

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.6867 of 2016

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1. Pranav Kant Babban, Son of Late Nand Kishore Prasad, Resident of Flat No. 402 A, R.N. Villa Apartment, Mahatma Gandhi Nagar, Kanti Factory Road, Patna P.O. Bahadurpur Housing Colony, P.S. Agamkuan, District- Patna, presently working as Accounts Clerk in the Office of Superintending Engineer, Road Construction Department, Mechanical Circle, Patna.

.... Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar Patna.
2. The Principal Secretary, Road Construction Department, Government of Bihar, Patna.
3. The Finance Secretary, Finance Department, Government of Bihar, Patna.
4. The Engineer-in-Chief-cum-Additional Secretary-cum-Special Secretary, Road Construction Department, Government of Bihar, Patna.
5. The Superintending Engineer, Road Construction Department, Mechanical Circle, Patna.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr S.B.K.Mangalam
Mrs. Anita Kumari
For the Respondent/s : Mr. GP30, Raju Giri

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CORAM: HONOURABLE MR. JUSTICE AJAY KUMAR TRIPATHI
ORAL JUDGMENT
Date: 01-07-2016

By virtue of Annexure- 7, dated 16.2.2016, the Superintending Engineer (Mechanical), Road Construction Department, Government of Bihar has modified the order from which the benefit of 1st ACP would be given to the petitioner i.e. 27.9.2003 to 13.10.2007. As a consequence thereof, the benefit of 2nd ACP has also been annulled and even the order for recovery has been passed.

Learned counsel representing the petitioner, who is working on the post of an Accounts Clerk, informs the Court that the

decision so taken in terms of Annexure- 7 is not only irrational but also arbitrary. If this decision is not interfered with, it will have the effect of allowing the respondents to reward their own inefficiency and inaction when nothing is attributable to the petitioner.

Counsel for the petitioner informs the Court that the petitioner was appointed initially in the year 1991 and appeared in the departmental examination for accounts in the year 1996. He cleared two papers. From 1996 till 2004, no departmental examination was conducted, therefore, the petitioner was deprived of the opportunity of passing the third paper in the accounts which could have facilitated the benefits of 1st ACP, increment etc. When the examination was held in the year 2006, he participated and passed the said examination for which the result was declared in the year 2007. It is in this context that the respondents have changed the date of grant of benefit of 1st ACP from 27.9.2003 to 13.10.2007.

Attention of the Court has been drawn to a well celebrated decision of Justice Chagla, as he then was, which is the case of **All India Groundnut Syndicate Limited vs. Commissioner of Income Tax**, reported in **AIR 1954 Bombay 232**. The relevant passage of the said decision is reproduced herein below :

“But the most surprising contention is put forward by the Department that because their own officer failed to discharge his statutory duty, the assessee is deprived of his

right which the law has given to him under Sub-section (2) of Section 24. In other words, the Department wants to benefit from and wants to take advantage of its own default. It is an elementary principle of law that no person--we take it that the Income-tax Department is included in that definition--can put forward his own default in defence to a right asserted by the other party. A person cannot say that the party claiming the right is deprived of that right because "I have committed a default and the right is lost because of that default."

The above decision was relied upon for the reason that it is the respondents, who have failed to conduct any departmental examination for almost eight years between 1996 to 2004. If there was no examination held, an employee cannot be blamed for not passing the same.

The other argument is that the petitioner did not play any role in award of the benefit of ACP. It was a conscious decision taken by the respondents and benefit was granted by a common notification to large number of persons, which is Annexure- 5 to the writ application. After so many years, the decision to not only change the date for grant of such benefit but even effect recovery is irrational and unjustified. In this regard reliance is placed on the decision in the case of **State of Punjab and others v. Rafiq Masih (White Washer) and others, reported in (2015) 4 SCC 334**. In matters of such recovery the Hon'ble Supreme Court has concluded its opinion in

paragraph 18 as under :

“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 herein above, we may, as a ready reference, summarise 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 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 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.”

With the law being laid down in unambiguous terms as above, there will be no occasion to permit the respondents to effect any recovery against the petitioner by virtue of Anenxure-7.

So far as change of date of grant of the benefit is concerned, respondent authorities are directed to take a policy decision as to what is required to be done to compensate the

employees, who were prevented from participation in the departmental examination of accounts for more than 8 years for the reason attributable to the department and not to the employees. Till such a decision is taken, Annexure- 7 will not be enforced against the petitioner.

Writ application is allowed in terms of the above.

(Ajay Kumar Tripathi, J)

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