IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.1566 of 2015
IN
Civil Writ Jurisdiction Case No. 5159 of 2013

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1. The State of Bihar
2. The Secretary, Public Works Department, Building Construction Department, Bishwasaraiya Bhawan, Bihar, Patna
3. The Chief Engineer, Dakshni Upbhag Building Construction Department Bihar, Patna
4. The Superintending Engineer, P.W.D., Building Circle, Gaya
5. The Executive Engineer, P.W.D. Building Division, Gaya
6. The Accountant General, Bihar, Patna

.... Appellants

Versus

Bimli Devi W/o Late Sushil Paswan, Resident of village - Nagwa, P.O. Damodarpur, Baldha, Block & P.S. Nagarnausa, District - Nalanda

.... Respondent

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Appearance :
For Appellants : Mr. Mani Kant Mishra, GP 25
Mr. Rajesh Kumar Sinha, AC to GP 25
For the Respondent : Mr. Anil Kumar Sinha, Advocate

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CORAM: HONOURABLE THE ACTING CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)
Date: 24 -11-2015

The short question, which has arisen in the present appeal, is: whether the family members of a deceased employee, who was appointed in a *work charged* establishment and died, while working as a *work charge* employee, would be entitled to *family pension* under the Bihar Pension Rules, 1950?

2. The State of Bihar and its officials have preferred this appeal, under Clause 10 of the Letters Patent of this High

Court, being aggrieved by an order of learned Single Judge, dated 27.8.2014, passed in CWJC No. 5159 of 2013, whereby the learned single Judge, relying on another decision of a single Judge of this Court in the case of ***Most. Baby Devi vrs. State of Bihar,*** reported in ***2012 (3) PLJR 910,*** has allowed the writ application and directed the respondent State to consider granting of *family pension* and other benefits to the writ petitioner, which she may be entitled to, by treating her husband, who was a *work charged* employee, as a *regular employee* under them.

3. The facts over which there is no dispute between the appellants and the respondent are that the husband of the respondent, Sushil Paswan, was initially appointed, on 9.9.1982, on *muster roll*, by an order issued by the Executive Engineer, Building Construction Department, Gaya, for a period of six months. He was, later on, taken as a *work charged* employee on the post of Chowkidar by a letter, dated 1.2.1983, issued by the Executive Engineer of the said Department. He died on 27.4.2009. His widow, who is the respondent in the present appeal, approached this Court by filing an application under Article 226 of the Constitution of India, on 8.3.2013, giving rise to CWJC No. 5159 of 2013, seeking a direction to the State of Bihar and its officials to pay to her the *family pension*, gratuity, group insurance, leave encashment and general provident fund amount, consequent upon the death of her husband, by treating the service of her deceased husband as that of a regular employee.

4. Before we deal with the stand taken by the respondent-State of Bihar in their counter affidavit in the writ proceedings, it has to be kept in mind that till the date of death of the husband of the respondent, he had been serving as a *work charged* employee inasmuch as his service had not, in fact, been regularized nor is there any pleadings on record to demonstrate that the respondent's husband had ever claimed regularization on the basis of his continuous service as a *work charged* employee.

5. In their counter affidavit, the appellants contended that under the relevant scheme of the State Government, a person, who had completed *continuous service* for a term of five years before cut-off date of 21.8.1984, would be eligible to be absorbed in regular establishment and since the husband of the petitioner had not completed five years of *service* before the aforesaid cut-off date, he was, in terms of the said scheme, not treated to be eligible for being absorbed in regular service. It was the specific case of the State of Bihar, in the writ petitioner, that since the deceased husband of the respondent was not absorbed as a *regular employee*, her claim for payment of death-cum-retirement benefits was not admissible.

6. In reply to the counter affidavit, the respondent herein, as writ petitioner, relied on a Division Bench decision of this Court, in ***Kosi Project Workers Association vs. State of Bihar & Ors.,*** reported in ***2007(1) PLJR 358,*** to contend that in the light of the decision in ***Kosi Project Workers Association*** (supra), her husband was required to be treated as a *regular employee* of the State Government from the date he had completed one year of regular service in *work charged* establishment.

7. In support of her claim, the respondent herein also relied upon a Single Bench decision of this Court, in ***Most. Baby Devi vs. State of Bihar,*** reported in ***2012 (3) PLJR 910***. In ***Most. Baby Devi*** (supra), taking note of the fact that the State of Bihar had fixed the cut-off date as 11.1.1990 for the purposes of considering cases of regularization of services of *muster roll workers*, a learned Single Judge of this Court held that in the case of *work charged* employee too, the cut-off date fixed, i.e. 21.10.1984, should have been extended to 11.1.1990. In the case of ***Most. Baby Devi*** (supra), this Court, accordingly, allowed payment of *family pension* with effect from the date of death of the deceased employee.

8. We have heard learned State Counsel appearing on behalf of the appellant-State of Bihar and learned counsel representing the sole respondent.

9. The question of the respondent's legal entitlement for *family pension* is dependent upon the answer to the fundamental issue, namely, as to whether the service of the appellant's husband, as a *work charged* employee, could be said to be pensionable under the statutory provisions governing payment of pension/family pension.

10. No doubt, pension is a retirement benefit partaking the character of regular payment to a person in consideration of the past service rendered by him. The State Government employees of Bihar, holding permanent post in substantive capacity, are governed by the Bihar Pension Rules, 1950.

11. We are, therefore, required to look into, on the above aspect, the statutory provisions before we consider various judicial pronouncements including those relied upon in the order under appeal.

12. Rule 58 of the Bihar Pension Rules, 1950, prescribes that service of a Government servant will not qualify for *pension* unless it conforms to the conditions prescribed therein. For ready reference, Rule 58 of the Bihar Pension Rules, 1950, is being extracted hereinbelow:-

> ***"58. The service of a Government servant does not qualify for pension unless it***

> ***conforms to the following three conditions:-***
>
> *First – The service must be under Government.*
>
> *Second – The employment must be substantive and permanent.*
>
> *Third – The service must be paid by Government.*
>
> *These three conditions are fully explained in the following sub-sections."*
>
> (Emphasis added)

13. Manifestly thus, for a service to qualify for *pension*, it must be under the Government, employment must be substantive and permanent and that the service must be paid by the Government. If any of these three ingredients is found to be lacking, a service cannot be held to be *pensionable* under the Bihar Pension Rules. 1950, For the purpose of resolving the dispute, in question, we reiterate and clarify that only such Government servants can qualify for *pension* whose employment is "*substantive and permanent*".

14. In the present case, admittedly though, *work charged* service of the husband of the petitioner was not regularized. However, taking aid of a Division Bench decision of this Court in the case of ***Kosi Project Workers Association*** (supra) and a later decision of a Single Bench this Court in the case of ***Most. Baby Devi*** (supra), the learned single Judge, by the order under appeal, has held that the husband of the sole writ petitioner (i.e, respondent herein) was required to be treated as a regular employee for the purposes of payment of post-retiral benefits.

15. Before we refer to what has been laid down by the Division Bench in the case of ***Kosi Project Workers Association vs. State of Bihar [2007 (1) PLJR 358],*** we must refer to, and take note of, the case of ***Most. Roopkali Kuer vs. State of Bihar [2006 (1) PLJR 323]***.

16. In the case of ***Roopkali Kuer*** (supra), an identical issue, as to whether the family members of a deceased *work charged employee,* would be entitled to family pension or not was involved.

17. In ***Roopkali Kuer*** (supra), the Division Bench of this Court, noticing the Supreme Court's decisions in the cases of ***State of Rajasthan vs. Kunji Raman [AIR 1997 SC 693]*** and ***Jaswant Singh vs. Union of India [AIR 1980 SC 115),*** laying down the distinction between the *regular establishment* and the *work charged* establishment of the Government, held in paragraph 12 as follows:-

> **"12.** *Counsel for the appellant relied upon another* Single Judge *decision of this Court in Shambhu Sharan Singh vs. State of Bihar and others, 1998(3) PLJR 908. In that decision a direction was given to issue sanction order with respect to the retiral benefits*

legally payable to the deceased who had completed six years as a work-charged employee before his death while still in service. The decision simply proceeds on the basis that the Government had taken a decision vide resolution, dated 22.10.1984 that the work-charged employees who had completed five years continuous satisfactory service should be regularized and be allowed all the retiral benefits, as admissible in the permanent Government service. This decision does not seem to be based on sound principles. It does not take into consideration any other statutory provisions nor does it refer to the earlier binding judgments of the Supreme Court and this Court. I am clearly of the view that the decision in the Shambhu Sharan Singh (supra) does not form a good precedent to be followed. In any event the Government resolution, dated 22.10.1984 shall have no application in the case of the appellant's husband for the simple reason that he died on 7.3.1973."

18. Dealing with the Circulars issued by the State Government from time to time and the plea of deemed absorption as a regular Government servant, it was held, in ***Roopkali Kuer's*** *case* (supra), at paragraph-13, as follows:-

"13. *………. Learned counsel*

submitted that Ram Ayodhya Tiwari had completed five years of continuous satisfactory service in 1972 itself and hence, by the time of his death on 7.3.1973, he must be deemed to be in the regular establishment. In my view the submission is quite misconceived. In the first place the true import of regularization in the work-charged establishment has been explained in the decision in Kosi Project Workers' Association which is noticed above. Secondly and more importantly the circular, dated 23.10.1987 shall have no application in the case of Ram Ayodhya Tiwari who died in the year 1973. The circular of 1987 would apply only two such workmen who were in service as on 21.10.1984 otherwise it would lead to highly anomalous consequences. Take the case of an employee who worked in the work-charged establishment till 1980 or 1981 or 1982 and then abandoned the job and left the service. If the submission advanced on behalf of the appellant is to be accepted in the case of a deceased employee, then another who abandoned and left the job may also claim pension and family pension on the same logic."

19. The Division Bench of this Court, in the case of

Most. Roopkali Kuer (supra), relied upon a previous decision of a Divison Bench of this Court in the case of ***Kosi Project Workers Association vrs. State of Bihar & Ors. [1997(2) PLJR 355].***

20. From the decision in the case of ***Most. Roopkali Kuer*** (supra), we notice that the decision of this Court in case of ***Shambhu Sharan Singh vs. State of Bihar & Ors. [1998(3) PLJR 908]*** was specifically over-ruled. From the judgment under appeal, it transpires that learned Single Judge has relied upon the decision rendered in ***Most. Baby Devi vs. State of Bihar*** (supra), which is clearly based on the decision in ***Shambhu Sharan Singh*** (supra), but the decision, in Shambhu ***Sharan Singh*** (supra), was overruled by a Division Bench in Most. ***Roopkali Kuer*** (supra).

21. We further notice that in the case of ***Koshi Project Workers Association vs. state of Bihar [2007 (1) PLJR 358],*** the Division Bench, without noticing the previous decision of a Division Bench of this Court in the case of ***Roopkali Kuer vrs. State of Bihar***, held, in paragraph 8, as follows:-

> " ***8.*** *On the 4th December, 1949 the State Government incorporated in PWD Code Volume-1, the condition of work-charge establishment and thereby provided, amongst others, that the post of work-charge establishment which are*

of permanent nature, i.e. required for 12 months in a year and for long and indefinite period, will be made permanent and included in the permanent establishment and men employed on these posts, having one year's approved service will be included amongst permanent Government employees."

22. Later on, however, a Full Bench of this Court, in the case of ***Durganand Jha & Ors. vs. State of Bihar & Ors. [2007 (4) PLJR 259]***, had the occasion to determine and distinguish the status of the employees working in a *work charged* establishment *vis-à-vis* regular employment of the State Government. The Full Bench held, in paragraphs 14 to 16, as follows:-

***"14**. Employees of Work charged Establishment have separate entity and status than that of the regular establishment. Their regularization/promotion in the regular establishment, therefore, would be wholly without jurisdiction and violative of Articles 14 and 16 of the Constitution.*

***15.** There is great difference between Work charged Establishment and permanent establishment of the State. The permanent establishment has status of permanency and will continue for ever, whereas the Work charged*

Establishment is created for a temporary purpose to complete a particular work, for which the establishment has been made.

16. *Accordingly, a person engaged to discharge the duty of Work charged Establishment will cease to be an employee no sooner the work of that establishment would come to an end. Obviously, therefore, their rights and status are fundamentally different."*

23. On the question pertaining to regularization of the employees of *work charged* establishment, the Full Bench of this Court held, in paragraph 20, as follows:-

"20. …….*it would be appropriate to mention that concept of regularization should not be construed in any manner as the act of the authorities regularizing the employees, whose appointments were casual, contractual or on daily wages having no sanction of law in consonance with Articles 14 and 16 of the Constitution."*

24. An identical question has to been dealt with the Supreme Court, in case of ***Uttar Haryana Bijli Vitran Nigam Ltd. & Ors. vs. Surji Devi)***, reported in (2008) 2 SCC 310. Applicability of Rule 3.12 of Punjab Civil Services Rules, which is *pari materia* Rule 58 of the Bihar Pension Rules, 1950, fall for consideration in ***Uttar Haryana Bijli Vitran Nigam Ltd.*** *(supra)* as is evident from paragraph 10 of the said decision. For the facility of quick reference, paragraph 10 of the said decision is reproduced hereinbelow:-

> ***"10.*** *The State of Punjab made the Punjab Civil Services Rules. The said Rules, subject to modifications, became applicable to the State of Haryana. Vol. 2 of the said Rules inter alia provide for service qualifying for pension. Rule 3.12 thereof reads as under:*
>
> *"3.12. The service of a government employee does not qualify for pension unless it conforms to the following three conditions:*
>
> *First - The service must be under the Government.*
>
> *Second–* ***The employment must be substantive and permanent.***
>
> *Third – The service must be paid by the Government."*
>
> (Emphasis is added)

25. Interpreting the said provisions and the scheme for grant of *family pension*, the Supreme Court held, in ***Uttar Haryana Bijli Vitran Nigam Ltd.*** *(supra),* that the period during which an employee worked as a *work charged* employee can be taken into consideration only when his services are regularized and he becomes permanent and not otherwise.

In the case before the Supreme Court in ***Uttar Haryana Bijli Vitran Nigam Ltd.*** (supra), family members of a deceased *work-charged* employee had claimed *family pension*, which was denied, holding that the statutory provisions debar grant of *family pension* in favour of family members of a *work charged* employee.

26. Paragraph 16 of the said decision, being theme, is extracted below:-

> ***"16.*** *The Scheme relating to grant of family pension was made under a statute. A person would be entitled to the benefit thereof subject to the statutory interdicts. From a bare perusal of the provisions contained in the Punjab Civil Services Rules, Vol.2 vis-à-vis the Family Pension Scheme, it would be evident that the respondent was not entitled to the grant of any family pension. The husband of the respondent was not entitled to the grant of any family pension. The husband of the respondent was a work-charged employee. His services had never been regularized. It may be unfortunate that he had worked for 11 years. He expired before he could get the benefit of the regularization scheme but sentiments and sympathy alone cannot be a ground for taking a view different from what is permissible in law. (See Maruti Udyog Limited v. Ram Lal (2005) 2 SCC 638; State of Bihar vs. Amrendra Kumar Mishra (2006) 12 SCC 561; SBI vs. Mahatma Mishra (2006) 13 SCC 727;*

State of Karnataka vs. Ameerbi (2007) 11 SCC 681; and State of MP vs. Sanjay Kumar Pathak (2008) 1 SCC 456."

27. In the case of ***State of Rajasthan vs. Kunji Raman*** (supra), the Supreme Court lucidly drew the distinction between the employees of a *work-charged establishment* and employees of a *regular establishment* in the following words:-

> *" A work-charged establishment as pointed out by this Court in Jaswant Singh vs. Union of India (1997) 4 SCC 440: (AIR 1980 SC 115), broadly means an establishment of which the expenses, including the wages and allowances of the staff, are chargeable to "works". The pay and allowances of employees who are borne on a work-charged establishment are generally shown as a separate sub-head of the estimated cost of the works. The work-charged employees are engaged on a temporary basis and their appointments are made for the execution of a specified work. From the very nature of their employment, their services automatically come to an end on the completion of the works for the sole purpose of which they are employed. Thus a work-charged establishment is materially and qualitatively different from a regular establishment …….. So far as employees engaged on work-charged establishments are concerned not only their recruitment and service conditions but the nature of work and duties to be performed by*

them are not the same as those of the employees of the regular establishment. A regular establishment and a work-charged establishment are two separate types of establishments and the persons employed on those establishments thus form two separate and distinct classes. For that reason, if a separate set of rules are framed for the persons engaged on the work-charged establishment and the general rules applicable to persons working on the regular establishment are not made applicable to them, it cannot be said that they are treated in an arbitrary and discriminatory manner by the Government. It is well settled that the Government has the power to frame different rules for different classes or employees."

"The Apex Court, thus held that a Work charged Establishment broadly means an establishment of which the expenses including the wages and allowances of the staff are chargeable to works. The pay and allowances of employees, who are borne on Work Charge Establishment, are generally shown as a separate sub-head of the estimated costs of the works. The Work charged employees are engaged on a temporary basis and their appointments are made for execution of specified work. Their services automatically, therefore, come to an end on completion of the work for the sole purpose of which they are employed. A Work charged Establishment,

thus, differs from a regular establishment, which is permanent in nature."

28. In view of the decision of Division Bench, this Court in ***Most. Roopkali Kuer*** (supra) and subsequent Full Bench decision of this Court in ***Durganand Jha*** (supra), we are of the considered opinion that there cannot be automatic induction of an employee of a *work charged establishment* into a *regular establishment*. The view, taken by the learned Single Judge in case of ***Baby Devi*** (supra), is based on reasoning given in the case of ***Shambhu Sharan Singh*** (supra) without noticing the fact that the decision, in the case of ***Shambhu Sharan Singh*** (supra), stood already over-ruled, later on, by the Division Bench in the case of ***Roopkali Kuer*** (supra).

29. We are also of the view that the decision of the Division Bench of this Court, in case of ***Roopkali Kuer*** (supra), was not brought to the notice of the Division Bench in ***Koshi Project Workers Association vs. State of Bihar,*** reported in ***2007 (1) PLJR 358***. It is settled rule of precedence that in case of two conflicting decisions of Co-ordinate Bench, previous decision would be binding if the subsequent of Co-ordinate Bench has failed to notice the previous Co-ordinate Bench decision. Further, in view of the later Full Bench decision in the case of ***Durganand Jha & Ors. Vs. State of Bihar*** (supra), there can be no question of automatic absorption/regularization.

30. Coupled with the above, we find, from the pleadings on record, that it was never the case of the widow of the deceased employee at any stage that her husband was taken into *work charged* establishment after following the mandate of Articles 14 and 16 of the Constitution of India. Considering the Supreme Court's decision in the case of ***State of Rajasthan vs. Kunji Raman*** (supra), we are of the considered view that the manifest distinction between a *work charged employee* and *regular employee* has to be borne in mind, while deciding the question as to whether family members of the employees in *work-charged establishment,* would be entitled to *family pension* or not.

31. We find direct answer to the legal issue involved in the present appeal in the decision of the Supreme Court in the case of ***Uttar Haryana Bijli Vitran Nigam Ltd***. (supra). We accordingly hold that the service of the employees, working under *work charged* establishment, is not *pensionable* under the Bihar Pension Rules, 1950. The family members of such an employee will, therefore, not be entitled to *family pension*.

32. In the result and for the reasons indicated above, we hold that the order under appeal, dated 27.8.2014, passed by the learned single Judge in CWJC No. 5159 of 2013, is not sustainable and is accordingly set aside. LPA No. 1566 of

2015 stands allowed and CWJC No. 5159 of 2013 is dismissed.

33. No order as to costs.

(Chakradhari Sharan Singh, J)

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I A Ansari, ACJ.: **34.** While agreeing with the observations made and the conclusions reached in the present intra-Court appeal by my esteemed brother, Chakradhari Sharan Singh, J., I deem it necessary to add a few lines to cull out the position of law discussed above.

35. The expenses, including the wages and allowances of the staff in a *work charged establishment,* are chargeable to the works to be done by such an *establishment*. The pay and allowance of the employees, who are engaged in a *work charged establishment,* are, generally, shown as a separate cost under the estimated cost of the works. Inherently, therefore, the appointment of a *work charged employee* is temporary in nature inasmuch as the engagement comes to an end, which the project, when a *work charged establishment* undertakes, is complete.

36. In other words, the *work charged employees* are engaged on temporary basis till complete execution of the specified work for which the establishment may have been created. Since the very nature of the employment of a *work charged employee* is inherently temporary in nature, his service *automatically* comes to an end on the completion of the work, which was sole purpose of the establishment unless, otherwise, directed.

37. A r*egular employment* under an establishment, thus, differs from a *work charged establishment* and the persons, employed for these two types of establishments, form two separate and distinct classes. Consequently, if a separate set of rules are framed for persons engaged on *work charged establishment* and the general rules, which are, otherwise, applicable to persons working on the *regular establishment*, are not made applicable to the *work charged employees*, it cannot be said that the *work charged employees* were being treated arbitrarily or being discriminated against inasmuch as a Government has the freedom to frame different rules for different classes of its employees.

38. *Family pension* is provided to the family of a person, whose services are covered by the scheme relating to grant of *family pension* or the statute governing the grant of *family pension*. In the State of Bihar, *pension* is made available to a person by virtue of Rule 58 of Bihar Pension Rules, 1950, which we have reproduced above.

39. In order to apply Rule 58 of Bihar Pension Rules, 1950, his service has to be of the nature, as contemplated by Rule 58 of Bihar Pension Rules, 1950, Rule 58 of Bihar Pension Rules, 1950, requires that in order to be eligible for pension, a service must be paid by the Government and the employment must be substantive and permanent. Since a *work charged employee's* service is not substantive and permanent, he cannot claim *pension* under Rule 58 of Bihar Pension Rules, 1950, unless the provisions of Rule 58 of Bihar Pension Rules, 1950, are made applicable to him by any statute or by some executive instruction or scheme provided that such a executive instruction or scheme is, otherwise, valid in law. No statutory provision, executive instruction/circular or notification or scheme has been brought to our notice, which makes a *work charged employee* entitled to *pension* in the State of Bihar. A *work charged employee's* entity and status materially differs from that of the *regular employee*. The *permanent establishment* of a State Government has the state of permanency and will continue until abolished; whereas the *work charged establishment* is created as a temporary measure to complete a particular work and the engagement of the employees would come to an end, when the work is complete.

40. Necessarily, therefore, a person, engaged to work as a *work charged employee,* will cease to be an employee as soon as the work of the charged establishment comes to an end. The rights and status of a *work charged employee* are, therefore, different from that of a *regular employee*.

41. In the present case, since the writ petitioner-respondent's husband was, admittedly, a *work charged employee*, and there is no statutory provision, executive instruction, circular, notification or scheme of the State Government, which makes a *work charged employee* entitled to receive pension, the writ petitioner-respondent herein, was not entitled to pension. The question, therefore, of making available to the writ petitioner-respondent herein *family pension* for the death of her husband did not arise.

42. In short, thus, when the husband of the writ petitioner-respondent herein, was an employee of a *work charged establishment* at the time, when he breathed last, his family is not entitled to *pension*.

43. I, therefore, allow this appeal, set aside the order, under appeal, dated 27.8.2014, passed in CWJC No.

5159 of 2013, and dismiss the writ petition with no cost.

(I. A. Ansari, ACJ.)

Pawan/AFR

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