

(2013) 08 PAT CK 0063
In the Patna High Court
Case No : CWJC No. 2790 of 2011

Syed Mashiullah and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 19-08-2013

Acts Referred:

Citation : (2013) 4 PLJR 232

Hon'ble Judges : Navaniti Pd. Singh, J

Bench : Single Bench

Advocate : Shivendra Kishore and Sanat Kumar Mishra, for the Appellant; Rajendra Kumar Jha for the State, Kamal Nayan Choubey, Ambuj Nayan Choubey, Ashok Kumar Garg, Gopal Swroop Dubey, Yogendra Kumar Dubey, Ms. Ritu Priyadarsani for the Private-Respondents, Madhuresh Prasad and Abhay Shankar for the Private Respondent No. 21, for the Respondent

Judgement

Navaniti Pd. Singh, J.—The five petitioners, by this writ petition, have challenged Annexure-1, the so-called second final gradation list in relation to the cadre of Live Stock Assistant in the Directorate of Animal Husbandry as published under the authority of the Director, Animal Husbandry dated 26.11.2010 (Annexure-1), whereby the final gradation list, as was published on 1.8.2006 (Annexure-5), has been revised drastically to their prejudice. They have further sought a relief that all actions taken by the State-respondents, consequent to this alleged unauthorized revision of the final gradation list, should also be cancelled and/or ordered to be withdrawn. In this writ petition respondent No. 3 to respondent No. 196 are private-respondents who by the revision of the final gradation list have stolen a march over the petitioners. They were noticed by this Court and have appeared.

2. State has filed a counter affidavit and supplementary counter affidavit and two sets of counter affidavits have been filed by the private-respondents. Petitioners have filed rejoinder thereto. Pleadings being complete, with consent of parties, this writ petition was heard at length for its final disposal at this stage itself.

3. From the various facts on record there appears to be no dispute on facts. The only question to be determined is as to the right, legality and propriety of the State in revising a duly published final gradation list of the cadre of Live Stock Assistant. Petitioners' contention would be that once having published provisional gradation list and thereafter having notified the same for objections, objections having been considered and then the final gradation list published in the year 2006, there being no challenge to it by any party in any Court, could the State and that too without notice revised this final gradation list upsetting the positions of seniority. State and the private-respondents joined in taking similar stands justifying the State's action firstly on the ground that there was a direction of this Court pursuant to which the final gradation list was revised. Secondly, there was legal justification in the revision. Which of the two opposing stand is correct has to be decided by this Court.

4. Facts are not in dispute. The five petitioners are all compassionate appointees as Live Stock Assistants. They were appointed on various dates being 19.4.1989, 4.4.1990, 4.4.1990, 27.11.1989 and 4.4.1990 respectively. There is no dispute about their eligibility to the post. Consequent to their appointment they were sent for one year training and confirmed in service as Live Stock Assistants on successful completion of training.

5. So far as the private-respondents are concerned, on 29.9.1986, State took a decision to fill up about 225 posts lying vacant of Live Stock Assistants by direct recruitment. In 1987, an advertisement was accordingly issued inviting applications, which was followed by written test and interview. The examinations were held by the Bihar State Subordinate Service Selection Board. It appears that immediately upon the results being declared, writ petitions were filed in this Court, being C.W.J.C. No. 693 of 1991 and analogous cases wherein on 25.1.1991 and later on 14.3.1991 interim orders were passed that if any appointments were made during pendency of the writ petition those would be subject to final order that may be passed. Ultimately, the writ petition was heard by a Division Bench of this Court and allowed by judgment and order dated 22.7.1991, which is Annexure-A to the counter affidavit of private-respondent No. 21. The Division Bench held that the merit list, as prepared by the Bihar State Subordinate Service Selection Board, was bad and had to be revised in accordance with the policy decision of the State Government treating Hindi as a qualifying subject only and not adding the marks thereof to determine the merit. Accordingly, the revised merit list was drawn up and the private-respondents were appointed as Live Stock Assistants on various dates between 1992 to 1994. Thus, there is no dispute as between the parties that petitioners were appointed in between 1989 and 1990, whereas the private-respondents were appointed in between 1992 to 1994.

6. These simple undisputed facts ordinarily should have been enough to determine the inter se seniority as between the petitioners and the private-respondents, for the fundamental rule for determining seniority amongst persons

of the same cadre is the length of service in the cadre. Undisputedly, the entry into cadre by the petitioners was long before the private-respondents' entry into the cadre. Yet, upon revision of the final gradation list, the private-respondents who have entered the cadre long after the petitioners have been given seniority over the petitioners.

7. It appears that State on 21.11.2005 (Annexure-3) published provisional gradation list. There is no dispute that petitioners were shown as senior to the private-respondents. Notices were published in newspapers calling for objections to the provisional gradation list. Notice was also published in Hindustan a Hindi newspaper of wide circulation on 7.1.2006 (Annexure-4). Various objections by various groups were filed and thereafter, State considering the objections on 1.8.2006 (Annexure-5) published the final gradation list.

8. It is not in dispute that the final gradation list shows the petitioners senior to the private-respondents as per their date of appointment, i.e., entry in the cadre. This final gradation list was then acted upon by the State for giving promotions to the petitioners. Suddenly, on 26.11.2010 State through the Director, Animal Husbandry cancelled the final gradation list dated 1.8.2006 (Annexure-5) and published the revised final gradation list (impugned Annexure-1). In this final revised gradation list though the petitioners' date of entry in the cadre and that of the private-respondents did not change the private-respondents were shown senior to the petitioners. The effect was that the petitioners who as per the final gradation list dated 1.8.2006 were between serial No. 3859 to 3877 with private-respondents below them, in this revised final gradation list dated 28.6.2010, the private respondents came up to serial No. 3853 to 4046 and the petitioners were pushed down to serial No. 4053 to 4071. This is the grievance of the petitioners and on whose behalf the simple submission is that having entered the cadre much before the private-respondents they cannot be demoted and be shown as junior to the private respondents.

9. On behalf of the State as also on behalf of private-respondents, who have joined in their stand, two justifications are given for this unusual and extraordinary step taken to revise the final gradation list. Firstly, to the authority to revise the final gradation list both the State and private-respondents first refer to the final order of this Court in the case of Md. Khalil vs. The State of Bihar & Ors., being C.W.J.C. No. 8022 of 2005, disposed of on 25.3.2008 wherein this is what the Court observed:--

.....A counter affidavit has been filed on behalf of the respondents. It states that a provisional inter se seniority gradation list has been prepared and that till today final gradation list could not be prepared. That process for preparation of the final gradation list has been undertaken and no sooner that the same is prepared the petitioner shall be considered for promotion and he shall be granted the same with retrospective effect.

It is noteworthy that one of the claim of the petitioner is of his juniors having

been promoted while he has been ignored.

This writ application is therefore disposed with directions to the respondents to publish final gradation list of Live Stock Assistant within a maximum period of twelve weeks from the date of receipt and/or production of a copy of this order if not already finalized....

10. The order of this Court aforesaid is Annexure-11 to the interlocutory application, being I.A. No. 1767 of 2013 (amendment petition) and Annexure-B to the counter affidavit of large number of private-respondents, as filed by the petitioners. State submits that this Court on 25.3.2008 clearly held that till that day there was no final gradation list prepared. It should be done immediately and it is pursuant to this that the State took steps and published the revised final gradation list on 26.11.2010 (Annexure-1), after obtaining opinion from the Personnel Department as well. Secondly, the stand is that the recruitment process of the private-respondents was started by the decision of the State Government to fill up the posts, on 29.9.1986, the advertisement for which was issued in the year 1987. Due to some disputes and controversies, the results were revised and published only after the decision of the Division Bench judgment in the case of Yogendra Mandal (C.W.J.C. No. 693 of 1991) dated 22.7.1991 whereafter the private-respondents were appointed from 1992 onwards. Thus, the State and private-respondents submit that their recruitment process having started before the appointment of the petitioners they would rank senior to the petitioners. For this the State and private-respondents have relied upon the circular of the State Government, being Circular No. 15784 dated 26.8.1972, as contained in Annexure-2 to the writ petition and, in particular, Clause-3 thereof. Clause-3 deals with determination of inter se seniority where appointments are made from two sources in the same transactions, direct recruits and appointment by promotion to a cadre.

11. Having considered the matter, in my view, the stand of the State and private-respondents are fallacious if not mala fide. The writ petition must be allowed and the revised final gradation list dated 26.11.2010 (Annexure-1) has to be set aside and the final gradation list as published on 1.8.2006 (Annexure-5) be held to be effective with all consequences. The reasons are thus.

12. As noticed above, the first stand of the State and the private-respondents is that by virtue of decision and direction of this Court in the case of Md. Khalil (supra) dated 25.3.2008 quoted above, obliged them to revise and publish the revised final gradation list. What was strenuously argued on behalf of State and private-respondents is that if one looks to the order of this Court in the aforesaid case, as quoted above, this Court found that till that date i.e. 25.3.2008 final gradation list had not been prepared and as such it should be done. On the face of it, the interpretation as sought to be given to the said order is misconceived and mala fide. The first thing to be noticed is that the said writ petition itself was filed in the year 2005 when admittedly and undisputedly the final gradation list had not been published. In the said writ petition, State had filed a counter

affidavit on 10.1.2006, which is Annexure-16 to the interlocutory application aforesaid filed by the writ petitioners. In the counter affidavit, it was stated that during consideration of promotions in the cadre of Live Stock Assistant to the post of Live Stock Inspector and Assistant Technical Officer it came to light that the final gradation list of Live Stock Assistant Cadre had not yet been finalized. It is on basis of this counter affidavit which as noted above was filed on 10.1.2006 and without further affidavit or enquiry on 25.3.2008 Court passed the aforesaid order noting that till today final gradation list could not be prepared which was obviously wrong and erroneous inasmuch as no one brought to the notice of the Court that during pendency of the writ petition after the counter affidavit which was filed on 10.1.2006, on 1.8.2006 the final gradation list had been published. Further, in the said order itself of this Court, it was noticed that the final gradation list should be published within 12 weeks "If not already finalized". Thus, even otherwise the direction of this Court was nowhere to revise the final gradation list already published. The direction was to publish the final gradation list if not already finalized.

13. In my view, the direction of this Court was an infructuous direction inasmuch as when the said order was passed almost 1⁷ years prior thereto the final gradation list had already been published. Petitioners have also brought on record two earlier orders of this Court in different cases, being the case of Bijay Shanker Choudhary & Ors. vs. The State of Bihar & Ors., being C.W.J.C. No. 4418 of 2004 dated 3.8.2006 and the case of Sri Parmeshwar Pandit & Ors. vs. The State of Bihar & Ors., being C.W.J.C. No. 2716 of 2005 disposed of on 10.10.2006, where in both the cases this Court clearly held that final gradation list of the cadre of Live Stock Assistant have already been published. The later case even notes the date thereof as 1.8.2006. These orders are Annexure-12 series to the interlocutory application filed by the writ petitioners. Regrettably, though both these orders were passed in the year 2006 itself they were withheld from the Court when it disposed of the case of Md. Khalil (supra) on 25.3.2008 and virtually misled the Court into passing an order, as noted above. It is this reason why I have said that the stand of the State and the private-respondents are mala fide. They derived no authority to revise the final gradation list from the order aforesaid.

14. 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 1.8.2006.

15. 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 and Others Vs. State of Bihar and Others, 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.

16. 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 Dr. Birendra Kumar Sinha and Others Vs. The State of Bihar and Others, and in particular paragraphs thereof Their Lordships while so holding followed the earlier Division Bench judgment of this Court in the case of Ram Swaroop Das and others Vs. The State of Bihar and others, . Thus, the argument that petitioners and the private-respondents were appointed in course of same transaction is wholly untenable. Delay in appointment will not ensure 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.

17. 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.

18. 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 1.8.2006 (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 basis of the final gradation list dated 1.8.2006 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. With these observations and directions, the writ petition is allowed.