
(1980) 09 PAT CK 0001
In the Patna High Court
Case No : C.W.J.C. No. 1487 of 1980

Satyadeo Singh and Others	Vs	APPELLANT
The State of Bihar and Others		RESPONDENT

Date of Decision : 19-09-1980

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 162, 226, 227

Citation : (1981) PLJR 515

Hon'ble Judges : S. Sarwar Ali, J;S. Narain, J

Bench : Division Bench

Advocate : S. Mukherji, S.J. Mukherji and Shivendra Kishore, for the Appellant;
T. Dayal and Ajiteswar Prasad, for the Respondent

Final Decision : Dismissed

Judgement

S. Narain, J.—In this application under Articles 226 and 227 of the Constitution, the petitioners pray for issuing a writ in the nature of mandamus, quashing the order dated 8.5.1980, copy whereof is Annexure 1 to the writ application, of the Director of Consolidation (respondent no. 2) by which the petitioners have been reverted from the post of Chak Inspector-cum-Survey Inspector to the post of Amin due to their failure to pass a practical test for determination of suitability for appointment as Chak Inspector cum Survey Inspector held on the 7th to 9th of December, 19(sic). The relevant facts are these: (a) In November, 1977 petitioner nos. 1 to 6 were Amins and petitioner no. 7 was a draftsman serving in the Department of Consolidation under the Director of Consolidation (respondent no. 2). That petitioner no. 1 was also an Amin at that time is not contradicted by the letter, copy whereof is Annexure 3 to the writ application. By that letter of the Deputy Director of Consolidation, the petitioner had been merely permitted to draw pay in the scale of pay admissible to the Chak Inspector cum-Survey Inspector (hereinafter referred to as "the Chak Inspector") because he was previously appointed as Amin on temporary post which had been abolished. In November 1977 a decision was taken at the meeting attended by the Director of

Consolidation and the various Deputy Directors of Consolidation, that the newly created temporary posts of 132 Chak Inspectors should be filled up by promotion from the rank of Amins or draftsmen. One of the decisions arrived at in the said meeting was that the minimum educational qualification for promotion to the aforesaid posts of Chak Inspectors would be the passing of the Matriculation Examination and experience as Amin for a minimum period of five years, which in certain circumstances, should be reduced to four years. In pursuance of that decision, the petitioners were appointed to the posts of Chak Inspectors by various letters in January, 1978. Copies of appointment letters of the petitioners except petitioner no. 4, are Annexures 7 to 10 to this writ application. All those promotions were temporary. The promotions of petitioners nos. 1, 2, 3 and 5 were described as temporary (vide Annexures 7 and 9) whereas the promotions of petitioner nos. 6 and 7 were described as adhoc (vide Annexures 8 and 10).

(b) It has been stated in the counter affidavit filed on behalf of respondent no. 2 Director of Consolidation, and the fact has not been seriously disputed and the same must be taken as accepted, that subsequently the State Government took the following policy decision about the recruitment of Chak Inspector:--

(a) All posts of Chak Inspectors shall be filled up by promotion of Chakbandi Amins only.

(b) A combined gradation list of all eligible Amins will be prepared and they will be asked to appear in a practical test to assess their capability and suitability for the post of Chak Inspectors and promotion will be made from the list of successful Amins according to seniority.

(c) Those Amins who have no requisite qualification and have been temporarily promoted for the time being as well as Draftsmen who have been appointed as Chak Inspectors shall be reverted.

(d) Those who are working as Chak Inspectors will have to appear in a practical test and if they fail to qualify in the test, they will be reverted.

(c) In pursuance of the aforesaid decision a practical test was organised in the month of February, 1979, but the petitioners and various other Amins boycotted the practical test. Thereafter by a letter dated 23.11.1979, copy whereof is Annexure 13 to the writ application, issued under the signature of the Deputy Director of Consolidation, it was stated that the promotions to the post of Chak Inspector would be made out of Amins who had passed the Matriculation or its equivalent examination and had also passed the practical test in order of seniority. The aforesaid letter called upon all the Amins who had been promoted to the post of Chak Inspector on ad-hoc basis without having gone through the practical test to appear at the practical test on the 7th and 8th of December, 1979 and it was also stated therein that on their failure to appear in that test, such Chak Inspectors would be reverted to their substantive post of Amin and they would not be eligible for promotion for two succeeding years. The said letter (Annexure 13) was addressed to the various Deputy Directors of Consolidation,

and it was duly brought to the notice of the petitioners also. All the petitioners thereafter appeared at the practical test and according to the averments in the counter affidavit of respondent no. 2 which has not been controverted, all of them failed at that test. Thereafter, the Director of Consolidation passed the impugned order reverting all these seven petitioners along with others to their substantive posts of Amin on the ground that they had failed or by clotted the practical test held on the 7th to 9th of December, 1979. In the counter affidavit filed on behalf of respondent no. 2 it has further been stated that the order reverting the petitioner no. 7 to the post of Amin was issued by mistake as the substantive post held by him was that of draftsman and that the question of correcting the same was under consideration. The impugned order was, it is not disputed, passed without giving the petitioner an opportunity to show cause against the reversion.

2. In the writ application and in the arguments advanced before us, the aforesaid order of reversion has been impugned on two main grounds. The first ground is that the subsequent order of the Government requiring the petitioners to appear at and pass the test being a mere executive instruction could not operate to the detriment of the petitioners and, therefore, the order reverting the petitioners on the ground that they had not passed the practical test was illegal because no such condition had been attached at the time of their initial promotion to the post of Chak Inspector. The second ground which was argued somewhat faintly is that the reversion order violates Article 311 of the Constitution.

3. Cause has been shown on behalf of the respondents and on behalf of respondent no. 2, a counter affidavit also has, as I have already stated, been filed. According to the respondents, the promotion of the petitioners to the posts of Chak Inspector made in January, 1978 was on ac-hoc basis and provisional in nature and further the promotion had not been made in regular manner and, therefore, in the interest of administration, it was decided that only such Amins should be eligible for promotion or should be permitted to continue as Chak Inspector who had, besides the educational qualification of being a Matriculate, passed the practical test held to determine their suitability for promotion. It was pointed out that as the promotions were all ad-hoc and provisional, the petitioners had no right to the posts to which they had been promoted and thus their services as Chak Inspector could be terminated at any time and that as there was no statutory rule governing the appointment of the Chak Inspectors or promotion of Amins or draftsman to the post of Chak Inspectors, the Government was competent to issue an executive instruction of the kind it had done.

4. The second ground of attack can be disposed of easily. Sri Mukherji appearing on behalf of the petitioners, specifically stated that he did not contend that the impugned order amounted to reduction of rank within, the meaning of Article 311(2) of the Constitution of India because of the reason for the reversion mentioned therein, namely, failure to pass the practical test. He, however,

contended that the impugned order of reversion amounted to an order of reduction of rank of the petitioners, because in the counter affidavit respondent no. 2 has stated that termination was necessary because of the unsatisfactory work of the highly technical job of Chak Inspectors. In my opinion, this contention is completely misconceived. A perusal of the counter affidavit makes it clear that the impugned order is not based on the circumstance that the petitioners were found not capable of performing the job in question. In the counter affidavit, it is not even stated specifically that the petitioners were found not capable of performing the duties of the office of the Chak Inspector. The only relevant averment is made in paragraph 3 of the counter affidavit in which it is stated that-"most of the promoted Chak Inspectors were found lacking in required technical knowledge.....that most of them were not capable of performing the highly technical job of Chak Inspectors....." As out of 87 Chak Inspectors, 39 joined their places of posting, it cannot be held definitely that this aforesaid imputation is necessarily directed against the seven petitioners. Further, in the counter affidavit it has been specifically stated (towards the end of paragraph 3) that "The petitioners appeared at the practical test but failed and, therefore, were reverted." The basis of their reversion was failure to pass the technical test and not their not performing satisfactorily their duties as Chak Inspector. This contention must therefore, fail.

5. So far as the first ground of attack is concerned, that also, in my opinion, is untenable. Admittedly, there are no statutory rules governing the appointment of Chak Inspectors either by direct recruitment or by promotion of Amins or draftsmen to the post of Chak Inspectors. That being the position, as was pointed out by Goswami, J. speaking for the Supreme Court in (1) P.C. Sethi & others vs. Union of India & others (1975 L and IC 1590) that ".....it was open to the Government in exercise of its executive power to issue administrative instructions with regard to constitution and reorganisation of the service as long as there is no violation of Article 14 or Article 16 of the Constitution...", I do not think, the subsequent executive instruction issued by the Government can be held to be invalid merely because it laid down a further test for promotion to the post of Chak Inspector which test was not laid down in the earlier executive instruction on the basis of which the petitioners had been promoted temporarily to the post of Chak Inspector. In P.C. Sethi's case (supra) the validity of a certain office memorandum of 1971 was impugned on the ground that it was not in conformity with the earlier office memorandum. That argument was rejected by the Supreme Court in these terms: "We, therefore, do not find any infirmity in the Office Memorandum of 1971 (Annexure 1) simply because it is not in conformity with the Office Memorandum of June 22, 1949." The subsequent executive instruction, therefore, cannot be held to be invalid, because they are not in conformity with the earlier executive instruction in which the only qualification for temporary promotion to the post of Chak Inspector, was the educational qualification of being Matriculate and having certain experience as Amin.

6. Sri Mukherjee, however, strenuously argued that the order of the Government directing that the persons who had been promoted to the temporary post of Chak Inspector on ad hoc basis must be reverted if they failed, or did not appear, at the technical test, was invalid and inoperative, because being an executive order it could have no retrospective effect and in so far as it directed that the service of the persons already promoted temporarily as Chak Inspectors, should be terminated if they did not pass the technical test, it operated retrospectively. The proposition that a mere executive instruction cannot have any retrospective effect, may not be disputed. In my opinion, however, the whole argument proceeds upon a misconception that the subsequent order of the Government operates retrospectively. As was pointed out by Das Gupta, J., speaking for the Supreme Court in *Sajjan Singh Vs. The State of Punjab*, , quoting Maxwell 11th Edition, page 211) "A Statute cannot be said to be retrospective" because a part of the requisites for its action is drawn from a time antecedent to its passing..." A statute cannot be held to be retrospective merely because it affects existing rights. To use the words of Buckley L.J. in *West Vs. Gwynne* [1911 (2) CD 1 at 11-12] "retrospective operation is one matter and interference with existing right is another." Merely because the rule laid down in the impugned order affects also some persons who were already appointed temporarily to the post of Chak Inspector, it cannot be held that the executive order has a retrospective operation.

7. In support of his contention that the order has retrospective operation, Sri Mukherjee drew our attention to the decision of the Supreme Court in (2). *The State of Jammu and Kashmir Vs. Shri Triloki Nath Khosa and Others*, . In that case, the rules provided that only those Assistant Engineers would be eligible for promotion who had passed the Bachelor's degree in Engineering or held the qualification of A.M.I.E., Sections A and B, and who had put in at least eight years of service in the Jammu and Kashmir Engineering (Gazetted) Service. In the writ application filed by the Assistant Engineers of the Jammu and Kashmir Engineering Service who did not possess the aforesaid qualification, one of the points raised was that in so far as the rules made Assistant Engineers recruited before the aforesaid rules came into force ineligible for promotion to the post of Executive Engineer, the rules operated retrospectively and retrospective application of the impugned rule was violative of Articles 14 and 16 of the Constitution. Repelling the argument that the rule had a retrospective operation, Chandrachud, J. (as he then was), speaking for the majority of the Supreme Court in the aforesaid case, observed:

.....It is difficult to appreciate this argument and impossible to accept it. It is wrong to characterize the operation of a service rule as retrospective for the reason that it applies to existing employees. A rule which classifies such employees for promotional purposes, Undoubtedly operates on those who entered service before the framing of the rule but it operates in future, in the sense that it governs the future right of promotion of those who are already in service. The impugned rules do not recall a promotion already made or reduce a

pay-scale already granted. They provide for a classification by prescribing a qualitative standard, the measure of that standard being educational attainment.....

These observations, in my opinion, do not lend any support to the contention that the impugned executive instruction has a retrospective effect. On the other hand, they show that it has no retrospective effect. Chandrachud, J. specifically pointed out that it is wrong to characterize the impugned rule as retrospective for the reason that it applies to the existing employees. Merely because the impugned executive instruction requires existing Chak Inspector appointed on a temporary basis to appear at and pass the practical test and on failure to be reverted to their substantive post, it cannot be regarded as retrospective. It is true that Chandrachud, J. noted in that case that the impugned rules in that case did not recall promotion already made, but his Lordship did not specifically state that a rule affecting a temporary promotion which had already been made, must be regarded as retrospective. In the present case the promotion already made is not in terms recalled, only continuance in the post to which the persons had been promoted on a purely temporary basis is made conditional upon passing of the technical test.

8. Further, it must be borne in mind that by the executive order the petitioners are not being deprived of any right vested in them. None of the petitioners had a right to the post of Chak Inspector. All of them had been promoted to the post of Chak Inspectors on a purely temporary basis "their appointments being in term either temporary or ad hoc." Neither of the two categories of appointment conferred upon the appointees any right to the post of Chak Inspector. That is clear from the celebrated decision of the Supreme Court in the case of (3) Parshotam Lal Dhingra Vs. Union of India (UOI), . If the petitioners had been substantively appointed to the post of Chak Inspector without their having passed any practical test and, thereafter, an executive order was made requiring them to pass a practical test or to face reversion, a question might have arisen whether their right to the post had not been taken away by a mere executive order. No such question arises in this case as by the impugned order only the persons who had been temporarily appointed to a higher post are being required to pass a practical test or to face reversion.

9. If the distinction between the appointment to a post on a substantive basis which confers a right to the post and the appointment on a temporary basis which confers no right to the post, is borne in mind, the decision in the case of (4) Sribatsa Misra Vs. State of Orissa and Another, on which reliance was placed by Sri Mukherjee, is seen to be clearly distinguishable. In that case by the impugned executive order, the Orissa Government required all Head Clerks in the District Offices and Offices of the Heads of Departments to pass an accounts examination within two years or face reversion to the lower post. In accordance with that order, the petitioner in the case before the Orissa High Court was reverted from the post of Accountant which was of a Senior Upper Division Clerk

which was equivalent to the post of a Head Clerk to the rank of Junior Upper Division Clerk on the ground that he had not passed the accounts examination. In that case, as is clear from the order of promotion of the petitioner of that case to the post of Accountant set out in paragraph 10 of the judgment of the Orissa High Court (at page 15 of the report), the appointment of the petitioner to the post of Accountant was not temporary but substantive. It further appears that in that case by a previous order the petitioner had been exempted from training in accounts. In those circumstances it was held by a Bench of the Orissa High Court in that case that it was not open to the Government to again require the petitioner to pass the examination as they purported to do by their subsequent order. And that was the reason for quashing the order of reversion in that case. The decision is no authority for the proposition that the Government has no power by an executive order to require its servant who has no right to the higher post which he is occupying temporarily, to pass a particular test or face reversion to a lower post even when there are no statutory rules on the subject which prevent the Government from passing such an order.

10. Sri Mukherjee also relied on the decision of the Supreme Court in (5) The Chief Secretary to the Government of Mysore, Bangalore & another vs. S.C. Chandraiah etc. (1967 SLR 155). But that decision again is completely inapplicable to the facts and circumstances of this case. In that case, the legality of an order of the Government of Mysore reverting the respondents before the Supreme Court from the post of Assistants to those of Junior Assistants on the ground that they had failed to pass the prescribed Departmental Examination within the time fixed, was impugned by the appellants by an application under Article 226 of the Constitution. The Mysore Government supported the legality of the order of reversion with reference to the provisions of Rule 10-A of the 1962 Rules on the subject, made by the Government in exercise of its powers under Article 309 of the Constitution. That rule provided that the Government servants who have been promoted temporarily subject to the condition that they should pass the Departmental examination and the language test shall, unless they are exempted from passing the Departmental Examination and the language test, be reverted to the grade from which they were promoted if they do not pass the same within the time allowed for doing so. The 1962 Rules did not themselves provide that the passing of a Departmental Examination was a condition for promotion of a Junior Assistant as an Assistant. Their Lordships also considered various other rules and also some executive orders which were relied upon by the Government of Mysore as laying down such condition for promotion of Junior Assistant as Assistant. On a consideration of all the rules and also the executive orders, Subba Rao, C.J. speaking for the Supreme Court observed as follows:--

The result of the, discussion may be summarised as follows: The executive orders passed before October 31, 1957, were superseded by the Mysore Secretariat Services Recruitment Rules, 1957. Neither under the 1957 Rules nor under the 1962 Rules the passing of departmental examinations and tests was made a condition for promotion of Junior Assistants as Assistants. No such

condition was imposed on the respondents in the orders issued by the Government promoting them as Assistant. If so, in terms of rule 10-A of the 1962 Rules, they could not be reverted to the grade from which they were promoted, as their promotions were not subject to the condition that they should pass the departmental examinations and the language test. The order of the High Court is, therefore correct.

The Supreme Court, accordingly, dismissed the appeal against the decision of the High Court quashing the order of reversion.

11. The Supreme Court, therefore, in the aforesaid case merely decided that the legality of the reversion could not be supported with reference to the provisions of Rule 10-A of the 1962 Rules, as there was no rule making the passing of a Departmental Examination a condition precedent for promotion from Junior Assistant to Assistant and no such condition had been imposed in the order issued by the Government promoting the petitioner as Assistant. This decision cannot be regarded as an authority for the proposition that even if by an executive order which is not in conflict with any statutory rules on the subject, a liability to pass a Departmental Examination is imposed as a condition precedent for continuing to hold a post to which a servant had been promoted earlier on a temporary basis, the order would be bad. It is no doubt, true that while referring to certain rules laid down by executive orders, Subba Rao, C.J. who spoke for the Supreme Court in that case, stated that the rules had no statutory force. But that does not mean that it was laid down that executive orders which have no statutory force are wholly ineffective. They can certainly operate in so far they are not inconsistent with the constitution or the statutory rules on the subject and do not affect any vested right.

12. The decision of the Punjab and Haryana High Court in (6) Shri Harjit Singh vs Inspector General of Police & others (1969 S-LR 845) on which Sri Mukherjee placed great reliance, is also distinguishable. In that case the writ petitioner who had been promoted as Inspector of Maintenance incharge Police Radio Workshop and Stores on an officiating basis against a permanent vacancy, failed to qualify at the Radio Technician Operator Grade I test three times and, thereafter, he was, by an order of the Inspector General of Police, Haryana, reverted to his substantive rank of Sub-Inspector of Police. The petitioner had been promoted without any condition as to passing any such test. The Service Rules applicable to the petitioner, were contained in Police Rules, 1934, which did not prescribe any qualification for the post of Inspector of Police Maintenance. Subsequently, on the basis of a report of the Technical Standard Committee for future contracts to the post of Inspectors who were given the rank of Inspector of Police, qualifications were prescribed which were not applicable to the existing staff and on the basis of the aforesaid order of the Government it could not be said that the petitioner was required to qualify himself as Grade I technician. In those circumstances, the Punjab and Haryana High Court held that the order of reversion of the writ petitioner before them on the ground of failure to pass that

test was bad.

13. In that case, therefore, there was not even an executive order of the Government which required the writ petitioner of that case to pass the aforesaid Departmental Examination and, therefore, it was held that reversion of the petitioner on the ground of failure to pass the examination was bad in law. This is clear from the following passage in that judgment:--

.....The Superintendent of Police required the petitioner to pass the test as Grade I Technician which was not warranted by any statutory rule or Government instructions. The petitioner could, therefore, not be reverted to the post of Sub-Inspector of Police on the ground mentioned in the impugned order.

In the present case, as I have already stated, there is a specific order of the Government requiring the petitioners to pass a practical test. No doubt, the opinion was expressed by the learned Single Judge of the Punjab and Haryana High Court who decided that case "that it was not open to the Government to prescribe any qualifications for the existing personnel of the Wireless Department after they had been promoted without any condition as to the acquisition of the prescribed qualification by mere executive instructions. Those observations are, however, clearly obiter. Apart from that, they appear to be based on the principle that in exercise of its executive power under Article 162 of the Constitution, the executive could not ignore or act contrary to a statutory provision reiterated by the Supreme Court in (7) B.N. Nagarajan and Others Vs. State of Mysore and Others, . This is clear from the fact that there were statutory rules in that case governing the case of the petitioner, namely, the Police Rules 1934, and Tuli, J. who decided that case, specifically referred to the passage in the judgment of the Supreme Court in B.N. Nagarajan's case (supra) in which the aforesaid rule had been reiterated.

14. This conclusion is also reinforced by the circumstance that his Lordship quoted with approval the observation of the Grover, J. in (8) S. Joginder Singh Grawal Vs. the State of Punjab and others (C.W. 1960 of 1965) to the following effect:--

.....I am of the view that since Class I Rules did not lay down any such limitation or qualification, the executive Government could not amend or alter the rules or add to them by prescribing any particular qualifications.....

It is also significant that his Lordship referred to another judgment of the Punjab and Haryana High Court taking the same view and in Joginder Singh's case (supra) and stated as follows:--

Their Lordships of the Supreme Court in Saab Ram Sharma vs. State of Rajasthan and another, 1967 S.L.R. 906 also held that the Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point, Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules

already framed.

Thereafter his Lordship formed the opinion to which I have already referred "in the light of the above judgment." The above opinion was, therefore, expressed on the assumption that such an executive order would be contrary to the statutory rules provided for the service. In our case, there is no statutory rule governing the appointment of Chak Inspectors.

15. Therefore, none of the aforesaid decisions relied upon, is of any avail to the petitioners in the present case. A reference was also made by Sri Mukherjee to the observations of the Supreme Court in (9) E.P. Royappa Vs. State of Tamil Nadu and Another, of Bhagwati, J who spoke for the majority of the Supreme Court, that the ambit and reach of Articles 14 and 16 of the Constitution are not limited to cases where the public servant affected has a right to a post and that even if a public servant is in an officiating position, he can complain of violation of Articles 14 and 16 if he has been arbitrarily or unfairly treated or subjected to mala fide exercise of power by the State machine. Those observations are of no avail to the petitioners, because in the present case it cannot be held that the petitioners have been arbitrarily or unfairly treated or subjected to mala fide exercise of powers. The reversion of the petitioners is on the ground of failure to pass a practical test. It cannot be doubted that the passing of the practical test has a reasonable nexus with the performance of the duties of Chak Inspector. The reversion of the petitioners for failure to pass the practical test cannot therefore, be characterised as arbitrary or unfair or mala fide. In the result, the application is without merit and it is, accordingly, dismissed. In the circumstances of the case, however, there will be no order as to costs.

S. Sarwar Ali, J.

I agree.