

IN THE HIGH COURT OF JUDICATURE AT PATNA

**Letters Patent Appeal No.145 of 2014
Arising out of
Civil Writ Jurisdiction Case No. 3893 of 2013**

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Vijay Kumar Mishra, Son of Sri Umesh Prasad Mishra, Resident of Village and
P.O. Pator, Via- Anandpur, P.S.- Ashok Paper Mill, District- Darbhanga

.... Petitioner /Appellant

Versus

1. The State of Bihar Through its Chief Secretary, Bihar, Old Secretariat, Patna
2. The Secretary, Registration, Excise and Prohibition Department, New Secretariat, Patna
3. The Commissioner, Registration, Excise and Prohibition Department, New Secretariat, Patna
4. The Superintendent of Excise, Darbhanga
5. The Accountant General, Bihar, Bir Chand Patel Path, Patna- 800001

.... Respondents/ Respondents

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Appearance :

For the Appellant/s : Mr. Kaushalesh Choudhary, Advocate

For the Respondent/s : Mr. Rajesh Kumar, AC to GP 28

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CORAM: HONOURABLE MR. JUSTICE HEMANT GUPTA

and

HONOURABLE MR. JUSTICE AHSANUDDIN AMANULLAH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE HEMANT GUPTA)

Date: 30-06-2016

The order dated 24th October, 2013 passed by the learned Single Bench in CWJC No. 3893 of 2013 is the subject matter of challenge in the present Letters Patent Appeal. By the order under appeal, the claim of the petitioner for grant of benefit of encashment of earned leave as well as other benefits for the period of judicial custody of the petitioner was directed to be examined by the State Government.

The appellant was in judicial custody in a case for offence



under Section 302 of the Indian Penal Code for 196 days. The appellant claims that there is no rule for withholding his retiral benefits such as pension, leave encashment and gratuity on account of pending criminal trial. Therefore, the action of the State Government in not paying the leave encashment and the gratuity is not sustainable. It is admitted that provisional pension has since been sanctioned and is being paid to the appellant.

The entire argument of the appellant is based upon the Supreme Court judgment reported as **(2013) 12 SCC 210 (State of Jharkhand vs. Jitendra Kumar Srivastava)**, wherein Rule 43(b) of the Bihar Pension Rules, 1950 and the Circular of the State Government dated 31st July, 1980 were considered. A finding was returned that the circular issued has no force of law. Therefore, the State Government cannot withhold any part of pension or gratuity.

Learned counsel for the appellant refers to Division Bench judgment of this Court reported as **2013(2) PLJR 866(Chairman & M.D. UCO Bank vs. Shambhu Sharan Singh)**, and also a Single Bench judgment of this Court reported as **2015(1) PLJR 842 (Vijay Kumar Chaurasia vs. State of Bihar)**.

We have heard learned counsel for the parties and find no merit in the present appeal. The Bihar Pension Rules, 1950 were published by the Finance Department vide Notification No. F.D.100-

F. dated 20th January, 1950 and were made applicable by the State Government under clause (b) of sub-section (2) of Section 241 of the Government of India Act, 1935. The relevant extract of the Bihar Pension Rules are as follows:-

“1.(a) These rules may be called the Bihar Pension Rules. They are intended to define the conditions under which pension is earned by service under the Government of Bihar and in what manner it is calculated and paid.

(b) Except where otherwise provided, the rules contained herein shall come into force with effect from the 20th January, 1950.

.....
“26. (a) *Pay* means the amount drawn monthly by a Government servant as –

(i) the pay, other than the special pay or pay granted in view of his personal qualifications, which has been sanctioned for a post held by him substantively or in an officiating capacity, or to which he is entitled by reason of his position in a cadre;”

.....
“27. *Pension* includes a gratuity.”

.....
“43. (a) Future good conduct is an implied condition of every grant of pension. The Provincial Government reserve to themselves the right of withholding or withdrawing a pension or any part of it, if the pensioner is convicted or serious crime or be guilty of grave misconduct. The decision of the Provincial Government on any question of withholding or withdrawing the whole or any part of a pension under this rule, shall be final and conclusive.

(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:

Provided that –

- (a) Such departmental proceedings, if not instituted while the Government servant was on duty either before retirement or during re-employment;
 - (i) shall not be instituted save with the sanction of the State Government;
 - (ii) shall be in respect of an event which took place not more than four years before the institution of such proceedings; and
 - (iii) shall be conducted by such authority and at such place or places as the State Government may direct and in accordance with the procedure applicable to proceedings on which an order of dismissal from service may be made;
- (b) judicial proceedings, if not instituted while the Government servant was on duty either before retirement or during re-employment, shall have been instituted in accordance with sub-clause (ii) of clause (a); and
- (c) the Bihar Public Service Commission, shall be consulted before final orders are passed.

Explanation. – For the purposes of the rule –

- (a) departmental proceeding shall be deemed to have been instituted when the charges framed, against the pensioner are issued to him or, if the Government servant has been placed under suspension from an earlier date, on such date; and
- (b) judicial proceedings shall be deemed to have been instituted:-
 - (i) in the case of criminal proceedings, on the date on which a complaint is made or a charge-sheet is submitted, to a criminal court; and
 - (ii) in the case of civil proceedings, on the date on which the

complaint is presented, or as the case may be, an application is made to a civil Court.”

Rule 43(b) of the Bihar Pension Rules confers the right on the State Government to withhold pension which would include the amount of gratuity in terms of Rule 27 of the Rules as reproduced above, if it is found that the pensioner is being proceeded in the departmental or judicial proceeding of grave misconduct, or having caused pecuniary loss to the Government by his misconduct or negligence.

The State in the counter affidavit relied on Circular issued by the State Government on 22nd August, 1974. Such circular contemplates that where any departmental or judicial proceedings have been initiated and in the meantime the officer attained the age of superannuation, then 75% of pension shall be paid till the conclusion of the departmental or judicial proceeding. But it also contemplates that he will not be paid any gratuity or death-cum-retirement gratuity.

It reads as under :-

“Subject. – Payment of pension to Government servants who are under suspension or against whom departmental or judicial proceedings or enquiries have not been concluded on the date of compulsory retirement.

The question of sanctioning pension to Government servants who are under suspension or against whom departmental or judicial proceedings or enquiries have not been concluded on the date of compulsory retirement has been under active consideration of

Government.

2. The State Government have been pleased to decide that (i) where any departmental or judicial proceeding is instituted under rule 43(b) of Bihar Pension Rules a Government servant or where a departmental proceeding is continued against an officer who have retired on attaining the age of compulsory retirement, or otherwise, he shall be paid during the period commencing from the date of his retirement to the date on which, upon conclusion of such proceedings, final orders are passed 75% provisional pension of the pension which would have been admissible on the basis of his qualifying service upto the date of retirement, or if he was under suspension on the date of retirement, upto the date immediately preceding the date on which he was placed under suspension, but no gratuity or death-cum-retirement gratuity shall be paid to him until the conclusion of such proceeding and the issue of final orders thereon.

(ii) Payment of provisional pension may under the above provision shall be adjusted against the final retirement benefits sanctioned to such officer upon conclusion of the aforesaid proceedings but no recovery shall be made where the pension finally sanctioned is less than the provisional or the pension is reduced or withheld either permanently or for a specified period.

3. The grant of pension under the aforesaid provision shall not prejudice the operation of rule 139 of Bihar Pension Rules where final pension is sanctioned upon the conclusion of the proceedings.

4. These orders will be effective from the 1st November, 1970. All pending cases will be decided accordingly. (Vide F.D.Memo No. PC-11-40-28/74/9144 F., dated 22.8.1974.).”

It is thereafter another circular was issued on 31.10.1974 clarifying as to when the gratuity and benefit of leave encashment can be withheld. Such circular reads as under:-

“**Subject** – Payment of pension to Government servants who are

under suspension or against whom departmental or judicial proceedings or enquiries have not been concluded on the date of compulsory retirement.

In Finance Department's letter No. PC-11-40.28/74/9144F, dated 22.8.1974; which provided that a Government servant who has retired and against whom, any departmental or judicial proceedings are instituted or are continued shall be paid provisional pension to the extent of 75% of the admissible pension. The payment of provisional pension under the aforesaid orders is mandatory. But some administrative authorities appear to be under the impression that in cases where the departmental proceedings instituted against a Government servant were for major penalty and in which ultimately no pension might become payable on the conclusion of the proceedings after his retirement under rule 43 of Bihar Pension Rules, even the provision need not be sanctioned. This view is against the letter and spirit of the said rules. All Heads of departments etc. are therefore requested to bring to the notice of pension sanctioning authorities under them the correct position of the rules as well as the intention of the State Government so that the payment of 75% provisional pension is not denied to the retired Government servants. (Vide F.D.Memo No. PC-11-40-98/74-11260 F, dated 31.10.1974)."

Learned counsel for the appellant refers to Circular issued by the Finance Department of the State Government on 31st July, 1980 to contend that such circular contemplates withholding of gratuity or leave encashment that it contravenes Rule 43(b) of the Bihar Pension Rules and thus not sustainable. The learned counsel draws support from the judgment of the Supreme Court in ***Jitendra Kumar Srivastava's*** case (supra) as well where the Court observed to the

following effect:-

“15. It hardly needs to be emphasized that the executive instructions are not having statutory character and, therefore, cannot be termed as “law’ within the meaning of aforesaid Article 300-A. On the basis of such a circular, which is not having force of law, the appellant cannot withhold even a part of pension or gratuity. As we noticed above, so far as statutory rules are concerned, there is no provision for withholding pension or gratuity in the given situation. Had there been any such provision in these rules, the position would have been different.”

We find that attention of the Hon’ble Supreme Court was not drawn to the fact that the Notification issued by the Finance Department on 31st July, 1980 was to substitute the Bihar Pension Rules, Treasury Code, Service Code and related orders. This notification was issued in terms of the decision of the State Government to amend the Bihar Pension Rules. It was the Finance Department of the State Government which notified the amended Rules. It was published in the same manner as was the publication of the Bihar Pension Rules, 1950 as well. The English translation of the relevant extract from the Notification dated 31st July, 1980 reads as follows:-

“1. The issue of expediting and simplifying the procedure for sanction and payment of pension to employees of the State Government was under consideration before the Government. After cautious consideration, the State Government has made the following amendments in the Bihar Pension Rules, Treasury Code, Service Code and related orders.

.....
7. To withhold or withdraw pension –

(a) The decision contained in Clause-6 shall not affect Rule-43 of Bihar Pension Rules under which power is vested to withhold or withdraw pension.

(b) If any kind of departmental proceedings, criminal case, judicial enquiry etc. has not been initiated against any government servant till the date of his retirement then in that situation, the Pension Sanctioning Authority shall not be empowered to withhold pension under any circumstances. Rule-43 of Bihar Pension Rules is a Statutory Rule. Hence, the provisions contrary to it by different departments and circulars in respect of obtaining clearance certificate from Vigilance Department shall be deemed to be cancelled automatically.

(c) Where the final disposal of departmental or judicial proceeding initiated during the service period of any government servant is not possible till the date of his/her retirement, then action to sanction provisional pension under provisions of Circular No. 9144/f, dated 22-8-1974 and 11260F, dated 31-10-1974 of the Finance Department be initiated so that that the government servant going to retire may not face any difficulty. Provisions contained in Clause 8(c) below shall not apply in matters of this category. In the cases of this category, the amount of provisional pension, as per rule, shall be less than the maximum amount of pension admissible but it shall not be less than 90 per cent in any circumstance.

(d) If pension papers under aforesaid Clause 2(d) have already been forwarded to the office of Authority for issuance of Pension Payment Order and meanwhile situation arises which may adversely affect the amount of pension, then, it be immediately communicated to the office of officer issuing pension/gratuity payment order (Accountant General).

.....
21. The corresponding provisions in the Pension Rules, Treasury Code and Bihar Service Code shall be deemed to be accordingly

amended.”

A perusal of the Notification dated 31st July, 1980 shows that it is not a circular or executive instruction which is contrary Rule 43(b) of the Bihar Pension Rules. Such notification in fact substitutes the Bihar Pension Rules, Treasury Code, Service Code and other instructions issued from time to time. Therefore, it is not an executive instruction but the substantive rules which permit withholding of gratuity and other benefits, if there are departmental or judicial proceedings pending against an officer even after his retirement. Still further, the attention of the Supreme Court was not drawn to Rule 27 of the Bihar Pension Rules. As per Rule 27, pension includes gratuity. Therefore, when Rule 43(b) talks about right to withheld pension, it will include the right to withhold gratuity as well. Therefore, even in terms of Rule 43(b), the pension which includes gratuity could be withheld but the issue stands clarified when amending notification was published.

The Supreme Court in *Jitendra Kr. Srivastava's* case (supra) proceeded on the assumption that the Notification dated 31.07.1980 is the circular which cannot supplant the substantive rules. The fact that it is not a circular but a notification amending the rules was not brought to the notice of the Court. In fact, the Hon'ble Supreme Court observed that if there is any statutory rule the position

would have been different.

Therefore, we find that the reliance of the petitioner on the said judgment that gratuity and leave encashment cannot be withheld cannot be sustained in law.

The judgment of the Division Bench of this Court in the case of ***Shambhu Sharan Singh*** (supra) relates to The Payment of Gratuity Act, 1972. The Payment of Gratuity Act is not applicable to the employees of the State Government. Therefore, such judgment is not applicable to determining the fixation of gratuity of an employee of the State Government. The finding of the learned Single Bench in the case of ***Vijay Kumar Chaurasia*** (supra) is following the judgment of the Supreme Court in the case of ***Jitendra Kumar Srivastava*** (supra) without noticing the distinction that the rule was amended vide Notification dated 31st July, 1980 and that it was not an executive instruction.

In respect of the claim of the appellant for encashment of earned leave of 196 days is concerned, it is the stand of the State that the maximum permissible leave for encashment is 300 days and that the appellant has been paid leave encashment for 104 days, after deducting 196 days, the time of judicial custody in a criminal case being Kotwali P.S. Case No. 26 of 2011, G.R. No. 395 of 2011. Such fact has not been controverted by the appellant. Thus for the period

spent under detention by the appellant, such absence has to be made good by accumulated earned leave of the appellant. Therefore, the claim for encashment of further 196 days of earned leave being untenable in the facts and circumstances of the present case is rejected.

In view thereof, we do not find any merit in the present appeal. The appeal is accordingly dismissed.

(Hemant Gupta, J)

(Ahsanuddin Amanullah, J)

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