

MD. ISLAM & ORS.

A

v.

THE BIHAR STATE ELECTRICITY BOARD & ORS.

(Civil Appeal No. 5764 of 2022)

AUGUST 23, 2022

B

[DR. D. Y. CHANDRACHUD AND A. S. BOPANNA, JJ.]

Judicial Review – When not – Date of applicability of ACP Scheme – Bihar State Employees Conditions of Service (Assured Career Progression Scheme) Rules 2003 – ACP Scheme notified in 2003 by State of Bihar for its employees retrospectively w.e.f 09.08.99, adapted by Respondent No.1-Electricity Board through notification dtd. 05.04.05 – Subsequent notification issued by respondent no.1 notified that the ACP Scheme would be applicable only for the staff appointed after issuance of the earlier notification dtd. 05.04.05– Challenged by appellants-employees in 2011 inter alia seeking directions to respondent no.1 to also introduce the benefit of the ACP Scheme w.e.f 09.08.99, writ petitions dismissed – On appeal, held: Appellants were guided by service regulations of the Electricity Board – Any notification relating to service conditions issued by State of Bihar was neither ipso facto nor mutatis mutandis applicable to the employees of Electricity Board unless the same was adapted – Even if adapted, it would depend on the manner and to the extent adapted – Further, the notification issued by State of Bihar itself clarified that it shall not be applicable to the employees of public sector undertakings/autonomous institutions – Respondent No.1 is an autonomous public undertaking – Thus, mere issuance of the said notification would not create any right in favour of its employees – Appellants cannot contend that the Scheme should be applicable from the very same date on which it was made applicable to the State Govt. employees – Judicial review of the date chosen for applicability would arise only if such choice of date is malafide or with ulterior motive– Furthermore, even when notification dtd. 05.04.05 was issued, all other appellants except the appellant no.1 had retired – Though, appellant no.1 was in service upto 31.07.08, neither him nor others raised any grievance till 2011 as it was clear that the Board in its discretion had adapted the Scheme w.e.f 05.04.05 – High Court adverted to all aspects of the matter– Decision

C

D

E

F

G

H

- A of High Court does not call for interference– Electricity (Supply) Act, 1948 – s.79(C).

Dismissing the appeal, the Court

- HELD:** The fact which cannot be disputed is that even though at an earlier point in time the Electricity Board had adapted the Bihar Service Code of the State Government due to which all Service Conditions, Rules and notifications applicable to the employees of the State Government had become applicable to the employees of the respondent No.1-Electricity Board, the respondent No.1- Electricity Board had thereafter in exercise of the power conferred under Section 79 (C) of the Electricity (Supply) Act, 1948 had framed its own service regulations. The indisputable position is that, the appellants, therefore, were guided by the service regulations of respondent No.1-Electricity Board. Therefore, the notification relating to service conditions if any issued by the State of Bihar to regulate the service conditions of its employees was neither *ipso facto* nor *mutatis mutandis* applicable to the employees of the respondent No.1- Electricity Board unless the same was adapted by the respondent No.1- Electricity Board. Even if adapted, it would depend on the manner and to the extent adapted. With this position being clear, a perusal of the notification dated 25.06.2003 issued by the State of Bihar will indicate, the benefit of the same is being sought by the appellants is in relation to its applicability w.e.f 09.08.1999 as provided therein. However, the notification on the face of it indicates the category of employees to whom it would apply as also the category to which it does not apply. The notification dated 25.06.2003 itself clarifies that it shall not be applicable to the employees of public sector undertakings or autonomous institutions. The respondent No.1 is a statutory Board which is therefore an autonomous public undertaking. If that be the position, the mere issue of the notification dated 25.06.2003 by the State of Bihar would not create any right in favour of the employees of the respondent no.1-Electricity Board for the benefits provided under such notification. The notifications dated 05.04.2005 and 07.10.2005 become relevant in the matter of granting benefit of the ACP Scheme to the employees of the respondent No.1-Electricity Board since there can be no claim H

until it is adapted. A perusal of the notification dated 07.10.2005 indicates that the decision of the Board to adapt the ACP Scheme of 2003 was only for the staff appointed after the issuance of the Board's notification No.25 dated 05.04.2005. The same indicates that respondent No.1-Electricity Board did not adapt the ACP Scheme of 2003 retrospectively w.e.f 09.08.1999 as was done by the State government for its employees but had given prospective effect from the date the respondent no.1-Electricity Board had adapted the same through the notification dated 05.04.2005. The appellants, in any event, cannot contend that the Scheme should be applicable from the very same date on which it had been made applicable to the State Government employees when the respondent no.1-Electricity Board had the discretion to either adapt or not to adapt the Scheme. When the Board had decided to adapt, in such event it has also the discretion to alter the date of its applicability as against the date notified by the State Government. Any judicial review on the date chosen for applicability would arise only if such choice of date is demonstrated to be malafide or with ulterior motive. In the instant case, the date chosen is the date on which the scheme was adapted and the advantage or disadvantage thereof would befall on all employees across the board depending on which side of the fence they are as on such date. In the instant appeal, even as on the date the notification dated 05.04.2005 was issued to adapt the scheme, all except the appellant No.1 had retired from service. Though, appellant No.1 was in service upto 31.07.2008 neither the appellant No.1 nor the other appellants or the other writ petitioners had raised any grievance till the year 2011 as the position was clear that the Board in its discretion had adapted the Scheme w.e.f 05.04.2005. Further, as indicated in the counter-affidavit filed by the respondent No.1- Electricity Board, the amended Rules 2006 had thereafter been brought to amend certain provisions of the ACP Scheme of 2003 which ceased to exist after 31.12.2008 with the adaption of the modified ACP Scheme of 2010 w.e.f 01.01.2009 with certain modifications. The grievance put forth by the appellants or the other writ petitioners before the High Court was rightly not accepted. The High Court adverted to all aspects of the matter and has thereafter arrived at the conclusion in accordance with law which does not call for interference.[Paras 9-15][63-B-E; 64-A-C; 65-A-G; 66-A] A
B
C
D
E
F
G
H

- A *Union of India and Another v. S. Dharmalingam (1994)*
1 SCC 179 : [1993] 3 Suppl. SCR 446 – referred to.

Case Law Reference

- [1993] 3 Suppl. SCR 446 referred to Para 7
B CIVIL APPELLATE JURISDICTION: Civil Appeal No. 5764
of 2022.

From the Judgment and Orders dated 18.12.2018 of the High Court of Judicature at Patna in Letters Patent Appeal No. 342 of 2018.

- C Amit Pawan, Anand Nandan, Hassan Zubair Waris, Suchit Singh
Rawat, Ms. Shivangi, Aakarsh, Advs. for the Appellants.

Navin Prakash, Abhishek Vikas, Raj Kishor Choudhary, Pranab Prakash, Advs. for the Respondents.

The Judgment of the Court was delivered by

- D **A. S. BOPANNA, J.**

- E 1. The appellants are before this Court claiming to be aggrieved by the judgment dated 18.12.2018 passed by the Division Bench, High Court of Judicature at Patna in LPA No.342/2018. Through the said judgment, the Division Bench has dismissed the appeal filed by the appellants herein while upholding the judgment dated 09.01.2018 passed by the learned Single Judge of that Court, in Civil Writ Jurisdiction Case No.13837/2011. The learned Single Judge had dismissed the writ petition along with the analogous petitions which were considered and disposed of by a common judgment.

- F 2. The appellant No.1 was an employee who retired from the service of respondent No.1 – the Bihar State Electricity Board on 31.07.2008. The appellants No.10 and 11 are the spouse of the deceased employees. The spouse of the appellant No.10, 11 and the other appellants retired on 31.01.2005. The appellants, through their writ petitions filed in the year 2011 had sought for issuance of directions to respondent No.1-

- G Electricity Board to introduce the benefit of the Assured Career Progression Scheme ('ACP' for short) with effect from 09.08.1999 and as a consequence thereof to pay all monetary benefits. The said relief was prayed to be granted by quashing the resolution no.8165 dated 22.09.2005 and the notification dated 07.10.2005 issued by the respondent H No.1 Electricity Board.

3. The brief facts leading to the case is that the appellants were appointed in the respondent No.1-Electricity Board as Junior Engineers/ Overseers over a period of time and were subsequently promoted to the post of Assistant Engineers. As noted, the petitioners before the learned Single Judge had retired on attaining the age of superannuation on different dates between 31.12.2000 to 31.01.2005, and insofar as appellants herein, except for appellant No.1 who retired on 31.07.2008, all others had retired prior to 31.01.2005. When this was the position, the Government of Bihar through the Finance Department notified on 25.06.2003, the Bihar State Employees Conditions of Service (Assured Career Progression Scheme) Rules 2003, ('ACP Scheme' for short). The same was introduced by the State of Bihar for its employees on 25.06.2003 but the scheme provided that it shall come into force w.e.f 09.08.1999. The notification had specified that the scheme shall not be applicable to the teachers of Nationalised Schools and employees of the public undertakings or autonomous institutions, assisted partially or fully, by the State Government. Thus, the scheme, by itself was not applicable to the respondent No.1 - Electricity Board until they chose to adapt the same. It is in that view, the respondent No.1 - Electricity Board through the notification dated 05.04.2005 adapted the ACP Scheme of 2003. Subsequent thereto, a notification dated 07.10.2005 was issued, notifying that the said ACP Scheme of 2003 would be applicable only for the staff appointed after the issuance of the earlier notification dated 05.04.2005. This was with a view to clarify that the scheme though adapted was not w.e.f 09.08.1999 as was in the case of Government employees.

4. Though, the initial notification dated 05.04.2005 and the subsequent notification clarifying the date of its applicability were notified on 07.10.2005, as on such date, insofar as the appellants herein are concerned, all the other appellants except appellant No.1 had retired and even though appellant No.1 was in service and had retired on 31.07.2008, they did not make any grievance with regard to the same until the year 2011 when the writ petition was filed. In the writ petition, the respondents were notified and respondent No.1- Electricity Board had filed a detailed objection explaining its stand on the applicability of the ACP Scheme of 2003 w.e.f 05.04.2005. The learned Single Judge having adverted to the rival contentions, had noted that the scheme would not be applicable until the respondent No.1 Electricity Board adapts the same. In that light, having noted that the adaption of the scheme was w.e.f 05.04.2005, had declined relief to the appellants. In addition, the

- A learned Single Judge had also taken into consideration the benefit that the appellants had derived under the earlier scheme which was in vogue. The fact that the appellants not having assailed the notification issued by respondent No.1-Electricity Board until they retired from the service and long thereafter was also held against the writ petitioners.
- B 5. The Division Bench of the High Court had also taken into consideration all these aspects of the matter and dismissed the appeals by upholding the order of the learned Single Judge. The appellants, therefore, being aggrieved by the concurrent view expressed by the High Court are before this Court in this appeal.
- C 6. Heard the learned counsel for the parties and perused the appeal papers.
 - 7. At the outset, it is necessary to take note that the learned Single Judge, as also the Division Bench of the High Court has referred to the fact that respondent No.1-Electricity Board had not adapted the ACP Scheme of 2003 until the notification dated 05.04.2005 was issued. By such time most of the appellants had retired, they had benefitted from the earlier scheme and as such could not avail dual benefits is also the view expressed by the High Court. The learned counsel for the appellants while assailing such a conclusion has sought to rely on the notification dated 23.03.2006 issued by the Government of Bihar, through the Finance department, produced as an additional document along with I.A. No. 115835 of 2019 to point out that the State Government while indicating that the Scheme shall come into effect from 09.08.1999 had clarified that the financial progression granted under Selection Grade/Time-Bound Promotion Scheme which came into force prior to 01.01.1996 shall not be treated to be a financial progression for the purposes of the ACP Scheme. In that regard, the learned counsel also placed reliance on the decision in the case *Union of India and Another vs. S. Dharmalingam* (1994) 1 SCC 179 wherein it is held that the earlier benefit derived would not be a bar for the subsequent entitlement and the rule cannot be held as conferring double benefit.
- G 8. Having noted the contention on the said aspect, we are of the opinion that the said issue would become relevant only if at the first instance the Court is satisfied that the ACP Scheme of 2003 is accepted to be applicable to employees of respondent No.1- Electricity Board w.e.f 09.08.1999 as was made applicable to the government servants,
- H the benefit of which is being sought by the appellants herein. Hence, it is

necessary to examine this aspect of the matter relating to the date on which the scheme will be applicable to employees of respondent No.1-Electricity Board. A

9. In that regard, the fact which cannot be disputed is that even though at an earlier point in time the Electricity Board had adapted the Bihar Service Code of the State Government due to which all Service Conditions, Rules and notifications applicable to the employees of the State Government had become applicable to the employees of the respondent No.1-Electricity Board, the respondent No.1- Electricity Board had thereafter in exercise of the power conferred under Section 79 (C) of the Electricity (Supply) Act, 1948 had framed its own service regulations. The indisputable position is that, the appellants, therefore, were guided by the service regulations of respondent No.1-Electricity Board. Therefore, the notification relating to service conditions if any issued by the State of Bihar to regulate the service conditions of its employees was neither *ipso facto* nor *mutatis mutandis* applicable to the employees of the respondent No.1-Electricity Board unless the same was adapted by the respondent No.1-Electricity Board. Even if adapted, it would depend on the manner and to the extent adapted. B

10. With this position being clear, a perusal of the notification dated 25.06.2003 issued by the State of Bihar will indicate, the benefit of the same is being sought by the appellants is in relation to its applicability w.e.f 09.08.1999 as provided therein. However, the notification on the face of it indicates the category of employees to whom it would apply as also the category to which it does not apply. The relevant portion reads as hereunder:- E

“It shall be extended to all the regular employees of Group ‘B’, ‘C’ and ‘D’ of the State Government of Bihar. This may also be made applicable, by a special order of the state Government, to holders of isolated posts of Group ‘A’. **This shall not be applicable to the teachers of nationalised schools and employees of the Public Undertakings or the autonomous institutions, assisted, partially or fully, by the State Government”** F G

(emphasis supplied)

11. A perusal of the same would indicate that, apart from the legal position relating to the applicability of its own service conditions to the H

- A employees of the respondent No.1-Electricity Board, the notification dated 25.06.2003 itself clarifies that it shall not be applicable to the employees of public sector undertakings or autonomous institutions. The undisputed position is that the respondent No.1 is a statutory Board which is therefore an autonomous public undertaking. If that be the position, the mere issue of the notification dated 25.06.2003 by the State of Bihar would not create any right in favour of the employees of the respondent no.1-Electricity Board for the benefits provided under such notification. It is in that light, the notifications dated 05.04.2005 and 07.10.2005 become relevant in the matter of granting benefit of the ACP Scheme to the employees of the respondent No.1-Electricity Board since there can be no claim until it is adapted. In that regard, a perusal of the notification dated 05.04.2005 (Annexure P3) indicates that the Committee constituted by the Board had submitted its recommendations which were considered by the Board and had thereupon taken a decision to replace the then existing system of ‘Selection Grade and Time-bound Promotion’ with ‘Assured Career Progression Scheme’. The pay-scale for the purpose of ACP Scheme was to be notified later. Though, the notification dated 05.04.2005 adapting the ACP Scheme was notified, immediately thereafter a notification dated 07.10.2005 (Annexure P4) was issued which reads as hereunder:

“BIHAR STATE ELECTRICITY BOARD, PATNA
 E (DEPARTMENT OF GENERAL ADMINISTRATION)
 NOTIFICATION

Notification XVIII/ Misc.-932/2003/108/ dated 7.10.2005

In pursuance of Board’s Resolution no. 8165 dated 22.9.2005 the Board in exercise of power conferred upon the Board under Section 79(C) of the electricity supply Act, 1948 **has decided to adapt Bihar State Employees Condition of Service (Assured Career Progression Scheme) Rules 2003 only for the staff appointed after issuance of Board’s notification No. 25 dated 5.4.2005. Board’s notification no. 25 dated 5.4.2005 stands modified to the above extent.**

G By order of the
 Bihar State Electricity Board
 Sd/-
 (Bishwanath Prasad)
 Secretary”
 (emphasis supplied)

H

12. A perusal of the notification dated 07.10.2005 indicates that the decision of the Board to adapt the ACP Scheme of 2003 was only for the staff appointed after the issuance of the Board's notification No.25 dated 05.04.2005. The same indicates that respondent No.1-Electricity Board did not adapt the ACP Scheme of 2003 retrospectively w.e.f 09.08.1999 as was done by the State government for its employees but had given prospective effect from the date the respondent no. 1-Electricity Board had adapted the same through the notification dated 05.04.2005.

A

B

C

D

E

F

G

13. If that be the position, the appellants, in any event, cannot contend that the Scheme should be applicable from the very same date on which it had been made applicable to the State Government employees when the respondent no.1-Electricity Board had the discretion to either adapt or not to adapt the Scheme. When the Board had decided to adapt, in such event it has also the discretion to alter the date of its applicability as against the date notified by the State Government. Any judicial review on the date chosen for applicability would arise only if such choice of date is demonstrated to be malafide or with ulterior motive. In the instant case, the date chosen is the date on which the scheme was adapted and the advantage or disadvantage thereof would befall on all employees across the board depending on which side of the fence they are as on such date.

14. In the instant appeal as already noted, even as on the date the notification dated 05.04.2005 was issued to adapt the scheme, all except the appellant No.1 had retired from service. Though, appellant No.1 was in service upto 31.07.2008 neither the appellant No.1 nor the other appellants or the other writ petitioners had raised any grievance till the year 2011 as the position was clear that the Board in its discretion had adapted the Scheme w.e.f 05.04.2005. Further, as indicated in the counter-affidavit filed by the respondent No.1- Electricity Board, the amended Rules 2006 had thereafter been brought to amend certain provisions of the ACP Scheme of 2003 which ceased to exist after 31.12.2008 with the adaption of the modified ACP Scheme of 2010 w.e.f 01.01.2009 with certain modifications. If all these aspects of the matter are kept in view, the grievance put forth by the appellants or the other writ petitioners before the High Court was rightly not accepted.

15. In that light, a perusal of the judgment dated 09.01.2008 passed by the learned Single Judge and the judgment dated 18.12.2008 by the

H

A Division Bench would indicate that the High Court adverted to all aspects of the matter and has thereafter arrived at the conclusion in accordance with law which does not call for interference.

16. In that view, the appeal being devoid of merit is accordingly dismissed with no order as to costs.

B 17. Pending applications, if any, shall stand disposed of.

Divya Pandey
(Assisted by : Deepak Panwar, LCRA)

Appeal dismissed.

C