

(2001) 02 PAT CK 0067

In the Patna High Court

Case No : C.W.J.C. No's. 12828, 13127, 13128, 13241, 13251, 13303 to 13306, 1316, 13364, 13452, 13474-75, 13570-72, 13661 and 13664 of 2000 and 17, 41, 131-33, 136, 226, 281, 288, 290, 293-94, 296, 298, 332, 357, 399, 412-14, 442, 468, 472, 530, 570, 575, 590 and

Mohd. Sirajuddin and Others

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 08-02-2001

Acts Referred:

Census Act, 1948 — Section 18, 4

Citation : (2001) 1 BLJR 689 : (2001) 2 PLJR 594

Hon'ble Judges : Sachchidanand Jha, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Sachchidanand Jha, J.—The petitioners in each of these cases are aggrieved by their repatriation from the Rural Development Department, to be precise, from the post of Block Development Officer to the Agriculture Department, which is their parent department vide notification No. 9839 dated 27.11.2000 of the Rural Development Department. The grievance and the controversy being the same the cases have been heard together and are disposed of by this common order.

2. The facts of the case may be mentioned from the record of C.W.J.C. No. 13661/2000 which has been argued as the representative case. The case of the petitioners is that scale of the post of Agriculture Inspector/Agriculture Graduates was revised from Rs. 850-1,360 to Rs. 1,000-1,820 upon upgradation of the 1423 posts of Bihar Subordinate Agriculture Service and merger in the Bihar Agriculture Service Class II. They were allowed the replacement scale of Rs. 2,200-4,000 pursuant to the recommendation of the 5th Pay Revision Committee. The same scale was allowed to the Deputy Collectors in the Bihar Administrative Service. The scale was later reduced to Rs. 2,000-3,800. The Bihar Agriculture Graduates Service Association filed C.W.J.C. No. 767/91

challenging the decision of the State Government, which was dismissed. The Supreme Court on appeal set aside the order of the State Government in Civil Appeal No. 4602/92 on 12.5.1993 which, according to the petitioners, amounted to restoration of the scale of Rs. 2,200-4,000. The Supreme Court, however, had given liberty to the Government to issue show-cause notice to the employees concerned and then take fresh decision. On 16.9.1993, the Government issued an order allowing the scale of Rs. 2,200-4,000 but the same was recalled on 6.12.1993. The Association again moved this Court in C.W.J.C. No. 12050/93 in which on 16.12.1993 an interim order was passed directing that the petitioners shall meanwhile be paid the salary which were being paid to them before issuance of the impugned order until further orders. The writ petition was eventually dismissed by a learned Single Judge on 10.1.1997. In LPA No. 166/97 however while admitting the appeal against the said order, the Division Bench passed similar interim order. By virtue of the said interim orders the petitioners have been getting their pay in the then existing scale of Rs. 2,200-4,000 (now Rs. 6,500-10,500) till date. The same scale being admissible to the Deputy Collectors, the petitioners must be held to be equivalent in rank and status to the Deputy Collectors and therefore, the order of repatriation on the ground that they are not eligible for the appointment as Executive Officer u/s 58(1) of the Bihar Panchayat Raj Act, 1993 (in short "Panchayat Act") is not legal.

It is also said that occasion for appointment of Executive Officer under the Panchayat Act would arise after the panchayat elections are held and Panchayat Samitis are constituted, since even the elections have not been held so far, the ground that the petitioners are not qualified for appointment as Executive Officer does not exist. Alternatively, it is said that the process for holding elections under the Panchayat Act has already commenced and the repatriation of the petitioners at this stage is likely to jeopardize the election process. As a matter of fact, it is submitted, the very shifting in the garb of repatriation is for extraneous purposes- to bring pliable and convenient officers of choice on the post of Returning Officer to help the powers-that-be in the ensuing elections. Another ground on which the petitioners seek interference with the impugned order is that having been appointed as Charge Officer u/s 4(2) of the Census Act, 1940 read with Rule 3 of the Census Rules, 1990 vide notification No. 244 dated 20.4.2000 of the Revenue and Land Reforms Department, they cannot be transferred at a stage when the census operation has actually commenced in the form of enumeration of the population, in view of the circular of the Director-cum-Principal Chief Census Officer (Census Operations) Bihar vide his letter No. 11015/2/2000-545 (CTU) dated 18.12.2000.

3. Two counter-affidavits have been filed-one on behalf of the Rural Development Department and the other on behalf of the Agriculture Department. The substance of the affidavit filed on behalf of the Rural Development Department is that u/s 58(1) of the Panchayat Act an officer not below the rank of Deputy Collector alone can be appointed as Executive Officer of the Panchayat Samiti, and since the Block Development Officer (BDO) has been notified as the Officer

to function as Executive Officer of the Panchayat Samiti, in order to avoid any legal complication, such of the BDOs who are holding the post on deputation from the Agriculture Department and are not in the pay scale of Rs. 6,500-10,500, which is the scale of Deputy Collectors, have been repatriated to the parent department. The petitioners who are Agriculture Inspectors/Graduates in the Scale of Rs. 5,000-8,000 have thus rightly been repatriated to their parent department/post.

4. In the affidavit filed on behalf of the Agriculture Department, it has been stated that on the recommendation of the 5th Pay Revision Committee replacement scale of Rs. 2,200-4,000 was provided for Class II posts in the recognized State Services carrying the erstwhile scale of Rs. 1,000-1,820 vide resolution No. 6021 dated 18.12.1989. For other Class II posts also carrying the scale of Rs. 1,000-1,820 sub replacement scale of Rs. 2,000-3,800 was provided. However, in the meantime, the posts in question in Bihar Sub-ordinate Agriculture Service Category I were included in Schedule I of the Bihar Agriculture Service Act, 1982 under Notification No. 6915 dated 23.6.1995. Though such merger was without the approval of the Finance Department and therefore, the persons concerned were not entitled to pay in the replacement scale of Rs. 2,200-4,000, they got their pay fixed in that scale as members of Class II Agriculture Service. When the mistake came to the notice of the Government, after due consideration, vide Finance Department's letter No. 314 dated 22.1.1991, the Government fixed their pay scale to be Rs. 2,000-3,800. Thereafter, on 8.2.1991 vide resolution No. 1495 deleted the posts in question from the Schedule of the Bihar Agriculture Services Act. The petitioners being members of the Bihar Agriculture Subordinate Service are thus entitled to scale of Rs. 2,000-3,800 (now Rs. 5,000-8,000). It has been further stated that the petitioners being Agriculture Inspectors in the Bihar State Subordinate Agriculture Service and thus permanent employees of the Agriculture Department they have no right to remain in the Rural Development Department.

5. It may be observed at the outset that a person holding any post on deputation has no right to hold that post and he can at any time be repatriated to the parent post/cadre/department. No argument to the contrary, in fact, has been made on behalf of the petitioners in these cases. The submission of the Counsel for the petitioners is that as the repatriation is for a reason which is non est the order should be held to be arbitrary and illegal. It is urged that if foundation of the decision/order goes the whole structure would go with it and therefore, the reason being non est the order must be stuck down. The reason, as noticed above, is that Section 58(1) of the Panchayat Act provides for appointment of an Executive Officer not below the rank of Deputy Collector and as the pay scale of the BDOs drawn from the Bihar Agriculture Service is less than that of Deputy Collector the Government has decided to repatriate them to the parent department, i.e., the Agriculture Department in order to avoid any dispute or legal complication in that regard.

6. Section 58(1) of the Panchayat Act runs as under:

The Government shall appoint an officer not below the rank of Deputy Collector to be Executive Officer of the Panchayat Samiti.

At the stage of hearing of the case, on behalf of the State, learned Addl. Advocate-General produced copy of the notification No. 6887 dated 23.12.1993 of the Rural Development Department (Panchayati Raj Directorate) declaring all BDOs, not below the rank of Deputy Collector, as the Executive Officers in the light of the provisions of Section 58(1) of the Panchayat Act. It is thus clear that all BDOs. of the respective Blocks have been appointed ex officio Executive Officer provided they are not below the rank of Deputy Collector-which is in consonance with the express bar/provision contained in Section 58(1) of the Panchayat Act.

7. It would not be out of place to mention here that the post of Block Development Officer in the State of Bihar is presently manned by both Deputy Collectors drawn from the Bihar Administrative Service as well as the Agriculture Officer/Inspectors drawn from the Bihar Agriculture Subordinate Service.

8. The only ground or reason for which the petitioners are sought to be repatriated from the present post is that the post substantively held by them is not equivalent to Deputy Collector's post. The pay scale admissible to the post is undoubtedly a relevant consideration for deciding the question of equivalence. In fact, it has been said so in express words in the impugned order that it is because the pay scale of the petitioners is less than that of the Deputy Collector that they are being repatriated. This therefore, is the core issue in this case. Nevertheless I do not wish to go into and decide that issue. In fairness to the Counsel for the petitioners, it must be said that after making submissions in this regard, they also very fairly agreed that the issue has to be decided in LPA No. 166/97, and it may not be proper to decide the same collaterally in these cases which arise from the repatriation orders. However, even though I do not wish to decide entitlement of the petitioners regarding scale, I must observe that the only basis of their claim of equivalence at this stage is that they are getting their pay in the same scale which is admissible to Deputy Collector, i.e., Rs. 6,500-10,500 corresponding to the erstwhile scale of Rs. 2,200-4,000 but that is so by virtue of interim orders of this Court. Though at one stage, in the writ petition also interim order was passed, the same was finally vacated and the writ petition was dismissed, as seen above. The Division Bench merely continued the interim order passed by the Single Judge. From perusal of the judgment of the Single Judge in C.W.J.C. No. 12050/93, it would, in fact, appear that learned Judge was of the view that finding and the decision of the Division Bench in the earlier writ petition namely, C.W.J.C. No. 767/91 on the point of entitlement of Agriculture Inspectors to the scale of Rs. 2,200-4,000 was not set aside by the Supreme Court. What was set aside was the order of the State Government dated 8.2.1991 by which posts were deleted from the schedule of the Bihar Agriculture Service Act. The Supreme Court set aside that order on the ground of

violation of rules of natural justice without interfering with the earlier order dated 22.1.1991 by which the Finance Department had clarified that Agriculture inspectors were entitled to the scale of Rs. 2,000-3,800, or decision of Division Bench on the point.

9. It would thus appear that as of date there is no adjudication either by the State Government or by this Court or by the Supreme Court in favour of the petitioners, it is wrong to say, as suggested in the writ petitions and argued by the Counsel, that while setting aside the order of the State Government dated 8.2.1991, the Supreme Court restored the scale of Rs. 2,200-4,000 to the Agriculture Inspectors. As pointed out by the Agriculture Department in its counter-affidavit, the issuance of pay slip in the scale of Rs. 2,200-4,000 was result of confusion on account of creation of two replacement scales- Rs. 2,000-3,800 and Rs. 2,200-4,000 - for the then existing scale of Rs. 1,000-1,820 pursuant to the recommendations of the 5th Pay Revision Committee which was rectified no sooner than the mistake came to the notice of the Government by the Finance Department vide resolution dated 22.1.1991. The order dated 16.9.1993 (supra) relied upon by the petitioners is of no avail to them. The entitlement of the Agriculture Inspectors being under examination pursuant to the direction of the Supreme Court in Civil Appeal No. 4602 of 1992 in the light of show cause filed by them, there was no occasion for issuing any order holding them entitled to the scale of Rs. 2,200-4,000. A detailed decision upon consideration of the issues involved and in the light of the above direction of the Supreme Court, was communicated on 11.11.1993 on the basis of which, rightly, if I may say so, said order dated 16.9.1993 was recalled. The writ petition challenging the said decision dated 11.11.1993, i.e., CW.J.C. No. 12050/93 having already been dismissed on merit, the petitioners cannot legitimately contend that they are in the scale of Rs. 2,200-4,000, now Rs. 6,500-10,500 which is the scale of the Deputy Collector. The interim orders-passed by the Division Bench in LPA No. 166/97 merely entitles them to receive their pay in that scale, but that cannot be interpreted as verdict of the Court on the point of entitlement. It would not be out of place to mention in this connection the stand of the respondents that even after their repatriation to their parent post/cadre, the petitioners will continue to get their salary in the scale of Rs. 6,500-10,500 pursuant to the above interim order of this Court till decision of the LPA.

10. It is true that the Panchayat Samitis have not been constituted and, in fact, elections have not been held under the Panchayat Act but this does not mean that the Government is precluded from, or should desist from, making suitable appointment on the post the holders of which are to function as Executive Officers. The submission that as the stage has not reached for appointment of Executive Officer, the impugned order of repatriation should be held to be premature has-no substance.

11. However, even though I do not find any error in the impugned decision of the State Government regarding repatriation, in my opinion, there are at least two

reasons for which the impugned orders should not be allowed to take effect for the present. By the aforesaid letter dated 18.12.2000, the Director, Census Operations Bihar has issued direction in terms of Rule 12 of the Census Rules, 1990 not to transfer the Charge Officers mentioned therein from their present Office in view of commencement of the process of enumeration, and in cases where such orders have been issued by mistake, to obtain his prior approval before relieving those officers. Rule 12 of the Census Rules framed u/s 18(1) of the Census Act empowers all the Census Commissioners and the Director of Census Operations to issue from time to time general or special instructions directions to the Principal Census Officer and other Census Officers appointed under the Act, as may be necessary for the efficient conduct and timely completion of the census operations. As a matter of fact, the-Chief Secretary, Government of Bihar has also issued instructions vide letter No. 48/Ra dated 13.1.2001 not to transfer officers connected with the census operation works till 31.3.2001.

12. Secondly, the elections under the Panchayat Acts are also round the corner. Though technically the election process has not commenced as the notification has not been issued, for all practical purpose's the process has begun as the election schedule has been announced. The shifting of the BDOs at this stage may disrupt the process. Thus, allowing the petitioners on the post of BDOs, for the present, is likely to serve twin purposes. It will be conducive to the census operation as well as conduct of Panchayat elections which are likely to be finished by April next. It will also amount to compliance of the statutory direction of the Director. Census Operations. The Chief Secretary, Government of Bihar has already stayed transfers till 31.3.2001. I am of the opinion that the Government should consider allowing the petitioners to continue on the present post of BDOs till such as the Panchayat elections are over.

13. In this connection, a doubt arose in course of hearing as to whether the petitioners are competent to hold the election by reason of provision of Section 30 of the Panchayat Election Rules, 1995. Rule 30 runs as under:

Nirwachi Padadhikah Ki Niyukti--Rajya Nirwachan Ayog Ya Uske Dwara Adhikrit Kiye Jane Par Zila Nirwachan Padadhikari Panchayat Me Nirwachan Ke Nimit Nirwachi Padadhikari Niyukt Kar Sakega Jo Prakhand Vikash Padadhikari/ Anchaladhikari/Up-Samaharta Se Anyun Astar Ka Ho.

From a bare perusal of the above rule, it is manifest that the posts mentioned therein, namely BDO/Anchal Adhikari/Deputy Collector have to be read as "either/or". Judicial notice can be taken to the fact that the Anchal Adhikaris are officers of the rank of Deputy Collector. Therefore, mention of both Anchal Adhikari and Deputy Collector suggests that not only a Deputy Collector posted not only as Anchal Adhikari but on any other post is competent to function as Returning Officer. Since the rule also mentions the post of BDO without any rider or qualification affixed, as the one contained in Section 58(1), I do not think, notwithstanding the dispute about the scale of the petitioners, they are

incompetent to function as Returning Officer under Rule 30 of the Rules.

14. In the result, these writ petitions are dismissed but subject to observations and directions mentioned in paragraphs 11 and 12. There will be no order as to costs.