

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.591 of 2021

Subhash Thakur, Son of Late Nagendra Thakur, Resident of Village- Uren Bankatta, Uren, P.S.- Benipatti, District- Madhubani, Retired as Laboratory Incharge, Department of Physics, K.V.S. College, Uchhaith, Benipatti, Madhubani

... .. Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Department of Education, Government of Bihar, Patna
2. The L.N. Mithila University, Kameshwar Nagar, Darbhanga through the Vice-Chancellor.
3. The Vice-Chancellor, L.N. Mithila University, Kameshwar Nagar, Darbhanga.
4. The Registrar, L.N. Mithila University, Kameshwar Nagar, Darbhanga
5. The Finance Officer, L.N. Mithila University, Kameshwar Nagar, Darbhanga
6. The Principal, K.V.S. College, Uchhaith, Benipatti, madhubani

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Bhavendra Jha, Advocate Mrs. Anju Jha, Advocate
For the Respondent/s	:	Ms. Namrata Singh, AC to GA-12
For the University	:	Mr. Nadim Seraj, Advocate

CORAM: HONOURABLE MR. JUSTICE HARISH KUMAR
CAV JUDGMENT

Date : 08-02-2023

Heard Mr. Bhavendra Jha, learned counsel for the petitioner, duly assisted by Mrs. Anju Jha, Mr. Nadim Seraj, learned counsel for the University and Ms. Namrata Singh, learned AC to GA-12, for the State.

2. By invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India, the petitioner seeks direction upon the respondents to grant and make payment of post retirement benefits of pension, gratuity and leave encashment in favour of the petitioner, who retired from the post



of Laboratory Incharge, Department of Physics in K.V.S. College, Uchaith, Benipatti, Madhubani (hereinafter referred to as 'K.V.S. College') on 31.01.2016 after taking into account the uninterrupted service since 17.05.1979 along with the interest on delayed payment.

3. Shorn of unnecessary details, the relevant facts, which are necessary for adjudicating the present matter is/are that the petitioner was appointed against 1st post of Laboratory incharge on 17.05.1979 by the then Governing body of the College vide letter no. 28/79 dated 17.05.1979 (Annexure-1). The College, in question, was made constituent in December, 1980. Subsequently, 47 posts of Class-III and IV working employees of the College, including one post of Laboratory Incharge of Physics on which the petitioner was working was sanctioned by the State Government vide letter no. 298 dated 09.03.1990.

4. In pursuant to the order of the Chancellor of the Universities, the services of the petitioner and others were regularized and payment of salary was started to him vide Annexure-3 to the writ petition, but subsequently the payment of salary to the employees including the petitioner was stopped, but they were allowed to continue to work, as would be evident from letter no. 24764 dated 02.11.1993, issued by the Registrar of the University (Annexure-11 to the rejoinder). The aforesaid order was



challenged by the employees, including the petitioner before this Court in C.W.J.C. No. 6145 of 1996, which was disposed of on 09.05.1997 with a direction to the University to fill up all sanctioned posts in regular manner within six months by issuing an advertisement and following the selection process giving age relaxation to the petitioners for the period they actually worked.

5. The University in response to the direction of this Court dated 09.05.1997 published an advertisement on 18.02.2002. Since the University took more than five years to issue advertisement, instead of six months, despite the mandate of this Court, the petitioner and others again moved this Court in C.W.J.C. No. 3377 of 2002 assailing the said advertisement on the ground that the advertisement was published belatedly, hence, they are entitled for their regularization, however, the petitioner along with other employees had also applied in response to the advertisement dated 18.02.2002. The said writ petition was disposed of on 09.02.2010 vide Annexure-4 to the writ petition with a direction to the respondents to complete the selection process pursuant to the advertisement dated 18.02.2002 within four months after giving them due relaxation of age.

6. In compliance to the aforesaid direction of this Court, as contained in order dated 09.02.2010, the selection committee was constituted by the University and on the recommendation of



the said selection committee, the Vice-chancellor of the University made appointment of 43 non-teaching Class-III and IV employees in the prescribed pay scale in the K.V.S. College vide Memo No. 10863-936/12 dated 11.08.2012 (Annexure-6) issued under the signature of the Registrar of the University. The name of the petitioner finds place at serial no.1 on the post of laboratory incharge of Physics department and having been attained the age of superannuation at the age of 62 years, finally superannuated on 31.01.2016 from the post of Laboratory Incharge.

7. It is the case of the petitioner that he was appointed in the year 1979 by the Governing body of the College, a competent authority and worked in a regular establishment on the duly sanctioned vacant post of Laboratory Incharge of Physics Department, which can also be substantiated from the materials available on record, including the letter no. 9341/12 dated 26.06.2012 of the Registrar of the University sent to the Principal Secretary, Education Department, Government of Bihar and as the petitioner continued his service uninterruptedly without any break followed by his absorption on 11.08.2012 vide Annexure-6 to the writ petition, he is entitled for the post-retiral benefits and other outstanding dues after counting of his whole period of service, as the respondents went on extracting work from him since 1979 till his retirement on 31.01.2016 to cater the necessity of the College.



8. Mr. Jha, learned counsel for the petitioner further submits that it is well settled principle of law that the incumbent of a selection would be governed by the scheme of pension, which was applicable at the time of advertisement. He further submits that the Division Bench of this Court in the case of **Braj Kishore Singh and others Vs. The State of Bihar and others**, since reported in 2004(3) PLJR 668 after taking note of the Full Bench of this Court in the case of **Braj Kishore Singh and others Vs. The State of Bihar and others**, reported in 1997 (1) PLJR 509 has been pleased to hold that the appellants were appointed against the post as per staffing pattern. However, it was open to the State Government to consider the validity of their appointment for the purpose of granting or refusing to grant *post facto* approval in terms of Section 35 of the Act, as interpreted by the Full Bench of this Court. The Full Bench further observed that it would have sent the matter to the State Government to consider the validity of their appointment, but as stated above taking into consideration more than 17 years of the services ordered for regularization of their services against the posts within the staffing pattern as applicable to the College. Though the Full Bench did not pass specific order as to from which date the regularization is to take effect, but as it appears from para. 32 of the judgment that the Full Bench took note of the judgment of the Apex Court in the case of **The Direct**



**Recruit Class-II Engineering Officers' Association and others
vs. State of Maharashtra and others (AIR 1990 SC 1607)** which
would be useful to refer hereinbelow.

“6. xxx xxx xxx

*In the above premises, the judgment of the learned Single Judge rejecting the claim of the appellants on the ground that they were appointed without prior approval of the State Government as contemplated under Section 35 of the Act cannot be sustained. In the ordinary course, in view of my conclusion that it is open to the State Government to consider the validity of appointments already made for the purpose of granting or refusing post facto approval, I would have considered asking the State Government to look into the claim of the appellants afresh. However, having regard to the fact that the appellants have continued in service for more than 17 years, I do not think it would be appropriate exercise of discretion to re-open the matter after such a long lapse of time. In **Direct Recruit Class-II Engineering Officers Association v. The State of Maharashtra**, (1990) 2 SCC 715 : AIR 1990 Supreme Court 1607 a Constitution Bench of the Apex Court has held that where initial appointment is not made according to the rules but the appointee continues in service uninterruptedly for long period till regularisation of his service, the entire period as the period spent in service for the purpose of consequential benefits will be counted. The appellants are accordingly entitled to have their services regularised against the posts within the staffing pattern as applicable to the College.”*



9. Further reliance has also been made on a judgment rendered by a coordinate Bench of this Court in the case of **Rajendra Kamti and another Vs. Lalit Narayan Mishra University and others**, reported in **2006 (3) PLJR 83** and emphasis has been made on paragraph no. 13, 14 and 15 wherein learned court has dealt with the provisions of the Bihar State Universities Act, 1976 in relation to the qualifying service of pension. He submits that in para. 13 of the said judgment, the learned Single Judge has been pleased to hold that “it can very well be visualized from the clean and clear definition of expression “qualifying service” which means service rendered as a member of staff of the University in a substantive capacity including the periods spent on probation. All services rendered in the University on full time basis on a temporary or officiating capacity followed without interruption by substantive appointment in the same or any other post shall count as qualifying service except in respect of periods of service in “Work Charged” establishment and periods of service paid from “Contingencies”.

10. In order to buttress his submission, learned counsel for the petitioner further placed reliance upon the judgment of the Hon’ble Supreme Court in the case of **Netram Sahu Vs. State of Chhattisgarh and Another**, reported in **(2018) 5 SCC 430** wherein the submission of the respondent State to the effect that



the appellant-employee could not be held eligible to claim the gratuity amount because out of total period of 25 years of his service, he worked 22 years as daily wagers and only three years as regular employee, for the purposes of the benefit under the gratuity act has been rejected and held that once the State regularized the services of the appellant while he was in State services, the appellant became entitled to count his total period of service for claiming the gratuity amount subject to his proving continuous five years of service as defined under Section 2-A of the Act which, in this case, the appellant has duly proved.

11. The counsel for the petitioner also went on relying upon a judgment passed by the learned coordinate Bench of this Court in C.W.J.C. No. 12318 of 2013 (**Sandhya Mandal Vs. The State of Bihar and others**) and other analogous cases, which shall be dealt with later on at appropriate place.

12. Per contra, learned counsel for the State confronting the submissions made on behalf of the petitioner submits that from the writ application, it appears that in view of the order passed by this Court in C.W.J.C. No. 6145 of 1999, the University came out with an advertisement for appointment of different posts on 18.02.2002 including the post of Lab incharge (Physics). The petitioner and other similarly situated persons unsuccessfully challenged the advertisement by filing C.W.J.C. No. 3377 of 2002,



which was disposed of on 09.02.2010 with a direction to the University to complete the process of appointment on vacant Class III and IV posts in the College after giving relaxation of age for actual period, the employee worked in the College. The University completed the selection process and finally 43 persons were appointed on different Class III and IV posts vide order dated 11.08.2012 and the petitioner joined the post on 16.08.2012 in the College. It is not in dispute that the petitioner was appointed on substantive basis on 11.08.2012 vide Annexure-6 to the writ petition. He further submits that the Hon'ble Chancellor vide its notification as contained in Memo No. AKU-05/2015-1445/GS(1) dated 07.08.2020 approved the Statute for New Contributory Pension Scheme, as applicable to the employees who are appointed on or after 01.09.2005 in the Universities and their constituent Colleges. He vehemently submits that Clause 2 of the said Statute provides that it shall apply to all teachers, officers and other employees of the University, who have been appointed on or after 01.09.2005 by a regular manner on a sanctioned posts or approved by the State Government by the due process of appointment. Since the petitioner was appointed on substantive and regular manner on 11.08.2012 after following the due process of appointment after 01.09.2005, therefore, the petitioner is not



entitled for pension and general provident fund, though he is entitled for death-cum-retiral gratuity and leave encashment.

13. During the pendency of the writ application, a supplementary counter affidavit has been filed on behalf of respondent no.1 and submissions has been made that in response to the letter no. 1133 dated 04.10.2021 of the Education Department, the University vide its letter no.266 dated 26.10.2021 informed the Education Department that since the service of the petitioner has been absorbed with effect from 16.08.2012 and, accordingly, he is covered with New Pension Scheme. So far the payment of retiral dues under New Pension Scheme is concerned, the same will be made after verification of the pay fixed by the University from the Pay Verification Cell of the Education Department.

14. Having heard the parties at length and considering the pleadings and the materials available on record, the only question arises for determination is as to whether the services rendered by the petitioner prior to his appointment/absorption of service can be accounted for grant of retiral benefits or not and if granted from which date and under which scheme.

15. Before parting with the final outcome, there are some undisputed facts, which are necessary to be taken note of. The petitioner was appointed in the year 1979 by the Governing



Body of the College against the vacant post and he continued to work as Laboratory Incharge of Physics Department, which post was duly sanctioned by the State Government vide letter no. 298 dated 09.03.1990. The service of the petitioner along with other employees appointed by the Governing Body of the College were regularized by the Vice-Chancellor of L. N. Mithila University vide Memo No. VCR-890-91/92 dated 18.09.1992 and the payment of salary to the employees, including the petitioner, was made in a prescribed pay scale along with all the admissible allowances, but subsequently, the Chancellor of the Universities reviewed and stayed his earlier order and the payment of salary of the employees of the College was stopped vide letter no. A/c 354/92 dated 17.12.1992, but the petitioner and other employees were allowed to continue to discharge work in order to cater the need of the University. It is also not in dispute that the aforesaid order was challenged by the petitioner and others in C.W.J.C. No. 6145 of 1996, which was disposed of on 09.05.1997 with a direction to the University to fill up all sanctioned posts in regular manner within six months by issuing an advertisement and following the selection process and in case the petitioners of the said writ application apply, their cases would also be considered and in case of any of the petitioner became overage, he would be entitled for relaxation of age, for the period he worked in the



College and whole exercise is directed to be completed within six months from the date of receipt/production of a copy of the order of this Court. However, after delay of five years, an advertisement was published on 18.02.2002, which finally resulted into appointment of the petitioner and others in the year 2012.

16. So far the issue with regard to the applicability of New Pension Scheme, which came with effect from 01.09.2005 is concerned, the similar issue was considered by a Bench of this Court in the case of **Md. Kayumuddin Ansari & Others Versus- State of Bihar & Others** passed in CWJC No 10901 of 2006 wherein under similar circumstances, the appointment letters of the petitioners came to be issued after 01.09.2005 and the learned coordinate Bench has been pleased to hold as follows:

“It is well settled by now that old vacancies have to be governed by the old Rules and the new Rules coming into force after beginning of the process of selection as per old Rules cannot be made applicable. Reference in this connection may be usefully made to the judgment of Apex Court in the case of P Mahendran Vs State of Karnataka reported in (1990) 1 SCC 411. Moreover a right to receive pension is condition of service as has been held by the Apex Court in the case of Union of India Vs Gurnam Singh, reported in (1982) 2 SCC 314 and thus to be governed in accordance with the terms and conditions of the advertisement and the existing Rules inasmuch as he acquires a right to be considered for selection



and appointment in accordance with the then existing Rules. This Court would accordingly hold that the petitioners being appointees of the old transaction of Advertisement No 2 of 2000 in continuation with old appointees of 2003 will be entitled to get the benefit of old pension scheme and they will not be governed by the new Contributory Pension Fund Scheme coming into force wef 01.09.2005. It has to be also kept in mind that even the original appointment letter issued on 26.11.2005 to the petitioners, did not contain any clause and/or condition that they will be governed by the new Contributory Pension Fund Scheme and therefore, the resolution of the Finance Department, contained in Annexure 10 dated 01.09.2005, cannot be made applicable in the case of the petitioners as it was not made part of their service condition also in their appointment letter.”

17. Further the Coordinate Bench of this Court while considering the application of Old Pension Scheme in relation to the **T.B. Attendant coming under Category-11 and was a Class IV post coming under Category-12 in different districts on different dates** in C.W.J.C. No. 16468 of 2016 (Chandra Kant Kumar and Others Vs. The State of Bihar and Others) vide judgment dated 03.04.2017 and relying on the aforesaid judgment this Court has allowed the writ petition, bearing C.W.J.C. No. 8319 of 2020 (Ram Janam Paswan and Others vs. The State of Bihar and Others) vide judgment dated 21.01.2021 extending the benefit of Old Pension Scheme on the ground that delay in



appointment pursuant to Advertisement No. 02/2004 in different districts will not cause prejudice to the persons appointed after coming into force the New Pension Scheme as all appointments were made pursuant to Advertisement No. 02/2004. It is trite law that the service condition of a person would be governed by the Rules and Regulations, which was enforced at the time of the issuance of the Advertisement and it cannot be altered by the subsequent Rules or Regulations enforced by the State respondents. The respondents cannot take benefits of their own wrong, as the petitioner cannot be told that their right stands defeated because the respondents failed to perform their duty and took decision for his regular appointment within time. Reference in this connection may be made to a celebrated judgment of Justice Chagla, C.J. in the case of **All India Groundnut Syndicate Ltd. Vs. Commissioner of Income Tax, Bombay City: AIR 1954 Bom. 232** in which it has been held as follows:-

“But the most surprising contention is put forward by the Department that because their own officer failed to discharge his statutory duty, the assessee is deprived of his right which the law has given to him under Sub-section (2) of Section 24. In other words, the Department wants to benefit from and wants to take advantage of its own default. It is an elementary principle of law that no person--we take it that the Income-tax Department



is included in that definition--can put forward his own default in defence to a right asserted by the other party. A person cannot say that the party claiming the right is deprived of that right because "I have committed a default and the right is lost because of that default."

18. It would also be relevant to note at this stage that the respondent University is governed by the provisions of Bihar State Universities Act, 1976. In Statute No.1 at item no. 14(i) a provision is made as to what is the qualifying service of pension. Part-II pertains to statutes. Chapter 1 deals with the general conditions of service. Clause 14 in Section II which deals with pension is very material and vital which reads as under:

“(i) “Qualifying service” means service rendered as a member of the staff of the University in a substantive capacity including period spent on probation. All services rendered in the University on a full time basis on a temporary or officiating capacity followed without interruption by substantive appointment in the same or any other post shall count as qualifying service except in respect of periods of service in “Work charged” establishment and periods of service paid from “Contingencies”:

Provided that continuous temporary service of not less than 15 years (10 years in the case of those who retire on or after 31st March, 1980) shall also be counted as qualifying service even if not followed by substantive appointment.



(ii) The minimum age after which service counts for pension shall be 18 years.

(iii) Service rendered in any College affiliated to a University in the State of Bihar followed without interruption by University service will also count as qualifying service for the purpose of these Statutes subject to the condition that the employer's contribution to his/her Provident Fund alongwith interest thereon maintained in the affiliated college has been deposited in the University by the College concerned or the employee concerned or in the event of his/her death by his/her beneficiary concerned.

(iv) Period of foreign service will also count for pension/gratuity if the employer's share of the Provident Fund plus interest thereon, for the period of foreign service is paid to the University by employer or the employee or in case of death by the beneficiary concerned. In cases of foreign service occurring after the promulgation of these Statutes, such service will also count for pension/gratuity if pension contribution therefore are paid to the University by the foreign employer or the employee concerned. The rates of pension contribution will apply, mutatis mutandis as laid down in Appendix II under Fundamental Rules, Govt. of India, as amended from time to time.

(v) All kinds of leave including extraordinary leave and joining time granted on transfer/appointment as admissible under the service Statutes, will count for pension without restriction.

(vi) Any interruption in service other than the period, indicated above shall not count for qualifying service.



(vii) Dismissal or removal from service will entail forfeiture of all past service for purpose of grant of pension/gratuity.”

19. Learned coordinate Bench of this Court in the case of **Rajendra Kamti** (*supra*) while dealing with the some what and identical matter considering the relevant provision of the Bihar State Universities Act, 1976 has been pleased to hold in para. 13 to 16 that the petitioners shall be entitled to have the benefit of past service for the purpose of adding or tagging or joining with the period of service after regularization for the purpose of payment of pension including the family pension. It would be apt to quote para 13 to 16 of the judgment for proper appreciation of this fact.

“13. It can very well be visualised from the clean and clear definition of expression “qualifying service” which means service rendered as a member of staff of the University in a substantive capacity including the periods spent on probation. All services rendered in the University on a full time basis on a temporary or officiating capacity followed without interruption by substantive appointment in the same or any other post shall count as qualifying service except in respect of periods of service in “Work Charged” establishment and periods of service paid from “Contingencies”.

14. It is not the case of the University that the petitioners till they were regularised were not working on full time basis. It is, also, not the case of the University that they worked in “Work Charged” establishment and paid out of contingencies. There is,



obviously, no case of period of service in the category of "Work Charged" as the same is not involved in this group of petitions.

15. It is, therefore, even apparent from the statutory provisions of the Statute under the Universities Act that the petitioners shall be entitled to have the benefit of past service for the purpose of adding or tagging or joining with the period of service after regularisation for the purpose of payment of pension including family pension. Let it be again highlighted that it is not the case of the University that the induction or their initiation of service was attributable to the misdeeds or malfeasance or misfeasance or mischief or fraud. The persons who are belonging to the poor status of the society who are attracted and called for work and from whom work is taken on full time basis but only on payment of daily wage basis for a long period, uninterruptedly, without any objection from any quarter after being regularised can be deprived of their right of joining the earlier period of service for the purpose of earning the pensionary benefits? To which the spontaneous answer would be in the negative.

16. There is a purpose and policy behind the concept of pension. Pension is not a charity or a chance. Pension is an amount to be paid to the employee upon completion of certain years of service of the period they have invested from capital of sweat and blood in the growth of the institution. Therefore, it cannot be said that an unscrupulous Master should be allowed to take undue advantage against the exploited labours."



20. There is nothing on record to show that the service of the petitioner was discontinued and admittedly the petitioner superannuated on 31.01.2016 and the stand of the University is not that the very initial appointment of the petitioner was against a non-sanctioned post and not by the competent authority. The reliance made by the petitioner on a judgment rendered in C.W.J.C. No.12318 of 2013 and other analogous cases titled as **Sandya Mandal Vs. The State of Bihar and others**, would also be worth mentioning here as this Court while considering the identical matters has been pleased to allow the writ applications and directed to ensure payment of retiral dues to the employees of different colleges by counting their prior services rendered before the regularization by holding the petitioners of the writ applications entitled to get the benefit of staffing pattern because it has already been set at rest that once posts are available, the competent authority may make appointment against such posts and the said appointment would be deemed to be an appointment according to the staffing pattern. Petitioner's assertion that he has been appointed on sanctioned vacant post is supported by various annexures issued by the respondents, which admits the fact that he was appointed by the competent authority against the sanctioned vacant post and further there is no such stipulation in the letter of appointment that the services of the petitioner shall be governed by



the New Pension Scheme and, as such, the judgment rendered in the case of **Netram Sahu** (*supra*) is attracted in the present case also, in the matter of counting past services for the purposes of pensionary benefit of the petitioner, as the petitioner was appointed on sanctioned post and he has continuously worked for more than three decades, which lastly culminated into absorption/appointment of the petitioner.

21. This Court also cannot lose sight of the fact that the services of the petitioner was already regularized way back in the year 1992 itself by the Vice-chancellor of the Magadh University vide Memo No.VCR- 890-91/92 dated 18.09.1992 and subsequently that order was only stayed and salary was stopped, but he has been allowed to continue to discharge his duty on the said post. Since the petitioner's past services has been recognized by the respondent and on the recognition of the past service, he has been appointed on regular post, he cannot be denied to pensionary benefit under Old Pension Scheme notwithstanding coming into force of New Pension Scheme as taking into advantage their own wrong in causing delay in regular appointment of the petitioner and other similarly situated persons. The petitioner should not be made to suffer for the gross laches, negligence and inaction on the part of the respondents in not making appointment of the petitioner and other similarly situated persons in the stipulated period, as



specified by the Hon’ble Court in C.W.J.C. No. 6145 of 1996. The arbitrariness apparent on the face of the records to the prejudice of the petitioner cannot go unchecked.

22. In view of aforesaid position obtaining in law, the writ petition stands allowed. The respondents are directed to ensure the payment of all the retiral benefits under the Old Pension Scheme after taking into account his past services rendered in the College, in question, w.e.f. the date when the post of Laboratory Incharge (Physics) was sanctioned by the State Government vide letter no. 298 dated 09.03.1990 (Annexure-2 to the writ petition).

23. This Court further directs the respondents that the entire exercise must be completed preferably within a period of three months from the date of receipt/production of a copy of this order.

24. There shall be no order as to costs.

(Harish Kumar, J)

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AFR/NAFR	NAFR
CAV DATE	28.11.2022
Uploading Date	13.02.2023
Transmission Date	

