
(1985) 07 PAT CK 0001

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 3648 of 1979

Taraka Nath Sharma

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 18-07-1985

Acts Referred:

Citation : (1985) PLJR 829

Hon'ble Judges : S.S. Sandhawalia, C.J.;N.P. Singh, J

Bench : Division Bench

Advocate : Sarojendu Mukherjee, S.J. Mokhopadhyay, Kamalendu Mukherjee, Ashok Kumar Sinha No. 3 and Dilip Kumar Tiwary, for the Appellant; Ram Balak Mahton, (A.G.), S.K.P. Sinha, (J.C. to A.G.) and Mahesh Prasad, (J.C. to A.G.), Karuna Nidhan "Keshav", Onker Nath Sinha, N.K.P. Sinha, Ajiteshwar Prasad and A.B. Sinha, for the Respondent

Judgement

N.P. Singh, J.—Petitioner has questioned the validity of a notification dated 5.9.1979 issued by the Commissioner of Commercial Taxes, Bihar showing the inter se seniority between the petitioner and respondents 2 to 19 (hereinafter to be referred to as "the respondents") in the Junior Branch of Bihar Finance Service (hereinafter to be referred to as "the Service"). In the said notification petitioner has been shown junior to the aforesaid respondents although, according to the Petitioner, he was throughout senior to them. There is no dispute that the petitioner and the respondents were temporarily promoted to the Service from the non-Gazetted rank on 28.7.1969 in accordance with the provisions of rule 20 of the Bihar Finance Service Rules (hereinafter to be referred to as "the Rules"), on the recommendation of a selection committee constituted under the said Rules and on the advice of the Bihar Public Service Commission (hereinafter to be referred to as "the Commission"). It has been asserted on behalf of the petitioner that he was given the highest position by the Selection Committee as well as by the Commission. In support of the aforesaid assertion, a copy of the notification dated 28.7.1969, the Minutes of the Selection Committee and the advice of the Commission has been annexed.

2. On 29.7.1971 the petitioner as well as the respondents were appointed on probation in the service against the permanent posts retrospectively with effect from the dates they had joined on basis of the aforesaid notification dated 28.7.1969 appointing them on temporary basis in the service. As the petitioner was senior in the initial appointment he was shown the senior-most even in the notification dated 29.7.1971. In view of rules 23 and 24 of the Rules, before confirmation, the petitioner and the respondents had to pass the departmental examination. Respondents, who were junior to the petitioner, passed the departmental examination before expiry of two years from the dates of their joining on basis of notification aforesaid dated 28.7.1969. the petitioner however, passed the departmental examination on 31.12.1971 later than the respondents.

3. By the notification dated 5.9.1979, which is under challenge, respondents have been confirmed with effect from the dates they completed the period of two years on probation from the dates of their joining in this service on basis of their initial appointment on 28.7.1969, whereas the petitioner has been confirmed with effect from 31.12.1971, the day he passed the departmental examination although he had completed the period of two years of probation much before that. As the petitioner was confirmed from a later date he has been shown junior to the respondents in the seniority list which is under challenge. According to the petitioner, the said notification is arbitrary and illegal because the seniority of the petitioner in the service cannot be effected merely because the petitioner passed the departments examination required by the Rules after the respondents. The stand of the petitioner is that once he passed the departmental examination and was confirmed, he shall rank senior to the respondents as he was throughout.

4. Counter-affidavits have been filed on behalf of the respondents, including the State of Bihar, justifying the seniority list in question. The respondents have pointed out that in view of rules 22, 23 and 24 of the Rules a member of the service can be confirmed only after completion of the period of probation and after passing the departmental examination. As the petitioner passed the departmental examination on 31.12.1971 after the respondents, he could not have been confirmed with effect from a date earlier than the date of passing the departmental examination. According to them, as the petitioner was confirmed later than the respondents, he shall rank junior to them.

5. From time to time controversy has arisen as to how inter se seniority should be determined amongst the members of the service in cases where they are appointed on the same day, but have joined on different dates, or have completed the period of probation if the appointment is on probation, on different dates, or have passed the departmental examination on different dates if passing the departmental examination is a must for confirmation in past this problem was not so acute, but in recent years the question has been further complicated because orders of confirmation are not being passed just after expiry of the period of probation or within a reasonable time in cases where the appointments are on temporary basis. During the hearing of the writ application it was pointed

out that sometimes the departmental examinations are not being held for years for reasons best known to the State Government. Now in this background it has to be examined whether the seniority of an employee should be made dependent on the event of his passing the departmental examination or the date on which he is confirmed.

6. Rule 2(g) of the Rules defines "Member of the Service" to mean a person appointed in a substantive capacity to a post in the service under the provisions of the Rules. "Service" has been defined to mean the Bihar Finance Service. Rule 20 prescribes the procedure for promotion of the officers to the service giving out the details regarding the constitution of a Selection Committee and seeking advice of the Commission on the merit of the candidates sought to be promoted. Rule 22 provides that every officer on appointment in the substantive vacancy in the cadre of the service be placed on probation for a period of two years which shall be counted from the date of appointment. Rule 23 is the provision for confirmation and it says that an officer appointed on probation shall be confirmed at the end of the period of his probation, if he has passed the departmental examinations before confirmation. Rule 39 contains the provision regarding determination of the seniority of officers appointed to the service. The relevant part of rule 39, as it stood at the relevant time, is as follows:--

39. Seniority-Seniority of officers appointed to the service shall be determined in accordance with the date of their substantive appointment to the service: provided that if more than one officer is substantively appointed at the same time.

(1)..

7. In view of the expression "the date of their substantive appointment to the Service" occurring in the aforesaid rule 39, the stand or the respondents is whatever may be the inter se seniority, when the petitioner and respondents were appointed on temporary basis or on probation, their seniority in the service after confirmation has to be determined with reference to the date of their substantive appointment, i.e., with effect from the date of confirmation. In support of the aforesaid stand reliance has been placed on a Bench decision of this Court in the case of Gaya Prasad Pandey and Another Vs. State of Bihar and Others, . In that case, it was considered as to whether in view of rule 39 aforesaid seniority in service has to be determined with effect from the date of promotion or with effect from the date of confirmation, after promotion. In that connection, it was observed:--

In unequivocal language it is clearly mentioned in the main provision contained, in Rule 39 quoted above that the seniority of the officers appointed to the Service shall be determined in accordance with the date of their substantive appointment to the Service. The petitioners having been confirmed earlier, their seniority ought to have been fixed according to the date of their confirmation.

There should not be any difficulty in accepting the contention raised on behalf of

the respondents in view of the aforesaid Bench decision. But, later in the case of S.B. Patwardhan and Another Vs. State of Maharashtra and Others, the Supreme Court considered the effect of confirmation in a Service. While examining the scope of rule 8(iii) of Bombay Service of Engineers (Class I and Class II) Recruitment Rules, 1960 it was observed:--

Instead of adopting an intelligible differentia, Rule 8(iii) leaves seniority to be determined on the sole touchstone of confirmation which seems to us indefensible. Confirmation is one of the inglorious uncertainties of Government service depending neither on efficiency of the incumbent nor on the availability of substantive vacancies. A glaring instance widely known in a part of our country is of a distinguished member of the judiciary who was confirmed as a District Judge years after he was confirmed as a Judge of the High Court. It is on the record of these writ petitions that officiating Deputy Engineers were not confirmed even though substantive vacancies were available in which they could have been confirmed. It shows that confirmation does not have to conform to any set ruler, and whether an employee should be confirmed or not depends on the sweet will and pleasure of the government.

It was further pointed out:

Rule 8(ii) in the instant case adopts the seniority-cum-merit test for preparing the state wise select List of seniority. And yet clause (iii) rejects the test-of merit altogether. The vice of that clause is that it leaves the valuable right of seniority to depend upon the mere accident of confirmation. That under Arts. 14 and 16 of the Constitution, is impermissible and therefore we must strike down Rule 8(iii) as being unconstitutional.

8. On basis of the aforesaid judgment of the Supreme Court it was submitted on behalf of the petitioner that for purpose of determining the seniority of the officers under rule 39 if the date of their substantive appointment to the service is calculated with effect from the date of their confirmation then rule 39 shall have to be struck down as unconstitutional. According to the petitioner, the expression "substantive appointment" does not mean only confirmation in the Service. There is a "substantive appointment" when a regular post is available and the person concerned is appointed after following the procedure prescribed for selection and appointment. In this connection reliance was placed on the judgment of the Supreme Court in the case of Baleshwar Dass and Others Vs. State of Uttar Pradesh and Others, . In the aforesaid case clause (b) of rule 3 of the United Provinces Service of Engineers Class II, Irrigation Branch Rules which defines "Member of the Service" to mean a government servant appointed in a substantive capacity under the provisions of these Rules to a post in the Service" was considered. In that connection it was observed:

We see no reason to hold that when engineers are appointed to temporary posts but after fulfilment of all the tests for regular appointments, including consultation with the Public Service Commission, they are not appointed in a

substantive capacity : That is to say, although they are temporary appointees, if their probation is completed and other formalities fulfilled, they become members of the Service. It follows that merely because the 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 Commissions etc.

In this case again the Supreme Court reiterated its earlier view in the case of S.B. Patwardhan (supra) saying that the confirmation cannot be the sole touchstone of seniority. It was pointed out as to what is meant by a substantive appointment in the following words:--

What, in the context, is a substantive capacity vis-a-vis an appointment to a post? In our view, the emphasis imported by the adjective "substantive" is that a thing is substantive if it is "an essential part or constituent or relating to what is essential". (Balck's Legal Dictionary, 4th Edn. p. 1597) we may describe a capacity as substantive if it has "independent existence" or is of "considerable amount or quantity". What is independent in a substantial measure may reasonably be described as substantive. Therefore, when a post is vacant, however designated in officials, the capacity in which the person holds the post has to be ascertained by the State. Substantive capacity refers to the capacity in which a person holds the post and not necessarily to the nature or character of the post. To approximate to the official diction used in this connection, we may well say that a person is said to hold a post in a substantive capacity when he holds it for an indefinite period especially of long duration in contradistinction to a person who holds it for a definite or temporary period or holds it on probation subject to confirmation.

Once we understand "substantive capacity" in the above sense, we may be able to rationalise the situation. If the appointment is to a post and the capacity in which the appointment is made is of indefinite duration, if the Public Service Commission has been consulted and has approved, if the tests prescribed have been taken and passed, if probation has been prescribed and has been approved, one may well say that the post was held by the incumbent in a substantive capacity.

9. It has been rightly submitted on behalf of the petitioner that if the expression "with the date of their substantive appointment to the Service" is interpreted to mean with effect from, the date of confirmation then rule 39 shall be unconstitutional in view of Supreme Court's judgment in the case of S.B. Patwardhan (supra). If the rule is to be held to be constitutional and valid then the expression "substantive appointment" has to be interpreted in light of the judgment of the Supreme Court in the case of Baleshwar Dass (supra). In other words, while examining the question as to when the petitioner vis-a-vis respondents were appointed on substantive basis for the purpose of determination of the seniority, the sole touchstone should not be the date of their confirmation, but, as to whether they fulfilled all the tests for regular

appointment, including their selection by a duly constituted Selection Committee or Commission, whether the appointment, was to last for any temporary period or for an indefinite period, whether they have successfully completed their period of probation and have been confirmed after expiry of that period. If the aforesaid tests are fulfilled, then the irresistible conclusion is that they have been appointed on substantive basis. If the petitioner and the respondents both have fulfilled the test of substantive appointment then their seniority cannot be determined only on basis of the date of their respective confirmation. In view of the aforesaid judgments of the Supreme Court now it is too late to urge that a person is appointed on substantive basis only with effect from the date of his confirmation in the service, if he has been appointed either on temporary basis or on probation.

10. It is true that in some cases there may be difficulty in determining as to when the person concerned shall be deemed to have been appointed on substantive basis. Till this was being done with reference to the date of confirmation in view of the aforesaid Bench decision of this Court in the case of Gaya Prasad Pandey and another (supra) there was no difficulty. But now the State Government or the appointing authority has to examine, while determining the date of the substantive appointment as to when such substantive appointment has taken effect. Although in Baleshwar Dass's case (supra) the Supreme Court simply pointed out the factors which have to be taken note of before coming to the conclusion in respect of substantive appointment to a Service, but, in my view, it has not been said in that judgment as to since which date the substantive appointment shall be deemed to have been made, even if the tests laid down have been fulfilled by the person concerned. Any way, once it is held that the date of substantive appointment has not to be determined solely with reference to the date of confirmation then, in my opinion, it shall be only just and proper that when temporary appointees or probationers are confirmed in the same rank having fulfilled the conditions for confirmation than they shall be deemed to have been substantively appointed maintaining their inter-se seniority of the initial appointment. I hasten to add that this principle shall be applicable till they are in the same rank. If the senior most person of the service does not pass the departmental examination and, as such, he is not confirmed, but in the meantime his junior having passed the departmental examination is confirmed and promoted to higher grade, in that event even if the person who was originally senior, later, after confirmation, cannot challenge the promotion of his junior, unless there is some specific rule which enables the senior employee, who has been superseded, to claim seniority in the promotional post within any specified period after having complied or fulfilled the conditions for promotion. I see no reason why the senior-most member of the service should lose his seniority merely because he was confirmed later having passed the departmental examination later than his juniors if they are in the same rank. In a Full Bench decision of this Court in the case of Bishundeo Mahto and Others Vs. State of Bihar and Others, Sarwar Ali, J. pointed out:--

In view of the decision in Baleshwar Das's case it can safely be said that (a) regular method of appointment after fulfilment of all the tests for regular appointment including consultation with the Public Service Commission, and (b) long duration for which the post is held are two important indicia for coming to the conclusion that the appointment is in a substantive capacity. The terms of appointment are also relevant but not conclusive. Other relevant factor, like the Service Rule in question or whether the appointee was on probation which has been completed, have also to be taken in account. It is only after taking into consideration all the relevant factors that a firm decision can be arrived at.

I may, however, point out that different considerations may arise in a case where an officer, even after completion of the period of probation is not confirmed in view of the performance of such an officer being not up to mark.

11. There is no dispute in the present case that the petitioner and the respondents were promoted to the Service from the non-Gazetted rank on 28.7.1969 in accordance with the provisions of rule 20 of the Rules on recommendation of a Selection Committee constituted under the Rules and on the advice of the Commission. Petitioner was appointed as senior to the respondents on the basis of merit list. Again when by another notification dated 29.7.1971 the petitioner and the respondents were appointed on probation with effect from the date of their initial appointments the petitioner was shown senior to the respondents. It is an admitted position that the petitioner as well as the respondents have completed their period of probation successfully and have been confirmed : only difference being that the petitioner passed the departmental examination later therefore, he was confirmed from the date of his passing the departmental examination. Till the day the petitioner passed the departmental examination, the petitioner as well as the respondents were in the same rank of service. Now, can it be said that the date of substantive appointment of the petitioner shall be a date later than the respondents solely because the petitioner passed the departmental examination later than the respondents? In my opinion, now it is not possible to come to that conclusion. Once the petitioner fulfilled all the conditions and tests for the substantive appointment, including confirmation, his seniority vis-a-vis the respondents has to be maintained as it was on the date of their initial appointment on temporary basis, as well as on probation, because that appointment had been made on regular basis after proper determination of the inter se merit.

12. I have not been able to appreciate as to how the respondent-State has been confirming its employees calculating the period of two years of probation with effect from the date of their joining the posts. It is well known that under the exigency of situation like accident, death in the family, not being immediately relieved from other service etc. a person, who is first in the merit list, may not join the same day the notification is made or immediately thereafter, and a person, who is lower in the merit list may join either on the date of notification itself or immediately thereafter. Now merely on the basis of the date of joining,

the merit and seniority has to be ignored? In such cases also, the period of two years of probation may be calculated from the date of joining, but after completion of the period of probation the inter-se seniority or the merit list as originally fixed should not be disturbed. In the instant case, I find that not only the period of two years of probation has been calculated with effect from the date of joining of the respondents, but they have been confirmed with effect from the completion of the period of two years of probation from the date of joining.

13. The impugned notification has specifically referred to the judgment of this court in the case of Gaya Prasad Pandey (supra) while fixing the inter-se seniority of the petitioner and the respondents. As later the Supreme Court in the cases of S.B. Patwardhan (supra) and Baleshwar Das (supra) have taken the view that seniority of the officer in the same cadre cannot be fixed, with reference to the date of confirmation in service only, I am left with no option, but to hold with due respect for the learned Judges who decided that case, that in view of the aforesaid later pronouncements of the Supreme Court, the case of Gaya Prasad Pandey (supra) does not lay down correct law. Normally, this case should have been referred to a larger Bench, but in view of the authoritative pronouncements by the Supreme Court, which runs counter to the view taken in the case of Gaya Prasad Pandey (supra), I do not consider it necessary to refer it to a larger Bench. Accordingly, I hold that the petitioner cannot be junior to the respondents merely because he had been confirmed later than the respondents. After confirmation, the seniority of the petitioner and the respondents has to be maintained as originally fixed at the stage of their initial appointments. In the result, this writ application is allowed and the notification dated 5.9.1979 is quashed so far as the petitioner and respondents are concerned, and I direct the respondent-State to maintain the inter se seniority of the petitioner and the respondents in accordance with their initial appointments; in other words, the petitioner shall rank senior to the respondents in the Junior Branch of the service. The petitioner shall be also entitled for any consequential benefits which he may be entitled to in law. There will be no order as to costs.