

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.1695 of 2011

IN

Civil Writ Jurisdiction Case No. 3911 of 2010

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1. The State of Bihar through the Principal Secretary, Water Resources Department, Sinchai Bhawan, Third Secretariat, Patna.
 2. The Under Secretary, Water Resources Department, Sinchai Bhawan, Third Secretariat, Patna.
 3. The Principal Secretary-cum-Commissioner, Finance Department, Government of Bihar, Main Secretariat, Patna. Appellants.

Versus

1. Birendra Prasad, S/o Sri Shiva Prasad, R/O Prasad Apartment, Flat No. 201, Block B, Mohalla- Hanuman Nagar, P.S.- Patrakarnagar, Town and District- Patna.
 2. Gauri Shankar Ram, S/o Sri Sheo Nath Ram, R/O Rajapur, Ekma, P.S.- Ekma, District- Saran.
 3. Jugal Kishore Mishra, S/o Sri Chittaranjan Mishra, R/O Village- Bandanwar, P.S.-Pathargama, District- Godda.
 4. Shila Nath Pandey, S/o Sri Ram Nath Pandey, R/O Road No.1, Buddha Nagar, Chiraiyatand, P.S.- Kankarbagh, District- Patna.
 5. Tapan Kumar Das, S/o Late Chittaranjan Das, R/O Village and Post - Noorsarai, P.S.- Noorsarai, District- Nalanda.
 6. Md. Parwaiz Alam, S/o Md. Hashim Ansari, R/O Village and P.S.- Madhepur, District- Madhubani.
 7. Shivaji Prasad Gupta, S/o Late Radha Krishna Prasad Gupta, R/O Bariahi Bazar, P.S.- Bangaon, District- Saharsa.
 8. Dinesh Chandra Ram, S/o Late Murli Ram, R/O Village- Palaunjia, P.S.- Birni, District- Giridih. Respondents.
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Appearance :

For the Appellants : Mr. Roy Shivajee Nath, AAG-3
Mr. Amrendra Kumar, JC to AAG-3.
For the Respondents : Mr. Jitendra Singh, Sr. Adv.
Mr. Akashdeep, Adv.

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CORAM: HONOURABLE MR. JUSTICE NAVANITI PRASAD SINGH

And

HONOURABLE JUSTICE SMT. NILU AGRAWAL

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE NAVANITI PRASAD SINGH)

Date: 17-08-2015

The State is aggrieved by the judgment and order dated 01.10.2010 passed in C.W.J.C. No.3911 of 2010 (Birendra Prasad and others Vs. the State of Bihar and others). The

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contesting respondents in this Intra-Court appeal have been heard and, with consent of parties, this matter was taken up for final disposal at this stage itself.

2. The writ petition was filed in the year 2010 making a grievance as against the order dated 22.01.2008. This order directed the writ petitioners/contesting respondents herein to submit prescribed forms in format for Contributory Provident Fund (hereinafter in short 'CPF') scheme, failing which their salary would be stopped. The dispute being whether the writ petitioners could be forced to join the new pension scheme i.e. the CPF scheme or were they entitled to the pension scheme as prevailed earlier. The difference being in the former, which was a new scheme, a lump-sum payment is made on superannuation with annuity through the third party. Under the old pension scheme, they have a right to receive pension right through their life from the State. The learned Single Judge decided in favour of the writ petitioners holding that as the writ petitioners had applied to the State, pursuant to the advertisement issued in the year 1988 though the appointment were made on 04.05.2007, pursuant to orders of this Court, their rights to receive pension were crystallized the day they had made the application in the year 1988. It is the correctness of this view that has been challenged by the State in

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this Intra-Court appeal.

3. Having heard Sri Roy Shivajee Nath, learned AAG-III and Sri Jitendra Singh, learned senior counsel for the contesting respondents, we are of the considered opinion that the judgment of the learned Single Judge cannot be sustained in law. There is a difference between the right and procedure for selection and the right to privileges under a service. The right to procedure of selection or for selection is governed by the state of affairs existing on the date of application. The procedure of selection cannot be changed once advertisement has been issued and applications have been invited. This is what the Apex Court had held in the case of **N.T. Bevin Katti etc. Vs. Karnataka Public Service Commission and others** since reported in **AIR 1990 SC 1233 : (1990) 3 Supreme Court Cases 157**. This decision was wrongly relied by the writ petitioners and wrongly applied by the learned Single Judge, for the proposition that the right crystallizes even in terms of the service conditions. The judgment is otherwise. It clearly lays down that the proportionate reservations fixed at the time of advertisement cannot be changed in course of the selection process. This case relates to rights created or crystallized at the time when applications are made in respect of the procedure of selection. It is totally a different matter when we come to the

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rights under a service. Unless a person is born in the cadre, he cannot claim the privileges or the rights under the cadre. His rights in the cadre gets crystallized only upon his selection and appointment in the cadre and not prior to that. If this distinction is borne in mind then the order and judgment of the learned Single Judge, to the contrary, cannot be sustained.

4. Here, though the contesting respondents, who were writ petitioners, had applied for the posts of Bill Clerk in the year 1988, which post itself was abolished in the year 2006, pursuant to orders issued by this Court, they were finally appointed on 04.05.2007, on a new post of Lower Division Clerk, which was subsequently, on protest, while order passed in a contempt petition, changed to Upper Division Clerk in the revised higher pay-scale with effect from 28.12.2007. It is in the mean time that with effect from 01.09.2005, there was this shift and change in the pension scheme as applicable to all State Government servants and services. Thus, anyone who was appointed beyond and after 01.09.2005 could not be given benefit of the old pension scheme. He had no option. He would by default be subject to the new pension scheme i.e. of CPF scheme and other benefits. This change having taken place almost two years prior to their appointment on 04.05.2007, in our view, learned Single Judge was

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in error in directing that the writ petitioners, by virtue of their application made in the year 1988, were entitled to the old pension scheme as their rights in the service became crystallized then. At the cost of repetition, the only thing that had crystallized was their right to be considered for selection. The right to be appointed crystallized upon their selection, which was, ultimately, done in the year 2007. By then rules had changed. Thus, so far the order of the learned Single Judge under appeal is concerned, cannot be sustained and is set aside.

5. However, Sri Jitendra Singh, learned senior counsel draws attention of this Court to a fact that has been brought on record in the appeal proceedings that the writ petitioners had applied, pursuant to advertisement no.04 of 1988, for the post of Bill Clerk. Similarly, there was an advertisement, being advertisement no.05 of 1988, in regard to some posts in the Subordinate Education Service. It was after a long delay that writ petitioners' appointment was made on or about 04.05.2007, whereas, pursuant to advertisement no.05 of 1988, the appointments were ultimately made on 07.01.2013, but, as per the decision of the Government dated 20.01.2015 (Annexure-D to the second supplementary counter affidavit to this appeal), the Government citing special circumstances has granted the benefit to

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those persons of the Subordinate Education Service, though appointed on 07.01.2013, under old pension scheme and not under the new CPF scheme, which was effective from 01.09.2005. In this appeal, there is no rebuttal to that basic issue. We do not know what the special circumstances were and whether those special circumstances would justify any distinction between the case of the writ petitioners/respondents herein and those who were appointed in Subordinate Education Service. This is a matter which has to be decided upon various facts, which are not before this Court.

6. While allowing this appeal and setting aside the order/judgment of the learned Single Judge, we would direct the State to examine the case of the petitioners, in view of the decisions taken in respect of the persons, who were appointed in Subordinate Education Service pursuant to advertisement no.05 of 1988, and, on parity of reasoning, take a decision appropriate to the case whether they would grant privilege of old pension scheme to the writ petitioners/respondents as well or the decision has to be taken keeping in view that it involves only nine persons who would shortly superannuate. The decision should be taken with promptitude within the next month without fail. The decision so taken would take into account any representation which the writ petitioners/respondents would file, which should be filed within a

week itself before the Principal Secretary, Water Resources Department as well as the Principal Secretary-cum-Commissioner, Finance Department, Government of Bihar, Patna.

7. With these observations and directions, this appeal is allowed.

(Navaniti Prasad Singh, J.)

(Nilu Agrawal, J.)

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