

Charitra Paswan Vs. State of Bihar and ors.

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Court : Patna

Decided On : Nov-21-2003

Judge : Sachchidanand Jha and Braj Nandan Prasad Singh, JJ.

Acts : Service Laws; Bihar Service Code

Appeal No. : C.W.J.C. No. 3044 of 2003

Appellant : Charitra Paswan

Respondent : State of Bihar and ors.

Advocate for Pet/Ap. : Sunil Kumar, Adv. S.J. Rahman (GP 7) and Manoj Kumar Sinha, JC to GP 7

Disposition : Petition dismissed

Prior history : S.N. Jha, J. 1. A short but significant question whether the village Choukidars are entitled to count the service prior to 1-1-1990 for the purpose of pension arises for consideration in this writ petition. As a matter of fact, the question already stands answered in the negative in the case of Karoo Paswan v. State of Bihar, 1999 (2) BLJR 1446. However, when this case came up for consideration before a learned Single Judge he took the view that there was conflict between the decision in the c

Judgement :

S.N. Jha, J.

1. A short but significant question whether the village Choukidars are entitled to count the service prior to 1-1-1990 for the purpose of pension arises for consideration in this writ petition. As a matter of fact, the question already stands answered in the negative in the case of Karoo Paswan v. State of Bihar, 1999 (2) BLJR 1446. However, when this case came up for consideration before a learned Single Judge he took the view that there was conflict between the decision in the cases of Karoo Ram (supra) and Upendra Prasad v. State of Bihar, 1995 (2) PLJR 22, and referred the case for hearing by a Division Bench. That is how this case came before this Bench.

2. The short facts of the case as stated in the writ petition are that the petitioner was appointed as village Choukidar in Bit No. 2 of Manigachi Police Station in Darbhanga District in the year 1973. Pursuant to a policy decision of the State Government making the post of village Choukidar regular vide Circular No. 359 dated 17-1-1990, his services were 'regularised' with effect from 1-1-1990. The petitioner superannuated from service on 30-6-1990. After superannuation he made representations for payment of retrial dues, viz. pension, gratuity, unutilised leave salary, amounts of GPF and group insurance but nothing has been paid. The petitioner has given the example of one Dularchand Paswan who upon his retirement was paid gratuity, unutilised leave salary, GPF dues. The case of the petitioner is that upon his absorption in Government Service he is entitled to count the past service continuously rendered by him prior to 1-1-1990 and to have his pension fixed according, besides other retiral dues.

3. Two counter-affidavit one on behalf of the District Magistrate, Darbhanga and the other on behalf of the Home (Police) Department have been filed. From the former affidavit it appears that Rs. 5,318.70 as the amount of group insurance, Rs. 10,018 as 90 per cent provisional gratuity, and Rs. 18,999/- as unutilised leave salary have been paid to the petitioner after filing of this case. Regarding the GPF it has been stated that as the petitioner did not make any contribution, he is not entitled to the same. As regards pension it has been stated that the petitioner did not render 10 years service and therefore, he is not entitled to pension. In the

other affidavit on behalf of the Home (Police) Department it has been stated that in terms of the Bihar Pension Rules, unless the employee completes qualifying period of ten years service he is not entitled to pension though he is entitled to gratuity in terms of the Rule 144 of the Pension Rules and necessary payment has already been made to the petitioner. Reference has been made to letter Nos. 7030 dated 17-7-2003 and 5932 dated 12-9-2003 of the Home (Police) Department containing decision of the State Government regarding entitlement to gratuity and pension.

4. Shri Sunil Kumar, learned Counsel for the petitioner submitted that the petitioner having rendered continuous service on the post of Choukidar, denial of the benefit of past service prior to his absorption is arbitrary and unreasonable. According to the Counsel, the petitioner fulfils all the three conditions for grant of pension under Rule 58 of the Pension Rules. Besides, under Rule 59 of the Pension Rules, the Government is empowered to declare any specified kind of service rendered in a non-gazetted capacity as qualifying for pension.

5. Shri S.J. Rahman, learned Government Pleader No. 7 appearing for the respondents, submitted that under the policy decision contained in circular dated 17-1-1990 (supra), what was done was to make the post of village Choukidar a regular Class IV post, and not to absorb or regularise the services of working Chaukidars. The Choukidars had been agitating for improvement of their service conditions for a long time. The appointment on the post of Choukidar in the beginning was a free-hold appointment and they were free to engage themselves in other avocations. There were no fixed conditions of service and they were paid a meager amount as salary. In 1977 the Government decided to give them higher pay. In 1982 their retirement age was fixed. On 31-12-1989 the Government took decision to make the post a regular Class IV post, thus conferring upon the Choukidars the status of regular Government servant. On 17-1-1990 the circular was issued in this regard making the decision effective from 1-1-1990. That is how the Choukidars have become holders of regular Class IV post, and in the circumstances they are not entitled to count their past service. Counsel submitted that under Rule 58 of the Pension Rules the service of the Government Servant qualifies for pension if, among other things, the employment is substantive and

permanent and as the petitioner's appointment as Choukidar prior to 1-1-1990 was not substantive or permanent he is not entitled to count the earlier period as qualifying the pension. Counsel also referred to Rule 2 of the Pension Rules and submitted that the Pension Rules are applicable to only such Government servants to whom the Rules of the Bihar Service Code apply and as the Bihar Service Code was not applicable to the Choukidars prior to 1-1-1990, for this reason too, the earlier period cannot be counted for the purpose of pension.

6. At the outset it may be stated that the post of Choukidar (or Dafadar) is a civil post as held by this Court in the case of Rajpati Dubey v. State of Bihar, 1973 BLJR 558. However, that is so for the purpose of Article 311(2) of the Constitution of India. The petition is creature of statute (called by whatever name) and therefore, right to receive pension would depend on the terms of the statute. Reliance on Rule 2 of the Bihar Pension Rules appears to be apposite and the same may therefore, usefully be quoted as under:

'Except where otherwise provided these rules apply to all Government servants to whom the rules in the Bihar and Orissa Service Code apply'.

A bare reading of the above rule makes it clear that if a Government servant is not governed by Bihar Service Code, the rules contained in the Bihar Pension Rules would not apply to him. The only rules governing grant of pension to Government servants in the State of Bihar being the Bihar Pension Rules it would follow that unless his employment is governed by Bihar Service Code, the rules contained in the Bihar Pension Rules would not apply to him. The petitioner cannot contend that his appointment on the post of Choukidar prior to 1-1-1990 was governed by the Bihar Service Code, and therefore, on this short ground alone he cannot count the past service for the purpose of pension. If petitioner is not entitled to count his post service, having superannuated from service after rendering less than ten years service which is the qualifying period under the Pension Rules, he cannot claim pension.

7. Had the petitioner been working on a pensionable post and his services regularised, the position might have been different. Though this is how the petitioner has described the effect of circular No. 359 dated 17-1-1990, but as

rightly pointed out by the learned Government Pleader, what was done by the circular was to make the post of Choukidar a regular Class IV post and not to regularise the services of the working Choukidars. This seems to be working in the mind of the petitioner. If that is so, it is a misconception devoid of any substance.

8. Under Rule 58 of the Pension Rules the service of a Government servant does not qualify for pension unless it conforms to three conditions:--(a) the service must be under Government, (b) the employment must be substantive and permanent and (c) the service must be paid by Government. In the case of village Choukidar prior to 1-1-1990, the second condition was clearly absent as the employment was not a substantive employment like one made a sanctioned post. Though the post of village Choukidar has been in existence the post of village Choukidar has been in existence since time immemorial, and as a matter of fact there are statutes, viz. the Village Choukidari Act, 1870 and the Bihar and Orissa Administrative Act, 1922, besides Choukidari Manual a compendium of Government orders and circulars containing provisions for appointment etc. on the post, the nature of employment was quite different. If that were not so, what else the Choukidars were clamouring for all these years prior to 1990? They wanted regular post so that could come at par with other Government servants and it was only in deference to their demand that the Government decided to make the post a regular Class IV post.

9. Thus there is a clear distinction between the status of village Choukidars prior to 1-1-1990 and afterwards. They constitute different class governed by different conditions of service and the services, therefore, cannot be construed as continuing one and hence they are not entitled to count the past service, matchless for the purpose of pension except what the State Government may by policy decision decide to give them. It is open to the employer to have different kinds of establishment and differently treat the employees working therein. It is well settled that a policy decision unless found to be arbitrary or against the public policy on the touchstone of Article 14 of the Constitution of India, it should not be interfered with by the High Court in exercise of writ jurisdiction. Further, it is well settled that in exercise of writ jurisdiction the High Court cannot perform executive functions.

10. Submission was also made on behalf of the petitioner regarding fixing 1-1-1990 as the cut-off date. The submission to this effect is to be summarily rejected. As held in *Union of India v. P.N. Menon*, (1994) 4 SCC 68, whenever the Government or authority within the meaning of State under Article 12 of the Constitution frames a scheme (that too was a case of superannuation benefits), it may be imperative to fix a cut-off date because benefit has to be allowed within the financial resources available to the Government unless persons concerned are governed by the same Rule and are similarly situated as was the case in *D.S. Nakara v. Union of India* AIR 1983 SC 130. Reference may also be made to cases of *Krishana Kumar v. Union of India*, (1990) 4 SCC 207, *Indian Ex-Services League v. Union of India*, (1991) 2 SCC 104, *All India Reserve Bank Retired Officers Association v. Union of India*, 1992 Supp. (1) SCC 664, *State of West Bengal v. Ratan Bihari Dey*, 1994 (1) PLJR 33 (SC) and *State of Rajasthan v. Sevanivatra Karamchari Hitkari Samiti*, JT (1995) 1 SC 315. In the instant case, 1-1-1990 cannot be said to be an imaginary date as the policy decision was taken by the Government on 31-12-1989, the circular dated 17-1-1990 making the decision effective from 1-1-1990 i.e. immediately after the policy decision cannot be said to be arbitrarily fixed. The submission of the Counsel is accordingly rejected.

11. The decision in the case of *Upendra Prasad* (supra) which led to reference of this case to Division Bench was rendered in the case of Extra clerks working in the Registration offices. The persons concerned were initially appointed as Extra Clerks, then made Temporary Clerks and finally Permanent Clerks before they superannuated. This Court observed that difference between Extra Clerks on the one hand and Temporary/permanent clerks on the other hand is that while permanent clerks have a regular pay-scale, extra clerks are paid wages on the basis of work done i.e. piece rated wages. However, in terms of the Rule 26 (2)(a) of the Bihar Registration Manual, Extra Clerks are selected from a panel prepared on the basis of selection and appointment on the post of Temporary clerk is made from amongst Extra Clerks and likewise, on the post of permanent clerk from amongst Temporary clerks, which is in the nature of promotion. Extra Clerks used to be appointed only because temporary clerks and permanent clerks employed in the office cannot cope with the work. In the circumstances, the Court held that service rendered by them as Extra Clerks should be included as part of total

service for the purpose of pension. The conditions of service of Extra Clerks, it would appear, are quite different. Being the feeder post for appointment on the post of temporary clerk and likewise, permanent clerk, they enjoy continuity of service and in this view of the matter, they were held entitled to count the period of service as Extra Clerks. The conditions of service of village Choukidar prior to 1-1-1990 are not comparable to those of Extra Clerks and therefore, the decision in the case of Extra Clerks of registration offices is not relevant to decide entitlement of village Choukidar to pension on the basis of their past service. If this is done it would amount to giving retrospective effect to the policy decision/circular dated 17-1-1990.

12. In the aforesaid premises I am of the view that the decision rendered in the case of Karoo Paswan (supra), requires no modification.

13. In the result, I find no merit in this writ petition which is accordingly dismissed but without any order as to costs.

B.N.P. Singh, J.

14. I agree.

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