
(2008) 12 PAT CK 0023
In the Patna High Court
Case No : LPA No. 1414 of 2001

Shiv Narayan Sharma and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 23-12-2008

Acts Referred:

Constitution of India, 1950 — Article 13, 16, 309

Citation : (2009) 2 PLJR 626

Hon'ble Judges : Chandramauli Kr. Pd., Acting C.J.; Ravi Ranjan, J; Barin Ghosh, J

Bench : Full Bench

Advocate : Anil Kumar, Rajiv Prakash, Shankar Kishore Shahi in 1414, 1417, 1419, 651, 8242, M/s Promod Kr. Sinha, Madhukar Kr. Sinha, Prakash Kr. Sinha and Arvind Kr. Sharma No. 1 in 1512, for the Appellant; Ashok Kr. Gupta GP-2 (in 1414), Mr. Dhurendra Kumar (in 1417) and Mr. Anwar Karim (in 1419), for the Respondent

Final Decision : Dismissed

Judgement

Barin Ghosh, J.—These appeals and many other appeals arose out of orders passed by a learned Single Judge whereby prayers made by the writ petitioners, who are Registration Clerks, to quash the orders of transfer transferring them from one district to another had been dismissed. A Division Bench, while considering the appeals, prima facie, opined that the writ petitioners were district cadre employees and as such could not be transferred from one district to another. The Division Bench noticed that a Division Bench of this Court in LPA No. 3032 of 2000(R) dismissed the appeal arising out of the order dismissing the writ petition filed by a similarly situated writ petitioner. In those circumstances, the Division Bench referred the matter to a larger Bench for the purpose of determination whether the appellants belong to district cadre and, accordingly, could not be transferred out of the district. Rule 12 of the Bihar Service Code, containing Rules made under proviso to Article 309 of the Constitution, provides that cadre means the strength of the service or a part of a service sanctioned as

a separate unit. In order to show that the Registration Clerks of different Districts were sanctioned as a separate unit the appellants relied upon Rules 23, 23A, 25 and 37 of Chapter-IV of the Bihar Registration Manual, containing various instructions and orders issued by the Government of the then province of Bihar, which dealt with establishment, transfer, appointment and service book. There is no dispute that in 1951 those instructions and orders became Rules made under Proviso to Article 309 of the Constitution.

2. However, Rule 23 does not sanction the strength of the service or part thereof as a separate unit. It only provides that establishment for the district should be determined on the basis mentioned therein, supplemented by one additional Clerk for every one thousand searches or for every six subordinate offices. In other words, it only directs what volume of work would justify the appointments in the District Registration Office. The said Rule alone does not indicate sanctioning of the strength of the service as a separate Unit.

3. Rule 23A provides that all permanent Clerks other than Head Clerks and Record Keepers of the Sadar Registration Office shall ordinarily be transferred to other offices in the same district at prescribed intervals, once in five years, unless it becomes necessary to transfer any particular Clerk at shorter intervals in public interest. Therefore, Rule 23A envisages transfer of a permanent Clerk from one Registration Office to another Registration Office but within the same District. Though the same indicates that a permanent Clerk would be rotated amongst various Registration Offices within the District, but that alone is not sanctioning of the strength of the service or a part of the service as a separate unit. The said Rule makes the posts transferable but as aforesaid within the District.

4. Rule 25(1)(b) of the Rule, upon which reliance had been placed, restricted appointment of Clerks to persons residing in the district where such Clerks are to be appointed. Therefore, the strength of the manpower is to be determined on the volume of work available in a district, people residing in that district will be appointed and they will be rotated within the district. Thus it was contended that strength of the district service was sanctioned as a separate Unit.

5. By virtue of the provisions contained in Article 16 of the Constitution of India read with Article 13 of the Constitution of India that part of Rule 25 should be deemed to have been not there on and from 26th January, 1950. The determined manpower, therefore, can be supplied by people residing outside the District. The appellants were appointed after 26th January, 1950. The requirement of manpower to be determined on the volume of work available in a district and the people engaged to discharge such work will remain in the district is also an indication that the intention was to create a district cadre was the assertion of the appellants. Principles laid down to ascertain required manpower is one thing and sanctioning the strength of the service is another, where the number is fixed and does not remain floating. In the absence of declaration of the strength of the service, from mere retention of the floating number of service holders, who may

come from anywhere, in the same district, no intention can be implied of creation of a district cadre.

6. Rule 37 directs maintenance of a service book and leave accounts of Clerks and supply thereof free of cost to the Clerks. These provisions of the Rules, therefore, do not suggest that district cadre of Registration Clerks had been intended or was made.

7. Rule 5 of the Bihar Service Code provides that no power under the Rules contained in the said Code may be exercised by the State Government except after consultation with the Finance Department. It further provides that it shall be open to that department to prescribe by general or special order, cases in which its consent may be presumed to have been given, and to require that its opinion on any matter on which it has been consulted shall be submitted to the Council of Ministers by the consulting department. The Code contains Appendix-1 in Part-II thereof, which lists delegation of powers which may be exercised by other Departments of the Government without consulting the Finance Department. In that it has been provided that the Clerks in Sadar and Sub-Registry Offices may be transferred from one Office to another within the district by the District Registrars. At the same time, it has been provided that the Inspector General of Registration may transfer Head Clerks and Record Keepers in the Registry Offices from one district to another within the State and such power is to be exercised when transfers are made by mutual consent of the Government servant concerned or at interval ordinarily of five years or when the exercise is necessitated by an administrative reason or by exigencies of public service. Appellants relied upon the said provisions to suggest that the Clerks in Sadar and Sub-Registry offices can only be transferred from one office to another within the district. A look at the appendix and the concerned Rule would make it amply clear that in the matter of transfer of Clerks of Sadar and Sub-Registry Offices from one office to another within the district by the District Registrars, consultation of the Finance Department would not be necessary. Apart from that it does not indicate anything else. While Clerks are Clerks Head Clerks are also Clerks. Inspector General of Registration has been authorized to transfer Head Clerks from one district to another without any further consultation of the Finance Department of the State. The aforementioned provision upon which reliance has been placed do not suggest that the Clerks of the Registration Offices in a District form a separate cadre.

8. The appellants are, no doubt, employees to the State Government. They were appointed as Clerks in the District Registration Offices. The post to which they were appointed were transferable posts. Rule 23A of the Rules referred to above, though indicated that the appellants shall be transferred to other offices in the same district but did not indicate who shall be competent to transfer them. The appendix, referred to above, made it clear that they may be transferred without consultation of the Finance Department by the District Registrars. It was not indicated either in the said Rules or in the said appendix or anywhere else that

the appellants cannot be transferred from an office situate in one district to another. At the same time it was clearly indicated in the said appendix that Head Clerks may be transferred from one district to another by the Inspector General of Registration without consultation with the Finance Department. The said state of affair clearly indicates that the appellants were State Government employees holding transferable posts with an assurance that they would be transferred from one office to another within the district but there was no indication at any point of time that there is a conscious decision of the Government to create a district cadre of Clerks working in different Registration Offices in a district.

9. The question is when there is an" indication that appellants can be transferred from one office to another within the district, but there is no indication of creating a district cadre, can it be said that the appellants cannot be transferred from one office in a district to an office in another district. It is the contention of the appellants that applying the de facto doctrine the appellants can only be transferred from one office to another within the same district. It is true that Rule 23A suggests that the appellants can be transferred from one office to another within the district, but the real purport of Rule 23A was to ensure that ordinarily a Clerk should not be permitted to remain in one office for a period in excess of five years. In other words, Rule 23A indicated the tenure of the Clerks, upon completion whereof they were to be shifted to another office. In the absence of intention to create a district cadre which neither the Rules nor the Appendix, referred to above, suggests, it cannot be said that because while specifying the tenure it had been indicated that a Clerk may be transferred from one office to another of the same district he cannot be transferred in an office situate beyond the district.

10. In a Circular dated 20th May, 1995, it had been stated that the post of Clerks in a Registration Office is a District level post. The said Circular was issued to provide clarifications as regards roster for filling up the posts of Clerk in the context of appointment of temporary Clerks from amongst the extra Clerks. In other words, the extra Clerks working in a District to be appointed as temporary Clerks in the District was the subject matter of the said Circular and the clarification indicated how the roster shall be applied for such appointment. When the volume of work justified appointment, extra Clerks appointed to deal with the volume could only be asked to continue to deal with such volume in their changed capacity provided they come with the reservation policy.

11. The appellants were employees of the State. As would be evidenced, amongst others, from the letter addressed to the Accountant General, Bihar, on 26th May, 1967 they were treated as such. This was further clarified by the State Government on 15th April, 1971 when it was stated that the appointments against the vacancies in the posts of Clerks shall be given by the Inspector General of Registration. Although, in the letters dated 26th May, 1967 and 15th April, 1971 the State Government used the expression "amalgamation", but in fact what the State Government intended to convey was "consolidation" since the

State Government had never created any District cadre, accordingly, question of amalgamating different cadres did never arise. As far back as on 10th March, 1965, as was conveyed in the letter dated 26th May, 1967, the decision to consolidate was taken. The decision to consolidate was taken for proper administration of the Registration Department of the State. In fact, what was prevailing in law all throughout was reiterated in 1965.

12. In the circumstances, the conclusion would be that the appellants were not working in any District cadre post, but, being employees of the State Government holding transferable posts were obliged to discharge duties assigned to them in any Registration Office of the State upon transfer being effected.

13. The reference is, accordingly, decided holding that the appellants were not holding any District cadre posts and, accordingly, their contention that they cannot be transferred to different districts is not sustainable. Appeals are, accordingly, dismissed. The writ petitions being the subject matter of these appeals and other appeals were filed when 266 Clerks were transferred at a time. The transfers have been effected. Subsequent thereto in 2004 separate Rules have been framed. In terms thereof the state of affair as was prevailing previously had been reiterated and it has been declared that the appellants are holding State cadre posts. Learned Advocate General has brought to our notice that one seniority list of the Clerks have been prepared. In such view of the matter, it is our duty to record that many of the appellants similarly situate to that of the appellants in these appeals did not press their appeals and permitted the same to be dismissed as infructuous.

Chandramauli Kumar Prasad, A.C.J.

I agree.

Dr. Ravi Ranjan, J.

I agree.