

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Letters Patent Appeal No.1740 of 2012**

**In**

**Civil Writ Jurisdiction Case No.2323 of 2012**

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Dr. Shyamal Kishore Singh, S/o of Shahdeo Prasad Singh, Resident of Mohalla New Balbhadrapur, (Ramanand Path) at P.O. & P.S. Laheria Sarai, District Darbhanga

... ... Appellant/s

Versus

1. The State of Bihar, through the Principal Secretary, Department of Health, Medical Education and Family Welfare, Govt. of Bihar, Patna
2. The Principal Secretary, Department of Health, Medical Education and Family Welfare, Govt. of Bihar, Patna
3. The Secretary, Department of Health and Medical Education, Govt. of Bihar, Patna
4. The Joint Secretary, Department of Health and Medical Education, Govt. of Bihar, Patna
5. The Medical Council of India through its Chairman, Aiwan-e-Galib Marg, Kotla Road, New Delhi- 2

... ... Respondent/s

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Bihar Medical Education Service Cadre and Cadre Post Selection Recruitment Rules, 1997- Rule 5(ka)- Bihar Medical Education Service Cadre and Bihar Health Service Cadre are two separate cadres- posts available in the cadre shall be filled up in accordance with requisite qualification and experience- no ambiguity remained in the matter of promotional avenues- petitioner admittedly not holding teaching post- cannot claim for treating him as if holding a teaching post in Bihar Medical Education Service Cadre- writ of Mandamus cannot be issued contrary to the statutory rules- Rules of 1997 not challenged. (Para- 12,13)

Petitioner appointed as Assistant Clinical Pathologist not holding a teaching post does not come under Bihar Medical Education Service Cadre and not entitled to for promotion to the post of Assistant Professor- no illegality/infirmary in the order of Ld. Writ court- LPA devoid of merit is dismissed. (Para-15,16)

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=====

**Appearance :**

For the Appellant/s : Mr. Amarendra Narayan, Advocate  
For the State : Mr. Kumar Alok, S.C. 8  
For the M.C.I. : Mr. Kumar Brijnandan, Advocate

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**CORAM: HONOURABLE THE CHIEF JUSTICE**

**and**

**HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD**

**ORAL JUDGMENT**

**(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)**



**Date : 09-04-2018**

Challenge in this Letters Patent Appeal is to the order dated 06.07.2012 passed by the learned Writ Court in C.W.J.C. No. 2323 of 2012 by which the learned Writ Court has refused to quash the order dated 13.09.2011 (Annexure-14 to the Writ Application) passed by the respondent Principal Secretary, Department of Health, Medical Education and Family Welfare, Government of Bihar, Patna rejecting the representation of the petitioner for his promotion to the post of Associate Professor and Professor in the department of Pathology.

2. It appears that the petitioner moved this Court under Article 226 of the Constitution for quashing of the order as contained in Annexure-14 mainly on the ground that the persons like Dr. Manorama Mishra and Dr. R.P. Agrawal have been given promotion pursuant to the order dated 16.07.2007 passed in C.W.J.C. No. 6386 of 2005. The petitioner claimed that treating him alike Dr. Manorama Mishra and Dr. R.P. Agrawal, the respondents be directed to promote him from the relevant date as Associate Professor on completion of five years of his service as Assistant Clinical Pathologist and thereafter to promote him as Professor on completion of four years in his service in the rank of Associate Professor. He has further prayed



for quashing of the seniority list dated 25.03.2008 and revising the same by including his name in the list of Associate Professors and Professors of the department in the Medical Colleges of the State.

3. The learned Writ Court took note of the service history of the petitioner and found that pursuant to the advertisement (Annexure-16 with reply of the petitioner to the counter affidavit) the name of the petitioner found place in the panel and he was finally appointed as Assistant Clinical Pathologist vide notification dated 30.12.1987 (Annexure-2 to the Writ Application). The notification itself provides that, apart from their own pay, the concerned person shall be entitled to additional allowance for teaching. The case of the petitioner is that from the day one petitioner's service was utilized also for imparting teaching and training to the Undergraduate as well as Post Graduate students of the Medical College.

4. The learned Writ Court also took note of the submission of the petitioner that Dr. Manorama Mishra, who was posted as Assistant Clinical Pathologist in P.M.C.H. was at first instance posted under the control of junior persons working as Assistant Professors and Associate Professors, upon a challenge made to her posting in this Court vide C.W.J.C. No.



7033 of 1998, this Court disposed of the Writ Application vide order dated 01.03.2000, as contained in Annexure-8 to the Writ Application, with a finding that the post of Assistant Clinical Pathologist may not be a cadre post under the Rules but was an ex-cadre teaching post. However, in respect of her claim for being promoted as Associate Professor and Professor, the Court remitted the matter for consideration by the respondents and granted liberty to them to seek necessary instructions/guidelines from the Medical Council of India in the matter.

5. The Medical Council of India vide its letter dated 07.02.2006 (Annexure-9) submitted that Teacher's Eligibility Qualification Sub-Committee in its meeting held on 26.05.2005 considered the case of the petitioner (Dr. Manorama Mishra) and it found that the post of Assistant Clinical Pathologist in a hospital could not be equated with any teaching post in a Medical College as these two were separate entities. The said resolution of the Sub Committee was approved by the Executive Committee of the Council on 13.08.2005. In this view of the matter, the representation of Dr. Manorama Mishra was rejected by the Principal Secretary against which she again moved this Court in C.W.J.C. No. 6386 of 2005. The said Writ Application was disposed of by this Court on 16.07.2007 (Annexure-10)



holding that the finding that the post of Assistant Clinical Pathologist held by Dr. Manorma Mishra was an ex-cadre teaching post had become final. It appears that during a contempt proceeding brought by said Dr. Manorama Mishra the Departmental Promotion Committee recommended the case of Dr. Manorama Mishra in view of her qualification to be treated as Lecturer and, therefore, the post was being recognized as equivalent to Assistant Professor. On completion of five years of teaching experience, her post was treated as upgraded with effect from 23.10.1984 as a post of Associate Professor with retrospective effect and she was promoted as such. Again counting four years of her service from the said date, the post was being treated as upgraded, as equivalent to Professor with effect from 23.10.1988 and she was being promoted as such. It was made clear in the said letter that the post being upgraded, shall stand reverted to the post of Assistant Clinical Pathologist on her superannuation and this shall not be treated as a precedent for any other case.

6. This petitioner had earlier moved this Court in C.W.J.C. No. 13875 of 2005 which was disposed of vide order dated 07.03.2011 (Annexure-12) with a direction to the respondents that if the case of the petitioner was found similar



to the case of Dr. Manorama Mishra and Dr. R.P. Agrawal and if the rule so permit, he should also be granted the same benefits. The representation of the petitioner, however, did not find favour with the Principal Secretary of the department and the same has been rejected vide Annexure-14 to the Writ Application. The Contempt Application brought by the petitioner was disposed of granting him liberty to challenge the said order of the Principal Secretary.

7. Having taken note of the facts and contentions of the petitioner, the learned Writ Court distinguished the case of Dr. Manorama Mishra and Dr. R.P. Agrawal. We do not go into such reasons at this stage for the brevity sake because the distinctions made out in the writ order has not been seriously challenged on any cogent ground in appeal before us. Save and except that the petitioner had been contending repeatedly that similarly situated persons have been granted the benefit, there is no legal and valid contention against the rule which is statutory in nature and was framed by the State Government in the year 1997, for the first time creating a teaching cadre. The rule was framed in exercise of the powers conferred upon the State Government under proviso to Article 309 of the Constitution of India. Rule 5(Ka) clearly provides the structure of the Bihar



Medical Education Service Cadre and the promotional line in the Medical Education Service Cadre have been provided therein. The learned Writ Court held that by 1997 Rules which was a statutory rule, teaching post of Medical Colleges were separated as independent and different cadre from non-teaching posts and qualification and mode of appointment on the posts were laid down. The petitioner's substantive appointment was in the hospital attached to the Medical College and not in the college and, as such, according to the learned Writ Court, this post was not included in the teaching cadre of the posts identified by the Rules in the Medical Colleges. The Medical Council of India had also made clear in respect of the petitioner, vide Annexure-9 that post of Assistant Clinical Pathologist in the hospital cannot be equated with any teaching post in a Medical College. The learned Writ Court hence rejected the contention of the petitioner that only because he had been imparting teaching to the students in the College for which he was/is being paid extra allowance it cannot be held that the post stood automatically converted into a teaching post.

8. Further, the learned Writ Court held that even if the finding of this Court in the order dated 01.03.2000 passed in the case of Dr. Manorama Mishra stating that the post of





Assistant Clinical Pathologist was an ex-cadre teaching post, is accepted, the same cannot benefit the petitioner as after coming into force of the Rules, no promotion can be made on the cadre post from an ex-cadre post. Moreover, the said finding was found to have been given only in the light of the two documents and some statements of the respondents in the counter affidavit and in the background of the situation as existed before 1997 Rules came into force. The Writ Court dismissed the Writ Application holding that once a statutory rules have come to occupy the field, this Court cannot direct the respondents to consider the case of the petitioner by taking into consideration the situation which existed prior to 1997 Rules.

9. While assailing the impugned judgment of the learned Writ Court, learned counsel representing the petitioner-appellant has once again attempted to take us through the judgment of this Court passed in the case of Dr. Manorama Mishra, the whole emphasis of the argument of the learned counsel is on the fact that the petitioner-appellant was admittedly involved in teaching work and once he was involved in teaching work, the post held by him becomes a teaching post and hence like Dr. Manorama Mishra the same may be required to be upgraded in order to give the benefit of promotion to the



petitioner. Learned counsel submits that the appellant fulfils all the criteria for getting promotional post of Associate Professor and Professor in the Pathology Department and, therefore, his case should be considered for promotion as Assistant Professor and then for Associate Professor. He has also submitted that in the year 1998 a joint seniority and Gradation List of designated Assistant Professors and Associate Professors was prepared in which the appellant was shown at Serial No. 45 in the list treating him posted as Assistant Professor with effect from 30.12.1990 although his such posting should be with effect from 30.12.1987 i.e. the date when the appellant was appointed as Assistant Clinical Pathologist. He claims that his placement in the joint seniority-list would have been between Serial No. 13- Dr. Rajni Ranjan Sinha and Serial No. 14- Dr. Baidyanath Thakur, in accordance with his seniority. He had represented against this but instead of placing him at correct position, the same was kept pending and the name of the appellant was not included in the Gradation List of Associate Teaching persons dated 25.03.2008 published under the signature of Deputy Secretary, Department of Health, Government of Bihar, Patna.

10. When the matter was listed on 23.11.2017, a coordinate Bench of this Court of which one of us (Mr. Justice



Rajiv Ranjan Prasad) was a party, directed the petitioner to produce clear notification and evidence showing that the initial posting on which the petitioner was appointed was a teaching post which can beget him future promotions in the line. The petitioner is unable to place on record any such notification and evidence to show that the post of Assistant Clinical Pathologist was a teaching post.

11. On the contrary, learned counsel representing the State has placed before us a copy of the notification dated 21<sup>st</sup> May, 1997 by which the rule, namely, Bihar Medical Education Service Cadre and Cadre Posts Selection Recruitment Rules, 1997 (hereinafter 'Rule 1997) has been brought into existence. Learned counsel refers Rule 5(ka) to show that with effect from 1<sup>st</sup> April, 1997 the Rule provides for a separate cadre for the Bihar Medical Education and now by virtue of the Rule of 1997 there are two cadres i.e. Clinical and non-Clinical Cadre. Our attention has also been drawn to Rule 5(Ga) to show that those officers who were willing to return to the Bihar Health Service Cadre were given an opportunity to give an option in the prescribed form, those who were in Medical Service Cadre could have opted for Bihar Health Service Cadre but not vice versa. It is submitted that so far as the present



petitioner is concerned, he was not holding a teaching post, as provided under Rule 5(Ka) and, therefore, for him there was no option, he remained in the Bihar Health Service Cadre.

12. Having heard learned counsel for the parties and on perusal of the records, particularly the Rules of 1997, which have been brought to our notice, we are of the considered opinion that after coming into force of the Rules of 1997, no ambiguity remained in the matter of promotional avenues to those who were on the teaching posts and remained in the Bihar Medical Education Cadre on the one hand and those who remained in the Bihar Health Service Cadre. The posts which were available in the Medical Colleges are clearly provided in Rule 5(Ka) of the Rules of 1997. It also provides for the posts available in the Directorate which were to be filled up from the Medical Education Service Cadre. The Rules of 1997 have made it very clear that both the Bihar Medical Education Service Cadre and the Bihar Health Service Cadre will be two separate cadres and the posts available in the cadre shall be filled up in accordance with the requisite qualification and experience.

13. By virtue of the Rules of 1997, the petitioner-appellant, who was admittedly not holding a teaching post,



cannot claim that he should be treated as if holding a teaching post in the Bihar Medical Education Service Cadre. The learned Writ Court is correct in distinguishing the case of Dr. Manorama Mishra and Dr. R.P. Agrawal. The petitioner cannot derive any benefit out of the fact that Dr. Manorama Mishra and Dr. R.P. Agrawal who were also appointed as Assistant Clinical Pathologist were given the benefit of promotion because, in our considered opinion, a writ of mandamus cannot be issued contrary to the statutory rules. In the present case, the petitioner-appellant has not challenged the Rules of 1997 (as amended up-to-date) and, therefore, he cannot be allowed to contend that this Court may issue a mandamus directing the respondents to treat the petitioner as holding a teaching post which would be contrary to the statutory Rules of 1997.

14. We also find from the pleadings available on the record that according to the petitioner initially he was kept in the joint Gradation List of designated Assistant Professors and Associate Professors, he had made a representation to place him at a certain place in the Gradation List but his representation was not considered, rather his name itself got deleted from the Gradation List. The said Gradation List was finally published on 25.03.2008. However, the petitioner could



not get any relief with respect thereto. In the first round when the petitioner moved this Court in C.W.J.C. No. 13875 of 2005, the learned Writ Court having taken note of the facts and circumstances pleaded before the Court directed the respondent Principal Secretary to consider the case of the petitioner and made it very clear that if it is found that his case is similar to that of Dr. Manorama Mishra and Dr. R.P. Agrawal, and if the rules so permit, he should be granted the same benefit. It is crystal clear from the operative part of the order dated 07.03.2011 passed in C.W.J.C. No. 13875 of 2005 that the learned Writ Court had directed the respondent authorities not only to consider the similarity in the case of the petitioner with that of Dr. Manorama Mishra and Dr. R.P. Agrawal but also directed that if the Rules so permit, he should be granted the same benefit.

15. The direction issued by the learned Writ Court in the first round of the Writ Application preferred by this petitioner itself, is an indication of the issues involved in the present case. As we have found that the Rules of 1997 creates a different service cadre, namely, Bihar Medical Education Service Cadre and the petitioner, who was initially appointed as Assistant Clinical Pathologist, is not holding a teaching post and



does not come under the Bihar Medical Education Service Cadre cannot be held entitled to be considered for promotion to the post of Associate Professor and so forth so on.

16. We do not find any illegality or infirmity in the order of the learned Writ Court. The Letters Patent Appeal is devoid of merit, hence, the same is dismissed but without any order as to cost.

**(Rajendra Menon, CJ)**

**(Rajeev Ranjan Prasad, J)**

P.K.P./-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
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