IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.2539 of 2021

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Mauleshwar Chaudhary Son of Late Butti Chaudhary Resident of Village- Babraha, Dumaria Bujurg, P.o.- Aguani, P.s.- Perbatta, District- Khagaria, Bihar-851216

... ... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Water Resources Department, Sinchai Bhawan, Patna-15
2. The Principal Secretary, Water Resources Department, Sinchai Bhawan, Patna-15
3. The Engineer-in-Chief Water Resources Department, Sinchai Bhawan, Patna-15
4. The Chief Engineer Water Resources Department, Irrigation Creation, Dehri-821307
5. The Superintending Engineer, Water Resources Department, Sone Canal Circle, Ara-802301
6. The Executive Engineer, Water Resources Department, Sone Canal Division, Khagaul-801105
7. The Accountant General Virchand Patel Path, Patna-01

... ... Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Rajendra Narayan, Sr. Advocate Mr. Manish Sahay, Advocate Mr. Anil Kumar Sinha, Advocate Mr. Siddharth Aditya, Advocate
For the Respondent/s	:	Mr. Vivek Prasad, GP-7 Mr. Binod Kumar Sinha, AC to GP-7

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CORAM: HONOURABLE MR. JUSTICE HARISH KUMAR
ORAL JUDGMENT
Date : 04-01-2024

Heard Mr. Rajendra Narayan, learned senior counsel along with Mr. Manish Sahay, learned counsel for the petitioner and Mr. Vivek Prasad, learned GP-7.

2. With the consent of the parties, the matter is heard and being disposed of at the stage of “Admission” itself.

3. The petitioner, who superannuated on 31.12.2011, as a Muharrir, from the office of the Executive Engineer, Sone Canal Division, Khagaul, Patna, has filed the present writ petition seeking a direction upon the respondents to ensure the benefit under the Assured Career Progression (ACP) Scheme, in the light of the decision of the learned Division Bench of the Hon'ble Court in the case of ***The State of Bihar & Ors. Vs. Smt. Jivachi Devi***, since reported in ***2020 (2) BLJ 471***.

4. It is submitted on behalf of the petitioner that despite having been superannuated in the year 2011, when the petitioner has not been accorded admissible retiral benefits, he was compelled to approach before this Court by filing CWJC No. 23058 of 2012, and thereupon, the petitioner has been accorded admissible retiral benefits, with a liberty that, in case, the petitioner disputes the amount, it would be open to him to file representation before the appropriate authority.

5. The petitioner, having found that nonetheless, he being entitled for the benefit under the Assured Career Progression (ACP) Scheme, the authority concern has not accorded such benefit, he filed several representation before the authorities concern, but to no avail, and lastly the present writ petition.

6. Learned senior counsel confining his submission to the entitlement of the petitioner for grant of benefit under the Assured Career Progression (ACP) Scheme, w.e.f. the date, when he became entitled for ACPs, submitted that, passing of accounts examination or departmental examination, as the case may be, under Bihar Boards' Miscellaneous Rule, 1958 would be necessary for crossing efficiency bar, confirmation and for promotion to selection grade, but not for general promotion. He further referring to the judgment rendered by the Division Bench in the case of ***Smt. Jivachi Devi (supra)*** has vehemently submitted that in any view of the matter, the State is not justified in refusing benefits of the financial progression to the petitioner on the ground that he did not pass the account or departmental examination. Heavy reliance has been made on paragraph no. 7, thereof, which reads as follows:

> *7. Recently, a Division Bench of this Court in case of* ***Ramadhar Thakur (supra)****, after extensive analysis and discussion of the provision of rule 157(3) (J) of the Bihar Boards Miscellaneous Rules 1958 and Rule 4 (clause 5) of the Bihar State Employees Service Condition (Assured Career Progression Scheme) Rules, 2003, conclusively held after referring to various judgments, viz.,****Mithilesh Kumar Sinha Vs. The State of Bihar & Ors. [2006(1) PLJR 282]; Syed Mozammil Ashraf Vs. The State of Bihar & Ors.***

[2007(1) PLJR 438]; Shashi Shekhar Ambasta Vs. The State of Bihar & Ors. [2011(3) PLJR 474];Maheshwar Prasad Singh & Ors. Vs. The State of Bihar [2000(4) PLJR 262]; Rameshwar Roy Vs. The State of Bihar & Ors. [2017(2) PLJR 127]; Daya Shankar Singh Vs. The State of Bihar & Ors. [2010(3) PLJR 220] and Md.Shamsuddin & Ors. Vs. The State of Bihar [1983 PLJR 347] *that Rule 157 (3) (J) of the Bihar Boards Miscellaneous Rules 1958 makes the passing of the departmental accounts examination a condition precedent for promotion to the selection grade, but not for general promotion and for not passing such exam, the benefits of the A.C.P. Rules, 2003, also cannot be withheld, unless there is a departmental rule for promotion. In other words, the Bench held that passing of departmental accounts examination is not a condition precedent for grant of A.C.P. Rules nor does Rule 157 (3) (J) of the Bihar Boards Miscellaneous Rules, 1958 conceive of such a requirement. The same issue is also been involved in the case of* ***Masomat Indu Devi Vs. State of Bihar and others****, reported in* ***2019(2) PLJR 241*** *in which the learned Single Judge of this Court has reiterated the same view and held that 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 election grade, but not general promotion. I also find that the provisions of the Bihar Water Resources Department Field Steno Typist's Cadre (Recruitment and Service Condition)*

> *Rules, 2014 does not apply in the respondent's case as respondent's husband superannuated from service in the year 2011. I do not find any reason to differ with the decision passed by co-ordinate benches of this Court.*

7. It is to be noted that during pendency of the writ petition, the Chief Engineer vide his letter contained in Memo No. 2571 dated 14.12.2020, has exempted the petitioner from passing departmental accounts examination, w.e.f. the date on which the petitioner superannuated, i.e. on 31.12.2011, in terms of Government Notification dated 12.08.1992. Consequent, thereupon, the Executive Engineer, Water Resources Department, vide Letter No. 510 dated 24.03.2021, accorded the benefit of 1st ACP to the petitioner, w.e.f. the date of such exemption, i.e., on 31.12.2011, causing serious prejudice to the right and entitlement of the petitioner.

8. The petitioner being aggrieved assailed the Letter No. 510 dated 24.03.2021, read with Memo No. 2571 dated 14.12.2020, so far it relates to the petitioner, whereby, he has been deprived to get the benefit of ACP, w.e.f. the due date of his entitlement, by filing I.A. No. 01 of 2021.

9. Learned senior counsel, while assailing the aforenoted orders, submitted that, any exemption granted by the State Government to the petitioner, was/is only for the purposes

of promotion which shall be effective w.e.f. the date of passing of the order and in no circumstances for granting the benefit of financial progression, there was even any need of exemption from passing accounts or departmental examination.

10. Per contra, Mr. Vivek Prasad, learned counsel for the State referring to the averments made in the counter affidavit submits across the Board that admittedly, the petitioner has submitted application for exemption of passing departmental examination, which was duly considered by the department and the petitioner has been exempted from passing departmental examination, vide order as contained in Memo No. 2571 dated 14.12.2020, with effect from the date of his retirement and, as such, the petitioner shall be accorded financial benefit, with effect from the date, when, he has been exempted from passing the departmental examination. He further relies upon the judgment rendered by the Division Bench of this Court in the case of ***The State of Bihar & Ors. Vs. Mahendra Baitha***, in ***LPA No. 332 of 2017***, disposed of vide order dated 04.05.2018, wherein, the Division Bench of this Court has held in paragraph no. 11, as follows:

> *11. This Court does not want to burden this order by relying on one too many decisions on the principle and requirements*

in relation to grant of benefit of A.C.P.. Let it be clarified that if a claim is made by any employee as to his entitlement under the A.C.P. Rules, such claim will have to be considered in the entirety of the scheme of the Rule and not on the mere object behind the Rules. Since the conditions laid down in sub-rule (5) of rule 4 of the 2003 A.C.P. Rules are integral to the Rules, which has been notified under Article 309 of the Constitution of India, therefore, the Rule cannot be truncated and directions cannot be issued for grant of benefit of A.C.P., merely because of passage of time, ignoring what is otherwise a must, in terms of fulfilling the eligibility.

11. Learned counsel for the State next submitted that from the record, it is evident that the petitioner superannuated in the year 2011, itself and earlier, he had also approached before this Court for the retiral benefit, but he never raised any claim for benefit under the Assured Career Progression (ACP) Scheme and now the writ petition has been filed after a decade for such relief.

12. This Court having anxiously heard the submissions advanced on behalf of the learned counsel for the respective parties and after perusing the materials as well as judgments referred by the learned counsels, *prima facie*, finds

substance in the submissions made on behalf of the petitioner that passing of departmental accounts examination, is not a condition precedent, for grant of benefit under the Assured Career Progression (ACP) Rules and the issue involved in this regard, has already been given quietus by the learned Division Bench of this Court in the case of ***Smt. Jivachi Devi (supra)*** which has also been affirmed by the highest Court of the land in the SLP No. 782 of 2022, preferred by the State of Bihar on being aggrieved by the order passed in LPA No. 833 of 2017.

13. This Court further finds that the order of exemption from passing a departmental examination has been passed in the year 2020, in terms of government notification dated 12.08.1992, which specifically says that it shall be effective, w.e.f. the date of passing of the order, though the petitioner superannuated on 31.12.2011, itself. Further, once the Court held that passing of any examination is not *sine quo non* for financial progression, then any exemption by the State Government, may be required for any other purpose but certainly not for the benefit of ACP. Thus, in any view of the matter, a vested right to get the financial progression with due date cannot be diluted by passing order for exemption, which has no concern for the benefit of ACP.

14. So far the submission of the petitioner based upon the judgment in the case of ***Mahendra Baitha (supra)*** is concerned, the judgment was taken note of by the subsequent Division Bench in the case of ***Smt. Jivachi Devi (supra)*** and now the same has affirmed by the Apex Court in SLP No. 782 of 2022.

15. Further submission of the learned counsel for the State with regard to delay is of no help, as it was incumbent upon the respondent authorities to consider the claim of the petitioner for grant of benefit under ACP Rules, when it became due and if in case the same has not been done, the petitioner can not be blamed. It would be appropriate to quote the relevant paragraph of a celebrated judgment, in the case of ***All India Groundnut Syndicate Ltd. Vs. Commissioner of Income Tax, Bombay City***, ***AIR 1954 Bombay 232***.

> *"9. 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 S. 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 asserted 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."*

16. In view of the aforesaid discussions and the observation, the present writ petition stands disposed of with a direction to the respondent no. 4 to consider the claim of the petitioner for grant of benefit of Assured Career Progression, in the light of the mandate of this Court in the case of ***Smt. Jivachi Devi (supra)*** and accord all the financial benefits, w.e.f. the due date, preferably within a period of twelve weeks, from the date of receipt/production of a copy of this Order, without being swayed by the order of exemption as contained in Memo No. 2570 dated 14.12.2020 and the consequential Letter No. 510 dated 24.03.2021.

(Harish Kumar, J)

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AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	09.01.2024.
Transmission Date	NA