
(1990) 07 PAT CK 0016
In the Patna High Court
Case No : C.W.J.C. No. 515 of 1989

Ashim kumar Das Gupta and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 09-07-1990

Acts Referred:

Citation : (1990) 38 BLJR 1018

Hon'ble Judges : S.B. Sinha, J;S. Roy, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. In 1974, a notice was issued by the Bihar Public Service Commission (B.P.S.C. for short) inviting applications for appointment to the posts of Sub-Inspector of Police and Sergeant, now known as Reserve Sub-Inspector. Copy of the notice is Annexure 1 to this writ petition. Petitioners 1 to 4 and respondent Nos. 4 to 27 applied and appeared at the examination. They all qualified in the written examination. Thereafter, an oral test was held by the Central Selection Committee. Twenty-six persons including the. petitioners 1 to 4 became successful for appointment to the posts of sergeant and 80 persons to the posts of Sub-Inspector. The petitioner were appointed as Sergeant under different letters issued to them, A sample copy of the appointment letter is Annexure 2 to this writ petition. The petitioners 1 to 4 joined on 9-2-1975 as Sergeants. The minute of the Central Selection Committee for appointment of Sergeants and Sub-Inspectors was also published. Copy of which is Annexure-3 to this writ petition, which also contained the names of those petitioners,

2. Respondent Nos. 5 to 27 had also applied in pursuance of Annexure-1 for the posts of Sergeant] Sub-Inspector. Although they also successfully qualified In the written test held by B.P.S.C. and were placed above petitioners 1 to 4, they were not found fit by the Central Selection Committee at the oral test either for the posts of Sergeant or Sub-Inspector, They were offered the posts of B.M.P. (Bihar Military Police) jamadars who are governed by Bengal Military Police Manual and

appointed to the those posts. They were so appointed without any examination being held for such selection and without calling for any application for such appointment. They have been included in the seniority list in B.M.P. cadre Jamadars and Subedars. Likewise, although the respondent 28 to 38 had applied for the posts of Sergeant/ Sub-Inspector, they were appointed in 1976, commonly known as 1976 Batch, B.M.P. Jamadar. Then also posts of B. M. P, Jamadar were not advertised.

3. Petitioners 5 to 8 were appointed sergeant by direct recruitment in 1984 and 1985.

4. Some of 1975 appointee Jamadars, who include some of respondents 5 to 27, filed C.W.J.C. No. 2645 of 1984 at Patna. Prayer was made therein for quashing their appointments as B.M.P. Jamadars and for writ of mandamus directing the State to appoint them to the post of Sergeant for which they had applied and had successfully competed in the written examination. They alleged that they were illegally excluded by holding oral test for which there was no provision. Petitioners of that writ petition brought on record order of the State Government dated 9-3-1987 by which a Committee was constituted to look into matter. The order of the State Government was Annexure 18 to that writ petition and is Annexure R/C to this writ petition. They had also brought on record in that writ petition the decision taken by the Committee on 4-5-1987. Copy of the minutes to that Committee was marked as Annexure 19 to that writ petition and is Annexure R/D, to this petition. The committee requested to have accepted the recommendation of the Director General of Police (D.G.P.) which is Annexure R/E to this writ petition and was Annexure 17 to that writ petition.

5. On behalf of the State in that writ petition it was stated that the State would implement the recommendation of the Committee. The learned Single Judge (S.B. Sinha, J.) issued direction to the State to give effect to the minutes as contained in Annexure R/D, i.e., Annexure 19 to that writ petition. Copy of the judgment is Annexure 5 to this writ petition,

6. The State thereafter issued the order as contained in Annexure 10 dated 12-5-1988 in which inter alia, it was stated that in pursuance of the decision in C.W.J.C. No. 2645 of 1984, and in view of the recommendation of the Committee, persons of 1975 batch who had been directly recruited to the post of B.M.P. Jamadars were to be absorbed in the cadre of Sergeant. By that Annexure. 20 Jamadars of 1975 batch, respondents 5 to 24 were absorbed in the cadre of Sergeant with effect from the date of their direct appointment as B.M.P. Jamadars. Likewise, by Annexure 11 dated 6-8-1986 respondents Nos. 25 to 27 of 1975 Batch were absorbed in the cadre of Sergeant from the date of their appointment as Jamadar. By Annexure 6 dated 25-12-1988 the inter se seniority of the petitioners and respondent Nos. 5 to 38 was published. The petitioners 1 to 4 were placed below 1975 Batch Jamadars i.e., respondent No. 5 to 27. Petitioners 5 to 8 were placed below the respondents 5 to 38.

7. The petitioners have challenged validity of Annexures 6, 10, 11 and 12 to this writ petition.

8. The grievance of the petitioners 1 to 4 was that although the petitioners were not party in C.W.J.C. No. 2645 of 1984, the State Government not only ordered for absorption of respondent Nos. 5 to 27 from the cadre of Jamadar in the cadre of Sergeant, but also placed them above the petitioners by Annexure 6. The grievance of the petitioners 5 to 8 was that as they were appointed Sergeant before the respondents 5 to 38, they could not have been placed below them by Annexure 6. It was submitted on behalf of the petitioners that if the State Government had given relief to respondent Nos. 5 to 38 in terms of the recommendation of the D.G.P. as contained in Annexure R/E which was purported to have been approved by the Committee, they had no grievance.

9. According to the respondents, which is not in dispute, respondent Nos. 5 to 27 had applied in pursuance of Annexure 1. They claimed that although they fared better in the examination held by the B.P. S.C. than the petitioners 1 to 4, the State Government by holding an oral test, which was not provided in Annexure 1, declared them not fit. They were offered the posts of Jamadar denying their legitimate claim for appointment as Sub-Inspectors and/or Sergeants. They made representation bringing to the notice the illegal and arbitrary action of the State Government. Similarly, respondents 28 to 38 were illegally declared not fit and offered the posts of Jamadar. The then D.G.P. by Annexure R/E noticed that the posts of Sergeant and Sub-Inspector were advertised and some persons whose names appeared in the panel prepared by B.P.S.C. were appointed to the post of B.M.P. Jamadars in 1975 and 1976 although those posts were not advertised, and those persons had applied for the posts of Sergeant/Sub-Inspector.

10. Further, according to them the State Government appointed a Committee to consider the representation of the respondents. The Committee in its meeting, minute of which is Annexure R/D to the writ petition, accepted the recommendation of the D.G.P. as contained in Annexure R/E. It further resolved that the inter se seniority would be according to the panel prepared by the B.P.S.C. of 1975 and 1976 appointees. The State Government have rectified the illegal and arbitrary action, and this Court should not interfere with the orders as contained in annexures impugned.

11. It was their further case that what the State Government had done, was done to implement the order of this Court passed in C.W.J.C. No. 2645 of 1984. The order passed by this Court in that writ petition having become final, and the State Government having implemented that order giving relief to the petitioners in that case, if this case is allowed it would amount to interfering with that order.

12. Both the parties have repeatedly referred to the recommendation of the D. G. P. (Annexure R/E) and the minutes of the Committee (Annexure R/D). I will refer to it in extenso at the relevant place.

13. Nothing has been brought on record by the petitioners to show that the posts of B.M.P. Jamadars were also advertised and respondent Nos. 5 to 38 had applied in pursuance of the same. We, therefore, find no reason why we should not proceed by holding that respondent Nos. 5 to 38 had applied for the posts of Sub-Inspector and Sergeant which were advertised. There is no dispute that the petitioner I to 4 were appointed Sergeants and they joined on 9-2-1975. Again there is no dispute that petitioners 5 to 8 were appointed Sergeants in 1984 and 1985. Till issuance of Annexures 10 to 12, i.e., prior to May, 1988 which were followed by Annexure 6, respondent Nos. 5 to 38 were not in the cadre of Sergeants.

14. In Annexure R/E, dated 2-11-1986, the Director General of Police noticed the fact that 23 successful candidates of 1976 batch were appointed as B.M.P. Jamadars on the basis of the examination held by the B.P.S.C. for the posts of Sub-Inspector and Sergeant, and the persons so appointed as Jamadar had applied for the posts of Sub-Inspector and Sergeant which were advertised. He also noticed the fact that those persons fared well in the examination. The Director General of Police also noticed that Nand Kumar Pathak who had obtained 220 marks was appointed B.M.P. Jamadar, whereas Diwakar Prasad, and Binoy Prasad Yadav who had also obtained 220 marks were appointed Sub-Inspectors. It was also noticed that there were vacancy in the posts of Sub-Inspector and Sergeant. He opined that one of the adverse effect was that Sub-Inspectors of 1975 batch have been promoted to the post of Inspector, but Jamadars could not be promoted to the next higher post. After noticing these facts, the Director General of Police made the following recommendation:

For the present 39 posts of Sergeants are vacant. If against those posts directly appointed B.M.P. Jamadars are adjusted, then better and trained persons will be available and the shortage of Sergeants will also be removed.... If this is done not only trained persons will be available but also the problem of seniority of directly recruited Jamadars which has cropped up will also be solved. (I have made free translation of the Hindi text used in Annexure R/E).

15. The Director General of Police recommended that 1975 and 1976 batch of directly recruited B.M.P. Jamadars, as the respondents 5 to 38 are ; be absorbed an Sergeants against 39 vacant posts then available, i.e., available in November, 1986, He did not suggest that those B.M.P. Jamadars should be adjusted against the vacancies of Sergeants which were available when 1975 and 1976 batch were appointed, thereafter by Annexure R/C, the State Government appointed a Committee to look into the problem. The Committee consisted of 4 persons and it was directed to give its recommendation to the State Government. The minutes of the meeting of the Committee held on 4-5-1987 is Annexure R/D.

(i) The Committee is of the opinion that the recommendation of the Director General of Police be accepted.

(ii) So far the question of seniority is concerned, the Committee is of the opinion

that basis of fixing inter se seniority will be the marks obtained by the candidates in the examination held by the B.P.S.C." (Annexure R/D is in Hindi, and I have made free translation of the same.).

16. It will thus be noticed that the Committee was of the opinion that the recommendations of the Director General of Force be accepted, I have already noticed the recommendation of the Director General of Police in detail. Although in Annexure 10 to 12, it has been stated that 1975 and 1976 batch of B.M.P. Jamadars were being absorbed in the cadre of Sergeants by accepting the Committee and in pursuance of the order of this Court in C.W.J.C. No. 2645 of 1984, the State Government absorbed the Jamadars with effect from 1975 and 1976. It may be notice that in all these annexures the recommendation of Director General of Police (Annexure R/E) was also taken into consideration. We have already noticed that the Director General of Police had recommended to absorb 1975 and 1976 batch of Jamadars against the then existing 39 vacancies of Sergeants, i.e., the vacancies existing in November, 1986, and this recommendation of the Director General of Police was accepted by the Committee and recommended it to the State Government for acceptance. Respondent Nos. 28 to 38 in their counter-affidavit filed in this case, which has been stated to be show cause, admitted that the Director General had recommended that the respondents-Jamadars be absorbed in the existing vacancies of Sergeant. This Court in C.W.J.C. No. 2645 of 1984 observed as follows:

In my opinion the suggestions of the Government Pleader No. 4 are very fair and in this view of the matter the respondents are hereby directed to give effect to the aforementioned minutes dated 4-3-1987 contained in Annexure 19 to the writ petition which was adopted in the light of the recommendations of the Director General of Police as contained in Annexure 18 to the writ petition within two months from the date of receipt of a copy of this order.

In view of the fact that inter se seniority of the petitioners and the intervenors vis-a-vis the other appointees are to be determined in terms of the aforementioned Annexure 19 in accordance with the merit list prepared by the Bihar Public Service Commission, I have no doubt in my mind that the concerned respondents shall also give necessary consequential benefits to the petitioners and other intervenors which are available to them in law.

17. The mandamus that was issued to the State Government by this Court was to absorb 1975 and 1976 batch of Jamadars against 39 posts of Sergeants which were available, 1986 because that was the recommendation of the Director General of Police which was accepted by the Committee appointed by the State Government. Neither the Director General nor the Committee recommended nor this Court ordered for absorbing 1975 and 1967 batch of B. M. P. Jamadars, i.e., respondents 5 to 38 herein, against the vacancies of Sergeants available in 1975 and 1976. There was nothing in record to show that some posts of Sergeant available in 1975 and 1976 continued to remain vacant till November, 1986. The

vacancies available in 1986 could not have been treated as vacancies available in 1975 and 1976.

18. The order issued in Annexures 10 to 12 regarding the date of absorption of Jamadars were surely not in conformity with the recommendation of the Director General of Police and of the Committee.

19. We have already noticed that the petitioners have no objection if respondent Nos. 5 to 38 were absorbed in the cadre of Sergeant with effect from 1986. The difficulty has been created as their inter se seniority vis-a-vis petitioners have been fixed by the State Government according to the panel position prepared by B. S.C. on the basis of written-examination of 1975 and 1976 appointees. Although the orders of absorption of respondents 5 to 27 were issued on 12-5-1988 and 6-8-1988, seniority was given to them treating them as 1975 appointees. Likewise respondents 28 to 38 have been given seniority treating them as 1976 appointees although order in their case was issued on 17-8-1988. As a result of this decision of the State Government, petitioners 1 to 4 have become junior to respondents 5 to 27 and petitioner 5 to 8 to respondents 5-38.

20. Mr. Prasad learned Counsel for respondents 5 to 27 urged that what the State Government had done by issuing Annexures 10 to 12 was merely to implement the order passed by this Court in C.W.J.C. No. 2645 of 1984. He submitted that no objection in law could be taken with regard to the action of the State Government as it was done to implement the order of this Court. According to him the petitioners were neither necessary nor proper parties to that writ petition as relief had been claimed against them. Mr. Prasad submitted that the decision of C.W.J.C. 2645 of 1984 will operate as resjudicata.

21. The relief prayed for in C.W.J.C. No. 2645 of 1984 was as follows:

It is therefore prayed that your Lordship may be pleased to issue rule asking the respondents to show cause as to why a writ in the nature of writ of certiorari quashing the order dated 7-5-1984 as contained in Annexure-9 and further as to why a writ in the nature of writ of mandamus be not issued directing the respondents to appoint the petitioners to the post for which they applied.

22. Reliefs prayed for were two: (a) to quash the order rejecting the representation of the petitioners (Jamadars) of that case, and (b) to appoint them to the posts for which they had applied i.e., Sergeant and Sub-Inspector. It is to be noticed that in the prayer the date from which they should be so appointed was not stated; it was also not stated that they be made senior to the present petitioners. As no claim was made against the present petitioners, they were not necessary parties to that writ petitions.

23. When C.W.J.C. No. 2645 of 1984 came up for hearing, on behalf of the State it was stated that the recommendations of the Committee as contained in Annexure 19 in that case, Annexure R/D in this case, had been accepted. As already noticed the recommendation was that the Jamadars be adjusted against

the 39 vacant posts Sergeants available in 1986. It was not said nor could it be said that seniority of such Jamadars to be so adjusted be given with effect from 1975 and 1976 although they were to be absorbed against posts available in 1986. When in Annexure R/E it was said that seniority would be determined as per 8. P. S.C. merit list, what was meant in the facts of that case was that basis for inter se seniority of Jamadars to be so adjusted would be the B.P.S.C. merit list.

24. It was not brought to the notice of the Court in C.W.J.C. No. 2645 of 1984 by the Jamadars that persons to be so adjusted would be placed above the Sergeants appointed in 1975 and 1976 or any period prior to 1986. It was also not stated by the State in that case that the Jamadars would be adjusted with effect from 1975 and 1976.

25. From a bare perusal of the aforementioned judgment (Annexure 5) it would be evident that none of the parties questioned the propriety or otherwise of the decision of the State of Bihar dated 4-5-1987 nor was it pointed out that thereby any other person would be aggrieved. In this situation, the judgment in the aforementioned C.W.J.C. No. 2645 of 1984 would be deemed to have been passed sub-initio and would not be binding so far as the present petitioners are concerned. Reference in this connection may be made to *Municipal Corporation of Delhi Vs. Gurnam Kaur*, and *A.R. Antulay Vs. R.S. Nayak and Another*. Further, it is now well settled that a point which has not been argued does not become a binding precedent.

26. Mr. Prasad has contended that a writ of mandamus issued by this Court was bound to be obeyed by it irrespective of the fact whether the same is right or wrong and all such decisions by necessary implication would constitute resjudicata. No exception can be taken to the aforementioned proposition of law. However, it is now well known that the judgment rendered on consent does not operate as resjudicata nor the same becomes a binding precedent. Assuming for the sake of argument that the State of Bihar was bound to implement the judgment of this Court passed in the aforesaid C.W.J.C. No. 2645 of 1984 it is evident that even pursuant thereto it could not have passed the impugned orders which are contained in Annexures 6, 10, 11 and 12 of the writ application.

27. If it is held that the impugned orders were passed in terms of Annexures R/E and R/D, the same shall result in absurdity, inasmuch as if the respondents 5 to 38 are made senior to the petitioners on the basis of the marks obtained by them in the written examination held by the Bihar Public Service Commission, there is absolutely no reason as to why the case of the Sub-Inspector of Police who were also appointed pursuant to the laid advertisement as contained in Annexure 1 to the writ application, could not come within the purview thereof. It has been admitted at the Bar that the persons who were appointed as Sub-Inspector of Police have since been promoted to the next higher post; whereas the petitioners who were appointed as Sergeants in the same batch are yet to be promoted to the next higher post. Thus under law, if it was required to fix inter

se seniority of all candidates on the basis of the marks obtained by them in the written examination held by the Bihar Public Service Commission there does not appear to be any reason whatsoever as to why the Sub-Inspectors of Police who were indicated hereinbefore were also the candidates along with others in 1975 should be left out.

28. Assuming that some injustice has been done to respondent Nos. 5 to 38 inasmuch as they were made to appear at the oral interview, despite a prohibition in relation thereto made in the advertisement (Annexure 1); they have continued in the said posts for a long time and they have made representations for the first time in the year 1981 and thus, in our opinion, it will be inequitable to place them over the petitioners after a long lapse of time.

29. The writ petition is allowed and Annexure 6, 10, 11 and 12 are quashed to the extent the respondents 5 to 38 have been made senior to the petitioners. The State is directed to fix the seniority of respondent Nos. 5 to 38 from 1986 keeping in view Annexure R/E, i.e., by adjusting the respondents against the vacancies available in 1986. For giving effect to this order, State shall hear persons who may be adversely affected.