

(1982) 08 PAT CK 0005

In the Patna High Court

Case No : C.W.J.C. No's. 1786, 1787 of 1969 with C.W.J.C. No. 623 of 1970
with C.W.J.C. No. 1043 of 1978

Kamta Prasad Sinha and Others

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 16-08-1982

Acts Referred:

Citation : (1983) 31 BLJR 25 : (1983) PLJR 61

Hon'ble Judges : S. Sarwar Ali, Acting C.J.;U.C. Sharma, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

S. Sarwar Ali, Actg. C.J.

1. These four writ applications have been heard together and are being disposed of by a common judgment.

2. In C.W.J.C. No. 1787 of 1969 the petitioner has prayed for quashing of Annexures 21 and 22 and fixing the seniority of the petitioner in accordance with law. Annexure 21 is the gradation list of permanent Assistant Engineers of Public Health Engineer Department. Annexure 22 is the communication rejecting the representation of the petitioner in relation to his seniority. During the pendency of the writ application a prayer has been made that the petitioner may be declared as senior and placed next to Respondent No. 6 (S. Narayan) in the rank of Executive Engineer as well as in the rank of Superintending Engineer. It is prayed that respondents 1 and 2 be directed to consider the case of the petitioner for promotion in the rank of Additional Chief Engineer treating him to be senior to Respondent No. 10 (R.R.B.P, Sinha).

3. C.W.J.C.1786/69 is an application by Kamta Prasad Sinha in which he has prayed for quashing of Annexure 4" to the writ petition which is the final inter-seniority list of Assistant Engineers (being the same as Annexure 21 to C.W.J.C. 1787/69). It is further prayed that the seniority of the petitioner be fixed in

accordance with law.

4. C.W.J.C. 1043/78 is also another writ petition by Kamta Prasad Sinha (who is Respondent No. 25 in C.W.J.C. 1787/69) praying that the petitioner should be treated as senior to Respondents No. 3 and 4 (R.R.B.P. Sinha and N. Das) in the rank of Executive Engineer irrespective of their seniority in the cadre of Assistant Engineers.

5. C.W.J.C. 623/70 is the petition on behalf of Prayag Prasad Sahu (who is Respondent No. 23 in C.W.J.C. 1787/69). In this writ application he has prayed for quashing of Annexure 1 being the gradation list of permanent Assistant Engineers of Public Health Engineering Department as it stood on 1.11.1969. The claim of the petitioner is that his seniority as Assistant Engineer must be reckoned from the date of his initial appointment (11.5.1955) and that he should be placed above N. Das in the aforesaid gradation list.

6. A number of counter-affidavits and replies thereto have been filed in the writ application but in the view that I am taking it would not be necessary to refer to them in detail.

7. A chart giving the necessary particulars in relation to the appointment and confirmation in the rank of Assistant Engineer and Executive Engineer is given below.

Name	Date of appointment as Assistant Engineer	Date of confirmation as Assistant Engineer	Date of promotion as Executive Engineer	Date of confirmation as Executive Engineer
L.U.C. Sinha	19.8.52	27.12.61	9.7.62/6.1.64	19.7.78
R.R.B.P. Sinha	16.4.55	1.6.59	1967	20.2.1973
N. Das	24.1.56	1.6.59	10.2.67	19.7.78
S.M.I. Warsi	23.12.56	1.6.59	1.2.67	Not confirmed
B.K. Maintin	24.1.56	1.6.59	4.2.67	Not confirmed
B. Guha	31.12.56	1.6.59	1967	19.7.78
Raghunandan Singh	23.12.55	1.6.59	6.2.67	19.7.78
S.K. Singh	31.12.55	1.6.59	13.2.67	19.7.78
S.P. Misra	24.1.56	1.6.59	14.2.67	19.7.78
N.P.R. Vithal	12.1.56	1.6.59	Deputation	Not confirmed
R.Prasad	16.7.55	2.1.60	11.2.67	19.7.78
P.P.Sahu	11.5.55	2.1.60	10.2.67	19.7.78
K.P. Sinha	1.3.52	25.7.62	19.12.63	19.7.78

It may be stated that by Annexure 25 all the aforesaid persons except R.R.B.P. Sinha have been promoted as Superintending Engineer on ad hoc basis for six months. We were informed that they are still continuing as Superintending Engineer,

8. It would be seen that so far as promotion to the post of Executive Engineer is concerned, Lala Umesh Chandra Prasad Sinha claims promotion in 1962-64. K.P. Sinha claims promotion from 19.12.1963. The other promotions have taken place in the year 1967 (except for N.P.R. Mittal who was on deputation and continues as such). So far as confirmation as Executive Engineer is concerned, the three petitioners and all the other respondents except one, have been confirmed on 19.7.1978. It is only R.R.B.P. Sinha, who has been confirmed on 20.2.1973 with

effect from 1.10.1968, Thus, it will be seen that except for R.R.B.P. Sinha whose case stands on a different footing, it is the date of substantive appointment as Executive Engineer which is determinative of seniority in the grade of Executive Engineer.

9. When an officer is promoted to a higher rank it is the seniority in that rank which is ordinarily material. Only when two or more officers are promoted at the same time they carry their seniority in the lower grade. In the circumstances of the present case it would be necessary to examine the position even in the rank of Assistant Engineers.

10. It is not in dispute that the petitioners in the four writ cases were appointed earlier than the contesting respondent-Engineers. Yet in order to determine whether their appointments were substantive or not, the relevant facts in relation to their appointment will have to be examined. It will also have to be decided whether the appointment from the dates, as mentioned in the third column of the chart, was substantive. But before examining this question, the legal position may be explained. This Court had occasion to consider the question when an appointment could be said to be substantive in a recent Full Bench decision of this Court in the case of Bishundeo Mahto v. State 1982 B.B.C.J. 45. It was held as follows:

It has next to be considered when a person can be said to be appointed or promoted substantively. In view of the decision in Parshotam Lal Dhingra Vs. Union of India (UOI), , it is clear that the question whether a person holds a post substantively is not dependent on whether he held a temporary or a permanent post. Appointment to a temporary or a permanent post. Appointment to a temporary post can also be substantive.

The question when a person can be said to have been appointed substantively has been considered by the Supreme Court recently in Baleshwar Dass and Others Vs. State of Uttar Pradesh and Others, . In this case the relevant rule under consideration stated that seniority in the service shall be determined according to the date of the order of appointment to the service. Rule 3(6) defined "Member of Service" to mean a Government servant appointed in a substantive capacity under the provisions of these rules to post in the cadre of the service. In this situation, the question as to what was meant by appointment in a substantive capacity was considered. Note was taken of Rule 17 which provided that "all persons appointed to the service who are not already in the permanent employment of the Irrigation Department shall be placed on probation for four years" (later reduced to two years). It was observed that in this situation the temporary appointees on completion of their probation and fulfillment of other conditions become members of the service and must be deemed to be appointed in a substantive capacity. In this context it was observed

Substantive capacity refers to the capacity in which a person holds the post and not necessarily to the nature or character of the post. To approximate to the

official decision used in this connection we may well say that a person is said to hold a post in a substantive capacity when he holds it for an indefinite period especially of long duration in contradiction to a person who holds it for a definite or temporary period or holds it on probation subject to confirmation.

At another place (Paragraph 26) it was explained that where appointments are made to a temporary post but after fulfillment of all the test for regular appointments including consultation with the Public Service Commission, there was no reason to hold that such appointments are not in a substantive capacity.

In view of the decision in Baleshwar Dos's case it can safely be said that (a) regular method of appointment after fulfillment of all the tests for regular appointments including consultation with the Public Service Commission, and (b) long duration for which the post is held are two important indicia for coming to the conclusion that the appointment is in a substantive capacity. The terms of appointment are also relevant but not conclusive. Other relevant factor, like the service rule in question or whether the appointment, was on probation which has been completed, have also to be taken in account. It is only after taking into consideration all the relevant factors that a firm decision can be arrived at. As was pointed out by the Supreme Court in *Municipal Corporation of Delhi Vs. Ram Sarup*, :

In order therefore to determine the nature of appointment we have to look into the heart and substance of the matter, the surrounding circumstances, the mode, the manner and the terms of appointment and other relevant factors.

11. I now take up the cases of the petitioners individually. The recommendation in relation to the appointment of Lala Umesh Chandra Sinha (petitioner in C.W.J.C. No. 1787 of 19691 is contained in Annexure "A" to the counter-affidavit of the State (in this and subsequent paragraphs reference to annexures shall be made from C.W.J.C. 1787/69, unless otherwise stated"). In Paragraph 12 the Commission recommended the names of six persons as being suitable for appointment as Assistant Engineers in the Public Health Engineer Department. In relation to this petitioner and one B.N. Das, the Commission opined:

Birendra Narain Das, No. 5 above, and Mr. Lala Umesh Chandra Sinha, No. 6 above, have been failures in the Public Works Department. They are recommended for Public Health Engineering Department for trial.

Annexure B to the counter-affidavit of the State is a copy of the memorandum prepared for the Council of Ministers. In relation to the aforesaid two persons it is stated:

They may be tried in this Department as recommended by the Commission.

The appointment in question was temporary and until further orders and was liable to be terminated without notice. It is also clear from the counter-affidavit of the State that the first reference to the Public Service Commission (the "Commission") in relation to the confirmation of petitioner L.U.C. Sinha along

with those of others was made by a letter dated 29.9.58. The Commission forwarded its recommendation under Annexure D dated 9.1.59. The subject matter of the letter, as mentioned therein, is "Substantive appointment of Assistant Engineers in Class II of Public Health Engineering Service." The Commission recommended the names of those whom it thought suitable for substantive appointment. The petitioner was not one of them. Thus, he was not found fit when the first reference was made to the Commission, Those who were found fit on the basis of the recommendation made by the Commission were appointed substantively under Annexure E dated 1.6.59. The second reference was made by a letter dated 14.7.59. Here also the name of the petitioner was included amongst those recommended for substantive appointment. But the Commission did not find the petitioner fit and recommended the names of six persons for substantive appointment. It was only when the third reference was made that the petitioner was found fit for confirmation. Accordingly the petitioner was confirmed with effect from 27.12.1961. It would thus be seen that the appointment of the petitioner was on a trial basis. On two earlier occasions he was not found fit for substantive appointment (confirmation) by the Commission. It was only on 27.12.61 that he was found fit and confirmed. In view of the position of law, as explained above, I am of the opinion that the petitioner cannot claim that he was substantively appointed on 19.8.52, being the date of his initial appointment on trial basis. The substantive appointment must, therefore, be reckoned, in the circumstances of the present case, from 27.12.61.

12. So far as Kamta Prasad Sinha (petitioner in C.W.J.C. 176/69) is concerned, his case is inferior to that of L.U.C. Sinha as he was not found fit even on the third reference and was found fit only when a reference was made to the Commission for the fourth time. Consequently he must be held to have been substantively appointed (confirmed) on 25.7.62.

13. Prayag Prasad Sahu, petitioner in C.W.J.C. 623/70, was appointed as Assistant Engineer on temporary basis on 11.5.55. Reference in his case as in the case of the two petitioners, as indicated above, was made to the Commission in the year 1959. He was not found fit for confirmation then. It was only on 2.1.1960 that he having been found fit for substantive appointment by the Commission was so appointed with effect from 2.1.1960. It would thus be seen that neither this petitioner nor the two petitioners in C.W.J.C. 1787/69 and C.W.J.C. 1786/69 can be reckoned senior to those substantively appointed earlier than the petitioners and who were confirmed in the year 1959.

14. I shall now consider the position so far as appointment as Executive Engineer, is concerned. The appointment of L.U.C. Sinha was first made as temporary Executive Engineer on 9.7.62. After a break in the said appointment, he was again appointed on temporary basis on 6.1.64. Kamta Prasad Sinha was appointed Executive Engineer on temporary basis on 19.12.63. The circumstances under which the aforesaid appointment took place have to be considered. It appears that some posts of Executive Engineer fell vacant.

Reference was made to the Public Service Commission inviting its recommendation. The opinion of the Commission was in relation to 16 officers which includes Kamta Prasad Sinha, Lala Umesh Chandra Sinha, R.R.B.P. Sinha, Rameshwar Prasad, P.P. Sahu.N. Das and S.M.I. War No reference was made nor opinion thought for in relation to the other officers as mentioned in the chart given in Paragraph 7 of the judgment. This was because the department was then proceeding on the basis of the old gradation list of Assistant Engineers of the year 1964. The seniority in this gradation list was reckoned with reference to the date of the initial appointment and not substantive appointment. Had the department proceeded on the basis of the substantive appointment, gradation list whereof was prepared in 1969, a reference should have been made in relation to the officers who were substantively appointed earlier than the petitioners in the four writ applications. The Commission did not recommend the names of Kamta Prasad Sinha for temporary appointment as Executive Engineer but recommended the other names which I have mentioned above. All this will be clear from a perusal of Annexure 12 which is a memorandum dated 30.12.1961. It would thus be clear that any temporary appointment made on the basis of the recommendation of the Public Service Commission, in view of the circumstances, as stated above, could not be deemed to be substantive appointment because of the continuance of temporary appointees on the basis of the said recommendation of the Commission, It has been stated in Paragraph 2(k) of the counter-affidavit of the State (in C.W.J.C. 1787/1969) that the gradation list of permanent Assistant Engineers in the Public Health Engineering Department was not ready till 1965 and that the proposal for promotion was made by the Public Health Engineering Department based on the gradation list of temporary Assistant Engineers prepared in 1960. The fixation of seniority of permanent Assistant Engineers was referred to the Appointment Department, but, in the meantime, some posts of Executive Engineers fell vacant. Pending the decision by the Appointment Department, proposals for promotion were made in 1960 according to the seniority list of temporary Assistant Engineers The Public Service Commission was not aware then that the recommendation was based on the list of temporary Assistant Engineers. This came to the notice of the Commission in the year 1965. In the letter of the Commission dated 30.9.65, which is Annexure "I" to the counter-affidavit of the State, it has been stated as follows:

Government in the year 1960 sent a proposal of Assistant Engineers for promotion to the rank of Executive Engineers contained in their letter No. 2150, dated the 12-7-1960. This proposal of Government was based on the gradation list of temporary Assistant Engineers The result was that Commission concurred in the officiating promotion of Shri B.N. Das as Executive Engineer when as many as 10 permanent Assistant Engineers were senior to him. Similarly, in the year 1963 Government obtained the concurrence of the Commission in respect of promotion of Sarbshri K.P. Sinha and L.U.C. Sinha in the rank of Executive Engineer. These two officers were confirmed in the rank of Assistant Engineer

with effect from 25-7-1962 and 27-12-1961 respectively. There were as many as 14 senior officers who were confirmed earlier than these two officers. The cases of these 14 senior officers could not be considered for promotion along with Shri K.P. Sinha and Shri L.U.C. Sinha because the proposal of Government was based on the gradation list of temporary Assistant Engineers. Had the correct gradation list of permanent Assistant Engineers been sent to the Commission at that time, this irregularity would not have occurred.

It would thus appear that all eligible persons not having been considered by the Commission, the temporary appointment of the two petitioners K.P. Sinha and L.U.C. Sinha on the basis of the recommendation of the Commission cannot be deemed to be substantive appointment in the eye of law. The petitioner in C.W.J.C. 1787/1969 cannot, therefore, claim his seniority on the basis of the gradation list of Assistant Engineers of the year 1960, nor on the basis of his temporary promotion as Executive Engineer in the year 1962 or 1964.

15. The case of Kamata Prasad Sinha petitioner in C.W.J.C. 17P6/69 and C.W.J.C. 1043/78) is similar to that of Lala Umesh Chandra Sinha. Relevant facts in relation to him also have been stated in the preceding paragraph. When K.P. Sinha was temporarily promoted on the basis of the recommendation, all eligible persons were not considered by the Commission. Temporary appointment in such a situation cannot be treated as substantive. Substantive appointment as Engineer of these petitioners and the respondent Engineers must be reckoned from the date of their valid confirmation as Executive Engineer. Those who were confirmed at the same time would carry their seniority in the next lower grade of Assistant Engineers.

16. The petitioners are claiming seniority over R.R.B.P. Sinha. It has already been held that none of the petitioners can be reckoned to be senior to R.R.B.P. Sinha in the grade of Assistant Engineer. So far as their promotion as Executive Engineer is concerned, it has already been noticed that the promotion of L.U.C. Sinha as also K.P. Sinha was without considering the case of R.R.B.P. Sinha, who was senior to both of them as Assistant Engineer. The said promotion cannot, therefore, be reckoned to be substantive. Apart from the fact that R.R.B.P. Sinha was recommended under annexure 12 even under Annexure "23" a number of officers were found suitable for promotion to the rank of Assistant Engineer, R.R.B.P. Sinha was placed higher than P. P. Sahu. It has already been held in Bishnudeo Mahto's case that a person should not lose seniority because of administrative lapses on the part of authorities having power to promote. The mistake occurred, as already discussed, in not appointing R.R.B.P. Sinha on the basis of the recommendation in Annexure 12. The State Government has confirmed R.R.B.P. Sinha with effect from 1-10-1968 by a notification dated 20-2-1973. The mistake appears to have been corrected. The said mistake or administrative lapses cannot be permitted to act to the prejudice of R.R.B.P. Sinha, without deciding whether 1-10-1968 would be the correct date of confirmation or not, it is clear that his confirmation from the date earlier than the

date of confirmation of the petitioners is perfectly valid. As Executive Engineer he should be treated to be senior to the three petitioners. Their claim for seniority over R.R.B.P. Sinha in the cadre of Executive Engineers cannot, therefore, be accepted.

17. Reference was made to the several rulings, but in the view that I have taken, it is not necessary to refer to them.

18. For the reasons discussed above, none of the petitioners can get the reliefs they have claimed in their respective writ applications.

19. In the result, all the four writ applications are dismissed but without Costs.