

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.5225 of 2012

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1. Sugia Kunwar, W/o Late Bhikhar Paswan
 2. Doman Paswan
 3. Jagdish Paswan, both S/o Late Bhikhar Paswan

All are resident of Village-Shahpur, Police Station and District - Aurangabad

.... Petitioners

Versus

1. The State of Bihar
2. The Secretary, Home & Police Department, Government of Bihar, New Secretariat, Patna
3. The Additional Home Secretary-cum-Special Secretary, Home Department, New Secretariat, Patna
4. The District Magistrate, Aurangabad
5. The Superintendent of Police, Aurangabad
6. The Finance Secretary-cum-Commissioner, Finance Department, Government of Bihar, New Secretariat, Patna

.... Respondents

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Appearance :

For the Petitioner/s : Mr. Shailesh Kumar Singh

For the Respondent/s : Mr. Chandra Shekhar Singh, AC to GA-10

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 10-11-2016

The writ petition was originally filed by one Bhikhar Paswan for quashing of the order dated 09.10.2009, as contained in Annexure-10 to the present application by which his claim with respect to the pensionary benefit has been refused by the State

Government on the ground that he had not completed ten years of qualifying service from 01.01.1990.

2. However, during pendency of the application, the original petitioner died, whereafter an interlocutory application, vide I.A. No. 7801 of 2014, was filed by the heirs of the deceased-petitioner for substituting their names in place of the original petitioner. The said interlocutory application was allowed by this Court, vide order dated 09.08.2016 whereupon the widow of the Government employee and their two sons were the original petitioner.

3. It is contended that the deceased husband of petitioner no.1 and father of petitioners no. 2 and 3, who was appointed as Choukidar, was entitled to pension having attained the age of superannuation on 31st March, 1995.

4. From perusal of the impugned Annexure-10 to the present application, it would be evident that the claim of retiral benefit of the deceased Bhikhar Paswan was rejected by the State Government on the ground that he had rendered less than ten years of qualifying service from 1st January, 1990 to 31st March, 1995.

5. It has been contended by the learned counsel for the petitioners that the deceased Bhikhar Paswan was appointed as Chaukidar, vide order dated 1st September, 1983 and was posted at

Circle No. 1/10 attached to the Aurangabad police station. The period prior to 1st January, 1990 was also liable to be counted for the pensionary benefits of the deceased but the same has illegally been not counted by the respondents in order to deny payment of pensionary benefits to the deceased Government employee.

6. On the other hand, learned counsel for the State has submitted that the deceased Bhikhar Paswan was appointed as Chaukidar by the then Sub Divisional Officer, Aurangabad on 1st September, 1983, but the Chaukidars were declared Government servant, as 4th Grade employee, vide letter dated 17.01.1990, with effect from 01.09.1990. Since the deceased Choukidar retired from service on 21.03.1995 on attaining the age of superannuation, he had not served as a permanent employee on a substantive post for the minimum eligibility period of ten years for receipt of pension.

7. He has submitted that the plea taken by the petitioner in the present case that the service rendered even prior to 01.01.1990 should be calculated for the purpose of pension was considered by a Division Bench of this Court in the matter of *Charitra Paswan vs. State of Bihar & Ors* since reported in **2004 (2) PLJR 454**. In the said decision, the Bench has held that Chaukidars appointment prior to 1st January, 1990 cannot be considered as a substantive and permanent employment like one

made on a sanctioned post and, hence, the period of service prior to 01.01.1990 cannot be counted for the purpose of pensionary benefits.

8. I have heard respective counsel for the parties and perused the record.

9. The impugned order dated 09.10.2009 as contained in Annexure-10 to the present application is to the effect that in terms of Rule 59 of the Bihar Pension Rules, 1950, the Finance Department has issued a circular dated 31.07.1980 that the prior period cannot be counted for the purpose of pension. The said circular dated 31.07.1980 is appended with the counter affidavit as Annexure-B. Clause 18 of the said circular contemplates that the minimum qualifying period for pension is ten years.

10. Rule 58 of the Bihar Pension Rules contemplates three pre-conditions for eligibility of a Government servant to receive pension. They are:-

(a) The service must be under Government.

(b) The employment must be substantive and permanent and

(c) The service must be paid by the Government.

11. Indisputably, in the present case, even if the deceased Choukidar was paid by the Government, his employment

was not against any substantive and permanent post prior to 1st January, 1990. Therefore, he did not satisfy the three pre-requisite conditions as contemplated in Rule 58 of the Bihar Pension Rules, 1950.

12. In this regard, it would also be relevant to refer to Rule 61 of the Bihar Pension Rules which reads as under:-

“Service does not qualify unless the Government servant holds substantively a post on a permanent establishment”

13. While arguing the writ petition, learned counsel for the petitioners has conceded that prior to 1st January, 1990 the employment of the petitioner was not pensionable as it was not considered to be a substantive and permanent employment.

14. In *Charitra Paswan (supra)*, the question whether the village Choukidars are entitled to count the service prior to 01.01.1990 for the purpose of pension was considered by a Division Bench of this Court, which held in paras 6 to 10 as under:-

***“6. At the outset it may be stated that the post of Choukidar (or Dafadar) is a civil post as held by this court in the case of Rajpati Dubey vs. State of Bihar, 1973 BLJR 558. However, that is so for the purpose of Article 311 (2) of the Constitution of India. The pension is creature of statute (called by whatever name) and therefore, right to receive pension would depend on the terms of the statute.*”**

Reliance on Rule 2 of the Bihar Pension Rules appears to be apposite and the same may therefore usefully be quoted as under:

“Except where otherwise provided these rules apply to all Government servants to whom the rules in the Bihar and Orissa Service Code apply”.

A bare reading of the above rule makes it clear that if a Government servant is not governed by Bihar Service Code, the rule contained in the Bihar Pension Rule would not apply to him. The only rules governing grant of pension to Government servants in the State of Bihar being the Bihar Pension Rules it would follow that unless his employment is governed by Bihar Service Code, the rules contained in the Bihar Pension Rules would not apply to him. The petitioner cannot contend that his appointment on the post of Choukidar prior to 1.1.90 was governed by the Bihar Service Code, and therefore on this short ground alone he cannot count the past service for the purpose of pension. If petitioner is not entitled to count his post service, having superannuated from service after rendering less than ten years service which is the qualifying period under the Pension Rules, he cannot claim pension.

7. Had the petitioner been working on a pensionable post and his services regularized, the



position might have been different. Though this is how the petitioner has described the effect of circular no. 359 dated 17.1.90, but as rightly pointed out by the learned Government Pleader, what was done by the circular was to make the post of Choukidar a regular class IV post and not to regularize the services of the working Choukidars. This seems to be working in the mind of the petitioner. If that is so, it is a misconception devoid of any substance.

8. Under Rule 58 of the Pension Rules the service of a Government servant does not qualify for pension unless it conforms to three conditions:- (a) the service must be under Government, (b) the employment must be substantive and permanent and (c) the service must be paid by Government. In the case of village Choukidar prior to 1.1.90, the second condition was clearly absent as the employment was not a substantive employment like one made on a sanctioned post. Though the post of villager Choukidar has been in existence since time immemorial, and as a matter of fact there are statutes, viz. the Village Choukidari Act, 1870 and the Bihar and Orissa Administration Act, 1922, besides Choukidari Manual - a compendium of government orders and circulars – containing provisions for appointment etc. on the post, the nature of employment was quite different. If that were not so, what else the

Choukidars were clamouring for all these years prior to 1990? They wanted regular post so that could come at par with other Government servants and it was only in deference to their demand that the Government decided to make the post a regular class IV post.

9. Thus there is a clear distinction between the status of village Choukidars prior to 1.1.90 and afterwards. They constitute different class governed by different conditions of service and the services therefore cannot be construed as continuing one and hence they are not entitled to count the past service, muchless for the purpose of pension except what the State Government may by policy decision decide to give them. It is open to the employer to have different kinds of establishment and differently treat the employees working therein. It is well settled that a policy decision unless found to be arbitrary or against the public policy on the touchstone of Article 14 of the Constitution of India, it should not be interfered with by the High Court in exercise of writ jurisdiction. Further, it is well settled that in exercise of writ jurisdiction the High Court cannot perform execution functions.

10. Submission was also made on behalf of the petitioner regarding fixing 1.1.1990 as the cut-off date. The submission to this effect is to be summarily rejected. As held in Union of India vs.



P.N. Menon, (1994) 4 SCC 68, whenever the Government or authority within the meaning of State under Article 12 of the Constitution frames a scheme (that too was a case of superannuation benefits, it may be imperative to fix a cut-off date because benefit has to be allowed within the financial resources available to the Government unless persons concerned are governed by the same Rules and are similarly situated as was the case in D.S. Nakara vs. Union of India, AIR 1983 SC 130. Reference may also be made to cases of Krishana Kumar vs. Union of India, (1990) 4 SCC 207, Indian Ex-Services League vs. Union of India (1991) 2 SCC 104, All India Reserve Bank Retired Officers Association vs. Union of India, 1992 supp. (1) SCC 664, State of West Bengal vs. Ratan Bihari Dey, 1994 (1) PLJR 33 (SC) and State of Rajasthan vs. Sevanivatra Karamchari Hitkari Samiti, JT (1995) 1 SC 315. In the instant case, 1.1.90 cannot be said to be an imaginary date as the policy decision was taken by the Government on 31.12.89, the circular dated 17.1.90 making the decision effective from 1.1.90 i.e. immediately after the policy decision cannot be said to be arbitrary fixed. The submission of the counsel is accordingly rejected”.

(underlining mine)

15. In view of the discussions made, hereinabove, and in view of the decision of this Court in *Charitra Paswan*

(*supra*), the challenge to the order dated 09.10.2009, as contained in Annexure-10 to the present application, whereby claim of the deceased Choukidar for pensionary benefit has been rejected, fails.

The writ petition, being devoid of any merit, is dismissed.

(Ashwani Kumar Singh, J.)

Sanjeet/-

AFR/NAFR	NAFR
CAV DATE	-----
Uploading Date	11.11.2016
Transmission Date	-----