

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.106 of 2014

In

C.W.J.C. No. 4881 of 2013

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Dr. Shobha Nand Jha, Son of late Abhiraman Jha, resident of Village-Mangarauni, P.S.- Rajnangar, District Madhubani (Retired Special Dy. Director, Cattle Development, Brihat (Major) Cattle Development Project, Headquarter Level, Patna

.... Petitioner-Appellant.

Versus

1. The State of Bihar, through the Principal Secretary, Animal Husbandry Department, Govt. of Bihar, Patna
2. The Principal Secretary, Animal Husbandry Dept. Govt. of Bihar
3. The Director, Animal Husbandry Dept. Govt. of Bihar, Patna
4. The Accountant General Bihar, Patna

.... Respondents-Respondents.

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Appearance :

For the Appellant/s : Mr. Dr. Mayanand Jha

For the Respondent/s : Mr. Prashant Pratap

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CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI

AND

HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH

C.A.V. ORDER

(Per: HONOURABLE MR. JUSTICE I. A. ANSARI)

6 07-01-2015 The writ petitioner-appellant filed a writ application, under Article 226 of the Constitution of India, seeking direction upon the respondents to make to him payment of full retrial benefits on the ground that he had retired from service on 31.07.2009. The writ petition gave rise to C.W.J.C. No.4881 of 2013.

2. In view of the fact that a disciplinary proceeding had been pending against the writ petitioner, the respondents sanctioned 90 per cent of the *provisional pension* on 03.10.2010, but *gratuity* and *leave encashment* were withheld in their entirety.

3. The case of the writ petitioner-appellant is



that in the light of express mandate of Rule 43 (b) of Bihar *Pension Rules, 1950*, the respondents can withhold or withdraw a part or whole of *pension* only in those cases, where one has been found guilty of *grave misconduct* in departmental or judicial proceeding or who is found to have caused pecuniary loss to the Government by *misconduct* or *negligence*.

4. According to the writ petitioner, since there was no final decision reached in the disciplinary proceeding, there was no question of his (i.e., the writ petitioner-appellant) having been found guilty of *grave misconduct* or of his having been found to have caused pecuniary loss to the Government by *misconduct* or *negligence*, and, hence, there was no justification for withholding either full or part of the *pension, gratuity* or *leave encashment* payable to him.

5. By the order, dated 03.12.2013, a learned single Judge of this Court has disposed of the writ application with a direction to the Chief Secretary, Government of Bihar, to ensure taking of final decision in the petitioner's case by the competent authority within eight weeks on the ground that the petitioner had already filed his reply to the notice of show-cause against the findings of guilt recorded in the enquiry report. Aggrieved by the decision of the learned single Judge, this appeal has

been preferred.

6. We have heard learned counsel for the parties concerned.

7. Learned counsel for the respondents submits that Executive Instructions of the State Government provide for withholding of part of the *pension* pending departmental proceeding.

8. The facts of the case are not in dispute. The writ petitioner-appellant retired from Bihar Veterinary Service, as a Special Deputy Director, Cattle, on 31.07.2009. He was proceeded departmentally for remaining on unauthorized leave from 25.02.2008 till 29.12.2008. However, he retired during the pendency of the departmental proceeding. There is no dispute that on one's retirement, the departmental proceeding can be continued as a proceeding under Section 43 (b) of the Bihar *Pension* Rules, 1950, for the purposes of withholding of *pension*. The proceeding, thus, continued, under Section 43 (b) of the Bihar *Pension* Rules, 1950, against the writ petitioner-appellant. As the departmental proceeding was pending against him, the respondents sanctioned 90% *provisional pension* and withheld *gratuity* and *leave encashment* vide Memo, dated 03.10.2010, in view of the administrative instructions, which permit withholding of part of the *pension* pending departmental enquiry.



9. Being aggrieved, the petitioner-appellant filed writ petition in this Court. During pendency of the writ petition, the enquiry report was submitted and the Department concerned issued notice directing the writ petitioner to give his response to the adverse findings recorded against him in the enquiry report. The show-cause reply was duly submitted by the writ petitioner-appellant.

10. As the writ petitioner-appellant had already filed his show-cause, the learned single Judge disposed of the writ application with a direction to the respondents to take a final decision with respect to awarding of punishment, if any, within eight weeks. The learned single Judge did not, however, accede to the prayer of the writ petitioner-appellant to direct release of entire *pension, gratuity* and leave encashment pending final order to be passed in the disciplinary proceeding.

11. The issue before this Court is: whether the State Government could have, in the face of Rule 43(b) of the Bihar *Pension* Rules, 1950, withheld *pension* and *gratuity* pending final decision in the departmental proceeding? Under Bihar *Pension* Rules, the term *pension* has been given a wider meaning to include *gratuity* as well. The situation in which *pension* or *gratuity* can be withheld is circumscribed by Rule 43 (b) of the Bihar



Pension Rules, 1950. According to the Rule, a part or full *pension* can be withdrawn or withheld only in the circumstances mentioned in Rule 43(b) of the Bihar *Pension* Rules, 1950. The provisions mandate that the *pension* can be recovered or withheld only if, as already mentioned above, one is found in departmental or judicial proceeding to have been guilty of *grave misconduct* or to have caused *pecuniary loss* to the Government by *misconduct* or *negligence*. The relevant extract of Rule 43 (b) of the Bihar *Pension* Rules, 1950, is reproduced below:

"43 (b). *The State Government further reserve to themselves the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period, and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government if the pensioner is found in departmental or judicial proceeding to have been guilty of grave misconduct; or to have caused pecuniary loss to Government by misconduct or negligence, during his service including service rendered on re-employment after retirement:*"

12. As the proceeding had not concluded and there was no final decision on the issue of having been found guilty of *grave misconduct* or having caused *pecuniary loss* to the Government by *misconduct* or



negligence, the Department concerned could not have withheld part or whole of the *pensionary* benefits in the face of plain reading of the provisions embodied in Rule 43(b) of the Bihar *Pension* Rules, 1950, which puts embargo on the power of the State Government to withhold a part or full *pension* till an employee, such as, the writ petitioner-appellant, is found guilty of *grave misconduct* or of having caused *pecuniary loss* to the Government by *misconduct* or *negligence*.

13. Rule 43 (b) of the Bihar *Pension* Rules, 1950, lays down the specific circumstances, whereunder the respondents can withhold part or full *pension* and not otherwise. In other words, the Rule does not empower the Government to withhold part or full *pension* unless the employee concerned is found, in departmental or judicial proceeding, to have been guilty of *grave misconduct* or to have caused *pecuniary loss* to the Government by *misconduct* or *negligence*.

14. In the context of the facts of the present case, reliance has been rightly placed on the decision in **State of Jharkhand & Others Vs. Jitendra Kumar Srivastava & Another**, reported in **(2013) 12 SCC 210**. In **Jitendra Kumar Srivastava's** case (*supra*), the *pensioner* was sanctioned 90 per cent of the *pension* pending departmental enquiry and 10 per cent of the



pension was withheld on the basis of administrative instructions. Rejecting the stand of the Government, the Supreme Court has observed that administrative instructions cannot supplant the statutory rules. However, these administrative instructions can supplement statutory rules by taking care of those situations, where the statutory rules are silent. Further-more, Rule 43 (b) prohibits withholding of *pension* till the time the *pensioner* is found guilty of *grave misconduct* in departmental or judicial proceeding or is found to have caused *pecuniary loss* to the Government due to *misconduct* or *negligence*. The aforesaid position of law cannot be subverted by administrative instructions, which endeavors to supplant the law.

15. Explaining the law, the Supreme Court has observed, in **Jitendra Kumar Srivastava** (supra), that a person cannot be deprived of his *pension* without the authority of law, which is the constitutional mandate enshrined under Article 300-A of the Constitution inasmuch as *gratuity* and *pension* are hard earned benefits accruing to an employee and is in the nature of '*property*' and it would, therefore, logically, follow that any attempt by the State Government to take away any part of *pension* or *gratuity* or even *leave encashment*, on the basis of administrative instructions, cannot be sustained.

16. In view of the Rule 43 (b) and the law explained and laid down in **Jitendra Kumar Srivastava's** case (supra), the respondents erred in law in withholding *pension* and *gratuity* and/or the *leave encashment* on the strength of administrative instructions.

17. The order of the learned single Judge, dated 03.12.2013, passed in C.W.J.C. No. 4881 of 2013, is modified to the above extent. The respondents are directed to release the *pension* and *gratuity* to the appellant if order of punishment has not already been awarded pursuant to the departmental proceeding. Further payment of *pension* would, however, depend on the final outcome of the disciplinary proceeding.

(I. A. Ansari, J.)

S. P. Singh, J.: I agree.

(Samarendra Pratap Singh, J.)

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