

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.15879 of 2016

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Dr. Shamsheer Bahadur Singh Son of Shri Parmeshwar Singh, Resident of M.I.G.
277, Lohianagar, Kankarbagh, Patna- 20.

.... Petitioner

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar.
2. The Principal Secretary, Department of Labour Resources, Government of Bihar, Vikas Bhawan, New Secretariat, Patna.
3. The Labour Commissioner, Department of Labour Resources, Government of Bihar, Vikas Bhawan, New Secretariat, Patna.
4. The Principal Secretary, Department of Finance, Old Secretariat, Government of Bihar, Patna.
5. The Principal Secretary, Department of Health, Vikas Bhawan, Government of Bihar, Patna.
6. The Under Secretary, Department of Labour Resources, Government of Bihar, Vikas Bhawan, New Secretariat, Patna.

.... Respondents

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Appearance :

For the Petitioner/s : Mr. P.K.Shahi, Sr.Adv.
Mr. Vikas Kumar, Adv.

For the Respondent/s : Mr. Anuj Kumar, AC to GP-24

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN
CAV JUDGMENT

Date: 06-11-2017

The petitioner has prayed for issuance of a writ in the nature of Certiorari for quashing the order bearing Memo No. 2545 dated 24.8.2016 passed by the Principal Secretary, Labour Resources Department, whereby while rejecting the claim of the petitioner seeking continuance in service up to the age of 67 years, the representation filed by the petitioner has been rejected. A copy of the order is impugned at Annexure 1 to the writ petition.

The brief facts leading to the order under challenge is that the petitioner is an M.B.B.S. doctor and was initially appointed as



Civil Assistant Surgeon in the State Health Service of the Government of Bihar on 9.2.1988. Vide Notification No. 671(2) dated 30.6.1988, present at Annexure 3, the services of the petitioner was transferred and placed with the Department of Labour, Employment and Training. The name of the petitioner appears at serial no. 50 of the Notification. The petitioner joined the department on 9.7.1988 in pursuance of the transfer order. Vide a second Notification bearing No. 1839 dated 8.9.1988 the petitioner was transferred to the ESI Hospital at Digha where he joined on 9.9.1988. A copy of the Notification is placed at Annexure 4. The petitioner was relieved to attend the Post Graduate course at Rajendra Medical College, Ranchi and after completion of the course that vide Notification No. 1214 dated 29.6.1991 the petitioner was posted in ESI Hospital at Kankarbagh. A copy of the Notification is placed at Annexure 5.

A requisition was placed by the Labour Commissioner before the Director, Employee State Insurance for deputation of two officers in the Civil Surgeon cadre, against two sanctioned post of Inspector of Factories (Medical) on 18.4.1995 vide Annexure 6 to the writ petition. Responding to the request made by the Labour Commissioner, the Director, ESI forwarded the name of several doctors which included the name of the petitioner. Vide Notification No. 511 dated 30.6.1996 the petitioner was transferred and posted



against the post of Inspector of Factories (Medical) with headquarters at Patna. A copy of the Notification is placed at Annexure 7 to the writ petition. According to the petitioner, his consent was not taken before placement of his service in the Labour Department or in the Employee State Insurance Hospital. Be that as it may, while the petitioner was working as Inspector of Factories (Medical) that options were invited from those working as Insurance Medical Officers vide Notification No. 161 dated 30.1.1990 for absorption in the Inspector of Factories (Medical) Cadre. A number of officers gave their option for absorption and after due deliberation, the services of the petitioner and one Dr. Rajkeshwar Kumar was absorbed vide Notification bearing no. 265 dated 9.9.2004, a copy of which is placed at Annexure 'G' to the supplementary counter affidavit filed on behalf of respondents no. 2, 3 and 6. It is following absorption of the petitioner and Dr. Rajkeshwar Kumar in the cadre of Inspector of Factories (Medical) that three Factory Inspectors raised objections through C.W.J.C.No. 2819/2007, which was dismissed vide judgment and order passed on 14.8.2007 with an advice to file their objection before the Government. Feeling aggrieved these Factory Inspectors filed intra Court Appeal giving rise to L.P.A.Nos. 300/2008 and 763/2008 (Surya Nandan Prasad v. State) and which again was dismissed vide judgment and order passed on 9.11.2009, a copy of



which is placed at Annexure 10.

It is stated by the petitioner that although the matter is now pending before the Supreme Court in SLP(Civil) No. 10848-10849 of 2010 but no stay has been granted.

It is during this period that the State Government enhanced the age of serving doctors in the State Health Services as well as those on the teaching side including the AYUSH doctors as well as the doctor in the Employee State Insurance Medical Services under the Labour Resources Department. While the age of the doctors was initially raised from 60 to 62 years, according to the petitioner, on 23.7.2010 and 1.9.2010 as manifest from Annexure 12, the enhancement in retirement age of Doctors from 62 to 65 years was done vide gazette notification dated 22.12.2011 placed at Annexure 'E', and the notification dated 23.7.2013 at Annexure 'F' of the supplementary counter affidavit filed on behalf of Respondent No.1. The retirement age of Doctors was again enhanced to 67 years vide notification dated 30.7.2015 at Annexure 'G' and vide notification dated 8.9.2016 at Annexure 'H' of the same affidavit, the Bihar Service Code was appropriately amended.

The petitioner after unsuccessfully raising his plea for enhancement of retirement age before the Labour Department, came before this Court in C.W.J.C.No. 5867/2016 which was disposed of



vide judgment and order passed on 28.7.2016 at Annexure 2 with liberty to the petitioner to first represent before the Department with supporting materials and it is in consideration of the representation so filed by the petitioner that the Principal Secretary, Health Department came of the opinion that since the petitioner is no more in the medical service cadre, the enhancement would not be applicable to him, even if the basis for his appointment in the Inspector of Factories (Medical) cadre to which he presently belongs, is founded on his doctor's qualification. Feeling aggrieved he is before this Court.

Mr. P.K.Shahi, learned Senior Counsel, has appeared for the petitioner with assistance of Mr. Vikas Kumar and the State is represented through Mr. Anuj Kumar, learned AC to GP-24.

Mr. Shahi, learned Senior Counsel, appearing for the petitioner while reiterating the sequences of events has submitted that there is no dispute that the petitioner is a qualified doctor and was initially appointed in the State Health Services. According to learned Senior Counsel, his services was placed with the Labour Department without consent and even though he has been absorbed in the cadre of Inspector of Factories under the Labour Department but he cannot be placed at a worst situation than he was, before his services were placed with the Labour Department. He submits that since the request of the petitioner for enhancement of age was not finding favour with



the respondent authority that he requested them for return of his services to the Health Department because having accepted the request of the Labour Commissioner to join the cadre of Inspector of Factories (Medical) he cannot be denied the benefit to which he was entitled as an officer of the State Health Service Cadre.

Learned Senior Counsel has next referred to the judgment of the Division Bench on the contest led by some Inspector of Factories questioning his absorption in the Inspector of Factories cadre which challenge was negated by the Single Judge and upheld by the Division Bench vide Annexure 10. In reference to the judgment he has submitted that Rule 3(i) of the Bihar Labour Services (Technical) Rules, 1969 (hereinafter referred to as 'the Technical Rules') provides for the cadre of Inspector of Factories. With reference to Rule 9, he submits that one of the eligibility criteria for appointment of the Inspector of Factories is a degree from a recognized University in the branch of Engineering, Technology or Medicine with practical experience in the field concerned and it is for the State Government to satisfy the need of the Inspector of Factories in the branch concerned. According to the learned counsel, the requisition placed by the Labour Commissioner at Annexure 6 itself clarifies that it is against the post of Inspector of Factories (Medical) that the recommendation was asked and since it is a qualification based appointment, even if the



nomenclature reads Inspector of Factories, yet the benefit of the status of the petitioner as a qualified doctor belonging to the State Health Services cannot be taken away because it is by virtue of his M.B.B.S. qualification from a recognized University that the appointment has been made. According to Mr. Shahi, if the appointment of the petitioner against the post of Inspector of Factories (Medical) would not be based upon his qualification as a qualified M.B.B.S. doctor, may be, the situation would be different but since it is the status of the petitioner as a qualified doctor which makes him eligible for appointment against the post, the petitioner is equally entitled to enhancement granted by the State Government to the doctors.

Learned counsel has relied upon two judgments of this Court to support his contention. While referring to a Bench decision in C.W.J.C.No. 10431/2012 (**Dr. Sharfe Alam v. the State of Bihar & ors.**) he submits that when a Homeopathic Medical Officer under the Employee State Insurance Scheme was denied such benefit of age enhancement that he came before this Court and when a similar stand was taken by the State that a Medical Officer appointed under the Labour Scheme would not come within the cadre of the Insurance Employees Medical Service. The plea of the State was rejected and the benefit extended to the petitioner of the said case whose writ petition was allowed vide judgment and order passed on 28.2.2013. It



is submitted that the view of the learned Single Judge was confirmed by the Division Bench when the Letters Patent Appeal preferred by the State bearing L.P.A.No. 1190/2013 was dismissed on 11.4.2017.

Making reference to another Division Bench judgment arising from L.P.A.No. 852/2012 (**the State of Bihar & ors. v. Dr. Radha Krishna Choudhary**) which was heard analogous with several other appeals, it is submitted that the benefit of age enhancement was denied to the Post Graduate doctors working in the Indira Gandhi Institute of Cardiology at Patna forcing them to come before this Court. The learned Single Judge allowed the writ petition filed by the Post Graduate doctors but did not extend the relief to the doctors holding Post Graduate Diploma or doctors, who were holding M.B.B.S. degree. The State as well as aggrieved doctors moved in intra Court Appeal and which was heard analogous. While the matter was pending that the State Government issued a notification dated 22.12.2011 enhancing the age of superannuation of all doctors irrespective of qualification. The dispute, thus, remained in relation to those who had superannuated in between the notification dated 28.1.2011 as it stood modified by the subsequent notification dated 22.12.2011. The Division Bench upheld the claim of the Diploma holders as well as M.B.B.S. doctors and held their superannuation on attaining age of 62 years as illegal. The Division Bench further



allowed the doctors who were made to superannuate, the difference of the salary which they would have drawn and retiral benefit which they were drawing, for the extended period of service. It is in reference to this judgment that Mr. Shahi contended that even though the petitioner has been wrongfully made to superannuate with effect from 31.7.2016 but in view of the judgment of the Division Bench in L.P.A.No. 852/2012 and analogous cases the petitioner would yet be entitled to the reliefs prayed.

The argument of Mr. Shahi has been contested by the learned State Counsel, who while contesting the submission of the petitioner that the placement of his service was without his consent has referred to the supplementary counter affidavit filed on behalf of respondents no. 2, 3 and 6 and with particular reference to the letter of the petitioner dated 19.1.2004 addressed to the Commissioner cum Secretary it was submitted that a request was made by the petitioner for his absorption in the Labour Department while counting his seniority from the date of his joining in the State Health Services. It is submitted that the request of the petitioner for absorption was acted upon and the recommendation was made by the Commissioner cum Secretary, Health Department for grant of permission for absorption of the petitioner and one Dr. Rajkeshwar Kumar against the post of Inspector of Factories (Medical). Learned Counsel has also referred to



the affidavit of the petitioner at Page-170 enclosed with his representation at Annexure 'D' to submit that the petitioner has categorically stated that he would have no claim on his lien in the Health Department after his absorption in the Labour Department. Learned counsel has lastly referred to the notification bearing No. 265 dated 9.9.2004 to submit that it is after consent was given by the petitioner that he was absorbed in Labour Services Technical Cadre under Labour Department against the post of Inspector of Factories (Medical) vide Annexure 'G' to the supplementary counter affidavit.

Learned counsel has next referred to the second supplementary counter affidavit filed on behalf of respondents no. 2, 3 and 6 on 23.1.2017 at running Page-175 and with particular reference to paragraph 5 onwards of the affidavit it is submitted that although the petitioner was appointed in the State Health Service but his cadre changed on being absorbed in the cadre of Inspector of Factories which has a superannuation age of 60 years. It is argued that a mere possession of medical degree by the petitioner would not entitle him to enhancement in superannuation age as the cadre of Inspector of Factories is from a different stream, with different qualification as also with different job role. It is further mentioned that the petitioner was working as Chief Inspector of Factories at the time of superannuation and since there is a clear distinction between the



duties attached to a post of the serving doctors and those attached to the post of Inspector of Factories, no parity can be claimed by the petitioner for enhancement in age. Supporting the order impugned at Annexure 1 he submits that it calls for no interference.

I have heard learned counsel for the parties and have perused the records.

The facts are not in dispute, rather has been exhaustively dealt hereinabove. It is also not in dispute that the basic qualification for a person occupying the post of Inspector of Factories (Medical) is a degree in Medicine from a recognized Institution. It is again not in dispute that it is by virtue of this professional qualification that the services of the petitioner were placed at the disposal of the Labour Department against the post of Inspector of Factories (Medical) and where he was subsequently absorbed in the year 2004 vide Annexure 'G' to the second supplementary counter affidavit which has also been enclosed at Annexure 20 to the writ petition. It would be a matter of academics to delve into the issue whether the petitioner had given consent or not because the situation as it stands is that the petitioner got absorbed in the Labour Service Cadre way back in the year 2004 against the post of Inspector of Factories (Medical) and he has also sworn an affidavit to give up his lien from the parent employer in the State Health Services and never earlier raised this issue.



The only issue which falls for consideration in the present case is whether in the circumstances where it is the status of the petitioner as a qualified M.B.B.S. doctor which persuaded the respondents in the Labour Department to initially place him on deputation against the post of Inspector of Factories (Medical) followed by his absorption against the post in the Labour Service Cadre, he is entitled to the benefit of age enhancement as admissible to serving Doctors including those on the teaching side.

Before proceeding further I would like to refer to some of the statutory provisions underlying the Factories Act, 1948 (hereinafter referred to as 'the Act') and the Bihar Factories Rules, 1950 (hereinafter referred to as 'the Rules') as well as 'the Technical Rules' referred to in the judgment rendered in the case of Surya Nandan Prasad (supra). Section 8 of 'the Act', inter alia, empowers the State Government to appoint such person possessing the prescribed qualification to be Inspectors for the purpose of 'the Act' and may assign to them local limits as it may think proper. The provision further empowers the State Government to appoint any person to be the Chief Inspector, who shall in addition to the powers conferred on a Chief Inspector, exercise the powers of an Inspector as well. The provision also empowers the State to appoint Additional Chief Inspector, Joint Chief Inspectors, Deputy Chief Inspectors and



as many other officers as it may think fit to assist the Chief Inspector and to exercise such powers of the Chief Inspector as may be specified in the notification. The powers attached to the post of Inspectors is discussed at Section 9 and basically revolves around all such duties which are felt important for ensuring smooth functioning of any factory. The job is technical and the statutory provision underlying 'the Act' would confirm that the Inspector of Factories has not only to deal with the safety aspect of the factory but they are also expected to advise and guide the factory owners for ensuring compliance with the provision of 'the Act' to avoid fatal accidents.

Rule 2(k) of 'the Rules' defines an "Inspector" and means an officer appointed under section 8 of 'the Act' and includes "Chief Inspector". Section 9 of 'the Act' and rule 13 of 'the Rules' exhaustively deals with the power of Inspector and Rule 13(1)(b), inter alia, provides that in case of an Inspector who is a duly qualified medical practitioner, he would also be required to carry out such medical examination as may be necessary for the purpose of his duties under 'the Act'.

The qualification of an Inspector is provided under Rule 13A and which while prescribing for age qualification, also stipulates that the person concerned to have a secured degree or Diploma equivalent to a degree, of a recognized University in any branch of



Engineering, Technology or Medicine. The provision underlying Rule 9 of 'the Technical Rules' is parimateria the qualifications so provided under Rule 13A of 'the Rules'.

For the sake of convenience I deem it necessary to briefly deal with the powers of Inspector as stipulated under section 9 of 'the Act' and Rule 13 of 'the Rules'.

“Sec.9. Power of Inspectors.- Subject to any rules made in this behalf, an Inspector may, within the local limits for which he is appointed.-

- (a) enter, with such assistants, being persons in the service of the Government, or any local or other public authority, or with an expert as he thinks fit, any place which is used, or he has reason to believe is used, as a factory;
- (b) make examination of the premises, plant, machinery, article or substance;
- (c) inquire into any accident or dangerous occurrence, whether resulting in bodily injury, disability or not, and take on the spot or otherwise statements of any person which he may consider necessary for such inquiry;
- (d) require the production of any prescribed register or any other document relating to the factory;
- (e) seize, or take, copies of, any register, record or other document or any portion thereof, as he may consider necessary in respect of any offence under this Act, which he has reason to believe, has been committed;
- (f) direct the occupier that any premises or any part thereof, or anything lying therein, shall be left



undisturbed (whether generally or in particular respects) for so long as is necessary for the purpose of any examination under Cl.(b);

(g) take measurements and photographs and make such recordings as he considers necessary for the purpose of any examination under Cl.(b), taking with him any necessary instrument or equipment;

(h) in case of any article or substance found in any premises, being an article or substance which appears to him as having caused or is likely to cause danger to the health or safety of the workers, direct it be dismantled or subject it to any process or test (but not so as to damage or destroy it unless the same, is, in the circumstances necessary, for carrying out the purposes of this Act), and take possession of any such article or substance or a part thereof, and detain it for so long as is necessary for such examination;

(i) Exercise such other powers as may be prescribed:

Provided that no person shall be compelled under this section to answer any question or give any evidence tending to incriminate himself.”

“Rule 13. Powers of Inspector.- (1) An inspector shall, for the purpose of giving effect to the provision of the Act have power to all or any of the following things, that is to say:-

(a) to photograph any worker; to inspect, examine, measure, copy photograph, sketch or test, as the case may be, any building or room, any plant, machinery, appliance or apparatus; any register or document, or anything provided for the purpose of securing the health,



safety or welfare of the workers employed in a factory;

(b) in the case of an Inspector who is duly qualified medical practitioner, to carry out such medical examination as may be necessary for the purposes of his duties under the Act;

(c) to file a complaint in a Court against the Manager or the occupier of a factory or against both or against any other person liable to be punished under the Act and to prosecute, conduct or defend before a Court any complaint or other proceedings arising under the Act or in discharge of his duties as an Inspector;

(d) to satisfy himself at each inspection that-

(i) the provisions of the Act and of these rules regarding the health and safety of the workers employed in the factory are observed;

(ii) the adolescents and children employed in the factory have been granted certificates of fitness and that no adolescent or child is employed who is obviously unfit;

(iii) the register of all workers employed in such factory, of their hours of work and the nature of their employment, is in the prescribed form;

(iv) the periods of rest and the holidays provided by the Act are granted, and that the limits of hours of work laid down therein are not exceeded;

(v) the provisions of Section 59 and of the rules relating to the payment of overtime are duly observed; and

(vi) the notices required by Sections 61 and 72 and the abstract required by Section 108 are duly affixed and that the registers required by these rules are properly maintained;



- (e) to enquire in to the causes of all accidents that have occurred since the last inspection;
 - (f) to note how far the defects pointed out at a previous inspection have been removed and how far orders previously issued have been complied with;
 - (g) to point out all such irregularities, defects or irregularities as he may observe during the course of his inspection and to forward a copy of the inspection note to the Manager or occupier of a factory for removal of the irregularities, defects, or irregularities;
 - (h) to seize any record or document for the purpose of examination and satisfying himself that the provisions of the Act and the rules thereunder were complied with or which he may consider relevant in respect of any offence under the Act which he may have reasons to believe or suspect has been committed by the occupier or the manager;
 - (i) to direct by an order in writing the occupier or the manager to produce either personally or through his agent any prescribed record or register at his office or at any other place where he may be temporarily camping or at any other convenient place; and
 - (j) to direct by an order in writing the manager or the occupier or any other employee of a factory to appear before him personally at his office, or at the place where he may be temporarily camping or at any other place, to be examined and interrogated by him on any matter connected with the compliance of the provisions of the Act or the Rules.
- (2) The Inspector shall keep a file of the records of this



inspection in Form No.29.

(3) Every order passed under the Act and these rules, shall be served on the manager of a factory:-

(a) by delivering a copy of it to him personally or at his office; or

(b) by registered post.”

A plain reading of the powers and duties attached to the post of an Inspector as spelt out under section 9 of ‘the Act’ and Rule 13 of ‘the Rules’ would confirm that basically it revolves around ensuring the functioning of any factory in efficient and lawful manner and which obviously would also include the health and safety of the workers employed therein. It is for this purpose that Rule 13(1)(b) provides that an Inspector who is a qualified medical practitioner would also be expected to carry out medical examination as may be necessary. In my opinion, while the dominant purpose for which an Inspector of Factories is appointed is for a lawful running of any factory, such of the Inspector of Factories who are duly qualified medical practitioner, have been assigned an additional duty of carrying out medical examination as found necessary.

While on the subject I also deem it necessary to deal with Section 10 of ‘the Act’ which enables the State Government to appoint qualified medical practitioners as Certifying Surgeons, for the purposes of ‘the Act’ within such local limits or for such factory or class or description of factories as it may assign to them respectively.



Sub-section (4) of Section 10 obliges the Certifying Surgeon to carry out such duty as may be prescribed in connection with examination and certification of young person, examination of persons engaged in factories in dangerous occupations, to exercise medical supervision and to tender advice into the causes of illness by virtue of manufacturing process carried on. The duties of a Certifying Surgeon has been spelt out in Rule 14 of 'the Rules' which exhaustively mentions the duty attached to the post. A plain comparison of duties attached to the post of Certifying Surgeon qua duties attached to the post of Inspector of Factories would confirm that the job of an Inspector of Factories (Medical) even though has an ancillary duty of medical examination on workers but his job primarily is to foresee that the provisions of 'the Act' are strictly complied with by the factory owners. Although the health aspect is also a part of such duty but the dominant object for such appointment is otherwise.

In this regard, it would also be necessary to examine the memorandum placed before the Cabinet on the issue of enhancement of age of the Medical Officers/ Teachers and it would not take long to conclude that it is by reason of the retirement of the doctors with no equal push coming through appointment that a decision was taken to enhance the age of the Doctors in State Health Services including AYUSH doctors as also those in the Dental Services, Employee State



Insurance Medical Service as well as those in the teaching line. The object for enhancement of the age is very clear and it is to meet depleting strength of the doctors in the College and Hospital as well as in the Health Services that such a decision was taken. The decision taken by the Government to enhance the age of doctors serving in medical colleges, hospitals in dental services and in ESI hospital was not by way of largesse rather it was a conscious measure undertaken to arrest the depleting strength of the doctors until effective appointments were made on the post. May be if the petitioner would have remained on deputation in the Labour Services Cadre he would have benefited from such decision but his absorption in the Labour Services Cadre against the post of Inspector of Factories (Medical) has brought a change in his cadre which no longer remains connected with the health services.

Undisputedly an Inspector of Factories can be appointed from any branch viz Engineering, Technology or Medical and in the case of the petitioner it is by virtue of his qualification in Medicine that he was initially deputed against the post and has been subsequently absorbed against one such post but then the discharge of duties attached to the post of Inspector of Factories (Medical) is entirely distinct to those discharged by doctors serving in the Medical Colleges and Hospitals including AYUSH doctors as well as those



coming under the Employee State Insurance Medical Services Cadre. I have already discussed the duties attached to the post of Inspector of Factories and even though it alongside also requires an Inspector who is a qualified medical practitioner, to use his medical skill as a part of the duty but that is only a small fraction of the number of statutory discharge which is attached to the said post. On the other hand, it is those qualified medical practitioners who have pursued their profession and are engaged in discharge of duties which is directly attributable to their qualification as a medical practitioner or are engaged in imparting medical education, who are covered by the notification in question.

In effect, it is not the qualification in medicine alone which would entitle a qualified medical practitioner to enhancement of age rather his claim has to be tested in the backdrop of the duties discharged by him and in so far as the case in hand is concerned, the opinion expressed by the Principal Secretary to reject the claim of the petitioner is founded on sound reason requiring no interference.

The writ petition is dismissed.

(Jyoti Saran, J)

Surendra/-

AFR/NAFR	AFR
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