
(2010) 11 PAT CK 0004
In the Patna High Court
Case No : CWJC No. 6541 of 1997

Mosmat Surya Maya Devi Thakur and Ors	APPELLANT
Vs	
The State of Bihar and Others	RESPONDENT

Date of Decision : 09-11-2010

Acts Referred:

Citation : (2010) 11 PAT CK 0004

Final Decision : Dismissed

Judgement

S.K. Katriar, J.—This writ petition has been preferred with the prayer to quash that part of the order dated 20.5.1997 (Annexure-1), whereby his promotion in the Work-charged Establishment of the Water Resources Development Department, Government of Bihar, from the date of promotion(s) with the consequential promotion has been cancelled with the direction to recover the excess payment made to the employee occasioned by the promotion(s). The Respondents have placed on record their counter affidavit and have supported the impugned action.

2. Babu Narain Thakur, the original Petitioner and the employee, died during the pendency of the present proceeding on 31.10.2006, and has been substituted by his heirs and legal representatives including his widow who are the present Petitioners.

3. According to the writ petition, the original Petitioner was initially appointed in a work-charged establishment of the Bihar Government way back in the year 1959, on the post of Assistant Fitter. He was promoted to the post of Fitter Gr.-I with effect from 1.5.1964. He felt aggrieved by the position that Rajeshwar Prasad Singh and others, similarly circumstanced employees and working as a Fitter Gr.-I, though junior to the Petitioner, were promoted to the next higher post of Supervisor with effect from 1.1.1971, to the exclusion of the Petitioner. He also felt aggrieved by another development, namely, Jagdish Prasad Yadav was promoted to the post of Supervisor Gr.-II with effect from 22.8.1968. He challenged this state of affairs by preferring C.W.J.C. No. 304 of 1982, which,

according to the Petitioners, was disposed of with the direction to the appropriate authorities to constitute a Selection Committee and consider the Petitioner's case for promotion. Copy of this order is not on record. In view of the order disposing of the writ petition, the employee filed a representation dated 17.5.1988 (Annexure-4). The intervening developments and matters of detail need not be recapitulated. The Petitioner superannuated from the services of Bihar Government while functioning as Fitter Gr.-I, with effect from 30.6.1995.

3.1. His fresh writ petition bearing C.W.J.C. No. 7697 of 1995 (Babu Narain Thakur v. State of Bihar and Others), was disposed of by a learned Single Judge of this Court by order dated 21.11.1996 (Annexure-14), whereby the Petitioner was permitted to withdraw the writ petition with the liberty to move the departmental authorities. The Petitioner did submit his representation (Annexure-15) praying therein that he may be promoted to the next higher post of Supervisor. The matter was considered in detail by the appropriate authorities leading to the impugned order, whereby his promotions have been countermanded with retrospective effect with consequential direction to recover the excess payment made to him. Hence this writ petition.

4. While assailing the validity of the impugned order, learned counsel for the Petitioners submits that the impugned order has lost sight of the fact that the question of validity of his promotion given to him long time ago were not the subject matter of C.W.J.C. No. 7697 of 1995, an issue raised in his representation. The sole grievance raised in the writ petition was the question of his promotion to the next higher post of Supervisor. Therefore, the impugned order is fit to be set aside on this ground alone. He relies on memo No. 1344, dated 4.2.1949 (Annexure-16), which was considered by a Division Bench of this Court in the case of Dr. Phani Bhushan Prasad v. State of Bihar & Ors. (1976 BBCJ 587). He next submits that, in any view of the matter, recovery of allegedly excess amount may not be permitted to be recovered (Syed Abdul Qadir & Ors. v. State of Bihar and Ors.) 2009 (2) PUR SC 74.

5. Learned Standing Counsel has supported the impugned action. He has taken us through his counter affidavit in an effort to establish that such quick promotions to the Petitioner in work-charged establishment speaks of mala fide in law. He submits in the same vein that there is no provision for promotion in a work-charged establishment. He relies on the judgment of the Full Bench of this Court Durganand Jha and Others Vs. The State of Bihar and Others, He next submits that the impugned order was passed in pursuance of the observations of this Court passed in CWJC 7697 of 1995, and not on the own volition of the Respondents. The question of the Petitioner's claim for promotion to the next higher post of Supervisor inherently involved examination of his entire service record and the logical conclusion was the impugned order. He submits in the same vein that the question of cancellation of promotion can be taken up by the authorities even after long length of time. He relies on the following reported judgments:-

(I) Indian Council of Agricultural Research and Another v. T.K. Suryanarayan and Others, 1997(6) SCC 766.

(II) Union of India (UOI) and Another Vs. Narendra Singh,

(III) Koshi Project Workers' Association and Others Vs. The State of Bihar and Others,

He also submits that an erroneous promotion to a similarly circumstanced person cannot be a ground to uphold promotion to the Petitioner by this Court. He relies on the judgment of the Supreme Court cases in Kerala State Electricity Board Vs. Mr. Saratchandran P. and Another,

Learned Standing Counsel lastly submits that the case of Kishori Mistri and similarly circumstanced employees were upheld by the judgment of a learned Single Judge of this Court dated 5.2.1998 (Annexure-18), passed in CWJC No. 7062 of 1996 (Kishori Mistri v. State of Bihar).

6. We have perused the materials on record and considered the submissions of learned counsel for the parties. It appears to us from the materials on record that the Petitioner was initially appointed in the work-charged establishment of the Water Resources Development Department as Helper on 1.1.1959. It further appears that, on account of local manipulations, he was promoted to the next higher post of Assistant Fitter with effect from 1.12.1959. He was again promoted to the next post of Fitter Gr-II with effect from 1.11.1962, and was finally promoted to the post of Fitter Gr-I with effect from 1.6.1964.

7. Before we proceed further we must clearly ascertain the status and the position of a person engaged in a work-charged establishment of the State Government. The issue for the consideration of a Full Bench of this Court in Durganand Jha & Ors. v. State of Bihar & Ors. (supra). Paragraphs 14 to 20 of the judgment are relevant in the present context and are reproduced hereinbelow:-

14. Employees of Work-charged Establishment have separate entity and status than that of the regular establishment. Their regularization/promotion in the regular establishment, therefore, would be wholly without jurisdiction and violative of Articles 14 and 16 of the Constitution.

15. There is great difference between Work-charged Establishment and permanent establishment of the State. The permanent establishment has status of permanency and will continue for ever, whereas the Work-charged Establishment is created for a temporary purpose to complete a particular work, for which the establishment has been made.

16. Accordingly, a person engaged to discharge the duty of Work-charged Establishment will cease to be an employee no sooner the work of that establishment would come to an end. Obviously, therefore, their rights and status are fundamentally different.

17. The entity and status of Work Charged Establishment was considered by the Apex Court firstly in *Jaswant Singh and Others Vs. Union of India (UOI) and Others*, and again in case of *State of Rajasthan v. Kunji Raman* [AIR 1997 (2) SC 693], it was observed:-

A work-charged establishment as pointed out by this Court in *Jaswant Singh and Others Vs. Union of India (UOI) and Others*, broadly means an establishment of which the expenses, including the wages and allowances of the staff, are chargeable to "works". The pay and allowances of employees who are borne on a work-charged establishment are generally shown as a separate sub-head of the estimated cost of the works. The work-charged employees are engaged on a temporary basis and their appointments are made for the execution of a specified work. From the very nature of their employment, their services automatically come to an end on the completion of the works for the sole purpose of which they are employed. Thus a work-charged establishment is materially and qualitatively different from a regular establishment.... So far as employees engaged on work-charged establishments are concerned not only their recruitment and service conditions but the nature of work and duties to be performed by them are not the same as those of the employees of the regular establishment. A regular establishment and a work-charged establishment are two separate types of establishments and the persons employed on those establishments thus form two separate and distinct classes. For that reason, if a separate set of rules are framed for the persons engaged on the work-charged establishment and the general rules applicable to persons working on the regular establishment are not made applicable to them, it cannot be said that they are treated in an arbitrary and discriminatory manner by the Government. It is well settled that the Government has the power to frame different rules for different classes or employees.

18. The Apex Court, thus, held that a Work-charged Establishment broadly means an establishment of which the expenses including the wages and allowances of the staff are chargeable to works. The pay and allowances of employees, who are borne on Work-charge Establishment, are generally shown as a separate sub-head of the estimated costs of the works. The work-charged employees are engaged on a temporary basis and their appointments are made for execution of specified work. Their services automatically, therefore, come to an end on completion of the work for the sole purpose of which they are employed. A Work-charged Establishment, thus, differs from a regular establishment, which is permanent in nature.

19. So far as employees engaged on Work-charged Establishment are concerned, not only their recruitment and service condition, but the nature of work and duties to be performed by them are not the same as those of the employees of the regular establishment. Regular Establishment and Work-charged Establishment are two separate types of establishment. and the persons employed on those establishments, thus, form two separate distinct classes, and

therefore, two unequal cannot be treated equally.

20. So far the question pertaining to regularization of the employees of regular establishment is concerned, it would be appropriate to mention that concept of regularization should not be construed in any manner as the act of the authorities regularizing the employees, whose appointments were casual, contractual or on daily wages having sanction of law in consonance with Articles 14 and 16 of the Constitution.

7.1. It is evident on a perusal of the same that engagement of a person working in a work-charged establishment is coexistent and co-terminus with the project which he has been engaged. It is engagement for a temporary and fixed period. There is no scope for promotion in a work-charged establishment. He can at best be regularized on the basis of rules and administrative instructions of the Government. Subject to the rules and regulations, manual, and administrative instructions regarding regularization, the Petitioner's promotion to the post of Assistant Fitter and Fitter Gr.-II and Fitter Gr.-I were beyond the scheme of work-charged establishment, and were void ab initio. We have no manner of doubt that repeated promotions to the Petitioner at such brisk pace, in a situation where no promotion is possible in a work-charged establishment, is entirely attributable to local manipulations to which obviously the Petitioner was a party.

8. Before we proceed further we must notice the order dated 28.9.1981, bearing memo No. 3274 (Annexure-B), whereby 13 persons including the present Petitioner were regularized in the work-charged establishment on the post of Fitter Gr.-II. That was on the own volition of the Respondent-authorities, and have not been disclosed either in the pleadings or during the course of submissions. It is another aspect of the matter that the impugned order has lost sight of this order and, therefore, the same is pro-tanto, erroneous and needs to be corrected. In other words, the combined effect of the impugned order after correction to the extent of the order of regularization dated 28.9.1981 (Annexure-B), is that the Petitioner stood confirmed in Fitter Gr.-II, with effect from 28.9.1981. It is evident that the Petitioner having joined as a Helper, he received two promotions with the order of regularization. This naturally disentitles him from the benefits of the two time bound promotions.

9. Learned counsel for the Petitioner has rightly relied upon the judgment in Indian Council of Agricultural Research & Another v. T.K. Suryanarayan & Others (supra), wherein Supreme Court has held that the question of regular promotion of an employee can be reopened even after long lapse of time from the very inception. We, therefore, do not find fault with the reopening of the orders of promotion in the case of the Petitioner.

10. Learned Standing Counsel rightly submits that the impugned order after all is a bona fide attempt on the part of the authorities to examine the question of Petitioner's promotion, inasmuch as the same was in obedience to the orders of this Court. It is further clear to us that the issue whether or not the Petitioner is

fit to be given the benefit of promotion to the next higher post of Supervisor inherently involves examination of the entire service record. Therefore, a detailed scrutiny of the same led to the conclusion that, in view of the legal position that promotion is not possible in a work-charged establishment, promotions to the Petitioner to the post of Assistant Fitter Gr.-I and Gr.-II were void ab initio. This was in the natural course and the logical conclusion of the direction of the Court read with the Petitioner's representation submitted in view of the liberty granted to the Petitioner. We are, therefore, of the view that this was not a mala fide action on the part of the Respondent authorities.

11. Learned Standing Counsel has rightly relied upon the judgment of a learned Single Judge of this Court in *Koshi Project Workers' Association v. State of Bihar*, which dealt with the comparable promotion wrongly given to the employees and members of the Petitioner's association of that case were re-opened and were recalled after long length of time. The association and the workers challenged the same which was repelled by this Court with an observation that the excess payment made to the employees in spite of illegal promotions may not be recovered.

12. We must notice, the judgment of another learned Single Judge of this Court in *Kishori Mistri v. The State of Bihar and Others* (supra). That was case of a similarly circumstanced employee, and was indeed part of the transaction in question as in the present proceeding. Kishori Mistri's promotion was also under similar circumstances cancelled by the authorities, which was set aside by this Court. That being the judgment of a learned Single Judge of this Court, we do not agree with the conclusion arrived at therein. Law is well settled by a long line of cases that promotions or benefits wrongfully given to a similarly circumstanced employee cannot be the ground for relief to the Petitioner, particularly in writ jurisdiction. The issue came up for the consideration of the Supreme Court in *Kerala State of Electricity Board v. Saratchandran P. & Another* (supra), paragraphs 15 to 17 of which are reproduced hereinbelow:-

15. It is now a well-settled principle of law that only because by reason of "fortuitous" circumstances an employee who is junior to another obtains some benefit to which he is ultimately not found to be entitled to, the same by itself may not be a ground to confer the same benefit upon the senior employee. We have noticed hereinbefore that a separate service known as "Board Secretariat Service" was formed on 1.4.1964. The said S.G. Rajappan and L. Radhadevi joined the said services. A separate seniority list was being maintained in respect of the said wing which was different and distinct from the wing of the Ministerial Service. The said S.G. Rajappan and L. Radhadevi were promoted on the basis of Regulation 5(c) of the Regulation which was amended with effect from 7.11.1985. The validity of the said Regulation came to be questioned, which was determined by this Court by reason of the judgment dated 23.7.1996. In implementation of the same, although, the first Respondent would rank as senior to them but, in our opinion, the same would not mean that he would be entitled

to promotion with retrospective effect.

16. We agree with the contention of Mr. George, learned counsel appearing on behalf of the Appellant that the said S.G. Rajappan and L. Radhadevi obtained out of turn promotion, and if the length of service was to be treated as the basis on which the inter se seniority of the employees was to be reckoned, the first Respondent indisputably would have been senior, but as noticed hereinbefore they obtained out of turn promotion, which ultimately was found to be illegal. It is not the case of the first Respondent that he was unjustly denied promotion. It is also not his case that he had suffered any pecuniary loss or any other prejudice. The High Court, therefore, in our opinion was not correct in holding that the first Respondent was entitled to the relief of promotion with retrospective effect and/or to get any monetary benefit therefore.

17. Article 14 as is well known is a positive concept. The provisions of Article 14 cannot be invoked only because some illegality has been committed by an employer as a result whereof some employee has obtained benefit. The constitutional scheme of the equality clause would apply only in a case where the parties are similarly situated. No equity can be claimed on the basis of an illegality.

13. To summarize the position, the Petitioner's promotion to the post of Assistant Fitter Gr.-II and Gr.-I are, subject to the order of regularization, hereby declared to be illegal and void ab initio. However, he was regularized in the work-charged establishment on the post of Fitter Gr.-II with effect from 28.9.1981 (Annexure-B), which is hereby upheld, in sum and substance, two promotions were given to the Petitioner. Therefore, he is disentitled to any consideration for the benefit of time-bound promotions. In other words, the Petitioner's promotion to the post of Fitter Gr.-I, as stated hereinabove, has rightly been recalled by the authorities. Consequently, there is no question of promotion to the next higher post of Supervisor.

14. In the result, this writ petition is dismissed with the modification in the impugned order dated 20.5.1997 (Annexure-1), in the manner indicated hereinabove. The Petitioner shall be entitled to post-retiral benefits accordingly. The Petitioner shall not be required to refund any amount paid in excess to the employee beyond his entitlement. In the circumstances of the case, there shall be no order as to costs.