IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.10228 of 2019

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Bimal Krishna Kundu, Son of Late Gopi Ballabh Kundu, Resident of "Ram Krishna Pally", Abdalpur, P.S.-Madhyam Gram, District-Kolkata, West Bengal.

... ... Petitioner

Versus

1. The State of Bihar through the Principal Secretary, Road Construction Department, Government of Bihar, Patna.
2. The Engineer in Chief Road Construction Department, Government of Bihar, Patna.
3. The Chief Engineer North Wing, Road Construction Department, Darbhanga, District- Darbhanga.
4. The Superintending Engineer, Road Construction Department, Road Circle, Saharsa.
5. Executive Engineer, Road Construction Department, Road Division, Khagaria, District- Khagaria.

... ... Respondents

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Appearance :

For the Petitioner	:	Mr. Suman Kumar Mishra, Advocate
For the Respondents	:	Mr. Ravi Bhardwaj, AC to GA13

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CORAM: HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY
ORAL JUDGMENT
Date : 18-12-2019

Heard learned counsel appearing on behalf of the petitioner and learned counsel appearing on behalf of the State.

2. The grievance of the petitioner in the present writ petition is that after serving for more than three decades, second and third ACPs have not been granted.

3. Learned counsel for the petitioner submits that scheme of ACP/MACP was introduced to do away stagnation in service. He submits that the respondents themselves have failed to conduct the departmental examination and in absence of

conduct of departmental examination, denial of the benefits of second and third ACPs amounts to illegal and arbitrary action. The petitioner has now superannuated.

4. Learned counsel appearing on behalf of the respondents submits that the petitioner has not completed ten years from the date of grant of first ACP and hence he was not granted second and third ACPs. The petitioner superannuated on 31st December 2019.

5. Law is well settled that the respondents cannot take advantage of its own wrong, if the respondents failed to conduct the departmental examination which, according to them, was the condition precedent for grant of ACP/MACP , the petitioner cannot be made to suffer the loss. **All India Groundnut Syndicate Limited Vs. Commissioner of Income Tax, Bombay City**, reported in **AIR 1954 Bombay 232**. The relevant part of the judgment is quoted hereinabove:-

> *"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 assert -ed 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."

6. In addition thereto, in the case of **Masomat Indu Devi Vs. State of Bihar & Ors. [2019 (2) PLJR 241]**, the Co-ordinate Bench of this Court had occasion to examine the effect of non-passing of departmental examination for grant of ACP. The judgment of the Co-ordinate Bench of this Court is reproduced hereinbelow:

"20. A bare reading of the three judgments, referred to above, makes the following propositions absolutely clear, leaving no scope of any confusion, unless the judgments are viewed and analyzed with a myopic vision. The common thread running in all the three judgments, referred to above, is as follows:-

(A) The A.C.P. Rules of 2003 do not provide an avenue of promotion, but only financial progression in case of no promotion having been given to an employee;

(B) The recipient/beneficiary of such scheme has to be an employee who is otherwise eligible for being promoted to the higher post;

(C) Passing of Accounts Examination or Departmental Examination, as the case may be, under the Bihar Boards Miscellaneous Rules, 1958 would be necessary for crossing efficiency bar, confirmation and for promotion to selection grade, but not general promotion;

(D) The requirement of passing the exam. can only be thrust upon and made applicable to an employee in view of the Service Rules of the Department.

21. A further condition can be gleaned from the aforesaid judgments for being eligible for getting the benefits of financial progression under the A.C.P. Rules of 2003, which is that, if there are *no promotional avenues available in the Cadre.*

22. Applying the aforesaid principles in the case of the late employee, it can safely be stated that he was absorbed and regularized in government service on 09.07.1981 on the post of Accounts Clerk in the Irrigation Department on which, he joined on 10.07.1981 at a pay- scale of Rs. 730-1080. Admittedly, he has not been paid the 1st time bond promotion and the benefits of A.C.P. Rules of 2003. The late employee died in harness on 04.09.2009, while was posted as Accounts Clerk. The Departmental Rules, framed only in the year 2014, has provided for 3-tier in the Cadre of Accounts Clerk and the requirement of passing the Departmental Accounts Examination and attaining computer knowledge for confirmation and promotion. The petitioner died much before the aforesaid rules came into effect.

23. Under such circumstances, in the considered opinion of this Court, the respondents are not justified in withholding the benefits of 1 st time bond promotion and financial progression under the A.C.P. Rules of 2003 to the late husband (employee) of the petitioner.

24. Under the aforesaid circumstances, the petitioner is directed to make a representation before the Principal Secretary, Water Resources Department, Govt. of Bihar, Patna (respondent No. 2) within a period of four weeks from the date of receipt/production of a copy of this order. On receipt of such representation, the Principal Secretary, Water Resources Department, Govt. of Bihar, Patna (respondent No. 2) shall dispose off such representation within a period of eight weeks thereafter, taking into account the position of law as has been discussed in the present order. If the dues of the late husband (employee) of the petitioner is found to be tenable, necessary sequel orders shall be or directed to be passed within the aforesaid stipulated period.

7. In view of the aforesaid decisions, the writ petition is disposed of with a direction to the respondents to consider the

case of the petitioner for grant of second and third ACPs as the respondents cannot take advantage of their own lapses. Accordingly, the respondents are directed to take fresh appropriate decision at the earliest.

(Anil Kumar Upadhyay, J)

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AFR/NAFR	NAFR
CAV DATE	N.A
Uploading Date	27.12.2019
Transmission Date	N.A