

(2010) 11 PAT CK 0077

In the Patna High Court

Case No : LPA Nos. 595 and 592 of 2007

Prakash Ranjan Kumar and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 16-11-2010

Acts Referred:

Citation : (2010) 11 PAT CK 0077

Judgement

Shiva Kirti Singh, J.—Both the Letters Patent Appeals arise out of a common judgment dated 31.5.2007 passed by a learned Single Judge of this Court whereby two writ petitions preferred by similarly situated persons working in Bihar Education Service (BES) as per recommendation by the Bihar Public Service Commission on the basis of 31st Combined Competitive Examination, have been dismissed. The writ Petitioners had challenged the inclusion of 87 private Respondents by way of adjustment in BES as well as grant of seniority to them above the Petitioners on the ground that the Respondents concerned had been recommended by the Bihar Public Service Commission albeit for a different service on the basis of 30th Combined Competitive Examination. For different reasons names of 5 private Respondents stand deleted.

2. Initially the writ petitions filed in the year 1996 were confined to a challenge to two notifications of September, 1996 by which five persons working in the Adult Education Scheme were adjusted in the BES. Subsequently, by an order dated 17.7.1997 those five Respondents were granted seniority above the 31st batch. Thereafter, on 13.1.1999 further 82 officers from the 30th batch were merged in the BES and 87 posts were created for adjustment of all the 87 persons. The seniority of 82 officers who were Respondents was dependant upon the outcome of the writ petition bearing CWJC No. 12348/ 1996 which has also been dismissed by the impugned order under appeal. The subsequent orders relating to encadrement of further 82 officers in BES and grant of seniority to them above the officers of 31st batch were also challenged by the Petitioners who are Appellants herein. Learned Single Judge considered the relevant facts, the objections to encadrement based mainly upon the provisions in the BES

(Class-I) and BES (Class-II) Recruitment Rules, 1973 (hereinafter referred to as the Rules) made under the proviso to Article 309 of Constitution of India. Learned Single Judge held that the rules provided only for entry into statutory cadre through direct appointment or promotion but did not debar amalgamation of non-cadre posts with cadre posts and the Government was well within its powers to create further posts in the cadre by such amalgamation which is a procedure well known to service jurisprudence having approval in catena of judgments which were discussed by the learned Single Judge in detail. Accordingly, it was held that it was permissible to transfer holder of a non-cadre post to cadre post and such transfer will not fall in the category of recruitment and amalgamation also is no recruitment understood under the Rules. The challenge to adjustment of the respondents in the statutory cadre under BES was, thus, repelled on the ground that the statutory rules are silent as regards transfer or amalgamation and hence, such powers could be exercised by the Executive. On analyzing the admitted facts, the learned Single Judge held that in the present case the adjustment of 87 persons in the BES had been effected by combining amalgamation and transfer. Admittedly, posts held by them were transferred and amalgamated to the posts in BES as per normal course and thereafter five private Respondents were transferred to such permanent posts. The transfer of remaining 82 Respondents had remained incomplete due to order of status quo passed in the writ petition but in the final order the learned Single Judge found no legal impediment in transferring the remaining 82 Respondents to the posts in the BES. Learned Single Judge did not find any allegation of mala fide so as to affect the validity of the impugned actions and allowed seniority to the Respondents mainly on the ground that "those 87 persons were appointed to permanent posts in the Government prior to the date of appointment of the first appointee of the 31st Combined Competitive Examination". Hence, it was held that all the 87 Respondents will have seniority above Petitioners as per their merit inter se in the 30th Combined Competitive Examination.

3. Before considering the various submissions advanced by the parties, it would be useful to take note of the relevant facts in brief. Advertisement for the 30th Combined Competitive Examination was issued in the year 1981. The vacancies indicated for different services show only six vacancies in the BES. On 11.7.1984, 201 candidates on the basis of marks and preference, which could be exercised till the stage of interview, were recommended for appointment to the post of Block Employment Officers/Assistant Employment Officers. In the advertisement this post was at serial No. 8 with pay scale of Rs. 455-840/- whereas seven other posts above this post which included posts in BES were in the pay scale of Rs. 510-1155/-. It is not in dispute that later on the pay scales for both services became common and same. Six posts available for BES were filled up in September, 1984. The posts of Block Employment Officers were abolished after the examination was held and that created obstacles in appointment of 201 candidates recommended for such posts. Since some candidates had obtained higher marks in their category as compared to those who were appointed in

other services, they approached this Court through writ petitions and Government decided, in principle, to appoint those candidates who had secured higher marks than the cut-off mark of 584. For accommodating such recommendees, vacancies were searched in other departments. Keeping in view the rules, marks and the reservation policy three persons including one Hasan Waris were appointed in the BES on 15.11.1985. For the remaining candidates the State Cabinet after considering the relevant facts, on 4th September, 1985 decided to appoint 59 candidates on different posts in different services. These included three already appointed in the BES. The Education Department on request disclosed 40 vacancies in Adult Education Scheme for the post of Project Officers. Subsequently, for one reason or the other the State Government decided to find out further posts in the Adult Education Scheme by sending back officers working on deputation and against such posts the remaining recommendees were also to be appointed on the post of Project Officers or the equivalent posts w.e.f. 1.3.1986 but were to be posted after imparting training till 31.3.1986. Annexure-5 to the writ petition dated 12.1.1986 contains a condition that such appointees had to sign an agreement accepting the appointment on the post offered to them otherwise their claim for appointment would stand extinguished.

4. Till March 1986 the Respondents continued to work in the Adult Education Scheme. As posts in the scheme were not permanent and there was threat to their continuance in service and for other perks and privileges, such appointees filed writ petitions and thereafter contempt petitions to claim appointment in regular service in the State. This Court passed orders in such matters in favour of such appointees and on account of such orders and contempt proceedings the Government ultimately decided to create 87 posts for the Respondents in the BES cadre and to this effect notification was issued on 13.1.1999. Since five Respondents had already been posted on the cadre post of BES on 9.8.1987, they came to occupy the permanent posts made available by creation of 87 posts but the adjustment of remaining 82 persons remained stayed under interim order of status quo until by the order under appeal the writ petitions were dismissed.

5. The main submissions on behalf of the Appellants are twofold. Firstly, the filling up of posts in the statutory cadre of BES by adjustment/transfer of the Respondents has been challenged mainly on the ground that such a mode of recruitment is not permitted under the Rules and secondly even if the entry be treated as valid, it should count towards service only from the date of substantive appointment on a permanent post as per Rule 7 of the Rules. According to Rule 7 the seniority of officers appointed to the Service shall be determined in accordance with the date of their substantive appointment to the Service and the date of substantive appointment will be the date on which the officer is appointed on probation in accordance with Rule 5 which in turn provides for placing every officer appointed or promoted in a substantive vacancy of Class-II or Class-I post, first on probation which is of two years.

6. On behalf of Respondents, it has been argued that the learned Single Judge has correctly appreciated the legal and factual position and has rightly held that other modes such as by amalgamation and transfer are permissible for filling up of statutory posts and in such a case the normal rules of recruitment shall have no play. It was further submitted that no provision in the Rule or any other law curtails the power of the Government to create posts by amalgamation and filling up those posts by transfer of the incumbent officers who held those posts. The same case laws as were considered by learned Single Judge were placed before us. On considering the rival submissions and the relevant case laws which are discussed in detail by learned Single Judge, we find no scope to take a different view so far as the issue of adjustment or transfer of services of the Respondents to the cadre post in BES is concerned. We also come to the same conclusion and finding as the learned Single Judge and hence, the first challenge of the Appellants/writ Petitioners that the Respondents could not have been absorbed in the 87 posts created in the cadre of BES is found to be without any substance.

7. So far as issue of seniority is concerned, it has rightly been submitted on behalf of the Appellants that this issue has not been fully discussed and considered by the learned Single Judge. It was further submitted that even if ordinary rules of recruitment and seniority are given a go-bye, the principles of service jurisprudence and reasonableness will have to be observed by the State and no seniority can be artificially conferred upon the Respondents unless it is shown that they have earned such seniority on account of their past service, and that past service was of the nature which is permissible to be counted as permanent service held in a substantive capacity.

8. A careful perusal of the judgment under appeal discloses that even while considering the relevant judgments, the matter was not considered from the perspective of the dispute regarding seniority which was addressed only in the concluding paragraph by discussing that "inasmuch as, admittedly, each of those 87 persons was appointed to permanent posts in the Government prior to the date of appointment of the first appointee of the 31st Combined Competitive Examination, it goes without saying that those 87 persons will have their seniority above that person...." In course of arguments on behalf of the Appellants it was pointed out that the Respondents were appointed in March, 1986 on temporary posts under the Adult Education Scheme whereas the Appellants or some of them on the basis of result of the 31st Combined Competitive Examination and recommendation by the Bihar Public Service Commission got appointment in BES on 27.1.1986. Hence, even according to well established principle of length of substantive appointment the Appellants should be held senior to the Respondents, who according to Appellants continued in the Adult Education Scheme on temporary posts till permanent posts were created for them in BES on 13.1.1999. According to Appellants the substantive vacancy for the Respondents could arise only on 13.1.1999 and, therefore, the Respondents must rank below the Appellants in seniority.

9. On the other hand, learned Counsel for the private Respondents strenuously submitted that injustice was caused to the Respondents by depriving them of substantive appointment although they were successful in 30th Combined Competitive Examination. The action of the State in cancelling the vacancies for which they were recommended should not cause loss of seniority to the Respondents and past service rendered by them in Adult Education having been brought finally in same pay scale and having similar responsibility, should not be ignored for the purpose of reckoning seniority.

10. At this stage, the various judgments cited on behalf of the Appellants to support their claim for seniority need to be considered.

11. In Union of India (UOI) through Chandigarh Administration (U.T.), Chandigarh and Another Vs. Sh. S.K. Sharma, Professor of Civil Engineering Punjab Engineering College, Chandigarh, general rule was highlighted that seniority was to be reckoned from the date of regular appointment and not from the date of ad hoc/officiating appointment even if during such appointment the pay of the regular post was granted.

12. In the case of Dev Raj Gupta Vs. State of Punjab and Others, the Appellant was originally appointed as a Clerk in another department in 1967 where he continued till 1976. He applied for another post of Clerk in another department and on being selected got appointed on 4.1.1977. His plea for counting the length of service rendered in the earlier department for the purpose of seniority was rejected by the Apex Court in view of provisions in the relevant rules which provided that the seniority inter se of the members of the services in the concerned department shall be determined by the dates of their continuous appointment in the service. In view of such statutory provisions in the Service Rules the benefit of past service was not permissible for computing seniority.

13. In the case of Maharashtra State Electricity Board v. Rama Rajaramji Wadekar (2002)X SCC 254 the term "cadre" was defined under the concerned regulations and seniority of some Engineers was determined circle-wise as each circle constituted a cadre. The transfer of the Respondents from one circle to other was, therefore, held to be ex cadre transfer which was made on the request of the employees and hence, as per the regulations, the seniority could not be determined on the basis of their continuous length of service but only on the basis of date of entry into the other cadre.

14. In the case of Kulwant Kumar Sood v. State of H.P. (2005)10 SCC 670 there was integration of cadres. The Apex Court while considering the claim of an employee for seniority in the unified cadre from the date of entry in his original cadre held that seniority had to be determined on the basis of principles in the rules for recruitment or as per administrative policy operative in the filed.

15. On behalf of the Appellants reliance was also placed upon judgment of the Apex Court in the case of Joyachan M. Sebastian Vs. Director General and Others, That was a case of abolition of posts and thereafter fresh entry in a

vacancy available in a different region. The absorption in the post available in another region was made on request and hence, it was held that the affected employee would not be entitled to the benefit of continuance in service for the purpose of seniority.

16. In the case of V.K. Dubey and Others Vs. Union of India (UOI) and Others, the drivers and the staff working with Diesel Locomotive Sector were absorbed after giving necessary training, in the trains operating on electricity on account of gradual displacement of diesel engines. On such shifting to a new cadre they were found not entitled to seniority over the staff regularly working on the electrical side.

17. In the case of Surendra Singh Beniwal Vs. Hukam Singh and Others, the regulations provided that a teacher seeking voluntary transfer on his own request from one education institution to the other shall be placed at the bottom of the seniority list of the teachers serving in the same cadre and category in the transferred institution. The Apex Court directed for determination of seniority in accordance with such regulations. However, while interpreting another provision in the regulations, it was held that the past service rendered in the previous educational institution shall count for other purpose like pensionary benefits etc.

18. On behalf of the Appellants, some other judgments were also cited in support of well accepted principle of seniority that usually seniority is counted from date of entry into a cadre and if an employee was not a regular employee in a cadre, on regularization his seniority will be counted from the date of regularization. But it is not in dispute that in the present case the private Respondents have not entered the cadre of BES in the manner provided under the statutory rules but by the methodology of creation of posts for them specially and by transferring their services on such posts. It is, thus, not a case of usual recruitment, rather, it is a case of entry into another cadre by transfer for which although there was no request in the usual terms but the demand of the private Respondents was always for their absorption/appointment in a regular service in the State having same pay scale etc. to which they would have been entitled if the 201 posts against which some others and the private Respondents have been recommended, had not been abolished. The private Respondents got the desired entry into regular service in the cadre of BES on account of their success in several litigations. Hence, it cannot be a clear case of transfer to another service on request. It was being claimed as a right for which they had to litigate. It may appear as equivalent to a transfer of service on request but in fact it was on account of judicial interference. Had it been a usual case of transfer of service on request, the private Respondents would not be entitled to counting their earlier service for the purpose of seniority. The issue-- whether the transfer of service in the present case should be accepted and treated as transfer on request or transfer made by the State Government for its own convenience and due to judicial orders is significant for the purpose of seniority.

19. On behalf of private Respondents, it was strongly contended that they were

granted and were getting same pay scale as admissible to the members of service belonging to the cadre of BES and had been adjusted in the Adult Education Scheme because of their recommendation for appointment pursuant to result of the 30th Combined Competitive Examination, therefore, there could be no justification or reason to deny benefit of their past service for the purpose of seniority. Rather, in case of such denial action of the State would have been arbitrary and violative of Article 14 of Constitution of India. Their further submission is that the posts in the Adult Education Scheme may be temporary but the Government had taken a policy decision to appoint them on permanent basis and they were given the admissible pay had they been appointed in the regular service under the State. Further, State had to concede these benefits due to judicial orders. On behalf of private Respondents several judgments of the Apex Court have been relied upon in support of their claim for seniority over the 31st and subsequent batches appointed prior to them in the regular cadre of BES.

20. In *The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others*, there was a contest over seniority between direct recruits and promotees belonging to same service. It was not a case of transfer from one service to another on request or on merger. In the facts of that case, it was held that if the initial appointment was not on account of fortuitous circumstances and the appointee continued in the office till regularization of his service in accordance with rules, the period of officiating service will be counted towards seniority. Those appointed in excess of quota due to non-implementation of quota for a number of years could not be pushed down below the appointees of later dates. The Respondents have pointed out that even if their services under the Adult Education is treated to be a period of continuous officiation which has been followed by appointment made in accordance with law for regular substantive appointment in the service, their past service cannot be ignored for the purpose of seniority.

21. In the case of *Tej Narain Tiwary Vs. State of Bihar and Others*, it was held that benefit of past service is admissible when an employee is compulsorily transferred to a new post or when an ex cadre post is amalgamated with cadre post. On facts, it was held in that case that the Appellant was transferred either due to abolition of previous post or by compulsory transfer.

22. In the case of *S.P. Shivprasad Pipal Vs. Union of India and Others*, the challenge was to constitution of a new service by merging three cadres existing from before in the Ministry of Labour, Union of India by framing Central Labour Services Rules, 1997 in exercise of powers under proviso to Article 309 of Constitution of India. The Apex Court held that power of judicial review was very limited in such matters because the merger/integration of cadres is essentially a matter of policy. If the relevant facts are taken into consideration while effecting the merger and if seniority is also determined on equitable considerations, there was no valid ground for judicial interference even if chances of promotion are adversely affected due to merger/integration of cadre. According to the

Respondents, ignoring their past service would be inequitable and, therefore, impugned decisions relating to seniority need not be interfered with.

23. The case of Ramesh K. Sharma and Another Vs. Rajasthan Civil Services and Others, appears quite relevant. The Appellants were the direct recruits to the post of Commercial Tax Inspector governed by rules framed under the proviso to Article 309 of Constitution of India. The private Respondents were appointed in the Land and Building Tax Department pursuant to an advertisement issued for appointment of trainee Inspectors under a special scheme for providing employment to educated unemployed. The appointment was after a regular selection by a duly constituted committee. Such trainees were initially on probation on the temporary post of 2nd Class Inspector. After probation period the private Respondents were appointed on temporary basis w.e.f. 1.3.1994 whereas Appellants were selected by the Rajasthan Public Service Commission under the Recruitment Rules of 1975 and were appointed as Commercial Tax Inspector Grade-II on probation by order dated 19.12.1977. Some of the Appellants were appointed on 28.7.1977 under Special Recruitment Rules of 1976 and all were made permanent in their post w.e.f. 1.3.1980. In the Urban Building and Land Tax Department the private Respondents were made permanent w.e.f. 27.2.1981 on account of 61 temporary posts having been made permanent from that date. Subsequently, the private Respondents were declared as surplus and in the Land and Building Tax Department and their services stood terminated. Some of these surplus employees were absorbed in the Commercial Tax Department as Commercial Tax Inspectors Grade-II by order dated 17.6.1982. Some were absorbed in Cooperative Department but on representation they were subsequently absorbed in the Commercial Tax Department. The private Respondents succeeded in getting their past service counted w.e.f. 1.3.1974 for the purpose of seniority and such decision was challenged before the Supreme Court by the Appellants. The Supreme Court explained that if the post itself is created only for a limited period and appointment is made by stop gap basis and not through any process of selection then such an appointment is not on substantive basis. But if the appointment is by process of selection and not ad hoc or purely stop gap or fortuitous then it may amount to appointment on substantive basis even if the post was earlier temporary and made permanent subsequently. On facts, in the aforesaid case it was found that the Respondents had held equivalent post in the Land and Building Tax Department on substantive basis w.e.f. 1.3.1974 because the posts were subsequently made permanent and also the incumbents. Hence, it was held that the continuous substantive service from 1.3.1974 will be reckoned for the purpose of seniority.

24. In the present case, the facts disclose that the private Respondents were subsequently given substantive appointment with equivalent salary and thereafter they have been absorbed in the cadre of BES. It is also evident that they were selected for appointment through a competitive examination and were actually appointed on the basis of their performance in the examination. Hence,

on the basis of aforesaid judgment in the case of Ramesh K. Sharma (supra) it must be held that the private Respondents are entitled to due seniority by counting of their past service with effect from the date they were appointed in the Adult Education Scheme sometime in March, 1986. The decision to this effect by the authorities is found to be fair and in accordance with Article 14 of the Constitution. Hence, it requires no interference. The issue of seniority is settled accordingly.

25. On behalf of the Appellants, it has been submitted on the basis of averments in paragraph (XXI) that the officers selected on the basis of 31st Combined Competitive Examination were appointed in January, 1986 whereas the private Respondents have been appointed with effect from 1.3.1986. If that be correct then such appointees from the 31st Combined Competitive Examination who were appointed prior to 1.3.1986 will rank senior to the private Respondents even after counting their past continuous service prior to their adjustment/absorption in the cadre of BES.

26. The task of looking into the date of appointment of officers selected on the basis of 31st Combined Competitive Examination is entrusted to the concerned official Respondents because the date of their appointment claimed to be in January, 1986 does not find mention in the pleadings of the parties either before the learned Single Judge or in the order under appeal.

27. With this clarification and modification in the order under appeal, the appeals are disposed of. No order as to costs.

Birendra Pd. Verma, J.

I agree.