(2016) 04 PAT CK 0027

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 8691 of 2014

Anil Kumar Sharma and Others APPELLANT

Vs

The State of Bihar and Others RESPONDENT

Date of Decision : 06-04-2016

Acts Referred:

Citation : (2016) 04 PAT CK 0027

Hon'ble Judges : Ajay Kumar Tripathi, J.

Bench : Single Bench

Advocate : Binod Kanth, Sr. Advocate and Abhinav Srivastava, for the Appellant; Sanjay Mandal, AC to SC6, for the Respondent

Final Decision : Partly Allowed

Judgement

Ajay Kumar Tripathi, J.—1. A batch of 10 petitioners, who are working as Assistants in the Patna High Court, have jointly filed the present writ application. However, subsequently, a prayer has been made to delete petitioner No. 4 from the list, which is allowed.

2. Writ application has been filed for a direction upon the respondent State authorities to extend the benefit of 2nd Financial Progression in terms of the provisions provided under Bihar State Employees Conditions of Service (Assured Career Progression Scheme) Rules, 2003 (hereinafter referred to as the ACP Scheme). Petitioners plead discrimination on the decision of not extending such a benefit despite the petitioners forming one class of Assistants, who came to be appointed and have termed themselves as the batch of 1984 appointees.

3. The background facts are that pursuant to an advertisement issued in the year 1984, applications came to be filed by eligible candidates for appointment on the post of Assistant in the Patna High Court. Many persons including the present petitioners came to be appointed between 22nd July, 1986 and 20th November, 1986. Learned Senior counsel representing the petitioners harps on the fact that it was one selection process and one list which was drawn up for such selection

but appointments were staggered over a period of time because the list itself indicated that appointment on the post of Assistant will be made from the said list against non-joining or future vacancies.

4. All such persons including the present petitioners were extended the benefit of 1st Financial Progression w.e.f. 9.8.1999 and all the appointees of the 1984 were treated as one class and there was no disparity in the scale extended to them.

5. While petitioners were working on the post of Assistant, a notification dated 13.07.2010 was issued by the Finance Department of the Government of Bihar, by virtue of which the ACP Repeal Rules, 2010 came into existence. The said amendment contained in Anneuxre-2, however, was made operative w.e.f. 01.01.2009. By virtue of the notification i.e. Anneuxre-2, the 2003 Rule has been repealed.

6. The State Government also introduced what is known as a Modified Assured Career Progression Scheme, 2010 (MACP) wherein the benefit of such progression would start accruing to employees after 10 years, 20 years and 30 years instead of 12 years and 24 years as per the 2003 Scheme.

7. By virtue of Annexure-3 a large number of persons who were similarly appointed as the present petitioners were given the benefit of 2nd ACP after completion of 24 years of regular service but petitioners have been denied the privilege.

8. The Finance Department issued yet another notification, contained in Anneuxre-4 dated 13.06.2013. By virtue of this notification now, the benefit of 2003 ACP Rule was extended up till 13.07.2010 i.e. the date when Annexure - 2 was notified.

9. By virtue of Anneuxre-4, it is the case of the petitioners that an incongruous situation has been created where a set of similarly appointed persons have been given the benefit of financial progression of a higher pay-scale whereas these petitioners because of the cut off date have been left out from the benefit of grant of such financial progression since they have not completed 24 years of service if the cut off date remains as 13.07.2010. It is also argued that Annexure-4 creates a class amongst class and probably Anneuxre-4 was issued with an object of extending benefit to a set of people at the cost of the petitioners who are appointees of the same transaction.

10. A detailed representation, contained in Annexure-5, was filed but because of Annexure-4, a dichotomous situation has been created. These petitioners have ended up with much lower pay-scale even though they were appointed in a similar fashion against the same advertisement. For the same nature of work which these petitioners are performing, they derive a much lower pay-scale than their contemporaries.

11. Learned senior counsel relies on a series of decisions to buttress his arguments that if the present situation is allowed to continue and the cut off date

fixed in terms of Anneuxre-4 is not interfered and extended, the same would fall foul of the principles laid down in the case of D.S. Nakara and others Vs. Union of India, , AIR 1983 SC 130, Indian Ex-Services League and others Vs. Union of India, , (1991) 2 SCC 104, Union of India and another Vs. S. Thakur, , (2008) 13 SCC 463 and Bishundeo Mahto Vs. A.P.N. Singh and others, 1982 BBCJ 45. With due respect none of the principles as above apply to the facts of this case.

12. The State opposes the plea of the petitioners and they have this to say in the counter affidavit:

"12. That since the petitioners were appointed between 22.7.1986 to 20.11.1986, they are not entitled for the benefits as per the provisions as contained in the notification dated 13.6.2013. The petitioners could not complete 24 years of service required for being eligible for the benefits in terms of the ACP Rules 2003. Hence they have rightly been extended the benefits of second financial progression under the MACP Scheme, 2010 and as such place din the pay structure, P.B.-2 Rs. 9300-34800 with grade pay of Rs. 5400.

13. That representation of petitioners were forwarded to the Secretary, Law Department by Registrar (Establishment), Patna High Court, Patna vide letter No. 11653/Accounts/dated 14.8.2013 for onward transmission to the Finance Department, Govt. of Bihar, Patna for opinion. The representation of the petitioners in brief was, "They belong to 1984 batch who were appointed as assistants. The appointment was spread between 1984 to 1986. Since the cut of date for benefit to second ACP under ACP Rules of 2003 was fixed 13.7.2010 therefore only the employee appointed prior to 17.7.86 have got benefit of second ACP where was these petitioners appointed in between 17.7.1986 to 20.11.1986, therefore they were denied the benefit of second ACP under the ACP amendment Rules, 2013." Their representation petition was forwarded to Finance Department for opinion and needful. The Finance Department opined the MACPS is in force on 1.1.2009 and cut of date is fixed 13.7.2010, just to give benefit a group of employees, it is not justified to extend the cut of date of repealed rule."

14. That it is to be submitted that the mode, the extent and the date of effect of any policy decision are in the exclusive domain of the executive. There are a number of judgments of the Hon''ble Apex Court that the Hon''ble Court should not interfere with formation of policy (S.I. Sachdeva V. Union of India , AIR 1981 SC 411) W.B. headmasters ASS V. State of W. Bengal 1990 Lab. IC1789/Union of India V. S.L. Dutta-, AIR 1991 SC 363/Sher Singh V. Union of India , 1995 SCC 515).

15. That the State Government cannot formulate any policy to give benefit to a particular group of employees. If cut off date of ACP Rules 2003 is extended to give benefit of 2nd financial progression to petitioners who were appointed in 1984, then those appointed after 1984 may also raise the similar demand of extending cut off date of ACP Rules 2003. As a matter of fact any such extension in the cut-off date without any basis will be discriminatory and violative of the

provision of the constitution."

13. In addition to that, a supplementary counter affidavit on behalf of respondent No. 3 has also been filed wherein they have further explained the position as under:

"4. That after perusal of records of proceeding of the concerned rules, it appear that the Bihar Government took decision to implement Modified Assured Career Progression Scheme in the tune of Central pay scheme which effect from the date 1.1.2009 when the Central pay scheme was implemented and accordingly, the State Government issued notification contained in Memo No. 7566 dated 14.7.2010 which was made effective with effect from 01.01.2009 in the tune of Central Pay Scheme and one day prior to that on 13.7.2010 earlier Assured Career Progression Scheme Rule, 2003 was repealed vide Memo No. 7549 dated 13.7.2010, which was made effective with effect from 1.1.2009.

5. That further it appears from the original record and its proceedings that though the ACP Repeal Rules was enforced w.e.f. 1.1.2009 in the tune of central pay scheme but the aim and ambition of Government was also to protect the interest of such employees who have already availed/got benefit of ACP Rules, 2003 or entitled to get the same benefit in between enforcement of MACP i.e. 1.1.2009 and issuance of ACP Repeal Rules, 2010 i.e. 13.7.2010 because the said period of time could not be a vacuum period and the employee of the State could not face any discrimination. In fact, ACP Scheme Repeal Rule, 2010 cannot be made with a retrospective effect because several employees have already got the benefit of earlier ACP scheme and several similarly situated persons were eligible to get the same benefit in between 31.12.2008 to 13.7.2010. (emphasis mine) Hence, memorandum for approval was sent by the Finance Department stating therein that the ACP Rule, 2003 will be available in between 31.12.2008 to the date of issuance of notification of ACP scheme repeal Rule, 2010 i.e. 13.7.2010 but inadvertently or any how in Rule 2 sub-clause (ii) last sentence of ACP Scheme Repeal Rules, 2010 dated 13.7.2010 inserted as follows:

"Further more the pay promotion under repeal ACP Rule will be available in between 31.12.2008 and date of this repeal rules is made effective" meaning thereby the MACP was made effective with effect from 1.1.2009 and ACP Scheme Repeal Rule, 2010 was enforced with effect from same date i.e. 1.1.2009. Thus the interest of employees who have got benefit of ACP scheme Rules, 2003 or entitled to get same benefit in between enforcement of MACP i.e. 1.1.2009 and issuance of ACP Repeal Rule, 2010 i.e. 13.7.2010 were not protected in ACP Repeal Rule, 2010 as there is no gap in between 31.12.2008 and 1.1.2009.

6. That only error was in above highlighted part i.e. "date of this repeal rule is made effective" instead of "the date of notification i.e. 13.10.2010 of the repeal rules" resulting several Associations of employees raised their alarm to rectify the same error. The Government considering and examining all the aspects rectified the mistake occurred in Rule 2 Sub-Clause (ii) last sentence of ACP Rules, 2010

dated 13.7.2010 by ACP Scheme Repeal (amendment) Rules, 2013 dated 17.6.2013 mentioning therein "Further more the pay promotion under repealed ACP rules will be available in between 31.12.2008 and the date of notification (13.10.2010) of the repeal Rules" in place of "Further more the pay promotion under repeal ACP Rule will be available in between 31.12.2008 and date of this repeal rules is made effective" which is rational, justified and there is no illegality and infirmity at all."

14. After having given a detailed hearing to the rival submissions of the counsels of the parties, the Court is of the opinion that the petitioners may have been appointed on the basis of one selection process by virtue of the advertisement issued in the year 1984 but the appointment is not one. Their appointment has been staggered; therefore, it is a case of one selection but separate appointments. The equality which the petitioners are seeking, therefore, does not exist.

15. The object behind issuance of Annexure-4 was not to give any benefit to a particular group A, B or C but to fill up the vacuum created by issuance of Annexure-2 because Annexure 2 was dated 13.7.2010 but 2003 ACP Rule was repealed and new MACP enforced from 01.01.2009. The object behind issuance of Annexure-4 was to cover up the vacuum between 01.01.2009 and the date of the notification of repeal i.e. 13.07.2010. It is further clarified by the Court that the object behind issuance of Annexure-4 was not to create any class amongst class but to ensure that the repeal coincided with the date of notification contained in Annexure-2, which was the notification of Repeal of 2003 Rule.

16. What is of significance is that the ACP Scheme as such is not under challenge. The object behind formulation of such scheme is to grant financial progression to remove stagnation. If that be so, then it is the actual length of service which an individual employee renders under the State which makes him entitled to grant of such financial progression under the scheme. Meaning thereby that such a benefit can be derived by any individual only when he has completed 12 years and 24 years of service individually and not as a class, notionally. Financial progressions are accorded or granted to an individual employee and not as a group or class.

17. Meaning thereby that every individual who claims benefit under the financial progression scheme must complete the requirements of 12 years and 24 years of service for the first time 1st and 2nd progressions, respectively.

18. In view of the above, the whole edifice of discrimination which has been built by the petitioners in the present writ application is totally misplaced and incongruous. The Court is satisfied that Annexure-4 was required to be issued to cover up the period or the gap between the date of repeal indicated as 01.01.2009 and the date of the notification which was 13.07.2010. If certain employees had completed 24 years of service between 01.01.2009 and 13.07.2010, their right could not be extinguished due to the anomaly and gap

between date of repeal and date of notification. Such grant of 2nd ACP was by virtue of completion of 24 years of service in the interregnum and not due to element of luck and providence, as was sought to be impressed upon the Court, by learned senior counsel for the petitioners.

19. Since these petitioners have not completed 24 years of service by virtue of the fact that they came to be appointed in the year 1986 between July, 1986 to November, 1986 and they do not have 24 years of service in their hands, they cannot derive benefit of second financial progression on a contrived reason of discrimination.

20. In view of the above, no mandamus or direction can be issued in favour of the petitioners for grant of benefit of second financial progression by extending the cut off date beyond 13.07.2010 so as to make them entitled to cover up the short-fall in the number of days, months and years which do not add up to 24 years of service for them.

21. Writ application, therefore, has no merit. It is dismissed.

