

(1989) 11 PAT CK 0030

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 3410 of 1988

Birchandra Patel and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 20-11-1989

Acts Referred:

Constitution of India, 1950 — Article 10, 14, 16, 16(1), 309

Citation : (1990) 1 PLJR 628

Hon'ble Judges : N.P. Singh, J;N. Pandey, J

Bench : Division Bench

Advocate : Radha Mohan Prasad, Shailendra Kumar Sinha and Ranjit Rumar Verma, for the Appellant; J.N.P. Sinha, Government Advocate and Subodh Prasad, J.C. to G.A., for the Respondent

Judgement

N.P. Singh and N. Pandey, JJ.—This writ application has been filed on behalf of the Petitioners for quashing a decision of the State Government which was circulated by a communication dated 12th July, 1967 in respect of the seniority of Doctors and" Engineers, who having joined the service of the State Government, later joined the Army service under emergency commission or having first joined Army service under emergency commission later joined the service of the State Government.

2. From the aforesaid communication dated 12th July, 1967, it appears that the State Government considered the question of grant of concession in the matter of civil employment to Doctors and Engineers who opted for or joined Emergency or short service Commission before the introduction of Compulsory Liability Scheme in January, 1965. Such persons were put under two categories. In the first category were those persons, who were already in the State Service but later joined Military service on deputatioe and again after release joined the State Service. In the other category were such persons, who first joined the Military service, but after release from the Military Service, were appointed in the State Service. The state Government decided that pesmanent Government

servants opting for Military service shall hold a lien on their civil posts. So far temporary Government servants were concerned, the decision taken was as follows:

If the holder of a temporary post under the State Government in Class I and Class II of State Engineering or Medical Services, to the same department which he had left he shall be appointed substantively from the date he had relinquished charge of the temporary civil post and that he shall get all the consequential benefits provided his conduct and service in the Military Service was satisfactory. If adequate number of permanent posts are not available for these in service optees at any particular time the temporary posts held by them shall be converted into permanent posts and such posts shall be adjusted, against permanent vacancies occurring in future. The concession will, however, apply only to those in service optees who opted for military service before the Compulsory Liability Scheme was adopted on 8th January, 1965 and not to those who opted for military service after 8th January, 1965. (c) During their absence from civil posts, they would be entitled to proforma promotion and confirmation and the military service would count for seniority, increment etc. in their civil employment.

Regarding the persons, who first joined Emergency commission and Short service commission and on their release were appointed in the service of the State Government, following decision was taken:

In respect of persons of the second Category namely the Engineers and Doctors who joined Emergency Commission and Short Service Commission directly and are thereafter released from Military service, the State Government have been pleased to grant the following concessions:

(i) 50% of the permanent vacancies which occur as result of retirement and other casualties from the permanent cadre of Class I and Class II State Engineering and Medical services, should be reserved for the Ex-Army personnel having to their credit satisfactory Military service and who are found physically fit at the time of consideration against reserved vacancies according to the rules applicable to the particular service. Until further order, reserved vacancies if remaining unfilled would be filled by other (other than ex-military service personnel) only on a temporary basis.

(ii) For the purpose of fixation of pay and seniority such a candidate shall be deemed to have been appointed to the civil post on the date on which he joined Military Service provided that no officer will get advantage in matter of seniority and pay fixation for the period of Military Service rendered by of him before 1st November, 1962. Of course, the service rendered after 1st November, 1962 will be counted in the manner indicated above.

3. On behalf of the Petitioners it was argued that the aforesaid decision of the State Government, taking into consideration even the period while the Respondents were in Military service for the purpose of fixing the seniority, is

violative of Articles 14 and 16 of the Constitution. In other words, in respect of persons who first joined the service of the state Government and then opted for the Military Service, if later re-joined the service of the State Government, the period spent by them in Military service should be treated as the break in the service of the State Government and that period should not be taken into account for determination of the seniority vis-a-vis those who throughout continued in the service of the State Government. In respect of persons, who first joined the Military Service and after their release, joined the service of the State Government, the stand of the Petitioners is that they shall be deemed to have joined the service of the State Government with effect from the dates they actually joined the service of the State Government after their release from the Military Service and their seniority should be reckoned from those dates.

4. In view of the decisions of the Supreme Court it is almost established that seniority normally is measured by length of continuous, service?the actual is easily accepted as a legal. Reference in this connection may be made to the judgment of the Supreme Court in the case of AIR 1977 251 (SC) . In that case it was said as follows:

(c) Seniority, normally, is measured by length of continuous, officiating service?the actual is easily accepted as the legal. This does not precluded different prescription, constitutionality tests being satisfied.

Again in the case of Paramjit Singh Sandhu and Others Vs. Ram Rakha Mal and Others, that question was considered in connection with determination of the seniority where appointments have been made from two sources, one by process of direct recruitment and the other by promotion. In that case the date of entry into the cadre was considered to be a reasonable basis for the purpose of determination of the seniority. In the case of T.R. Kapur and Others Vs. State of Haryana and Others, it was said:

...there is no power to make such a rule under the proviso to Article 309 which affects or impairs vested rights. Therefore, unless it is specifically provided in the rules, the employees who are already promoted before the amendment of the rules cannot be reverted and their promotions cannot be recalled. In other words, such rules laying down qualifications for promotion made with retrospective effect must necessarily satisfy the test of Articles 14 and 16(1) of the Constitution.

In the aforesaid cases having said that seniority is determined with reference to the date of he entry into the cadre or the service, it was observed that it does not preclude a different mode being adopted by the State Government, which satisfied the Constutional tests.

5. The decision aforesaid in respect of persons who having joined the State Government Service, later joined Army service under Emergency or Short Service Commission before the introduction of compulsory liability scheme in January 1965, and after release rejoined the State's service, cannot be

challenged in my view. It cannot be urged that it amounts to giving notional seniority to such persons by adding the period spent by them in Military Service because during that period they shall be deemed to be on deputation.

6. So far persons who first joined Military service under Emergency Commission or Short Service Commission and after release joined the State Service their case has to be examined in detail as to whether decision taken about them satisfied the tests of Articles 14 and 16 of the Constitution.

In the case of Ex-Capt. K.C. Arora and Another Vs. State of Haryana and Others, a question arose as to whether an amendment introduced in the Punjab National Emergency (Concessions) Rules, 1965 amending Rule 4(ii) and the definition of the expression "Military Service" was valid and constitutional. It may be mentioned that by Rule 4(ii) as it originally stood the period of Military Service was to be taken into consideration for the purpose of determining the seniority of a person, who first joined the Army during the emergency as Commissioned Officer and, after serving the Indian Army, was appointed in the service of the Haryana Government, as a temporary Assistant Engineer. Later, amendments were introduced in Rule 4(ii) and in the definition of "Military Service" taking away the benefit of counting the period of Military Service towards the seniority. It was held that the amendments so introduced were ultra vires the Constitution.

7. It is true that the Supreme Court in this case was more concerned as to whether having extended the benefit to the persons, who initially joined the Military Service, that benefit later could be withdrawn. But on the basis of that judgment it can be said that if Rule 4(ii) of the Rules by which such benefit was extended for counting even the period in Military Service for the purpose of seniority, itself being violative of Articles 14 and 16 of the Constitution there was no necessity to declare the amendment thereof as unconstitutional. In other words, instead of declaring the amendment in that rule unconstitutional it was open to the Supreme Court to hold that Rule 4(ii) as framed originally giving notional seniority on the basis of the period they spent in Military Service itself was ultra vires. In our opinion, the persons, who joined Army for defending the Nation specially in many cases at the instance of the Government concerned, under emergency, such persons can be treated as a class for special treatment in matters of seniority and any such decision shall not be violative of Articles 14 and 16 of the Constitution. However, this principle will be applicable where under emergency persons were recruited in Military Service on Short Commission and later released. That may not be said in respect of persons who joined the Military Service on their own volition in a regular manner according to the procedure prescribed for recruitment to the Military service. In this view of the matter it is, not possible to hold that the decision taken by the State Government, which was circulated by letter dated 12th July, 1967 aforesaid, was irrational, arbitrary and, as such, violative of Articles 14 and 16 of the Constitution.

8. It was then submitted that even if the period during which the Respondents aforesaid were in Military Service is counted towards seniority, still the gradation

list has not been prepared with reference to the dates of the initial appointments but with reference to the dates of confirmation. This aspect of the matter has been examined by the Supreme Court in the case of S.B. Patwardhan and Another Vs. State of Maharashtra and Others, and in the case of Baleshwar Dass and Others Vs. State of Uttar Pradesh and Others, . In the case of S.B. Patwardhan (supra) it was pointed out as follows:

Instead of adopting an intelligible differentia Rule 8(iii) leave seniority to be determined on the sole touchstone of confirmation which seems to us indefensible Confirmation is one of the inglorious uncertainties of Government service depending neither on efficiency of the incumbent nor on the availability of substantive vacancies. A glaring instance widely known in a part of our country is of a distinguished member of the judiciary who was confirmed as a District Judge years after, he was confirmed as a judge of the High Court. It is on the record of these writ petitions that officiating Deputy Engineers were not confirmed even though substantive vacancies were available in which they could have been confirmed. It shows that confirmation does not have to conform to any set rules and whether an employee should be confirmed or not depends on the sweet will and pleasure of the government.

It was further pointed out:

Rule 8(ii) in the instant case adopts the seniority-cum-merit test for preparing the state wise select List of seniority. And yet clause (iii) rejects the test of merit altogether. The vice of that clause is that it leaves the valuable right of seniority to depend upon the mere accident of confirmation. That under Articles 14 and 10 of the Constitution, it is impermissible and therefore we must strike down Rule 8(iii) as being unconstitutional.

In the case of Baleshwar Dass (supra) it was observed as follows:

We see no reason to hold that when engineers are appointed to temporary posts but after fulfilment of all the tests for regular appointments, including consultation. with the Public Service Commission, they are not appointed in a substantive capacity That is to say, although they are temporary appointees, if their probation is completed and other formalities fulfilled, they become members of the service. It follows that merely because the person is a temporary appointee it cannot be said that he is not substantively appointed if he fulfils the necessary conditions for regular appointment such as probation and consultation with the Public Service Commissions etc.

9. A Bench of this Court has also examined the question of seniority with reference to date of confirmation in the case of Taraka Nath Sharma v. The State of Bihar and Ors. 1985 PLJR 829 and it was pointed out that the sole touchstone should not be the date of their confirmation but as to when they shall be deemed to have entered in service after fulfilling the test for regular appointment, including their selection by a duly constituted selection committee or commission. Having said so it was then observed as follows:

Any way, once it is held that the date of substantive appointment has not to be determined solely with reference to the date of confirmation then, in my opinion, it shall be only just and proper that when temporary appointees or probationers are confirmed in the same rank having fulfilled the conditions for confirmation then they shall be deemed to have been substantively appointed maintaining their inter-se seniority of the initial appointment. I hasten to add that this principle shall be applicable till they are in the same rank. If the senior most person of the service does not pass the departmental examination and, as such, he is not confirmed but in the meantime his junior having passed the departmental examination is confirmed and promoted to higher grade, in that event if the person who was originally senior, later, after confirmation, cannot challenge the promotion of his junior, unless there is some specific rule which enables the senior employee, who has been superseded to claim seniority in the promotional post within any specified period after having complied or fulfilled the conditions for promotion.

10. Accordingly, we direct the State Government to consider the grievance of the Petitioners in the light of the aforesaid judgments. We, however make it clear that we are not expressing any opinion on the claim of the Petitioners that they should rank senior to the Respondent Nos. 4 to 31, that has to be examined by the State Government.

11. With the aforesaid direction, this writ application is disposed of.