

(1990) 12 PAT CK 0027
In the Patna High Court
Case No : C.W.J.C. No. 8102 of 1988

Jai Jaiyendra Kumar Singh and Others APPELLANT
Vs
The Bihar State Electricity Board and Others RESPONDENT

Date of Decision : 18-12-1990

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 309
Electricity (Supply) Act, 1948 — Section 79

Citation : (1991) 1 BLJR 653

Hon'ble Judges : N.P. Singh, Acting C.J.; Sachchidanand Jha, J

Bench : Division Bench

Final Decision : Allowed

Judgement

N.P. Singh, A.C.J.

1. This writ application has been filed on behalf of the petitioner for quashing a notification dated 8.10. 1988 passed by the Bihar State Electricity Board (hereinafter) referred to as "the Board") absorbing Sri Arjun Lal, respondent No.3, in the cadre of Deputy Director of Accounts of the Board with effect from 19.8.1983.

2. Petitioner Nos. 1 to 5 and 7 to 9 were promoted from the post of Accounts Officer to the post of Deputy Director of Accounts between 2.5.1986 and 18.3.1988. So far petitioner No. 6 is concerned, he was appointed as Deputy Director of Accounts by process of direct recruitment on 12.8.1986. According to the petitioners, the absorption of the respondent No. 3, from the cadre of Assistant Electrical Engineer (Selection Grade) to the cadre of Deputy Director of Accounts of the Board by the impugned notification is not only against the provisions of the Bihar State Electricity Board Regulations, 1976 (hereinafter referred to as "the Service Regulation) but also affects the seniority of these petitioners. In other words, as petitioners had entered into the cadre of Deputy Director of Accounts on different dates between 2.5.1986 and 18.3.1988, the said respondent No. 3 could not be absorbed on 8.10.1988 in that cadre with

effect from 19.8.1983 superseding the petitioners as Deputy Director of Accounts.

3. There is no dispute that the said respondent No. 3 was a member of the cadre of the Assistant Electrical Engineer of the Board. On 31.12.1980 an office order was issued by the Board, which is as follows:

Office Order No. II/Acctts-Apptt-109/80 5478/EB dated 31.12.1980. Shri Arjun Lal, Assistant Electrical Engineer (Planning) Board's headquarters, Patna, will remain incharge of the post of Deputy Director of Accounts (Planning) created vide office order No. 559 dated 1.2.1980, in addition to his own duties, until further orders.

By order of the Bihar State Electricity Board, (Sd) ILLEGIBLE 30.12.80 A.K. Choudhary Secretary

A copy of the aforesaid office order is Annexure-E to the counter-affidavit filed on behalf of the said respondent No. 3. The impugned notification dated 8.10.1988 is as follows:

In pursuance of the Board's Resolution--No. 6141 dated 5.10.1988, Sri Arjun Lal, a permanent Assistant Elecl. Engineer (Selection Grade) of the Board, who has been working as Deputy Director of Accounts (Plg) as the Board's Headquarters, Patna since 31.12.1980 is absorbed as Deputy Director of Accounts in the pay scale of Rs. 1700-70-2400 in the cadre of Deputy Director of Accounts of the Board with effect from 19th August, 1983.

By order of the Bidar State Electricity Board, (Sd) ILLEGIBLE 18.10.80. N.K. Pande Secretary.

4. The stand of the respondents is that although respondent No. 3 had been appointed as an Assistant Electrical Engineer, but as he had been working against the post of Deputy Director of Accounts since the issuance of the aforesaid office order dated 31.12.1980, it was though just and proper to absorb him in the cadre of Deputy Director of Accounts with effect from 19.8.1983.

5. It is always open to the appointing authority to decide the mode of recruitment to a particular service. The two well known modes of recruitment are by process of direct recruitment and promotion. But if any other procedure is adopted by an appointing authority, such procedure must fulfil the requirement of Articles 14 and 16 of the Constitution. It must be reasonable and should not affect the rights of others in the Service. Where the appointments are governed by the statutory rules or regulations, then the appointing authority has to follow the procedure prescribed by such rules and regulations. As the service Regulations referred to above have been framed under Sections 79(c) of the Electricity (Supply) Act, 1948, it should be considered as to whether under the said regulations it was permissible to absorb respondent No. 3 from the cadre of Assistant Electrical Engineer to the cadre of Deputy Director of Accounts by the impugned notification.

6. Regulation (sic) (ii) of Chapter I of the Service Regulations is as follows:

(ii) Except as otherwise provided or under these Regulations they shall apply to all employees appointed to any post in the Board or to any post under any of the establishments of the Board including the Area Boards and Generation-cum-Transmission Organisation:

Provided, however, that the Board may, by notification, exempt, any particular category or categories of employees from the application of these Regulations or may, by notification, prescribe different date or dates for the application of these Regulations to any category or categories of employees.

In view of the aforesaid statutory mandate the Service Regulations aforesaid are applicable to employees to be appointed to any post in the Board except otherwise provided. The expression "Cadre" has been defined in Regulations 2(ix) as follows:

(ix) "cadre" means employees grouped together for the purpose of common seniority, promotion and lien on certain posts.

Chapter II of the Regulations prescribes the procedure for recruitment to the service of the Board Regulation 4(i) of Chapter II says that "Recruitment to any service or cadre of the Board or any of the establishments including the Area Boards and Generation-cum-Transmission Organisation shall be in accordance with the rules/standing orders governing the relevant recruitment." The other part of Regulation 4 prescribes the procedure for constitution of a Selection Committee.

7. The learned Advocate General, who appeared for the Board, had to concede that respondent No. 3 has been recruited to the cadre of Deputy Director of Accounts either by process of direct recruitment or by promotion. According to him, respondent No. has been recruited to the cadre of Deputy Director of Accounts by process of absorption under Regulation 17 of Chapter III, Regulation 17 is as follows:

17. (i) In Board's interest the Board or the competent authority shall have an absolute right to transfer any employee at any time from one job to another for which in the Board's/competent authority's opinion the employee is suited, from one section or department to another and from one office of the Board to another office of the Board or any of its establishments including the Area Boards and Generation-cum-Transmission Organisation, situated in any part of Bihar or to the Board's offices in Calcutta or Delhi or any other offices that may be set up in future anywhere in India.

(ii) Area Boards and the Generation-cum-Transmission organisation shall have similar powers as laid down in Clause (i) above in respect of employees which are borne on their cadres or employees regarding whom power of transfer has been delegated to time:

Provided, however, that such transfers shall not involve any decrease in the substantive pay of employees and shall not affect their conditions of service adversely.

8. According to the respondents, the aforesaid Regulation 17 not only vests absolute power in the Board to transfer an employee of the Board from one job to another, from one department to other, but even to absorb the services of an employee from one cadre to another. Regulation 17 does not speak of absorption of an employee from one service to another. It only vests power in the Board or the competent authority to transfer an employee of the Board at any time from one job to another, from one section of the department to another and from one office of the Board to another office of the Board or to any other establishment. Regulation 17 occurs in Chapter III the heading whereof is "DUTIES AND OBLIGATIONS OF EMPLOYEES" Regulation 13, which is the first Regulation in that Chapter says that every employee must carry out the duty for which he has been employed or which has been entrusted to him in the course of the employment diligently and honestly. Regulation 14 says that such employees, who have been paid by the Board, should not engage themselves in any other work beyond the working hours except with previous permission of the competent authority. Regulation 15 enjoins every employee to be responsible for the cadre of the Board's property and Bank's interest. Regulation 16 lays down that every employee on arrival and at the time of departure each day shall record time of his arrival and departure in the manner as prescribed. Then comes the aforesaid Regulation 17 quoted above. Regulation 18 says that it shall not be open to an employee to refuse any work or duty, which a competent authority asks him to do and the last Regulation 19 in that Chapter requires an employee at all times to carry out all valid and legitimate orders of his superiors. Regulations 13 to 19, which occur in Chapter III, prescribe the duties and obligations of the employees. In this background, in my view, it is difficult to hold that Regulation 17, while vesting absolute right in the Board or the competent authority to transfer an employee at any time from one place to another, from one department to another department, also vests in the Board or the competent authority impliedly to transfer an employee from one cadre to another cadre for ever or to absorb the service of an employee of one cadre into another cadre. When the procedure for recruitment in the service of the Board has already been prescribed in Chapter II, it is not possible to hold that a procedure of recruitment by absorption has been prescribed under Regulation 17 in Chapter III.

9. It was then submitted that a respondent No. 3 had already been transferred from the post of Assistant Electrical Engineer to the post of Deputy Director of Accounts as early as on 31.12.1980 and he had worked on that post for the last several years satisfactorily, the Board had no option but to absorb him in the cadre of Deputy Director of Accounts. From a bare reference to aforesaid office order dated 31.12.1980 quoted above, it shall appear that the said respondent No. 3 had been directed to remain in charge of the post of Deputy Director of Accounts (Planning) in addition to his own duties until further orders. If an

employee of particular department or cadre, who has been posted under exigencies of the situation against a post in another service or cadre, is to be absorbed in that service or cadre merely because he has been working against that post it shall lead to a chaotic in many services, because by this process of absorption the seniority of the persons, who are already in the cadre, is bound to be affected which will be violative of Articles 14 and 16 of the Constitution. In the case of AIR 1977 251 (SC) , it was said:

(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.

Again in the case of Paramjit Singh Sandhu and Others Vs. Ram Rakha Mal and Others, 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 underserved 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 officiation.

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 selections committee constituted under the rules contained in P. W. D Code The order of temporary appointment by the impugned orders dated 18th August and 20th 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 overseer. The High Court in our opinion was fully justified in allowing the writ petition in part.

From a bare reference to the facts of the aforesaid case it shall appear that an attempt to appoint the appellants before the Supreme Court with retrospective effect, which affected the seniority of the respondents, who were already in the service, was held to be clearly violative of Articles 14 and 16 of the Constitution.

10. In yet another case of A.N. Pathak and Others Vs. Secretary to the Government, Ministry of Defence and Another, a rule framed giving national seniority to the appointees by process of direct recruitment on the pica that there

was an inordinate delay in making the direct recruitment was held to be invalid by the Supreme Court and in that context it was pointed out 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 consistency learned 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 the explanation since that is little consolation to the petitioner.

In the case of *T.R. Kapur and Others Vs. State of Haryana and Others*, the rule framed under Article 309 of the Constitution giving retrospective benefits to one group of appointees came up for consideration before the Supreme Court. That rule was held to be violative of Articles 14 and 16 of the Constitution and in that connection it was held 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.

Any attempt to give retrospective seniority to an entrant in a cadre even while trying to rectify any injustice or injury done to him has not found favour with the Courts because the seniority and the right of the persons, who, have entered into the service earlier cannot be jeopardised and ignored on the plea that but for the process of selection having not been delayed the persons entering in the service later would have entered into the service earlier.

11. Same is the position in the present case. By the impugned notification dated 8.10.1988 the absorption of respondent No. 3 in the cadre of Deputy Director of Accounts with a retrospective date i.e. from 19th August, 1983 is said to have been made on the ground that he was working on that post since December, 1980. In other words, according to the Board the appointment of respondent No. 3 from a retrospective date amounts to recognition of the services of the said respondent as Deputy Director of Accounts. In view of the judgments of the Supreme Court, referred to above, it is not permissible. In the case of *A.N. Pathak v. Secy. to the Govt. Ministry of Defence* (supra) Supreme Court rejected the jurisdiction that retrospective seniority was being given to appointees by process of direct recruitment because there had been inordinate delay in making direct recruitment and because of that a rule had been framed to rectify the injustice done to such appointees. Any attempt to confer seniority to an entrant in service from a retrospective date even by a statutory rule including rules framed under Article 309 of the Constitution has been held to be violative of

Articles 14 and 16 of the Constitution, I do not understand as to how the Board by an order could have absorbed respondent No. 3 in the cadre of Deputy Director of Accounts, with a retrospective date affecting the seniority of the petitioners, who had entered in the cadre of Deputy Director of Accounts before the date of the issuance of the impugned notification.

12. On behalf of the respondents it was urged that by aforesaid office order dated 31.12.1980 respondent No. 3 should be deemed to have been appointed as Deputy Director of Accounts on ad hoc basis, thereafter, taking into consideration his continuous officiation by the impugned notification dated 8.10.1988 he could have been absorbed in the cadre of Deputy Director of Accounts. Reference in this connection was made to the judgment of the Supreme Court in the case of *The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others*, . It is difficult to accept this contention. From a bare reference to office order dated 31.12.1980 it shall appear that respondent No. 3 was directed to "remain incharge of the post of Deputy Director of Accounts (Planning) created vide office order No 55), dated 1.2.1980, in addition to his own duties, until further orders". In my view, this order cannot be read to mean that the said respondent had been appointed on ad hoc officiating basis against the post of Deputy Director of Accounts so that later by the impugned notification it shall be deemed that he has been confirmed against that post with retrospective date.

13. Reference on behalf of respondent No. 3 was also made to a judgment of the Supreme Court in the case of *State of Andhra Pradesh and Another Vs. V. Sadanandam and Others*, . In that case the scope of Rule 3 of Andhra Pradesh Treasury and Accounts Subordinate Service Rules, 1963, and Andhra Pradesh Public Employment (Organisation of Local Cadres and Regulation of Direct Recruitment) Order, 1975, issued by the President of India under Clauses (1) and (2) of Article 371-D of the Constitution was under consideration by the Supreme Court. The Rule 3 aforesaid as well as the provisions of the Presidential Order provided for transfer of an employee from one cadre to another. In the Presidential order it has been provided that persons so transferred shall be assigned seniority in the latter cadre with reference to date of his transfer to that cadre. The process of filling up the posts by transfer was challenged. In that context it was observed:

We need only point out that the mode of recruitment and the category from which the recruitment to a service should be made are all matters which are exclusively within the domain of the executive. It is not for judicial bodies to sit in judgment over the wisdom of the executive in choosing the mode of recruitment or the categories from which the recruitment should be made as they are matters of policy decision falling exclusively within the purview of the executive. As already stated, the question of filling up of posts by persons belonging to other local categories or zones is a matter of administrative necessity and exigency. When the Rules provide for such transfers being effected

and when the transfers are not assailed on the ground of arbitrariness of discrimination, the policy of transfer adopted by the Government cannot be struck down by Tribunals or court of Law.

In my view, the aforesaid judgment is of no help to the respondents. In the aforesaid case recruitment by transfer had been made under Presidential order, issued under Clauses (1) and (12) of Article 371-D of the Constitution which specifically provided that such transferred employees shall be assigned seniority with effect from the date of transfer. There is no provision in the Regulation for transfer of an employee from one cadre to another. Even if there was any such Regulation such transfer could not have been effected with a retrospective date so as to affect the seniority of others.

14. Reliance was placed on behalf of respondent No. 3 on a Full Bench judgment of the Punjab and Haryana High Court in the case of Kartar Singh and others Vs. State of Punjab and others, . In that case also by a rule framed, retrenched employees were to be absorbed in a Department. The validity whereof was questioned. In that connection it was observed as follows:

Absorption thus has the effect of sucking and imbibing into that is originally existing, on absorption thus an employee becomes part and parcel of the department absorbing him & partakes the same colour and character of the existing employee of the department, classified as promotees, direct appointees or transferees on the loss of his identity. If this is understood in this perspective, there is no difficulty in assigning the absorbees seniority in accordance with seniority Rs. 15. Nothing more need be added.

This case is also distinguishable in view of the fact that absorption of retrenched employees had been made under statutory rule without affecting the seniority of persons already in the service.

15. Accordingly, it is held that it was not open to the Board under the existing, Regulations to absorb respondent No. 3 in the cadre of Deputy Director of Accounts and in any case from a retrospective date so as to affect the seniority of these petitioners, who had entered into the cadre of Deputy Director of Accounts admittedly before 1.10.1988 when the impugned notification was issued.

16. This writ application is, accordingly, allowed. The impugned notification dated 8.10.1988 is quashed. But in the circumstances of the case, there will be no order as to costs.

Sachchidanand, Jha, J.

17. I agree.