
(1995) 09 PAT CK 0029
In the Patna High Court
Case No : C.W.J.C. No. 6991/1993

Deo Narayan Jha

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 13-09-1995

Acts Referred:

Citation : (1995) 09 PAT CK 0029

Final Decision : Allowed

Judgement

Radha Mohan Prasad, J.—The present writ application is directed against the order dated May 12, 1993 as contained in Annexure 1, whereby and whereunder the District Sub-Registrar, Katihar (respondent No. 4) in the light of the order of the Secretary to the I.G. Registration, Bihar, contained in letter No. 1434 dated October 27, 1989 and order of Collector dated July 20, 1992 has held that as the petitioner had not been confirmed, he was not entitled for more than one increment, but still as he has received more than one increment, a direction for recovery of the amount of Rs. 16,969.85 P. has been ordered on account of such alleged illegal withdrawal made by him.

2. In short, the facts of the case are that the petitioner was appointed as L.D. Assistant on April 2, 1973 vide order contained in Annexure-4 and joined service pursuant there to on April 9, 1973. He passed the Noting and Drafting Examination in the year 1974 and the Accountant Examination in the year 1978. On November 6, 1981, he was granted promotion also as U.D. Assistant and on April 19, 1989 he was allowed to cross the E.B. The Petitioner was paid his increment regularly after completion of first year of his joining the service. It is also stated that the service record of the petitioner is also satisfactory. However, when a gradation list was published on January 24, 1986 he discovered from it that the dates of his appointment etc. were wrongly shown. The petitioner thereafter, made representation before the I.G. Registration for making necessary correction in the said gradation list, whereupon it appears that it came to light to the concerned authorities that he had not been confirmed in the

service and thus, as per the Rule 149 of the Bihar Boards Miscellaneous Rules, he was not entitled to draw more than one increment.

3. It appears that thereafter steps were taken for ascertaining the correct position and finally by the impugned order (Annexure- 1) recovery of Rupees 16,969.85 P. was directed to be made on account of the alleged illegal increments that the petitioner received. The petitioner has challenged the validity of the said order in the present writ application on various grounds including the alleged mala fide against respondent Nos. 6, 7 and 8, who are represented by Mr. Nazmul Hoda, learned Advocate.

4. Separate counter-affidavits have been filed on behalf of Respondents 1 to 5 as well as on behalf of Respondents 6 to 8. In the counter-affidavit filed on behalf of Respondents 6 to 8 the mala fide alleged against them has been denied. In the counter- affidavit filed on behalf of Respondents 1 to 5 it is stated that the petitioner who was a probationary clerk received annual increment without having been confirmed on the post and apparently therefore, he drew increments, for which he was not entitled under the rules. As such according to the respondent, there is absolutely no illegality in the impugned order, whereby and whereunder the petitioner has been asked to refund the excess amount which he had received on account of the above. It is further stated that without confirmation of his service the petitioner cannot cross Efficiency Bar and his contention in this regard is baseless and imaginary. As regards the claim of the petitioner of having satisfactory service records, it is alleged that as a matter of fact, there were a number of complaints and reports by his immediate bosses regarding negligence of duty, carelessness and indiscipline and he was put under suspension and he remained under suspension with effect from May 17, 1990 to May 20, 1992 on account of indiscipline and carelessness etc.

5. Dr. Jha, learned Senior Counsel for the petitioner contended that the impugned order besides being in utter violation of principle of natural justice, is wholly illegal, arbitrary and violative of Articles 14 and 16(1) of the Constitution of India. In regard to the first contention, the learned Counsel referred to the statement made in paragraph 29 of the writ application, wherein it is specifically stated that no opportunity or show cause was given to the petitioner before issuance of the impugned order. This has been answered in paragraph 25 of the counter- affidavit in which it is stated that if any illegal order has been passed, the Governor has all rights to rectify it and there is no question of giving any notice to the petitioner. I am unable to appreciate the said stand of the respondents in the counter-affidavit. It is by now well settled that if an order is passed adversely affecting the emolument which an employee is drawing, then he is atleast entitled for a notice before any such order is passed. In this regard a reference may be made to the decision of the Supreme Court, in the case of H.L. Trehan and Others Vs. Union of India (UOI) and Others, :

6. Moreover, I fail to appreciate the stand of the respondents on the merit as well. The only ground for passing the impugned order is that under Rule 149 of

the Bihar Boards Misc. Rules probationary clerk can draw the first increment one year after the appointment, but if not confirmed at the end of the second year, he will draw no further increment till he is confirmed. It may be useful to quote the said Rule hereinbelow:

"The period of probation- A probationary clerk will ordinarily remain on probation of two years. He can draw the first increment one year after the appointment, but if not confirmed at the end of second year, he will draw no further increment till he is confirmed, when he will draw pay at the stage he would have drawn if his increment had not been withheld."

7. The said rule itself prescribes the period of probation of a clerk. Under the said rule a probationary clerk will ordinarily remain on probation of two years. Moreover, it has rightly been pointed out by Dr. Jha, learned Senior Counsel for the petitioner that even as per the terms of appointment of the petitioner, which is contained in Annexure 4, the period of probation of the petitioner was fixed for two years. A Constitution Bench of the Supreme Court in the case of State of Punjab Vs. Dharam Singh, held that where the service rules fix a certain period of time beyond which the probationary period cannot be extended, and an employee appointed or promoted to a post on probation is allowed to continue in that post after completion of the maximum period of probation without an express order of confirmation, he cannot be deemed to continue in that post as a probationer by implication. In the said case, the Supreme Court held that in such a case, it is permissible to draw the inference that the employee allowed to continue in the post on completion of the maximum period of probation has been confirmed in the post by implication.

8. As I have already noticed above that Rule 149 of the Bihar Boards Miscellaneous Rules prescribe the period of probation of two years for a clerk, thus admittedly, the petitioner was allowed to continue beyond the said period. Therefore, in the light of the law laid down by Supreme Court in the case of State of Punjab v. Dharam Singh (supra) an inference is to be drawn that the petitioner has been confirmed on completion of the maximum period of probation, i.e. two years. Moreover, no cogent reason has been assigned for not confirming the petitioner after the expiry of two years, except the vague statement made in the counter-affidavit that his record of service has not been satisfactory. It is not the case of the respondents that the case of the petitioner was considered for confirmation after the expiry of two years and the same was rejected as his service records were not found to be satisfactory.

9. Further, I do not find any justification to deny the confirmation to the petitioner in the service after expiry of two years, if there was something against the petitioner after the completion of his probationary period, I do not find any reason as to why the petitioner should have been allowed to continue beyond the said period. But the fact that he was allowed to continue in the service beyond the probationary period goes to show that there was nothing against him at the time. The suspension of the petitioner in the year 1990 as alleged in the counter-

affidavit in my opinion, could not come in the way of his confirmation in service in April, 1975 when he completed his probationary period particularly as it is not the case of the respondent that the probationary period of the petitioner was ever extended by specific order and was kept for consideration in future. The Supreme Court in the case of Shiv Kumar Sharma Vs. Haryana State Electricity Board, Chandigarh and Others, held that: (at p 362).

"If during the period of probation a Government servant is found to be unsuitable, his service may be terminated. On the other hand, if he is found to be suitable he would be allowed to continue in service. The archaic rule of confirmation still in force, gives a scope to the executive authorities, to act arbitrarily or mala fide giving rise to unnecessary litigations." In the said case it was further observed by the Apex Court...

"It is high time that the Government and other authorities should think over the matter and relieve the Government servants of becoming victims of arbitrary actions...

In this connection the Supreme Court referred to the decision in the case of S.B. Patwardhan and Another Vs. State of Maharashtra and Others, in which the Supreme Court observed that

"Confirmation is one of the inglorious uncertainties of Government service depending neither on efficiency of the incumbent, nor on the availability of substantive vacancies and that the confirmation does not have to (sic.) conform to any set rules and whether an employee should be confirmed or not depends on the sweet will and pleasure of the Government."

No rule has been brought to my notice regarding confirmation of such a Government servant.

10. In my opinion, in the absence of any rule the employer must consider the case of its employees for confirmation immediately after the period of probation is over and where the appointment is not on probation, but on temporary basis, in my opinion, the cases should be taken up for confirmation by the component authority within a reasonable time, which according to me should be the probationary period as prescribed under various rules i.e. maximum two to three years; otherwise besides being violative of various provisions of the Constitution would be arbitrary and violative of Articles 14 and 16 of the Constitution, inasmuch as, it is bound to lead to discrimination as can very well be gathered from the facts of the instant case itself. Respondent Nos. 6, 7 and 8, who are juniors to the petitioner were confirmed and as such they got increments in due time, whereas, the case of the petitioner was not taken up for confirmation after completion of the probationary period, though he was given promotion in the U.D. scale and also was allowed to cross Efficiency Bar and thus, he is sought to be denied the increments in due time and consequently impugned order for recovery has been passed.

11. In the result, the writ application is allowed and the impugned order, contained in Annexure-1 is quashed, but in the facts and circumstances, there shall be no order as to costs.