(2011) 08 JH CK 0149

In the Jharkhand High Court

Case No : Writ Petition (S) No. 1436 of 2011

Ajit Kant Sahay APPELLANT

Vs

State of Jharkhand and Others RESPONDENT

Date of Decision : 21-08-2011

Acts Referred:

Miscellaneous Rules of the Board of Revenue, Bihar, 1958 — Rule 157(3)(J), 43

Citation : (2012) 1 JCR 113

Hon'ble Judges : Rakesh Ranjan Prasad, J

Bench : Single Bench

Final Decision : Allowed

Judgement

1. The petitioner was appointed on the post of Clerk on 5.11.1977 in the Department of Mines and Geology in the erstwhile State of Bihar. In course of time, 1st Time Bound Promotion was given with effect from 5.11.1987. On implementation of the scheme of assured career progression, the petitioner was granted 1st A.C.P with effect from 9.8.1999 in the pay scale of Rs. 5000-8000/- and 2nd A.C.P with effect from 5.11.2001 in the pay scale of Rs. 5500-9000/- vide order as contained in letter No. 575 dated 31.3.2005. When the petitioner completed 30 years of service, he on the ground of ill-health applied for grant of VRS on 10.12.2008. While the matter relating to grant of VRS was pending, an order was passed on 11.9.2009 by the Deputy Secretary, Department of Mines and Geology, Government of Jharkhand, Ranchi as contained in memo No. 1275 dated 11.9.2009 (Annexure 6) whereby date of grant of 1st A.C.P and the 2nd A.C.P to the petitioner was shifted to 8.6.2004 as that was the date when petitioner cleared 2nd paper of the accounts examination and at the same time, excess amount drawn by the petitioner was ordered to be adjusted from the amount to be paid to the petitioner on fixation of pay. The said order has been challenged in this writ application. At the same time, another order was passed by the Director of Mines as contained in memo No.2326 dated 27.12.2010 (Annexure 11) whereby 1st Time Bound Promotion given with effect from

5.11.1987 was cancelled as on that day, he had not passed the departmental examination and thereby the amount drawn on account of enhancement of pay on account of grant of 1st Time Bound Promotion was directed to be recovered in one lump sum from the arrears of pay which would be paid to the petitioner on account of grant of A.C.P/ revised pay scale. The said order as contained in Annexure 11 has also been challenged

2. Learned counsel appearing for the petitioner submitted that admittedly the petitioner had been granted 1st Time Bound Promotion with effect from 5.11.1987 but that was cancelled, aide order dated 27.12.2010 after more than 23 years on the ground that at the time of grant of 1st Time Bound Promotion, the petitioner had not passed the departmental examination, rather he had passed the departmental examination in the year 2004. The said order perhaps was passed under wrong notion that one in terms of Rule 157(3)(J) of the Bihar Board''s Miscellaneous Rules. 1958 needs to pass examination of accounts for having promotion but that rule in case of Md. Samsuddin v. State of Bihar. 1983 PLJR 347, has been held to have been devoid of any statutory force and thereby then, is no necessity of passing examination of accounts for having promotion. It was pointed out that some proposition has been laid down in other cases such as Kedar Prasad Singh v. State of Bihar and others. C.W.J.C No.42 of 1989 (R) and Uday Kant Jha and others v. State of Bihar and others, C.W.J.C No. 1824 of 1995 (R)

3. By referring those judgments, it was submitted that the order as contained in Annexure 11 cancelling 1st Time Bound Promotion granted to the petitioner on 5.11.1987 and seeking recovery of the amount said to have been drawn in excess on that count is bad and is fit to be set aside

4. It was further submitted that it is also the case of the respondents that the petitioner had wrongly been given benefit of 1st and 2nd A.C.P with effect from 9.8.1999 and 5.11.2001 respectively as before grant of 1st A.C.P and 2nd A.C.P, the petitioner had never passed the examination of accounts, rather the petitioner had passed the examination in the year 2004 and thereby the petitioner is entitled to have benefit of A.C.P with effect from 8.6.2004 and as such, excess amount drawn has been ordered to be recovered but the petitioner had been granted 1st A.C.P and 2nd A.C.P without there being any misrepresentation on the part of the petitioner and therefore, the authority is not competent to recover the amount said to have been drawn in excess from the pensionary benefit which proposition has been laid down by this Court in a case of Surjeet Singh and Another Vs. The State of Bihar and Another,

5. As against this, learned counsel appearing for the State submitted that before passing the departmental examination, the petitioner had been granted 1st Time Bound Promotion and similar was the case with respect to granting of 1st A.C.P and 2nd A.C.P and hence, by the impugned orders the order by which 1st Time Bound Promotion was granted and also the order by which 1st and 2nd A.C.P was granted to the petitioner have been cancelled and the amount drawn has

been ordered to be recovered not from the pensionary benefit but from the arrears which would be paid to the petitioner on fixation of pay in revised scale and therefore, decision referred to on behalf of the petitioner is not applicable in this case as the Full Bench has categorically said that though the Government does have power to recover excess amount paid by mistake or on wrong promotion, but the same cannot be recovered after the retirement without taking recourse of the provision of Rule 43(b) of the Bihar Pension Rules but here it is not the case of recovery from the pension or other retiral dues and hence, the impugned orders need not to be interfered with by this Court

6. Having heard learned counsel appearing for the parties, it does appear that 1st Time Bound Promotion given to the petitioner in the year 1987 was withdrawn after 23 years on the ground that the petitioner when had been granted 1st Time Bound Promotion had not passed the department examination. While cancelling the 1st Time Bound Promotion, reference has been made to sub-clause (VI) of Clause 11 of the Resolution of the Government of Bihar, Finance Department No. 10770 dated 30.12.1981, the said sub-clause (VI) reads as follows :

the other conditions the rules and procedures meant for usual promotion should be followed in case of aforesaid time bound system also

7. Though by referring to the aforesaid clause, the order granting 1st Time Bound Promotion to the petitioner has been cancelled but nothing has been placed on the record that any rule had been framed in this respect governing the service condition of the petitioner. However, generally in this respect Rule 157(3)(j) of the Bihar Board''s Miscellaneous Rules, 1958 is being referred which prescribes passing of the account examination for the purpose of promotion. But way back in the year 1983 itself. It has been held in a case of Md. Samsuddin v. State of Bihar (supra) that the said rule does not have any statutory force and hence, one cannot be debarred for promotion on account of non- passing of the accounts examination in terms of Rule 157(3)(j) of the Bihar Board''s Miscellaneous Rules, 1958

8. The said decision subsequently has been followed in number of cases by this Court including In a case of Kedar Prasad Singh v. State of Bihar and others, C.W.J.C No.42 of 1989 (R) and In a case of Uday Kant Jha and others v. State of Bihar and others, C.W.J.C No. 1824 of 1995 (R)

9. In that view of the matter, the order passed under Annexure 11 whereby 1st Time Bound Promotion granted to the petitioner has been cancelled and the excess amount drawn by the petitioner has been ordered to be recovered is hereby set aside

10. Coming to other aspect of the matter, it be stated that the petitioner had been granted 1st and 2nd A.C.Ps. with effect from 9.8.1999 and 31.3.2005 respectively but subsequently, date of grant of 1st A.P.C was shifted to 8.6.2004 on the ground that the petitioner had passed examination of accounts on

8.6.2004

11. There has been no denial of the fact that under the scheme of A.C.P, one is entitled to get benefit of A.C.P, if he is eligible to be promoted. It has never been the case of the petitioner that no rule/circular Is there prescribing passing of examination for the purpose of having benefit of A.C.Ps. At the same time. State has also not come forward to put forth that under any rule/circular one is supposed to pass examination for having promotion. Therefore, in absence of such pleading, matter is left open as to whether one need to pass exanimation of account for having promotion or benefit of A.C.P. However, it is quite clear that the order as contained in memo No. 1275 dated 11.9.2009 whereby date of grant of A.C.P has been shifted and the amount said to have been drawn in excess has been ordered to be recovered has been passed without giving any opportunity to the petitioner to have his say in the matter and hence, the said order being violative of the principle of natural justice is also fit to be set aside

12. Accordingly, the order as contained in Memo No. 1275 dated 11.9.2009 (Annexure 6) and also the order as contained in Memo No. 2326 dated 27.12.2010 (Annexure 11) are hereby set aside

13. At the same time, respondent concerned is directed to do needful in the matter of fixation of pension so that arrears of pension be paid to the petitioner within three months from the date of receipt/production of a copy of this order

14. Thus, this writ application is allowed.

