
(1994) 10 PAT CK 0010
In the Patna High Court
Case No : C.W.J.C. No. 1840 of 1993

Smt. Krishna Rai and Others

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 25-10-1994

Acts Referred:

Citation : (1994) 10 PAT CK 0010

Final Decision : Allowed

Judgement

Radha Mohan Prasad, J.—In this writ application the petitioners, six in number have prayed for quashing of the office order dated 4.1.1993, whereby respondent No. 10 has been promoted in the Junior Selection Grade and the office order dated 11th February, 1993 whereby respondent Nos.5 to 9 have been promoted in the Senior Selection Grade in the scale of Rs. 1800-3300 with effect from 7.9.1990 as contained in Annexures-5 and 6 respectively; and for directing the respondent State to promote the petitioners of Junior Selection Grade with effect from 7.9.1987 and as Senior Selection Grade Assistant with effect from 7.9.1990 in the aforementioned scale and further to direct the respondent State to place the petitioners above the private respondents in the seniority list and to give all consequential benefits in the service for which they are entitled. In course of hearing Mr. Jha, learned senior counsel appearing for the petitioners also prayed for quashing of the office order dated 3-6-1988 whereby, and whereunder the respondent Nos. 5 to 7 were given promotion in Selection Grade with effect from 7.9.1987 and respondent Nos. 8 and 9 with effect from 10.9.1987 and 11.11.1987 respectively. Later a petition for amendment of writ application was filed on behalf of the petitioners challenging the notification No. 422 dated 16th October, 1993, a photo-copy whereof has been annexed as Annexure-12, in so far as respondent Nos. 5 to 9 have been promoted by it to the post of Section Officer in the scale of Rs. 2,000-3,500 with effect from the date of their joining with monetary benefit. The said petition was allowed by order dated 26.4.1994. Thus, in the present writ application the petitioners now also pray for quashing of the aforesaid Annexure-12.

2. In short, the relevant facts of the case are that petitioner No. 1 was initially appointed as Typist in the year 1973, petitioner No. 2 as Computer Assistant on 26.8.1976, petitioner Nos. 3, 4 and 5 as Typist on 28.2.1975, 11.2.1974 and 20.12.1979 respectively and petitioner No. 6 as Bill Clerk on 1.10.1977. Their case is that a Combined Limited Examination only for the candidates, who were working as typist, computer and bill clerk in the Secretariat cadre was held and the petitioners, who fulfilled the minimum requisite qualification appeared in the said examination and after being successful were appointed in Class III as Secretariate Assistant by the competent authority and they joined on 4.9.1980 except petitioner No. 2, who joined on 3.2.1981 under Engineer-in-chief, Public Works Department, which now has been bifurcated into Road Construction Department and Building Construction Department. The services of the petitioners have been placed under the Road Construction Department. They were treated as Probationary with effect from their respective date of joining.

3. Respondent Nos. 5 to 9 without appearing in the Combined Limited Examination were appointed as Secretariat Assistant on the basis of the recommendation of the Secretariat Sports Club and respondent No. 10 was appointed on compassionate ground as his father died in harness. Out of the said respondents, respondent Nos. 5, 6 and 7 joined service on 7.9.1979, respondent No. 8 on 10.9.1979, respondent No. 9 on 10.10.1979 and respondent No. 10 on 18.6.1980.

4. It is contended that as per the Government resolution dated 11 th December, 1983 issued by the Personnel and Administrative Reforms Department, a true copy whereof has been annexed as Annexure-1, an Assistant, who entered in service after passing the competitive examination is to be declared on probation in substantive capacity with effect from his date of joining, whereas, those Assistants, like the respondent Nos. 5 to 10 who joined service without passing the competitive examination on the recommendation of the Secretariat Sports Club or on compassionate ground are to be declared on probation, only after they complete three years meritorious satisfactory service and shall be confirmed after completion of two years continuous satisfactory service on probation provided they pass the departmental examination in four opportunities. According to the petitioners, the aforesaid Government resolution has been issued in furtherance of its earlier resolution dated 30th March, 1981 which was taken on consideration of various circulars relating to confirmation of such Assistants, as also the grievances made by them. It is, thus contended that the aforesaid respondents Nos. 1 to 10 could be put on probation only after they completed three years meritorious satisfactory service from the date of joining, whereas, the petitioners, who joined as Assistants after passing the competitive examination have been on probation right from the date they joined the service.

5. A counter affidavit has been filed on behalf of respondent Nos. 5 to 9 in which it is stated that earlier there were separate cadres of Class III employees in different departments of the Secretariat and its attached offices consisting the

posts of Lower Division Assistants and Upper Division Assistants, which were merged on 1st January, 1977 and now they all are called Assistants. According to the said respondents, rules relating to the appointment to the post of Lower Division Assistant was laid down in the Bihar Secretariat instruction under which the appointments used to be made on the basis of competitive examination. The said rule was followed up to the year 1961. During the years 1961 to 1973 no examination was conducted for such appointments, except two special examinations, one in the year 1966 and the other in the year 1971 and a large number of persons were appointed as Lower Division Assistants on the basis of the aforesaid Secretariat examination upto the year 1976. Further case of the respondents it that for the first time the State Government by letter dated 14th March, 1973 introduced special provision for appointment of Sportsmen in the Secretariat against Class III and Class IV posts which was reiterated in the Government resolution dated 20th January 1979. It is contended that separate procedure was laid down for such appointments, which was different from the rules contained in the Secretariat instructions which was silent in this regard. According to the said respondents in terms of the said 1979 resolution name were called for and the names of respondents 5 to 8 who were Footballers and responder No. 9, who was a Table Tennis player were recommended for appointment as Secretaria Assistants. It is claimed by the said respondents that they were appointed on the basis class recommendation made by the Special Selection Committee, which made their selection from amongst the candidates in the aforesaid category.

6. It is contended that the State Government vide its resolution dated 30th March, 1981 also took notice of the various appointments made between 1961 and 1976 without passing any competitive examination in different departments and decided to regularise the services of those, who were appointed on the basis of some Special Examination and/or Limited Examination. As regards the petitioners, it is stated that those who were functioning against one or other lower posts in different offices by way of Stop-Gap Arrangement, were allowed to appear in 1976 limited examination. However, in anticipation of the result of the said examination they were appointed on purely temporary and provisional basis to the post of Assistant on 4th of September 1980 and later when, they were declared successful in the said examination their names were forwarded for appointment on regular basis and were finally appointed in between December, 1980 and November 1982. It is thus, contended that the petitioners were appointed practically after one to three years of the appointment of the said respondent Nos. 5 to 9. However, as per the resolution dated 30th March, 1981 and 11th December, 1981 the petitioners were placed on probation from the initial date of regular appointment between December, 1980 and November, 1982 and respondent Nos. 5 to 9 in September to November, 1982 and thus, the petitioners had a march over respondent Nos. 5 to 9 in the matter of seniority as Assistants. It is also stated that the petitioners as well as respondent Nos. 5 to 9 were placed on probation by the same order dated 2nd September, 1987 and

that they were also confirmed as Assistants by the same order dated 17th November, 1987.

7. Further case of the respondents is that prior to recommendation of the 5th Pay Revision Committee i.e. 18th December, 1989, there were only Higher Grade, commonly known as Selection Grade Assistants and for the purpose of promotion to the same rules and guidelines were laid down by the State Government. According to the said Rules two conditions namely, passing of departmental examination and completion of Kalawadhi of 8 years. Assistants were required for consideration of a case for promotion to the selection grade. The copies of the rules/guidelines dated 23rd May, 1979 and 27th July, 1979 have been annexed as Annexure R/L and R/M. It is said that in the year 1987 a large number of posts of Selection Grade Assistants fell vacant in Public Works Department and the matter for promotion of the same were taken up by the State Government in May/June, 1988, by the time respondent Nos. 5 to 9 had completed the aforesaid period of 8 year of Kalawadhi as Assistants and were eligible for promotion in September-November 1987. According to the respondents, petitioners who had not completed 8 years of Kalawadhi by them, were not eligible for promotion. The said respondents also claim to have passed the requisite departmental examination by 1986. It is thus contended that their cases were considered for promotion, whereas the cases of the petitioners were not considered and by order dated 3rd June, 1988 the said respondent Nos. 5 to 9 were promoted to the scale of Selection Grade Assistant with effect from 7.9.1987, in the case of respondent Nos. 5 to 7 on 10.9.1987 and 11.1.1987 in the case of respondents 8 and 9 respectively. In August, 1988 the respondent State came out with a resolution merging the cadre of ministerial offices of different departments at Secretariat and its attached offices level and the posts of assistants, Selection Grade Assistants, Section Officers, Registrars were merged with effect from 30th August, 1988 at its corresponding levels. According to them, as per Clause 7 of the said resolution dated 3rd August, 1988, separate joint seniority of different posts/ranks were to be determined. In the case of assistants it was to be determined as on 30th August, 1988, whereas in the case of Selection Grade Assistants and above, it was to be determined on the basis of substantive appointment in the said grade and/or continued officiating appointment, whichever was earlier. It is also stated that by Bihar Ordinance No. 18 the aforesaid Government resolution was introduced in the form of Statute. Later, the said Ordinance was converted into Act 19 of 1989 commonly known as "Assistants of Secretariat and attached offices joint cadre Act, 1989. It is contended that u/s 5 of the said Act a separate Joint seniority list of Selection Grade Assistants is to be prepared prior to the cut-off date i.e. 10th August, 1988.

8. Mr. Jha, learned Counsel appearing for the petitioners submitted that question involved in this case is as to whether the period of probation as declared vide Annexure-2 issued pursuant to the Govt. resolution dated 11-12-1984 contained in Annexure-1 which was never challenged by any party, can be counted for the

purpose of determining the required Kalawadhi for promotion or not. Alternatively. It was submitted by the learned Counsel for the petitioners that in any view of the matter, the petitioners were entitled for availing the provisions of relaxation, as incorporated in Clause 4 (Kha) in Govt. resolution No. 11601 dated 20th October, 1982, the relevant extract of which has been given in Annexure-9 before the issuance of the impugned order of promotion, inasmuch as according to the learned Counsel two persons namely Sarbshri Nawal Kishore Sharma and Sita Saran Prasad were given Relaxation pursuant to the said Govt. resolution whereas petitioners have not been given the same treatment. Thus, according to him, the action of the official respondents in not considering the case of the petitioners for promotion in Junior Selection Grade and Senior Selection Grade after giving relaxation of one year is violative of Articles 14 and 16 of the Constitution of India, specially in the back ground of the fact that the petitioners had entered service after passing of the required examination whereas, the concerned respondents did not enter service on the basis of the result of any examination, rather they were appointed either because they were sportsmen or on compassionate ground.

9. On the other hand, learned Standing Counsel 1, appearing on behalf of the official respondents, submitted that the authority can take into account any period since after the appointments whether on temporary or permanent basis for the purpose of computing Kalawadhi and as the petitioners did not even complete the Kalawadhi, they were not eligible for promotion. Thus, according to him, the petitioners cannot question the validity of promotion of respondent Nos. 5 to 10.

10. Mr. Mukhopadhyaya, learned Counsel appearing for respondent Nos. 5 to 9 also submitted that the petitioners were not eligible in the year 1988 for promotion and thus, according to him, no right of the petitioners was adversely affected when the respondents were given their first promotion on 3.6.1988. Further, it was submitted that in any case, the petitioners are not entitled to question the validity of the aforesaid order in the present writ application after a lapse of 5 years. According to him, the petitioners are not entitled for any relief from this Court in the present writ application.

11. On merit learned Counsel for respondent Nos. 5 to 9 submitted that they passed the departmental examination in between 1983 to 1985 and also completed the Kalawadhi whereas, the petitioners were not eligible, as they did not complete the Kalawadhi, Thus, according to him, even if it is held that respondents Nos. 5 to 9 were initially junior to the petitioners, still they cannot be given any relief in view of the aforementioned undisputed facts.

12. Further, it was submitted by Mr. Mukhopadhyaya, that the cadre consists of temporary and permanent posts and it is nobody's case that the service of Assistants consists of two separate cadres for temporary and permanent employees. Accordingly, relying upon the Supreme Court decision in the case of Baleshwar Dass and Others Vs. State of Uttar Pradesh and Others, , the learned

Counsel submitted that the respondent Nos. 5 to 9, who, in fact, entered the service before the petitioners, cannot claim to be senior to the said respondents merely because their dates of probations are of later dates.

13. The real question involved in the present case is as to since when a Government servant can be said to have entered the service.

14. Rule 41 of the Bihar Service Code, 1952 (hereinafter referred to as the "Code" defines the word "Probation. According to it "Probation" means a Government servant employed on probation in or against a substantive vacancy in the cadre of a department. It is well known that the term "Probation" means testing of a person's capacity, conduct or character especially before he is admitted to regular employment. In Webster's dictionary "Probation" is said to have been derived from the Latin word "Probatio" and French "Probare" which mean to try, examine, prove and is itself defined as any proceeding designed to ascertain truth, to determine character, qualification etc., examination, trial or a period of trial, as to engage a person on probation. A reference may be made to the decision of the Supreme Court in the case of Kesharichand Jaisukhal Vs. The Shillong Banking Corporation, . Further the meaning given to the word "Probation" in Wharton's Law Lexicon; thirteenth Ed., is "suspension of a final appointment to an office until" a person temporarily appointed (who is called a "Probationer") has by his conduct proved himself to be fit to fill it. Thus, even from reading of Rule 41 of the Code it is clear that when a Government servant is put on probation only then he gets appointment in a substantive capacity in the cadre of a department against a substantive vacancy.

15. Under the aforementioned Govt. resolution an Assistant who entered service after passing the competitive examination is to be declared on probation in substantive capacity with effect from the date of his joining, whereas those assistants, who joined service without passing the competitive examination, such as on the recommendation of the Secretariat Sports Club or on compassionate ground are to be declared on probation only after they complete three years of meritorious satisfactory service. Thus, in view of the aforesaid Government resolution read with Rule 41 of the Code it is difficult to hold that the persons appointed on purely temporary basis without appearing at the competitive examination could claim entry in the service before they are given appointment on probation against a substantive post in the department.

16. The Supreme Court in the case of Baleshwar Dass and Others Vs. State of Uttar Pradesh and Others, held that the order of appointment to the service is decisive of seniority in service. Further, in the said case the Supreme Court held that when a person is appointed temporarily to a post but after fulfilment of all the tests for regular appointments, including consultation with the Public Service Commission, he must be held to be in substantive capacity. It was also held merely because a person is a temporary appointee, it cannot be said that he is not substantively appointed if he fulfils the necessary conditions for regular appointment such as probation and consultation with the Public Service

Commission etc.. According to the Supreme Court the order of appointment in a substantive capacity is a significant starting point for reckoning seniority.

17. In the present case it is not in dispute that respondent Nos. 5 to 10 did not face the competitive examination. Further, it is also not in dispute that the said respondents were put on probation after the petitioners and accordingly, their names, in the seniority list (Annexure-3) which was prepared in the year 1988 were also shown below the petitioners and were also treated to be juniors to the petitioners. This fact is also evident from the office order giving them selection grade (Annexure-4) in which it was also made clear that by the said promotion the seniority shall not be affected. I am unable to appreciate as to how the concerned respondents 5 to 10 can be granted promotion before the petitioners, who were appointed on the result of an open competitive examination and in the seniority list also they were shown as senior to the said respondents. By the grant of promotion, in my opinion, the Government in fact, attempted to change the seniority of the petitioners vis-a-vis respondents on the basis of length of service ignoring the aforementioned Government resolution, rules and the principle of fixation of seniority.

18. Moreover, from the facts it appears that all the petitioners were initially appointed in between 1973 and 1977 on temporary capacity before taking the Combined Limited Examination and on being successful in the said examination were appointed on probation sometime in between September, 1980 and February 1981. Respondents 5 to 9 were also given appointment on purely temporary basis without requiring them to appear in any competitive examination and later, they were put on probation after the petitioners. Thus, also I do not find any justification to supersede the claim of the petitioners by giving promotion to junior persons, namely, the concerned respondents.

19. It is not in dispute that both the petitioners as well as the concerned respondents had already passed the requisite departmental examination by the year 1985-86. The only plea taken against the petitioner for non-consideration of their cases for promotion is that they had not completed 8 years of "Kalawadhi" when the cases of concerned respondents were considered. I am unable to appreciate the said plea of the concerned respondents. From reading of Rule 41 of the Code, which defines "Probation", it is clear that a substantive vacancy in the cadre of department became available for appointment of the concerned respondents only when they were put on probation and thus, in my opinion, they cannot get the advantage of the period when the said respondents were working on purely temporary basis in the matter of seniority or even for reckoning of Kalawadhi. In any case, if the period of their purely temporary appointment can be counted for determining "Kalawadhi" of the concerned respondents, I do not find any justification to deprive the same benefit of the appointment of the petitioners in between 1973 and October, 1977. Moreover, the Government resolution contained in Annexure-1 which was never challenged by any party itself has now put the petitioners and the respondents at par. According to the

said Government resolution, the concerned respondents could be treated equally to the petitioners only after they were put on probation. In any view of the matter, in my opinion, in the facts of this case it is a fit case in which the Government should have exercised the power of relaxation in the matter of Kalawadhi in order to protect the right of the petitioners for consideration of their cases for promotion before their juniors.

20. Normally, in view of the delay in approaching this Court by the petitioners, I would not have considered their contentions on merit and to grant them the relief. But as I find that the action of the official respondents in giving promotion to the concerned respondents had been wholly arbitrary and contrary to the Government resolution and the rules as also the fact that the petitioners had filed representation before the Chief Engineer as well as before the Secretary, Personnel and Administrative Reforms Department Secretary, Road Construction Department in the years 1988 and 1989 respectively vide Annexures-7 and 8 and further that respondent No. 10 was given promotion in the year 1993 ignoring the legitimate superior claim of the petitioners, I feel persuaded to grant relief to the petitioners in the present application and accordingly direct the respondents to promote these petitioners to the Junior Selection Grade as well as Senior Selection Grade with effect from a date prior to the concerned respondent Nos. 5 to 10 and place them above the said respondents in the seniority list (Annexure-3) and also give all consequential benefits in the service, for which they are entitled.

21. In the result, the writ application is allowed, but without costs.