

(2007) 07 JH CK 0024

In the Jharkhand High Court

Case No : Civil Writ Jurisdiction Case No. 2185 of 1997 (R)

Dr. Basant Kumar Singh

APPELLANT

Vs

The State of Bihar (Now Jharkhand) and Others

RESPONDENT

Date of Decision : 20-07-2007

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2008) 56 BLJR 888 : (2008) 116 FLR 410 : (2007) 4 JCR 243

Hon'ble Judges : D.G.R. Patnaik, J

Bench : Single Bench

Advocate : Devi Prasad and S. Srivastava, for the Appellant; H.K. Singh, SC-I, for the Respondent

Judgement

D.G.R. Patnaik, J.—Petitioner has prayed for issuance of a writ of mandamus against the respondents commanding them to give retrospective effect to the promotion of the petitioner to the post of Associate Professor in Neuro Surgery from the date the petitioner was awarded degree of M.Ch in Neuro Surgery i.e. from 1.12.1989 and further, to promote the petitioner to the post of Professor in Neuro Surgery taking into consideration the retrospective promotion of the petitioner to the post of Associate Professor and counting the teaching experience of the petitioner, from the date of retrospective promotion i.e. 1st December 1989 and likewise, for direction to the respondents to promote the petitioner to the post of Professor in Neuro Surgery with effect from 31.1.1994 i.e. the date on which the post of professor in Neuro Surgery fell vacant and to pay the salary of the retrospective post from those dates.

2. An interlocutory application was filed by the petitioner on 13.09.2005 seeking permission for amendment in the prayer of the writ application in order to enable him to challenge the clause in notification No. 121(2) dated 06.05.2004 (Annexure-10) issued by the Department of Health, Government of Jharkhand. It is explained in the interlocutory application that during the pendency of the writ application, petitioners representation was considered by the Health Department,

Government of Jharkhand and the petitioner's claim for his promotion was allowed by the aforesaid notification (Annexure-10) whereby the petitioner's promotion with retrospective effect from 1.2.1994 was allowed but with a clause that the monetary benefits shall however be admissible from 15.11.2000 only. Petitioner has challenged the aforesaid clause in the notification in respect of the date from which the monetary benefits has been declared as admissible to him. It is also explained that the petitioner has superannuated from service during the pendency of this writ application on 31.7.2003. Earlier, vide notification No. 142(17) dated 15.05.1996 petitioner was granted promotion by the respondents on 19.01.1996 to the post of Associate Professor, though he being possessed with all requisite qualification, was eligible for the post since 01.12.1989. Likewise, he was granted promotion to the post of Professor with effect from 3.4.2002 vide notification No. 36(2) dated 03.04.2002 and that too, without any monetary benefits, though he was entitled for promotion to the post of Professor from the date it had fallen vacant since 31.1.1994.

3. Subsequent to the above notification, petitioner had represented before the respondents on 12.4.2004 for making necessary correction in respect of the date of promotion and also for allowing monetary benefits from the date when the petitioner became eligible. Petitioner's claim is that the respondents while granting promotion to the petitioner, cannot deprive him from the retrospective monetary benefits by putting a cut off date as 15.11.2000 and such action on the part of the respondents is arbitrary, unreasonable, unjustified and mala fide and, therefore, is liable to be set aside.

4. Learned Counsel for the petitioner explains that the instant application was filed on 25.7.1997 claiming relief (s) against the State of Bihar through the Commissioner-cum-Secretary, Medical Education, Department of Health, New Secretariat Building, Patna as respondent No. 1. Petitioner was posted at the relevant time in Rajendra Medical College, Ranchi as Associate Professor of Neuro Surgery and had rendered continuous service since the date of his appointment in the said college and from where he eventually superannuated on 31.7.2003. In the writ application, petitioner had sought for a writ of mandamus to be issued against the respondents to give retrospective effect to the petitioner's promotion to the post of Associate Professor in Neuro Surgery from the date the petitioner was awarded qualifying degree of M.Ch in Neuro Surgery i.e. from 1.12.1989 and also to promote the petitioner to the post of Professor in Neuro Surgery on the basis of the retrospective promotion of the petitioner to the post of Associate Professor and counting his teaching experiences from the date of retrospective promotion i.e. 1.12.1989. Since the post of Professor in Neuro Surgery fell vacant on 31.1.1994, the petitioner had prayed for a directive for his promotion to the post of Professor with effect from 31.1.1994. Petitioner had sought parity in the matter of his promotion in the same manner as extended to another doctor namely Dr. R.P. Choudhary. Learned Counsel emphasizes that the demand for his promotion was advanced on the basis of the fact that the petitioner had possessed all requisite qualification to make him eligible for promotion and that

such demand was also made on the basis of the service conditions of the petitioner. When the petitioner was not promoted to the post of Associate Professor, he was constrained to file a writ application before this Court vide C.W.J.C. No. 1238 of 1991(R) which was disposed of on 13.9.1991 and thereafter, he had filed another writ application vide C.W.J.C. No. 2832 of 1993 (R) which was disposed of on 12.1.1994 with a direction to the concerned Government to consider the petitioner's representation for his promotion in the light of the judgment of the Supreme Court in Dr. Arun Kumar Agrawal Vs. The State of Bihar and others, , within four months from the date of receipt of the copy of the order, but despite orders of this Court, his representation for his promotion was not considered by the respondents and hence, he had to file another petition vide M.J.C. No. 51 of 1995 (R), where-after he was promoted to the post of Associate Professor vide notification No. 142(17) dated 15.5.1996. Learned Counsel adds that vide notification No. 2074/F dated 4.4.1985 and another notification No. 1082 dated 22.2.1988 issued by the Government of Bihar, it was declared that eligible candidates are entitled to promotion to the higher post from the date the post fell vacant i.e. with retrospective effect. In this context, learned Counsel invites attention to annexure-6 to the instant writ application. According to the petitioner, post of Associate Professor in the Neuro Surgery fell vacant on 1.11.1987 on the retirement of then incumbent Dr. N.P. Sinha and the post of Professor fell vacant on 31.1.1994 on the retirement of then incumbent Dr. H.P. Narayan. Yet, both the posts were deliberately kept vacant without considering the petitioner's representation demanding his promotion to the said post. When repeated representations failed to yield any response, petitioner had to file the present writ application. It was during the pendency of this writ application, that the State of Jharkhand had finally considered the petitioner's representation and conceded the petitioner's demand for his promotion to the post of Professor with retrospective effect from 1.2.1994 in consonance with the earlier notification of the Government of Bihar dated 4.5.1989 and 22.2.1988 respectively. Learned Counsel adds that since the petitioner's claim for his promotion with retrospective effect has been conceded, he is also entitled to monetary benefits accrued by virtue of his promotion to the higher post from the date of his promotion and, therefore, fixing the cut off date for extending monetary benefits to the petitioner as 15.11.2000 only, is totally illegal and arbitrary. Learned Counsel submits that since his demand for promotion has already been conceded with retrospective effect, his only grievance is in respect of the clause contained in the notification (annexure-10), whereby his claim for the monetary benefits with retrospective effect i.e. 1.2.1994 has been denied.

5. Mr. H.K. Singh, learned Standing Counsel No. 1 has appeared for the State of Jharkhand. Learned Counsel admits that notification No. 121(2) dated 06.05.2004 (Annexure-10) was issued by the Department of Health, Government of Jharkhand, whereby the petitioner was granted promotion with effect from 1.2.1994, but adds that the monetary benefits cannot be admissible to the

petitioner prior to 15.11.2000. Learned Counsel explains that the stipulation in the notification is that the monetary benefits on the basis of promotion to the higher post shall be effective from 15.11.2000 or from the date of promotion. The petitioner had actually taken over charge of professor on 3.4.2004 and as such, promotion granted to him by the aforesaid notification, is notional in nature and consequently, the petitioner cannot claim salary from retrospective date. It is further submitted by the learned Counsel that since the State of Jharkhand was created on 15.11.2000, the Government of Jharkhand cannot pay the promotional benefits with retrospective effect prior to the date of creation of the State.

6. Short points for determination are, whether having conceded the petitioner's claim for his promotion to the post of Professor, Neuro Surgery with effect from 1.2.1994, can respondents refuse to extend the monetary benefits to the petitioner since the declared date of promotion, on the ground that the petitioner having taken charge of the post of Professor actually on 3.4.2004, and not earlier, is not entitled to claim for arrears prior to 3.4.2002 and on the further ground that the State of Jharkhand is not liable to make payment with retrospective date prior to the date of its own creation on 15.11.2000.

7. The impugned notification No. 121(2) dated 06.05.2004, reads as follows:

Jharkhand Sarkar Swastha Chikitsa Shiksha aewam Pariwar Kalyan Vibhag
Chikitsa Shiksha aewam School Adhisuchana

Sankhaya -2 / ratha - 3 -10 / 04 -121(2) / racha. Dinank 6/5/04 chikitsa shiksha - swastha, chikitsa shiksha aewam shhodh vibhag, Jharkhand, Ranchi kii adhisuchana sankhaya - 105(2) dinank 08-04-2004 dwara sachiv, chikitsa Shiksha aewam shhodh, Jharkhand, Ranchi kii adhyaksha mae gathit virmati nirakaran samitee kii baithak dinank 20-04-2004 mae ki gai anushansa ke alok mae Rajendra Aayurevigyan Sansthan, Ranchi mae karyarat shaekshnik ranberg ke shikshako ko sanlagna vivrani k, kh, ga aewam gh ke anusar kramasha uchchar pad par pronnatti, naam mae sudhar, pronnatti ki tithi mae sudhar, sewa nivrat shikshako ke mamle mae uchchar pad par vittayi laav hetu pronnatti di jati hai!

Is adhisuchana dwara pronnatti ke phalswarup uchchar vetanmano mae daie vittai laav dinank 15-11-2000 ke prabhao se athawa pronnatti ki tithi ya pad rikta hone ki tithi jo hi baad mae ho, vo prabhavi hoga!

Jharkhand Rajyapal ke aadesh se

(Prem Prakash Sharma) Sarkar ke sachiv

Sapank -2 /ratha-3-19/04 121(2) / aswa, Ranchi, dinank - 6/5/04

Pratilipi: Adhikshak, Rajkiye Mudranalaya, Jharkhand, Doranda, Ranchi ko sarkari rajpatra kea gale asadharan ank mae prashnarth preshit!

Unase anurodh hai ki sarkari rajpatra ki 100 (ak sau) pratiya vibhag ko uplabdha

ki kripa ki jaye.

(Prem Prakash Sharma) Sarkar ke Sachiv

A chart (Annexure- "gha") annexed to the notification contains names of as many as 10 persons to whom benefits of promotion was extended by the respondents. The name of the petitioner is at serial No. 4 in the chart and it declares the date of his promotion as 1.2.1994.

8. The impugned clause in the notification purports to qualify that the monetary benefits shall be with effect from 15.11.2000 or from the date of promotion, whichever is later. Admittedly, in the instant case, the date of promotion declared in favour of the petitioner is 1.2.1994. Though, in the counter-affidavit, stand taken by the respondent No. 2 is that pursuant to a notification dated 3.4.2002 issued by the Government, the petitioner had taken charge of Professor on 3.4.2002, but he continued to draw the salary of Associate Professor, the post in which he was functioning prior to taking over charge as Professor on 3.4.2002 and had subsequently retired from service on 31.7.2003. Nevertheless, by the same notification, the petitioner's promotion was declared with retrospective effect from 1.2.1994. This privilege, according to the counter-affidavit of the respondent No. 2, was on considering the representation of the petitioner. It stands admitted therefore that the claim for his promotion, as advanced by the petitioner, was considered and conceded by the respondents and conceding the demand, the notification (Annexure-10) declaring his promotion with retrospective effect from 1.2.1994 was issued.

9. The issue which invites for consideration is, whether in the facts and circumstances, promotional benefits with retrospective promotion can be refused to the petitioner on the principle of "no work no pay".

Principle of "no work no pay" has been applied in several cases on the basis of which claim for monetary benefits with retrospective promotion has been refused. However, the aforesaid principle cannot be accepted as a rule of thumb and there are exceptions where monetary benefits can be extended with retrospective promotion. In the case of *State of Kerala and Ors. v. E.K. Bhaskaran Pillai* reported in 2007 (3) JLJR (SC) 26, the Supreme Court while observing that the principle "no work no pay" cannot be accepted as a rule of thumb, has explained that there are exceptions where courts have granted monetary benefits also and it depends upon the facts of each case since there are various facets which have to be considered and has observed as follows:

So far as the situation with regard to monetary benefits with retrospective promotion is concerned, that depends upon case to case. There are various facets which have to be considered. Sometimes in a case of departmental enquiry or in a criminal case it depends on the authorities to grant full back wages or 50 per cent of back wages looking to the nature of delinquency involved in the matter or in criminal cases where the incumbent has been acquitted by giving benefit of doubt or full acquittal. Sometimes in the matter

when the person is superseded and he has challenged the same before Court or Tribunal and he succeeded in that and direction is given for reconsideration of his case from the date persons junior to him were appointed, in that case the Court may grant sometime full benefits with retrospective effect and sometimes it may not. Particularly when the administration has wrongly denied his due then in that case he should be given full benefits including monetary benefit subject to there being any change in law or some other supervening factors. However, it is very difficult to set down any hard and fast rule

10. In the instant case, petitioner's claim for his promotion to the higher post was based on the notification No. 2074(F) dated 4.4.1985 and another notification No. 1082 dated 22.2.1988 issued by the Government of Bihar, according to which, he being an eligible candidate and possessed of all requisite qualification, was entitled to be promoted to the higher post from the date when the post fell vacant i.e. with retrospective effect. The petitioner had to take recourse to the High Court by filing writ application. Despite specific direction issued by this Court on considering the petitioner's application vide order dated 12.1.1994 passed in C.W.J.C. No. 2832 of 1993 (R) to take appropriate decision on the petitioner's representation for his promotion within four weeks from the date of the order, respondents had failed and neglected to take action in the matter and thus, petitioner was denied benefits of his promotion to which he was entitled, without there being any justification. It was only after protracted delay that the petitioner's representation was considered and his claim for his promotion to the post of Professor, Neuro Surgery from the date the post fell vacant, was conceded and by the notification (Annexure-10), he was promoted from the retrospective effect i.e. 1.2.1994. In the meantime, petitioner has superannuated on 31.7.2003. It cannot be disputed therefore that the administration had wrongly withheld the petitioner's claim for his promotion from the date when it fell due.

11. In the facts and circumstances, petitioner is entitled to the monetary benefits with retrospective effect from the date of his promotion to the post of Professor, i.e. w.e.f. 1.2.1994 and the arrears of such monetary benefits accrued to him prior to 15.11.2000, cannot be denied to him.

12. For the above reasons, the impugned portion of the notification No. 121(2) dated 06.05.2004 whereby the monetary benefits of the promotion to the higher post has been confined to take effect from 15.11.2000, is without proper basis, arbitrary and unreasonable and is, therefore, set aside. Petitioner being entitled to the monetary benefits accrued to him by virtue of his promotion to the post from 1.2.1994 and till the date of his superannuation, the respondents are accordingly directed to grant the monetary benefits to him from the date of his promotion i.e. 1.2.1994 till the date of his superannuation.

13. As earlier informed by the learned Counsel for the petitioner, relying on a judgment dated 10.2.2003 passed by this Court in WPS No. 2894 of 2001 (Dr. Bijay Narayan and Ors. v. The State of Jharkhand and Ors.), by a special

arrangement, arrears accrued prior to 15.11.2000 to the Government doctors, is to be paid by the State of Jharkhand and for which, a separate Government head of account has been created and the State of Jharkhand can adjust the same from the State of Bihar. The same arrangement may also be extended in the case of the petitioner for the payment of his monetary benefits with retrospective effect from the date of his promotion i.e. 1.2.1994 till the date of his superannuation on 31.7.2003.

With the aforesaid observations and directions, this application is disposed of.