

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.445 of 2010

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Satya Narayan Prasad, S/O Late Laljee Prasad, R/O House Near Circle
Office, Behind Sabour College, P.O. & P.S.Sabour, Distt-Bhagalpur

.... Petitioner/s

Versus

1. The Bihar State Electricity Board, Through Its Chairman Vidyut Bhawan , Bailey Road , Patna
2. The Secretary, Bihar State Electricity Board Vidyut Bhawan , Bailey Road , Patna
3. The Joint Secretary, Bihar State Electricity Board Vidyut Bhawan , Bailey Road , Patna
4. The General Manager-Cum-Chief Engineer Transmission Zone, Muzaffarpur, Bihar State Electricity Board, Distt-Muzaffarpur
5. The Electrical Superintending Engineer, Transmission Circle Sabour, Distt- Bhagalpur , Bihar State Electricity Board, Distt-Bhagalpur
6. The Electrical Executive Engineer, Transmission Division Sabour, Distt-Bhagalpur, Bihar State Electricity Board, Distt-Bhagalpur

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Rajeeva Roy, Advocate.

For the Respondent/s : Mr. Vinay Kirti Singh, Advocate.

Mr. Vijay Kumar Verma, Advocate.

Mr. Akhileshwar Singh, Advocate.

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CORAM: HONOURABLE MR. JUSTICE MIHIR KUMAR JHA

ORAL JUDGMENT

(Date - 06.05.2015)

Heard learned counsel for the parties.

2. The prayer of the petitioner in this writ application

reads as follows:

"1.(i) For quashing of the office order No. 12/Misc.2003/87-4132 dated 22.12.2008 issued under the signature of the Joint Secretary to the Bihar State Electricity Board (hereinafter to be referred to as the Board) whereby and whereunder on wrong assumptions of facts and laws, the promotion granted to the petitioner to the post of Electrician for Pump long time back, was annulled and right from the date he was appointed as Electrician for Pump House on promotion, his pay was refixed and order to recover the same was made."

(ii) For commanding the respondents that if reversion of the petitioner on the original post of Pump Operator is withdrawn then the benefits admissible to the post of Pump Operator as per Board's orders/circular applicable from time to time should be allowed and granted to the petitioner and his pay be refixed after admissible benefits.

(iii) For restraining the respondents from making any deduction from the retiral benefits of the petitioner during the pendency of the writ petition and/or till his pay is refixed on the post of Pump Operator with effect from 24.04.1990 and calculated with all the benefits admissible to the post right from that date."

3. Mr. Rajeeva Roy, learned counsel for the petitioner, in support of the aforementioned prayer, has basically concentrated on the aspect that after the petitioner had retired from service, while holding the post of Electrician, he should not have been subjected to either refund of his last pay drawn or subjected to made recovery of excess amount allegedly paid to him on account of an alleged illegal promotion given to him on the post of Electrician in the year 1990. He has also explained that the petitioner, in fact, at one point of time when he was subjected to similar order of cancellation of his promotion on the post of Electrician in the year 1995 he had sought for his being rescinded altogether by reverting him to the post of Pump Operator, but then was also not allowed and the petitioner was continued on the post of Electrician till the year 2005 when he had retired holding the

post of Electrician.

4. According to Mr. Roy, had this prayer of the petitioner been allowed in the year 1995 by allowing him to revert back to his original post of Pump Operator, he could have been gainer by earning the selection grade and as per selection grade of the post of Pump Operator and in any view of the matter, the petitioner could not have been subjected to financial loss both by way of recovery and reduction of his last pay, which, in turn, was to affect his all retirement benefits.

5. Mr. Vinay Kirti Singh, learned counsel appearing on behalf of the Board, on the other hand, having filed a counter affidavit, has sought to explain that the very promotion given to the petitioner on 24.04.1990 from the post of Pump Operator to Electrician for Pump, was out and out illegal because the post of Electrician for Pump did not fall in the line of promotion of the post of Pump Operator. According to Mr. Singh, the petitioner, instead of giving promotion, ought to have been appointed against the said post and that error was, in fact, noticed within a space of five years when one Ramanand Jha, a Line Patrolman, being promoted on the post of Electrician, had started claiming similar benefit as in the case of the petitioner.

6. Mr. Singh explains that as a matter of fact when this



Court came to know with regard to such illegal promotion given to the petitioner in the year 1995 at the instance of Ramananda Jha and a direction was given to consider the case of Mr. Jha on the basis of the precedent of the petitioner a corrective action was taken by passing the order changing the promotion of the petitioner to appointment vide office order no. 57 dated 16.05.1995, but then such order could not be given effect on account of the agitation lodged by the workers Union. Mr. Singh, however, has explained that when this anomaly was again pointed out by the Auditors of the Accountant General, the same was sought to be corrected by passing the impugned order on 22.12.2008 both by way of refixation of pay of the petitioner as also order for recovery of the excess amount.

7. Mr. Roy, in reply, submits that the story of agitation by the workers' Union and/or in not giving effect to the order of change of petitioner's assignment on the post of Electrician by way of appointment in place of promotion vide office order no. 57 dated 16.05.1995, will have no relevance because ultimately the same authority had cancelled said order dated 16.05.1995 from the date of its issuance. According to Mr. Roy, once the order dated 19.06.2004 was passed while the petitioner was continuing in service any unilateral action taken by the respondents-Board by

the impugned order dated 22.12.2008 in complete violation of the principle of natural justice as also ignoring the relevant facts by itself would vitiate the entire action of the respondents- Board.

8. In the considered opinion of this Court, there are two facets to the issue in question. Firstly, as to whether the petitioner could have been subjected to re-fixation of his salary as has been done by the impugned order dated 22.12.2008 and secondly, as to whether the petitioner could have been also subjected to recovery of the excess amount allegedly as paid to him.

9. The answer to the first facet would in fact be dependant on the second facet. It is not in doubt and Mr. Roy learned counsel for the petitioner also does not controvert the position that the post of Electrician for Pump does not fall in line nor in promotional post of Pump Operator. The moment this basic fact is admitted, there would be no difficulty in holding that the petitioner was appointed on the post of Pump Operator on 08.01.1981 and therefore if he had been selected by the selection committee for the post of Electrician that could have been only by way of appointment.

10. Let it be noted that when the petitioner had entered in service on the post of Pump Operator, its pay scale was Rs. 420-644 and in fact, the date on which he had got promoted on the post



of Electrician from the post of Pump Operator, it still had a lower pay scale of Rs. 1300-2240 as against the pay scale of Electrician of Rs. 1400-2450. Based on this crucial fact, this Court will have no difficulty in holding that the petitioner being brought on the post of Electrician could be still justified of course not by way of promotion but only way of appointment from internal recruitment. In the Board or any other organization, there has always been a provision for appointment either from internal open market or internal recruitment which is distinct from appointment by way of promotion from lower post of the cadre to the higher post.

11. In the present case, the petitioner, in fact, by way of internal recruitment had got access to the higher post on his own request of course by assessment of his merit. Once, the petitioner had, therefore, appeared before the selection committee offered his candidature for the post of Electrician, he could not have been allowed to roll back from the post of electrician to Pump Operator and to that extent, this Court is not impressed with the submission of Mr. Roy that in the year 1995, when the promotion of the petitioner was found to be illegal and it was sought to be substituted by way of appointment, he could have gone back on the post of Pump Operator. The petitioner, in fact, had already been given a higher post of Electrician for Pump with higher pay

scale and that he had accepted the same not only because he was given promotion but because he was given the aforesaid higher post with higher pay scale as against the post of Pump Operator.

12. In that view of the matter, the Board's action also taken in the year 1995 subsequent to discovery of the fact relating to promotion in place of appointment on the post of Electrician in view of the representation filed by Ramanand Jha in the light of order passed in C.W.J.C. No. 11784 of 1993 and its withdrawal by him remitting the matter to the Board by this Court, could have definitely led to change of the promotion of the petitioner to his appointment on the post of Electrician. That, however, was not done despite issuance of the office order of the Electrical Superintending Engineer in 1995 and the petitioner was allowed to continue on the post of Electrician till date of his retirement in the year 2005. In that view of the matter, now the respondents cannot taken any advantage of the office order issued in the year 1995 specially when same was also cancelled from the inception by the Electrical Superintending Engineer in the year 2004, vide Annexure-6 to this writ application.

13. In view of the aforesaid finding, the only question which now would remain to be answered is the justification of the impugned order. The impugned order is in two parts. Firstly, it



seeks to fix the entire pay of the petitioner right from his inception in service to the date of his retirement as on 30.04.2005. Secondly, it also directs for recovery of the excess amount drawn by him on account of decision of the promotion on the post of Electrician in the year 1990 in place of appointment. The respondents, in fact, in the counter affidavit, have also explained that pursuant to the aforementioned decision, the petitioner has been subjected to recovery of Rs. 1,29,237/- and to that extent, paragraph no. 8 and 9 of the counter affidavit becomes relevant and are quoted herein below:

"8. That it is stated that since the promotion letter itself mentioned that the promotion is provisional as such the order contained in Annexure-1 is not illegal and the petitioner is rightly treated to be a fresh appointment from 1990 and his pay fixation was revised and the Joint Secretary has directed to deduct the excess pay drawn amounting to Rs. 1,24,096/- excess leave encashment amounting to Rs. 452/-, house rent amounting to Rs. 600/- and Rs. 20/- as electricity charges, total Rs. 1,29,237.00 was deducted.

9. That vide cheque no. 006998 dated 14.05.2009 a balance amount of Rs. 33,627/- was ready for payment but the petitioner has refused to receive the cheque."

14. As would be evident, the recovery from the petitioner has been made on the basis that his pay fixation in the year 1990 was made by giving him the promotional benefits in the pay scale of Electrician whereas he ought to have been given the

benefit of appointment.

15. Let it be noted that the petitioner, on being promoted in the pay scale of Electrician of Rs. 1400-2450, had been given the benefit of pay fixation of 12½% of the last pay drawn by him on the post of Pump Operator in the pay scale of Rs. 1300-2240 and that had led to recurring excess payment. Such excess payment had started to the petitioner with effect from 25.04.1990 and that has been sought to be recovered by the impugned order passed on 22.12.2008 i.e. after more than 18 years of the petitioner being given such financial benefits. This fact along with the fact that the petitioner had also stood retired with effect from 30.06.2005 will be sufficient to hold that the petitioner could not have been subjected to any recovery even if an excess payment was made to him.

16. The law in this regard has been recently once again reported in the case of ***State of Punjab & Ors. v. Rafiq Masih(White Washer) & Ors.*** reported in ***2015(4) SCC 334*** wherein it has been held as follows:

"18. It is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to hereinabove, we may, as a ready reference, summarize the following few situations, wherein recoveries by the employers, would be

impermissible in law:

(i) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).

(ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongly been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

17. This Court finds from the facts, as noted above, that the case of the petitioner is squarely covered under first, second and third category inasmuch as the petitioner belongs to Class-III posts and recovery is sought to be made after his retirement and the excess payment has been made to the petitioner in excess of five years.

18. In that view of the matter, this Court would quash the impugned order so far it relates to recovery of the excess amount from the petitioner, which has also been quantified in the counter affidavit to the tune of Rs. 1,24,096/-.

19. This Court, however, must make it clear that part

quashing of the impugned order will not mean that it has also held the pay fixation of the petitioner on the post of Electrician after treating the same to be appointed in place of promotion with effect from 1990 to be bad. As a matter of fact, this aspect was also clarified by the Apex Court in the case of **Rafiq Masih** (supra) wherein it was held as follows:

"... Based on the above consideration, we are of the view, that if the mistake of making a wrongful payment is detected within five years, it would be open to the employer to recover the same. However, if the payment is made for a period of excess of five years, even though it would be open to the employer to correct the mistake, it would be extremely iniquitous and arbitrary to seek a refund of the payments mistakenly made to the employee."

20. This aspect, in fact, even otherwise stands settled that even where excess amount in certain cases cannot be recovered from an employee his entitlement for future benefits including retirement benefits has to be always decided on the basis of his entitlement and payment in future has to be always made only as per his entitlement.

21. In the present case, the petitioner's retirement benefit had already been paid on the basis of his last salary drawn and that was sought to be recovered by way of certain amount also from post retirement benefit. This Court, however, having held that no such excess amount could have been recovered from the

petitioner, it would direct that any excess amount recovered from the petitioner, except on the head of House Rent and Electricity charges, must be refunded back to the petitioner.

22. The petitioner, however, will be entitled to draw his pension and other retirement benefit on the basis of his last pay determined in the impugned order i.e. Rs. 7575/- per month and any excess amount of retirement benefit, if any made, will be definitely accounted and adjusted by the Board at the time of refund of excess amount to the petitioner.

23. With the aforementioned observation and direction, this writ application is disposed of.

(Mihir Kumar Jha, J)

Patna High Court
Dated the 6th May 2015
A.F.R./Sujit/-

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