

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.18238 of 2019

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Rakesh Kumar Mishra, S/o Late B.K. Mishra, Resident of 304, Mourya Vihar,
Mourya Path, B.V. College, Khajpura, Rukanpura, District-Patna, Pin Code-
800014.

... .. Petitioner

Versus

1. The State of Bihar through the Principal Secretary, Law Department, Bihar, Patna.
2. Principal Secretary, Finance Department, Bihar, Patna.
3. Registrar General, Patna High Court, Patna.
4. Registrar (Establishment), Patna High Court, Patna.

... .. Respondents

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Appearance :

For the Petitioner/s	:	Mr. Abhinav Srivastava, Sr. Advocate Mr. Pushkar Bhardwaj, Advocate
For the Respondent/s	:	Mr. Gopal Krishna, AC to GP-2

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CORAM: HONOURABLE MR. JUSTICE HARISH KUMAR
CAV JUDGMENT

Date: 21-07-2025

Heard Mr. Abhinav Srivastava, learned Senior Advocate with Mr. Pushkar Bhardwaj, learned Advocate for the petitioner and Mr. Gopal Krishna, learned Advocate for the State.

2. The question for consideration in the present writ petition is, as to whether the petitioner, who had been serving East Central Railway at Patna, on being selected for the post of Assistant in the Establishment of the Patna High Court, Patna in pursuant to an advertisement was entitled to the benefit of pay protection in terms with the provisions contained under Rule-78 of Bihar Service Code.



3. Before coming to the impugned order(s), it would be pertinent to give the short facts of the case, in the premise of which, the present writ petition came to be filed.

(i) The petitioner after facing due process, on being duly selected, was appointed against the post of Chemical & Metallurgical Assistant-II, in the East Central Railway in the Grade Pay of Rs.5000-8000/- vide Office Order dated 12.12.2001 (Annexure-1). During the service tenure, the petitioner was posted at Work Shop Project under East Central Railway at Patna, in the meanwhile, in pursuant to Advertisement No.1/2010 issued by the Authority of the Establishment of the Patna High Court, Patna, the petitioner after procuring “No Objection Certificate”, from the concerned authority, participated in the process of selection for the post of Assistant in the Establishment of the Patna High Court, Patna. On being found successful, vide letter dated 08.08.2011 (Annexure-3), the petitioner was informed with respect to his selection for appointment against the post of Assistant in the revised pay structure having Pay Band-2 of Rs.9300-34800/- plus Grade Pay of Rs.4600/-.

(ii) Subsequent upon the appointment of the petitioner, he was relieved from his duties in the Indian



Railways and thus he submitted his joining as Assistant; the basic salary payable in favour of the petitioner upon his joining in the capacity of an Assistant was fixed at Rs.12540/- with Grade Pay of Rs. 4600/-; however, while continuing in the capacity of Chemical & Metallurgical Assistant-II, in the East Central Railway, till month of October, 2011, the basic salary admissible in favour of the petitioner was fixed at Rs.14920/-.

(iii) The petitioner aggrieved with the action of the respondent authorities of the Establishment of the Patna High Court, Patna as also the Government of Bihar, submitted a representation dated 14.01.2016, requesting therein to extend him the benefits of pay protection and also to take steps towards processing the transfer of Provident Fund Account, which had remained with the Indian Railways. The representation was duly sent to the concerned authorities under the Law Department of the State Government. The service history as well as service-book and appointment letter etc. were called for to examine the claim of the petitioner at the level of the Finance Department of the State Government.

(iv) Following due deliberation, letter no.423 dated 23.01.2017 was issued by the Law Department of the State Government, by which the opinion expressed by the Finance



Department of the State Government was communicated to the Registrar Establishment, Patna High Court, informing him that the petitioner was not entitled to the benefit of pay protection in terms with Rule-78 of Bihar Service Code. The aforesaid letter clearly postulates that said rule was applicable only in cases of State Government employee(s) and not extended to the Central Government employee(s).

(v) In the circumstances, afore-noted, the petitioner submitted a detailed representation dated 27.09.2018 before the Establishment of the Patna High Court; however, that letter also did not persuade the respondent authorities of the State Government and finally the claim of the petitioner negated vide letter dated 26.03.2019 issued from the Law Department of the State Government.

4. That it is these two letters dated 23.01.2017 and 26.03.2019, which are under challenge before this Court, whereby the benefit of pay protection under the provisions contained under Rule-78 of Bihar Service Code has been turned down, assigning reason that in terms of the provisions contained under Rule-2, which contemplate that Rule-2 applies to all Government servant under the State Government and Rule-45 thereof says that the expression “State Government or



Government” connotes employees of the Government of State of Bihar and, as such, the petitioner could not be extended the benefits of pay protection, taking note of the services rendered by him in the Indian Railways prior to his appointment in the capacity of Assistant in the Establishment of the Patna High Court.

5. Mr. Abhinav Srivastava, learned Senior Advocate for the petitioner taking this Court through Rule-78 of Bihar Service Code has submitted that the petitioner was entitled for being extending the benefit of fixation of his initial pay in the time-scale mentioned above the substantive pay that was admissible in his favour while continuing in the capacity of Chemical & Metallurgical Assistant-II, in the East Central Railway. Referring to the provisions contained under Rule-78 of Bihar Service Code as well as the definition of “Government Servant” as contained under Annexure-B to Appendix-6 of Bihar Service Code, according to which, “Government Servant means service under Government of Bihar and includes service under the Government of India and other Provincial Governments of India”; it is urged that reason assigned for negating the claim of the petitioner is untenable and contrary to the provisions contained under Rule-78 of Bihar Service Code.



Moreover, the opinion expressed by the concerned authorities under the Finance Department of the State Government referring to Rule-2 and Rule-45 of Bihar Service Code, would clearly demonstrate that provisions contained under said Rules have been clearly misinterpreted. So far as Rule-2 of Bihar Service Code is concerned, it only provides that the provisions contained under Bihar Service Code would apply to the employees of the State Government and would also include the staff attached to the Patna High Court and the secretarial staff of Assembly and Council. Rule-45 of the Bihar Service Code does not define the expression “Government Servant” and on the contrary it prescribes what the expressions “State Government” or “Government” mean and in manner the same does not concern or cover the definition of “Government Servant”. On the grounds, afore-noted, learned Senior Advocate sought quashing of the impugned order(s).

6. It has further been informed to this Court that during the pendency of the present writ petition, the Finance Department had expressed its agreement for counting the services rendered by the petitioner for the period between 12.12.2001 to 16.11.2011 under the Government of India, which in the humble submission of the learned Senior Advocate, has



material bearing on the issue(s) involved in the present writ petition. In furtherance of the agreement expressed by the Finance Department, the consequential order as contained in Memo No.16435-16448 dated 23.03.2022 came to be issued and notified that the services rendered by the petitioner under the Indian Railways along with his services in the Establishment of the Patna High Court shall be considered for the purposes of pensionary benefits.

7. While concluding the submissions, learned Senior Advocate further referred to Office Order dated 02.12.2008 (Annexure-P/13 to the supplementary affidavit) and submitted that the authorities of Rajendra Agricultural University, Bihar, Pusa, who had appointed a person against the post of Assistant Professor-cum-Junior Scientist in the services of the said University has been extended the benefits of pay protection taking note of the services rendered by the said person under Birsa Agricultural University, Kake, which falls under the State of Jharkhand, in terms with the provisions contained under Rule-78(A)(II) of Bihar Service Code. By referring abovementioned instance, a further submission has been added basing the case of the petitioner on parity and in case of non-adherence to equality, it will cause discrimination.



8. *Per contra*, Mr. Gopal Krishna, learned Advocate for the State dispelling the aforesaid submissions advanced by the learned Senior Advocate for the petitioner, vehemently contended that admittedly pursuant to Advertisement No.1/2010, the petitioner applied and participated in the selection process and on being found successful, joined as Assistant and accordingly the petitioner was granted admissible pay-scale applicable to the post of Assistant. The petitioner has not raised any objection to the pay-scale given to him; surprisingly, after four years, for the first time, the petitioner filed a representation claiming pay protection under Rule-78 of Bihar Service code. Rule-2 of Bihar Service Code makes the code applicable to all Government servants under the rules making control of the State Government as also the staff attached to the Patna High Court and thus the provisions underlying with Rule-78 clearly restrict the privilege of pay protection to the employees of Bihar State Government, it cannot be extended to the employees of other State/Central Government being appointed as fresh appointees. Since the petitioner had never been under the rule making control of the State Government of Bihar, he is not entitled to pay protection as prayed for.



9. Refuting the contention of the petitioner, it is further submitted by the learned Advocate for the State that as per Note-3 of Rule-78(2) of Bihar Service Code, the provisions of Appendix-6 is applicable in case of pay fixation of Gazetted Government servant on promotion to higher post or on promotion from a Non-Gazetted to a Gazetted post and in no way applicable to fresh appointee.

10. Reliance has also been placed on a decision of the learned Division Bench of this Court in the case of **The State of Bihar & Ors. v. Rajendra Rai and other analogous cases [L.P.A. No. 374 of 2019]**, wherein the benefit of pay protection has been denied to the respondents on being found their appointment through fresh recruitment. It is also contended that similar view has been taken by the learned co-ordinate Bench of this Court in the case of **Dr. Sunita Kumari v. The State of Bihar and other analogous cases [C.W.J.C. No.5152 of 2016]** and further in the case of **Praveen Kumar Mishra v. The State of Bihar & Ors. [C.W.J.C. No.368 of 2017]**.

11. After having given anxious consideration to the submissions advanced by the learned Advocate for the respective parties, this Court finds that the facts are admitted and it do not require any comment; since the claim of the



petitioner is resisted on the point of delay; hence, it is required to be dealt with primarily.

12. There is no dispute that the issue regarding delay and laches had immense significance and if the Court while exercising the extraordinary writ jurisdiction finds that the claims raised are stale in nature and the delay is unexplained on the part of the litigant, it deserves to be scuttled at the very threshold, is the settled legal position.

13. In **Karnataka Power Corporation Ltd. through its Chairman and Managing Director and Another v. K. Thangappan and Another [(2006) 4 SCC 322]**, while reinforcing the afore-noted proposition, the Apex Court has observed that *“Delay or laches is one of the factors which is to be borne in mind by the High Court when they exercise their discretionary powers under Article 226 of the Constitution and if there is such negligence or omission on the part of the applicant to assert his right as taken in conjunction with the lapse of time and other circumstances, causes prejudice to the opposite party, the High Court may refuse to invoke its extraordinary powers in appropriate cases.”*

14. Normally, in a case relating to service matter/promotion, an aggrieved person should approach the



Court at least within six months or at the most a year of arising of the cause of action has been ruled by the Apex Court long back in the case of **P.S. Sadasivaswamy v. State of Tamil Nadu [(1975) 1 SCC 152]**.

15. It would also be worth benefiting to note the relevant observation made by the Apex Court in the case of **Tukaram Kana Joshi and Others v. Maharashtra Industrial Development Corporation Limited and Others [(2013) 1 SCC 353]**, wherein the learned Court ruled that delay and laches is adopted as a mode of discretion to decline exercise of jurisdiction to grant relief. The Court is required to exercise judicial discretion. The said discretion is dependent on facts and circumstances of the cases. Delay and laches is one of the facets to deny exercise of discretion. It is not an absolute impediment. There can be mitigating factors, continuity of cause action, etc. That apart, if whole thing shocks the judicial conscience, then the Court should exercise the discretion more so, when no third party interest is involved.

16. Admittedly, in the case in hand, the petitioner was duly appointed long back in the year 2011 and submitted his joining on 17.11.2011 after having been relieved from his duties in the Indian Railways. For the first time, the petitioner



submitted a representation on 14.11.2016 requesting therein to extend the benefit of pay protection by fixation of his initial pay in the time-scale mentioned above the substantive pay that was admissible in his favour while continuing in the capacity of Chemical & Metallurgical Assistant-II, in the East Central Railway. Thus, admittedly there is a delay of five years. This reason is alone requiring no interference by this Court while exercising extraordinary writ jurisdiction; however, in order to give quietus to the litigation, this Court thinks it apt and proper to consider the matter on its merit(s).

17. To answer the issue(s) as formulated in the case in hand, it would be apt and proper to encapsulate relevant provisions of Bihar Service Code, which are applicable herein.

Rule-2 of Bihar Service Code speaks “These Rules apply to all Government Servant under the rule making control of the State Government. They also apply to staff attached to the Patna High Court and the secretarial staff of the Assembly and Council.”

18. Bare reading of the afore-noted provisions, there is no iota of confusion that the Rules under Bihar Service Code shall only apply to the employees of the State Government and would also include the staff attached to the Patna High Court



along with secretarial staff of the Assembly and Council. Further, Rule-45 says, the State Government or Government means the “State Government of Bihar” meaning thereby wherever the terms “State Government” or “Government” used in the Bihar Service Code, it denotes to State Government of Bihar.

19. There is no ambiguity with regard to the application of the provisions that Bihar Service Code would only be applicable to the employee(s) of the State Government i.e. State Government of Bihar, including the staff attached to the Patna High Court and secretarial staff of Assembly and Council

20. Now coming to Rule-78 of Bihar Service Code, which prescribes pay protection to the Government servant. The relevant provisions of which is quoted hereinbelow:-

“The initial substantive pay of a Government Servant who is appointed substantively to a post on a time scale of pay is regulated as follows:-

(a) If he holds lien on a permanent post other than a tenure post, or would hold a lien on such a post had his lien not been suspended;

(i) When appointment to the new post involves the assumption of duties or responsibilities of greater importance (as interpreted for in purpose of rule 89) than those



attaching to such permanent post, he will draw as initial pay in the stage of the time-scale next above his substantive pay in respect of the old post:

(ii) When appointment to the new post does not involve such assumption, he will draw as initial pay the stage of the time-scale which is equal to his substantive pay in respect of the old post, or if there is no such stage the stage next below that pay, plus personal pay equal to the difference and in either case will continue to draw that pay until such time as he would have received an increment in the Time-scale of the old post or for period after which an increment is earned in the time-scale of new post, whichever is less. But if the minimum pay of the time-scale of new post, is higher than his substantive pay in respect of the old post, he will draw that minimum as initial pay.

(iii) When appointment to the new post is made on his own request under rule 56 (a) and the maximum pay in the time-scale of that post is less than his substantive pay in respect of the old post he will draw that maximum as initial pay."

(Emphasis supplied)

21. From reading of Rule-78 of Bihar Service Code, it would be evident that all the three contingencies as mentioned under Rule-78(a), (i), (ii) and (iii) would be applicable to a Government Servant, if he holds lien on a permanent post other than a tenure post, or would hold a lien on such a post had his



lien not been suspended. The three eventualities and consequential protection would flow only if the pre condition as prescribed under Rule 78(a) fulfilled. Once, a Government servant is appointed on substantive basis on any permanent post, under Rule-68 of Bihar Service Code, the Government servant ceases to hold lien previously acquired to any other post, unless in any case, it would be otherwise provided, in the rules.

22. In the case in hand, the petitioner had applied his application in terms of Advertisement No.1/2010 issued by the authorities of the Establishment of the Patna High Court, Patna with open eyes. The advertisement in nowhere stipulates regarding pay protection; nonetheless, the petitioner applied for the post of Assistant and on being selected he submitted his joining, however, without any objection. There is no provision under Bihar Service Code to the extent it prescribes that the employee, who had come from the Central Government Services or from other States will get pay protection of his previous post.

23. The identical issue has come up for consideration before the learned Division Bench in **Rajendra Rai** (supra), wherein the appellant-State aggrieved with the order passed by the learned Single Judge extending the benefit of pay protection



on the ground of parity, preferred appeal; while setting aside the order of the learned Single Judge, the Court has observed that the original writ-petitioners participated in the recruitment process which was conducted afresh for the post of Headmaster. The target pool of persons who could have participated in such recruitment process was open to all, including employees of the Central Government and all such persons who are having experience of teaching in other States as well. In that view of the matter, if the original writ-petitioners were appointed as Headmasters, there cannot be any dispute over the proposition that such appointment was fresh recruitment and in cases of fresh recruitment, there cannot be any claim for protection of pay merely on the ground that for some time in their teaching experience, they had rendered their services in the State of Bihar.

24. Since much emphasis has been given to the exception to Rule 78, it is to be noted here that it only clarifies that the entitlement of pay protection in paragraph (iii) of the first proviso that the temporary post should be on the same time-scale as a permanent post shall not be enforced in two eventualities, mentioned therein, which has nothing to do with the case of the petitioner, as it confined to temporary post having same nature



of work with that of earlier permanent post, sanctioned with identical time-scale in the cadre under the different Government and Department.

25. Further, Note-3 of Rule-78 stipulates that for rules regarding fixation of pay of gazetted Government servants on promotion to certain higher posts or on promotion from a non gazetted to a gazetted post, Appendix-6 is required to be seen. Thus there is no confusion to visualize that the “Government Servant” as defined under Annexure-B to Appendix-6 only covers the cases with respect to promotion of a Government servant either in the service of Government of Bihar or the Government of India and other Provincial Governments of India.

26. So far the contention of the petitioner that counting of service rendered by him for the purposes of retiral benefits is concerned, in the opinion of this Court would have no material bearing over the issue as the same was extended in terms with the prescription provided under Resolution No.665 dated 15.07.2019, which clearly stipulates that the past services of the Central Government employees’ rendered before joining the State Government will be added for death-cum-gratuity under New Pension Scheme, in case, *inter alia*, they were



governed under the New Pension Scheme and joined the services of the State on or after 01.09.2005, on being lawfully relieved from earlier services.

27. Now coming to the next contention of the petitioner based upon parity, it would be pertinent to observe that the decision to extend the benefit of pay protection to one Pallav Shekhar, who has been allowed pay protection on being appointed as Assistant Professor under Rajendra Agriculture University; on being relieved from Birsa Agricultural University, Kake, there is neither any relevant material nor even the facts have been disclosed as to in what manner he was appointed. Moreover, it is admitted to be a wrong by the answering respondent.

28. It would be suffice to encapsulate the relevant para of **State of Bihar v. Upendra Narayan Singh [(2009) 5 SCC 65]**, wherein the Apex Court reinforce the following settled proposition:-

“By now it is settled that guarantee of equality before law is a positive concept and it cannot be enforced in a negative manner. If an illegality or irregularity is committed in favour of any individual or a group of individuals, or a wrong order has been passed by a judicial forum, others cannot invoke the jurisdiction of higher



Court or superior Court for repeating or multiplying the same irregularity or illegality.”

29. In view of the discussions made hereinabove, this Court is of the opinion that the provisions underlying Rule-78 of Bihar Service Code, restrict the privilege of pay protection to the employee(s) of Bihar State Government and cannot be extended to the employee(s) of other State and the Central Government employee(s) on being appointed as a fresh appointee after going through a fresh recruitment process; unless it is otherwise provided, hence, this Court does not find any merit in the present writ petition. Accordingly, the same stands dismissed.

rohit/-

(Harish Kumar, J)

AFR/NAFR	NAFR
CAV DATE	23-06-2025
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Transmission Date	

