

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.1139 of 2009

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Shailendra Kumar, son of Dr. Mahabir Das, Scientist (suspended) Bihar State Pollution Control Board, Beltron Bhawan, Shastri Nagar, Patna, residing at Mohalla- East Boring Canal Road, Kamta Singh Lane, P.S. Budha Colony, District- Patna.

.... Petitioner/s

Versus

1. The State of Bihar through the Secretary, Department of Forest and Environment, Government of Bihar, Patna
2. The Bihar State Pollution Control Board through its Chairman, Beltron Bhawan, Shastri Nagar, Patna
3. The Chairman, Bihar State Pollution Control Board, Beltron Bhawan, Shastri Nagar, Patna
4. The Member Secretary, Bihar State Pollution Control Board, Beltron Bhawan, Shastri Nagar, Patna.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Nand Kymar Singh, Advocate. .
For the State : Mr. Divya Verma, AC to AAG 3.

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY

ORAL JUDGMENT

Date: 27.01.2015

Heard the parties.

2. In the present writ petition petitioner has sought relief for a direction be given to the respondent for promoting him to the vacant post of Deputy Analyst in the Bihar State Pollution Control Board (hereinafter referred to as “the Board”) with effect from 31.12.1989 after shifting the date of his promotion as Scientist to 27.10.1988 and also for granting consequential benefits of the post.

3. Petitioner was initially appointed on 14.10.1986 as



Senior Scientific Assistant. There were two sanctioned posts of Deputy Analyst in the Board. One Sri S.N. Rao was holding the post of Deputy Analyst since 8.5.1981 and second post was vacant. The second post of Deputy Analyst was reserved for scheduled caste. The Government of Bihar through Finance (Bihar Public Enterprises) issued letter no.1983 dated 8.7.1981 has fixed the Kalawadhi for the promotion to the higher post for the member of schedule caste and schedule tribes would be two years. Petitioner claims that he was appointed in 1986 and after two years he completed the period of Kalawadhi and as such he should have been considered for next post as Scientist with effect from 27.11.1988 and next post of Deputy Analyst with effect from 31.12.1989. The petitioner, however, was granted promotion to the post of Scientist with effect from 12.3.1992.

4. When the petitioner was not treated properly as explained hereinabove he filed a writ petition vide C.W.J.C. 4275 of 1993 making a prayer for shifting the year of promotion as Scientist to 1988 which was disposed of on 7.2.1995. In pursuance of the disposal of the writ petition, the Board vide letter no. 298 dated 16.3.1995 granted the benefit of Scientist with effect from 12.3.1992 (Annexure-3). After promotion to the post of



Scientist which ought to have been given to him with effect from 27.10.1988 and next promotion to the post of the Deputy Analyst should have been given with effect from 31.12.1989 but was denied the benefit. In that circumstance the petitioner filed representations from time to time for his promotion to the post of Deputy Analyst as the post of Deputy Analyst was vacant The Board was not taking any cognizance of his representation, then he filed the writ petition vide C.W.J.C. No.9214 of 1995 for grant of promotion for the post of Deputy Analyst with effect from 1989.

5. Earlier to filing of the aforesaid writ petition the petitioner was put under suspension vide notification no.49, memo no.877 dated 19.7.1993 and accordingly a departmental proceeding was initiated against him vide order dated 7.6.1994. Enquiry Officer submitted its report on 3.1.1995 holding four charges out of seven were fully proved and in pursuance thereof the petitioner was discharged from service vide order dated 14.11.1995.

6. Petitioner challenged the order of discharge vide C.W.J.C. No.2435 of 1996 that was dismissed vide order dated 19.4.2000. While the writ petition challenging the order of discharge was pending, his case vide C.W.J.C. 9214 of 1995



relating to granting the benefit of promotion as Scientist from 1988 came for consideration and this Court vide order dated 16.1.1997 dismissed the writ petition in view of discharge of the petitioner from service. Petitioner challenged the order passed in C.W.J.C. No.4235 of 1996 vide L.P.A. No.893 of 2000 which was allowed vide order dated 22.7.2008 (Annexure-6) permitting the Board for de novo enquiry and to pass the order thereafter.

7. In pursuance of the order passed in L.P.A. No.893 of 2000 the petitioner joined the service on 7.8.2008 and again he was placed under suspension with effect from 13.11.1995 vide order dated 22.8.2008 and enquiry report dated 4.8.2009 was submitted and Enquiry Officer found out of seven charges five charges were proved. The Member, Secretary issued the office order dated 22.4.2010 stating that salary for the period of suspension apart from subsistence allowance shall be paid as per the decision taken by the Board. The Board has asserted that the Member Secretary had no power to issue such letter as the departmental proceeding was pending and enquiry report dated 4.8.2009 holding five charges out of seven charges were proved.

8. During pendency of the enquiry proceeding vide order



dated 22.4.2010 the order of suspension was revoked. On the basis of the enquiry report, the petitioner was served show cause on 3.10.2012 which was replied by the petitioner on 7.6.2013 as the same was found to be unsatisfactory vide Office Order No.117 dated 22.10.2013 awarded the punishment (Annexure-A to the counter affidavit) with-holding one increment without affecting his pension and no payment other than subsistence allowance for the period of suspension but the period of suspension was treated as on duty for all other purposes. In this manner the petitioner remained out of service from 14.11.1995 up-to 22.8.2008 till his reinstatement in terms of order passed by Division Bench later on an fresh order of punishment dated 22.4.2010 (Annexure-8) was passed.

9. It will be relevant to mention that after bifurcation of the State of Bihar the second post of Deputy Analyst went to the State of Jharkhand but the fact remains that petitioner is the senior most Scientist also having requisite qualification which is apparent from the note sheet dated 8.11.1989 (Annexure-4) which shows that petitioner was senior most Scientist and there was vacancy for the post of Deputy Analyst as on 8.11.1989.

10. Learned counsel for the petitioner submits that in terms of circular of the State of Bihar dated 8.7.1981 for the candidate



of scheduled caste and scheduled tribes the period of Kalawadhi was/is fixed for two years. As he was appointed as Senior Scientific Assistant on 14.10.1986 his case ought to have been considered for promotion to the post of Scientist after completion of two years but he was deprived for consideration and ultimately was given promotion to the post of Scientist with effect from 23.2.1992. Another point that has been raised by the petitioner that the petitioner was inflicted punishment of stoppage of one increment without affecting pension and the period of suspension was treated as on duty for all other purposes and as such punishment order does not any way affect the promotion to the post of Deputy Analyst. So much so in the year 1989 the petitioner was entitled for promotion to the post of Deputy Analyst there was no departmental proceeding and as such his date of promotion as Scientist should be shifted 1988. So much so he should be given the benefit of promotion to the post of Deputy Analyst from 1989. He has also submitted that petitioner while on the post of Scientist was directed to discharge the duty of Deputy Analyst which is apparent from 4.8.2011 (Annexure-9) and his joining date 4.8.2011 (Annexure-10) shows that he has been discharging the duty of Deputy Analyst and as such he is entitled at least to the pay

scale of Deputy Analyst.

11. In support of his contention he has relied on the following judgments: (i) 1999(1) PLJR 391, Dhirendra Nath Saha Vs. State of Bihar & Ors., (ii) 2014(3) PLJR 782, Laxman Singh V. The State of Bihar through Director general of Home Guard, Bihar, Patna and other, (iii) 2008 (3) PLJR 144, Prafulla Ranjan Shrivastava Vs. The State of Bihar & others, (iv) 2007 Supl. PLJR 278, Om Prakash V. State of Bihar & others and (iv) (1998) 5 SCC 87, Secretary-cum-Chief Engineer, Chandigarh V. Hari Om Sharma and others.

12. In contra, learned counsel for the respondent has submitted that petitioner cannot be considered for promotion to the post of Deputy Analyst as he was out of service from 14.11.1995 to 22.8.2008 and as such he is not entitled for consideration for promotion to the post of Deputy Analyst. So much so that after the division of State of Bihar now in the present position there is only one post of Deputy Analyst and claim of the petitioner on the post as reserve candidate is not sustainable as there cannot be reservation for the single post and in view of the judgment of the Hon'ble Supreme Court in the case of Chakradhar Paswan v. State of Bihar, reported in AIR 1988 SC 959.



13. Having considered the rival contentions of parties, let us examine the judgment that has been placed by the parties. In the case of Dhirendra Nath Saha (supra) where a disciplinary proceeding was initiated against the petitioner as he was found in an intoxicated state, misbehaved with a girl. She was rescued only by the intervention of another police constable. He was awarded punishment of with-holding of two annual increments for one year which was equivalent of two black marks. The aforesaid case was placed for consideration for promotion but he was denied on account of his conduct led to departmental proceeding. The Court arrived to a conclusion that in the opinion of the Board he was guilty of a misconduct involving moral turpitude is based on the nature of charge led to passing of final order by the Zonal IG in the disciplinary proceeding. The Court has held that once an order of punishment is passed finally, the delinquent would only suffer the legal consequences arising from that order and is not permissible to go back to the charges to deny him the promotional benefits, otherwise it will lead punishment twice. It will be relevant to quote paragraph 8 of the aforesaid judgment:

“8. As noted above the opinion of the Board that the petitioner was guilty of a misconduct involving moral turpitude is based on the nature of the charge rather than the final order passed by the

Zonal I.G. in the disciplinary proceeding. Once an order of punishment is passed finally, the delinquent would only suffer the legal consequences arising from that order and it would not be permissible to go back to the charges to deny him promotional benefits. Otherwise it would amount to punishing a delinquent employee twice over for the same chare(s).”

14. In the case Laxman Singh (supra) relying on the judgment of Sant Kumar Sharma Vs. State of Bihar, reported in 1996(2) BLJ 6 the punishment order of with-holding one increment for six months amounting to black mark was passed . The Court relying on the judgment of Sant Kumar Sharma (supra) held that punishment will relate back to the year of omission with respect to proceeding was initiated and not from the date of passing of the order of punishment.

15. In the case of Om Prakash (supra) there also consideration was for promotion after completion of Kalawadhi. There was Kalawadhi of four years though there was specific issue decided whether on the completion of Kalawadhi the employer is bound to consider the case of person for promotion when there was vacancy available but the Court at the end held that as the posts were available on 6.4.1994 on that day no departmental proceeding was pending though subsequently the departmental proceeding was initiated in



which he was exonerated. An another departmental proceeding was subsequently initiated, there punishment was passed for deduction of 25% pension. The Court has held that as on the aforesaid date the post was vacant and the person was entitled for promotion accordingly directed to grant the promotion.

16. On consideration of the aforesaid judgment, in the present case in the year 1988 the Kalawadhi of two years is over for the purposes of granting promotion but the petitioner was granted benefit of promotion as Scientist in 1992 after direction from this Court though he become entitled in the year 1988. In the year 1992 he was not given the promotion to the post of Deputy Analyst on the premises that petitioner cannot be allowed to two jumps at a time and as such he was granted the promotion to the post of Scientist. Subsequently proceeding was initiated and that has come to an end on 22.10.2010 when finally the punishment was awarded of stoppage of one increment till his service period and this order was never challenged before any court, now it has attained finality. The question would arise merely on crossing the Kalawadhi whether the respondent is bound to consider the case of petitioner for promotion as Kalawadhi is a bar, before that there cannot be a consideration for promotion. When matter for promotion comes



for consideration then the employer has to see whether he is fit for promotion to next higher grade from earlier date. There is no pleading in the writ petition as to whether there was any vacancy available in the year 1988 as availability of vacancy is a major factor for consideration for promotion. But certainly after 1992 he was under the departmental proceeding mere pendency of departmental proceeding is not a ground for non-consideration of promotion as the matter of promotion would be placed before the departmental promotion committee and result will be kept in a sealed cover and after completion of the departmental proceeding the sealed cover will be opened. But in the present case before 1992 after completion of Kalawadhi, the case of the petitioner ought to have been considered for promotion on the next higher grade but that was not done. After 2000 only one vacancy is available in the State of Bihar and the petitioner is the senior most, though he is a scheduled caste candidate but can compete with general candidate in single vacancy and his case ought to have been considered for promotion.

17. In view of the aforesaid discussions this Court directs the respondents to consider the case of petitioner for promotion to the post of Deputy Analyst.

18. So far the claim has been made by the petitioner that after release from suspension the petitioner was asked to discharge the duty of Deputy Analyst claimed pay of that period, relied on the judgment in the case of Hari Om Sharma (supra) paragraph nos. 6 and 8 and Prafulla Ranjan Shrivastava (supra), in view of aforesaid judgments the respondents are directed to consider the case of the petitioner for granting him the salary as he has discharged the duty of Deputy Analyst in the pay scale of Scientist in terms of Bihar Service Code.

19. With the aforesaid observation and direction this writ petition is allowed.

Vinay/-

(Shivaji Pandey, J)

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