
(2001) 04 PAT CK 0054
In the Patna High Court
Case No : C.W.J.C. No. 2353 of 1987

Dr. Anirudh Mishra

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 04-04-2001

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (2001) 2 PLJR 406

Hon'ble Judges : S.N. Jha, J;I.P. Singh, J

Bench : Division Bench

Advocate : Kamal Nayar Choubey, Dharnidhar Mishra, Binay Kant Mani Tripathi and Sanjay Kumar Pandey, for the Appellant; Anil Kumar Verma for State and Mr. Ashok Kr. Singh for Respondent 44, for the Respondent

Final Decision : Allowed

Judgement

S.N. Jha & I.P. Singh, JJ.—The dispute in this writ petition relates to seniority. The petitioner seeks quashing of the impugned gradation lists in which he has been placed below the respondents. The gradation lists referred to in the petition are dated 2.10.80 contained in Annexure-8, 15.5.81 contained in Annexure-10, 20.1.84 contained in Annexure-12 and 31.3.87 contained in Annexure-14. During the pendency of the case a revised gradation list was published on 19.8.96 vide Annexure-24. The petitioner seeks quashing of the said gradation list by amendment. As the earlier gradation lists have been revised and stand merged in the gradation list dated 19.8.96, it is not necessary to refer to the inter se seniority of the parties in the earlier lists. It may be mentioned at the outset that out of 40 private respondents originally impleaded in the case, 27 appear to have retired from service during the intervening period on reaching the age of superannuation and therefore, the dispute relating as to seniority is now confined to between petitioner on the one side and respondent nos. 21, 22, 25, 26, 27, 30, 31, 32, 34, 36, 38, 42 and 44 on the other. 15 more persons were sought to be added as respondents vide I.A. no. 3942/97 after the revised gradation list

dated 19.8.96 was published, but the same was not even referred to at the time of hearing.

2. From the body of the resolution dated 19.8.96 under which the gradation list was finalised and published, it appears that the State Government evolved two-fold criteria for fixing inter se seniority. In cases where appointments were made from different sources and not in the same transaction, or from a common list after comparative assessment of the merit of the persons concerned, their seniority was determined on the basis of the date of first joining i.e. date of entry in the service. With respect to those who were appointed pursuant to selection by the selection Committee of the Department, their seniority was fixed on the basis of merit position in the select list.

3. Shri Kamal Nayan Choubey submitted that the petitioner was appointed on the post of Deputy Superintendent, Government Ayurvedic College, Patna in the scale of Rs. 415-475 but by reason of merger of administrative and teaching posts and provision for a common scale of pay the petitioner has been placed below the persons who were in the lower scale of Rs. 296-430 on the basis of date of appointment. He submitted that where appointment is made from different sources, on merger of posts the date of entry in service should not be treated as the criterion for determining seniority specially when the posts carried different scales of pay. He pointed out that while in the earlier gradation lists, the petitioner was placed at SI. No. 41, in the revised gradation list dated 19.8.96 his position slid down to SI. No. 51 on account of wrong fixation of seniority. In support of the contention, he placed reliance on *Om Prakash Sharma and ors. vs. Union of India* and ors. AIR 1985 Supreme Court 1276, and *Bihar State Text Book Publishing Corporation vs. Basudeo Singh and ors.*, 1996 (2) PLJR 11.

4. The submission of the counsel, in our opinion is well founded and finds support from circular no. 15784 of the Personnel Department dated 26.8.72. The said circular lays down general principles for fixation of inter se seniority in the State Services in cases of direct recruitment, promotion, direct recruitment vis-avis promotion, merger etc. Before referring to the relevant paragraph of the Circular, it may be useful to refer to its introductory part so far as relevant, as under :

.....Wherever separate cadre or groups of posts are amalgamated to form a single cadre, inter-se seniority of incumbents coming from different source is required to be refixed.....

The principle laid down for fixing seniority in such cases as contained in sub-para (ii) read with sub-para (iv) as under :

(ii) Where officers serving within the department but in different posts are recruited at the same time by direct appointment, their inter-se seniority will be determined according to sub-para (iv) below irrespective of the date of their joining the posts to which they are appointed.

(iv) Where officers are promoted to a service at the same time but from different

services, their inter-se seniority is fixed according to the following

(a).....

(b).....

(c) Where no such order of merit is fixed, persons who had drawn higher pay, or pay in a higher scale in the lower posts from which they are promoted shall rank senior to another person who had drawn lesser pay, or pay in lower scale. In case the pay scales are identical persons who had drawn higher pay shall rank higher. If two such persons had been drawing pay at the same stage in the identical time scale of two different services their seniority on promotion shall be determined according to age.

5. Sub-para (ii) in terms refers to appointment and sub-para (iv) in terms refers to promotion-both from different sources. But a combined reading of the two, in context, makes it clear that the principle as laid down therein would govern cases of merger of different posts. It would make little difference whether it is a case of appointment or promotion to the post from different sources or different posts are merged. Where such appointment/promotion/merger takes place, the determining factor of seniority would be the pay drawn by the person. If he was drawing pay in the higher scale or drawing higher pay in the same scale, he would rank senior to the person who was drawing pay in the lower scale or lower pay in the same scale. To the same effect was the earlier circular of the Appointment Department (now known as Personnel Department) no. A-3650 dated 6.4.56. So far as relevant, it may be quoted as under,

(3) (a) Where no such order of merit is fixed, a person who had drawn higher pay or pay in a higher scale, shall rank senior to another who had drawn lesser pay, or pay in a lower scale.

(b) If persons belonging to different services having identical scales of pay are promoted to another service at the same time, a person who had drawn higher pay shall rank higher. If two such persons had been drawing pay at the same stage in the identical time scale of the two services, their seniority on promotion shall be fixed according to age.

The decision of this Court in Bihar State Text Book Publishing Corporation vs. Basudeo Singh (supra) is also to the same effect. The Court stated as under :

I hold that earlier date of initial appointment to lower grade/grades has got no nexus, for the purpose of determination of seniority in the higher grade, except where the date of entry in the higher grade is the same. It is for the said reason. I hold that the ratio laid down by the learned Single Judge that the date of initial appointment in the Corporation will be the criteria for determination of seniority as completely against the law, the same being violative of Articles 14 and 16 of the Constitution of India.

6. At this stage we may mention that though quite a number of private

respondents have entered appearance through counsel and filed counter affidavits, none of them except respondent no. 44 appeared at the time of hearing of the case. The State counsel also did not render any assistance to the Court whatsoever. He said that he did not have file of the case. All that counsel for respondent no. 44 said was that the appointment of the petitioner was ad hoc and not as per the prescribed procedure. We therefore, considered the case of the petitioner virtually ex parte. Regretfully, the submissions of the counsel for the petitioner too were rather sketchy. We looked into the counter affidavit of the State of Bihar and found that the same was filed in 1988 much before the finalisation of the revised gradation list of 1996. In the absence of proper assistance from the parties and their counsel we felt little handicapped. However, on the basis of what has been conveyed to us on behalf of the petitioner it appears that the petitioner at the time of merger held the post of Deputy Superintendent, Government Ayurvedic College and Hospital, Patna in the scale of Rs. 415-745. If it is a fact that the posts held by respondents concerned were in the scale of 249-460, they can not be treated to be senior to the petitioner merely on the ground that they were appointed earlier in point of time. It is well settled that in the absence of statutory rules, the criteria, procedure of appointment, promotion, seniority etc. can be laid down by executive instructions. Reference may be made to the well known case of Sant Ram Sharma Vs. State of Rajasthan and Another, . Viewed in the light of the circular dated 26.8.72 (supra), there appears little room for doubt that where the appointment or promotion is made from two sources or posts are merged, the person getting pay in the higher scale or higher pay in the same scale, must be treated as senior to his counter part getting pay in the lower scale or lower pay in the same scale. We would therefore, without going into individual cases, observe that if the case of the petitioner that at the time of merger he was getting pay in the higher scale than the respondents is true, he must be treated senior to them. In any view, the criterion laid down in paragraph 1 (Kha) of the impugned resolution dated 19.8.96 fixing seniority on the basis of the date of first joining i.e. date of entry in the service, must be held to be arbitrary and therefore, violative of Article 14 of the Constitution of India. To this extent, the impugned gradation list cannot be sustained.

7. We accordingly direct the State Government to re-fix the seniority of the petitioner vis-a-vis the respondents in the light of circular No. 15784 dated 26.8.72 and, further, in the light of the observations made hereinabove and consider the case of the petitioner and/or others for promotion to the higher post accordingly. In the result this writ petition is allowed in the manner indicated above, without any order as to costs.