

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.1469 of 1995

Amarendra Arya, son of late Prabha Shanker, Resident of L.I.G. Flat No. 178,
Sector-6, Block -3, Bhutnath Road, Bahadurpur Housing Colony, P.S.-
Agamkuan, District- Patna.

... .. Appellant

Versus

1. The State of Bihar.
2. The Secretary, Department of Welfare, Government of Bihar, Patna.
3. The Director, Social Welfare, Government of Bihar, Patna.
4. The Additional Director, Social Welfare, Government of Bihar, Patna.
5. Gyanendra Arya, S/o late Prabha Shanker, Resident of E 79A, 2nd Floor,
Bengali Colony, (Near Kali Bari) Mahavir Enclave, New Delhi- 45.
6. Shailendra Arya, S/o late Prabha Shanker, Resident of Sector-6 Block-7,
M.I.G. Flat No. 238 Bahadurpur Housing Colony P.S. Agamkuan, Distt.
Patna.

... .. Respondent/s

Appearance :-

For the Appellant/s	:	In person
For the State	:	Mr. S.D. Yadav, A.A.G.-9. Mr. Rajeshwar Singh, G.A.-10
Amicus Curaie	:	Mr. Mrigank Mauli, Amicus Curaie Mr. Prince Kumar Mishra, Advocate Mr. Snaket, Advocate

CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY

And

HONOURABLE MR. JUSTICE S. KUMAR

And

HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE SHIVAJI PANDEY)

Date : 25-09- 2019

We have heard Mr. Amrendra Arya, in person, who



is the son of late Smt. Vidya Sinha - original petitioner, Mr. Mrigank Mauli, Amicus Curiae, assisted by Mr. Prince Kumar Mishra and Mr. Sanket, learned Advocates and Mr. S.D. Yadav, learned Additional Advocate General-9 assisted by Mr. Rajeshwar Singh, G.A.-10, on behalf of the State.

2. This case has been referred before this Full Bench in view of the order dated 24.07.1996, though in this order no term of reference has been mentioned, but the order reflects that the Division Bench was of the view that where a Government servant, against whom a departmental proceeding has been initiated, is entitled to full pay and allowances during the period of his suspension, if he is ultimately exonerated. If that be so, without concluding a departmental proceeding, it would be arbitrary to deprive him of his full pay and allowances during the period of suspension under Rule 97(3) of the Bihar Service Code. If the disciplinary proceeding is rendered infructuous by reason of the fact that the concerned Government servant superannuates from the service, the order of suspension must also go and the Government servant concerned will be entitled to full pay and allowances for the period during which he was placed under suspension. So, the order is summarized in three parts, are as follows:-



(i) If a departmental proceeding has been initiated against a Government servant and if he is ultimately exonerated, he will be entitled to full pay and allowances during the period of suspension.

(ii) If the departmental proceeding initiated against the Government Servant is not concluded, it would be arbitrary to deprive him of his full pay and allowances during the period of suspension under Rule 97(3) of the Bihar Service Code.

(iii) If the disciplinary proceedings are rendered infructuous by reason of the fact that the concerned Government servant superannuated from the service, the order of suspension must also go and the Government servant concerned will be entitled to full pay and allowances for the period during which he was placed under suspension.

3. Before advertizing to answer the proposed questions framed hereinabove, it will be proper to concisely deal with the facts of the present case. As the facts are taken from the original



writ petition, so everywhere, she will be addressed as original writ petitioner.

4. The original writ petitioner had joined the services of the State of Bihar on 14.02.1956, thereafter she was promoted on different posts and finally superannuated on 30.11.1994 from the post of Superintendent, Beggars Home, Patna. She was made in-charge of Remand Home, Patna, along with Superintendent, Beggars Home, Patna. During inspection, it was found found that the Remand Home was in very bad and dilapidated condition, as she was not authorized to make repair and incur the expenditure, on that account she started writing letters for repairing of Chapakal, electricity etc. in the Remand Home. Some boys had fled away from the Remand Home and the cumulative effect led to putting the original writ petitioner under suspension vide order dated 25.08.1993, inasmuch as the original writ petitioner was put to departmental proceeding, the headquarter was fixed at Chotanagpur at Ranchi. The original writ petitioner challenged the order of suspension in C.W.J.C. No.10657 of 1993, the same was disposed of vide order dated 24.01.1994, without interference but, with a direction that the departmental proceeding be concluded within a period of three months from the date of receipt of the copy of the order and if



the departmental proceeding is not concluded within the aforesaid period, the order of suspension passed against the petitioner would stand revoked. It was further directed that the petitioner shall render all cooperation in the smooth conduct of the departmental proceeding, failing which the same may be heard and disposed of *ex parte*. As the departmental proceeding could not be concluded in terms of the order passed in the writ petition, the suspension order ought to have been revoked, ultimately, on filing of contempt petition vide M.J.C. No.877 of 1994, the order of suspension was revoked vide order dated 01.05.1994, but the departmental proceeding continued, ultimately the original writ petitioner superannuated from the service on 30.11.1994, at the final stage of the departmental proceeding. After superannuation, vide memo no.23 dated 03.01.1995 the petitioner was visited with the punishment of censure. The order of punishment was challenged by the original writ petitioner in C.W.J.C. No.5982 of 1995, which was allowed in the background of the fact that the respondents, after superannuation of the original petitioner, did not convert the proceeding under Section 43(b) of the Bihar Pension Rules. The Director, Social Welfare, Government of Bihar, Patna, vide letter no.488 dated 07.03.1995 issued show-cause in terms of



Rule 97 read with Sub-Rule 3 and 5 of the Bihar Service Code with respect to her entitlement of salary for the period of suspension i.e. from 25th August, 1993 to 30th April, 1994. In the said letter, it has been mentioned that out of seven charges four charges namely, charge nos. 1, 5, 6 and 7 were proved and the Government had concurred with the finding of the Inquiry Officer and ultimately he was served the punishment of censure vide memo no.23 dated 03.01.1995.

5. The original writ petitioner filed her show-cause, in which she has taken a plea that she had retired from the service on 30.11.1994 and as such, any order passed after the date of superannuation in relation to departmental proceeding which did not conclude during the period of service, has been held to be bad in law. If the order of punishment is illegal, the provisions of Rule 97 (3) and (5) of the Bihar Service Code cannot be exercised after her superannuation. As the order of punishment has been set aside, she has claimed the entire salary for the period of suspension i.e. from 25th August, 1993 to 30th April, 1994 and finally the order dated 30.06.1995 has been passed, whereby the petitioner has been made entitled to subsistence allowance only for the period from 25.08.1993 to 30.04.1994, which is under consideration in the present case. The Director,



Social Welfare, Bihar, Patna, has communicated that the period of suspension will not be treated to be break in service and will be taken into consideration for the purposes of pension, gratuity and leave encashment. The said order was challenged in C.W.J.C. No.2727 of 1995. The question of applicability of Rule-97 of the Bihar Service Code came for consideration before the learned Single Judge, where the plea was taken that after superannuation, Rule-97 of the Bihar Service Code will not come into play for the purposes of deprivation of salary for the period of suspension. The learned Single Judge considered the provisions of Rule 97 of the Bihar Service Code and accordingly, question was framed for consideration, whether after superannuation of a Government servant any order denying the salary for the suspension period is legal and proper. The learned Single Judge has held in the following terms:- *“There is no doubt that the provision is applicable only when the Government Servant is to be reinstated in service, but when the Government servant has already superannuated, there is no question of his reinstatement and, therefore, the provisions, in terms, is not applicable. However, that does not mean that on his superannuation from service, the Government servant under suspension on the date of superannuation, will ipso facto*



*become entitled to full salary and allowances for the suspension period” and ultimately the learned Single Judge has recorded a finding in the following manner:- “In my opinion, in such a situation, it would be permissible to the competent authority to consider whether the person should be paid salary and allowances for the suspension period after, of course, giving opportunity of hearing to him. There cannot be any doubt that any order denying salary and allowances for the suspension period is not a penalty within the meaning of the Service Rules but, nevertheless, is penal in nature and effect and, therefore, cannot be passed except after giving opportunity of hearing. While in the case of Government servant in service, the order is to be passed under Rule-97 of the Service Code, after his superannuation, it will be deemed to be an independent order and not under Rule-97 but the consideration will more or less be the same”. The learned Single Judge further held that “the State Government is competent to deny salary for the suspension period on valid grounds even after superannuation after giving opportunity of hearing”. The Court has placed reliance on the decision rendered in the case of **Dr. Lakshmi Narain Singh vs. The State of Bihar (1989 BBCJ, 147)** and ultimately dismissed the writ petition.*



6. The order of the learned Single Judge was challenged before the Division Bench having stated that as no punishment order was inflicted upon the petitioner during the service period nor the proceeding was converted under Section 43(b) of the Bihar Pension Rules, the competent authority is not authorized to initiate a proceeding under Rule 97 of the Bihar Service Code and deprive her of salary for the period under suspension.

7. Mr. Mrigank Mauli, on request of this Court, has assisted this Court as *Amicus Curaie*, has taken plea that after superannuation, the relationship of master and servant ceases to exist and there is no such provision in the Bihar Service Code or under the Bihar Pension Rules, which would authorize the competent authority to exercise the power of Rule-97 of the Bihar Service Code. He further submits that Rule 97 of the Bihar Service Code will be applicable during the subsistence of relationship of master and servant, once the relationship is over, any of the provision of Rule-97 cannot be pressed into service to deprive a retired Government servant of the benefit of salary for the period under suspension on any ground whatsoever. It has further been submitted that identical or similar provision in the shape of Rule-54 of the Fundamental Rules applicable to the



Central Government employees was existing, but later on, feeling difficulty in dealing with the matter of Government servant, retired from the service before conclusion of the inquiry, initiation of proceeding for the purposes of entitlement of salary for the suspension period, amendment has been made in Rule-54 of the Fundamental Rules and accordingly, the provisions of Rule-54(A) and (B) especially for dealing the case of retired Government servant has been added. The original Rule-54 was replaced by new Rule-54 in a different structure and formulation supported by Rule-54 (A) and (B). The other Indian States, in tune with the amendment made in the Fundamental Rules governing the employees of the Central Government, have also amended their Service Rules, inserting identical provision as that of Rule-54(B) in their respective Service Rules.

8. Mr. Mrigank Mauli, has drawn the attention of this Court to the Punjab Civil Services Rules, Volume-1, more particular Rule-7.3. B; Rule-54(B) of the Fundamental Rules of Madhya Pradesh; Rule 54(B) of the Fundamental and Subsidiary Rules of Assam and Rule-54(B) of the Fundamental Rules of Andhra Pradesh and submitted that these amendments have been brought with the line of the amendment made in the



Fundamental Rules of the Central Government. He further submitted that the State of Bihar has not amended its Service Code in the identical term as that of Rule-54(A) and (B), which have been included in the Fundamental Rules of the Central Government and submitted that in view of the amendment effected in the respective Services Rules the competent authority of the respective States do have an authority to initiate or continue the proceeding against retired Government servant for consideration of entitlement of the salary for the period of suspension but, such power cannot be exercised by the authority of the State of Bihar and that too when the State Government does not have an inherent jurisdiction in absence of any specific provision in the Service Rules empowering to undertake such exercise.

9. He has dealt with the judgment of Dr. Laxmi Narain Singh (supra) having stated that the said case was heard by the Division Bench, comprising of members namely, Hon'ble Mr. Justice H.L. Agrawal (as he then was) and Hon'ble Mr. Justice M.P. Verma (as he then was) and it has been held that after superannuation from the service, the Government has no jurisdiction to continue with the departmental proceeding against a retired employee, but the difference of opinion has



emerged on the question as to whether in that circumstances, the Government servant is entitled to claim full salary for the period of suspension. Hon'ble Mr. Justice H.L. Agrawal took the view that as a general rule, a Government servant cannot be held to be entitled for full pay, in every case a disciplinary proceeding ultimately ends without imposing the punishment on him. Referring to certain circumstances, briefly, ultimately, his Lordship held that the petitioner was not entitled to any relief on this account. Hon'ble Mr. Justice M.P. Verma has held that discretion to refuse payment of full salary to the Government servant can be exercised only in a case, which is governed by Rule 97(3) of the Bihar Service Code, since the present case cannot be held to be governed by the said Rule, the claim of the petitioner for full salary cannot be legitimately refused. In view of difference of opinion, the matter was referred to another Single Judge, namely, Hon'ble Mr. Justice L.M. Sharma (as he then was), and finally the judgment was passed by Hon'ble Mr. Justice L.M. Sharma.

10. Mr. Mauli, has submitted that in that case also learned counsel for the petitioner submitted that before conclusion of departmental proceeding Dr. Lakshmi Narain Singh, petitioner, superannuated from the service, whereafter a



fresh proceeding was initiated, but the same also could not be concluded before his retirement and ultimately the order of suspension was withdrawn. In that case Dr. Lakshmi Narain Singh had claimed the salary for the entire period and the competent authority had held that he would not be entitled to any additional payment beyond the subsistence allowance, which he had already drawn and the period he was under suspension will be treated to have been in continuous service only for the purposes of pension. It has further been submitted that paragraph no.4 of the aforesaid judgment itself depicts that learned counsel for Dr. Lakshmi Narain Singh had taken a specific plea that Rule 97(3) cannot apply in a case of retired Government servant for the reason that relationship of master and servant comes to an end on his superannuation and the person concerned cannot be held to be a Government servant within the meaning of Sub-Rule 5. It has further been submitted that the argument raised by learned counsel for Dr. Lakshmi Narain Singh with respect to the event when a Government servant superannuated, can the proceeding be continued or initiated after his or her superannuation from the service. Hence, it would be considered that the aforesaid judgment is dealing with a situation that the Government servant is in service and



cannot be applied to those cases where a Government servant has superannuated from the service, inasmuch as, on account of superannuation, no penalty can be imposed against a retired Government servant in the shape of depriving the salary for the period of his or her suspension.

11. In support of the submission, Mr. Mauli, has placed reliance on the following judgments:-

(i) ***M. Gopalkrishna Naidu vs. The State of M.P.***

reported in ***AIR 1968 S.C. 240*** on the proposition that provision of Rule-54 before amendment was same and similar to the Rule-97 of the Bihar Service Code.

(ii) ***H.L. Mehra vs. Union of India and Others***

reported in ***(1974) 4 SCC 396***, on the proposition that after superannuation the relationship of master and servant ceases to exist and order of suspension is co-terminus to the date of his superannuation. In that case, the question was answered in the term that the order of suspension, which was passed pending disciplinary proceeding led to dismissal and after setting aside the dismissal, the order of suspension will not revive automatically unless the



competent authority passes specific order of suspension putting the Government servant under suspension.

(iii) ***Kirti Bhusan Singh vs. State of Bihar and Others*** reported in ***(1986) 3 SCC 675***.

12. He has also placed reliance on two judgments of Delhi High Court rendered in the case of ***Union of India and Ors. vs. Raj Bahadur*** reported in ***2016 SCC Online Del. 4460*** and in the case of ***Union of India and Anr. vs. S.K. Gupta*** decide in ***W.P. (C) no.11860 of 2015*** to show that as there is a provision of Rule 54(B) under the Fundamental Rules and the Delhi High Court has held that the authority is competent to take decision with respect to payment of salary for the period of suspension of those Government servant who has superannuated from the service.

13. He has also relied on the judgment of Delhi High Court rendered in the case of ***Raj Bahadur (supra)*** and submitted that as there was a provision in Rule-69 read with Rule-54(B) the power of the competent authority has been recognized to take decision with respect to the period under suspension. It will be relevant to quote paragraph no.16 of the



said judgment, which is as follows:-

“16. Fundamental Rule 54-B(1) makes a provision for the competent authority to pass orders on pay and allowance to a government servant for the period of suspension, upon being reinstated and not otherwise. Such reinstatement, when post-retirement, would also mandate an order under FR 54-B(1). It would equally apply to cases of reinstatement after premature retirement. In such cases, the competent authority should pass any order as to whether or not the suspension period shall be treated as a period spent on duty. The said rule reads as under:-

“... FR 54-B (1) When a Government servant who has been suspended is reinstated or would have been so reinstated but for his retirement (including premature retirement) while under suspension, the authority competent to order reinstatement shall consider and make a specific order-

(a) Regarding the pay and allowance to be paid to the Government servant of the period of suspension ending with reinstatement or the date of his retirement (including premature retirement), as the case may be; and

(b) Whether or not the said period shall be treated as period spent on duty...”

14. Mr. Mauli, learned advocate, has also placed



reliance on three judgments of Calcutta High Court, namely:-

- (i) ***Babu Ram Pramanick vs. the Assistant Security Commissioner, R.P.F. S.E. Railway Santragachhi at Shalimar and Others*** reported in ***2003 SCC OnLine Cal 693: (2003) 6 SLR 177***, in that case minor penalty was imposed upon delinquent employee and the Calcutta High Court has held that in such a case, the delinquent Government employees would get the benefit of full pay and allowance during the period of suspension.
- (ii) ***Bijoy Gopal Sur vs. State of West Bengal and Ors.*** reported in ***1961 SCC OnLine Cal 107***, on the proposition that unless there is specific rule empowering the authority to exercise the power, the competent authority cannot exercise the power on the principle of inherent jurisdiction or implied power to pass an adverse or penal order against any Government servant or Ex-Government servant.



(iii) *Secretary of State v. Surendra Nath*

Goswami reported in *AIR 1938 Calcutta 759*, on the proposition that there is no implied power with the employer to punish a Government servant by suspension, if the Government servant is suspended when there is no power to suspend, he can sue for damages for being not allowed to work, if he was ready to work. If, however, there is power to suspend, the effect of the suspension is to suspend the contract of service as a whole, with the result that Government servant cannot insist on working or claim his pay for the period of suspension.

15. He has also placed reliance on the decision of the Hon'ble Supreme Court rendered in the case of *Bhagirathi Jena vs. Board of Directors, O.S.F.C. and Ors.* reported in *(1999) 3 SCC 666* on the proposition that once the delinquent employee retires from the service there was no authority vested with the Corporation in continuing the departmental inquiry even for the purposes of effecting recovery from the retirement.



benefits payable to the delinquent employee. So, the proposition is that unless power has been conferred under the Rule, no adverse order or penalty order in any term can be imposed on the Government servant.

16. Further reliance has been placed on the decision rendered in the case of *Sharda Singh vs. State of Uttar Pradesh and Ors.* reported in (2009) 11 SCC 683, wherein the Court has framed the question as to whether the Government servant is entitled for full back wages/ salary during the period of suspension till the date of passing the order of reinstatement into service, when he was exonerated of the charges framed against him by the disciplinary authority. The Court has held that when the Government servant has been exonerated of the charges, he cannot be deprived of any portion of his pay for the period of suspension. Further held that rule or regulation which may provide that during the period of suspension an employee would be entitled only for subsistence allowance, dehors the ultimate result of the inquiry proceedings. This grey area, either should have been determined by the Court or the authorities should have been asked to determine the claim with reference to the prevailing rules/regulations.



17. Lastly he has placed reliance on the decision rendered in the case of *Balvantray Ratilal Patel vs. State of Maharashtra* reported (1968) 2 SCR 577 = A.I.R. 1968 S.C. 800, on the proposition that general principle is that an employer can suspend an employee pending an inquiry into his misconduct and the only question that can arise in such suspension will relate to payment during the period of such suspension. If there is no express term relating to payment during such suspension or if there is no statutory provision in any enactment or rule, the employee is entitled to his full remuneration for the period of his interim suspension. On the other hand, if there is a term in this respect in the contract of employment or if there is a provision in the statute or the rules framed thereunder, providing for the scale of payment during suspension, the payment will be made in accordance therewith.

18. The judgment of the Hon'ble Supreme Court, rendered in the case of Balvantray Ratilal Patel (supra) is being referred to and paragraph no.4 thereof case is reproduced hereinbelow:-

“4. The general principle therefore is that an employer can suspend an employee pending an inquiry into his misconduct and the only question that can arise in such suspension will



relate to payment during the period of such suspension. If there is no express term relating to payment during such suspension or if there is no statutory provision in any enactment or rule the employee is entitled to his full remuneration for the period of his interim suspension. On the other hand, if there is a term in this respect in the contract of employment or if there is a provision in the statute or the rules framed thereunder providing for the scale of payment during suspension, the payment will be made in accordance therewith. This principle applies with equal force in a case where the Government is an employer and a public servant is an employee with this qualification that in view of the peculiar structural hierarchy of Government administration, the employer in the case of employment by Government must be held to be the authority which has the power to appoint the public servant concerned. It follows therefore that the authority entitled to appoint the public servant is entitled to suspend him pending a departmental enquiry into his conduct or pending a criminal proceeding, which may eventually result in a departmental enquiry against him. But what amount should be paid to the public servant during such suspension will depend upon the provisions of the statute or statutory rule in that connection. If there is such a provision the payment during suspension will be in accordance therewith. But if there is no such provision, the public servant



will be entitled to his full emoluments during the period of suspension. On general principles therefore the government like any other employer, would have a right to suspend a public servant in one of two ways. It may suspend any public servant pending departmental enquiry or pending criminal proceedings; this may be called interim suspension. The Government may also proceed to hold a departmental enquiry and after his being found guilty order suspension as a punishment if the rules so permit. This will be suspension as a penalty. As we have already pointed out, the question as to what amount should be paid to the public servant during the period of interim suspension or suspension as a punishment will depend upon the provisions of the statute or statutory rules made in that connection.”

19. Mr. Mrigank Mauli, has submitted that no power has been given by the Legislature to deal with the situation of period of suspension after the superannuation from the service as at the earlier stage identical Rule 54 of the Fundamental Rules was there, but Rule-54 has been amended with a view to deal with the different situations including the situation after retirement of Government servant from the service and he has placed reliance on Rule-54 of the Fundamental Rules to show that earlier Rule-54 was *pari materia* to Rule-97. It will be



relevant to quote earlier Rule-54 of the Fundamental Rules.

"F. R. 54-B. (1) When a Government servant who has been dismissed, removed or suspended is reinstated; the authority competent to order the reinstatement shall consider and make a specific order-,

(a) Regarding the pay and allowance to be paid to the Government servant for the period of his absence from duty; and

(b) whether or not the said period shall be treated as a period spent on duty-,

(2) Where the authority 'Mentioned in sub-rule (1) is of opinion that the Government servant has been fully exonerated or in the case of suspension, that it was wholly unjustified, the Government servant shall be given the full pay and allowances to which he would have been entitled, had he not been dismissed, removed or suspended as the case may be.

(3) In other cases, the Government servant shall be given such proportion of such pay and allowances as such competent allowances are admissible:

Provided that the payment of allowances under clause (2) or clause (3) shall be subject to all other conditions under which such allowances are admissible.

Provided further that such proportion of such pay and allowances shall not be less than the



subsistence and other allowances admissible under Rule 53.

(4) In a case falling under clause (2), the period of absence from duty by shall be treated as a period spent on duty for all Purposes.

(5) In a case falling under clause (3) the period of absence from duty shall not be treated as a period spent on duty, unless such competent authority specifically directs that it shall be so treated for any specified purpose.

Provided that if the Government servant so desired, such authority may direct that the period of absence from duty shall be converted into leave of any kind due and admissible to the Government servant."

20. He also placed reliance on Rule 54 (B) of the Fundamental Rules to show that the Central Government and correspondingly the State Governments have amended the rules in terms of Rule 54(B) of the Fundamental Rules. He also placed reliance on Rule-54(B) (1) that deals with the only issue as to in what manner the period of suspension will be treated, as has been submitted that in the event the Government servant is suspended, is reinstated or would have been so reinstated but for his retirement while under suspension, the competent authority to order reinstatement shall consider and make specific order



with regard to pay and allowances for the period of suspension ending with reinstatement or in the event, the proceeding could not be completed on account of superannuation.

21. He further submits that this type of provision is not there either in the Bihar Service Code or anywhere by way of Statutory provision dealing with the right and entitlement of salary for the suspension period for retired Government servant. In absence of the same, the power cannot be exercised to decide the entitlement of salary or allowance for the period of suspension or in what manner the period will be treated for the purposes of future entitlement.

22. The same view has been reiterated in the case of S.K. Gupta (*supra*).

23. He further submitted that after superannuation, the jural relationship of master and servant does not exist. Further submitted that unless there is a specific provision, to deal with the period prior to retirement, the competent authority cannot have jurisdiction to take away the entitlement of the entire salary pertaining to the period of suspension. He next submitted that in absence of such power the delinquent employee will be entitled to full salary and the entire period of suspension will be



treated to be in service and he will be entitled to the retiral benefits in terms of the Bihar Pension Rules, further submitted that the authority cannot claim the implied power to exercise the jurisdiction and pass an order in absence of specific provision and for that he has placed reliance on the judgment of Calcutta High Court in the case of Bijoy Gopal Sur (supra). It will be relevant to quote paragraph no.16 of the said judgment, which reads as under:-

“16. In the instant case, however, the petitioner was not discharged as under rule 105 but was ordered to be compulsorily retired. The Municipality possesses no power of compulsory retirement. The order, made on April 30, 1954, was thus in excess of the power vested in the Municipality under rule 105. In a case reported in (1) 42 C.W.N. 1186 (Secretary of State vs. Surendranath) Mitter and Sen, JJ. held against the theory of any implied power of punishment of servant, where the rules expressly provided for none. On a parity of reason I hold that there is no implied power of compulsory retirement where the rules provided for none. Then again the order of compulsory retirement was made with retrospective effect, that is to say, with effect from February 3, 1954. This was again bad, because, under rule 105, the power of discharge can take effect only prospectively. For the two reasons given above, the order of the Administrator, dated April 30, 1954, deserves to



be quashed.”

24. It has further been submitted that the power of suspension can be exercised by the competent authority against the Government servant, but in absence of any specific provision specifically dealing with the provision of grant of power of withholding the salary for the suspension period, the delinquent employee will be entitled to salary for the period of suspension.

25. Per contra, learned counsel for the State has submitted that in view of the judgment of Dr. Lakshhmi Narain Singh (supra) it can safely be argued that power conferred under Rule 97 of the Bihar Service Code can be exercised by the Government even after the superannuation of delinquent Government servant, further supplemented his argument placing reliance on the judgment of Jharkhand High Court rendered in the case of *Anant Pandey and Ors. vs. State of Jharkhand and Ors.* reported in *2003 (3) JCR 776 Jhr.* and on the strength of both the arguments, it has been argued that the Government has not only power to exercise the power under Rule-97 of the Bihar Service Code during the subsistence of service, but even after the cessation of service, or on his superannuation, the principle mentioned in Rule-97 will equally applicable in the matter of a



retired Government employee and further submitted that the delinquent Government servant will be entitled to full salary in the event if he has been exonerated or the order of suspension is unjustified as has been mentioned in Rule 97(2) of the Bihar Service Code.

26. Before giving the answer to the questions which have been framed hereinabove, the earlier judgments which have been passed in connection with Rule 97 of the Bihar Service Code by this Court and the Jharkhand High Court are to be taken into consideration. In this connection, it will be appropriate to consider the decision rendered in the case of Dr. Lakshmi Narain Singh (supra) as the facts of the aforesaid case is by and large near to the facts of the present case and for that it will be necessary to advert to the necessary facts of the said case. Dr. Lakshmi Narain Singh superannuated from the service on 31.03.1979 as Civil Assistant Surgeon. Before his retirement, a departmental proceeding was initiated against him and he was put under suspension, was allowed the subsistence allowance in terms of Rule-96 of the Bihar Service Code. Dr. Lakshmi Narain Singh had filed the show-cause and thereafter he was served with another show-cause in reference to second proceeding for the same charges. On receipt of the inquiry report, the



Government has found Dr. Lakshmi Narain Singh to be guilty and imposed the punishment of “censure, stoppage of three increments, his absence from the duty for about a year and 10 months to be treated as break in service with consequential financial loss and adverse entries in the service book” upon him. Thereafter, another notice was served on him mentioning, besides the earlier allegations, and asking him to show-cause as to why he should not be discharged from the service, the same was replied by Dr. Lakshmi Narain Singh. Few further queries were made from Dr. Lakshmi Narain Singh, thus the matter remained in correspondence for considerable period, no final order was passed. Later on, a fresh notice starting a separate departmental proceeding was issued, but this proceeding also remained in a dormant state. Dr. Lakshmi Narain Singh was to superannuate from the service by the end of March, 1979 and in February, 1979 probably realizing that fresh proceeding which had been initiated could not be concluded before his retirement, his order of suspension was withdrawn, accordingly, he was communicated the decision regarding payment of salary for the period of suspension would be taken up at a later stage after factual examination of the case. The petitioner, thus, joined on 27.03.1979 and retired after three days, leading to him claiming



full salary for the period of his suspension. On failure to make payment, he approached this Court at the first instance, which was remanded back for consideration by the appropriate authority. On the representation, final decision was taken holding that he was found guilty of disobedience and therefore, decision was taken to reimpose the punishment which was earlier inflicted upon him. It was further communicated that he will not be entitled to any additional payment beyond the subsistence allowance which he had already drawn, and for the period he was under suspension, will be treated to have been in continuous service only for the purpose of pension. On conflict of view, on the issue of payment of full salary for the period of suspension, the matter was referred to the Single Judge and the learned Single Judge after analyzing the provisions of Rule 97 of the Bihar Service Code in extenso has held that Sub-Rule 2 and 3 of Rule-97 is divided in two categories; first where the competent authority is of the opinion that the Government servant has been fully exonerated or in the case the suspension, it was wholly unjustified depriving full payment, and second category covers all other cases. In the first case, the Government servant is entitled to full pay and allowance, while in the second, the competent authority would take decision as to the



entitlement of quantum of payment of salary and allowance for the period of suspension. While taking decision in the matter falling under the category of Sub-Rule 3 of Rule-97, the competent authority would consider the facts and circumstances of the case. Rule-97(4) makes it very clear that in a case falling under Clause-2 the period of absence of duty will be treated as a period spent on duty for all purposes, but it is not the same as Sub-rule 5 of Rule-97 stipulates that those cases falling under Clause-3 the period of absence from the duty shall not be treated as a period spent on duty unless the competent authority so specifically directs that it shall be so treated for any specified purpose. In this connection, it will be relevant to quote paragraph no.5 of the said judgment, which reads as under:-

“5. The right of a Government servant to get his salary for the period he has been under suspension pending a disciplinary enquiry has to be determined in accordance with Sub-rules (2) and (3) of Rule 97, which are in the following terms :-

“97. (2) Where the authority mentioned in Sub-rule (1), is of opinion that the Government servant has been fully exonerated, or in the case of suspension that it was wholly unjustified, the Government servant shall be given full pay and allowance to which he would



have been entitled, had he not been dismissed, removed or suspended, as the case may be.

(3) In other cases, the Government servant shall be given such proportion of such pay and allowance as such competent authority may prescribe:

Provided that the payment of allowances under Clause (2) or Clause (3) shall be subject to all other conditions under which such allowances are admissible.”

The further question whether the period of his absence from duty should be treated as period spent on duty for all or any specified purpose has been dealt with in Sub-rules (4) and (5) quoted below :-

“97. (4) In a case falling under Clause (2) the period of absence from duty shall be treated as a period spent on 'duty for all purposes.

(5) In a case falling under Clause (3) the period of absence from duty shall not be treated as a period spent on duty unless such competent authority specifically directs that it shall be so treated for any specified purpose :

Provided that if the Government servant so desires such authority may direct that the period of absence from duty shall be converted into leave of any kind due and



admissible to the Government servant.”

The provisions of Sub-rules (2) and (3) indicate that cases in which Government servants have been subjected to disciplinary enquiry are divided, for the question in issue, in two categories: first, where the competent authority is of opinion that the Government servant has been fully exonerated or in the case of suspension it was wholly unjustified; and the second category, in which all other cases are included. In the first case the Government servant is entitled to the full pay and allowance, while in the second, the competent authority has to take a decision as to the proportion of the pay and allowance to be paid to him. It need not be said that while exercising his discretion the competent authority is expected to follow the rule of just and fair play and should, therefore, take into account all factors which may be relevant. The principle laid down by Sub-rules (2) and (3) covers all cases of disciplinary proceeding. It cannot be assumed that the rules were framed to apply only to some of such cases, leaving the other cases uncovered. While deciding the question as to whether a given case comes under the first category or the second, it has to be appreciated that the second category is residuary in nature, and if a case is held to be not included in the first one, it must be deemed to belong to the second. The further question in regard to cases of the second category has to be answered with reference to Sub-rule (5).”



27. This Court would also like to consider the judgment of Jharkhand High Court rendered in the case of Anant Pandey (Supra) where also the question arose what will be the true construction and interpretation of Rule-97 of the Bihar Service Code. In that case the petitioner, namely, Anant Pandey being an accused of Fooder Scam was suspended, an F.I.R. was also lodged against him. While under suspension, he superannuated from the service on reaching the age of superannuation. The question which arose for consideration before the Jharkhand High Court is as follows:-

“Whether an employee of the State of Jharkhand under suspension would get automatically exonerated from the charges and is entitled for full salary of the period of suspension if no final order is passed in the departmental proceeding during the service period and the delinquent retires while under suspension.”

Second part of the question is not very much relevant for consideration in the present case.

The Jharkhand High Court has considered the judgment of Dr. Lakshmi Narain Singh (supra) as well as the



order passed by the Single Judge in the case of Smt. Vidya Sinha (present case) and ultimately in paragraph no.17, the question was answered in the following term:-

“(i) An employee of the State Government under suspension is not exonerated from the charges automatically on retirement as the proceeding deemed to be a proceeding under Rule 43(b) of the Pension Rules;

(ii) Immediately on retirement, a suspended Government employee is not entitled for full salary for the period of suspension. The question of payment of salary of the period of suspension shall depend on the final order as may be passed under Rule 43(b) of the Pension Rules on the basis of the finding in the departmental proceeding/or the criminal proceeding.

So, the Jharkhand High Court is of the view that as because a proceeding could not be converted during the service period *ipso facto* the employee will not be entitled to full salary, will be subject to outcome of the proceeding converted under Rule 43(b) of the Bihar Pension Rules.



28. Before dealing with the issue, it will be relevant to examine the provisions of Rule-97 of the Bihar Service Code, which are as follows:-

“97. (1) When a Government servant who has been dismissed, removed or suspended is reinstated, the authority competent to order the reinstatement shall consider and make specific order-

(a) regarding the pay and allowance to be paid to the Government servant for the period of his absence from duty, and

(b) whether or not the said period shall be treated as a period spent on duty.

(2) Where the authority mentioned in Sub-rule (1), is of the opinion that the Government Servant has been fully exonerated, or in the case of suspension, that it was wholly unjustified, the Government servant shall be given full pay and allowance to which he would have been entitled has he not been dismissed, removed or suspended, as the case may be.

(3) In other cases, the Government servant shall be given such proportion of such pay and allowance as such competent authority may prescribe;

Provided that the payment of allowance under Clause (2) or Clause (3) shall be subject to all other conditions under which such allowance are admissible.



(4) In a case falling under Clause (2) the period of absence from duty shall be treated as a period spent on duty for all purposes.

(5) In a case falling under Clause the period of absence from duty shall not be treated as a period spent on duty, unless such competent authority specifically directs that it shall be so treated for any specified purpose;

Provided that if the Government servant so desires such authority may direct that the period of absence from duty shall be converted into leave of any kind due and admissible to the Government servant.”

29. At the same time, the provisions of Rule 43(b) (c) and Rule-99 and 100 of the Bihar Pension Rules, are also relevant to examine. Let us now quote Rule-43(b) and (c), 99 and 100 of the Bihar Pension Rules:-

“Bihar Pension Rules:-

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 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:

Provide 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 Govt. 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.



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).

99. Time passed under suspension pending enquiry into conduct counts, if the suspension is immediately followed by reinstatement, but time passed under suspension adjudged as specific penalty does not count.

100. If a Government servant, who has been suspended, pending enquiry into his conduct, is reinstated, but with forfeiture or any part of his allowances for the period of suspension, this period does not count (save with the special sanction of the Head of the Department), unless the authority who reinstates the Government servant expressly declares at the time that it shall count."

30. Rule-97 (1) is a general provision in the sense that it comprehends the situation when the Government servant is dismissed, removed or suspended, reinstated, the authority competent shall pass the order of reinstatement and make specific order regarding payment of salary and allowances as



well as the period of suspension shall be treated to be spent on duty or not. In Rule-97, three contingencies have been stipulated; one is dismissal, second is removal and third is suspension, in the event of reinstatement the question of payment of subsistence allowance will be taken into consideration by the authority. Let us examine the situation, the Government servant has been suspended during the proceeding, later on, the suspension order was revoked, finally either the competent authority dropped the proceeding or the proceeding terminated on account of superannuation. Rule- 97 (2) deals with the situation when the Government servant is fully exonerated in the departmental proceeding or in case of suspension, which was found wholly unjustified, in such circumstance, straightway it has been held that he will be entitled to full pay and allowances to which he would have been entitled has he not been dismissed, removed or suspended, as the case may be, but in the event that person is not fully exonerated or suspension was not found to be unjustified, in such circumstances, the competent authority will decide what portion of pay and allowances will be paid to him. Clause- 4 stipulates that the case which is falling under Clause-2 of Rule-97, the period of absence from the duty shall be treated to be the



period spent on duty for all purposes, but the case which falls under Rule 97(5) the period of absence from the duty shall not be treated to be the period spent on duty, unless such competent authority specifically directs that it shall be so treated in such particular manner and purpose. This Clause plays a very important role in the matter of deciding the entitlement of entire salary for suspension period as well as in what manner the period under suspension will be treated in the matter of entitlement of Government servant in relation to break in service, which may ultimately effect entitlement of pensionary benefit and incidental reliefs.

31. Rule-43(b) of the Bihar Pension Rules stipulates that in the event of a departmental proceeding or judicial proceeding, the person is found guilty of grave misconduct or is found to have caused pecuniary loss to the Government by misconduct or negligence, in that event the disciplinary authority will have a jurisdiction to take decision with regard to entitlement of benefit arising from Bihar Pension Rules and Rule-43(c) which has recently been inserted specially stipulates that during the period of a departmental proceeding or a criminal proceeding the Government servant will be entitled to 90% provisional pension. So, Rule-43(b) empowers the



competent authority to convert the departmental proceeding which was initiated before superannuation into a proceeding under Rule- 43(b) of the Bihar Pension Rules, as also it envisages continuation of departmental proceeding for the purposes of proving of the charges against the Government servant.

32. Rule-99 and 100 of the Bihar Pension Rules provides, time spent under suspension pending inquiry will be taken into account, if the suspension is immediately followed by reinstatement, but time spent under suspension has been held to be penalty, would not be counted. In a situation when the Government servant is suspended, pending inquiry into his conduct, is reinstated, but with forfeiture of any part of his allowances for the period of suspension, this period would not be counted, save and except with the special sanction of the head of the department, and unless the authority who reinstates the Government servant expressly declares, the suspension period shall be counted. So, Rule-99 and Rule-100 are dealing with the situation which has been mentioned in Rule-97(2) and (3) as well as Rule-100 specially empowers the competent authority even after retirement, he will have a jurisdiction to decide the entitlement of benefit for the period under suspension



pending departmental inquiry. Rule-99 and 100 of the Bihar Pension rules, itself recognizes the power of the disciplinary authority to take a decision with respect to the period the person has been put under suspension. It can be considered from a different angle, just for example, if a person has been dismissed from the service on the last date of his retirement and the competent authority has taken a decision that he will not be entitled to any benefit for the period under suspension in terms of the allowances as well as treated the period of suspension as break in service. On appeal, the appellate authority sets aside the order on technical ground, i.e. while holding the inquiry it was found that fairness of inquiry has not been maintained, the principles of natural justice have been violated, in that event, if the power of the competent authority is not recognized, it will lead to travesty of justice and would cause very serious consequences in the manner that the competent authority will be bereft of power to consider in what manner the period of suspension will be treated either in terms of the salary or in terms of his continuation in service as Rule-97(5) specially stipulates that the period of suspension will be treated to be break in service unless the competent authority specifically directs that it shall be so treated for any specific purposes. This



view is supported from the judgment as has been mentioned hereinabove.

33. The aforesaid view is fortified from the recent judgment of the Hon'ble Supreme Court rendered in the case of State of *Jharkhand and Anr. vs. Amresh Narayan Sinha* reported in *2019(3) PLJR 329 (S.C.)*, wherein Amresh Narayan Sinha was placed under suspension and was informed about the initiation of departmental proceeding. The subsistence allowance which was paid initially at the rate of 50% was increased to 75%. The departmental proceeding was kept in abeyance pending the criminal proceeding. The prosecution has filed the charge-sheet and cognizance was taken. Thereupon, a Writ Petition was filed, the learned Single Judge directed the Government to take a decision with respect to the payment of full salary for the period of suspension irrespective of the pendency of the criminal case. This view was affirmed by the Division Bench, placing reliance on Rule 97 and held that Amresh Narayan Sinha is entitled to fully pay and allowances upon the revocation of his suspension, even if the departmental proceeding is pending against him. The Hon'ble Supreme Court has taken a different view having held that where the authority concludes that the suspension was wholly unjustified, the



Government servant shall be given full pay and allowances as if the order of suspension had not been passed. It has further been held that the High Court misconstrued the provisions of Rule 97, gave direction for payment of full salary and allowance as a consequence of the suspension being revoked. The disciplinary proceedings have been kept in abeyance pending the conclusion of the criminal trial. It is only after the conclusion of the departmental inquiry that the competent authority will have to decide in terms of Rule 97 how the period of suspension should be treated and whether it is liable to be treated as a period spent on duty. The decision will be taken on the pay and allowances which should be allowed. Hence, the directions of the High Court at this stage were contrary to Rule 97.

34. It will be relevant to quote paragraph no.9 of the said judgment, which is as follows:-

“9. Sub-rule (1) of Rule 97 indicates that where a government servant is suspended, the authority competent to order the reinstatement has to consider and make a specific order regarding the pay and allowances for the period of absence from duty and on whether the period shall be treated as a period spent on duty. Sub-rule (2) indicates that where the authority concludes that the suspension was "wholly



unjustified", the government servant shall be given full pay and allowances as if the order of suspension had not been passed. The High Court misconstrued the provisions of Rule 97 in coming to the conclusion that full pay and allowances must necessarily follow as a consequence of the suspension being revoked. This construction is contrary to the plain terms of Rule 97 as extracted above. The disciplinary proceedings have been held in abeyance pending the conclusion of the criminal trial. It is only after the conclusion of the departmental inquiry that the competent authority will have to decide, in terms of Rule 97, how the period of suspension should be treated and whether it is liable to be treated as a period spent on duty. A decision will be taken on the pay and allowances which should be allowed. The directions which were issued by the High Court at this stage were hence contrary to Rule 97."

35. In view of aforesaid discussions, it becomes amply clear that the competent authority has inherent power and jurisdiction to deal with situation in what manner the period of suspension would be treated in terms of break in service or will be treated as spent on duty, consequently, it has the power to decide the entitlement of full salary taking aid of the principles mentioned in Rule-97 of the Bihar Service Code.

36. As has been explained hereinabove, Rule-99 and



100 of the Bihar Pension Rules was never brought to notice in the earlier proceeding and after conjoint reading of Rule-97 of the Bihar Service Code read with Rule-43(b) (c), 99 and 100 of the Bihar Pension Rules, I am of the opinion that even after superannuation, in what manner the period of suspension will be considered, power lies within the domain of the competent authority as per the guidelines of Rule-97 of the Bihar Service Code. The proceeding after superannuation, with respect to entitlement of full salary, is akin to the proceeding of Rule- 97 of the Bihar Service Code, is not a penalty proceeding, but nevertheless is penal in nature, requires notice or show-cause, whereupon the competent authority would decide entitlement of full salary, after considering explanation, if any, filed by the delinquent Government servant.

37. Incidental, but important point has been raised by Mr. Mauli, learned advocate, who has submitted that the judgment of Dr. Lakshmi Narain Singh (supra) is a judgment of three Judges Bench as after difference of opinion the matter was referred to the third Judge, so it will be treated to be a Larger Bench Judgment of three judges and has placed reliance on Clause-28 of the Letters Patent of Patna High Court, which is as follows:-



“28. Single Judges and Division Courts. - And we hereby declare that any function which is hereby directed to be performed by the High court of Judicature at Patna, in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court, thereof, appointed or constituted for such purpose in pursuance of section one hundred and eight of the Government of India Act, 1915; and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there be a majority, but, if the Judges be equally divided, they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it.”

38. He further placed reliance on Clause-12 of Chapter-2 and Clause-1 of Chapter-5 side by side Section 392 of the Code of Criminal Procedure and Section 98 of the Code of Civil Procedure, which are as follows:-

“Clause-12 of Chapter-II. A Full Bench shall be a Bench of any number not less than three Judges.

“Clause- 1 of Chapter V. Whenever a Division



Bench desires and the Chief Justice consents that any case shall be referred to a Full Bench, or whenever in any case a Division Bench differs from any other division Bench upon a point of law or usage having the force of law, such case shall be referred for decision by a Full bench.”

“Section 392 of Code of Criminal Procedure. Where Judges of Court of Appeal are equally divided:- *When an appeal under this Chapter is heard by a High Court before a Bench of Judges and they are divided in opinion, the appeal, with their opinions, shall be laid before another Judge of that Court, and that Judge, after such hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow that opinion:*

Provided that if one of the Judges constituting the Bench, or, where the appeal is laid before another Judge under this section, that Judge, so requires, the appeal shall be re-heard and decided by a larger Bench of Judges.”

“Section 98 of Code of Civil Procedure. Decision where appeal heard by two or more Judges:- *(1) Where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges.*

(2) Where there is no such majority which



concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed:

Provided that where the Bench hearing the appeal is [composed of two or other even number of Judges belonging to a Court consisting of more Judges than those constituting the Bench], and the Judges composing the Bench differ in opinion on a point of law, they may state the point of law upon which they differ and the appeal shall then be heard upon that point only by one or more of the other Judges, and such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal, including those who first heard it.

(3) Nothing in this section shall be deemed to alter or otherwise affect any provision of the letters to patent of any High Court.”

39. By and large dealing with an identical situation, in the event of conflict of view of two Judge of the Bench, the matter is referred to third Judge under Clause-28 of the Letters Patent of Patna High Court and the issue is to be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it, which is similar to the provision of Section 98 of the Code of Civil Procedure, but in Section 392 of the Code of Criminal



Procedure, the opinion of the third Judge will be the final opinion irrespective of the opinion of members of the earlier Bench. A Full Bench shall be a Bench of any number not less than three Judges. Clause-28 of the Letters Patent of Patna High Court talks about the majority of the opinion in terms of the Judges, who have heard the case including those who first heard the matter earlier, but does not talk of final judgment.

40. In my view, the Full Bench is constituted by number of judges sitting and hearing, in a proceeding, it cannot be conceived idea to split up the Bench, may be as per Clause-28 of the Letters Patent of Patna High Court the view of the majority of the Judges will govern the field but in the event it is heard by third Judge, it will not be treated to be the judgment of three Judges Bench unless it is constituted in terms of Clause-12 of Chapter-II of the Patna High Court Rules.

41. On conclusion of argument, the case was reserved for judgment. However, Mr. Mrigank Mauli, mentioned for further hearing of the case as he could lay his hand on certain judgments of different High Courts, accordingly, the case was listed under the heading “To Be Mentioned”. Both sides have been heard at full length on the question as to whether judgment of Dr. Lakshmi Narain Singh (supra) is a Full Bench judgment



or Single Bench judgment.

42. Whether the status of a judgment will be treated to be that of Single Bench Judgment, Division Bench Judgment or Full Bench judgment, on reference to the third Judge, who gives his opinion concurring with the view of one of the members of the Division Bench, came for consideration before the Lahore High Court in the case of *The Royal Calcutta Turf Club through its Acting Secretary Mr. D. J. Leckle vs. Kishan Chand Manchanda*, reported in *AIR 1943 Lah. 84*, in which the question has been formulated in the following manner:-

“1. When a point is referred to a 3rd Judge under Clause 26 of the Letters Patent on a difference of opinion between the two judges hearing the appeal can that 3rd Judge pronounce the decision of the whole appeal according to his decision on that point or must he return his finding on that point to the original Bench for them to pronounce the decision of the appeal.

2. In either case is the decree that of-

- (a) the original Bench, or
- (b) the third Judge, or
- (c) all three Judge, or



(d) the two who have agreed.

43. The facts of that case are that a suit was filed for declaration and injunction instituted by Mr. Manchanda against the Royal Calcutta Turf Club and the Lahore Race Club. The Trial Judge held that though the Lahore Court has jurisdiction but, the plaint did not disclose a cause of action and accordingly, dismissed the suit. On first appeal, the learned Senior Subordinate Judge decided that the plaint discloses the cause of action against both defendants, he accordingly, accepted the appeal and remanded the case to the trial Court for decision on merits. On second appeal, the decision was affirmed by the learned Single Judge. The defendants preferred two separate appeals under the Letters Patent, the Division Bench differed on the question whether the plaint discloses a cause of action. Mr. Justice Tek Chand was of the opinion that the decision of the learned Single Judge must be maintained and the appeal must be dismissed, whereas Mr. Justice Blacker was of the opinion that the plaint discloses no cause of action and that the appeal should be accepted and the order of the Trial Court is required to be restored. In such circumstance, the matter was referred to the third Judge in terms of Clause- 26 of the Letters Patent, the third Judge considered the judgment of Allahabad High Court and



other High Courts and the practice in Allahabad High Court, in such cases, is for the referee Judge to return his opinion to the Bench concerned for pronouncement of judgment whereas the practice in the Lahore High Court is that, on difference of opinion, when the matter is referred to the third Judge, he is not required to return the opinion arrived at by him, but pronounce the judgment, but in the aforesaid case, the Court has recorded that the practice which has been narrated in these cases was not judicially considered as to whether the final decision should be that of the referee Bench or whether the referee Bench should return his finding to the original Bench and specifically formulated the question in the following manner:-

“From this analysis of cases of this High Court, cited before us it will appear that in no case has it been judicially considered whether the final decision should be that of the referee Bench or whether the referee Bench should return the case for pronouncement of order to the referring Bench.”

44. After due deliberation, the answer has been given in the following manner:-

“My answer, therefore, to the first question referred



to the Full Bench is that the third or referee Judge should return his finding on the point of difference to the referring Bench for it to pronounce the decision of the appeal.”

45. Taking note of the fact that Clause 26 of the Letters Patent postulates that on reference the point is to be decided according to the opinion of the majority, even if the decision on that point is to be given by the referee Judge, it cannot be held that the point should be regarded as synonymous with the whole appeal and on analysis and on consideration, the Lahore High Court held that it will be referable that when the Division Bench differs on a particular point and the same is referred to the third Judge, the probity lies that the third Judge gives his opinion and would remand the same to the referee Judge, who will actually pronounce the judgment, hence, in terms of Lahore High Court judge, it will be a Division Bench Judgment.

46. Identical issue came up for consideration in Calcutta High Court in the case of *Shivani Properties Private Limited vs. United Bank of India*, reported in *CALLT - 2014, volume-3, 465* and the issue was decided under Clause-36 of the Letters Patent, which is identical to the provision of Clause-28 of the Letters Patent of Patna High Court. In that case also, upon



a difference of opinion in a Division Bench regarding fixation of actual rent with respect to the suit premises, the matter was referred to the third Judge for its opinion. In that case, the scope of Clause-36 of the Letters Patent was considered. It has been held that it is evident that upon there being a difference of opinion of the Judges of a Bench, comprising an even number of Judges, a reference shall be made only to the extent of the difference and such aspect shall be placed before another Judge or a Bench of more than one Judge, provided that the differing Judges are not party to any Bench taking up the reference. The ultimate decision on the relevant aspect would be the majority view thereon. But, the Court has further modified in the manner that in practice, upon there being a difference of opinion in a two-Judges Bench, the point of difference is referred to a third Judge to concur with the opinion of one of the two original Judges for a majority view being obtained on the point of difference. If there are only two possible answers to a question and there is a difference of opinion in a two-Judge Bench, the reference to a third Judge would suffice to achieve the majority view on the point. However, on the point of difference, the majority opinion may not be achieved upon a reference being made to a third Judge for it would only be a third opinion as



having held that in the case of difference of opinion on the quantum of rent was referred to the third Judge and the third Judge instead of concurring with either of the two members of the Division Bench, given a third opinion and held that highest common factor in arithmetic would be taken for fixation of rent. In the aforesaid case, the Court has not gone into the issue as to whether it will be a judgment of Single Bench, Division Bench or it will be a judgment of Full Bench.

47. In Delhi High Court the issue in connection with Section 259 of the Income Tax Act, which is similar to Clause-28 of the Letters Patent of Patna High Court, came for consideration in the case of *P.C. Puri vs. The Commissioner of Income Tax, New Delhi*, reported in *ILR (Delhi) 134*. In that case also, the reference was made under Section 259 of the Income Tax Act, the matter was being heard by the Division Bench, but they drew conflict of opinion and reference was made to the third Judge in terms of Section 259 of the Income Tax Act. Clause-2 postulates as follows:-

“2. Where there is no such majority, the Judges shall state the point of law upon which they differ, and the case shall then be heard upon that point only by one or more of the other judges of the High Court,



and such point shall be decided according to the opinion of the majority of the judges who have heard the case including those who first heard it.”

48. In paragraph no.9 of the said judgment, it has been held that there is no difference, really speaking, between a full Bench of three Judges sitting together and this method of reference to the third Judge in the case of a difference of opinion between the two judges. Whether the first method is adopted or the second, “opinion of the majority” will be basis. In that case, the reference was made to a third Judge to ascertain his opinion. His is the deciding voice and the third Judge is the Full Bench, not alone, but along with two others who first heard the case. If the three judges sit at the same time or at different times and the third Judge hears the matter later on, a difference of opinion does not make much difference. It will be relevant to quote paragraph no.9 of the said judgment, which reads as under:-

“9. There is no difference, really speaking, between a full bench of three judges sitting together and this method of referring to the third judge in the case of a difference of opinion between the two judges. Whether the first method is adopted or the second, "opinion of the majority" will be decisive. In this case there is a formal reference to a third judge to ascertain his



opinion. His is the deciding voice. He turns the scales. The third judge is the full bench. Not alone. But along with two others who first heard the case. Whether the three judges sit at the same time or at different times-two at one time, and the third hearing the matter later on a difference of opinion-does not make much difference. As has happened in this case, the two judges have differed. So the case has come to me, the third judge. The two judges have expressed their opinion. I, am now called upon to give my opinion. The opinion of the majority will prevail. All that happens is that the third is segregated from the two and does not sit with them. He comes in later on when there is a difference of opinion between them. In all cases it is the theory of numbers which is the foundation of the doctrine of stare decisis. Majority is a term signifying the greater number. Counting of heads underlies the theory' of judicial precedents as in any majority decision. The constitutional requirement of a constitution court of five judges is based on this theory. Similarly the Code of Civil Procedure of 1908 enacts that in case of difference of opinion the matter has to be referred to a third judge. (See Section 98, Civil Procedure Code.). In my opinion the reference was correctly made to me as the third judge."

49. The view that has been taken by the Delhi High Court is not conceivable in the context of Patna High Court



Rules on the ground that the strength of the Bench is decided by the number of Judges sitting together in one transaction and not by a split up Bench would constitute the number of Judges. In case of three Judges or two judges, it will be a Full Bench judgment or the Division Bench judgment respectively, but in case of difference of opinion in a Division Bench and the matter being referred to the third Judge for his opinion, in our view, that cannot constitute a Full Bench judgment. A split of Bench cannot be said to be a Full Bench judgment, but a Full Bench means when three judges sit together and hear the case in one transaction and decide the same.

50. In Bombay High Court a peculiar situation arose in the case of *Vasant Ganu Patil of Thane vs. University of Mumbai* reported in *2014 SCC OnLine Bom. 1855 = (2015) 1 AIR Mom R 576*. In this case also, on difference of opinion in a Division Bench, the matter was referred to the third Judge under Clause- 36 of the Letters Patent, but the third Judge did not give his clean opinion. The matter was placed before the Division Bench presided over by the Chief Justice and Justice Godbole. The Union of India has submitted that the Single Judge has not given clear opinion whether the view of the Chief Justice was correct or the view of another member, namely, Justice Godbole



was, hence, the matter was again referred to the Division Bench, as Division Bench found the answer was not clear as to which view was correct, hence it referred the matter to another Division Bench to test the correctness of its view. After reference, the petitioner amended the petition, added several fresh grounds of challenge, which traversed beyond the points of reference. The question was raised as to whether the Bench, which has been assigned the matter on reference would consider the additional points which were not point of reference, but added by way of filing amendment petition. After detailed discussion, it has been held that referee Judge will not have jurisdiction to give his opinion beyond the points referred, additional points raised would not be decided by referee Judge, in the manner that Clause- 36 of the Letters Patent provides for resolution of difference of opinion between the Judges of the referring Court. It will be relevant to quote paragraph nos. 25, 26 and 32 of the aforesaid judgment, which reads as under:-

“25. It, therefore, follows that the Judges hearing the reference under clause 36 are required to express their opinion upon the points of difference formulated by the referral Judges and not on the points, which were not raised or were raised and dealt with by the referral Judges. This proposition has been clearly articulated by



the full bench of Lahore High Court in Royal Calcutta Turf Club through Acting Secretary D.J. Leckie v. Lala Kishan Chand Manchanda [AIR (30) 1943 Lahore 84] as under:-

“.....Even if the jurisdiction of the referee Judge is, therefore, confined to a decision of the point or points of difference it must follow that the jurisdiction for deciding the whole appeal must remain with the referring Bench. But I would go further. It appears to be doubtful whether even the referee Judge has jurisdiction to decide the point of difference. The clause says that the appeal shall be heard upon that point by the referee Bench and the point shall be decided according to the opinion. It does not specifically lay down that the point shall be decided by the referee Judge, as the Legislature could very easily have stated if it had been the intention to transfer jurisdiction for deciding the point, from the Division Bench seized of the case, to the referee Judge. It appears to me, therefore, that the jurisdiction for the decision not only of the appeal as a whole, but also of the point of difference, remains with the referring Bench; and all that the clause lays down is a method by which in the case of a difference of opinion, the difficulty is to be resolved. On this view, it would be the duty of the referee Judge to express an opinion on the point or points of difference and to return the case with his opinion to the Division Bench seized of the case which must pronounce the final judgment, according to the



method provided by cl. 26.”

26. This is an Authority of the proposition that the jurisdiction of the judges deciding the reference is restricted to expressing an opinion on the point of difference and the jurisdiction for deciding all the points, including the points of difference vests with the referral bench. These principles have been reiterated in the case of Amalgamated Coalfields Ltd. Calcutta v. State of Madhya Pradesh [AIR 1967 Madhya Pradesh 56].

32. The result of the above discussion can, therefore, be summed up as:-

(i) Clause 36 of the Letters Patent provides for a mechanism to resolve the difference of opinion between the Judges of the referring Court.

(ii) The differing judges are required to formulate points of difference.

(iii) the Judges to whom the reference is made can only express their opinion on the points so formulated.

(iii) the jurisdiction of deciding the points as per the majority opinion vests with the referral bench.”

51. In Madhya Pradesh High Court in the case of ***Firm Ladhuram Rameshwardayal vs. Krishi Upaj Mandi Samiti Shivpuri and Ors.*** reported in ***1977 SCC OnLine MP 33***, the



Division Bench has arrived to a difference of opinion, on that account, the matter was referred to the third Bench and after the decision when the matter again went back for final pronouncement one of the members of the referring Bench was not available. The question arose as to whether the new Division Bench would have jurisdiction to adjudicate, decide and pronounce the majority view on the point referred, the Court held, mere pronouncement of final opinion by any Division Bench, consisting the old member or new member, would not effect jurisdiction to pronounce the majority opinion after return of the opinion of the referee Judge.

52. The facts of that case are that Firm Ladhuram Rameshwardayal sought a relief to quash the Electoral Roll and also to quash the Election programme in connection with an election to the Agriculture Market Committee of Krishi Upaj Mandi Samiti, Shivpuri. The Division Bench comprising of Justice Raina and justice Bhachawat, heard the matter, but they differed. In the opinion of justice Raina, the petition was to be dismissed and in the opinion of justice Bhachawat the petition was to be allowed. As per Rule-11 of Chapter 1 of the Madhya Pradesh High Court Rules, Justice Lodha was appointed as third Judge to give his opinion, he partly allowed the petition,



quashed the Electoral Roll and directed to prepare a fresh Electoral Roll in accordance with law, on the lines indicated by him and consequently, the election held during that period was quashed. The matter was referred to the Chief Justice, who constituted a Division Bench comprises of Justice Vyas and Justice Bhachawat as Justice Raina had already joined as Chairman of the Industrial Court, Indore, hence, the matter was placed before that Division Bench, where a question cropped up as to whether that Bench, which had not heard the matter on merit at any stage, could have jurisdiction to decide the case in accordance with the majority opinion of Bench. Both the Judges decided that it requires a hearing by a Larger Bench and the matter was referred to Full Bench, as like Clause- 28, identical provision of Rule-26 in the Letters Patent of the Madhya Pradesh High Court is silent as to which Bench shall discern and declare the majority opinion, as it stipulates the point shall be decided according to the opinion of the majority of the Judges who heard the case including those who have first heard it. The question arose that the word 'decided' ordinarily envisages an application of the mind but, such application of the mind must be restricted to two things only; first, to find out from the three opinions what the majority opinion is and to 'decide' the point



according to the majority opinion; and second, to decide what relief flows from such decision, which relief the Division Bench shall be bound to give to the parties. On interpretation of provision of Rule-26, it is completely reflected that the opinion has to be formed at two stages. At first stage of Division Bench, the two Judges have to record a separate finding on difference of opinion and later on, the third Judge, who has to give his finding approving either of the findings, will be referred back to the Division Bench, all the opinions would be placed side by side to declare majority opinion, may be formal expression of majority view. As the provision of Rule- 26 prescribes that the referee Judge will not give his third opinion apart from the opinion that has been given by two Judges, giving a difference of opinion, as has been held that the third Judge has no jurisdiction to decide any other point. His jurisdiction is limited to the point on which the Division Bench disagreed in opinion. It is that point alone, which is referred to the third Judge for decision and it has been held that if the referee Judge decides apart from the points referred, on which the Judges of Division Bench have not differed or if the referee Judge decides the whole case, that part from his opinion or order or judgment must be read as opinion on the point or points on which the Division Bench were



divided in opinion, the rest to be ignored for want of jurisdiction. By way of clarification, the Court has dealt with this provision by way of giving example, if in an appeal A, B and C are three parties, claiming their title over a piece of land and two Judges of the Division Bench have differed in their opinion, one of them is holding that A is the owner, while the other is holding that B is the owner. In such situation, the matter is referred to the third Judge, he gives his opinion that neither A nor B is the owner, but C is the owner. The Court has taken a view that the third Judge will have to confine his opinion either in favour of A or in favour of B, ultimately, the Court has held that the third Judge will confine his opinion on the point which has been referred, he does not have jurisdiction to decide new point nor he can enter into the point on which the Judges of the Division Bench were not divided in opinion, if the third Judge express any opinion on other points and finally decides the case as a whole, the later part of his opinion has to be ignored.

53. While deciding the matter, the Full Bench has taken into consideration the judgment of the Lahore High Court rendered in the case of *Royal Calcutta Turf Club (supra)* and quoted the relevant portion of that judgment to understand the real matrix of the case. It will be relevant to quote certain



portion of paragraph no.11 and paragraph nos. 18, 19, 20, 21 and 22 of the judgment, which are as follows:-

“11. The third Judge has no jurisdiction to decide any other point. His jurisdiction is limited to the point on which the Judges of the Division Bench are divided in opinion. It is that point alone which is referred to the third Judge for decision. In Clause 26 of the Letters Patent the word 'point' is used everywhere. It is true that in Rule 11 of Chapter I of the High Court Rules the expression employed is 'to deal with the matter' but it is plain enough that the word 'matter' here means the point and not the whole case. The referee Judge has no jurisdiction to enter into any question or point on which the Judges who first heard the case did not differ, and the referee Judge has no jurisdiction to decide the whole case. It must, therefore, be said that even if the referring Division Bench directs that the 'case be referred to a third Judge', the jurisdiction of the third Judge cannot be enlarged by the Division Bench. Clause 26 of the Letters Patent itself confines it to the 'point' on which there has been difference of opinion between the two Judges. It follows that if the referee Judge decides any point on which the Judges of the Division Bench did not differ, or if referee Judge decides the whole case, that part of his opinion, or order or judgment (howsoever the opinion may be styled) must be read as opinion on the point or points on which the



Judges of the Division Bench were divided in opinion. The rest is to be ignored, for want of jurisdiction, by application of the principle of Kiran Singh v. Chaman Paswan, AIR 1954 SC 340. See Amalgamated Coalfields Ltd. v. State of M. P., AIR 1967 MP 56 ; 1966 Jab LJ 884 (Para 58 at p. 917) : 1966 MP LJ 842 where it is observed as follows (at p. 74 of AIR)...

18. Suppose in a civil appeal between A as the appellant, and B and C as respondents, each one of the three parties claims title to the land and the two Judges of the Division Bench of the High Court differ in their opinion, one of them holding that A is the owner, while the other holding that B is the owner. In such a case, if the third Judge is of the opinion that neither A nor B is the owner, but C is the owner, it will have to be said that the opinion of the third is without jurisdiction. He has to confine his opinion to the difference of opinion whether A is the owner or B.

19. We would now advert to the question whether after the opinion of the third Judge is recorded, it is necessary that the case must be placed before the same Bench which first heard it. There is no such restriction either in Rule 11, Chapter I of the High Court Rules, or in Clause 26 of the Letters Patent.

20. But as a matter of propriety it should be laid before the same Bench which first heard it. However, if that Bench is not available or if it is



not convenient for that Bench to sit, for instance in our High Court, where Judges who sat in a Division Bench at one of the seats of the High Court may be sitting at another seat when the matter is returned by the third Judge, it is not necessary that the matter should go before the same Bench for deciding the point according to the opinion of the majority.

21. As already said, after the opinion of the third judge is returned, it is more or less a matter of formality to pronounce the decision of the Court which has got to be according to the opinion of the majority, consisting of the third Judge and the Judges of the Division Bench which first heard it.

22. In the result, we answer the two questions referred to us as follows:--

(1) When on account of difference of opinion between two Judges constituting a Division Bench, a matter is referred to a third Judge nominated by the Chief Justice under Rule 11 of Chapter I of the High Court Rules, and the third Judge, after formulating the point or points of difference of the Judges of the Division Bench, returns his opinion under Clause 26 of the Letters Patent, any other Division Bench of which one or both of the Judges were not members of the Division Bench which originally heard the case, can render the decision in accordance with the majority of the opinion of the Judges of the



referring Bench and the referee Bench.

(2) When on a difference of opinion between two Judges constituting a Division Bench, a matter is referred to a third Judge, the third Judge can, only express his 'opinion' on the 'point' on which the Judges are divided in opinion. However, the third Judge cannot 'decide' that point. (He has to leave to the Division Bench to 'decide' the point as directed under Clause 26 of the Letters Patent). Nor can he enter into any other point on which the Judges of the Division Bench were not divided in opinion. If the third Judge expresses his opinion on any other point or finally decides the case as a whole, the latter part of his opinion (be it styled as 'order' or 'judgment') has to be ignored as without jurisdiction. After the third Judge has recorded his opinion; the case must be laid before the Division Bench for deciding the point or points which were referred to the third Judge according to the method provided by Clause 26 of the Letters Patent and it is at this stage that a Division Bench will finally decide the case before it. It is not the requirement of law that the case must be laid before the same Division Bench which first heard it, after it is returned by the third Judge. When one of the Judges constituting the Division Bench which first heard the case, has retired or is not otherwise available, the Chief Justice can



constitute another Division Bench to decide the case according to the method provided by Clause 26 of the Letters Patent.”

54. So, the crux of the Full Bench judgment is that the referee Judge will confine his consideration with respect to the issue which has been framed and referred, the third Judge has to choose either of the opinion given by the members of the Division Bench, who differed with each other and he cannot give his separate opinion apart from the opinion given by the Division Bench, inasmuch as, he cannot give his opinion on the point which has not been referred and he cannot decide the case as a whole, but after recording his opinion, will return the same to the Division Bench, who will declare the majority of the opinion. This aspect will be dealt with by this Court at a later stage.

55. In the case of *Shriram Industrial Enterprises Ltd. vs. the Union of India and Others* reported in *1995 SCC OnLine ALL 647 : AIR 1996 All 135*, the interpretation of identical provision of letters Patent came for consideration before the Full Bench of Allahabad, as in that case two Judges have differed in their opinion on the question of competence of State Legislature to enact U.P. Sheera Niyantiran Adhiniyam



1964. The Hon'ble Chief Justice instead of referring the matter to the third Judge, constituted a Full Bench to answer the point of difference between two Judges. For understanding the real issue involved in that case, certain facts has to be recorded. The Constitutional validity of U.P. Sheera Niyantaran Adhiniyam 1964 was assailed before the Division Bench basically on three grounds. The Judges of the Division Bench delivered a separate opinion, both have concurred in repelling the attack based on Article 19(1) (f) and (g) and Article 301 of the Constitution of India, however, they differed on the third point, one Judge has given his opinion that State Legislature lacked legislative competence to enact Sections 7, 8 and 10 of the Adhiniyam while second Judge was of the opinion that the State Legislature had jurisdiction to legislate and the Adhiniyam was valid. The orders of the writ petition was challenged when both the Judges signed their opinions. On the same day, they passed another order formulating the point of difference and directing the papers to be laid before the Hon'ble Chief Justice for referring the matter to the third Judge. At the initial stage of the proceeding, one of the pertinent questions was raised that when the two Hon'ble Judges delivered the final judgment, one allowing the writ petition and another dismissing the writ



petition and after having been delivered the judgment they became *functus officio* and thereafter they could not have passed the order formulating their point of difference for being decided by another Judge. In that view of the matter, the request was made to hear the whole petition and decide the point accordingly, but the Full Bench has rejected the objection raised having stated that Members of the Division Bench have recorded the point upon which they differed, then the case shall be heard by a Bench of two or more Judges, as may be nominated by the Hon'ble Chief Justice, upon which the reference has been made, shall then be decided according to the majority of the opinion of the Judges, who has heard the case including those who who have first heard it. The Court has arrived to a finding that in fact the Division Bench could not decide the case finally as they have recorded their separate opinion, which they were differing to each other, so that decision will not have a force of law and binding on the parties, will only be an opinion not a judgment. It has further been held that if the two Judges constituting a Division Bench gives contradictory decision or decisions at variance with each other, in law, such decisions cannot be called as judgments as they do not decide any question or issue in the case or proceeding nor do



they decide any of the rights of the parties. In such a situation, the decision so rendered will only be an opinion on the point, but it could not be a judgment at all. In crux, it has been held that there can be no doubt that the proper course for the Judges who have dissented in their respective opinions while hearing a case is not to pass final order either allowing or dismissing the same, but to record their point of difference expressing their opinions. However, it will still be open to them to state the point upon which they have differed even if they have passed final orders. If the point of difference is not stated, it will be for the third Judge or Judges to whom the case is referred to ascertain the same and to give his or their opinion thereon. It was further held that the Full Bench would not decide the whole case, but opinion formed by Full Bench would be returned to referred Judge for final adjudication of the case.

56. It will be proper to quote paragraph nos. 116, 117, 118 and 124 of the said judgment, which read as under:-

“116. These authorities show that if the decision or order does not of its own force bind or affect the rights of the parties, it will only be an opinion and not a judgment.

117. A careful examination of the stand and texts and authorities referred to above shows that



even according to the wider view, leaving aside the stricter or narrower view, an adjudication, in order to constitute a judgment, must decide any question or issue in the case or any of the rights of the parties. Further the form of the adjudication or the language used is not material, what is to be seen is its effect on the suit or proceeding in which it is made.

118. *If that be the real meaning of the word judgment, it follows as a corollary that there can be only one judgment in a case. Two contradictory judgments or judgments in variance with each other will not have the effect of deciding any question or issue in the case or of deciding any of the rights of the parties. It is also plain that such judgments can neither be enforced nor be given effect to. Therefore, if two Judges constituting a Division Bench give contradictory decisions or decisions at variance with each other, in law, such decisions cannot be called as judgments as they do not decide any question or issue in the case or proceeding nor do they decide any of the rights of the parties, the real test being what is the effect of the two decisions on the case or proceedings in which it is made, the language or phraseology used being wholly immaterial having no bearing. In such a situation, the decision so rendered will only amount to opinions of the respective Judges. This principle will, however, not apply where on account of some statutory provisions like Section 98, C.P.C contradictory decisions*



be their own force lead to decision of any question or issue in the case for any of the rights of the parties.

124. There can be no doubt that the proper course for the Judges who have dissented in their respective opinions while hearing a writ petition is not to pass final order either allowing or dismissing the same but to state their point of difference after expressing their opinions. However, it will still be open to them to state the point upon which they have differed even if they have passed final orders. If the point of difference is not stated, it will be for the third Judge (or Judges) to whom the case is referred to ascertain the same and to give his (or their) opinion thereon.”

57. One matter relating to Small Causes Court came for consideration in the case of ***Shekhar Narayan Shetty vs. Madhavlal Pittie and Ors.***, reported in ***2015 (4) Mh. L.J. 687***, which was considering the contextual interpretation of Section 98 of the Civil Procedure Code and it has been held that when the two Judges recorded a difference of opinion and the matter is referred to the third Judge, the third Judge would not give a final verdict, but he can only record his opinion. He cannot decide the case finally nor can decide the point, as the matter is to be decided by the two Judges' Bench. It is only after the



opinion of the third Judge, it placed before the Division Bench, who will make a final declaration. It will be relevant to quote paragraph no.14 of the said judgment, which reads as under:-

“14. In order to become a judgment, it must decide the question or issue in the case or of the rights of the parties. When the Appeal Bench of Small Cause Court disposes an appeal, there can be only one judgment. There cannot be two contradictory judgments. They will not have the effect of authoritatively deciding the case, or deciding any question or issue or any of the rights of the parties. Even if they are styled as judgment, they remain only differing views, to be reconciled after the receipt of the opinion of the third Judge. When the matter is referred to the third Judge, he also cannot give the final verdict, but can only record his opinion. He cannot decide the matter finally nor can decide the point, as the matter is to be decided by the two Judges’ Bench. A third Judge cannot decide the matter as he would be a Single Judge in that respect and cannot decide a matter assigned to a two Judges Bench. It is only after the opinion of third Judge is placed before the Bench, it is two Judges’ bench who will make a final order.”

58. In the case of ***the State of Bihar vs. Ram Ballabh Das Jalan and Another***, reported in ***AIR 1960 Patna 400***, the interpretation of Clause-28 of the Letters Patent came for



consideration before this Court and the Court has held that when the members of the Division Bench are divided in their opinion, in that event, the matter will be placed before the Hon'ble Chief Justice to refer the matter to the Single Judge or Division Bench, whatever he likes and the referee Judge would confine his consideration only to the point of difference, which has been referred for giving his opinion. The opinion of referee Judge and Judges who have heard the case earlier will decide the majority of opinion. The referee Judge will not endeavour to give his opinion on the point which has not been urged before the Division Bench and on which there has been no difference of opinion between them, since it cannot be heard under the above Clause of the Letters Patent by a third Judge, in that case the decision cannot be according to the opinion of the majority of the Judges including those who first heard it. It would be proper to quote relevant portion of paragraph no.7 of the said judgment, which is as follows:-

“7. ... on behalf of the appellant, however, it has been submitted that it is not open to the respondent to urge this point before me because there was no difference of opinion on this point between the Hon'ble Judges of the Division Bench and the jurisdiction of this Bench hearing the appeal under clause 28 of the Letters Patent



of this Court is limited to decide the question on which there is a difference between the two Hon'ble Judges. To me there appears to be much substance in the contention raised by the learned Government Pleader on behalf of the appellant. Clause 28 of the Letters Patent runs as follows:

"And we do hereby declare that any function, which is hereby directed to be performed by the High Court of Judicature at Patna, in the exercise of its original or appellate jurisdiction may be performed by any Judge, or by any Division Court, thereof, appointed or constituted for such purpose in pursuance of Section one hundred and eight of the Government of India Act, 1915; and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decisions to be given on any point, such point shall be decided according to the opinion of the majority of the Judges if there be a majority, but, if the Judges be equally divided they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it".

The above provision makes it perfectly clear



that, if the Judges of the Division Bench are divided in their opinion as to the decision to be given on any point, they shall state that point and the case shall then be heard upon that point by one or more of the other Judges. Therefore, it is only that point on which there has been the difference of opinion between the two learned Judges of the Division Bench which can be heard by me under Clause 28 of the Letters Patent. The latter part of the clause, that the point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it, also makes it perfectly clear that a point which has not been urged before the Division Bench and on which there has been no difference of opinion between them cannot be heard under the above clause of the Letters Patent by a third Judge inasmuch as in that case the decision cannot be according to the opinion of the majority of the Judges including those who first heard it.

In that view of the matter, I do not think the respondent is entitled to urge this point before me. True it is that the point was not urged before the Division Bench because the respondents were not represented by any lawyer to press their case, as stated above, but that cannot be helped. Law does not permit such an argument to be advanced before a Bench hearing an appeal under the above clause of the Letters Patent.” (Emphasis underlined)



59. Identical situation arose in the case of *Smt. Jayanti Devi vs. Srichand Mal Agrawal and Ors.*, reported in *1984 PLJR 852*. In that case also two Judges had recorded a difference of opinion and the matter was referred to the third Judge. As the matter was related to Section 98 of the Code of Civil Procedure preliminary objection was raised that since the point of law upon which the Judges have differed have not been stated by the Bench, hearing of the appeal, as required under the proviso to sub-section (2) of Section 98 of the Civil Procedure Code, the reference to the third Judge itself is illegal. There is no majority opinion of the Judges reversing the decree of the Court below and the same should be deemed to be confirmed. In that case, the Court has made a comparison of Section 98 of the Civil Procedure Code with Clause 28 of the Letters Patent and held that difference of opinion on the question of law will be formulated and referred to the third Judge for his opinion as Section 98 of the Code of Civil Procedure envisaged, the difference of opinion only on the question of law. So, Section 98 stipulates that it is only confined to the opinion on the question of law, upon which two Judges differed, referred to the third Judge who will record his own opinion, remit back and that part will be decided according to the majority opinion, who have



first head the appeal including the referee Judge.

60. In view of the aforesaid, it is very much clear that in the event of difference of opinion between the members of the Division Bench, the Division Bench will record its difference of opinion and on the discretion of the Chief Justice the matter will be referred to the third Judge, either Single or Division Bench and the third Judge will confine his opinion on the point which has been referred and will not embark on the point or points not referred, but in a situation if the third Judge gives an opinion apart from the point referred, I am of the opinion that when the matter again goes to the Division Bench for final pronouncement, the majority of the opinion will be the basis for judgment on the point which was referred. But, it is also made clear that on consideration of judgment of different High Courts, it can safely be recorded that when a single issue or several issues have been raised and on few issues the Division Bench agreed and on certain issues they have differed, that issues on which there is difference, will be referred to the third Judge and the third Judge would give his opinion on the point referred, but will not have a jurisdiction to finally pronounce the judgment between the parties, but the referee Judge has only to record his opinion and remit back the same to



the Division Bench and the Division Bench will formally declare the majority opinion and then the Division Bench will not start a *de novo* hearing on the issue which has already been concluded. The majority opinion is to be culled out and final verdict could be pronounced, as it will be a matter of declaration of final verdict, but if on any point, apart from the reference, the referee Judge gives his opinion on such point, the parties will have a liberty to address the Division Bench on new point which was not subject matter of consideration and the Division Bench will decide the new point and give the final decision on that point.

61. As we have already held that even after superannuation of a Government employee, the Government will have a jurisdiction to examine the entitlement of full salary for the period of suspension, applying the principle of Rule 97 of the Bihar Service Code, which has elaborately been dealt with, this Court in normal circumstance ought to have referred back this case to decide the same on its merit. But, since much time has already been spent, it will not be judicious, prudent and proper to leave the matter undecided on its merit. While deciding the issue on merit, the Court will have to apply the principle of judicial review in the matter of administrative



decision i.e. under what circumstance the Court can interfere with the decision of the authority in administrative action. The basic principle of interference is that the Court would interfere with the action if the same suffers from perversity, patent illegality, irrationality, want of power to take the decision and procedural irregularity. If any act is based on some materials, it cannot be said to be perverse or warrant interference in exercise of extraordinary power of the High Court under judicial review. A decision is vitiated and irrational if the decision is so outrageous that it is in defiance of all logic. If the person acting reasonably, has taken a possible decision having regard to the material available on record, the decision cannot be said to be irrational. Moreover, when the decision apparently suffers from apparent error of law on the face of the decision, which goes to the root of the decision or the error is so apparent, then in such circumstance, the Court will interfere with the order in exercise of power under judicial review. The judicial review would be exercised not against the decision, but the decision making process, of course a patent illegality, perversity and irrationality, which goes to the root of the matter, may vitiate the decision making process itself.



62. Reliance can be placed on the decision of the Hon'ble Supreme Court in the case of ***Sarvepalli Ramaiah (Died) as per LRs and others v. District Collector, Chittoor District and others***, reported in ***AIR 2019 S.C. 1706***. It will be relevant to quote paragraph nos. 37 to 40 of the said judgment, which are as follows:-

“37. Administrative decisions are subject to judicial review under Article 226 of the Constitution, only on grounds of perversity, patent illegality, irrationality, want of power to take the decision and procedural irregularity. Except on these grounds administrative decisions are not interfered with, in exercise of the extra ordinary power of judicial review.

38. In this case, the impugned decision, taken pursuant to orders of Court, was based on some materials. It cannot be said to be perverse, to warrant interference in exercise of the High Court's extra ordinary power of judicial review. A decision is vitiated by irrationality if the decision is so outrageous, that it is in defiance of all logic; when no person acting reasonably could possibly have taken the decision, having regard to the materials on record. The decision in this case is not irrational.

39. A decision may sometimes be set aside and quashed under Article 226 on the ground of illegality. This is when there is an apparent



error of law on the face of the decision, which goes to the root of the decision and/or in other words an apparent error, but for which the decision would have been otherwise.

40. Judicial review under Article 226 is directed, not against the decision, but the decision making process. Of course, a patent illegality and/or error apparent on the face of the decision, which goes to the root of the decision, may vitiate the decision making process. In this case there is no such patent illegality or apparent error. In exercise of power under Article 226, the Court does not sit in appeal over the decision impugned, nor does it adjudicate hotly disputed questions of fact.”

63. Reliance can also be placed on another decision of the Hon’ble Supreme Court rendered in the case of ***Heinz India Private Limited and Another vs. State of Uttar Pradesh and Others***, reported in ***(2012) 5 SCC 442***. Paragraph nos. 60, 62 to 68 of the said judgment are as follows:-

“60. The power of judicial review is neither unqualified nor unlimited. It has its own limitations. The scope and extent of the power that is so very often invoked has been the subject-matter of several judicial pronouncements within and outside the country. When one talks of “judicial review” one is instantly reminded of the classic and oft-quoted



passage from Council of Civil Service Unions, where Lord Diplock summed up the permissible grounds of judicial review thus: (AC pp. 410 D, F-H and 411 A-B)

"... Judicial Review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. ...

By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the State is exercisable.

By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision



falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system... ..

I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

62. *In Tata Cellular v. Union of India (1994) 6 SCC 651, this Court identified the grounds of judicial review of administrative action in the following words : (SCC pp.677-78, para 77)*

"77. The duty of the court is to confine itself to the question of legality. Its concern should be :

- 1. Whether a decision-making authority exceeded its powers?*
- 2. Committed an error of law,*



3. committed a breach of the rules of natural justice,

4. reached a decision which no reasonable tribunal would have reached or,

5. abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under :

(i) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety."

63. *Reference may also be made to the decision of this Court in State of Punjab v. Gurdial Singh (1980) 2 SCC 471 where Krishna Iyer, J. noticed the limitations of judicial review and declared that the power vested in the Superior Courts ought to be exercised with great circumspection and that interference may be permissible only where the exercise of the power*



seems to have been vitiated or is otherwise void on well established grounds. The Court observed: (SCC p. 475, para 8)

"8. ...The court is handcuffed in this jurisdiction and cannot raise its hand against what it thinks is a foolish choice. Wisdom in administrative action is the property of the executive and judicial circumspection keeps the court lock jawed save where the power has been polluted by oblique ends or is otherwise void on well- established grounds. The constitutional balance cannot be upset."

64. There is almost complete unanimity on the principle that judicial review is not so much concerned with the decision itself as much with the decision-making process. (See Chief Constable of North Wales Police v. Evans [1982] 3 All ER 141). As a matter of fact, the juristic basis for such limitation on the exercise of the power of judicial review is that unless the restrictions on the power of the Court are observed, the Courts may themselves under the guise of preventing abuse of power, be guilty of usurping that power.

65. Frankfurter J.'s note of caution in Trop v. Dulles 356 U.S. 86 (1958) is in this regard apposite when he said: (L Ed p.653)

"... All power is, in Madison's phrase, 'of an encroaching nature'. ... Judicial power



is not immune against this human weakness. It also must be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint upon it is self-restraint."

66. That the Court dealing with the exercise of power of judicial review does not substitute its judgment for that of the legislature or executive or their agents as to matters within the province of either, and that the Court does not supplant "the feel of the expert" by its own review, is also fairly well-settled by the decisions of this Court. In all such cases judicial examination is confined to finding out whether the findings of fact have a reasonable basis on evidence and whether such findings are consistent with the laws of the land. [See Union of India v. S.B. Vohra, (2004) 2 SCC 150, Shri Sitaram Sugar Co. Ltd. v. Union of India, (1990) 3 SCC 223, and Thansingh Nathmal and Ors. v. Supdt. of Taxes and Ors., Dhubri, AIR 1964 SC 1419].

67. In Dharangadhra Chemical Works Ltd. v. State of Saurashtra and Ors., AIR 1957 SC 264, this Court held that decision of a Tribunal on a question of fact which it has jurisdiction to determine is not liable to be questioned in proceedings under Article 226 of the Constitution unless it is shown to be totally unsupported by any evidence. To the same effect is the view taken by this Court in Thansingh Nathmal's case (supra) where this Court held



that the High Court does not generally determine questions which require an elaborate examination of evidence to establish the right to enforce which the writ is claimed.

68. *We may while parting with the discussion on the legal dimensions of judicial review refer to the following passage from Reid v. Secretary of State for Scotland [1999] 1 All ER 481, which succinctly sums up the legal proposition that judicial review does not allow the Court of review to examine the evidence with a view to forming its own opinion about the substantial merits of the case. (AC pp. 541 F-H and 542 A)*

"Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decisions itself it may be found to be perverse or irrational or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence,



or of sufficient evidence, to support it, or through account being taken of irrelevant matter, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of evidence."

64. In the present case, the petitioner has challenged the notice vide memo no.488 dated 07.03.1995 as well as memo no.1357 dated 30.06.1995, issued by the Director, Social Welfare, Government of Bihar, Patna. By the memo dated 07.03.1995 show-cause notice was issued to the original writ petitioner with respect to her entitlement to the entire salary for the period of her suspension as per Rule 97 of the Bihar Service Code. It was ultimately held vide memo dated 30.06.1995 that the original writ petitioner will be entitled to only subsistence allowance for the period from 25.08.1993 to 30.04.1993. In the present case, departmental proceeding was initiated for misconduct, inquiry was conducted, in which the petitioner has been found guilty and thereafter the punishment of censure was



inflicted upon the petitioner vide order dated 03.01.1995, but this order was passed after his superannuation, hence in such circumstance, the said order dated 03.01.1995 was interfered with by this Court and the same was set aside as the proceeding was not converted under Section 43(b) of the Bihar Pension Rules, but the fact remains that the order of punishment was passed on the basis of the finding of misconduct, recorded by the Inquiry Officer in which charge nos. 1, 5, 6 and 7 have been found to be proved. This part remained untouched since the petitioner superannuated. That is why the order of punishment was set aside. Considering the broader principle, Clause-2 of Rule-97 stipulates that in the event the Government servant is fully exonerated or suspension order is declared to be wholly unjustified, the retired Government servant will be entitled to fully pay and allowances and those who are not governed under Clause-2 will be governed by Clause-3 read with clause-5 of the Bihar Service Code. Admittedly, the petitioner has not been exonerated as certain charges have been found to be proved, though the order of punishment was set aside on technical grounds. In such circumstance, I would rely on the principle enumerated in Rule-97 read with Clause 3 and 5 of the Bihar Service Code. Hence, I do not find that the action impugned



suffers from procedural illegality or in any manner it can be said, suffers from illegality, irrationality or perversity.

Summation:-

65. In view of the aforesaid discussions, I hold that:-

- (i) The competent authority is empowered to exercise the jurisdiction with regard to entitlement of full salary during the period of suspension for those who have already superannuated from the service, but while considering the claim, the principle mentioned in Rule- 97 of the Bihar Service Code will be invoked.
- (ii) If in the departmental proceeding, the Government servant has been fully exonerated, he will be entitled to full pay and allowances for the period of suspension.
- (iii) In case the departmental proceeding has been initiated but, could not be concluded or was dropped or in any manner does not come to its finality, the delinquent Government employee cannot be deprived of his full pay and allowances on account of non-



completion of the inquiry proceeding or non-submission of the inquiry report.

- (iv) If the departmental proceeding has been rendered infructuous and not converted under Rule 43(b) of the Bihar Pension Rules and no inquiry report has been submitted, in that circumstances, the retired Government servant will be entitled to the entire salary.
- (v) If the departmental proceeding has been initiated, the inquiry proceeding has been concluded and in case any substantive order has been passed after superannuation, which cannot be upheld on account of cession of relationship of master and servant, in that circumstance, the competent authority is empowered to take a decision on the principle of Rule-97(3) read with Rule 97(5) of the Bihar Service Code.
- (vi) If the Government servant has been prosecuted departmentally and the order of punishment has been passed while in service and he has filed an appeal but by that time he



superannuates and the appeal is remanded back on technical ground, in that circumstance, Rule-97 (3) read with Sub-rule (5) will play an important factor for entitlement of full salary during the period of suspension.

- (vii) If the two members of the Division Bench record a difference of opinion, the reference would be made to the third Judge either Single or Division Bench in terms of Clause-28 of the Letters Patent of the Patna High Court and the third Judge will confine his opinion to the point which has been referred and will not embark on the point or points not referred. After recording his/their opinion, the referee Judge will return his/their opinion to the referral Bench in terms of Clause-28 of the Letters Patent of Patna High Court and the point shall be decided according to the opinion of the majority of Judges, who have heard the case including those who first heard, whereupon



the referral Bench would finally pronounce the judgment. In the event, the referee Bench decides the point apart from the point referred for adjudication, the opinion recorded by the referee Bench will be subject matter of discussion before the referral Bench and the decision of the Division Bench will be treated to be the final opinion on that point or points and the same will be treated to be the part of the judgment and in that event, the principle laid down in Clause-28 of the Letters Patent of Patna High Court will not be applicable for deciding the majority opinion.

(viii) The contention of Mr. Mauli, learned Advocate, that the judgment of Dr. Lakshmi Narain Singh (supra) is a Full Bench Judgment, cannot be approved and accepted as the judgment has been delivered by Single Bench and not remitted to Division Bench for final approval. Hence, the said judgment is a Single Bench Judgment.



66. For the reasons recorded hereinabove, I am of the view that the notice dated 07.03.1995, issuing show-cause and the ultimate action taken by the respondent authorities vide order dated 30.06.1995, do not suffer from any patent illegality, irrationality or perversity and procedural irregularity. Hence, this Court does not find any merit in this appeal, accordingly, the same is dismissed.

67. Before parting with this judgment, we record our appreciation to the valuable assistance given by Mr. Mrigank Mauli, Advocate, as an Amicus Curiae, in effective disposal of this case.

(Shivaji Pandey, J)

I agree.

(S. Kumar, J)

I agree.

(Mohit Kumar Shah, J)

pawan/

AFR/NAFR	A.F.R.
CAV DATE	15.03.2019
Uploading Date	
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