(2012) 09 PAT CK 0072

In the Patna High Court

Case No : LPA No. 266 of 2011 in CWJC No. 4369 of 2010 and Interlocutory Application No''s. 1116 and 5292 of 2011

The State of Bihar and Others — APPELLANT

Vs

Kusheswar Nath Pandey and Another — RESPONDENT

Date of Decision : 19-09-2012

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2013) 1 PLJR 939

Hon'ble Judges : R.M. Doshit, C.J;Ahsanuddin Amanullah, J

Bench : Division Bench

Advocate : Subhash Prasad Singh, Dilip Kumar and Bajarangi Lal, for the Appellant; Abhimanyu Sharma, Bijay Prakash Singh and Ms. Prakritita Sharma for the Respondent No. 1, for the Respondent

Final Decision : Allowed

Judgement

R.M. Doshit, C.J.—Feeling aggrieved by the judgment and order dated 25th October, 2010 passed by the learned single Judge in C.W.J.C. No. 4369 of 2010, the respondents-State of Bihar and its officials have preferred this Appeal under Clause 10 of the Letters Patent. The respondent-writ petitioner joined the service as a Tracer (Blue Print) in 1979. By order dated 30th December, 1981, he was promoted as Correspondence Clerk effective from 1st September, 1981. By order dated 13th November, 1998 made by the Chief Engineer, Patna, the respondent-writ petitioner was extended the benefit of time bound promotion in the pay-scale of Rs. 1400-2300 effective from 1st September, 1991 (on completion of ten years'' service as Correspondence Clerk). The said order was made subject to approval of the competent authority. The order further specified that in the event the said order was not approved by the competent authority within three months, the said order would stand automatically cancelled. Thereafter, the writ petitioner would not be entitled to the benefit of the time bound promotion. It is not in dispute that the said order of promotion was never approved by the competent authority; may be, it was not sent for approval by the competent authority. Nevertheless, the writ petitioner continued to receive the benefit of the said time bound promotion. Since the said order dated 13th November, 1998, the writ petitioner passed the Departmental Accounts Examination in 2007 (hereinafter referred to as "the Accounts Examination"). On reaching the age of superannuation he retired from service on 31st May, 2009.

2. While processing the pension papers of the writ petitioner, the Accountant General, Bihar, under his communication dated 24th October, 2008, raised objection in respect of the time bound promotion granted to the writ petitioner on the premise that the writ petitioner had not passed the Accounts Examination. The Accountant General revised the pay scale and the pay of the writ petitioner since 1st September, 1991 till 31st August, 2008 and held that a sum of Rs. 91,840.00 was paid to the writ petitioner in excess of his due salary.

3. Pursuant to the said objection, the State Government, under its order dated 16th September, 2009, cancelled the above referred time bound promotion granted to the writ petitioner with effect from 1st September, 1991 and directed to recover the amount paid in excess of the due salary. Pursuant to the said order, by order dated 5th October. 2009, a sum of Rs. 1,84,201.00 was ordered to be recovered from the writ petitioner.

4. Feeling aggrieved, the writ petitioner filed above C.W.J.C. No. 4369 of 2010 under Article 226 of the Constitution. The writ petitioner challenged the above referred order dated 16th September, 2009 on the ground that the same was made at the behest of the Accountant General and that the writ petitioner was not afforded opportunity of hearing. The writ petitioner also asserted that since his promotion to the higher grade effective from 1st September, 1991, he has passed the requisite Accounts Examination in 2007.

5. The petition was contested by the State Government. According to the State Government, passing of the Accounts Examination was a condition precedent for promotion to a higher grade or post. The writ petitioner having not passed the said examination was not entitled to the promotion nor was the promotion order forwarded to the competent authority for approval. The State Government also indicated that the writ petitioner being the Correspondence Clerk, the papers were in his custody and it was his duty to forward the papers to the competent authority for approval.

6. The learned single Judge has allowed the writ petition. Learned single Judge was pleased to hold that the order impugned could not be explained by the averments made in the counter affidavit. The learned single Judge has held that the writ petitioner having passed the Accounts Examination in 2007; the order made in 2009 was on non-est ground. Feeling aggrieved, the State Government has preferred this Appeal.

7. Learned Advocate Mr. Subhash Prasad Singh has appeared for the appellants. He has relied upon Rule 156A and Rule 157 of the Bihar Board''s Miscellaneous Rules, 1958 and the Government Circular dated 1st April, 1980. Mr. Subhash

Prasad Singh has submitted that passing of the Accounts Examination was a condition precedent for promotion. The writ petitioner having not passed the said Accounts Examination in 1991 or even in 1998, he could not have been promoted to the higher grade. He has further submitted that the order of promotion was made subject to the approval of the competent authority, which was never received. The promotion of the writ petitioner was, thus, illegal and was made contrary to the rules.

8. Learned Advocate Mr. Abhimanyu Sharma has appeared for the respondent-writ petitioner. He has contested the Appeal. He has relied upon the Government Circular dated 26th December, 1985. He has submitted that the writ petitioner was entitled to promotion subject to his passing the Accounts Examination. He has further submitted that since 1998 Accounts Examination was not conducted. The writ petitioner, therefore, had no opportunity to pass the said examination. He has also submitted that on reaching the age of 50 years, the writ petitioner was entitled to exemption from passing the Accounts Examination. Mr. Abhimanyu Sharma has also relied upon the order dated 28th March, 2012 made by the Accountant General in respect of one Shambhu Nath Chaudhary. He has submitted that in the case of the said Shambhu Nath Chaudhary a similar order cancelling his time bound promotion and recovery was made. Under the order of this Court dated 8th November, 2011 passed by the learned single Judge in C.W.J.C. No. 10590 of 2010 (Shambhu Nath Chaudhary vs. The State of Bihar & Ors.), the amount recovered from him was remitted to him.

9. The State of Bihar has framed the Bihar Board''s Miscellaneous Rules, 1958. The said Rules are applicable to all subordinate officers under the State Government to the extent they are not inconsistent with any instructions specially issued by the department concerned in relation to any particular office. Rule 157 thereof provides for Accounts Examination. Clause (J) of sub-rule 3 of the said Rule 157 makes the passing of the Accounts Examination a condition precedent for confirmation; for crossing the efficiency bar; and for promotion to the selection grade. The said Clause (J) reads as under:--

(J) (a) Any Clerk, who has not passed the preliminary examination in Accounts, will be neither confirmed nor be allowed to cross the efficiency bar;

(b) A clerk, who has not passed the final examination, will not be promoted to the Selection grade;

(c) In case of non-availability of senior clerk, finally passed in Accounts Examination, any Junior Clerk, having passed the final Accounts Examination may be temporarily promoted to the selection Grade:

Provided that the Junior Clerk temporarily promoted to the Selection grade shall be reverted to the post of clerk if the clerk senior to him passes the final Accounts Examination within two years from the date of his first supersession and is promoted with effect from any date within the said two years, otherwise the senior clerk would be treated junior to all the clerks promoted to the selection grade prior to him.

Explanation.-- xxx xxx xxx

10. Pursuant to the aforesaid Rule 157, the State Government has issued the above referred Circular dated 1st April, 1980. The officers concerned have been instructed to follow the aforesaid Rule 157 scrupulously in matters of grant of time bound promotion and that any order which is not approved by the Finance Department be reconsidered. Under the above referred Circular dated 26th December, 1985, detailed instructions have been issued for grant of time bound promotion to the Government servants under Government Resolution dated 30th December, 1981. The said Circular, inter alia, enjoins the concerned authority to forward the proposal for approval of the time bound promotion granted by the competent authority. The approval would be granted by the Finance Department. In case the approval is not granted or it is wrongly made, the amount paid in excess of the due salary shall be recovered. The above referred Instructions dated 12th August, 1992 were issued by the Finance Department, Government of Bihar to all departments of the Secretariat. The said Instructions reiterated that all Clerks in the subordinate offices were required to pass the Accounts Examination. It further provided that the Clerks who are granted time bound promotion after 1st April, 1983, without passing the Accounts Examination, be reverted. It also provided that in case adequate number of qualified Clerks were not available, the Clerks who were not qualified (had not passed the Accounts Examination) may also be granted ad hoc promotion on condition that the concerned Clerk will pass the next Accounts Examination.

11. Thus, it is evident that all along the rule makes passing of the Accounts Examination a condition precedent for promotion to a higher post including the promotion to a higher grade under the "Time Bound Promotion Scheme". Admittedly, the writ petitioner had not passed the Accounts Examination in 1991, the date from which he has been given the benefit of time bound promotion or in 1998, the date on which such promotion was granted. His promotion was not even approved by the Finance Department as required. Evidently, the writ petitioner received the benefit of time bound promotion to which he was not entitled to under the rules. His passing of Accounts Examination in 2007 will not validate the promotion granted to him with effect from 1st September, 1991 nor would it validate the order dated 13th November, 1998.

12. Although, teamed Advocate Mr. Abhimanyu Sharma has submitted that on reaching the age of 50 years the writ petitioner was entitled to exemption, there is nothing on the record that the writ petitioner ever approached the State Government for exemption from passing the Accounts Examination. Besides, in 1998, when the writ petitioner was granted the benefit of time bound promotion or in 1991, the year from which he was given such promotion, the writ petitioner had not yet attained the age of 50 years. In other words, he was not eligible for exemption at the relevant time. Mr. Abhimanyu Sharma has also strenuously urged that pursuant to Clause 4(iv) of the Instructions dated 12th August, 1992,

the writ petitioner was entitled to ad hoc promotion to a higher grade. We are afraid, we cannot entertain such a contention at this stage. In the writ petition, the writ petitioner has not built up a case around the aforesaid Clause 4(iv). It is not his case that at the relevant time, although the vacancies were available, the qualified Clerks for promotion were not available; nor it is his case that since his actual promotion in 1998, the writ petitioner had attempted and passed the next Accounts Examination. We may further note here that the aforesaid Clause 4(iv) talks about regular promotion on available vacancy. A time bound promotion is not a regular promotion on available vacancy. In absence of the relevant averments in the writ petition the contention deserves to be rejected outright. Thus, for the aforesaid reasons, we are of the opinion that neither on 1st September, 1991 nor on 13th November, 1998 (the date of the order), the writ petitioner was eligible for time bound promotion to the higher grade.

13. The question now arises whether the promotion granted to the writ petitioner as early as on 13th November, 1998 could have been cancelled without affording opportunity of hearing to the writ petitioner. Ordinarily, the principles of natural justice do require that cancellation of the order of promotion, even on the ground that it was made without the authority of law not in consonance with the relevant rules and the recovery of the amount of salary paid in excess of due salary, could not have been made without affording opportunity to the employee concerned. But in the present case, now that the matter has been analysed by the learned single Judge and this Court, there being no dispute that the writ petitioner did not possess the requisite qualification and was not eligible for promotion to a higher grade, the remand of the matter for compliance with the principle of natural justice would be an exercise in futility.

14. One more question arises is whether under the aforesaid circumstances the recovery should be allowed to be made from the writ petitioner who has now retired from service. In this respect we rely upon the judgment of the Full Bench of this Court Bihar State Electricity Board and Others Vs. Ram Kumar Bharti @ R.K. Bharti and Others , followed by us in LPA No. 616 of 2011 (The State of Bihar & Anr. vs. Deotanand Singh & Anr.) arising from C.W.J.C. No. 7581 of 2005 decided on 2nd August, 2012. The Full Bench has held that even though the payment may have been made to the employee concerned by the mistake committed by the department; even though the employee concerned may not be instrumental in getting the order in his favour or that such order is not made on account of misrepresentation made by the employee; if the amount has been paid erroneously the same can be recovered.

15. Following the above referred judgments we hold that in the instant case also the writ petitioner is liable to refund the amount received by him in excess of due salary.

16. We have perused the order made by the learned single Judge in above referred C.W.J.C. No. 10590 of 2010 filed by one Shambhu Nath Chaudhary. It appears that the said order was decided in absence of the counter affidavit filed

by the State Government without reference to the above referred Statutory Rules governing the service conditions of the Government servants and the Circulars issued by the Government from time to time. Ex facie, the order is per in curium.

17. For the aforesaid reasons, we allow this Appeal. The impugned judgment and order dated 25th October, 2010 passed by the learned single Judge in C.W.J.C. No. 4369 of 2010 is set aside. C.W.J.C. No. 4369 of 2010 is dismissed. Interlocutory Applications stand disposed of.