

(1987) 04 PAT CK 0015

In the Patna High Court

Case No : Civil Writ Jurisdiction Cases No's. 453 of 1986

Shashi Shekhar Prasad Singh

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 01-04-1987

Acts Referred:

Bihar and Orissa Excise Act, 1915 — Section 2(7), 7(2)(a), 7(2)(e), 7(2)(f), 89

Citation : (1987) PLJR 1128

Hon'ble Judges : S. Ali Ahmad, J;B.N. Agrawal, J

Bench : Division Bench

Advocate : Shreenath Singh Maheeh Prasad, Tej Bahadur Singh, R. K. Singh and Rajeshwar Singh, 453/86 Ravindra Kumar Singh and Mahesh Prasad Singh, 627 and 629/86 Sadanand Roy and S. J. Mukherjee, 4097/85, for the Appellant; R. B. Mahto, (A.G.) Mahesh Prasad and Amarnath Singh, (J.C.) for the State, M/s T. K. Jha, Madhav Roy and Chandramauli Kumar Prasad . for Respondents 3, 4, 5 to 12, for the Respondent

Judgement

B. N. Agrawal, J.—In all these four writ applications the petitioners have challenged the gradation list dated 9.1.1986 of the Inspectors of Excise by which the Government of Bihar has finally fixed the inter se seniority of the petitioners vis-a-vis the contesting respondents. The petitioners in all the writ applications are promotees Excise Inspectors from the cadre of Excise Sub-Inspector. In the first three writ applications all the contesting respondents have been directly recruited as Ins pectors of Excise, but in the last writ application out of the contesting respondents, respondent nos. 5 to 11 have been recruited directly as Inspectors of Excise whereas respondent nos. 3, 4 and 12 have been promoted as Inspectors of Excise from the post of Upper Division Assistants in the Excise Department. The petitioners in all the writ applications were appointed and joined the post of Excise Inspectors on dates earlier to the appointment and joining of respondents in all the four cases as Inspector of Excise, but even then the petitioners have been shown as junior to the contesting respondents in the gradation list, referred to above. All the petitioners and all the respondents were

confirmed as Excise Inspectors on 23.9.1983. The stand of the State in all the writ applications is that the gradation list has been correctly prepared in accordance with the relevant rules. The petitioners were temporarily promoted as Excise Inspectors in excess of their quota in the vacancy of direct recruits and when the direct recruitment was made, such directly recruited persons ranked senior to the petitioners, i.e., the respondents ranked senior and the promotees in excess of their quota were liable to be pushed down for the purpose of seniority.

2. Learned Counsel for the petitioners have challenged the gradation list on two grounds, viz. (i) the State Government has no jurisdiction to determine the seniority of Excise Inspectors and the only competent authority for determining the same is the Excise Commissioner which has neither determined the seniority nor prepared the gradation list and (ii) since the petitioners have continuously officiated for years together in the vacancy of direct recruits and merely because the appointment has been made against the vacancy of direct recruits, by appointing the contesting respondents, the petitioners cannot be pushed down for determining the seniority and shown junior to the contesting respondents.

3. In support of the first contention the Learned Counsel has placed before me rules 1 and 4 of the Inspector of Excise Recruitment Rules, 1936 (hereinafter referred to as "the Rules") which lay down that the Inspector of Excise shall be appointed by promotion of selected Sub-Inspectors of Excise by the Commissioner of Excise. It further lays down that the quota fixed for appointment of Inspectors of Excise by direct recruitment can be relaxed on the recommendation of the Commissioner of Excise. Section 2 (7) of the Bihar Excise Act, 1915 (hereinafter referred to as "the Act") defines the Excise Commissioner to mean the Officer appointed u/s 7 (2) (a) of the Act. Section 7 (2) (a) lays down that the State Government may by notification appoint an Officer who shall, subject to such control as the State Government may direct for, have the control of the administration of the Excise Department and the collection of excise revenue. Section 7 (2) (e) lays down that the State Government may delegate to the Excise Commissioner all or any of the powers conferred upon the State Government by or under the Act, except the power conferred by section 89 of the Act to make rules. Section 7 (2) (f) lays down that the State Government may withdraw from any Officer any of the powers conferred upon him by or under this Act. By notifications no. 470 F. dated 15.1.1919 in exercise of the powers conferred under the Act the Lieutenant Governor in Council was pleased to make in clause (ii) of the notification order to the effect that there shall be an Excise Commissioner who shall subject to the general control of the Board will have throughout the province of Bihar the control of the administration of the Excise Department and the collection of excise revenue. In clause (iv) of the notification the power to appoint by promotion Inspectors of Excise was delegated to the Excise Commissioner. On a bare perusal of the aforesaid provisions it would appear that the Excise Commissioner is the appointing authority of Inspectors of Excise. It has nowhere been mentioned in any of these

provisions that the Excise Commissioner is vested with the powers of deciding the seniority. The fact that the powers to appoint an Excise Inspector has been only delegated to the Commissioner of Excise by the Mate Government goes to show that the power to decide the seniority of the Inspector of Excise has not been vested in the Excise Commissioner and this power has been retained by the State Government. In that view of the matter, the Excise Commissioner has no jurisdiction to determine the seniority of the Inspectors of Excise and the same having been determined by the State Government itself which alone was competent to decide the seniority, the contention raised on behalf of the petitioners must be rejected.

4. This takes us to the next submission made on behalf of the petitioners which is the crucial one to be decided in the case for determining seniority. It will be necessary to refer to the Recruitment Rules for deciding this question, Rule I whereof reads as follows : -

Inspectors of Excise and Salt shall be appointed -

(1) by direct recruitment by the Board of Revenue, or

(2) by promotion of selected Sub-Inspectors by the Commissioner of Excise and Salt.

Not more than 25 percent of the vacancies shall ordinarily be filled by direct recruitment; but with the approval of the Board of Revenue on the recommendation of the Commissioner of Excise, this proportion may on any occasion, be increased to 50 percent.

Later on by notification no. 1451 dated 2.3.1945 published in the Bihar Gazette on 7.3.1945, the expression "not more than" in the last paragraph of rule I has been deleted. Subsequently by Government notification S. O. 411, dated 31st March, 1975 published in the Bihar Gazette, Extra-ordinary Issue on that day, after clause (2) of rule 1 clause (3) has been added which reads as follows :-

by promotion from among selected confirmed Upper Division Assistants of the Excise Commissioner's office and selected confirmed Head Clerks of the District Excise Offices".

By the said notification the following has been added at the end of rule 1:-

Atleast 5 percent of the total vacancies shall be filled by promotion from among the Selected Upper Division Assistants and selected Head Clerks".

5. A bare perusal of the aforesaid rule as amended goes to show that 25 percent of the vacancy shall be filled by direct recruitment, 70 percent shall be filled by promotion from among the selected Sub-Inspectors and 5 percent shall be filled by promotion from among the confirmed Upper Division Assistant of the Excise Commissioner's Office and confirmed Head Clerks of the District Excise Offices. The 25 percent quota of direct recruits can be relaxed and increased to 50 percent, but no provision for relaxation has been made under the rules so far the

quota of promotees is concerned. Now the question arises if promotion has been made in excess of the quota of the promotees in the vacancy of direct recruits and later on direct recruitment has been made, the promotees in such circumstances can be treated to be junior to the direct recruits or not. This question was directly under consideration before the Supreme Court in *V. B. Badami vs. State of Mysore* (A. I. R. 1980 S. C. 1561) in which promotees were appointed in excess of their quota i. e, against the quota of direct recruits and they officiated on the said post after their promotion, but Safer on when the direct recruitment was made the promotees were absorbed in the quota of subsequent years and the direct recruits though recruited subsequent to the promotees were ranked senior. After considering its earlier decisions the Supreme Court laid down in that case as follows : --

In working out the quota rule, these principles are generally followed. First, where rules prescribe quota between direct recruits and promotees, confirmation or substantive appointment can only be in respect of clear vacancies in the permanent strength of the cadre. Second, confirmed persons are senior to those who are officiating. Third, as between persons appointed in officiating capacity, seniority is to be counted on the length of continuous service. Fourth, direct recruitment is possible only by competitive examination which is the prescribed procedure under the rules. In promotional vacancies, the promotion is either by selection or on the principle of seniority-cum-merit. A promotion could be made in respect of a temporary post or for a specified period but a direct recruitment has generally to be made only in respect of the clear permanent vacancy either existing or anticipated to arise at or about the period of probation is expected to be completed, Fifth, if promotions are made to vacancies in excess of the promotional quota, the promotions may not be totally illegal but would be irregular. The promotees cannot claim any right to hold the promotional posts unless the vacancies fall within their quota. If the promotees occupy any vacancies which are within the quota of direct recruits, when direct recruitment take place, the direct recruits will occupy the vacancies within their quota. Promotees who were occupying the vacancies within the quota of direct recruits will either be reverted or they will be absorbed in the vacancies within their quota in the facts and circumstances of a case".

The important principle is that as long as the quota rule remains neither promotees can be allotted to any of the substantive vacancies of the quota of direct recruits for direct recruits can be allotted to promotional vacancies. The result is that direct recruitment vacancies between 11 September, 1959 and 26 October, 1964 cannot be occupied by any promotees. The fact that direct recruits were confirmed on 26 October, 1964 will not rob the direct recruits of their quota which remained unfilled from 2 December, 1957".

if two vacancies belonging to the quota of Assistant Executive Engineers are to be filled by Assistant Engineers for want of availability of eligible Assistant Executive Engineers the appointment of Assistant Engineers to fill in those two

vacancies would be irregular because they would have to be pushed down to later years when their appointment could be regularised as a result of absorption in their lawful quota for those years"

6. From the aforesaid judgment of the Supreme Court it is amply clear that if promotion has been made in excess of the quota rule and later on direct recruitment has been made, the promotees who were promoted in excess of their quota will be absorbed in the vacancy of the later years and the direct recruits will be put in their own vacancy. This shows that according to the Supreme Court decision for the purposes of seniority direct recruits would be deemed to have been appointed earlier than the promotees even though their appointment was factually made on a later date.

7. The law laid down in Badami's case (supra) has been subject matter of consideration in the later decisions of the Supreme Court in which the ratio laid down by the Supreme Court in the Badami's case has been relaxed. The latest of such cases is the case in of Na render Chadha vs. Union of India (A. 1. R. 1986 S. C. 638) which was a case of Indian Economic Service. In the relevant rules in that case not less than 75 percent of the vacancy were to be filled by direct recruitment and not more than 25 percent of the vacancy could be filled by promotion and the Government had power to make relaxation in the quota rules. It appears that the prescribed quota for appointment from two sources was not amended and no specific order for relaxation was passed by the Government. Between 1964 to 1984 there were 435 vacancies for direct recruits out of which 342 posts were filled up by direct recruitment and the remaining 93 posts which were intended for direct recruits remained unfilled and most of the said posts were held all along by persons who had been promoted. In that case the promotees in excess of their quotas held the post for 9 to 15 years and only thereafter direct recruitment could be made. In those circumstances, their Lordships held that even though promotees were promoted in excess of their quota but since they continued on the promoted post for 15 to 20 years, i.e., for a very long period and only thereafter direct recruitment could be made, quota rule would be deemed to have been relaxed and the promotees could not be treated junior to the direct recruits. After taking all the relevant previous decisions, the Supreme Court laid down the law as follows :--

Therefore it can be safely stated that the enormous departure from the quota rule year to year permits an inference that the departure was in the exercise of the power of relaxing the quota rule conferred on the controlling authority. Once there is power to relax the mandatory quota rule, the appointments made in excess of the quota from any given source would not be illegal or invalid but would be valid and legal. The enormity of the prejudice that is likely to be caused to the petitioners and others who are similarly situated can be demonstrated by setting out the effect of sticking to the quota rule as found in R. 8 (1) (a) even though there has been a deliberate deviation from it. The result of applying the quota rule would be as follows: Petitioner no. 1 who was promoted to Grade IV

on November 6, 1965 would be junior to a direct recruit of 1974 batch. Petitioner No. 3 who was promoted to Grade IV on March 22, 1966 would become junior to a direct recruit of 1979 batch. Petitioner no. 6 who was promoted to Grade IV post in July 1, 1966 would become junior to direct recruit of 1982 batch. Petitioner no. 10 who was promoted to Grade IV on May 18, 1968 would become junior to direct recruit of 1982 batch. Petitioners Nos. 16 to 18 and 21 to 25 would continue to be treated as ad hoc appointees and will be junior to everybody appointed till now into the service as they cannot be fitted anywhere even though they have put in 9 to 15 years of service in Grade IV. These startling results ought to shock anybody's conscience. The only just solution to this problem is to treat the petitioners as persons duly appointed to the Service with effect from the day on which they were promoted to the Grade IV posts. When an officer has worked for a long period as in this case for nearly fifteen to twenty years in a post and has never been reverted it cannot be held that the officer's continuous officiation was a mere temporary or local or stop (sic) arrangement even though the order of appointment may state so. In such circumstances the entire period of officiation has to be counted for seniority".

8. While laying down the law aforesaid, their Lordships have followed the earlier judgments of the Supreme Court in *A Janardhana v. Union of India and others* (A. I. R. 1983 S. C. 769) and *O P. Singh and another v. Union of India and others* (A. I. R. 1984 S. C. 1995) in which same principle has been laid down. Learned Counsel for the petitioner has also referred to the case of *G. S. Lamba and others vs Union of India and others* (A. I. R. 1985 S. C. 1019) wherein it has been said that when quota rule has not been implemented or there has been malfunctioning of the quota rule then it will be unjust and unfair to push down persons who were appointed earlier.

9. Thus, in my view the law laid down by the Supreme Court in the aforesaid cases is that the quota rule is mandatory in nature and if any promotion is made in excess of the quota rule against the vacancy of the direct recruits and such promoted officers have continuously officiated even for a long period, they cannot claim seniority over the direct recruits who later on are recruited against their vacancy. The exception provided to this general law laid down is that if a power has been conferred upon the Government to make relaxation in the quota rule and promotion has been made against the vacancy of direct recruits and such promotees have continuously officiated on the promoted post for 15 to 20 years against the vacancy of direct recruits, it will be assumed that the Government by making such promotion in excess of the quota has made relaxation in the quota rule even if no specific order of making relaxation in the quota rule has been passed. Therefore, the promotees have to first show that the Government is empowered to make relaxation in their quota rule. But in cases where there is no power of relaxation for howsoever long period a promotee may officiate in excess of the quota against the vacancy of direct recruit, he cannot claim seniority over the direct recruit who is recruited even after a long time against the vacancy. Rule 1 of the Rules referred to above which is the relevant

rule in the present case confers power upon the State Government to increase 25 percent quota of direct recruit to 50 percent and as such Government can increase the quota of direct recruit only. This rule shows that no power for increasing the quota of promotee has been conferred upon the State Government. No other rule has been placed before us which could show that relaxation can be made by the State Government in the quota of promotees. Therefore, the present case will not come under the exception enumerated above and even if the promotees in excess of their quota have been promoted and continuously officiated for a long time, they cannot claim seniority over the direct recruits who were recruited after a long time against the vacancy of their sources. In view of this in the present case it was not necessary to consider the question whether the promotees who were promoted in excess of their quota had officiated in the vacancy of direct recruits for a long time. In this connection it will also be necessary to find out if the quota rule has been implemented or not and if implemented then whether it was mal-implementation. I now proceed to consider the individual cases from that angle as well.

10. In this case, the sole petitioner was promoted as. Inspector of Excise and he joined on 5.5.1972. He was shown junior to respondents 3, 4 and 5. Respondents 3 and 4 joined as direct recruits on the post of Excise Inspector on 4.9.1972. Respondent no. 5 joined as such on 26.6.1974. Respondents 3 and 4 joined only after four months of the joining of the petitioners against the vacancy of the year 1968-69 and the petitioner held this vacancy of direct recruit only for a period, of five months. Likewise, respondent no. 5 joined this post against the vacancy of 1969-70 of direct recruit on 26.6.1974 and the petitioner held this post for period of two years. Therefore, in this case the petitioner was promoted in excess of quota of promotee and held the post in some cases for few months and in some cases for two years which period is a very short period. Therefore, he cannot take any advantage from the ratio laid down in Narender Chadha's case (supra) and he has been rightly shown as junior to respondents 3 to 5 in the gradation list and no illegality or mal-functioning of the quota rule have been committed in preparing the same specially when the petitioner has been absorbed in the vacancy of promotees of the year 1971-72.

C. W. J. C. No. 627 of 1986.

11. In this case the petitioner was promoted in the vacancy of direct recruit and joined on 10.4.1972. The petitioner in this case also claims seniority over the same very respondents 3 and 5. Since the petitioner did not continue on the vacancy beyond the quota for a long time, for the same reasoning he cannot claim seniority over respondents 3 to 5 and he was also absorbed in the vacancy of promotee of the year 1971-72. Therefore, the petitioner has been rightly shown in the gradation list as junior to respondents 3 to 5.

G. W.J. C. No. 629 of 1986.

12. The petitioner of this case was appointed against the vacancy of direct recruit

and joined on 10.3.1972. He claims seniority over respondents 3 to 8. Respondents 3 to 5 were common in this case also. Therefore, for the same reasoning the petitioner cannot rank senior to them. So far respondent no. 5 is concerned, he was recruited in June 1974 against the vacancy of direct recruit of the year 1969--70. So far as respondents 6 to 8 are concerned they were recruited against the vacancy of direct recruits of the year 1971-72 and the recruitment was made in June, 1974. These facts also show that for about two years only the petitioner held the vacancy of direct recruits and he was absorbed in the vacancy of petitioners of the year 1972-73. As stated above, since this petitioner also held the vacancy of direct recruit only for two years, he cannot claim seniority over respondents 6 to 8 and has been rightly shown junior to them in the gradation list.

C. W. J. C. No. 4097 of 1985.

13. In this case there are six petitioners and the contesting respondents are respondents 3 to 12. Petitioner no. 1 claims seniority over respondents 3 and 4 as he has been shown junior to them in the gradation list. This petitioner was appointed in the vacancy of promotee of the year 1974-75 and he joined as Inspector of Excise on 24.4.1974. The respondents 3 and 4 were promoted to the post of Excise Inspector from among the Upper Division Assistants of the Excise Department against the vacancies of the year 1974-75 and they joined on 7.5.1976. Since this petitioner and respondents 3 and 4 were absorbed in the vacancy of the year 1974-75 and the petitioner having joined on 24.4.1974 and these respondents having joined two years thereafter on 7.5.1976, this petitioner cannot be made junior to respondents 3 and 4. As such, the State has committed an error in showing this petitioner junior to respondents 3 and 4 in the gradation list,

14. So far as petitioners 2 to 6 are concerned, they joined in April and May, 1974 against the vacancies of direct recruits and 5 percent against the vacancies of promotion from among the Upper Division Assistants. So far as the seniority of these petitioners 2 to 6 vis-a-vis respondents 3 and 4 is concerned, in my view they have been wrongly shown in the gradation list as junior to these respondents. The Government notification fixing 5 percent quota from among the Upper Division Assistants was issued at the close of the year 1974-75, i.e., on 31.3.1975. Therefore, no 5 percent quota could be allotted to such promotees in the year 1974-75 as before the notification dated 31.3.1975 by which 5 percent quota was fixed, these petitioners were promoted as Inspectors of Excise. Since respondents 3 and 4 are said to have been appointed on 7.5.1976 against the promotees' vacancy of 5 percent quota of the year 1974-75, which was not then available. Therefore, I think the petitioner 2 to 6 have been wrongly shown in the gradation list as junior to respondents 3 and 4.

15. So far the seniority of petitioners 2 to 6 vis-a-vis respondents 5 to 9 is concerned, it may be stated that these petitioners were promoted in the year 1974 against the vacancy of direct recruits of the year 1974-76. Out of

respondents 5 to 9 some were appointed in the year 1977 and some in the year 1978 against the vacancy of direct recruits of the year 1974-75. These petitioners held the vacancy of the direct recruits for a period of about 3 to 4 years which cannot be said to be long one so as to confer a right, upon them to claim seniority. These petitioners were absorbed in the vacancy of promotees of the year 1977-78. Thus in my view, these petitioners cannot claim seniority over respondents 5 to 9 and they have been rightly shown as junior to them,

16. So far the seniority of petitioners 2 to 6 vis-a-vis respondents no. 10 is concerned, it may be stated that respondent no. 10 was recruited in the year 1979 in the vacancy of direct recruit of the year 1975-76. Respondent no. 11 was directly recruited in the year 1979 against the vacancy of direct recruit of the year 1976-77. Since these petitioners held the vacancy of the direct recruits for about 5 years which is not a very long period, they cannot claim seniority over respondent nos. 10 and 11 particularly when nothing has been shown to us that there was malfunctioning of the quota rule.

17. Petitioners 2 to 6 also claim seniority from respondent no. 12 who was appointed against 5 percent vacancy of Upper Division Assistants of the year 1977-78. Petitioners 2 to 6 were absorbed against the vacancy of promotees of the year 1977-78. Since petitioners 2 to 6 and respondent no. 12 were absorbed against their own respective vacancy and these petitioners were admittedly appointed and joined in 1974 and respondent no. 12 was appointed and joined in the year 1980, they could not have been shown junior to this respondent. Therefore, petitioners 2 to 6 have been wrongly shown as junior to respondent no. 12 in the gradation list (Annexure 15 to this writ application).

18. Learned Counsel for the petitioners further contended that the Government by orders dated 30th June, 1985 (Annexure 12) and 23rd December, 1985 (Annexure 14) has directed that respondents nos. 3 to 8 have been given charge of the post of Superintendent of Excise by treating them senior to the petitioners. Annexure 12 shows that respondents 3 and 4 while holding the charge of office of Inspector of Excise have been directed to discharge the functions of Superintendent of Excise and it has been mentioned in the order that this charge was given to them only provisionally and by this order no right is created in respondents 3 and 4. So far respondents 5 to 8 are concerned, Annexure 14 shows that these respondents who have held the charge of office of the Superintendent of Excise provisionally will not be entitled to claim any seniority by holding the charge of the office of the Superintendent of Excise nor they can claim any right of promotion thereby. It appears that Annexures 12 and 14 are in the nature of stop gap arrangement by which no right can be conferred in respondents 3 to 8 in any manner. Therefore, the petitioners cannot be said to be effected in any way by passing of Annexures 12 and 14. In the result, C.W. J C. Nos 453, 627 and 629 of 1986 are dismissed and C. W. J. C. No. 4097 of 1985 is allowed in part and the gradation list contained in Annexure 15 is hereby quashed. Respondents 1 and 2 are directed to draw up a fresh gradation list in

the light of the observations made in this judgment. All promotions granted since the filing of this writ application are subject to the decision herein given and they must be readjusted to be brought in consonance with this judgment. In the circumstances of the case, there will be no order as to costs.

S. Ali Ahmad, J.

I agree.