

(2020) 09 JH CK 0157

In the Jharkhand High Court

Case No : Writ Petition (S) No. 275 Of 2018

Dr. Bhuvan Jyoti

APPELLANT

Vs

State Of Jharkhand And Ors

RESPONDENT

Date of Decision : 22-09-2020

Acts Referred:

Jharkhand Service Code, — Rule 85, 85(b), 180, 204, 217, 236, 236(ii)
General Rules (Civil), 1957 — Rule 47
Bihar Service Code, — Rule 204b
Constitution Of India, 1950 — Article 226, 309

Citation : (2020) 09 JH CK 0157

Hon'ble Judges : Sanjay Kumar Dwivedi, J

Bench : Single Bench

Advocate : Saurav Arun, Surbhi, Dr. Ashok Kumar Singh

Final Decision : Partly Allowed

Judgement

1. Heard Mr. Saurav Arun, learned counsel for the petitioner, Ms. Surbhi, learned counsel for the respondent-State and Dr. Ashok Kumar Singh, learned counsel for the respondent-RINPAS.

2. This writ petition has been heard through Video Conferencing in view of the guidelines of the High Court taking into account the situation arising due to COVID-19 pandemic. None of the parties have complained about any technical snag of audio-video and with their consent this matter has been heard on merit.

3. The petitioner has preferred this writ petition for quashing the letter dated 17.12.2015 as contained in Annexure-12, whereby, study leave granted to the petitioner has been regularized with extraordinary leave without pay, but further it has been stated that extraordinary leave will not be counted towards seniority and other benefit for that reason petitioner is not getting increment and benefit of dynamic ACP nor the service book of the petitioner has been verified though he has completed approximately more than 12 years of service. The further prayer is made for direction to declare the action of the respondent authority in

granting extraordinary leave is illegal, void and without jurisdiction in view of the provision of Rule 236 of the Jharkhand Service Code (hereinafter to be referred to as "the Code"). The further prayer is also made for direction to the respondents to consider the case of the petitioner for grant of dynamic ACP as he completed more than 10 years in terms of the notification dated 31.10.2017. The further prayer is also made for direction to the respondents for verification of the service book of the petitioner in grant of 2nd installment of 6th Pay Revision Committee as well as 7th Pay Revision Committee. The further prayer is also made for payment of annual increment w.e.f. 2008.

4. The facts of this case in short are that pursuant to publication of advertisement bearing Advt. No. DIR/6/0401 for the different posts, the petitioner applied for the post of Dental Surgeon Clinical and after being selected and facing the interview, he was appointed by the Managing Committee of the Ranchi Institute of Neuro-Psychiatry & Allied Sciences (RINPAS) in the year 2005. The petitioner joined the service on 13.05.2005 and working to the satisfaction of the respondent-authority. The petitioner was selected for master degree i.e. Master of Dental Surgery, Oral Medicine and Radiology at Rama Dental College and Hospital, Kanpur and, therefore, he applied for the study leave on 04.08.2008 stating therein that he has been selected for three years Master Degree Course and after completion of the same, he will be joining the institution again and requested for grant of study leave. On 20.06.2009, the application of the petitioner has been forwarded to the Health Department for necessary action though the Director is himself empowered for the same. On 10.09.2009, the Director vide letter at Annexure-3 asked the petitioner to get the leave approved from the Health Department. The petitioner has handed over the charge when he was proceeded on study leave, which was duly accepted by the respondent-authority. On 02.02.2010, the Deputy Secretary, Department of Health asked the Director, RINPAS to send all the necessary documents so that necessary action can be taken in this regard. On 12.08.2010, the Director, RINPAS sent entire documents as demanded by the Deputy Secretary of the Health Department. On 27.06.2011, after completion of the course of MDS, the petitioner joined RINPAS and his joining was accepted by the Director, RINPAS with rider clause that the payment for the period of study leave will be considered after approval from the Health Department. On 02.05.2012, after passing the examination the petitioner submitted his degree certificate before the Director, RINPAS. The petitioner filed representation on 18.06.2012 for granting study leave for the period from 07.08.2008 to 26.06.2011 though the case of the petitioner was pending before the respondents since 2008 and no heed has been paid on the representation of the petitioner. The petitioner again filed representation on 17.01.2013 for regularization of study leave from 07.08.2008 to 26.06.2011. The petitioner is the only Dental Surgeon in the RINPAS, who is having experience of Cancer treatment. The file of the petitioner has been sent to the Health Department all of a sudden. The Managing Committee of RINPAS took a decision for regularization of the service of the petitioner with extraordinary leave without

pay, but with the rider clause that the extraordinary leave i.e. for the period of three years will not be counted for the seniority. The petitioner also applied for grant of dynamic ACP on 08.07.2016 and on 16.05.2017 regarding payment of due annual increment as well as ACP and its arrear, but three years period has been considered as break down and in that view of the matter, the petitioner is not getting seniority.

5. Mr. Saurav Arun, learned counsel for the petitioner assailed the impugned order contained in Annexure-12 on the ground that the petitioner has applied for study leave on 04.08.2008 and on 20.06.2009 although the Director was himself competent to grant the leave, but on 10.09.2009 the Director has asked the petitioner to get the leave sanctioned at his own. The facts, as narrated above about request by the Deputy Secretary and sending of the documents, have also been referred by Mr. Saurav Arun, learned counsel for the petitioner. Learned counsel for the petitioner submits that after completion of the petitioner's master degree, he joined the service on 27.06.2011 and his joining was accepted with rider that salary for that period will be subject to the decision by the Health Department. The petitioner has submitted his degree certificate on 02.05.2012. By way of referring Annexures-9 and 9/1, he submits that the petitioner also represented before the respondents. By way of referring paragraph 30 of the counter affidavit filed by respondent no.5, he submits that this fact has been stated in this paragraph that the study leave was not granted, but extraordinary leave has been granted post facto by the Managing Committee. By way of referring paragraph 7 of the counter affidavit, he submits that the service book of the petitioner was sent to the Health Department on 05.08.2015, whereas, the petitioner was working with the RINPAS since 2005 itself. By way of referring paragraph 5 of the counter affidavit, he submits that this fact has been admitted in the counter affidavit that the petitioner has applied for regularization of study leave, but the same was not sanctioned by the RINPAS. He further submits that in paragraph 7 of the counter affidavit, it is admitted by the RINPAS that it is an autonomous body and in the said counter affidavit, it has further been stated that the respondents will pay the benefit of 2nd installment of 6th Pay Revision to the petitioner as soon as the service book of the petitioner is verified. Learned counsel for the petitioner refers to Rule 217 of the Code.

6. For the ready reference, Rule 217 of the Code is quoted herein below:

"217. Study leave will count as service for promotion and pension but not for leave. It will not effect any leave which may already be due to a Government servant; it will count as extra leave on half average pay and will not be taken into account in reckoning the aggregate amount of leave on half average pay taken by the Government servant towards the maximum period admissible under these rules."

7. By way of referring Rule 217 of the Code, learned counsel for the petitioner submits that in view of this Rule, Study leave will count as service for promotion and pension, but not for leave. He further submits that the petitioner has applied

for study leave and if extraordinary leave has been granted by the RINPAS, the RINPAS needs to give reason why that Rule has not been followed in the case of the petitioner when the application of the petitioner is already there.

8. Learned counsel for the petitioner further refers Rule 236 of the Code regarding extraordinary leave.

9. Rule 236 of the Code is quoted herein below:

"236. Extraordinary leave may be granted to a Government servant in special circumstances-

(i) When no other leave is admissible under these rules;

(ii) When, other leave being admissible, the Government servant concerned applies in writing for the grant of extraordinary leave."

10. Learned counsel for the petitioner submits that in view of Rule 236 of the Code, unless the Government servant applies in writing for grant of extraordinary leave, the same cannot be granted. He further submits that the RINPAS has suo motu granted extraordinary leave in absence of any application by the petitioner in this regard.

11. Learned counsel for the petitioner further refers Rule 85(b) and Note 5 of the Code.

12. Rule 85 (b) and Note 5 of the Code are quoted herein below:

"85(b). The following periods count for increment in the time-scale of post on which the Government servant concerned holds a lien, as well as in the time-scale of the posts, if any, on which he would hold a lien, had his lien not been suspended:-

(i) service in another post other than a post carrying less pay referred to in clause (a) of Rule 56, whether in a substantive or officiating capacity;

(ii) service on deputation;

(iii) foreign service; and

(iv) all leave other than extraordinary leave.

Note-(5) Under the special order of the State Government in each case extraordinary leave when taken on account of ill health or for any other cause beyond the Government servant's control or when taken for the purpose of study with a view to improve the Government servant's professional qualification and knowledge may allowed to count for increment under Clauses (b) and (c) of this rule :

Provided that, when a special order of this nature has been made by the State Government in favour of a Government servant proceeding on extraordinary leave for the purpose of study, such Government servant shall on return from

leave produce satisfactory evidence in the form of a degree, diploma or other qualification, or in form of a certificate from the head of the institution where the course of study, has been prosecuted to show that he had profited from the course of study and in default of the production of such evidence by the Government servant, the State Government may record the special order allowing the period of extraordinary leave to count for increment."

13. By way of referring, Rule 85(b) and Note 5 of the Code, learned counsel for the petitioner submits that the petitioner has gone for maximum degree and after obtaining such degree, he is the only specialist of Cancer in the Department. He further submits that it is for the benefit of the RINPAS and the State and in view of this Rule, the petitioner is entitled for increment.

14. Learned counsel for the petitioner further submits that although the petitioner has joined the service in the year 2005, the service book of the petitioner was sent for verification in the year 2015, which shows capricious attitude of the RINPAS. He also submits that the petitioner has also represented before the respondent-authority for grant of dynamic ACP, but the same has not been decided as yet.

15. Learned counsel for the petitioner relied upon the judgment rendered by the Hon'ble Supreme Court in the case of Santosh Kumar v. State of A.P., reported in (2003) 0 Supreme (SC) 584.

16. Paragraph 10 of the said judgment is quoted herein below:

"10. A Constitution Bench of this Court in Direct Recruit Class II Engineering Officers Association's case (supra), after considering various aspects and earlier decisions, summed up the conclusions in paragraph 47 of the judgment. For our purpose paras (A) and (B) of the said paragraph are relevant, which are extracted hereunder: -

"47. To sum up, we hold that:

(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.

The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.

(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularization of his service in accordance with the rules, the period of officiating service will be counted." The respondent and others were appointed as Sub-Inspectors out of seniority looking to the outstanding merit and record prior to the direct recruits like the appellant. Their services were admittedly regularized by relaxing the Service Rules in exercise of power available under Rule 47 of the

General Rules. The appellant did not challenge the validity of Rule 47 and no malafides were established against the authorities in exercise of powers of relaxation under the said Rule. The Tribunal has recorded a finding that the rule relating to the method of recruitment was not relaxed but only the conditions which had to be fulfilled for the purpose of promotion to the category of Sub-Inspector were relaxed; this finding is not disturbed by the High Court; there was no relaxation as to the basic qualification; the State Government regularized the services of the respondent and others with retrospective effect from the date they were temporarily appointed as Sub-Inspectors (OSSIs). It is also not disputed that they continued in service uninterruptedly for about 12-13 years till their services were regularized with retrospective effect. This being the factual position it could not be said that the corollary to paragraph 47(A) of the aforementioned Constitution Bench judgment applies to the facts of the present case. Once their services were regularized it cannot be contended that their initial appointment was only on ad hoc basis and not according to the Rules and made as a stop-gap arrangement. On the other hand paragraph 47(B) supports the case of the respondent."

17. Learned counsel for the petitioner relied upon the judgment rendered by the Hon'ble Patna High Court in the case of Anil Prasad Gara and Rajiv Kumar v. State of Bihar, reported in (1991) 0 Supreme (Pat) 315.

18. Paragraphs 8, 10 and 14 of the said judgment are quoted herein below:

"8. It is true that the leave cannot be claimed as a matter of right but, according to policy of the State Government, as incorporated in the Notes appended to Rule 204 of the Bihar Service Code, such study leave has to be granted liberally. It is true that in terms of Clause (b) of Rule 204 such leave may be granted if the State Government is of the opinion that it is in public interest. I, for one, inspite of best persuasion, have not been able to agree with the logic that the grant of study leave would not be in public interest. It is too late in the day to contend that the attainment of higher qualification or specialisation in a particular subject would not be in public interest. We are living in an age of specialisation and the Medical Science is one branch, which has made tremendous strides abroad mainly on account of better facilities for getting specialised training. In this background, it is difficult to countenance this stounding proposition that grant of study leave for attaining speciality in a particular subject would not be in public interest.

In this connection I can do no better than to quote a passage from the decision of the supreme Court in Dr. Jagdish Saran V/s. Union of India -- :

If equality of opportunity for every person in the country is the constitutional guarantee, a candidate who gets more marks than another is entitled to preference for admission. Merit must be the test when choosing the best, according to this rule of equal chance for equal marks. This proposition has greater importance when we reach the higher levels of education like post-

graduate courses. After all, top technological expertise in any vital field like medicine is a nation's human asset without which its advance and development will be stunted. The role of high grade skill or special talent may be less at the lesser levels of education, jobs and disciplines, of social inconsequence, but more at the higher levels of sophisticated skills and strategic employment. - To devalue merit at the summit is to temporise with the country's development in the vital areas of professional expertise. In science and technology and other specialised fields of developmental significance, to relax lazily or easily in regard to extracting standards of performance may be running a grave national risk because in advanced medicine and other critical departments of higher knowledge, crucial to material progress, the people of India should not be denied the best the nation's talent lying latent can produce. If the best potential in these fields is cold shouldered for populist considerations garbed as reservations, the victims, in the long run, may be the people themselves. Of course, this unrelenting strictness in selecting the best may not be so imperative at other levels where a broad measure of efficiency may be good enough and what is needed is merely to weed out the worthless.

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10. Even if it is accepted for the sake of argument, without holding the same to be correct, that one year's rule applies in the case of grant of study leave also, in my opinion, nothing prevents the Government from relaxing the said rule in appropriate cases to undo hardship and in the ends of justice and fair play. In this connection, I would like to refer to a statutory rule framed by the State Government in exercise of power under the Proviso to Article 309 of the Constitution, which empowers the State Government to relax the requirements of a particular rule. I would better quote the aforesaid rule in extensor:-

-No. III/RI-2010/55A-11505 the 23th November, 1956. In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, and in supersession of previous order on this subject the Governor of Bihar hereby makes the following Rules.

Where the State Government are satisfied that the operation of any rule regulating the conditions of service of State Government servants, or any class of such Government servant, causes undue hardship in any particular case, they may by order, dispense with or relax the requirement of that rule to such extent and subject to such conditions as they may consider necessary for dealing with the case in a just and equitable manner. The Government has obviously acted unmindfully of its power as contained in the aforesaid rule while rejecting the request for grant of study leave. The question, therefore, that next arises for consideration is whether this Court in exercise of its writ jurisdiction should issue appropriate order or direction directing the concerned authority to grant study leave or not.

Learned Counsel for the State has argued that the grant of leave being

discretionary in nature, this Court has no jurisdiction to issue any mandamus in the matter. I regret my inability to agree to this contention. The Supreme Court in *The Comptroller & Auditor General V/s. K.S. Jagannathan* -- , after referring to the celebrated observations of Justice Subha Rao AIR 1966 S.C. 81 (sic) that Article 226 is designed "to reach injustice wherever it is found" and "to mould the reliefs to meet the peculiar and complicated requirements of this country, "had this to say while laying down the scope of power of this Court under Article 226 of the Constitution in such matters:-

- There is thus no doubt that the High Courts in India exercising their jurisdiction under Article 226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the Government or a public authority has failed to exercise or has wrongly exercised to discretion conferred upon it by a Statute or a rule or policy decision of the Government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the Government or a public authority, and in a proper case, .in order to prevent injustice resulting to the concerned parties, the Court may itself pass an order or give directions which the Government or the public authority should have passed or given had it properly and lawfully exercised the discretion.

The submission, therefore, of the learned Counsel for the State that a mandamus of the nature suggested by the petitioners cannot be issued, has no merit.

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14. It was stated at the Bar that many persons, having been forced to the wall, out of sheer desperation, resigned their jobs as Medical Officers (Civil Assistant Surgeons) rather than forgo the opportunity to do post graduation. Jobs are hard to get these days and if the authorities have created a situation in which persons per force resigned their jobs, such an anti-careerist and callous attitude on their part can only be deprecated. In the words of Justice Chinnappa Reddy in *Randhir Singh V/s. Union of India*-- , "The Judges have a duty to redeem their constitutional oath and do justice no less to the pavement dwellers than to the quest of the Five_ Stars hotel." If the Government has failed to discharge its duty and obligation, the court must extend its helping hand to undo the injustice. I would, therefore, be failed in my duty if I do not extend the benefit of this judgment and order to such persons, who, although not before us, are similarly situate as these petitioners or even to those who have resigned their jobs for doing post graduation. It is obvious that the alleged resignation has been made under coercive circumstances and cannot be said to be out of free volition."

19. By way of relying the aforesaid judgments, learned counsel for the petitioner submits that the Constitution Bench of the Hon'ble Supreme Court has considered in Direct Recruit Class II Engineering Officers Association's case that if the person has worked on ad-hoc basis and if his service is regularized, the concerned person will be entitled for the benefits.

20. Per contra, Dr. Ashok Kumar Singh, learned counsel for the respondent-RINPAS submits that the petitioner has proceeded for study leave at his own without having sanction for the same. In view of Rule 180 to be read with Rule 236 of the Code, the petitioner is not entitled for increment and other benefits as the petitioner was not granted the study leave. He refers to Rule 180 of the Code and submits that in special circumstances and when no other leave is admissible under these rules, extraordinary leave may be granted. He further submits that lenient view in the matter has been taken against the petitioner as the petitioner has not been terminated rather the service of the petitioner has been accepted with certain riders. He also submits that so far as the increments are concerned, the petitioner is not entitled for the increment in view of the judgment delivered by this Court in the case of Ansaalem Tirki v. State of Jharkhand & Ors., reported in 2016 (1) JBCJ 504.

21. Ms. Surbhi, learned counsel for the respondent-State submits that the RINPAS is an autonomous body and the State has got no role in the RINPAS. The RINPAS is the competent authority to take any decision with regard to the grievance of the petitioner.

22. In view of the above facts and the arguments advanced by the learned counsel for the parties, the Court proceeded to examine the submissions as well as the fact and finds that Rule 204 of the Code speaks about study leave. It is true that the leave cannot be claimed as a matter of right, but according to the policy of the Government, as incorporated in the Notes appended to Rule 204 of the Code, such study leave has to be granted liberally. It is too late in the day to contend that the attainment of higher qualification or specialization in a particular subject would not be in public interest. We are living in an age of specialization and the Medical Science is one branch, which has made tremendous strides abroad mainly on account of better facilities for getting specialized training. Rule 217 of the Code provides that study leave will count as service for promotion and pension, but not for leave. Rule 85 (b) of the Code prescribes that increment will be payable if the Government servant concerned holds a lien. Admittedly, the petitioner has not left the service. Note 5 of Rule 85 of the Code clearly speaks that the purpose of study with a view to impose the Government servant's professional qualification and knowledge may allow to count for increment under Clauses (b) and (c) of the Rule. Admittedly, the petitioner has undergone the course of master degree i.e. Master of Dental Surgery, Oral Medicine and Radiology at Rama Dental College and Hospital, Kanpur and he is the only Cancer specialist in the State of Jharkhand and this fact has not been denied either by the RINPAS or by the State. Thus, in view of

Rule 85 of the Code, it was for the benefit of the State. Rule 180 of the Code, which has been referred by the learned counsel for the respondent-RINPAS is applicable if no other leave is admissible. Admittedly, in the case of the petitioner special leave's provision is there, as discussed herein above. Thus, Rule 180 of the Code is not applicable in the facts and circumstances of the present case. For applying the extraordinary leave, it is condition precedent that it must be in the signature of the concerned employee. In light of Rule 236 (ii) of the Code, the petitioner has not applied for extraordinary leave. Thus, Rule 236 is not applicable in the case of the petitioner. The judgment relied by Dr. Ashok Kumar Singh, learned counsel for the respondent-State in the case of Ansalem Tirki (supra) is distinguishable in the facts and circumstances of the present case. Admittedly, in the case of the petitioner, the post facto sanction of leave is there. However, the post facto is with regard to extraordinary leave and it is not in the nature of study leave, but the fact remains that post facto sanction of leave is there. Thus, the case of the Ansalem Tirki (supra) is different from the present case. It is celebrated judgment of the Constitution Bench of the Hon'ble Supreme Court in Direct Recruit Class II Engineering Officers Association's case that even if the person has worked on ad-hoc basis and if his service is regularized, the concerned person will be entitled for the benefits.

23. In view of these discussions, the part of the impugned order dated 17.12.2015 cannot sustain in the eyes of law. Accordingly, the impugned order dated 17.12.2015 contained in Annexure-12 to the writ petition is partly quashed to the effect that the petitioner has been denied the benefits and so far as regularization part is concerned, that is kept intact as it is. The respondent-RINPAS is directed to take hectic steps to complete the formalities for grant of the benefits, which have been prayed in this writ petition. It must be completed within a period of twelve weeks from the date of receipt/production of a copy of this order.

24. With the above observations and directions, this writ petition stands partly allowed and disposed of.