IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.4238 of 2022

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Lalan Prasad, aged about- 61 years (male), S/o Late Ledar Prasad, R/o-at-Vill-Jalpura, P.S.-Koilwary, District- Bhojpur at Ara.

... ... Petitioner/s

Versus

1. The State of Bihar through the Principal Secreary, Government of Bihar, Patna.
2. The Principal Accountant General (A and E), Bihar, Patna.
3. The Director, Secondary Education, Govt. of Bihar, Patna.
4. The District Education Officer, Bhojpur at Ara.
5. The District Programme Officer (Estt.), District, Bhojpur at Ara.
6. The Accountant General, Bihar, Patna.

... ... Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Rajeev Kumar Singh, Advocate
		Mr. Gyanendra Kumar Diwakar, Advocate
		Mr. Pranab Kumar, Advocate
		Mr. Santosh Kumar Singh, Advocate
		Mr. Prabhojot Singh, Advocate
For the respondent/s	:	Mr. Kameshwar Kumar, GP-17
		Mr. S.K. Ranjan, AC to GP-17

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CORAM: HONOURABLE MR. JUSTICE PURNENDU SINGH

ORAL JUDGMENT

Date : 21-09-2023

Heard Mr. Rajeev Kumar Singh, learned counsel appearing on behalf of the petitioner and Mr. Kameshwar Kumar, learned GP-17 appearing on behalf of the respondent/s.

2. Learned counsel appearing on behalf of the

petitioner submitted that the petitioner was a Class-IV employee in Hit Narayan Kshatriya +2 High School, Bhojpur at Ara, which was run by the Managing Committee and was taken over by the State Government on 02.10.1980 and in support of the same, learned counsel submitted that the State has not denied the said fact in their counter affidavit. He further submitted that the petitioner had attained age of 20 years on the said date. The petitioner had retired on 31.01.2021, on which date he had drawn a sum of Rs. 46,100/-. The petitioner has been denied due pension from the date he had joined service i.e. on 01.03.1976. The petitioner at the relevant time was aged about 15 years and 2 months treating his date of birth 17.01.1961. The School was run by the Managing Committee and treating the said date, the petitioner has been denied due pension and other retiral dues treating that the petitioner has rendered altogether 44 years of service . The petitioner is entitled for pensionary benefits in accordance with the Provisions of the Bihar Pension Rule, 1950 and Bihar Service Code, 1952 wherein pensionable service has been defined. The school was run by the Managing Committee and treating the date of appointment, the authorities have decided that the petitioner was required to retire on 31.03.2018 when he had completed in terms of the **Resolution No. 12978**

dated 19.09.2019 maximum period of 42 years of service of the General Administrative Department, Government of Bihar. The said finding for denial of pensionary benefit is contrary to the Provision of Bihar Pension Rules, 1950, particularly, Rule 57 of the said rules.

3. In support of his contention, learned counsel has referred to the provision of Appendix 5 appended to Rule 5 of the Bihar Pension Rules, 1950, which prescribes for the qualifying period for consideration of benefit or raising of such age from 16 years to 18 years makes no difference to the age of the retirement prescribed under Rule 73 of the Bihar Service Code, 1952. In support of his contention, the petitioner has relied upon a judgment dated ***07.08.2023*** passed in ***CWJC No. 10651 of 2022 (Ganga Deyal Singh v. The State of Bihar & Ors.)***, wherein, this Court has taken into consideration the law laid down by the Apex Court in case of ***Gopal Prasad v. Bihar School Examination Board & Ors.*** reported in ***(2020) 18 SCC 255.***

4. *Per contra*, learned counsel appearing on behalf of the State has referred to the statement made in paragraph no. 12 of the counter affidavit filed on behalf of the respondent no. 4- the District Education Officer, Bhojpur at Ara. It is relevant

to quote paragraph no. 12, which is as follows:

> *"12. That it is stated that according to letter no. 12978 dated 19.09.2019 issued by General Administrative Department, Govt. of Bihar clearly stipulates in para-6 that an employee appointed lesser than 18 years age can serve only 42 years in service. Since the appointment of the petitioner was made on 01.03.1976. Therefore he has completed 42 years of Service on 31.03.2018 and accordingly he must have to retire on 31.03.2018. Since the petitioner got retired on 31.01.2021 after completion of 44 years of service which is against the decision of the General Administrative Department under letter no. 12978 dated 19.09.2019."*

5. Learned counsel for the State emphatically submitted that the judgment upon which the petitioner has relied has been passed in the facts and context of the said case, which is not identical to the case of the petitioner and will not be of any help to the petitioner. In the present case the date the petitioner had joined the service under the management would be relevant and having completed 42 years of service on 28.02.2018 in view of letter no. 12978 dated 19.09.2019 issued by General Administration Department, which clarifies that an employee can only serve 42 years in service from the date of appointment. The statement to that effect has been made in paragraph no. 14 of the counter affidavit filed on behalf of the respondent no. 4. In support of claim of the State learned counsel has relied upon paragraphs no. 38 to 44 of the judgment

passed by the Full Bench of this Court in case of ***State of Bihar & Ors v. Asha Sharma*** reported in ***(2019) 2 PLJR 724***, which is reproduced hereinafter:

> ***"38. In the conspectus of the discussion hereinabove, the Court has to ascertain the logic behind the cut-off date. There is no dispute that every teacher and nonteaching employee became government servant by operation of law under Section 4(2) of the Act with effect from 2.10.1980 or the date of take over of the school. There is no dispute or discordant judicial pronouncement contrary to the proposition that service of teachers and non-teaching employees have all pensionary benefits admissible from the date of grant of recognition. The only rub in the instant case is whether service should be counted from the date of grant of permission to establish the educational institution or not. This concept of grant of permission to establish the educational institution was coined for the first time in the 1974 Ordinance. Prior thereto, there was no provision of opening any school without prior permission. It was open for the private player to establish educational institution to impart education. This scheme of 1974 Ordinance was subsequently retained in Section 29 of the 1976 Act. It may be relevant to mention here that under the Ordinance as well as under the Act there was specific condition enumerated for grant of permission to establish high school and permission was only granted on fulfillment of the condition for establishment of the school. Section 29 of the Ordinance which was retained in 1976 Act as Section 31 is quoted below:—***
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> **विधालय खोलने के लिए अनुमति** — माध्यमिक विधालय तब तक नही खोले जायेंगें और न संचालित होगें जब तक इस संयोजन के लिए बोर्ड से पूर्व अनुज्ञा प्राप्त न हो जाय।
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> *39. **It would be appropriate to note here that the scheme of pension was introduced by way of triple benefit scheme with effect from 1st April, 1962. The benefit of pension was admissible to all non-government schools whether run by local bodies or private management. Therefore, with the grant of permission to establish educational institution a teacher or non-teaching employee was entitled to the benefit of pension as a matter***

of course under the 1962 triple benefit scheme and 1964 triple benefit scheme. In the Notification dated 4th September, 1964 while extending the benefit of pension by improving the service condition, the State Government framed Rules in this regard and benefit was also extended to the permanent members of the ministerial staff serving in nonPatna government elementary school other than proprietary school whether run by local body or by private management would not only be entitled to contributory provident fund but also pension and gratuity. Under the 1964 Rules, there was no requirement that the school must be recognized school and thus the teachers of the school obtaining permission to establish educational institution were entitled to the benefit of pension in terms of the Rules framed by the State Government for triple benefit. As indicated, hereinabove, on 29.11.1978, the State Government decided to grant benefit of pension, family pension, provident fund and gratuity on the line of the employees of the State Government whose earlier age of retirement as 62 years by reducing to 58 years with effect from 1.4.1978, this benefit was available to those teaching and nonteaching employees, who opted for benefit of the pension scheme of 29.11.1978 by exercising option up to 31.12.1978. By subsequent Resolution dated 30.8.1980, the State Government in continuation of the triple benefit scheme launched vide notification dated 4.9.1964 and 29.11.1978 has decided to relax Rules-58, 60 and 79 of the Bihar Pension Rules. This aspect of the matter was not considered by another Full Bench in the case of State of Bihar v. Bhagwan Singh (supra) on which Mr. Anjani Kumar, learned AAG, has placed reliance.

40. On careful scrutiny, the Court finds fallacy in the submission of Mr. Anjani Kumar, learned AAG, that pension admissible under the 1962 scheme or 1964 scheme as well as after coming into force of the 1974 Ordinance and 1976 Act was not the liability of the State Government but it was a private arrangement from the District Secondary Education Fund. However, Mr. Anjani Kumar failed to explain the position that when the school was taken over and fund was retained by the State Government then how the pre-2.10.1980 liability to pay pension, gratuity and provident fund can be disowned by the State Government. While confronted on the scheme, on the definition under 2(anga) and Section 12 of the 1981 Act that the district secondary education fund is

raised in similar manner as District Secondary Education Fund used to be raised in 1974 Ordinance and 1976 Act and there is no corresponding provision that the District Secondary Education Fund shall be used for payment of pension, gratuity and provident fund in 1981, Mr. Anjani Kumar has no explanation to the absence of statutory scheme of payment of pension from District Education Fund under the 1981 Act. *(Emphasis Supplied)*

41. Considering the totality of the fact, we are of the considered view that the contentions advanced by Mr. Anjani Kumar that liability to grant pension to employees of private school under the 1962 and 1964 scheme or 1974 or 1976 Ordinance and Act does not pass on to the State Government and there is no liability of the State Government to grant pension, gratuity and provident fund to the teachers covered under the triple benefit scheme prior to take over are misconceived. The Court on careful consideration of the entire scheme of the Act and the notifications issued from time to time either for the purpose of counting service or for extending the benefit of triple benefit scheme and pension, as indicated hereinabove, is of the considered view that pension is admissible not only from the date of take over but from the date of grant of permission to establish in view of the fact that the Board took a conscious decision to count service from the date of grant of permission for establishment of the school. The decision of the Secondary Board to count service from the date of grant of permission to establish secondary school is saved by operation of Section 21 of the repeal and saving clause of the 1980 Ordinance and once the action of the Board is saved it follows as a matter of corollary that service is to be counted from the date of grant of permission to establish secondary school for the purpose of pensionary benefits.

42. Accordingly, we hold that teachers appointed prior to grant of permission shall reckon their service from the date of grant of permission for establishment of the institution and their service should be counted from that date for the benefit of pension. *(Emphasis Supplied)*

43. So far as the factual issues involved in CWJC No. 13563 of 2006 and CWJC No. 3486 of 2008 are concerned, the Court is of the view that directly the issues have not been referred for adjudication but it has been

referred to Full Bench as one of the issue was counting of service from the date of permission to establish secondary education. We refrain to decide the other issues raised in these writ applications as it would cause prejudice to either party and there is no conflicting decision on the issue of condonation of break in service. Since there is no decision of the writ court, this Court deems it fit and proper to remit CWJC Nos. 13563 of 2006 and 3486 of 2008 to be adjudicated by the learned Single Judge in the light of our discussion and decision that service shall count from the date of permission to establish secondary school in terms of 1974 Ordinance and 1976 Act.

44. In the result, LPA No. 1568 of 2011 and LPA No. 1681 of 2013 are dismissed. All the decisions contrary to the view we have taken stand over ruled."

6. On these basis, learned counsel submitted that the petitioner is not entitled for grant of relief and fixation of pensionary benefits from the date school was taken over by the State Government.

7. Having heard the rival submissions made by the parties and perused the record. The issue relating to the qualifying service has already been released by the Hon'ble Apex court in case of ***Gopal Prasad* (*supra*)**. The observation made by the Hon'ble Supreme Court, particularly, in paragraphs no. 48, 49 and 67 is relevant, wherein the relevant rules of Bihar Service Code, 1952, as well as, Bihar Pension Rules, 1950 have been discussed. To appreciate the facts of the present case and issue involved, it is apt to reproduce paragraphs no. 28, 31, 32, 33, 44, 48, 49, 55, 56 and 67 hereinafter:

"28. The terms and conditions of service of employees of the Bihar School Examination Board are governed by the Bihar Service Code. Rule 73 of the Bihar Service Code, inter alia, provides that "the date of compulsory retirement of a government servant is the date on which he attains the age of 58 years. He may be retained in service after the date of compulsory retirement with the sanction of the State Government on public grounds, which must be recorded in writing".

31. <u>On a bare reading of the said resolution, it is patently clear that employees who had been appointed before attaining the age of 18 years, were to be deemed to have attained the age of 18 years on the date of their appointment and that they would superannuate on completion of 60 years of age if they were Category 4 employees and on completion of 58 years of age in case they were Category 3 employees. The age of 58 years for Category 3 employees was, later, during the tenure of service of the appellant, increased to 60 years.</u> *(Emphasis Supplied)*

32. <u>The resolution may not have perfectly been worded. In my view, the resolution was a beneficial one in the interest of those employees who would otherwise have been deprived of pensionary benefits for the period of service rendered by them before attaining the age of 18 years.</u> Such employees were to be deemed to be 18 years on the date of their appointment, so that they were not deprived of pensionary benefits for part of their service period, but were to retire on attaining the age of retirement as prescribed in Rule 73 of the Bihar Service Code. The resolution might also have been necessitated by reason of irregular appointments after the Circular dated 15-1-1998 of persons who had not attained 18 years of age, to put all disputes with regard to the legality of their appointment to rest. It does not appear that the resolution was intended to retire employees who had joined service before attaining the age of 18 years, before completion of their actual age of retirement, as per the Rules. *(Emphasis Supplied)*

33. If it were the intent of the resolution that employees appointed before attaining the age of 18 years, would retire before attaining the actual age of retirement, as per Rule 73 of the Bihar Service Code, the language and/or wording of the resolution would have been different. The resolution would then have expressly stated that the date of birth of employees, appointed before attaining the age of 18 years, would, for the purpose of retirement, be deemed to be the date

on which the employee concerned would have been born, if he/she were to complete 18 years of age on the date of appointment. The Resolution would clearly have stated that such employees would retire on attaining the age of retirement prescribed in the Bihar Service Code on the basis of their deemed date of birth, notwithstanding the fact that they may not have attained the age of retirement as per the Bihar Service Code as per their date of birth as recorded by the Bihar School Examination Board.

44. The mere fact that an employee may have been a minor at the time of his initial appointment is inconsequential in the absence of any law at the material time of his appointment, prohibiting appointment of 15/16 year old minors. The appellant who was 15½ years old may have been a minor, but certainly not a toddler. It is absurd that any rational employer, far less a statutory body, would appoint a toddler. The hypothesis of appointment of a toddler is far-fetched and unrealistic. The apprehension of claims in future to appointment from persons less than 18 years of age is also baseless in view of the Circular dated 15-1-1998 which fixes 18 years as the minimum age of retirement. The circular would govern subsequent appointments.

48. <u>In my view, the interpretation of the Full Bench of Rule 73 of the Bihar Service Code in Ragjawa Narayan Mishra [Ragjawa Narayan Mishra v. Bihar Rajya Khadi Gramoudyog Board, 2005 SCC OnLine Pat 978 : (2006) 1 PLJR 410] is misconceived and erroneous. The counsel appearing on behalf of the appellant has rightly argued that there is no rule which prescribes the length of service as a criteria for superannuation. Neither Rule 73 of the Bihar Service Code, nor Rule 57 of the Bihar Pension Rules, 1950 prescribed any limit to the length of service.</u> *(Emphasis Supplied)*

49. The Full Bench [Ragjawa Narayan Mishra v. Bihar Rajya Khadi Gramoudyog Board, 2005 SCC OnLine Pat 978 : (2006) 1 PLJR 410] fell in error in proceeding on the basis of the length of service, when Rule 73 of the Bihar Service Code prescribes a specific age of superannuation. As argued on behalf of the appellant, Rule 73 of the Bihar Service Code prescribes an age of retirement. The said Rule does not make

length of service a criteria for retirement.

55. __Thus, if the age of qualifying service for pension is 18 years, the length of service for computation of pensionary benefits would have to be computed from the date of attainment of 18 years of age. However, if the prescribed age of retirement is completion of 60 years, an employee cannot be forced to retire before attaining that age except on grounds provided in Service Rules. For example, an employee may prematurely be retired by way of disciplinary action, if the rules so provide.__(Emphasis Supplied)

56. When the age of retirement is governed by express rules, which do not prescribe length of service as a criteria of retirement, but provide for retirement upon attainment of age, an employee cannot be made to retire before attaining that age of retirement, only because he/she has served for a certain length of time, by a convoluted process of logical reasoning. My judicial conscience, also does not permit me to uphold the judgment under appeal, only because the High Court has, for a while, followed the Full Bench decision of that Court which has held the field for a while. The Full Bench decision was, in my opinion, erroneous. This Court has time and again reversed its own decisions including those of Constitutional Benches, which have held the field for decades. To cite an example, the Constitution Bench judgment of this Court in Atiabari Tea Co. Ltd. v. State of Assam [Atiabari Tea Co. Ltd. v. State of Assam, AIR 1961 SC 232] which held the field for almost half century was overruled by a judgment of nine-Judge Bench judgment in Jindal Stainless Ltd. v. State of Haryana [Jindal Stainless Ltd. v. State of Haryana, (2017) 12 SCC 1] . I see no reason why the judgment and order impugned [Gopal Prasad v. Bihar School Examination Board, 2012 SCC OnLine Pat 1735] should not be set aside.

__67. I am of the view that the appeal should be allowed and the judgment and order [Gopal Prasad v. Bihar School Examination Board, 2012 SCC OnLine Pat 1735] of the Division Bench and the Single Bench [Gopal Prasad v. Bihar School Examination Board, 2012 SCC OnLine Pat 1734] be set aside. The appellant is entitled to a declaration that the appellant was entitled to continue in service till 18-11-2014, being the date on which he completed 60 years of age, as per his__

service records, and shall be entitled to all consequential benefits including arrears of pay, if any, pensionary benefits, etc.” *(Emphasis Supplied)*

8. The matter was referred to a larger Bench of the Hon’ble Apex Court. The larger Bench did not interfere with the Division Bench nor formed any opinion to differ from judgment passed by the Division Bench.

9. In the above circumstances and the observation made by the Apex Court in the case of *Gopal Prasad (supra)*, it is made clear that the misconceived objection raised by the Accountant General, Bihar has only delayed the matter in fixation of pension of the petitioner by misinterpreting the Rules governing entitlement of pension, at the same time petitioner, who was a Class-IV employee, has been harassed by not being given his legal dues.

10. Considering the aforesaid proposition of law laid down by the the Apex Court and facts of the present case the petitioner is entitled to continue in service till 17.01.2021 being the date on which he had completed 60 years of the age as per his service records, and shall be entitled to all consequential benefits including arrears of pay and pensionary benefits.

11. The concerned respondents are directed to complete the entire exercise in recalculating the pensionary

benefits including other retiral dues of the petitioner, who was a Class-IV employee, within a period of six weeks from the date of receipt/production of this order in accordance with the law laid down by the Apex Court.

12. The Accountant General, Bihar is directed to fix the pension/ commutation of pension of petitioner, who was a Class-IV employee, as applicable on the basis of available records in accordance with discussion made hereinabove and law laid down by the Apex Court he must accordingly issue authority within a period of six weeks from the date of communication of this order.

13. There is no order as to costs.

14. Accordingly, the present writ petition is allowed.

(Purnendu Singh, J)

Niraj/-

AFR/NAFR	AFR
CAV DATE	N.A.
Uploading Date	13.10.2023
Transmission Date	N.A.