

IN THE HIGH COURT OF JUDICATURE AT PATNA

**Letters Patent Appeal No.806 of 2014
IN
Civil Writ Jurisdiction Case No. 20676 of 2012**

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Binay Shankar Shukla Son of Late Arbind Prasad Shukla Resident of Village - Sitla
Sthan Road, Tilkamanjhi, P.S. Tilkamanjhi, District - Bhagalpur

.... Appellant/s

Versus

1. The State of Bihar through the Principal Secretary, Finance Department,
Government of Bihar, Old Secretariat Bailey Road, Patna
2. The District Magistrate, Bhagalpur
3. The District Accounts Officer, Bhagalpur
4. The District and Sessions Judge, Civil Court, Bhagalpur
5. The Registrar, Civil Courts, Bhagalpur

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. D.K.Sinha, Sr. Advocate
For the State : Mr. Dhurjati Kr Prasad, Advocate
For the Civil Court : Mr. Mrigank Mauli, Advocate
Mr. Prince Kumar Mishra, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY)

Date: 06-09-2017

The instant Letters Patent Appeal has been filed by
the appellant against the order dated 11.3.2014 passed by the Writ
Court in CWJC No. 20676 of 2012.

The writ application was filed by the appellant on
2.11.2012 for directing the respondents to allow the actual



monetary benefits of grant of 1st and 2nd ACP with effect from 09.08.1999 and 02.03.2003 respectively and to pay the arrears of such benefit. The appellant has also prayed for grant of benefits of Modified Assured Career Progression Scheme on completion of 30 years of service with effect from 2.3.2009, for payment of arrears of revised pay scale on account of 6th pay revision and also for quashing of the decision to recover the alleged excess amount drawn by the appellant prior to 29.6.2003. The writ petition was finally heard and decided on 11.03.2014. The Writ Court referring to the objection of the District Accounts Officer, as contained in Annexure-5 to the effect that in terms of Rule 4(5) of the ACP Rules, 2003 every employee has to fulfill the requirement as contemplated for grant of regular promotion, even for getting the benefit of ACP and in terms of Rule 21(1) of the Bihar Civil Court (Staff Class III and Class IV) Rules, 1998 the scale is admissible only on passing of examination as prescribed by the High Court. The Writ Court noticing the requirement of Rule 21(5) and 21(6) held out that passing of departmental examination is a condition precedent for grant of benefit of first and second ACP. The Writ Court as such held out that the monetary benefit accrued to the appellant only with effect from 29.6.2003 on passing of departmental examination and the past benefit, which the appellant



has drawn, was contrary to the requirements of the rules and therefore, there was occasion to either re-fix as well as demand recovery of the benefit drawn by the appellant and relying upon the judgment of the Apex Court in the case of **Chandi Prasad Uniyal and others Vs. State of Uttarakhand and others: (2012) 8 SCC 417** the Writ Court concluded that there is no irregularity in the decision with regard to the recovery of excess amount. However, the Writ Court considering the claim of the appellant under Modified Assured Career Progression Scheme, 2010 directed that the case of the appellant would be examined taking into consideration the length of service as per the requirement under 2010 Rules within a period of three months from the date of production/communication of the order and the writ petition was allowed to the extent of payment of difference of salary as well as examination of entitlement of the appellant for 3rd ACP.

In this appeal, Mr. D.K.Sinha, learned Senior counsel appearing on behalf of the appellant has submitted that the Civil Court Rules was framed in 1998 and after framing of such rule the departmental examination was held for the first time in 2003 and in the very first attempt the appellant has passed the departmental examination and as such the appellant cannot be made to suffer on account of non-holding of the departmental examination as the law



is well settled that one cannot take advantage of his own laches. If the departmental examination was not conducted by the respondents from the date of framing of the Bihar Civil Court (Staff Class III and Class IV) Rules, 1998, the appellant cannot be made to suffer. He further submits that the appellant retired on 28th of February, 2011 from the post of Clerk and as such, the decision to recover the alleged excess amount from the appellant is also unsustainable.

Learned counsel appearing on behalf of the respondents submitted that for grant of benefit under the ACP Scheme individual must be qualified for regular promotion as the ACP is anti-stagnation measure and it is only available in the event when despite fulfilling all the conditions for grant of regular promotion, if any individual is subjected to stagnation for lack of promotional avenue. In the instant the appellant who passed the departmental examination in 2003 is only entitled to the protection of anti-stagnation measure of ACP with effect from 29.6.2003 and the Writ Court has committed no illegality.

We have considered the rival submissions of the parties. We find substance in the submission of counsel appearing on behalf of the appellant that in the absence of holding of departmental examination denying the benefit of ACP to the



appellant will amount to taking advantage of own default. It is elementary principle of law that one cannot take advantage of its own cause. In **All India Groundnut Syndicate vs Commissioner Of Income Tax: AIR 1954 Bom. 232**, Hon'ble Mr. Justice Chagla, Chief Justice has laid down the principle that one cannot take advantage of his own default, which reads as follows:

"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."

In fact the Apex Court in the case of **State Of Maharashtra vs Jagannath Achyut Karandikar: AIR 1989 SC 1133**, in similar fact situation has held out that failure of the Government to hold examination for several years person who has not exhausted all his chances, could not be denied of his



seniority as it is unreasonable and arbitrary to penalize such person for the default of the Government to hold examination every year. Paras 9 and 10 of the judgment is quoted below for ready reference.

9. This is a question of construction of the rules which form part of the scheme prescribing a condition for promotion. We do not have to reflect upon the rules of interpretation since they are well settled. They are now like the habits of driving which have become ingrained. They come to our assistance by instinct. We are to use the different rules meticulously to give effect to the scheme as we use the clutch, brake and accelerator for smooth driving. These rules are to be harmoniously construed. We should not concentrate too much on one rule and pay too little attention on the other. That would lead us astray and result in hardship. We must avoid such construction. Rule 2 of the 1962 Rules no doubt states that a candidate who does not pass the examination at the end of nine years' service will lose his seniority. But this rule cannot be read in isolation as the High Court did. It has to be read along with the other rules since it is a part of the scheme provided for promotion. Rule 5 requires the Government to hold the examination every year. This rule is the basis of the entire scheme and the effect of other rules



depends upon holding the examination. If examination is not held in any year, the rule 2 cannot operate to the prejudice of a person who has not exhausted all his chances. The person who has not exhausted the available chances to appear in the examination cannot be denied of his seniority. It would be unjust, unreasonable and arbitrary to penalise a person for the default of the Government to hold the examination every year. That does not also appear to be the intent or purpose of the 1962 Rules.

10. If the examination is not held in any year, the person who has not exhausted all the permissible chances has a right to have his case considered for promotion even if he has completed 9 years' service. The Government instead of promoting such persons in their turn made them to wait till they passed the examination. They are the persons falling into the category of "Late Passing". To remove the hardship caused to them the Government wisely restored their legitimate seniority in the promotional cadre. There is, in our opinion, nothing improper or illegal in this action and indeed, it is in harmony with the object of the 1962 Rules.

The Apex Court has thus held out that one cannot be made to suffer for the default of the Government. The case of the appellant is squarely covered by the judgment of the Apex Court in



the case of **State Of Maharashtra vs Jagannath Achyut Karandikar** (supra) as no departmental examination was held before 2003 and in first attempt itself the appellant has cleared the departmental examination and as such the appellant cannot be made to suffer on account of non-holding of examination particularly, in view of the fact that Civil Court Rule itself was framed in the year 1998 and the departmental examination for the first time was conducted on 29.3.2003 after framing of 1998 Rules and the appellant was declared successful in very first attempt.

Thus, we have no hesitation in holding that the appellant cannot be made to suffer on account of non-holding of examination by the respondents and in view of the judgment of the Apex Court as mentioned above, the appellant is entitled to grant of the benefit under ACP Scheme treating the appellant to have passed the departmental examination with effect from the date the Scheme of ACP was introduced, firstly on the ground that Civil Court Rules was framed in 1998 wherein the requirement of passing departmental examination was introduced and secondly that in the very first departmental examination held on 29.6.2003 the appellant was declared successful. Even otherwise the decision of the Writ Court approving recovery is also not sustainable in the light of the judgment of the Apex Court in the case of **State of**



Punjab v. Rafiq Masih (2015) 4 SCC 334

Accordingly, the present appeal is allowed. The judgment and order of the learned Writ Court to the extent of grant of ACP restricted from 29.6.2003 is set aside. The objection of the District Accounts Officer as contained in Annexure-5 is also set aside and the order of the learned writ court is modified to the extent that the appellant shall be entitled to grant of first ACP and 2nd ACP with effect from 9.8.1999 and 2.3.2003 respectively. The other direction of the Writ Court with regard to benefit under Modified Assured Career Progression Scheme and benefit as to 6th PRC stand approved.

The appeal is allowed to the extent indicated above.

(Rajendra Menon, CJ)

S.Pandey/-

(Anil Kumar Upadhyay, J)

AFR/NAFR	NAFR
CAV DATE	NA
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