IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.22172 of 2019

Ramayan Sah S/o Sanupdeyal Sah, Resident of Pani Tanki, Bazar Samiti, Vishnu Nagar, Post- Anaith, P.S.- Nawada, Dist.- Bhojpur (Ara).

... ... Petitioner

Versus

1. The State of Bihar through the Chief Secretary, Patna.
2. The Principal Secretary, Finance Department, Govt. of Bihar, Patna.
3. The Principal Secretary, Building Construction Department, Govt. of Bihar, Bisheswaraiya Bhawan, Patna.
4. The Chief Engineer (South Bihar), Building Construction Department, Govt. of Bihar, Bisheswariya Bhawan, Patna.
5. The Superintending Engineering, Building Construction Circle Ara.
6. The Executive Engineer, Building Construction, Ara.
7. The District Account Officer, Bhojpur at Ara.
8. The Treasury Officer, Bhojpur at Ara.
9. The Accountant General, Bihar, Patna.

... ... Respondents

Appearance :

For the Petitioner/s	:	Mr.Aditya Nath Jha, Advocate
For the Respondent/s	:	Ms. Puspanjali Shama, AC to SC-20
For the Accountant General:		Mr. Ram Kinkar Choubey, Advocate

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
ORAL JUDGMENT
Date : 23-02-2023

Heard learned counsel for the petitioner, learned counsel for the State and learned counsel for the Accountant General, Bihar.

2. Petitioner, in the present case, is seeking the following reliefs:

> "(i) For issuance of an appropriate writ in the nature of "certiorari' for quashing the memo no. 147 dated 30.01.2018 (Anne.-P3) issued under the Signature of the Superintending Engineer Building Construction Circle, Ara (Respondent -5) whereby and whereunder the date from

which benefits of 1st and 2nd Assured Career Progression (ACP) had earlier granted to petitioner under order dated 23.12.2009 (Annexure – P1) has been modified to 12.10.2017 in place 09.08.1999 for 1st ACP and 12.10.2017 in place of 19.12.2005 for the 2nd ACP.

(ii) For issuance of an appropriate writ in the nature of certiorari, for quashing the consequential memo no. 1199 dated 19.07.18 and letter no. 1401 dated 21.08.2018 contained in Annexure P4, Annexure P5 respectively issued under signature of the Executive Engineer Building Construction Division, Ara (Respondent 6) whereby and whereunder the excess amount Rs. 827527/- (Rupees eight lac twenty seven thousand five hundred twenty seven) paid to petitioner in the light of ACP, has been recovered from his post retiral benefits.

(iii) For issuance of mandamus to the respondents to refund the amount illegally recovered from retiral benefits of petitioner and retire his retiral benefits as per his pay fixed earlier according to benefit of ACP given to him through Annexure-P1."

3. It is the case of the petitioner that he was appointed on the post of Correspondence Clerk on 16.12.1981 and joined on the said post on 19.12.1981 in the pay scale of Rs. 580-860/- in Building Construction Department, Government of Bihar.

4. Petitioner was granted 1st Assured Career Progression (in short "ACP") w.e.f. 09.08.1999 and 2nd ACP w.e.f 19.12.2005 under the provisions of Bihar State Employee Service Condition (Assured Career Progression) Rules, 2003 as amended by Rule 2006 (hereinafter referred to as the 'ACP Rules'). In this connection, the petitioner has relied upon memo no. 1160 dated 23.12.2009 to show that he was granted 1st and 2nd ACP under signature of the Superintending Engineer, Building Circle, Ara. After the issuance of Annexure – ‘P1’, his pay was upgraded as per 1st ACP in Rs. 5000-8000/- and as per 2nd ACP as Rs. 5500-9000/- and accordingly he was given the benefit of 6th Pay Revision and other benefits regularly till his retirement on 31.01.2018.

5. It is stated that in the year 2017 at the time of 7th Pay Revision an objection was raised by the District Accounts Officer, Ara as to the effective date of grant of 1st ACP and 2nd ACP to the petitioner. The objection was taken on the ground that the petitioner had not passed the departmental accounts examination so he was not entitled for ACP from 09.08.1999 though the District Accounts Officer approved the same after 6th Pay Revision through letter No. 2147 dated 28.06.2011.

6. It is stated that both the 1st ACP and 2nd ACP which were granted to the petitioner w.e.f. 09.08.1999 and 19.12.2005 respectively were earlier approved by the District Accounts Officer. The petitioner had also been granted the 3rd ACP w.e.f 09.12.2011 vide order No. 11/0-12 contained in memo no. 750 dated 01.08.2012. It is stated in paragraph ‘8’ of the writ application that in the order dated 31.07.2014 issued by the Executive Engineer, Building Division, Ara petitioner was promoted on the post of Head Clerk in the pay scale of Rs. 9300-20800/- with grade pay Rs. 4200/- notionally as he was already getting the benefit of pay scale granted to him according to ACP through order dated 31.12.2009.

7. At this stage, the grievance of the petitioner is that all of a sudden, the Superintending Engineer, Building Construction Circle, Ara (respondent no. 5) issued memo no. 147 dated 30.01.2018 whereby the date 09.08.1999 from which benefits for 1st ACP and 19.12.2005 i.e. the date from which benefit of 2nd ACP were granted to the petitioner through Annexure 'P-1' has been modified to 12.10.2017 i.e. the date when the petitioner has passed the departmental accounts examination. A copy of memo no. 147 dated 30.01.2018 has been annexed as Annexure 'P-3' to the writ application.

8. Learned counsel for the petitioner submits that the Executive Engineer, Building Construction Division, Ara has recalculated the benefit for which the petitioner is entitled as per modified order dated 30.01.2018 and has come to the conclusion that an excess payment of Rs. 8,27,527/- was made to petitioner and vide memo no. 1199 dated 19.07.2008, adjusted Rs.

6,46,280/- from the retiral benefits of the petitioner against unutilized earned leave and has directed the Treasury Officer for recovery of rest of Rs. 1,81,387/- from other retiral benefit of the petitioner. The petitioner has, thus, challenged Annexure 'P-3' and 'P-4' to the writ application.

9. Learned counsel for the petitioner has relied upon the Hon'ble Division Bench judgment of this Court in the case of Ramadhar Thakur Vs. The State of Bihar and others (LPA No. 599/2015) decided on 19.03.2018 to submit that in absence of any provision prescribing passing of Accounts Examination for regular promotion, the petitioner could not have been denied grant of 1st and 2nd ACP with effect from the dates mentioned in Annexure 'P-1' to the writ application.

10. It is submitted that a learned coordinate Bench of this Court in the case of ***Most. Indu Devi Vs. The State of Bihar and others reported in (2019) 2 BLJ 330*** has once again considered sub-clause (5) of Rule 4 of the ACP Rules, 2003, discussed the Hon'ble Division Bench judgments in the case of **Uday Shankar Prasad v. The State of Bihar & Ors.** reported in **2017 (3) PLJR 824** and the judgment in the case of State of Bihar and others Vs. Mahendra Baitha in LPA No. 332/2017 decided on 04.05.2018 as also the judgment in LPA No. 599/2015 (Ramadhar

Thakur Vs. The State of Bihar and others) and ultimately held that the employee in the said case having died in harness on 04.09.2009 could not have been subjected to the departmental rules framed only in the year 2014. He had been granted the benefit of 1st time bound promotion and the benefit of ACP rules prior to his death in harness.

11. Learned counsel points out that so far as the present case is concerned, in this case the Building Construction Department has not framed any rules prescribing any departmental accounts examination for regular promotion to the post of head clerk, therefore, in absence of the rules, the petitioner cannot be subjected to the Rule 156 and 157 of the Bihar Board Miscellaneous Rules, 1958 (hereinafter referred to as the “Rules of 1958”) and the Finance Department’s circular bearing No. 4685 dated 25.06.2003 which require an employee to pass a department accounts examination mandatorily for any regular promotion as also for getting the benefit of ACP/MACP.

12. On the other hand, learned counsel for the State has opposed this application on the grounds inter alia that for being eligible for regular promotion to the post of head clerk the petitioner was required to pass the departmental accounts examination as per rule 157 of the Rules of 1958. It is also reflected from the letter no. 4178 dated 12.08.1992 of the Finance Department wherein it has been specifically stated that all the clerks in the works department are required to pass departmental accounts examination for consideration for further promotion and only those clerks were exempted who were granted promotion before 01.09.1983.

13. Learned counsel submits that as per provision contained in sub-rule (5) of Rule 4 of the Rules of 2003, an employee is required to fulfill all the eligibility conditions for promotion in order to get the benefit of ACP upon stagnation for the period of continuous 12/24 years.

14. It is stated in paragraph ‘8’ of the counter affidavit that the petitioner has passed the departmental accounts examination on 12.10.2007. Thus, the petitioner had been wrongly granted the benefit of 1^{st} ACP w.e.f. 09.08.1999 and 2^{nd} ACP w.e.f 19.12.2005 without his passing the departmental accounts examination.

15. Learned counsel has relied upon the judgment of the Hon’ble Division Bench of this Court in the case of State of Bihar and others Vs. Mahendra Baitha (LPA No. 332/2017) decided on 04.05.2018 to submit that in an identical case the Hon’ble Division Bench has been pleased to hold that all requirements which are needed for substantive promotion and passing of departmental accounts examination is integral to the ACP rules. A copy of the judgment has been brought on record of this case for perusal.

16. As regards the judgment of the Hon'ble Division Bench in the case of Ramadhar Thakur (supra) and Most. Indu Devi(supra), learned counsel submits that in those cases the respondents had not brought to the notice of the court any statutory provision or executive instruction specifically providing that passing of departmental accounts examination is a *sine qua non* for grant of regular promotion. It is submitted that in this case the facts are otherwise. In this case, the petitioner had a promotional avenue available and for getting that promotion he was required to pass departmental accounts examination which in fact he passed in the year 2007, therefore in this case it cannot be contended that either there was no promotional avenue or that the requirement to pass departmental accounts examination was not there to get regular promotion.

17. Learned counsel for the State has further sought to draw distinction on facts with the case of Most. Indu Devi (supra). It is submitted that in the said case the employee had died in harness in the year 2009 whereas rule requiring passing of departmental examination were farmed in the year 2014 which were held not applicable to the case of the late employee. Learned counsel submits that the distinction may be well understood on perusal of the judgment of the Hon'ble Division Bench in the case of ***Uday Shankar Prasad Vs. The State of Bihar reported in (2017) 3 PLJR 824*** wherein the Hon'ble Division Bench had occasion to consider the earlier judgment rendered in the case of ***State of Bihar Vs. Kusheshwar Nath Pandey reported in 2013(1) PLJR 939.*** A distinction has been drawn on the ground that there was no promotional avenue to the petitioner of the said case from the post of compilation clerk and further the rules for recruitment for promotion had not been framed. **Uday Shankar Prasad** (supra) has, thus, been decided in the background of the fact that a compilation clerk had no further avenue for further promotion and recruitment to the higher post which is not here.

Consideration

18. Having heard learned counsel for the parties, this Court has perused the materials available on the record. Admittedly, in this case the petitioner had a promotional avenue from the post of correspondence clerk. It is his own case in paragraph '8' of the writ application that vide letter no. 24/014 dated 31.07.2014 (Annexure 'P-2' to the writ application) he was promoted to the post of head clerk in the pay scale of Rs. 9300-

20800/- with a grade pay of Rs. 4200/-. A perusal of Annexure 'P-2' would show that his case was considered by the Screening cum Establishment Committee and on the basis of the recommendations made by the said Committee the petitioner along with one Satyanarayan Prasad had been granted regular promotion to the higher post. The petitioner was already getting the benefit of pay scale because of grant of ACP through order dated 31.12.2009.

19. To this Court, therefore, it is crystal clear that it is not a case identical to the case of **Uday Shankar Prasad** (supra) in which the Hon'ble Division Bench found that there was no promotional avenue to the petitioner in the said case, therefore, in absence of any rule governing the regular promotion or a condition precedent, the grant of ACP to the petitioner without passing the departmental accounts examination was fully justified. This case is also distinguishable from the case of Most. Indu Devi (supra) in which the learned Single Judge of this Court found that the husband of the writ petitioner had died in the year 2009 whereas the recruitment rules providing for departmental accounts examination were framed in the year 2014.

20. In the present case, the petitioner had a promotional avenue and he was required to pass departmental accounts examination. He indeed appeared in the said examination in the year 2007 and passed it. He is therefore precluded from arguing that there was no requirement of passing of departmental accounts examination for regular promotion to the post of head clerk. In such circumstance, in the opinion of this Court, the Division Bench judgment in the case of **Kusheshwar Nath Pandey** (supra) would be applicable. In the said case, the respondent-writ petitioner had joined the service as Tracer (Blue Print) in 1979. By order dated 30th December, 1981 he was promoted to Correspondence Clerk w.e.f. 1st September 1981. By order dated 13th November, 1998 the Chief Engineer, Patna granted him the benefit of first time bound promotion in the pay scale of Rs. 1400-2300/- w.e.f. 1st September 1991 on completion of 10 years service as Correspondence Clerk. The said order was made subject to approval of the competent authority but the order was not approved, may be that the same was not sent to the competent authority for approval within three months, the same was automatically cancelled but since the said order dated 13th November, 1998, the writ petitioner continued to receive the benefit of said time bound promotion. He, however, passed the Departmental Accounts examination (hereinafter called 'the examination') in the year 2007 and retired from service on 31st May, 2009.

21. In these circumstances, while processing his pension papers the Accountant General raised objection in respect of the time bound promotion granted to the petitioner on the premise that the petitioner had not passed the examination. The Accountant General revised the pay scale and the pay of the writ petitioner since 1st September 1991 till 31st August 2008 and held that a sum of Rs. 91,840/- was paid to the writ petitioner in excess of his due salary. A recovery was ordered against the petitioner. The same was under challenge before the learned writ court. The writ application was allowed by the learned Single Judge on the ground that since the petitioner had passed the examination in the year 2007 the order for recovery was on nonest ground.

22. In the Letters Patent Appeal of Kusheshwar Nath Pandey, the Hon'ble Division Bench considered Rule 157 of the Bihar Board Miscellaneous Rules, 1958 and recorded as follows in paragraph 10, 11 and 12 of the judgment:

> "**10.** The State of Bihar has framed the Bihar Board's Miscellaneous Rules, 1958. The said Rules are applicable to all subordinate officers under the State Government to the extent they are not inconsistent with any instructions specially issued by the department concerned in relation to any particular office. Rule 157 thereof provides for Accounts Examination. Clause (J) of sub-rule 3 of the said Rule 157 makes the passing of the Accounts Examination a condition precedent for confirmation; for crossing the

efficiency bar; and for promotion to the selection grade. The said Clause (J) reads as under:—

"(J)(a) Any Clerk, who has not passed the preliminary examination in Accounts, will be neither confirmed nor be allowed to cross the efficiency bar;
(b) A clerk, who has not passed the final examination, will not be promoted to the Selection grade;
(c) In case of non-availability of senior clerk, finally passed in Accounts Examination, any Junior Clerk, having passed the final Accounts Examination may be temporarily promoted to the selection Grade:
Provided that the Junior Clerk temporarily promoted to the Selection grade shall be reverted to the post of clerk if the clerk senior to him passes the final Accounts Examination within two years from the date of his first supersession and is promoted with effect from any date within the said two years, otherwise the senior clerk would be treated junior to all the clerks promoted to the selection grade prior to him.
Explanation.- xxx xxx xxx"

11. Pursuant to the aforesaid Rule 157, the State Government has issued the above referred Circular dated 1st April, 1980. The officers concerned have been instructed to follow the aforesaid Rule 157 scrupulously in matters of grant of time bound promotion and that any order which is not approved by the Finance Department be reconsidered. Under the above referred Circular dated 26th December, 1985, detailed instructions have been issued for grant of time bound promotion to the Government servants under Government Resolution dated 30th December, 1981. The said Circular, inter alia, enjoins the concerned authority to forward the proposal for approval of the time bound promotion granted by the competent authority. The approval would be granted by the Finance Department. In case the approval is not granted or it is wrongly made, the amount paid in excess of the due salary shall be recovered. The above referred Instructions dated 12th August, 1992 were issued by the Finance Department, Government of Bihar to all departments of the Secretariat. The said Instructions reiterated that all Clerks in the subordinate offices were required to pass the Accounts Examination. It further provided that the Clerks who are granted time bound promotion after 1st April, 1983, without passing the Accounts Examination, be reverted. It also provided that in case adequate number of qualified Clerks were not available, the Clerks who were not qualified (had not passed the Accounts Examination) may also be granted ad hoc promotion on condition that the concerned Clerk will pass the next Accounts Examination.

12. Thus, it is evident that all along the rule makes passing of the Accounts Examination a condition precedent for promotion to a higher post including the promotion to a higher grade under the "Time Bound Promotion Scheme". Admittedly, the writ petitioner had not passed the Accounts Examination in 1991, the date from which he has been given the benefit of time bound promotion or in 1998, the date on which such promotion was granted. His promotion was not even approved by the Finance Department as required. Evidently, the writ petitioner received the benefit of time bound promotion to which he was not entitled to under the rules. His passing of Accounts Examination in 2007 will not validate the promotion granted to him with effect from 1st September, 1991 nor would it validate the order dated 13th November, 1998."

23. This Court however finds that on the point of recovery the Hon'ble Division Bench in the case of Uday Shankar Prasad (supra), though took note of the judgment of the Hon'ble Division Bench in the case of Kusheshwar Nath Pandey (supra) but by that time judgment of the Hon'ble Supreme Court in the case of **State of Punjab Vs. Rafiq Masih (White Washer etc.)** reported in **(2015) 4 SCC 334** had already come, therefore, followed the law laid down by the Hon'ble Supreme Court in the case of **Rafiq Masih (White Washer etc.)** and questioned the order of recovery after holding that the petitioner in the said case would be entitled for the ACP and other benefits granted to him earlier. In the case of **Rafiq Masih** (supra) the Hon'ble Supreme Court has laid down certain guidelines in the matter of recovery. Paragraph '6', '7' and '18' of the judgment are quoted hereunder for a ready reference:-

> "**6.** In view of the conclusions extracted hereinabove, it will be our endeavour, to lay down the parameters of fact situations, wherein employees, who are beneficiaries of wrongful monetary gains at the hands of the employer, may not be compelled to refund the same. In our considered view, the instant benefit cannot extend to an employee merely on account of the fact, that he was not an accessory to the mistake committed by the employer; or merely because the employee did not furnish any factually incorrect information, on the basis whereof the employer committed the mistake of paying the employee more than what was rightfully due to him; or for that matter, merely because the excessive payment was made to the employee, in absence of any fraud or misrepresentation at the behest of the employee.
>
> **7.** Having examined a number of judgments rendered by this Court, we are of the view, that orders passed by the employer seeking recovery of monetary benefits wrongly extended to the employees, can only be interfered with, in cases where such recovery would result in a hardship of a nature, which would far outweigh, the equitable balance of the employer's right to recover. In other words,

interference would be called for, only in such cases where, it would be iniquitous to recover the payment made. In order to ascertain the parameters of the above consideration, and the test to be applied, reference needs to be made to situations when this Court exempted employees from such recovery, even in exercise of its jurisdiction under Article 142 of the Constitution of India. Repeated exercise of such power, "for doing complete justice in any cause" would establish that the recovery being effected was iniquitous, and therefore, arbitrary. And accordingly, the interference at the hands of this Court.

18. It is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to hereinabove, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(*i*) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).

(*ii*) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.

(*iii*) Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(*iv*) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(*v*) In any other case, where the court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

24. In the light of the aforementioned discussion, this Court is of the considered opinion that no fault may be found with Annexure 'P-3' and 'P-6' to the writ application. It is stated that the entire excess amount has already been recovered from the petitioner. If it is so, he is at liberty to file an appropriate representation before the Principal Secretary, Building Construction Department, Government of Bihar claiming restoration of the said amount in the light of the judgment of Hon'ble Supreme Court in the case of **Rafiq Masih** (supra). If any such application is filed within a period of four weeks from today the Principal Secretary, Building Construction Department, Government of Bihar (respondent no.3) shall consider the same and take an appropriate view of the matter keeping in view the judicial pronouncements on the subject.

25. This Writ Application stands disposed of accordingly.

(Rajeev Ranjan Prasad, J.)

Rajeev/-

AFR/NAFR	AFR
CAV DATE	
Uploading Date	27.02.2023
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