
(1983) 04 PAT CK 0005

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 3263 of 1980.

Satyendra Narain Sinha

APPELLANT

Vs

The State of Bihar and others

RESPONDENT

Date of Decision : 12-04-1983

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3
Constitution of India, 1950 — Article 16(1), 226, 227

Citation : (1983) PLJR 739

Hon'ble Judges : Uday Sinha, J;P.S. Mishra, J

Bench : Division Bench

Advocate : S. Mukharji and Rewati Raman Saran, for the Appellant; Madhukar Krishna Sinha, (for R. 2 to 5), Mr. B.C. Ghosh, Parmeshwar Pd. Sinha and Mr. Vijayeshwar Narain Sinha . (for R. 7)M/s Mani Lal, S.C. IV and Shahjehan Ali, Junior to S. C. IV, for the Respondent

Final Decision : Allowed

Judgement

Prabha Shanker Mishra, J.—By order dated 2.1.1979 of the Chairman, Bihar State Agro Industries Development Corporation Ltd., as contained in Annexure-9 to the writ application, the order dated 18.12.1973 of the Managing Director of the said Corporation has been modified and accordingly on a redetermination of the inter-se seniority of the petitioner and the respondent no. 7 in the cadre of senior Storekeepers, the latter has been ordered to rank senior to the petitioner. The petitioner's representation for a review of the order dated 2.1.1979 has been rejected by the order of the Chairman as communicated by the Secretary of the Corporation on 1.12.1980, which is Annexure-15 to the writ application. By a notification dated 24.9.1979 issued under the signature of the Chief Administrative Officer, the respondent no. 7 has been promoted on temporary basis as Assistant Store Officer in anticipation of the approval of the Board of Directors, which notification is Annexure 16 to the petition for amendment of the writ application. The petitioner has moved this Court under Articles 226 and 227 of the Constitution of India for quashing the orders as contained in Annexures 9,

15 and 16 to the writ application and also prayed for the consequential reliefs. The Bihar State Agro Industries Development Corporation Ltd. (hereinafter referred to as "the Corporation"), although registered as a Company, is a Government undertaking. A post of Store-keeper in the Corporation was advertised in the year 1967. It appears (a copy of the advertisement for the said post was produced before this Court in the course of hearing) that the minimum qualification for the said post was Intermediate with Mathematics, Science or Commerce and experience of three years in stores. This was a post in the scale of pay of Rs. 160.280/-. No appointment followed the said advertisement. Respondent no. 7 who was/is simply a matriculate and thus not qualified for the post was appointed as Storekeeper in the scale of pay of Rs. 105-155/- with effect from 1.2.1968 and his pay was fixed at Rs. 117/- per month. In the appointment letter, issued by the Managing Director it was said, "the post, is temporary and is terminable on 15 days notice" (Annexure G-7). Previous to this appointment the respondent no. 7 was a clerk-cum-typist and Worked in the Model Carpentry workshop at Poosa Road, Darbhanga, from 6.1.1965 to 31.1.1968. He represented that he should be given the scale of Rs. 160-280/- as advertised by the Corporation and circulated by the Industries Department of the State Government-vide their letter no. 9461 dated 10.5.1967. By an office order dated 6.4.1968 issued under the authority of the Managing Director of the Corporation, respondent no. 7, however, was given the scale of pay of Rs. 150 5-180-EB 5-200 (Annexure I-7). By yet another office order issued on 10.6.1971 by the Managing Director of the Corporation, respondent no. 7 was given the scale of pay of Rs. 160-280 with effect from 15.6.1971 with a direction for fixation of his pay in the replacement scale as per rules of the State Government (Annexure J-7). His pay accordingly was fixed at Rs. 167/- in the scale of pay of Rs. 160-280 with affect from 15.6.1971 vide office order dated 18.6.1971 (Annexure K-7).

2. The Corporation had/has a post of Assistant Foreman in the scale of pay of Rs. 160-280. The petitioner was appointed as Assistant Foreman with effect from 1.12.1969 in the scale of pay of Rs. 160-280 on a purely temporary basis for a period of six months-vide the office order of the Managing Director of the Corporation dated 17.1.1970 (Annexure-1). His services, however, as the Assistant Foreman were continued until an office order dated 20.6.1971 (Annexure-2) of the Managing Director of the Corporation was issued and he was redesignated as Storekeeper in the same scale of pay of Rs. 160-280 with effect from 1.12.1969. This, according to the petitioner, was done for the reason that although the petitioner was appointed as Assistant Foreman the Corporation took the work of Store-keeper from him.

3. The Board of Management of the Corporation at its meeting dated 8.5.70 sanctioned the post of Assistant Store Officer in the scale of pay of Rs. 290-650, besides two posts of Storekeeper in the scale of pay of Rs. 160-250 and one post of Store Clerk in the scale of pay of Rs. 105-155 (Annexure E-7). The post of the Store Clerk was/is in the scale of pay of Rs. 105-155, the scale in which the

respondent no. 7 had been initially appointed.

4. The above arrangement of keeping the petitioner in the scale of pay of Rs. 160-280 on his having been redesignated as Storekeeper-vide office order dated 25.8.1971 and the respondent no. 7 on his being allowed to draw the pay scale of Rs. 160-280 as Store keeper-vide office order dated 10.6.1971 continued until by the office order no. 1920 dated 18.12.1973 of the Managing Director of the Corporation, the petitioner as well as the respondent no. 7 were put on probat on with effect from the dates mentioned against their names in column no. 3 in the scale of pay of Rs. 160-280 (since revised to Rs. 296-460) and were appointed substantively and confirmed with effect from the dates mentioned in Column no. 4 after counting the period of temporary appointment for one year preceding that date towards probation or on completion of their period of probation, as the case may be, Under this office order (Annexure-3), the petitioner was given 1.12.1970 as the date of his appointment on probation and 1.12.1971 as the date of his substantive appointment. The respondent no. 7 was given 15.6.1971 as the date of appointment on probation and 15.6.1972 as the date of appointment on substantive basis. Respondent no. 7 made a representation against his appointment on probation as also substantive appointment with effect from the dates given in Annexure-3 on 19.7.1974. A draft gradation list of Storekeepers of all grades and Store-helpers was published by the Corporation on 4.3.1975 and representations, if any, were invited. The representation of the respondent no. 7 dated 19.7.1974 was, however, rejected by the order dated 4.9.1976.

5. The respondent no. 7 filed Title Suit No. 59 of 1975 before the Munsif 2nd Court, Patna, seeking adjudication of his right of seniority and declaration that he is senior to the defendant no. 3 (the petitioner in the present application) and for setting aside the order under which he was placed below the defendant no. 3 (the petitioner in the present case). The Corporation as well as the petitioner appeared in the suit. In the written statement that was filed it was maintained by the Corporation that the petitioner was rightly allowed a place above the respondent no. 7 as the latter did not possess the requisite qualification for appointment as a Storekeeper and until he was given the said appointment by the office order dated 18.12.1973 (Annexure-3) he was not in the scale of Storekeepers. During the pendency of the said title suit, however, a certain assurance was given to the respondent no. 7 and he withdrew the suit. The learned Munsif by his order dated 16.12.1978 permitted the withdrawal of the suit holding, "as stated by the plaintiff (respondent no. 7) he had already been promoted by the Corporation". The fact that the assurance given to the petitioner was only oral is recorded in a communication to the respondent no. 7 by the Chief Administrative Officer of the Corporation in his letter dated 4.12.1978 (Annexure-8). On 2.1.1979 the office order modifying the dates of appointments on promotion as also on substantive basis of the petitioner and the respondent no. 7 was revised, and accordingly the inter-se seniority also was re-fixed (Annexure-9). Under this office order the respondent no. 7's appointment on probation was retained as

that on 16.6.1971 and his appointment on substantive basis as that on 15.6.1972. In the case of the petitioner, however, his date of appointment on probation was shifted to 26.8.1971 and his date of substantive appointment was shifted to 26.8.1972. The respondent no. 7 was thus shown to have been appointed as Store-keeper from a day before the appointment of the petitioner and he was made to rank senior to the petitioner. The petitioner made a representation before the Chairman of the Corporation on 25.1.1979. A reference was made to the Appointment Department of the State Government on the question of the inter se seniority of the petitioner and the respondent no. 7. In answer to the said reference a communication was made from the Joint Secretary of the concerned department of the Government in which it was stated that the revision of the confirmation and seniority of the petitioner on the facts and in the circumstances of the case was not proper and that the petitioner having been appointed as Store-keeper earlier would rank senior to the respondent no. 7. Ignoring, however, the communication of the concerned department of the Government of the State, the Corporation rejected the petitioner's representation and a communication to this effect was made on 2.12.1980 (Annexure-15).

6. After filing of the present writ application by the petitioner the Corporation decided to give to the respondent no. 7 promotion to the post of the Assistant Stores Officer in the scale of pay of Rs. 455-840/-. A notification to this effect was issued on 24.1.1979 and the respondent no. 7 was promoted as Assistant Stores Officer on temporary basis subject to the approval of the Board of Directors of the Corporation. In course of the hearing of this application, we have been informed that the Board of Directors of the Corporation has since approved the promotion of the respondent no. 7 as the Assistant Stores Officer.

7. The issue involved in this case in its condensed and crystallised form is whether it was open to the respondent-Corporation to shift the date of appointment on probation as also on substantive basis of the petitioner from the dates originally given to him by the office order dated 18.12.1973 (Annexure-3) and by treating the petitioner so appointed both on probation as well as on substantive basis later than the respondent no. 7, could he be made to rank junior to the respondent no. 7 ?.

8. But before prospecting into the above question, I propose to dispose of a few other contentions of the parties. Mr. B.C. Ghosh, learned counsel for the respondent no. 7 contended before us that the petitioner's application is not maintainable as a writ cannot issue upon the respondent-Corporation and/ or its officers. According to him, the necessary averments have not been made in the writ application for this Court to conclude that the Corporation is an instrumentality and/or agency of the Government of the State. He has also submitted that even if it is assumed that the Corporation, a Government Company is an authority, it is a State only for the purposes of Part-III of the Constitution and there is no violation of any of the rights of the petitioner as

guaranteed under Part-III of the Constitution. Mr. Madhukar Krishna Sinha, learned counsel for the Chairman, the Managing Director, the Secretary and the Chief Administrative Officer of the Corporation as also Mr. Mani Lal, the Standing Counsel No. IV, who appeared for the State of Bihar and the Joint Secretary, Department of Personnel, Government of Bihar, have, however, maintained that the Corporation is a Government undertaking and it has always functioned as an instrumentality of the State. Almost in every office orders that have been produced before us by either party the Corporation has been described as a Government undertaking. It is undoubtedly an Agency of the Government of the State of Bihar. For the welfare and development activities in the field of agriculture, horticulture, irrigation, mineral development and other activities under various welfare schemes of the Government of the State, the Bihar Government has constituted several Corporations, Boards and Authorities. Some of such Boards and Authorities are formed as Societies registered under the Societies Registration Act and/or the Bihar and Orissa Co-operative Societies Act and some of such Government Undertakings are registered as Government Companies. It needs no pleading and/or statement of fact to hold that the Government of the State of Bihar has been taking recourse to the creation of such bodies for the purposes of the development and welfare functions which are solemn responsibilities of our democratic Government. The Corporation before us is one such Government Undertaking created for the research and development on and/of agriculture in the State of Bihar. The Corporation before us is evidently an instrumentality of the Government of the State. Mr. Ghosh has rightly submitted that the Corporation even though it is a Government undertaking and an instrumentality of the Government of the State, it in itself, is a State only for the purposes of Part III of the Constitution of India. His submission, however, that no violation of any provision of Part-III of the Constitution has been made in refixing the petitioner's date of appointment on probation and/or on substantive basis and his placement in the scale of pay of Store-keepers to rank as a junior to the respondent no. 7, is not acceptable. If there is a discrimination in treating two persons similarly situate, the equal protection of law and equality before law are violated. Fixation of seniority or pay and a policy for determination of inter se seniority of persons recruited to a service is a right included in the equality of opportunity in matters relating to employment or appointment to an office under the State. Laying down as a general rule of law that if the cadre consists of persons recruited or promoted from the same source their seniority inter-se should be governed by the period of continuous appointment in or protection to the grade in respect of which the seniority is to be fixed, the Supreme Court held in the case of *Mervyn Coutindo and Others Vs. Collector of Customs, Bombay and Others*, that a deviation from such a rule will be in the teeth of the guarantee under Articles 16(1) of the Constitution of India. While, it is permissible to classify the employees for the purposes of promotion, such a classification also will be permissible only if there is a reasonable nexus. The view taken by the Supreme Court in *Mervyn* case has been reiterated more than once and it is now a concluded law that no discrimination is permissible after recruits

from different sources have been integrated into one grade or service. Differential treatment founded on the fact that the recruits belong to two different groups or classes have been discouraged. It is too late in the day to accept a contention of this nature to hold that a differential treatment in refixing the date of appointment and seniority will not constitute an infringement of the fundamental right guaranteed under Article 16(1) of the Constitution of India.

9. Mr. Ghosh has also attempted to suggest that on the facts of this case there is no differential treatment. According to him, the respondent no. 7 was appointed as a Store-keeper although in the lower scale of pay and continued to hold Store-keeper's post. The petitioner's absorption by the re-designation of his appointment as Storekeeper by the office order dated 26.8.1971 was no appointment in the eye of law as a Store-keeper. The order dated 18.12.1973, which acknowledged the petitioner's appointment as Store-keeper with effect from 1.12.1970 on probation, was a follow up action of the re-designation of the petitioner as Store-keeper. The office order dated 2.1.1979 only rectified a wrong done by the office order dated 18.12.1973 (Annexure-3). He has also submitted that the petitioner has not stated as to how he was appointed as Assistant Foreman and as to how he came to discharge the duties of the Store-keeper. According to him, nothing is available on the record to justify the re-designation of the petitioner as Store-keeper. This argument of Mr. Ghosh, in my opinion, is misconceived. It was as far back as August, 1971, that the petitioner was re-designated as Store-keeper. From the very day of his appointment as Assistant Foreman, he has been in the pay scale of Rs. 160-280/-. The Corporation had a post of Store-keeper which had been advertised in the year 1967, but none became available for appointment in the said post. The respondent no. 7, who was a mere clerk was given the designation of Store-keeper but not its scale of pay until the office order dated 10.6.1971 was issued giving to him the scale of pay of Rs. 160-280 with effect from 15.6.1971. If the case of the petitioner is that of a re-designation, the case of the respondent no. 7 was only of a designation given to him without any valid appointment as Store-keeper. Whereas the petitioner possessed the academic qualification for the post of Store-keeper the respondent no. 7 did not possess the said qualification. It is nowhere available that the petitioner ever applied for the post of the Store-keeper and was not appointed because he did not possess the requisite experience of three years in store's work. The respondent no. 7 applied for the post of Store-keeper in its original scale of pay of Rs. 160-280 and was not selected. These clearly go to show that keeping in view the requirement of a Store-keeper and the fact that the petitioner was a person having the requisite academic qualification for the said post of Store-keeper, but had joined the Corporation as Assistant Foreman in the same scale of pay of Rs. 160-280/-, the Corporation took the work of Store-keeper from him and finding that he was discharging his work satisfactorily redesignated him as Store-keeper and later by the order dated 18.12.73 gave him appointment as Store-keeper on regular basis with effect from 1.12.70 on probation and with effect from 1.12.1971 on substantive basis.

10. Mr. Ghosh also advanced some arguments to suggest that the present writ application of the petitioner was/is barred on the principle embodied under order 23 rule 3 of the Code of Civil Procedure. It is difficult to appreciate this argument. How can withdrawal of a suit by the plaintiff be said to be a disposal of the matter in issue on a compromise, acceptance and/or adjudication. In my opinion, none of the rules of Order 23 of the CPC are attracted on the facts of the present case.

11. Adverting to the main question involved in the case, I have no hesitation in accepting that the shifting of the date of appointment on probation and the date of substantive appointment of the petitioner to a date later than the date given in the office order dated 18.12.1973 has caused serious prejudice to the petitioner as he has been made to rank junior to the respondent no. 7. This Court had the occasion of considering on a somewhat similar facts the question as to whether a certain order granting a civil right to a person in a public service could be rescinded/reviewed unilaterally by the State. In the case of Dr. Chhedi Choudhary (C.W.J.C. No. 1341 of 1974) this Court held that such an order although administrative in nature has to be treated as quasi judicial. This view is supported now by any number of decision of the Supreme Court. This Court further held that a review of the order of this nature can take place only if there are some new facts, new rules, and/or new circumstances which were not in existence when the original order had been made. Even for such a review a notice to the person affected is a sine qua non.

12. The respondents have not shown that there was any new fact which emerged and came to knowledge after the making of the order dated 11.12.1973. They have not also shown that any new rule was required to be applied. No new circumstance has been shown which prompted the respondent-Chairman of the Corporation to reopen the matter after the representation of respondent no. 7 was rejected by the order dated 4.9.1976. Nothing transpired that can justify the change of the stand of the Corporation taken by it in the written statement filed before the Munsif, Second Court, Patna for the verbal assurance to the respondent no. 7, upon which he withdrew his suit and the order dated 2.1.79, as contained in Annexure-9 was issued.

13. Apart from the above stated facts, there is yet another important aspect. After the rejection of the representation of the respondent no. 7 the petitioner had every reason to think that things had settled in his favour and he ranked senior to the respondent no. 7. If the respondent-Corporation and its officers thought that there was any basis for reviewing the earlier order, it was incumbent upon them to give to the petitioner opportunity to represent his case. They could not review the matter without making to the petitioner the facts giving rise to the review known and without affording opportunity to him to show cause. The rule of audi alteram partem has got to be observed in such a situation. No opportunity was afforded to the petitioner, no notice was given to him, he was not heard either orally or by a representation and the order dated

18.12.1973 was reviewed and modified to his prejudice. The rule of fair play in administrative actions was not observed at all by the respondents 2 to 5.

14. In view of my discussions above, the office order dated 2.1.1979 is evidently without jurisdiction. As the order contained in Annexure-9 is without jurisdiction the order contained in Annexure-15 is also without jurisdiction. The order contained in Annexure-15 suffers from yet another infirmity. No reason whatsoever has been assigned for rejecting the petitioner's representation. The respondents themselves made reference of the dispute to the Appointment Department of the State Government. The Appointment Department opined that the review of the petitioner's appointment on substantive basis and his seniority was not valid. I am not suggesting that the respondents were obliged to follow the opinion of the Appointment Department of the State Government. But they were at least obliged to state as to why they were not accepting the opinion of the Appointment Department of the State Government. The rule that an administrative order also should be explicit enough to disclose the reasons and the facts has not at all been followed in rejecting the petitioner's representation by the order dated 1.12.1980 as contained in Annexure-15.

15. The order promoting the petitioner as Assistant Stores Officer came during the pendency of this application. Promotion has been given to the respondent no. 7 because he was made to rank senior to the petitioner. As indicated by me above, the re-determination of the petitioner's seniority and his placement below the respondent no. 7 itself was bad. The order promoting the respondent no. 7 as Assistant Stores Officer on the basis of the new seniority assigned to him is, therefore, also illegal and without jurisdiction. The orders as contained in Annexures 9, 15. and 16 are so arbitrary that they smack of abuse of power. They are evidently mala fide in law.

16. To conclude, the impugned orders cannot be sustained and they are fit to be quashed. I accordingly allow this writ application. In the result, this application is allowed. The office orders of the Bihar State Agro Industries Development Corporation Ltd., as contained in Annexures 9, 15 and 16 are hereby quashed. Let a writ of certiorari accordingly issue. The respondents shall give effect to the order contained in Annexure-3 and treat the petitioner as senior to the respondent no. 7 as Store-keeper and accordingly consider his case for promotion as Assistant Stores Officer in accordance with law. The respondents shall forbear to deny to the petitioner his consequential benefits. On the facts and in the circumstances of the case, there shall be an order as to costs payable to the petitioner by the respondent no. 7. Hearing fee Rs. 200/-