

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.615 of 2014

IN

Civil Writ Jurisdiction Case No. 9630 of 1997

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The Managing Director, Bihar State Housing Board, Patna Appellant/s
Versus

1. Sri Narad Prasad Sinha, Son of Late Ramanand Sinha, Resident of MIG, 119/A, Lohiyanagar Housing Colony, P.S.- Kankarbagh, Town & District- Patna
 2. The State of Bihar
 3. The Commissioner-cum-Secretary, Building Construction, Housing Department, Nirman Bhawan, Baily Road, Patna
 4. The Accountant General, Bihar, Patna Respondent/s
- =====

Appearance :

For the Appellant/s : Mr. Lalit Kishore, Sr. Advocate
Mr. Rabindra Kumar Priyadarshi, Advocate
For the Resp No. 1 : Mr. Kumar Kaushik
Mrs. Shally Kumari, Advocates

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CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA

and

HONOURABLE MR. JUSTICE BIRENDRA KUMAR

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA)

Date: 02-12-2016

Heard learned counsel for the appellant-Bihar State Housing Board and learned counsel for the writ petitioner-Respondent No.1.

The appeal has been filed against the judgment and order dated 20.08.2013 passed in CWJC No. 9630 of 1997 by a learned Single Judge of this Court by which the writ petition has been allowed and it has been held that it will be deemed that the petitioner was substantively appointed as Chief Engineer and would thus be entitled to full emoluments as such for the period he worked as Chief Engineer up-to his superannuation and the consequence



would be that his last substantively pay drawn would be that of a Chief Engineer. Accordingly, the second relief also could be to the petitioner, i.e., revision of his pensionary and post retiral dues according to the last pay drawn as a Chief Engineer.

The writ petitioner-respondent No. 1 was appointed as Assistant Engineer on 25.7.1964 and was serving the Housing Department and when the Bihar State Housing Board was constituted in the year 1972, his services along with others, were en block transferred to the Housing Board by Government order dated 20.9.1972 which further provided that services of all permanent and temporary technical staff of the Housing Department and all other categories of permanent and temporary staff, including those of subordinate office, except those who are retained to do work at Government level, will be placed at the disposal of the Board with effect from 1.9.1972. It was further provided that until the Board has finalized the service condition of its employees, the officers and staff whose services have been placed at its disposal shall continue to enjoy under the Board the same service conditions in respect of pay, increments, leave, promotions, discipline and other fringe benefits as admissible under the State Government but it was clarified that they will not be allowed any deputation allowance. It was also provided that they will continue their pensionary rights and the pensionary



benefit admissible shall be subject to the same conditions and restrictions as may be applicable under the pension Rules of the State Government as amended from time to time from the date of retirement of the staff. The petitioner continued to serve the Housing Board and in due course he was promoted as Superintending Engineer in the year 1978. Under Section 16(2) (9) of the Bihar State Housing Board Act, 1982, it is provided, inter alia, that appointment of the Chief Engineer shall be made by the State Government. By Government Notification dated 25.3.1984, the petitioner was posted as In-charge Chief Engineer in the Housing Board and assumed his office on 26.3.1994. While still functioning as In-charge Chief Engineer, the petitioner superannuated from his service on 28.2.1997. After his retirement the petitioner approached this Court by filing CWJC No. 9630/1997, from which the present appeal arises, with the grievance that he has not been paid salary and related salary benefits commensurate to his post of Chief Engineer despite several requests and reminders.

The learned Single Judge considering the aforesaid facts as also the fact that the writ petitioner was admittedly the senior most Chief Engineer in the Housing Board and that the case was not covered under Rule 103 of the Bihar Service Code, which only permits officiating allowance of 20%, rather he was fully qualified



and entitled to be promoted substantively and was wrongly made to officiate for three years as Chief Engineer and thus he was made to work at a higher post involving higher duties and responsibilities and he cannot be denied the benefit of the same. Reference was made to two decisions in the case of Dr. Nitya Gopal Bandyopadhyay Vs. The State of Bihar & Ors.: 2008(1) PLJR 245 and the case of Prafulla Ranjan Shrivastava Vs. The State of Bihar & Ors.: 2008(3) PLJR 144. It was further held that the arrangement neither being stop-gap nor short-term, the person shall be entitled to the substantive promotion and working on the said higher post, Rule 89 of the Bihar Service Code would apply and thus the findings and directions noted above were given.

The principal submission of Mr. Devendra Kumar Sinha, learned Senior counsel for the appellant is that the appellant, belonging to the substantive State Cadre and his appointment being on deputation as acting Chief Engineer, was on deputation to the Housing Board and thus it is not Rule 89 which would be applicable but Rules 282 and 283 of the Bihar Service Code are applicable in his case. It is therefore, contended that the pay drawn by the writ petitioner from the foreign employer, i.e., the Housing Board, was to be as specified in the order sanctioning his transfer and if it was intended that he shall receive any remuneration, etc. in addition to



what he was getting under the State Government, it was required to be specified and no Government servant shall be permitted to receive any remuneration or enjoy any concession which is not so specified. Referring to the order of posting of the petitioner as In-charge Chief Engineer when he was holding the substantive post of Superintending Engineer in the Building Department (Housing), it is urged that no further benefit of the post of Chief Engineer was to be granted to the petitioner by not specifying the same in the said order. In the said circumstances, it is clear that the writ petitioner-respondent No. 1 would be entitled only to the substantive pay as a Superintending Engineer which he received during almost three years continuously on the post of In-charge Chief Engineer and accordingly, fixation of pension on the basis of such last pay drawn is also justified.

It is urged that Rule 89 could have been invoked if the writ petitioner had been appointed on the post carrying duties and responsibilities of greater importance than those of the permanent post by the petitioner within the Government but not on deputation, which is covered by Rules 282 and 283. In support of the same learned counsel relies a decision of this Court in the case of Arun Kumar Sinha Vs. The State of Bihar & ors.: 2000(4) PLJR 515 wherein this Court has held that the writ petitioner-respondents in the



said appeal were not entitled to payment of salary of higher post for the periods the appellants had performed the additional duties save and except the payment as prescribed under Rule 203 of the Bihar Service Code.

Reliance is also placed upon Rule 58 of the Bihar Pension Rules for the proposition that service does not qualify for pension unless it is under the Government, substantive and permanent, and paid by the Government, whereas in the case of the respondent no. 1 the service of acting Chief Engineer was neither under the State Government nor substantive or permanent on the post of acting Chief Engineer nor paid by the Government.

Learned counsel for the Respondent No. 1, on the other hand, seeks to support the order of the learned Single Judge by strongly relying upon the Government order dated 20.9.1972 by which the services of the petitioner along with practically the entire employees of the then Housing Department, except retaining a nucleus organization at the secretariat level for exercising administrative control comprising of two sections, were made available to the Housing Board with effect from 1.9.1972 laying down the terms and conditions.

It is urged that by the said Government order it is clearly directed that the office staff shall continue to enjoy under the



Board the same service conditions in respect of pay, increments, leave, promotions, discipline and other fringe benefits as admissible under the State Government, clearly stating that they would not be allowed deputation allowance. Further the pensionary rights were also directed as applicable under the Bihar Pension Rules.

In the said circumstances, it is submitted that the case of the respondent no. 1 cannot be treated to be one under deputation or foreign service in the strict sense of the term as the same is understood and, therefore, there could be no application of Rules 282 and 283 of the Bihar Service Code in the case of the respondent no. 1. It is, therefore, submitted that the provisions of Rule 89 of the Bihar Service Code would be squarely applicable, as rightly held by the learned Single Judge, to the case of the writ petitioner and the benefits granted in the impugned order under appeal would follow as a natural course.

In support of the same learned counsel relies apart from the two decisions cited in the judgment of the learned Single Judge, a decision of a Division Bench of this Court in the case of Nand Kishore Roy Vs. The Bihar State Housing Board & Ors.: 2008(2) PLJR 675 in which the appellant, an Assistant Engineer in the Housing Board who had been appointed as In-charge Executive Engineer along with three others, had claimed the benefit of the pay



scale of the Executive Engineers and this Court had ultimately held that Rule 89 of the Rules would be applicable in such cases and the appellants would be entitled to the higher scale of pay of the post of Executive Engineer. Paragraphs 4 to 7 of the said decision are quoted below:-

“4. Rule 89 of the said Rules provides that a Government Servant, who is appointed to officiate in a post, shall not draw pay higher than the substantive pay in respect of the permanent post other than a tenure post, unless the officiating appointment involves the assumption of duties or responsibilities of greater importance than those attaching to the permanent post (other than a tenure post) on which he holds a lien or would hold a lien had his lien not been suspended. The said rule further provides that officiating appointment shall not be deemed to involve the assumption of duties or responsibilities of greater importance in the post to which it is made is in the same scale of pay as that of the permanent post or on a scale of pay identical therewith.

5. It was not disputed by the Board that assumption of duties and responsibilities of the post of Executive Engineer would not be of greater importance than discharging the duties of Assistant Engineer. It was also not in dispute that the pay-scale of Executive Engineer is higher than the pay-scale of Assistant Engineer.

6. In such situation, on the bare charges allegedly



made against the appellant remuneration to which he was entitled to in terms of the Rules made under proviso to Article 309 could not be denied to him.

7. In those circumstances, the appeal is allowed and, accordingly, the order under appeal is modified by directing payment of salary to the appellant in the scale of Executive Engineer from the date he assumed officiating charge of such Executive Engineer as had been granted by and under common order to the writ petitioner no.2. There shall be no order as to costs.”

Learned counsel also relies upon a decision of a learned single Judge of this Court (Justice Ashok Kumar Ganguly, as his Lordship then was) dated 2.2.1998 in CWJC No. 12491/1996 (K. M. Thomas Vs. The State of Bihar & Ors.) which also pertains to an Assistant Engineer of the Housing Board who was appointed on the post of Executive Engineer In-charge on a sanctioned post in which the learned Single Judge relied upon an earlier decision dated 20.10.1995 of another learned Single Judge of this Court in the matter of Assistant Engineers of the Housing Board posted as In-charge Executive Engineer against which judgment the LPA was dismissed and the SLP also stood dismissed, holding in paras 6 and 9 as follows:-

“6. In that view of the matter, this Court holds that there is no reason to deny the petitioner his salary



which is payable for the post of Executive Engineer which was held by the petitioner from 27.2.1980 till October, 1995. It is not in dispute that against the petitioner there has never been a departmental proceeding during the period when he held the said post of Executive Engineer. There is no doubt that the petitioner worked during that period quite satisfactorily. In that view of the matter, there is no justification to deny the petitioner's salary which is due and payable to him for working in the post of Executive Engineer for about 15 years.

9. Be that as it may, if the proposals ultimately materialize and the petitioner is given regular promotion that is another matter. But whether or not the petitioner is given regular promotion to the post of Executive Engineer, this Court following the ratio in the judgment delivered by a Single Bench of this Court as noted above on 20.1.1995 directs respondent nos. 2 and 3 to pay the petitioner the differences of arrears of salary for the post of Executive Engineer which he held from 27.1.1980 till October, 1995 the date of his retirement within a period of three months from the date of service of a copy of this order upon the concerned respondents. In view of payment of salary which has been thus directed to be paid, all consequential benefits and retiral benefits to the petitioner should also follow.”

We have considered the submissions of learned



counsels for the parties and perused the judgment of the learned Single Judge. In the conspectus of facts stated above, it is too late in the day for the appellants to argue that the employees of the then Housing Department whose services were en mass made available to the Housing Board would be considered as one in parent service and not entitled to the benefit of Rule 89 of the Bihar Service Code rather they would be covered by Rules 282 and 283 of the Bihar Service Code. The order of the State Government transferring the said services made it clear that the employees whose services were made available to the Housing Board would continue in same service conditions in all respect as they were entitled under the State Government as also to the same pensionary benefits. The said Government order is a complete answer to the submissions made by learned Senior Counsel for the appellants with regard to non-applicability of Rule 89 of the Bihar Service Code and applicability of Rules 282 and 283 thereof. The submission on that count has to be rejected. The said order also answers the submission made by the appellants with regard to applicability of Rule 58 of the Bihar Pension Rules.

Once it is accepted that Rule 89 of the Bihar Service Code is applicable to the case of the respondent no. 1 then it would be too late in the day to argue that the post of Chief Engineer does



not carry duties and responsibilities of greater importance than what is attached to those of the Superintending Engineer. If that were so, there would have been no occasion to provide under Section 16 of the Bihar State Housing Board Act that the appointment to the said post of Chief Engineer along with that of the Chairman, Managing Director, Secretary and Chief Accounts Officer of the Housing Board shall be made by the State Government. Evidently, the said posts were considered to have much greater responsibility and authority to be directly filled up by order of the State Government and not by the Housing Board itself. Even otherwise, there can be hardly any doubt that the post of Chief Engineer carries duties and responsibilities of greater responsibility than that of Superintending Engineer and thus there could not be any doubt that the writ petitioner's case comes squarely under the ambit of Rule 89 of the Bihar Service Code. The writ petitioner-respondent No. 1 would thus be entitled to the benefit of the same. The decisions cited by the respondent No. 1 specially the Division Bench decision in the cases of Nand Kishore Roy (supra) as also of learned Single Judge in K. M. Thomas (supra) clearly lay down the law on the point with respect to the case of similarly situated Engineers in the Housing Board, albeit in the case of those Assistant Engineers who were made to work as In-charge Executive Engineer. The principles,



however, would be the same and the same result would follow.

So far as the reliance upon the decision in the case of Arun Kumar Sinha (supra) is concerned, the same was one of holding additional charge. The case was argued under the provisions of Rule 103 which does not exactly apply to the circumstances in the present matter. In this regard reliance of learned counsel for the appellant on Note 4 to Rule 103 is also of no avail as according to us, the said rule is only applicable in the circumstance when the Government servant is directed to officiate in two or more independent posts at one time as a temporary measure. The present is not a case where the writ petitioner was holding two posts rather he was holding the substantive rank of Superintending Engineer but was posted as In-charge Chief Engineer. Hence, neither Rule 103 of the Bihar Service Code nor Note 4 can apply to the present case.

We may, however, make it clear that the benefit to be derived under Rule 89 of the Bihar Service Code is irrespective of the fact whether the employee concerned is actually entitled to a promotion or not. Thus, the fact whether the writ petitioner-respondent No. 1 was the senior most Engineer and due for substantive promotion as Chief Engineer or not, is not very relevant for the decision of the present matter and the respondent No. 1 would have been entitled to the pay of the higher post on which he



was made In-charge in view of the application of Rule 89 of the Bihar Service Code and other relief would also follow as a matter of course but it cannot be held that he has to be deemed to be appointed as Chief Engineer.

The appeal, thus, is without any merit and is, accordingly, dismissed with the aforesaid observations.

(Ramesh Kumar Datta, J)

S.Pandey/-

(Birendra Kumar, J)

AFR/NAFR	NAFR
CAV DATE	NA
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