
(2017) 02 PAT CK 0089

In the Patna High Court

Case No : Letters Patent Appeal No.1412 of 2013 in Civil Writ Jurisdiction Case No. 2790 of 2011

Sudhesh Kumar

APPELLANT

Vs

Syed Mashiullah

RESPONDENT

Date of Decision : 21-02-2017

Acts Referred:

Citation : (2017) 2 BLJud 127

Hon'ble Judges : Ajay Kumar Tripathi and Nilu Agrawal, JJ.

Bench : Division Bench

Advocate : Mr. Uma Kant Shukla and Mr. Shakti Suman Kumar, Advocates, for the Appellants; Mr. Swapnil Kumar Singh, A.C. to G.P. 19, for the Respondents

Final Decision : Dismissed

Judgement

Ajay Kumar Tripathi, J. (Oral)—I.A. No. 7962 of 2013 has been filed for condonation of delay of 5 days in filing the Letters Patent Appeal.

2. For the reasons mentioned in the Interlocutory Application, the delay in filing the present Letters Patent Appeal is condoned. I.A. No. 7962 of 2013 is, accordingly, allowed. Re : L.P.A. No. 1412 of 2013.

3. The challenge in the present Letters Patent Appeal is to an order dated 19.08.2013 passed by the learned Single Judge in C.W.J.C. No. 2790 of 2011 whereby the writ application filed by the respondents 1st set was allowed.

4. Since the writ application of the five private respondents, who were petitioners before the learned Single Judge, was allowed and the gradation list which was published by the Director, Animal Husbandry Department after drastic revision to the earlier gradation list dated 01.08.2006 was set aside, these appellants decided to file the present Letters Patent Appeal.

5. Many a submissions are made by the learned counsel representing the appellants that the decision of the learned Single Judge is erroneous because he

overlooked the basic fact that these appellants were appointed after a direct recruitment by the competitive examination whereas the private respondents, who were petitioners in the writ application, were compassionate appointees and they were supposed to be on probation for a period of three years and, therefore, they became junior to these appellants and that is the rectification which had been done by revising the earlier gradation list vide order dated 26.11.2010 which was subject matter of challenge before the learned Single Judge.

6. The learned Single Judge after considering the contentions made at the Bar had thus opined in the impugned order at paragraphs 15 to 19 as follows :

15. Normally, the final gradation list published after notifying for objections and considering them is not to be revised unless there are certain mistakes apparent on the face of the list. It can normally be revised only upon judicial determination of any legal infirmity otherwise the sanctity attached to a final gradation list would be lost. Each time an Officer or a group of Officers who either changed their views or are persuaded to change opinion, the final gradation list would be revised and the revised final gradation list would again be revised losing finality and sanctity, which is not permissible. Thus, there was no authority much less legal authority to revise the final gradation list published on 01.08.2006.

16. The second justification sought to be given by the respondent-State including the private-respondents is that the appointment of the private-respondents was pursuant to decision taken by the State in the year 1986. The results were published, pursuant to Court's order, after revision in the year 1991. Therefore, their appointment having been delayed, their recruitment process having started much earlier, they would rank senior notwithstanding they having entered the cadre much later. Reliance is placed on Clause-3 of the notification of the State Government of the year 1972, as referred to above. This again, in my view, is fallacious. What Clause-3 in fact talks is of appointments from different sources being made in the "same transaction". The circular itself defines what would be "same transaction". Same transaction means where a decision to make appointment from both the sources are taken together or at the same time and the process of appointment from two sources being different, one source gets appointed earlier or before the other. In this connection, I may refer to Full Bench judgment of this Court in the case of Bishundeo Mahto & Ors. v. The State of Bihar & Ors., since reported in 1982 BBCJ 45 wherein the Full Bench clearly held that though ultimate appointment may be at different dates they must be pursuant to singular decision taken at a point of time to qualify as appointment in same transaction. This is admittedly not the fact obtaining in the present case. Petitioners were compassionate appointees. They were neither direct recruits nor promotees. Decision to appoint them was not taken in 1986. Decision to appoint them on compassionate grounds were independent and distinct from the decision taken to appoint the private respondents. The rule of appointment in same

transaction would not at all apply.

17. I may note one thing at this juncture that virtually the plea of private-respondents is that but for the delay in process of selection or implementation of the decision to appoint them, they would have entered the cadre earlier and as such they must rank senior to the petitioners. This is not acceptable. Virtually, identical argument was rejected by this Court in the case of Sri Birendra Kumar Sinha & Ors. v. The State of Bihar & Ors., since reported in 1989 PLJR 925 and in particular paragraph 9 thereof their Lordships while so holding followed the earlier Division Bench judgment of this Court in the case of Ram Swaroop Das & Ors. v. The State of Bihar & Ors, since reported in 1989 PLJR 143. Thus, the argument that petitioners and the private-respondents were appointed in course of same transaction is wholly untenable. Delay in appointment will not to respondents benefit to give them seniority over earlier appointed petitioners. Here, I may note that this misconceived advice was obtained by the Animal Husbandry Department from the Personnel Department long after the final gradation list had been published, which was virtually a camouflage to justify revision which was otherwise impermissible.

18. In fairness to learned counsel for the private respondents, I must note that a feeble argument was made though not persuaded ultimately that petitioners were apparently appointed in excess of quota reserved for compassionate appointees and thus their very appointment was wrong. Firstly, no empirical data to establish this was brought on record. Secondly and more importantly, for almost two decades no body challenged their appointment which was in 1989/1990 nor even in the present writ petition is there a challenge to the appointment of the petitioners. Private-respondents did not raise any such objection when the provisional gradation list was published in 2005 in which private respondents were shown junior to the petitioners. They had accepted the position when the final gradation list was published in 2006. It is only now feebly this point was raised after more than two decades. Such belated challenge cannot be entertained. Thus, there is no legal justification for revising the final gradation list much less without notice to parties likely to be effected.

19. Thus, the impugned revised final gradation list dated 26.11.2010 (Annexure-1) cannot be sustained and is hereby set aside. The result would be that final gradation list as published on 01.08.2006 (Annexure-5) revives and would be deemed to be operative at all times. Consequently, all actions taken by State, pursuant to the revised final gradation list (Annexure-1) in granting promotions to the private-respondents to the prejudice of the petitioners cannot be sustained nor denial of promotions due to the petitioners on the basis of the final gradation list dated 01.08.2006 be sustained. They must get their promotions from due date accordingly with full monetary benefits and other consequential benefits treating them as senior to the private-respondents. These adjustments must be done within three months, the responsibility whereof will be on the Director, Animal Husbandry, Government of Bihar, Patna.

7. With the finding as above, the learned Single Judge committed no error of law by quashing the revised gradation list contained in annexure-1 to the writ application and restoring the final gradation list dated 01.08.2006.

8. For record, it is clarified that merely because a person is kept on probation for whatever be the period of time, once he is confirmed in service, it will always relate back to his initial appointment and that cannot be altered or shifted to a subsequent date ignoring the period of probation. It is a misplaced kind of submission to overcome the finding given by the learned Single Judge.

9. The present Letters Patent Appeal has no merit. It is dismissed as such.