

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No. 6148 of 2008

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Dr. Ravi Bhushan Sharma, S/o Late Manoranjan Sharma, R/o village + P.O. - Jhuli, P.S. - Dhaka, District- East Champaran, presently R/o - 2-H/26, Bahadurpur Housing Colony, P.O. + P.S. - Kankarbagh, Town + District - Patna.

.... Petitioner

Versus

1. The State of Bihar
2. The Secretary, Department of Health, Medical Education and Family Welfare, Government of Bihar, New Secretariat, Patna.
3. The Deputy Secretary, Department of Health, Government of Bihar, New Secretariat, Patna.
4. The Under Secretary, Department of Health, Government of Bihar, New Secretariat, Patna.

.... Respondents

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Appearance :

For the Petitioner/s : Mr. Patanjali Rishi, Adv.
with Mr. Sanjeet Kumar Singh

For the Respondent/s : AC to A.A.G.-15

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CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR
ORAL JUDGMENT
Date: 26-03-2015

Heard learned counsel for the petitioner and learned
A.C. to Addl. Advocate General - 15.

The petitioner has approached this Court by filing the
present writ petition on 16-04-2008 under Article 226 of the
Constitution of India with a prayer to direct the respondents to fix
pension and other post retiral dues in favour of the petitioner and
make payment of the same alongwith suitable amount of interest.
Besides this, the petitioner has made a prayer for directing the
respondents to make payment of other incidental & consequential

benefit including arrear of salary and other dues after regularizing the period of ex-India leave from 21-07-1976 to 17-07-1982.

Short fact of the case is that the petitioner was initially appointed for six months in the Bihar Health Services temporarily as Adhoc Civil Assistant Surgeon alongwith others, vide Govt. Notification No. 1834(2)/Health dated 29-04-1971. Subsequently, the period of temporary employment was extended for one year and finally, vide Government Notification No. 8044(2)/Health dated 12-12-1972, the services of the petitioner alongwith others were regularized temporarily as Assistant Civil Surgeon-cum-Medical Officer. Thereafter, within a very short period, the petitioner sought study leave, which was approved, vide **Annexure '4'** on 19-07-1974 and the petitioner was relieved for higher study in foreign for two years. The petitioner thereafter started his study in the United Kingdom and from there, he sought extension of leave for higher studies. Finally, after return on 17-07-1982, he submitted his joining in the office of Director, Health Services, vide **Annexure '10'** to the writ petition. However, the petitioner was not permitted to join, despite the fact that the petitioner filed several representations. In the

meanwhile, he attained the age of superannuation on 31-05-2003. Since, no notice was taken on the representation/request of the petitioner, the petitioner approached this Court by filing the present writ petition.

Learned counsel for the petitioner submits that since the petitioner was never dismissed from the service, after attaining the age of superannuation, he is entitled to get all the retiral dues after regularizing the period of ex-India leave from 21-07-1976 to 17-07-1982. It has been argued that right to get pension is a Fundamental Right as contained in Part III of the Constitution of India. Learned counsel for the petitioner, in support of his submission, has placed heavy reliance on a judgment of the Apex Court, reported in 1971 (2) S.C.C. 330 (DEOKINANDAN PRASAD -Versus- THE STATE OF BIHAR AND OTHERS). He has placed reliance specifically to Paragraph 33 of the Judgment, which is quoted here-in-below:-

"33. Having due regard to the above decisions, we are of the opinion that the right of the petitioner to receive pension is property under Article 31(1) and by a mere executive order the State had no power to withhold the same. Similarly, the said claim is also property under Article 19(1)(f) and it is not saved by sub-article (5) of Article 19. Therefore, it follows that the order, dated June 12, 1968, denying the petitioner right to receive pension affects the fundamental right of the petitioner under Articles 19(1)(f) and 31(1) of the Constitution, and as such the writ petition under Article 32 is

maintainable. It may be that under the Pension Act (Act 23 of 1871) there is a bar against a civil court entertaining any suit relating to the matters mentioned therein. That does not stand in the way of writ of mandamus being issued to the State to properly consider the claim of the petitioner for payment of pension according to law."

Learned counsel for the petitioner has also placed reliance on a Division Bench judgment of this Court, reported in **1989 P.L.J.R. 485 (Smt. Prabhabati Sengupta Vs. The State of Bihar and others)** and he has placed reliance on paragraph - 5 of the judgment, which is quoted here-in-below:-

"5. Now, after five years of continuous absence from duty the State Government has to determine whether a Government servant without leave has ceased to be a Government employee. But clause (b) of that Rule 76 says that if a Government servant, after the expiry of his leave, absents from duty other than on foreign service or on account of suspension, for any period, which together with the period of leave granted to him exceeds a continuous period of five years, he shall, unless the State Government otherwise determine, be removed from the service after following the procedure laid down in the Civil Service (Classification, Control & Appeal) Rules and the Bihar & Orissa Subordinate Services (Discipline & Appeal) Rules, 1935. There is no statement in the counter affidavit that at any stage any proceeding in accordance with Civil Service (Classification, Control & Appeal) Rules and Bihar & Orissa Subordinate Services (Discipline & Appeal) Rules, 1935 was initiated against the petitioner for her removal from the service of the State Government. The effect will be that it shall be deemed that she has continued in the service of the State Government."

Learned counsel for the petitioner has placed reliance



on **Annexure '14'** to the writ petition, which is a provisional gradation list of Medical Officers in which petitioner's name was indicated at serial no. 1396 (running page 87). He has also placed reliance on **Annexure '15'**, which is a newspaper publication published in Hindustan Times to show that petitioner was in Health Services, Bihar. On aforesaid ground, it has been prayed to direct the respondents to fix pension after regularizing the period of ex-India leave from 21-07-1976 to 17-07-1982.

In this case, a counter affidavit has been filed on behalf of respondent no. 2, 3 & 4. In the counter affidavit, it has categorically been stated that after expiry of two years of ex-India higher education leave i.e. 19-07-1976 up to 17-07-1982, the petitioner never filed any application in the department for extension of the leave. By way of counter affidavit, the respondent/State has categorically denied the claim of petitioner that he rejoined the department. For the first time, the case of petitioner was noticed on 05-09-2006 when the petitioner submitted his claim before the department after lapse of more than three years after the date of his superannuation i.e. 31-05-2003. In sum & substance, it has been indicated that after the petitioner proceeded on ex-India leave in the year 1974, for the

first time, he approached the department on 05-09-2006.

Besides hearing the parties, I have also perused the materials available on record. Fact remains that the petitioner was granted leave for higher education in foreign in 1974 only for two years and though in the writ petition, certain document has been brought on record to show that he was seeking extension of leave, but on record, there is nothing to indicate as to whether leave was extended or granted by the competent authority. It further appears that after return from the foreign, the petitioner wanted his appointment as Assistant Professor in Neuro Surgery in the State Medical College, Bihar, however; the said request was turned down by the Medical Council of India, vide **Annexure '12'** to the writ petition. In the writ petition, nothing has been indicated as to whether his joining was accepted or not. Ofcourse, a plea has been taken, vide **Annexure '10'** to the writ petition that he had submitted joining on 17-07-1982, but this plea is repelled by the stand taken by the petitioner himself in **Annexure '13'** to the writ petition, which is a representation filed by the petitioner before the Hon'ble Chief Minister dated 16-09-1987, wherein, he has accepted that his joining was not accepted by the Department of Health. The conduct of the petitioner shows that he himself



abandoned his claim to be considered as a government employee and that was the reason that three years after his date of superannuation he filed representation, vide **Annexure '16'** on 05-09-2006 to the Secretary-cum-Commissioner, Department of Health, Bihar for payment of back-wages, pension and other post retiral dues. Even thereafter, he slumbered over his right for quite considerable time and finally, he filed the present writ petition in the month of April, 2008. It is not evident as to whether the petitioner had ever approached this Court for claiming his salary or for claiming regularization of his study leave. The conduct of the petitioner categorically establishes that he had abandoned his right. It is true that right to get pension is a Fundamental Right, which has been held by the Apex Court in the case of *Deokinandan Prasad (supra)*, but at the same time, it is also necessary to indicate that for claiming pension, one has to establish that he had rendered the qualifying service for being paid pension. On this very point, it is necessary to notice Rule 134 of the Bihar Pension Rules, which indicates regarding the qualifying service for claiming pension.

For just decision in the matter, it is necessary to quote Rule 134 of the Bihar Pension Rules, 1950 which is as follows:-

"134. (a) A retiring pension is granted to a Government servant who is permitted to retire after completing qualifying service for thirty years or such less time as may for any special class of Government servants be prescribed.

(b) A retiring pension is also granted to Government servant who is required to retire after completing 25 years of qualifying service or more or any other prescribed period of service."

If for the time being, it is assumed that the petitioner had filed application for joining in the year 1982, nothing prevented the petitioner to approach this Court at earlier stage. It is also evident that without any salary or without joining after the year 1974 he continued upto the age of his superannuation i.e. 31-05-2003 and even thereafter, for three years he slept over his right. His date of superannuation was 31-05-2003, whereas the petitioner filed the present writ petition in the year 2008. The aforesaid conduct of the petitioner itself indicates that the petitioner has abundant his right for being considered as Govt. employee.

So far as **Smt. Prabhabati Sengupta's case (*supra*)** is concerned the petitioner may not get any benefit from the said case. In the said case, petitioner (Smt. Sengupta) had continued in service for more than twelve (12) years and due to mental disorder she remained absent and immediately when she had



recovered, she approached for joining. However, her representation was rejected in terms of Rule 76 of Bihar Service Code. The said order was set aside by this Court since it was in violation of Rule 76(2) of the Bihar Service Code, whereas in the present case, the petitioner remained unauthorisedly absent after expiry of two years leave, which ended some time in the year 1976 and the petitioner for the first time approached this Court by way filing this writ petition in the month of April, 2008, even after he attained his age of superannuation on 31.5.2003, without any plausible explanation for delay of about 32 (thirty two) years from the date of expiry of his leave. Even for the time being if it is assumed that he tried to join in year 1982, which, according to petitioner was not accepted, nothing prevented the petitioner to knock the door of Court. Meaning thereby that even thereafter the petitioner kept sleeping for about 21 (twenty one) years till his age of retirement i.e. 31.5.2003. This was not the end but even after the petitioner attained the age of retirement, he again slept for about 3 (three) years in approaching this Court and this writ petition was filed on 16.4.2008. Moreover, in the present case actually he rendered his service only for three years and few months, i.e. from April, 1971, the date of initial appointment

which was only for six months, to 19.7.1974, when his foreign study leave for two years was approved and he was relieved.

The Court is of the opinion that in facts and circumstances of the present case, the petitioner is not entitled to get any relief.

The writ petition stands dismissed.

(Rakesh Kumar, J.)

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