

State of Bihar and others

Vs

Sri Akhouri Sachindra Nath and others

Civil Appeals No 232 and 235 of 1978

(B. C. Ray, R. M. Sahai JJ)

19.04.1991

JUDGEMENT

RAY, J. :-

1. These two appeals were filed against the common judgment and order dated 29th July, 1978 made by the Division Bench of the High Court at Patna in C.W.J.C. No. 756 of 1977 whereby the High Court quashed the orders of the Government contained in Annexures 8, 9 and 10 to the writ petition. The facts unfurled from the writ petition are as follows:-

The respondents Nos. 1 to 5 in these appeals (the petitioners in the writ petition) were directly appointed in the Bihar Engineering Service Class II as Assistant Engineers of the Irrigation Department on the recommendation of Bihar Public Service Commission and were posted in River Valley Project in 1961. The respondents Nos. 6 to 23 in C. A. No. 232 of 1978 (who are appellants in C.A. No. 233 of 1978 and respondents Nos. 5 to 22 in the writ petition) were working at that time as Overseers in the Bihar Subordinate Engineering Service (Irrigation Department). On 7th April, 1958 the Governor took a decision under rule 2 of the Public Works Department Code that 25% of the posts in the Bihar Engineering Service, Class II shall be filled up by promotion, subject to availability of suitable hands. Thus, out of the total vacancies in Bihar Engineering Service, Class II, 75% of the vacant posts as determined by the Government will be filled up by direct recruitment and 25% of the vacant posts will be filled up by promotion subject to availability of suitable candidates. By notification dated 18th July, 1964/27th August, 1964, respondents Nos. 6 to 13 in C. A. No. 232 of 1978 (appellants Nos. 1 to 8 in C. A. No. 233 of 1978 and respondents Nos. 5 to 12 in the writ petition) who were members of the Bihar Subordinate Engineering Service (Overseers) were promoted to the post of Assistant Engineer in Class II and by another notification dated 21st July, 1969, respondents Nos. 14 to 23 in C. A. No. 232 of 1978 (appellants Nos. 9 to 18 in C.A. No. 233 of 1978 and respondents Nos. 13 to 22 in the writ petition) were also promoted to Bihar Engineering Service, Class II as Assistant Engineers. On February 26, 1969, a seniority list of Assistant Engineers was published by the Department wherein the names of the respondents Nos. 1 to 5 (the petitioners) were mentioned at Sl. Nos. 170, 199, 208, 211 and 226 and the names of the respondents Nos. 6 to 23 (respondents Nos. 5 to 22 in the writ petition) were mentioned at Sl. Nos. 253, 254, 256 to 262, 687 to 695 and 701 respectively. The respondents Nos. 6 to 23 were thus shown as juniors to the respondents Nos. 1 to 5 (the petitioners). The respondents Nos. 6 to 23 feeling aggrieved by the said seniority list made representations claiming seniority over respondents Nos. 1 to 5. On 3rd May, 1972 the State of Bihar constituted a Committee known as Ramanand Committee by a resolution to consider the inter se seniority of Civil Engineers including the Assistant Engineers. On April 19, 1973 the Ramanand Committee submitted a report making certain recommendations. It was alleged that a revised seniority list was prepared wherein the respondents

Nos. 1 to 5 were shown juniors to the respondents Nos. 5 to 23. This, of course, has been denied in affidavit-in-counter filed on behalf of the Government (appellants in C.A. No. 232 of 1978, respondents Nos. 6 to 9 in C. A. No. 233 of 1978, and respondents Nos. 1 to 4 in the writ petition). On 21st of July, 1975, an order was made whereby the date of promotion of respondents Nos. 6 to 13 was changed from 21st July, 1962 to 27th February, 1961 thereby making the respondents Nos. 1 to 5 juniors to respondents Nos. 6 to 13. This order is contained in annexure 8 to the writ petition. In other words, the respondents Nos. 6 to 13 were promoted retrospectively from the said date. The respondents Nos. 1 to 5 made representations to the State against it but the State Government instead of redressing their grievances made another order of January 20, 1976 (annexure 9 to the writ petition) re-fixing the seniority of respondents Nos. 6 and 7 promoting them to the Bihar Engineering Service with effect from December 19, 1958. Again, to the prejudice of the respondents Nos. 1 to 5, an order was passed by the State Government by which the date of promotion of respondents Nos. 14 to 23 was pushed back to February 27, 1961 making them also senior to the respondents Nos. 1 to 5. This order is contained in annexure 10 to the writ petition.

2. The respondents Nos. 1 to 5, therefore, filed a writ petition in the High Court at Patna being Civil Writ Petition No. 756 of 1977 challenging the seniority conferred on the respondents Nos. 6 to 23 (respondents Nos. 5 to 22 in the writ petition) by annexures 8, 9 and 10 on the ground that these orders were wholly arbitrary illegal, void and inoperative and ineffective and so prayed for appropriate writ for quashing those orders.

3. A counter-affidavit was filed in behalf of the State Government. In para 3 (iii) of the said affidavit, it has been averred that till 1957, 25% of the vacancies in Bihar Engineering Service, Class II, were being filled up by promotion from the Bihar Subordinate Engineering Service (commonly known as 'Overseers'). Subsequently, in the year 1958, it was decided that 25% of the cadre posts in the Bihar Engineering Service, Class II both permanent and temporary, shall be reserved for being filled up through promotion from the members of the Bihar Subordinate Engineering Service. It has been further averred in para 3(iv) that all the posts of temporary Assistant Engineers to which the Overseers were entitled to be promoted on the basis of 25% reservation in the cadre were not filled up by promotion of Overseers, only 3 overseers were given promotion with effect from 19-12-1958 vide order No. A/P1-409/ 64-1-14294 dated 18-7-64/ 27-8-64. In the said affidavit it has also been stated that on a careful examination of the matter it was found that on the basis of total number of posts of Assistant Engineers in the Department, the Overseers were entitled to 60 posts on the basis of 25% reservation till 1958, out of which they were already given 33 posts and 27 more posts of Assistant Engineers were still due to them and accordingly by an order dated 20th January, 1976 the 21 Overseers who had earlier been given promotion as temporary Assistant Engineers from later dates in 1960, 1961 and 1962 by the order dated 18-7-64/ 27-8-64 were given promotion, with effect from 19-12-1958. Due to this correction, respondents Nos. 6 and 7 and one Shri Mithileshwari Sahay (since retired) were promoted as temporary Assistant Engineers with effect from 19-12-1958 in partial modification of the Government order dated 18-7-64/ 27-8-64 and another order dated July 12, 1975. It has been further stated that as a result of this modification in the dates of promotion as Assistant Engineer who by the order dated 20th January, 1976 were allowed promotion as temporary Assistant Engineers with effect from 19-12-1958 as against promotions from later dates in 1960, 1961 and 1962 given to them by earlier Government Order dated 27-8-1964 and order dated 21-7-1969. It has also been stated that the respondents Nos. 6 and 7 were entitled to promotion in 1958 and respondents Nos. 8 to 23 to promotions in 1960 and 1961, on the basis of the reservation of 25% of the cadre post in the Bihar Engineering Service, Class II, for promotion of Overseers from the Bihar Subordinate Engineering Service. It has been further averred that as against 21 consequential vacancies, the case

of only 17 Overseers was modified accordingly in supersession of the earlier Government order dated 18-7-64 /278-64 and respondents Nos. 8 to 13 were given promotion as temporary Assistant Engineer with effect from 27-2-1961, from which date the promotion was due to them on the basis of the quota by a Government Order No. 10501 (annexure 8 to the writ petition) dated July 12, 1975 and No. 17328 dated November 8, 1975 respectively. It has also been stated that the seniority list that was prepared and published in 1959 was tentative.

4. The High Court, Patna held that no person can be promoted with retrospective effect from a date when he was not borne in. the cadre so as to adversely affect others. The respondents Nos. 1 to 5 were recruited to the post of Assistant Engineers, Class II before the respondents Nos. 6 to 23 were promoted to the post of Assistant Engineer, Class II in the Bihar Engineering Service, Class II. The High Court, therefore, held that the orders contained in Annexures 8, 9 and 10 promoting the respondents Nos. 6 to 13 (respondents Nos. 5 to 22 in the writ petition) with retrospective effect are bad and so quashed those Government orders referred to in the said annexures.

5. Against this judgment and order made by the High Court, the instant appeals on special leave were filed.

6. The sole question which falls for decision in these appeals is whether the inter se seniority between the petitioners-respondents Nos. 1 to 5 who are direct recruits and the Overseers belonging to the Bihar Subordinate Engineering Service (Irrigation Department) who had been promoted retrospectively in their 25% quota for the year 1958 as revised by the Government orders, mentioned in annexures 8, 9 and 10 to the writ petition is arbitrary, illegal and inoperative as those orders purport to affect prejudicially the seniority of the petitioners-respondents Nos. 1 to 5 in the service of Bihar Engineering Service, Class II. It is not disputed that in 1958 under Rule 2 of the Public Works Department Code, the Governor of Bihar took a decision to the effect that 25% of the posts in the Bihar Engineering Service, Class II shall be filled up by promotion, subject to availability of suitable hands. It also appears from the counter-affidavit filed on behalf of the Government that in 1958, the total number of posts to be filled up by promotion from the Overseers in the Bihar Subordinate Engineering Service (Irrigation Department) to the post of Assistant Engineer, in. Bihar Engineering Service, Class II was 60 out of which only 33 posts were filled up by promotion, leaving 27 more posts of Assistant Engineers to be filled up by promotion from the Overseers in the Bihar Subordinate Engineering Service (Irrigation Department). It is also clear from the averments made in the said counter-affidavit that the petitioners-respondents Nos. 1 to 5 were appointed in Bihar Engineering Service Class II on the recommendation of the Bihar Public Service Commission in the year 1961 and the respondents Nos. 6 to 13 who had been working in the Bihar Subordinate Engineering Service (Irrigation Department) as Overseers and having independent charge of the sub-division were promoted to the post of Assistant Engineer, Class II by notification dated 18-764/27-8-64. The respondents Nos. 14 to 23 were also promoted by a notification dated 21-7-1969. On the basis of these appointments and promotions in the post of Assistant Engineer in the Bihar Engineering Service, Class II, a seniority list was prepared and published in February, 1969 tentatively where in the petitioners-respondents Nos. 1 to 5 were shown as senior to respondents Nos. 6 to 23. However, the Government by its order dated 21st July, 1962 changed the date of promotion of respondents Nos. 6 to 13 from 21-7-1962 to 27-2-1961 (Annexure 8 to the writ petition) thereby making the petitionersrespondents Nos. 1 to 5 junior to respondents Nos. 6 to 13. On January 20, 1976, the Government passed another order re-fixing the seniority of respondents Nos. 5 and 6 promoting them to Bihar Engineering Service, Class II with effect from 19-12-1958 (Annexure 9 to the writ petition). Again an order contained in Annexure 10 to the writ petition was passed by which the date of promotion of respondents Nos. 14 to 23 was pushed back

to February 27, 1961, thus making them senior to the petitioners-respondents Nos. 1 to 5. The petitioners-respondents Nos. 1 to 5 challenged these three Government orders mainly on the ground that these orders giving promotion to the respondents Nos. 6 to 23 from a date earlier to their date of promotion to the post of Assistant Engineer in Bihar Engineering Service, Class II purport to affect prejudicially the rights of the petitioners-respondents Nos. 1 to 5 in as much as they were appointed to the post of Assistant Engineer in the Bihar Engineering Service, Class II earlier to the promotion to the said post of the respondents Nos. 6 to 23. It has also been submitted in this connection that the seniority has to be reckoned amongst the officials working as Assistant Engineers in the Bihar Engineering Service, Class II from the date of their appointment on promotion to the said Service. The petitioners-respondents Nos. 1 to 5 being appointed earlier directly in the quota of direct recruits than the promoted respondents who were promoted later cannot be given seniority in service to the petitioners-respondents Nos. 1 to 5 and it was contended that the impugned orders are wholly illegal and unwarranted and so the High Court has rightly quashed the said orders. It has been further urged in this connection that the State can promote its employees with retrospective effect provided such retrospective promotion does not affect the right and seniority already earned by others. The petitioners-respondents Nos. 1 to 5 who were senior to the promotee-respondents Nos. 6 to 23 were made junior to them by the said Government orders as contained in Annexures 8, 9 and 10 to the writ petition. It has, therefore, been contended that the promotion to the respondents Nos. 6 to 23 was illegal and arbitrary as the same had prejudicially affected the petitioners-respondents Nos. 1 to 5 in regard to their seniority.

7. The High Court while rendering its judgment relied on the decision in the case of *A.K. Subraman v. Union of India* (1975) 1 SCC 319 : (AIR 1975 SC 483), specially on the observation made therein as under (at p. 495 of AIR) :-

"Once the Assistant Engineers are regularly appointed to officiate as Executive Engineers within their quota they will be entitled to consideration in their own rights as Class I Officers to further promotions. Their "birth marks" in their earlier service will be of no relevance once they are regularly officiating in the grade of Executive Engineer within their quota."

8. The High Court held that no person can be promoted with retrospective effect from a date when he was not born in the cadre so as to adversely affect others.

9. It is the admitted position that the respondents Nos. 6 to 23 were working as Overseers in the Bihar Subordinate Engineering Service and were promoted to the post of Assistant Engineer in Bihar Engineering Service, Class II much after the petitioners-respondents Nos. 1 to 5 were directly recruited and appointed on the basis of the recommendation of the Bihar Service Commission, to the post of Assistant Engineers in 1961 and as such they have been working in the grade of Assistant Engineers much before the respondents Nos. 6 to 23. Undoubtedly, on the basis of the order of the Governor in 1958, the posts of Assistant Engineers are to be filled up from two sources i.e. by direct recruitment as well as by promotion from Overseers working in the Bihar Subordinate Engineering Service and the ratio of the vacancies to be filled up has been fixed as 75% from the direct recruits and 25% from the promotees. It has been urged on behalf of the respondents Nos. 5 to 23 that in view of the quota rule the respondents Nos. 6 to 23 who were promoted in the quota set out for promotees in respect of the vacancies of 1958 shall be taken to be promoted in 1958 notwithstanding that they have been actually promoted long after 1958 and after the direct recruits i.e. respondents Nos. 1 to 5 were recruited directly to the post of Assistant Engineers. In other words even though the respondents Nos. 6 to 23 have been promoted after the date of recruitment of

respondents Nos. 1 to 5 to the post of Assistant Engineer, still then the promotee respondents Nos. 6 to 23 should be deemed to be senior to the direct recruit respondents Nos. 1 to 5 as they were promoted in the vacancies for 1958 quota set up for promotees. In support of this submission the decision in *V. B. Badami v. State of Mysore* CI 976) 1 SCR 815 : (AIR 1980 SC 1561) as well as *Gonal Sihimappa v. State of Karnataka* 1987 Supp SCC 207 : (AIR 1987 SC 2389) were cited at the bar. In both these cases the promotees occupied in the quota of direct recruits as direct recruits were not available to fill up the quota meant for them. It was held that direct recruits who were appointed within their quota subsequently were entitled to the vacancies within their quota which had not been filled up and they would become senior to the promotees. The promotees would be pushed down to later years when their appointment could be regularised as a result of absorption in their lawful quota of those years. The promotees cannot claim any right to hold promotional posts unless the vacancies fall within their quota. These cases have no application in the instant case inasmuch as the direct recruits i.e. respondents Nos. 1 to 5 were recruited in their quota i.e. the quota meant for them. This being so, the decision in these two cases has no application to the instant case. Moreover, there is nothing to show that the respondents Nos. 6 to 23 who were promoted in 1962 and thereafter i.e. subsequent to the direct recruits i.e. respondents Nos. 1 to 5 could be deemed to be recruited in 1958 quota as there was nothing to show that these vacancies were carried forward.

10. The Government's orders as contained in annexures 8, 9 and 10 which purport to give promotion to the respondents Nos. 6 to 23 retrospectively are arbitrary, illegal and inoperative inasmuch as these seriously affect the respondents Nos. 1 to 5. The respondents Nos. 6 to 23 were not in the cadre of Assistant Engineers even in officiating capacity at the time when the respondents Nos. 1 to 5 were directly recruited to the post of Assistant Engineer. As such, the said promotee respondents Nos. 6 to 23 could not be under any circumstances, given seniority over the directly recruited respondents Nos. 1 to 5. The High Court has rightly quoted the observation made by this Court in the case of *A. K. Subraman* (AIR 1975 SC 483) (supra) as mentioned in the preceding paragraphs.

11. It is pertinent to mention in this, connection, the observation of this Court in the case of *D. K. Mitra v. Union of India* 1985 Supp SCC 243 : (AIR 1985 SC 1558). In this case the petitioners were confirmed as Assistant Medical Officers in 1962 and 1963 and they were placed in the higher scale of Assistant Divisional Medical Officers to the Indian Railways with effect from January 1, 1973. Thereafter they were appointed as Officiating Divisional Medical Officers in 1972, 1973 and 1974 and they had been continuing there uninterrupted. Respondents Nos. 4 to 64 were given substantive appointments as Divisional Medical Officer later on but they were confirmed earlier than the petitioners because of the zone-wise confirmation given by the Railway Administration. It was held that the petitioners should be considered at par for the purpose of fixing seniority, with those appointed to permanent posts in a substantive capacity. For the purpose of determining seniority among promotees, the petitioners should be treated as having been appointed to permanent vacancies from the respective dates of their original appointment and the "entire period of officiating service performed by them should be taken into account as if that service was of the same character as that performed by the substantive holders of permanent posts."

12. In the instant case, the promotee respondents Nos. 6 to 23 were not born in the cadre of Assistant Engineer in the Bihar Engineering Service, Class II at the time when the respondents Nos. 1 to 5 were directly recruited to the post of Assistant Engineer and as such they cannot be given seniority in the service of Assistant Engineers over the respondents Nos. 1 to 5. It is well settled that no person can be promoted with retrospective effect from a date when he was not borne in the cadre so as to adversely affect others. It is well settled by several decisions of this Court that amongst members of the same grade seniority is reckoned from the date of their initial entry into the service.

In other words, seniority inter se amongst the Assistant Engineers in Bihar Engineering Service, Class II will be considered from the date of the length of service rendered as Assistant Engineers. This being the position in law the respondents Nos. 6 to 23 cannot be made senior to the respondents Nos. 1 to 5 by the impugned government orders as they entered into the said service by promotion after the respondents Nos. 1 to 5 were directly recruited in the quota of direct recruits. The judgment of the High Court quashing the impugned Government. orders made in annexures 8, 9 and 10 is unexceptionable.

13. In the premises aforesaid, we confirm the judgment and order rendered by the High Court. The appeals are, therefore, dismissed. In the facts and circumstances of the case, there will be no order as to costs.

Appeals dismissed.

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