

9

469

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.332 of 2017

In

Civil Writ Jurisdiction Case No.13975 of 2011

1. The State of Bihar through the Principal Secretary, Water Resources Department, Government of Bihar, Patna.
2. The Principal Secretary, Water Resources Department, Government of Bihar, Patna.
3. The Engineer-in-Chief, Water Resources Department, Government of Bihar, Patna.
4. The Chief Engineer (Mechanical), Department of Water Resources, Government of Bihar, Patna.
5. The Superintending Engineer (Mechanical), Irrigation Mechanical Circle, Department of Water Resources, Muzaffarpur, District Muzaffarpur.
6. The Executive Engineer (Mechanical), Irrigation Mechanical Circle, Department of Water Resources, Muzaffarpur, Division, District Muzaffarpur.

Versus

Mahendra Baitha, S/o Late Tildhari Baitha, Resident of Village- Baijnathpur (Ramgadh Chhauradano) P.O. Chhauradano, District East Champaran, Motihari.

... .. Appellant/s

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Anjani Kumar
Sr. Advocate, A.A.G. - 4
Mr. Sanjay Prasad
AC to A.A.G. - 4

For the Respondent/s : Mr. Lalan Kumar Singh
Advocate

CORAM: HONOURABLE MR. JUSTICE AJAY KUMAR TRIPATHI

and

HONOURABLE JUSTICE SMT. NILU AGRAWAL

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE AJAY KUMAR TRIPATHI)

Date : 04-05-2018

The State of Bihar is aggrieved by the order and judgement, dated 25.04.2016, passed by the Learned Single Judge in C.W.J.C. No. 13975 of 2011.

2. Writ Application of the private-respondent, who was the petitioner, was allowed by the Learned Single Judge with a direction upon the State authorities to grant benefit of A.C.P.,

AFR

S.O-18

Ami
16/12/25

विधि पदाधिकारी,
पत्र संख्या... 3399
प्राप्ति दिनांक... 16/12/2025
जल संसाधन विभाग, बिहार, मुंबई

श्री कृष्ण जी
17/12/25

3350
17-12-25

(418)

despite the accepted position that the private-respondent had never passed the departmental examination.

3. The decision of the Learned Single Judge was based on an observation made in the case of *Avinash Chandra Singh v. the State of Bihar & ors., reported in 2012 (1) P.L.J.R. 663*. Portions of the said observation has been quoted in the order, which formed basis for allowing the writ application.

4. The learned Additional Advocate General, representing the State of Bihar submits that the Learned Single Judge missed out the basic essence of the adjudication and the reliance placed by him on Avinash Chandra Singh's case (supra), has been quoted out of context and the real essence of the dispute whether the benefit of A.C.P. could be granted to an employee, contrary to the Rules, laid down under Article 309 by the State of Bihar, is permissible. Learned Additional Advocate General No. 4 drew the attention of this Court to rule 4, sub-rule (5) of the Bihar ACP Rules, 2003, wherein certain conditions have been laid down before an employee can claim benefit under the A.C.P. Rules.

5. Further, attention of this Court has been drawn towards an order / judgement passed by a Division Bench of this Hon'ble Court in the case of *Uday Shankar Prasad v. The State of Bihar & Ors., reported in 2017 (3) PLJR 824*. The Division Bench, while

dealing with sub-rule (5) of rule 4, has this to say in paragraph 8 of the said judgement :

“4 (5).... स्कीम के अधीन वेतन उन्नयन की मंजूरी की निहित अध्यपेक्षाएँ एवं ढंग वही होंगे जो भर्ती/सेवा नियमावली में रिक्तियों के विरुद्ध नियमित प्रोन्नति के लिए विहित किये गये हों। यदि किसी प्रोन्नति के लिए विभागीय परीक्षा पास करना या कोई अन्य अर्हता विहित की गयी है तो स्कीम के अधीन लाभ की मंजूरी के लिए भी वह अनिवार्य शर्त होगी यदि वे भर्ती नियमावली/परिपत्रों/संकल्पों के अधीन विहित की गयी हों :

परन्तु स्कीम के अधीन वित्तीय उन्नयन 12/24 वर्षों की सेवा पूर्ण होने के बाद देय होगा और इसके लिए नियमित प्रोन्नति के लिए निर्धारित कालावधि कोई बाधा नहीं होगी।

स्पष्टीकरण : (i) किसी नियमावली में कतिपय श्रेणियों के कर्मियों को नियमित प्रोन्नति के लिए सेवा की कालावधि में शिथिलन के प्रावधान अंतर्विष्ट रहने पर भी स्कीम के अधीन वित्तीय उन्नयन के लाभ के लिए विहित पात्रता हेतु 12/24 वर्षों की कालावधि में कोई शिथिलन नहीं दी जायगी।

(ii) यदि सरकारी सेवक को अनुशासनिक कार्यवाही आदि के चलते या प्रोन्नति के योग्य नहीं पाए जाने के चलते ए0सी0पी0 योजना के अधीन प्रथम वित्तीय उन्नयन का लाभ ठीक 12 वर्ष के बाद न देकर विलंब से दिया जाता है तो ए 0सी0पी0 योजना के अधीन दूसरा वित्तीय उन्नयन, प्रथम वित्तीय उन्नयन की तिथि से 12 वर्षों बाद दिया जायगा।

8. A perusal of the aforesaid rules clearly stipulates that the prescribed requirement and mode of sanction of financial progression under the scheme shall be the same which are prescribed under the Recruitment/Service Rule for regular

466

promotion against the vacancy. It is, therefore, clear that for getting benefit under the scheme in question, an employee has to fulfill all the conditions stipulated in the Recruitment or the Service Rules which is prescribed for regular promotion from the post held to the next higher post. Admittedly, in the case in hand, for further promotion from the post of Compilation clerk to a higher post, no Service Rules are prescribed as there is no further avenue for promotion from post of Compilation clerk to any other higher post. That being so, sub rule 5 of Rule 4 and its interpretation would clearly show that for grant of ACP from the post of Compilation Clerk no rules of promotion or recruitment being prescribed, this rule will not apply, i.e. 4(5). Thus, there are no prescribed statutory rules for recruitment or promotion from the post of compilation clerk to any other post. That apart, we find that the rules of 2003 are the rules framed under Article 309 of the Constitution of India and there is no stipulation in these rules that the rules contemplated under the Bihar Board Miscellaneous Rules, 1958 would be applicable for grant of ACP. That being the position, the contention of the respondents that the appellant is

465

not entitled to the benefit under the scheme, is wholly misconceived and while rejecting the claim of the appellant the learned Writ Court has not taken note of this factual or legal aspect of the matter. On going through the judgment referred to by the State in the case of Kusheshwar Nath Pandey (supra), we find that it was a case pertaining to grant of time bound promotion under a particular scheme and the said case was pertaining to promotion of a Tracer to some higher post and is not applicable to this appellant."

6. No doubt, the A.C.P. Rules, 2003 was enacted by the State of Bihar on a similar kind of policy adopted by the Central Government, where employees, who had not had avenues of promotion, or, had not been granted benefit of promotion for a long period of time and stagnating on the same post, the policy extended a helping hand to them. The sum essence of the policy is anti-stagnation measure and, therefore, the broad frame-work of the policy, laid down in 2003 Rules, is that the person must have remained in his post without promotion for 12 years and thereafter another 12 years, which makes it 24 years for grant of A.C.P. The benefit under the A.C.P. does not give any substantive promotion to an employee, but holding his post, he is given the benefit of pay of

the next higher post, even though his responsibility and nature of duty does not change.

7. Merely because certain time-frames have been indicated in the broad policy in the Rules of 2003, merely passing of 12 years or 24 years is not going to be enough to demand and beget the benefit of A.C.P. That broad parameters have been curtailed by sub-rule (5) of rule 4, where the Rule contemplates that any employee claiming benefit of A.C.P. must fulfill all the requirements, which are needed for substantive promotion and if it includes passing of certain departmental examination etc. it is integral to the same.

8. With due respect, since the Division Bench, while dealing with the Avinash Chandra Singh's case (supra) did not deal with the entirety of the scheme of the A.C.P. Rules, 2003, therefore, passing reference or observation as to the object behind the A.C.P. Rule and distinction between substantive promotion, cannot become the basis for a direction for grant benefit of A.C.P. on the ground that it basically is an anti-stagnation measure and as if mere passing of 12 years or 24 years is good enough for an employee to demand and beget benefit of A.C.P.

9. To that extent the judgement passed in Avinash Chandra Singh's case (supra) is not a good law on the question of

KS 82

entitlement of A.C.P., especially when the said Division Bench has no occasion to deal with the 2003 Rules, while passing the said order. Therefore, that judgement cannot be used for the purpose to demand and beget A.C.P. on the principle enunciated therein.

10. It is not that the dispute of such kind has arisen before this Court for the first time. Cases of such nature and demand by various employees, who have not passed departmental examination, seeking some kind of benefit despite knowing fully well as to the requirements of the Rules, have been trickling into the High Court from time to time. There has been occasions for different Benches to deal with the principle and the object behind grant of A.C.P., including the requirements thereof. Attention of this Court has been drawn to one of the decisions of the Division Bench rendered in the case of *The State of Bihar & ors. v. Anjani Kumar, reported in 2013 (2) PLJR*. The relevant paragraphs are paragraph 5, 6 and 7, which reads as under:

“5. It is not in dispute that the promotion in question is governed by the Bihar Board’s Miscellaneous Rules, 1958. Rule 157 of the said Rules provides for passing of the Departmental Accounts Examination, a condition precedent for further promotion. The writ petitioner had not passed the Departmental Accounts Examination. He was, therefore, not

eligible for promotion. Consequently he was not entitled to the financial progression under Assured Career Progression.

6. Four years after retirement from service in 2008, the writ petitioner approached this Court to claim exemption from passing the Departmental Accounts Examination and consequential promotion relying on the Government Circular dated 15th May, 1992. The writ petitioner claims that the writ petitioner had passed in two of the three papers, he was, therefore, entitled to exemption as envisaged by the aforesaid Circular dated 15th May, 1992. The learned single Judge, having observed that the exemption was not a matter of right, has issued direction as if the writ petitioner has been granted exemption. We may note here that at no point of time the petitioner had been granted exemption as recorded by the learned single Judge; nor is there a concept of deemed exemption referred to by the learned single Judge. Besides, the most disturbing factor is that the aforesaid Rules of 1958 do not provide for exemption from passing the Departmental Accounts Examination. In absence of any provision for exemption, no government servant could have been exempted from passing the said examination; nor

461

would a government servant be entitled to promotion on attaining the age of 50 years without passing the Departmental Accounts Examination. The Circular dated 15th May, 1992 offends the very basic principle that the statutory rules cannot be improved or modified or altered by an executive order, the statutory rules shall prevail. The circular dated 15th May, 1992, being contrary to the statutory rules, cannot be enforced. The claim for exemption based on the said Circular dated 15th May, 1992 cannot be countenanced.

7. A Full Bench of this Court has, as early as in 2000, in the matter of Maheshwar Prasad Singh vs. The State of Bihar and Ors. [2004(4) PLJR 262], enunciated the said principle to hold that the government cannot amend, modify or supersede the statutory rules by administrative instructions. The judgement in the matter of Dinesh Narayan Mishra (supra) is per incuriam the above refereed judgement in the matter of Maheshwar Prasad Singh."

11. This Court does not want to burden this order by relying on one too many decisions on the principle and requirements in relation to grant of benefit of A.C.P.. Let it be clarified that if a claim is made by any employee as to his

AFR
460

entitlement under the A.C.P. Rules, such claim will have to be considered in the entirety of the scheme of the Rule and not on the mere object behind the Rules. Since the conditions laid down in sub-rule (5) of rule 4 of the 2003 A.C.P. Rules are integral to the Rules, which has been notified under Article 309 of the Constitution of India, therefore, the Rule cannot be truncated and directions cannot be issued for grant of benefit of A.C.P., merely because of passage of time, ignoring what is otherwise a must, in terms of fulfilling the eligibility.

12. These grounds, therefore, are good grounds for this Court to set aside the impugned order, dated 25.04.2016, passed by the Learned Single Judge. The impugned order stands quashed. The appeal is allowed.

It is made clear that the issue of recovery has not been dealt with by us, as that was not even the issue before the Learned Single Judge.

(Ajay Kumar Tripathi, J)

(Nilu Agrawal, J)

skm/-

AFR/NAFR	AFR
CAV DATE	
Uploading Date	08.05.2018
Transmission Date	