

KUSHESWAR NATH PANDEY

v.

STATE OF BIHAR & ORS.  
(Civil Appeal No. 6658 of 2013)

AUGUST 5, 2013

[H.L. GOKHALE AND J. CHELAMESWAR, JJ.]

*Service Law - Promotion - Time bound promotion - Granted to appellant in 1998 - Promotion subsequently found to be irregular as appellant had not passed promotional examination prior thereto - Orders issued in 2009 for cancellation of the promotion - Justification - Held: On facts, not justified - The appellant was not at all in any way at fault - It was a time bound promotion which was given to him and some eleven years thereafter, the Government Authorities woke up - Moreover, appellant had passed the required examination subsequently in 2007 much before the cancellation orders were issued in 2009 - Approach of the Government authorities was totally unjustified.*

**The appellant was in service under the State of Bihar. An order was issued by the Finance Department on 13.11.1998 granting him time bound promotion w.e.f. 1st September, 1991. Subsequently it was found that this promotion was irregular for not passing a promotional examination prior thereto and thereafter orders were issued on 16.9.2009 and 5.10.2009 for cancelling this time bound promotion. Aggrieved, the appellant filed writ petition. A Single Judge of the High Court allowed that writ petition holding that the promotion granted to the appellant eleven years earlier was not because of any fault or fraudulent act on the part of the appellant, and therefore could not be cancelled. The respondents filed appeal which was allowed by the Division Bench.**

A In the instant appeal, the appellant pointed out that there was no fraud or misrepresentation on the part of the appellant; that the appellant was given a time bound promotion by the concerned Department and if at all the examination was required to be passed, he had passed B it subsequently in 2007 much before the cancellation orders were issued in 2009.

Allowing the appeal, the Court

C HELD: 1.1. The facts of the present case are clearly covered under the two judgments of this Court in the cases of Bihar State Electricity Board and Purushottam Lal Das wherein it has been held that recovery can be permitted only in such cases where the employee concerned is guilty of producing forged certificate for the D appointment or got the benefit due to misrepresentation. [Paras 7, 10] [596-G-H; 597-A, E]

E 1.2. The appellant was not at all in any way at fault. It was a time bound promotion which was given to him and some eleven years thereafter, the Authorities of the Bihar Government woke up and according to them the time bound promotion was wrongly given and then the relevant rules are being relied upon and that too after the appellant had passed the required examination. This F approach was totally unjustified. The writ petition filed by the appellant will stand decreed as granted by the Single Judge. [Paras 10, 11] [597-E-G]

G *Bihar State Electricity Board and Another vs. Bijay Bhadur and Another* (2000) 10 SCC 99 and *Purushottam Lal Das and Others vs. State of Bihar and Others* (2006) 11 SCC 492 - held applicable.

*Chandi Prasad Uniyal and Others vs. State of Uttrakhand and Others*, (2012) 8 SCC 417 - cited.

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**Case Law Reference:**

<b>(2000) 10 SCC 99</b>	<b>held applicable</b>	<b>Para 7</b>
<b>(2006) 11 SCC 492</b>	<b>held applicable</b>	<b>Para 7</b>
<b>(2012) 8 SCC 417</b>	<b>cited</b>	<b>Para 9</b>

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6658 of 2013.

From the Judgment and Order dated 19.09.2012 of the High Court of Judicature at Patna in LPA No. 266 of 2011.

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Nagendra Rai, Abhishek Kr. Singh, Shantanu Sagar, Shashank Singh, Amrita Rai (for Chandra Prakash) for the Appellant.

Mohan Jain ASG, Ardhendumauli Kumar Prasad, D.K. Thakur, Shashank Bajpai, M.S. Vishnu Sankar, D.S. Mahra for the Respondents.

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The Judgment of the Court was delivered by

**H.L. GOKHALE, J.** 1. Heard Mr. Nagender Rai, learned senior counsel appearing for the appellant, Mr. Arijit Prasad, learned counsel for the State of Bihar and Mr. Mohan Jain, learned Additional Solicitor General for the respondent no.5.

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2. Leave granted.

3. This appeal seeks to challenge the judgment and order rendered by the Division Bench of the Patna High Court in L.P.A. No. 266 of 2011 dated 19.9.2012 whereby the Division Bench reversed the judgment of the Learned Single Judge of that High Court in case No. 4369 of 2010.

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4. The facts leading to this case are as under:

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The appellant herein joined the service under the State of Bihar on 5th May, 1979 and on 29th August, 1981, he was promoted as a Correspondence Clerk. An order was subsequently issued by the Finance Department on 13.11.1998 granting him promotion with effect from 1st September, 1991

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A which was a time bound promotion. Subsequently it was found that this promotion was irregular for not passing a promotional examination prior thereto and therefore the orders were issued on 16.9.2009 and 5.10.2009 for canceling this time bound promotion.

B 5. Being aggrieved by that order, the appellant filed the above referred writ petition No. 4369/2010. Learned Single Judge of the High Court who heard the matter allowed that writ petition. He held that the time bound promotion granted to the appellant eleven years earlier was not because of any fault or fraudulent act on the part of the appellant, and therefore could not be cancelled. The Learned Single Judge allowed that writ petition and set aside the order of cancelling his promotion. It is also relevant to note that the appellant had passed the required examination in the meantime in 2007 and had retired on 31st May, 2009.

D 6. Being aggrieved by that order, respondents herein, filed an appeal which has been allowed by the Division Bench. The Division Bench found that the promotion was not approved by the competent authority and passing of the Accounts examination was condition precedent and therefore the decision of the Government to cancel his promotion was a proper one. Being aggrieved by this judgment, the present special leave petition has been filed.

E 7. Mr. Rai, learned senior counsel for the appellant points out that there was no fraud or misrepresentation on the part of the appellant. The appellant was given a time bound promotion by the concerned Department. If at all the examination was required to be passed, he had passed it subsequently in 2007 much before the cancellation orders were issued in 2009. Mr. Rai relied upon two judgments of this Court in case of *Bihar State Electricity Board and Another vs. Bijay Bhadur and Another* reported in (2000) 10 SCC 99 and *Purushottam Lal Das and Others vs. State of Bihar and Others* reported in (2006) 11 SCC 492 wherein it has been held that recovery can be permitted only in such cases where the employee

concerned is guilty of producing forged certificate for the appointment or got the benefit due to misrepresentation. A

8. The learned counsel for the State of Bihar submitted that under the relevant rules passing of this examination was necessary. He referred us to the counter affidavit of the respondent No.1 wherein a plea has been taken that under the particular Government Circular dated 26.12.1985 the amounts in excess are permitted to be recovered. He relied upon clause (j) of the Government Circular dated 1st April, 1980 to the same effect. B

9. Mr. Jain, learned Additional Solicitor General appearing for the Accountant General drew our attention to another judgment of this Court in *Chandi Prasad Uniyal and Others vs. State of Uttrakhand and Others* reported in (2012) 8 SCC 417 and particularly paragraph 14 thereof which states that there could be situations where both the payer and the payee could be at fault and where mistake is mutual then in that case such amounts could be recovered. C D

10. In our view, the facts of the present case are clearly covered under the two judgments referred to and relied upon by Mr. Rai. The appellant was not at all in any way at fault. It was a time bound promotion which was given to him and some eleven years thereafter, the Authorities of the Bihar Government woke up and according to them the time bound promotion was wrongly given and then the relevant rules are being relied upon and that too after the appellant had passed the required examination. E F

11. In our view, this approach was totally unjustified. Learned Single Judge was right in the order that he has passed. There was no reason for the Division Bench to interfere. The appeal is therefore allowed. The judgment of the Division Bench is set aside. The writ petition filed by the appellant will stand decreed as granted by the Learned Single Judge. The parties will bear their own costs. G

B.B.B. Appeal allowed. H