IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.7776 of 2016

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Vijoy Kumar Sinha son of Late Nand Kishore Prasad Sinha, Resident of Mohalla-Bari Mirzapur, P.O. Munger, P.S. Kashim Bazar, District- Munger, the retired Senior Accounts Clerk, Road Construction Department, Road Division, Munger.

.... Petitioner

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar, Patna
2. The Finance Secretary, Finance Department, Government of Bihar, Patna
3. The Principal Secretary, Road Construction 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, Road Circle Munger
6. The Executive Engineer, Road Construction Department, Road Division, Munger.

.... Respondents

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Appearance :

For the Petitioner	:	Mr. S.B.K. Mangalam, Advocate
For the State	:	Mr. Raj Ballabh Pd. Yadav, AAG11
		Mr. Dinesh Maharaj, AC to AAG11

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CORAM: HONOURABLE MR. JUSTICE AJAY KUMAR TRIPATHI

CAV JUDGMENT

Date: 15-12-2016

Petitioner is seeking quashing of the decision dated 26.02.2016, issued under the signature of the Superintending Engineer, Road Construction Department, Road Circle, Munger (Annexure-5) by virtue of which the benefit of first and second ACP granted to the petitioner w.e.f. 19.12.2006 vide order dated 02.06.2009 issued by respondent no.5 has been modified. It is the case of the petitioner that since he was exempted from appearing in the departmental accounts examination w.e.f. 19.12.2006, therefore, there was no illegality at all if the benefits of first and second ACP was granted to him from 19.12.2006 itself, keeping in mind the length of service of the petitioner.

2. Petitioner was initially appointed as a Blue Printer in the Public Works Department in the year 1971. He earned promotion to the post of Tracer, which post he joined on 18.04.1978. Subsequently since the petitioner was also well versed in maintenance of accounts while working as a Tracer, he came to be adjusted against sanctioned and vacant post of Junior Accounts Clerk in the Department w.e.f. 06.07.1979.

3. It is also the case of the petitioner that the post of Accounts clerk and Junior Accounts Clerk were merged and brought under one cadre and they were called Senior Accounts Clerk. Petitioner too became Senior Accounts Clerk w.e.f. 01.05.1980 as a result of the merger.

4. The State of Bihar notified an Assured Career Progression Scheme, 2003 in terms of the proposal of the 5th Pay Revision Committee. This Rule came into effect from 09.08.1999. Since the petitioner had not passed the departmental examination of accounts, he did not get the benefit of the ACP. Subsequently, he was granted exemption from passing the departmental accounts examination w.e.f. 19.12.2006. The petitioner applied for grant of benefit of ACP from the date the exemption was granted from passing

the departmental examination of accounts and the benefit of grant of first and second ACP was extended w.e.f. 19.12.2006. However, subsequently vide Annexure-5, this grant of ACP was withdrawn and the previous order was cancelled. This is how the writ application has been filed seeking quashing of Annexure-5 in so far as it relates to the present petitioner.

5. The stand of the State emerging from the counter affidavit filed on behalf of respondent no.6 is that the history of service of the petitioner is not being disputed. However, they do clarify one aspect that the petitioner was promoted as Junior Accounts Clerk with a pay scale of Rs.220-315 w.e.f. 06.07.1979 meaning thereby that the cadre of the petitioner was changed by giving pay protection to him. This fact is also corroborated from perusal of the pension fixation form. From a perusal of the same culled out from the service book and the pension fixation form, which are Annexure-A series to the supplementary counter affidavit of respondent no.6. It is evident that his service was treated w.e.f. 27.07.1971.

6. The petitioner could not be granted benefit of ACP due to non-passing of the departmental accounts examination. However, since exemption was subsequently granted by the superior authority w.e.f. 19.12.2006, the right of the petitioner for consideration arose thereafter. However, respondent no.5 either by

misreading or misrepresentation of facts as to the ACP Rules, granted the benefit of first and second ACP on the same date as the date of exemption dated 19.12.2006. This was totally erroneous because the petitioner would earn his first ACP from the date of exemption and the second ACP thereafter will accrue once the petitioner completed the desired timeframe laid down in the ACP Rule, which is 12 years and then 24 years. The fixation of pay and all consequential benefit had been given to the petitioner after approval of the concerned authorities, but under the reference of different letter of the Finance Department Vide Letter No.711(2) dated 23.01.2008, Letter No.712 dated 25.01.2009, Letter No.7099 dated 01.08.2011, Letter No.10936 dated 27.11.2014, and Letter No.3111 dated 25.03.2015, a meeting of the Screening Committee was held at the office of the Superintending Engineer, RCD, Road Circle, Munger, on 28.01.2016. It was found that as per ACP/MACP Rule, as the petitioner had already availed two promotions from Blue Printer to Draftsman and Draftsman to Junior Accounts Clerk and in such circumstance cancelled the 1st and 2nd ACP granted to the petitioner, vide Memo No.172 (अनु0) dated 26.02.2016. In the order as contained in Memo No.885 (अनु0) dated 02.06.2009, it was made clear that if any mistake is found it can be corrected and accordingly excess payment may be recovered.

7. If this be the position then the petitioner cannot be

hang on to a benefit even though it was wrongly given by the Superintending Engineer earlier, which was contrary to the service record and the ACP Rules in existence. A government servant cannot derive any benefit over and above his entitlement and it has to be inconformity with the Rules from where such benefit flows. Any benefit, therefore, availed over and above the parameters laid down in the Rules is totally unjustified and illegal and no person can either continue to derive or hold on to the advantage of such illegally extended benefit on one pretext or the other.

8. In view of the same, the decision to modify and annul the grant of first and second ACP from the same date does not suffer from any vice or irrationality, therefore, it is not required to be interfered with.

9. However, keeping in view the recent decision of the Hon'ble Supreme Court in the case of *State of Punjab & Ors. vs. Rafiq Masih (White Washer) & Ors*., reported in *(2015) 4 SCC 334* and the parameters laid down therein, the Court is inclined to extend the benefit to the petitioner with regard to the recovery part since not only the petitioner is a Class III employee but this recovery is sought to be made after almost four years of his superannuation, which in the opinion of the Court, is not justified in view of the decision of the Apex Court in *Rafiq Masih* (supra).

10. Writ is allowed to the extent of recovery whereas re-fixation and cancellation of ACP contained in Annexure-5 is not required to be interfered with.

(Ajay Kumar Tripathi, J.)

S.Kumar/-

AFR/NAFR	NAFR
CAV DATE	14.09.2016
Uploading Date	15.12.2016
Transmission Date	NA