

(1989) 04 PAT CK 0012
In the Patna High Court
Case No : C.W.J.C. No. 284 of 1987

Dr. Birendra Kumar Sinha and Others	Vs	APPELLANT
The State of Bihar and Others		RESPONDENT

Date of Decision : 24-04-1989

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 309

Citation : (1989) 37 BLJR 324 : (1989) PLJR 925

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

Bench : Single Bench

Final Decision : Allowed

Judgement

N.P. Singh, J.—This writ application has been filed on behalf of the petitioners for quashing the gradation list of the members of the Bihar Animal Husbandary Service Class II, which was notified by the State Government on 31-12-1986.

2. According to the petitioners they should have been placed above respondent Nos. 5 to 70 (hereinafter referred to as "the respondents") in the said gradation list. It may be pointed out that initially in Bihar Animal Husbandry Service Class II (hereinafter referred to as "the Service") there were two branches, senior and junior. The six petitioners were appointed to the Senior Branch of that service through process of direct recruitment, whereas respondent Nos. 5 to 70 who were in junior branch of service became members of the senior branch of the service by process of merger of the senior and junior branches of the service.

3. The Bihar Public Service Commission (hereinafter referred to as "the Commission") recommended the names of the petitioner Nos. 1 to 4 and 6 for appointments against the posts in the Senior Branch of Class II service between 24-8-1976 and 5-1-1977. So far petitioner No. 5 is concerned, his name was recommended by the Commission on 23-3-1978. On the basis of the aforesaid recommendations the petitioners were appointed in the Senior Branch of Class II service on the following dates:

Petitioner No. 1 ... 14-2-1977 Petitioner No. 2 ... 19 2-1977 Petitioner Nos. 3 and 6 ... 4-5-1977 Petitioner No. 4 ... 12-5-1977 Petitioner No. 5 ... 22-12-1978

4. As already stated above, so far the respondents are concerned, they became members of Senior Branch of class II service on the basis of merger. It may be pointed out that by a resolution dated 11-4-1977 the State Government, after having considered the question of stagnation indifferent services and for making available more promotional avenues, took a decision to merge the Junior Branch of Service with the Senior Branch of Bihar Agriculture Service, Bihar Animal Husbandry Service, Bihar Fishery Service, Bihar Co-operative Service, and certain other services mentioned therein. Such merger was to be effective with effect from 1-1-1977. In that very resolution it was specifically said that the different departments on the basis of that resolution and after prior approval from the Finance Department shall issue separate Government order in respect of the merger of the posts of Junior Branch and Senior Branch of different services mentioned therein As this part of the resolution has direct bearing on the controversy raised in the present application, it will be proper to reproduce the relevant part thereof, which is as follows:

* * * * *

According to the petitioners, pursuant to the aforesaid decision dated 11-4-1977, so far the Department of Animal Husbandry is concerned, a communication dated 29-7-1977, a copy whereof is Annexure 6, was issued 13 the Accountant General, Bihar, giving details of the posts in the Senior Branch and the Junior Branch of the Class II service, which were being merged, On 14-6-1978 a formal notification was issued giving the details of the posts in the Junior Branch and the Senior Branch of the Class II service, which were being merged. It may be pointed out that in this notification even the names of the members of the Junior Branch including the respondents were also mentioned. On 16-2-1982 a provisional gradation list of the officers of the Class II service was published in which the petitioners were shown above the respondents aforesaid. But, as already stated above, in the final gradation list they were placed below the respondents.

5. The stand of the petitioners is that as they entered in Senior Branch Class II service through direct recruitments prior to the respondents, they shall rank senior to them and it was not open to the respondent-State to give any notional seniority to such respondents on the basis of the decision of the merger aforesaid. As already mentioned above, in the merger decision it has been said that the merger of the Junior Branch and the Senior Branch of Class II service shall be effective from 1-1-1977. If this decision of the State Government is held to be valid, then it shall be deemed that the respondents have become the members of the Senior Branch of Class II service with effect from 1-1-1977 i.e., before the petitioners entered into the said service through direct recruitment. In that event, they shall rank senior to the petitioners and it has to be held that the final gradation list has been rightly prepared. But the question which has to be

answered is as to whether it was open to the State Government to affect the seniority of the petitioners, who had already entered into the Senior Branch of the service, by an administrative decision, the aforesaid resolution dated 11-4-1977.

6. Before I examine the question about giving notional seniority on the basis of the merger, it will be proper to decide as to since which date there has been actual merger of the Junior Branch and the Senior Branch of Class II service. According to the respondents, the merger of the two branches took place on 11-4-1977 with effect from 1-1-1977. Normally, there was no difficulty in accepting this contention because resolution dated 11-4-1977 says that the State Government had taken a decision to merge the Senior and the Junior Branches of different services including the Animal Husbandry with effect from 1-1-1977. But as already pointed out above, that very order also says that all concerned departments including the Animal Husbandry Department shall issue separate Government orders in respect of the merger of the posts in the Junior and the Senior Branches of the service. As such, it is not possible to hold that merger of the Junior Branch and the Senior Branch Class II service took place with effect from 11-4-1977 when that resolution itself said that for the purpose of merger of two branches of service the different departments shall issue separate Government orders. So far the department with which the petitioners and the respondents are concerned, it shall be deemed that such merger took place either with effect from 29-7-1977 when communication (Annexure 6) was issued or with effect from 14-6-1978 when a formal notification (Annexure 7) was issued giving the names of the respondents, who were members of the Junior Branch and whose services were being merged to the Senior Branch with effect from 1-1-1977. In my view, when it was specifically said in the resolution dated 11-4-1977 that a separate Government order has to be issued by different departments for merging the Junior Branch of service with the Senior Branch so far the Department of Animal Husbandry is concerned, that Government order shall be deemed to be the notification dated 14-6-1978 merging the Junior Branch with Senior Branch of Class II service.

7. Coming to the next question as to whether it was open to the State Government while issuing notification dated 14-6-1978 to say that the merger of the two branches of the service shall be effective from 1-1-1977 so as to affect the rights of persons including the petitioners 1 to 4 and 6, who had already entered into the Senior Branch of Class II service through direct recruitment, it needs deeper examination. It is well-known that it is open to the State Government to issue any order to give any benefit to its employee from a retrospective date. But this right is subject to a restriction that while bestowing any benefit to a class of employees from a retrospective date the right of others, who are members of that very service is not affected. This principle has to be applied even in cases where such benefits are made available through statutory provisions. As such, whenever a decision is taken to give benefit of seniority to a class of employees from retrospective date, then such decision must stand the

test of Articles 14 and 16 of the Constitution, that it is not affecting the persons, who are already in the service.

8. From time to time controversy has arisen in respect of fixation of seniority in the service between persons appointed by process of direct recruitments and by promotion. In the present case, the controversy has arisen because of the decision of the merger of the two branches of the same service by which the members of the Junior Branch have become members of the Senior Branch But, even in this process, members of Junior Branch while becoming members of the Senior Branch due to merger of two services cannot affect the seniority of the persons, who are already in the senior branch of service In order to resolve the claims of two groups of employees, the Supreme Court has pointed out that, normally, the date of entry in a particular service should be taken as the basis for fixing the seniority of persons entering in that service through different process. Reference in this connection may be made to the judgment of AIR 1977 251 (SC) , where it was observed:

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

In the case of Paramjit Singh v. Rakha Mal AIR 198 S SC 314 it was pointed out:

Ordinarily speaking, where recruitment is from two sources with a view to integrating recruits from both sources after the recruitment seniority is determined from the date of entry into the cadre except where there has been a substantial violation of the quota giving undeserved advantage to one or the other source. Seniority ordinarily speaking is determined with reference to the date of entry into the cadre which in service jurisprudence is styled the date of continuous efficiation.

The Supreme Court in the case of Ramendra Singh and Others Vs. Jagdish Prasad and Others, observed as follows:

In view of this clear authority, it cannot be argued for the appellants that they could be appointed with retrospective effect so as to affect the seniority of the respondents. The orders dated 18th August and 26th September, 1964 which purported to appoint the sub-overseers named therein as temporary overseers from the date of publication of their result of diploma examination are clearly violation of Articles 14 and 16 of the Constitution inasmuch as the petitioners had already been appointed as overseers by Selection Committee constituted under the rules contained in P.W.D. Code. The order of temporary appointment by the impugned orders dated 18th August and 26th September, 1964 conferred notional seniority on the contesting respondents for the period while they were actually working as sub-overseers in the lower scale outside the cadre of overseers. The High Court, in our opinion, was fully justified in allowing the writ petition in part.

The Supreme Court declared the rule invalid in the case of A.N. Pathak and Others Vs. Secretary to the Government, Ministry of Defence and Another, which purported to give notional seniority to the appointees by process of direct recruitments on the plea that there was inordinate delay in making direct recruitments. In that connection it was observed as follows:

The learned Counsel for the respondents found it difficult to justify the validity of rules and the lists in the light of the various decisions of this Court which have consistently leaned in favour of the promotees based on their length of service and seniority, in cases where there was inordinate delay in making direct recruitment. He tried to justify the inequity saying that the new rules have tried to rectify it. We are not satisfied with this explanation since that is little consolation to the petitioners.

It was impressed by the Supreme Court that for the purpose of determination of the seniority between the appointees from the different source the real tests should be the length of service. In other words, as to which group entered into the service first.

9. In the case of T.R. Kapur and Others Vs. State of Haryana and Others, the rule framed under Article 309 of the Constitution which purported to give retrospective benefits to one group of appointees, was held to be violative of Articles 14 and 16 of the Constitution and it was pointed out as follows:

...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.

The same question has been considered by a Bench of this Court in the case of Ram Swroop Das and Ors. v. The State of Bihar and Ors. 1989 PLJR 143. In view of the aforesaid judgments of the Supreme Court it is almost settled that the seniority and the right of persons, who have entered into service earlier cannot be jeopardised and ignored on a plea that but for the delay in the process of selection or in the implementation of the decision of merger the persons entering in the service later would have entered in the service earlier.

10. When any notional seniority given to one group of appointees over the other through Rules framed under Article 309 of the Constitution has been held to be ultra vires on the ground that it is violative of Articles 14 and 16 of the Constitution as it purports to affect the seniority of persons, which has been fixed with effect from the date of entry in the service, it is difficult to uphold any administrative decision of the State Government giving retrospective seniority to persons who entered in service later either through promotion or through process of merger

11. In the instant case, as I have already held that the merger of the Junior Branch and the Senior Branch of Class II service took place on the issuance of the aforesaid Government order dated 14-6-1978, since which date, the respondents, who were members of the Junior Branch of service, shall be deemed to have become members of the Senior Branch of service; by that time all the petitioners except petitioner No. 5 had already entered into Senior Branch of service, AS such, merely, on basis of the resolution dated 11-4-1977 saying that the merger will be with effect from 1-1-1977, shall not affect the seniority of the petitioners, who had already entered into the Senior Branch of Class II service. As such, there is no escape from conclusion that the respondents shall not rank senior to the petitioners 1 to 4 and 6 in the Senior Branch of class II service on the basis of the decision of merger. So far petitioner No. 5 is concerned, I have already pointed out that he was appointed on 22-12-1978. Prior to that, Government order dated 14-6-1978 had already been notified even mentioning the names of the respondents aforesaid. As such, the said petitioner No. 5 shall be deemed to have entered in senior branch of class II service after the respondents.

12. This writ application is allowed so far petitioner Nos. 1 to 4 and 6 are concerned, and I direct that they be treated senior to respondent Nos. 5 to 70, who have become members of the Senior Branch of Class II service on the basis of the Government notification dated 14-6-1978. Before I part with this judgment, it shall be proper to clarify that if any notional seniority has been given to the members of Junior Branch of Class II service, whose services were merged with the Senior branch of Class II service in the second or third phase, while fixing their seniority with reference to the petitioners or the respondents 5 to 70, the rule, of the date of entry in the service should be followed in the light of the judgment of the Supreme Court referred to above.