
(2002) 09 JH CK 0040

Jharkhand High Court

Case No: C.W.J.C. No. 371 of 1996 (R)

Rajeshwar Prasad and
Others

APPELLANT

Vs

State of Bihar and
Others

RESPONDENT

Date of Decision: Sept. 29, 2002

Acts Referred:

- Constitution of India, 1950 - Article 226

Hon'ble Judges: Tapen Sen, J

Bench: Single Bench

Advocate: Saurav Arun, for the Appellant; Ritu Kumar, G.P.-IV, for the Respondent

Judgement

Tapen Sen, J.

Heard Mr. Saurav Arun, learned counsel for the petitioner and Mrs. Ritu Kumar, learned G.P.-IV.

2. By this writ application, the petitioners have prayed for quashing the order dated 26.8.1995 as contained at Annexure-4 to the writ application and has sought for a direction upon the respondents to promote them in the B.A. Trained Scale as per the gradation list as contained at Annexure-3. The petitioners have further prayed that the respondents be directed to treat them as senior to those teachers who have been working in Matric Trained Scale notwithstanding the rule of 1993.

3. The facts of this case as stated in the writ application are that the petitioners have all been working as teachers in different school in the district of Palamau and Garhwa in the I.A. Trained Scale. According to them, the petitioner Nos. 1 to 15 were all appointed in the I.A. Trained Scale in the years, 1977 and 1981 while the petitioner Nos. 16 and 17 were appointed in the year, 1973 in the Matric Trained Scale and they were subsequently promoted to the I.A. Trained Scale in the year, 3 975. In the counter affidavit also the respondents at paragraph 6 have stated that all the petitioners were appointed directly on

the I.Sc. (Trained) Scale but, there is no provision of direct appointment in the said scale because the teachers must first be appointed in the Matric Trained Scale and after obtaining higher qualification and after consideration of the gradation list and availability of vacant posts, they can be considered for promotion in the I.A. Trained Scale. There is no dispute however, that the appointment of all the petitioners in the LA. Trained Scale save and except the petitioner Nos. 16 and 17 who were appointed in the Matric Trained Scale were ever challenged or terminated on the ground that they had been appointed directly. The rest of the petitioners i.e. petitioner Nos. 18 to 24 were all appointed in the I.A. Trained Scale in the years, 1973 and 1977 and 1981. The places where the petitioners have been working are mentioned at paragraph 5 of the writ application.

4. The petitioners have stated that a Government Notification had been issued taking over all the schools on 15th December, 1977 and after such take over three different cadres of teachers were provided which Included the Matric Trained Cadre, I.A. Trained cadre and B.A. Trained cadre.

5. The petitioners have stated that subsequently on 18.12.1984 another notification were issued in which petitioners were categorized in four different cadres in the following manner :--

GRADE-I

(i)	Senior	Rs.
	Selection	1,000/-
	Grade.	to
	B.A.	1,820/-
	Trained.	
(ii)	Junior	Rs.
	Selection	1,880/-
	Grade,	to
	B.A.	1,940/-
	Trained.	
(iii)	Basic,	Rs.
	B.A.	850/- to
	Trained.	1,360/-

GRADE-II

(i)	Senior	Rs.
	Selection	850/- to
	Grade,	1,360/-
	I.A.	
	Trained.	

(ii)	Junior Selection Grade. I.A. Trained.	Rs. 785/- to 1,210/-
(iii)	Basic. I.A. Trained.	Rs. 730/- to 1,080/-

GRADE-III

(i)	Senior Selection Grade, Matric Trained.	Rs. 730/- to 1,080/-
(ii)	Junior Selection Grade, Matric Trained.	680/- to 965/-
(iii)	Basic, Matric Trained.	580/- to 860/-

6. According to the petitioners, in the aforementioned circular all the three cadres were different cadres and promotion from one to the other were done through Departmental Promotion Committee. Thus, on perusal of the aforementioned categories of the cadres, what the petitioners contend is that the teachers in the Matric Trained Scale were lower in cadre and pay as compared to the teachers in the LA. Trained cadre and that the teachers working as such in the I.A. Trained cadre rank senior to those working in the Matric Trained cadre.

7. Some dispute arose in relation to finalization of the gradation list which was creating difficulties as a result of which the department issued a circular dated 25.8.1983 by which a prescribed format was provided giving separate columns for mentioning specifically the dates of appointment in the Matric Trained Scale as also I.A. Trained Scale. Accordingly, on 24.5.1995 a computerized gradation list (Annexure-3) was prepared in which seniority was counted as per date of entry into I.A. Trained Scale. This gradation list was prepared for purposes of subsequent promotion to B.A. Trained Scale and it was circulated on 24.5.1995.

8. In the mean time, the Government in exercise of powers conferred under Article 309 of the Constitution of India framed a rule known as Bihar Taken Over Elementary School Teachers" Promotion Rule, 1993 in which I.A. Trained Scale and the Matric Trained Scales were merged and formed a single cadre. According to the petitioners, on account of the aforesaid merger of the two cadres in one, persons who were working on higher grade should be ranked senior to persons working on the lower grade and that the merger of two scales in one could not take away nor destruct the existing seniority of the I.A. Trained Scale teachers.

9. Contrary to the aforementioned expectation, the respondents issued a Notification dated 26.8.1995 (impugned Annexure-4) stating that since Matric Trained Scales and I.A. Trained Scales have been merged therefore a person who was first appointed in the Matric Trained Scale shall rank senior to those working on LA. Trained Scale. It is against the aforementioned circular/decision that the petitioners have filed the instant writ application.

10. A similar matter came for consideration before the Patna High Court in the case of Yugeshwar Yadav and Ors. and in the case of Mahesh Rai and Ors. v. The State of Bihar and Ors., reported in 1998 (1) All PLR 608. In the aforementioned case, the 1993 rule was challenged. The -Division Bench, at paragraph 14 of the aforesaid judgment held that the rule cannot be said to be ultra vires on the ground that it had been given retrospective effect. However, in the matter relating to seniority, the Division Bench held that seniority is a vested right and it cannot be taken away by making the rule retrospective and accordingly, at paragraph 16, while referring to other judgments, the Division Bench held as follows :--

"This Court in the case of Mithileshwari Sharan Sinha v. The State of Bihar, 1978 BBCJ 445, has observed that there is vested right of seniority, which cannot be re-determined and the right cannot be taken away even by framing new rules and giving retrospective effect to it. In the case of Ram Swaroop Das v. The State of Bihar. 1989 PLJR 143, it has been observed that merger of junior and senior branches (of Bihar Finance Service) cannot affect seniority of persons appointed prior to date of merger. In the case of Smt. Pratibha Singh v. The State of Bihar 1988 PLJR 646, it is observed that it is also well known that terms and conditions of service cannot be altered with retrospective effect. It was further observed that vested right cannot be taken away even by way of rule framed under Article 309 of the Constitution of India by giving a retrospective effect there to inasmuch as by such retrospective amendments the vested right of an employee cannot be taken away. The Apex Court in the case of T.R. Kapur v. The State of Haryana, AIR 1987 SC 415, while considering the rule, which was enforced with retrospective effect laying down qualification for promotion observed that it is well settled that any rule, which affects the right of a person to be considered for promotion is a condition for service, although mere chances of promotion may not be. It is further observed that the rules defining qualifications and suitability for promotion are conditions of service and they can be changed retrospectively; but this rule is subject to a very recognized principle that the

benefits acquired under the existing rules cannot be taken away by an amendment with retrospective effect, that is to say, there is no power to make such a rule under the proviso to Article 309 which affects or impairs the vested rights."

11. Thus, what appears and what is clear is that a rule defining qualification and suitability for promotion etc. are conditions of service, but such a rule is always subject to the well recognized principles that vested or acquired rights cannot be taken away. In other words, and in view of para 17 of the said judgment, what emerges is that a valid seniority, once acquired becomes a vested right and such a vested right cannot be affected adversely or taken away by enforcing a rule with retrospective effect.

12. Similar view has been taken in the case of Uday Pratap Singh and Ors. v. The State of Bihar, reported in 1994 Suppl (3) SCC 451. At paragraph 6 of the said judgment it has been inter alia observed as follows :--

"By a catena of decisions of this Court, it is now well-settled that by an executive order the statutory rules cannot be whittled down nor can any retrospective effect be given to such executive order so as to destroy any right which became crystallised. In this connection, it is profitable to refer a decision of this Court in T.R. Kapur v. State of Haryana, wherein it is held that rules framed under Article 309 of the Constitution cannot affect or impair vested rights, unless it is specifically so provided in the statutory rules concerned. It is obvious that an executive direction stands even on a much weaker footing. It is true, as laid down in Bishan Sarup Gupta v. Union of India, that effect of upgradation of a post is to make the incumbent occupy the upgraded post with all logical benefits flowing therefrom and can be treated as promoted to the post. Still it cannot be again said that no retrospective effect could be given to any merger of erstwhile lower branch into higher branch in the cadre so as to affect the vested rights of incumbents already occupying posts in the erstwhile higher branch of the cadre. In the present case it has to be kept in view that the contesting respondents were directly recruited and appointed in the Senior Branch on 12.5.1974 and 25.5.1974 retrospectively, while the appellants were appointed on 2.11.1975 in the merged cadre. It is true that their order of appointment purports to give them appointment retrospectively from 1.4.1974 but such effect cannot be given so as to destroy the seniority herein, who were inducted as direct recruits in the Senior Branch prior to 2.11.1975. The earlier decision of the Patna High Court in the case of Kartik Charan Jha case was rightly distinguished by the Division Bench in the present case as in Jha case the direct recruits were inducted much after 2.11.1975 when the mergers got their Junior Bench's appointments upgraded to the combined merged cadre and became a part and parcel of the Senior Branch earlier to these direct recruits, while in the present case all the contesting respondents had entered the Senior Branch much prior to 2.11.1975 as seen above. Therefore, they were entitled to be treated as seniors to the appellants."

13. In view of what has been stated above, the Notification dated 26.8.1995 in so far as it relates to the petitioners and in so far it declares that only those teachers will be treated

senior who have got the Matric Trained Scale earlier is hereby set aside and the respondents are directed to pass a fresh order in accordance with law after taking into consideration the observations made above.

14. With the aforementioned observations and directions this writ petition is disposed off.
No order as to costs.