

CASE NO. :
Appeal (civil) 62-65 of 1999
Appeal (civil) 66 of 1999

PETITIONER:
Pramod K. Pankaj

RESPONDENT:
State of Bihar and Ors.

DATE OF JUDGMENT: 20/11/2003

BENCH:
CJI, & S.B. Sinha.

JUDGMENT:
J U D G M E N T

S.B. SINHA, J :

INTRODUCTION :

The usual problem which frequently arises in service matters i.e. inter se seniority between two groups of employees is involved in these appeals which arise out of a judgment and order dated 23.5.1997 passed by the High Court of Patna in L.P.A. Nos. 100, 158, 101 of 1994 and C.W.J.C. No.7826 of 1995.

BACKGROUND FACTS :

The appellant and the contesting respondents were appointed in the Bihar Subordinate Engineering Service Cadre as Junior Engineers. The sources for appointment to the rank of Assistant Engineer in Bihar Engineering Service Class II were : (a) from Junior Engineer (Diploma Holder) Cadre to 30% of cadre strength of Assistant Engineers; (b) from Engineer Assistant Cadre (Engineering Graduate or equivalent Degree Holder) to 20% of total cadre strength of Assistant Engineers; and (c) 50% of the posts of the Assistant Engineers from direct recruitment of Engineering Graduate or equivalent Degree Holders from outside.

On or about 17.8.1973, the cadre of Engineer Assistants was abolished in various phases and only promotional avenue was left for Junior Engineers from amongst the quota of 30% of the diploma-holders. Keeping in view the fact that promotional avenue of those Junior Engineers who had acquired degree in engineering during service was taken away, the State of Bihar by reason of a resolution dated 17.1.1979 sought to provide special facility by way of incentive of promotion to the post of Assistant Engineer to those Junior Engineers who had acquired degree in engineering or passed equivalent examination during their service to the extent of 3%. The said employees besides holding the degree of engineering or passing of equivalent examination were further required to complete a minimum period of five years in service in the cadre of Junior Engineers. The relevant clauses of the aforementioned resolution are as under :

"Gha. This facility of promotion to the post of Assistant Engineer on the basis of quota mentioned in paragraph (Ka) shall be equally available to all those permanent/temporary Junior Engineers who have passed the examination of Graduate in Engineering or its equivalent examination during their service period and have completed a minimum of 5 years service on the

post of Junior Engineer.

Cha. Promotion to the vacant posts of Assistant Engineer on the basis of the quota mentioned in paragraph (Ka) be given in accordance with their seniority. With regard to inter se seniority of these Junior Engineers, the decision be taken after obtaining the opinion of the personnel Department."

The Personnel Department of the State of Bihar indisputably did not lay down any procedure for determination of the inter se seniority of such Assistant Engineers who were promoted in the aforementioned 3% quota. Seniority list was, however, prepared by the Water Resources Department in the light of the order dated 22.12.1992 wherein it was laid down :

"According to the provisions made in Circular No.947 dated 17.1.79 of Public Works Department, 3% posts of Assistant Engineer out of total vacant posts of Assistant Engineers are to be filled up by promotion of those Junior Engineers who have passed Degree/AMIE after entry into service. In the Department the number of available posts under the above quota basis is less than the number of available such qualified Junior Engineers. Applicants are more and posts are less, under such situation it has become inevitable for fixation of inter se, seniority of Degree/AMIE holder Junior Engineers as per Circular referred to.

2. Generally, basis of seniority in a cadre is the date of entry into service in that cadre but in the case under reference fixation of seniority on that basis is not justifiable, because on the basis of seniority service 35% posts are reserved for promotion to the posts of Assistant Engineer separately. Therefore, it has been decided by the department to fix the inter se seniority on the following basis :

(Ka) That the inter se seniority should be kept as in service seniority of those officers who by remaining in service have completed the period of five years and have obtained qualification of AMIE or Bachelors' degree in Engineering within those five years of service.

(Kha) That the fixation of inter se seniority be fixed on the basis of the date of obtaining AMIE or Bachelors Degree in Engineering of those officers who, by remaining in service, have completed the minimum service period of five years but have obtained certificate of AMIE or Bachelor's degree in Engineering after five years.

3. On the basis of the principles enumerated above, the fixation of inter se seniority of all applicants received within the stipulated period from the concerned applicants has been done according to the enclosed list."

A gradation list dated 10.9.1992 was issued and the same was purported to have been finalized on or about 22.12.1992 in terms of the aforementioned circular letter. The appellant herein submitted his representations/objection to the said list on 12.1.1993. Allegedly on the premise that without disposing of the said objections, some Junior Engineers were promoted, a writ petition was filed before the Patna High Court, which was marked as C.W.J.C. No.2489 of 1993. The said writ petition was allowed by a learned Single Judge of the said High Court by a judgment and order dated 25.4.1994 holding that as the Government resolution dated 17.1.1979 had been issued by way of incentive of adding the qualification during continuation of service for getting advantage of acceleration in promotion; in the event the said gradation list dated 22.12.1992 is given effect to, the same would be violative of Articles 14 and 16 of the Constitution of India as thereby the incentive sought to be given by reason of Resolution dated 17.1.1979 would become nugatory. Two letters patent appeals were filed by some respondents against the said judgment which were marked as L.P.A. Nos.100 and 101 of 1994. The State of Bihar, however, filed a special leave petition before this Court but having regard to the fact that they had a remedy by way of letters patent appeal, withdrew the same whereafter they filed a letters patent appeal before the Division Bench which was marked as L.P.A. No.158 of 1994. The Division Bench by reason of a judgment and order dated 23.5.1997 allowed the said appeals and writ petition which was also filed in the meanwhile holding that the aforementioned gradation list dated 22.12.1992 for promotion of Junior Engineers was not in conflict with the Government Resolution dated 17.1.1979. The Division Bench in support of its aforementioned finding relied upon a decision of this Court in N. Suresh Nathan and Another vs. Union of India and Others [(1992) Supp. 1 SCC 584]. The High Court, therefore, directed that inter se seniority of the concerned officers be determined against the special quota of 3% in terms of the said circular letter dated 22.12.1992.

The appellant in Civil Appeal Nos.62-65 of 1999 filed a special leave petition, inter alia, on the ground that pursuant to or in furtherance of the said judgment, 22 persons all of whom were junior to the appellant, except Mr. Guru Saran Singh, had been promoted.

The appellant in Civil Appeal No.66 of 1999 had filed a writ petition on 12.12.1995 which was marked as C.W.J.C. No.11149 of 1995 on the ground that he had been denied promotion to the post of Assistant Engineer in terms of Resolution dated 17.1.1979. During the pendency of the writ petition as certain posts fell vacant in relation where to he filed representation which was not accepted as also on the ground that the some persons junior to him had been promoted, he filed an application for amendment of the writ petition. In the light of the judgment in L.P.A. No.100 of 1994, the said Writ Petition No.11149 of 1995 was dismissed by an order dated 16.6.1997 stating :

"In view of the Division Bench judgment in L.P.A. No.100 of 1994 and analogous cases, a true copy of which has been annexed as Annexure 'O' to the show cause filed on behalf of the Secretary-cum-Commissioner, Department of Road Construction, Government of Bihar, Patna both the writ applications are accordingly dismissed."

The appellant filed a letters patent appeal which was barred by limitation of 36 days. By an order dated 18.9.1997, the said letters

patent appeal was dismissed stating :

"Flag 'A' is an application under Section 5 of the Limitation Act seeking condonation of delay of 36 days in filing the appeal.

It is contended that the appellant was advised to prefer S.L.P. before the Apex Court which had delayed the filing of the appeal. On being asked to show the order passed in the S.L.P. Learned Counsel said that no S.L.P. was filed. This being so no ground is made out for condoning the delay in filing the appeal. The application at flag 'A' is accordingly rejected. Consequently, the appeal is dismissed being barred by limitation."

Mr. Vikas Singh, learned counsel appearing on behalf of the appellants, inter alia, would submit that the basic qualification for promotion to the post of Assistant Engineer being acquisition of a degree in engineering or passing of an equivalent examination together with five years experience in the post of Junior Engineer, the inter se seniority of the concerned officers should have been directed to be determined on the basis of the gradation list in the post of the Junior Engineer. The learned counsel would urge that the purported direction issued by the Water Resources Department in terms of order dated 22.12.1992 was illegal. Mr. Singh pointed out that the decision of this Court in N. Suresh Nathan (supra) which has been relied upon by the Division Bench has been distinguished and explained in subsequent decisions by this Court in M.B. Joshi and Others etc. vs. Satish Kumar Pandey and Others etc. [(1993) Supp. 2 SCC 419], Satpal Antil etc. vs. Union of India and Others [(1995) 4 SCC 419] and D. Stephen Joseph vs. Union of India and Others [(1997) 4 SCC 753].

Mr. B.B. Singh, learned counsel appearing on behalf of the State of Bihar; and Mr. Akhilesh Kumar Pandey and Mr. Manan K. Mishra, learned counsel appearing on behalf of the private respondents, however, would submit that the date of eligibility should be determined on the basis of the general principles with reference to the date of qualification. It was urged that eligibility of a candidate for promotion to the post of Assistant Engineer was required to be determined on fulfillment of both the conditions, namely, acquisition of a degree in engineering or passing of an equivalent examination as also five years' experience in the post of Junior Engineer and, thus, the circular letter dated 22.12.1992 cannot be said to be illegal. It was further submitted that the principles evolved by the Water Resources Department had been given effect to and in terms thereof several persons having been promoted, the settled position should not be unsettled.

ISSUE :

The short question which arises for consideration before us is that as to whether the purported qualification issued by the Water Resources Department as contained in order dated 22.12.1992 is valid?

THE POLICY DECISION :

The policy decision of the State as contained in the resolution of the State Government dated 17.1.1979 is not in question. It is accepted that the said resolution was adopted in the special situation that 20% quota which was earlier reserved for graduate engineers was abolished, as a result whereof they suffered immense prejudice. Clause 'Cha' of

the said circular states that the promotion on the vacant posts of Assistant Engineer under the quota mentioned in clause 'Ka' i.e. 3% would be made on the basis of seniority. In absence of any statutory provision or rules made thereunder or under the proviso appended to Article 309 of the Constitution of India, it is trite, that once an incumbent is appointed to a post according to rules his seniority has to be counted from the date of his appointment.

The aforementioned Resolution dated 17.1.1979 was introduced as a special measure. The promotion of the holders of the post of Junior Engineers to the post of Assistant Engineer was not to be done on selection basis. No written examination was to be held nor any oral interview was to be taken. No criteria whatsoever was laid down for selecting the candidates. For the purpose of granting promotion to the post of Assistant Engineer in the aforementioned category, only two conditions which were required to be fulfilled on the relevant date are : (a) the employee must be holder of a degree or must have passed an equivalent examination; (b) he must have completed five years of service in the post of Junior Engineer.

A plain reading of the aforementioned resolution dated 17.1.1979 would clearly go to show that no further requirement was prescribed therefor. Clause 'Cha' of the said resolution merely stated that with regard to inter se seniority of these Junior Engineers, the decision be taken after obtaining opinion from the Personnel Department.

In the aforementioned premise, it was obligatory on the part of the Personnel Department itself to take a firm decision laying down the criteria for fixation of inter se seniority in absence of any statute or rules having the force of law. Admittedly, the Personnel Department did not issue any such order. The said resolution dated 17.1.1979 was an executive order passed by the State of Bihar in terms of Article 162 of the Constitution of India. By reason of the said policy decision, the Personnel Department alone was delegated with the power to lay down the criteria for determining the inter se seniority. The Personnel Department neither in fact delegated the said power to the Water Resources Department nor in law could do the same. The purported order dated 22.12.1992 issued by the Water Resources Department was, therefore, illegal having been rendered by an authority which had no jurisdiction therefor.

'Delegatus Non Potest Delegare' is a well-known maxim which means in absence of any power a delegatee cannot sub-delegate its power to another person. It is beyond any cavil that the Water Resources Department did not have the requisite competence to issue the said order dated 22.12.1992. If a guideline for determining the inter seniority was to be laid down, the State could do so in terms of Article 162 of the Constitution of India. The said order dated 22.12.1992 also does not satisfy the requirements of Article 162 of the Constitution of India. This aspect of the matter unfortunately was not adverted to before the High Court.

CASE LAWS :

In N. Suresh Nathan (supra) on the basis whereof the learned Division Bench upheld the validity of the said order dated 22.12.1992 to the effect that the inter se seniority be determined on the basis of the date of acquisition of a degree in engineering and not on the basis of service, the factual matrix was different. Therein the dispute was as to whether a diploma-holder Junior Engineer who had obtained a degree while in service had become entitled for appointment as Assistant Engineer by promotion on completion of three years' service including the period of service prior to obtaining of such degree or whether the three years' service as a degree-holder for the said purpose shall be reckoned from the date of obtaining such degree. The Central

Administrative Tribunal before which the application was filed held that the diploma-holders were entitled to be considered for promotion to the post of Assistant Engineer on par with the degree-holder Junior Engineers having regard to the total length of service rendered in grade of Junior Engineer irrespective of the fact that as to whether he had acquired the necessary degree qualification earlier than the applicants.

This Court in N. Suresh Nathan (supra) held :

"In our opinion this appeal has to be allowed. There is sufficient material including the admission of respondents diploma-holders that the practice followed in the department for a long time was that in the case of diploma-holder Junior Engineers who obtained the degree during service, the period of three years' service in the grade for eligibility for promotion as degree-holders commenced from the date of obtaining the degree and the earlier period of service as diploma-holders was not counted for this purpose. This earlier practice was clearly admitted by the respondents diploma-holders in para 5 of their application made to the Tribunal at page 115 of the paper book. This also appears to be the view of the Union Public Service Commission contained in their letter dated December 6, 1968 extracted at pages 99-100 of the paper book in the counter-affidavit of respondents 1 to 3. The real question, therefore, is whether the construction made of this provision in the rules on which the past practice extending over a long period is based is untenable to require upsetting it. If the past practice is based on one of the possible constructions which can be made of the rules then upsetting the same now would not be appropriate. It is in this perspective that the question raised has to be determined."

The scheme under the recruitment rules in said case were different. The scheme obtaining therein postulated that the period of three years' service in the cadre required for degree-holders as a qualification for promotion in the said category would mean three years' service in the grade as a degree-holder. In the instant case, experience of five years upon acquisition of a degree in the engineering is not a qualification laid down in terms of the aforementioned Resolution dated 17.1.1979.

In that case, the practice followed by the State was, thus, upheld.

In M.B. Joshi (supra), this Court distinguished N. Suresh Nathan (supra). Therein, this Court was considering a case where promotions from the post of Sub-Engineer to the post of Assistant Engineer were inter alia required to be made from amongst the persons who were graduate Sub-Engineers completing eight years of service. In that case, the State Government had applied the principle of counting the seniority of graduate Sub-Engineers from the date of their continuous officiation irrespective of the date on which such diploma-holder Sub-Engineers acquired degree in engineering. A contention similar to one raised before us by the respondents was raised therein on behalf of the respondent. Rejecting the said contention, this Court distinguishing N. Suresh Nathan (supra), and upon taking into consideration, the fact

situation obtaining therein as also the findings rendered by this Court, held :

"11. A perusal of the above observations made by this Court clearly show that the respondents diploma-holders in that case has admitted the practice followed in that department for a long time and the case was mainly decided on the basis of past practice followed in that department for a long time. It was clearly laid down in the above case that if the past practice is based on one of the possible constructions which can be made of the rules then upsetting the same now would not be appropriate. It was clearly said "it is in this perspective that the question raised has to be determined". It was also observed as already quoted above that the Tribunal was not justified in taking the contrary view and unsettling the settled practice in the department. That apart the scheme of the rules in N. Suresh Nathan case (1992 Supp (1) SCC 584 : 1992 SCC (L&S) 451 : (1992) 19 ATC 928) was entirely different from the scheme of the Rules before us. The rule in that case prescribed for appointment by promotion of Section Officers/Junior Engineers provided that 50 per cent quota shall be from Section Officers possessing a recognised degree in Civil Engineering or equivalent with three years' service in the grade failing which Section Officers holding Diploma in Civil Engineering with six years' service in the grade. The aforesaid rule itself provided in explicit terms that Section Officers possessing a recognised Degree in Civil Engineering was made equivalent with three years' service in the grade. Thus, in the scheme of such rules the period of three years' service was rightly counted from the date of obtaining such degree. In the cases in hand before us, the scheme of the rules is entirely different."

It was further observed :

"...The Rules in our case do not contemplate any equivalence of any period of service with the qualification of acquiring degree of graduation in engineering as was provided in express terms in N. Suresh Nathan case (1992 Supp (1) SCC 584 : 1992 SCC (L&S) 451 : (1992) 19 ATC 928) making three years service in the grade equivalent to degree in engineering. In our opinion, the Rules applicable in the cases before us clearly provide that the diploma-holders having obtained a degree of engineering while continuing in service as Sub-Engineers shall be eligible for promotion to the post of Assistant Engineer in 8 years of service and quota of 10 per cent posts has been earmarked for such category of persons."

This aspect of the matter was also considered in Satpal Antil (supra), holding :

"...Such rules for promotion do not contain any provision for determining inter se seniority for the purpose of giving promotion earlier or later

with reference to date of passing the qualifying examination. In our view, Mr Goswami is justified in his contention that in the absence of any specific rule indicating inter se seniority to be observed with reference to the date of passing the qualifying examination and promotion to be given on the basis of such inter se seniority, general principle of length of service as a basis for promotion amongst eligible candidates with qualifying service should be made applicable..."

Yet again in D. Stephen Joseph (supra), this Court following M.B. Joshi (supra), observed :

"It appears to us that the State Government is labouring under a wrong impression as to the applicability of the past practice as indicated in Suresh Nathan case [1992 Supp (1) SCC 584 : 1992 SCC (L&S) 451 : (1992) 19 ATC 928]. This Court in the said decision, has only indicated that past practice should not be upset provided such practice conforms to the rule for promotion and consistently for some time past the rule has been made applicable in a particular manner. In our view, the decision in Nathan case [1992 Supp (1) SCC 584 : 1992 SCC (L&S) 451 : (1992) 19 ATC 928] only indicates that past practice must be referable to the applicability of the rule by interpreting it in a particular manner consistently for some time. Any past practice dehors the rule cannot be taken into consideration as past practice consistently followed for long by interpreting the rule. It may be indicated here that a similar question also came up for consideration before this Court in M. B. Joshi v. Satish Kumar Pandey [1993 Supp (2) SCC 419 : 1993 SCC (L&S) 810 : (1993) 24 ATC 688]. The decision in Suresh Nathan case [1992 Supp (1) SCC 584 : 1992 SCC (L&S) 451 : (1992) 19 ATC 928] was distinguished in the facts of that case and it was indicated that when the language of the rule is quite specific that if a particular length of service in the feeder post together with educational qualification enables a candidate to be considered for promotion, it will not be proper to count the experience only from the date of acquisition of superior educational qualification because such interpretation will violate the very purpose to give incentive to the employee to acquire higher education."

Mr. Pandey, the learned counsel appearing on behalf of the respondents, however, relied upon Ashok Kumar Sharma and Others vs. Chander Shekhar and Another [(1997) 4 SCC 18]. In that case, this Court was considering a matter of direct recruitment. The question which arose for consideration therein was as to whether in the advertisement or notification issued/published calling for applications constituted a representation to the public and the authority issuing it is bound by such representation. Having regard to the importance of adhering to the representation made to the public and the binding nature thereof upon the authorities issuing the same, it was held that no action contrary thereto would be permissible, stating :

"...One reason behind this proposition is that if it were known that persons who obtained the qualifications after the prescribed date but before the date of interview would be allowed to appear for the interview, other similarly placed persons could also have applied. Just because some of the persons had applied notwithstanding that they had not acquired the prescribed qualifications by the prescribed date, they could not have been treated on a preferential basis..."

We are not concerned in this case as regard acquisition of a qualification by a prescribed date. No date for acquisition of the qualification has been prescribed by reason of the aforementioned resolution dated 17.1.1979.

It is further not a case where a practice had been followed for a long time. It is also not a case where the appellants herein had allowed a seniority list to operate without protest and stood by the same for a long time. The seniority list dated 22.12.1992 was questioned in the year 1993 in C.W.J.C. 2489 of 1993 and the litigations are continuing since then. From the very beginning, thus, the position remained fluid and the position of the parties was not settled.

GRADATION LIST :

Submission of Mr. Pandey to the effect that the appellants had filed objections after a final gradation list was published on 22.12.1992 cannot be accepted. If a gradation list was published by an authority relying on or on the basis of criteria which was illegal, the seniority list issued pursuant thereto or in furtherance thereof must necessarily fall.

FINDINGS :

The proposition of law, therefore, which emerges from the aforementioned discussions is that in absence of any statutory rule governing the field the criteria for promotion should be construed upon applying the principle of literal meaning as also continuous officiation in the lower post.

We are, therefore, of the view that the impugned judgment cannot be sustained.

We, therefore, are of the opinion that the aforementioned order dated 22.12.1992 passed by the Water Resources Department being illegal and without jurisdiction, the impugned seniority list cannot be sustained which is set aside accordingly. We are further of the opinion that having regard to the facts and circumstances of the case, the order of the High Court dated 18.9.1997 passed by the High Court in L.P.A. No.1018 of 1997 refusing to condone the delay must also be set aside. We condone the delay and direct that the writ petitions filed by the appellants herein should also be disposed of on the above terms.

For the reasons aforementioned, the appeals are allowed and the judgments under appeals are set aside. No costs.