

(2014) 11 PAT CK 0009

In the Patna High Court

Case No : Letters Patent Appeal No. 168 of 2013 in Civil Writ Jurisdiction Case No. 4855 of 2008, Letters Patent Appeal No. 257 of 2013 in Civil Writ Jurisdiction Case No. 10925 of 2010, Interlocutory Application No. 1527 of 2013 in Letters Patent Appeal No. 257 of

Digambar Thakur

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 10-11-2014

Acts Referred:

Constitution of India, 1950 — Article 226, 309

Citation : (2015) LabIC 212 : (2015) 1 PLJR 918

Hon'ble Judges : Rekha M. Doshit, C.J.;Ashwani Kumar Singh, J

Bench : Division Bench

Advocate : Rajendra Narain, Jitendra Singh, Y.V. Giri, Senior Advocates, Anju Narain, Kamal Kishore Jha, Subodh Jha, Raju Giri, Sarvesh Kumar Singh, Dharendra Kumar Jha-II, Krishna Chandra Jha, Advocate for the Appellant; Vinod Kumar Kanth, Senior Advocate, Nishi Nath Ojha, Sarvesh Kumar Singh, Siddhartha Prasad, Abhinav Shrivastava, Gopal Prasad Roy, Advocates Subhash Pd. Singh, G.A.-2, Satish Narain Singh, A.C. to G.A.-2, Bajrangi Lall, A.C. to G.A.-2, Advocate for the Respondent

Judgement

Rekha M. Doshit, C.J.—These four Appeals preferred under Clause 10 of the Letters Patent arise from the common judgment and order dated 6th November 2012 passed by the learned single Judge insofar as CWJC Nos. 4855 of 2008, 10925 of 2010, 11337 of 2010 and 11160 of 2010 are concerned.

2. The matter at dispute is the inter-se seniority amongst the Assistant Conservators of Forest in Bihar Forest Service appointed by direct recruitment and by promotion, an age old never ending dispute.

3. The appointment to the Bihar Forest Service is governed by the Bihar Forest Service Rules, 1953 (hereinafter referred to as "the 1953 Rules") framed by the Government of Bihar in exercise of the power conferred by the proviso to Article 309 of the Constitution. Rule 3 thereof provides for mode of appointment to the

Bihar Forest Service. The said rule provides for appointment by promotion of the selected Rangers (now known as "Range Officers of Forest") and by direct recruitment selected and recommended by the Bihar Public Service Commission (hereinafter referred to as "the Commission") after holding competitive examination. Part II of the 1953 Rules comprising rules 5 to 8 provides for direct recruitment. Part III of the 1953 Rules contains supplementary instructions in respect of selection to be made by the Commission and preparation of the merit list. Rule 29 thereof, since its amendment under the Notification published on 30th August 1985, provides, inter alia, that an Assistant Conservator of Forests (hereinafter referred to as "the Assistant Conservator") appointed by direct recruitment shall be confirmed against the permanent post after he successfully undergoes the professional training for a period of two years at Forest Research Institute and College, Dehradun. The only provision made in respect of seniority of the officers appointed to the Bihar Forest Service is found in Rule 35 of the 1953 Rules. Rule 35 reads as under:-

"35. Seniority of officers appointed to the service shall be determined with reference to the date of their substantive appointment to the service:

Provided that -

(i) in the case of members of the service appointed by direct recruitment at the same time, their seniority inter se shall be the order of merit in which their names are placed in the list of successful candidates at the Final Examination of the Indian Forest College, Dehra Dun;

(ii) in case where appointments are made to the Service both by direct recruitment and promotion of selected Rangers at the same time, the promoted members of the service shall be senior to the members directly recruited; and

(iii) the seniority inter se of Rangers on substantive appointment to the Service by promotion at the same time shall be their seniority inter se held as Rangers."

4. The general instructions issued by the State of Bihar in this regard provide that in case of direct recruits and promotees appointed as a result of the "same transaction", the promotees shall rank senior to the direct recruits. The dispute requires to be examined and resolved in the backdrop of the above Rules and the general rule of seniority of the Government servants in respect of inter se seniority amongst the direct recruit and promotee officers.

5. Now I shall come to the hard facts shorn of the unnecessary details, in a nutshell. The appellants in Letters Patent Appeal Nos. 257 of 2013, 491 of 2013 and 509 of 2013 are one Mihir Kumar Jha, Sunil Kumar Sinha, Patanjali Kumar Choudhary, Dinesh Kumar Das, Nand Kumar Manjhi and Naresh Prasad, the Assistant Conservators appointed on 13th April 1988 and 10th August 1989 by direct recruitment pursuant to 1985 selection process. It appears that pursuant to the requisition made by the Government of Bihar for direct appointment on 40 posts of Assistant Conservator of Forests, the Commission initiated a recruitment

process under the advertisement published on 24th July 1985. Pursuant to the said recruitment process, 40 candidates were selected and recommended for appointment. The said 40 candidates selected by the Commission were appointed on 14th December 1987. The above referred six appellants were also the candidates in the said recruitment process, but were not selected by the Commission, nor were they appointed as Assistant Conservators. Nevertheless, undeterred by their failure to clear the competitive examination conducted by the Commission, some eighteen unsuccessful candidates relentlessly pursued the State Government to appoint them as Assistant Conservators. Ultimately, they succeeded in their efforts and were appointed as Assistant Conservators in two batches on 13th April 1988 and 10th August 1989 respectively. Their appointment came to be questioned by some direct recruit and some promotee Assistant Conservators before the State Government. At one time, the concerned Minister was of the opinion that their appointment was totally illegal and that their service should be terminated. Nevertheless, the said eighteen persons were continued in service. Out of the said eighteen Assistant Conservators ten were, on bifurcation of the larger State of Bihar, transferred and allocated to the State of Jharkhand. The remaining eight such officers have continued in service. On 3rd October 2005, the then Governor of Bihar proposed that their service be regularised. Ultimately, the State Government gave in and under Notification dated 4th October 2010 regularised the appointment of the said eight officers with effect from 3rd October 2005, the date of recommendation made by the Governor of Bihar. Accordingly, the said eight officers have been given seniority in the final gradation list effective from 3rd October 2005.

6. It is the said action of the State Government which was the subject matter of challenge in CWJC Nos. 10925 of 2010; 11160 of 2010 and 11337 of 2010 filed by the appellants Mihir Kumar Jha, Sunil Kumar Sinha, Patanjali Kumar Choudhary, Dinesh Kumar Das and Nand Kumar Manjhi and Naresh Prasad. According to the said appellants, they were duly appointed on 13th April 1988 and 10th August 1989 respectively. Their appointment was never questioned and cannot be held to be bad or illegal after a long, undue and unexplained delay. The appellants are, therefore, entitled to seniority from the date of their appointment on the principle of continuous officiation.

7. The learned single Judge has rejected the contentions. The learned single Judge has held that the appointment of the said writ petitioners- appellants was totally illegal. Their appointment was questioned before the State Government. The issue was, however, never decided by the State Government. At one point of time, the concerned Minister had proposed termination of their service. However, while the State Government was under the Governor's rule, on 3rd October 2005 the Governor proposed to regularise their service. The State Government has, therefore, regularised their service as on 3rd October 2005. The learned single Judge has noticed that the requisition was made for 40 vacancies. After due selection process, 40 successful candidates were appointed as Assistant Conservators. The said 40 selected Assistant Conservators have successfully

undergone training in forestry. Once the select list was exhausted, there was no occasion for the State Government to oppress the Commission into recommending further names and make more appointments. Nevertheless, that is what the State Government actually did. The Commission resisted at first but gave in to the pressure of the State Government and made recommendation of eighteen candidates. Ten such candidates were appointed on 13th April 1988 and eight on 10th August 1989. The aforesaid appellants are the six of the said Assistant Conservators appointed on 13th April 1988 and 10th August 1989. The learned single Judge has also noticed that after completion of the selection process pursuant to the advertisement dated 24th July 1985, on 12th June 1987, the State Government had made a fresh requisition for recruitment for 40 posts of Assistant Conservator of Forests in Bihar Forest Service. Pursuant to the said requisition, the Commission had commenced the recruitment process under advertisement dated 19th December 1987. Pursuant to the said selection process, some 40 officers were selected and appointed on 30th March 1990. It was pending the said selection process, the above mentioned 18 persons were appointed as Assistant Conservators in total disregard of the 1953 Rules and general principles for appointment in public service.

8. Now in the final gradation list published on 10th February 2010, the said appellants have been given seniority from the date of their regularization in service on 3rd October 2005 and have been placed at the rock bottom of seniority at serial Nos. 321 and below. As recorded hereinabove, the challenge to the seniority has been rejected by the learned single Judge. The learned single Judge has considered the submissions made on their behalf and the case law in extenso. The learned single Judge has observed, "Thus, on the aforesaid basis, I hold that the appointment of the second and third phase direct recruits pursuant to 1985 advertisement after the advertised posts had been filled up, was a rank illegality and cannot be termed as an irregularity or a minor deviation from the Rules. It was a misadventure from the very beginning on which those petitioners had embarked. They cannot invoke equity in their favour. The law does not support them."

9. It is this decision of the learned single Judge which is the subject matter of challenge in the above Letters Patent Appeals Nos. 257 of 2013, 491 of 2013 and 509 of 2013.

10. Learned counsels Mr. Y.V. Giri and Mr. Jitendra Singh and learned advocate Mr. Dharendra Kumar Jha-2 have appeared for the appellants. Learned counsels in their marathon arguments have relied upon the 1953 Rules, voluminous records and the case law in the matters of Pandit M.S.M. Sharma Vs. Dr. Shree Krishna Sinha and Others, ; of Roshan Lal and Others Vs. International Airport Authority of India and Others, ; of Supreme Court Employees' Welfare Association and Others Vs. Union of India (UOI) and Another, ; of The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others, ; of Prem Singh and Others Vs. Haryana State

Electricity Board and Others, ; of Rudra Kumar Sain and Others Vs. Union of India and Others, ; of Suvidya Yadav and others Vs. State of Haryana and others [(2002) 10 SCC 269]; of Ramadhar Shrivastava Vs. Bhagwandas, ; of India Household and Healthcare Ltd. Vs. LG Household and Healthcare Ltd., ; of Amarjeet Singh and Others Vs. Devi Ratan and Others, ; of Union of India (UOI) and Another Vs. Kartick Chandra Mondal and Another, ; of Rakhi Ray and Others Vs. The High Court of Delhi and Others, ; of H.S. Vankani and Others Vs. State of Gujarat and Others, ; of Shanker Raju Vs. Union of India (UOI), ; of Shankara Co-op Housing Society Ltd. Vs. M. Prabhakar and Others, ; and of Royal Orchid Hotels Limited and Another Vs. G. Jayarama Reddy and Others, .

11. The Appeals are contested by the State Government and the contesting respondents. Learned advocates Mr. Subhash Prasad Singh and Mr. Satish Narain Singh have appeared for the State Government and learned counsel Mr. Vinod Kumar Kanth for the contesting respondents.

12. Mr. Vinod Kumar Kanth has relied upon the judgments of the Hon'ble Supreme Court in the matters of Baleshwar Dass and Others Vs. State of Uttar Pradesh and Others, ; of Sanjay K. Sinha-II and Others Vs. State of Bihar and Others, ; of Government of Karnataka and Others Vs. Smt. Gowramma and Others, ; of Rakhi Ray and Others Vs. The High Court of Delhi and Others, ; of State of Orissa and Another Vs. Mamata Mohanty, ; and the judgments of this Court in the matters of Bishnundeo Mahto Vs. The State of Bihar & Ors. [1982 BBCJ (FB) 45]; and of Sanjay Kumar Sinha-II and Others Vs. The State of Bihar and Others, .

13. Learned advocate for the State has relied upon the judgments in the matter of State of Bihar and others Vs. Sri Akhouri Sachindra Nath and others, ; of Sanjay K. Sinha-II and Others Vs. State of Bihar and Others, ; and of Uttaranchal Forest Rangers" Asson. (Direct Recruit) and Others Vs. State of U.P. and Others, .

14. I have perused the records and have considered the submissions made by the learned senior counsels and the advocates. Appeals are decided in accordance with the principles laid down in the above judgments.

15. The learned single Judge having considered the record, the contentions and the case law in extenso, I do not suppose I want to repeat the contentions and the case law extensively dealt with by the learned single Judge. I fully agree with the learned single Judge that the appointment of the said 18 persons including the six appellants before us as Assistant Conservators pursuant to the recruitment process commenced on 24th July 1985 was totally illegal and in contravention of all canons of service jurisprudence. First, the recruitment process had been commenced for 40 posts which were duly filled in by appointment of the selected persons on 14th December 1987. The recruitment process having thus been completed, there was no occasion for the State Government to make further appointments pursuant to the said recruitment process. The appellants were the persons who had not been selected or

recommended by the Commission; nor were they placed in the wait list; nor did the State Government have the occasion to operate the wait list. The said appointments made on 13th April 1988 and 10th August 1989, therefore, in my view, were not only totally illegal, should also be considered non est. Nevertheless, the State Government has, under its Notification dated 4th October 2010, regularised their service with effect from 3rd October 2005, the date on which the Governor of Bihar State recommended to regularise their service. The generosity of the State Government should stop there. The appellants cannot claim the benefit of seniority on the principle of continuous officiation. The seniority given to them from 3rd October 2005, the effective date of regularization of their service, should not call for intervention by this Court in exercise of power of judicial review conferred by Article 226 of the Constitution.

16. For the aforesaid reasons, Letters Patent Appeal Nos. 257 of 2013; 491 of 2013 and 509 of 2013 and the concerned CWJC Nos. 10925 of 2010; 11337 of 2010 and 11160 of 2010 are dismissed.

17. The appellant in Letters Patent Appeal No. 168 of 2013 is one Digambar Thakur, an Assistant Conservator of Forests in Bihar Forest Service. The said appellant joined the service of the Bihar Government as Range Officer of Forests (hereinafter referred to as "the Range Officer") in 1981. In course of time, he became eligible for promotion to the post of Assistant Conservator of Forests in Bihar Forest Service. His case for promotion along with several other Range Officers was considered by the Departmental Promotion Committee. After the recommendation made by the Departmental Promotion Committee were accepted by the State Government and approved by the Commission, such Range Officers came to be promoted as Assistant Conservators in three different batches in the year 1990, 1991 and 1992, but the promotions were made effective from 30th March 1990. The appellant Digambar Thakur and nine others were promoted as Assistant Conservators under Government Notification dated 18th July 1991. It should be noted here that on 30th March 1990, the State Government had made appointment of several Assistant Conservators by direct recruitment pursuant to the selection process initiated in June 1987. On their promotion, the appellant and such other Assistant Conservators were treated senior to the direct recruit Assistant Conservators appointed on 30th March 1990. The said seniority was objected to by the direct recruit Assistant Conservators appointed on 30th March 1990. Ultimately, in the final gradation list published on 2nd July 2010, the promotee Assistant Conservators were placed below the direct recruit Assistant Conservators appointed on 30th March 1990.

18. The appellant Digambar Thakur had approached this Court under Article 226 of the Constitution in above CWJC No. 4855 of 2008 to challenge the appointment of direct recruit Assistant Conservators appointed under Government Notifications dated 13th April 1988 and 10th August 1989 and for ancillary reliefs. Under the said Notification dated 13th April 1988 one Rabindra Kumar Mishra and ten others were appointed as direct recruit Assistant

Conservators in Bihar Forest Service. Of the said eleven Assistant Conservators, six are the appellants before us in the above Letters Patent Appeal Nos. 257 of 2013, 491 of 2013 and 509 of 2013. Similarly, under Notification dated 10th August 1989, eight more persons were appointed as Assistant Conservators in Bihar Forest Service by direct recruitment. As I have already discussed above, the appointment of the said Assistant Conservators has been held to be bad and illegal by the learned single Judge. However, in view of the regularization of their service with effect from 3rd October 2005, under Government order dated 4th October 2010 and their placement in the final gradation list below other direct recruit and promotee Assistant Conservators, the challenge to the said Notifications dated 13th April 1988 and 10th August 1989 did not survive.

19. Pending the said writ petitions, the State Government has, on 2nd July 2010, published the final gradation list of Assistant Conservators. In the final gradation list, the appellant and such other Assistant Conservators promoted with effect from 30th March 1990 have been placed below the Assistant Conservators appointed on 30th March 1990 by direct recruitment. It is the said gradation list and the placement of the appellant below the direct recruit Assistant Conservators which really is the matter at dispute which remained to be resolved by the learned single Judge. The learned single Judge has upheld the action of the State Government. Therefore, this Appeal.

20. Learned counsel Mr. Rajendra Narain has appeared for the appellant. He has taken us through the voluminous records and the elaborate judgment of the learned single Judge. He has also relied upon the relevant rules and instructions governing the seniority inter se of the direct recruit and promotee Government officers. In support of his submissions, Mr. Rajendra Narain has relied upon the judgments of the Hon'ble Supreme Court in the matters of R.N. Nanjundappa Vs. T. Thimmiah and Another, ; of B.N. Nagarajan and Others Vs. State of Karnataka and Others, ; of Bindeshwari Ram Vs. State of Bihar and Others, ; of Keshav Chandra Joshi and others etc. Vs. Union of India and others, ; of Ashwani Kumar and Others Vs. State of Bihar and Others, ; of Sanjay K. Sinha-II and Others Vs. State of Bihar and Others, ; of Uttaranchal Forest Rangers" Asson. (Direct Recruit) and Others Vs. State of U.P. and Others, ; and of Pawan Pratap Singh and Others Vs. Reevan Singh and Others, .

21. Mr. Rajendra Narain has also relied upon Rules 67, 41, 28 and 38 of the Bihar Service Code and the Bihar Forest Service Rules, 1953. He has heavily relied upon the general instructions that in case of appointment by direct recruitment and promotion in the "same transaction", promotee officers will take seniority above the direct recruit officers. He has vehemently submitted that in 1990, the appellant was eligible for promotion. The appointment of the direct recruit Assistant Conservators was made on 30th March 1990 in the quota of direct recruitment pursuant to the selection process commenced in June 1987. At the same time, the Range Officers were entitled to promotion in the quota for promotion. Appointment of both, the direct recruits and the promotees, were,

therefore, part of the "same transaction" and as per the prevalent instructions of the State Government, the promotee officers should rank above the direct recruit officers.

22. The learned single Judge has rejected the contentions raised by the appellant and other similarly situated writ petitioners. The learned single Judge has elaborately discussed the term "same transaction" and the process of recruitment to hold that the direct recruitment made on 30th March 1990 and later promotions made effective from 30th March 1990 were not part of the "same transaction".

23. I fully agree with the learned single Judge. Further, the process for direct recruitment and promotion are entirely different. The direct recruitment and promotion can never be the part of the "same transaction".

24. The next question that arises is whether the State Government was justified in making the promotions effective from 30th March 1990 although the promotions were made later in the years 1990, 1991 and 1992. In absence of any specific rule of seniority to the contrary, the seniority shall be governed by the principle of continuous officiation from the date of substantive appointment. This cardinal principle of seniority is well known and well settled. The same principle should apply in the present case also. That is the provision under Rule 35 of the 1953 Rules. The appellant and such others who were promoted after 30th March 1990 shall take their seniority from the date of their appointment. Ordinarily, the date of appointment is the date on which the appointment order is made. True, it is not unknown or infrequent that the promotions are given with retrospective effect. However, the promotions are made with retrospective effect only in cases where the concerned officer had wrongly been superseded when one or more of his juniors were promoted or he was not promoted on the due date in spite of his being eligible and suitable on account of pending disciplinary proceeding or some such reason. In that case, when the name of the officer is cleared, he is given promotion with retrospective effect from the due date.

25. In the present case, it is not the case of the appellant or the State Government that the appellant and such other officers were required to be given promotion from retrospective effect, that too from 30th March 1990 for some valid reason. Further, merely because an officer has become eligible for promotion, he does not become entitled to promotion. For promotion to the higher post, a Government servant not only has to be eligible for such promotion, he should also be within the zone of consideration; he should be found suitable for promotion by the Departmental Promotion Committee; his suitability should be accepted by the appointing authority; and a vacant post should be available. In the present case, it has come on the record that the appellant Digambar Thakur did not become eligible till he completed 10 years' service as Range Officer in 1991. The fact that the appellant had become eligible for consideration for promotion in 1991 is not in dispute. On mere eligibility, the appellant could not have been promoted as Assistant Conservator until he was

found suitable by Departmental Promotion Committee and the recommendation for his promotion to the Bihar Forest Service was approved by the Commission. Indisputably, such process was not completed in 1990. The appellant, therefore, could not have been promoted with effect from 30th March 1990. In all probability the appellant was not eligible for appointment as Assistant Conservator as on 30th March 1990, nor was his suitability as on 30th March 1990 examined by the Departmental Promotion Committee. It has not been brought on the record whether or not the Public Service Commission had been specifically consulted on the point of retrospective promotion. The mischief in the action of the State Government to make promotion to the post of Assistant Conservators in the Bihar Forest Service with effect from 30th March 1990 is apparent. The purpose was to take undue advantage of the term "same transaction" or "same time" and to rank promotee officers senior to direct recruit officers.

26. In my opinion, the State Government has rightly undone the said mischief by placing the promotee Assistant Conservators of 1990, 1991 and 1992 below the direct recruit Assistant Conservators appointed on 30th March 1990.

27. Much is argued on the point of sanctioned strength of the Assistant Conservators, the confusion prevalent in respect of the extent of the sanctioned strength and the sanctioned strength of 133 accepted by the Hon'ble Supreme Court in the matter of Sanjay K. Sinha-II and Others Vs. State of Bihar and Others, and the quota for promotion and direct recruitment in the cadre of Assistant Conservators.

28. In my view, the said arguments are besides the point and have no relevance to the determination of seniority on the principle of continuous officiation.

29. To me, it appears that a simple issue of determination of seniority on the principle of continuous officiation has been twisted and has been given larger than life proportion by lengthy arguments, voluminous records and irrelevant submissions. The ultimate goal is to win seniority so as to reach the Indian Forest Service, an All India Service by stealing march over the others. The Court, at least the High Court will not be a party to such ill intentions and oblique motives. The learned single Judge has rightly upheld the position of the appellant and such others below the direct recruit Assistant Conservators of 30th March 1990 in the final gradation list published on 2nd July 2010.

30. No other issue arises in this Appeal.

31. For the aforesaid reasons, the Letters Patent Appeal No. 168 of 2013 and the writ petition CWJC No. 4855 of 2008 are dismissed.

32. Interlocutory Applications stand disposed of.

Ashwani Kumar Singh, J.

I agree.