

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.2202 of 2016

In

Civil Writ Jurisdiction Case No.240 of 2011

-
-
1. The State of Bihar, through the Principal Secretary, Water Resources Department Govt. of Bihar Sinchai Bhawan, Patna.
 2. The Joint Secretary, Water Resources Department, Sinchai Bhawan, Patna.
 3. The Deputy Secretary, Water Resources Department, Sinchai Bhawan, Patna.
 4. The Finance Commissioner, Finance Department, Old Secretariat, Patna.

... .. Appellant/s

Versus

Shankar Ram S/o Late Bhikhar Ram Resident of Village - Math Banwari, P.S.
Piprakothi, District East Champaran, Motihari.

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Anjani Kumar, AAG-4 Mr. Deepak Sahay Jamuar, AC to AAG-4 Mr. Alok Kumar Rahi, AC to AAG-4 Mr. Utkarsh Bhawan, Advocate
For the Respondent/s	:	Mr. Rupak Kumar, Advocate

CORAM: HONOURABLE MR. JUSTICE P. B. BAJANTHRI

and

HONOURABLE MR. JUSTICE ARUN KUMAR JHA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE P. B. BAJANTHRI)

Date : 22-03-2023

In the instant L.P.A., appellant has assailed the order of the learned Single Judge dated 20.06.2016 passed in C.W.J.C. No. 240 of 2011.

2. Grievance of the respondent – Shankar Ram in the writ petition is that he is entitled to pay scale (salary) attached to the post of Chief Engineer during the intervening period from 07.10.2004 to 31.07.2007 (the date on which he attained age of superannuation and retired from service). Respondent was holder of the post of Superintending Engineer. He was asked to



hold the additional charge of the post of Chief Engineer which is the promotional post to the Superintending Engineer on 07.10.2004 and he continued to hold such post of Chief Engineer in addition to the post of Superintending Engineer till the date on which he attained the age of superannuation and retired from service on 31.07.2007. In the meanwhile, he was subjected to disciplinary proceedings on 15.09.2006. The same was a subject matter of litigation before this Court and disciplinary proceedings were set aside on 26.08.2010. In this backdrop, question for consideration is whether respondent is entitled to pay scale (salary) attached to the post of Chief Engineer or not?

3. Arrangement of incharge in addition to original post to a particular Government servant is governed by Rule 103 of Bihar Service Code. At the same time, method of recruitment to the post of Chief Engineer is by promotion from the cadre of Superintending Engineer.

4. In the light of these facts and circumstances, learned Single Judge has allowed the respondent's writ petition, hence the State is aggrieved by the order of the learned Single Judge presented this L.P.A.

5. Learned counsel for the appellant State vehemently



contended that as long as respondent had not entered into cadre of Chief Engineer post (promotional post to the Superintending Engineer), he is not entitled to pay scale (salary) attached to the post of Chief Engineer. At the best, he is entitled to compensatory allowance in terms of Rule 103 of Bihar Service Code. It is further submitted that the decision cited does not assist the factual aspects of the case in hand. It is also submitted that cause of action accrued to the respondent in the year 2004 to 2007 whereas he has invoked writ jurisdiction in the year 2011, there is a delay and laches. Therefore, order of the learned Single Judge is to be set aside.

6. *Per Contra*, learned counsel for the respondent resisted the aforesaid contentions and supported the order of the learned Single Judge. He has also relied on decision of this Court in the case of ***Prafulla Ranjan Shrivastava vs. The State of Bihar & Ors.*** reported in [2008 (3) PLJR 144 (para 8)] and further relied on two more decision of the Apex Court in the case of ***State of Punjab vs. B.K. Dhir*** reported in (2017) 9 SCC 337 and ***State of Punjab and Another vs. Dharam Pal*** reported in (2017) 9 SCC 395.

7. Heard learned counsel for the respective parties.

8. It is undisputed fact that respondent was holder of



the post of Superintending Engineer, even as on the date of his retirement on 31.07.2007. In other words, he was not appointed on officiating basis to hold the post of Chief Engineer so as to seek relief of pay scale (salary) attached to the post of Chief Engineer. Unless and until, he is promoted on officiating basis and entering into the cadre of Chief Engineer on substantive capacity, he is not entitled to pay scale (salary) attached to the post of Chief Engineer. Further, he had cause of action to seek promotion to the post of Chief Engineer on officiating basis with reference to his service particulars in the cadre of Superintending Engineer read with the seniority in the cadre of Superintending Engineer and rules of recruitment governing the post of Chief Engineer. It is to be noted that post of Chief Engineer is governed by rules of recruitment issued under Article 309 of Constitution and it has statutory force. Government servant who is holder of substantive post is entitled to pay scale (salary) attached to that particular substantive post. In the present case, respondent is holder of substantive post of Superintending Engineer and not the Chief Engineer post. These material information have not been taken note of by the learned Single Judge while allowing the writ petition.

9. The cited decisions on behalf of the respondent



read with Rule 103 of Bihar Service Code. Respondent's case is not covered by decisions cited and so also Rule 103 of Bihar Service Code. Under Bihar Service Code, he is entitled to only compensatory allowance for having discharged the post of Chief Engineer in addition to the post of Superintending Engineer. It is to be noted that respondent had lien over the post of Superintending Engineer till 31.07.2007, the date on which he attained superannuation and retired from service. Therefore, he cannot claim pay scale (salary) attached to the post of Chief Engineer. The cited decisions are not assisting the respondent's case for the reasons that relevant rules of recruitment to the post namely Chief Engineer is governed by rules made under Article 309 of Constitution.

10. Apex Court in the case of ***Nair Service Society Vs. Dr. T. Beermasthan & Ors.*** reported in ***(2009) 5 SCC 545*** at para 48, it is held as under:-

“48. Several decisions have been cited before us by the respondents, but it is well established that judgments in service jurisprudence should be understood with reference to the particular service rules in the State governing that field. Reservation provisions are enabling provisions, and different State Governments can have different methods of reservation. There is no challenge to the Rules, and what is challenged is in the matter of application alone. In our opinion the communal rotation has to be applied taking 20 vacancies as a block.”



11. In the light of Apex Court's decision cited in ***Nair Service Society Vs. Dr. T. Beermasthan & Ors.*** reported in ***(2009) 5 SCC 545***, the cited decision on behalf of the respondent cannot be stated to have taken note of and applied the principle laid down therein. On the other hand, principle laid down in the ***Nair Service Society Vs. Dr. T. Beermasthan & Ors.*** reported in ***(2009) 5 SCC 545***, relevant rules are required to be taken note of and then Courts should examine whether the matter is covered by earlier decisions or not? In the present case, learned Single Judge has not taken note of the method of recruitment to the post of Chief Engineer is that promotion from the cadre of Superintending Engineer *vide* rules of recruitment framed under Article 309 of Constitution. The respondent has not availed the remedy or cause of action in seeking regular promotion to the post of Chief Engineer as and when cause of action accrued on 07.10.2004, the date on which he was placed incharge of the post of Chief Engineer while he was holding the post of Superintending Engineer. This Court in the case of ***Arun Kumar Sinha vs. State of Bihar*** reported in ***2000 (3) BBCJ 457*** held that merely discharging duties on higher post does not amount to promotion. In such cases employee cannot get salary of higher post. Such employee is entitled to get additional pay.



At this stage, it is necessary take note of Memo No. 1479 F. dated 30.12.1968 & its contents. Memo is re-produced here under:-

“Several cases have come to the notice of Finance Department where additional pay under Rule 103 of the Bihar Service Code, has been sanctioned to Government servant by the Department of Government and the Heads of Department in exercise of the powers delegated to them even though the conditions laid down in the said Rule were not fulfilled in those cases. It has also been reported by the Accountant-General, Bihar that Additional pay has been sanctioned in many cases rather liberally without strictly conforming to the provisions of the Rule.

2. In order to avoid irregular sanction of Additional Pay, it is requested that the following point should be kept in view:-

(i) In cases where Government servant takes full charge of more than one post (other than inferior or subordinate post), he may be allowed Additional Pay not exceeding 20% of his "substantive pay" by the competent authority. In cases where it is proposed to sanction 20% of "officiating pay" as distinct from "substantive pay" the prior concurrence of Finance Department will be necessary.

(ii) Arrangement regarding combination of appointment as contemplated in the Rule shall be made with the prior approval of an authority not below the rank of the appointing authority. In such cases necessary notification or office order, as the case may be, appointing the Government servant concerned to perform the duties of additional post in addition to his own duties should Invariably issue. For such combination of appointment however, approval of the Council of Ministers or the Public Service Commission will not be required.

(iii) Such an arrangement should not be in vacancies of less than fifteen days duration and in case the same has to continue for more than six months, Finance Department's concurrence must be obtained.

(iv) The Additional post/posts, the duties of which a Government servant is required to combine must be independent of his own post. The term independent post have been defined in Note 1 below Rule 103 of the Bihar Service Code.



The additional post, the duties of which are combined should not be on the same establishment or office and should not also fall in the line of normal promotion. For example the posts of Under Secretary/Deputy Secretary, Deputy Directors, Deputy Commissioner, Accountants, Assistantants and Clerks etc. in the same office or establishment are not independent of each other for the purpose of the Rule,

(v) Holding additional charge means holding of full responsibilities of the other post. Extra duties should not be nominal or light and should not be of brief duration. Nature or extent of extra work done and responsibility involved should be fully scrutinised and assessed. Similarly, the work and duties performed against the combined posts must be satisfactory.

(vi) In accordance with the instructions laid down in note 3 below Rule 133 of the Bihar Service Code, such an arrangement cannot be made if there are leave and deputation reserve posts in the particular cadre, if the arrangement of dual charge is made by the Appointing Authority in respect of cadres and services having leave reserve posts, no additional pay will be admissible. In very exceptional circumstances where due to vacancies or shortage in leave reserve post, it is not possible to manage the work by adjustment within the cadre, the matter should be referred to the Finance Department for advice.

(vii) Arrangement to hold additional charge of a lower or subordinate post is permissible but no additional pay will be allowed to the Government servant concerned. Similarly, no additional pay is admissible to holders of supertime scale posts for combination of work relating to supertime scale posts of equivalent or higher status.

(viii) For holding current charge of doing routine duties of additional posts, no additional pay will be admissible. In deserving cases where a Gazetted Officer holds current charge of another higher Gazetted post, additional pay may be allowed at the rate not exceeding 10% of pay with the concurrence of Finance Deptt.

(ix) It may be noted that in no case the Additional Pay alone or the total of Additional pay plus special pay should exceed Rs. 250/- per month.

3. It is requested that all cases of grant of Additional Pay should be regulated in the light of the clarification furnished above. Doubtful cases should invariably be referred to Finance Department for advice.”



12. Further, Memo no. 1082- वि० (2) dated 22.02.1988 of the Finance Department, Government of Bihar in clause 5 (ग) provides as under:-

“(ग) उन्नतर पद का कार्यकारी प्रभार ग्रहण करने की तिथि से सम्बन्धित पदाधिकारी को बिहार सेवा संहिता के नियम 103 के प्रधीन निम्नतर वेतनमान में प्राप्त मूल वेतन का प्रधिवक्तम 20 प्रतिशत अतिरिक्त वेतन अवमान्य होगा। तत्सम्बन्धी प्रस्ताव में वित्त विभाग को प्रोपचारिक सहमति प्राप्त कर लेनी होगी।”

13. At this stage, it is necessary to take note of Rule 34 of Bihar Service Code. Rule 34(a) reads as under:-

“34. (a) Pay means the amount drawn monthly by a Government servant as-

(i) the pay, other than special pay or pay granted in view of his personal qualifications, which has been sanctioned for a post held by him substantively or in an officiating capacity, or to which he is entitled by reasons of his position in a cadre; and

(ii) overseas pay, special pay and personal pay;

(iii) any other recurring emoluments which may be specially classed as pay by the State Government.

(b) In the case of a military officer in receipt of the rates of pay introduced on July 1, 1924, pay includes the amount which he receives monthly under the following designations:

(i) pay of appointment, lodging allowance and marriage allowance; (ii) pay of rank, command pay, additional pay, Indian Army allowance, lodging allowance and marriage allowance.

In the case of a military officer, in receipt of the rates of pay in force before July 1, 1924, pay includes the amount which he receives monthly under the following designations:-

(i) military pay and allowances, and staff salary;

(ii) Indian Army pay and staff salary; and



(iii) consolidated pay.

Note.- In the case of a piece worker in the Government Presses, Bihar when appointed to a post on a time scale, 'pay' shall be deemed to be equivalent to one hundred and fifty times his hourly class rate."

14. That apart, respondent has slept over the matter from the year 2004 till 2007 and further he has taken four years in approaching this Court from the year 2007 to 2011 even on the ground of delay and laches he is not entitled to any relief. This Court had an occasion to examine the delay in the case of ***Ambika Prasad Singh vs. State of Bihar*** reported in ***(2020) 6 BLJ 264***.

15. In the light of these facts and circumstances, the appellants have made out a case so as to interfere with the order of the learned Single Judge dated 20.06.2016 passed in C.W.J.C. No. 240 of 2011.

16. Accordingly, order of the learned Single Judge stands set aside while allowing the L.P.A. and dismissing the respondent's writ petition.

(P. B. Bajanthri, J)

(Arun Kumar Jha, J)

shoaib/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	04.04.2023.
Transmission Date	NA

