
(2012) 10 PAT CK 0058

In the Patna High Court

Case No : Letters Patent Appeal No. 1896 of 2010

The Secretary Science and Technology Department and
Others

APPELLANT

Vs

Aukhari Paras Nath Sinha

RESPONDENT

Date of Decision : 10-10-2012

Acts Referred:

Citation : (2013) LabIC 178

Hon'ble Judges : T. Meena Kumari, J;Chakradhari Sharan Singh, J

Bench : Division Bench

Advocate : Amarendra Kumar, for the Appellant; Rajendra Prasad Singh Rajeev Kumar Singh, Rakesh Kr. Singh and Navjot Yesu, for the Respondent

Final Decision : Allowed

Judgement

Chakradhari Sharan Singh, J.—This appeal under Clause 10 of the Letters Patent of Patna High Court has been filed on behalf of the State of Bihar questioning the legality of the order dated 16.4.2010 passed in C.W.J.C. No. 12261 of 2006 whereby, the learned single Judge has held that the sole respondent (petitioner in C.W.J.C. No. 12261 of 2006), though superannuated while serving in Bihar Police Building Construction Corporation (hereinafter referred to as the "Corporation"), continued to maintain his lien in his parent department i.e., Department of Industries and Technical Education, Government of Bihar, and therefore, he retired as an employee of the Government of Bihar. Having held so, learned single Judge, by the impugned order, has directed the concerned authorities of the State of Bihar for re-fixation and recalculation of the pension and pensionary entitlements to which the respondent was found entitled to, as an employee of the State Government of Bihar, after adjusting the amount which had already been drawn by the respondent by way of retiral benefits from the Corporation. The facts over which the respondent cannot have any dispute and which in fact have been pleaded in the writ petition being C.W.J.C. No. 12261 of 2006 filed by him, are that he was initially appointed as Assistant Engineer in

Gandak Design Division-I under the River Valley Project Department, Government of Bihar vide Memo No. 3964 dated 5.8.1966 where he joined on 12.8.1966. Subsequently, pursuant to an advertisement issued by the Bihar Public Service Commission, on due selection he was appointed along with others, as Assistant Professor in the Department of Industries and Technical Education, Government of Bihar, which post he joined on 8.1.1969 at Government Polytechnic, Dhanbad vide memo No. 1666 dated 29.4.1970 (Annexure-B to the counter-affidavit filed on behalf of the State of Bihar). Petitioner's service was confirmed as Assistant Professor of Civil Engineering after completion of probation for a period of one year with effect from 8.1.1970.

2. In the year 1973, an advertisement was issued by the Irrigation Department, Government of Bihar, for appointment of ad hoc engineers pursuant to which the petitioner applied and being declared successful he was appointed as such in Central Design, Patna. While relieving the petitioner for appointment in Irrigation Department on the post of Assistant Engineer vide Notification dated 3.5.1973 (Annexure-C to the counter-affidavit filed on behalf of the State of Bihar), the Department of Industries and Technical Education made it clear that the petitioner will maintain his lien on the post of Assistant Professor, Civil Engineer in the Department.

3. Thereafter, vide Notification No. 309 dated 31.1.1975 (Annexure-D to the counter-affidavit filed on behalf of the State of Bihar), the services of the respondent and two other persons were handed over to the Bihar Police Building Construction Corporation for their "appointment" in the Corporation. The respondent was accordingly relieved to join as Assistant Engineer in the Corporation vide Memo No. 561 dated 9.5.1975 and he joined in the Corporation as an Assistant Engineer on 10.5.1975.

4. A fresh appointment letter was issued by the Corporation vide office order contained in Memo No. 649 dated 31.5.1975, as per specific pleading in the writ application. As according to me, this statement to above effect made in paragraph 16 of the writ petition is one of the crucial aspects for adjudication of the present case, I consider it appropriate to reproduce the same which is as follows:--

16. That thereafter an office-order contained in Memo No. 649 dated 31.5.1975 was issued by the Chairman-cum-M.D. Bihar Police Building Construction Corporation (P) Ltd. whereby and whereunder he had issued a fresh appointment letter to the petitioner in corporation as Asstt. Engineer in the scale of Rs. 510-1155/- plus other allowances admissible to the State Govt. Offices of his rank.

The said office order vide memo No. 649 dated 31.5.1975 has not been brought on record.

5. It is further pleaded in paragraph-17 of the counter-affidavit that objecting against the office Memo No. 649 dated 31.5.1975, the respondent filed a

representation before the Chairman of the Corporation on 23.8.1975 requesting therein that he should not be treated as a fresh appointee but no order on his representation was passed to his knowledge.

No copy of the alleged representation dated 23.8.1975 has been brought on record.

6. The respondent having attained the age of superannuation retired with effect from 31.12.2000 while working in the Corporation as an Assistant Engineer. He submitted his papers for the post-retiral benefits to the Corporation and received the post retiral benefits from the Corporation as has been stated in the writ petition itself. He continued to receive pension from the Corporation.

7. It is to be noted, and as would be evident from the respondent's own representation, that as on the date with effect from which the respondent superannuated, 58 years was the age of superannuation prevailing in the Corporation whereas the same was 60 years for the employees of the State Government of Bihar.

8. The respondent has alleged in the writ petition that his service was never confirmed in the Corporation.

9. Nearly five years thereafter, the respondent filed a representation before the Secretary, Science and Technology Department, Government of Bihar through Chairman-cum-Managing Director of the Corporation, which is Annexure-2 to the writ petition (C.W.J.C. No. 12261 of 2006). He claimed in his representation that he was confirmed as Assistant Professor, Civil Engineering in Industries and Technology Department with effect from 8.1.1970 and, therefore, he acquired lien on that post. (This is to be noted that the Industries and Technology Department has been renamed as Science and Technology Department.) He stated in his representation, which fact has been pleaded in the writ petition also, that in the Memo No. 1569 dated 3.5.1973 (Annexure-C to the counter-affidavit), it was specifically mentioned, while relieving him to join in the Irrigation Department that his lien in the Department shall be maintained. He further stated in his representation that there was no justification for the Corporation to sanction his terminal benefits nor was there any logic for the respondent to accept that because according to the Rules, the pensionary benefits were required to be calculated and sanctioned by the Science and Technology Department, Government of Bihar, in accordance with the Bihar Pension Rules, 1950. Referring to Rule-28 of the Bihar Service Code, the respondent in his representation contended that he acquired a title to hold substantively the post of Assistant Professor after he was confirmed on the post with effect from 8.1.1970.

10. He also submitted in his representation that he was not made permanent against any post in the Corporation and, therefore, his lien on the post of Assistant Professor could not be terminated in view of Rule 71(a) of the Bihar Service Code. He, in his representation pleaded ignorance about the correct

position in law with regard to his lien and in paragraph-6 of the said representation he stated that had he been knowing about it, he would have returned back to the Science and Technology Department and in that circumstance he would have had the opportunity to remain in service for two more years.

11. In paragraph-5 of the representation, he has admitted that in the year 1979 itself he was made to become a member of Contributory Provident Fund while working in the Corporation, which was not proper for the reason that from the very date of his confirmation as Assistant Professor, the conditions of service applicable to the State Government employees as contained in Bihar Service Code, Bihar Pension Rules and Bihar Provident Fund Rules, became applicable for all time to come. The respondent's representation was however rejected by the Science and Technology Department, Government of Bihar, vide Memo No. 1224 of 20.6.2006 (Annexure-1 to the writ application) on the ground that the respondent's claim of lien could be entertained on his return to the parent department but as he retired while serving in the Corporation, he would not be entitled for pensionary benefits. The said decision dated 20.6.2006 was based on the opinion of the Finance Department, Government of Bihar. The relevant portion of the opinion of the Finance Department is also part of Annexure-1 to the writ application which contains, inter alia, as follows:--

(Vernacular matter omitted)

(It appears from the Corporation's letter kept at page 23/c that he was directly appointed in the Corporation) (Translation by me.)

12. A counter-affidavit has been filed on behalf of the State of Bihar in C.W.J.C. No. 12261 of 2006. In paragraph-9 of the said counter-affidavit, it has been stated as follows:--

9. The deponent respectfully submits that the above facts show that the petitioner has neither retired from the service of the State Government nor he was dismissed, nor he joined the Corporation on deputation.

13. A counter-affidavit on behalf of the Corporation sworn by its Secretary, Shri Radhika Raman Sinha, has also been filed. It has been stated in paragraph-8 of the said counter-affidavit that as per the Memo. No. 307 dated 31.1.1975 issued by the Irrigation Department, Government of Bihar, the services of the respondent along with others were rendered to the Corporation for being appointed as Assistant Engineer on "Ad hoc" basis. Before referring to other statements it is required to be noted that the term "Ad hoc" is not there in the letter dated 31.1.1975 which is Annexure-"D" to the counter-affidavit sworn by Deputy Secretary, Science and Technology, Mr. Akhtar Immam in C.W.J.C. No. 12261 of 2006. Insertion of the term "Ad hoc" in the counter-affidavit filed on behalf of the Corporation is not only incorrect but a deliberate attempt by the Corporation to support the case of the respondent that vide letter dated 31.1.1975 his relieving was for appointment on "Ad hoc" basis only. I depreciate

the conduct of the deponent for swearing such affidavit.

14. There is further statement in paragraph-8 of the counter-affidavit filed on behalf of the Corporation that the respondent was appointed as Assistant Engineer in the Corporation on temporary basis by the office order No. 33 dated 31.5.1975 with clear stipulation that it would be treated as fresh appointment in the Corporation. The Corporation also in its counter-affidavit did not bring on record the appointment letter issued in favour of the petitioner for his appointment as Assistant Engineer in the Corporation. As has been noted hereinabove, the respondent also did not bring on record the letter of his appointment in the Corporation.

15. Based on the facts as noted above learned counsel appearing on behalf of the appellant, contended, *inter alia*, that the petitioner got a fresh appointment on the substantive post of Assistant Engineer in the Corporation and accordingly his services were handed over to the Corporation vide Notification No. 309 dated 31.1.1975. It has been submitted on behalf of the State of Bihar that the respondent was not on deputation to the Corporation and referring to a letter No. 2619 dated 26.6.1978 of the Corporation, it has been pleaded that his claim for payment of deputation allowance was rejected by the Corporation on the ground that he was appointed directly on the post of Assistant Engineer in the Corporation. Learned counsel for the appellant has also referred to the statement made in the writ petition in paragraph-16, wherein the petitioner has stated that a fresh appointment letter was issued by the Corporation.

16. Shri Rajendra Prasad Singh, learned counsel appearing on behalf of the respondent on the other hand has placed reliance on the provisions contained in the Bihar Service Code, more particularly Rules 28, 68 and 71 of the Bihar Service Code to contend that the respondent had a right to hold lien on the post of Assistant Engineer which lien continued even on the date of his superannuation in the Corporation for the reason that he was not appointed in the Corporation on permanent basis. He has placed reliance on a Division Bench judgment of this Court reported in Syed Mohammad Zeyaul Haque Vs. The State of Bihar and Others, to strengthen his plea that there could not be automatic termination of lien on substantive post in the parent department only on the ground that petitioner could not be repatriated back before his retirement. Reliance has also been placed on a single Judge judgment of this Court reported in Prabhakar Pandey Vs. The State of Bihar and Others, where the Government Employee was deputed in the Bihar State Housing Board by the Urban Development Department, Government of Bihar, and superannuated while in service of the Board. This Court in that case held that since there were no material to show that his service was confirmed in the Board, the petitioner of that case maintained his lien in the parent department. For the reason that the petitioner in case of Prabhakar Pandey (*supra*) was not substantively appointed in the services of the Board, it was held that the employee maintained lien on permanent post in the Government department.

17. In my opinion, facts of the present case has a different profile altogether. Firstly, it is not the case of the respondent that he was sent on deputation by the Government Department to the Corporation. It is the case of both the parties that the appointment of respondent in the Corporation was a fresh appointment. Secondly, the appointment letter issued by Corporation in favour of the respondent was not brought on record by the respondent in the writ proceeding. As there would be a presumption that the respondent was in possession of the said letter, non-production of the same in the writ proceeding amounts to withholding vital document from the Court. Thirdly, as per the respondent's own pleadings in the writ petition, he had raised objection regarding his fresh appointment letter issued by the Corporation in 1975 itself (paragraph 17 of the writ petition). He, thereafter, did not take any step which he could have taken if according to him, he had a right to hold the post of Assistant Professor in the Science and Technology Department. Not only this, the petitioner became a member of the Contributory Provident Fund in the year 1979 itself while serving in the Corporation. Having full knowledge that retirement age for the State Government employees is 60 years, he did not raise any claim even at the time of superannuation in the Corporation at the age of 58 years. After attaining the age of superannuation, he applied for post retiral benefits from the Corporation which according to the respondent himself were paid by the Corporation. He continued with the said retiral benefits for long five years and in October, 2005 for the first time he raised the plea that on the date of superannuation while serving in Corporation, he held the lien on the post of Assistant Professor in the Department of Science and Technology.

18. The Division Bench judgment of this Court in the case of Syed Md. Zeyaul Haque (*supra*) will not be applicable for the reason that, that was an admitted case of deputation which is not the situation in the present case in hand.

19. Similarly, the case of Prabhakar Pandey Vs. The State of Bihar and Others, was a case of deputation. In the present case, the situation is entirely different as has been discussed above.

20. There is yet another aspect of the matter. Learned Senior counsel appearing on behalf of the respondent has harped on rule 71(a) of the Bihar Service Code to submit that a Government servant lien on a post may in no circumstances be terminated even with his consent, if the result will be to leave him without a lien or suspended lien upon a permanent post. Learned Senior counsel has contended that the respondent had a title to hold the post of Assistant Professor in Science and Technology Department. Lien has been defined in Rule-28 of the Code as under:--

28. Lien means the title of a Government servant to hold substantively, either immediately or on the termination of a period or periods of absence, a permanent post, including a tenure post, to which he has been appointed substantively.

21. As per the case of the respondent, he joined in Corporation on 10.5.1975 and retired with effect from 31.12.2000. Thus, even if, it is presumed that his lien on the post of Assistant Professor continued while he was serving in Corporation, the period of absence from the post of Assistant Professor terminated on 31.12.2000. If, it is the case of the respondent that had he been under the department of the State Government, he would have retired two years thereafter i.e., after attaining sixty years of age, he could have claimed his title to hold the post immediately on superannuation from the Corporation with effect from 31.12.2000. Admittedly, he did not exercise his right to return to the post as per his own case and he treated himself to be an employee of the Corporation for all purposes. After having received the post retiral benefits respondent is estopped from turning around to take a plea that he continued to hold the lien on the post of Assistant Professor for the purpose of grant of pensionary benefits.

22. The respondent did not have any case for grant of pensionary benefits from the State Government in accordance with the Bihar Pension Rules and other statutory provisions governing the conditions of service of the State Government employees. The writ application is accordingly dismissed. The present appeal under the Letters Patent of this Court is allowed. The order dated 6.4.2010 passed in C.W.J.C. No. 12261 of 2006 is set aside. There will be no order as to costs.