

**(2011) 05 PAT CK 0119**

**Patna High Court**

**Case No:** CWJC No. 13354 of 2008

Ram Saran Singh

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

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**Date of Decision:** May 3, 2011

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### **Judgement**

@JUDGMENTTAG-ORDER

Sheema Ali Khan, J.

The petitioner was appointed as a Cleaner in the Road Construction Department (Mechanical Division). Subsequently the petitioner was promoted to the post of Plant Operator on 7.2.1981. It is the case of the petitioner that the post of Plant Operator was converted into the post of Batching Plant Operator by a decision of the Government taken on 6.9.1995 which was communicated vide letter No. 1281, dated 29.8.1996. By Annexure-2, the Executive Engineer, Road Construction Department, Hazaribagh issued an order, that since the Government is considering the conversion of the post of Plant Operator to Batching Plant Operator, the petitioner is being promoted to the post of Batching Plant Operator with effect from 7.2.1981. As a consequence of Annexure-2, the petitioner began to receive the emoluments attached to the post of Batching Plant Operator. Eventually vide Annexure-5, the matter was examined and it came to the knowledge of the respondents that the petitioner was receiving the salary etc. attached to the post of Batching Plant Operator, although the Government had not taken a decision to upgrade the salary of Batching Plant Operator, when it took a decision to convert/amalgamate the post of Plant Operator to Batching Plant. On the aforesaid premise Annexures-5 and 9 were issued after the retirement of the petitioner asking him to refund the difference of salary which has been received by him during his service period. This order has been challenged before this court.

2. Annexure-5 has been issued by the Chief Engineer, Road Construction Department which clarifies that the post of Plant Operator was converted to the post of Batching Plant Operator on 29.8.1996. It also clarifies that the pay scale was

not enhanced, it was fixed at Rs. 1,200/- to 1500/-. Therefore, it has been held that not only was the petitioner's promotion in 1981 illegal, but the increase in salary was unwarranted. The money that is to be recovered is to the tune of Rs. 6,40,884/-.

3. Before proceeding in the matter I would like to refer to Annexure-10, which is an order of this court passed in CWJC No. 2094/2010 wherein the court has quashed the order by which one Ram Prasad Singh had challenged the order of recovery, dated 9.11.2009. Annexure-10 has been passed on the premise that the post of Plant Operator was not in existence and as such Ram Prasad Singh could not have been appointed/promoted as Batching Plant Operator. This court rejected the aforesaid plea of the State because it was not correct. The case of the State in the present writ petition is quite the contrary, which would be apparent from the facts stated hereinafter.

4. In the case of Ram Prasad Singh the facts have not been brought to the notice of the court. It would appear from the pleadings in the present case that the State does not take a stand that the post of Plant Operator was not in existence, rather, the stand is that the order for converting the post of a Plant Operator to the post of Batching Plant Operator was issued in 1996. Thus, the Executive Engineer could not have promoted the petitioner as Batching Plant Operator in 1981 on the ground that it was under consideration of the Government to convert the post of Plant Operator to Batching Plant Operator.

5. A stand has also been taken on behalf of the respondents that the Executive Engineer could not have promoted the petitioner from the post of Plant Operator to Batching Plant Operator within a period of one year, even if it is to be presumed that the petitioner was working as a Batching Plant Operator on the basis of promotion and not on the basis of conversion of the post.

6. The first counter affidavit filed on behalf of the State indicates that before the conversion took place in 1996, there was only one sanctioned post of Batching Plant Operator in the Mechanical Division. In this context it has been stated that one Basudeo Singh has filed CWJC No. 5555 of 2006 claiming promotion to the post, on examination of the facts, the respondents promoted Basudeo Singh.

7. A supplementary counter affidavit has been filed which is in direct conflict with the earlier stand. Apparently the notification issued vide memo. No. 866, dated 6.9.1995 which indicates certain category-1 Operator of Mechanical Division, who were getting equivalent pay scale to Batch Operators would be treated to be Batch Operators. Forty five posts of Category-1 operators were converted to the Batch Operators (Annexure-D). The notification specifies that the conversion of the said post would not burden the State with financial liability. The list of persons who were given the said upgradation of post is annexed with annexure "D". The names of the petitioner and Chandrabansh Giri (petitioner of CWJC No. 16866/2008) or for that matter Ram Prasad Singh (petitioner of CWJC No. 2094/2010, disposed of on

10.8.2010) were not in the list. It is said that the petitioner was not a operator in category-1, and he was not receiving an equivalent scale and as such he could not be promoted. A clarification was issued vide office order No. 1281, dated 29.8.1986 (Annexure "E") which also indicates that the pay scale shall remain in the scale of Rs. 1200-1800/-; to the person who were given the designation of Batching Plant Operators. On the basis of the aforesaid facts, it is submitted that the petitioner is not entitled to the higher scale of Batching Plant Operator.

8. The facts which have emerged in this case are that after working as a work charge employee since 1972, the petitioner was appointed by a duly constituted committee as Plant Operator on 7.2.1981 (Annexure-1). There appears to be no illegality in this order. The State objects to issuance of memo No. 801, dated 21.8.1988 (Annexure-2) by which the petitioner was promoted to the post of Batching Plant Operator with effect from 7.2.1981, in anticipation of a decision of the State to convert the post to Batching Operator to Batching Plant Operator. The Executive Engineer could not have granted the said promotion for the reasons mentioned at Annexure-2 i.e. in anticipation of the decision of the State. The decision for conversion came in 1996. It has thus been argued that the decision of the State asking the petitioner to refund the amount is justified.

9. Counsel for the petitioner in support of his case submits that he was granted the promotion and had worked on the post for twenty seven years. After his retirement the respondents are seeking to recover the salary paid to him. It is also submitted that several persons similarly situated to the petitioner who have received monetary benefits of a higher scale have not been disturbed nor there is any order of recovery passed in their case. As such the petitioner cannot be singled out for recovery of the amount, specially in view of the fact that the petitioner was not in any way instrumental in getting the benefits of promotion or higher salary. He has not made any representation nor has he made a misrepresentation; as such this court should quash the order contained in Annexure-9 seeking to recover the excess amount paid to the petitioner.

10. The law with regard to recovery of monetary benefits paid to an employee in cases of his entitlement envisages that it should normally not be recovered after a lapse of long time, especially if the employee has retired. In the case of [Bihar State Electricity Board and Others Vs. Madan Mohan Prasad and Others](#), the court laid down exceptions to the aforesaid rule, namely, if the order granting the monetary benefit itself stipulates that the same is liable to be recovered if found erroneous at a late stage or is subject to the approval by authorities, then recovery is justified. The second exception which enumerates interference is when such a monetary benefit has flowed to the employee on account of fraud, misrepresentation or the like attributed to him. Counsel for the petitioner relies on the case of Syed Abdul Qadir vs. State of Bihar, 2009 (2) PLJR (SC) 74, to substantiate his claim that no recovery can be made at this belated stage. The Patna High Court had dismissed the

letters patent appeal filed by the appellant challenging the fixation of pay scale on promotion of Assistant Teacher of the Government Taken Over Schools. Shorn of the facts it would suffice to say that the single Judge of the High Court which held that F.R. 22(1)(a)(1) and F.R. 22(1)(a)(1) would be applicable in fixation of pay scale of teachers of nationalized schools and that the office order, dated 16.11.2000 would apply prospectively and not retrospectively, quashed the office order whereby direction for recovery of amount paid in excess was given. The petitioners appeal was dismissed and the appeal of the State of Bihar was allowed. The State of Bihar had only challenged part of the order holding that the office's order would apply prospectively before the Apex Court. The Supreme Court held as under:--

But, in the peculiar facts and circumstances of this case and having regard to the fact that the State Government did not move this court against the decision of the Division Bench whereby letters patent appeal preferred by the State Government challenging judgment of the learned single Judge holding that Resolution dated 20.2.1993 amending sub clause (ii) of Clause 13 of the resolution would apply to the class of teachers referred to in the said sub-clause prospectively i.e. w.e.f. the date of issuance of resolution dated 20.2.1993, was dismissed, we hold that F.R. 22(1)(a)(2) shall apply to the teachers of Secondary Schools also w.e.f. 20.2.1993.

11. The decision of the Apex Court was based on the fact that the Finance Department had, in its affidavit admitted that it was a bona fide mistake on their part. The excess payment was made on the basis of a wrong interpretation of the rule. As such the Apex Court allowed the appeal.

12. It is apparent from the facts stated aforesaid that the decision aforesaid would not help the petitioner in substantiating his claim. The order of the Apex Court was passed in the "peculiar facts" of the case. The case of the petitioner will fall on a different level of consideration in the facts peculiar to this case.

13. It was next argued on behalf of the petitioner that the doctrine of condonation should be applied in this case, taking into account the fact that the petitioner has worked for twenty seven years and it would be very hard on the petitioner if recovery of the entire amount is upheld by this court. The doctrine of condonation has been coined and utilized in a case where the misconduct of employee is condoned, which would be apparent from the decision referred to by counsel for the petitioner i.e. State of M.P. vs. R.N. Mishra, (1977) 7 SCC 644. It cannot come to the rescue of the petitioner in the facts of the present case.

14. In the present case it would appear that the order passed in 1988 granting the petitioner promotion or treating the petitioner as a Batching Plant Operator was obviously unwarranted. However, there is no challenge to the promotion of the petitioner as Plant Operator in 1991. Once the posts of Plant Operators were converted to the post of Batching Plant Operator, I see no justification that the petitioner and two others similarly situated to the petitioner should be deprived of

the benefits even though the notification mentions that they would not be entitled to monetary benefits. There is nothing to show that there were two scales of pay for the post of Plant Operators, as such it appears to this court that Category-I is nothing, but a nomenclature. Therefore, I feel inclined to quash that part of the order as contained in Annexures-5 and 9 which orders the recovery from the year 1996 till the date of retirement. In other words this court upholds the recovery for the period 1981 to 1996.

This writ petition is partly allowed with the aforesaid observations.