

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.8369 of 2008

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1. Mahanand Prasad Sinha, Son of Sri Mukund Lal, Resident of Village-Koshikapur, Police Station- Narpatganj, District Araria.
 2. Bijendra Narayan Singh, Son of late Rameshwar Prasad Singh, Resident of Village- Baruyari, Police Station- Supoul, District Supoul.
 3. Binod Kumar Singh, Son of late Wakil Prasad Singh, Resident of Village-Brahaunia, Police Station- Sangrampur, District- Munger.
 4. Deep Narayan Rai, Son of late Dhanulal Rai, Resident of Village- Maharaji Hatta, Purnia Court, Police Station- K.Hat, District- Purnia.
 5. Shambhu Nath Mishra "Suman", son of Sri Hira Nand Mishra, Resident of Village- Nawalranjmainpur, Police Station- Bhargama, District- Araria.
 6. Sita Ram Mochi, Son of late Vishwanath Mochi, Resident of Village- Barhara Kithi, Police Station- Barhari Kothi, District- Purnia.
 - 7(a) Santsewi Indramani Kumari, D/o Late Baban Ravidas
 - 7(b) Jaidharmini Kumari, daughter of late Baban Ravidas
- Both are residents of Village Purnia Court, Police Station- Khajanchihat, District- Purnia.
8. Jaydeo Rajbanshi, Son of late Raghurajbanshi Resident of Village- Harganga, Police station- Sarasi, District- Purnia.
 - 9(a) Pano Devi, W/o Late Shiv Prasad Paswan
 - 9(b) Birendar Paswan, S/o Late Shiv Prasad Paswan
 - 9(c) Shashikala Devi, D/O Late Shiv Prasad Paswan.
 - 9(d) Sabita Devi, D/o Late Shiv Prasad Paswan.
 - 9(e) Sulekha Devi, D/o Late Shiv Prasad Paswan.
- All are residents of Village- Barhara, Police Station- Barhara Kothi, District- OurneaAt present residing at Koshi Colony, Police Station- Araria, District- Araria.
10. Dinesh Paswan, Son of late Janak Paswan, Resident of Village- Indarpur Barhari, Police Station Raniganj, District Araria.

.... Petitioner/s

Versus

1. The State of Bihar, through the Principal Secretary, Water Resources Department, Government of Bihar, Patna.
2. The Chief Engineer, Water Resources Department, Government of Bihar, Purnia.
3. The Superintending Engineer, Water Resources Department, Government of Bihar, Canal Circle -1, Purnia.
4. The Executive Engineer, Irrigation Division, No. 1, Purnia.
5. The Executive Engineer, Irrigation Division, Katihar.
6. The Executive Engineer, Irrigation Division, Banmankhi.
7. The Executive Engineer, Irrigation Division, Araria.
8. The District Accounts Officer, Purnia.

.... Respondent/s

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Appearance :

For the Petitioner/s : Ms. Mahashweta Chatterjee, Advocate
For the Respondent/s : Mr. Anwar Jarunm, AC to GP-10

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN

ORAL JUDGMENT

Date: 20-10-2016

Heard Ms. Mahashweta Chatterjee, learned counsel appearing for the petitioners and Mr. Anwar Karim, learned Assisting Counsel to Government Pleader No.10 for the State.

The ten writ petitioners some of whom have deceased during the pendency of the present proceedings, initially came before this court questioning the letter bearing No.613 dated 4.4.2008 and letter bearing No.615 dated 8.4.2008 of the District Accounts Officer, Purnea addressed to all the Engineers in the Water Resources Department, Purnea Division, Purnea to review all cases of time bound promotion and promotion under the Assured Career Progression Scheme (hereinafter referred to as the 'ACP') and in case it is found that any of the employees were granted such promotion without passing the departmental examination then necessary steps be taken to cancel the same and for recovery of pecuniary benefits received by the employee concerned by virtue of such promotion.

Even before the matter could be taken up for consideration on merits that two of the petitioners have deceased, namely, petitioner no.7 (Baban Ravidas) and petitioner no.9 (Shiv Prasad Paswan) and who have been substituted by their respective legal heirs.

Ms. Mahashweta Chatterjee, learned counsel appearing on behalf of the petitioners informs that all the ten petitioners had

approached this Court apprehending coercive action against them and although action has been taken as against petitioner nos.1, 2, 7, 9 and 10 but in so far as petitioner nos.3 to 6 and 8 are concerned, no such action has been taken against them and who thus do not wish to press the writ petition.

In view of the submission so made by Ms. Chatterjee this writ petition in so far as petitioner nos.3 to 6 and 8, is concerned, is disposed of as not pressed and shall proceed only in respect to petitioner nos.1, 2, 10 and substituted heirs of the deceased petitioner nos.7 and 9.

The broad outline of the contest has been briefly discussed above and basically it is in view of the attempted action of the respondents to cancel the promotion granted to the petitioners holding Class-III post of Lower Division Clerk on grounds of not passing the departmental examination, that it prompted them to approach this Court.

The writ petition was filed in 2008 and during its pendency the petitioner no.1 has superannuated on 31.7.2012, petitioner no.2 superannuated on 31.5.2009 and petitioner no.10 has superannuated on 31.1.2014. The petitioner no.7 deceased on 5.10.2011 and the petitioner no.9 deceased on 20.1.2011, both in harness.

It is not in dispute that all these five petitioners who



have chosen to pursue the writ petition were granted promotion either under the time bound promotion scheme or under the 'ACP scheme'. While the order relating to petitioner no.1 in respect of cancellation of promotion dated 30.9.2012 is impugned at Annexure-9 to the proceedings at page 101, a recovery order has followed the cancellation which was passed on 30.5.2013 and which is impugned at Annexure-10 at page 102. Both these orders have been demonstrably passed after the superannuation of the petitioner no.1 on 31.7.2012.

The petitioner no.2 superannuated on 31.5.2009 and even his promotion has been cancelled after his superannuation vide order dated 9.3.2010 impugned at Annexure-8 at page 63 of the proceeding.

The petitioner nos.7 and 9 have died in harness and in so far as deceased petitioner no.7 is concerned, a recovery order has followed on 31.1.2014 impugned at Annexure-14 at page-109 and in similar fashion vide Annexure 15, recovery has also been effected from the superannuation benefits of the petitioner no.9 vide order passed on 18.9.2014 impugned at Annexure-16.

Annexure-18 is the order of recovery in so far as the petitioner no.10 is concerned which is dated 5.8.2014, seven months after the superannuation of the petitioner on 31.1.2014.

It is undisputed that the cancellation of promotion of

these petitioners, the orders of recovery as well as the recovery has been effected, ex-parte and without notice or opportunity of hearing either to the petitioners or their legal heirs. Meaning thereby that the orders are passed in apparent violation of principles of Natural Justice.

Another relevant aspect of the matter would be whether at all any proceeding with regard to any service benefit could have been drawn after the superannuation of the petitioners, more particularly where there is no charge that the benefit drawn by these petitioners was either affected by fraud or misrepresentation. There is no such charge rather the charge is that the petitioners had been granted promotion under the time bound promotion scheme and the 'ACP' scheme without passing the departmental examination.

In my opinion, in the undisputed position discussed and if the respondents have not chosen to draw any proceeding against these petitioners while in service, they cannot do so after the retirement/death of these petitioners for no punishment as envisaged under the Discipline and Appeal Rules can be imposed after superannuation of an employee or after his death. No doubt the employer, in such circumstances can draw proceedings under the Bihar Pension Rules, 1950 but then the considerations are different. I draw my strength from the legal position settled in the Full Bench judgment of this Court in the case of **Shambhu Saran**

vs. The State of Bihar since reported in **2000(1) PLJR 665** and the extract of paragraph 5 relevant for the purpose, is given hereinbelow:

“5.

 In this context, it may be pointed out that if the Government servant is in service, the disciplinary proceeding can be initiated against him and certain punishments may be imposed upon him as provided in the relevant Classification, Control and Appeal Rules. However, such punishments cannot be imposed upon him if retired from service. After his retirement he cannot be punished otherwise but pension can be withheld and other steps taken as contemplated by the said Rule 43. Punishments, major or minor, like dismissal or removal from service or withholding of increments etc., which contemplates that he is still in service, cannot be imposed upon him.”

Ms. Chatterjee has relied upon the opinion expressed by the Supreme Court in a recent judgment since reported in **2015(1) PLJR (SC) 261 (State of Punjab vs. Rafiq Masih)** to submit that the Supreme Court after discussing the law laid down in a catena of judgments passed on the issue of recovery, has concluded as such in paragraph 12:

“12. 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, summarise the following few situations, wherein recoveries by the employers, would be

impermissible in law:-

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

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

(iii) Recovery from 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 wrongfully 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."

Having heard learned counsel for the parties and considering the grievance raised in view of the legal position discussed above, it is apparent that the action impugned in the present writ petition is neither sustainable on merits nor on the issue of violation of principles of natural justice.

In result, the orders dated 30.9.2012 and 30.5.2013 impugned at Annexures 9 and 10 in so far as it relates to petitioner no.1; the order dated 9.3.2010 impugned at Annexure-8 in so far as it relates to petitioner no.2; the order dated 31.1.2014 impugned at Annexure-14 in so far as it relates to petitioner no.7; the order dated 18.9.2014 impugned at Annexure-16 in so far as it relates to

deceased petitioner no.9 and the order dated 5.8.2014 impugned at Annexure-18 in so far as it relates to petitioner no.10, cannot be upheld and are accordingly quashed and set aside.

The writ petition is allowed. Let the recovery so effected from the retiral benefits of petitioner nos.1, 2 and 10 as well as from the retiral benefits of deceased petitioner nos.7 and 9 be refunded to the petitioner nos.1, 2 and 10 as well as the legal heirs of the deceased petitioners nos.7 and 9 within a period of three months from the date of receipt/production of a copy of this order.

As a consequence of the order, these petitioners would be entitled to the salary which they were drawing on the date of passing of the impugned order and thus the difference of salary and other consequential benefits as found admissible to them should be calculated and be paid to them within three months from the date of receipt/production of a copy of this order.

The writ petition is allowed.

(Jyoti Saran, J)

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AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	02-11-2016
Transmission Date	NA