

SUPREME COURT OF INDIA

Sanjay K. Sinha-II

Vs

State of Bihar

Civil Appeal No. 6565 of 1999

(Brijesh Kumar and Arun Kumar)

31/05/2004

JUDGMENT

ARUN KUMAR, J.

1. This appeal is directed against the judgment dated 13th July, 1998 of a Division Bench of the High Court dismissing a writ petition filed by the appellants herein challenging a final seniority list issued by the State Government of Bihar whereunder the appellants who are direct recruits to the Bihar Forest Service were shown junior to the private respondents who are promotees in the service. The appellants were appointed as Assistant Conservators of Forests (ACFS) to the Bihar Forest Service (hereinafter called the 'service') as direct recruits in pursuance of advertisement issued by the Bihar Public Service Commission on 24th July, 1985 for filling 40 permanent posts of Assistant Conservators of Forests in the service. According to the appellants the process of direct recruitment was completed on 8th June, 1987. However, the appointment orders with respect to the direct recruits were issued only on 14th December, 1987. The appellant state that at the relevant time the cadre strength of the post of Assistant Conservator of Forests was only 172 and the promotees were already occupying more than 50% posts. Their quota being only 50% of the posts. We may note here that it is not in dispute that the quota of promotees and direct recruits was 50% each at the relevant time.

2. It appears that while all the formalities with regard to recruitment of direct recruits were completed by 8th June, 1987, a Departmental Promotion Committee was constituted on 20th June, 1987 to consider candidates for promotion to the posts of Assistant Conservator of Forests from the feeder posts of Range Officers. Other Departmental Promotion Committees for the same purpose were held on 2nd July, 1987 and 17th October, 1987. Two notifications dated 6th October, 1987 and

23rd November, 1987 were issued whereby promotees were appointed to the posts of Assistant Conservator of Forests. The notification regarding appointment of direct recruits was issued only on 14th December, 1987 i.e. after the appointments of the promotees had been notified. This gave an edge to the promotees in the matter of seniority over direct recruits. A tentative seniority list was issued on 7th March, 1989 while the final seniority list showing the appellants who are direct recruits as juniors to the promotees was issued on 24th July, 1989. The appellants challenged this final seniority list by filing a Writ Petition in the High Court. The said Writ Petition was dismissed by a Division Bench of the High Court on 3rd April, 1996. In a Special Leave Petition filed against the said judgment this Court by order dated 2nd September, 1996 remanded the matter back to the High Court with a direction that the High Court should give fresh decision after hearing all parties.

3. After the remand order passed by this Court, the petitioners in the writ petition (who are appellants herein) filed an application for amendment of the writ petition on 28th November, 1996 in the High Court. Several points were sought to be raised in the amendment application. The amendment was allowed on 25th May, 1997. None of the parties filed any fresh counter affidavit in reply to the amendment writ petition. As a matter of fact no reply was filed to the amendment application by any of the respondents. Ultimately the High Court passed the impugned judgment on 13th July, 1998 dismissing the writ petition. Apart from rejecting the case of the appellants on merits, the High Court has laid much stress on the aspect of delay on the part of the appellants in challenging the promotions of the respondents. In the original writ petition the appellants had not challenged the appointments of the promotees/ respondents as such. They had only challenged the final seniority list. Absence of challenge to the appointments of the respondents i.e. promotees in the writ petition is another ground which weighed with the High Court in dismissing the writ petition.

4. We have heard the learned counsel for the parties on this aspect of the matter. In our view in the facts and circumstances of the case, the appellants cannot be non-suited on the ground of delay in challenging the orders of the promotion of the respondents. The important aspect of the case which persuades us to take this view is that the notifications dated 6th October, 1987 and 23rd November, 1987 with respect to the promotions/ appointments of the respondents had been quashed by another Division Bench of the High Court by its judgment dated 9th February, 1996 in C.W.J.C. 1634/1986. By the said judgment of the High Court had permitted the State Government to issue fresh notification with regard to the appointments of promotees. The fresh notification came to be issued only on 15th July, 2002. Therefore, on 3rd April, 1996 when the present writ petition was earlier dismissed and again on 13th July, 1998 when it was again dismissed by the High Court after the remand order passed by this Court, there was no notification in existence regarding appointments of the respondents/promotees. The High Court had even quashed the final seniority list by the said judgment dated 9th February, 1996, in these facts, the appellants cannot be non-suited on the ground of delay in challenging the order of promotion to the respondents.

5. Coming to the merits of the controversy, Mr. Gopal Subramaniam, learned counsel for the appellant raised the following points:

1. Posts of Assistant Conservator of Forests were not available at the relevant time for appointments of the promotees. In any case promotees were already occupying posts of far in excess of their 50% quota and therefore, no promotee could be appointed till the process of direct recruitment was completed and direct recruits were given 50% quota in the service.

2. The Departmental Promotion Committee which was constituted for purposes of making

promotions to the posts of ACFs was not constituted in accordance with the rules and therefore, the promotions recommended by it were invalid and illegal.

3. Malafides on account of delay in issuance of notification regarding appointment of direct recruits. The point though raised was not pressed before us, and therefore, it need not be gone into.

6. In our view the first point regarding alleged non-availability of posts of ACFs for appointment of promotees at the relevant time is sufficient to decide this appeal. On the question of availability of posts the case of the appellants is that posts were not available and in the absence of the posts no appointments could be made. Still the respondents had gone ahead with the appointments of the promotees. Such appointments are mere fortuitous and cannot confer the benefit of seniority from the date of appointment. The first document relied upon in support of this contention is a letter dated 23rd September, 1985 from the Chief Conservator, Forests and Environment Department, Government of Bihar, Patna. The letter directly deals with the question of promotion of Forest Range Officer (FRO) to the post of Assistant Conservator of Forests (ACF). The letter notes that under Rule 3 of the Bihar Forest Service Rules, at least 50% of the total existing vacancies have to be filled by promotion. It goes on to add: "presently there are 125 officers in the cadre in the Bihar Forest Service, out of which 105 have been promoted from the post of Range Officer and rest are appointed by way of direct recruitment". According to this letter as per the cadre strength of the posts of ACF in Bihar State Forest Service, the promoted officers constituted 84%. The Chief Conservator of Forests expressed his view in the said letter that filling such large number of posts by way of promotions affects the quality of service. The Chief Conservator of Forests also notes that the State Service Commission had already issued advertisement for filling 40 posts of ACFs by direct recruitment. He has opined that in these circumstances it would not be proper to fill up the posts of ACF by promotion. This letter highlights the imbalance already existing in the service qua the posts of ACF so far as appointments of direct recruitments and promotees are concerned.

7. The process of filling the posts by promotion was undertaken in June, 1987 onwards, which culminated with the issuance of notifications regarding appointments of promotees as ACF on 6th October, 1987 and 23rd November, 1987. On the question of cadre strength qua the posts of ACF reference has to be made to a notification dated 12th August, 1987 on which reliance has been placed by both the sides. According to appellants the said notification shows that the posts were not available for appointment of the promotees while the respondents read the said notification as an instrument creating sufficient number of posts to which the promotees could be appointed. The notification dated 12th August, 1987 is in the form of a resolution. The subject is mentioned as 'Determination of cadre strength of Bihar Forest Service'. The notification states that the cadre strength of Bihar Forest Service is being determined by the State Government with effect from the date of the publication of the resolution as follows:

(1) Sanctioned posts as per letter No. 4260 dated 26.8.1986 of Department of Forest & Environment as on 15th April, 1985

151

(2) Sanctioned posts after 15th April, 1985 as per letter No. 2856 Dated 11th April, 1985 of Chief

Conservator of Forest.

21

(3) Sanctioned posts of deputation under department of Rural Development for the implementation of Social Forestry Schemes

38

(4) Created posts under Bihar State Forest department operation for development and extraction of minor Forest.. Producer

18

(5) Non-Cadre posts of Divisional forest Officers created in the cadre of Bihar Forest Service.

49

Total

277

8. The learned counsel for the appellants submitted that the above resolution only determines the cadre strength. It notes the posts which can be available for the Bihar Forests Service from various departments. It is at best a decision which remains to be implemented. While posts at Serial no.1 & 2 above are clearly available in the Bihar Forests Service, rest of the posts have to be added to it which would require certain formalities to be completed before the post could be taken as a part of Bihar Forest Service. In Government there are rules of business which have to be followed before the posts are created and become available. Thus according to the learned counsel for the appellants only 172 posts were existing in the service at the relevant time. Relying on the letter of the Chief Conservator of Forests, referred to hereinbefore, the learned counsel submits that firstly such large number of posts were not available for being filled by appointment of promotees, secondly the

promotees were already occupying posts far in excess of their 50% quota and therefore, without first restoring the balance in the service, promotees could not be appointed.

9. We have carefully perused the said resolution. As the heading of the resolution suggests, it is merely a determination of the cadre strength of the post of ACF. It is a decision as to what should be the cadre strength. The resolution cannot be said to be creating the posts. There is lot of difference between determination of cadre strength and creation of posts. Determination is a decision regarding what should be the cadre strength. The decision needs to be implemented. Implementation is by creation of posts. For creation of posts certain formalities have to be gone through. Nothing has been shown to suggest that requisite formalities regarding creation of posts had taken place. The resolution therefore cannot be taken as a creation of posts. The discussion which follows will show that the State Government itself understood the legal position in the same manner as the State Government has taken as stand in the subsequent proceedings that sufficient number of posts had not been created and therefore were not available.

10. In support of his contention that posts were not available for the appointment of the provisions at the relevant time in the year 1987 the learned counsel for the appellants drew our attention to an affidavit filed on behalf of the respondents in response to a petition for initiating contempt of court proceedings against the State Government and its officers for not complying with the judgment dated 9th February, 1996 of the Division Bench of the High Court. It will be recalled that by the said judgment the High Court had quashed the notifications dated 16th October, 1987 and 23rd November, 1987 regarding appointments of promotees to the posts of Assistant Conservator of Forests and had permitted the State Government to issue fresh orders in this behalf in accordance with law. There was inordinate delay on the part of the State Government in issuing the fresh notification regarding appointment of the promotees which led to certain promotees filing application for initiating contempt of court proceeding. In reply to the Contempt Application, the Commissioner-cum-Secretary, Department of Forests & Environment, Government of Bihar stated as under:--

Para 8:

"That so far as the direction issued by this Hon'ble Court vide paragraph 93, 94, 95 are concerned, steps have been taken for issuance of fresh notification. However, the process has not been completed because from the record it appears that the promotions were made in the relevant period against non-existing posts. As such necessary Government order is required to be issued for creation of post of Assistant Conservator of Forest by the State Government first. Thereafter fresh notification regarding promotions of the petitioners will be issued after following the laid down procedure for giving promotions."

Para 17 of the affidavit states 'that the Deponent had called for relevant records and from the records it was found that in the year 1985 there was 133 posts of ACF and in the year 1986 140 incumbents were holding the posts of ACF".

Para 18 - "That from the record it further transpires that in the year 1987, 82 persons appears to have been promoted/ appointed in addition to 140 ACFs already working from before but there was no sanction order regarding creation of these posts. Even as on date no sanction order for creation of these posts is available. After verifying from the records it transpires that only 133 posts of A.C.F. have been created by the State Government."

Para 19 - "That this matter has been discussed within department and a proposal of creation of additional 91 posts of ACF has been moved. In absence of availability of sanctioned post of ACF, any notification for appointment of petitioners as ACF will be a nullity in the eyes of law."

Para 21 - "That the deponent will issue fresh notification as soon as the Government sanctions additional post of ACF which will be subject to the result of the SLP No. 15295/1998 pending in the Hon'ble Supreme Court." *

11. This stand of the Government is reiterated in para 11 of the Counter Affidavit on behalf of the State Government filed in response to the Special Leave Petition in this Court. It is stated 'respondent-State being conscious of the direction issued by the Hon'ble Patna High Court has taken appropriate steps for issuance of notifications promoting / appointing the concerned ACFs, the Government could not take a decision to notify their promotion/appointment immediately after the judgment passed by the Hon'ble Patna High Court because of certain factors, such as, pendency of the instant SLP, pendency of MJC No. 631/1998(R) in the Patna High Court, Ranchi Bench and also due to non-availability of sufficient number of posts of ACFs".

12. It is clear from the admissions made on behalf of the respondents by way of affidavits filed in judicial proceedings that **sanctioned number of posts were not available in the year 1987 when the respondents were promoted as ACFs, rather the promotions were made against non-existing posts. Can such promotions confer any right on the officers concerned particularly over and above the other duly appointed officers in the service like the appellants? In this connection we have to note that Rule 35 of the Bihar Forest Service Rules provides that seniority of officers appointed to the service is to be determined with reference to the date of their substantive appointment. In order to become a member of the service the person concerned has to satisfy at least two conditions - first, appointment must be in substantive capacity and (2) the appointment has to be to the post in the service according to the Rules and within the quota to a substantive vacancy. # (per Keshav Chandra Joshi and others vs. Union of India and others).**

13. In the present case neither of the two conditions is satisfied. The posts to which substantive appointments were to be made were not available; therefore, there could be no appointment to the service. When there is no appointment to the service, much less substantive appointment to the service, the promotees could not be given seniority with effect from the purported date of their promotion.

14. At this stage it must be noticed that as a matter of fact the notifications dated 6th October, 1987

and 23rd November, 1987 regarding appointments of the promotees had been quashed by the Division Bench by its judgment dated 9th February, 1996 in C.W.J.C. No. 1634/1986. The Division Bench had permitted fresh notification to be issued for the purpose. The notification regarding fresh appointment of the promotees was delayed. It was ultimately issued only on 15th July, 2002. The said notification again states that the officers are promoted at the post of Assistant Conservator of Forest with effect from the date mentioned against their names. The date which is mentioned against their names is 20th June, 1987. This notification was issued during pendency of the present proceeding in this Court. The appellant immediately applied for relief against this notification in the present proceedings. The question that arises is that when admittedly in June, 1987 the posts of ACFs were not available for the promotees, how could by a notification dated 15th June, 2002 the promotees could be appointed with effect from 20th June, 1987. Till the affidavit was filed in the contempt proceedings in 1998 the posts had not been created, a fact mentioned in the affidavit.

15. The learned counsel for the respondents tried to explain this clear admission on the part of the State Government by saying that the affidavit was only by an officer of the Government and did not necessarily represent the view of the Government. In our opinion this argument is highly technical and least responsible to carry any credence. Firstly, the officer was impleaded in the contempt petition as a respondent because he was holding the key post at the relevant time. The officer filed the affidavit on the basis of record of Government which fact has been so stated in the affidavit itself at various places. Secondly, the State Government has reiterated the same view in the Counter Affidavit filed in response to the SLP in this Court. We are surprised that in spite of these facts, such a contention is advanced by a senior counsel appearing on behalf of the respondents.

16. We have no reason to discard the clear admissions made on behalf of the State Government about non-availability of posts of ACFs for promotion of the promotees at the relevant time. This leads to the conclusion that the appointments of the respondents-promotees between June and November, 1987 as ACFs were against non-existing posts. When the posts were not available at the entire next question as to whether the posts were falling within the quota of the promotees does not arise. Therefore, we need not advert to it. The question of availability of posts and the number of posts which are available is a question which can be best answered on the basis of record. Unfortunately no effort was made to place the relevant information before the court by supporting it with records. The record position we got in this case only from the affidavit of Shri K.D. Sinha, Commissioner-cum-Secretary, Department of Forests & Environment, Government of Bihar filed in reply to the contempt petition in the Patna High Court, copy of which is available as Annexure R3 to the Rejoinder Affidavit filed on behalf of appellants in this Court. The affidavit with which copy of the affidavit of Shri K.D. Sinha is annexed, was filed on 4th November, 1999. No effort has been made on behalf of the State Government to controvert the factual position stated in the affidavit of Shri K.D. Sinha. We can safely accept the position explained by Shri K.D. Sinha in his affidavit. Thus we hold that the appointments of the respondents/ promotees made between June and November, 1987 to the posts of ACFs cannot be termed as substantive appointments to the service and therefore, they cannot confer any benefit of seniority on the respondents over and above the appellants who were directly appointed to the service vide notification dated 14th February, 1987.

17. It is settled by that appointments made contrary to the rules are merely fortuitous and do not confer benefit of seniority on the appointees over and above the regular/substantive appointees to the service. #

18. See C.K. Antony vs. B. Muraleedharan and others), M.S.L. Patil, Asstt. Conservator of Forests, Solarpur (Maharashtra) and others vs. State of Maharashtra and another A.W. Dhope and others vs. Sanjay Thakre and others 7).

19. The exact date on which Shri K.D. Sinha filed the affidavit in response to the contempt petition is not ascertainable however it has to be sometime in the year 1998 or thereafter. From the affidavit of Shri .D. Sinha it is clear that even till the date of filing of the affidavit sufficient number of posts had not been created by the State Government because Shri has stated that he will issued fresh notification about the appointment of the promotees as soon as the State Government sanctioned additional posts of ACFs. The State Government issued notification regarding appointment of the respondent on 15th July, 2002. The said notification purports to appoint the respondents with effect from 16th July, 1987. This shows that the posts of ACFs might have been created by the State Government subsequently. While issuing the notification dated 15th July, 2002, the State Government could not ignore or prejudice officers like the appellants who were substantively appointed to the service w.e.f. 14th December, 1987 i.e. about fifteen years prior to the issuance of the notification dated 15th July, 2002 the seniority gained by the appellant fifteen years prior thereto is sought to be set at naught. The learned counsel for the appellant fairly submitted that the appellants were not interested in seeking quashing of the appointments of the respondents. They were only concerned about maintaining their seniority over the respondents. In the facts and circumstances of the case we see no justification for disturbing the seniority of the appellants and giving the respondents seniority over them. While the State Government may regularise the appointment of the respondents-promotees, we hold that the respondents cannot be given seniority over and above the petitioners-appellants. The Writ Petition succeeds on the question of seniority. The final seniority list dated 24th July, 1989 is quashed and the State Government is directed to issue fresh seniority list fixing the seniority of appellants over the respondents in accordance with this judgment.

20. In view of the above discussion, we do not propose to go into the question of constitution of the Departmental Promotion Committee regarding promotion of the respondents. The appeal is accordingly allowed. No order as to costs.