

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.7277 of 2020

1. Shiv Shankar Prasad male aged about 45 years Son of Nand Kishore Ram, Resident of Mohalla-New Shital Tola Ara, P.O. Ara, P.S. Nawada, District-Bhojpur at Ara, presently working as Correspondence Clerk, Road Division, Road Construction Department, Shahabad.
2. Sri Bhagwan Singh @ Bhagwan Singh male aged about 47 years, Son of Late Dhanraj Singh, Resident of Village-Garura, P.O. and P.S. Sanjhauli, District-Rohtas at Sasaram, presently working as Correspondence Clerk, Road Division, Road Construction Department, Buxar.
3. Sunil Kumar Rai male aged about 57 years, Son of Late Vishwanath Rai, Resident of Village and P.O. Pandey Patti, P.S. Buxar Muffasil, District Buxar, presently working as Correspondence Clerk, Road Division, Road Construction Department, Buxar.
4. Shashi Bhushan Pandey male, aged about 51 years, Son of Late Kuldeep Pandey, Resident of Mohalla-Uma Nagar Chandwa, P.O. Chandwa, P.S. Nawada, District Bhojpur at Ara, presently working as Correspondence Clerk, Bhojpur Road Circle, Road Construction Department, Ara.

... .. **Petitioners**

Versus

1. The State of Bihar through the Chief Secretary Government of Bihar, Patna.
2. The Principal Secretary, Road Construction Department, Government of Bihar, Patna.
3. The Engineer-in-Chief-cum-Additional Secretary-cum-Special Secretary, Road Construction Department, Government of Bihar, Patna.
4. The Chief Engineer, South Bihar Road Construction Department, Patna.
5. The Superintending Engineer, Bhojpur Road Circle, Road Construction Department, Ara.
6. The Executive Engineer, Road Division, Road Construction Department, Shahabad.
7. The Executive Engineer, Road Division, Road Construction Department, Buxar.

... .. **Respondents**

Appearance :

For the Petitioners : Mr.Shashi Bhushan Kumar Manglam, Advocate
For the Respondents no.2 to 7 : Mr.R.K.Chandram, AC to GP 19

CORAM: HONOURABLE MR. JUSTICE PRABHAT KUMAR SINGH
ORAL JUDGMENT

Date : 22-02-2021



At the outset, learned counsel for the petitioners prays for and is allowed to make correction in paragraph 1(III) of the prayer portion.

Heard learned counsel for the petitioners and the State.

Writ petition has been filed for the following reliefs:-

(I) For issuance of an appropriate writ in the nature of Certiorari for quashing the order dated 19.2.2020 issued under the signature of the respondent no.5 and contained in his memo no. 187 dated 19.2.2020, whereby and whereunder he has been pleased to modify the date for grant of benefits of financial progression to the petitioners and has also directed for recovery on the ground that earlier the petitioners were granted the benefits of financial progression with effect from a date when they had not cleared their accounts examination.

(II) For issuance of an appropriate writ in the nature of Certiorari for quashing the order dated 12.5.2020 issued under the signature of the respondent no.7 and contained in his letter no. 644 dated 12.5.2020 whereby and whereunder the respondent no.7 has been pleased to direct for withholding the salary of writ petitioners until their fixation of salary in terms of the order passed by the respondent no.5 and contained in his letter no. 187 dated 19.2.2020.

(III) For a declaration that if no Departmental Examination was conducted by the Nodal Department, i.e., Water Resources Department



for the Clerks of the Works Department of the State from 1996 to 2004, the respondents cannot deny the benefit of financial progression to the petitioners on the ground that the petitioners had not passed the accounts examination when they were otherwise entitled for such grant in view of the financial progression scheme.

(IV) For issuance of an appropriate writ in the nature of Mandamus, commanding and directing the respondent authorities for grant of benefits of first ACP with effect from the date when the petitioners had put 12 years of their services after their first joining on the ground that if they had not cleared their departmental examination for no fault on their party, they cannot be denied the benefits of the first ACP only on the ground that they had not cleared their accounts examination.

(V) For issuance of any other appropriate writ/writs, order/orders, direction/directions for which the writ petitioners are found entitled under the facts and circumstances of the case.

Petitioners have also filed Interlocutory Application No.1 of 2020 seeking some additional reliefs made therein bringing on record photo stat copies of the representation dated 10.6.2020 (Annexure 9), Memo No. 879 dated 29.6.2020 (Annexure 10) and Memo No. 880 dated 29.6.2020 (Annexure 11), which have been issued by the respondent Executive Engineer directing for recovery of the excess amount allegedly drawn by petitioner



no.2 and petitioner no.3 respectively, because of illegal grant of ACP benefits before the due date.

It is submitted by learned counsel for the petitioners that initially all the four petitioners were appointed as Lower Division Clerk (Correspondence Clerk) in the Road Construction Department, Government of Bihar, Patna in 1994, 1992, 1990 & 1990 respectively. In the year, 2003, the State Government vide Notification No. 4785 dated 25.6.2003 came out with a new promotion rule, namely, 'Bihar State Employees Service Condition (Assured Career Progression Scheme) Rules, 2003 (herein after referred to as 'the ACP Rules, 2003'), which was made effective from 9.8.1999. A copy of ACP Rules, 2003 is contained in Annexure P-1 to the writ petition. As per the ACP Rules, 2003, every Government servant of Group B, C and D, who have not been granted any financial progression within 12 years of their appointment were held entitled for grant of benefits of the first ACP on completion of 12 years of services and the benefits of second ACP on completion of 24 years of service. Said ACP Rules, 2003 was modified by 'Modified Assured Career Progression Rules, 2010' (herein after referred to as 'the MACP Rules, 2010). A copy of MACP Rules, 2010 is contained in Annexure P-2 to the writ petition. MACP Rules, 2010 provides



three assured financial progressions to the employees of the State Government, first by the end of the 10 year of service, the second by the end of 20 years of service and the third after completing 30 years of service.

Learned counsel for the petitioners submits that petitioners were required to pass the departmental examination conducted by the Nodal Department, i.e., the Board of Revenue, Bihar, Patna for grant of benefits of time bound promotion, but since the Board of Revenue did not conduct the departmental examination in between 20.1.1996 to 20.3.2004, petitioners, in spite of being eligible in length of service, got no opportunity to appear and clear the said departmental examination. To buttress the submission, petitioners have placed on record a letter of the Deputy Secretary cum Public Information Officer, Board of Revenue, Bihar, Patna contained in Letter No. 868 dated 17.7.2014 (Annexure P-3) to the effect that no departmental examination was conducted by the Board of Revenue from 29.1.1996 to 20.3.2004. Learned counsel submits that though the petitioners were entitled for grant of benefits of first ACP with effect from the date they had completed 12 years of service but arbitrarily respondents did not grant them benefits of the ACP. Petitioner no.2 was granted the benefits of first MACP with effect from 3.10.2012, whereas



petitioner no.3 was granted the benefits of first MACP with effect from 1.1.2011. Thus, they were granted the benefits of MACP only pursuant to passing the departmental examination.

It is also the case of the petitioners that instead of revising the earlier orders shifting the date of grant of benefits of the first ACP/MACP to the petitioners, respondent no.5 passed impugned order, contained in Memo no. 187 dated 19.2.2020 (Annexure P-5) directing for recovery of excess payment made to the petitioners. Learned counsel submits that the action of the respondents is arbitrary as it was the duty of the Board of Revenue to conduct the mandatory departmental examination in time and for laches and negligence on their part, petitioners cannot be made to suffer if no examination was conducted during the period 1996 to 2004. Employees cannot be blamed for not passing the examination.

Learned counsel for the petitioners submits that similar issue had been considered and decided by a co-ordinate Bench of this Court vide judgment dated 4th July, 2016 passed in C.W.J.C.No. 6867 of 2016 (Pranav Kant Babban Vs. the State of Bihar and others) which was upheld by the Hon'ble Division Bench vide judgment dated 11.12.2017, passed in LPA No. 1695 of 2016.



Learned counsel for the State controverts the submissions of the petitioners. He submits that the orders impugned are based on the ACP/MACP Rules, and instant writ petition, is unfounded, misleading and without any basis as such the same is fit to be rejected. With respect to the case of **Pranav Kant Babban (supra)**, learned counsel submits that order passed in the said writ petition has been obtained on fraud, misleading statements and suppression of facts. He submits that Accounts examination for Works Department was conducted between 1996 to 2004, therefore the statement that no departmental examination had been conducted during the said period, is false and misleading. He submits that when the matter came to the knowledge of the respondents after passing LPA order, State has filed Civil Review No. 488 2018. However, the same has stood dismissed vide order dated 30.1.2019 for non-compliance of peremptory order, as such, restoration petition bearing MJC No. 569 of 2019 has already been filed which is pending for consideration.

On consideration of submissions of learned counsel for the parties and on going through the materials on record, it is not in dispute that due to non conducting of the departmental examination by the competent authority for almost eight years between 1996 to 2004, petitioners could not appear and clear the



departmental examination, though they were eligible in terms of MACP Rules, 2010. Thus, the petitioners cannot be blamed for non-passing of the departmental examination. It is also the submission of the petitioners that they did not play any fraud or misrepresentation in award of the benefit of ACP. It was conscious decision taken by the respondents and benefit was granted by a common notification to large number of persons as contained in Memo no. 272 dated 18.3.2015 and Memo no. 183 dated 1.2.2012 (Annexures P-4 and P-4/1 to the writ petition). After so many years, the decision to not only change the date for grant of such benefit but even effect recovery is irrational and unjustified. Reference, in this regard, can be made to the decision in the case of **State of Punjab and others v. Rafiq Masih (White Washer) and others, reported in (2015) 4 SCC 334**. In matters of such recovery, the Hon'ble Supreme Court has concluded its opinion in paragraph 18 as under :

“18. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be



impermissible in law: (i) Recovery from the employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) Recovery from the retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover.”

With the law being laid down in unambiguous terms as above, there will be no occasion to permit the respondents to effect any recovery against the petitioner by virtue of impugned order. In view of the submissions of rival parties, the law laid down by the Hon'ble Apex Court in case of **Rafiq Masih (supra)** as well as the judgment of the Hon'ble Division Bench dated 11.12.2017, passed in LPA No. 1695 of 2016, this Court is of the view that the impugned orders dated 19.2.2020 and 12.5.2020 (Annexures P-5



& P-6), as well as consequential orders dated 29.6.2020, passed by respondent no.7, contained in Annexures P-10 and P-11 to the I.A.No.1/2020 respectively, cannot be upheld and are, accordingly, set aside.

Respondents shall refund the amount of recovery to the petitioners within eight weeks from the date of receipt/production of a copy of this order.

Needless to state that the petitioners are at liberty to make representation before the respondents for redressal of their remaining grievance, if any, which would be disposed of in accordance with law.

Writ petition stands allowed with the aforesaid observations and directions.

(Prabhat Kumar Singh, J)

Shashi

AFR/NAFR	A F R
CAV DATE	NA
Uploading Date	24.02.2021.
Transmission Date	NA

