IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.9987 of 2014

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Shivjee Mahto Son of late Mahavir Mahto resident of Ram Nagar Dhala, (Naya Tola), P.S. - Chapra Muffasil, District - Saran.

.... Petitioner

Versus

1. The State of Bihar.
2. The Principal Secretary, Education Department, Govt. of Bihar, Patna.
3. The District Magistrate, Saran at Chapra.
4. The District Programme Officer (Establishment), Sarna at Chapra.
5. The District Education Officer, Saran at Chapra.
6. The Headmaster, Visheshwar Seminary Inter College, Chapra.
7. The Director, Secondary Education, Govt. of Bihar, Patna.
8. The Accountant General (A & E), Bihar, Patna.

.... Respondents

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Appearance :

For the Petitioner/s	:	Mr. Bindhyachal Singh, Advocate
		Mr. Ram Binod Singh, Advocate
For the State	:	Mr. Mrigendra Kumar, AC to GA-4
For Accountant General	:	Mr. Ranjan Kumar, Standing Counsel

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 16-02-2017

Originally, the writ petition was filed by the petitioner for payment of retiral dues, including pension and gratuity. During the pendency of the writ petition, an interlocutory application vide I. A. No. 274 of 2015 was filed by the petitioner whereby an additional prayer for quashing the order dated 28.08.2014 issued by the Accountant General, Bihar, Patna has been made by which an amount of Rs.3,00,000/- from the total amount of DCRG of Rs.4,53,750/- has been withheld.

2. The contention of the petitioner is that he was appointed on the post of peon in Bisheswar Seminary School, Chapra on 12.09.1978 and after completing the satisfactory service, he retired on attaining the age of superannuation on 31.01.2014. After superannuation, when he applied for his retiral dues, he was communicated by the Principal vide order dated 28.08.2014 that due to error in service record, his retiral dues are not being paid. He made several communications in order to know about the errors in his service record, but he was not intimated about those errors. When he demanded copy of service book under Right to Information Act, a copy of service book was provided to him and he came to know that the following entries were made in the service book on 19.05.2014 :-

(i) Certified that the service has been continuous from 12.09.1978 to 11.06.2012.

(ii) Break in service from 12.06.2012 to 02.08.2012

(iii) Again service is continuous from 03.08.2012 to 31.01.2014.

(iv) In the light of departmental letter no. 4981 dated 12.12.2017 the service is pensionable.

(v) Certified that a departmental proceeding is pending against the petitioner (copy of the FIR enclosed).

(vi) Certified that Sri Mahto after his superannuation took away Sisam wood worth Rs.3,00,000/- from the school in the night of 14.04.2014.

3. It is submitted by the learned counsel for the petitioner that the salary of the petitioner from 12.06.2012 to 02.08.2012 has wrongly been withheld and he is entitled to receive payment of salary for the aforesaid period. He submitted that the petitioner had applied for medical leave for the period 12.06.2012 to 02.08.2012 on the ground of illness and, after recovery, he joined the school on 03.08.2012.

4. It is submitted by the learned counsel for the petitioner that as far as the F.I.R. in criminal case is concerned, on completion of investigation, the police submitted final report holding the petitioner to be innocent and the learned Chief Judicial Magistrate, Saran at Chapra also accepted the final report vide order dated 21.03.2014. He submitted that in view of acceptance of the final report, it cannot be said that any criminal case is pending against the petitioner. However, he conceded that the order by which the final form was accepted, was challenged in revision in

the year 2015 by the Headmistress of the School and, on technical grounds, the revisional court set aside the order of the Chief Judicial Magistrate and remanded the mater back to the Chief Judicial Magistrate for consideration. He submitted that in view of the remand order, the matter had gone back to the stage where the final form was to be considered by the Magistrate concerned. He conceded that the criminal case which was instituted against the petitioner, was based on false allegation of cutting down and removing *Sisam* wood from the school premises. In respect of the criminal case, he contended that the criminal case was instituted against the petitioner by respondent no. 6 for illegal cutting down and removing *Sisam* trees from the campus of the school while his son had purchased dead *Sisam* trees in the auction conducted by the Circle Officer, Siwan at Chapra. After payment of Rs.3,00,000/-, those dead trees were cut down and legally removed by his son. He submitted that till date, no departmental proceeding has been initiated against the petitioner and in absence of any departmental proceeding, withholding of Rs.3,00,000/- from his pensionary benefits cannot be justified.

5. On the other hand, learned counsel for the State submitted that during the pendency of the writ application, the petitioner has been paid his retiral dues under the head leave

encashment, general provident fund and group insurance. He submitted that regular pension of the petitioner has not yet started apart from withholdment of Rs.3,00,000/- out of the gratuity amount because of institution of a criminal case against him by the Headmistress of the School.

6. The stand of the Accountant General is that pension, gratuity and commuted value of pension has already been authorized by the office of the Accountant General vide Authority No. -05/PEN140814052625/201411052568C0 on the basis of service book and sanction order sent by the DPO (Estt.) Siwan at Chapra vide letter No.1114 dated 31.07.2014.

7. Learned counsel for the Accountant General submitted that the Accountant General has authorized the gratuity after deducting Rs.3,00,000/- as per sanction order sent by the department under the said head. He submitted that if the department reviews the case of the petitioner and revises the sanction order and service book, the due amount of gratuity can also be authorized for payment.

8. I have heard learned counsel for the parties and perused the record.

9. From the pleading of the parties, it would be evident that the State is denying payment of pension and part of

gratuity of the petitioner because of institution of a criminal case against him. Admittedly, no departmental proceeding was initiated against the petitioner while he was in service. Even after retirement, no proceeding under Bihar Pension Rules, 1950 (for short 'Pension Rules') has been initiated against him.

10. As stated before the Bar, the said criminal case was investigated upon by the police and on completion of investigation, the police found the case to be false and, accordingly, a report under Section 173(2) of the Code of Criminal Procedure was filed in the court of Chief Judicial Magistrate, Saran at Chapra. The said report was also accepted by the Magistrate concerned. However, the order passed by the learned Magistrate whereby the police report was accepted, has been set aside on technical grounds by the revisional court, as according to revisional court, notice regarding submission of the final report by the police was not duly served upon the informant of the case. Such being the position of the criminal case, in the opinion of this Court, the respondents would not be justified at all in withholding the full pension and Rs.3,00,000/- from the gratuity of the petitioner.

11. It is well settled principle that the benefit of pension is conferred upon an employee for his unblemished career. It is hard earned money of a Government employee and is not a

bounty. It is to be paid to an employee immediately after his retirement.

12. In ***D. S. Nakara vs. Union of India [(1983) 1 SCC 305]***, the Hon'ble Supreme Court observed that :

> "18. The approach of the respondents raises a vital and none too easy of answer, question as to why pension is paid. And why, was it required to be liberalized ? Is the employer, which expression will include even the State, bound to pay pension? Is there any obligation on the employer to provide for the erstwhile employee even after the contract of employment has come to an end and the employee has ceased to render service?
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> 19. What is a pension? What are the goals of pension? What public interest or purpose, if any, it seeks to serve? If it does seek to serve some public purpose, is it thwarted by such artificial division of retirement pre and post a certain date? We need seek answers to these and incidental questions so as to render just justice between parties to this petition.
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> 20. The antiquated notion of pension being a bounty, a gratuitous payment depending upon the sweet will or grace of the employer not claimable as a right and, therefore, no right to pension can be enforced through Court has been swept under the carpet by the decision of the Constitution Bench in Deoki Nandan Prasad v. State of Bihar,

> 1971 (Supp) SCR 634 : (AIR 1971 SC 1409) wherein this Court authoritatively ruled that pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a Government servant coming within those rules is entitled to claim pension. It was further held that the grant of pension does not depend upon anyone's discretion. It is only for the purpose of quantifying the amount having regard to service and other allied matters that it may be necessary for the authority to pass an order to that effect but the right to receive pension flows to the officer not because of any such order but by virtue of the rules. This view was reaffirmed in State of Punjab v. lqbal Singh, (1976) 3. SCR 360 : (AIR 1976 SC 667)."

13. The aforesaid observation of the Supreme Court has been repeatedly followed in various subsequent decisions relating to retiral benefits and as a concept the said view still holds the field.

14. Before adverting to the submissions advanced at the Bar, it would be apt to refer to the statutory provisions of the Pension Rules which have bearing on the merit of the arguments advanced before the Court.

15. Rule 43 and Rule 139 of the Pension Rules read as under :-

"**Rule 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 of 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 he 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.

(c)- Where the departmental proceeding or judicial proceeding, in which the prosecution has been sanctioned against such servant, initiated during the service period of the government servant, is not concluded till the retirement of the government servant, the amount of provisional pension shall be less than the maximum admissible amount of pension but shall in no case be less than 90 % (ninety percent).

Rule-139. (a) The full pension admission under the rules is not to be given as a matter of course, or unless the service rendered has been really approved.

(b) If the service has not been thoroughly satisfactory, the authority sanctioning the pension should make such reduction in the amount as it thinks proper.

(c) The State Government reserve to themselves the powers of revising an order relating to pension passed by subordinate authorities under their

> control, if they are satisfied that the service of the pensioner was not thoroughly satisfactory or that there was proof of grave misconduct on his part while in service. No such power shall however, be exercised without giving the pensioner concerned a reasonable opportunity of showing cause against the action proposed to be taken in regard to his pension, nor any such power shall be exercised after the expiry of three years from the date of the order sanctioning the pension was first passed."

16. From perusal of the aforesaid Rule 43 of the Pension Rules, it would be evident that Rule 43(b) of the Pension Rules empowers the State Government to withhold or withdraw a pension or any part of it, whether permanently or for a specified period, and to recover 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 rendered or reemployed after retirement.

17. The proviso to Rule 43(b) of the Pension Rules further stipulates that such departmental proceedings, if not instituted while the Government servant was on duty either before retirement or during reemployment shall not be instituted save with

the permission of the State Government and such sanction shall not be accorded in respect of an event which took place more than four years before institution of such proceeding. It further contemplates that the proceeding shall be conducted in accordance with the procedure applicable to proceedings on which an order of dismissal from service may be made.

18. Further, Rule 43(c) of the Pension Rules confers power upon the State Government to pay provisional pension to the Government servant where the departmental or Judicial proceeding, in which the prosecution sanctioned and initiated against such servant is not concluded till his retirement. However, in such case also the amount of provisional pension shall in no case be less than ninety percent.

19. As far as Rule 139 of the Pension Rules is concerned, it empowers the State Government and the pension sanctioning authorities to decide the question whether full pension should be allowed to a Government servant or not. If the service of the Government servant is not found to be thoroughly satisfactory, appropriate reduction in the pension can be ordered by the sanctioning authority. Further, if it is found that service of the pensioner was not thoroughly satisfactory or that there is proof of gross misconduct on the part of the Government servant while in

service, the State Government in exercise of revisional power may interfere with the fixation of pension by the subordinate authority. For exercise of revisional power, the conditions are that same has to be exercised in consonance with the principle of natural justice and that it can be exercised only within three years from the date of sanctioning of the pension for the first time.

20. Having noticed the statutory Pension Rules governing the case of retired Government servant, which I look to the facts of the present case, it would be evident that no departmental proceeding was initiated against the petitioner while he was in service. He has never ever been held guilty of grave misconduct either in departmental or judicial proceeding. He has also not been held guilty of causing any loss to Government by misconduct or negligence during his service or after retirement. It is also not the case of the respondents that any prosecution has been sanctioned by the competent authority against the petitioner.

21. Thus, in absence of these pre-requisites for withholding or withdrawing a pension or any part of it, the respondents could not have invoked the jurisdiction to withhold pension or part of gratuity of the petitioner under Rule 43(b) or (c) of the Pension Rules.

22. Similarly, no adverse entry in the service book

of the petitioner was made by the authorities while he was in service. His entire service was unblemished. Hence, by no stretch of imagination, it can be argued that the service of the petitioner was not thoroughly satisfactory or that there was proof of grave misconduct on his part while he was in service.

23. Under the circumstances, neither the pension sanctioning authority nor the State Government could have exercised the revisional power and reduced the pension of the petitioner under Rule 139 of the Pension Rules.

24. No other provision has been brought to the notice of the Court by the learned counsel appearing for the State under which the pension of the petitioner could have been withheld.

25. Coming to the question of withholdment of gratuity, Rule 27 of the Pension Rules reads “Pension includes gratuity”. Once this Court has come to the conclusion that pension of the petitioner could not have been withheld under the facts and circumstances of the case, on the same reasoning even the gratuity or any part of it could not have been recovered or withheld by the respondents.

26. In ***State of Jharkhand and Ors. vs. Jitendra Kumar Srivastava [(2013) 12 SCC 210]*** , the Hon’ble Supreme Court observed that gratuity and pension are hard earned benefits of

an employee and right to receive pension is in the nature of "property". It has held that this right cannot be taken away from a Government employee without the due process of law as per the provisions of Article 300 A of the Constitution of India.

27. Thus, I am of the opinion that the action of the respondents in withholding pension and part of gratuity in case of petitioner is wholly illegal, arbitrary and without jurisdiction.

28. In the result, the writ petition is allowed. Respondent nos. 4 to 8 are directed to pay arrears of pension, current pension, commuted value of pension and part of the gratuity amount withheld by them within three months from today.

(Ashwani Kumar Singh, J.)

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CAV DATE	…
Uploading Date	22.02.2017
Transmission Date	