IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.2306 of 2015

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Meena Kuer wife of late Ram Bilash Singh, resident of village-Rewatit Hakam, P.O. Majhali Patti Hakam, Police Station Mahmadpur, District Gopalganj.

... . Petitioner/s

Versus

1.The State of Bihar through the Principal Secretary, Public Health Engineering Department, Government of Bihar, Patna.
2.The Engineer in chief, Public Health Engineering Department, Government of Bihar, Patna.
3.The Chief Engineer, Public Health Engineering Department, Government of Bihar, Patna.
4.The Superintending Engineer, Public Health Engineering Circle, Saran Circle, Chapra.
5.The District Magistrate, Siwan.
6.The Executive Engineer, Public Health Engineering Division, Siwan.
7.The Sub Divisional Officer, Public Health Engineering, Sub division, Siwan.
8.The Junior Engineer, Public Health Engineering Branch, Siwan.
9.The District Treasury Officer, Siwan.
10.The District Provident Fund Officer, Siwan.
11.The Accountant General, Bihar, Beerchand Patel Marg, Patna.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Umesh Kumar Mishra, Adv
For the Respondent/s : Mr. Gp3- Santosh Kumar Jha
For the A.G. : Mr. Ram Kinkar Choubey, Adv

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CORAM: HONOURABLE MR. JUSTICE MIHIR KUMAR JHA

ORAL JUDGMENT

2 05-02-2015 Heard learned counsel for the parties as with regard to the following prayer made in this writ application:-

> "1(i) For issuance of an appropriate writ in the nature mandamus for commanding and directing for commanding and directing the respondent authorities concerned to pay the family pension including all retrial dues to the petitioner after death of her husband, namely, late Ram Bilash Singh with statutory interest as well as penal interest.
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> (ii) For issuance of an appropriate writ in the nature mandamus for commanding and directing the

respondent authorities concerned to pay the family pension to the petitioner aftr death of her husband, namely, late Ram Bilash Singh, who has died 4.12.2005 while he was working as Pump Khalasi, Sub Divisional Officer, Public Health Engineering Sub Division, Siwan.

(iii) For issuance of an appropriate writ in the nature mandamus for commanding and directing the respondent authorities concerned to fix the family pension of the petitioner after death of her husband, namely, late Ram Bilash Singh, who died while he was working as Pump Khalasi, Sub Divisional Officer, Public Health Engineering Sub Division, Siwan.

(iv) For issuance of an appropriate writ in the nature mandamus for commanding and directing the respondent authorities concerned to pay all the benefits of post retirement benefits to the petitioner after death of her husband, namely, late Ram Bilash Singh for which the petitioner is entitled.

(v) For issuance of a direction to the respondents to pay appropriate compensation for mental agony caused to the petitioner for non payment of his legitimate dues and cost of the writ proceedings."

2. Having regard to the fact that the husband of the petitioner was an employee in the work charge Establishment, this Court would find it difficult to direct the respondents to make payment of family pension to the petitioner. Law in this regard is very clear that family pension can only be paid to a the dependents of a employee who was entitled to get pension. The work charge employees as per the Government policy as also

in terms of Bihar Pension Rules are not entitled for grant of pension. Consequently, the petitioner, the widow of the work charge employee, also will not be entitled for family pension.

3. This Court by a judgment dated 20.10.2014 in CWJC No. 14998 of 2011 (Most. Menna Devi Vs. The State of Bihar & Ors.) has considered this aspect with regard to the grant of pension and consequential family pension to the dependent of a Work Charge Employee incidentally of the same department, namely, Bihar Health Engineering Department (PHED). After detailed analysis of the provision of Work Charge Employee, it was held as follows:-

> "7. The provision of payment of pension including family pension for a Government servant of the State of Bihar is Governed by Bihar Pension Rules which in Rule-58 itself lays down the conditions for grant of pension, which reads as follows:-
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> > "Rule-58 The service of a Government servant does not qualify for pension unless it conforms to the following three conditions:- First-The service must be under Government. Second-The employment must be substantive and permanent. Third-The service must be paid by Government."
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> 8. Thus, from the reading of the provision of Bihar Public Works Department Code in relation to the work charge establishment, it becomes clear that it is not a permanent establishment nor the employees of work charge establishment hold any substantive appointment. As a matter of fact, the Apex

Court itself has gone into the nature of work charge establishment in the case of **Jaswant Singh vs Union of India,** reported in **(1979) 4 SCC 440** and again in the case of **State of Rajasthan vs Kunji Raman** reported in **(1997) 2 SCC 517,** wherein, it was held as follows:**-**

> "6. A work-charged establishment as pointed out by this Court in Jaswant Singh vs Union of India broadly means an establishment of which the expenses, including the wages and allowances of the staff, are chargeable to "works". The pay and allowances of employees who are borne on a work-charged establishment are generally shown as a separate sub-head of the estimated cost of the works. The work-charged employees are engaged on a temporary basis and their appointments are made for the execution of a specified work. From the very nature of their employment, their services automatically come to an end on the completion of the works for the sole purpose of which they are employed. Thus, a work-charged establishment is materially and qualitatively different from a regular establishment.
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> 8. A work-charged establishment thus differs from a regular establishment which is permanent is nature. Setting up and continuance of a work-charged establishment is dependent upon the Government undertaking a project or a scheme or a "work" and availability of funds for executing it. So far as employees engaged in work-charged establishments are concerned, not only their recruitment and service conditions but the nature of work and duties to be performed by them are not the same s those of the employees of the regular establishment. A regular establishment and a work-charged establishment

> are two separate types of establishments and the persons employed on those establishments thus form two separate and distinct classes. For that reason, if a separate set of rules are framed for the persons engaged in the work-charged establishment and the general rules applicable to persons working on the regular establishment are not made applicable to them, it cannot be said that they are treated in an arbitrary and discriminatory manner by the Government. It is well settled that the Government has the power to frame different rules for different classes of employees. We, therefore, reject the contention raised on behalf of the appellant in Civil Appeal No. 653 of 1993 that clauses (g), (h) and (i) of Rule 2 of RSR are violative of Articles 14 and 16 of the Constitution and uphold the view taken by the High Court."

9. This aspect of the nature of work charge appointment was again gone into specifically as with regard to grant of pension and family pension in the case of **Uttar Haryana Bijli Vitran Nigam Limited & Ors vs Surji Devi** reported in **(2008) 2 SCC 310,** wherein, it was held as follows:-

> "16. The scheme relating to grant of Family Pension was made under a statute. A person would be entitled to the benefit thereof subject to the statutory interdicts. From a bare perusal of the provisions contained in the Punjab Civil Services Rules, Volume 2 vis-`-vis the Family Pension Scheme, it would be evident that the respondent was not entitled to the grant of any family pension. The husband of the respondent was a work-charge employee. His services had never been regularized. It may be unfortunate that he had worked for 11 years. He expired before he could get the benefit of the

regularization scheme but sentiments and sympathy alone cannot be a ground for taking a view different from what is permissible in law. Maruti Udyod Ltd. v. Ram Lal and Others, (2005) 2 SCC 638, State of Bihar & Ors. v. Amrendra Kumar Mishra, 2006 (12) SCC 561, Regional Manager, SBI v. Mahatma Mishra, 2006 (13) SCC 727, State of Karnataka v. Ameerbi & Ors. 2007 (11) SCC 681 and State of M.P. and Ors. v. Sanjay Kumar Pathak and Ors. 2008 (1) SCC 456.

17. The statutory provisions, as noticed hereinbefore, debar grant of family pension in favour of the family members as the deceased employee if was a work-charge employee and not a permanent employee or temporary employee. The period during which an employee worked as a work-charge employee could be taken into consideration only when his services are regularized and he becomes permanent and not otherwise."

10. Let it be noted that the ratio laid down in the aforementioned case of Surji Devi (supra) was again approved by the Apex Court in the case of **State of Haryana & Ors vs Shakuntala Devi** reported in **(2008) 15 SCC 380,** holding that if the husband of the employee concerned was not regular Government servant till his death, widows/dependants would not be entitled for the benefit of family pension scheme.

11. Thus, both in the light of the provisions made as also Bihar Pension Rules read with Bihar Public Works Department Code, it has to be held that neither the work charge employee is entitled for payment of pension under Bihar Pension Rules nor their widos/dependants would be entitled for payment of pension which is essentially payable to the dependant of regular Government servant, who is eligible to get pension specially when the law has been now virtually settled on the issue of

family pension to dependant of work charge employee by the Apex Court in the case of Surji Devi (supra).

12. Once this Court would come to the conclusion that the husband of the petitioner being a work charge employee had no right to claim pension, gratuity or any other retirement benefit in terms of Bihar Pension Rules, there would be also no question of making payment of family pension which is only extended part of benefit under Bihar Pension Rules."

4. Thus, having regard to the law laid down by this court in the case of Most. Menna Devi (supra), there will be no difficulty for this court that the petitioner will not be entitled for payment of family pension as has been prayed in this writ application. It, however, must again, for the reasons stated in the case of Most Menna Devi (supra), direct the authorities to consider the case of the petitioner for grant of amount of gratuity, inasmuch as, in this regard, this Court had, in the case of Most. Menna Devi (supra) had held as follows:-

"19. Having held that the petitioner would not be entitled for payment of family pension the issue still would be as to whether the petitioner could be deprived of the amount of gratuity on the ground that her husband was a work charge employee.

20. For the Government servant entitled to pension as per the provision of Bihar Pension Rules including the amount of gratuity, the husband of the petitioner did not qualify because he was work charge employee and his services were never regularized so as to make his appointment substantive and permanent. The provision of making payment of gratuity, however, is also separately incorporated under the provision of

Payment of Gratuity Act, 1972, wherein, Section-2 (e) defines the employee as follows:-

> "(e). "employee" means any person (other than an apprentice) who is employed for wages, whether the terms of such employment are express or implied, in any kind of work, manual or otherwise, in or in connection with the work of a factory, mine, oilfield, plantation, port, railway company, shop or other establishment, to which this Act applies, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity. "

21. From the exclusion made in the category of an employee only such employee of the State Government are excluded for holding the post under the State Government and are governed by any other act or any other Rule providing for payment of gratuity. Thus, the moment this Court holds that the husband of the petitioner was neither holding any post under the Government nor was qualified to earn his pension/gratuity in terms of Bihar Pension Rules, he would still be an employee in terms of Section-2(e) of the Payment of Gratuity Act, 1972. Section-4 while laying down the provision of payment of gratuity makes the qualifying service of five years as a condition precedent for grant of gratuity. Such gratuity, as per Section-4 of the Payment of Gratuity Act, 1972 is payable in the event of superannuation or retirement or resignation or even on death or disablement due to accident or disease. As a matter of fact, termination of employment of any employee due to death or disablement even qualifying service of five years is not essential. Here, in this case it is an admitted position that the husband of the petitioner was earlier working on daily wages and later on was brought to work charge establishment in the year 1988 and in that capacity he had continued till 2005, when he had died on 06.03.2005, therefore, the husband of the petitioner had at least 17 years of service in the work charge establishment and if he was not entitled to get pension including

gratuity under the Bihar Pension Rules, he would be automatically entitled for grant of gratuity under the provision of Section-4 of the Payment of Gratuity Act, 1972, reading as follows:-

> "Payment of gratuity.-(1) Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years.-
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> (a) on his superannuation, or
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> (b) on his retirement or resignation, or
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> (c) on his death or disablement due to accident or disease:
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> Provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement:
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> (Provided further that in the case of death of the employee, gratuity payable to him shall be paid to his nominee or, if no nomination has been made, to his heirs, and where any such nominees or heirs is a minor, the share of such minor, shall be deposited with the controlling authority who shall invest the same for the benefit of such minor in such bank or other financial institution, as may be prescribed, until such minor attains majority.]
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> Explanation.- For the purposes of this section, disablement means such disablement as incapacitates an employee for the work which he was capable of performing before the accident or disease resulting in such disablement.
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> (2) For every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen day‟s wages based on the rate of wages last drawn by the employee concerned:
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> Provided that in the case of a piece-rated employee, daily wages shall be computed on the average of the total

wages received by him for a period of three months immediately preceding the termination of his employment, and, for this purpose, the wages paid for any overtime work shall not be taken into account:

Provided further that in the case of [an employee who is employed in a seasonal establishment and who is not so employed throughout the year], the employer shall pay the gratuity at the rate of seven days" wages for each season.

[Explanation.- In the case of a monthly rated employee, the fifteen days" wages shall be calculated by dividing the monthly rate of wages last drawn by him by twenty-six and multiplying the quotient by fifteen].

(3) The amount of gratuity payable to an employee shall not exceed [ten lakh rupees].

(4) For the purpose of computing the gratuity payable to an employee who is employed, after his disablement, on reduced wages, his wages for the period preceding his disablement shall be taken to be the wages received by him during that period, and his wages for the period subsequent to his disablement shall be taken to be the wages as so reduced;

(5) Nothing in this section shall affect the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer.

(6) Notwithstanding anything contained in sub-section (1),-

(a) the gratuity of an employee, whose services have been terminated for any act, willful omission or negligence causing any damage or loss to, or destruction of property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused;

(b) the gratuity payable to an employee [may be wholly or partially forfeited]-

(i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or

(ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment."

22. In the considered opinion of this court, having regard to the provision of Bihar pension Rules and Payment of Gratuity Act, 1972, it has to be held that work charge employee who is not entitled for payment of pension including the gratuity as per Rule-58 of the Bihar Pension Rules would still be entitled for payment of gratuity in terms of Section-4 of the Payment of Gratuity Act, 1972. Specially, when the Section-14 of the Payment of Gratuity Act, 1972 lays down that provision of aforesaid Act or any Rule made thereunder shall have effect nothwithstanding anything inconsistent therewith contained in any enactment other than Act or in any instrument or contract having effect by virtue of any enactment other than this Act.

23. Thus, in the case of work charge employee, the State of Bihar cannot have best of both the world. Firstly, by denying the payment of retirement benefit of pension including gratuity as well as family pension and also depriving work charge employee from getting the benefit of gratuity under the provision of Payment of Gratuity Act, 1972 which is payable to each and every employee on completion of a minimum period of five years of service.

24. It is this aspect of the matter which will require serious consideration and since this may be one of the first case of this kind as with regard to applicability of the provision of payment of gratuity of a work charge employee of the State of Bihar, this Court would remit the matter back to the Principal Secretary of the Public Health and Engineering Department (PHED) to pass an appropriate order as with regard to admissibility of amount of gratuity of the petitioner for the services rendered by her husband in the work charge establishment from 1988 till his death in the year 2005. A decision in this regard, must be taken by the Principal Secretary of the Public Health & Engineering

Department expeditiously and in the event the petitioner is found entitled for payment of gratuity in terms of the provisions of Payment of Gratuity Act, 1972, the amount of gratuity should also be paid to the petitioner."

5. Thus, having regard to the fact that the petitioner's husband was engaged on 1.3.1982 on the post of Pump Khalasi on daily wages and on 7.1.1988 he was also appointed in the Work Charge Establishment in which he continued till the date of death i.e. 4.12.2005, this Court would direct that a decision with regard to payment of gratuity to the petitioner must be taken by the Principal Secretary of the PHED within a period of four months from the date of receipt of this order.

6. Similarly, the issue relating to payment of leave encashment of the husband of the petitioner in terms of the recommendation made by the Executive Engineer, PHED Division, Chapra to the Superintending Engineer, Public Health Engineering Anchal, Muzaffarpur vide memo no. 538 dated 8.9.2009 must be taken within a same period of four months by the Principal Secretary of the Department.

7. In order to expedite this process, this Court would also give liberty to the petitioner to file a self contained representation for payment of gratuity and leave

encashment and the period of four months shall commence from the date of filing of such representation by the petitioner to the Principal Secretary of the PHED.

8. With the aforementioned observation and direction, this application is disposed of.

(Mihir Kumar Jha, J)

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