

Letters Patent Appeal No. 1357 of 2018

- Appellant/s

... Respondent/s

For the Appellant/s : Mr. Anil Kumar Sinha, Advocate
: Mr. Kumar Ravish, Advocate
: Mr. Kashyap Kaushal, Advocate
For the Respondent/s: Mr. Kumar Kaushik, Advocate
: Mrs. Namrata Dubey, Advocate



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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE JUSTICE SMT. ANJANA
MISHRA
ORAL JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 15-01-2019

We have heard Mr. Anil Kumar Sinha, Mr. Kumar Ravish and Mr. Kashyap Kaushal, learned counsels for the appellants, Mr. Kumar Kaushik and Mrs. Namrata Dubey, learned counsels for the respondents.

The dispute giving rise to this appeal is by those who were initially appointed as extra clerks in the Department of Registration, Govt. of Bihar in the pay-scale of Rs. 975-1540/-. They were appointed as such in the year 1996-97 as is evident from the discussion made in the impugned judgment of the learned Single Judge. It is therefore undisputed that all the respondent-petitioners were appointed as Extra Clerks and given a temporary status in the pay-scale of Rs. 975-1540/- in the year 1996-97.

Some of the respondent-petitioners had retired and some were at the fag end of their service when the writ petition came to be filed for a direction to grant them the pay-scale of Upper Division Clerks of the Department of Registration from the date of initial appointment. The foundation of the entire submission of the respondent-petitioners was that since the cadre of Lower Division



Clerk and Upper Division Clerk have already merged into one cadre of Clerk on 24th of May, 1980 then they were all entitled to the same scale of pay that was admissible to Upper Division Clerks as there was no other cadre in existence. The scale of pay as given to them at the time of initial appointment was erroneously not revised in the correct pay-scale and the respondent-petitioners were wrongly given the pay-scale of Lower Division Clerk. The basic argument was that when merger had already taken place in the year 1980 then at the time of appointment of the respondent-petitioners, the Lower Division Clerks became entitled to the pay-scale of Upper Division Clerk as there was no cadre of that of Lower Division Clerk in existence. The revised pay-scale, therefore, of Rs. 4,000-6,000/- to Upper Division Clerk was admissible to the respondent-petitioners and in spite of the representations made in the year 2011 no decision had been taken. It is with this grievance that some other temporary clerks of the Department of Registration had preferred CWJC No. 6107 of 1992 that was disposed of on 01.01.1997 and pursuant thereto it is alleged that the State Government decided to treat temporary clerks equal to Remunerative Copyist in the pay-scale of 4,000-6,000/- vide a Memo dated 01.09.1998.



The appellants-State contested the said claim of the respondent-petitioners on the ground that even though there was a merger in the year 1980 but the respondent-petitioners had been appointed as Extra Clerks on daily basis.

In order to accommodate extra clerks and bring them within the fold of regular appointments one thousand posts were created that were designated as temporary clerks. These posts were not included within the cadre of either Lower Division Clerk or Upper Division Clerk so as to treat them to be governed by the merger scheme of 24th May, 1980.

Vide a Department Letter dated 5th of January, 1984 Extra Clerks were given the benefit of promotion to the post of Upper Division Clerk to the extent of 40% of the said cadre. The rest were to be filled up by direct recruitment. Thus, these Extra Clerks who had been appointed on temporary basis were in effect neither appointed as Upper Division Clerks nor were they within the merged cadre. They had been appointed against the one thousand posts that had been created for Extra Clerks and designated as temporary clerks. Later on, these appointees came to fill up all the posts of the clerks and their pay-scales in the same grade were revised subsequently from time to time. They were however not given the higher scale nor their pay-scales had



merged into the higher pay-scale. In these circumstances, they were not entitled to any such claim as stated by them and their demand was not justified as they were appointed against specially created posts for Extra Clerks with the status of temporary clerks. It has also been pointed out that they were also confirmed in the scale of pay of Lower Division Clerks later on which has not been challenged.

The respondent-petitioners relied on the Circular dated 20th December, 2000 contending that a demerger took place in the year 1999 and upon this demerger the respondent-petitioners were entitled to the pay-scale of the Upper Division Clerk. Such demerger, therefore, gives the benefit to respondent-petitioners and they cannot be treated differently after having been extended the benefit of being appointed as Clerks in the same department. The use of the word temporary clerk does not take away the status of the respondent-petitioners who after the merger in the year 1980 are entitled to the same status as that of Upper Division Clerks.

After having heard Sri Anil Kumar Sinha, learned counsel for the appellant and Sri Kumar Kaushik, learned counsel for the respondent-petitioners, we find that the learned Single Judge while proceeding to allow the writ petition of the respondent-petitioners has held that the post became permanent on 14th



September, 1990. The respondent-petitioners were given the pay-scale of Rs. 975-1540/- which was the pay-scale of Lower Division Clerk which post was not in existence in the cadre when the respondent-petitioners were appointed much after the merger. The creating of 1000 post of clerks on temporary basis did not give the respondents a different status by virtue of having been appointed against such posts. The learned Single Judge further held that while issuing the notification in 1981 and merging the cadres of Lower Division Clerks and Upper Division Clerks into one, the Government had overlooked the notification creating one thousand posts of Clerks. According to the learned Single Judge, posts of Lower Division Clerks was not in existence nor was the pay-scale of Rs. 220-315/-of Lower Division Clerk admissible. The learned Single Judge, therefore, held that the pay-scale of the posts hold by respondent-petitioners ought to have been higher and subsequently its replacement also ought to have been revised.

Learned Single Judge also came to the conclusion that the stand of the Government that the posts against which the petitioners were working were posts of a different status of clerks is erroneous as the posts were created on regular basis but on a pay-scale that was not existing on the date it was notified. Neither the post of Lower Division Clerk was available nor such pay-scale



was in existence and since there was only one cadre of clerks after the merger, the respondent-petitioners were entitled to have this pay-scale. The learned Single Judge ultimately concluded that there cannot be creation of a post like a temporary clerk with a wrong pay-scale of Lower Division Clerk which was not in existence in the department.

It is here that we differ from the learned Single Judge. The power of the State Government to create posts and to define cadres is sovereign. It is undisputed that the post of extra clerks had been created in the year 1978 much before the merger as distinct from the cadre of Lower Division Clerks and Upper Division Clerks with a view to cope up with the overloaded work of the Registration Department and these extra clerks were later on sought to be absorbed into the stream by creation of one thousand separate posts. The Government, therefore, created these special posts in the pay-scale of Lower Division Clerks and from a combination of the reading of the Letters of appointment of the respondent-petitioners and their confirmation later on it is absolutely clear that they had been extended the benefit of pay-scale of the Lower Division Clerk and not that of the Upper Division Clerk. These posts were not included in the merger scheme. The assumption by the learned Single Judge that this was



overlooked at the time of merger is neither substantiated by any cogent material. The presumption of overlooking a fact is contrary to the clear stand of the government that the said posts were of a different status to accommodate extra clerks. Neither the orders of appointment or confirmation of the appointees were under-challenge and nor were ever disputed. It is after a long time that the respondent-petitioners who were either at the fag end of their service or had retired raised this claim that in view of the merger of Lower Division Clerks and Upper Division Clerks into one they were entitled to the pay-scale of Upper Division Clerk as the previous cadre of Lower Division Clerk did not exist.

We are unable to accept this submission inasmuch as the respondent-petitioners with open eyes had accepted their appointments against such posts that had been created to accommodate extra clerks. These were separate posts and the conclusion of the learned Single Judge that such posts could not have been created and ought to have been in the same pay-scale does not stand to reason inasmuch as it is for the employer to decide as to what posts and in what scale it seeks to offer employment. If the Lower Division Clerks and Upper Division Clerks had merged into a single cadre of clerks, then the same cannot be through a presumptuous reasoning be construed to also



include the post of temporary clerks which was offered to these extra clerks. This equivalent status of posts that it ought to have been the same due to non-existence of the post of Lower Division Clerks, could not have been assumed as the power to create a post and to assign a particular pay-scale rests with the Government. For the purpose of granting equivalence, it is the Equivalence Committee which is authorized to take a decision in the matter. No such decision appears to have been taken by the State Government nor was there any challenge raised to the status of these posts previously. If the State Government chose to extend the pay-scale of Lower Division Clerks to these extra and temporary clerks, then in the absence of the cadre of Lower Division Clerk, it cannot be said that the State Government was denuded of its authority to make appointments in that pay-scale when the post creation order of one thousand posts to accommodate these extra clerks was never under-challenge.

There is one more aspect which deserves to be noticed namely that there are no allegations of *mala fides* and, therefore, the same cannot be inferred. The learned Single Judge has held that at the time of merger the issue of these posts were overlooked. It is not the case of the respondent-petitioners that the posts held by them were deliberately created in a lower pay-scale. This was



also not possible inasmuch as the posts were created long back before the appointment of the respondent-petitioners and, therefore, no intention can be gathered that this was done deliberately to keep the respondent-petitioners in a lower pay-scale. Since the respondent-petitioners formed a different class of appointees the question of attracting Article 14 of the Constitution of India on the facts of the present case does not arise.

Apart from this the acceptance and confirmation on the said posts against the said pay-scale is yet another factor which could not have been lost sight of. The learned Single Judge came to the conclusion that this ought to have been in the scale of Upper Division Clerk does not appear to be based on sound reason as it seeks to undermine the very power of the State Government to make appointments against posts the creation whereof and the pay-scale whereof was never under-challenge. The merger of the two cadres did not prevent the State Government from proceeding to make appointments in the pay-scale of Lower Division Clerks of these extra clerks who were designated as temporary clerks against specially created posts. Merger was only for the cadre posts of Lower Division Clerk and Upper Division Clerk and not of these posts which had been created separately. The respondent-petitioners, therefore, cannot claim parity having accepted their



appointments, confirmation and having continued as such through a different source of recruitment as extra clerks designated as temporary clerks. The State Government therefore had the authority to place them in the pay-scale as per the post creation order and consequently the learned Single Judge could not have extended any such benefit on the basis thereof.

There was no legal impact of the policy of merger which even though had taken prior in point of time to the appointment of the respondent-petitioners as the posts against which the respondent-petitioners came to be appointed were created with a clear recital that they shall be the posts meant for accommodating the Extra Clerks. The finding recorded by the learned Single Judge that the respondent-petitioners ought to have been placed in the same pay scale proceeds on an erroneous assumption as if there was a deemed inclusion of these posts after the merger in the same cadre which had been merged together. On a reading of the documents referred to hereinabove, the creation and the existence of these posts remained a separate entity and, therefore, merely because the respondent-petitioners who have been given the same pay-scale cannot be a ground to assume that the Government had intended to make appointments as urged on behalf of the respondent-petitioners. To the contrary, the appointments were



clearly made and in the case of the respondent-petitioners in the year 1996-97, with a clear understanding that they were appointed against the said posts on the pay-scale referred to therein. This, therefore, cannot be a ground to find error in the action taken by the State Government. A mandamus, therefore, as prayed for, could not have been issued.

Learned counsel for the respondents has cited the judgment in the case of **State of Madhya Pradesh vs. Yogendra Shrivastava** reported in (2010) 12 SCC 538 that has been followed by a learned Single Judge in the case of **Sheo Charan Paswan vs. The State of Bihar & Ors.** Vide order dated 08.08.2011 passed in CWJC No. 1102 of 2009. The judgment in the case of **State of Madhya Pradesh** (supra) was in relation to the extension of the benefit of pay-scales. It was held that the challenge cannot be barred by limitation or the doctrine of lapse as it is a continued benefit if an error was committed at the time of appointment, as such, their claim cannot be denied.

The learned Single Judge in the case of **Sheo Charan Paswan** (supra) was dealing with a situation of the clerks of Public Health Engineering Department (PHED). It was observed that they were posted as Junior Accounts Clerk consequent to the merger and, therefore, if the fact of merger was not brought to the pay



revision committee, the same would not deprive the incumbent of such benefits.

The instant case is clearly distinguishable where it is being assumed that there was no post in existence of a Lower Division Clerk after merger and, therefore, the learned Single Judge came to the conclusion that this error would not enable the appellants to deny the higher pay-scale of Upper Division Clerk to the respondent-petitioners. As is evident from the facts of the present case, there is a separate post creation order of 1000 posts that continued to exist separately and which was not part of the merger. These posts were created separately and they continued to have a separate existence in order to accommodate Extra Clerks. This distinction, therefore, would not attract the ratio of the judgments cited by the learned counsel for the respondent-petitioners.

We are, therefore, satisfied that the impugned judgment deserves reversal.

For the reasons hereinabove, the appeal is, accordingly, allowed and the impugned judgment dated 23.02.2018 passed in CWJC No. 15862 of 2013 is set aside.



(Amreshwar Pratap Sahi, CJ)

Vikash/-

(Anjana Mishra, J)

AFR/NAFR	AFR
CAV DATE	NA
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