IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.2891 of 2011

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Daya Nand Pandit Son Of Late Laldeo Pandit Resident Of Village:Dinabigha, P.S.:Bikram, District:Patna. Retired Assistant Teacher, Middle School, Makhdumpur Sarai, Danapur, Patna

.... Petitioner/s

Versus

1. The State Of Bihar through the Secretary, Human Resources Development Department, Govt. Of Bihar, Patna
2. The District Superintendent of Education, Patna
3. The Incharge Headmaster, Middle School, Makhdumpur Sarai, Danapur, Patna
4. The Drawing and Disbursing Officer-Cum-Headmaster, Middle School, Lalkothi, Danapur, Patna
5. The District Accounts Officer, Patna
6. The Accountant General, Bihar, Patna

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Mukesh Kumar Jha
For the State : Mr. Tripurari Nath, A.C. to G.P. 14
For the A.G. : Mr. Ranjan Kumar

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CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

C.A.V. JUDGMENT

Date: 23-03-2015

1. This writ application has been filed for quashing the objection raised by the District Accounts Officer, Patna on 22.12.2010 (Annexure-12) whereby it has been pointed out that verification of pay fixation of the petitioner as on 01.01.1986 and 01.01.1996 was incorrectly done. The petitioner by way of amendment application vide I.A. No. 1575 of 2012 has also sought for quashing of consequential order as contained in Letter No. 180 dated 15.12.2011 issued by the Drawing and Disbursing Officer-cum-Head Master, Middle School, Lalkhothi, Danapur, Patna whereby the In-charge, Head Master has been directed to recover/adjust the excess amount

paid to the petitioner.

2. I.A. No. 1575 of 2012 is allowed and the petitioner is permitted to challenge the validity of the letter dated 05.12.2011 brought on record by way of Annexuere-17 to the said amendment application. The averments made in I.A. No. 1575 of 2012 have been treated to be averments made in the writ application.

3. It is the petitioner's case that he, alongwith other teachers was appointed as Assistant Teacher in different primary schools vide order dated 15.10.1982 in Matric Untrained Scale of Rs. 535-765/- with effect from 28.04.1982. Subsequently, the petitioner and two other teachers, namely, Bhim Shankar Singh and Birendra Prasad were granted I.Sc. Untrained Scale of Rs. 680 to 965/- with effect from 28.04.1982 vide letters dated 28.03.1984 and 07.05.1984 issued by the District Superintendent of Education, Patna on the basis that their qualification was "B.Sc. Part-I Untrained" and since then, they were getting their salary in the said scale. Subsequently, vide Finance Department Resolution No. 6022 dated 18.12.1989, Matric Trained, Intermediate Untrained and Bachelor Untrained teachers were granted revised scale of Rs. 1200-2040/- with effect from 01.01.1986 and accordingly the petitioner was given such scale with effect from 01.01.1986. It is further claim of the petitioner that as per the said Resolution dated 18.12.1989, Intermediate Trained and Untrained/Bachelor Untrained teachers were granted three increments

on the pay fixed in revised scale with effect from 01.01.1986. The petitioner's pay was accordingly revised by the District Superintendent of Education, Patna on 12.06.1991 (Annexure-5) in the scale of Rs. 1200 to 2040/- with three increments. Thereafter, vide Government Resolution No. 660 dated 08.02.1999, pay scale of the State Government employees were revised with effect from 01.01.1996. The petitioner was granted scale of Rs. 4500-7000/- accordingly. His pay fixation was done by the District Superintendent of Education (hereinafter as referred to as the 'D.S.E.'), Patna and he was accordingly getting his salary with no impediment till February, 2005.

4. By Letter No. 58 dated 27.01.2005, the D.S.E., Patna directed the Head Master to modify the petitioner's pay, which according to him was wrongly fixed as on 01.01.1986 and 01.01.1996. He also asked the Head Master to recover the excess amount paid to the petitioner due to wrong fixation of pay. The said Letter dated 27.01.2005 was challenged before this Court by the petitioner by filing C.W.J.C. No. 3627 of 2006. Counter affidavits were filed in that case by the District Superintendent of Education as well as District Accounts Officer in C.W.J.C. No. 3627 of 2006. In the counter affidavit, they took stand that the petitioner's grievance had been redressed. The writ application being C.W.J.C. No. 3627 of 2006 was accordingly disposed of as having become infructuous by an order

dated 21.08.2006. The petitioner, thereafter, superannuated from service with effect from 31.07.2010. After the petitioner's superannuation, the present Accounts Officer again raised an objection on 20.12.2010 as regards wrong fixation of pay of the petitioner as on 01.01.1986 and 01.01.1996.

5. It is the plea of the petitioner that his earlier writ application against the same stand of the Respondents was disposed of as having become infructuous as the Respondents had themselves redressed the grievance and now, the same objection is being raised, which is totally illegal and arbitrary.

6. A counter affidavit has been filed by the District Project Officer (Establishment) Patna. It has been stated in the counter affidavit that the petitioner was appointed as an Assistant Teacher in Matric Untrained Scale on 28.04.1982 but was wrongly given scale of a trained teacher by the then D.S.E., Patna which resulted into wrong fixation of his pay with effect from 01.01.1986 and 01.01.1996. It has been asserted in the counter affidavit that the petitioner became entitled for Matric Trained Scale with effect from 17.04.1995 when he passed the Teachers Training Examination and prior to passing of the Teachers Training Examination, sanction/payment of emoluments on the basis of trained scale was outrightly wrong. It has been stated in the counter affidavit that the then D.S.E., Patna had wrongly issued the order vide Memo dated 12.08.2006 cancelling the order of

recovery dated 27.01.2005. It has further been stated that the present District Accounts Officer realising the wrong committed by his office raised objection through letter dated 22.12.2010 pointing out that petitioner was appointed as an untrained teacher and became trained on 07.04.1995 and as such, he would be entitled for trained scale from 07.04.1995 and he was entitled for revision of his pay with effect from 01.01.1986 and 01.01.1996 accordingly, on that basis. It has specifically been stated that earlier, petitioner had wrongly been receiving excess amount on account of wrong fixation of pay made by the then D.S.E., Patna, namely, Prem Shankar Srivastava which was later sought to be corrected by the incumbent D.S.E., Patna, by a Letter dated 27.01.2005 but at that time, it was wrongly contradicted by the then District Accounts Officer. It has further been stated that present Accounts Officer realising the correct state of affairs raised the objection through Letter dated 22.12.2010 for fixation of pay at the correct admissible stage. It has been stated in paragraph No. 8 of the counter affidavit filed on behalf of the District Superintendent of Education that ultimately the authority slips for payment of final pension, gratuity and commutation of pension have been issued by the Accountant General, Bihar at the correct admissible stage vide authority Letter dated 21.09.2011.

7. Another counter affidavit has been filed by the District Accounts Officer, Patna in compliance of an order of this Court dated

10.11.2014 whereby the Respondents were directed to deal with circumstance as to how there was deviation in the stand of the State Government in the present writ application which is substantially different from the one taken earlier in the counter affidavit filed in C.W.J.C. No. 3627 of 2006, which the petitioner had earlier preferred and was withdrawn in the light of the counter affidavit filed in that case.

8. It has been stated in the supplementary counter affidavit filed on behalf of the Respondent No. 5 that then the D.S.E., Patna, had rightly issued the letter bearing No. 58 dated 27.02.2005 which was wrongly contradicted by the District Accounts Officer, which resulted into recalling the decision of re-fixation of pay and consequent withdrawal of the writ application being C.W.J.C. No. 3627 of 2006. It has been asserted that the petitioner was appointed as an Assistant Teacher in Matric Untrained Scale on 28.04.1982 and was granted Trained Scale with effect from 28.04.1982 itself which could be done only by way of promotion, though the petitioner was not entitled for such promotion. This resulted into wrong fixation of petitioner's pay in revised scales with effect from 01.01.1986 and 01.01.1996. It has further been stated that D.S.E., Patna had no power to grant higher scale by way of promotion rather such power is vested with the District Education Establishment Committee on the basis of final gradation list as per seniority. In support of this plea,

Respondents have relied upon a Division Bench order of this Court dated 17.08.1992 passed in C.W.J.C. No. 8186 of 1991 and other analogous cases.

9. Rejoinders to the counter affidavit filed on behalf of the Respondents No. 2 and 5 have been filed by the petitioner. It has been asserted in the reply/rejoinder to the counter affidavit that the petitioner was not granted trained scale by the then D.S.E., Patna, Mr. Prem Shankar Srivastava rather he had granted the petitioner I.Sc. Untrained Scale. The petitioner has relied upon Annexure-6 to the writ application which is Finance Department Resolution and according to the petitioner, the teachers who were untrained but were having higher qualification were given Trained Scale of Rs. 1200-2050/- with effect from 01.01.1986 and were granted three increments on the said scale.

10. Learned counsel for the petitioner assailing the impugned orders passed by the authorities has contended that the Respondents have acted in most arbitrary manner and they cannot be allowed to change their stand from the one which they had taken in their counter affidavit filed before this Court earlier in C.W.J.C. No. 3627 of 2006. He has submitted that if the Respondents intended to change their stand from the one they have taken before this Court through their counter affidavits earlier, they ought to have sought review of the order of this Court passed in C.W.J.C. No. 3627 of 2006.

11. Learned counsel appearing on behalf of the Respondents-State of Bihar has submitted that it was a sheer mistake on the part of the Respondents to have taken incorrect stand in the earlier proceeding before this Court in C.W.J.C. No. 3627 of 2006. He has contended that the petitioner was not entitled for matric trained scale with effect from the date of his appointment which was wrongly granted to him by the then D.S.E., Patna. He has also submitted that there was no need to seek review of the order passed in C.W.J.C. No. 3627 of 2006 by this Court since there was no adjudication with respect to the dispute.

12. From the rival pleadings in the present proceeding and the submissions made on behalf of the parties, I find that the sole question which has emerged in the present case for consideration is as to whether the scale which was granted to the petitioner by the then D.S.E., Patna with effect from the very date of his initial appointment i.e. 28.04.1982 was permissible for the post which the petitioner was holding. It is the petitioner's case that the scale which was given to him cannot be said to be Matric Trained Scale rather it was granted to him because he held higher qualification of Intermediate and accordingly he was granted "Intermediate Untrained Scale". Learned counsel for the petitioner has given much emphasis upon Annexure-6 to the writ application which is a letter written by the Director, Primary Education, Government of Bihar, Patna to all District

Superintendent of Education. Annexure-6 dated 06.06.1995 refers to the Finance Department Resolution No. 6022 dated 18.12.1989, mentioning that such Graduate Untrained, Intermediate Untrained teachers who are working against the post of Matric Trained teachers will be entitled for the scale of 1200 to 2040/-. There is no averment in the writ application that the petitioner's initial appointment was against the post of "Matric Trained Teacher". The petitioner in the absence of such pleading, cannot take a plea that he was entitled for the said scale of Rs. 1200-2040/- in terms of Resolution No. 6022 dated 18.12.1989. I, therefore, do not find any illegality in the objection raised by the District Accounts Officer, Patna, through Memo dated 20.12.2010.

13. However, there is no averment in the counter affidavit that the said amount was paid in excess to the petitioner or the fixation was done wrongly in his favour because of any misrepresentation on his part. In any view of the matter, in my opinion, it will be too harsh for the petitioner, if recovery of amount said to have been paid in excess to the petitioner is allowed to be recovered after several years, particularly after his superannuation from service. Further, in view of recent pronouncement of Supreme Court in case of State of Punjab Vs. Rafiq Masih (A.I.R. 2015 SC 696) it will be iniquitous to make recovery of the excess amount paid to the petitioner. Paragraph No. 12 of the said decision is relevant and is being quoted hereinbelow"-

> "12. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:
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> (i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).
>
> (ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.
>
> (iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.
>
> (iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.
>
> (v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover. "

14. The Respondents, therefore, in the facts and circumstances of the case, in my opinion will not be justified in making recovery of the amount paid to the petitioner after he superannuated with effect from 31.07.2010. The Letter No. 180 dated 05.12.2011 (Annexure-17) issued by the Drawing and Disbursing Officer-cum-Head Master, Middle School, Lal Kothi, Danapur, Patna, whereby excess payment made the petitioner because of wrong fixation of pay is sought to be recovered, is quashed.

15. In view of the fact that I do not find any infirmity in the objection raised by the Accounts Officer through Letter dated

20.12.2010, I am of the opinion that the petitioner cannot claim retiral benefits on the basis of higher pay scale which was wrongly given to him.

16. It has been stated in the counter affidavit that post retiral benefits e.g. pension gratuity and commutation of pension have already been sanctioned and authorized in favour of the petitioner on the basis of correct pay fixation. In my view, no further direction need be issued in this regard.

17. It appears from the pleadings that the Respondents have withheld the amount equivalent to unutilized Earned Leave admissible to the petitioner. Since I have held that the amount paid in excess to the petitioner because of wrong fixation of pay should not be recovered now, I direct that Respondents must release amount of leave encashment for payment to the petitioner, if not already released, within a period of three months from the date of receipt/communication of this order.

18. This application is allowed, but to the extent as indicated above.

19. There shall be no order as to costs.

(Chakradhari Sharan Singh, J.)

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