

Sanjay Kumar Vs. State of Bihar and ors.

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Court : Patna

Decided On : Jan-15-2007

Judge : Ramesh Kumar Datta, J.

Appellant : Sanjay Kumar

Respondent : State of Bihar and ors.

Disposition : Application dismissed

Judgement :

Ramesh Kumar Datta, J.

1. I.A. No. 2047 of 2006 has been filed praying for modification in the prayer portion of the writ application in order to include the prayer for quashing memo No. 251 dated 28.4.2006, as contained in Annexure-9 in the I.A., by which it has been ordered that Rs. 17,441,75 will be recovered from the petitioner's salary in 30 installments. The said order being in continuation of the earlier order dated 18.8.1999 and 31.3.2006 by which the time bound promotion granted to the petitioner on 26.11.1994 was cancelled and the same was granted from 30.7.1996 and direction for recovery of the excess amounts between the said period had been made.

2. In the circumstances, the interlocutory application is allowed by permitting the said amendment in the prayer portion of the writ application.

3. Heard Mr. Rajendra Prasad Singh, learned Senior counsel appearing for the petitioner and learned Standing Counsel No. 12, for the State.
4. The petitioner had filed the present writ application initially for quashing memo No. 108 dated 18.8.1999 issued by the Executive Engineer, Bridge Design Division No. 2 Advance Planning, Road Construction Department, Patna, and also memo No. 61 dated 7.4.2006 by which the petitioner has been directed to show cause to the effect that under which circumstances excess amount paid to him has not been recovered till date but during the pendency of the writ application vide office order contained in memo No. 251 dated 28.4.2006 it was ordered that Rs. 17,441.75 will be recovered from the petitioner's salary in thirty instalments and the petitioner has challenged the said order by filing I.A.No. 2047/2006.
5. The short facts of the case are that the petitioner was initially appointed on compassionate ground as Correspondence Clerk and was posted in the Special Road Division, Ara in the scale of Rs. 580-860/- and he joined the said post on 26.11.1984. Thereafter by order contained in memo No. 107 dated 25.4.1995 (Annexure-3) the petitioner was granted first time bound promotion with effect from 26.11.1994, i.e., the date on which he had completed in years of service, in the scale of Rs. 1320-2040/-. Subsequently, the petitioner appeared in the month of July, 1996 in the Accounts examination conducted by the Water Resources Department and was declared successful by letter dated 15.2.1997 of the Department which is contained in Annexure-4 to the writ application. The Superintending Engineer, Advance Planning Circle by his letter dated 28.4.1997 forwarded the petitioner's first time bound promotion for approval before the Commissioner, Patna. After consideration of the same by letter No. 1687 dated 14.5.1997 issued by the Deputy Director, Land Revenue, Manik Karan, Patna Commissionery, Patna addressed to the Superintending Engineer, Advance Planning Circle it was informed that if the petitioner had cleared the Accounts examination in 1996 then how he was granted first time bound promotion with effect from 26.11.1994. Accordingly, the Superintending Engineer wrote to the Executive Engineer and thereafter the impugned order dated 18.8.1999 was issued from the office of the Executive Engineer, amending the earlier order of grant of time bound promotion and changing the date of the same from 30.7.1996

instead of 26.11.1994, further directed for recovery of the excess amount paid to the petitioner for the period from 26.11.1994 to 21.7.1996 by instalments. However, even after the said order was passed, no recovery was made for several years and thereafter by letter dated 31.3.2006 issued by the Superintending Engineer to the Executive Engineer to explain under what circumstances the recovery has not been made and similarly an explanation was asked from the petitioner by memo No. 61 dated 7.4.2006, which are contained in Annexures-1 & 2. Aggrieved by the same the petitioner has come to this Court.

6. Learned Counsel for the petitioner submits that the aforesaid orders are contrary to law and in violation of the principles of natural justice since no notice was issued to the petitioner and he was not afforded any opportunity of hearing in the matter before the impugned order shifting the date of his time bound promotion and directing recovery was passed.

7. In the counter affidavit of the State stand has been taken that passing of the Accounts examination has been held to be mandatory by a Full Bench decision of this Court in the case of Maheshwar Prasai Singh etc. v. State of Bihar and Ors. 2000 (4) PLJR 262.

8. Learned Counsel for the petitioner submitted that the matter between the parties stood concluded in 1995 itself and the petitioner was granted time bound promotion and all consequential benefits were also given and thus the same could not be later taken away on the basis of subsequent decision of the Full Bench of this Court which would only apply to matters which have still not acquired finality and not to the present matter which had acquired finality in 1995 itself. It is thus, submitted that on the basis of the Full Bench decision benefits earlier granted to the petitioner cannot be taken away. Learned Counsel for the petitioner further submitted that no fraud or misrepresentation was committed by the petitioner in the matter of grant of time bound promotion from the earlier date and thus, the authorities are not justified in either changing the said date or in any case making recovery of the excess amount paid, in view of the law laid down by the Supreme Court and this High Court in this regard.

9. The further submission of the learned Counsel for the petitioner is that only on the basis of highly technical plea regarding passing of the accounts examination no such conclusion/order granting time bound promotion is permissible since no plea has been taken in the counter affidavit that examination was held in 1995 and immediately after the grant of time bound promotion the petitioner has appeared in the examination which was held in July, 1996 and he had also passed the same.

10. Learned Counsel for the petitioner also submits that there is nothing in the Resolution No. 10770 dated 30.12.1991 of the Finance Department (Annexure-10) that passing of Accounts examination is essential for the grant of time bound promotion and for the said reason also the respondents cannot be permitted to insist upon such conditions which are not there in the Government Resolution which grants benefit of time bound promotion.

11. Lastly, it is submitted by the learned Counsel for the petitioner that in terms of Clause (iv) of para-4 of the circular dated 12.8.1992 (Annexure-E to the counter affidavit filed on behalf of respondent NOS. 5 and 6) read with para 11 (ii) and (iv) of Resolution dated 30.12.1981 also, the petitioner should be given the benefit of time bound promotion from the earlier date since in the said clause it is provided with respect to regular promotions that in case the vacancies remained then even such clerks who had not passed the Accounts examination should be given ad hoc promotion on those posts subject to their passing the next accounts examination held by the Department.

12. Learned Counsel for the State, on the other hand, relied upon the averments made in the counter affidavit filed on behalf of respondent Nos. 5 and 6, the Superintending Engineer and the Executive Engineer. It is submitted that provisionally first time bound promotion was sanctioned by the office of respondent No. 5 with effect from 26.11.1994 but the promotion approval authority raised objection to the same and accordingly, the financial benefits of promotion of the petitioner was shifted from 26.11.1994 to 30.7.1996 since the petitioner had cleared the accounts examination which was held in July, 1996. The further submission of the learned Counsel on the basis of the counter affidavit is that the revised date of promotion of the petitioner is fully covered by the Finance

Department letter No. 4178 dated 12.8.1992 in which it is clearly stated that passing of the accounts examinations would be essential for the purpose of promotion and thus, the clerks who had not passed, the accounts examination and had been granted promotion would be reverted to their earlier post. Learned Counsel also relies upon the decision of the Full Bench in the case of Maheshwar Prasad Singh etc. v. State of Bihar and Ors. 2000(4) PLJR 262, in para 16 of which it has been clearly laid down as follows:

The result of the above discussion is that the clerks of the Muffasil offices could/can not be promoted to the selection grade posts without passing final examination in Accounts except during the period between 1.5.1980 and 29.3.11382. Any promotion due to the clerks during that period thus, cannot be denied on the ground that they had not passed the said examination.

13. It is thus, submitted that passing of the departmental Accounts Examination is essential for the purpose of grant of promotion and accordingly, it would be essential also for the purpose of grant of time bound promotion since the resolution dated 30.12.1981 clearly lays down that the conditions regarding promotion have to be fulfilled for the said purpose also.

14. Learned Standing Counsel also sought to argue that the writ petition is barred by delay and laches since the order regarding grant of time bound promotion was passed on 18.8.1999 whereas the challenge of the same has been made after a delay of nearly 7 years by filing the present writ petition.

15. The benefit of time bound promotion was introduced for the first time by the State Government by the Resolution No. 10770 dated 30.12.1981 while accepting the recommendations of the 4th Pay revision Committee. Para-11 of the said resolution lays down the terms and conditions of promotion specially time bound promotion and the same has been followed through by other circulars and decisions of the State Government laying down the modalities under which the said time bound promotion is to be granted. It is clear from the said resolution itself that time bound promotion is only to be granted to an employee if he is otherwise fit for promotion but even after ten years of service on the same post he has not received even a single promotion. It is further provided in the said resolution itself

that all other terms and conditions and the rules and procedures with respect to regular promotion will also have to be followed in the case of time bound promotion. In the subsequent circulars the decisions of the State Government regarding the modalities granting time bound promotion were issued. The earlier was the circular of the Finance Department dated 26.9.1985 in which it was provided that the time bound promotion may be granted on a post provisionally by the cadre controlling authority/competent authority for granting promotion and thereafter the same has to be approved by the Finance Department through the Administrative Department. Subsequently by another circular of the Finance Department bearing No. 3/M-2/5-30/91/4178(2) dated 12.8.1992 it was laid down that after the provisional time bound promotion had been accorded as per the earlier circular dated 26.9.1985 with respect to the first time bound promotion, instead of the Finance Department, with respect to the employees working in the Muffasil offices, the approval have to be obtained from the concerned Secretary of the Administrative Department/Commissioner & Secretary or the Divisional Commissioners, as the case may be. Thus, time bound promotion that was granted was purely provisional and it could not be said that it was the final order which could not be changed or modified adversely to the employee concerned without giving him a notice and hearing him in the matter. Although the order dated 25.4.1995 (Annexure-3) by which time bound promotion was granted to the petitioner does not mention the word 'provisional' yet it must be read in terms of the Government circulars issued in this regard from time to time and must to treated as provisional order subject to confirmation/approval by the competent authority and even the said order clearly mentions the fact that if any irregularity is found as a result of the promotion, then the amount paid in excess shall be recovered from salary of the employees concerned and they shall be reverted to their old pay scale.

16. Further, the issue regarding passing of the Accounts examination, whether the same was compulsory or not for the purpose of promotion was considered by the Full Bench in the case of Maheshwar Prasad Singh (supra) and the Court clearly came to the conclusion that except for the period between 1.5.1980 and 29.3.1982 any clerk of the Muffasil offices could/can not be promoted to the selection grade posts without passing the final examination in Accounts. In view of the said law

laid down by the Full Bench it is not open to the petitioner to argue that passing of the Accounts examination was not mandatory and by subsequently passing the same examination it must be deemed that he was eligible or had become eligible for the time bound promotion on completing 10 years of service. In this regard learned Counsel for the petitioner placed reliance on an order dated 14.12.1985 (Annexure-5) passed by a learned Single Judge Bench of this Court in CWJC No. 1824/1995(R) (Uday Kant Jha and Ors v. State of Bihar and Ors.) regarding passing of Accounts examination not being mandatory for the purpose of time bound promotion, but it cannot stand in the face of the law laid down by the Full Bench.

17. So far as the plea that the matter stood concluded between the parties in 1995 and the matter would not be covered by the subsequent decision of the Full Bench in the year 2000 is concerned, it must be held that any declaration of law by this Court must be applied to all cases which have not acquired finality. Except for the bar of reopening such closed cases, the law must be applied to all matters which are still under consideration. In any case the impugned order as contained in Annexure-1 was passed in 1999 prior to the decision of the Full Bench and the same had been passed during the course of approval/confirmation by the competent authority regarding grant of time bound promotion and thus it cannot be said that the matter stood concluded between the parties in 1995 itself and it was not open to the authorities to make any change in the same order in 1999. For the same reason there would be no requirement to issue notice to the petitioner since he was put to notice of the fact that the first time bound promotion granted to him in the year 1995 was subject to the confirmation/approval of the higher authority in terms of the various decisions of the State Government Communicated from time to time referred to above. The order itself made it clear that if the time bound promotion was found to be contrary to rules then the same would be withdrawn and he would be reverted to his old pay scale and the excess amount paid would be recovered.

18. The further plea of the petitioner on the basis of Annexure-E, the circular dated 12.8.1992, also does not appear to be acceptable in view of the provisions contained therein. The said circular had been issued on the basis of an

understanding reached by the State Government with the Employees Union and it applied to such cases where vacant posts for regular promotion were available but that many number of clerks who had passed the Account examination were not there in the concerned department and in such circumstances it was laid down that those vacant promotional posts could be filled up by ad hoc promotion of such clerks who had not passed the Accounts examination subject to the condition that they shall pass the first Accounts examination after the issuance of the said circular. It was further made clear in para (iv) and (v) of the said circular that the said benefit was a one-time measure and applies to the clerks concerned passing the first examination held at the departmental level after the circular dated 12.8.1992 and that was not meant to (sic) continuous process. Thus, the said circular of 1992 cannot be applied to all future transactions with respect to the grant of promotion and it is doubtful whether it can be applied to any time bound promotion, since it was meant to cater to a specific situation arising on the basis of an agreement entered into between the State Government and the employees Union. Thus, no benefit can be given to the petitioner by reading Clause (iv) of the said circular along with para 11 (ii) and (vi) of the resolution dated 30.12.1981.

19. So far as the plea, that the resolution dated 30.12.1981 itself does not mention the fact that passing of the Accounts examination for grant of time bound promotion is essential, is concerned, the same is clear from the stipulation that the employee must be otherwise found fit for promotion, which would include the passing of the Accounts examination.

20. Lastly, so far as the issue that recovery cannot be made since there was no fraud or misrepresentation by the petitioner, is concerned, the same has no relevance in the facts and circumstances relating to grant of first time bound promotion with specific stipulation that if the same is found to have been made contrary to rules then the employee would be reverted to his earlier pay scale and recovery from salary would be made. Since the said stipulation was contained in the order granting time bound promotion, coupled with the circular of the State Government dealing with the said matter, it does not appear that any benefit could be derived by the petitioner on the basis of the said principle that no recovery can be made if there is no fraud or misrepresentation on the part of the employee. The

recovery in fact has been made in the process of granting time bound promotion, which process does not get concluded only by passing the order of provisional time bound promotion by the immediate superior officer out only after the final confirmation has been obtained from the higher authorities, in this case the Divisional Commissioner. Since the said confirmation was not obtained, it was open to the respondents to cancel the time bound promotion from the earlier date and grant it from the date on which the petitioner had appeared in the departmental Accounts examination and which he successful cleared.

21. In view of the aforesaid facts and circumstances and the decisions or the points involved, there is no merit in the writ application which is accordingly dismissed. But, in the facts and circumstances of the case, there shall be no order as to costs.

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