

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.6314 of 2011

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Tarkeshwar Thakur, S/o Bhikhari Thakur , Resident of Mohalla - Nawadah
Arrah, P.S. and P.O. Arrah, District -Bhojpur

.... Petitioner/s

Versus

1. The State Of Bihar
2. The Secretary, Minor Irrigation Department Vikash Bhawan, New Secretariat,
Patna
3. The Engineer-In-Chief, Tubewell Department Bishwaswaraiya Bhawan, Bailey
Road, Patna
4. The Chief Engineer (South), Minor Irrigation Department Area Sheikhpura,
Government Of Bihar, Patna-14
5. The Superintending Engineer, Tubewell Circle Ara, Bhojpur
6. The Executive Engineer, Tubewell Division Ara

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Gopal Govind Mishra

For the Respondent/s : AC to SC26

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CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR

ORAL JUDGMENT

Date: 11-12-2015

Heard Sri Gopal Govind Mishra, learned counsel for the
petitioner and learned AC to SC No. 26.

The petitioner, invoking writ jurisdiction of this court
under Article 226 of the Constitution of India has prayed for
issuance of writ in the nature of Mandamus for commanding the
respondent authorities to promote the petitioner on the post of
“Muharrir” in the Tubewell Circle, Arrah w.e.f. from due date and
further issuance of writ in the nature of Certiorari to quash the order
passed by the Chief Engineer vide Memo No. 610 dated 21.5.2010 as



annexed to Annexure - '8' of this writ petition whereby and whereunder the promotion of the petitioner was cancelled which was earlier approved by the Chief Engineer vide Memo No. 475 dated 16.4.2010 as per Annexure - '7' of this writ petition and grant of other consequential benefits for which the petitioner is entitled under the law.

It is the case of the petitioner that he was appointed on 11.2.1973 as "Chainman" in Minor Irrigation Department, Tubewell Circle, Arrah. Subsequently, vide order dated 13.1.1978 (Annexure - '2') the petitioner was promoted as "Muharrir". He continued on the promoted post. However, subsequently by order dated 27.9.1978 (Annexure - '3') the said promotion was cancelled. By order dated 27.9.1978 promotion of petitioner along with other five persons was cancelled and petitioner was directed to again function as "Chainman". However, subsequently one of the persons included in Annexure - '3' namely, Sri Bansh Bahadur Giri was granted promotion as 'Muharrir' vide order dated 21.3.1979. Thereafter, the petitioner raised his grievance and even approached this court by filing a writ petition vide CWJC No. 4052 of 1992 which was disposed of on 18.2.1993 by division bench of this court to enable the petitioner to file representation before the competent authority. Thereafter, the petitioner filed representation and finally on



20.11.2008 vide Annexure - '6' to the writ petition the petitioner was promoted as "Muharrir" with retrospective effect as was granted to Sri Bans Bahadur Giri. This order was passed by the Superintending Engineer in anticipation of approval of the Chief Engineer. After the order dated 20.11.2008, it was submitted by learned counsel for the petitioner that petitioner started discharging duty as "Muharrir". However, finally his promotion as "Muharrir" was approved by the Chief Engineer by order contained in Memo No. 475 dated 16.4.2010. After the approval of promotion of the petitioner as "Muharrir" by order dated 16.4.2010 (Annexure - '7' to the writ petition) almost after about one month i.e. by order dated 21.5.2010 (Annexure - 8) the same Chief Engineer recalled its earlier order and cancelled the order of approval dated 16.4.2010 whereby promotion of petitioner as "Muharrir" was approved with retrospective effect. The said order is under challenge in the present writ petition. Before approaching this court the petitioner filed representation before the Chief Engineer vide Annexure - '11' to the writ petition. However, since no heed was paid on his representation the petitioner was constrained to approach this court by filing the present writ petition in the year 2011 itself.

Sri Mishra, learned counsel for the petitioner has assailed the impugned order dated 21.5.2010 contained in Memo No. 610



Annexure - '8' to the writ petition primarily on the ground that once the Chief Engineer in its administrative capacity had approved the promotion of the petitioner as "Muharrir", subsequently without any specific instruction or rule he was not authorized to review his own order. It has been argued that the order impugned was issued without affording any opportunity to the petitioner. According to learned counsel for the petitioner the order impugned is also liable to be set aside in view of violation of the principle of natural justice. To substantiate his aforesaid submission learned counsel for the petitioner has placed reliance on a division bench judgment of this court reported in **1994 BBCJ 177 (Dr. Awadh Kishore Prasad Yadav and others Versus The State of Bihar & Ors.)**. He has specifically placed paragraph no. 12.1, 12.3 of the said judgment. On the aforesaid grounds a prayer has been made to set aside the impugned order and direct the respondents to grant all consequential benefits. By filing supplementary affidavit it has been indicated that during the pendency of the writ petition the petitioner superannuated with effect from 31.10.2014.

Learned counsel for the State by way of referring to the averments made in the counter affidavit has opposed the prayer of the petitioner. Learned State Counsel has placed reliance on the statement made in paragraph no. 5(iv) of the counter affidavit and he submits



that the petitioner was under work charge establishment and as such there was no question of granting promotion to the petitioner. Besides this he further submits that the post of “Chainman” is not under the category of promotional post. On the aforesaid grounds the writ petition has been opposed.

In the supplementary affidavit filed by the petitioner it has been stated in paragraph no. 7 that number of persons who were under work charge establishment were given promotion. Name of such persons has also been mentioned in paragraph no. 7 of the supplementary affidavit which has not been rebutted. It has not been controverted by way of filing any counter affidavit to the supplementary affidavit.

Besides hearing learned counsel for the parties, I have also perused the materials available on record. Fact remains that the petitioner was initially promoted as “Muharrir” in the year 1978 itself by order dated 13.1.1978 (Annexure – ‘2’). However, subsequently, promotion of the petitioner as “Muharrir” was cancelled on 27.9.1978 (Annexure - ‘3’). By the same order, i.e. order dated 27.9.1978 along with petitioner, promotion of other five persons including one Sri Bansh Bahadur Giri was also cancelled. Subsequent to cancellation order one of the persons from the same list namely Sri Bansh Bahadur Giri was also promoted as



“Muharrir”. Thereafter, the petitioner claiming equality filed representation and finally by order dated 20.11.2008 the petitioner’s promotion as “Muharrir”, with retrospective effect was passed vide Annexure - ‘6’ to the writ petition by the Superintending Engineer. This order was passed in anticipation of approval of the Chief Engineer. Finally, the Chief Engineer by its order contained in Memo No. 475 dated 16.4.2010 approved the promotion of the petitioner with retrospective effect. However, the same authority i.e. the Chief Engineer by the impugned order cancelled the earlier order of approval dated 16.4.2010 which has been assailed in the present writ petition. Though, in the case counter affidavit has been filed, it has not been indicated as to whether prior to passing of the order which was directly going to affect the indefeasible right of the petitioner, whether any opportunity was given to the petitioner or not. Nor in the counter affidavit any stand has been taken that the Chief Engineer was empowered by any instruction or rule to review its own order. Obviously the order impugned was passed without following the principles of natural justice and the said order was passed without any specific instruction or rule authorizing the Chief Engineer to review its own administrative order and as such the same is liable to be set aside. It has already been observed by division bench of this court in paragraph no. 12.3 in Dr. Awadh Kishore

Prasad Yadav Case (Supra) that a administrative order may not be reviewed unless the authority concerned is authorized specifically to do so. It would be appropriate to quote paragraph no. 12.3 of the said judgment, which is as follows:-

“12.3. One of the main questions in this connection is whether they had any such power to withdraw such concurrence. It is well settled that the power of review cannot be easily implied when it is not expressly conferred. Reference may be made in this connection to the decision in Patel Narshi Thakershi and others V. Pradumansinghji Arjunsinghji (ibid), mentioned above. In this connection reference may also be made to the case of Gram Panchayat V. Director , Consolidation of Holdings: A.I.R. (1990) S.C. 763. Realizing this legal implications, this is why it is being contended on behalf of the commission that it was not a case of “review” but only a case of “correction of mistakes”, . In my opinion, it is merely a play of words. The commission had given its concurrence to such confirmation and thereafter it has withdrawn the same. By whatever name it is called, this, in my opinion, amounts to exercise of power of review which the Commission did not have. Reference may also be made in this connection in the case of Smt. Saraswati Mishra V. Chancellor, Ranchi University (ibid).”

In view of the proposition of law the order contained in Annexure - ‘8’ which is virtually a review order is liable to be set aside on the ground that administrative order was not required to be

reviewed by the same authority without any authorization. Secondly the order impunged is also liable to be set aside in view of the fact that before issuance of such order no opportunity was given to the petitioner whereas the petitioner had already accrued the right by way of issuance of promotional order vide Annexure - '6' to the writ petition which was passed long back in the year 2008. Accordingly the order impugned is hereby set aside. The writ petition is allowed with all consequential benefits.

(Rakesh Kumar, J)

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