IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.9004 of 2019

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Dr. (Mrs.) Pratima Modi Wife of Dr. Satyadeo Modi, Resident of Nawabbagh Colony, P.S. Tilkamanjhi, District- Bhagalpur.

... ... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Health Department, Government of Bihar, New Secretariat, Patna.
2. The Special Secretary, Health Department, Government of Bihar, New Secretariat, Patna.
3. The Joint Secretary, Health Department, Government of Bihar, New Secretariat, Patna.
4. The Under Secretary, Health Department, Government of Bihar, New Secretariat, Patna.
5. Officer on Special Duty, Health Department, Government of Bihar, New Secretariat, Patna.
6. The Accountant General, Bihar, Birchand Patel Path, Patna.

... ... Respondent/s

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Appearance :
For the Petitioner/s : Mr.Saroj Kumar
For the Respondent/s : Mr.Mujtabaul Haque (Gp12)

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CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH
C.A.V. JUDGMENT
Date : 17-10-2019

1. The present writ petition has been filed for directing the respondents to sanction and release 10% pension, 10% gratuity and entire leave encashment amount in favour of the petitioner herein. The petitioner has further prayed for quashing of the letter dated 13.02.2018 issued under the signature of the Officer on Special Duty, Health Department, whereby and whereunder the Accountant General, Bihar, Patna has been informed that the leave encashment amount of the

petitioner *in lieu* of 249 days, has been decided to be withheld till conclusion of the two departmental proceedings pending against the petitioner herein.

2. The brief facts of the case are that the petitioner was initially appointed as Medical Officer on 28.06.1974. The retirement age was enhanced by the respondents vide notification no. 825 dated 28.01.2011 from 62 years to 65 years *qua* the doctors posted in I.G.I.C. The petitioner was to superannuate on 30.06.2011 upon attaining the age of 62 years, however on account of enhancement in superannuation age, since the respondent-State vide notification no. 682 dated 24.01.2011 had also enhanced the retirement age of the doctors who belong to the Bihar Medical Education Cadre from 62 years to 65 years, the petitioner was compelled to file a writ petition bearing CWJC no. 10180 of 2011, for a direction upon the respondent-State to enhance the superannuation age of the petitioner from 62 years to 65 years, in light of the notification dated 28.01.2011. Ultimately, the said writ petition of the petitioner along with other writ petitions were disposed off vide judgment dated 14.02.2012 and all the writ petitioners were directed to be taken back in service if they are post graduate and have retired on or after 21.01.2011. The petitioner had then filed

an appeal bearing L.P.A. no. 673 of 2012 against the aforesaid judgment dated 14.02.2012 passed in C.W.J.C. no. 101180 of 2011 and the State Government had also filed an appeal which were disposed off vide order dated 28.06.2016 by setting aside the judgment of the learned Single Judge and the appeals of the Post Graduate Diploma Holder Doctors and the MBBS doctors of Bihar Health Service were allowed. Nonetheless, the respondents made the petitioner to retire from the post of Civil Surgeon-cum-Chief Medical Officer, Bhagalpur at the age of 62 years on 30.06.2011, whereafter 90% pension, 90% gratuity amount, G.P.F. amount and Group Insurance amount were sanctioned and released to the petitioner herein, however 10% pension and 10% gratuity amount and the entire leave encashment amount were not released to the petitioner. It is the further case of the petitioner that in a malafide manner, after expiry of six years of retirement, the respondent issued resolution dated 21.09.2017, whereby and whereunder a departmental proceeding was initiated against the petitioner under Rule 17 of the Bihar Government Servant (Classification, Control and Appeal) Rules, 2005 for being allegedly guilty of misconduct and disobedience of the government orders. Thereafter, the petitioner had filed a detailed written statement stating the actual facts and submitted that the petitioner was not guilty of any of the allegations levelled against her and had denied all the charges. On 01.12.2017, the departmental inquiry was closed by the Inquiry Officer, however till date, no final order has been passed in the said departmental proceeding. The petitioner is stated to have challenged the said departmental proceeding initiated vide notification dated 21.09.2017 by filing a writ petition bearing CWJC no. 15947 of 2017 and a Bench of this Hon’ble Court, by an order dated 26.04.2018, has passed an interim order restraining the respondents from passing any final order till the disposal of the writ petition. Thereafter, the Officer on Special Duty, Health Department has issued the impugned letter dated 13.02.2018, whereby the Accountant General, Bihar has been intimated that since two departmental proceedings are pending against the petitioner, leave encashment amount be not released to her. It is submitted that the said order dated 13.02.2018 has been challenged in the aforesaid pending writ petition bearing CWJC no. 15947 of 2017, by filing an amendment petition bearing I.A. no. 7729 of 2018, however the same has been filed on wrong legal advice, thus the petitioner is taking steps to withdraw the same.

It has been further stated in the writ petition that another department proceeding was initiated vide resolution dated 18.11.2016 under Rule 17 of the Bihar Government Servant (C.C.A.) Rules, 2005 and Rule 43-B of the Bihar Pension Rules for committing irregularity in purchase of machine, to which the petitioner has also submitted her written statement. The said resolution dated 18.11.2016, initiating departmental proceeding against the petitioner has also been assailed in a writ petition bearing CWJC no. 13944 of 2018 and the same is pending adjudication before this Court.

3. The learned counsel for the petitioner has relied upon a judgment rendered by the Hon'ble Apex Court reported in ***(2013) 12 SCC 210 (State of Jharkhand and others v. Jitendra Kr. Srivastava and another),*** paragraphs no. 13 and 14 whereof, are reproduced hereinbelow :-

> *13. In State of West Bengal Vs. Haresh C. Banerjee and Ors. (2006) 7 SCC 651, this Court recognized that even when, after the repeal of Article 19(1)(f) and Article 31 (1) of the Constitution vide Constitution (Forty-Fourth Amendment) Act, 1978 w.e.f. 20th June, 1979, the right to property was no longer remained a fundamental right, it was still a Constitutional right, as provided in Article 300A of the Constitution. Right to receive pension was treated as right to property. Otherwise, challenge in that case was to the vires of Rule 10(1) of the West Bengal Services (Death-cum-Retirement Benefit) Rules, 1971 which conferred the right upon the Governor to withhold or withdraw a pension or any part thereof under certain circumstances and the said*

challenge was repelled by this Court.

Fact remains that there is an imprimatur to the legal principle that the right to receive pension is recognized as a right in "property".

14. Article 300 A of the Constitution of India reads as under:

> *"300A Persons not to be deprived of property save by authority of law. - No person shall be deprived of his property save by authority of law." Once we proceed on that premise, the answer to the question posed by us in the beginning of this judgment becomes too obvious. A person cannot be deprived of this pension without the authority of law, which is the Constitutional mandate enshrined in Article 300 A of the Constitution. It follows that attempt of the appellant to take away a part of pension or gratuity or even leave encashment without any statutory provision and under the umbrage of administrative instruction cannot be countenanced.*

4. *Per contra,* the learned counsel for the respondents has submitted that since two departmental proceedings are pending against the petitioner herein, it has been decided to withhold the amount of leave encashment and accordingly, the same has been withheld vide departmental letter dated 13.02.2018.

5. The learned counsel for the respondent-State has further relied on a judgment rendered by the Full Bench of this Court reported in ***2018 (2) PLJR 933 (Arvind Kumar Singh v.***

The State of Bihar and others), paragraphs no. 29 whereof, is reproduced hereinbelow :-

> *" 29. We see no reason to hold that leave encashment can be granted even in cases where the employee at the time of retirement is facing departmental or judicial proceeding. The law laid down in this regard in the cases referred to hereinabove do not consider this aspect of the matter, all the cases proceeded under the mistaken asumption that the leave encashment is provided for in the Pension Rules, and, therefore, we have no hesitation in holding that when an employee is facing a criminal case or a departmental proceeding, at the time of his retirement, the Government is well within its power in withholding leave encashment."*

It is further submitted by the learned counsel for the respondent State that 10% amount of pension and 10% amount of gratuity has also been withheld on account of the aforesaid two departmental proceedings being pending as against the petitioner herein.

6. I have heard the learned counsel for the parties and perused the materials on record and I find that in view of the law laid down by the Full Bench of this Court in the case of ***Arvind Kumar Singh (supra),*** though the respondents are entitled to withhold 10% pension and 10% gratuity amount as also the leave encashment amount, in cases where an employee

is facing a departmental proceeding or a criminal case, however the same is subject to the said proceeding/ case being pending as on the date of retirement. In this regard, it would be appropriate to reproduce paragraphs no. 24 and 28 of the judgment rendered in the case of ***Arvind Kr. Singh (supra),*** hereinbelow :-

> *" 24. Even if we, for a moment, accept this contention of the learned Advocate General then also we find that with regard to payment of provisional pension and gratuity the field was initially occupied by two circulars and one notification i.e. 22.08.1974, 31.10.1974 and 31st of July, 1980 respectively, the State Government in its own wisdom thought it appropriate to amend the pension rules again and incorporated Section 43 (c) on 19th of July, 2012 and when Section 43(c) was incorporated on 19th of July, 2012 in the matter of fixing the amount of provisional pension to be paid in cases where an employee is facing a departmental proceeding or a criminal case, the provision incorporated for the sake of repetition reads as under:-*
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> > *"43(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). This will come into force with immediate effect."*

*28. The Bihar Service Code, Chapter-VI deals with general conditions of leave and from Rule 149 onwards,provisions have been made for grant of various kinds of leave like Casual Leave, Special Leave, Medical Leave, Extraordinary Leave, Hospital Leave etc. and under this Chapter from Rule 227 onwards provisions have been made for grant of Earned Leave. Under Rule 227 (1) it is stipulated that the Earned Leave admissible to a Government servant in permanent employment shall be in accordance to Clause (a) and (b) stipulated therein and under sub-section 2 it is contemplated that a Government servant shall cease to earn such leave when the Earned Leave due to him has reached a particular level. The method and principle for calculating Earned Leave etc. are provided in the Rule. Nowhere in this rule is there a provision for permitting leave encashment. It is for the first time by an executive instruction bearing No. 4564 dated 6th of July, 1993, that a provision has been made for encashment of unused Earned Leave after retirement and in this circular in Paragraph 2 the fo*llowing stipulations have been made:-

> *"2. उपर्युक्त संदर्भ में अधोहस्ताक्षरी को पुनः यह स्पष्ट करने का निर्देश हुआ है कि छुट्टी स्वीकृत करने के लिए सक्षम पदाधिकारी स्वविवेक से सम्पूर्ण नगद राशि अथवा उसके निश्चित अंश के भुगतान को वैसे मामले में रोक सकते हैं, जिसमें सेवा–निवृत्त कर्मचारी के विरूद्ध सेवा–निवृत्ति की तिथि तक किसी भी तरह की विभागीय कार्यवाही, फौजदारी मुकदमा अथवान्यायि क जॉच का अन्तिम निष्पादन नहीं हो पाया हो और जिसमें जॉच के*

फलाफल के रूप में वसूली की क्षीण संभावना भी विद्यमान हों। जॉच के अन्तिम निष्पादन होने पर रोके गये भुगतान को विमुक्त कर दिया जायेगा। परन्तु जॉच के परिणाम स्वरूप यदि कोई वसूली करने का निर्णय हो, तो वसूली करने के बाद ही शेष राशि विमुक्त की जायेगी।"
(Emphasis supplied)

7. This Court finds, from a bare perusal of Rule 43 (C) of the Bihar Pension Rules, 1950, that only in cases where the departmental proceeding or judicial proceeding, in which the prosecution has been sanctioned against such government servant, has been initiated during the service period of such government servants and is not concluded till the retirement of the government servant, the amount of provisional pension to be sanctioned, is to be less than the maximum admissible amount of pension but, in no case, is to be less than 90%. I further find that the said provision would also be applicable to gratuity, inasmuch as, as per Rule 27 of the Bihar Pension Rules, pension includes gratuity. However, in the present case, the petitioner had stood retired on 30.06.2011 but as on that date, neither any judicial proceeding nor any departmental proceeding was pending and only after huge delay as also after lapse of the prescribed time limit for initiating a departmental proceeding under Rule 43-B of the Bihar Pension Rules, 1950, the

respondents have initiated two departmental proceedings belatedly vide notifications dated 18.11.2016 and 13.02.2018 respectively, hence the bar under Rule 43-C, regarding making payment of 90% pension and 90% gratuity amount would not be applicable in the present case, inasmuch as Rule 43-C of the Bihar Pension Rules, 1950 is neither applicable in the present case nor covers the present case. Thus, this Court is of the opinion that the respondent-State is liable to sanction and pay forthwith the balance amount of 10% of final pension and 10% gratuity amount. It is directed accordingly.

8. Now, coming to the question of payment of leave encashment amount, it is apparent from the aforesaid executive instruction bearing no. 4564 dated 6th July, 1993, issued by the respondent-State that the payment of leave encashment amount can be withheld in such cases, wherein till the date of superannuation of the government servant, the pending departmental proceeding, criminal case and judicial inquiry has not been finally disposed of. However, in the present case, on the date of retirement, neither any departmental proceeding nor any criminal case nor any judicial inquiry was pending against the petitioner herein, hence the respondent-State could not have withheld the payment of leave encashment amount.

Accordingly, this Court holds that the petitioner is entitled to payment of the leave encashment amount as well, hence the order dated 13.02.2018 issued under the signature of Officer on Special Duty, Health Department is quashed and the respondent-State is directed to release the amount of leave encashment of the petitioner herein forthwith.

9. The writ petition stands allowed.

(Mohit Kumar Shah, J)

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AFR/NAFR	AFR
CAV DATE	15.07.2019
Uploading Date	18.10.2019
Transmission Date	NA