

CASE NO.:
Appeal (civil) 4760 of 2006

PETITIONER:
Suresh Chandra Jha

RESPONDENT:
State of Bihar & Ors

DATE OF JUDGMENT: 10/11/2006

BENCH:
ARIJIT PASAYAT & LOKESHWAR SINGH PANTA

JUDGMENT:
J U D G M E N T
(Arising Out of S.L.P. (C) No. 23063 of 2003)

ARIJIT PASAYAT, J.

Leave granted.

Challenge in this appeal is to the legality of the judgment rendered by a Division Bench of the Patna High Court. By the impugned judgment the Division Bench set aside the judgment rendered by a learned Single Judge who had quashed the notification dated 31.1.1991 issued by the State Government purportedly issued under the Bihar Private Engineering College (Control Ordinance) 1986 (in short 'Ordinance') which was subsequently replaced by the Bihar Private Engineering College Control Act 1990 (in short the 'Act'). The appellant had questioned the legality of Section 5(3) of the Ordinance/Act which was accepted by learned Single Judge. But the Division Bench by the impugned judgment upset judgment of learned Single Judge.

Background facts in a nutshell are as follows:

In response to the advertisement for appointment to the post of Assistants in the Dr. Joggnath Mishra Institute for Technology (a private institution hereinafter referred to as the 'Institute') appellant and several others applied for the said post. After selection at a test conducted, 5 persons were appointed and the appellant was one of them. Appellant was appointed vide order dated 18.7.1981 and was given six weeks time from the date of issue of the letter to report for duty to the office of the General Secretary, Mithila Vikas Sansthan Laheriasarai, Darbhanga/Director of the Institute at Darbhanga. In case of respondent no.8 P.K. Choudhary, the appointment letter was dated 22.7.81 and he joined on the same day. The appellant who claims to have received the appointment letter on 23.7.81, in fact, joined on 24.7.81. At this juncture, it is to be noted that though in the appeal, challenge was made to the appointment of respondent no.7, the same was not pressed. On the basis of Section 5(2) of the Act and in purported exercise of powers under Section 5(3) of the Act, respondent no.8 was retained in service while the appellant was not retained. The appellant questioned correctness of the procedure adopted. When there was no positive response, the writ petition was filed before the Patna High Court which was allowed by learned Single Judge. It was noted by the learned Single Judge that the order dated 31.1.1991 issued by the State Government absorbing in

service of some of the respondent was contrary to law. It was noted that the procedure of determining as to who had joined the college earlier was wrong. It was pointed out that admittedly selection was on 18.7.1981 and six weeks time was granted for joining. Merely because of fortuitous circumstances, respondent no.8 joined earlier that cannot be a ground to make him senior to the appellant, though in the merit list prepared appellant was ranked 20 while respondent no.8 was ranked 43. The learned Single Judge accepted the stand. In the appeal filed by respondent no.8, different view was taken by the Division Bench. It was held that the seniority is to be reckoned on the basis of the date of joining. According to High Court the logic of last-come first-go was applicable and, therefore, appellant who has joined later was to be treated as junior to respondent no.8.

Learned counsel for the appellant submitted that the view taken by the Division Bench is clearly contrary to law. If there are no rules governing the field, it is the placement in the merit list which is determinative and not the date of joining. It is accepted that no rules had been framed and, therefore, the merit as appearing in the rank list has to be taken.

In response, learned counsel for the respondent submitted that right from 1981, respondent no.8 has worked and he having joined earlier has to be treated as senior to the appellant.

There is no dispute that the appellant was ranked higher to respondent no.8. There is also no dispute that in the appointment letter the appellant was given six weeks time to join. Merely because respondent no.8 joined earlier that did not in any way affected the merit placement.

This Court in *Chairman, Puri Gramya Bank and Anr. v. Ananda Chandra Das and Ors.* 1994 (6) SCC 301 held as follows:

"This appeal arises from the Judgment of the High Court of Orissa in O.J.C. No. 1007/88, dated March 4, 1992. The respondent and others were selected by direct recruitment as managers of Rural Bank. His rank was No. 9 in the merit list. He was directed to be given seniority on the basis of the date of his reporting to duty. It is reported that the first respondent is dead. The only question in this case is that what shall be the ranking among the direct recruits? Is it the date on which they joined duty or according to the ranking given by the selection board? On comparative evaluation of the respective merits of the candidates for direct recruitment, the Board has prepared the merit list on the basis of the ranking secured at the time of the selection. It is settled law that if more than one are selected, the seniority is as per ranking of the direct recruits subject to the adjustment of the candidates selected on applying the rule of reservation and the roster. By mere fortuitous chance of reporting to duty earlier would not alter the ranking given by the Selection Board and the arranged one as per roster. The High Court, is, therefore, wholly wrong in its conclusion that the seniority shall be determined on the basis of the joining reports

given by the candidates selected for appointment by direct recruitment and length of service on its basis. The view, therefore, is wrong. However, we need not interfere with the order, since the first respondent has died."

(Underlined for emphasis)

Since there was no rule in operation, obviously the ranking in the merit list was to decide the respective seniority. The ratio in Chairman, Puri Gramya Bank's case (supra) has full application to the facts of the case. Appellant's claim that he was to be treated as senior to the respondent no.8 was rightly accepted by learned Single Judge. Unfortunately, the Division Bench did not address itself to the specific question and has placed undue stress on the respondent no.8 having joined earlier.

Therefore, the judgment of the Division Bench is set aside and that of the learned Single Judge is restored. We have, however, make it clear that the appellant will not be entitled to any salary for the period during which the respondent no.8 has worked. For all other service benefits, the period in question shall be reckoned. The official respondents shall explore the possibility of absorbing respondent no.8 to the suitable post considering the fact that for nearly quarter of the century he has rendered services. The payment made to him shall not be recovered.

The appeal is allowed to the aforesaid extent with no order as to costs.