

**(2012) 04 PAT CK 0116**  
**In the Patna High Court**  
**Case No : CWJC No. 6164 of 2006**

Praveen Wilson Herbert and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

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**Date of Decision :** 12-04-2012

**Acts Referred:**

Constitution of India, 1950 — Article 309

**Citation :** (2012) 4 PLJR 583

**Hon'ble Judges :** V.N. Sinha, J

**Bench :** Single Bench

**Advocate :** Amit Prakash, for the Appellant; Md. Anis Akhtar for the State and M/s Jitendra Singh and Shankar Kumar Thakur for the High Court, for the Respondent

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## Judgement

V.N. Sinha, J.—Learned counsel for the petitioners is permitted to correct the description of petitioner no. 2. It is submitted by the learned counsel for the petitioners that during the pendency of the writ petition, petitioner no. 6 left for heavenly abode and his name be expunged from the array of parties.

2. As requested by the counsel for the petitioners, let the name of deceased petitioner no. 6 be expunged from the records of this case.

3. Heard learned counsel for the petitioners, the State and the High Court.

4. At the time of filing of the writ petition, petitioners served the High Court in the cadre of Assistant. They have filed this writ petition for quashing the instruction of the State Government issued from the Finance Department, bearing Memo No. 3387F(2) dated 29.4.2002, Annexure-3 to the writ petition whereunder Resolution of the State Government bearing No. 59 dated 14.7.1977, Annexure-2 notifying Bihar Government (Family Planning Special Provision) Rules, 1977 (hereinafter referred to as the Rules) providing for one increment as Family Planning Allowance has been modified with retrospective i.e. from 1.1.1996 observing that the increment earned as Family Planning Allowance

shall not be taken into account for grant of allowances.

5. It is submitted on behalf of the petitioners that in the light of notification dated 14.7.1977, Annexure-2, petitioners were allowed family planning increment which was also taken into account for grant of allowances but after issue of Memo No. 3387F(2) dated 29.4.2002, Annexure-3 amending notification dated 14.7.1977, Annexure-2 allowances earned pursuant to grant of family planning increment during the period between 1.1.1996-29.4.2002 is to be recovered, which is wholly arbitrary and cannot be permitted as family planning rules framed under proviso to Article 309 of the Constitution of India being statutory in nature cannot be amended by a Memo, that too with retrospective effect.

6. Counsel for the State opposed the submission. According to him, Rules were notified after obtaining approval of the Bihar Government, the instruction contained in Memo No. 3387F(2) dated 29.4.2002, Annexure-3 amending the Rules, Annexure-2 was also issued after adopting the same procedure i.e. with the Cabinet approval, as such, it is the State Government which notified the Rules as also issued Memo for its amendment. The only distinction which is to be noticed in the notification dated 14.7.1977, Annexure-2 notifying the Rules and Memo No. 3387F(2) dated 29.4.2002, Annexure-3 amending the Rules is that Rules have been notified under Article 309 of the Constitution of India but Memo No. 3387F(2) dated 29.4.2002, Annexure-3 there is hardly any reference of proviso to Article 309 of the Constitution of India, but the procedure adopted for notifying the Rules and for issue of Memo No. 3387F(2) dated 29.4.2002, Annexure-3 being the same i.e. with the approval of the State Government i.e. the Council of Ministers, there is hardly any distinction between the two.

7. The procedure adopted for notifying the Rules under notification dated 14.7.1977, Annexure-2 and for issue of Memo No. 3387F(2) dated 29.4.2002, Annexure-3 by which the Rules have been amended being the same i.e. with the approval of the State Government, in my opinion, there is no difficulty in concluding that the amendment made in the Rules, Annexure-2 is in accordance with law. Counsel for the State further submitted that perusal of Clause 3 of the Rules would indicate that the same is not applicable to the employees of the High Court and as the original notification itself is not applicable to the High Court, its amendment made under Memo No. 3387F(2) dated 29.4.2002 is also not applicable to the petitioners. In this connection, he relied upon the order of the High Court dated 13.7.2011 passed in C.W.J.C. No. 10660 of 2001 (Mithilesh Kumar Dwivedi vs. The State of Bihar and Others) in which Division Bench of this Court considered the Rules and held that in view of the provisions contained in sub-clause 3 of Rule 1 of the Rules, the Officers and Servants of the High Court and courts subordinate to the High Court are excluded from the applicability of the Rules.

8. A copy of this writ petition was served in the. Legal Cell of the High Court on 4.5.2006 but the counsel appearing for the High Court has not chosen to file any

counter affidavit in the matter either accepting or disputing the applicability of the Rules to the Officers and Servants of the High Court. He, however, states that in this connection, petitioners have filed representation dated 24.1.2006 addressed to the learned Registrar General of the High Court which is contained in Annexure-5 to the writ petition, which may be directed to be disposed of by the learned Registrar General in accordance with law.

9. Having heard counsel for the petitioners, the State and the High Court, I direct the Registrar General, Patna High Court to consider and dispose of the representation of the petitioners dated 24.1.2006, Annexure-5 in accordance with law and pass appropriate reasoned order in the matter, as early as possible, in any case within two months from the date of receipt/production of a copy of this order before the Registrar General, Patna High Court.

10. Before parting with this order, I would like to observe that in case Registrar General concludes that the Rules are applicable to the Officers and Servants of the High Court and courts subordinate thereto, he shall direct that the amendment made in the Rules under Memo No. 3387F(2) dated 29.4.2002, Annexure-3 will not have any retrospective operation from 1.1.1996. The amendment in the Rules shall come into effect from 29.4.2002, the date of issue of Memo No. 3387F(2) dated 29.4.2002, Annexure-3, as it is well settled that the Rules cannot be amended by the Executive with retrospective effect.

11. It is made clear that if the Rules are not applicable to the Officers and Servants of the High Court as also to courts subordinate to the High Court the amount paid to the petitioners pursuant to the Rules be recovered. The writ petition is, accordingly, disposed of.