# IN THE HIGH COURT OF JUDICATURE AT PATNA

**Civil Writ Jurisdiction Case No.5380 of 2014**

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Ramanand Ram aged about 61 years, son of Late Tengar Ram, resident of Mohalla Srikrishna Nagar, West of Shiv Mandir, Police Station Aurangabad, District – Aurangabad.

.... .... Petitioner/s

Versus

1. The State of Bihar through the Secretary, Road Construction Department, Vishweshraiya Bhawan, Bailey Road, Patna.
2. The Special Secretary, Road Construction Department, Vishweshraiya Bhawan, Patna.
3. The Deputy Secretary (Vigilance), Road Construction Department, Bihar, Patna.
4. The Under Secretary, (Accounts), Road Construction Department, Vishweshraiya Bhawan, Patna.
5. The Principal Secretary, Finance Department, Old Secretariat, Patna.
6. The Director, Provident Fund, Pant Bhawan, Patna.
7. The Treasury Officer, Vishweshraiya Bhawan, Bailey Road, Patna.
8. The Treasury Officer, Aurangabad.
9. The Estate Officer, Building Construction Department, Vishweshraiya Bhawan, Patna
10. The Executive Engineer, Rent Division, Building Construction Department, Shastrinagar, Patna
11. The Accountant General (Accounts and Entitlement), Birchand Patel Path, Patna.

.... .... Respondent/s

With

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**Civil Writ Jurisdiction Case No. 7093 of 2014**

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Shashi Bhushan Singh aged about 68 years, son of Late Narayan Prasad, Resident of Professor Colony, Bhaneshwar Ghat, Biharsharif, Police Station Biharsharif, District- Nalanda.

.... .... Petitioner/s

Versus

1. The State of Bihar through the Secretary, Road Construction Department, Vishwesharaiya Bhawan, Bailey road, Patna.
2. The Engineer in Chief, Road Construction Department, Vishwesharaiya Bhawan, Bailey Road, Patna.
3. The Under Secretary, Road Construction Department, Vishwesharaiya Bhawan, Bailey Road, Patna.
4. The Accountant General ( Accounts and Entitlement), Bihar, Patna, Birchand Patel Path, Police Station- Kotwali, District- Patna.

.... .... Respondent/s

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**Appearance :**

(In CWJC No.5380 of 2014)

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| For the Petitioner/s | : | Mr. Rupak Kumar, Advocate |
| For the Respondent/s | : | Mr. Anjani Kumar, A.A.G.-4 |
| | | Mr. Sanjay Prasad, A.C. to A.A.G.-4 |

(In CWJC No.7093 of 2014)

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| For the Petitioner/s | : | Mr. Rupak Kumar, Advocate |
| For the Respondent/s | : | Mr. Vivek Prasad, G.P.-18 |
| | | Mr. S. K. Saraf, Advocate |

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**CORAM: HONOURABLE MR. JUSTICE HEMANT GUPTA**

ORAL JUDGMENT

**Date: 22-10-2016**



Since the issue of law and facts in both the petitions is the same, therefore, the same are taken up together for hearing but the facts are taken up from CWJC No.5380 of 2014.

2. The petitioners claim a direction to pay 10% of amount of pension, gratuity and leave encashment withheld on account of departmental and judicial proceedings pending against the petitioners.

3. The petitioner was appointed as Junior Engineer in the year 1973 in the then Public Works Department, now Road Construction Department. He was promoted to the post of Assistant Engineer and Executive Engineer in the years 1983 and 1992 respectively. The petitioner was made an accused in Bitumen case bearing R.C.2(A)/97 by the C.B.I. in which he surrendered on 19th April, 2000 and was released on bail on 20th of July, 2000. The said case still pending decision.

4. It was on 2nd of August, 2004, the petitioner was informed that he has been placed under suspension with effect from 3rd of May, 2001. Later, on 14th November, 2008, departmental

proceedings were initiated against the petitioner in respect of irregularities said to have been committed when he was posted as Executive Engineer, Road Division, Chatra, Road Construction Department. The petitioner remained under suspension till he superannuated on 31st of May, 2013. On 20th November, 2013, the State Government sanctioned payment of 90% of the pension; gratuity and leave encashment with effect from 1st of June, 2013.

5. Admittedly, the departmental as well as criminal proceedings are pending against the petitioner. The claim of the petitioner is that he is entitled to full pension, full gratuity and leave encashment in the light of the judgment of the Hon'ble Supreme Court reported as State of Jharkhand vs. Jitendra Kumar Srivastava, (2013) 12 SCC 210. It is also contended that the Notification dated 31st July, 1980 has not been issued by the Governor in exercise of the powers conferred under proviso to Article 309 of the Constitution of India, thus, Rule 43(b) of the Bihar Pension Rules published in exercise of the powers conferred under proviso to Article 309 of the Constitution cannot be supplanted by such Notification. It is, thus, contended that the action of the State in withholding the amount of pension, gratuity and leave encashment is contrary to the judgment of the Hon'ble Supreme Court in Jitendra Kumar Srivastava's case (supra).

6. Learned counsel for the petitioner relies upon a

judgment of the Hon'ble Supreme Court reported as Ajaya Kumar Das Vs. State of Orissa & Ors., 2010 (1) PLJR 29, to contend that the Rules framed under proviso to Article 309 of the Constitution cannot be supplanted by the executive instruction, therefore, the Notification dated 31st of July, 1980, which is not stated to be published in exercise of the powers conferred under proviso to Article 309 of the Constitution of India, cannot be deemed to be a rule framed by the State in exercise of powers conferred under proviso to Article 309 of the Constitution. Learned counsel for the petitioners relies upon two Division Bench judgments of this Court in the cases of Bajrang Deo Narain Sinha Vs. The State of Bihar & Ors., 1999 (3) PLJR 949, and The State of Bihar & Ors. Vs. Shamsher Bahadur Singh, 2003 (2) PLJR 833, to contend that pension amount cannot be withheld unless misconduct is proved against the employee.

7. On the other hand, learned counsel for the State relied upon the judgment of the Division Bench of this Court in Letters Patent Appeal No.145 of 2014 (Vijay Kumar Mishra Vs. The State of Bihar & Ors.) decided on 30th June, 2016, wherein it has been noticed that Notification dated 31st July, 1980 substitutes the Bihar Pension Rules, Treasury Code, Service Code and related orders.

8. I have heard learned counsel for the parties and find that the issues raised by the petitioners are covered against the

petitioners by the judgment of this Court in Vijay Kumar Mishra's case (supra).

9. The Notification dated 31st of July, 1980 is issued by the Finance Department published under the authority of the Governor of Bihar and in the official Gazette. Under proviso to Article 309 of the Constitution, no other procedure was required to be followed. Mere fact that it does not recite that such Notification has been issued in terms of proviso to Article 309 of the Constitution of India will not make it to be a non statutory rule when all pre requisite condition for issuance of a rule in exercise of such power has been satisfied. It is specifically mentioned in such notification that such Notification substitutes the Bihar Pension Rules, Treasury Code, Service Code and other related orders. The Notification has been issued by the Finance Department under the orders of the Governor of Bihar and published in the official Gazette. It satisfies the parameters of the Rules required to be published under proviso to Article 309 of the Constitution. Therefore, the Notification dated 31st July, 1980 is a statutory Rule framed in terms of proviso to Article 309 of the Constitution. The judgment referred to by the learned counsel for the petitioner in Ajaya Kumar Das's case (supra) has no application to the facts of the present case.

10. The issue has been dealt with by the Division Bench

of this court in Vijay Kumar Mishra's case (supra). It has been held therein that in terms of the Notification dated 31st of July 1980, the State has power to withhold the amount of pension and gratuity. However, the Notification dated 31st of July, 1980 does not empower the State Government to withhold the amount of leave encashment.

11. The Division Bench judgments of this Court have no applicability to the facts of the present cases as pending judicial and departmental proceedings, by virtue of the Notification dated 31st July, 1980, there is a power to the State Government to withhold pension and gratuity amount. The Notification dated 31st July, 1980 was not brought to the notice of the Court in the judgments referred to by learned counsel for the petitioners.

12. The other prayer of the petitioners is that the period of suspension has not been taken into consideration for determination of the amount of pension payable to the petitioners.

13. I do not find that any direction can be issued to take into consideration the period of suspension for payment of pension at this stage when departmental and judicial proceedings are pending against the petitioners. An appropriate decision shall be taken only after the conclusion of the departmental and judicial proceedings in accordance with law.

14. Consequently, the present writ petitions are

dismissed so far as it relates to release of pension and gratuity, but the State Government is directed to pay the withheld amount of leave encashment to the petitioners expeditiously, preferably within a period of four months from the date the certified copy of the order is served upon them.



**(Hemant Gupta, J.)**

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| AFR/NAFR | A. F. R. |
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