

(1968) 12 PAT CK 0021

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 4 of 1968

Gaya Prasad Pandey and Another

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 04-12-1968

Acts Referred:

Bihar Finance Service Rules, 1953 — Rule 39

Citation : AIR 1969 Patna 311 : (1969) 17 BLJR 293

Hon'ble Judges : S.C. Misra, C.J.;B.D. Singh, J

Bench : Division Bench

Advocate : Basudeo Prasad and Karuna Nidhan Keshava, for the Appellant; K.P. Verma, for the Respondent

Final Decision : Allowed

Judgement

B.D. Singh, J.—This application has been filed by the petitioners, namely, Sri Gaya Prasad Pandey, Assistant Superintendent of Commercial Taxes, and Sri Triloki Nath, Assistant Treasury Officer, for an appropriate writ and order, quashing the fixation of the seniority of the petitioners and respondents 2 to 21 as contained in the gradation list (Annexure F) and for a writ of mandamus directing the State of Bihar (respondent No. 1) to fix the seniority of the two petitioners in accordance with the provisions contained in Rule 39 of the Bihar Finance Service Rules, 1953 (hereinafter referred to as the Rules").

2. In order to appreciate the point involved in this application, it will be necessary to summarise the facts stated by the parties. According to the petitioners, they were appointed on the 2nd February, 1957, on probation to the junior branch of the Bihar Finance Service as a result of a competitive examination held in the month of December, 1955, in accordance with the rules in part II of the Rules. A copy of the notification dated the 2nd February, 1957, by which the petitioners were appointed has been annexed as Annexure A to their petition. They were confirmed to the post in the junior branch of the Bihar Finance Service by Government order contained in notification dated the 20th

June, 1960 (vide Annexure B). According to them, respondents 2 to 8 (who) were inspectors in the Commercial Taxes Department of the Government of Bihar were temporarily appointed to the junior branch of Bihar Finance Service by notification dated the 12th April, 1956 (see Annexure C). These respondents were subsequently promoted with effect from 16th September, 1960, to the junior branch of the Bihar Finance Service and they were put on probation by notification dated the 16th September, 1960 (vide Annexure D). Respondents 9 to 21 were ministerial officers of the Government, like respondents 2 to 8, and were promoted to the junior branch of the Bihar Finance Service and were placed on probation with effect from 16th September, 1960, by another notification of the same date (see Annexure E). The petitioners have stated that in 1963 they came to know about the fixation of their seniority in the junior branch of the Bihar Finance Service by the impugned gradation list (Annexure F).

3. The main grievance of the petitioners is that due to the fixation of the seniority in accordance with the said gradation list, respondents 2 to 8 were placed at serial numbers 43 to 49 and respondents 9 to 21 were placed at serial Nos. 50 to 62, whereas the petitioners 1 and 2 were placed at serial Nos. 72 and 65 respectively. Therefore, it is contended on behalf of the petitioners that although the petitioners were appointed substantively earlier than respondents 2 to 21, they were arbitrarily and illegally placed junior to respondents 2 to 21.

4. A counter-affidavit has been filed on behalf of State of Bihar and respondents 2 to 21, relevant portion of which is to be found in paragraph 4(j) of the counter-affidavit, which reads as follows:--

"(j) It is submitted that the appointments of the persons as direct recruits on the one hand, and those promoted on the other, against the vacancies decided to be filled in the year 1956 by the Governor under Rule 6 of the Rules, are deemed to be substantive appointments made "at the same time" within the meaning of the proviso to Rule 39 of the Rules, notwithstanding the different dates on which notifications of their appointment had to be issued by Government as in the instant case. It is further submitted that the expression "same time" has been wrongly equated by the petitioners with the expression "same date". If a bunch of vacancies are to be filled up and steps are taken to fill them all, but exigencies of procedure result in the finalisation of some of the appointments earlier and some later, all those appointments are in fact and law made at the same time, although on different dates."

5. Therefore, the main issue to be decided in this application is regarding the basis for fixing the seniority. The question at the bottom is, as I see it, one of true construction of Rule 39 of the Rules.

6. Mr. Basudeva Prasad, learned "counsel appearing on behalf of the petitioners, has contended that the petitioners were confirmed in 1960 with effect from 3rd February, 1959, whereas the respondents 2 to 8 were confirmed on the 16th September, 1960, and the respondents 9 to 21 were appointed by promotion on

the 16th September, 1960 and were confirmed on the 16th September, 1962. Therefore, he has urged that the petitioners were confirmed earlier and according to him the real test for fixing the seniority is the date of confirmation and he has relied on main provision of Rule 39 of the Rules which reads as follows:--

"39. Seniority -- Seniority of officers appointed to the Service shall be determined in accordance with the date of their substantive appointment to the service:

Provided that If more than one officer is substantively appointed at the same time -

(i) to either branch of the service by direct recruitment, their seniority inter se shall be determined by the order of preference assigned to them by the Public Service Commission in the list of their recommendations;

(ii) to the Senior branch of the service by promotion, their relative seniority shall be their order of seniority inter se in the Junior branch of the Service;

(iii) to the Junior branch of the Service by promotion, their seniority, inter se shall be determined by the order of preference assigned to them by the Public Service Commission, except that where more than one officer is promoted from the same service or Cadre, their seniority shall be determined by the order of their position inter se in the service or Cadre from which they are promoted; and

(iv) to either branch of the service both by direct recruitment and promotion, the officer promoted shall rank senior to the officer recruited direct."

7. Mr. Prasad has laid stress that the seniority shall be determined in accordance with the date of their substantive appointments. He has relied on a decision of the Supreme Court in Parshotam Lal Dhingra Vs. Union of India (UOI), where at page 42 in paragraph ,11 their Lordships have held:--

"The appointment of a Government servant to a permanent post may be substantive or on probation or on an officiating basis. A substantive appointment to a permanent post in public service confers normally on the servant so appointed a substantive right to the post and he becomes entitled to hold a "lien" on the post."

8. He has further contended that In the present case only the main provision of Rule 39 shall apply, because the language used in the said rule clearly indicates that the proviso is applicable only when more than one officer is substantively appointed at the same time. In other words, the proviso applies when two or more officers are appointed on the same date and if seniority has to be fixed between them. But in the instant case, the admitted case of the parties is that the petitioners were confirmed earlier than the respondents. Therefore, he has urged that the proviso to the said rule is not relevant in the present case.

9. On the other hand, Mr. Verma, learned Standing Counsel appearing on behalf

of the respondents, has urged that the phrase "more than one officer is substantively appointed at the same time" occurring in the proviso to Rule 39 does not mean officers appointed simultaneously or on the same date, but according to him, the phrase "at the same time" should be liberally construed and it includes appointments of officers made in close proximity and has submitted that the proviso to the rule will also be applicable in the instant case. He has relied upon proviso (iv) to the said rule, which provides that as between the direct recruitment and promoted officer, the latter shall rank senior to the officer recruited direct. Therefore, he has submitted that although the respondents 2 to 21 were confirmed to the post a few months later than the petitioners, the said respondents shall rank senior to the petitioners. He has, therefore, contended that the gradation list contained in Annexure F has been prepared according to the provision contained under the said rule. He has further argued that the expression "officers appointed at the same time" had all along been administratively interpreted to cover bunches of vacancies declared simultaneously, irrespective of the time taken in finalising the appointments, which almost invariably left a substantial gap between the dates of appointments of the direct recruits and the dates of appointment of promotees. In spite of the gap, they were deemed to have been appointed at the same time for the purpose of the application of the rule.

In view of this, Rule 39 must be deemed to have been made in that very sense. This will be illustrated from the fact that in the year 1951, six vacancies were declared to be filled up by direct recruitment and six were to be filled up by promotion, but though the appointments of direct recruits were notified in Government Notification No. 16448/BFS/103-49, dated 27-12-52 and those of the promotees were notified in Government Notification No. BFS-53/51-15972, dated 12-11-1953, the promotees ranked senior to the direct recruits. In brief, according to Mr. Verma, the basis for fixing the seniority is not the date of confirmation, but the occurrence of vacancy (vide paragraph 4(a) of the counter-affidavit of respondents 1 to 21). In this connection he has drawn our attention to rules 6 & 7 of the Rules. The former refers to the procedure regarding fixation of vacancies, whereas the latter refers to that of announcement of vacancies by the Commission.

10. In my opinion, Rules 6 and 7 are not relevant to the issue, nor they support in any way the argument advanced by Mr. Verma. The expression "at the same time", if we refer to Shorter Oxford English Dictionary, third edition, means "during the same period, at the same moment, not before or after." In my view, this is the correct meaning of the expression used in the said rule. This also appears to be the intention of the Rule making Authority. Had it not been so, in proviso (iv) they would have clearly mentioned that the officer promoted shall rank senior to the officers recruited, although substantively appointed on later date. Hence, I hold that the proviso is not applicable to the instant case. In unequivocal language it is clearly mentioned in the main provision contained in Rule 39 quoted above that the seniority of the officers appointed to the Service

shall be determined in accordance with the date of their substantive appointment to the service. The petitioners having been confirmed earlier, their seniority ought to have been fixed according to the date of their confirmation. I am not impressed with the contentions of Mr. Verma. The gradation list contained in Annexure F cannot be sustained. The seniority has been fixed contrary to the provisions under Rule 39.

11. In the result, I quash the gradation list contained in Annexure F, fixing the seniority of the petitioners vis-a-vis respondents 2 to 21 and direct the State Government to reconsider and fix their seniority according to the provisions embodied in the above rule, on the basis of the date of their confirmation. The application is allowed; but in the circumstances of the case, there will be no order as to costs.

Misra, C.J.

12. I agree.