

Nirmal Kumar Choudhary and Others

Vs

State of Bihar and Others

Civil Appeal Nos. 2049 and 3128 of 1979

(Ranganath Misra, G. L. Oza JJ)

16.12.1987

JUDGMENT

RANGANATH MISRA, J. –

1. These two appeals are by special leave. They are directed against the same judgment of the Patna High Court in an application under Article 226 of the Constitution filed by respondents 6 to 51 of Civil Appeal No. 2049 of 1979. In the writ petition the aforesaid respondents impleaded the State of Bihar and certain public officers as also all others who were included in the gradation list for purpose of seniority in the combined cadre of engineers in the Department of Agriculture. The other appeal is by the State of Bihar and its public officers and both the appeals challenge the correctness of the decision of the Division Bench of the High Court. Both the appeals are disposed of by this judgment.

2. There were three different wings of engineers in the Department of Agriculture being Irrigation, Minor Irrigation and River Valley Projects. On 9th January, 1969, the State Government amalgamated the cadre of engineers and other employees of the Irrigation and the River Valley departments. Engineers and other employees of the Minor Irrigation wing were, however, not amalgamated. On 17th November, 1969 the Directorate of Minor Irrigation was made permanent and the State Government created a distinct and permanent cadre of Overseers who came to be known as junior Engineers. 191 permanent posts of Overseers were sanctioned. Discussions were held and committees were appointed for the purpose of merging the Minor Irrigation wing with the other two wings which had already been amalgamated in 1969. On 17th May, 1976. The Government ultimately approved the Minor Irrigation wing to amalgamate. On 29th August, 1977, the Engineer-in-Chief-cum-Special Secretary, Irrigation Department, circulated a combined final gradation list said to have been prepared, taking into consideration the status of the Overseers as obtaining on 9th January, 1969. On 30th June, 1978, an amended combined gradation list was published which was further changed on 18th July, 1978. Respondents 6 to 51 had already filed their writ application before the Patna High Court being C.W.J. Case No. 1820 of 1977 which the High Court by the impugned judgment dated 2nd March, 1979 allowed. The High Court quashed the orders contained in Annexures 11, 11/1, 12, 13, 13/1, 15 and 16 and called upon the State Government and its officers to prepare a fresh combined gradation list in accordance with the principles laid down in the judgment.

3. The High Court referred to all the materials that were placed before it by the different parties and in para 17 of the judgment came to the conclusion :

From the discussion of the facts of the case before us, it is clear that the petitioners got their

substantive appointment earlier than the respondents concerned and if seniority would have ranked on that consideration, then the petitioners would have ranked senior in the integrated cadre. This was also the recommendation of both the High Powered Committees which suggested that two seniority lists, one for the permanent incumbents and the other for the temporary incumbents, be framed. No specific rule was brought to our notice by either side which could govern the case of the petitioners and respondents.

On the other hand, learned counsel for the petitioners has referred to the instructions issued by the Personnel Department of the State Government to all principal Secretaries and Heads of Departments etc. in its memo. No. 3/RI-106/72-F-15784 dated the 26th August, 1972. Clause 3(vii) thereof provides that in the event of amalgamation of cadres seniority is determined with reference to the date of appointments in the particular grade on substantive or continuous officiating basis, whichever is earlier, without, however, disturbing the inter se seniority of incumbents in any group of posts as amongst themselves in that process. No other rule was brought to our notice on behalf of either the learned counsel appearing for the State or the contesting respondents.

An attempt had been made before the High Court to rely upon the executive instructions issued in a Government resolution (Annexure 9). The High Court found that the circular had got no application to the case before it and it related to Secretariat Assistants. The High Court was not prepared to act upon it because it was not laying down any general principles. According to the High Court :

Substantive appointment in a service gives the incumbent a right and if that cannot be taken away by the a temporary incumbent of the same department, we do not see why that right should be allowed to be taken away if a question of integration or merger comes in by such incumbent who were similarly temporary and thereby junior to the permanent employees. In our opinion therefore, the gradation list in this case (Annexure 12) is violative of the principles contained in Articles 14 and 16 of the Constitution and impinges upon the civil right of the petitioners, making them several hundreds places junior in the integrated or combined cadre on a basis which cannot, in any view of the matter, be said to be reasonable in the light of the principles discussed in the aforesaid authorities.

It is not in dispute that the three wings, though under the administrative control of the Agriculture Department, were separate before amalgamation. As already pointed out, permanent post had been sanctioned in the Minor Irrigation wing to which the petitioners before the High Court belonged and they were appointed on permanent basis. The High Powered Committees had taken all aspects into consideration and had recommended relevant aspect to be kept in view to regulate seniority in the merged cadre. When integration takes place and officers in different cadres are merged into one, there is bound to be some difficulty in the matter of adjustment. That obviously has occurred here. The High Court has found that the petitioner before it had held, on the basis of confirmation, permanent posts and on that basis directed that the combined seniority list should be prepared taking dates of substantive appointments as the basis for fixing inter se seniority. That indeed might create problems because depending upon availability of opportunities in the different wings, confirmation may have been granted while in the absence of the same, though officer in the other wings may be senior they may not have been confirmed. The approach of the High Court has been, as extracted above by us, that if within the cadre earlier confirmation gives seniority why should that basis be not extended to the combined gradation list, This may not be applicable in every situation - particularly when there is a merger of cadre and the combined gradation list is proposed.

4. It is a well settled position in law that seniority would ordinarily depend upon length of service

subject, of course, to rules holding the filed. That view has been taken by this Court in several cases and it is unnecessary to refer to all of them. In *A. Janardhana v. Union of India* ((1983) 2 SCR 936 : (1983) 3 SCC 601 : 1983 SCC (L&S) 467) the situation was somewhat the same as here. The Court found that the method adopted for fixing seniority overlooked the character of appointment and pushed down persons validly appointed below others who had no justification to be given higher place. At page 960 of the Reports, the Court observed : [SCC p. 620 : SCC (L&S) p. 486, para 28]

It is an equally well recognised canon of service jurisprudence that in the absence of any other valid rule for determining inter se seniority of members belonging to the same service, the rule of continuous officiation of the length of service or the date of entering in service and continuous uninterrupted service thereafter would be valid and would satisfy the tests of Article 16.

We may also refer to a very recent decision of this Court in *K. S. Vora & Ors v. State of Gujarat*. The High Court recorded a finding that there is no applicable rule in the matter of fixing inter se seniority in a situation of this type. In the absence of rules, the more equitable way of preparing the combined gradation list would be to take the total length of service in the common grade as the basis for determining inter se seniority. We would like to add that in regard to the supervisors (now called junior Engineers) serving in the three wings there is no dispute of the grade being the same. While we do not agree with the High Court that confirmation should be the basis and would substitute it by the length of service test, we would uphold the direction that in the fixing the combined gradation list the inter se seniority of the incumbents in their respective departments would not be disturbed. Even if this be the test, the gradation list as punished by Government has to be modified. We would accordingly confirm the conclusion of the High Court that Annexures 11, 11/1, 12, 13, 13/1, 15 and 16 should be quashed and a fresh combined gradation list has to be published. We have altered the test for fixing the seniority inter se seniority in their own departments to be respected. The respondent-State and its officers are direct to prepare and publish the fresh combined gradation list keeping the aforesaid direction in view.

5. Both the appeals are allowed to the extent indicated above. Parties shall bear their own costs throughout.

</html