

Ramendra Singh and Others

Vs

Jagdish Prasad and Others

State of Bihar and Others

Vs

Shyam Dayal Pandey and Others

Civil Appeals Nos. 308-310 with 311-313 of 1977

(R. B. Misra, E. S. Venkataramiah JJ)

17.02.1984

JUDGMENT

R. B. MISRA J. -

1. This bunch of appeals is directed against a common judgment and order of the Patna High Court dated September 8, 1975 allowing three petitions under Article 226 of the Constitution, in part.
2. The material facts to bring out the points for consideration in these appeals lie in a narrow compass. The Public Works Department in Bihar had a very small mechanical organisation. In 1962, however, it undertook the execution of a World Bank project. In that connection a number of the mechanical overseers were needed. As the project had to be executed on an emergency basis within a short time and there being dearth of qualified overseers, persons who were working only as sub-overseers or persons who had appeared at the diploma examination in engineering, but had not passed the same, were appointed against the sanctioned posts on a provisional basis. There were some others who were also appointed as mechanical overseers on temporary basis in World Bank project, a wing of the Public Works Department, after appearing before a selection committee duly constituted according to Rule 1, Appendix II of the Bihar Public Works Department Code, First End., 1958, Vol II. This rule reads :

All permanent appointments to the Bihar Subordinate Engineering Service either by absorption of temporary or work-charged Overseers and Estimators, or by direct recruitment, will be made by the Chief Engineer, provided that in the case of direct recruitment (permanent or temporary) appointment will be made on the advice of the committee of senior officers constituted for the purpose. The committee will consist of three members including the Chief Engineer, who will be the Chairman of the committee. The other two members will be nominated by him with the approval of the Government in the Public Works Department from time to time.
3. The Chief Engineer by orders dated August 18 and September 26, 1964 appointed among other the following persons, already working as sub-overseers in the department as temporary overseers

against the sanctioned posts on their passing the diploma examination from the date of publication of their results of the diploma in mechanical/electrical engineering examination :

1. Ramendra Singh
2. Keshav Singh
3. Bhola Nath Chaudhary
4. Awadesh Kumar Singh
5. Rajeshwar Sinha
6. Ram Chandra Prasad
7. Udai Narain Singh
8. Sunil Kumar
9. Rajnandan Pd. Singh
10. Gopal Ram
11. Sidh Nath Singh
12. Prem Chand Prasad, and many others who are not parties here.

It appears that a provisional gradation list of overseers was prepared. Certain overseers who felt aggrieved by the provisional list made various representations and eventually a revised gradation list dated November, 17, 1973 was prepared. Some of the aforesaid twelve person were promoted as Mechanical Sub-Divisional Officers by an order dated March 13, 1974.

4. The revised gradation list dated November 17, 1973 and the two orders dated August 18 and September 26, 1964 appointing the aforesaid twelve persons as temporary overseers with retrospective effect and the order dated March 13, 1974 promoting some of them as Mechanical Sub-Divisional Officers were challenged by there separate writ petitions : (1) Writ No. 1419 of 1973 filed by Shyam Dayal Pandey, (2) Writ No. 467 of 1974 filed by Ful Chand, and (3) Writ No. 522 of 1974 filed by the Jagdish Prasad and Mohammed Shamsuddin. The respondents in the three petitions including the aforesaid twelve persons were common, though differently numbered.

5. It would be convenient to identify the parties with reference to the writ petition. The writ petitioners therein will be referred to hereinafter as the petitioners and the above-mentioned twelve persons, whose retrospective appointment has been challenged, as the contesting respondents.

6. The case of the petitioners in the three petitions has been that they were appointed as mechanical overseers as temporary basis in the World Bank project, a unit of the Public Works Department after appearing before a selection committee duly constituted according to Rule 1 referred to above. The appointment of the contesting respondents by orders dated August 18 and September 26, 1964 with retrospective effect has been challenged on the ground that they were temporary mechanical sub-overseers and had not got the requisite qualification for being appointed as overseers nor did they

appear before the selection committee as required by Rule 1 of the PWD Code and in any case they could not be appointed with retrospective effect. It was further pleaded that the contesting respondents were junior to the petitioners but in the revised gradation list the contesting respondents were shown above the petitioners on the basis of the aforesaid two orders dated August 18 and September 26, 1964. The promotion of some of the contesting respondents as mechanical sub-divisional officers was also bad on that account.

7. The contesting respondents as well as the State of Bihar filed a return justifying the appointment of the contesting respondents as well as the promotion given to some of the contesting respondents as mechanical sub-divisional officers. On the contentions of the parties, the High Court formulated the following points for consideration :

1. Whether the impugned gradation list had been prepared in accordance with law ?
2. Whether the promotion of various respondents on the basis of the said gradation lists is justified ?
3. Whether the appointment of the respondents was bad as they had not appeared before the selection committee ?
4. Whether the orders dated August 18 and September 26, 1964 appointing the respondents and some of the petitioners as temporary overseers from the date of publication of their results of the diploma in mechanical/electrical engineering examination, are justified and in accordance with law and whether the same could have been made the basis for preparing the gradation list ?

8. While supporting the appointment of contesting respondents on merits two preliminary objections were raised on behalf of the contesting respondents about the maintainability of the writ petitions :

1. None of the requisites of Rule 1 of the PWD Code was complied with while constituting the selection committee and this being the position the petitioners themselves were not selected by a duly constituted committee, and, therefore, they had no right to assail the gradation list and to challenge the appointment of the contesting respondents under Article 226 of the Constitution.
2. The petitioners could not challenge the gradation list without assailing the orders dated August 18 and September 26, 1964 on which the gradation list was based, and the petitioners could not be allowed to assail those orders after a lapse of about 10 years and if they were allowed to challenge the gradation list that would virtually amount to permitting the petitioners to challenge those orders.

9. The High Court overruled both the preliminary objections. The first preliminary objection was overruled on the ground that the requirements of Rule 1 of the PWD Code are not mandatory, they are merely departmental instructions which had not acquired the statutory force and the petitioners could not be non-suited merely because there was no compliance of Rule 1 of the Code. The second preliminary objection was also overruled on the grounds : (a) that the petitioners had not prayed for the quashing of the entire orders but they were aggrieved only with that portion of the orders by which the contesting respondents were appointed retrospectively from the date of the publication of the results of diploma in mechanical/electrical engineering examination, which affected the seniority of the petitioners in revised gradation list; (b) that the petitioners came to know of the two orders

after the preparation of the revised gradation list on November 17, 1973 wherein the contesting respondents were placed above the petitioners; (c) that the Court was mainly concerned with the revised gradation list, but with a view to find out the basis for preparation of the revised gradation list the Court had to examine as to whether the retrospective appointment of the contesting respondents by the aforesaid two orders in the circumstances was valid. If the Court holds that they could not have been appointed retrospectively that would simply change their position in the revised gradation list and that would not affect the appointment of the contesting respondents; and (d) that ignoring the claim of the petitioners on the ground of the laches or delay is not a rule of law but a rule of practice.

10. Coming to the merits, the appointments of the contesting respondents was challenged by the petitioners on the ground that they had not appeared before the selection committee as required by Rule 1 and therefore their appointment was illegal and at any rate they could not have been placed higher than the petitioners in the revised gradation list.

11. The High Court negated the contention on the selfsame ground on the which the preliminary objection No. 1 was overruled. Rule 1 of the PWD Code was merely a departmental instruction and it had not acquired the statutory force, therefore, the appointment of the contesting respondent could not be held to be invalid merely because they had not appeared before the selection committee. Besides there was no such stipulation in their initial order of appointment nor were they called for appearing before the selection committee. Keshav Singh and Sunil Kumar, two of the contesting respondents and one Shyam Dayal Pandey, one of the petitioners in one of the writ petitions, who were placed in similar situation as the contesting respondents appeared before the selection committee but it was due to some misunderstanding on the part of the Executive Engineer (Workshop Division) under whom they happened to be posted although their original letter of appointment contained no such stipulation that they would have to appear before the selection committee.

12. On the crucial point whether the two orders dated August 18 and September 26, 1964 making retrospective appointments were valid, the Court held in the affirmative after taking into consideration the various authorities cited before it.

13. The Court further held that the petitioners were initially appointed provisionally but after they appeared the selection committee they were appointed temporarily and, therefore, the services of the petitioners from the date of their appointment could be counted while fixing their seniority, whereas those of the contesting respondents, who were provisionally appointed could not have been counted for fixing seniority. It also held that the revised gradation list showing the contesting respondents above the petitioners on the basis of the two orders dated August 18 and September 26, 1964 was bad in law.

14. Consequently, the High Court quashed only that part of the two orders which had fixed the date of publication of the result of diploma in mechanical/electrical engineering examination as the date of commencement of the length of service of temporary overseers. The seniority list prepared in pursuance of the order dated November 17, 1973, insofar as it relates to the contesting respondents vis-a-vis the petitioners in the three petition was also quashed. The order of promotion of some of the contesting respondents, namely, Ramendra Singh, Bhola Nath Chaudhary, Rajeshwar Sinha, Ram Chandra Prasad and Udai Narain Singh was also quashed.

15. The contesting respondents have now come to challenge the order of the High Court by special

leave under Article 136 of the Constitution. The State of Bihar has also filed three separate appeals against the same order and for the same relief.

16. The crucial question for consideration in this case is whether the appointment of the contesting respondents, arrayed as appellants in the first batch of the three appeals, by the two orders dated August 18 and September 26, 1964, with retrospective effect is bad in law.

17. Shri A. K. Sen along with Shri G. L. Sanghi appearing for the petitioners, now arrayed as respondents in these appeals supported the judgment of the High Court. Their main contention was that the contesting respondents had not acquired the requisite qualification on the date of their appointment and, therefore, their appointment by orders dated August 16 and September 26, 1964 with retrospective effect was in the teeth of Rule 1 of the PWD Code, and in any case there can be no retrospective appointment of the contesting respondents from the date of passing their diploma examination inasmuch as it affected the seniority of the petitioners in the revised gradation list.

18. Shri Lal Narain Singh assisted by Shri R. K. Garg appearing for the petitioners appellants, raised the following three contentions :

1. The impugned orders are about ten years old and the petitioners could not be permitted to challenge those orders after the lapse of such a long time.
2. The High Court itself had made a discrimination inasmuch as the writ petitions against Keshav Singh and Awadesh Kumar Singh have already been dismissed.
3. In the absence of any statutory rule or rules framed under Article 309 of the Constitution, it was open to the Government to make appointments to suit the exigencies of the situation.

19. The High Court has given detailed reasons for not accepting the contention of undue delay in filing the writ petitions. It is not necessary to repeat those grounds over again. We fully agree with the view taken by the High Court that the writ petitions filed by the petitioners could not be dismissed on the ground of laches.

20. As regards the second contention of Shri Lal Narain Sinha, we are of the view that the mere fact that the writ petitions have been dismissed against Keshav Singh and Awadesh Kumar Singh, will not be a ground for setting aside the impugned order of the High Court. The contesting respondents have to show that the two orders dated August 18 and September 26, 1964 making retrospective appointments were valid one.

21. As regards the third contention, Shri Lal Narain Sinha submits that the executive power of the State is con-extensive with its legislative power and therefore if the State can pass an enactment so also it can pass orders in exercise of its executive power, as contemplated by Article 162 of the Constitution to suit the exigencies of a particular situation. In the instant case, as stated earlier, the World Bank project was undertaken by the PWD in 1962. A large number of mechanical overseers were needed as the project had to be executed on emergency basis within a short time and there being dearth of qualified hands persons who were working only as sub-overseers or who had appeared at the diploma examination but had not passed were appointed against sanctioned posts and were permitted to draw the pay scale of overseers from the date of the passing of the diploma examination.

22. There is no denying the fact that the executive power of the State is in no way narrower than the legislative power. But the question is whether in exercise of that power the State in violation of Article 16 of the Constitution could make retrospective appointment of the contesting respondents in the instant case so as to affect the seniority of the petitioners.

23. For the respondents reliance was placed on *State of Punjab v. Kishan Dass* ((1971) 3 SCR 389 : (1971) 1 SCC 319 : AIR 1971 SC 766 : 1971 Lab IC 481). In that case pursuant to certain charges against a police constable his entire service with permanent effect was forfeited, which meant reducing his salary to the starting point in the time scale for constables. The constable challenged the order by filing a regular suit. The two courts below decreed the suit holding that there was flagrant violation of Article 311(2) of the Constitution as the impugned order amounted to reduction in rank. This Court interpreted the expression 'reduction in rank' and held : (SCC p. 325, para 13)

The expression "reduction in rank" in the article, therefore, means reduction from higher to a lower rank or post when imposed as a penalty. Therefore, an order forfeiting the past service which has earned a Government servant increments in the post or rank he holds, howsoever adverse it is to him, affecting his seniority within the rank to which he belongs or his future chances of promotion, does not attract the article. His remedy, therefore, is confined to the rules of service governing his post.

The impugned orders in the instant case may be have resulted in reduction of rank but all the same they affected the seniority of the petitioner which eventually might result in reducing their chances for promotion.

24. Reliance was next placed on *B. N. Nagarajan v. State of Mysore* ((1966) 3 SCR 682 : AIR 1966 SC 1942 : (1967) 2 SCJ 664 : (1967) 1 LLJ 698). One of the arguments advanced in that case was that till the rules are made in that behalf no recruitment could be made to any service. This argument was, however, repelled by this Court, firstly because, it was not obligatory under proviso to Article 309 to make rules of recruitment, etc. before a service could be constituted or a post created or filled; secondly, the State Government had executive power in relation to all matter with respect to which the Legislature of the State has power to make rules; and it follows from this that the State Government will have executive power in respect of List II, Entry 41, State Public Service. Relying on *Ram Jawaya Kapur v. State of Punjab* ((1955) 2 SCR 225 : AIR 1955 SC 549 : 1955 SCJ 504) it was held that it was not necessary that there should be a law already in existence before the Executive is enabled to function and that the powers of the Executive were limited merely to the carrying out of these laws. There was nothing in the terms of Article 309 of the Constitution which abridges the power of the Executive to act under the Article 162 of the Constitution without a law. The Court, however, put a word of caution in mentioning that if there is statutory rule or an Act on the matter, the Executive must abide by that Act or rule and it could not in exercise of executive power under Article 162 of the Constitution ignore or act contrary to that rule or Act.

25. The second contention in the above case was that the Executive could not frame rules retrospectively unless the Act specifically empowers it to do so. This Court, however, refrained from deciding this point because in their opinion the appeal could be disposed of on another grounds. This Court observed that assuming for the sake of argument that the Mysore State Government could not make rules retrospective and that the rules were thus void so far as they operated retrospectively, proceeded to ignore to rules and to examine whether the appointments made on October 31, 1961 could be upheld. The Court came to the conclusion that those appointments could be considered to have been validly made in exercise of the executive power of

the State under Article 162 of the Constitution.

26. For the appellants strong reliance was also placed upon *Rajendra Narain Singh v. State of Bihar* ((1980) 3 SCR 450 : (1980) 3 SCC 217 : 1980 SCC (L&S) 363 : (1980) 2 LLJ 138). It was laid down in that case that in the absence of any legislation on the subject or a rule framed under the proviso to Article 309 of the Constitution, the State Government could regulate its public services in the exercise of its executive power. In the above case there was no statute or any rule framed under the proviso to Article 309 to determine the seniority as between the direct recruits and the promotees. The determination of the seniority on the basis of the continuous officiation was held to be valid on the basis of the decision in *S.B. Patwardhan case* (*S.B. Patwardhan v. State of Maharashtra*, (1977) 3 SCR 775 : (1977) 3 SCC 399 : 1977 SCC (L&S) 391 : 1977 Lab IC 1367). There is no gainsaying the fact that the executive power of the State is co-extensive with the legislative power, but whether the exercise of the power can be in such a way as to offend Article 16 of the Constitution. The retrospective appointment of the respondents in the aforesaid writ petitions affected the seniority of the respondents.

27. This question, however, need not detain us as the point in question is covered by *R.N. Nanjundappa v. T. Thimmiah* ((1972) 2 SCR 799 : (1972) 1 SCC 409 : (1972) 1 LLJ 565 : 1972 Lab IC 618). In that case the respondent Thimmiah was appointed through the Public Service Commission as an Assistant Geologist in the Department of Geology in the Mysore Government in 1951 in the grade of Rs 125-10-175. When the Kolar Gold Fields School in Mines was set up in July 1957 the respondent was sent on deputation for two years as Vice-Principal of the School of Mines. When the then Principal of the School of Mines, who was employed on a part-time basis on an allowance of Rs 200 left on July 22, 1958, the respondent who was Vice-Principal and was also doing the duties of Principal since February 15, 1958, was appointed as officiating Principal with effect from July 22, 1958 in the grade of Rs 500-30-800 by an order dated September 25, 1958. On April 3, 1959 the State Government in modification of the notification dated September 25, 1958 appointed the respondent as temporary officiating Principal with effect from February 15, 1958. The Mysore Education Department Service Rules, 1967 regularised the appointment of the respondent. The relevant portion of the Rules reads :

Notwithstanding any rules made under the proviso to Article 309 of the Constitution of India, or any other Rules or Order in force at any time, Dr T. Thimmiah B.Sc. (Hons.) Ph.D. (Lond.) F.G.S. shall be deemed to have been regularly appointed as Principal, School of Mines, Ooragaum, Kolar Gold Fields, with effect from February 15, 1958.

This rule was challenged by the appellants on various grounds :

(a) That the respondent was governed by the Mysore Service Regulations, 1943, the Mysore State Civil Services (General Recruitment) Rules, 1957 as well as the Mysore Education Department Service (Technical Education Department) (Recruitment) Rules, 1964.

(b) That the respondent was in Class III service and his appointment by the impugned regulation amounts to his promotion from Class III service to Class I. If so, it is hedged by two limitations as contemplated by sub-clause (a) and (b) of Rule 4(3) of the Mysore State Civil Service Rules, 1957, i.e. (1) it has to be on the basis of merit and suitability with due regard to seniority from among persons eligible for

promotion, and (2) it has to be on the basis of seniority-cum-merit from among persons eligible for promotion.

28. The stand of the respondent, however, was that (1) he was a local candidate in service and, therefore, the aforesaid rules did not apply to him and the regularisation of his appointment was valid; (2) under Article 162 of the Constitution regularisation would in itself be a mode of exercise of power of the appointment of the Executive Government. Such an appointment even if made in the shape of rules under Article 309 could not be attacked on the ground of being made for one person just as a piece of legislation could not be attacked on the ground of being made for a particular person or entity.

29. The High Court came to the conclusion that the appointment of the respondent could be regularised with effect from any date as he was a local candidate within the meaning of the Mysore Government Seniority Rules, 1957. This Court in appeal, however, reversed the judgment of the High Court and observed : (SCC p. 415, para 23)

No one can deny the power of the Government to appoint. If it were a case of direct appointment or if it were a case of appointment of a candidate by competitive examination or if it were a case of appointment by selection recourse to rule under Article 309 for regularisation would not be necessary. Assume that rules under Article 309 could be made in respect of appointment of one man but there are two limitations. Article 309 speaks of rules for appointment and general conditions of service. Regularisation of appointment by stating that notwithstanding and rules the appointment is regularised strikes at the root of the rules and if the effect of the regularisation is to nullify the operation and effectiveness of the rules, the rule itself is open to criticism on the ground that it is in violation of current rules. Therefore, the relevant rules at the material time as to promotion and appointment are infringed and the impeached rule cannot be permitted to stand to operate as a regularisation of appointment of one person in utter defiance of rules requiring consideration of seniority and merit in the case of promotion and consideration of appointment by selection or by competitive examination.

The Court gave further reasons for holding the regularisation to be bad in law. It observed : (SCC p. 419, para 33)

This regularisation is bad for the following reasons : First, regularisation is not itself a mode of appointment. Secondly, the modes of appointments are direct recruitment or selection or promotion or appointing for reasons to be recorded in writing an officer holding a post of an equivalent grade, by transfer from any other service of the State. The Government did not contend it to be a case of promotion. If it were a case of promotion it would not be valid because it would be a promotion not on the basis of seniority-cum-merit but a promotion of some-one who was in Class III to Class I. Even with regard to appointment under Rule 16 by transfer of a person holding an equivalent grade the appointment would be offending the rules because it would not be transfer from an equivalent grade. Again, merit and seniority could not be disregarded because the respondent was not in the same class as the Principal of the School of Mines. The pay of the Principal was Rs 500-800 whereas the respondent was getting a salary of Rs 165 in the grade of Rs 125-165 plus an allowance of Rs 75.

The Court also brought out the distinction between the scope of Article 309 and Article 162 of the Constitution. It observed : (SCC pp. 419-20, para 34)

There were 1957 rules which spoke of appointment by competitive examination or by selection or by promotion. Even if specific rules of recruitment for such service were not made the rule as to appointment by competitive examination or selection or by promotion was there. Article 162 does not confer power of regularisation. Article 162 does not confer power on the Government to make rules for the recruitment or conditions of service. There can be rule for one person or one post by rules are meant for recruitment and conditions of service. Rules are not for the purpose of validating an illegal appointment or for making appointments or promotions or transfers. Rules under Article 309 are for the purpose of laying down the conditions of service and recruitment. Therefore, the regularisation by way of rules under Article 309 in the present case by stating that notwithstanding anything the rules the appointment of the respondent was being regularised was in itself violation of the rules as to appointment and as to cadre and also as to the proper selection.

30. In view of this clear authority, it cannot be argued for the appellant that they could be appointed with retrospective effect so as to affect the seniority of the respondents. The order dated August 18 and September 26, 1964 which purported to appoint the sub-overseers named therein as temporary overseers from the date of publication of their result of diploma examination are clearly violative of Article 14 and 16 of the Constitution inasmuch as the petitioners had already been appointed as overseers by selection committee constituted under the rules contained in PWD Code. The order of temporary appointment by the impugned orders dated August 18 and September 26, 1964 conferred notional seniority on the contesting respondents for the period while they were actually working as sub-overseers in the lower scale outside the cadre of overseers. This High Court in our opinion was fully justified in allowing the writ petitions in part.

31. For the reasons given above the appeals must fail. They are accordingly dismissed. In the circumstances of the case, however, we allow the parties to bear their own costs.

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