

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.1945 of 2008

=====

Chandra Mani Baitha @ Chandra Mani Prasad, son of Sri Chchattoo Baitha, resident of Village Keas Nizamat, P.S. Samastipur, District Samastipur at present the petitioner is posted as Executive Engineer, Punpun Flood Protection Division, Patna City, Patna Camp Karbighia

.... Petitioner/s

Versus

1. The State of Bihar
2. The Secretary, Personnel & Administrative Reforms Department, Government of Bihar, Patna
3. The Commissioner-cum-Secretary, Water Resources Department, Government of Bihar, Patna
4. The Additional Secretary, W.R.D. Government of Bihar, Patna
5. The Deputy Secretary, Water Resources Department, Government of Bihar, Patna
6. The Joint Secretary, Water Resources Department, Government of Bihar, Patna.
7. Sri Hare Krishna Prasad, Executive Engineer, Municipal Corporation, Gaya
8. Smt. Sheema Kumari, Executive Engineer, Engineer-in-Chief (Centre) Cell, Water Resources Department, Patna
9. Sri Shashi Kumar Choudhary, Executive Engineer, Municipal Corporation, Bhagalpur
10. Sri Sudhir Kumar, Executive Engineer, Rural Works Department Division no.2, Jamui
11. Sri Jay Prakash Paswan, Executive Engineer, Rural Works Department, Work Division No.2, Jamui
12. Sri Pawan Kumar Rai, Executive Engineer, Tube Well Division, Madhepura
13. Sri Jagannath Paswan, Executive Engineer, Tub well Division, Khagaria
14. Sri Chandrashekhar Azad, Executive Engineer Rural Works Department, Work Division No.2, Sheikhpura
15. Sri Arbind kumar, Executive Engineer, Tube well Division, Bhagalpur

.... Respondent/s

=====

Appearance :

For the Petitioner/s : Mr. Ram Chandra Prasad Bharti
Mr. Md. Aslam Ansari

For the State : Mr. Chitranjan Sinha, Sr. Advocate, PAAG-2
Ms. Ratna Kumari AC to PAAG 2

For the Respondent/s : Mr. Tuhin Shankar
Mr. Gopal Kumar

=====

CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY

ORAL JUDGMENT

Date: 19.4.2018

Heard learned counsel for the petitioner and learned counsel



for the State.

2. In the present writ petition, the petitioner is challenging the order dated 3.1.2008 (Annexure-10) issued under the signature of the Additional Secretary, Water Resources Department, Government of Bihar, Patna by which a final gradation list has been published for scheduled caste Assistant Engineer consisting of direct recruit and promotee Assistant Engineers as promotee Assistant Engineer in block has been shown junior to direct recruit. Further prayer has been made that seniority should be decided on the basis of the reasoned order contained in Memo No.602 dated 27.2.2006 (Annexure-7) and accordingly fresh list should be published by making necessary correction.

3. The petitioner is promotee in the cadre of the Assistant Engineer whereas private respondent nos. 7 to 20 are direct recruits of the Assistant Engineer. The petitioner was appointed as Junior Engineer on 19.1.1987 (Annexure-1) and accordingly he joined the post on 22.1.1987 (Annexure-2). He was promoted to the post of Assistant Engineer on 24.11.1995 (Annexure-3) as the date of promotion was not mentioned in the said letter and accordingly the Government has issued a fresh Office Order dated 28.7.2001 (Annexure-5) whereby and whereunder date of



promotion was shifted to 22.2.1995. The Government issued Memorandum No.288 dated 10.5.1978 by which for un-reserved category candidate the Kalabadhi was fixed for eight year to the promotion to the next grade and one year relaxation has been granted to the member of scheduled caste and scheduled tribes. On the basis of the Government order dated 28.7.2001 (Annexure-5) a final gradation list was published in which the position of the petitioner was 39 and the private respondents who are direct recruits were below to the promotee.

4. Being aggrieved by the action of fixation of seniority direct recruits through Arvind Kumar and others approached this Court vide C.W.J.C. No. 5996 of 2002. While matter was pending the Government has issued another notification thereby cancelled the seniority fixed on the basis of the letter dated 28.7.2001. On account of withdrawal of the seniority list as circulated earlier was no longer in existence and as such Court disposed of the writ petition giving direction that before finalizing the seniority the Government will be obliged to receive objection from all parties and as the seniority list has been withdrawn and as such seniority fixed earlier does not stand in fresh consideration of seniority.

5. In view of the order passed in C.W.J.C. No.5996 of 2002 the objections were invited from the direct recruits vis-à-vis



promotees and by a reasoned order dated 27.2.2006 (Annexure-7) it has been held that as the appointment of direct recruits as well as promotees was done in the same transaction as such promotee Assistant Engineer rank will senior. Accordingly the Government issued provisional seniority list which was published on 9th April, 2007 (Annexure-8) in which in block the promotees were shown senior whereas direct recruits were shown junior.

6. Against the order of the learned Single Judge passed in C.W.J.C. No.5996 of 2002 petitioner promotee challenged the same in L.P.A. No. 603 of 2005 (Annexure-9) which was dismissed for default and later on a restoration, case was again heard and matter was disposed of vide order dated 26th August, 2010 and did not interfere with the order of the learned Single Judge and thereafter again authorities have took decision vide order dated 3.1.2008 (Annexure-10) in item no. "J" it has been mentioned that direct recruits have entered into service in between 16.5.1995 to 17.8.1995 whereas promotees have entered into service in between 24.11.1995 to 17.9.1997. As the promotees have promoted later on to the direct recruits as they were appointed much earlier on that basis their seniority the direct recruits in block have been shown senior and promotees have been shown junior which is under challenge.



7. Learned counsel for the petitioner submits that as Government issued Kalabadhi for promotion to the next grade will seven years which matured on 20.2.1995 and as such their promotion should be treated from that date and further submitted that direct recruits have been given promotion from the date of vacancy and whereas the principle is that the date of vacancy cannot be the basis for deciding inter se seniority but seniority will be counted from the date the person has entered in the cadre on the basis of substantive promotion. The date of substantive promotion will be decisive for reckoning seniority. He has further submitted, if process of selection, decision of promotion in the same transaction, they should be given promotion from the anterior date the vacancy was treated to have been created so they have wrongly been treated junior to direct recruit. Basically thrust has been given that direct recruits have been given promotion from the date of vacancy whereas promotees have been granted benefit from the date of their actual promotion which is de hors to the basic principle of reckoning seniority and as impugned action of respondents is completely not sustainable in law whereas learned counsel for the respondent submits that earlier their date of promotion was counted for five years back and petitioners were wrongly shown to have been promoted from the date they



completed the Kalabadhi on 21.1.1995, not from the date they were actually promoted which was challenged before this Court vide C.W.J.C. No.5996 of 2002 and during pendency of that writ petition the Government found that the action was not correct and accordingly another notification was issued granting the promotion from earlier date has been withdrawn. In such circumstances, showing the seniority of petitioners above respondent was declared to be bad by writ court and LPA Bench has attained finality. In C.W.J.C. No.5996 of 2002 the Court has directed for seeking objection from both sides. All sides have filed their objection and whereafter the Government had issued notification dated 27.2.2006 (Annexure-7) and provisional gradation list dated 9.4.2007 was published thereby they reiterated that promotee would rank senior to the direct recruit thereby acted de hors to the decision of the writ Court and later they revisited the issue, made correction by passing the order dated 3.1.2008 (Annexure-10) thereby respondents who were direct recruits have been shown senior to the promotees the petitioner. In Clause "J" it has specifically been mentioned that direct recruits have entered into service in between 16.5.1995 to 17.8.1995 whereas promotees have entered into service in between 24.11.1995 to 17.9.1997. Both sides have placed reliance on the following



judgment: State of Uttar Pradesh & others v. Ashok Kumar Srivastava, reported in 2013 (4) PLJR 229.

8. Learned counsel for the respondents have placed reliance on the following judgments: A.K. Subramaniam & Ors, v. The Union of India and others, reported in (1975) 1 SCC 319, D.K. Mitra and others v. The Union of India and others, reported in (1985) Supp. SCC 243, State of Bihar and others v. Sri Akhouri Sachindra Nath & others, reported in (1992) 3 SLR 94= AIR 1991 SC 1244.

9. As per petitioner seniority will be counted from the date of birth in the cadre (promotion) not from the date of vacancy. Both sides are not disputing, the manner the issue of seniority will be decided i.e. from the date of their entry in cadre, not prior to that. Learned counsel for the State has also supported the argument of the respondent and submitted that Government has rectified its mistake and rightly declared the respondents who are direct recruits as senior as they have entered into service much prior to the promotee so claim of the petitioner to show them senior in rank is not sustainable.

10. The issue of seniority of promotee vis-à-vis direct recruits have been discussed and decided in several judgments of Hon'ble Supreme Court and this Court, Reliance can be placed on



the judgments which are near to the fact of the present case. One of the case is Akhoury Sachindra Nath (supra). The issue was raised, the manner and principle would be invoked and applied to resolve the dispute of seniority was raised in between direct recruits and promotee Engineers in Bihar Public Works Department Code where according to Rule, 25% of the posts of Assistant Engineers in the Bihar Engineering Service, Class II were to be filled by promotion and 75% of the posts were to be filled by direct recruitment. Seniority of promotee vis-à-vis direct recruits has been fixed was gone into and it has been held that granting of seniority to the promotees before birth in the cadre is not sustainable. It can only be counted from the date of his birth in the cadre or it will be counted from the actual date of promotion not on the date on which the vacancy occurred. Specifically the question was addressed how inter se seniority between the direct recruits and promotees has been resolved as the Overseers belonging to the Bihar Subordinate Engineering Service, Irrigation Department who were promoted retrospectively in their 25% quota on the date on which the vacancy had occurred. The Court has held that seniority cannot be granted from retrospective date before their birth in the cadre but from the actual date of entry in the cadre. It will be relevant to quote relevant portion of



the aforesaid judgment:

“... The Government Orders dated 12.7.1975, 28.1.1976 and 9.4.1977 which purported to give promotion to the appellants retrospectively were arbitrary, illegal and inoperative inasmuch as these seriously affected respondents no.1 to 5. The appellants were not borne in the cadre of Assistant Engineers even in officiating capacity at time when respondents no.1 to 5 were directly recruited to the post of Assistant Engineer. As such, the promotee appellants could not be under any circumstance given seniority over the directly recruited respondents no. 1 to 5. The judgment of the High Court in quashing the impugned Government Orders was, therefore, unexceptionable.

2.1. 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; and amongst members of the same grade, seniority is reckoned from the date of their initial entry into the service.”

11. In the case of D.K. Mitra (supra) one of the point was raised that in what manner seniority will be fixed and it has been held that seniority will be counted from the date of entry into service and not from anterior date. The date of appointment to a permanent vacancy, whether of a promotee or a direct recruit, will



be the date of determining the seniority of the officer. It will be relevant to quote paragraph nos. 30 and 31 of the aforesaid judgment:

“30. The respondents rely on A.K. Subraman (supra). In that case, however, the facts which the Court took into consideration and upon which it proceeded to render judgment were different. The point raised in the present case falls more appropriately within the scope of the observations in A. Janardhana (supra), to which elaborate reference has been made earlier. Indeed, when A.K. Subraman (supra) was considered subsequently by this Court in [P.S. Mahal v. Union of India](#) the Court expressly referred to the exception implied in [Bishan Sarup Gupta v. Union of India](#) as the effect of a serious deviation from the quota rule, and it recorded its agreement with A Janardhana (supra). It said:

"But this rotational rule of seniority can work only if the quota rule is strictly implemented from year to year. Some slight deviations from the quota rule may not be material but as pointed out by Palekar, J. in the Bishan Sarup Gupta case, "if there is enormous deviation, other considerations may arise". If the rotational rule of seniority is to be applied for determining seniority amongst officers promoted from different sources, the quota rule must be observed. The application of



the rotational rule of seniority when there is large deviation from the quota rule in making promotions is bound to create hardship and injustice and result in impetmissible discrimination. That is why this Court pointed out in A.K. Subraman case that '..when recruitment is from two or several sources it should be observed that there is no inherent invalidity in introduction of quota system and to work it out by a rule of rotation. The existence of a quota and rotational rule, by itself, will not violate [Article 14](#) or [Article 16](#) of the Constitution It is the unreasonable implementation of the same which may, in a given case, attract the frown of the equality clause.' (SCC para 28, p.333:SCC (L&S) p.50) *The rotational rule of seniority is inextricably linked up with the quota rule and if the quota rule is not strictly implemented and there is large deviation from it regularity from year to year, it would be grossly discriminatory and unjust to give effect to the rotational rule of seniority. We agree wholly with the observation of D.A. Desai, J. in [A Janardhana v. Union of India](#) that '...where the quota rule is linked with the seniority rule if the first breaks down or is illegally not adhered to giving effect to the second would be unjust, inequitous and improper.'* (SCC para 29, p.621 :SCC (L&S) p. 487) *This was precisely the reason why the Court in the first Bishan Sarup Gupta*



case held that with the collapse of the quota rule, the rule of seniority set out in Rule 1 (f) (iii) also went."

31. In our opinion, the directly recruited Divisional Medical Officers are entitled to seniority only from the date of their entry into service and not from any anterior date, and therefore cannot enjoy a seniority above the petitioners. The date of appointment to a permanent vacancy, whether of a promotee or a direct recruit, will be the date for determining the seniority of the officer. We may also observe that there is no ground for detaining the confirmation of the petitioners merely because the quota reserved for direct recruitment has not been filled."

12. Similar issue came for consideration before Hon'ble Supreme Court in the case of Ashok Kumar Srivastava (supra). There also question of seniority of direct recruits and promotees were taken into consideration. The Court opined that seniority starts running from the date promotion is granted and not from the date of occurrence of vacancy or creation of the vacancy. It will be relevant to quote paragraph nos. 10, 11, 12, 13, 14, 15 and 16 of the aforesaid judgment:

10. From the aforesaid, it is clear as day that what is meant by reckoning of seniority from the



date of vacancy in the context of the facts of the said judgment has been wholly misunderstood by the High Court. In the case of Keshav Chandra Joshi (supra), the controversy that arose pertained to the seniority between direct recruits and promotees. The Court opined that when promotion is given beyond the quota of the promotees, the seniority has to be reckoned from the date of vacancy arising within the quota meant for the promotees. The Court further observed that the previous promotion would be regular only from the date of vacancy within the quota and the seniority shall be counted only from that date and not from date of earlier promotion or subsequent confirmation.

The factual matrix, the relevant rules, the concepts of direct recruit quota and the promotee quota and the fortuitous appointment and the principle stated therein have nothing to do with grant of retrospective seniority in the context of the present case. Thus, we have no scintilla of doubt that the High Court has erroneously applied the ratio laid down in Keshav Chandra Joshi (supra).

11. The thrust of the matter is how the seniority is to be determined in such circumstances. [In Union of India v. S.S. Uppal and another](#), [4] it has been opined that the seniority of a person is to be determined according to the seniority rule



applicable on the date of appointment. It has also been observed that weightage in seniority cannot be given retrospective effect unless it is specifically provided in the rule in force at the material time.

12. [In State of Karnataka and others v. C. Lalitha](#)[5] *it has been observed that it is well settled that seniority should be governed by rules and a person should not be allowed to derive any undue advantage over other employees, for concept of justice demands that one should get what is due to him or her as per law.*

13. [In State of Uttaranchal and another v. Dinesh Kumar Sharma](#)[6] *it has been clearly stated that seniority has to be decided on the basis of rules in force on the date of appointment and no retrospective promotion or seniority can be granted from a date when an employee has not even been born in the cadre.*

14. *In Nirmal Chandra Singh (supra) it has been ruled that promotion takes effect from the date of being granted and not from the date of occurrence of vacancy or creation of the post. It has also been laid down therein that it is settled in law that date of occurrence of vacancy is not relevant for the determination of seniority.*

15. *Learned senior counsel for the appellants*



has drawn inspiration from the recent authority in [Pawan Pratap Singh and others v. Reevan Singh and others](#),[7] where the Court after referring to earlier authorities in the field has culled out certain principles out of which the following being the relevant are reproduced below:

“(ii) Inter se seniority in a particular service has to be determined as per the service rules. The date of entry in a particular service or the date of substantive appointment is the safest criterion for fixing seniority inter se between one officer or the other or between one group of officers and the other recruited from different sources. Any departure therefrom in the statutory rules, executive instructions or otherwise must be consistent with the requirements of Articles 14 and 16 of the Constitution.

xxx xxx xxx

(iv) The seniority cannot be reckoned from the date of occurrence of the vacancy and cannot be given retrospectively unless it is so expressly provided by the relevant service rules. It is so because seniority cannot be given on retrospective basis when an employee has not even been borne in the cadre and by doing so it may adversely affect the employees who have been appointed validly in the meantime.”

16. In view of the aforesaid enunciation of law,



the irresistible conclusion is that the claim of the first respondent for conferment of retrospective seniority is absolutely untenable and the High Court has fallen into error by granting him the said benefit and accordingly the impugned order deserves to be lanced and we so do.”

13. Applying the said principle as stated hereinabove that seniority will be counted from the date the petitioner has entered into cadre not from the date when the vacancy has occurred. The vacancy might have occurred earlier will not be a relevant factor but seniority will be counted from the date they have entered into cadre of Assistant Engineer.

14. In the present case, admittedly the petitioner who is a promotee promoted as Assistant Engineer in between 24.11.1995 to 17.9.1997 whereas direct recruits including the respondents were appointed in between 16.5.1995 to 17.8.1995. The mistake committed by the State regarding seniority from the date of vacancy was rectified and treated to be from the date of promotion is a correct approach, accordingly necessary correction was done in the seniority list, caused an effect that petitioner has been placed below the direct recruits as he has been brought to the cadre at a later stage, cannot be in any manner said to be a wrong exercise of power.



15. Accordingly this Court does not find any reason to interfere in the matter. Accordingly this writ petition is dismissed.

(Shivaji Pandey, J)

Vinay/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	25.4.2018
Transmission Date	NA

