

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.560 of 2014

IN

Civil Writ Jurisdiction Case No. 18012 of 2012

- =====
1. The State Of Bihar Through The Principal Secretary, Education Department, Government Of Bihar, Patna
 2. The Principal Secretary, Education Department, Government Of Bihar, Patna
 3. The Director, Secondary Education, Government Of Bihar, Vikash Bhawan, Patna
 4. The District Education Officer, Nawada

.... **Appellants**

Versus

1. Saket Bihari Sharma Son Of Late Kesho Singh Resident Of Village - Bhelwa, P.O. + P.S. - Hasua, District - Nawada, Retired Teacher Of Nehru Smarak High School, Narpur Pakaria, P.S. - Hasua, District - Nawada

.... **Respondent**

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Appearance :

For the Appellants : Mr. Anjani Kumar, AAG 6
Mr. Brisketu Sharan Pandey, Advocate
For the Respondent : Mr. Bankey Bihari Singh, Advocate
Mr. Sanjay Kumar, Advocate
Mr. Shailendra Prasad, Advocate

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**CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI
AND
HONOURABLE JUSTICE SMT. ANJANA MISHRA**

CAV JUDGMENT

(Per: HONOURABLE JUSTICE SMT. ANJANA MISHRA)

Date: 19 -02-2015

The present appeal by the State of Bihar seeks to annul and set aside the order, dated 10.01.2013, passed, in C.W.J.C. NO. 18012 of 2012, by the learned single Judge whereby the petitioner's claim, for granting 84 days of earned leave, has been allowed setting aside thereby the order of Deputy Secretary, Directorate of Secondary Education,

Government of Bihar, Patna, contained in Memo No. 174, dated 21.01.2011. By the said letter, Deputy Secretary, Directorate of Secondary Education, Government of Bihar, Patna, had rejected the claim of the writ petitioner for granting 84 days of earned leave in accordance with Rule 184 of Bihar Service Code.

2. The writ petitioner-respondent came to this Court after his superannuation claiming encashment of earned leave for 183 days, and contended that the respondents (i.e. appellants herein) had deprived him from 84 days of earned leave.

3. It was submitted, on behalf of the writ petitioner, that though the writ petitioner (i.e., sole respondent herein) had 267 days earned leave to his account, the respondents (i.e., appellants herein) had declined to accept his entitlement and permitted the benefit of only 183 days as against the 267 days of earned leave available for encashment. The representation of the writ petitioner having been declined on the ground that granting the earned leave of 84 days, as had been sought for, would amount to accord double benefit to the writ petitioner since he had already availed the allowances, attached to the said work, which he had carried out during the election and census of BPL related survey. Deputy Secretary, Directorate of Secondary

Education, Government of Bihar, Patna, in his Order No. 174, dated 20.01.2011, stated that Rule 184 of the Bihar Service Code did not apply to the facts of the present case.

4. Learned counsel for the writ petitioner-respondent herein, had taken the plea, in the writ petition, that the leave entitlement arises from Rule 184 of Bihar Service Code, which is only statutory in nature. He further submitted that Rule 184 of Bihar Service Code is relatable to Article 309 of the Constitution of India and, thus, cannot be amended or modified or, for that matter, read down by a letter of the Deputy Secretary without substantive amendment of the rule itself and since there is no amendment at hand, the case of the writ petitioner was fit to be entertained being in accordance with statutory provisions. That being so, the order, annexed as Annexure-A to the writ petition, filed on behalf of the State of Bihar, was, accordingly to the learned Counsel for the writ petitioner-respondent herein, illegal, arbitrary and not sustainable in the eyes of law.

5. The learned single Judge, upon appreciating the case of the writ petitioner, had fully agreed with the rationale adopted by the writ petitioner and by the impugned judgment has fully endorsed the same and allowed the writ petition.

6. Being aggrieved by the order passed by the learned single Judge, the respondents have preferred this

appeal on the following grounds:

(i) The learned counsel for the appellants strenuously urged that the order of the learned single judge is bad and contrary to the Rules and submits that the order is wholly misdirected inasmuch as it suffers from non-consideration of the provisions of the Bihar Education Code read along with the Bihar Service Code;

(ii) Learned counsel for the appellants has urged that though the writ petitioner had not prayed for quashing of the letter No. 174, dated 21.01.2011, which had been annexed to the counter affidavit, the learned single Judge proceeded to set aside the same, though the letter No. 174, dated 21.01.2011, constituted sum and substance of the issue to be adjudicated upon.

(iii) It is submitted, on behalf of the appellants, that the learned single judge wholly overlooked the provisions of Rule 64 and Rule 65 of Bihar Service Code. The provisions of Rule 64 and Rule 65 (a) of Bihar Service Code, being relevant, are quoted hereinbelow:

"64. *A vacation department is a department, or part of a department to which regular vacations are allowed, during which Government servant serving in the departments are permitted*

to be absent from duty.

65. (a) *the following classes of Government servants serve in vacation departments when the conditions of rule 64 are fulfilled.*

(i) *Educational officers other than administrative and inspecting officers, and their establishments.*

(ii) *Subordinate Judges, Munsifs, and the establishments of all judicial officers.*

(iii) *Members of the teaching staff of the Prince of Wales Medical College, Patna; Darbhanga Medical College; and of the Bihar Veterinary College, Patna.*

(iv) *Government servants employed in the Bihar College of Engineering, the Tirhut Technical institute, and the evening mining classes at Jharia and Sijua.*

(v) *Any other class of Government servants which the State Government, may declare to be so*

serving."

(iv) Learned counsel for the appellants contends that even though the writ petitioner/respondent herein had worked during the vacation, he had also worked during the course of election and also participated in BPL survey duties, wherein he had been paid certain allowances. In view of the fact that the writ petitioner had already availed the benefit of such allowances, he cannot deprive double benefit of earned leave too during the period he was supposed to be in vacation. Learned counsel for the appellants further contended that the writ petition cannot be guided by Rule 184 of the Bihar Service Code alone inasmuch as the Deputy Secretary, Directorate of Secondary Education, Government of Bihar, Patna, had clarified, in the Order No. 147, dated 20.01.2011, that in consultation with the Finance Department, the plea of the petitioner, with respect to Rule 184 of Bihar Service Code, cannot be accepted as it would amount to granting double benefit to the petitioner. The said Order No. 174, dated 20.01.2011, was to be implemented by all departments being vacation department. Learned counsel for the appellants further pointed out that Order No. 174, dated 20.01.2011, issued by the Deputy Secretary, Directorate of Secondary Education, Government of Bihar, was never under challenge before the writ Court and the learned single Judge had

seriously erred in setting aside the same by the order under appeal.

7. The writ petitioner/respondent herein has contested the appeal. Countering the arguments advanced by the appellants, learned counsel for the writ petitioner/respondent submitted that there was no illegality in the order passed by the learned single Judge inasmuch as there was no question of double benefit. It was contended that teachers of the schools were, in fact, functioning in vacation department as explained within the meaning of Rule 64 and 65(a) of the Bihar Service Code. It was further submitted that any work, done by the petitioner during the vacation period, has to be treated as work done on duty if it is related to performance of any Government work, it would, in turn, mean disallowing the enjoyment of the vacation period.

8. Learned counsel for the writ petitioner/respondent further submits that entitlement for the leave to be encashed arises from Rule 184 of Bihar Service Code, which is statutory in nature and these are rules framed under Article 309 of the Constitution of India and these provisions, thus, being statutory in nature, can only be amended or modified in the manner prescribed under law. It was pointed out by the writ petitioner/respondent that mere issuance of Annexure-A could not have deprived the writ

petitioner/respondent of his right and entitlement as was envisaged under Rule 184 of Bihar Service Code and any attempt do so by the appellants herein was clearly illegal, arbitrary and not sustainable in the eyes of law.

9. In order to explain the entitlement, it has been submitted on behalf of the writ petitioner/respondent that during the summer vacation and also Durga Puja vacation, the writ petitioner/respondent had performed duties under the instructions of the Head Master for about 83 days and out of this period of 83 days, for 15 days and 11 days on BPL related work. It is submitted, on behalf of the writ petitioner/respondent, that he was on election duty, he had also worked in all 57 days of the summer vacation as Incharge Head Master and, thus, he claimed leave encashment for a total period of 83 days treating the said period as earned leave. Referring to Rule 184 of the Bihar Service Code, the writ petitioner/respondent contends that Rule 184 of Bihar Service Code clearly entitles him to avail benefits as prescribed in the said rule and the department, by issuing impugned order, cannot deprive him of his benefits as envisaged under the Rule.

10. Rule 184, in Bihar Service Code, incorporated for the benefits of vacational departments, reads hereunder:

"184. *The following provisions apply to vacation departments only-*

(a) Except as otherwise expressly provided in these rules, vacation counts as duty. But for each year of duty in which a Government servant has availed himself of the vacation, the period of total leave in rules 171, 176 and 177 shall be reduced as follows :-

(i) for subordinate judges, munsifs and other staff of Civil Courts, by 15 days:

(ii) for all other Government servants, by one month.

(b) If a part only of the vacation has been taken in any year; the period to be deducted will be a fraction of fifteen days or of a month, as the case may be, equal to the proportion which the part of the vacation taken bears to the full period of the vacation.

(c) In cases of urgent necessity the periods of total leave in rules 171 and 176, as reduced by clauses (a) and (b) of this rule, may, except in the case of subordinate judges, munsifs and other staff of Civil Courts, be increased by one month for every two years of duty in a vacation department".

11. Having heard learned counsel for the appellants and learned counsel for the writ petitioner/respondent, we notice that in order to claim the

benefit of leave encashment of 183 days, the writ petitioner/respondent has clearly relied on the provisions of Rules 64 and 65 of Bihar Service Code read with Rule 184 of Bihar Service Code.

12. Learned counsel for the appellants, however, has found error in the order of the learned single Judge by referring to Memo No. 174, dated 21.10.2010, whereby the Department had categorically directed not to compute the period of election duty/ census duty of employees as earned leave and any additional benefit thereof. In the counter affidavit filed by the appellants before the writ Court, they have categorically averred that on the basis of Memo No. 174, dated 21.10.2010, the writ petitioner/respondent was not entitled to earned leave and/or any additional benefit thereof and the claim of the writ petitioner is not sustainable as the said letter does not permit double benefits of allowing an employee the benefit of leave during the period of election if he works. The reason, assigned by the State respondents (i.e., appellant herein), is that the writ petitioner/respondent's claim had already been settled by the Department after due consultation with the Finance Department and the office of the Auditor General and also after harmoniously construing various provisions of Bihar Service Code.

13. It is contended, on behalf of the appellants,

that the learned single Judge failed to appreciate the case of the respondents and even though there was no prayer for setting aside Annexure-A, the writ Court set aside the same and allowed the prayer of the writ petitioner.

14. Learned counsel for the appellant has also filed a supplementary affidavit, in the appeal, contending and clarifying that Nationalized Secondary Schools are in the category of vocational departments and due to long vacation in the school, only 14 days of earned leave is allowed, wherein other government departments, where long vacation is not allowed, the Government has allowed 11 days earned leave for every working day and by virtue of Rule 184 of Bihar Service Code, provisions have been made for all in vocational departments.

15. It may be noted here that the memo of appeal specifically avers that the writ petitioner had already been paid his post retiral dues with direction to verify and, upon verification of his service records, the State Government, having found that the writ petitioner/respondent had been paid his full salary and allowances for the election duty as well as BPL functions, decided, in the light of Annexure-A to the counter affidavit, to not provide double benefit to the writ petitioner/respondent by allowing him earned leave.

16. It is submitted, on behalf of the appellant, that

the writ petitioner/respondent having rendered service on election duty, the said period had been compensated by the casual leave made available to him in the same calendar year. This fact has, however, been denied by the writ petitioner/respondent.

17. We have given anxious consideration to the rival submissions made before us and we find that the writ petitioner/respondent had, undoubtedly, worked during the vacation period. The learned single Judge, while deciding the case of the writ petitioner, took into consideration the writ petitioner/respondent's claim in the light of the rules and the provisions of Bihar Service Code. Appellants herein do not dispute that the writ petitioner/respondent is entitled to the benefit of Rule 184. The only contention on which the appellants seek to deny the right of the writ petitioner/respondent to receive earned leave is that the Circular, bearing Memo No. 174, dated 24.01.2011, does not envisage granting of double benefit for service rendered during the vacation period on account of election duty and/or BPL related jobs. Though the appellants have raised a contention that the writ petitioner/respondent was paid allowances for the work rendered by him and had also been benefited by compensatory casual leave, while determining his retirement, there is no such averment by the appellants



before the writ court. Even in this appeal, the appellants have failed to place on record any special payments made to the writ petitioner/respondent. Moreover, the said plea having not been taken by the appellants before the writ Court, such a contention cannot be sustained at the appellate stage, when it amounts to raising a new plea of fact.

18. So far as the letter contained in Memo No. 174, dated 21.10.2010, is concerned, the said memo issued by the Deputy Secretary, Directorate of Secondary Education, Government of Bihar, Patna, is confined only to those employees, who have been benefited by grant of allowances and remuneration for the period that they have worked during the vacation. However, the said memo could not have been applied to negate the rights of the writ petitioner/respondent in the given facts and circumstances. Hence, the learned single Judge was right in holding that the memo being in contravention of Rule 184 of the Bihar Service Code, such instructions given by the Deputy Secretary, seeking to deprive the petitioner of his 83 days of earned leave, cannot be accepted. Further-more, we have also noticed that the learned single judge had only set aside the same to the extent it sought to deprive the petitioner of 84 days of earned leave.

19. Hence, we find no error in the reasoning adopted by the learned single judge so as to warrant

interference at the appellate stage. The order of the learned single Judge is hereby upheld and the appeal is thus dismissed. The appellants are hereby ordered to implement the directions issued by the learned single Judge within the period prescribed therein by the order under appeal.

(Anjana Mishra, J.)

I. A. Ansari, J. : I agree.

(I. A. Ansari, J.)

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