

(2012) 08 JH CK 0142

In the Jharkhand High Court

Case No : L.P.A. No's. 444 and 354 of 2010

Sushil Kumar Ranjan and Others

APPELLANT

Vs

The State of Jharkhand and Others
 The State of
Jharkhand and Others Vs Rameshwar Prasad Chaubey and
Others

RESPONDENT

Date of Decision : 31-08-2012

Acts Referred:

Citation : (2012) 08 JH CK 0142

Hon'ble Judges : Prakash Tatia, J; Aparesh Kumar Singh, J

Bench : Division Bench

Advocate : V. Shivnath and Mr. M.K. Sah in LPA 444/10, Mr. Indrajit Sinha in LPA 296/10, Mr. V.P. Singh, Mr. Naresh Pd. Singh and Mr. Arbind Kr. Singh, in LPA No. 298/10 and Mr. Rajesh Shankar, GA and Mr. Rishi Pallav, JC to AG for State in LPA 354/10, for the Appellant; Sumeet Gadodia, Krishna Murari and Mr. Vivek Bajoria, Advocates in LPA 444/10 and 296/10, Mr. Naresh Pd. Singh, Arbind Kumar Singh and Mr. A.K. Sahani, Advocates in LPA 296/10, 444/10, 354/10 and 298/10, for the Respondent

Judgement

1. Heard learned counsel for the parties. This Letters Patent Appeal is preferred by the private respondents as well as by the State Government to challenge the judgment dated 23rd June 2010 passed in W.P.(S) No. 2325 of 2007, whereby the writ petition of the petitioner was allowed and the provisional gradation list dated 19th March 2007 and final gradation list dated 11th February 2009 of the Diploma Engineers in the Road Construction Department of the State Government, have been quashed and the respondent authorities were directed to prepare a fresh final seniority list of the Junior Engineers of the concerned Department by applying the procedure laid down in the Circular Dated 17th June 1975 issued by the Department.

2. Facts of the case are that in view of the long unemployment of the Diploma Engineers, a cabinet decision was taken on 9th January 1979 so as to give appointment to some of the junior Engineers and for that purpose, some

guidelines were framed. Gist of the guidelines have been conveyed vide order dated 28th February 1979 issued from the Department of Labour, Employment and Training Department, Government of Bihar and it was circulated to the various departments. In the guidelines, it has been mentioned that for the purpose of appointment on the post of Junior Engineer from the candidates of Diploma and Degree holders, percentage of marks obtained in the final year of the Diploma / Degree will be the percentage of marks allotted for the purpose of appointment. In addition to the above marks, further three marks would be allotted to the candidates for the each year which they have passed since their last technical centre examination. Meaning thereby the candidate will get 03 marks for one completed year and this can be up to 20 marks and it has been further explained by giving mode of counting of "idle marks" in the communication dated 28th February 1979 that, in a case a candidate obtained 70 percent marks in the final examination and his case is considered for appointment after four years of his passing final examination, then he will get 4x3 marks in addition to his 70 percent marks, which will make him having 82 marks and this way maximum 20 marks can be awarded. It was also made clear in the communication dated 28th February 1979 that the appointment shall be made without any interview or any other further inquiry. But this selection shall be without there being any further process of judging the merit of any person.

3. In pursuance of the communication dated 28th February 1979, 676 posts were advertised. However, against these posts, only 237 candidates got appointment. Appointment letters were issued on 09th December 1982 and along with the general order for appointment, a list of the employees who were selected for appointment, was annexed. In this list, column no. 2 has heading merit (Yogyata). In this list, writ petitioners' names were below the names of appellants non petitioners in the writ petition. As we have already noticed that this appointment was because of the reason that there was no appointment given for the past number of years and therefore, to meet the grievances of the Diploma / Degree holders, Engineers, this procedure was adopted for making ad-hoc appointment without getting recommendation from the State Public Service Commission. These appointments were only for six months. However, these appointments continued and ultimately on 29th October 1986, an Ordinance was issued for regularization of the services of the various Engineers including the selected 237 candidates. A consequential order was issued by the Government on 8th December 1986 regularizing the services of all 237 employees from the date of their initial appointment. Along with this order of 8th December 1986, the list of employees was also enclosed. In this list of employees, writ petitioners were shown above the present appellants. This placement was not challenged by the appellants and thereafter, in the year 1993, 1996, 2001 and 2002 provisional gradation lists were published, but those gradation lists were not challenged. However, it is the case of the appellants that they submitted representation against this gradation list so as to get seniority above the writ petitioners and their those representations were rejected but admittedly said lists were never

challenged in Court.

4. In another case, i.e. CWJC No. 937 of 1992 (R) preferred by one Kapildeo Prasad & another, a dispute was raised by the petitioners of that writ petition with respect to their placement in the seniority list. The above writ petitioners were selected subsequently, in pursuance of the selection initiated in the year 1983 and were appointed vide notification no. 3617(E) dated 05th October 1983. The dispute in above case was due to one of the condition, that whoever will join on the post first, he will be senior. The condition of the determination of seniority in this manner was strange, and therefore, was challenged in above case. In the above judgment of Kapildeo Prasad & another dated 11th August 2000, it was held that the petitioner of" the above writ petition and the contesting respondent nos. 3 to 14 having been appointed initially in pursuance of the common advertisement, on the basis of a common merit list, the seniority between them has to be determined on the basis of their position in the merit list and the same cannot be altered on the basis of date of joining and the joining being based on fortuitous circumstances. It has been held that if the position of the petitioners was shown above the contesting respondents 3 to 14 in the merit list at the time of their initial appointment on regularization of their services made in pursuance of the same Act, by common order, the original seniority is to continue which is to be based on the basis of the merit list. So because of this reason, that the department gave seniority on the basis of date of joining on the post which could not have been given, the writ petition was allowed and the respondents were directed to prepare a fresh merit list by showing the position of the persons as shown in the merit list and appointed on the basis of common advertisement and thereby to place the names of the petitioners above the respondents 3 to 14 and to provide them consequential benefits.

5. In view of this judgment delivered in the case of Kapildeo Prasad & another (supra), the State Government proceeded to issue a fresh merit list on 10th March 2003 which is annexure-13 annexed to the writ petition. In this seniority list, detailed reasons have been given for issuing a fresh seniority list for the employees who were appointed since 1962-1999. In this seniority list, the position of the writ petitioners were changed to below the appellants and the reason for change in the seniority position of these writ petitioners has been given that, the writ petitioners were shown below the names of the present appellants in the original appointment list dated 9th December 1982 by which posts were offered to the writ petitioners and the appellants. Being aggrieved against the said alteration, Association of Diploma Holders applied before Patna High Court in MJC No. 2753 of 2005 for modification of order passed in Kapildeo Prasad's Case. Said application for modification was disposed of by the Patna High Court vide order dated 21.11.2005 with direction to the petitioners to submit representation to the State Government. However, the State published the final gradation list keeping the petitioners below the appellants.

6. The petitioners in the writ petition initially challenged the office order no. 56

dated 19th March 2007 (Annexure-19) annexed to the writ petition and order dated 11th February 2009 whereby a fresh seniority list of the Junior Engineers was declared and also prayed for quashing the order dated 09th July 2008 passed by the respondent and also prayed for quashing the letter dated 28th February 1979 passed by the Principal Secretary, Labour, Employment and Training, Government of Bihar. However, during the course of argument, the petitioners did not press the prayer in respect of the order dated 09th July 2008 and the letter dated 28th February 1979, for the obvious reason that, by virtue of the order dated 28th February 1979, the petitioners also got appointment on the post by order dated 09th December 1982. The writ petition was allowed by the learned Single Judge after observing that the Government Circular No. 6509(A) dated 12th December 1934 has not been superceded by any order or Rules and the writ petitioners' case is covered by Clause-2(c) of the said Circular. Learned Single Judge also held that Government Letter dated 17th June 1975 also supports the petitioners' case and therefore, in the matter of determination of inter se seniority, marks awarded to the candidates for the "idle period" i.e. period spent idle after passing examination cannot be added into with the marks the candidates got in their educational examination. The learned Single Judge held that the list annexed with the order dated 9th December 1982 is not a merit list. The learned Single Judge also held that Kapildeo Prasad's case (supra) had no application at all to the present controversy and thereafter held, that the writ petitioners-respondents just to be placed above the appellants. Being aggrieved against the judgment of the learned Single Judge dated 23rd June 2010, this Letters Patent Appeal has been preferred by the appellants and the State.

7. Learned counsel for the appellants vehemently submitted that a policy decision was taken by the State Government in its Cabinet meeting held on 9th January 1979 and a complete procedure has been given in the communication dated 28th February 1979 and this procedure was not only for the purpose of giving appointment under the prescribed manner in which the candidate will be selected and marks will be counted for the purpose of appointment, but the communication dated 28th February 1979 clearly provides that because of the idleness of the candidate, the marks calculated on the basis of three marks per year shall be added in the marks given on the basis of the marks obtained in the last examination. Therefore, these marks cannot be bifurcated for the purpose of giving merit. In view of the said communication dated 28th February 1979, in fact, the list was prepared for giving appointment and by order dated 9th December 1982, all candidates including the petitioners-respondents and the appellants were given appointment vide order dated 9th December 1982. Along with appointment order, a merit list was also enclosed indicating separately the merit of the candidates which is clear from the column no. 2 of the list. Therefore, in view of the Government Circular dated 12th December 1934, and by virtue of Clause-2(b), when direct recruits have been placed in order of merit by a Selection Board, full consideration should be given to the opinion of such

Board and this clearly indicates that when the Selection Board in this case was the Engineer-in-Chief and he has assigned the merit in the appointment order itself, then in that situation, it is required to be given due weightage for the purpose of inter se seniority. It is also submitted that even as per Clause-2(c) of the Circular Dated 12th December 1934, decision regarding the seniority of direct recruits shall be made by the Authority entitled to appointment at the time of their first appointment and in all cases, such decision of the Appointing Authority shall be final. It is submitted that Engineer-in-Chief being the Appointing Authority, he was competent to select the candidates according to merit and his decision is final and it could not be altered by the State Government. It is submitted that the lists which have been relied upon by the petitioners-respondents were tentative and provisional seniority lists and final seniority list was declared on 19th March 2007. It is also submitted by the learned counsel for the appellants that appointments were given at the time of erstwhile State of Bihar and the Bihar State also has given seniority according to the merit given in the appointment order dated 9th December 1982. Learned counsel for the appellants vehemently submitted that the learned Single Judge committed serious error of law by misreading the Circular dated 17th June 1975. It is also submitted that the Circular was misread by the learned Single Judge is not disputed by the writ petitioners/respondents as in the copy of the Circular shown to the learned Single Judge, there was some typing mistake. However, the learned Single Judge observed that it cannot be accepted that there is any typing mistake in the Circular dated 19th June 1975, because of the reason, the Stale Government yet has not come with any corrigendum. Be that as it may be, now it is admitted fact as it is evident from the copy of the Gazette that the Circular of 1975 relates to the appointment "between" 1958 to 21st August 1970 and not relates to the appointment given "after" 1970. Therefore, the direction of the learned Single Judge to apply the procedure laid down in the circular dated 17th June 1975 on the face of it, it is contrary to the Circular.

8. Learned counsel for the appellants relied upon the judgment of the Supreme Court delivered in the case of Manish Kumar Shahi vs. State of Bihar & others reported in (2010) 12 SCC 576 and submitted that the petitioners who did not challenge their placement in the select list dated 09th December 1982, cannot challenge that merit/seniority list now after more than 25 years. It is also submitted that the petitioners took the benefit of the decision of the Government and tried to initially challenge the Government Order dated 9th January 1979 as well as the Communication dated 28th February 1979, but they did not challenge that communication and the decision and therefore, the natural consequence is that whatever has been decided by the cabinet in it's meeting dated 9th January 1979 and has been decided to follow by the Appointing Authority vide communication dated 28th February 1979, is required to be accepted as a valid process of selection and in this process, it is clearly provided that the marks, due to the idleness of the candidate, will be added in the marks which are given according to the percentage of marks obtained in the examination.

9. Learned counsel for the writ petitioners-respondents supported the judgment of the learned Single Judge and submitted that the list enclosed with the order dated 9th December 1982, cannot be read to mean that it is a merit/seniority list. For this, learned counsel for the petitioners-respondents submitted that it is clear from the facts of the case which are not in dispute, that this was not a regular selection of the candidate on the post of Junior Engineer. It was a deviation and it has been specifically decided by the cabinet that because of the dissatisfaction of the Diploma and Degree holders Engineers and because of not offering any appointment for last many years, some appointments are required to be given without following the procedure of appointment which requires recommendation from the Public Service Commission and therefore, for ad-hoc appointment for six months, these posts were offered. It is also submitted that the communication dated 28th February 1979 which prescribes procedure for giving appointment it nowhere prescribes procedure for determination of inter se merit.

10. It is also submitted that in Kapildeo Prasad's case (supra), the controversy related to subsequent appointments of the year 1983 and not related to appointments of 1982 and the dispute was entirely different and that was because of giving seniority to the person who joined the services prior in time in place of merit or seniority and it had nothing to do with the controversy which is involved in the present matter. Here in this case, the question is involved in respect of communication dated 28th February 1979 which prescribed the process of appointment giving no criteria for determination or assignment of seniority according to merit. The Circular says that these appointments are only for six months and they are ad-hoc appointments and in ad-hoc appointments, there arises no question of inter se seniority as some persons were appointed at the same time without there being any question of seniority as their services were to come to an end by efflux of time only. In the advertisement issued in pursuance of the communication dated 28th February 1979, it has been clearly mentioned that for regular selection, the candidates will have to face the selection process through the Public Service Commission and therefore, the Selection Board was the State Public Service Commission.

11. Learned counsel for the State supported the argument advanced by the learned counsel for the appellants.

12. According to the learned counsel for the writ. petitioners-respondents, it is not in dispute that the Circular dated 12th December 1934 is statutory Circular having the force of law and so has been held in Kapildeo Prasad's case (Supra) also. It is also submitted that in the said Circular, there are two contingency dealt with; one is for determination of inter se seniority in a case when a candidate gets appointment on promotional post from different sources i.e.; directly recruited and therefore, Clause-A, B and C of the Circular applies to such contingency and it has no application to the contingency of determination of inter se seniority when the candidates have been appointed by one source i.e.; direct

recruitment process only. Clause-2(c) clearly indicates that inter se seniority is required to be determined by general consideration on merits by educational qualification or by age obviously in a case two candidates have secured the same marks, then the candidate having more age, is required to be given preference. It is also submitted that in the Circular of 1975, detailed reasons have been given and it has been clearly mentioned that the procedure of giving seniority according to the date of joining was wrong and in the same Circular, it has been clearly mentioned that earlier, there was different courses for diploma in the State of Bihar and different papers were there. However, after 1958, the examinations of diploma courses were taken according to the uniform question papers and therefore, it is expected that for the purpose of determination of seniority-cum-merit, marks obtained in the examination be taken into account. However, the learned Single Judge may have directed to decide the seniority according to the Circular of 1975, but at the same time, the Circular of 1975 is only, in fact, in furtherance of the notification of 1934 which also prescribes the same criteria for the purpose of determination of inter se seniority but may have limited application, for specific period only.

13. Learned counsel for the writ petitioners-respondents also submitted that in fact, it was settled position of seniority of the writ petitioners-respondents above the appellants since 1986 and thereafter, it was made known by various gradation lists issued in 1993, 1996, 2001 and 2002. This settled position should not have been disturbed by the State Government without there being any lawful reason.

14. Learned counsel for the petitioners-respondents also submitted that in fact, by subsequent final seniority list dated 19th March 2007, the settled position has been changed and that the petitioners selected in 1982 along with others were treated discriminately whereas prior and after this one appointment, persons have been given seniority according to the marks obtained by them in their examination and marks given for idleness were never treated as marks to judge merit.

15. Learned counsel for the writ petitioners also submitted that the State Government itself, in its seniority list dated 19th March 2007, gave a reason, wherein also, the State Government also recognized the giving of benefit of marks in the examination and for calculating the merit according to the marks obtained in the examination.

16. We considered the submissions of the learned counsel for the parties and perused all relevant documents and materials placed before us. It is not in dispute that in special circumstances, a decision was taken by the State Government on 9th January 1979 and in order to give some relief to unemployed Engineers, ad-hoc appointments were made in pursuance of the said decision of the cabinet dated 9th January 1979. The Cabinet decision was conveyed vide Circular dated 28th February 1979. The counsel for the petitioners submitted that, this circular was issued by the Department of Labour, Employment and

Training, Government of Bihar who was not competent to prescribe criteria for selection. However, this issue is not relevant in view of the fact that Circular dated 28th February 1979 is not under challenge and petitioners rightly did not press this prayer as they also got appointment by virtue of this Circular dated 28th February 1979. Be it as it may be, the fact remain is that the Circular was issued for the limited purposes of giving appointment on the post of Junior Engineer who were unemployed diploma and degree holders. Under this circular, these appointments were ad-hoc for six months and for regular appointment, such employees were required to face the selection process through the Public Service Commission. Circular dated 28th February 1979 prescribes procedure only for appointment and it nowhere prescribes the position of merit. There is provision for giving marks according to the percentage of marks obtained in the last examination of the candidate obviously, of technical education and thereafter, three marks to be added in these marks for each completed years after the examination which could be up to maximum 20 marks. This provision appears to has been made only for the purpose of giving preference to the candidates who have already idly spent number of years after passing the examination so that they may get preference over the other candidates who cleared their examination in the year of the selection. Otherwise also, the communication dated 28th February 1979 nowhere provides for determination of inter se merit or seniority.

17. It is not in dispute that the Circular of 1934 is in a form of law and as per the subsequent clause-2(b) of Circular of 1934, when direct recruits have been placed in order of merit by a Selection Board, then that placement is required to be accepted for the purpose of determination of inter se seniority. Admittedly and also clear from the advertisement itself that there was already a Selection Board for regular appointments and the appointments in question were not given on recommendation from the Selection Board and criteria to give marks for idle period was not determined by the Selection Board (BPSC) for the purpose of preparing the merit list for the candidates. Not only this, the communication dated 28th February 1979 nowhere prescribes procedure for determination of the merit of the candidates. It is clear from the facts of the case that all the petitioners got their services regularized by virtue of the Ordinance of 1986 otherwise they had to face selection through the Public Service Commission. In the regularization order also, it has been mentioned that the services of the candidates have been regularized from the date of their initial appointment. Along with this order of regularization of the year 1986, a list was enclosed wherein the names of the writ petitioners have been shown above the names of the appellants. This decision was not challenged by the appellants at any point of time. Admittedly, thereafter, several times, seniority lists were issued by the State Government, though they may be provisional and tentative but those lists were never challenged by the appellants. However, because of the direction issued in Kapildeo Prasad's case (supra) in which the State Government got the opportunity to revise the seniority list of the candidates who were wrongly given

seniority according to fortuitous circumstances of earlier joining on the post, revised seniority list was published. Kapildeo Prasad's case (supra) is concerned, that judgment has nothing to do with the controversy relating to the appointments made by order dated 19th December 1982 and with respect to regularization of these employees. The controversy in Kapildeo Prasad's case (supra) was with respect to giving seniority according to the time and date of joining of the candidates irrespective of the merit of the candidate and that was set aside by the learned Single Judge. Therefore, decision of the State Government to redetermine the seniority under the assumption that in Kapildeo Prasad's case (supra) the High Court had directed it to take different way of determination of inter se seniority for the candidates who were given appointment vide order dated 9th December, 1982 and whose merit and seniority position was assigned by regularization order dated 8th December, 1986 is absolutely misconceived. It will be appropriate to mention here that it is not in dispute that prior to these appointments, all other appointments from the year 1961 onwards, the criteria for judging merit was according to the marks obtained in the relevant certificate or degree. Everything was going on according to the said procedure, but has been disturbed by misinterpretation of Kapildeo Prasad's case (supra) by the State Government by issuing the tentative seniority list dated 19th March 2007 and final seniority list dated 11th February 2009.

18. So far as the Circular dated 17th June 1975 is concerned, it is true that in that Circular at the relevant place, there appears to be some mistake in the copy which was supplied to the learned Single Judge and in clause-5(ka), it is mentioned that for the Engineers selected from 1958 to 21st August 1970, their seniority will be determined according to the marks obtained in the relevant diploma. Even if Circular dated 17th June 1975 has no application, even then the Circular of 1934 clearly provides for determination of merit only on the basis of criteria of merit determined by the Selection Board, i.e. by Public Service Commission which has not been done in this case. Clause-2(c) of 1934 Circular says that inter se seniority will be determined according to the merit by educational qualification or by the age. So far as age is concerned, it is not in dispute that none of the candidates is claiming seniority because of having equal marks in their educational qualification and because of more age. The only dispute before us is with respect to the determination of inter se seniority and for that purpose, clause-2(c) clearly provides that seniority may be determined by general consideration of merit by educational qualification or by age. In the circular dated 17th June 1975 also, it has been clearly mentioned in sub para-1 of para-3 that giving seniority according to the date of joining of a candidate, cannot be justified and along with this, it also has been considered that prior to 1957 in different diploma colleges, different papers were there. After 1958, there were uniform pattern of examination and therefore, merit should be determined according to the marks obtained in the diploma of the relevant year. Be that as it may be, even if Circular of 1975 specifically not covers the appointment of 1982, yet in view of the Circular of the Government dated 12th December 1934, merit

could have been determined only on the basis of criteria fixed by the Selection Board which has not been done in this case at the time of ad-hoc appointments and therefore, the merit could have been assigned on the basis of educational qualification which has been assigned while regularizing the services in the year 1986 and this position continued till it is erroneously, by wrong interpretation of Kapildeo Prasad's case, altered. Therefore, the State Government who continuously accepted that position from the time of issuing the regularization order and prepared the gradation list according to the marks obtained in the diploma examination, could not have changed its view after such a long period and that too even after issuing the provisional gradation lists in the years 1993, 1996, 2001 and 2002. Therefore, in fact, it is the case where appellants want to unsettle the position settled by so many provisional gradation list and it is not a case where the writ petitioners wanted to unsettle the said position as the position which was settled for a long period, was unsettled by the State Government by issuing provisional seniority list on 19th March 2007 and the final seniority list dated 11th February 2009. Therefore, we do not find any merit in these Letters Patent Appeal. However, it is made clear that the State Government instead of proceeding to publish the Final seniority list in consonance with the Circular dated 17th June 1975, may proceed to publish the final gradation list according to the marks obtained in diploma examination of the relevant year and it appears from the facts of the case that the list which was continuously in force till 2002, is the correct seniority list, so far as these petitioners are concerned. Therefore, this seniority list may now be published. This judgment is only with respect to the candidates who were given appointment, initially by appointment order dated 9th December, 1982 and whose services have been regularized vide regularization order dated 9th December 1986 and shall not affect seniority of any other appointments.

The seniority list must be published within a period of eight weeks from the date of receipt / production of a copy of this order.

L.P.A. Nos. 444/10, 296/10, 298/10 and 354/10 are disposed of.