IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.17683 of 2013

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Dr. Rajendra Kumar Son Of Late Kailash Kumar Resident Of 4h/26, Bahadurpur Housing Colony, Kankarbagh, Patna, Police Station- Agamkuan, District- Patna

.... Petitioner

Versus

1. The State Of Bihar
2. The Secretary, Department Of Health, Medical Education And Family Welfare, Govt. Of Bihar, Patna
3. The Under Secretary, Department Of Health, Medical Education And Family Welfare, Govt. Of Bihar, Patna
4. The Director, Department Of Health, Medical Education And Family Welfare, Govt. Of Bihar, Patna
5. The Accountant General, Bihar, Veer Chand Patel Path, Patna

.... Respondents

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Appearance :

For the Petitioner/s : Mr. Siya Ram Shahi, Adv.
For Respondents no.1 to 4: Mrs. Nivedita Nirvikar, G.A.10
Mr. Manoj Kumar, AC to GA10
For respondent no.5 : Mrs. Anita Sinha, Adv.

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CORAM: HONOURABLE MR. JUSTICE MIHIR KUMAR JHA

CAV JUDGMENT

19-03-2015

Heard learned counsel for the parties.

2. The prayer of the petitioner in this writ application reads as follows:

> "(i) For issuance of an appropriate writ commanding the respondents to pay the difference of salary after granting annual increment with effect from 20.11.1991 in pursuance to the promotion to the post of Junior Selection Grade vide Notification No. 344(4) dated 20.11.1991 and senior selection grade promotion w.e.f. 1.4.1993.
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> (ii) For issuance of an appropriate writ commanding the respondent no.5- the Accountant General, Bihar, to revise the pension and gratuity and other post retiral dues

accordingly w.e.f. 31.1.2004."

Mr. Siyaram Shahi, learned counsel appearing on behalf of the petitioner, in support of the aforementioned prayer has submitted that the decision of the State Government and the office of the Accountant General in refusing to pay the salary of the petitioner without benefit of annual increments was/ is wholly irrational and the only ground on which the petitioner has been denied such payment of annual increment of the petitioner having not passed Hindi Noting and Drafting Examination can also not be made applicable because the petitioner on completion of 50 years of age was eligible for grant of exemption as per the Government Rules and policy.

3. In this regard he has also pointed out that the petitioner had filed a representation, as contained in Annexure 3, seeking exemption from passing of the Hindi Noting and Drafting Examination but that was also not disposed of by the Departmental Secretary. Mr. Shahi, therefore, is of the view that the petitioner's grievance in this regard should be redressed by the respondents by passing necessary order holding the petitioner eligible for grant of annual increments which had remained withheld from November, 1991 onwards when the petitioner was granted promotion in the Junior Selection Grade with effect from

1.4.1983.

4. A further plea for such a relief has been that the petitioner has already retired from service on 31.1.2004 and therefore, denial of annual increment from 1991 onwards till the date of his retirement has also heavily weighed in payment of reduced amount of retirement benefit including monthly pension, gratuity and leave encashment which are dependent on the quantum of last salary drawn by an employee.

5. Per contra, Mrs. Nivedita Nirvikar, learned counsel appearing on behalf of the State, has submitted that first of all this writ application is hit by the principles of delay and laches, inasmuch as a cause of action of the year 1991 has been sought to be raised by the petitioner by filing this writ application. In this regard she explains that the petitioner ever since being given his promotion in the Junior Selection Grade on 20.11.1991 with effect from 1.4.1983 had stood deprived of the annual increment as per provisions made in the Government Rules "Bihar Sarkari Sevak (Hindi Priksha) Niyamawali, 1968 (hereinafter referred to as 'the Rules') framed under proviso to Article 309 of the Constitution of India but the petitioner in his active service till 2004 had never raised this issue before the competent authority and/or any court and in fact for the first time after his retirement when he had filed

a writ petition assailing the order of punishment being C.W.J.C.No. 5295/2004 this issue was also raised by the petitioner that as a consequence of quashing of the order of punishment he should also be given the benefit of annual increment withheld since 1991.

6. Learned counsel for the State has also submitted that first of all grant of exemption as claimed by the petitioner on attaining the age of 50 years is not automatic and secondly, there is nothing to show at least from Annexure 3 that such a representation was filed by the petitioner directly to the Health Commissioner. According to her, neither the promotion given to the petitioner in the Junior Selection Grade and/or Senior Selection Grade would entitle him to weigh the consequence of Rules with regard to not passing Hindi Noting and Drafting Examination. She, therefore, is of the view that the petitioner will not be entitled for grant of annual increments and will have to be satisfied with the drawing of salary as per provision of 1968 Rules.

7. The facts giving rise to this writ application in fact lie in a very narrow compass. As a matter of fact the only facts to be noticed with regard to the relief sought for in this writ application would be that after the petitioner was appointed on 2.5.1971 on the

basic grade of the post of Medical Officer and had joined service on 3.5.1971 he had been promoted in the Junior Selection Grade of the post of Medical Officer by an order dated 20.11.1991 with effect from 1.4.1983. Subsequently the petitioner was also granted promotion in Senior Selection Grade by notification dated 11.7.1998 with effect from 1.4.1993.

8. The petitioner, however, was sought to be subjected to a departmental proceeding for his unauthorized absence and an order of punishment was passed on 4.4.2003 whereby and whereunder the period of 1.7.1989 to 12.3.1991 was directed to be treated as break in his service and thus, disqualified him to earn pension for the aforementioned period. It was this order of punishment that the petitioner had retired on 31.1.2004 and after his retirement he had filed a writ petition on 28.4.2004 being C.W.J.C.No. 5295/2004 assailing the order of punishment dated 4.4.2003 and had also prayed for some more reliefs which for the sake of clarity and convenience is quoted hereinbelow:

> "A. For issuance of an appropriate writ in quashing the notification no. 393(3) dated 4.4.2003, issued under the signature of the under Secretary, Department of Health, Medical Education and Family Welfare, Govt. of Bihar, Patna contained in Annexure 14.
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> B. For issuance of an appropriate writ commanding the respondents to grant Senior selection grade to the petitioner

for which he is entitled and monetary benefits of Junior Selection grade promotion which has given vide notification no. 344(4) dated 20.11.1991 with effect from 1.4.1983.

C. For issuance of an appropriate writ commanding the respondents to fix the pay after giving due increment as well as the arrears of salary from June 1996 to February, 1998, January, February and December 1999 and January 2000 to 31.1.2004 as the petitioner till the date of superannuation has been working on the initial stage of salary and for issuance of 9 rule of contempt suomoto for non compliance of annexure 13."

9. The aforesaid writ application, C.W.J.C.No. 5295/2004, was ultimately disposed of by this Court by an order dated 8.7.2009 wherein this Court having quashed the order of punishment on account of non-supply of the enquiry report had remitted the matter back for holding enquiry from the stage of supply of enquiry report. To that extent it would be relevant to quite the relevant paragraphs of the aforementioned order which would be necessary because of the fact that the petitioner's relief for grant of annual increment with effect from 1991 though prayed for in the writ application filed by the petitioner after his retirement was not allowed by this Court in any manner. The order of this Court dated 8.7.2009 reads as follows:

" Heard learned counsel for the petitioner and learned counsel for the State.

As a consequence of departmental proceeding, an order of punishment has been passed against the petitioner as contained in Annexure 14, which was notified through Memo No. 393(3)/Health, Patna, dated 4.4.2003.

Learned counsel for the petitioner submits that before this punishment order, neither the copy of the enquiry report was made available to him nor he was given any opportunity to file a second show cause against the findings of the enquiry report. He submits this fact stands admitted by the respondents in paragraph 6 of the counter affidavit, in which the respondents have disclosed that copy of the enquiry report was sent to the petitioner through letter No. 1020(9) dated 6.7.2004 only.

Learned counsel for the State does not claim any typing mistake in the date of letter mentioned in the said paragraph 6 of the counter affidavit.

In the circumstances, it is apparent that the copy of the enquiry report was sent to the petitioner for filing second show cause after more than one year of the order of punishment passed against him. There is apparent violation of principle of natural justice in the case.

In the circumstances, the punishment order contained in Annexure 14 is hereby quashed.

Since the petitioner has claimed violation principle of natural justice in not furnishing a copy of the enquiry report and not giving any opportunity to him before passing of the impugned order of punishment, the respondents have to be given liberty to proceed afresh from the stage of furnishing a copy of the enquiry report to the petitioner for filing second show cause.

However, learned counsel for the petitioner submits that the said punishment order was passed against the petitioner for his unauthorized absence from 1.8.1989 to 12.3.1991. He submits that from the charge Annexure 12 it is apparent that the petitioner had submitted his joining in the department on 3.12.1990 and notification with regard to his posting was issued on 12.3.1991, pursuant to which he joined on 13.3.1991. He submits that period between 3.12.1990 to 12.3.1991 cannot be a basis for framing a charge on account of his unauthorized absence during the period.

Since the matter is being remitted back for the respondents to proceed afresh from the stage of furnishing a copy of the enquiry report to the petitioner, it will be open to the respondents to consider whether this period can at all be treated as unauthorized absence in view of the admitted position that the petitioner had submitted his joining in the department on 3.12.1990 and the notification for posting was issued on 12.3.1991.

So far as the earlier period of alleged unauthorized absence from 1.7.1989 (wrongly typed in the typed copy of Annexure-14, 1.8.1989) to 2.12.1990 is concerned, learned counsel for the petitioner submits that the respondents may consider for adjustment of this period against any admissible leave to the petitioner in accordance with law. This matter can also be considered by the respondents while considering the matter afresh before passing any final order in the matter.

Learned counsel for the petitioner also submits that since the petitioner has superannuated in January, 2004 some time frame may be fixed for any decision by the respondents in the matter if they at all decide to proceed with the matter afresh.

Considering the fact that the petitioner has already been superannuated and it is also stated that he is not getting any pensionary benefit on account of the pendency of this proceeding, the respondents are given liberty to furnish a copy of the enquiry report to the petitioner within three months from today with giving him two weeks time to file second show cause. From the date of filing of the second show cause they must take a final decision within one month. It is made clear that in case they do not adhere to the time frame as indicated above, they will not be at liberty to proceed afresh and in that a situation they shall finalize the pensionary benefit of the petitioner and start payment of the same immediately.

Learned counsel for the petitioner also submits that in the earlier writ application of the petitioner, namely, C.W.J.C.No. 11851 of 1996 certain other directions had also been issued for considering the adjustment of several period of absence of the petitioner. He submits that pursuant to the said directions respondents have passed Annexure 15 and 16, which is not as per the directions of this Court passed in the said writ application. In the circumstances, petitioner will be at liberty to file a fresh representation pointing out the anomalies in Annexures 15 and 16 and if he is able to satisfy the respondents that the said orders as contained in Annexures 15 and 16 have not been passed strictly in terms of the order passed in the earlier writ application, they may consider the matter in accordance with law.

Since this application is being disposed of with quashing of Annexure 14 only on the ground of violation of principles of natural justice, it is made clear that nothing observed above in the order shall be considered by either party as an opinion of this Court on any other matter which has to be considered by the respondents' independently on its own merit in accordance with law.

With the aforesaid observations and directions, this writ application is disposed of."

10. As a matter of fact even when there was no direction for payment of increments to the petitioner the whole issue was sought to be raised in the contempt application filed by the petitioner being M.J.C.No. 1499/2010 and now the petitioner wants to capitalize on an observation made in the order dated 16.1.2013 that this writ application has been filed as per liberty given in the order dated 16.1.2013 while disposing of the contempt application, M.J.C.No. 1499/2010 which reads as follows:

" The grievance of the petitioner is now confined to only non-grant of annual increment on the ground of non-passing of the departmental examination.

Learned counsel for the petitioner submits that petitioner intends to challenge the said order of refusal in an appropriate proceeding in accordance with law.

This contempt application is, accordingly, disposed of with the aforesaid liberty."

11. Thus, the first and foremost question which would emerge for consideration is as to whether the writ application seeking relief for grant of annual increment for the period November, 1991 to January, 2004 is not hit by the doctrine of delay and laches? As noted above, the petitioner was appointed as a doctor in the basic grade of Bihar Health Service and had continued to be shown till the order of his promotion in Junior Selection Grade on 20.11.1991 by which he was given retrospective promotion with effect from 1.4.1983. The petitioner, therefore, stood deprived of annual increment with effect from 20.11.1991 as a consequence of his not passing the Hindi Noting and Drafting Examination as per 1968 Rules but this grievance was never raised by the petitioner while he was in active service though he had come to this Court even in the year 1996 by filing C.W.J.C.No. 11851/1996 in relation to his some other grievance relating to payment of salary. This fact in fact is noted in the subsequent order of this Court dated 8.7.2009 in C.W.J.C.No. 5295/2004. The very fact that the petitioner was not paid his

annual increment ever since 20.11.1991 and this issue came to be raised for the first time in the writ application filed by him after his retirement in C.W.J.C.No. 5295/2004 would go to show that the petitioner was well aware of the consequence of not passing the Hindi Noting and Drafting Examination that he was not to be granted annual increments.

12. As a matter of fact 1968 Rules having statutory force in view of its being framed under proviso to Article 309 of the Constitution of India very clearly lays down that a person who is required to pass Hindi Noting and Drafting Examination and does not do so shall stand deprived of increments as would be evident from reading of Rules 7 and 8. Thus, this Court will have no difficulty in holding that the writ application is delayed by at least 12 to 13 years of the cause of action even after taking into consideration that such an issue was raised by the petitioner for the first time in the writ application filed in the year 2004 after his retirement.

13. At this stage this Court must also take into consideration one of the main plank of the petitioner which has been sought to be raised in the writ application that the petitioner's date of birth being 2.1.1946 he had completed the age of 50 years as on 1.1.1996 and therefore, he had filed an application seeking

exemption from appearing in the Hindi Noting and Drafting Examination. For this purpose reliance has been placed on a representation filed by the petitioner before the Health Commissioner. First of all this representation having no evidence of its being received in the office of the Health Commissioner and in fact bearing also no date of its filing much less of its receipt does not inspire confidence. Secondly, it must be kept in mind that even when an earlier writ application was filed by the petitioner seeking this very relief being C.W.J.C.No. 5295/2004 neither this fact was mentioned therein nor the petitioner had enclosed this application. In that view of the matter, it becomes absolutely clear that this application has been invented only for the purpose of this writ application in order to now make out a case of grant of exemption from passing of the Hindi Noting and Drafting Examination.

14. As a matter of fact the moment the petitioner claims that he had filed an application for grant of exemption, he will be deemed to have admitted the necessity of passing of the Hindi Noting and Drafting Examination as per 1968 Rules, which, as noted above, is statutory in character and cannot be waived by any Government servant requiring to pass such an examination. Let it be noted that grant of exemption is not an automatic event because

the Government in the circular dated 21.6.1978 had only made a provision that such of the employees who had attained 50 years of age may be granted exemption by way of compassion under special circumstances. To that extent the relevant portion of the order of the State Government dated 21.6.1978 reads as follows:

> "[पत्र संख्या 12 आर0/5040–78 का0/1925, दिनांक 21.6.1978 की प्रतिलिपि।]
>
> विषय– विभागीय परीक्षा का उर्त्तीणता से विमुक्ति के संबंध में।
>
> निदेशानुसार उपर्युक्त विषय पर .... कहना है कि सरकार ने नीति निर्धारित किया है कि जिन पदाधिकारियों की उम्र पचास वर्ष से अधिक हो गयी है, उन्हीं पदाधिकारियों को अनुकम्पा के आधार पर विशेष परिस्थिति में विभागीय परीक्षा से विमुक्ति संबंधी आवेदन पर विचार किया जायेगा। किसी भी परिस्थिति में पचास वर्ष से कम उम्र वाले पदाधिकारियों को विभागीय परीक्षा से छूट नहीं दी जायेगी।
>
> 2. इस आशय की सूचना सभी पदाधिकारियों को दी जाये।''

15. A question would, thus, arise that if the petitioner had really filed his application for grant of exemption as claimed by him in paragraph no. 16 of the writ application that such an application was filed by him on 19.1.1997 directly to the Health Commissioner though he was working as a Medical Officer at Additional Primary Health Centre, Saidpur at Rajgir in the district of Nalanda under administrative control of the Civil Surgeon, Nalanda without its being ever sent through proper channel, the issue still would be why did not petitioner raise this issue in next seven years in which he had remained in service after filing of his

aforesaid alleged application for seeking exemption from appearing in the Hindi noting and Drafting Examination. No plausible explanation in fact however can be found at least from the pleadings in the writ application. This Court, therefore, will have no difficulty in holding that the petitioner would not be entitled for exemption at least now because if a decision of grant of exemption is not taken during the service tenure there cannot be such exemption after the employee retires from service.

16. Thus, for all these reasons this Court is not impressed with the submission of Mr. Shahi so far it relates to petitioner being granted automatic exemption from appearing in Hindi Noting and Drafting Examination on the basis of his mere filing of the alleged application which itself is shrouded in mystery.

17. In view of the aforesaid discussion this Court comes to the conclusion that the petitioner had not passed the Hindi Noting and Drafting Examination which he was required to pass as per 1968 statutory Rules and thus there would be no escape from the consequence of 1968 Rules which had to be followed even in his case. The Rules, as noted above, clearly lay down that a person not passing Hindi Noting and Drafting Examination neither shall be given the benefit of increment nor shall be confirmed in service nor shall be allowed to cross efficiency bar till he passes the

prescribed Hindi Noting and Drafting Examination. It has also been clarified in the Rule that such stoppage of increment was not on cumulative basis and the moment such a Government servant passes the examination his increment shall be restored from the date he passes the Hindi Noting and Drafting Examination without of course giving the benefit of arrears of amount of salary on account of such withheld increment.

18. This 1968 Rule was, therefore, also applicable in the case of the petitioner right from 1991 and therefore, this Court also does not find any error in the query made by the office of the Accountant General with regard to fixation of pay and payable of retirement benefit to the petitioner by taking into account as to whether the petitioner had passed the Hindi Noting and Drafting Examination so as to be given benefits of increment for the purposes of calculation of retirement benefit, as also mentioned in the letter of the Accountant General dated 12.10.2012, as contained in Annexure 7.

19. The alternative submission of Mr. Shahi that since the petitioner had been given promotion in the Selection Grade, it would be deemed that the authorities had waived the requirement of petitioner passing Hindi Noting and Drafting Examination again if judged in the background of the 1968 Rules will have to

be only noted for its being rejected. The Rules do not say that the promotion shall be withheld and in fact Rules are only to the effect that the person not passing the Hindi Noting and Drafting Examination shall not be entitled to earn increment or be confirmed in service or cross the efficiency bar. There is no bar that the person shall not be promoted if he does not pass the Hindi Noting and Drafting Examination. Therefore, the grant of promotion of the petitioner in the Junior Selection Grade and Senior Selection Grade will also have little bearing so far it relates to issue of grant of annual increment to the petitioner.

20. The reliance placed by Mr. Shahi on an order of this Court in the case of Dr. Shree Narayan Pandit v. the State of Bihar & ors., reported in 2013(1) PLJR 747, and on an earlier order of this Court in the case of Dinesh Narayan Mishra v. the State of Bihar & ors., reported in 2006(2) PLJR 169, as referred to and relied in the case of Dr. Shree Narayan Pandit (supra) is also wholly misconceived. First of all from reading of the facts of the case of Dr. Shree Narayan Pandit (supra) it would be found that the first time bound promotion was made subject to a condition that he must pass the Hindi Noting and Drafting Examination or be granted examination from passing such an examination. As noted above, neither the time bound promotion Scheme as per the

Government policy decision dated 30.12.1981, not being statutory rule alike 1968 Rules, had envisaged passing of Hindi Noting and Drafting Examination as a condition precedent for grant of promotion nor the case in hand having the individual facts of the case of the petitioner will have any relevance on account of the order which was assailed by Dr. Shree Narayan Pandit in his writ petition.

21. In any event this Court while disposing of the writ petition of Dr. Shree Narayan Pandit (supra) had not taken into consideration the impact of 1968 Rules which, as noted above, are statutory in character and therefore, nothing said in the said judgment of Dr. Shree Narayan Pandit (supra) will be a binding precedent for this Court.

22. Similarly the other case of Dinesh Narayan Mishra (supra) had a different issue altogether. There the employee had already retired from service and had been allowed to draw benefit of increments but the same was not being taken into account on account of an objection of the office of the Accountant General that the petitioner's higher pay scale by way of time bound was given without passing of the Hindi Noting and Drafting Examination. Thus, whatever was said in relation to recovery of the amount or reduction of the amount of pension in the case of

Dinesh Narayan Mishra (supra) will have no bearing on the result of this case wherein the prayer for the first time has been made that the petitioner's annual increment withheld from 1991 should be released only because the petitioner was granted promotion in the Selection Grade.

23. As noted above, the facts of this case are absolutely different and in fact the petitioner wants this Court now to issue a direction for payment of his arrears of increment from 1991. This court however has found that the writ application is not only delayed by more than a decade but seeks to claim monetary benefit of a period prior to three years which has been made a bench mark by the Apex Court in the matter of claiming financial benefit in the case of Union of India & ors. v. Tarsem Singh, reported in (2008)8 SCC 648, wherein it was held that the payment of any amount or service benefit to be reduced in monetary terms beyond a period of three years is not to be entertained. The Apex Court in this regard had held as follows:

> "7. To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such

continuing wrong creates a continuing source of injury.................................. Insofar as the consequential relief of recovery of arrears for a past period is concerned, the principles relating to recurring/successive wrongs will apply. As a consequence, the High Courts will restrict the consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition.

8. In this case, the delay of sixteen years would affect the consequential claim for arrears. The High Court was not justified in directing payment of arrears relating to sixteen years, and that too with interest. It ought to have restricted the relief relating to arrears to only three years before the date of writ petition, or from the date of demand to date of writ petition, whichever was lesser. It ought not to have granted interest on arrears in such circumstances".

(underlining for emphasis)

24. As noted above, the petitioner in this case wants payment of his full salary by including the increments from 1991 onwards which has been withheld till the date of his retirement in the year 2004, by filing this writ application in the year 2013. Thus, if the period of three years for payment of arrears of salary is taken into account, such period can be shifted at best in view of the judgment in the case of Tarsem Singh (supra), three years before the date of filing of the writ petition. The writ application was filed on 04.09.2013 and therefore, such period will be 04.09.2010. The demand for payment of such increments was also made by the petitioner, after his retirement, and in fact after

07.01.2010, when the departmental inquiry was closed in terms of the order of remand dated 08.07.2009 in C.W.J.C No. 5295 of 2004, thus, that period would also commence from the year 2007 and therefore, in either view of the matter, this Court by applying the principle in the case of Tarsem Singh (supra), will have no difficulty in coming to the conclusion that the petitioner will not be entitled for claiming his arrears of salary by way of grant of increment from 1991, as sought for and pressed in this writ application.

25. Consequently, the petitioner will be entitled for payment of pension, gratuity and other post retirement benefits without giving him any benefit of annual increment and as a matter of fact since such amount has already been paid, the prayer for revision of pension, gratuity as well as other retirement benefit made by the petitioner is also rejected, inasmuch as, his list pay being the basis of calculation of pension and gratuity and other retirement benefit will be one, which he was actually drawing on being denied the payment of increment from 1991, onwards.

26. Thus, for the reasons indicated above, this writ application must fail and is, accordingly, dismissed.

surendra/-

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(Mihir Kumar Jha, J)