

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**Civil Writ Jurisdiction Case No 3628 of 2018**

Dr Gopal Prasad son of Late Jadu Lal, Resident of 201- Shristi House,  
Opposite Kankarbagh Police Station, P.S.- Kankarbagh, Town and District-  
Patna.

... .. Petitioner/s

Versus

1. The State Of Bihar through the Principal Secretary, Health Department,  
Government of Bihar, New Secretariat, Patna
2. The Special Secretary, Health Department, Government of Bihar, New  
Secretariat, Patna.
3. The Additional Secretary, Health Department, Government of Bihar, New  
Secretariat, Patna.
4. The Joint Secretary, Health Department, Government of Bihar, New  
Secretariat, Patna.
5. The Under Secretary, Health Department, Government of Bihar, New  
Secretariat, Patna.

... .. Respondent/s

**Appearance :**

|                      |   |                                                                                 |
|----------------------|---|---------------------------------------------------------------------------------|
| For the Petitioner/s | : | Mr Shivendra Kishore, Sr Advocate with<br>M/s Saroj Kr, Bimlendu Shekher Thakur |
| For the Respondent/s | : | Mr Anil Kr Verma, AC to AAG IX                                                  |

**CORAM: HONOURABLE MR JUSTICE RAJIV ROY**

**ORAL JUDGMENT**

**Date : 26-09-2023**

Heard Mr Shivendra Kishore, learned Senior Counsel  
for the petitioner and Mr Anil Kumar Verma, learned AC to AAG  
IX.

**2** This writ petition has been filed for the following  
reliefs:

*“i for quashing of word ‘notional’ from the  
notification bearing Memo No 06 (17) dated 08.01.2018  
by which the petitioner has been appointed w e f*



*15.10.2014 on the post of Assistant Professor, Nephrology Department by modifying earlier notification dated 01.04.2016 in the light of order dated 15.07.2014 passed in CWJC No 10226 of 2013 and MJC No 4559 of 2014.*

*ii for a direction on the respondents to issue appointments/posting order of the petitioner to the post of Assistant Professor, Nephrology Department w e f 15.10.2014 in the light of order dated 15.07.2014 passed in CWJC No 10226 of 2013 and MJC No 4559 of 2014.*

*iii for a direction on the respondents to pay consequential benefit of arrears of salary w e f 15.10.2014 and other service benefit including seniority and promotion consequent upon issuance of actual appointment order w e f 15.10.2014 in the light of order dated 15.07.2014 passed in CWJC No 10226 of 2013 and MJC No 4559 of 2014.*

*iv for any other relief/reliefs to which petitioner is found entitled in the facts and circumstances of the case.”*

**3** The case of the petitioner is/are as follows:

*i) the petitioner is MBBS, DCH, MD (Pediatrics) and DM (Nephrology).*

*ii) in the year 1990, after following procedure, petitioner was appointed as Medical Officer, Bihar Health Service Cadre, Government of Bihar.*

*iii) further, vide notification No 717 (2) dated 22.06.2001 of the Health Department, Government of Bihar, petitioner was posted as Medical Officer, Primary Health Centre, Paraiya, Gaya on which petitioner joined on 06.07.2001 and discharged the duty of Medical Officer.*

*iv) On 23.03.2004, petitioner proceeded on leave due to illness and due to protracted illness submitted leave application seeking extension of medical leave.*



v) *the Civil Surgeon -cum- Chief Medical Officer, Gaya vide its letter bearing Memo No 2853 dated 07.08.2006 informed the Health Department in regard to absence of petitioner from duty w e f 25.10.2005 which led to initiation of a departmental proceeding under Rule 17 of the Bihar Government Servant (Classification, Control and Appeal) Rules, 2005 vide resolution No 149 (9) dated 04.02.2010.*

vi) *in the meanwhile, on recovery, petitioner submitted his joining report in the office of CS -cum- CMO, Gaya on 11.01.2008 which was accepted and vide letter bearing Memo No 117 dated 11.01.2008 of CS -cum- CMO, Gaya, petitioner was directed to discharge the duty as Medical Officer, Primary Health Centre, Paraiya, Gaya.*

vii) *while the petitioner was functioning as Medical Officer, PHC, Paraiya, Gaya Health Department issued a press communique on 04.01.2008 in the local daily for appointment on the post of Associate Professor and Assistant Professor on contract basis in various faculties including Nephrology in different medical colleges of the State of Bihar.*

viii) *the petitioner, being eligible in terms of Press Communique dated 04.11.2008 for the post of Assistant Professor, Nephrology, applied.*

ix) *the Health Department vide its notification No 497 (17) dated 17.06.2010, appointed the petitioner as Associate Professor, Nephrology, Patna Medical College, which was partially modified at the instance of petitioner by appointing the petitioner to the post of Assistant Professor, Nephrology, Patna Medical College, Patna by issuing corrigendum contained in Memo No 956 (17) dated 08.11.2010.*

x) *petitioner joined the post of Assistant Professor, Nephrology, Patna Medical College and was continuing in the aforesaid capacity. However, he was not paid his salary of the said post.*



*xi) the petitioner filed representation both before college authority and Health Department for release of salary but they remained unresponded.*

*xii) in the meanwhile, Bihar Public Service Commission issued advertisement No 06/11 to 37/11 in Hindustan dated 20.07.2011 for regular appointment to the post of Assistant Professor in different medical colleges of the State of Bihar. Advertisement No 37/11 was for appointment on 2 posts of Assistant Professor, Nephrology, one from general category and one from MBC.*

*xiii) the petitioner, being eligible, applied for the post of Assistant Professor, Nephrology as a general category candidate and was allotted Roll No 37004. Interview letter was issued in the name of petitioner, interview was held on 11.05.2012, the result was published in Dainik Jagran on 17.05.2012, petitioner was declared successful for appointment to the post of Assistant Professor, Nephrology (super speciality).*

*xiv) the petitioner learnt that Bihar Public Service Commission has recommended his name for appointment on regular basis to the post of Assistant Professor, Nephrology Department (super speciality) in the light of advertisement No 37/2011.*

*xv) later, for the payment of arrears and current salary of the post of Assistant Professor, Nephrology (on contract), petitioner had to file writ application vide CWJC No 12626 of 2012. During pendency of the above writ application, contract appointment of the petitioner to the post of Assistant Professor, Nephrology was cancelled vide Notification bearing Memo No 948 (17) dated 17.07.2012.*

*xvi) the notification bearing Memo No 948 (17) dated 17.07.2012 was challenged in amendment application bearing IA No 4662 of 2012 which was allowed vide order dated 23.07.2012.*

*xvii) CWJC No 12626/2012 was finally allowed vide order dated 08.10.2012. Order dated*



*17.07.2012 was set aside and the petitioner was reinstated to the post of Assistant Professor, Nephrology. The respondents were directed to pay the arrears of salary within a period of 4 weeks.*

*xviii) on filing contempt application bearing MJC No 36/2013, the respondents issued notification bearing Memo No 446 (17) dated 02.04.2013 allowing the petitioner to continue on the post of Assistant Professor (contract), Nephrology Department, PMCH, Patna and also ordered for payment of arrears of salary.*

*xix) later, the petitioner had to file another writ application bearing CWJC No 10226/13 for a direction on the respondents to issue order of appointment to the post of Assistant Professor, Department of Nephrology in the light of recommendation of BPSC pursuant to advertisement No 37/2011.”*

**4** Heard the parties.

**5** Learned Senior Counsel submits that pursuant to the advertisement of the Bihar Public Service Commission (henceforth for short, ‘the BPSC’) for appointment of Assistant Professors on contract basis which included the DM (Nephrology), the petitioner, being eligible, applied and was appointed. He was thereafter posted as an Assistant Professor, Nephrology, PMCH, Patna (Annexure 2 to the petition). He submits that later on BPSC came out with Advertisement No 6/11 to 37/11 in the year 2011 for regular appointment of Assistant Professor in different Medical Colleges and Advertisement No 37/11 was for the purpose of



appointment to the post of Assistant Professor, Nephrology which included one each seat for the general as well as MBC candidate.

**6** The petitioner applied in the general category with Roll No 37004. Subsequently, he was declared successful for the appointment to the post of Assistant Professor, Nephrology (super speciality) and, accordingly, his name was recommended by the BPSC.

**7** In the meantime, for payment of his salary/current salary as he was working on contract basis as an Assistant Professor (Nephrology), CWJC No 12626 of 2012 was preferred which came to be allowed vide an order dated 08.10.2012. The respondents were directed to pay the arrears of salary within a period of four weeks (Annexure 6). He further submits that on filing of MJC No 36 of 2013 before this Court, the petitioner was allowed to continue as Assistant Professor (contract), Nephrology Department, PMCH and payment of salary was also ordered.

**8** However, despite the recommendation of the BPSC, as the notification regarding his regular appointment was not issued, he preferred CWJC No 10226 of 2013 which came to be disposed of on 15.07.2014 with a direction to the respondents to take up the pending departmental proceeding and conclude the same within a period of two months failing which the petitioner shall be treated



to be fully exonerated of all the charges. It was further observed that the respondents shall be debarred from taking any action against the petitioner and shall further be taking up the recommendation of the BPSC (Annexure 8).

**9** It is the further case of the petitioner that for every action, the respondents wanted an order of this Court and in continuation of that, he preferred MJC No 4559 of 2014 which followed the Notification dated 26.06.2015 (Memo No 541 (9) by which they denied the salary for unauthorized period.

**10** Aggrieved, CWJC No 11460 of 2016 was preferred and during the pendency of the writ petition, he was appointed on the post of Assistant Professor, Nephrology Department, PMCH, Patna on 01.04.2016 (Annexure 10). It is his further submission that the Health Department vide Memo No 760 (9) dated 05.08.2016 cancelled its earlier Notification dated 26.06.2015.

**11** Finally, CWJC No 11460 of 2016 was disposed of on 08.08.2016 and it is important to incorporate the concluding portion which reads as follows:

*“Although Mr Shivendra Kishore, learned Senior Counsel appearing for the petitioner prays for appropriate direction to the respondents for providing the service benefits that has been taken away from the petitioner by the order impugned but in my opinion once the State Government themselves have cancelled the punishment order then the petitioner should have no apprehension regarding the consequences flowing*



*therefrom, which are obvious and only a matter of natural course. Needless to mention that the State Government would not delay the matter and provide the admissible benefits to the petitioner within three months from receipt/production of a copy of this order.*

*The writ petition is disposed of accordingly.”*

**12** Learned Senior Counsel in the present case submits that thereafter the Health Department vide Memo No 118 (17) dated 17.02.2017 regularized the period of absence from duty as earned leave and extraordinary leave. Thus, invoking the writ jurisdiction/contempt petition continued and in the meanwhile, the petitioner submitted his joining report on 16.01.2018 which was accepted by the Principal of the PMCH vide Memo No 382 dated 25.01.2018. He further submits that later the respondents corrected themselves and passed the order in question vide Memo No 6 of 2017 dated 08.01.2018 (Annexure 1) by which petitioner's appointment date has been shifted to 15.10.2014, though notionally.

**13** Learned Senior Counsel further submits that in its counter affidavit, the State has conceded to extend all the benefits like seniority and promotion, however, the petitioner is entitled to the salary too. He has cited a judgment of this Court in the case of *Madhu Sudan Prasad -Versus- State of Bihar & Others*, reported



in 2012 (3) PLJR 55 with specific reference to paragraphs 5 and 9

which read as follows:

*(5.) Rule 58 provides that a Government servant shall begin to draw pay and allowances with effect from the date he assumes duties of that post. The Rule fell for consideration by a Division Bench of this Court in 1990(2) PLJR 248 (Dr. Paras Nath Prasad V/s. State of Bihar). The contention raised presently was expressly rejected at Paragraph-19 holding as follows:-*

*"19. The other contentions of the learned counsel for the respondents that Rule 58 of the Bihar Service Code prohibits any grant of pay and allowances to the petitioner on fictional and notional promotion granted to him, is in my view, misconceived. A notional promotion has to be as if, for service benefits, he had being given due promotion. A person, who is entitled to promotion and is not promoted can always invoke the jurisdiction of this Court under Article 226 of the Constitution for a mandamus to the employer State to consider his case for such promotion. Such due promotion is not a claim of anything notional but it is something that is really attached to the status and service contract of the employee concerned....."*

*(9.) In A.I.R. 2002 SC 808 (Food Corporation of India V/s. S.N. Nagarkar) it was held at Paragraphs-19 and 20 as follows:-*

*"19. Having regard to the facts and circumstances of the case, the Court was satisfied that the respondent was not only to be considered for promotion to the promotional posts, but was also entitled to arrears of pay and allowances since he had been deprived of those benefits not on*



*account of any fault of his but on account of the fault of the authorities concerned. It is well settled that in exercise of writ jurisdiction, the Court may mould the relief having regard to the facts of the case and interest of justice.*

*20. In this appeal, we are not called upon to pass a judgment on the correctness of the order passed by the learned Judge in Civil Writ Petition No. 4983 of 1993 dated 6th May, 1994. The only question that arises for consideration is whether under the said judgment and order, the respondent is entitled to the arrears of pay and allowances from the dates of promotion. In our view the learned Single Judge as well as the Division Bench in Letters Patent Appeal have correctly held that the respondent (petitioner in the writ petition) is entitled, in terms of the order dated 6th May, 1994, to arrears of pay and allowances with effect from the dates he was granted the two promotions, and not from the date he joined the promotional posts. No interference by this Court in exercise of jurisdiction under Article 136 of the Constitution of India is called for. This appeal is, therefore, dismissed with costs which is quantified at Rs. 2,500/-."*

**14** It is the case of the petitioner that there is no difference between the promotion and the appointment and if the date of appointment has been shifted to 15.10.2014, the salary of the said period be also given to him. He further submits that all his batch mates, who were continuing as such, have been extended the salary but only he has been singled out.



**15** Learned State Counsel opposes the prayer stating that the petitioner cannot equate his case with his batch mates inasmuch as he was on an unauthorized leave for a long period between 14.10.2003 to 10.01.2008 and, thereafter, from 15.01.2008 to 21.11.2010. He further submits that later the petitioner was taken in contract appointment.

**16** Finally, the petitioner appeared in the BPSC advertisement for the regular appointment and as the departmental proceeding could not be concluded, the appointment letter was not issued to the petitioner. The last submission is that the respondents themselves have shifted the date of the petitioner's initial appointment effective from 15.10.2014, though notionally.

**17** With the help of the counter affidavit, learned State Counsel submitted that minus salary, all benefits have been extended to the petitioner but for the period, he had not worked, no payment can be made. He further submits that the case cited by the petitioner relates to promotion. The person was continuing on the post and there was laches on the part of the respondents and in that background, direction was given to make payment. In this case, there was unauthorized leave as also the departmental proceeding, the same got concluded and now they have also shifted his date of appointment to 15.10.2014.



**18** Having gone through the facts of the case as also the submission put forth by the parties, this Court finds force in the submission of the learned State Counsel. Admittedly, there was a departmental proceeding pending against the petitioner and after the order of this Court in CWJC No 10226 of 2013, direction was given to conclude the departmental proceeding within a period of two months. As the respondents failed to do so, the petitioner was rightly extended the appointment whereafter he finally joined on 01.04.2016.

**19** Further, the respondents have shifted the date of petitioner's appointment to 15.10.2014 and as per the counter affidavit, the petitioner will be entitled to all other benefits including seniority/promotion effective from 15.10.2014. The only thing that is missing is the salary and that is why the word "notional" is there in the order which the petitioner wants to go.

**20** This Court is not questioning the merit of the petitioner. He, being a qualified doctor, cleared both the advertisements of the BPSC, earlier when he was taken in on contract basis and later on regular basis, despite the post being single post, the fact remains that instead of serving the needy diligently, he remained on unauthorized leave which led to the



departmental proceeding. Thus, instead of visiting his medical institution, he repeatedly visited Patna High Court.

21 The State Government has been generous enough to extend all the benefits to him. Since he remained absent for a long period, rightly the word “notional” has been incorporated in the order. The petitioner does not have any case.

22 The writ petition stands disposed of.

(Rajiv Roy, J)

M.E.H./-

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