
(2012) 04 JH CK 0208

In the Jharkhand High Court

Case No : Writ Petition (S) No. 6840 of 2004

Mahendra Narain Mishra

APPELLANT

Vs

State of Jharkhand and Others

RESPONDENT

Date of Decision : 17-04-2012

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2013) 1 AJR 454 : (2012) 4 JCR 203

Hon'ble Judges : P.P. Bhatt, J

Bench : Single Bench

Advocate : D.K. Prasad, Umesh Pathak, N. Ganguli and A.K. Pathak, for the Appellant; Rakhi Rani, JC to Sr. SC-II and Suman Kr. Ghosh, JC to SC-II, for the Respondent

Final Decision : Allowed

Judgement

P.P. Bhatt, J.—Heard the learned counsel for the parties. The petitioner, by way of filing this writ petition under Article 226 of the Constitution of India, has prayed for a direction to the respondent authority concern to pay the petitioner all the consequential benefits from the date of his promotion.

2. The short facts are as under;

1. That the petitioner is initially appointed as Pump operator in the office of Executive Engineer, Irrigation Division, D.C. Chowk Dumka after following the procedure provided for appointment and accordingly, he joined the said post in the year 1972. The petitioner has passed his matriculation examination in the year 1971 and by the order of the Chief Engineer, Irrigation Deoghar dated 27.4.81 a gradation list of regular class IV employees was prepared and published on 21.8.81 vide memo No. 1712; under the signature of the Chief Engineer, Irrigation, Deoghar in which petitioner finds place at Sl. No. 46.

3. It is the case of the petitioner that as per Govt. Circular No. 6856 dated 6.10.83 issued by the Secretary, Irrigation Department it is very clear that 20%

of vacancy falling in grade Posts III was to be filled up from grade IV employees on the basis of seniority. It was further mentioned in the said circular that persons appointed in Class-IV prior to 18.10.78 would be given promotion to Class III posts according to their seniority. It is the case of the petitioner that he was appointed as a class IV employee in the year 1972. However, in a promotion list published vide Memo No. 21 dated 7.1.83 surprisingly the persons who were juniors to the petitioner and whose name appeared below the name of the petitioner in the gradation list were given promotion to Class III post. According to the petitioner, the employees at Sl. Nos. 200, 201 and 216 in the gradation list were promoted whereas, the case of the petitioner, who is above in the gradation list, was not considered and he was not given promotion. Being aggrieved and dissatisfied by the action of the respondent authorities, the petitioner preferred CWJC No. 4171 of 98. The said petition was disposed of vide order dated 6.12.99 directing the respondents to consider the case of the petitioner for his promotion to the post of Class-III within a period of six months from the date of receipt of a copy of that order. Thereafter, since the order passed by High Court of Patna in CWJC No. 4171/98 was not complied with by the respondent authorities, the similarly situated person preferred a contempt proceeding vide MJC No. 3270 of 2000 and during the pendency of the said proceeding, the State of Jharkhand implemented the order and petitioner was granted promotions notion-ally w.e.f. 12.7.1990 but the payment with regard to difference of salary of the intervening period has not been granted to the petitioner. Being aggrieved and dissatisfied by the said action of the respondent authorities, the petitioner approached this Court by way of filing the present writ petition.

4. Learned counsel for the petitioner in support of his contention, referred to and relied upon the documents annexed to this petition i.e. gradation list, order passed in CWJC No. 4171/98, etc. Learned counsel for the petitioner has also referred to and relied upon the judgment reported in Dr. Paras Nath Prasad Vs. State of Bihar and Others, . Learned counsel for the petitioner submitted that in the judgment reported in 2010(3) JCR 238, this Court has considered all the previous judgments rendered on this point and after careful consideration of the facts and circumstances of the present case involved in the matter, passed an order directing the respondent authorities retrospective promotion and to compute all financial benefits pre and post retirement of the petitioner. It is further submitted that the provision contained in Rule 58(A) and (B) of the Bihar Service Code read with Rule 74 of the Bihar Financial Rules have been considered by the Court and it was held that there is no applicability of Rule 58 of the Bihar Service Code r/w Rule 74 of the Bihar Financial Rules in the facts and circumstances of the present case. Learned counsel for the petitioner further submitted that the present case is also squarely covered by the above referred judgment and therefore, the petitioner is entitled to get monetary benefit with retrospective effect.

5. As against this, learned counsel for the State by referring para 6 of the counter affidavit filed by the State submitted that in fact some error was

committed in haste by the officers concerned while granting promotion to the petitioner, as they were under the pressure of contempt proceedings. It is submitted that the petitioner was in fact not eligible and entitled to get promotion at the relevant point of time but this fact could not be brought before the Court during the pendency of the C.W.J.C. or contempt proceeding and the concerned authorities of the respondent State passed an order of promotion in hasty manner as they were under pressure of contempt proceedings and therefore certain relevant materials which were required to be considered diligently could not be considered at the relevant time. Learned counsel for the State by referring gradation list (Annexure-1 to the petition) pointed out that the employees at Sl. Nos. 200, 201 and 216 were possessing the higher educational qualification than that of the petitioner and therefore, the case of those employees stands on a different footing than that of the present petitioner. It is also submitted that those employees are work charged employees and as such, the policy of the respondent State was to grant promotion on the basis of seniority-cum-merit for giving promotion to class III posts from amongst the work charged employees and on that basis, they were promoted to class-III Post. Learned counsel for the State further submitted that Rule 58 of the Bihar Service Code read with Rule 74 of the Bihar Finance Rules is applicable in the case of the petitioner and the said rule is very much relevant for the purpose of deciding the present case and therefore in view of these two rules, the petitioner is not entitled to get monetary benefit from the retrospective effect. Learned counsel for the State referred to and relied upon para 19 of the judgment reported in *Paluru Ramkrishnaiah and Others Vs. Union of India (UOI)* and Another, as well as paras 6 to 9 of the judgment reported in *State of Haryana and Others Vs. O.P. Gupta, etc.*, and submitted that in view of the ratio laid down in the aforesaid two judgments, the petitioner is not entitled to get the monetary benefit from the intervening period as the promotion was granted to the petitioner nationally. It is also submitted that the judgments cited by the learned counsel for the petitioner are not relevant and applicable to the facts and circumstances of the present case. It is submitted that each case is required to be decided on the basis of facts and circumstances involved therein, Learned counsel for the State tried to distinguish the aforesaid judgments on the basis of the facts and circumstances of the present case.

6. Considering the rival submissions advanced by the learned counsel for the parties and from perusal of material facts on record, it appears that the petitioner was appointed as class-IV employee in the year 1972 and thereafter the gradation list was prepared by the Chief Engineer of the department concerned in respect of its class-IV employees. Out of this gradation list, promotions were to be granted on the basis of seniority-cum-merit to the Class-III post. It appears that the petitioner has been superseded by their juniors while grant of promotion. From perusal of order passed by respondent authorities regarding grant of promotion to their employees, it appears that employees, who were placed at Sl. Nos. 200, 201 and 216 in the gradation list i.e. below the

petitioner, were promoted to the post of Class-III post, whereas, the case of the petitioner was not considered for the promotion to Class-III posts. Being aggrieved by and dissatisfied with the said action of the respondent authority, the petitioner preferred CWJC No. 4171/98 which was disposed of by order dated 6.12.99 directing the respondent authority to consider the case of the petitioner for his promotion from Class-IV employees to Class-III post within stipulated time. Since the respondent authorities did not consider the case of the petitioner within stipulated time, the similarly situated person preferred MJC No. 3270/2000 for contempt proceeding against the department concerned but during the course of said contempt proceeding, respondent authority issued promotion order in favour of the petitioner and granted promotion notionally w.e.f. 12.7.90. The stand taken by the respondent authority in the present petition with regard to eligibility for grant of promotion to the petitioner cannot be accepted at this stage as it was open for the respondent State to agitate this point at the time of filing of the earlier writ petition, filed by the petitioner. From gradation list, it becomes very clear that the petitioner is senior to other three employees, whose cases have been considered by the respondent authority. Meaning thereby the petitioner has been superseded. It also appears that the respondent authorities have not preferred any Letters Patent Appeal against the order passed in CWJC No. 4171/98 meaning thereby, the respondent State has accepted the order and in fact implemented by granting the promotion to the petitioner. The respondent is unable to point out or bring it on record as to why the petitioner is not eligible and entitle to get promotion when it was due. The criteria for promotion is seniority-cum-merit, therefore usually the seniority shall prevail if there is nothing adverse is found in service record of the petitioner which dis-entitle him on merit but no such specific adverse material is pointed out which dis-entitle the petitioner from getting the promotion to Class-III post when juniors to the petitioners were promoted. Admittedly the petitioner is senior to the other employees who have been given promotion. The State has canvassed the argument that error was "committed by the official in grant of promotion but unable to bring any material to show the demerit of the petitioner which dis-entitle the petitioner for grant of promotion. The State could not produce any material adverse to the petitioner even in previous round of litigation or in the present proceedings. The contention raised by the learned counsel for the State with respect to provision of Rule 58 of the Bihar Service Code r/w Rule 74 of the Bihar Finance Rules has also been considered by this, Court from time to time such as in a case of Md. Izharul Haque Vs. The State of Bihar and Others, and in a case of Krishnadeo Singh Vs. State of Bihar and Others, . Paras 5 to 12 of the judgment reported in Md. Izharul Haque Vs. The State of Bihar and Others, read as under:

5. The scope of Rule 58 of the Bihar Service Code has been interpreted by a Bench of this Court in Dr. Paras Nath Prasad v. State of Bihar and Others, 1990 (2) Pat LJR 248. In paragraph 19 of the case of Dr. Paras Nath Prasad (supra), this Court held as follows :

The other contentions of the learned counsel for the respondents that Rule 58 of the Bihar Service Code prohibits any grant of pay and allowances to the petitioner on a fictional and notional promotion granted to him is, in my view, misconceived. A notional promotion has to be as if, for service benefits, he had been given due promotion. A person, who is entitled to promotion and is not promoted, can always invoke the jurisdiction of this Court under Article 226 of the Constitution for a mandamus to the employer State to consider his case for such promotion. Such due promotion is not a claim of anything notional but it is something that is really attached to the status and the service contract of the employee concerned. In the case of *Alappat Narana Menon v. State of Kerala*, (1997 Volume II S.L.R. 656) the Supreme Court has stated:

The foregoing discussion with reference to the pronouncement of the Supreme Court and the Gujarat, Allahabad and Mysore High Courts clearly establish that a Government servant cannot be said to have forfeited his claims for arrears of salary when he did not get his due promotion for no fault of his. The Government's plea the petitioner was given only a notional promotion is not sustainable in law. What the petitioner got was not a notional promotion and it is wrong to call this promotion as "notional" in the context of the peculiar facts and circumstances of this case. The concept of notional promotion cannot enter the realm of discussion in this case. Notional promotion is one which a Government servant gets under particular exigencies of situation, which he cannot claim as of right. Here the petitioner is entitled as of right, to get the promotion from 1.4.1955 and, therefore, his claim for arrears of salary and other material benefits cannot be denied to him on the plea that what was given to him was only a notional promotion and the policy of the Government is not to give the arrears of salary in such cases. It is no argument to say that many have been promoted ignoring the petitioner's claim. I, therefore, hold that the petitioner is entitled to succeed.

6. It appears that this Court held that notional promotion is one, which a government servant gets under particular exigencies of situation, which he cannot claim as of right, but the petitioner of that case was entitled as of right to get the promotion from 1.4.1955 and, therefore, necessary directions were issued for payment of salary and other material benefits to that petitioner. In sum and substance, this Court held that the material benefits cannot be denied to a Government servant who have been granted even notional promotion.

7. Again in the case of *Shiva Narayan Lal v. State of Bihar and Ors.*, 1999 (1) Pat LJR 243, this Court held that a Government servant being granted promotion from retrospective date cannot be denied the material benefits accruing from the promotion.

8. This question was also considered by the Apex Court in the case of *Food Corporation of India Vs. S.N. Nagarkar*, and the Apex Court held that the Government servant is entitled to the arrears of pay and allowances from the date of promotion.

9. From the pleading of the parties, it is admitted position that the petitioner firstly was promoted to the post of Registrar under the respondents vide order, as contained in Annexure 1, and the same was given retrospective effect by virtue to notification, as contained in Annexure-2, as noticed above and vide order as contained in Annexure-3, the petitioner was again promoted to the post of Under Secretary with effect from 5.10.1993.

10. Since the petitioner was promoted firstly to the post of Registrar with effect from 5.10.1989, he would be entitled to get the arrears of benefits with effect from 5.10.93 and not from the date of his joining. On account of the subsequent promotion given to the petitioner by virtue of the notification, as contained in Annexure-3, the petitioner would be entitled to get the monetary benefit from the retrospective date fixed in the notification with effect from 5.10.93 and even though the petitioner retired prior to issuance of Annexure 3 dated 17.8.1998 the material benefits will be available to him with effect from 5.10.1993.

11. the plea taken by the State respondents that the material benefits will be given to the petitioner from the date of his joining appears to be wholly misconceived and at the same time, the stand of the State that the meaning of notional promotion is only for the sake of promotion and not for the material benefits also appears to be wholly misconceived. The concept of notional promotion is to ensure monetary benefits to the employees and, therefore, the petitioner was entitled to get the monetary benefits on account of the promotion given to him with effect from the dates already notified vide notifications as contained in Annexures 2 and 3.

12. Since the petitioner has retired from services with effect from February 1997, the State authorities are directed to pay the consequential monetary benefits on account of the promotions given to the petitioner, as referred to above, within a period of three months from the" date of receipt/production of a copy of this order.

Paras 6 to 9 of the judgment reported in Krishnadeo Singh Vs. State of Bihar and Others, read as under;

6. Law on this question is almost settled by the judgments of this Court and also of the Apex Court reference may be made to the cases of Dr. Paras Nath Prasad v. State of Bihar and Ors., 1990 (2) Pat LJR 248; Shiva Narayan Lal v. State of Bihar and Ors., 1999 (1) Pat LJR 243; Food Corporation of India Vs. S.N. Nagarkar, and Md. Hafiz v. State of Bihar and Ors., 2003 (2) Pat LJR 44.

7. It has been held by this Court and the Apex Court that monetary benefits cannot be denied to a Government servant, who has been granted notional promotion. The petitioner, as it appears, superannuated after recommendation of the DPC dated 25.4.1996. However, the post facto approval was granted by the Cabinet on 30th July, 1996.

8. In this view of the matter, it is held that the petitioner would be entitled for all

consequential monetary benefits on account of his notional promotion, as claimed by him.

9. In the result, this application is allowed and the authorities concerned are directed to pay the monetary consequential benefits to the petitioner on account of his notional promotion, if not already paid, within a period of three months from the date of receipt/production of a copy of this order.

The latest judgment which has been referred to and relied upon by the learned counsel for the petitioner is 2010(3) JCR 238, which is also relevant for the purpose of deciding the present case, whereby it is held that the said rules are not having any applicability. Paras 8, 9, 12 and 13 of the said judgment reads as under;

8. Both the aforesaid Rules were considered by the Division Bench of the Patna High Court in the case of Dr. Paras Nath Prasad Vs. State of Bihar and Others, . The Division Bench in that case held that where an employee deserved promotion but was not granted the same for no fault of the employee, but because of wrong decision on the part of the State the employee would be entitled to not only to be granted promotion with retrospective effect but also financial benefits as a consequence of such promotion as also the interest on delayed payment of the financial benefits. The Division Bench expressly overruled the applicability of the Rule 58 to such situation.

9. Following the aforesaid Division Bench decision a learned Single Judge of this Court in the case of Shri Mahavir Pandey v. State of Bihar and Ors., reported in 2000 (7) PLJR 768 held that not only Rule 58 but also Rule 74 would have no application in such situation.

12. Thus in a nut shell the facts suggest that the petitioner's name was approved not by one but by both the DPC's for promotion to the post of Chief Engineer w.e.f. 7.4.2005. It is also clear that there was a vacancy existing on that post and but for the subsequently initiated departmental inquiries and the incorrect decisions of the respondents not to give effect to the recommendations of the two DPCs, the petitioner would have been promoted and would have joined on the promotional post, and would have got all the financial benefits.

13. However, the petitioner although found fit for promotion w.e.f. 7.4.2005 could not have joined the promotional post before 22.4.06 i.e. the date that the 1st Departmental Promotion Committee drew up its proceedings and therefore from the date 1.4.2005 i.e. the date with effect from which the petitioner was found fit for promotion by the DPC and the actual date of DPC i.e. 22.4.2006, the petitioner cannot be given the financial benefits in accordance with the Rule 58 of the Jharkhand Service Code as prior to the 1st Departmental Promotion Committee, it was not possible for the petitioner to join the post. However, after 22.4.2006, the petitioner should have been granted promotion and his failure to join the promotional post is not due to any fault on the part of the petitioner but exclusively on account of wrong decision by the respondents and therefore in

view of the law laid in the precedent as cited above, the petitioner is entitled not only to promotion w.e.f. 22.4.2006 but to all consequential financial and other benefits which the petitioner would have got if the petitioner had actually Joined the post w.e.f. 22.4.2006. The petitioner will also be entitled to recomputation and payment of all post retirement benefits which he would have got if he had actually joined the post of Chief Engineer w.e.f. 22.4.2006.

7. Other judgments Cited by the learned counsel for the petitioner Dr. Paras Nath Prasad Vs. State of Bihar and Others, and 2000 (1) PLJR 768 are also applicable to the facts and circumstances of the present case. I have also perused the judgment cited by the learned counsel for the State reported in Paluru Ramkrishnaiah and Others Vs. Union of India (UOI) and Another, and the judgment reported in State of Haryana and Others Vs. O.P. Gupta, etc., the same are not applicable in the facts and circumstances of the present case. The arguments advanced by the learned counsel for the State that the decision for grant of promotion to the petitioner was erroneous and therefore, the petitioner is not entitled to get the monetary benefit with retrospective effect in view of Rule 58 of the Bihar Service Code r/w Rule 74 of the Bihar Financial Rules, cannot be accepted at this juncture as it was open for the respondent State to agitate this point of eligibility and entitlement in the previous round of litigation which was filed in respect of grant of promotion by the petitioner. But unfortunately the respondent State did not raise this plea at the relevant point of time and the petitioner was given promotion w.e.f. 12.7.1990. Therefore, it is not open for this Court at this stage to sit in appeal over the said proceedings. It also appears that the persons, junior to petitioner, have been granted promotion, as is apparent from the gradation list, and they got and enjoyed the monetary benefit, and therefore, this Court is of the view that the petitioner, who is senior to those employees in the gradation list is also entitled to get the monetary benefit from the date of promotion i.e. 12.7.1990.

8. In view of the facts and circumstances of the present case, this Court is of the view that the present petitioner is eligible and entitled to get the monetary benefit with retrospective effect. Accordingly, the respondent authorities are directed to grant monetary benefit to the petitioner from the date of promotion and to pay their all consequential benefits within three months from the date of receipt/production of a copy of this order. With the aforesaid observations and directions, this writ petition is allowed.