

THE STATE OF BIHAR & ORS.

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v.

ARBIND JEE

(Civil Appeal No. 3767 of 2010)

SEPTEMBER 28, 2021

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[R. SUBHASH REDDY AND HRISHIKESH ROY, JJ.]

Service law: Retrospective seniority – Claim for, from a date when an employee was not even borne in service – Held: Retrospective seniority unless directed by court or expressly provided by the applicable Rules, should not be allowed, as in so doing, others who had earlier entered service, would be impacted – Seniority benefit can accrue only after a person joins service – In the instant case, precedence of seniority was claimed by respondent over other regular employees who had entered service much before him – Respondent's case was of compassionate appointment on the order of court – The court's direction to the State was to appoint him within one month without specifying that the appointment would have a retrospective effect – Respondent never raised any claim before the court for relating his appointment to an earlier date (1.8.1985) – Post appointment, he never raised any such grievance within reasonable time – Six years later, he made a representation and same was rejected with the observation that on 1.8.1985, he was yet to enter service – Respondent slept over his rights, and never earlier pointedly addressed his present claim either before the court (in the earlier round) or to the State, soon after his appointment – Moreover, his was a compassionate appointment without any element of competitive recruitment where the similarly recruited stole a march over him – High Court was in error in granting retrospective seniority to him – Service jurisprudence.

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Allowing the appeal, the Court

HELD: 1.1 The respondent entered service only on 10.2.1996 and yet under the impugned judgment, the High Court directed counting of his seniority from 20.11.1985 when he was not borne in service. The jurisprudence in the field of service law advise that retrospective seniority cannot be claimed from a date when an employee is not even borne in service.

- A **Retrospective seniority unless directed by court or expressly provided by the applicable Rules, should not be allowed, as in so doing, others who had earlier entered service, will be impacted.** [Para 10][51-F-G]
 - 1.2 **The compassionate appointment of the respondent is not being questioned here but importantly he is claiming seniority benefit for 10 years without working for a single day during that period. In this situation, the seniority balance cannot be tilted against those who entered service much before the respondent. Seniority benefit can accrue only after a person joins service and to say that benefits can be earned retrospectively would be erroneous.** [Para 12][52-D-E]
- B **not being questioned here but importantly he is claiming seniority benefit for 10 years without working for a single day during that period. In this situation, the seniority balance cannot be tilted against those who entered service much before the respondent. Seniority benefit can accrue only after a person joins service and to say that benefits can be earned retrospectively would be erroneous.** [Para 12][52-D-E]
- C **Seniority benefit can accrue only after a person joins service and to say that benefits can be earned retrospectively would be erroneous.** [Para 12][52-D-E]

*Shitla Prasad Shukla v. State of UP and Ors. (1986)
Suppl. SCC 185 : [1986] SCR 106 – held inapplicable.*

- D **C. Jayachandran v. State of Kerala (2020) 5 SCC 230 – distinguished.**
Ganga Vishan Gujrati And Ors. v. State of Rajasthan and Ors. (2019) 16 SCC 28 : [2019] 11 SCR 444 – referred to.

- E **2. The present is a case of compassionate order made on this court's order. The respondent never raised any claim for relating his appointment to an earlier date from this Court. Post appointment, he never raised any grievance within reasonable time, for fixing his date of appointment as 20.11.1985. Six years later, only on 10.9.2002, he made a representation and the same was rejected with the observation that on 1.8.1985, the respondent was yet to enter service. Thus, the respondent slept over his rights, and never earlier pointedly addressed his present claim either to the Supreme Court (in the earlier round) or to the State, soon after his appointment. The records reflect that the State have faithfully implemented the direction issued by this Court and appointed the respondent. Moreover, the action of the authorities in determination of the respondent's seniority from the date of entering service is found to be consistent with the applicable laws. There could be individual cases where a bunch of applicants are recruited through a common competitive process but for one reason or another, one of them is left out**
- F **2. The present is a case of compassionate order made on this court's order. The respondent never raised any claim for relating his appointment to an earlier date from this Court. Post appointment, he never raised any grievance within reasonable time, for fixing his date of appointment as 20.11.1985. Six years later, only on 10.9.2002, he made a representation and the same was rejected with the observation that on 1.8.1985, the respondent was yet to enter service. Thus, the respondent slept over his rights, and never earlier pointedly addressed his present claim either to the Supreme Court (in the earlier round) or to the State, soon after his appointment. The records reflect that the State have faithfully implemented the direction issued by this Court and appointed the respondent. Moreover, the action of the authorities in determination of the respondent's seniority from the date of entering service is found to be consistent with the applicable laws. There could be individual cases where a bunch of applicants are recruited through a common competitive process but for one reason or another, one of them is left out**
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while others get appointed. When the denial of analogous appointment is founded to be arbitrary and legally incorrect, the benefit of notional seniority may be conferred on the deprived individual. However, the present is not a case of that category. The High Court was in error in granting retrospective seniority to the respondent. [Paras 13, 14 and 15][53-E-G; 54-A-E]

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Case Law Reference

[1986] SCR 106	held inapplicable	Para 11	
[2019] 11 SCR 444	referred to	Para 12	
(2020) 5 SCC 230	distinguished	Para 13	C

CIVIL APPELLATE JURISDICTION: Civil Appeal No.3767 of 2010.

From the Judgment and Order dated 28.09.2008 of the High Court of Judicature at Patna in LPA No.245 of 2008.

Abhinav Mukerji, Ms. Pratishtha Vij, Mrs. Bihu Sharma, Akshay C. Shrivastava, Advs. for the Appellants.

Satwik Misra, Ms. Udita Singh, Lakshmi Raman Singh, Advs. for the Respondent.

The Judgment of the Court was delivered by

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HRISHIKESH ROY, J.

1. This appeal is directed against the judgment and order dated 29.9.2008 of the Patna High Court in LPA No. 245 of 2008.

2. The father of the respondent was working as a Home guard and after he died in harness, the respondent applied for compassionate appointment. The concerned Committee recommended the respondent and others whereafter the order dated 20.11.1985 was issued by the Commandant, Bihar Home Guard forwarding the name of the respondent as one of the persons shortlisted for appointment on compassionate basis. The appointment was conditional upon physical fitness certificate issued by the Civil Surgeon and it was made clear that appointment of the enlisted persons will be effective only after due satisfaction of their capability, educational qualification etc.

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- A 3. The recommended persons appeared in the Home Guard Headquarter as directed, but the respondent was denied appointment as he was found deficient in the physical standards. Thus aggrieved, the respondent moved and obtained relief from the Patna High Court for appointment in Class IV post. As the respondent was shortlisted for the post of *Adhinayak Lipik*, he challenged the High Court order through SLP(C) No. 6437 of 1993. The resultant Civil Appeal No. 220 of 1996 was allowed by the Supreme Court with the following direction:-

- “....We, therefore, allow this appeal and direct the respondents to appoint the appellant to the post of ‘Adhinayak Lipik’ in the Homeguard Department, State of Bihar within one month from the date of communication of this order.”
- B 4. Following the above direction of the Supreme Court, the respondent was appointed on 27.2.1996 by the order No. 108 of 1996 dated 10.2.1996 issued by the Commandant of the Bihar Home Guard Bn., Patna. Six years after joining service, an application was made on 10.9.2002 by the respondent claiming seniority from 5.12.1985 but the authorities rejected the claim on 20.11.2002 on the ground that the respondent was appointed on 27.2.1996 on direction of the Supreme Court and that he was not borne in service as on 5.12.1985. The rejection order was then challenged and the Patna High Court in the respondent’s
- C E CWJC no. 6683/2003 directed the authority to consider the respondent’s seniority from 5.12.1985.

- D 5. The above order passed by the learned Single Judge was challenged by the State and the Division Bench on 29.9.2008 while dismissing the LPA no. 245 of 2008 noted that the respondent was denied F appointment, (as proposed on 20.11.1985), on the ground that he did not conform to the physical standards applicable to a Constable and eventually the Supreme Court directed appointment of the respondent as *Adhinayak Lipik* in the Home Guard Department. Therefore, the appointment should relate back to the date of the initial order on 20.11.1985. With this G observation, the State’s LPA was dismissed by the order impugned in this appeal.

- H 6. We have heard Mr. Abhinav Mukerji, learned counsel appearing for the appellants. The respondent is represented by Mr. Satvik Misra, learned counsel.

7. The issue to be answered here is whether the respondent is entitled to claim seniority in service from a retrospective date i.e. 20.11.1985 as was ordered by the High Court or whether he is entitled for seniority from the date he entered service.

8. It is important to bear in mind that the order No. 1169/1985, whereby the respondent along with few others were shortlisted for compassionate appointment, did not materialize and was in fact refused for the respondent as he failed to meet the physical standards. Eventually, following the direction issued by this Court on 2.1.1996 to appoint the respondent within one month from the date of communication of the Supreme Court's order, the respondent was appointed on 10.2.1996. The respondent joined service without demur and made no claim for any retrospective effect to his appointment, until addressing the representation on 10.9.2002, to claim seniority from 5.12.1985.

9. In the previous round before this Court, the respondent was concerned about securing appointment as *Adhinayak Lipik* and direction was issued to appoint him, specifying the time limit of one month. But there was no direction for allowing retrospective benefit to the appointee. In such circumstances, the High Court in our view should not have travelled beyond the order passed by this Court to hold in favour of the respondent that his seniority should be counted from 5.12.1985 although he entered service a decade later only on 10.2.1996. Moreover, the respondent even after entering service did not immediately claim the benefit of retrospective appointment, and only on 10.9.2002 he applied to the Commandant to claim seniority from 5.12.1985 which claim was however rejected by the Authority on 20.11.2002.

10. As earlier noted, the respondent entered service only on 10.2.1996 and yet under the impugned judgment, the High Court directed counting of his seniority from 20.11.1985 when he was not borne in service. The jurisprudence in the field of service law would advise us that retrospective seniority cannot be claimed from a date when an employee is not even borne in service. It is also necessary to bear in mind that retrospective seniority unless directed by court or expressly provided by the applicable Rules, should not be allowed, as in so doing, others who had earlier entered service, will be impacted.

11. To challenge the conferment of retrospective seniority, the learned counsel for the appellant has cited *Shitla Prasad Shukla vs.*

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- A *State of UP and Ors.*¹ where this court speaking through Justice M. P. Thakkar rightly held that:

“10.The late comers to the regular stream cannot steal a march over the early arrivals in the regular queue. On principle the appellant cannot therefore succeed. What is more in matters of seniority the Court does not exercise jurisdiction akin to appellate jurisdiction against the determination by the competent authority, so long as the competent authority has acted bona fide and acted on principles of fairness and fair play. In a matter where there is no rule or regulation governing the situation or where there is one, but is not violated, the Court will not overturn the determination unless it would be unfair not to do so...”

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12. The principles enunciated in *Shitla Prasad Shukla (supra)* are applicable to the case at hand. The compassionate appointment of the respondent is not being questioned here but importantly he is claiming seniority benefit for 10 years without working for a single day during that period. In other words, precedence is being claimed over other regular employees who have entered service between 1985 to 1996. In this situation, the seniority balance cannot be tilted against those who entered service much before the respondent. Seniority benefit can accrue only after a person joins service and to say that benefits can be earned retrospectively would be erroneous. Such view was expressed in many cases and most recently in *Ganga Vishan Gujrati And Ors. Vs. State of Rajasthan and Ors.*². Justice Dr. D. Y. Chandrachud speaking for the Court opined as under:-

“41. A consistent line of precedent of this Court follows the principle that retrospective seniority cannot be granted to an employee from a date when the employee was not borne on a cadre. Seniority amongst members of the same grade has to be counted from the date of initial entry into the grade. This principle emerges from the decision of the Constitution Bench of this Court in Direct Recruit Class II Engineering Officers’ Association v State of Maharashtra³. The principle was

¹(1986)(Supp.) SCC 185

²(2019) 16 SCC 28

H ³(1990) 2 SCC 715.

reiterated by this Court in State of Bihar v Akhour Sachindra Nath⁴ and State of Uttaranchal v Dinesh Kumar Sharma.⁵ A

13. The learned counsel for respondent relies on *C. Jayachandran vs. State of Kerala⁶*, to argue for retrospective seniority. The bench speaking through Justice Hemant Gupta in the context of a diligent litigant observed that:

"41The appellant has submitted the representation on 11-4-2012 i.e. within 1 year and 2 months of his joining and submitted reminder on 18-9-2014. It is the High Court which has taken time to take a final call on the representation of the appellant and other direct recruits. The appellant was prosecuting his grievances in a legitimate manner of redressal of grievances. Therefore, it cannot be said that the claim of the appellant was delayed as he has not claimed the date of appointment as 30-3-2009. The appellant having been factually appointed vide communication dated 22-12-2010, he could not assume or claim to assume charge prior to such offer of appointment. The appellant has to be granted notional seniority from the date the other candidates were appointed in pursuance of the same select list prepared on the basis of the common appointment process." C

As can be seen from the above extracted passage, the benefit of notional seniority was claimed within 1 year from date of actual appointment. This was also a case where the contesting parties were recruited through a common competitive process. But the present is not a case of recruitment by selection and is a compassionate appointment made on this court's order. The court's direction to the State was to appoint within 1 month without specifying that the appointment should have a retrospective effect. The respondent never raised any claim for relating his appointment to an earlier date from this Court. Post appointment, he never raised any grievance within reasonable time, for fixing his date of appointment as 20.11.1985. Six years later, only on 10.9.2002, he made a representation and the same was rejected with the observation that on 1.8.1985, the respondent was yet to enter service. Proceeding with these facts, it is clearly discernible that the respondent D

⁴1991 Supp. (1) SCC 334.

⁵(2007) 1 SCC 683.

⁶(2020) 5 SCC 230

- A has slept over his rights, and never earlier pointedly addressed his present claim either to the Supreme Court (in the earlier round) or to the State, soon after his appointment. Moreover, his was a compassionate appointment without any element of competitive recruitment where the similarly recruited has stolen a march over him. Therefore, the ratio in *C. Jayachandran (supra)* will be of no assistance to the respondent
- B as that case is distinguishable on facts.

- 14. The records here reflects that the State have faithfully implemented the direction issued by this Court and appointed the respondent. Moreover, the action of the authorities in determination of the respondent's seniority from the date of entering service is found to be consistent with the applicable laws. There could be individual cases where a bunch of applicants are recruited through a common competitive process but for one reason or another, one of them is left out while others get appointed. When the denial of analogous appointment is founded to be arbitrary and legally incorrect, the benefit of notional seniority may be conferred on the deprived individual. However, the present is not a case of that category.
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- 15. Supported by our above discussion, we are of the considered opinion that the High Court was in error in granting retrospective seniority to the respondent. The appeal is accordingly allowed and the impugned orders passed by the High Court are set aside and quashed. With this order the case is disposed of leaving the parties to bear their own cost.
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Devika Gujral

Appeal allowed.