

(2004) 12 PAT CK 0082
In the Patna High Court
Case No : CWJC No. 4459 of 2004

Md. Mumtaz Ahmad

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 07-12-2004

Acts Referred:

Citation : (2005) 1 PLJR 265

Hon'ble Judges : Chandramauli Kr. Prasad, J

Bench : Single Bench

Advocate : Kamla Lal Srivastava, for the Appellant; Rajesh Kumar Singh, for the Respondent

Final Decision : Dismissed

Judgement

Chandramauli Kr. Prasad, J.—This application has been filed for issuance of a writ in the nature of certiorari for quashing the order dated 31.5.2002 (Annexure-5) whereby emoluments paid to the petitioner on account of conditional promotion are sought to be recovered due to his failure to pass the departmental examination. Short facts giving rise to the present application are that the petitioner was working as an Assistant in the Department of Health, Medical Education and Family Welfare. By order dated 3.2.1986 (Annexure-3), he was granted promotion to Junior Selection Grade on completion of ten years of service as an Assistant. While passing the order of promotion, it was made clear that such of the Assistants who do not pass the departmental examination in the ensuing two examinations, shall be reverted to their original post. Petitioner, undisputedly, did not pass the departmental examination but continued to get salary in the Junior Selection Grade till his superannuation on 31.1.2000. It seems that the petitioner was not given his entire retiral dues and hence, preferred C.W.J.C. No. 11633 of 2001 (Md. Mumtaz Ahmad vs. The State of Bihar & Ors.) before this Court. This Court, by order dated 7.9.2001, disposed of the writ application directing that all lawfully payable retiral dues be paid to the petitioner within stipulated time. In the light of the direction of this Court, the

case of the petitioner was examined and it was found that his continuance in the Junior Selection Grade till his superannuation without passing the departmental examination, is in the teeth of the conditions laid down in the order of promotion and accordingly, excess amount paid to the petitioner is sought to be recovered by the impugned order.

2. Mr. Kamla Lal Srivastava, appearing on behalf of the petitioner contends that when the petitioner had been allowed to superannuate from service in the Junior Selection Grade and no order having been passed rescinding his promotion and further, in the absence of any misrepresentation or fraud committed by him, the decision to recover the amount is illegal. In support of his submission, he has placed reliance on a judgment of this Court in the case of Madan Mohan Prasad Vs. The Bihar State Electricity Board and Others and my attention has been drawn to para-3 of the judgment which reads as follows:-

"It is not the case of the respondent Board that there was any finding against this petitioner that he misrepresented the Board on account of which he was paid higher pay. The Board has not even pleaded that said junior of the petitioner Shri Jagdish Prasad was not paid higher pay than him. Thus, it is not a case where it can be held that the petitioner received alleged higher pay by misrepresenting the facts before the authority concerned. In view of the settled law in the case of Sahib Ram Vs. State of Haryana and Others, , that no such recovery is permissible unless it is found that such payment was made on account of misrepresentation or fraud committed by the employee concerned, the impugned order cannot be sustained."

3. Junior Counsel to AAG-II, however, contends that in terms of the order of promotion itself, the petitioner was to pass the departmental examination in the ensuing two examinations, and he having admittedly not passed the examination, petitioner was not entitled to continue in the Junior Selection Grade and when this fact came to the notice of the respondents, excess amount paid to the petitioner on account of his continuance in the Junior Selection Grade, has been sought to be recovered and no fault can be found in the same. He submits that the matter stands concluded by the judgment of this Court in the case of Shiv Nath Singh Vs. State of Bihar and Others, and my attention has been drawn to the following passage from the said judgment which runs as follows:

"10. xxxx The pleas that no notice was given to him or that no formal order was issued cancelling the promotion are quite misconceived. In the first place the promotions in question were expressly subject to approval by the Finance Department. Secondly, once the promotion is found to be illegal and unauthorised it is a simple clerical matter of correcting the petitioner's fixation of pay."

4. Having considered the rival contention, I do not find any substance in the submission of Mr. Srivastava and the decision relied on by him is clearly distinguishable. Undisputedly, petitioner was granted Junior Selection Grade on

completion of ten years of service with the condition that he has to pass the departmental examination in the ensuing two examinations. Petitioner did not pass the said examination but continued to get the salary in the Junior Selection Grade. After retirement, he filed application for payment of the post retiral dues and when the matter was examined, it was found that the petitioner's continuance in the Junior Selection Grade is in the teeth of the condition laid down in the order of promotion itself. In such a circumstance, recovery cannot be said to be illegal only on the ground that formal order of cancellation was not passed. The view which I have taken finds support from the decision of this Court in the case of Shiv Nath Singh (*supra*).

5. Now, reverting to the decision of this Court in the case of Madan Mohan Prasad (*supra*), the same is clearly distinguishable. Here, in the present case, the continuance of the petitioner in the Junior Selection Grade becomes illegal in terms of the order of promotion and theory of misrepresentation or fraud has no bearing. In such a circumstance, there is no impediment in directing for recovery from the retiral dues. I do not find any merit in the application and it is dismissed accordingly.