(1996) 11 PAT CK 0011

In the Patna High Court

Case No : C.W.J.C. No. 7644 of 1995

Bishwanath Prasad Pandey APPELLANT

Vs

The State of Bihar and Others RESPONDENT

Date of Decision : 15-11-1996

Acts Referred:
Constitution of India, 1950 — Article 14, 16(1)

Citation : (1997) 1 PLJR 405

Hon'ble Judges : Radha Mohan Prasad, J

Bench : Single Bench

Advocate : Kamla Lal Srivastava, for the Appellant; G.P. Roy and Parshuram Singh, for the Respondent

Final Decision : Allowed

Judgement

Radha Mohan Prasad, J.—The Petitioner in this writ application prays for issuance of an appropriate writ in the nature of certiorari for quashing the order dated 21.4.1995 of the Commissioner, Commercial Taxes, Bihar, Patna communicated vide letter No. 1090 dated 24.4.1995, as contained in annexure-1 and for issuance of writ in the nature of writ of mandamus directing the Respondents to place his name above Prabhakar Pd. Das, (Respondent No. 5) in the gradation list of Assistants and to promote him on the post of Section Officer with effect from 4.6.1995 and in consequence thereof to promote him also on the post of Registrar.

2. In short, the relevant facts are that in the year 1961 the Finance Department arranged a competitive examination for recruitment of Secretariat Assistants as per the Rules contained in the Secretariat Instructions, 1952 (hereinafter referred to as ''the Rules''). The Petitioner and Respondent No. 5 along with Ors. appeared in the said examination. Out of the successful candidates the Finance Department allotted three candidates to the Finance (Commercial Taxes) Department vide memo No. 10401 dated 17.1.1965. The names and merit position of the said three candidates are as follows:

1. Sri Jyotendra Pd.--496.

2. Bishwanath Pandey (Petitioner)--503.

2. Prabhakar Pd. Das (Respondent No. 5)--504.

A photo copy of the said Memo is annexed as annexure-5 to the writ petition. As per the said memo the candidates were required to join the respective departments by 30th November, 1965. The aforementioned three persons joined the Commercial Taxes Department well within time. Jyotendra Pd. joined on 26th November, 1965, the Petitioner joined on 30th November, 1965 and Respondent No. 5 joined on 22nd November, 1965. The Petitioner, as well as Respondent No. 5 were confirmed in lower division on 18.11.1972 and both were promoted as Upper Division Assistants and got junior selection grade also on the same date i.e. 3.10.1975 and 14.5.1983 respectively. Respondent No. 5 however, was promoted as Section officer with effect from 4.6.1985 vide annexure 6 and the case of the Petitioner and the aforementioned Jyotendra Pd. were considered later. Jyotendra Pd. filed representation that he being higher in merit to the Respondent No. 5, should be declared senior and given promotion on the post of Section Officer with effect from 4.6.1985 i.e. the date on which Respondent No. 5 was given promotion. Respondents considered his case and promoted him also on the post of Section Officer with effect from 4.6.1985 vide office order No. 743 dated 31.1.1991. But the case of the Petitioner was again left out. On 26th November, 1994 a notification was issued giving promotion to said Jyotendra Prasad and Prabhakar Pd. Das (Respondent No. 5) in the rank of Registrar. A photo copy of the said notification is annexed as annexure-8. It is significant to note here that in the said notification Jyotendra Prasad was placed above Prabhakar Pd. Das (Respondent No. 5) obviously, according to their merit position at the time of initial recruitment. However, it appears that in the meantime, the Petitioner was pursuing internal remedy for redressal of his grievance against his supersession in the rank of Section Officer and with respect to the same a decision was taken by the Commissioner, Commercial Taxes, Bihar in consultation with the Personnel and Administrative Reforms Department of the Government of Bihar to promote the Petitioner by creating shadow post as Section Officer with effect from 4.6.1985 i.e. the date when his junior Respondent No. 5 was promoted. However, when pursuant to the said decision no further action was taken in the matter and the Petitioner was deprived of being considered for promotion as Registrar, he filed writ bearing C.W.J.C. No. 6076 of 1994 in this Court. The aforementioned decision of the Commercial Taxes Department was annexed as annexure-13. This Court having perused the said decision as well as having considered the fact that Sri Das, who has been found to be junior to the Petitioner had already been promoted as Registrar, as also the fact that the Petitioner was going to superannuate on 31st March, 1995, considered it expedient to dispose of the writ petition vide order dated 27.1.95 (annexure 2) with the direction to Respondents to forthwith consider the grievance of the Petitioner in the light of the aforementioned decision taken by the Commissioner, Commercial Taxes, Bihar, Patna and grant him all consequential reliefs, for which he is entitled in law.

3. The Petitioner filed representation along with copy of the said order of this Court before the competent authority for consideration of his grievance. However, when no action was taken by the concerned authority, he filed M.J.C. No. 735 of 1995 for initiating contempt proceeding against the Respondents of the writ case. As in the meantime, the impugned order was passed on 21.4.95 the said M.J.C. application was permitted to be withdrawn with an observation that the Petitioner may file a writ petition challenging the said decision of the authority, whereafter the present writ application was filed. It is alleged that instead of sanctioning shadow post for the period 4.6.1985 to 30.4.91 to regularise the promotion of the Petitioner on the post of Section Officer, the Respondent Nos. 1 to 4 and 6 re-examined the inter se seniority of the Petitioner vis a vis Respondent No. 5, which was also finally decided by the Commissionner, Commercial Taxes, Bihar, Patna vide annexure-13 to the earlier writ petition, a photo copy whereof has been annexed as annexure-4 to the present writ petition and passed the impugned order.

4. Earlier, notice was issued to Respondent No. 5 for disposal of this writ petition, which was validly served but he has not chosen to appear, nor filed counter affidavit. On 27.2.96 a counter affidavit was filled on behalf of the Commissioner, Commercial Taxes (Respondent No. 3) and also on behalf of the Commissioner-cum-Secretary, Personnel and Administrative Reforms Department (Respondent No. 2). The learned Counsel for the patties were heard in part on 27th February, 96 when at the request of the learned State Counsel the matter was adjourned to 25th March, 96 in order to get further instructions and file affidavit. It was further observed that in the meantime, the Respondent No. 3 may pass fresh order in the light of the earlier direction given by this Court in C.W.J.C. No. 6076 of 94. Thereafter, this matter was taken up on 13.8.96 when as a last indulgence, on the prayer made by the learned S.C.2, the matter was adjourned to 16th August, 96 in order to produce notification/order complying with the earlier direction of this Court. On 16th August, 1996 the learned Addl. Advocate General No. III appeared in this case for the Respondents and prayed for adjournment. The matter was accordingly adjourned to 20th August, 96 to enable him to bring on record the relevant rules and circulars in the meantime, on which he wanted to place reliance to support the impugned decision by filling supplementary counter affidavit. The learned A.A.G. III was given opportunity to examine the matter himself with reference to the rules and to advise for taking suitable action accordingly. On 20th August, 96 after the matter was heard at some length and it was contended by the learned A.A.G. that decision was taken by the Administrative Personnel Committee (A.P.C.) whose members were then not made partics, the matter was adjourned for 22nd August, 96 to enable the learned A.A.G. to furnish the names of the members of the said committee. However, on 22nd August, 96 when the names and the present posting of some members were not furnished and a stand was taken that it was for the Petitioner

to furnish the names, this Court directed the Chief Secretary, Bihar, Patna who was also associated with the said Committee to furnish the names and present posting of other members on an affidavit. A copy of the said order was also directed to be communicated to the Chief Secretary directly. Thereafter an affidavit sworn by the Chief Secretary was filed furnishing the names and the present (sic) of the officers, who were parties to the impugned decision, as members of the aforementioned Committee. On the request of the learned Counsel for the Petitioner the said persons were permitted to be added as parties Respondents by name, by making necessary addition as against the Respondents in the cause title vide order dated 28.8.96 and notices were issued to the said Respondents, whereupon separate counter affidavits have been filed on behalf of the Commissioner-cum-Secretary, Department of Personnel and Administrative Reforms (Respondent No. 2), the ex-Commissioner-curn-Secretary, Finance Department (Respondent No. 4) and the Development Commissioner (Respondent No. 6. A supplementary counter affidavit was also filed on behalf of the Commissioner, Commercial tax (Respondent No. 3). In the main counter affidavit filed on behalf of Respondent No. 3 it is stated that a competitive examination for the recruitment of Secretariat Assistants was arranged as per Secretariat Rules and the result was published, in which some examinees were declared passed and some had failed. Those, who failed in that examination were called by the department as ''un-passed'' and for them two separate lists-one of the passed candidates and the other of the un-passed candidates were prepared. The passed candidates were appointed against the permanent vacant posts and unpassed candidates were appointed on temporary basis. It is admitted that the Petitioner and Respondent No. 5 both were recruited from the list of unpassed candidates. According to the said Respondent, their seniority were decided in accordance with the Finance Department letter No. 11663 dated 3.12.68 which according to him, laid down that the inter se seniority of those, who were appointed from unpassed list would be determined on the basis of their continuous length of service. It is stated that as per the direction of this Court given in C.W.J.C. No. 6076 of 94 the matter was considered by the Administrative Personnel Committee, who by their majority opinion decided that the applicable principle determining the seniority on the facts and circumstances continues to be one as laid down in the aforementioned Finance Department Circular. Accordingly, the impugned order was communicated by Respondent No. 3 declaring the Respondent No. 5 senior to the Petitioner and thus we held that there is no need to create a shadow post of Section Officer.

5. In the supplementary affidavit filed on behalf of the Petitioner it is stated that Respondent No. 3 vide Government order No. 1804 dated 9.4.96 (annexure-II) sanctioned the creation of the shadow post of Section Officer from 4.6.85 to 30.4.91 pursuant to the decision of the Government to promote the Petitioner as Section Officer from 4.5.85 for pay fixation/protection in the scale of Section Officer and allowed the monetary benefit only from 12.7.88 to 30.4.91 as the Petitioner had actually worked on that post from that date. This has however

been made subject to result of this writ petition. The Respondents, however, have not allowed promotion to the Petitioner on the post of Registrar with effect from 26.11.94 when Respondent No. 5 was promoted on the said post with effect from 26.4.94.

6. The facts that among the three recommendees to the Commercial Taxes Department Jyotendra Pd. was above the Petitioner and the Petitioner was above Respondent No. 5 in the merit list and that the. department had given promotion to Jyotendra Pd. with effect from 4.6.85 on the post of Section Officer on the basis of his higher merit position in the examination and also in order to keep his seniority intact in the gradation list, issued by the Personnel and Administrative Reforms Department contained in annexure-8, are not disputed. It appears that said Jyotendra Pd. had moved this Court in C.W.J.G. No. 2231 of 90 claiming seniority over Respondent No. 5 and consequential promotion on the post of Section Officer with effect from 4.6.85, in which direction was given by this Court that as said Jyotendra Pd. was higher in merit to that of Respondent No. 5, he should be declared senior and given promotion with effect from the date on which Respondent No. 5 had been given promotion. The official Respondents considered the case and gave him promotion with effect from 4.6.85 vide office order No. 7486 dated 31.1.91 as already stated above. It is also admitted by the Respondents that all the three candidates had been allotted to the Commercial Taxes Department from the unpassed list. It is also admitted that earlier, the case of the Petitioner vis a vis Respondent No. 5 was examined by the Personnel and Administrative Reforms. Department, which had taken decision in favour of the Petitioner in the year 1991. However, it is stated that the said decision was taken under the impression that both of them were in the category of passed candidates and as such, would be governed by the 1972 circular. Accordingly, the seniority of the writ Petitioner vis a vis Respondent No. 5 was revised and sanction for creating a shadow post of Section Officer was made, but when the matter went before the A.P.C. which is the final authority for creation of the shadow post, then it was detected that Respondent No. 5 was senior to the writ Petitioner in view of the circular dated 3rd December, 1968 contained in annexure 9 and accordingly, A.P.C. approved its decision vide impugned annexure-1.

7. Mr. Shrivastava, learned Counsel for the Petitioner submitted that the impugned decision is wholy arbitrary, illegal and violative of Articles 14 and 16(1) of the Constitution of India, besides being in violation of the earlier direction of this Court given in C.W.J.C. No. 6076 of 94, whereby this Court, on perusal of the decision contained in annexure 13 and on consideration of the fact that Respondent No. 5, who had been found junior to the Petitioner, had already been promoted as Registrar as also the fact that the Petitioner was going to superannuate on 31st March, 95 disposed of the writ petition with the direction to the Respondents to forthwith consider the grievance of the Petitioner in the light of the said decision (annexure 13) and grant him all consequential reliefs, which he is entitled in law. It was submitted that the arbitrariness of the

Respondents is writ large in the present case, inasumch as, in deciding inter se seniority of Jyotendra Pd. vis a vis Respondent No. 5 the Respondents adopted the merit to be the basis for fixation of seniority, whereas in the case of Petitioner vis a vis Respondent No. 5 they adopted date of initial joining as the basis, ignoring the merit, though the dates of the order of their appointment are of the same date and all joined before the date, by which they were required to join as per the order of appointment. It was also contended that the case of the Petitioner is to be governed as per Paragraph 3(1) (Ga) of the Personnel and Administrative Reforms Department''s circular No. 15784 dated 26.8.72, but the Respondents have somehow applied the Finance Department''s Circular no 11663 dated 3.12.68 for determining seniority of the Petitioner with Respondent No. 5 which is not applicable to the cases where recruitment has been made through a competitive examination.

8. On the other hand, the learned A.A.G. III appearing for the official Respondents submitted that the date of joining of all the three candidates including the Petitioner clearly declares the inter se seniority. It was submitted that from the unpassed list merit position is not relevant for determining inter se seniority. The length of service i.e. date of joining is the relevant fact for the same, which is very clear from the 1968 circular of the Finance Department contained in annexure-9 to the writ petition. In this regard, he also referred to Rule 3 of the Rules relating to recruitment of the Assistants of the Lower Division of the Bihar Secretariat and some other offices contained in annexure (sic) of Chapter II of the Secretariat instructions, which deals with as to how the number of existing vacancy and those likely to occur in the lower division during twelve months from 1st July following are to be notified and other unforeseen vacancies occurring thereafter till the publication of the result of the ensuing examination are similarly to be reported to the Finance Department. On the basis of this return the Finance Department will allow requisite number of passed candidates to the posts after the result of the next examination is published. Rule 10 (now Rule 9) provides that the Board of Examiners will prepare two lists one for passed candidates and the other for those unpassed candidates only whom the Board considers suitable for temporary appointment and each list will show the names of persons arranged in their merit with their addresses. In the second list the names of those Assistants only are required to be entered who have got not less than 40 percent of the aggregate mark in the four subjects combined. The Finance Department is required to circulate the list of the candidates to all departments of the offices concerned and will also provide a copy to each candidate. In Sub-rule (2) of Rule 10 no person is to be appointed to the lower division permanently in the department and offices mentioned in Schedule I unless he has been allotted for such appointment by the Finance Department on his passing the Lower Division Examination. The candidates on appointment are to be kept on probation for a period of two years with effect from the date of their joining to pass successfully after passing the examination. Under Sub-rule (3)(a) the candidates in the first list of passed candidates who are not allotted

for permanent appointment shall have preference for appointment on temporary basis over the candidates included in the second list of unpassed candidates for such appointment.

9. From the perusal of the said rules contained in the Secretariat Instructions, it is evident that even list of unpassed candidates are to be prepared showing names of persons arranged in order of merit with their addresses. Rule 13(1) (now Rule 12(1)) provides that when two or more successful candidates of the same year are confirmed in a particular department or office, they will ordinarily rank inter se in the year in which their names appear in the list of successful candidates irrespective of the fact whether any of them happens to be confirmed earlier and gets promotion earlier thereby from one grade to Anr. . Under Sub-rule (3) seniority of assistants allotted to different departments or offices are to be determined inter se, if and when necessary according to the aforesaid Sub-rule (1). 1968 Circular (annexure 9) on which the learned A.A.G. has laid emphasis, deals with the subject "substantive appointment of temporary lower division assistants working in Secretariat and the attached offices (including offices of the Chief Conservator of Forest, Ranchi and offices of the Divisional Commissioner) without they being required to pass Special Lower-Division Assistants'' Examination". Para 2 of the said circular deals with allotment of permanent post to such temporary lower Division Assistants'' examination held in the year 1966. They have been given priority in allotment and seniority in the cadre over such temporary Lower Division Assistants, who would become eligible for appointment against permanent post on the basis of completion of at least three years continuous service and having satisfactory record of service. Further, on their appointment to permanent post, the inter se seniority of those unpassed temporary Assistants are to be determined on the basis of their continuous length of service as temporary Lower Division Assistants and on their appointment to permanent post they will be on probation for a period of two years and would have to pass the Lower Division Confirmatory examination before they would be confirmed. As per para 3 panel of those candidates eligible for permanent allotment is to be prepared.

10. It is thus, evident that such Lower Division Assistants, who had already passed the Special Lower Division Assistants'' Examination held in the year 1966 were given priority in allotment and seniority in the cadre over those, who would have become eligible for appointment against permanent post on the basis of completion of three years'' continuous service and having satisfactory records of service by virtue of 1968 circular and in the matter of such appointees to permanent post, the inter se seniority was to be determined on the basis of their continuous service as temporary Lower Division Assistants. It is not the case of the Respondents that the Petitioner and Respondents had not passed the special Lower Division Assistants'' Examination held in the year 1966 and that they only became eligible for appointment against permanent post on the basis of completion of atleast three years continuous service having satisfactory record of service, in whose case only the inter se seniority is to be determined on the basis

of their continuous length of service as temporary Lower Division Assistant. Moreover, the Secretariat instructions, which is a Rule, provides that seniority of Assistants allotted to different departments or offices shall be determined inter se if and when necessary in the case when two or more successful candidates of the same year are confirmed in a particular department or office, in the order, in which their names appear in the list of successful candidates irrespective of the fact whether or not all of them happen to be confirmed earlier and get promotion earlier thereby from one grade to Anr. .

11. Further, in the peculiar facts and circumstances of the present case, I am unable to accept that in the present case, the date of joining in the lower Division will be the basis for determining inter se seniority of the Petitioner and Respondent No. 5 and Jyotendra Pd. Under Rule 10 (now Rule 9) of the Secretariat Instructions, the list of unpassed candidates, whom the Board considered suitable for temporary appointment is required to be prepared showing names of persons arranged in order of merit with their addresses. In the order of their appointment the Petitioner and Respondent No. 5 were given the joining time till 30th November, 1965, by which time admittedly all of them joined. In my opinion, merely because Respondent No. 5 submitted his joining before the Petitioner and Jyotendra Pd. cannot rank senior to them when in the merit list his position was below them. By now, it is well settled that if the persons are given appointment from the merit list prepared for the said purpose and a joining time is given in the order of appointment, the seniority of such persons will not be affected by their respective dates of joining ignoring the merit. Obviously, the reason behind it is that one may be living nearer to the place where he is to join than the persons, who are above in the merit list, which may expedite his joining the post and the persons, who live away from the place of joining may have to suffer on account of the same without any fault of their part though they ranked above in the merit list than the person living nearer to the place of joining. By mere fortuitous chance of reporting to duty earlier would not alter the ranking given by the Selection Board, as has been held by the Supreme Court in the case of Chairman, Puri Gramya Bank v. Ananda Chandra Das Civil Appeal No. 6308 of 1994 decided on 12.9.1994. The relevant extract from the order passed by the Supreme Court is quoted hereunder:

The only question in this case is that what shall be the ranking among the direct recruits? Is it the date on which they joined duty or according to the ranking given by the Selection Board? On comparative evaluation of the respective merits of the candidates for direct recruitment, the Board has prepared the merit list on the basis of the ranking secured at the time of the selection. It is settled law that if more than one are selected, the seniority is as per ranking of the direct recruits subject to the adjustment of the candidates selected on applying the rule of reservation and the roster. By mere fortuitous chance of reporting to duty earlier would not alter the ranking given by the Selection Board and the arranged one as per roster. The High court, is therefore, wholly wrong in its conclusion that the seniority shall be determined on the basis of the joining reports given by the

Candidates selected for appointment by direct recruitment and length of service on its basis. The view therefore, is wrong....

12. I do not find any substance in the argument of the learned A.A.G. that 1972 circular of the State Government which came into effect prior to the date of confirmation of the Petitioner, Respondent No. 6 and said Jyotendra Pd. relates to persons, who had passed the examination. By the said circular the State Government laid down general rule of determination of seniority in supersession of earlier ones. According to Sub-clause ''Ga'' of Para (2) of the said circular seniority is to be determined as per the merit position assigned by the competent authority. Thus, even according to the said circular laying down the general guide-line for determination of seniority, the Petitioner, who ranked above the Respondent No. 5 in the merit list has to be held senior to the said Respondent No. 5. However, there cannot by any justification to deny seniority to Petitioner over Respondent No. 5 when said Jyotendra Pd. has been given seniority over Respondent No. 5, though the date of joining of Jyotendra Pd. is later than Respondent No. 5. This action of the official Respondents is wholly arbitrary and violative of Articles 14 and 16(1) of the Constitution of India.

13. As has been discussed above, in the year 1991 the decision was rightly taken in favour of the Petitioner to declare him senior to Respondent No. 5 and to give the consequential promotion, as obviously the seniority of the Petitioner vis a vis Respondent No. 5 stood determined as per the provision contained in the Secretarial Instructions on the basis of their respective position as determined by the Selection Board. The circular of 1968 of the Finance Department can have no application with retrospective effect disturbing the seniority of the Petitioner and Respondent No. 5 which a stood determined as per the existing rules. In the case of Gaya Pd. Pandey v. The State of Bihar reported in 1972 P.L.J.R. 464 a Division Bench of this Court held that seniority of a person in Government service does not depend how it is fixed by the authority concerned. It stands automatically determined according to the existing rules. Preparation of the seniority list by the authority concerned is a mere formal matter. Thus, in my opinion, the 1968 Government Circular cannot have any application for determining the seniority of the Petitioner vis a vis Respondent No. 5. Any other interpretation to the said circular may render it violative of the fundamental right guaranteed by Articles 14 and 16(1) of the Constitution to persons including Petitioner and Respondent No. 5, whose seniority stood automatically determined according to the existing rules contained in the Secretariat Instructions.

14. In any view of the matter, after the disposal of the earlier writ petition filed by the writ Petitioner on hearing learned Counsel for the parties including the official Respondents, this Court vide annexure-2 directed the Respondents to consider the grievance of the Petitioner in the light of the decision taken by the Commissioner, Commercial Taxes, Bihar, Patna as contained in annexure-13 to the said writ petition, whereby and where-under, Respondent No. 5 was found junior to the Petitioner and also to grant him all consequential reliefs, for which

he is entitled in law, the Respondents, in fact, were left with no option but to grant promotion to the Petitioner as Section Officer as well as Registrar atleast with effect from the date Respondent No. 5 had been given promotion. It is not the case of the Respondents that the Petitioner was not qualified for such promotion and/or did not possess satisfactory service records. In fact, in my opinion, the official Respondents have acted mala fide besides in gross violation of the said order in reversing the earlier decision taken by them by the impugned order, which compelled the Petitioner to approach this Court twice, earlier in M.J.C. application and later by the present writ petition. In such circumstances, in my opinion, the Respondents are liable to be saddled with heavy costs to be paid to the Petitioner. Accordingly, the impugned order contained in annexure-1 is quashed. As the Petitioner has superannuated from service, the Respondents are directed to issue necessary order/notification giving promotion to the Petitioner in the rank of Section Officer, as well as on the post of Registrar with financial benefit with effect from the date when said Respondent No. 5 was given promotion on the said post within two weeks from today.

15. In the result, the writ application is allowed with cost of Rs 5,000/- (rupee five thousand) awarded against Respondent Nos. 1, 2, 3, 4 and 6 payable Rs. 1000/- (one thousand) by each of them from their pocket to the Petitioner and receipt thereof to be filed in this Court within two weeks from today and in case of their failure to pay the cost within the said time, the matter shall be posted for orders for further appropriate action to be taken against them.

