(2024) 01 PAT CK 0024

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 16497 Of 2022

Brij Raj Kunwar @ Brij Raj Kumar APPELLANT

Vs

State Of Bihar RESPONDENT

Date of Decision : 08-01-2024

Acts Referred:

Constitution Of India, 1950 — Article 166, 226
Bihar Pension Rules, 1950 — Rule 58, 59
U.P. Retirement Benefits Rules, 1961 — Rule 3(8)

Citation : (2024) 01 PAT CK 0024

Hon'ble Judges : Harish Kumar, J

Bench : Single Bench

Advocate : Awadhesh Kumar, Vishambhar Prasad

Final Decision : Dismissed

Judgement

1. Heard Mr. Awadhesh Kumar, learned advocate for the petitioner and Mr. Vishambhar Prasad, learned advocate representing the State.

2. The petitioner by invoking the extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India has preferred the present writ petition, seeking a direction upon the respondent authorities to provide regular pension to the petitioner, in lieu of New Pension Scheme, 2005, taking note of the fact that the petitioner has worked since 31.05.1986 and superannuated from the service on 31.01.2021.

3. Shorn of unnecessary details, the relevant facts for adjudicating the issue is that initially, the petitioner was engaged as daily wages employee in Public Health Engineering Department, Government of Bihar on 31.05.1986. Thereafter, in course of time, vide Letter No. 378 dated 05.03.1990, issued by the Chief Engineer Cum Special Secretary, Public Health Engineering Department, Government of Bihar, Patna in the light of an agreement with the Bihar State Public Health Engineering Association took a decision that those daily wagers, who are on muster roll, have completed 240 days of their service, their demand

for adjustment under the work charge establishment shall be accepted in principle and those, who have been retrenched their services shall also be adjusted in the work charge establishment, in accordance with law.

4. In the year of 2002, the services of several work charge employees have been reverted as daily wages employees, and the services of the several daily wager employees, including the petitioner, have been retrenched. However, subsequently in the light of the order(s) of this Court in different cases, the services of the daily wages employees and retrenched employee have been adjusted against the newly created post of Khalasi and Key Man Cum Chowkidar vide letter dated 24.03.2008, issued under the signature of the respondent no. 3.

5. Learned counsel for the petitioner drawing the attention of the aforenoted letter, tired to impress upon the Court that the name of the petitioner finds at Serial No. 13 and the date of joining as Daily Wager has been shown as 31.05.1986. Thus, in view of the aforesaid letter, issued by the respondent no. 3, the service of the petitioner has been adjusted vide Memo No. 196 dated 18.04.2008 against a sanction post of of Group D in the Pay Scale of 2550-55-3200.

6. Mr. Awadhesh Kumar, learned counsel for the petitioner after highlighting the facts submitted that admittedly, the petitioner had been working as daily wages employee since 1986, but he was illegally retrenched and in the year 2008, though his services were regularized by way of an appointment, but was forced to fill up the application for Pension under New Pension Scheme, 2005. The petitioner, being a daily wages employee, not in a position to oppose, but having no option, given such application and after retirement on 31.01.2021, he has been allowed the benefits as per the New Pension Scheme, instead of the Regular Pension Scheme, by ignoring the earlier services rendered as daily wages employee. It is submitted that since the service of the petitioner was not illegal, and he had worked since 1986 till 2002, for more than 16 years and, thus in terms of Rule 59 of Bihar Pension Rules, 1950 such period cannot be ignored for the purposes of pension as held by the Hon’ble Apex Court as well as the Hon’ble High Court.

7. Mr. Awadhesh Kumar, learned counsel for the petitioner primarily put his reliance upon a judgment rendered by the Hon’ble Apex Court in the case of State of Bihar and Anr. Vs. Sunny Prakash and Ors. reported in 2013 (3) SCC 559 and submitted at the bar that since the Government has taken a decision in the light of an agreement entered between the State of Bihar and the Department and thus, the commitment given by the State Government to the Members of the Association is to be honoured and implemented and the services of the petitioner must be treated as work charge employee and thus, the period prior to 2008 to be counted for the purposes of pension.

8. Referring to the aforesaid decision, he also submits that the provisions under Article 166 of the Constitution of India are only directory and not mandatory in

character and if they are not complied with, it can be established as a question of fact that the order was issued in fact by the State Government as the terms of the letter issued by the Chief Engineer cum Special Secretary, Public Health Engineering Department, Government of Bihar, in no uncertain term, accepted the services of the petitioner as daily wager under the work charge establishment.

9. He further made reliance upon three Judges Bench decision of the Hon'ble Apex Court in the case of Prem Singh Vs. State of Uttar Pradesh and Ors., reported in 2019 (10) SCC 516, wherein while examining the validity of Rule 3(8) of the U.P. Retirement Benefits Rules, 1961 and Regulation 370 of the Civil Services Regulation of Uttar Pradesh, excluded computation of the period of work-charged services from qualifying service for pension, the Hon'ble Court has held that "it was unfair on the part of the State Government and its officials to take work from the employees on the work-charged basis. They ought to have resorted to an appointment on regular basis. The taking of work on the work-charged basis for long amounts to adopting the exploitative device. Later on, though their services have been regularised. However, the period spent by them in the work-charged establishment has not been counted towards the qualifying service. Thus, they have not only been deprived of their due emoluments during the period they served on less salary in work-charged establishment but have also been deprived of counting of the period for pensionary benefits as if no services had been rendered by them. The State has been benefitted by the services rendered by them in the heydays of their life on less salary in work-charged establishment."

10. In the similar fashion, he next relied upon a Two Judges Bench decision of the Apex Court in the Case of Uday Pratap Thakur & Ors. Vs. The State of Bihar & Ors., and other analogous cases, reported in AIR 2023 SC 2971/2020 (2) PLJR 299. Referring to the aforesaid judgment, he submits that rendering the service for number of years, they cannot be denied pension, and work charge service can be counted as qualifying for pension and it will be unfair, unjust and inadmissible to deny them the pension under the Old Pension Rules in terms of Rule, 2013 as also the follow up notification of the Finance Department vide Circular No. 10710 dated 17.10.2012, especially, Rule 5 (V) of the Circular, which clearly stipulates that Old Pension Rules shall be applied on these employees. The benefit of pension, and gratuity shall be counted by giving one year advantage against the five years services as work charged employee. Even then, if the minimum requirement of ten years of service for pension is not met under the old rules, then minimum service shall be added to give advantage thereof.

11. Mr. Awadhesh Kumar, further submitted that even if the case of the petitioner is said to be not under the work charge establishment, his service under daily wage establishment cannot be ignored for the purposes of pension under the Bihar Pension Rules, 1950, especially, in terms of Rule, 1959 which empowers the State Government that if the service of the temporary or officiating

Government servant, who is not confirmed in any post, is continuance and is more than 15 years, it will be considered as pensionable under Rule, 59 of the Bihar Pension Rules.

12. Heavy reliance has been made on a judgment rendered on the Division Bench of this Court in the case of The Registrar General, Patna High Court Vs. Ram Vyas Dubey & Ors. (LPA No. 198 of 2016), wherein the learned Division Bench of this Court in its penultimate paragraph taking note of Rules 58 and 59 of the Bihar Pension Rules, 1950 has held that even if a person has worked in a temporary capacity and has not been confirmed, if his service on any post is continuance and is for more than 15 years, then it may be considered as pensionable under Rule 59 of the Bihar Pension Rules, 1950.

13. The similar reliance has been made on a Bench decision of this Court in the case of Krishna Prasad Vs. The State of Bihar and Ors., (CWJC No. 8701 of 2021), the learned single Judge after taking reliance of the aforenoted judgment in the case of Prem Singh and The Registrar General, Patna High Court (supra) has been pleased to held that the writ petitioner of the said case, who had rendered 32 years as daily wager and only 5 years as permanent employee, he became a public servant like any other servant. To deprive him of pension since his engagement on 23.08.1982, on daily wages and is regularized on 28.08.2014, is not only unjust and inequitable, but is hit by the vice of arbitrariness. It has been held that covenant contained in offer of regular appointment to petitioner cannot take away right vested in him under Bihar Pension Rules, Bihar Service Code and the petitioner will be governed by Old Pension Rules and the Contributory Pension Fund Scheme will not apply.

14. Per contra, Mr. Vishambhar Prasad, learned counsel representing the State while refuting the contention of the petitioner has submitted that admittedly the services of the petitioner was regularized and included in the New Pension Scheme way back in the year 2008, itself and, as such, the writ petition is barred by delay or latches. Referring to the judgments of the Apex Court in the case of State of M.P. & Anr. Vs. Bhailal Bhai & Ors., reported in AIR 1964 SC 1006 as also in the case of Karnataka Power Corpn. Ltd. & Anr. Vs. K. Thangappan & Anr. reported in 2006 (4) SCC 322, he submitted that unreasonable delay denies to the petitioner, the extra ordinary remedy. Delay or latches is one of the factors, which is to be borne in mind by the High Court, when they exercise their discretionary powers under Article 226 of the Constitution of India. In an appropriate case, the High Court may refuse to invoke its extra ordinary powers if there is such negligence or omission on the part of the applicant to assert his right. So far the merit of the case is concerned, he submitted that petitioner was admittedly engaged as daily wager on 31.05.1986 and it was not made against sanctioned and vacant post, since there was no sanctioned and vacant post of Group D in the year 1988, rather 2277 Group D post has been sanctioned and created in the year 2006 in the Public Health Engineering Department. It is also the fact that neither any GPF Account was opened nor any deduction had ever

been made from the GPF Account, like other employees, who were working in work charge establishment.

15. Learned counsel for the State further submits that the service of the petitioner and other daily wagers had been retrenched in the year 2002 and the same was challenged by similarly situated employees, which have been heard along with CWJC No. 7359 of 2002 (Ram Tapeshwar Sah & Ors. Vs. The State of Bihar & Ors. and other analogous cases). In terms of the order of the Hon'ble Court dated 13.07.2006, a Three Member Committee was constituted to consider the case of the employees for the purposes of their regularization in the light of the judgment of the Hon'ble Apex Court in Secretary, State of Karnataka & Ors. Vs. Uma Devi & Ors.

16. In the meantime, the Government of Bihar took a policy decision to regularize the services of the employees, working as daily wager employee, vide Resolution No. 639 dated 16.03.2006, and a division wise panels were already prepared for consideration of the cases of the daily wager employee and a seniority list was prepared, in accordance with date of birth, roster clearance and following the reservation policy, but as the petitioner was a retrenched employee, his case was not considered for regularization in the year 2006. Subsequently, in the light of a Bench order in the case of Sushil Kumar Pandey Vs. The State of Bihar & Ors. in MJC No. 1030 of 2006, the cases of the retrenched employees were also considered for regularization and a fresh division wise seniority list has been prepared and in the light of the aforesaid, the services of the petitioner has been regularized against the newly sanctioned Group D post vide Memo No. 196 dated 18.04.2008.

17. In the meantime, the Government of Bihar introduced a Contributory Pension Scheme vide Memo No. 1964 dated 31.08.2005, which is made applicable to the employees, who have been appointed on or after 01.09.2005. Since the services of the petitioner has been regularized from 20.06.2008, as such, the case of the petitioner has been found to be applicable under the New Pension Scheme. Moreover, the petitioner, having been superannuated on 31.01.2021, has already received the benefits attributable to him under the New Pension Scheme.

18. This Court has given anxious consideration to the submissions advanced on behalf of the respective parties and also perused the materials available on record. So far the submissions advanced on behalf of the petitioner in respect to the agreement entered into by the State of Bihar and Bihar State Public Health Engineering Association is concerned, from the contents of the letter as annexed to the writ petition (Annexure 1), it is needless to observe that the same is neither in according to the terms of the Rules of Executive Business, nor there is a proposal of the Finance Department and, all the more, in absence of any decision by the Cabinet in terms of the Rules of Executive Business, any agreement or decision is not binding. Though, it is well settled that the provisions of Article 166 of the Constitution are only directory and not mandatory in character and if they are not complied with, it can be established as a question of

fact, as to whether the order was issued by the State Government or not, but, in the case in hand, there is no iota of any evidence suggesting that the decision is at the level of the State Government, moreover, there is no consequential order, showing the petitioner has ever been adjusted under the work charge establishment and has been accorded any benefit of such post.

19. From the materials available on record, inevitably, there is nothing which suggest even a semblance that the service of the petitioner had even been under work charge establishment, thus the reliance of the petitioner on the judgment rendered by the Apex Court holding the computation of the period of work charge services for qualifying service for pension, is not applicable in the case in hand and thus, the reliance made on behalf of the petitioner on such issue is wholly misplaced.

20. Now, coming to the next submission of the petitioner in the light of the judgment rendered by the Division Bench in the case of the The Registrar General, Patna High Court and Krishna Prasad (supra), indisputably in the case of The Registrar General, Patna High Court (supra), the petitioner of the said case was appointed as daily wage (Literate) Mazdoor in the office of the Registrar General and was appointed as Ex-Cadre Assistant on 18.03.2004 and retired on 31.10.2010. The employee was held to be not entitled for grant of pension on account of the fact that the period of his service was less than 10 years. The learned Division Bench taking note of the fact that the employee had worked from the period of 1988 to 1994 as regular employee, but the order of regularization was recalled and the petitioner was again placed as daily wage employee and counting such period, the Court has found that the writ petitioner has rendered 18 years 11 months as Casual Literate Mazdoor/Daily Wager and only 6 years 7 months and 13 days as permanent employee and held that since the employee had worked in a temporary capacity, but has not been confirmed, irrespective of the fact that his service on the post was the continuance for more than 15 years has affirmed the order of the learned Single Judge directing the respondents to consider the period of service rendered by the writ petitioner from May 1988 to 10th August, 1994, to add the same to the period of writ petitioner’s service from 18.03.2004 to 31.10.2010, and, thereafter, to calculate the period and compute and release the pension without unnecessary delay.

21. It goes without saying that from the reading of the aforenoted judgment, it is manifest that the period rendered as a daily wager has not been computed for the purposes of pension rather only those period has been directed to take into consideration, which was rendered as regular employee, but the order of regularization was recalled subsequently.

22. Further, in the case of Krishna Prasad Vs. The State of Bihar and Ors., (supra), the learned co-ordinate Bench of this Court on making reliance on the afore-discussed judgment rendered by the learned Division Bench of this Court has concluded that the writ petitioner of the said case had rendered 32 years as daily wager and only 5 years as permanent employee. After the services of the

petitioner had been regularized on 28.08.2014, he became a public servant like any other servant. To deprive him of his pension, since his engagement on 23.08.1982 on daily wages, and thereafter, his regularization on 28.08.2014, is only unjust and inequitable, but his hit by the vice of arbitrariness.

23. The learned Single Judge while adjudicating the issue has held in paragraph nos. 27 and 28 as follows:

27. In this background, I conclude that petitioner's initial appointment before regularization will be the date on which employee takes charge of the post. Once the entire service of daily wage is to be counted as qualified service then his date of appointment will relegate back to his initial date of engagement i.e 23.08.1982 and he cannot be ousted from pension scheme by applying the date of regularaization i.e 28.08.2014, which is evident after the New Pension Scheme which came into force on 01.09.2005 in the State of Bihar.

28. The discriminatory treatment meted out to retired persons while granting pension was not approved by the Apex Court the case of D.S. Nakara v. Union of India reported in (1983) 1 SCC 305. A careful reading of the instructions of New Pension Scheme would show that the same is applicable to entrants on the basis of offer of appointment issued to them. The New Pension Scheme cannot be made applicable to petitioner since he cannot be considered a new entrant. It is held that covenant contained in offer of regular appointment to petitioner cannot take away right vested in him under Bihar Pension Rules, Bihar Service Code and the petitioner will be governed by Old Pension Rules and the Contributory Pension Fund Scheme will not apply. Accordingly, respondents are directed to treat the whole period of service of the petitioner qualified service for pension because according to clarification issued on New Contributory Pension Scheme will be applicable to all employees who have been regularized then, because there is nothing in Pension Rules which requires "the qualifying service to be computed from date of the employee makes contribution towards CPF fund or from date of his confirmation." Rather, qualifying service is to be counted in terms of provison of Rule 58 and 59 of Bihar Pension Rules, 1950. The petitioner is accordingly entitled for pension under Old Pension Scheme and for other benefits, as is applicable to government employees.

24. In order to appreciate the issue, it would be proper to quote Rule 58 and 59 of the Bihar Pension Rules.

58. The service of a Government servant does not qualify for pension unless it conforms to the following three conditions:-

First- The service must be under Government.

Second The employment must be substantive and permanent.

Third - The service must be paid by Government.

These three conditions are fully explained in the following sub- sections.

59. The Provincial Government may, however, in the case of service paid from general revenues, even though either or both of conditions (1) and (2) are not fulfilled-

(1) declare that any specified kind of service rendered in a non- gazetted capacity shall qualify for pension;

(2) in individual cases, and subject to such conditions as it may think fit to impose in each case, direct that service rendered by a Government servant shall count for pension.

25. From bare reading of Rule 58, it goes without saying that in order to qualify for pension, the aforenoted three conditions is sine qua non, and in case the Government servant does not conform to any condition, he could not qualify for pension. So far Rule 59 of the Bihar Pension Rules, 1950 is concerned, it is an exception to Rule 58 of the Bihar Pension Rule, which empowers the State Government that in certain cases, where the Government, in the case of service paid from general revenues, even though, either or both of the conditions (1 and 2) are not fulfilled declare that any specified kind of service rendered in a non-gazetted capacity shall qualify for pension or in individual cases direct the service rendered by a Government servant shall count for pension.

26. From bare reading of the Rule 59 of the Bihar Pension Rules, 1950, it goes without saying that this power has been bestowed upon the State Government to exercise in exceptional circumstances, where either it is a special kind of service rendered in a non-gazetted capacity or in individual cases, services rendered by a Government servant.

27. In no circumstances, a daily wager, who is working against non sanctioned post can be counted for the purposes of pension.

28. The learned Full Bench of this Court in the case of The State of Bihar & Anr. Vs. Bhagwan Singh (since dead), reported in 2014 (4) PLJR 229, while considering the identical issue has held that services rendered by the petitioner as daily wage cannot be said to be a service for which the petitioner was paid from the general revenue of the State Government or the service rendered on a substantive post in a permanent establishment. Such service, although was followed by absorption on regular establishment, will not qualify for pension. It would be proper to quote paragraph nos. 14 and 15, for ready reference:

14. Keeping in view the above provisions, we are of the opinion that the service rendered by the petitioner as daily wage Choukidar under the Executive Engineer, Tubewell Division, Gaya cannot be said to be a service for which the petitioner was paid from the general revenue of the State Government or the service rendered on a substantive post in a permanent establishment. Such service, although was followed by absorption on regular establishment, will not qualify for pension. Therefore, the service rendered by the petitioner, as daily wage employee from April 1973 to December 1978, was not a pensionable service or

did not qualify for pension. On his retirement from service or his superannuation from service, he would be entitled to pension for the service rendered on a substantive post from 1 January 1979 till the date he retired from service.

15. It is not in dispute that the petitioner has indeed been paid pension for the service rendered by him from 1 January 1979 till July 2002 in the Work Charge Establishment, the petitioner is, therefore, not entitled to the relief claimed in the writ petition.

29. This Court also cannot lose sight of the fact that the appointment of the petitioner was made way back in the year 2008, itself by providing the benefits under New Pension Scheme and having been superannuated in the year 2021, he has accepted the benefits accrued under the aforenoted scheme, but, at not point of time, any objection has been made and now the petitioner cannot be allowed to turn around and assail the terms of his services, after attaining his superannuation.

30. In view of the aforesaid legal position, this Court does not find any merit in the present writ petitioner and accordingly, the same stands dismissed.

31. There shall be no order as to cost.