Counter Affidavit, indicated that where Assistant Engineers got the same marks applying the aforesaid criteria of allotment of marks to the candidates (Annexure-B of the Counter Affidavit of the State), the principle of giving inter se seniority on the basis of age had already been applied. Moreover, and as the respondents have correctly stated, CWJC No. 4246 of 1985 and other analogous cases, viz. CWJC Nos. 3660, 4149, 4216 and 6014 of 1985 were all filed by persons who were appointed as Engineer Assistants and later on promoted to the rank of Assistant Engineers. Their inter se seniority was finalised after their promotions. So, the Judgment passed on 5.7.1989 is not applicable to the petitioners. The posting of Assistant Engineer as incharge Executive Engineers cannot be assailed as it appears to be a very rational step and that too when the petitioners, at present,

are much junior to many Assistant Engineers as per the Final Gradation List published on 14.2.2001. Their case for posting them on current charge of Executive Engineers may be considered only when their turn comes. Moreover, according to the notification dated 2.5.2001, the case for giving current charge of Executive Engineers has been considered upto SI. NO. 2477 of the Final Gradation List dated 14.2.2001. The Serial Numbers of the petitioners in the said Gradation List are:--

Name of the petitioner SI. No. in the Gradation List

(a) A.K. Pandey (Petitioner No. 1) : 3364

(b) C.S. Pandey (Petitioner No. 2) : 3283

(c) Md. M. Alam (Petitioner No. 3) : 3167

42. Hence, the petitioners are very junior and therefore their prayer can be considered only when their turn comes.

43. For all the reasons stated above, this Court holds that there is no merit in the instant Writ Petition and it is accordingly, dismissed. Writ dismissed.