

(2019) 10 PAT CK 0039

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 6725 Of 2018

Birendra Kumar Singh

APPELLANT

Vs

State Of Bihar Through The Principal Secretary And Ors

RESPONDENT

Date of Decision : 17-10-2019

Acts Referred:

Constitution Of India, 1950 — Article 12, 14, 16, 309

Bihar Taken Over Elementary School Teacher Promotion Rules, 1993 — Rule 13(1), 13(2), 13(3)

Bihar Nationalized Elementary School Teachers Promotion Rules, 2011 — Rule 16

Citation : (2019) 10 PAT CK 0039

Hon'ble Judges : Mohit Kumar Shah, J

Bench : Single Bench

Advocate : Satyavrat Verma, Madhaw Pd. Yadaw

Final Decision : Dismissed

Judgement

1. The present writ petition has been filed for quashing the order dated 6.8.2015 passed by the District Programme Officer, Siwan and the order dated 22.7.2016 passed by the Director Primary Education, as also the order dated 16.2.2018 passed by the Secretary, Department of Education, Government of Bihar, Patna. By the impugned order dated 6.8.2015, the benefit of ACP granted to the petitioner vide memo dated 21.6.2012 and 14.9.2012 has been cancelled and it has been further stated that any benefit of ACP given to any Physical Education Teacher also stands cancelled. The aforesaid impugned order dated 6.8.2015 has been upheld by the Respondent No. 3 by an order dated 22.7.2016, as also has been upheld by the Respondent No. 2 by an order dated 16.2.2018. Consequently, the petitioner has prayed for directing the respondents to re-fix the pension of the petitioner in the grade pay of Rs. 4200/- and accordingly, make payment of the retiral benefits.

2. The brief facts of the case are that the petitioner was appointed on the post of Physical Education Teacher vide memo dated 19.10.1985 whereupon the

petitioner joined the Madhya Vidyalaya, Raghunathpur on 26.10.1985. Thereafter, the State Government framed the Bihar Taken Over Elementary School Teacher Promotion Rules, 1993 (hereinafter referred to as the 'Rules, 1993'), vide GSR dated 9.7.1993. According to the said Rules, 1993, only trained teachers were made eligible for promotion. Rule 13 (1) of the Rules, 1993 postulate that an untrained teacher shall not be eligible for promotion to any of the grade i.e. 1 to 8, Rule 13(2) of the said Rules, 1993 postulate that an untrained teacher may be given time bound promotion according to the orders issued by the State Government from time to time like other employees of the State Government. Rule 13(3) of the Rules, 1993 postulate that an untrained teacher may be given Grade 1 from the date on which he becomes trained.

3. Thus, it is submitted by the learned counsel for the petitioner that since the petitioner was a Physical Education Teacher in matric untrained scale, he was not eligible for further promotion in terms of the aforesaid Rules, 1993, however, the untrained teachers were liable to be treated like other Government employees for the purposes of grant of time bound promotion only.

4. The aforesaid Rules, 1993 were amended in the year 2000, however, Clause 13(2) of the said Rules was retained with regard to untrained teachers and they were made entitled to the benefits of time bound promotion, as applicable to the State Government employees.

5. The learned counsel for the petitioner has submitted that vide letter no. 2052 dated 31.7.1993, issued by the Director Primary Education, Government of Bihar, a decision was taken for granting time bound promotion to teachers of Elementary School working in matric untrained scale. It is only thereafter, that the petitioner was granted first time bound promotion by an order contained in memo dated 16.9.1999 with effect from 26.10.1995. Thereafter, vide office order dated 14.7.2012, the petitioner was placed in the pay-scale of Rs. 1200-2040/-, as a consequence of grant of first time bound promotion. It appears that a State Level meeting was held at Patna on 27.5.2009 of all the Regional Deputy Directors and Superintendents of Education in which a decision was taken that Physical Education Teachers, who were getting Matric Untrained Scale from 1.1.1996, shall be given time bound promotion and after completing 12 years of service, they shall be given the benefits of ACP. The said decision was then communicated to all the Deputy Directors and Superintendents of Education vide memo dated 26.6.2009. It is only then that the authorities, upon convening a meeting on 31.5.2012 of the District Education Establishment Committee, Siwan, decided to grant benefits of first ACP with effect from 9.8.1999 to Physical Education Teachers working in matric untrained scale in terms of Rule 13(2) of the Rules, 1993 in the pay-scale of Rs. 4500 - 7000/-and accordingly, the petitioner was granted the benefit of first ACP vide memo dated 21.6.2012 with effect from 9.8.1999. Thereafter, vide office order contained in memo dated 14.9.2012, the petitioner was granted the benefit of second ACP with effect from 1.1.2009 in the pay-scale of Rs. 9300- 34800/-, with grade pay of Rs. 4200/-.

6. Subsequently, the petitioner came to know that the Director Primary Education, Government of Bihar, vide order dated 1.7.2015, has directed that since the Physical Education Teachers in the untrained scale are not entitled to any financial increment or promotion after 1.1.1996, the District Programme Officers should review the cases of such Physical Education Teachers and in case, anyone of them have been granted time bound promotion, the same should be taken back and cancelled. In light of the aforesaid decision of the Director Primary Education, Government of Bihar, dated 1.7.2015, the District Programme Officer, Establishment (Education), Siwan vide memo dated 6.8.2015 informed the Drawing and Disbursing Officer, as also the Treasury Officer, Siwan that the benefits of ACP granted to the Physical Education Teacher after 1.1.1996 stands cancelled.

7. The aforesaid order dated 1.7.2015 issued by the Director Primary Education, Government of Bihar, Patna as well as the order dated 6.8.2015 issued by the District Programme Officer Establishment (Education), Siwan was challenged by the petitioner before this Court by filing a writ petition bearing CWJC No. 13487 of 2015, however, the same was disposed of by a coordinate Bench of this Court by a judgment dated 15.12.2015 with liberty to the petitioners to approach the Director Primary Education, Government of Bihar, Patna, who shall decide the grievance of the petitioners within three months of filing of the representation.

8. The petitioner had then approached the Director Primary Education, Government of Bihar, Patna by filing appropriate representation, however, the representation of the petitioner has been rejected by an order contained in memo no. 833 dated 22.7.2016 on the following grounds:-

(i) According to the Bihar Taken Over Elementary School Teachers Promotion Rules, 1993, there was provision to grant time bound promotion to the untrained teachers like other employees of the State Government and since the Physical Education Teachers fell under the untrained teachers category, they were entitled to grant of time bound promotion till the 4th pay revision recommendations remained effective i.e. till 31.12.1995, however, upon coming into force of the Bihar State Employees Service Condition (Assured Financial Progression Scheme) Rules, 2003 (hereinafter referred to as the 'Rules 2003') with effect from 9.8.1999, the teachers of the nationalized school stood not covered by the said Rules. Similarly, the teachers of the nationalized school, who are not covered by the Assured Financial Progression Scheme, 2010 which has come into force on account of the resolution of the Finance Department dated 14.7.2010, in terms of the recommendations of the 6th Pay Revision Commission recommendations.

(ii) According to Clause 16 of the Bihar Nationalized Elementary School Teachers Promotion Rules, 2011, by which the Rules, 1993 were cancelled, also provides that untrained teachers shall not be entitled to promotion to any grade.

(iii) Untrained teachers would be entitled to grade III (original pay scale of matric / inter trained, pay band II, grade pay 4200/-) from the date, they have

been given trained pay-scale.

(iv) It is thus clear that after 1.1.1996, Physical Education Teachers under the untrained teacher category are not covered by any scheme pertaining to financial progression or promotion.

Hence, the Director Primary Education, Education Department, Government of Bihar, Patna vide order dated 27.7.2016 held that the time bound promotion / ACP, granted to the petitioner, has been rightly cancelled and such action of the District Programme Officer (Establishment), Siwan is according to the Rules, as such, the claim of the petitioner was rejected.

9. The petitioner had then filed an appeal on 21.9.2017 before the Principal Secretary, Department of Education, Government of Bihar, Patna, however, the same was sent to the Secretary, Department of Education, Government of Bihar, Patna for adjudication which was then rejected by an order dated 16.2.2018.

10. The learned counsel for the petitioner has submitted that as per Rule 13(2) of the Rules, 1993, a Physical Education Teacher under the untrained category was also entitled to grant of time bound promotion, according to the orders issued by the State Government from time to time, treating such untrained teacher to be like any other employees of the State Government. It is further submitted that the time bound promotion Rules were replaced by the ACP Rules 2000, made effective from 9.8.1989, however, the teachers of the Government schools were excluded from its purview inasmuch as they had promotional avenues, however, the benefits being given to the Physical Education Teachers under the untrained category in terms of the 1993 Rules, continued in absence of any promotional avenues to the Physical Education Teachers under the untrained category, like the petitioner herein especially, since the aforesaid Rule 13 (2) of the Rules, 1993 had not been repealed. It is only with the coming into effect of the 2011 Rules i.e. with effect from 1.9.2011 that the Rules, 1993 were superseded and cancelled. It is further submitted that grant of the benefits of ACP (Assured Career Progression) is not a promotion, but merely a measure to remove stagnation in service by giving financial up-gradation in the scale of an employee having no promotional avenues, as such, the benefits of ACP, granted to the petitioner, treating him like any other Government Employees, was not illegal.

11. The learned counsel for the petitioner has relied upon a judgment rendered by the Hon'ble Apex Court, reported in (2004) 9 SCC 65 (State of Tripura & Others vs. K.K.Roy), paragraph no. 6 is reproduced hereinbelow:-

"It is not a case where there existed an avenue for promotion. It is also not a case where the State intended to make amendments in the promotional policy. The appellant being a State within the meaning of Article 12 of the Constitution should have created promotional avenues for the respondent having regard to its constitutional obligations adumbrated in Articles 14 and 16 of the Constitution of India. Despite its constitutional obligations, the State cannot take a stand that as

the respondent herein accepted the terms and conditions of the offer of appointment knowing fully well that there was no avenue for promotion, he cannot resile therefrom. It is not a case where the principles of estoppel or waiver should be applied having regard to the constitutional functions of the State. It is not disputed that the other States in India / Union of India having regard to the recommendations made in this behalf by the Pay Commission introduced the scheme of Assured Career Promotion in terms whereof the incumbent of a post if not promoted within a period of 12 years is granted one higher scale of pay and another upon completion of 24 years if in the meanwhile he had not been promoted despite existence of promotional avenues. When questioned, the learned counsel appearing on behalf of the appellant, even could not point out that the State of Tripura has introduced such a scheme. We wonder as to why such a scheme was not introduced by the appellant like the other States in India, and what impeded it from doing so. Promotion being a condition of service and having regard to the requirements thereof as has been pointed out by this Court in the decisions referred to hereinbefore, it was expected that the Appellant should have followed the said principle."

12. Per contra, the learned counsel for the respondents-State has submitted that the time bound promotion scheme of untrained teacher as per Rules, 1993 ceased, with effect from 31.12.1995, after introduction of the 4th pay revision recommendations. Subsequently, the Assured Career Progression Scheme was introduced by the State of Bihar vide notification dated 25.6.2003, however, the teachers of nationalized school were excluded from the benefit of the ACP scheme. The Finance Department had issued a resolution dated 14.7.2010 with effect from 1.1.2009, however, again the teachers of the nationalized school were neither entitled to the benefit of ACP nor that of MACP. Thereafter, the State Government had come out with the promotion Rules of primary school teachers in the year 2011 by which the 1993 Rules were repealed and Clause 16 thereof clearly mentions that untrained teachers are not entitled for promotion in any grade, however, an untrained teacher can be granted promotion from the date on which he becomes trained. Thus, it is submitted that the Physical Education Teachers under the untrained category are not eligible for grant of any promotion or the benefits of ACP, hence, the benefits of first ACP and second ACP granted to the petitioner herein has been rightly cancelled.

13. I have heard the learned counsel for the parties and perused the materials on record and I find that Rule 13(2) of the Bihar Taken Over Elementary School Teachers Promotion Rules, 1993 provides for grant of time bound promotion to an untrained teacher according to the orders issued by the State Government from time to time like other employees of the State Government. Apparently, since the petitioner had been appointed on 19.10.1985 as a Physical Education Teacher under the untrained category and had joined his services on 26.10.1985, he was granted first time bound promotion on account of completion of ten years on the same post by a notification dated 16.6.1999 with effect from 26.10.1995. This Court finds that up to this stage, there is no dispute. However, it appears

that thereafter, the Bihar State Employee Service Condition (ACP) Rules, 2003 came into force with effect from 9.8.1999, however, the teachers of the nationalized school were not covered by the same. It is the stand of the Respondents-State that since the aforesaid ACP Rules, 2003 had excluded the teachers of the nationalised school from its purview, the petitioner herein was not entitled to be granted the benefit of first financial progression (ACP), which was granted to the petitioner vide notification dated 21.6.2012 with effect from 9.8.1999. This Court is of the view that since Rules, 1993 had not been repealed with the coming into force of the ACP Rules, 2003, and Rule 13(2) of the said Rules, 1993, framed in exercise of the powers conferred upon the State Government by proviso to Article 309 of the Constitution of India was very much in force, even the Physical Education Teachers under the untrained category were entitled to grant of time bound promotion according to the orders issued by the State Government from time to time like other employees of the State Government, hence, this Court finds that there is no infirmity in grant of first financial progression, granted to the petitioner, vide notification dated 21.6.2012 with effect from 9.8.1999. This is not the end of the matter inasmuch as thereafter the respondents-State came out with the Bihar Nationalized Elementary School Teachers Promotion Rules, 2011 in exercise of the powers conferred under the proviso to Article 309 of the Constitution of India with effect from 1.9.2011 and it is only then that the earlier Rules, 1993 were repealed and the said Rules, 2011 specifically provides that untrained teachers will not be eligible for grant of promotion and any grade, however, they would be entitled to grade III from the date they are granted trained pay scale.

14. This Court is of the view that since the Rules, 1993 provide for grant of time bound promotion, as per the orders issued from time to time by the State Government, like other employees of the State Government and the said Rules, 1993 stood repealed only with effect from 1.9.2011, the provision for grant of time bound promotion had continued to exist till 1.9.2011. In such view of the matter, it is crystal clear that the untrained teachers, for the first time, became ineligible for grant of any promotion or financial benefits, after the year 1993, only with effect from 1.9.2011. Thus, this Court holds that as far as the case of the petitioner till the stage of grant of 1st ACP with effect from 9.8.1999, is concerned, the same cannot be reviewed or annulled despite the coming into force of the ACP Rules, 2003 and the MACP Scheme 2010, excluding the teachers of the Nationalized School from the said schemes and in fact the said schemes would stand extended to the untrained teachers by virtue of the force of Rule 13(2) of the Bihar Taken Over Elementary School Teachers Promotion Rules, 1993 till the coming into force of the Bihar Nationalized Elementary School Teachers Promotion Rules, 2011 since Rule 13(2) of the Rules, 1993 itself provides that the untrained teachers would be granted time bound promotion according to the Rules framed by the Government in the said regard from time to time like other employees of the State Government. Now coming to the 2011 Rules, which have come into force with effect from 1.9.2011, this Court finds

that Rule 16 thereof prohibits grant of promotion in any grade to the untrained teacher, however, the same does not prohibit grant of financial up-gradation for the purposes of removing stagnation in service. In any view of the matter, it is a well settled principle of law that grant of benefits of ACP /MACP is not a promotion, but merely, a measure to remove stagnation in the service career of an employee. Although, this Court finds that the petitioner was granted second ACP with effect from 1.1.2009 i.e. prior to the coming into force of the 2011 Rules with effect from 1.9.2011, thus, the same can also not be touched on the principles laid down by this Court hereinabove, but nonetheless, this Court further holds that since the 2011 Rules merely prohibits grant of promotion to the untrained teachers, there is no bar to grant of financial up-gradations to the untrained teachers, in accordance with the policy of the Government issued from time to time for the purposes of removal of stagnation in service.

15. Having regard to the facts and circumstances of the case and for the reasons mentioned hereinabove, the present writ petition is allowed and the orders dated 6.8.2015 passed by the District Programme Officer, Siwan, the order dated 22.7.2016 passed by the Director Primary Education, Government of Bihar, Patna and the order dated 16.2.2018 passed by the Secretary, Department of Education, Government of Bihar, Patna are quashed. Consequently, the respondents are directed to make payment of the recovered amount, if any, on account of the ill effect of the aforesaid orders, which have been quashed by this Court, as also are directed to fix the retiral benefits of the petitioner herein on the basis of the last pay granted to the petitioner herein, taking into account the benefits of the first and second ACP granted earlier to the petitioner herein.