

IN THE HIGH COURT OF JUDICATURE AT PATNA
Letters Patent Appeal No.1202 of 2015
In
Civil Writ Jurisdiction Case No.584 of 2014

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Birendra Nath Tiwari Son of late Bidya Tiwari Resident of Village-
Parsurampur, P.O.- Parsurampur, P.S. Pipra, District East Champaran.

... .. Appellant/s

Versus

1. The State of Bihar
2. The Principal Secretary, General Administration Department, Govt. of Bihar, Patna.
3. Principal Secretary, Finance Department, Government of Bihar, Patna
4. The Joint Secretary, Department of Finance, Govt. of Bihar, Patna
5. District Magistrate, Motihari East Champaran.
6. Secretary, Bihar State Food and Civil supplies Corporation Limited , Sone Bhawan, 5th Floor, Birch
7. Managing Director, Bihar State Food and Civil Supplies Corporation ltd, 5th Floor, Birchand Patel Pa
8. The Principal Secretary, Food and Consumer Protection Department, Govt. of Bihar, Patna
9. The District Manager, Bihar State Food and Civil Supplies Corporation, District Siwan, Bihar
10. The President cum Chairman, District Consumer forum , Motihari East Champaran.
11. The Accountant General, Govt. of Bihar, Patna.

... .. Respondent/s

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Appearance :

For the Appellant/s	:	Mr. Gautam Saha, Adv. Mr. Sunil Kumar Mandal, S.C.
For the B.S.F.C.	:	Mr. Anjani Kumar, Sr. Adv. Mr. Shailendra Kumar Singh, Adv.
For the Accountant General:		Mr. Ravindra Priyadarshi, Adv.

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN
and
HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE JYOTI SARAN)

Date : 02-04-2019

This intra-court appeal arises from a judgment and order of the learned Single Judge dated 27.03.2015 passed in C.W.J.C. No. 584 of 2014 whereby the writ petition was



dismissed and the claim of the petitioner for A.C.P by counting his past service rendered in the Bihar State Food and Civil Supplies Corporation which had been disallowed after its grant by the State Government on the absorption of the petitioner in the Food and Consumer Protection Department of the Government of Bihar was withdrawn which order of withdrawal was followed by an order of recovery.

Facts of the case leading to the impugned order briefly stated is that this petitioner was appointed on the post of Stenographer with the Bihar State Food and Civil Supplies Corporation on 23.11.1976. A process of appointment was initiated by the State Government in its Food and Consumer Protection Department and during which course a number of officers serving in the Corporation were posted in the different District Consumer Forums with appropriate directions to the District Magistrate(s) for appointing them against the post of Personal Assistant. An order to such effect bearing Memo No.2186 dated 04.04.1997 is enclosed at Annexure-2 to the writ petition.

The petitioner pursuant to the order of appointment gave his joining on the post of Personal Assistant, District Consumer Forum, East Champaran, Motihari on 08.04.1997. A



formal order of appointment was issued by the District Magistrate, East Champaran bearing Memo No. 212 dated 07.06.1997 vide Annexure-4 to the writ petition. While serving in such capacity the petitioner superannuated on 31.05.2012.

In between this period, the petitioner was granted first and second progression under the Assured Career Progression Scheme, 2003 by counting the past service rendered by the appellant/petitioner in the Corporation as well. It is after the petitioner superannuated that it transpired to the State Government that the appellant/petitioner was not entitled to count his services in the Corporation for the purpose of grant of progression and when an order cancelling the progression was passed vide memo No.878 dated 26.10.2012 by the District Magistrate, East Champaran impugned at Annexure-1 to the writ petition and which was followed by an order dated 08.02.2013 impugned at Annexure-11 whereby recovery orders were issued.

It is feeling aggrieved by such action of the State Government through the District Magistrate and the order of the Chairman, District Consumer Forum, East Champaran impugned at Annexure-1 and 11 respectively to the writ petition that he approached this Court through the writ petition in



question and since the writ petition has been dismissed, that he is before this Court in intra-court appeal.

The only issue which falls for consideration in this appeal is whether or not the petitioner was entitled to count his service rendered with the Corporation for the purpose of grant of Assured Career Progression. It is framing such issue that a Division Bench of this Court vide order passed on 23.01.2017 referred the matter for answer by a larger bench and which has since been answered on 14.03.2019 with the following opinion:

"From a perusal thereof as well as the other annexures appended to the writ petition, including the service conditions in relation to such absorption, we do not find that the absorption order or the orders of appointment in any way spelt out benefits of the past services or any further pecuniary benefits like A.C.P. or pension. It is admitted to the learned counsel for the appellant that the post which he was holding in the Corporation was not a pensionable post.

In this background, the other decision cited by the learned counsel for the appellant in the case of State of Jharkhand vs. Veer Kunwar Paswan, decided on 7th September, 2017 also does not come to the aid of the appellant inasmuch as the said judgement clearly recites that the employee therein was working in a Public Sector Undertaking where the job was pensionable.

Thus, both the judgements cited by the learned counsel for the appellant and their ratio do not in any way cover the grievance raised by the appellant which, to the contrary, in our opinion, is covered by the ratio of the Full Bench in the case of Harishankar (supra).

Consequently, the reference is answered in the negative without prejudice to the rights of the appellant to seek his other benefits or reliefs involved in the appeal before the Division Bench. Learned counsel submits that the respondents have



proceeded to recover the amount which issue requires to be considered. This may be raised before the appropriate Bench for consideration and shall be dealt with in accordance with law. The other arguments in relation to any other pecuniary benefits may be raised before the appropriate Bench.

Let the matter be listed at the earliest before the appropriate Division Bench."

It is under the orders of the larger bench that the matter is placed before this Court and when we have heard Mr. Gautam Saha, learned counsel for the petitioner/appellant, Mr. Sita Ram Yadav, learned State counsel and Mr. Shailendra Kumar Singh, learned counsel for the Bihar State Food and Civil Supplies Corporation.

Mr. Saha, learned counsel for the appellant/writ petitioner while accepting the position in view of the opinion expressed by the larger bench on the issue whether or not the services rendered by the appellant/writ petitioner in the Corporation could be counted for the purpose of grant of A.C.P benefits which has been answered in the negative by the larger bench submits that yet in view of the opinion expressed by the Supreme Court in the case of **State of Punjab versus Rafiq Masih** since reported in **(2015) 4 SCC 334** more particularly at paragraph 18, no recovery can be made from the employees coming under the Class III and IV service. He thus submits that



since admittedly the petitioner superannuated from Class III cadre post of Personal Assistant and even if the relief of progression has been withdrawn by the respondents, there cannot be any recovery. He also questions the denial of the gratuity amount by the respondent.

Though Mr. Singh learned counsel for the Corporation and learned counsel for the State attempted to oppose the proposition framed by this Court in the light of the opinion of the Supreme Court in the case of **Rafiq Masih** (supra) in so far as the recovery aspect is concerned as also on the issue of gratuity, in our opinion in view of the clear position settled by the Supreme Court foreclosing any attempt by the concerned respondent authorities to effect a recovery of any amount following a cancellation of an order of promotion or otherwise, the order of recovery cannot be upheld. While observing thus, we are however, persuaded to uphold the objection raised by the learned counsel for the respondent in so far as the gratuity payment is concerned because the larger bench while denying the benefit of A.C.P to the petitioner by counting the service in the Corporation have held that the past service rendered by the petitioner in the Corporation cannot be relied upon for grant of pecuniary benefits like A.C.P. or



Pension and in view of the full bench decision of this Court in the case reported in **2018(2)PLJR 933 (Arvind Singh versus State)** the term 'Pension' includes the gratuity as well.

In such view of the matter and if the larger bench while considering the reference has held that the past service rendered by the petitioner would not enure to any pecuniary benefits like A.C.P and pension, it takes into its fold the benefit of gratuity as well and to that extent we reject the contention of Mr. Saha to count the period rendered in the Corporation for purpose of gratuity. While observing thus we would clarify that the period rendered by the appellant/petitioner in the Government since after his appointment in the Department of Food and Consumer Protection would be counted for the purpose of gratuity, if found admissible and payable.

For the reasons and discussions above, we are in respectful disagreement with the opinion expressed by the learned Single Judge on the writ petition arising from C.W.J.C. No. 584 of 2014 to the extent it upholds the recovery proceeding for in view of the legal position settled by the Supreme Court in the case of **Rafiq Masih** (supra) even if the petitioner was not entitled for counting of the past service for the purpose of ACP benefits, the amount paid to the appellant/petitioner by the



respondents by counting the past service, cannot be recovered from the petitioner for the fault certainly lay with the respondents while granting such benefit.

We thus, while upholding the order bearing Memo No.878 dated 26.10.2012 passed by the District Magistrate, East Champaran whereby the order of grant of the first and second Assured Career Progression has been recalled impugned at Annexure-1 would definitely interfere with the order bearing memo No.71 dated 08.02.2013 of the Chairman, District Consumer Forum, East Champaran whereby the recovery order has been issued and which order of the Chairman, District Consumer Forum is quashed and set aside.

The writ petition is allowed to the extent above.

The judgment and order of the learned Single Judge stands modified to the extent above with no order as to costs.

The appeal is allowed.

(Jyoti Saran, J)

Bibhash

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	22.04.2019
Transmission Date	NA

(Arvind Srivastava, J)

