

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.3072 of 2013

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1. Hans Raj Singh S/O Late Keshwar Singh Mohalla Mithapur, B- Area, Kannulal Road, P.S- Jakkanpur, District- Patna And Retired Executive Engineer, Road Construction Department, Govt. Of Bihar, Patna.

.... Petitioner/s

Versus

1. The State Of Bihar
2. The Principal Secretary, Road Construction Department, Govt. of Bihar, Patna.
3. The Principal Secretary, Building Construction Department, Govt. of Bihar, Patna.
4. The Engineer In Chief Cum Chairman Screening Committee, Road Construction Department, Govt. of Bihar, Patna.
5. The Assistant Engineer (Pension Cell) Cum Incharge Section-Ii, Road, Construction Department, Bihar, Patna.

.... Respondent/s

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Appearance:

For the Petitioner/s : Mr. Ramakant Sharma, Sr. Counsel
Mr. Rajesh Kumar, advocate

For the Respondent/s : Mr. P. K. Verma, Sr. Counsel, A.A.G.-5
Mr. Saroj Kumar Sharma, A.C. to A.A.G.-5

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY

ORAL JUDGMENT

Date: 29-02-2016

1. In the present case, the petitioner is seeking relief of Assured Career Progression (A.C.P.) as he was promoted to the post of Executive Engineer in the year 1986 but wrongly the order has been passed on the assumption of proposed punishment, claiming order vide memo No.7802 (E)/Patna dated 29.11.2012 be quashed as it is based on wrong recording of facts.

2. The shorts facts of this case are that the petitioner was appointed as Assistant Engineer in Public Works Department on 18.8.1965. In the year 1996, he was promoted to the post of Executive

Engineer and posted to Building Construction Department at Building Division, Gardanibagh, and ultimately superannuated from the service on 21.01.2002.

3. The claim of the petitioner is that he is at least entitled to the first A.C.P. in terms of 2003 A.C.P. Rules, later on, which was modified or amended in the year 2006. As has been claimed that the petitioner has been deprived of the first A.C.P. as in the impugned order it has been mentioned the benefit of A.C.P. has not been given on account of proposed punishment.

4. From the counter Affidavit, it appears that on 18.10.2010, the Screening Committee considered the case of the petitioner and rejected the same on the ground of proposed punishment, which is completely incorrect as it was found by the Department that the Screening Committee has wrongly recorded the fact of proposed punishment on him. Later on, another Screening Committee considered the case of the petitioner on 20.08.2013 and not granted the benefit of A.C.P. on the ground of adverse vigilance report, which is apparently clear from Annexure-B. It further appears that during the period 1990-91, when the petitioner was posted in the concerned Department an F.I.R. was lodged against him for misappropriation of Rs.50 lakhs. The Vigilance Department registered

a case against the petitioner being Gardanibagh P.S. Case No.208 of 2008. As per the statement mentioned in the Supplementary Counter Affidavit, the charge sheet vide chargesheet No.64 of 2013 has been filed against the petitioner under Section 407, 406, 467, 471 and 120(B) of the Indian Penal Code.

5. Learned counsel for the petitioner submits that the petitioner was entitled to the first A.C.P in the year 1999 as he completed 12 years of service from 1986 and even on the date of superannuation there was nothing against the petitioner, which may disentitle him from the benefit of the first A.C.P. He further submits that after lapse of long time, the petitioner was served the impugned order, wherein wrong fact has been recorded that he has been deprived of the benefit on account of proposed punishment, which is incorrect fact and apparently clear from the Supplementary Counter Affidavit of the State itself, as in the year 2010 there was no order of proposed punishment against the petitioner and in the year 2013 the petitioner has wrongly been deprived of the benefit on account of adverse vigilance report.

6. Learned counsel for the petitioner submits that the sealed cover procedure will be applicable only when either the charge sheet has been filed in a criminal case or in a departmental proceeding the

charge sheet has been served upon the employee concerned. In the present case, the Department has never initiated any proceeding against the present petitioner, but placing reliance on the criminal case, in which admittedly upto the year 2010, no charge sheet was filed against the petitioner and only on 19.03.2013 as per the learned counsel for the State charge sheet has been served upon him.

7. In support of his contentions, learned counsel for the petitioner has placed reliance on the following judgments:-

- (i) *Union of India and Others vs. K.V. Jankiram and Others*, reported in (1991) 4 SCC 109.
- (ii) *Subodh Bihari Sahay vs. the State of Bihar & Anr.*, reported in 2005(4) P.L.J.R. page-162
- (iii) *The State of Bihar vs. Bishan Singh Jayat*, reported in 2002(3) P.L.J.R., page-610
- (iv) *Bank of India and another vs. Degala Suryanarayana*, reported in 1999 S.C. 2047, Para 14
- (v) *Awadhesh Pandey vs. the State of Bihar & Ors.* reported in 2006(3) PLJR, page- 617
- (vi) *Dipak Babaria and Another vs. State of Gujarat and Others*, reported in (2014)3 S.C.C. page- 502, paragraph Nos. 60, 61 and 65.

8. The judgment reported in *Dipak Babaria and another vs. State of Gujarat and Others* (*supra*) principle adumbrates that if the law requires that a particular thing should be done in a particular manner, it must be done in that way alone not in deviation of the manner prescribed.

9. Learned counsel for the respondent submits that the petitioner cannot be given the benefit of A.C.P. as 2003 A.C.P. Rules provides that all the conditions which are applicable for the regular promotion will be equally applicable in granting the benefit under 2003 A.C.P. Rule. He has further placed reliance on Executive Instructions vide 3/M149/2001-7457 dated 11.09.2002, more particularly Clause 2(i) and 11 of the said Circular, submitting that even a Government servant has not been served any charge memo in the departmental proceeding or charge sheet in criminal case has not been filed, and Departmental Promotion Committee found him entitled, but before serving the actual order of promotion, either in the criminal case charge sheet has been filed or charge memo has been served, the order of promotion would be withheld till the conclusion of departmental proceeding or criminal trial. Let the aforesaid provision be examined.

Clause 2(i) provides causes of adverse effect on the



promotion of a Government employees; (i) suspension of the Government servant (ii) the Government servant against whom a decision was taken for initiation of departmental proceeding, and (iii) there will be an adverse effect on the promotion of a Government servant, in a case of lodging of criminal case and the charge sheet has been submitted.

Clause-11 of the said Circular provides that if a Departmental Promotion Committee approves the promotion of a Government servant, but information with respect to clause 2(i) is actually received before granting the Promotion, in that circumstances, the sealed cover procedure will be adopted.

10. On this strength, learned counsel for the respondent submits that even if the petitioner was entitled for A.C.P. but before giving the benefit of A.C.P., a charge sheet has been filed against him, which makes him disentitled to the A.C.P. in terms of 2003 A.C.P. Rule, amended in the year 2006.

11. Having considered the rival contentions of the parties, to understand the real dispute in the present case and to find out whether the petitioner is disentitled to the benefit of A.C.P. on the ground of pendency of criminal case against him. In order to appreciate this



issue, it is necessary to examine 2003 A.C.P., Rule. The A.C.P. Rule, 2003, has been enforced with effect from 9.8.1989. Rule-5 of A.C.P. Rules, provides that the condition of assured progression under the scheme shall be the same which are prescribed under the Recruitment/Service Rules for regular promotion against the vacancies. If the rule and regulations prescribes passing of the departmental examination or any qualification for promotion that also be an essential condition for sanctioning of benefit under the scheme, provided that after completion of 12 to 24 years of service, the financial progression shall be given subject to satisfaction of aforesaid condition.

12. One thing is very important to note that 2003 A.C.P. Rules, has been amended by 2010 A.C.P. Rules, which was made effective from 01.01.2009, repealed all the provisions, save and except, the action taken under 2003 A.C.P. Rules, will be treated the action taken under 2010 A.C.P. Rules.

13. The A.C.P. Rules, 2010 does not impose any such condition like 2003 A.C.P. Rule for passing the departmental examination for promotion or Government servant is under suspension or criminal case is pending, simply prescribes completion of 10 years of service, an employee will be entitled to the first A.C.P.,



after completion of 20 years of service, the employee will be entitled to the 2nd A.C.P. and after completion of 30 years, the employee will be entitled for 3rd A.C.P. There is no such condition imposing embargo in granting progression under 2010 A.C.P. Rule similar to rules and regulations of regular promotion. In normal circumstances of regular promotion, the terms of Executive Instructions dated 11.09.2002 sealed cover procedure will be applicable in a case when the Departmental Promotion Committee has recommended for promotion, but actual promotion was not granted by the time, it was found that the Government employee falls in category of 2(i).

14. Before considering the applicability of the provisions, it will be appropriate to deal with in what circumstances the sealed cover procedure applies. In this regard, this Court will have to place reliance on the judgment in *Union of India vs. Janki Raman, reported in 1991(4) SCC, page 109*, where the Hon'ble Supreme Court has an occasion to deal with the situation about the applicability of the sealed cover procedure in the matter of promotion. As per the memorandum of the Government of India, the sealed cover procedure would be applicable against the Government Servant in three situations; (a) the Government servant was put under suspension; (b) against whom the disciplinary proceeding are pending or decision has



been taken by the competent authority to initiate the disciplinary proceeding; and (c) against whom the prosecution has been launched in a Court of law or for sanction of prosecution has been issued, are to be considered for promotion by the Departmental Promotion Committee and in that circumstances, the finding of the Committee are to be kept in a sealed cover to be opened after conclusion of the disciplinary/Court proceedings. If on conclusion of the Departmental Proceeding or Court proceeding, the Officer concerned is completely exonerated from all the charges and where he is under suspension it was also held that the suspension was wholly unjustified, the sealed cover is opened and the recommendation of the Departmental Promotion Committee are to be acted upon. If the recommendation goes in his favour he will get the benefit of promotion including seniority and fixation of pay on the notional basis with reference to the date on which he would have been promoted in the normal course, but for pending disciplinary/Court proceeding. The Hon'ble Supreme Court has further taken a view that the disciplinary proceeding will be treated to have commenced after the service of charge memo/charge sheet submitted in a criminal prosecution, in that circumstances, the departmental proceeding and criminal proceeding will be treated to have been initiated. The pendency of preliminary investigation prior to that stage will not be sufficient to enable the authority to adopt the



sealed cover procedure. The Court has taken note that preliminary investigation takes an inordinate long time particularly when they are initiated at the instance of the interested person, they are kept pending deliberately. Many times, they never result in the issue of charge memo and charge sheet. If the allegations are serious and authority are keen in investigation them, ordinarily, it should not take much time to collect the relevant evidence and finalized the charge. It is relevant to quote paragraph No.16 of the said judgment, which reads as under:-

“16. On the first question, viz., as to when for the purposes of the sealed cover procedure the disciplinary/criminal proceedings can be said to have commenced, the Full Bench of the Tribunal has held that it is only when a charge-memo in a disciplinary proceedings or a chargesheet in a criminal prosecution is issued to the employee that it can be said that the departmental proceedings/criminal prosecution is initiated against the employee. The sealed cover procedure is to be resorted to only after the charge-memo/charge-sheet is issued. The pendency of preliminary investigation prior to that stage will not be sufficient to enable the authorities to adopt the sealed cover procedure. We are in agreement with the Tribunal on this point. The contention advanced by the learned counsel for the appellant-authorities that when there are serious allegations and it takes time to collect necessary evidence to prepare and issue charge-memo/charge-



sheet, it would not be in the interest of the purity of administration to reward the employee with a promotion, increment etc. does not impress us. The acceptance of this contention would result in injustice to the employees in many-cases. As has been the experience so far, the preliminary investigations take an inordinately long time and particularly when they are initiated at the instance of the interested persons, they are kept pending deliberately. Many times they never result in the issue of any charge-memo/chargesheet. If the allegations are serious and the authorities are keen in investigating them, ordinarily it should not take much time to collect the relevant evidence and finalise the charges. What is further, if the charges are that serious, the authorities have the power to suspend the employee under the relevant rules, and the suspension by itself permits a resort to the sealed cover procedure. The authorities thus are not without a remedy. It was then contended on behalf of the authorities that conclusions nos. 1 and 4 of the Full Bench of the Tribunal are inconsistent with each other. Those conclusions are as follows: (ATC p.196, para 39)

"(1) consideration for promotion, selection grade, crossing the efficiency bar or higher scale of pay cannot be withheld merely on the ground of pendency of a disciplinary or criminal proceedings against an official;

*(2) * * **

(3) * * *

(4) *the sealed cover procedure can be resorted to only after a charge memo is served on the concerned official or the charge-sheet filed before the criminal court and not before .”*

15. This issue again come for consideration in ***Delhi Development Authority vs. H.C. Khurana***, reported in ***1993 (3) SCC 196***, ***Union of India vs. Kewal Kumar***, reported in ***1993(3) SCC 204***, ***State of Madhya Pradesh and Another vs. Syed Naseem Zahir and Others***, reported in ***1993 Suppl. (2) SCC page 225***, ***Bank of India vs. Dhigal Sury***, reported in ***1999 SC, page 2407***, paragraph No.14, ***Union of India vs. Sangram Keshari Nayak***, reported in ***2007(6) S.C.C. 704***. In all those cases, the issue of applicability of sealed cover procedure has been discussed and the Court has arrived to a conclusion that if on the day of consideration of the case of a Government servant by Departmental Promotion Committee of his promotion, any of the conditions are attached with him, the recommendation of the Departmental Promotion Committee for promotion will be kept in the sealed cover and the same will be opened after the conclusion of criminal trial or after the conclusion of the disciplinary proceeding and the benefit will be given in terms of the recommendation of the Departmental Promotion Committee.



16. In the present case, the question would arise whether the stipulation attached to regular promotion will apply in the case of the petitioner or not, in terms of A.C.P. Rule 2003, certainly, all the conditions attached to the regular promotion for granting A.C.P. will be applicable, but the conditions which are attached for granting regular promotion is completely absent in 2010 A.C.P. Rules, which has been made effective from 01.01.2009, the effect will be that the Circular dated 11.09.2002, Clause-11 providing that if before giving actual promotion, if any of the conditions mentioned in the clause 2(i) comes to fore, in that circumstances, the recommendation of Departmental Promotion Committee will be kept in sealed cover, so additionally this condition has been attached that before giving any promotion any of the infirmities mentioned in 2(i) is emerged sealed cover procedure will be applicable, but in the present case for the first time the case of the petitioner was considered by the Screening Committee on 18.8.2010, recorded benefit of the A.C.P. was not extended on account of proposed punishment and later on, another Screening Committee considered the case of the petitioner on 28.02.2013, wherein it has been recorded that he is not entitled to the ACP on account of adverse vigilance report.

17. As has been accepted by the State that the Screening



Committee has wrongly recorded the fact of proposed punishment against the petitioner and has been stated in the Counter Affidavit that it is an error committed by the Screening Committee. The provisions of A.C.P. Rules 2003, comes to an end before 1.1.2009, on and after 1.1.2009 the modified A.C.P. Scheme 2010 has come into play. On the date of consideration of the case of the petitioner for the benefit of A.C.P., no such condition is attached as like 2003 A.C.P. Rules in 2010 A.C.P. Rules.

18. In such view of the matter, the memorandum dated 11.09.2002 has only been made applicable to the government servant in the case of the regular promotion of the Government employee. This circular does not mention its applicability in the matter of A.C.P., so this Court is of the view that this Circular does not apply in the case of granting A.C.P. after 01.01.2009. It may have an application while 2003 A.C.P. Rules was in operation. The charge sheet has been filed after the operation of 2010 A.C.P. Rule and so long 2003 A.C.P. Rule was in operation, none of the ground mentioned in 2(i) of 2002 executive instructions is satisfied.

19. In such view of the matter, the impugned order dated 29.11.20012 holding the petitioner disentitled for A.C.P. on account of proposed punishment is completely illegal and factually wrong and

liable to be set aside. Accordingly, the same is set aside. The authorities are directed to consider the case of the petitioner for granting A.C.P. in terms of 2010 A.C.P. Rules.

20. With the aforesaid observations and directions, this writ petition is allowed.

(Shivaji Pandey, J)

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