
(2014) 04 JH CK 0022
In the Jharkhand High Court
Case No : L.P.A. No. 511 of 2009

State of Bihar

APPELLANT

Vs

Ravindra Prasad Singh

RESPONDENT

Date of Decision : 22-04-2014

Acts Referred:

Bihar Reorganisation Act, 2000 — Section 72, 72(2), 73

Citation : (2014) 4 AJR 258 : (2014) 3 JLJR 76

Hon'ble Judges : R. Banumathi, C.J;S. Chandrashekhar, J

Bench : Division Bench

Advocate : Ramit Satender, Advocate for the Appellant; M.S. Anwar, Senior Advocate and Sumir Prasad, S.C. I, Advocate for the Respondent

Final Decision : Allowed

Judgement

S. Chandrashekhar, J.—A writ petition was filed by respondent No. 1 herein seeking direction "to consider and take a decision" on his representation dated 16.01.2008 by which he had made a request either to relax the condition contained in notification No. 12730 dated 05.12.2007 providing that his claim for seniority would not be considered or to permit him to join his post in the State of Bihar as per the final cadre allocation. Following the judgment in Rajendra Pratap Sinha Vs. The State of Jharkhand and Another, , the writ petition was allowed holding that the writ petitioner (respondent No. 1 herein) is entitled to claim seniority on the basis of the original gradation list. Aggrieved, the State of Bihar through, the Home (Special) Department, Government of Bihar has preferred this Letters Patent Appeal. The issue involved in the present case is, whether the employees opting for mutual transfer from one State to another State can be subjected to a condition whereunder their claim for seniority in terms of the original gradation list would not be entertained and whether such employees whose request for mutual transfer has been accepted by the respective States are entitled for protection u/s 73 of the Bihar Reorganisation Act, 2000?

2. Before dealing with the issue involved in the present Letters Patent Appeal, it

would be appropriate to notice various orders/circulars/notifications of the Central Government, the Government of Bihar and the Government of Jharkhand issued in this regard. u/s 72(2) of the Bihar Reorganisation Act, 2000 the Central Government was to allocate cadre and post in various services of the undivided State of Bihar. Under the scheme adopted for division of cadres and allocation of posts and personnel, the government employees were called upon to submit their options for serving either in the reorganised State of Bihar or in the newly created State of Jharkhand. The State Advisory Committee, created for the purpose, prepared a tentative list of the employees in various departments. After the publication of the tentative allocation list, the State Advisory Committee invited objections and thereafter, the final cadre allocation orders were issued. After the final allocation orders were issued, a large number of representations were received by the Ministry of Personnel, Public Grievances and Pensions, Government of India for reallocating the cadre. On 15.09.2004, Department of Personnel and Training, Government of India wrote letter to the Chief Secretary, Government of Bihar and Government of Jharkhand indicating that the representation made on behalf of the employees falling under certain categories may be considered. Thereafter, the Special Secretary, Home (Special) Department vide letter dated 21.05.2005 requested the Chief Secretary, Government of Jharkhand to entertain applications for mutual transfers on the following conditions,

- (i) Both employees belong to the same service and cadre.
- (ii) Both employees are of equivalent pay-scale and have the same level of seniority.
- (iii) Both employees have same marital status, so that in matters related to spouse regarding posting in the same State, conflict of decisions did not arise.
- (iv) Both employees have not exercised option earlier or their option has not been considered.
- (v) Request is being made for allocation of service in the State to which they are original inhabitant of that State.
- (vi) Due to illness or arise of any other casual reasons, allocation of service in another State has become necessary.

3. Noticing that in some cases both the successor States have been requesting for change in the allocation of cadre of the employees, the Department of Personnel and Training vide letter dated 08.06.2006 communicated the Chief Secretary of the Government of Bihar and the Government of Jharkhand that it was open to the successor State Governments to consider the request for revision of cadre allocation based on broad consensus arrived at between the successor State Governments inter-alia, either by defining the terms and conditions for such consideration or by framing suitable rules for the said purpose.

4. In the light of letter dated 08.06.2006, the Principal Secretary, Department of Personnel, Administrative Reforms and Rajbhasa, Government of Jharkhand vide letter dated 21.12.2006 informed the Chief Secretary Government of Bihar that the Government of Jharkhand has taken a decision to entertain the application seeking change in cadre allocation under the following conditions:

(i) Such employees whose final cadre allocation has been done against their option.

(ii) Cadre revision shall be considered only on the basis of availability of post.

(iii) Claim for seniority as a result of cadre revision shall not be admissible i.e., he shall be placed as the most junior in his category/cadre.

(iv) Till issue of this order or those cadres whose final allocation is awaited, facility of cadre revision shall be admissible only against representations received within four months of final allocation.

5. On 27.06.2007, the High Powered Committee constituted under the State Reorganisation took a decision to issue a fresh communique inviting applications for seeking cadre revision. In these circumstances, the respondent No. 1 herein (writ petitioner) was permitted to remain in the State of Jharkhand on the conditions that his claim for seniority based on original gradation list would not be entertained.

6. Now, adverting to the facts of the case, it is seen that the respondent No. 1 was appointed as Assistant Engineer in Road Construction Department, Government of Bihar in the year, 1987 and at the time when the final cadre allocation order was issued, he was posted as Assistant Engineer in National Highway, Subdivision, Medininagar, Daltonganj, State of Jharkhand. The final cadre allocation order relating to the Assistant Engineers in Road Construction Department was issued on 13.09.2006 and the respondent No. 1 was allocated State of Bihar and his name appeared at serial No. 950/Bihar in the final cadre allocation list. One Avinash Prasad Singh, Assistant Engineer in Road Construction Department working in the State of Bihar was allotted State of Jharkhand by the said order dated 13.09.2006 and his name appeared at serial No. 215 in the said list. The respondent No. 1 and the said Avinash Prasad Singh mutually agreed to seek revision in the cadre allocation order on the understanding that the respondent No. 1 intended to remain in the State of Jharkhand whereas, the said Avinash Prasad Singh desired to remain in the reorganised State of Bihar. They submitted a joint representation dated 04.10.2006 to the Deputy Secretary, Home (Special) Department, Government of Jharkhand. However, by notification dated 20.10.2006, the respondent No. 1 was relieved and therefore, a writ petition being W.P. (S) No. 6234 of 2006 was filed which was disposed of vide order dated 02.11.2006 directing the concerned authority to consider and take a decision on the application moved by the respondent No. 1 and other employees who were also petitioners in W.P. (S) No. 6234 of 2006. It was further ordered that the applicants who were before the

Court shall not be disturbed from their posting. Thereafter, the respondent No. 1 and the said Avinash Prasad Singh again submitted a joint representation before the Commissioner-cum-Secretary, Road Construction Department, Government of Bihar on 08.01.2007 seeking mutual transfer. However, the respondent No. 1 having come to know that the mutual transfer is being ordered by the Home (Special) Department, Government of Bihar on the condition that the claim of seniority would not be considered, submitted a representation dated 05.11.2007 before the Secretary, Road Construction Department, Government of Jharkhand withdrawing his earlier representations dated 04.10.2006 and 08.01.2007 and requested that in terms of notification dated 13.09.2006 issued by the Department of Personnel and Training, he may be permitted to join his post under the Government of Bihar. However, vide notification dated 05.12.2007 issued by the Home (Special) Department, Government of Bihar, the respondent No. 1 was retransferred to State of Jharkhand on the conditions that his claim for seniority would not be considered. Thereafter, the respondent No. 1 submitted a representation on 16.01.2008 to the Secretary, Road Construction Department, Government of Jharkhand for relaxing the condition relating to seniority or to send him to the State of Bihar.

7. The respondent No. 1 has filed a counter-affidavit taking a plea that, since the State of Jharkhand has decided to implement order passed in "Rajendra Pratap Sinha" (supra) and consequently order dated 19.07.2008 has been recalled by issuing order dated 29.08.2009 therefore, no interference is required in the matter. It is further submitted that since in letter dated 21.05.2005 which prescribed the conditions for transfer, a condition as to loss of seniority was not provided, therefore, in the order of cadre re-allocation dated 05.12.2007 no such condition could have been incorporated so as to make respondent No. 1 suffer the loss of seniority.

8. The State of Jharkhand filed a counter-affidavit stating that the claim for relaxing the condition cannot be entertained as, such a condition cannot be changed unilaterally by the Road Construction Department, Government of Jharkhand. It is further stated that the Road Construction Department, Government of Jharkhand is bound to follow the condition imposed by Home (Special) Department, Bihar and it is not competent to send service of the respondent No. 1 back to Bihar because his service was received through mutual transfer.

9. We have heard the learned counsel appearing for the parties and perused the documents on record.

10. Mr. Ramit Satender, the learned counsel appearing for the appellants has submitted that the appellant - Home (Special) Department was constituted as the Nodal Agency which has passed the orders of cadre revision after the final cadre allocation orders were issued by the Central Government. It is submitted that in view of the letter dated 21.12.2006, whereunder the State of Jharkhand communicated its agreement for entertaining request for change in cadre

allocation and one of the conditions was that the employee would not be entitled for seeking seniority on the basis of original gradation list and those employees seeking mutual transfer would be placed at the bottom in the seniority list, the order dated 05.12.2007 has been issued by the appellant - Department. It is submitted that the respondent No. 1 having full knowledge about the conditions on which the request for mutual transfer was entertained and having submitted his representation seeking mutual transfer cannot seek for relaxation in the conditions imposed in the order dated 05.12.2007. It is thus submitted that, the learned Single Judge fell in error in allowing the writ petition on the ground that u/s 73 of the Bihar Reorganisation Act, the benefit of service which accrued to the respondent No. 1 cannot be denied, curtailed or withdrawn. It is further submitted that the order in "Rajendra Pratap Sinha" (supra) is also erroneous for the reason that Section 73 of the Bihar Reorganisation Act is not attracted in cases of mutual transfer. It is stated that the appellant herein which was not made a party in W.P. (S) No. 3844 of 2008 (Rajendra Prasad Sinha) has therefore, filed a Civil Review bearing No. 112 of 2009. It is further submitted that in view of order dated 10.12.2007 in C.W.J.C. No. 10928 of 2006, "Bharat Jha v. State of Bihar and others", the request of the respondent No. 1 vide letter dated 05.11.2007 withdrawing his earlier representation seeking mutual transfer could not have been acceded to, as letter dated 05.11.2007 was submitted by the respondent No. 1 alone and it was not signed by the other person namely, Avinash Prasad Singh.

11. Referring to letters dated 15.09.2004 and 21.05.2005, Mr. Sohail Anwar, the learned Senior Counsel appearing for the respondent No. 1 has submitted that as directed by the Government of India, neither any rules nor any guidelines have been formulated by the State Governments for regulating the mutual transfer of the employees. It is further submitted that the reliance placed by the appellant on letter dated 03.02.2009 is misplaced inasmuch as, by order dated 05.11.2007, the respondent No. 1 stood transferred and since the letter dated 03.02.2009 has not been made applicable with retrospective effect, the conditions mentioned therein cannot be made applicable to the transfers made prior to 03.02.2009. It is further submitted that in pursuance of order passed by this Court in "Rajendra Pratap Sinha" (supra), the State of Jharkhand decided to implement the direction passed by this Court in the case of "Rajendra Pratap Sinha" (supra) by issuing letter dated 29.08.2009. It is thus submitted that since the State of Jharkhand has decided to give seniority to respondent No. 1 as per the original gradation list and it has not decided to challenge the order passed by this Court in the case of "Rajendra Pratap Sinha" (supra), this Court may not interfere with the impugned order dated 01.07.2009. It is further submitted that since the Civil Review No. 112 of 2009 filed by the appellant against order dated 26.02.2009 in W.P. (S) No. 3844 of 2008, that is, in the case of "Rajendra Pratap Sinha" (supra) is pending before this Court, it would be proper to wait for the final decision in the said review petition.

12. Replying to the submission made on behalf of the respondent No. 1, Mr.

Ramit Satender, the learned counsel appearing for the appellant has submitted that since Home (Special) Department, Government of Bihar has been constituted as the Nodal Agency and in view of the consent given by the State of Jharkhand vide a letter dated 21.12.2006, the applications for re-allocation of cadre including the applications for mutual transfers were considered and cadre reallocation orders were passed, therefore, the letter dated 29.08.2009 of the State of Jharkhand whereby it decided to implement order passed by this Court in the case of "Rajendra Pratap Sinha" (supra) would not be binding and it cannot be taken into consideration by this Court.

13. We have considered the submissions of the counsel appearing for the parties and perused the documents on record.

14. Under the Bihar Reorganisation Act, 2000, the Government of India was the final authority with respect to allocation of cadre and posts in the undivided State of Bihar. The Department of Personnel and Training, Government of India vide letter dated 15.09.2004 permitted the State Governments to consider the requests for revision in the cadre allocation order. The relevant extract relating to mutual transfer in letter dated 15.09.2004 is extracted below:

Mutual Transfer Cases:

A large number of representations have been received from personnel requesting for consideration of their mutual transfer with another consenting State Service personnel. Since the Central Government has already issued final allocation orders, it finds no reason to entertain such requests. However, it is open to the successor State Governments to consider requests of mutual transfer based on broad consensus arrived between the State Governments, inter alia either defining the terms and conditions for such consideration or by framing suitable rules for this purpose.

15. Thus, it is seen that by letter dated 15.09.2004, the Central Government communicated to the Chief Secretary, Government of Bihar that it was open to the Governments of successor State to consider request of mutual transfer based on broad consensus arrived between the State Governments, inter-alia, either defining the terms and conditions for such consideration or by framing rules for this purpose. By order dated 21.05.2005, six conditions were notified for entertaining requests for mutual transfer.

16. A perusal of the above communications makes it apparent that the cases of mutual transfer were to be dealt with "on the basis of broad consensus" between the State Governments and it was open to the State Governments to either define the "terms and conditions" for considering the request of mutual transfer or to frame suitable rules for this purpose. By letter dated 21.12.2006, the State of Jharkhand in clear terms communicated the terms and conditions based on which the cases of mutual transfers were to be considered. The appellant herein acted on the letter dated 21.12.2006 and issued order dated 05.12.2007 whereby the cadre allocation of respondent No. 1 was reviewed with a condition

that he would not be entitled for claiming seniority as per the original gradation list.

17. The learned Senior Counsel has submitted that since the letter dated 21.05.2005 did not postulate any condition of loss of seniority, therefore, by order dated 05.12.2007 the respondent No. 1 could not have been subjected to such a condition. A perusal of letter dated 21.05.2005 makes it clear that it was a communication to the Chief Secretary, Government of Jharkhand for sending the proposals for review of cadre allocation only of those employees who fulfilled the above mentioned 6 conditions. The conditions mentioned in letter dated 21.05.2005 are the eligibility conditions for consideration of the cases for mutual transfer and letter dated 21.05.2005 does not prescribe the terms and conditions for transfer. The contention raised on behalf of the respondent No. 1 that, in the absence of any condition relating to loss of seniority prescribed in letter dated 21.05.2005, by the transfer order dated 05.12.2007 the respondent No. 1 could not have been subjected to such a condition whereunder he would lose his original seniority, is thus liable to be rejected.

18. In "Rajendra Pratap Sinha" (supra), a prayer was made for restraining the State - respondents from downgrading the employee in the seniority list as stipulated in the transfer order and the learned Single Judge of this Court taking note of the provision u/s 73 of Bihar Reorganisation Act observed that since the conditions of service of the government servants whose services are allotted to the successor States shall not be changed, therefore, a provisional gradation list was published in which it was mentioned that the seniority of government servants who are allotted the Jharkhand cadre shall not be affected. However, since the seniority of the said Rajendra Pratap Sinha was sought to be altered, in view of the said facts the learned Single Judge held that in the said case the writ petitioner's case was not one of transfer from one cadre to another, rather it was a case of allotment of his services to the successor State of Jharkhand on the basis of a scheme for mutual exchange of services. It was finally held that the provisions of Section 73 of the Bihar Reorganisation Act does not permit any change in the service conditions to the disadvantage to the government servants whose services have been allotted to any one of the successor States.

19. As noticed above, in the present case the writ petition was filed only for a direction to the respondent - State of Jharkhand "to consider and take a decision" on the representation dated 16.01.2008 submitted by the respondent No. 1 herein. Thus, the relief sought in the case of "Rajendra Pratap Sinha" (supra) was entirely different from the prayer made by the respondent No. 1 in the present case. Moreover, from a perusal of Section 73 of the Bihar Reorganisation Act, 2000 it is apparent that the protection of proviso to Section 73 of the Bihar Reorganisation Act is available to an employee only during the process of final allocation of his service from one State to the other. Admittedly, by virtue of final cadre allocation order dated 13.09.2006 issued u/s 72 of the Bihar Reorganisation Act, the services of the respondent No. 1 stood finally

allocated to the State of Bihar. Section 72 and 73 of the Bihar Reorganisation Act, 2000 read as follows:

72. Provisions relating to services in Bihar and Jharkhand - (1) Every person, who immediately before the appointed day is serving in connection with the affairs of the existing State of Bihar shall, on and from that day provisionally continue to serve in connection with the affairs of the State of Bihar unless he is required, by general or special order of the Central Government to serve provisionally in connection with the affairs of the State of Jharkhand:

Provided that no direction shall be issued under this section after the expiry of a period of one year from the appointed day.

(2) As soon as may be after the appointed day, the Central Government shall, by general or special order, determine the successor State to which every person referred to in sub-section (1) shall be finally allotted for service and the date with effect from which such allotment shall take effect or he deemed to have taken effect

(3) Every person, who is finally allotted under the provisions of Sub-section (2) to a successor State shall, if he is not already serving therein be made available for serving in the successor State from such date as may be agreed upon between the Governments concerned or in default of such agreement, as may be determined by the Central Government.

73. Other provisions relating to services.--(1) Nothing in Section 72 shall be deemed to affect on or after the appointed day the operation of the provisions of Chapter I of Part XIV of the Constitution in relation to determination of the conditions of service of persons serving in connection with the affairs of the Union or any State:

Provided that the conditions of service applicable immediately before the appointed day in the case of any person deemed to have been allocated to the State of Bihar or to the State of Jharkhand u/s 72 shall not be varied to his disadvantage except with the previous approval of the Central Government.

(2) All services prior to the appointed day rendered by a person. -

(a) if he is deemed to have been allocated to any State u/s 72, shall be deemed to have been rendered in connection with the affairs of that State;

(b) if he is deemed to have been allocated to the Union in connection with the administration of the Jharkhand shall be deemed to have been rendered in connection with the affairs of the Union,

for the purposes of the rules regulating his conditions of service.

(3) The provisions of Section 72, shall not apply in relating to members of any All India Service.

20. It would thus appear that the protection of proviso to Section 73 of the Bihar

Reorganisation Act would have been available to the respondent No. 1 only in the event he would have joined service under the Government of Bihar in compliance of cadre allocation order dated 13.09.2006 and in that event his service conditions could not have been altered, in any manner to his detriment. However, pursuant to letter dated 15.09.2004 of the Government of India, the order reviewing the cadre allocation on an application for mutual transfer on certain terms and conditions agreed upon by the respective States and implemented by the Nodal Department, was altogether a different transaction and the protection under proviso to Section 73 of the Bihar Reorganisation Act is not available to the employees who sought mutual transfer and whose requests have been accepted subject to condition that they would not claim seniority as per the final gradation list. The condition stipulating loss of seniority in order dated 05.12.2007 whereby the respondent No. 1 was re-allocated cadre in the State of Jharkhand cannot be said to be hit by provision u/s 73 of the Bihar Reorganisation Act. The condition stipulated in order dated 05.12.2007 is binding on the respondent No. 1 and the learned Single Judge clearly fell in error in holding that the respondent No. 1 would be entitled for his seniority as per the final gradation list, even though such a prayer was not made in the writ petition.

21. The decision of the Nodal Agency that is, Home (Special) Department is binding on both the States and in fact the State of Jharkhand has filed counter affidavit stating that the conditions imposed by order dated 05.12.2007 cannot be changed unilaterally by the Road Construction Department, Government of Jharkhand. The appellant has also taken a plea that the State Reorganisation High Level Committee in its meeting dated 27.06.2007 felt that if the condition in the cadre re-allocation orders stipulating loss of seniority are relaxed, it would adversely affect the morale of those employees who obeyed the order of the Government of India and joined their allocated successor States and it was decided that the employees seeking cadre re-allocation should be subjected to the condition that they would not claim seniority as per the final gradation list. It is submitted by the counsel appearing for the appellant that in view of order passed in "Rajendra Pratap Sinha" (supra), the Patna High Court has also granted interim protection to several employees and therefore, the issue involved in the present case required to be decided by this Court. For the aforesaid reasons, we find no substance in the contention that since the State of Jharkhand has chosen to implement the order passed by this Court in "Rajendra Pratap Sinha" (supra), no interference is required in the present case. The State of Jharkhand after communicating its consent vide letter dated 21.12.2006 could not have chosen to implement the judgment in "Rajendra Pratap Sinha" (supra) as it would amount to withdrawing its consent unilaterally. We further find that in "Rajendra Pratap Sinha" (supra), the appellant herein was not made a party and thus, the decision in the said case was rendered in the absence of the appellant herein, and therefore, the writ petition preferred by respondent No. 1 herein could not have been allowed following the judgment in "Rajendra Pratap Sinha" (supra). Since we have held that the protection u/s 73 of the Bihar

Reorganisation Act, 2000 is not available to the employees seeking mutual transfer, we do not accept the plea of the respondent No. 1 that till the final decision in Review Petition No. 112 of 2009, the hearing of the present Letters Patent Appeal be adjourned. In the result, we hold that the condition stipulated in order dated 05.12.2007 is binding on the respondent No. 1 and other employees and the protection under proviso to Section 73 of the Bihar Reorganisation Act is not available to the employees seeking mutual transfer. The impugned order dated 01.07.2009 passed by the learned Single Judge suffers from serious infirmities and accordingly, we set-aside the impugned order dated 01.07.2009. Consequently the Letters Patent Appeal stands allowed.