
(1999) 10 PAT CK 0006
In the Patna High Court
Case No : C.W.J.C. No. 6493 of 1998

Sri Mahavir Pandey

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 13-10-1999

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2000) 1 PLJR 768

Hon'ble Judges : S.J. Mukhopadhaya, J

Bench : Single Bench

Advocate : Ajay Kr. Tripathi and G.P. Ojha, for the Appellant; B.N. Singh for the State, for the Respondent

Final Decision : Allowed

Judgement

S.J. Mukhopadhaya, J.—The case relates to payment of arrears of salary on promotion from retrospective date. The petitioner, who started his career as writer constable on 18.3.1964, was promoted as A.S.I. Police in 1968. His promotion to the post of Sub-Inspector of Police was due since 1979 but his case remained pending and subsequently granted such promotion from retrospective date. Initially, he was provisionally promoted as Sub-Inspector of Police w.e.f. 1.6.1988 and subsequently from further retrospective date of 1.12.1979 granted vide order dated 8.2.1997. The arrears of salary having not granted on such retrospective promotion, the writ petition was preferred. The respondents opposed the writ petition on the ground that there is bar of promotion from retrospective date under rule 58 of Bihar Service Code and rule 74 of Bihar Financial Rules. Reliance was placed on (unreported) decision of this court in the case of Ramakant Singh and others vs. State of Bihar & ors. in C.W.J.C. no. 11130/98, disposed of on 13.5.1999. Plea has been taken that the petitioner having not performed the duty of higher post of sub-Inspector of Police since 1979, is not entitled for arrears of salary on the principle of "no work no pay".

2. The sole question to be determined in the case is as to whether a person is

entitled for arrears of salary on retrospective promotion or not.

3. This question fell for consideration before Division Bench of this Court in the case of Dr. Paras Nath Prasad Vs. State of Bihar and Others, . The writ petition was allowed giving benefit of arrears of salary taking into consideration of rule 58 of Bihar Service Code and the Court held as follows :?

The other contention 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 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 service contract of the employee concerned.....

In the case of Alappat Narana Menon vs. State of Kerala (1977 (II) S.L.R. 656), the Supreme Court observed as follows :

The foregoing discussion with reference to pronouncement of the Supreme Court and Gujrat, 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 a right. Here the petitioner is entitled as of right to get the promotion from 1.4.1955 and, therefore, his claim for arrears 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.

In the case of Union of India Vs. K.V. Jankiraman, etc. etc., , the Supreme Court took into consideration the fact that the respondent of the said case was not promoted because of pendency of departmental proceeding and matter was kept in sealed cover. Subsequently, the employee was granted retrospective promotion. Taking into consideration the aforesaid fact, there being no laches on the part of the employee, allowed consequential benefit of arrears of salary and held that the principle of "no work no pay" was not applicable in such case.

Similar view was taken by this Court in C.W.J.C. no. 1631/96, disposed of on 10.4.1997 wherein the provisions of Bihar Service Code and Bihar Financial Rules

were taken into consideration.

Similar question fell for consideration before the Supreme Court in the case of Calcutta Iron merchants Association and another Vs. Commissioner of Commercial Taxes and another, . The Supreme Court made distinction between sets of persons, one promoted notionally and the other who had right to be promoted and affirmed the view taken in the case of Union of India Vs. K.V. Jankiraman, etc. etc., .

4. So far as the case of Ramakant Singh & others (supra) as referred by the respondents is concerned, it was a case of notional promotion granted by the State of its own. Those petitioners had no right to be considered for promotion from retrospective date, nor worked against higher post. Nothing was brought on record to suggest that the petitioner were eager to perform the duty of higher post but because of some action on the part of the authorities, could not do so. In such circumstances, taking into consideration the decision of the Supreme Court in the case of Calcutta Iron merchants Association and another Vs. Commissioner of Commercial Taxes and another, , this court held those petitioners were not entitled for arrears of salary.

So far as Rule 58 of the Bihar Service Code is concerned, it is to be read alongwith other relevant rules, namely, Rule 74 of Bihar Financial Rules and other guidelines/rules issued by the State from time to time.

Sub-rule (b) to rule 58 relates to a direct recruitment in overseas, which is not applicable in the present case whereas sub-rule (a) of rule 58 relates to draw of pay and allowance attached to tenure of a post of incumbent which starts from the date the person assume the duties, subject to exception specifically made in the rule. The same do not make complete bar of retrospective promotion, nor debar payment of arrears of salary on such retrospective promotion will be evident from Rule 74 of the Bihar Financial Rules where the authorities are competent to sanction benefit from retrospective effect, but in exceptional circumstances and in other cases with the special approval of the Government.

5. Thereby, while in all cases an employee cannot ask for arrears of salary on promotion from retrospective date, in certain cases, persons are entitled for such benefit. It can be classified in two groups, namely, (a) a person notionally promoted by the authorities, of their own cannot claim for arrears of salary on such retrospective promotion, till the same is granted by the authorities/State by special order under rule 74 of the Bihar Service Code (sic). The principle of no work no pay can be made applicable in such case as held in the case of Calcutta Iron merchants Association and another Vs. Commissioner of Commercial Taxes and another, and the decision of this Court in the case of Ramakant Singh & others in C.W.J.C. no. 11130/98, disposed of on 13.5.1999; and (b) where a person accrues (sic?acquires ?) right to be promoted but because of one or other action on the part of the authorities/State, is not promoted in time but granted such promotion subsequently from retrospective date, is entitled for arrears of

salary on such retrospective promotion, even if not worked against the higher post. In such case the principle of no work no pay will not be applicable as held in the case of Union of India Vs. K.V. Jankiraman, etc. etc., , and in the case of Dr. Paras Nath Prasad Vs. State of Bihar and Others, and other cases.

For example, in a case where promotion was not considered because of pendency of departmental proceeding/suspension/criminal case or matter is pending under sealed cover, on completion of such proceeding and promotion from retrospective date a person is entitled for arrears of salary on such retrospective promotion, though not worked against the higher post. Similarly in a case where for one or other reason, case of senior is not considered and junior promoted but subsequently such mistake is rectified on consideration of case of senior and such promotion is granted from retrospective date.

However, the principle of no work no pay on retrospective promotion to selection grade in the same cadre cannot be made applicable, as the person continued to function against the cadre post, even on such promotion to selection grade scale. In such case, on such retrospective promotion, arrear is payable.

6. In the present case of petitioner, it is pleaded that his case was not considered alongwith juniors as the service records were not placed before the Departmental Promotion Committee, which were lying in the district of Dhanbad. The case was kept pending but juniors were promoted. On the other hand, according to the respondents, because of two departmental proceeding, the case of petitioner was kept pending.

7. In the circumstances, as the case remained pending because of one or other action on the part of the respondents/ authorities, there was no laches on the part of the petitioner in the matter of performing the duty of the higher post, juniors have been promoted earlier, on his promotion from retrospective date, the petitioner is entitled for arrears of salary. Accordingly, I direct the respondents to fix the pay of petitioner to the post of Sub-Inspector of Police w.e.f. 1.12.1979 and to pay the arrears of salary after adjustment of the amount already paid within a period of two months from the date of receipt/production of a copy of this order.

The writ petition is allowed, with the aforesaid observations/directions.