
(2007) 09 PAT CK 0025
In the Patna High Court
Case No : LPA No. 1401 of 1998

Indrawati Devi and Others	Vs	APPELLANT
The State of Bihar and Others		RESPONDENT

Date of Decision : 03-09-2007

Acts Referred:

Citation : (2007) 4 PLJR 661

Hon'ble Judges : Barin Ghosh, J;Anwar Ahmad, J

Bench : Division Bench

Advocate : Surendra Kishore Verma and Jitendra Pd. Verma, for the Appellant;
Arvind Kumar for BPSC and Mr. S.B. Kumar for State, for the Respondent

Judgement

Barin Ghosh & Anwar Ahmad, JJ.—There cannot be any dispute that if a person is asked and thereby compelled to discharge duties of a higher post, even in officiating capacity, he must be paid the salaries payable for the higher post. That appears to be also the mandate of the Bihar Service Code. An agreement contrary to law is not enforceable and as such no agreement can be made or enforced not to pay such higher salary. However, when an agreement is made to comply with another law, the same, despite stipulating non-payment of such higher salary, may be enforced for complying with the other law; compliance whereof, entails payment of such higher salary from the date of discharge of duties of higher post. An Assistant Engineer, as that of the predecessor in interest of the appellants, could only be appointed as an Executive Engineer upon obtaining approval of Bihar Public Service Commission, in short "B.P.S.C." Approval of B.P.S.C, may be had, before asking an Assistant Engineer to discharge the duties of Executive Engineer or after having asked him to perform such duties. In such case, after approval of B.P.S.C, is obtained, he is treated to have obtained approval from the date he was discharging the duties of the Executive Engineer, as he was asked to do. At the same time there cannot also be any dispute that in the matter of asking an Assistant Engineer to perform the duties of an Executive Engineer, as well as obtaining of approval of B.P.S.C, the

Assistant Engineer concerned has no role to play.

2. In the instant case by an order dated 5th April, 1989 two Assistant Engineers, one of whom was the predecessor-in interest of the appellants, then working as Assistant Engineers, were promoted to the post of Executive Engineer with effect from 17th November, 1988 on the condition that such promotion would be effective upon obtaining approval of B.P.S.C The said order dated 5th April, 1989 further added that until such time approval to such promotions is not obtained from B.P.S.C., those Assistant Engineers, shall render the duties of Executive Engineer but shall be paid the salary payable to Assistant Engineers. It was thus made clear that approval of B.P.S.C, would relate back to the effective date of promotion as was indicated in the order.

3. It is the case of the appellants that the person, who was also assigned the duties of Executive Engineer alongwith the predecessor in interest of the appellants, and two other persons, who were similarly assigned the duties of Executive Engineer, on the basis of orders passed by this court in two writ petitions, have been accorded payment of salaries payable to Executive Engineers inasmuch as, in fact, they rendered the duties of Executive Engineers.

4. Seeking payment of salary of Executive Engineer less the salary of Assistant Engineer, as was paid to the predecessor in interest of the appellants, he filed a writ petition three years after his retirement from service, which took place on 31st October, 1994. The writ petition was dismissed on the ground of the delay and laches.

5. We personally feel that when the claim is on account of salary payable to a Government servant, delay in approaching the court may not be fatal for entertainment of writ petition, because non-payment of due salary is a continuous wrong. In such view of the matter, we differ with the conclusion of the learned Single Judge that the writ petition should be rejected on the ground of delay and laches.

6. The learned counsel appearing in the support of the appeal submitted that there were six Assistant Engineers, who were dealt with in similar manner, and three of them, on the basis of orders passed by this court, obtained the difference of salary of Executive Engineer and Assistant Engineer and accordingly, the original writ petitioner should have also been accorded the same benefit. He submitted that in terms of the Article 14 of the Constitution, original writ petitioner should have been treated equally, with his other three colleagues.

7. While a wrong cannot be a precedent, a wrong cannot be the basis for determination of discrimination under Article 14 of the Constitution. Therefore, it would be necessary to ascertain whether the orders by which those three persons obtained the benefit, as was sought for by the original writ petitioner, should also be followed in order to bring about equality in between the original writ petitioner and those three colleagues of him.

8. While passing those orders in those writ petitions, the learned Single Judge, who dealt with those writ petitions, correctly held that there was no obligation of the writ petitioners to have the approval of B.P.S.C. The learned Judge also correctly held that the fact remains that the writ petitioners, in view of a decision taken by their superiors, had to discharge the duties of Executive Engineer, but the learned Judge while passing those orders did not take note of the fact that the promotions in question were subject to the approval thereof by B.P.S.C, and accordingly it was stipulated that those promotions would be effective only on obtaining such approval. At the same time it was provided, while granting such promotions, which were accepted by the Assistant Engineers concerned that until such time the approval of B.P.S.C, comes, although they would be discharging the duties of the Executive Engineers, but would be drawing salaries of Assistant Engineers. This was done obviously in order to ensure that the promotions accorded are in accordance with law. As aforesaid the promotion to the original writ petitioner was given with effect from 17th November, 1988 although the order giving such promotion is dated 5th April, 1989. The intention was to give the promotion to the original writ petitioner with effect from 17th November, 1988 but that was dependent upon the post facto approval of B.P.S.C.

9. In those writ petitions the learned Single Judge expressly recorded that there is nothing on record to suggest that the proposals for obtaining approval of those promotions were sent to B.P.S.C. In such situation the learned Judge could not issue a direction for payment of salary contrary to the understanding recorded in the promotion orders in question, which were acted upon and which understanding was to make the promotions legal. The learned Judge at the best could direct the respondents to those writ petitions to send the papers of the writ petitioners to B.P.S.C, forthwith for the purpose of obtaining approval, inasmuch as by then the beneficiaries of such promotions had retired and accordingly they could not be made to wait further. In those circumstances, although we would set aside the order under appeal, but would not issue direction for payment as had been sought for in the writ petition. Instead, we direct Patna Municipal Corporation, upon whom all rights and obligations of erstwhile Patna Regional Development, i.e. the employer of the original writ petitioner, has devolved during the pendency of this appeal by a law made by the legislature, to send the papers pertaining to the original writ petitioner to B.P.S.C. for obtaining approval to the promotion in question within a period of one month from the date of service of a copy of this order upon it, with a corresponding direction upon B.P.S.C, to give its opinion pertaining to the matter within a period of one month from the date of receipt of such papers from Patna Municipal Corporation. It goes without saying that in the event such approval is granted, the original writ petitioner shall be deemed to have been promoted by the order dated 5th April, 1989 with effect from 17th November, 1988 and accordingly he shall be entitled to what has been provided therein.