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**(2021) 02 JH CK 0110**

**In the Jharkhand High Court**

**Case No : L.P.A. No. 394 Of 2018, I.A. No. 6618 Of 2018**

State Of Jharkhand And Ors

APPELLANT

Vs

Dr. (Mrs.) Karuna Jha And Ors

RESPONDENT

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**Date of Decision : 11-02-2021**

**Acts Referred:**

Rajendra Institute Of Medical Sciences Act, 2002 — Section 13, 29, 32  
Constitution Of India, 1950 — Article 226

**Citation : (2021) 02 JH CK 0110**

**Hon'ble Judges : Dr. Ravi Ranjan, CJ; Sanjay Kumar Dwivedi, J**

**Bench : Division Bench**

**Advocate : Sreenu Garapati, Ritu Kumar, Dr. Ashok Kumar Singh**

**Final Decision : Allowed**

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## **Judgement**

1. Heard, Mr. Sreenu Garapati, learned counsel appearing for the appellants, Mrs. Ritu Kumar, learned counsel for the respondent no. 1 and Dr.

Ashok Kumar Singh, learned counsel for the respondent-RIMS.

2. This Letters Patent Appeal 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.

3. The instant intra Court appeal has been filed under Clause 10 of Letters Patent against the judgment dated 26.04.2017 passed in W.P.(S) No. 5125

of 2012 whereby the writ petition has been allowed and resolution dated 25.07.2012 have been quashed whereby, the departmental proceeding has

been initiated against the writ-petitioner and Memo dated 20.02.2013 by which the writ petitioner-respondent no.1 has been directed to deposit a sum

of Rs. 23,65,858/- in the name of Director, RIMS.

4. The brief facts made in the writ petition which are required to be enumerated herein for proper adjudication of the case are as under:-

The writ petitioner-respondent no. 1 was appointed on the post of Civil Assistant Surgeon, Government of Bihar vide Notification No. 1343 (2) dated

13.08.1976. She gave her joining at State Dispensary, Chanho Block, District Ranchi on 19.08.1976. The petitioner-respondent no. 1 was transferred

to one place to another and ultimately in the year, 1980 she was transferred to Rajendra Medical College and Hospital, Ranchi. The writ petitioner-

respondent no.1 was promoted to the post of Assistant Professor in the year, 1984 and was subsequently promoted to the post of Associate Professor

with effect from 21.05.1989. It was further case of the writ petitioner-respondent no. 1 that she was Associate Professor in the Department of

Gyneology and Obstetrics, Rajendra Medical College and Hospital, Ranchi. The State of Bihar was reorganized with effect from 15.11.2000 and the

State of Jharkhand came into existence on the same date and the writ petitioner-respondent no.1 has been posted in the State of Jharkhand. The State

of Jharkhand enacted the provisions of Rajendra Institute of Medical Sciences Act, 2002 in terms thereof Rajendra Medical College and Hospital,

Ranchi was converted into an autonomous Institutions and named as Rajendra Institute of Medical Sciences, Ranchi. Rule 13 of the Rajendra Institute

of Medical Sciences Act, 2002 provides that all the service rules and regulations which were applicable to the State Government employees would

continue to apply on the employees working at the newly created Rajendra Institute of Medical Sciences, Ranchi till appropriate service rules were not

framed in terms of Section 32 of Rajenedra Institute of Medical Sciences Act, 2002. No rules in terms of section 32 of the Rajenedra Institute of

Medical Sciences Act, 2002 have been framed and as such service conditions applicable to the State Government employees were applicable to the

writ petitioner-respondent no. 1 and other doctors/employees working at Rajenedra Institute of Medical Sciences, Ranchi. The service of the writ

petitioner- respondent no. 1 was absorbed. It was further case of the writ petitioner-respondent no. 1 that the absorption was conditional, the writ

petitioner-respondent no. 1 was promoted to the post of Professor w.e.f. 01.11.2003 by Notification dated 08.04.2004. The writ petitioner-respondent

no. 1 was regularly performing her duty but salary from the month of June, 2005 was not paid. The writ petitioner-respondent no. 1 was on earned leave from 07.10.2005 and she gave her joining on 06.01.2006 before the Director, Rajendra Institute of Medical Sciences, Ranchi which was received on 06.01.2006. It was further case of the writ petitioner-respondent no. 1 that she applied for emergency leave for ten days on 10.01.2006.

Since, the writ petitioner-respondent no.1 fell ill on 19.01.2006 and as such she applied for medical leave on 21.01.2006 alongwith medical prescription.

The writ petitioner-respondent no. 1 was on medical leave but she was directed by the Director, RIMS by letter dated 22.06.2006 to give her joining within ten days. The writ petitioner-respondent no. 1 received the said letter and informed the Director, RIMS about her illness and she also informed that she had already sent an application for extension of her medical leave. She made request for arrears of salary from May, 2005 till September, 2005. She also informed that she is entitled for earned leave, medical leave, emergency leave etc. By letter dated 18.08.2006 the writ petitioner-respondent no. 1 has been removed from the service. The writ petitioner-respondent no.1 challenged the said order in W.P.(S) No. 5991 of 2006 before this Court. The said writ petition was allowed and order dated 18.08.2006 was quashed and the learned Single Judge held that as a consequence the writ petitioner shall be entitled to get all benefits without any break in service. Further learned Single Judge directed the Director, RIMS to consider the claim of the writ petitioner-respondent no. 1 for payment of the arrears of her salary and to pass appropriate order in accordance with law. The writ petitioner-respondent no. 1 after quashing of the said order gave her joining before the Director, RIMS on 21.07.2011.

In the meantime, writ petitioner-respondent no.1 applied for voluntary retirement on 09.09.2011 by submitting an application before the Secretary, Health Medical Education and Family Welfare Department, Government of Jharkhand, Ranchi. The writ petitioner- respondent no. 1 had put in more than thirty years of qualifying service therefore, she was entitled for voluntary retirement. The said letter was forwarded to the Principal Secretary, Health Medical Education and Family Welfare Department, Government of Jharkhand, Ranchi for necessary action. It was further case of the writ petitioner-respondent no. 1 that her application for voluntary retirement was kept pending and she received Resolution dated 25.07.2012 issued under

the signature of the Special Secretary, Health Medical Education and Family Welfare Department, Government of Jharkhand whereby a departmental

proceeding has been initiated against the writ petitioner-respondent no. 1 on the first charge that she has been doing private practice and has been

absenting from her duties and the second charge was that though she was removed from service with effect from 07.10.2005 by office order dated

18.08.2006 for an unauthorized leave of eleven months and doing private practice but inspite of that she gave her joining suo moto and resigned suo

moto and has been on unauthorized leave, disobeys the government orders which is undisciplined.

Being aggrieved, writ petitioner-respondent no. 1 invoked jurisdiction of this Court by filing writ petition which was heard and disposed of by the

learned Single Judge.

5. It was the case of the appellants that the writ petitioner-respondent no. 1 has not taken valid ground for quashing order of departmental proceeding

pending against her. The writ petition being W.P.(S) No. 5991 of 2006 was allowed on a legal point that the major punishment can not be awarded

without holding any enquiry. The learned Single Judge in W.P.(S) No. 5991 of 2006 directed the Director, RIMS to consider the case of the writ

petitioner- respondent no. 1 for the period of absence as to whether she is entitled for the salary or not. On representation of the petitioner, Director,

RIMS directed to pay salary to the writ petitioner-respondent no. 1. The Director, RIMS has not passed reasoned order for payment of salary for the

period 01.06.2005 to 20.07.2011, (approximately six years) and merely intimated the Health Department about the said payment causing the huge

financial loss of the public money and government exchequer. Director, RIMS was required to adhere the principle of 'no work, no pay' that is why

departmental proceeding has been initiated and recovery of amount was justified. It was further case of the appellant-respondent no. 2 that voluntary

retirement is not a right of an employee rather it is the employer right to accept it or not to accept the application for voluntary retirement.

6. It was the case of the respondent-RIMS that the writ petitioner- respondent no. 1 was engaged in private practice at the cost of her duty in RIMS.

She was dismissed from the service on 18.08.2006 however, pursuant to order dated 07.07.2011 passed in W.P.(S) No. 5991 of 2006, the said order

was quashed. The said quashing of termination order is based on without initiation of departmental proceeding. The application for voluntary

retirement of the writ petitioner-respondent no. 1 was not accepted by the Government because it was decided to start regular departmental

proceeding against her in view of the serious charges against her which had already come to the notice of the Government. The direction of the

government to recover the amount already paid to the writ petitioner-respondent no. 1 for the period she was not in employment of RIMS, is justified.

Even in the case of quashing of termination order by a Court of competent jurisdiction, an employee can be paid back wages only if he/she can prove

that he/she was without any employment or without any source of income during the period he/she was out of job. The writ petitioner- respondent no.

1 was not entitled for payment of back wages for the entire period during which she was absent and as such the State Government was justified in

issuing direction as contained in Annexure-12 of the I.A. No. 1485 of 2013 in W.P. (S) No. 5125 of 2012 filed by the writ petitioner-respondent no. 1

whereby she was asked to refund Rs. 23,65,858/- to the RIMS.

7. Mr. Sreenu Garapati, learned counsel for the appellants submitted that the learned Single Judge has not considered the order dated 07.07.2011

passed in W.P.(S) No. 5991 of 2006. He submitted that the learned Single Judge did not pass categorical order regarding the payment of arrear of

salary for the period the writ petitioner-respondent no. 1 remained out of service rather learned Single Judge has directed the Director, RIMS to

consider the claim of the petitioner- respondent no. 1 and to pass an appropriate order for payment of arrears of salary. The Director, RIMS has

passed order for payment of arrears of salary which was non-speaking order and this aspect of the matter has not been considered by the learned

Single Judge for payment of arrears of salary w.e.f. 01.06.2005 to 20.07.2011 as the writ petitioner-respondent no. 1 did not work at all for the said

period. So she was not entitled for payment of arrears of salary and particularly in view of the fact that she was engaged in private practice. The

learned Single Judge has not considered the principle of 'no work, no pay' and petitioner's application for voluntary retirement was also not concluded.

W.P.(S) No. 5991 of 2006 was allowed due to the fact that it was in absence of departmental proceeding.

8. Learned counsel for the respondent no. 2 further submitted that Clause 74(III) (b) Rule 16 of the Service Code does not apply in the case where

the proposal for initiation of disciplinary proceeding is under consideration. He submitted that the writ petitioner-respondent no. 1 was indulged in

private practice and the learned Single Judge has not taken into consideration the fact that the doctors of teaching cadre of RIMS are paid non-

practicing allowance and the doctors are bound not to do private practice in view of this as the writ petitioner-respondent no. 1 was indulged in private

practice, she was gainfully employed and in that view of the matter, the petitioner-respondent no. 1 was not entitled for arrears of salary. The

Governing Body of RIMS, in its 13th meeting held on 17.07.2006 took a resolution whereby the writ petitioner-respondent no. 1 was provided as last

opportunity either to leave practice and join back or to take voluntary retirement. The writ petitioner-respondent no. 1 has never claimed that she was

not gainfully employed. The Director, RIMS should not have passed an order for the payment of Rs. 23,65,858/- without taking into consideration this

aspect of the matter.

9. Mrs. Ritu Kumar, learned counsel for the writ petitioner-respondent no. 1 submitted that learned Single Judge in W.P.(S) No. 5991 of 2006 quashed

the termination order observing that as a consequence, the petitioner-respondent no. 1 shall be entitled to get all benefits without any break in service.

She further submitted that so far as the arrears of salary before her termination was concerned, the learned Single Judge directed the Director, RIMS

to consider the claim of the petitioner and pass appropriate order in accordance with law. She submitted that pursuant to that order, Director, RIMS

passed order for payment of Rs. 23,65,858/-. She further submitted that by letter dated 09.02.2013, the Principal Secretary, Health, Medical Education

and Family Welfare Department, Government of Jharkhand, Ranchi directed to recover the amount paid to the writ petitioner-respondent no. 1.

Pursuant to that, order dated 20.02.2013 has been issued by the Director, RIMS for recovery of Rs. 23,65,858/-. She further submitted that the

Principal Secretary, Health, Medical Education and Family Welfare Department, Government of Jharkhand has no jurisdiction to issue such order and

in that view of the matter, Director was not required to act and pass order of recovery. She further submitted that the order passed in W.P.(S) No.

5991 of 2006 has attained its finality and considering all these aspects of the matter, the learned Single Judge has rightly passed the impugned order.

10. Dr. Ashok Kumar Singh, learned counsel appearing for the respondent- RIMS submitted that it is an admitted position that pursuant to order issued

by the Principal Secretary, Health, Medical Education and Family Welfare Department, Government of Jharkhand, order of recovery has been passed

by the Director, RIMS. He repeated his argument as advanced in the writ petition.

11. Learned Single Judge after considering the facts came to the conclusion that order passed in W.P.(S) No.5991 of 2006 has attained its finality and

allowed the writ petition considering this aspect of the matter that there is no mis- representation on the part of the petitioner-respondent no. 1.

Moreover, the respondent-Director, RIMS passed an order for payment pursuant to order passed in W.P.(S) No. 5991 of 2006. Furthermore, there is

no gainsaying of the fact that without following any principle of natural justice, recovery order has been passed. Accordingly, the learned Single Judge

quashed the Resolution dated 25.07.2012 whereby departmental proceeding has been initiated against the petitioner-respondent no. 1 and by Memo

dated 22.02.2013 the petitioner- respondent no. 1 was directed to deposit Rs. 23,65,858/- in the name of Director, RIMS.

12. This Court while considering the aforesaid findings of the learned Single Judge deemed it proper to examine following questions:-(i) whether the

petitioner-respondent no.1 is entitle for any salary allowance for the period which she has not worked and (ii) whether order of recovery passed by the

Director, RIMS is justified in view of the fact that the Principal Secretary, Health, Medical Education and Family Welfare Department, Government of

Jharkhand is competent to direct for such recovery or not. Since, all these questions are co- related, they are taken up simultaneously.

13. Admittedly, the writ petitioner-respondent no. 1 has retired from the service and as allegation against her of private practice, it transpires that she

was gainfully employed.

14. It is settled proposition of law that one cannot be entitled for any salary for the period not worked, as held by the Hon'ble Apex Court in the case

of ""Shobha Nelson Vs. State of Madhya Pradesh & Others"" reported in (2017) 16 SCC

448. The relevant paragraph 11 of the said judgment is being quoted here-in-

below:-

11. Having decided that the appellants are entitled to the service from 13.08.1991, the point that is to be determined is whether they should be treated to be in service even during period of their absence between 1975 to 1991. In view of the finding that they did not take permission before going to Zanzibar in 1975, the normal course would have been to permit the respondent to proceed with the departmental inquiry as contemplated in the order dated 3.1.1996. But taking note of the fact of retirement of both the appellants and death of Dr. S.K.

Nelson we do not see any useful purpose being served by directing any inquiry at this stage. We hold that the period from 1975 to 1991 spent by the appellants in Zanzibar shall be treated as duty for the purpose of computation of pension only. They shall not be entitled for any salary or allowance for that period. The appellants shall be treated to have joined back in service on 13.08.1991. They shall be entitled for salary and other benefits to which they are entitled from 13.08.1991. till the date of their superannuation.

The writ petitioner-respondent no. 1 is the doctor and above matter is also of a doctor.

15. It is further settled proposition of law as has been held by the Hon'ble Apex Court in the case of ""Haryana and Another Vs. S.K. Khosla & others"" reported in (2007) 15 SCC 777. Since, the question of arrears of salary with retrospective effect does not arise since undisputedly, the petitioner-respondent no. 1 had not worked in that period. The settled proposition of principle of 'no work, no pay' was applied in that case. The relevant paragraph of the said judgment is being quoted here-in-below:-

2. Heard the learned counsel for the appellants. He brought to our notice a decision of this Court in State of Haryana V. O.P. Gupta-whereunder in respect of an identical matter arising out of similar proceedings of even date this Court while setting aside the decision of the High Court allowed the appeal at the instance of the State and held that in the circumstances noticed in that case which are identical as well in the cases before us, the question of payment of arrears of salary with retrospective effect from the notional dates does not arise since, indisputedly the respondents had never worked during that period in the promotional post, the settled principle in such cases being, ""no work, no pay"". The said principle applies with equal

force to the cases before us too. Applying the ratio of the said decision these appeals are also allowed and the orders of the High Court are set-aside

and the writ petitions before the High Court shall stand dismissed. No costs.

16. It is also settled proposition of law that grant of back wages it requires to be proved as to whether during that period one was gainfully employed

or not. In this regard reference may be made to the case of ""Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya"", reported in (2013)

10 SCC 324 in which the Hon'ble Supreme Court has held as under:

38.3. Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at

least make a statement before the adjudicating authority or the court of first instance that he/she was not gainfully employed or was employed on

lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the

employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is

so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averment about its

existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed,

the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially

similar emoluments.

17. Denial of salary on the ground of 'no work, no pay' cannot be treated as any penalty. The government control on the autonomous body RIMS is

evasive which is apparent from Section 29 of the RIMS Act which is quoted here-in- below:-

29. - -

18. In view of the fact that aforesaid provisions, confers power upon the State Government and it has evasive control upon the RIMS, the action

pursuant to direction of the Principal Secretary, Health, Medical Education and Family Welfare Department, Government of Jharkhand cannot be

faulted with. Therefore, the argument of learned counsel appearing for the writ petitioner- respondent no. 1 about Government jurisdiction is not fit to

be accepted keeping the position of law as contained under Section 29 of the Act

of 2002. The learned Single Judge has admitted this position that admittedly the writ petitioner- respondent no. 1 has not worked for that period. The learned Single Judge quashed the recovery order on the ground that there is no mis-representation on the part of the writ petitioner-respondent no. 1.

19. Learned Single Judge has given emphasis that there is no misrepresentation committed on the part of the writ petitioner-respondent no. 1 and this

led the learned Single Judge to come to the contrary view as has been taken by the Government. Now, the question as to whether it was not desirable

for the learned Single Judge, before coming to the conclusive finding about the entitlement of the writ petitioner-respondent no.1, merely on the ground

that no misrepresentation has been committed, to have considered the vital material aspect pertaining to the conduct of the writ petitioner-respondent

no. 1 whereby writ petitioner-respondent no. 1 is claiming that she had made an application for VRS but no action was taken by the State authority.

Hence at this juncture, learned Single Judge ought to have taken into consideration as to whether by merely having applied under Rule 74(b) of the

Service Code upon which no decision could be taken by the State, what legal recourse was taken by the writ petitioner-respondent no. 1 against any

inaction by the State authority. Admittedly the application under Rule 74(b) does not confer any right for separation from service rather it is the

discretion of the State Government to accept or not accept. Therefore, in our considered view the learned Single Judge was not right in saying that,

since there is no misrepresentation, the writ petitioner-respondent no. 1 would be entitled for monetary benefit for the period without the enquiry with

respect to the conduct of writ petitioner-respondent no. 1 and without recording a finding as to whether at that point of time the writ petitioner was

gainfully employed or not.

It is settled position of law that Article 226 of the Constitution of India confers power on High Court to maintain equity but not for recording sweeping

finding that as there is no misrepresentation by the writ petitioner-respondent no. 1 the payment has to be made and recovery cannot be allowed

without any thorough enquiry taking into consideration of the fact that admittedly writ petitioner-respondent no. 1 has not performed her duty and may

be gainfully employed during that period. Therefore, if the order passed by the

learned Single Judge is allowed to be continued it will lead to financial gain to the writ petitioner-respondent no. 1 without coming to conclusive finding regarding the aforesaid, which is not acceptable at all. In that view of the matter, it requires reconsideration by the authority.

In the result, the order passed by the learned Single Judge dated 26.04.2017 is set-aside. The matter is remanded back to the authority to pass afresh under applicable Rule in accordance with law. In view thereof, appeal succeeds and is, accordingly, allowed.

20. Consequent upon disposal of this appeal, I.A. No.6618 of 2018 stands disposed of.