IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.937 of 2020

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Dr. Sarju Prasad @ Sarjoo Prasad S/o Late Rajendra Prasad R/o Mohalla-Rental Flat 125 Kankarbag Colony, P.S. Kankarbag, District- Patna- 800020.

... ... Petitioner/s

Versus

1. The State of Bihar .
2. The Principal Secretary, Department of Health, Govt. of Bihar, Patna.
3. The Principal Secretary, Department of Finance, Govt. of Bihar, Patna.
4. The Director-in-Chief, Department of Health Govt. of Bihar, Patna.
5. The Controlling Officer -cum -H.O.D., Bihar College of Physiotherapy and Occupational Therapy.
6. The Accountant General, Bihar

... ... Respondent/s

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Appearance :
For the Petitioner/s : Mr. Vishwa Mohan Kumar Sinha, Advocate.
Mr. Debanjan Chowdhary, Advocate.
Mr. Ashok Kumar Pathak, Advocate.
For the Respondent/s : Mr. Rajeshwar Singh, GA-10.
Mr. Neeraj Kumar, AC to GA-10.
For Accountant General : Mrs. Ritika Rani, Advocate.

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CORAM: HONOURABLE MR. JUSTICE PURNENDU SINGH
ORAL JUDGMENT

Date : 02-11-2023

Heard Mr. Vishwa Mohan Kumar Sinha, learned counsel assisted by Mr. Debanjan Chowdhary and Mr. Ashok Kumar Pathak, learned counsel appearing on behalf of the petitioner; Mr. Rajeshwar Singh, learned GA-10 along with Mr. Neeraj Kumar, learned AC to GA-10 for the State and Mrs. Ritika Rani, learned counsel for the Accountant General.

2. Petitioner has filed the present writ petition for the following reliefs:

> *"(i) For revising the pension in the light of Third Pay Commission and also in the light of subsequent fourth and*

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fifth pay commission.
(ii) For granting the benefit of recommendation of Third Pay Commission and subsequent recommendation of Fourth and Fifth Pay Commission.
(iii) For any other benefits of Third and subsequent pay Commission such as enhancement of DCRG and Leave encashment."

3. Learned counsel appearing on behalf of the petitioner submits that Bihar College of Physiotherapy and Occupational Therapy was created on 04.04.1998 by a Gazette Notification No. 102(1) dated 29.03.1998 of the State Government. The petitioner was appointed on the post of Professor cum Head of the Department of the said college, in the prescribed pay scale of Rs. 4100-5300/- ,vide Memo No. 277(i) dated 18.08.1998. Pursuant to the order of the State Government dated 20.08.1998, the petitioner gave his joining on the same date on the post of Professor and Head of the Department of the college. The petitioner being the Drawing and Disbursing Officer of the college, was responsible for submitting his salary and has been drawing the same. Learned counsel further submits that at no point of time, the State Government has raised any objection with respect to his position as a Professor and Head of the Department of the said college, up until his retirement in the year 2002. Petitioner is aggrieved by the action of the Government for not extending him benefit of Pay Revision from time to time leading to less payment of salary and pension which he is drawing as on date.

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He submits that the benefit of subsequent pay revisions were not given to him by the State Authority. The petitioner had filed his representation before the Director, Disease Control, Public Health, Para Medical Health Services, Bihar, Patna**,** but his claim was denied and communicated to him vide Letter dated 10.12.2019. It is submitted that no reason has been assigned in the said letter by the concerned authority for denying the benefit to the petitioner and on this ground, it is fit to be set aside and quashed for being non-speaking. The petitioner thereafter filed a supplementary affidavit bringing on record Memo No. 233 dated 27.05.2014 by which the Accountant General, Bihar was informed by the Director-in-Chief, Health Services, Bihar (sanctioning authority), that since the petitioner was appointed on the post of Non-Diploma holder Junior Occupational Therapist and thereafter he has already been given due promotion in terms of Clause 4(3) of the Assured Career Progression Scheme Rules, 2003, he is not entitled to ACP. It is submitted that the said letter contained in Memo No. 233 dated 27.05.2014 is also misconceived and any action taken pursuant to the same must be deprecated. The respondents have failed to bring on record any notification to show that the petitioner, after being appointed on the post of Professor cum Head of the Department of the said college, was granted any promotion.

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Vide Resolution No. 102(i) H, dated 29.03.1998 (Annexure 7), the State Government took the policy decision that the qualification of post and pay will be same as other Medical College and Senior most person in Occupational Cadre will be head of the department and also the pay scale of professor and Head of the Department of the said college has been notified to be Rs. 4100-5300/-.

4. The petitioner who remained on the said post till his retirement has been wrongly denied the benefits of pay revision due to the petitioner on the ground of financial upgradation by giving him benefit of 1st and 2nd ACP/MACP from the date he became entitled for at the prescribed pay scale. Accordingly petitioner is entitled for difference of salary along with difference of pension and accordingly pension of the petitioner is also required to be revised.

5. Per contra, learned counsel appearing on behalf of the State submits that the petitioner was appointed on the post of Occupational Therapist in Patna Medical College and Hospital in the year 1966. Thereafter, he was given two promotions and became Senior Occupational Therapist in the year 1972 and since then he was drawing pay scale of Rs. 415-925/- and corresponding pay scale is Rs.6500-10500/- and the same is applicable in the case of the petitioner**.** The notification

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by which the petitioner was notified as Professor cum Head of the Department vide Memo No. 277(1) dated 18.08.1998 was in exercise of executive power for the purposes of administrative order. The said notification will not entitle the petitioner for any prescribed pay scale as notified in the Gazette Notification dated 04.04.1998. The appointment of the petitioner on the post of Professor and Head of the Department will not accordingly entitle him to draw benefit of pay scale prescribed therein i.e. Rs. 4100-5300/-. He further submits that the notification of the State Government appointing him as professor and Head of the Department is self-explanatory as it clarifies that the petitioner has been appointed in the said cadre in which he was before the coming into force of the Gazette Notification of the State Government dated 04.04.1998. Learned counsel further submits that the question of delay and laches has been raised in the counter affidavit and on this ground also the writ petition is fit to be dismissed in exercise of power conferred under Article 226 of the Constitution.

6. I have heard learned counsel appearing on behalf of the petitioner and learned counsel appearing on behalf of the respondent/s at length.

7. The question which falls for consideration before this Court is as to whether the petitioner was appointed on the

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permanent substantive post of Professor and the Head of the Department in prescribed pay scale of Rs.4100-5300/- pursuant to the creation of the Bihar College of Physiotherapy and Occupational Therapy vide Gazette Notification No. 102 dated 04.04.1998 and grant in continuity of service after his been having suspended in the PMCH.

8. The requisite qualification for being appointed on the post of Professor and the Head of the Department and other teaching staff of the institution has been prescribed for by the notification dated 29.03.1998 as contained in Annexure-7, which is reproduced hereinafter:

> **Qualification and experience required for the Post :**
>
> **1) Professor & Head of the Department** : Degree diploma in Physiotherapy with 10 years clinical experience out of which 5 years teaching to undergraduate students or diploma in Physiotherapy student Post graduate in Physiotherapy would be prepared.
>
> **2) Associate Professor:** Degree/Diploma in Physiotherapy with 5 years clinical experience out of which 3 years teaching to Degree/Diploma students.
>
> **3) Lecturer:** M. Sc. in Physiotherapy of Bachelors in Physiotherapy/Diploma in Physiotherapy with three years clinical experience at a centre attached to medical college.
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> **QUALIFICATION & EXPERIENCE FOR THE POST**
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> **Qualification:** For the post of professor and Head of the Deptt. and Associate Professor Degree/Diploma with 10 years clinical experience in occu. Therapy, or Degree with 3 years Teaching Experience in Occu. Therapy.
>
> **Lecturer:** Degree/Diploma with 3 years' clinical experience in Occupational therapy at O.T. School and center only or M. Sc. in Occupation therapy.
>
> **O.Ts.:** Degree/Diploma in Occupational therapy.

9. Before proceeding to decide the moot question in the present writ petition, I would like to first deal with the

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maintainability of the writ petition on the ground of delay and laches. In the present writ petition, the original cause of action arose in the year 2002 when the petitioner had superannuated from the service and question raised by the respondent/s that a belated writ petition on account of delay and laches should be dismissed *in limine.* In this regard, it is relevant to refer the law laid down by the Apex Court in case of ***C. Jacob v. Director of Geology and Mining & Anr.*** reported in ***(2008) 10 SCC 115***. It has been held that the issue has been kept alive being continuing one the law of limitation on delay and laches will not apply.

10. In the words of Justice A.L. Smith, who had observed that ""If once a cause of action arises, and the acts complained of are continuously repeated, the cause of action continues and goes on *de die in diem*. It seems to me that there was a connection in the present case between the series of acts before and after the action was brought they were repeated in succession and became a continuing cause of action. They were an assertion of the same claim-namely, a claim to continue to board sewage into the stream-continuation of the same alleged right. In my opinion, there was a continuing cause of action within the meaning of the rule."

11. Thus, a continuing cause of action would be a recurring cause of action, or to put it differently the phrases,

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continuing cause of action and recurring cause of action would be synonym. The petitioner is aggrieved by the approach of the competent authority before whom he had prayed for re-fixation of his pension by giving the benefit of ACP/MACP and had also repeated before the competent authority in this regard have been able able to make out a case that writ petition does not suffer from any delay and laches as the act of the respondent/s in not giving the benefit of ACP/MACP has seriously prejudiced the fixation of petitioner's pension, who has been getting less amount of pension every month and, therefore, the cause of action is recurring or continuing one.

12. The prescribed pay scale for the post of Professor and Head of the Department has been notified for the financial year 1997-98 to be Rs.4100-5300/- and accordingly the budget expenditure has also been prescribed in the said notification dated 29.03.1998 to be allocated for the Professor and the Head of the Department to be Rs. 1,12,800/- (Annexure 7). The State government found the petitioner to have fulfilled all the requisite criteria and appointed him on the post of Professor and Head of the Department in the said pay scale of Rs. 4100-5300/-. The petitioner was directed to give his joining by the Senior Drawing and Disbursing Officer vide letter dated 20.08.1998 and pursuant to the said direction of the Drawing

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and Disbursing Officer, the petitioner gave his joining on the same date. The petitioner never raised any grievance during his service period that he is entitled for pay revision from time to time and pursuant to such enhancement he is also entitled for grant of financial upgradation on account of ACP and MACP applicable in the case of the petitioner in the pay fixed in the year 1998 in terms of the notification on which date the institution was established being altogether a separate entity and parted from Patna Medical College and Hospital from the date of the notification i.e. 04.04.1998.

13. It is the admitted case of the parties that the Bihar College of Physiotherapy and Occupational Therapy was established vide notification no. 102 dated 04.04.1998 and the state government has adopted the Rules to govern the service condition as well as condition which is applicable to the Government Medical College, Nagpur. The notification is annexed to the writ petition but the same is silent on the point of the prescribed pay scale applicable to the Professor and Head of the Department of Bihar College of Physiotherapy and Occupational Therapy in which the petitioner was appointed on the permanent post of Professor and the Head of the Department vide Notification No. 277(1) dated 18.08.1998 and has retired from the said post.

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14. The communication contained in Memo No. 233 dated 27.05.2014 confirms that the petitioner was holding the permanent post of Professor and Head of the Department of the newly created college. The petitioner is aggrieved for having denied the benefit of pay revision and grant of financial upgradation on account of ACP/MACP treating the petitioner to be still employee of the Patna Medical College and Hospital where the petitioner was appointed on the post of tutor and was granted two promotions from the date of his appointment i.e. before and those promotions were before his being appointed on the permanent post of Professor and the head of the Department. The communication contained in Memo No. 233 dated 27.05.2014 (Annexure-14) is hereby set aside and quashed.

15. The petitioner entered into service of Occupational Therapy could not be said to have held lien on the said date on any permanent post in Patna Medical College and Hospital. The letter of appointment shows that petitioner was appointed as Occupational Therapist with effect from the date of his appointment. From the date of appointment, the petitioner was receiving salary continuously till his date of retirement i.e. in the year 2002. Permanent post generally means a post carrying a definite rate of pay sanctioned without limit of time. The petitioner’s pay scale after revision of pay from time to time

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was lastly in pay scale of Rs.6500-10500/-. The pay scale of the petitioner cannot be considered on officiating capacity or on deputation rather the order of appointment confirms the fact that he was posted on the permanent post like other employees of the Bihar College of Physiotherapy and Occupational Therapy. The appointment of the petitioner was made after finding him to be eligible for the said post arising out of contingency after establishment of the College. The appointment of the petitioner was by the express order on the substantial and permanent post and once it is found that the government servant has acquired the status of a permanent government servant, he becomes entitled for all the benefits including promotion and benefit of pay revision, financial upgradation, etc. The petitioner is aggrieved that he has been denied the financial benefit accrued to him as a result of ACP/MACP scheme.

16. Fifth Central Pay Commission made recommendation relating to Assured Career Progression (ACP) in such categories of post which has no promotional avenues to qualify for the benefit subject to certain conditions. The Scheme provides for two financial upgradation under ACP only if no regular promotions during the prescribed periods (12 and 24 years) have been availed by an employee. The scheme came into effect w.e.f. August 9, 1999.

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17. Sixth Central Pay Commission recommended that Modified Assured Career Progression Scheme (MACPS) to be administered at 10, 20 and 30 years and the Seventh Central Pay Commission recommended that the MACP will continue as before in the new Pay Matrix. The Apex Court has already held that the MACP shall be effective from 01.09.2008.

18. The object and purpose of ACP/MACP scheme has been held by the Apex Court time and again and again reiterated in **Union of India and Ors. Vs. C. R. Madhava Murthy and Anr.** reported in **(2022) 6 SCC 183**, that the purpose of the ACP Scheme/MACP Scheme is to relieve the frustration on account of stagnation and the Scheme does not involve the actual grant of promotional post to the employees, but to merely monetary benefits in the form of next higher grade.

19. Subsequent to the above judgment, the Hon'ble Supreme Court has reiterated the above view regarding the purpose of ACP/MACP scheme in the case of ***Amresh Kumar Sinha and Ors. Vs. State of Bihar and Ors.*** **(SLP(C) Nos. 8219-8226 of 2019)** in the following paragraphs, which are reproduced herein under:

> ***"16. In Union of India and Anr. Vs. G.Ranjanna and Ors. reported in (2008) 14 SCC 721, the three-Judges Bench of this Court held that in situ promotions are made to remove stagnation of grade C***

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and grade D employees by giving them certain monetary benefits.

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18. In the aforesaid case, the employees were working as malis (Gardeners) and had claimed promotion in the higher pay scale. The Central Administrative Tribunal seized of the original applications observed that the employees cannot claim the scale of the next higher post by way of in situ promotion. On the matter being taken to the High Court by way of a writ petition, the contention of the employees was accepted and it was observed that the object of in situ promotion on non-functional posts, is to ensure that the group C and D employees are not stagnated in the same cadre/pay scale and that they should be provided with certain monetary benefits. Therefore, the rejection of the claim for such nonfunctional in situ promotion on the ground that the employees do not possess the necessary minimum qualification of matriculation as per the rules is not justified and renders the order erroneous in law. The view so taken by the Division Bench of the High Court was affirmed by this Court in the above referred Civil Appeals holding that the High Court has correctly analysed the object of the in situ promotion and fixation of pay scales to Group C and D employees to avoid stagnation.

19. In view of the aforesaid legal position coupled with the fact that the qualification of graduation prescribed is for the promotion to the post of Accounts Officer rather than for the grant of in situ promotion on the non-functional post or for extending the benefit of ACP which is purely and simply in the nature of grant of monetary benefit without actually effectuating any promotion to any higher post, we are of the opinion that the judgment and order of the Division Bench of the High Court impugned in the appeals cannot be sustained. It is accordingly hereby set aside and that the judgment of the writ court dated 28.11.2017 is restored. The appellants are extended the benefit of ACP, as directed by the writ court."

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20. The petitioner had filed his detailed representation before the Director, Disease Control, Public Health, Para Medical Health Services, Bihar, Patna contained in Letter No. 1090(11) dated 10.12.2019 and the order denying his claim without assigning any reason is hereby set aside and quashed. The law relating to pension is no more *res integra* to the extent that pension is not a bounty rather a property in terms of Article 300A of the Constitution as held in the case of **D. S. Nakara & Others Vs. Union of India reported in (1983) 1 SCC 305.**

21. It is not clear from the pleadings made in the writ petition as well as counter affidavit particularly subsequent to the adoption of the Service Condition Rules of Government Medical College, Nagpur vide Gazette Notification dated 04.04.1998 the prescribed pay scale for the Professor and Head of the Department. The petitioner by way of Annexure 7 has been able to bring on record that the pay scale for Professor and the Head of the Department, Physiotherapy has been notified by the State Government vide notification no. 103(1) dated 29.03.1998 just before the Gazette Notification dated 04.04.1998 and said pay scale has been claimed by the petitioner to be applicable to him, whereas the State Government has denied the same and has relied on Finance

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Department Resolution dated 30.11.1972 which was applicable to the tutor of the medical college including the dental colleges in pay scale of Rs. 415-925/-. Accordingly, incorrect pay scale of the petitioner has been fixed depriving him of the benefit which, in fact, was to be calculated on the basis of pay scale prescribed vide Notification no. 103(1) dated 29.03.1998. That is the point which is required to be considered by the State Government based on the factual position, which has emerged from the pleadings made in the writ petition as well as in the counter affidavit.

22. The Additional Chief Secretary, Health Department, Bihar is directed to call for the service particulars of the petitioner as well as the notification prescribing the required pay scale pursuant to the Gazette Notification No. 102(1) dated 04.04.1998, pursuant to which the Bihar College of Physiotherapy and Occupational Therapy came into existence and had adopted the service condition Rules of Government Medical College, Nagpur. In case no pay scale has been prescribed as a consequence of the said notification, the petitioner is held to be entitled to the pay scale of Rs.4100-5300/- which has been prescribed vide Notification No. 103(1) dated 29.03.1998 by the government which was issued just few days before the Gazette Notification dated 04.04.1998.

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23. The Additional Chief Secretary must ensure to direct the concerned sanctioning authority to fix the pay scale of the petitioner and grant difference of salary on account of pay revision and financial upgradation as a result of ACP/MACP and accordingly direct to sanction the pension by revising it on the basis of the prescribed pay scale of Professor and Head of the Department from the date of appointment of the petitioner in accordance with law within a period of six weeks from the date of passing of this order.

24. The petitioner, if so advised, may also provide assistance to the Additional Chief Secretary, Health Department, Bihar.

25. The writ petition is allowed.

(Purnendu Singh, J)

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AFR/NAFR	N.A.F.R.
CAV DATE	N.A.
Uploading Date	23.11.2023
Transmission Date	N.A.

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