
(2008) 03 PAT CK 0003
In the Patna High Court
Case No : LPA No. 1647 of 1999

Prafulla Ranjan Shrivastava

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 17-03-2008

Acts Referred:

Contract Act, 1872 — Section 23

Citation : (2008) 3 PLJR 144

Hon'ble Judges : S.K. Katriar, J; Kishore K. Mandal, J

Bench : Division Bench

Advocate : Keshav Srivastava and Alok Anand, for the Appellant; Shashi Bhushan Prasad, for the Respondent

Final Decision : Allowed

Judgement

S.K. Katriar and Kishore K. Mandal, JJ.—The petitioner of CWJC No. 2644 of 1998 (Prafulla Ranjan Shrivastava vs. The State of Bihar & Ors.) has preferred this appeal in terms of Clause 10 of the Letters Patent of the High Court of Judicature at Patna, whereby the writ petition has been substantially dismissed, and has been partly allowed in terms of Rule 103 of the Bihar Service Code (hereinafter referred to as the Code) . We shall go by description of the parties occurring in the writ petition. The facts essential for disposal of the appeal are not in dispute and may be indicated briefly. The writ petitioner (the appellant herein) was appointed as an Assistant Engineer, and holds the following educational qualifications as indicated in para-3 of the writ petition:

- (i) Passed the Examination of B.Sc. Engineering (Civil) from Bihar University.
- (ii) Passed the Examination of two years Post-Graduate Diploma course in Town and Country Planning from the school of Planning and Architecture, New Delhi.
- (iii) Passed the Examination of Diploma course in Urban Survey from the International Institute of Aerial and Earth Science, Netherland.

(iv) Passed the Examination of LL.B. from Magadh University; Bihar and is a Fellow member of the Institute of Town Planner, India.

He was duly appointed as an Assistant Engineer in Town and Country Planning Organisation, Local Self Government Department of the Government of Bihar, by Notification dated 1.12.1967 (Annexure-1). He was promoted to the post of Associate Planner by order dated 10.11.1976 (Annexure-2). He was promoted to the next higher post of Town Planner by order dated 11.11.1996 (Annexure-6). After the retirement of M.S. Ahmad, the previous officiating Chief Town Planner, the petitioner, being the seniormost Town Planner, was given additional charge of Chief Town Planner by Notification dated 8.2.1996 (Annexure-10). He assumed the charge as Chief Town Planner Town & Country Planning Organisation at Headquarter, Patna, vide charge report dated 8.2.1996 (Annexure-11). By order dated 16.4.1996 (Annexure-12), he was declared to be the drawing and disbursing officer in the capacity of Chief Town Planner and ultimately superannuated from the service of Bihar Government with effect from 31.1.1997, while functioning as Chief Town Planner.

1.1) The petitioner submitted his representation dated 17.3.1998 (Annexure-14), submitting therein that he may be given the regular pay scale of the Chief Town Planner with consequential benefits. The petitioner never received reply to the same leading to the writ petition, which has been allowed in part, and the petitioner has been given the benefit of officiating allowance in terms of Rule 403 of the Code.

2. Learned counsel for the petitioner submits that, in the facts and circumstances of the case, the petitioner is entitled to the regular pay scale admissible to Chief Town Planner with consequential reliefs. He relies on a number of reported judgments.

3. The learned Standing Counsel for the respondents has supported the order of the learned writ court.

4. We have perused the materials on record and considered the submissions of learned counsel for the parties. The qualifications for the post of Chief Town Planner are indicated in the resolution of 25.4.1972 (Annexure-4). The admitted position is that the petitioner was qualified to hold the post of Chief Town Planner on a substantive basis and was, after the retirement of U.S. Ahmad, the Senior-most Town Planner in the organization. It is equally the admitted position that by virtue of the Notification dated 8.2.1996 (Annexure-10), he discharged the duties of the office of the Chief Town Planner uninterruptedly from 8.2.1996 to 31.1.1997, that is, for a period of one year less one week. It is, equally the admitted position. and is indeed stated in the said Notification dated 8.2.1996 (Annexure-10), that the petitioner was given the charge of the office because he was the senior-most functionary, which he occupied till the date of his superannuation. It is equally the admitted position that it is not the case of the respondent authorities that the petitioner did not satisfactorily discharge the

duties of the higher post, nor is it their case that the petitioner was required to occupy the post as a fortuitous circumstance. The State Government has also not answered the question as to why steps were not taken to fill up the post in a regular manner. We are, therefore, of the view that the petitioner is entitled to the regular pay scale of Chief Town Planner from 8.2.1996 to 31.1.1997.

5. Learned counsel for the petitioner has rightly relied upon the judgment of the Supreme Court in the case of Secy.-Cum-Chief Engineer, Chandigarh Vs. Hari Om Sharma and Others, . Dealing with a comparable situation, the Supreme Court observed as follows:

"6. Having regard to these facts, we are of the view that the Tribunal was fully justified in ordering that the respondent shall be promoted on the basis of "quota" fixed for non-diploma-holders with 10 years of service and not on the basis of integrated seniority. The Tribunal was also justified in ordering payment of salary to the respondent for the post of Junior Engineer I with effect from 1990 when he was made to work on that post. It is true that the respondent, to begin with, was promoted in stop-gap arrangement as Junior Engineer I but that by itself would make no difference to his claim of salary for that post. If a person is put to officiate on a higher post with greater responsibilities, he is normally entitled to salary of that post. The Tribunal has noticed that the respondent has been working on the post of Junior Engineer I since 1990 and promotion for such a long period of time cannot be treated to be a stop-gap arrangement.

7. Learned counsel for the appellant has placed reliance on Sreedam Chandra Ghosh Vs. State of Assam and others, as also on State of Haryana Vs. S.M. Sharma and others, , to contend that since the respondent was promoted on the basis of stop-gap arrangement, he could not claim promotion as a matter of right nor could he claim salary for the post of Junior Engineer I as he was given only current duty charge of that post. Both the contentions cannot be accepted. The Tribunal has already held that the respondent having been promoted as Junior Engineer I, though in stop-gap arrangement, was continued on that post and, therefore, he has a right to be considered for regular promotion. Having regard to the facts of this case, there is no reason to differ with the Tribunal.

8. Learned counsel for the appellant attempted to contend that when the respondent was promoted in stopgap arrangement as Junior Engineer I, he had given an undertaking to the appellant that on the basis of stop-gap arrangement, he would not claim promotion as of right nor would he claim any benefit pertaining to that post. The argument, to say the least, is preposterous. Apart from the fact that the Government in its capacity as a model employer cannot be permitted to raise such an argument, the undertaking which is said to constitute an agreement between the parties cannot be enforced at law. The respondent being an employee of the appellant had to break his period of stagnation although, as we have found earlier, he was the only person amongst the non-diploma-holders available for promotion to the post of Junior Engineer I and was, therefore, likely to be considered for promotion in his own right. An agreement

that if a person is promoted to the higher post or put to officiate on that post or, as in the instant case, a stopgap arrangement is made to place him on the higher post he would not claim higher salary or other attendant benefits would be contrary to law and also against public policy. It would, therefore, be unenforceable in view of Section 23 of the Contract Act, 1872.

6. Learned counsel for the petitioner has equally rightly relied upon the judgment of the learned Single Judge of this Court in *Dr. Sachita Kumar Sinha vs. The State of Bihar and Others*, 1995(1) PLJR 362, which also dealt with a comparable situation. A Deputy Director of Secondary Education was asked to discharge the duties of Additional Director (Secondary Education), in addition to his own work for over 3 years prior to reaching the age of superannuation but was denied the benefits available to Additional Director. Relying upon the judgment of the Supreme Court as well on a consideration of Rules 58 & 103 of the Code, the learned Single Judge allowed the writ petition and directed the respondent authorities to allow the petitioner the pay scale admissible to the Additional Director with consequential reliefs of arrears of differential amount of salary and payment of retiral benefits. Para-15 of the judgment is reproduced herein below for the facility of quick reference:

"Therefore, I am unable to uphold the pleas raised by the learned counsel for the respondents and I allow this writ application by directing the respondents to pay to the petitioner the salary and other allowances for the work taken from him for the post of Additional Director of Secondary Education from 6.8.1988 to 9.5.1990 and for the post of Director of Secondary Education from 10.5.1990 till 31.12.1991 on the basis of the revised scale of pay as stated above after deducting the amount already paid. I further direct the respondents to pay the retirement benefits of the petitioner on the basis of his pay as Director, Secondary Education. The respondents are further directed to make the aforesaid payment within a period of three months from today and fix the pension of the petitioner and other retirement benefits, as aforesaid, within a period of four months from date."

7. In our view, Rule 103 of the Code was intended to take care of a situation where an employee was given additional charge on a purely temporary and transitional basis, where permanent arrangement was not required, or for a period or pending finalization of the permanent arrangement.

7.1) A number of cases are coming up before this court where the Government has not taken steps to fill up the higher post on a permanent basis. Furthermore, Rule 103 of the Code does not, to our mind, seem to contemplate a situation where the additional charge of a higher post is given. Perhaps Rule 103 covers cases of equivalent or coordinate post. In this connection, we may usefully reproduce para-12 of the judgment in *Dr. Sachita Kumar Sinha* (supra);

"12. There is also another aspect of the matter inasmuch as the Supreme Court has repeatedly asked the State to act as a model employer. In a welfare State

where the Government is one of laws and not of men, the role of a model employer of the State is not at all compatible with its action in the present case, namely, getting the work for higher posts discharged by the petitioner and at the time of making payment trying to defeat the claim of the petitioner by raising all sorts of, if I may say so, without any disrespect, specious pleas.

In the result, we respectfully disagree with the order of the learned writ court. The writ petition is allowed. The petitioner shall be entitled to the pay scale admissible to the Chief Town Planner, for the period 8.2.1996 to 31.1.1997. He shall accordingly be entitled to the differential amount of salary and post retirement benefits.