

(1983) 01 OHC CK 0002
In the Orissa High Court
Case No : O.J.C. No. 916 of 1979

D.B. Jena

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 28-01-1983

Acts Referred:

All India Services Act, 1951 — Section 3(1)
Police Service (Regulation of Seniority) Rules, 1954 — Rule 3, 3(3)
Railway Establishment Code — Rule 137

Citation : (1983) 55 CLT 290

Hon'ble Judges : P.K. Mohanti, J;B.N. Misra, J

Bench : Division Bench

Advocate : G.A.R. Dora, for the Appellant; B.K. Pal, B. Pal, Devananda Misra and Deepak Misra, for the Respondent

Final Decision : Allowed

Judgement

B.N. Misra, J.—The Petitioner is a railway employee. He joined service on 19-1-1949 as a Waterman. He was promoted as a Vaccinator on 28-7-1963 and was confirmed in the said post on 15-2-1966. The post of Health Inspector, Grade III, which is higher to the post of Vaccinator was lying vacant since 8-2-1972 in the office of the Divisional Medical Officer, Khurda Division. On the recommendation of the Divisional Medical Officer, the Petitioner was promoted as a Health Inspector, Grade III, with effect from 7-4-1973. The Petitioner continued in the post of Health Inspector, Grade III for more than six years. Thereafter, by order dated 30-5-1979, Annexure-3, the Petitioner was reverted to his substantive post of Vaccinator and opposite, party No. 3 was temporarily appointed as the Health Inspector, Grade III. This order of reversion is under challenge in this writ application.

2. According to the Petitioner, his service as Health Inspector, Grade III, for more than six years, from 7-4-1973 till 30-5-1979, was quite satisfactory and he had drawn about seven increments during the said period. He had been put to E.B.

test in the post of Health Inspector, Grade III, and had been found fit, vide Divisional Medical Officer's letter dated 14-2-1978, Annexure-2. The Petitioner contends that the order of reversion is illegal being in violation of Railway Board's statutory order circulated under letter dated 1-7-1966, vide Annexure-5, which enjoins that any person who, is permitted to officiate beyond eighteen months cannot be reverted for unsatisfactory work without following the procedure prescribed in the Discipline and Appeal Rules. Admittedly, the Petitioner is a non-matric and he does not possess Sanitary Inspector's Certificate/Diploma, but according to the Petitioner, these qualifications do not govern his promotion as he is a departmental candidate and not a direct recruit and he is to be absorbed against the 25% - reserved quota from the lower ranks. It has been pointed out in para-I of the rejoinder filed by the Petitioner that the four persons named in that paragraph are also non-matrices and do not possess the Sanitary Inspector's Certificate and yet they have been absorbed as Health Inspectors. The Petitioner also contends that although in the order of his promotion as Health Inspector, Grade III, it was mentioned that the promotion was purely on a stop-gap basis, since he had continuously officiated in the post of Health Inspector, Grade III, for more than six years, he is entitled to the protection of the 18 month rule contained in Annexure-5. The Petitioner has accordingly prayed that the order of his reversion, vide Annexure-3, should be quashed.

3. In their counter, the railways have denied the claim of the Petitioner. It is admitted that the Petitioner had been promoted from the post of Vaccinator to the post of Health Inspector, Grade III, with effect from 7-4-1973. However, it is stated that the minimum qualification necessary for the post of Health Inspector, Grade III, was Matriculation or equivalent and Sanitary Inspector's Certificate/Diploma. Therefore, when the services of opposite party No. 3, who is a qualified candidate, became available, he was appointed to the post of Health Inspector, Grade III, and consequently the Petitioner was reverted to his substantive post of Vaccinator. It is also stated that the promotion of the Petitioner was purely on stop-gap basis on compassionate grounds and did not confer any right on the Petitioner to continue in the said post. Another contention of the railways is that the protection under the 18 month rule, vide Annexure-5, is not available to the Petitioner as by virtue of the clarification issued by the Board on 15-1-1966, Annexure-N, the rule does not apply to those officiating on promotion as a stop-gap measure. The railways have accordingly submitted that the order of reversion of the Petitioner is legal and valid.

4. Learned Counsel appearing for the railways submitted that the qualifications for the posts of Health Inspectors have been statutorily laid down in the Indian Railway Establishment Manual, Volume 1. This Manual has been published on 1-4-1968. According to Rule 137 of the Indian Railway Establishment Code, Volume I, the rules for the recruitment of non-gazetted railway servants are contained in Chapter I of the Indian Railway Establishment Manual. At page 83 of the Manual, the qualifications of Sanitary (Health) Inspectors are

(a) Age-Between 18 and 25 years.

(b) Education-Matriculation (or its equivalent) with Sanitary Inspectors Certificate/Diploma issued by a recognised institution.

There can be no dispute that the aforesaid qualifications must govern direct recruitment to the posts of Health Inspectors, but It is extremely doubtful if the said requirements as to qualifications also govern appointment to the posts of Health Inspectors by way of promotion to the reserved quota from the lower ranks. It does not appear reasonable that the age restriction of 18 to 25 years should also govern promotions from the lower ranks.

Learned Counsel for the railways fairly conceded that the age restriction may not hold good in case of promotions from the lower ranks. He however insisted that the educational qualifications are mandatory and for this purpose he relied on Annexure-B. Annexure-B is a copy of letters from the Chief Personnel Officer. The first part refers to Board's letter E(NG) 167P MI/161 dated 17-6-1968 wherein it has been stated that 25% of the vacancies in the posts of Sanitary Inspectors should be filled up by promotion and 75 % by direct, recruitment. The second part of Annexure-B lays down the qualifications for the posts of Sanitary Inspectors as contained in the Railway Establishment Manual. In the penultimate paragraph of Annexure-B, it is stated that the qualifications laid down in the Railway Establishment Manual are also necessary in the case of departmental candidates against the 25% reserved quota. The requirements of educational qualifications noted in the penultimate paragraph of Annexure-B appear to be mere instructions from the Chief Personal Officer. The Railway Establishment Manual does not indicate that the requirements of educational qualifications will also govern the departmental candidates against the 25% reserved quota and learned Counsel appearing for the railways did not place before the Court any statutory rule or order extending the requirements of educational qualifications to departmental candidates. In the absence of any statutory rule or order, it is not possible to hold that the age restriction and the requirements of educational qualifications govern that case of departmental candidates for promotion to the posts of Health Inspectors, Grade III, against the reserved quota.

5. As regards the 18 month rule contained in Annexure-5, learned Counsel for the railways has referred to Pashupati Narain Sinha Vs. Union of India (UOI) and Others, Pat. 18, wherein it was observed that the Board's instructions contained in Annexure-5 did not create any legally enforceable right. Learned Counsel appearing for the Petitioner has cited a number of Bench decisions of this Court wherein the implications of the 18 month rule contained in Annexure-5 and the subsequent clarification issued under Annexure-N have been duly considered. In S.K. Mohanty v. Union of India and Ors. 49 (1980) C.L.T. 382 in a similar case, this Court held:

There is no dispute that Board's instructions issued from time to time intended to have general application would be statutory and enforceable. The relevant

instructions issued by the Board on the question may now be extracted. On 21-5-1956, in a letter marked confidential relating to the subject of observance of disciplinary proceedings in cases of staff officiating in a grade beyond eighteen months when the question of reversion of such staff arises, the Board indicated:

The Board, therefore, desire that, with immediate effect, the performance of every Railway Servant officiating in a higher grade should be adjudged by the competent officer before the expiry of 12 months of total officiating service and if the performance is not satisfactory, either the Railway servant may be reverted on the grounds of unsuitability, or he may be warned that his work is not quite satisfactory, but that he is being permitted to draw his increment in the expectation that his performance will improve during the next six months for which he will continue to be under observation. At the end of the extended period of six months, i.e. of a total officiating service of 18 months, either the person should be declared suitable for retention in the grade or should be reverted because he is unsuitable. Any person who is permitted to continue to officiate beyond 18 months cannot in future be reverted for unsatisfactory work without following the procedure prescribed in the Discipline and Appeal Rules.

In the case of Somanath Rath v. Union of India and Anr., Petitioner relied on this circular. On behalf of the Railway Administration, it was contended that the appointment of Somanath was by way of stop-gap arrangement and, therefore, the circular was not applicable. Besides, the circular had been modified by the Board on 16th of March, 1960 and, therefore, Somanath was not entitled to any relief on the basis of 1956 circular letter. This Court took the view that the 1956 circular was enforceable; the right had accrued to Somanath before 1960 and as such he was entitled to the relief. For convenience, we may refer to the Board's letter dated 1-2-1960 which read thus:

Please refer to Kemalkara Rao's confidential D.O. No. E 55 RG 6-26 dated 21-5-1956, where in it was, inter alia, stated that any person who is permitted to continue to officiate beyond 18 months cannot in future be reverted for unsatisfactory work without following the procedure prescribed in the Discipline and Appeal Rules. Subsequently, in Sri. P.C. Mukherjee's confidential D.O. No. E 55 RG/26 dated 7-6-1958, it was emphasised that prompt and timely review of a railway servant's performance within the first 12 months of his officiating service in a higher grade should be made to decide whether or not he should be reverted for unsatisfactory work.

It was now been decided that there is no need to prescribe any period during which a final assessment must necessarily be made of the performance of each railway servant officiating in higher grade and accordingly the instructions contained in Board's D.O. letters dated 21-5-1956 and 7-6-1958 may be treated as modified.

On 9-6-1965, the Board, again issued the following direction:

In Shri N. Kamalakara Rao, Director Establishment's D.O. No. E 55 RG 6-26

dated 21-5-1956, it was, *inter alia*, stated that any person who is permitted to continue to officiate beyond 18 months cannot in future be reverted for unsatisfactory work without following the procedure prescribed in the Discipline and Appeal Rules. These instructions were cancelled vide Board's letters No. E (D & A) 60 RG 6, 5 dated 1-2-1960 and 14-5-1960, thus permitting the reversion of an employee officiating in a higher post, on the grounds of general unsuitability, at any time and not necessarily within a period of 18 months, without following the procedure prescribed in the Discipline and Appeal Rules.

The Board have reconsidered the matter and feel that it would not be correct to effect such reversions after prolonged officiating periods. They have, therefore, decided again that, in future, any person who is permitted to officiate beyond 18 months cannot be reverted for unsatisfactory work without following the procedure prescribed in the Discipline and Appeal Rules.

On behalf of the opposite parties, reliance was placed on a communication dated 15-1-1966 which ran thus:

Reference Board's letter of even number dated 9-6-1965 wherein it has, *inter alia*, been stated that, in future, any person who is permitted to officiate beyond 18 months cannot be reverted for unsatisfactory work, without following the procedure prescribed in the Discipline and Appeal Rules. A question has been raised whether this safeguard applies to persons who are officiating on promotion as a stop-gap measure and not after empanelment (in the case of selection posts) and after passing the suitability test in the case of non-selection post:

It is clarified that the safeguard applies to only those employees who have acquired a prescriptive right to the officiating posts by virtue of their empanelment or have been declared suitable by the competent authorities. It does not apply to those officiating on promotion as a stop-gap measure and also to, those cases where an employee, duly selected, has to be reverted after a lapse of 18 months because of cancellation of Selection Board's proceedings or due to a change in the panel position consequent to rectification of mistakes in seniority etc.

If this clarification was intended to govern, the Chief Personnel Officer of the South Eastern Railway would not have circulated the Board's instruction dated 9-6-1965 without clarification under his letter dated 2-12-1966. In this circular letter of the Chief Personnel Officer, reference has been made to any person without any indication that the two categories referred to in the letter of 15-1-1966 were intended to be excluded.

Board's letter dated 5-2-1972 (Annexure-7) on principle supports the same position. We are inclined to take the view, that the clarification indicated in the communication dated 15-1-1966 was with reference to cases of purely stop-gap appointments. In the instant case, there was a clear vacancy. Petitioner held the post for almost three years. Though in the original order of appointment it had been stated to be on stopgap basis, the fact that the appointment continued for

three years itself militates against the concept of stopgap arrangement and we are inclined to hold that the Petitioner came within the ambit of the protective provision in the Board's Circular letters. He could not have been reverted after completing almost three years in the higher post and without any adverse remarks, in the absence of a disciplinary proceeding. It has been held by the Calcutta High Court in the case of *Madhukar Raghunath Nafdey v. Union of India and Ors.*, that a circular of the Railway Ministry laying down the principle that no reversion from officiating service after completing 18 months should be made without following the prescribed rules created a right in favour of the railway servant and reversion made contrary to the circular would be bad.

Mr. Pal for the Railway Administration, on the other hand, places reliance on a decision, of the Patna High Court in the case of *Braj Nath Rai. v. Union of India and Ors.*, wherein, it had been pointed out:

...He (Mr. Ghose for the Petitioner) further urged that the Petitioner's continuous officiation could not have been said to be a merely temporary or local or stop-gap arrangement. In this connection he has placed reliance on *D.R. Nim, I.P.S. Vs. Union of India (UOI)*, . In that case their Lordships were considering Rule 3 of the Indian Police Service (Regulation of Seniority) Rules, 1954, issued u/s 3(1) of the All India Services Act, 1951. On the facts and circumstances of that case it was held that the Appellant was officiating for eight years, that he had never been reverted and that he was appointed to the post when vacancies fell, and therefore it could not be held that the Appellant's continuous officiation was a mere temporary or local or stop-gap arrangement, within the meaning of Explanation I to Rule 3(3)(b) of the Indian Police Service (Regulation of Seniority) Rules. In my opinion on the facts and circumstances of the present, case, which I have elaborately discussed above, on the basis of Annexures 6, 7 and 8, the above observation of their Lordships is not applicable to it.

We are inclined to think that the Patna decision must be confined to its own facts and in a case like ours, where the Petitioner has been allowed to serve in the promotional post for about 3 years and there is no adverse remark against him, the appointment though initially stated to be stop gap, cannot be taken to be a stop-gap arrangement and in our considered view, a case like the Petitioner's would be governed by the Board's rule.

Learned Counsel for the Petitioner has also filed a copy of the order of the Supreme Court in SLP No. 7493/80 dated 24-8-1981 wherein the SLP against the Judgment of this Court in the aforesaid case was dismissed on merits.

6. Further, in *Rama Chandra Pradhan and Ors. v. Union of India and Ors.* 42 (1980) C.L.T. 266, *B. Jagannath Rao and Anr. v. Union of India and Anr.* O.J.C. No. 1721 of 1978-D/17-3-1982, and *Harihar Samantra and Anr. v. Union of India and Ors.* O.J.C. No. 225 of 1978-D/17-3-1982, the protection of the 18 month rule, as contained in Annexure-5, was made available to the Petitioners who had continued to hold the promotional posts for more than eighteen months. In view

of the Bench decisions of this Court referred to above, the Patna decision reported in Pashupati Narain Sinha Vs. Union of India (UOI) and Others, Pat. 18 must be held to be confined to its own facts. In the present case, the Petitioner has been allowed to serve in the promotional post for more than six years and during this period there has been no adverse remarks against him. On the contrary, he has received about seven increments and has also been found fit to cross the efficiency bar. Therefore, the appointment of the Petitioner as Health Inspector, Grade III, though initially stated to be stop-gap, cannot be taken to be a stop-gap arrangement in view of the Petitioner's continued service for more than six years. The Petitioner must be held to be entitled to the protection of the 18 month rule contained in Annexure-5.

7. For the reasons stated above, this writ application is allowed and the order reverting the Petitioner from the post of Health Inspector, Grade III, to the post of Vaccinator is quashed. Petitioner is entitled to the service benefits due to him on the basis that the order of reversion dated 30-5-1979, Annexure-3, was bad and he must be deemed to be continuing in that post. There shall be no order for costs.

P.K. Mohanti, J.

8. I agree.