IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.12461 of 2012

==

Md.Anisul Haque son of Late Reyazul Haque Resident of Mohalla- Mithapur Surbhi Path, Police Station- Gardanibagh, District- Patna.

.... Petitioner/s

Versus

1. The State of Bihar
2. The Director- in Chief, Health Department, Bihar, Patna.
3. The Secretary, Health Department, Bihar, Patna.
4. The Superintendent, Nalanda Medical College Hospital, Agam Kuan, Patna.
5. The Principal, Nalanda Medical College, Bahadrupur, Patna.

.... Respondent/s

==

Appearance :

For the Petitioner/s	:	Mr. Md. Abu Haider, Advocate
	:	Mr. Ram Kishun Prasad, Advocate
	:	Mr. Abu Shajar, Advocate
For the Respondent/s	:	Mr. Kinker Kumar, S.C.-9

==

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 22-11-2016

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

2. In the present writ petition the petitioner has made two prayers. The first prayer is to direct the respondents to release the left over G.P.F. amount of Rs.55,547/- with interest which has not been paid to the petitioner since the date of retirement on 31st May, 2002. The second prayer is to direct the respondents to enhance the amount of post retrial benefits on the basis of the salary drawn at the time of retirement.

3. The petitioner has calculated the aforesaid amount of

Rs.55,547/- on the basis of non-calculation of contributory provident fund of Rs.10,993/- deposited by the petitioner before taking over of Nalanda Medical College and Hospital, Patna (for short 'NMCH, Patna'). By way of interlocutory application being I.A. No.8912 of 2016 filed on 15th November, 2016, the petitioner has prayed for amendment in the writ petition by adding an additional relief. The additional relief sought by the petitioner is for quashing of the office order dated 31.12.2002 issued under the signature of Superintendent, NMCH, Patna as contained in Annexure-E to the counter affidavit filed on behalf of respondent no.3 whereby it has been ordered to recover excess amount of Rs.1,12,473/- paid to the petitioner while in service from his post retiral benefits. The aforesaid amendment application made by the petitioner was allowed by this Court vide order dated 19th November, 2016 giving liberty to the State to contest the relief sought by the petitioner on merits at the time of final argument of the writ petition.

4. It is contended by the learned counsel for the petitioner that the respondents have made payment of Rs.3,39,550/- only under the head of G.P.F. out of total deposit of Rs.3,95,097/-. The respondents have not issued the authority slip to the petitioner for the remaining amount of Rs.55,547/-. It has been contended that prior to taking over of the NMCH, Patna, the petitioner had contributed

Rs.,10,993/- towards contributory provident fund and its maturity amount of Rs.55, 547/- has illegally been retained by the petitioner. It is further contended that the petitioner is entitled for fixation of post retiral benefits on the basis of the salary being drawn by him on the date of retirement i.e., in the pay scale of Rs.335-555, but his pension was illegally fixed in the pay scale of Rs.340-490. It is also contended that the respondents had no jurisdiction to recover any amount from the post retiral benefits of the petitioner in view of the law laid down by the Supreme Court in the matter of ***State of Punjab and Others vs. Rafiqu Masih (White Washer) and Others*** reported in ***2015(4) SCC 324.*** It has been contended that the respondents have illegally recovered Rs.1,12,473/- from the post retiral benefits of the petitioner pursuant to the office order dated 31.12.2012 passed by the Superintendent, NMCH, Patna as contained in Annexure-E to the counter affidavit filed on behalf of respondent no.3.

5. Per contra, learned counsel for the State has submitted that the maturity amount of contribution towards contributory provident fund of the petitioner being Rs.10,993/- from 1.3.1970 to 31.12.1979 was deposited by the Principal, NMCH, Patna through Challan in favour of General Provident Fund Officer, Patna for allocation of such amount in the petitioner's G.P.F. account. On retirement, the authority slip for Rs.3,39,550/- was issued by the

General Provident Fund Officer, Patna and the said amount was paid to the petitioner. According to him, contributory provident fund of Rs.10,993/- has already been calculated with the G.P.F. statement of the petitioner in the year 1988-89 and the authority for final withdrawal has been given inclusive of the said contributory provident fund along with interest.

6. In reply to the claim of the petitioner to enhance amount of post retiral benefits on the basis of the salary drawn at the time of retirement, it has been submitted that the petitioner was initially appointed as a clerk on 1st March, 1970 in the NMCH, Patna, which, at the relevant time, was a private institution and later on taken over by the Government of Bihar with effect from 1st January, 1980 under notification no.415 dated 26.8.1998. There was an error in fixation of pay of the petitioner and he got benefits of government pay scale and time bound promotion from the date prior to taking over of NMCH, Patna. He was granted first time bound promotion with effect from 1.4.1981 and second time bound promotion with effect 1.3.1995 treating to have completed ten years and twenty five years of service. It was an error to consider the first appointment date of the petitioner as 1.3.1970 for granting first and second time bound promotion of the petitioner. It is submitted that in view of the above discrepancies, it was found that the petitioner was paid Rs.1,12,473/- in excess to what he was legally entitled to while in service and, hence, vide office order dated 31.12.2002 issued under the signature of Superintendent, NMCH, Patna as contained in Annnexure-E to the counter affidavit filed on behalf of respondent no.3 it was ordered to recover the said excess amount from the Untilised Leave Salary and Gratuity amount of the petitioner and, accordingly, recovery was made immediately thereafter from the post retrial benefits of the petitioner.

7. Learned counsel for the State has further contended that the ratio laid down by the Supreme Court in the ***State of Punjab and others*** (supra) would not be applicable in the case of the petitioner as the Supreme Court did not allow the concluded proceedings to be re-opened. He has submitted that prior to the aforesaid decision of the Supreme Court the law permitted recovery of excess payment made to an employee while in service from his post retiral dues. In this regard he has placed reliance on the Full Bench decision of this Court in the matter of ***Ram Binod Singh vs. The Bihar State Electricity Board and Others*** reported in ***2007(3) PLJR 398***. He has contended that the writ petition was filed by the petitioner in 2012 and an interlocutory application seeking amendment in the prayer has been made in the year 2016. The amended prayer made in the year 2016 is not maintainable on the principle of delay and laches. In this regard, he has placed reliance on a decision of the Supreme Court in the matter of ***S.S.Balu and Another vs. State of Kerala and Others*** reported in ***(2009)2 SCC 479.***

8. Being confronted with these arguments by the learned counsel for the State, learned counsel for the petitioner has submitted that the writ petition would not be hit by the principle of delay and laches because the petitioner was never made aware about the office order as contained in Annexure-E to the counter affidavit filed on behalf of respondent no.3. He has submitted that the said order came to the knowledge of the petitioner only after copy of the counter affidavit was served upon the petitioner on 20th January, 2015. Thereafter, an amendment was sought in the prayer by filing an interlocutory application on 15th November, 2016 wherein the petitioner has challenged the aforesaid Annexure-E to the counter affidavit.

9. I have heard respective learned counsel for the parties and perused the record.

10. It is not in dispute that the petitioner was initially appointed in 1970 in a private medical college. In 1976 the Bihar Private Medical Colleges (Taking Over of Management) Ordinance, 1976 (for short 'Ordinance') was promulgated by the Government of Bihar authorizing the State Government by a notification to take over the management of the private medical colleges and to exercise such functions of management in regard to such colleges as might be specified in the notification. Pursuant to the Ordinance a notification was issued by the State Government taking over the management of the N.M.C.H., Patna with effect from 1st July, 1978. The Ordinance was subsequently replaced by the Bihar Private Medical Colleges (Taking Over) Act, 1978 (for short 'the Act'). Section 3 of the Act provides for taking over of private medical colleges and it reads as under:-

> *"3 (1). The State Government may, by a notified order and from the date mentioned therein, take over a College and the management and control thereof shall thereupon be exercised by the State Government in such manner as may be laid down in the said Order;*
>
> *(2) All the assets and properties of the College and the College body whether movable or immovable including lands, buildings, workshops, stores, instruments, machinery, vehicles, cash balance, reserve fund, investments, taxes, furniture and others shall, on the date of take over, stand transferred to and vested in, and be deemed to have come into the possession of the State Government;*
>
> *(3) All the liabilities and obligations of the College under any agreement or contract entered into bona fide before the date of taking over shall devolve and shall be deemed to have devolved on*

the State Government."

11. Section 6 of the Act deals with the determination of terms of teaching staff and other employees of the medical college taken over by the State Government which reads as under:

*"**6.** Determination of terms of the teaching staff and other employees of the College- **(1)** As from the date of the notified order, all the staff employed in the College shall cease to be the employees of the College body:*

Provided that they shall continue to serve the College on an ad hoc basis till a decision under sub- section (3) and (4) is taken by the State Government.

***(2)** The State Government will set up one or more Committee of experts and knowledgeable persons which will examine the bio data of each member of the teaching staff and ascertain whether appointment, promotion or confirmation was made in accordance with the University Regulations and in keeping with the guidelines laid down by the Medical Council of India and taking into consideration all other relevant materials including length of service in the College, and submit its report to the State Government.*

***(3)** The State Government on receipt of the report of the Committee or Committees, as the case may be, will decide in respect of each member of* *teaching staff on the merits of each case, whether to absorb him in Government service or whether to terminate his service or to allow him to continue on an ad hoc basis for a fixed term or on contract and shall, where necessary redetermine the rank, pay, allowances and other conditions of service.*

(4) *The State Government shall similarly determine the term of appointment and other conditions of service of other categories of staff of the College on the basis of facts to be ascertained either by a Committee or by an officer entrusted with the task and the provisions of sub-sections (2) and (3) shall apply mutatis mutandis to such cases."*

12. It would be evident that pursuant to Section 3 of the Act a notification dated 26.8.1998 as contained in Annexure-C to the counter affidavit filed on behalf of respondent no.3 was issued by the State Government taking over the NMCH, Patna with effect from 1.1.1980 with the result that the management and control of the NMCH, Patna became exercisable by the State Government and all the assets and properties of the NMCH, Patna stood transferred and became vested in the State Government and all its liabilities and obligations also devolved on the State Government.

13. Under such circumstances, the petitioner could not have been treated in service under the State from a date prior to the 1st January, 1980. The claim of the petitioner to enhance the amount of post retiral benefits on the basis of salary drawn at the time of retirement is based on the fact that a wrong fixation of salary was made in the case of the petitioner wherein his service was treated under the State Government with effect from 1.3.1970 as a result of which he got first time bound promotion and second time bound promotion with effect from 1.4.1981 and 1.3.1995 respectively. There is no dispute that an employee in the State Government becomes entitled to his first time bound promotion on completion of ten years of service and second time bound promotion on completion of twenty five years of service. The service of the petitioner having been recognized under the State Government with effect from 1.1.1980 would have qualified for first time bound promotion not before 1.1.1990. In that view of the matter, if the State Government came to know that due to wrong fixation of pay the petitioner was paid certain amount in excess to what he was entitled to no error can be found with the office order dated 31.12.2002 passed by the Superintendent, NMCH, Patna as contained in Annexure-E to the counter affidavit filed on behalf of respondent no.3 whereby an order for recovery of excess amount paid to the petitioner has been made. For the same reason the petitioner cannot be allowed for enhancement of the amount of post retiral benefits on the basis of the salary drawn at the time of retirement.

14. As far as reliance of the petitioner on the decision of the Supreme Court in the matter of ***State of Punjab and Others*** (supra) wherein the Supreme Court has held that recovery from the employee belonging to Class III and IV service (Group 'C' and Group 'D' service) as also from the retired employees or employees who are due to retire within one year of the order of recovery is impermissible is concerned, learned counsel for the State has rightly contended that the ratio of the said judgment would not be applicable in case of the petitioner as the petitioner had retired in 2002 and the recovery was made from payments under the head of unutilized leave salary and gratuity amount immediately after his retirement. The petitioner was very much aware of the fact that recovery was made from his post retiral benefits on account of excess payment paid to him while in service due to wrong fixation of salary.

15. The contention of the petitioner that he came to know about the order of recovery only after a copy of the counter affidavit was served upon him in the year 2015 cannot be believed. It would be evident from the notification as contained in Annexure-E to the counter affidavit filed on behalf of respondent no.3 that the same was also marked to the petitioner. Learned counsel for the State has rightly placed reliance on the Full Bench judgment of this Court in ***Ram Binod Singh vs. The Bihar State Electricity Board and Ors.*** (supra) wherein it has held that in appropriate facts and situation of a case mistake, clear, plain and simple, leading to wrong grant of increment, time bound promotion or wrong fixation of pay can justify recovery from an employee who has already superannuated. I also find substance in the argument of the learned counsel for the State that the decision of the ***State of Punjab and Others*** (supra) of the Supreme Court cannot be read in the manner that it permitted re-opening of all the concluded and settled proceedings. He is right in his submission that if this is allowed, it would lead to opening a prolific source of troubles. The courts would be flooded with litigation in which recoveries might have been made 30 and 40 years ago from the amount of the employees who would have been wrongly paid excess amount due to wrong grant of increment, time bound promotion or wrong fixation of pay.

16. In the present case, the recovery was made nearly fifteen years back and for that the petitioner did not raise any grievance. The petitioner has raised his grievance in this regard for the first time in 2016 after the decision of the Supreme Court in ***State of Punjab and Others*** (supra) by way of filing an interlocutory application seeking amendment in the relief. In my opinion, such a belated claim cannot be allowed to be agitated. So far as release of left over of G.P.F amount of Rs.55,547/- is concerned, there is definite assertion on behalf of the State that contribution towards contributory provident fund being Rs.10,993/- from 1.3.1970 to 31.12.1979 was deposited by the Principal, NMCH, Patna through Challan in favour of the G.P.F., Officer, Patna for allocation of such amount in the petitioner's G.P.F. account and on retirement an authority slip for Rs.3,39,550/- was issued by the G.P.F. Officer, Patna and the said amount was paid to the petitioner with interest. Such contention made by the respondents in the counter affidavit has not been controverted by the petitioner by filing any rejoinder of the petition. Hence, the said prayer of the petitioner also cannot be allowed.

17. For the reasons discussed hereinabove, the application being devoid of any merit, is dismissed.

(Ashwani Kumar Singh, J)

Md.S./-

AFR/NAFR	NAFR
CAV DATE	……
Uploading Date	29.11.2016
Transmission Date	