

IN THE HIGH COURT OF JUDICATURE AT PATNA

**Letters Patent Appeal No.239 of 2015
IN
Civil Writ Jurisdiction Case No. 19876 of 2011**

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1. The State of Bihar
2. The Secretary, Road Construction Deptt., Bihar, Patna
3. The Deputy Secretary (Management Cell), Road Construction Department,
Bihar, Patna

.... Appellants

Versus

Surya Nath Pathak Son of Late Satya Narain Pathak Resident of Mohalla - Chhote
Badalpur, P.S. Khagaul, District - Patna

.... Respondents

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Appearance :

For the Appellant/s : Mr. Gyan Shankar, AC to GP-2

For the Respondent/s : Mr. Prabhu Nath Pathak, Adv.

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN

and

**HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH**

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE JYOTI SARAN)

Date: 20-02-2018

This appeal under Clause 10 of the Letters Patent of the High Court of Judicature at Patna has been filed by the State and its officials in the Road Construction Department feeling aggrieved by the judgment and order of the learned Single Judge of this Court dated 30.1.2014 passed in C.W.J.C.No. 19876/2011, whereby the prayer of the petitioner for grant of 2nd Assured Career Progression under the Assured Career Progression Rules, 2003 (hereinafter referred to as 'the ACP Rules') has been allowed with all consequential benefits.

The facts lie in a very narrow compass. The petitioner was appointed as an Engineer Assistant on 17.8.1973 in the Public Works



Department. On merger of the department with the Road Construction Department, it became a part thereof. The post of Engineer Assistant got merged with the post of Assistant Engineer in 1975. The petitioner was promoted to the post of Executive Engineer on 18.11.1996. According to the petitioner, since he had already been granted a promotion to the higher post that on completion of 24 years of regular service i.e. 17.8.1997, he became entitled for the benefit of 2nd Assured Career Progression under 'the ACP Rules'. The petitioner was put under suspension on 22.6.2000 vide notification no. 4058 dated 22.6.2000 and he superannuated in such state with effect from 31.1.2001 from the post of Executive Engineer, Road Construction Department.

It is after the superannuation of the petitioner that a disciplinary proceeding was initiated against him under the Civil Services (Classification, Control and Appeal) Rules, 1930 (hereinafter referred to as '1930 Rules') which now stands repealed by the Bihar Government Servants (Classification, Control and Appeal) Rules, 2005 (hereinafter referred to as 'the Disciplinary Rules'). The petitioner was served with a charge memo bearing No. 1425(S) dated 2.3.2001 under Rule 55 of the '1930 Rules'. The enquiry concluded in favour of the petitioner when the Enquiry Officer submitted his report on 8.6.2001 exonerating him of the charges. Not being satisfied by the



report that the respondents directed for a second enquiry on 19.1.2002 although the source for such direction is debatable. The proceeding was converted into a proceeding under Rule 43(b) of the Bihar Pension Rules vide Memo No. 9013 dated 18.10.2003 and resulted in punishment of deduction of 10% of pension which was questioned by the petitioner in C.W.J.C.No. 2689/2010. The punishment order was quashed by a learned Single Judge of this Court vide judgment and order passed on 26.8.2010 and the matter remitted for disposal afresh, whereafter a second punishment order of deduction of 5% pension was passed vide notification No. 3371(S) dated 17.3.2011.

The facts above have been discussed primarily for the reason that it is by taking refuge under the said proceedings which has culminated in a punishment order, that the respondents have chosen to deny the petitioner benefit of 2nd Assured Career Progression. The challenge has gone in favour of the petitioner under the judgment and order of the learned Single Judge and feeling aggrieved the State is before this Court in appeal.

Mr. Gyan Shankar, learned AC to GP-2, has questioned the judgment and order of the learned Single Judge mainly on two grounds:

- (a) The culmination of the proceeding in a punishment order would confirm that the



service of the petitioner was not satisfactory which is a prerequisite for grant of benefit under 'the ACP Rules'; and

- (b) The issue stands settled by a Division Bench judgment of this Court reported in 2016(3) PLJR 392 (**State of Bihar & ors. v. Dhirendra Prasad Shrivastava**).

According to Mr. Shankar, a similar issue questioned by the State before the Division Bench, has been answered in the light of the stipulations present under 'the ACP Rules' which according to the learned counsel as held by the Division Bench debars an incumbent from such benefit if he is faced with a disciplinary proceeding.

The arguments have been countered by Mr. Pathak, learned counsel for the respondent, in submitting that while the entitlement of the petitioner to the benefit arose on 9.8.1999, it is undisputed that neither any charge nor any proceeding nor any adverse recommendation was present on the said date to deny the petitioner of the said benefit. According to Mr. Pathak, since there was nothing adverse existing on the date when the petitioner became entitled to such progression, he could not have been denied the benefit and for which learned counsel has relied upon a Division Bench judgment of this Court since reported in 2015(2) PLJR 659 (**Ram Keshwar Ram**



v. the State of Bihar & ors.).

We have heard learned counsel for the parties and have perused the records and the only issue which according to us calls for consideration is whether in the undisputed circumstances existing the petitioner could have been denied the benefit of 2nd Assured Career progression under 'the ACP Rules'.

The main plank of argument of Mr. Shankar rests on the judgment of the Division Bench rendered in the case of **Dhirendra Prasad Shrivastava (supra)**. It is by-now well settled that a judgment is an authority on the facts contested, which accompanies a particular case. It is thus to be seen whether or not the facts which accompanied the judgment in **Dhirendra Prasad Shrivastava** case are the facts involved in the present case.

In our opinion the situation in the two cases are vastly different. In so far as the present case is concerned, it is a specific observation by the learned Single Judge that the petitioner completed 24 years of service on 17.8.1997, i.e. much prior to enforcement of the scheme on 9.8.1999 and until the said date, there was nothing adverse against the petitioner to deny him the 2nd Progression. There is nothing present either in the counter affidavit filed in the writ proceeding or in the memo of appeal to contest this observation of the learned Single Judge. Clause 5 of 'the ACP Rules' no doubt mandates



an incumbent to have a satisfactory service and in so far as the case in hand is concerned, even though the petitioner became entitled to the benefit on completion of 24 years of service on 17.8.1997, 'the ACP Rules' stipulated grant of such benefit with effect from the date it was enforced i.e. 9.8.1999 which is two years thereafter. As we have noted, nothing has been placed before us by the appellants to deny such benefit to the petitioner. The reliance of Mr. Shankar, on the judgment of **Dhirendra Prasad Shrivastava (supra)** is on the issue that since on the date of consideration of grant of financial progression admittedly a proceeding was pending, the judgment would apply to the present case. For the purpose Mr. Shankar has relied upon disciplinary proceeding initiated vide Memo No. 1425 dated 2.3.2001 whereby a memo of charge was served on the petitioner under Rule 55 of the '1930 Rules'.

In our opinion the reliance placed by Mr. Shankar on the proceedings initiated vide Memo No. 1425(S) dated 2.3.2001 to deny the benefit of financial progression to the petitioner is founded on patent illegality because the initiation itself was void ab initio. The petitioner having superannuated with effect from 31.1.2001 even if he was allegedly charged for misconduct for an act done during the course of service after his superannuation, no such proceedings could have been initiated under 'the Disciplinary Rules' which at the



relevant time was governed under the '1930 Rules', even if the respondents could have proceeded against the petitioner under the Bihar Pension Rules, 1950. In fact the respondents did realize their mistake and did proceed to convert such void proceeding into a proceeding under the Bihar Pension Rules vide Memo No. 9013 dated 18.10.2003 but in our opinion a void proceeding could not have been provided a legal status by a subsequent valid act.

Whether or not in such circumstances the punishment imposed under the Pension Rules did have a validity, is not an issue posed before this Court and thus we would refrain from expressing any opinion on the same for the present. We have made reference to the validity of the initiation because Mr. Shankar has chosen to place much reliance on such initiation to take benefit of the judgment of the Division Bench passed in the case of **Dhirendra Prasad Shrivastava** (supra) for saving the impugned action of the respondents which has been set aside by the learned Single Judge. In our opinion, since the proceeding itself was void ab initio, the initiation could not act an obstacle for the petitioner nor provide a reason to the respondents for denial of the benefit of financial progression.

Whether or not the judgment of **Dhirendra Prasad Shrivastava** (supra) can be pressed into service in defence of such action is the other issue raised by the learned counsel for the



appellants. We would in this regard simply refer to two earlier Division Bench judgments of this Court which have a divergent opinion on the issue.

The first judgment is the one which has been relied upon by Mr. Pathak rendered in the case of **Ram Keshwar Ram** (supra) and the other is rendered by a Division Bench on 20.4.2015 in the case of **State of Bihar v. Pramod Kumar**, arising from L.P.A.No. 1260/2012.

Unfortunately the attention of the Division Bench which passed the judgment in the case of **Dhirendra Prasad Shrivastava** (supra) was neither invited to the judgment of **Ram Keshwar Ram** (supra) which was a judgment passed on a similar issue nor to the judgment in the case of **Pramod Kumar** (supra) wherein the scheme of ACP Rules itself got discussed. In fact the Division Bench in the case of **Ram Keshwar Ram** (supra) when faced with similar issue allowed the claim of the incumbent for progression in reference to the legal position settled in the judgment of the Supreme Court rendered in the case of **Union of India & ors. v. K.V.Jankiraman & ors.**, since reported in (1991)4 SCC 109= 1992(1) PLJR (SC) 27 to hold that unless a disciplinary proceeding is validly initiated and is pending on the date when the right to such progression arose, the benefit of progression under the 'ACP Rules' cannot be denied.



In fact the legal position in this regard stands well settled and until a disciplinary proceeding validly initiated is pending on the date when an incumbent becomes entitled for the benefit either under ‘the ACP Rules’ or for promotion or any such proceedings initiated relates to an act of alleged misconduct which took place during the period of consideration, a proceeding luxuriously initiated by the department and equally luxuriously delayed cannot be an obstacle for grant of progression nor can be a stumbling block for an incumbent to get such relief.

In the circumstances noted, we are persuaded to refer to the judgment of the Supreme Court since reported in (2011)4 SCC 589 (**Union of India & ors. v. S.K.Kapoor**) wherein it has been clearly held that if a subsequent Co-ordinate Bench of equal strength wants to take a different view than earlier held by a Bench of equal strength, it can only refer the matter to a larger Bench otherwise the prior decision of a Co-ordinate Bench is binding on the subsequent Bench of equal strength. We are persuaded to reproduce the relevant extract of paragraph 9, which runs under:

“9. It may be noted that the decision in S.N.Narula case, reported in (2011)4 SCC 591, was prior to the decision in T.V.Patel case, reported in (2007)4 SCC 785. It is well settled that if a subsequent coordinate Bench of equal strength wants to take a different view, it can only refer the matter to a larger Bench, otherwise the prior decision of a coordinate Bench is binding on the subsequent Bench of equal strength. Since, the decision



in S.N.Narula case (supra) was not noticed in T.V.Patel Case (supra), the latter decision is a judgment per incuriam. The decision in S.N.Narula case (supra) was binding on the subsequent Bench of equal strength and hence, it could not take a contrary view, as is settled by a series of judgments of this Court.”
(Emphasis supplied)

In the circumstances noted, the reliance by Mr. Shankar, learned State Counsel on the judgment of **Dhirendra Prasad Shrivastava**, would not improve the situation for the appellant either on merits or on the principles underlying the ‘per incurium’ doctrine.

For the reasons discussed, we find no merit in this appeal warranting indulgence, which is accordingly dismissed with no order as to costs.

(Jyoti Saran, J)

(Chakradhari Sharan Singh, J)

Surendra/-

AFR/NAFR	AFR
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