

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.6126 of 2009

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Ram Deo Mishra, son of late Nandlal Mishra, Resident of Village Gijas, P.S. Saraiya, Dist. Muzaffarpur. At present working as Accounts Assistant, Patna Electric Supply Undertaking (PESU), Manglas Road, Patna.

... .. Petitioner/s

Versus

1. Bihar State Electricity, Vidyut Bhawan, Jawahar Lal Nehru Marg, Bailey Road, Patna through its Chairman.
2. The Chairman, Bihar State Electricity Board, Vidyut Bhawan, Jawahar Lal Nehru Marg, Bailey Road, Patna-1.
3. The Secretary, Bihar State Electricity Board, Vidyut Bhawan, Jawahar Lal Nehru Marg, Bailey Road, Patna-1.
4. The Director of personnel, Bihar State Electricity Board, Vidyut Bhawan, Jawahar Lal Nehru Marg, Bailey Road, Patna-1.
5. The General Manager-cum-Chief Engineer, Patna Electric Supply Unit, Renamed as Area Electricity Board, PESU, Manglas Road, Patna-1.

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Abhimanyu Sharma, Adv. Mr. Udai Shanker Singh
For the Respondent/s	:	Mr. Dharmeshwar Mishra, Adv. Mr. Sanjay Kr. Srivastava, Adv.

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY
ORAL JUDGMENT

Date : 30-04-2018

In the present case, the petitioner has prayed for following relief:-

“1(i) To command and direct the respondents to promote the petitioner in the rank of Accounts Assistant from the date Juniors to the petitioner promoted and to grant all consequential reliefs/benefits as granted in favour of the juniors to the petitioner.

(ii) To command the respondents to fix his salary in the promoted post after considering the salary paid to his



juniors and also the salary drawn by the petitioner at the time of his promotion.

(iii) To command and direct the respondents to give all sort of pay protection to the petitioner while re-fixing his salary on promotion so that the petitioner's salary may not be fixed less than what he has been actually getting before the promotion.

(iv) To command and direct the respondents to maintain inter-se seniority on promoted post of Accounts Assistant taking the seniority in the fitter post of Junior Account Clerk/bill clerk.

(v) To command and direct the respondents return back the amount recovered from him as excess payment of increments granted in favour of the petitioner for not promoting the petitioner after passing his departmental examination as the relevant rules and there was no misrepresentation or fraud of petitioner in getting increments.

(vi) To demand and direct the respondents to adquarely comperate the petitioner maintaining his seniority in the cadre as his promotion has been delayed due to arbitrary action of the respondent by preventing the petitioner from appearing in the 1984-86 examination on the account of his suspension and departmental proceeding in which he has been exonerated.

(vii) To direct and command the respondents to reckon the date of passing his departmental examination in the year 1983 as the petitioner was wrongly prevented from appearing in the exam and the Board can not take advantage of its own fault and entitled for promotion alongwith the candidates passing examination in 1983 as well as for menetary and other benefits."



The fact in the present case is that the petitioner was appointed as Casual Clerk on daily wages basis in Patna Electricity Supply Unit on 26.6.1975 through the advertisement and test as well as interview, was for appointment of Temporary Clerk in the pay-scale of Rs. 110-250 but, the petitioner was working as daily wager casual labour at the rate of Rs. 8/- per working day. The services of the petitioner was converted vide order dated 28.3.1997 in Clerk Grade II in the pay-scale of Rs. 260-425/- and, accordingly, directed to give joining. The then State Electricity Board vide letter dated 1085 dated 22.3.1978 re-designated all the Class III employees of PESU on the basis of date of their appointment. The person appointed on and before 6.2.1974 and working as temporary clerk grade II were re-designated as Bill Collectors and and person appointed after 6.2.1974 working as temporary clerk grade II were designated as Bill Clerk and since then the petitioner was discharging the duty of Bill Clerk. The service condition of the employee of Accounts Cadre was governed by Recruitment Promotion and Cadre Rules for the Subordinate Accounts Service of the Bihar Electricity Board was framed u/s 79(c) of the Indian Electricity Supply Act, 1948. The cadre of the subordinate accounts services were grouped in seven cadres, five Area Board Cadres, Generation cum Transmission



Organization, the Headquarter has different categories of employees, later on, all the seven segments were unified and it was made integrated single cadre of Accounts Division. The next ladder of promotion of Bill Clerk was/is Account Assistant. For that, the person discharging the duty of Bill Clerk was to cross the hurdle of passing the examination. The Board had conducted examination in the year 1983, as the petitioner was in PESU, the examination conducted for the employees of Bill Clerk at PESU was canceled but, later on, the examination was not re-conducted. The petitioner along with three others vide Memo No. 451 dated 14.9.1983 were put under suspension. The departmental examination was conducted on 1.4.1984 and in the year 1985. As the petitioner was under suspension, was not allowed to participate in the examination. Ultimately, the petitioner was exonerated from all the charges vide Memo No. 527 dated 19.11.1985 which led to withdrawal of the suspension order, whereafter, no examination was conducted save and except in the year 1990 which the petitioner has passed and cleared the same. So from the year 1985 to 1989, admittedly, departmental examination was not conducted and, as such, the petitioner could not get a chance to clear the departmental examination. After his release from the suspension, he passed the examination in the year 1990, in such circumstances,



he has all requisite qualification for consideration for promotion to the next higher grade i.e. Accounts Assistant. The office order no. 3396 dated 29.6.1995 (Annexure-7) reflects that in pursuance of the judgment passed by this Court in C.W.J.C. No. 1174 of 1992 and in continuation of the office order of the Board vide order no. 3166 dated 2.7.1990 and no. 693 dated 3.2.1994, notified for promotion to the post of Accounts Assistant but, the name of the petitioner was absent and, thereafter, again vide office order no. 6148 dated 27.12.1999 in continuation of office order no. 3166 dated 2.7.1990, office order no. 693 dated 3.2.1994, office order no. 2286 dated 25.4.1994 and office order no. 3396 dated 29.6.1995 reflects that certain persons who had passed the departmental examination were promoted but the name of the petitioner did not figure. Though the D.P.C. was held during 1985-99, ultimately, the petitioner was promoted to the post of Accounts Assistant vide office order no. 3996 dated 27.10.2003 (Annexure-10). It has further been submitted that on account of his passing the examination in the year 1990, he was granted three advance increment as per the standing order of the Board but, on 9.9.2003, he was granted promotion but, his total pay packet was reduced. Earlier before the promotion, his total pay packet was 8710 and, after promotion, the same was reduced to 8380 by deducting three



advance increments vide office order no. 497 dated 2.12.2006 (Annexure-13), in the said letter, it has been mentioned the realization of the excess amount paid to the petitioner in easy installments and has made a calculation and directed for realization of total amount of Rs. 10,886/-. That has been challenged by the petitioner in I.A. No. 5821 of 2015.

Learned counsel for the petitioner has challenged the action of the Bihar State Electricity Board now Holding Company that the reduction of his pay-scale from 8710 to 8380 is completely illegal action of the Board as instead of increase of pay-packet on promotion, the same has been reduced. Even if some gap is created on promotion in terms of Rule 78 1(a) of the Bihar Service Code, that will be saved and protected by making provision of personal pay. Second point has been taken by the petitioner that late passing the examination will not make the petitioner junior to the persons who have passed the examination earlier. He has further submitted that the examination was conducted in the year 1983 which was canceled. Further re-examination was not conducted and whereafter the examination was conducted in the year 1984 and 1985, on account of his suspension, the petitioner was not allowed to participate in the examination and, thereafter, after the release, examination was not conducted up to the year 1990 and has passed



the examination. So, in nutshell, he had never an occasion to appear in the examination before 1990 to pass the same. Inasmuch as, for the first time, he has got an opportunity in the year 1990, he has cleared the examination but, he was granted the promotion in the year 2003 whereas as per petitioner, his certain juniors, namely, Smt. Swapna Prasad, Abhijit Kr. Roy, Ratneshwar Prasad Singh, Prem Piyus, Pramod Kr. Verma, Kamal Kishore Singh and others who were junior (Annexure-5) to the petitioners were granted promotion and was given seniority from the date of their passing the examination in the year 1985 vide Memo No. 4937 dated 14.9.1987 and the date was maintained from the date of passing the examination but, later on, their date of promotion vide office order no. 3166 dated 2.7.1990 (Annexure-5), their promotion has been shifted to 10.7.1982 as their names standing at serial no.216 to 224 though they have passed the examination in the year 1980-1985 promotion was granted in the year 1987 but, it has been back dated to 10.7.1982 in order to fit at proper place in the seniority list. It has further been submitted that after the amalgamation of 7 segments, certain anomalies crept in, on that account, the readjustment was made as it was found that certain persons who were junior to these persons were granted benefit from earlier date. So, in order to remove the anomalies,



rearrangement has been made. It has further been submitted that the Service Rule does not stipulate and postulate the passing of the departmental examination, is a criteria for deciding the seniority amongst the Account Assistants, as nowhere in the service rule prescribes such stipulation that within the certain attempts or in certain period, the departmental examination is required to be cleared. As there is no provision in the Recruitment Promotion and Cadre Rules for the Subordinate Accounts Service, it cannot be said that merely the petitioner has passed the examination later on so he will become junior to those who have passed the examination earlier. If the promotion rule would have stipulated such condition, only in that circumstances, in failure to pass or to pass examination within certain attempts could be treated to be making the petitioners to be junior to those persons who have passed earlier. In absence of such stipulation, it cannot be taken against the interest of the petitioners. Further submitted that the petitioners should be placed at a right place and he should be granted the same benefit from the same date as has been given to his juniors, namely, Prem Piyus from serial no. 216 to 224 (Annexure-5), the last person Pradeep Kumar Saha.

In contra, learned counsel for the Holding Company has submitted the departmental examination was conducted in the year



1983 and he had taken leading part for derailment of the examination, on that account, the examination of that center was canceled and no further examination was conducted but, in the year 1983, he was placed under suspension, though the examination was conducted in the year 1984 and 1985, he was rightly not allowed to participate therein, as he passed the examination in the year 1990, so he cannot claim seniority over the persons who have passed the examination earlier. The petitioner has claimed seniority over certain persons mentioned herein above, they have passed the examination in the year 1985, certainly, they will rank senior than to the petitioner who has passed the examination later on. He further submits that the Departmental Promotion Committee was held in the year 2003, he was found fit and the vacancy was available for him, he was promoted to the post of Account Assistant accordingly. As per the standing order of the Board, after passing the examination, the petitioner was granted three advance increments and on promotion to next higher grade, three advance increment would be withdrawn and, only thereafter, it was re-fixed as he could not be allowed two benefits, firstly, three advance increments and secondly promotion. Further submitted that no anomaly is there in the action of the then Board now Holding Company. Further submitted that after lapse of



36 years, the issue of seniority cannot be again revisited as it will lead to turmoil in the cadre. If the petitioner had any grievance, he should have approached this Court at the earliest but, he has approached this Court after such a belated stage and, as such, his grievance cannot be entertained. Further learned counsel for the Board has submitted that the pay-scale of the petitioner was fixed in the year 2006 and he has without any objection accepted the same and has turned around in the year 2009 challenging the pay-fixation.

Having considered the rival contention of the parties, from the aforesaid discussions, it appears that two grievances are that his pay has wrongly been reduced from 8710 to 8380 and another issue is for consideration for this Court that whether passing the examination is the basis for fixation of seniority of the Account Assistant but, the seniority always is decided on the basis of rules and regulations governing the field. To resolve the first dispute of reduction of the pay-scale, it has to be looked into that the petitioner was granted the three advance increments in the year 1990 on account of passing the three examination. As per standing order framed by the Bihar State Electricity Board, there itself it has been mentioned that on promotion, it will be adjusted but, the question would arise even if the standing order is there, on



reaching a particular pay packet, total pay on promotion, the three advance increments was withdrawn and finally, the total pay-packet was/has been reduced to 8387. In such circumstances, it is the cardinal principle of law that the person on promotion cannot get less pay what was getting at the time of promotion and will be saved in terms of Rule 78 of the Bihar Service Code which reads as follows:-

"Rule 78.- The initial substantive pay of a Government servant who is appointed substantively to a post on a time-scale of pay is regulated as follows:- (a) If he holds lien on a permanent post other than a tenure post, or would hold a lien on such a post had his lien not been suspended:- (i) When appointment to the new post involves the assumption of duties or responsibilities of greater importance (as interpreted for the purpose of rule 89) than those attaching to such permanent post, he will draw as initial pay the stage of the time-scale next above his substantive pay in respect of the old post.

(ii) When appointment to the new post does not involve such assumption, he will draw as initial pay the stage of the time-scale which is equal to his substantive pay in respect of the old post, or, if there is no such stage the stage next below that pay, plus personal pay equal to the difference and in either case will continue to draw that pay until such time as he would have received an increment in the Time-scale of the old post, or for period after which an increment is earned in the time-scale of new post, whichever is less. But if the minimum pay of the time-scale of the new post, is higher



than his substantive pay in respect of the old post, he will draw that minimum as initial pay;

(iii) When appointment to the new post is made on his own request under rule 56 (a) and the maximum pay in the time scale of that post is less than his substantive pay in respect of the old post he will draw that maximum as initial pay.

(b) If the conditions prescribed in clause (a) are not fulfilled he will draw as initial pay the minimum of the time scale:

Provided, both, in cases covered by clause (a) and in cases, other than cases of re-employment after resignation or removal or dismissal from the public service covered by clause (b), that if he either-

(1) has previously held substantively or officiated in-

(i) the same post; or

(ii) a permanent or temporary post on the same time scale, or

(iii) a permanent post, other than a tenure post, on an identical time scale, or a temporary post on an identical time scale such post being on the same time scale as a permanent post, or

(2) is appointed substantively to a tenure post on a time scale identical with that of another tenure post which he has previously held substantively or in which he has previously officiated, then the initial pay shall not be less than the pay, other than special pay, personal pay or emolument classed as pay by the State Government under rule 34 (a) (iii), which he drew on the last such occasion and he shall count the period during which he drew that pay on such last and any previous occasions for increment in the stage of the time scale equivalent to that pay.



If however, the pay last drawn by the Government servant in a temporary post has been inflated by the grant of premature increments the pay which he would have drawn, but for the grant of those increments, shall unless otherwise ordered by the authority competent to create the new post, be taken for the purposes of this provision to be the pay which he last drew in the temporary post."

Rule 78 makes it very clear that if such event takes place, that will be taken care of by making a payment by way of personal pay, as and when the increment will go up, the gap will be filled up till it neutralizes the gap but, in no circumstances, on promotion and that too on higher post, the petitioner will be paid lessor amount what he was getting, this gamut of dispute has been discussed and resolved by this Court in the case of Surendra Kumar Vs. Bihar Electricity Board C.W.J.C. No. 6120 of 1994 (Annexure-11A). In this case also, similar situation was there. On getting the higher grade, the total pay was reduced, taking aid of Rule 78 (a) (i) of the Bihar Service Code this Court has held that the total pay packet cannot be reduced but can be saved by way of personal pay.

In such circumstances, there is no hesitation for this Court to hold that the total pay what he was getting before promotion is to be saved even if on granting of his promotion his pay was fixed at the lower stage, that should have been taken care of by way of personal pay and the action thereafter in recovery of



Rs. 10,886/- that has been affected after superannuation after 29.8.2012 is completely illegal and not sustainable. When this Court has arrived to a finding that his pay could not have been reduced on promotion, the action for deduction of the aforesaid amount cannot be said to be a legal action of the Board or the Holding Company and the same is quashed with a direction to the Board to return the said amount.

So far the issue of seniority is concerned, learned counsel for the Board has taken a plea that after 36 years, the issue has been raised by the petitioner, as the petitioner has passed the examination in they year 1990, he was granted promotion of Accountant Assistant in the year 2003 and the present petition has been filed in the year 2009. So the plea of delay of 36 years is not a correct submission of the learned counsel for the Holding Company.

As because the petitioner was granted promotion in 2003 from the date of notification which created the cause of action for the petitioner to approach this Court to make correction in the seniority list and his date of promotion from the right date.

So far the issue of seniority is concerned, as has been claimed by the learned counsel for the Holding Company that the petitioner has passed the examination in the year 1990, so he



cannot claim preference over those persons who have passed the examination in the year 1985, certainly those who have passed the examination in the year 1985 will rank senior to the person who has passed subsequently. But this proposition runs counter to the well settled principle of law that unless there is a rule and regulation, the seniority is dependent on the basis of entry in service and unless the rule prescribes the passing of the examination will be guideline and the prescription for deciding the seniority, in normal circumstance, the moment the person passes the examination, he will regain his original seniority but, if the rule is such that the person has to pass the examination within certain attempt or certain period, in such circumstances, in failure to pass the examination will affect the seniority of the person but, here in the present case, the Recruitment Promotion and Cadre Rules for the Subordinate Accounts Service does not prescribe and gives a guideline for such events but, is completely silent and does not prescribe the attempt within which the person has to clear the examination, inasmuch as, the petitioner passed the examination in first attempt as examination conducted in the year 1983 was cancelled whereafter the petitioner was not allowed to appear in the examination on account of his suspension and the petitioner, for the first time, got the opportunity to appear in the examination



in the year 1990. This proposition can be supported from the judgment reported in the case of State of Maharashtra Vs. Jagannath Achyut Karandikar reported in 1989 (0) AIJEL-SC 28664, relevant portion whereof reads as follows:-

“9. ----- The person who has exhausted the available chances to appear in the examination cannot be denied 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.”

Further this proposition has again been settled by the judgment in the case of Satpal Antil Etc vs Union Of India & Anr reported in 1995 (4) SCC 419. The identical issue has been gone into by the Hon'ble Apex Court and the Apex Court has said that if the promotion rule or cadre rule is silent, not fixing a particular



number of attempt for clearing the examination or the period, in the event of person who passes the examination will regain his seniority and seniority is not dependent merely on passing the examination.

Further this Court can take note of the fact that the persons who have passed the examination in the year 1985 but, he was granted benefit from 7.2.1982 i.e. before passing the examination, on merger in the event of preparation of consolidated seniority list, their position was improved and his date of promotion shifted from 1987 to 10.7.1982 itself indicates that retrospectivity has been given to others. In the present case, the petitioner has passed the examination in the year 1990 but, unfortunately has been granted the benefit from 2003, at least, the good sense could have prevailed to the authority that he should have been granted the benefit at least from the date of passing of the examination, that has not been given.

In overall consideration of this facet of the issue, this Court is of the view that on passing of the examination will regain the position in the seniority list and his case should be considered for promotion to the Account Assistant from the date of his juniors have been granted but, that will be the notional, the actual payment



will be made from the date the petitioner has passed the examination.

With the aforementioned observation and direction, this writ application is disposed of.

(Shivaji Pandey, J)

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