

IN THE HIGH COURT OF JUDICATURE AT PATNA

**Letters Patent Appeal No.1077 of 2012
IN
Civil Writ Jurisdiction Case No. 9098 of 2009**

- =====
1. State Of Bihar Through Chief Secretary, Government Of Bihar, Patna
 2. Commissioner-Cum-Secretary, Department Of Water Resources, Government Of Bihar, Patna
 3. The Commissioner-Cum-Secretary, Department of Finance, Government of Bihar, Patna.
 4. Joint Secretary, Department Of Water Resources, Government Of Bihar, Patna
 5. Engineer-In-Chief, Department Of Water Resources, Government Of Bihar, Patna

.... Appellants

Versus

Krishna Kumar Sinha Son Of Late Ganga Prasad Resident Of Pahari Lane, New Godown, P.O.- Gaya, Police Station- Kotwali, District- Gaya

.... Respondent

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Appearance :

For the Appellants : Mr. Mayank Rukhaiyar, AC to G.A.1

For the Respondent : Mr. Kumar Kaushik &

Mr. Jay Prakash Sharma, Advocates.

For the Intervener : Mr. Sanjay Kumar Ojha, Advocate.

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CORAM: HONOURABLE MR. JUSTICE NAVANITI PRASAD SINGH

and

HONOURABLE MR. JUSTICE JITENDRA MOHAN SHARMA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE NAVANITI PRASAD SINGH)

Date: 11-02-2015

There are two intervener applications being I.A. No. 6704 of 2014 and I.A. No. 595 of 2015 by which the persons are seeking to intervene in this appeal opposing the stand of the State as they have similar subsisting interest similar to the writ petitioner.

The intervener applications are allowed and the interveners are also heard along with the writ petitioner.

The State is in appeal being aggrieved by the judgment and order dated 27.09.2011 in C.W.J.C.No. 90981 of 2009, whereby the prayer of the writ petitioner who is the sole respondent in this appeal has been allowed.

The question is purely a question of law and there are no disputes

in facts. The issue involved is whether the writ petitioner who entered into the Government service as a Junior Engineer and was promoted in the cadre of an Assistant Engineer through 3% quota fixed for those Junior Engineers who enhanced their qualification to the degree or equivalent to that, i.e. AMIE (Associate Members of Institution of Engineers in India) the said promotion would deprive them of the first ACP.

The learned single Judge held that they would be deemed to be promoted and appointed to the cadre of the Assistant Engineer by virtually passing a competitive examination and that being so their past services for ACP would not be counted. This stand the State challenges in this intra- court appeal.

Primarily submission of the State is that rules have to be applied and such rules do not contemplate such a promotion. The rules read as a whole clearly stipulates various situations and the explanation to the said rules which is statutory makes the situation clear. Once the position is clear then it is not open to the Court to read the rule otherwise.

On the other hand, on behalf of the sole respondent who was the writ petitioner as also the intervener who have entered at this stage it is submitted that if the rules are not read as read by the learned single Judge it may lead to anomaly at a future stage apart from causing discrimination.

We have resolved two stands. So far writ petitioner is concerned, the facts are not in dispute which are as follows:-

In 1967 the writ petitioner who was then a diploma holder engineer joined as Junior Engineer. In 1975 he cleared AMIE certification which is equal to a degree in engineering and having thus enhanced his educational qualification to the degree level he became entitled to be considered for promotion to the cadre of the Assistant Engineer in 3% quota reserved for such persons. Upon there being vacancy, which was in 1979, he was appointed in the cadre of Assistant



Engineer upon promotion through this reserved channel. In 2003 when Assured Career Progression Scheme came into force with effect from 09.08. 1999 it replaced the earlier Time Bound Promotion Scheme. The State considering the services of the writ petitioner with effect from 1967 and considering that he had earned promotion to the post of Assistant Engineer took the stand that having received promotion he would not be entitled to the first ACP, but then considering that he had got promotion in 1979 and had been in service since 1967 on completion of 24 years of service, i.e. with effect from 1991 he would be entitled to second ACP alone. Thus, evidently having got promotion to the cadre of Assistant Engineer he would be only entitled for up-gradation of pay scale instead of ACP. On the other hand, the writ petitioner submits that having got appointment as Assistant Engineer by dint of his merit and up-gradation of his educational qualification his services prior to 1979, when he was so promoted and appointed, should not be counted and accordingly he would be entitled to the first ACP in 1991, i.e. twelve years from 1979 and it would actually become available to him with effect from 1999 and thereafter he would be entitled to second ACP in the year 2003 i.e. 24 years from 1979 prior to his superannuation. The learned single Judge has accepted the writ petitioner's contention which is challenged in this appeal by the State.

It appears that the Fourth Pay Revision Committee was set up by the State Government. It made its recommendations and one of them was that due to paucity of promotional posts most of the employees suffered from long stagnation and as a measure for anti stagnation it had recommended that all persons who were otherwise fit for promotion but could not get promotion because of non availability of posts at the promotional level would get up-gradation in their pay scale in a time bound manner. In the case of **Daya Shankar Singh Vs. The State of Bihar**, reported in 2010 (3) PLJR 220 one of us had in

detail discussed the scheme and its implications. This was accepted by the Government and this led to the time bound promotion scheme. Apparently, the Government then thought over the matter once again. The said time bound promotion scheme ended in or about 1995 and ultimately the Government came up with the scheme of Assured Career Progression in the year 2003 with effect from 1999.

It has been rightly pointed out that essentially and principally the rational behind the two schemes is not much different. Now we may refer to Rule-4 of the Bihar State Employees Conditions of Service Conditions (“Assured Career Progression Scheme”) Rules, 2003 which is quoted hereunder:-

“(4) **Eligibility and condition:** The eligibility under this scheme shall be regulated by the following conditions:-

(1) The basic criteria for the sanction of financial Progressions under the ACP scheme is whether the concerned employee has been working in the same scale of pay, including the revised scale for the prescribed period of 12/24 years. In such a situation, higher scales of pay shall be sanctioned irrespective of the fact that the persons has worked on different posts in the same scale.

Provided that if **appointment** on a post, different from the post on original **appointment**, is made in the higher scale of pay, then it shall be treated as **direct recruitment** and **previous service** shall not be counted for the purpose of sanction of the benefits of financial progression under the Scheme.

Example: (i) if a person working as Sweeper is recruited on the post of orderly, the scale of pay of which is the same, previous service shall be counted.

(ii) In case of recruitment from the post of orderly to the post of driver, which has a higher as scale of pay the service rendered on the post of orderly shall not be counted.

(2) Appointment made to higher post on the basis of selection made through **limited competitive examination**, shall be treated as **direct recruitment** for the purpose of sanction of financial progression under the Scheme and Service rendered in the lower scale of pay shall not be counted if there is provision for direct recruitment in the relevant Recruitment Rules.

Provided that if the relevant recruitment rules, a **promotion quota** has been fixed for the employees in the lower scale of pay then **such appointment** shall be treated as **promotion** for the purpose of benefit of financial progression under the scheme and the past service **shall be counted** for the sanction of benefits of financial progression.

EXPLANATION:

(i) For example, if the relevant Recruitment Rules

provide for filling up of vacancies of Deputy Collectors cadre only by direct recruitment and any secretariat Assistant is required in the said grade, through limited competitive examination then it shall be treated as direct recruitment for the purpose of sanction of benefit under the Scheme. In such cases, period of service rendered in a lower pay scale shall not be counted for the purpose of benefit of financial progression under the Scheme. On the other hand relevant Recruitment Rules of appointment to LDC prescribe a promotion quota for Group-‘D’ employee so the service rendered as a Group-‘D’ shall be counted for sanction of financial progression under the scheme subject to the promotional quota and they would be treated as having obtained one financial progression.

(ii) A promotion quota is fixed for Junior Engineers in the Assistant Engineers Cadre, though there is no provision for competitive examination for this promotion. However there is provision for Junior Engineer, on acquiring an Engineering Degree to get promotion into the Cadre of Assistant Engineers. Therefore, a Junior Engineer, when he has been appointed to the post of Assistant Engineer shall be treated as having got a promotion for the purpose of sanction of benefits of financial, progression under the Scheme, even though the both the cadres are separate both employees shall be deemed to have got the first financial progression. “

On behalf of the writ petitioner and the interveners it is submitted that in terms of Rule 4 (1) and in particular proviso thereto the writ petitioner having attained higher qualification while working as Junior Engineer was appointed as Assistant Engineer and therefore his previous services would not be counted.

On behalf of the State with reference to Rule 4 (2) and proviso thereto read with explanation (ii) thereto submits that the writ petitioner was appointed upon promotion. He could not be taken to be a direct recruit and having been appointed by promotion through the quota reserved, not by way of competitive examination and therefore his past services cannot be ignored.

Having heard the learned counsels at length and considered the matter, in our view the submissions on behalf of the State has to be accepted. The view taken by the learned single Judge that having enhanced the qualification it would be akin to the competitive examination and thus they would be treated as

direct recruit is not sound as it ignored the substantial part of Sub Rule 2 of Rule 4 of the Rules. It is well settled rule of interpretation that rules like any other statutes have to be harmoniously construed and no part of rules and statutes have to be held to be redundant. It is again well settled principle that unless the statutes provides the Courts cannot start creating deeming fiction. That is reserved for the legislature.

If we read whole Rule-4 as quoted above to us there appears to be a rational which distinguishes groups of cases, one where persons are directly appointed or appointed through the competitive examination, upon promotion. There direct recruitment is also provided. These are all taken to be direct recruitment or direct appointment, thus, ignoring their past services. The other class of the cases are where it is merely a promotion or appointment by way of promotion to the higher cadre in quota fixed for the said promotion. There could be regular promotion within a quota or promotions upon achieving the higher education qualification. They are distinct from direct recruits or recruitment on the post through the limited competitive examination. There being two distinct classes, there is a reasonable classification and later does not get the disadvantage of counting the past services. The past services are to be taken into account there.

If we look specifically to the proviso of sub. Rule 2 of Rule 4, the requirement is of promotion quota and if a person comes through that quota then he cannot be equated to the earlier clause of direct recruits or recruitment through the limited competitive examination and his past services have to be counted. This position has been made abundantly clear by explanation (ii) to the said rule which deals specifically with the case of the writ petitioner. To us unless this part of the statutes is declared ultra-virus we are bound to take cognizance of the statutes and apply it to the case before us. The statutes lead to no discrimination. Explanation (ii) in clear terms provides that where Junior Engineer acquiring an Engineering



Degree gets promotion into the cadre of Assistant Engineer it would be deemed as having got a promotion and that promotion would be deemed to be the first financial progression, thus understood this there is no scope for the writ petitioner to contend otherwise. We are bound by the statutes and thus we cannot uphold the view taken by the learned single Judge that acquiring higher qualification would be akin to appearing in a competitive examination. This line of reasoning ignores not only the proviso of sub rule (ii) of rule 4 but also ignores the statutory explanation 2 of the said rules. That is impermissible. No part of statutory rules can be ignored or held redundant if the meaning is plain and clear.

In that view of the matter, we cannot uphold the judgment of the learned single Judge. We, accordingly, set aside and hold that the writ petition ought to have been dismissed upholding the stand of the State by disallowing the assured career progression to the writ petitioner.

In fairness with the learned counsel for the writ petitioner we must notice the submission that in future there may be discrimination or conflict. By illustrating this he submits that this anomaly in fact has arisen.

As noted above the writ petitioner joined as Junior Engineer in 1967 and was promoted to the post of Assistant Engineer in 1979, i.e. being treated as first assured career progression. He is thereafter given second assured career progression with effect from 1999 though according to the writ petitioner it ought to be given in 2003 with grant of first ACP in 1999 which became due in 1991. He then points out that when he was already in the cadre of Assistant Engineer in 1979 those direct recruits who joined later in the year 1979 or 1980 and were thus junior to him got their first ACP i.e. they got the pay scale of Executive Engineer in 1999 and then they reached at the scale of the Superintending Engineer in 2003-2004 on getting 2nd ACP, whereas, the writ petitioner who was senior to them, as per ACP statute got only second time bound

promotion in 1999 and thus they got struck at the level of Executive Engineer pay scale from 1999 and thus their juniors by virtue of this ACP would be getting higher pay scale. So far financial progression is concerned, this financial progression is personal promotion and therefore the anomaly now is that though the writ petitioner is senior to the direct recruit he is in the pay scale of the Executive Engineer, whereas, his juniors who were direct recruits to the post of Assistant Engineer are now in the pay scale of the Superintending Engineer. Normally, these are met by stepping up of the pay scale to protect the seniors but that in our view could be a matter for the State to consider it at the first instance. It would be for the State to examine whether in fact such anomaly has arisen and if it has arisen then the State would have to immediately take steps to remove this anomaly and under no circumstances apart from the circumstances where the senior suffers a disqualification can the senior receive or be in a pay scale lower than his juniors.

Advisedly, we are not deciding this issue and leave it upon the parties to first raise it before the State Government and then they or any one dissatisfied would have remedy in accordance with law.

With these observations and directions this letters patent appeal is allowed.

(Navaniti Prasad Singh, J)

Abhay/-
AFR

(Jitendra Mohan Sharma, J)

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