

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.493 of 2017

In

Civil Writ Jurisdiction Case No.5561 of 2011

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1. Ms. Sufia Hassan, Wife of Late Md. Shabbir Hassan
 2. Md. Parwez Son of late Md. Shabbir Hassan
 3. Mrs. Rubina Shaheen D/o - late Shabbir Hassan All are resident of 140, Patliputra Colony, District- Patna.

... .. Appellant/s

Versus

1. The State of Bihar.
2. The Principal Secretary, Road Construction Department, Bihar, Patna.
3. The Chief Engineer, Road Construction Department, Setu Nirupan Anchal, Patna.
4. The Superintending Engineer, Road Construction Department, Setle Nirupan Anchal, Patna.
5. The Account Officer, Setu Nirupan Anchal, Road Construction Department, Patna.
6. The District Provident Fund Officer, Patna.
7. The Accountant General , Bihar.

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Gyanendra Kumar Shukla, Advocate
		Mr. Ashok Kumar Choudhary, Advocate
		Ms. A. Ankit, Advoate
For the Respondent/s	:	Mr. Raj Ballabh Prasad, AAG-XI
		Mrs. Archana, A.C. to AAG-XI

CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD



ORAL JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 21-03-2018

Hard learned counsel for the parties on I.A. No. 1865 of 2017, an application for condonation of delay in filing of this appeal and I.A. No. 8662 of 2017 an application for leave to appeal filed on behalf of the legal heirs of late Md. Shabbir Hassan.

Late Md. Shabbir Hassan was working in the department in question and retired on attaining the age of superannuation on 30th of September, 2009 after working for 34 years. While he was alive and after his retirement, when post retiral benefit and A.C.P. granted to him while in service was withdrawn and recovery ordered, he filed the writ petition in the year 2011 and while the writ petition was pending, it is reported that after the order was passed on 26.09.2014 he died on 10.05.2015. It is stated in the application that the counsel or the clerk had not informed the employee Shri Shabbir Hassan about disposal of the matter on 26.09.2014. It is only after death of Shabbir Hassan that the present applicant came to know about dismissal of the writ petition and, therefore, they have filed I.A. No. 1865 of 2017 for condoning the delay and I.A. No. 8662 of 2017 seeking leave to file this appeal.



Taking note of the averments made in the application, they are allowed and delay in filing of the appeal is condoned and the applicants are granted liberty to prosecute the matter.

Having heard learned counsel for the parties, we find that while late Md. Shabbir Hassan was in service, he was granted A.C.P. and after his retirement, A.C.P. namely the 1st or the 2nd A.C.P. granted to him has been cancelled on account of the fact that he did not pass the required departmental examination. The question of a delinquent employee holding a clerical post and the requirement of his passing the departmental examination was considered recently by a Division Bench of this Court in the case of **Uday Shankar Prasad Vs. The State of Bihar through the Chief Secretary & Ors.-2017 (3) PLJR 824** and after taking note of the Bihar Board Miscellaneous Rules, 1958 and the Bihar State Employees Service Condition (Assured Career Progression Scheme) Rules, 2003 in Paragraph 8 and 9 the principle has been crystallized by the coordinate Bench in the following manner:-

“8. A perusal of the aforesaid rules clearly stipulates that the prescribed requirement and mode of sanction of financial progression under the scheme shall be the same which are



prescribed under the Recruitment/Service Rules for regular promotion against the vacancy. It is, therefore, clear that for getting benefit under the scheme in question, an employee has to fulfill all the conditions stipulated in the Recruitment or the Service Rules which is prescribed for regular promotion from the post held to the next higher post. Admittedly, in the case in hand, for further promotion from the post of Compilation Clerk to a higher post, no Service Rules are prescribed as there is no further avenue for promotion from post of Compilation Clerk to any other higher post. That being so, sub-rule 5 of Rule 4 and its interpretation would clearly show that for grant of ACP from the post of Compilation Clerk no rules of promotion or recruitment being prescribed, this rule will not apply, i.e. 4(5). Thus, there are no prescribed statutory rules for recruitment or promotion from the post of compilation clerk to any other post. That apart, we find that the Rules of 2003 are the rules framed under Article 309 of the Constitution of India and there is no stipulation in these rules that the rules contemplated under the Bihar Board Miscellaneous Rules, 1958 would be applicable for grant of ACP. That being the position, the contention of the respondents that the appellant is not entitled to the benefit under the scheme is wholly misconceived and while rejecting the claim of the appellant the learned Writ Court has not taken note of this factual or legal aspect of the



matter. On going through the judgment referred to by the State in the case of **Kusheshwar Nath Pandey** (supra), we find that it was a case pertaining to grant of time bound promotion under a particular scheme and the said case was pertaining to promotion of a Tracer to some higher post and is not applicable to this appellant.

9. A perusal of the Rule, which is reproduced in para 10 of the judgment in the case of **Kusheshwar Nath Pandey** (supra), goes to show that the rule is applicable for the purpose of crossing the efficiency bar, confirmation and for promotion to the selection grade. There is nothing in the said rule to show that it pertains to promotion of Compilation Clerk to any other higher post. Rules of 2003 is the rule framed under Article 309 of the Constitution and the aims and objects of the scheme is to grant higher pay scale or grade to the employees who stagnate in particular post without any promotion, may be because no promotional posts are available or vacancies are not available and the scheme has been envisaged to grant only benefit of higher pay scale or grade to an employee who stagnates for 12 years or 24 years. Once we are convinced that there are no rules for promotion from the post of Compilation Clerk and the Boards Miscellaneous Rules of 1958 are not applicable, in the case in hand, there is no reason why the benefit claimed by the appellant cannot be granted. That being the position, the benefit of ACP was rightly



granted to the appellant and there was no justification in withdrawing the same.”

From the aforesaid, it is clear that if there is no avenue for promotion under the recruitment or the service rules formulated under Article 309 of the Constitution then in that case by applying the Bihar Board Miscellaneous Rules, 1958 for grant of A.C.P. the State Government cannot insist upon passing of the departmental examination. In the present case also same is the position and we see no reason to take a different view. That apart, the case in hand is also hard for the simple reason that the A.C.P. was granted to the employee while he was in service. He had retired after completing 34 years of service. It is after his retirement based on audit objection that the impugned auction has been taken. Taking note of all these circumstances, we are of the considered view that at least in the matter of withdrawal/cancellation of the A.C.P. and its recovery relief has to be granted to the appellants and to that effect the appeal has to be allowed.

Accordingly, we allow this appeal, quash the order dated 26.09.2014 passed by the Writ Court in C.W.J.C. No. 5561 of 2011 so far as it pertains to upholding the cancellation of an A.C.P. granted to the writ-petitioner, allow the writ petition



and direct that the order passed withdrawing/cancelling the A.C.P. granted to Shri Shabbir Hassan shall stand set aside and the appellants herein shall be granted pensionary benefit treating the employee to have been granted the A.C.P. and the Time Bound Promotion which was earlier granted to him. Necessary post retiral benefit be now recalculated and along with arrears the same be granted to the appellants within three months.

(Rajendra Menon, CJ)

(Rajeev Ranjan Prasad, J)

P.K.P./-

AFR/NAFR	N.A.F.R.
CAV DATE	N.A.
Uploading Date	27.03.2018
Transmission Date	

