IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.17034 of 2012

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Nand Kishore Prasad S/o Late Jai Mangal Prasad, R/o Mohan Khandha, P.S.-Harnaut, Distt-Nalanda. ... ... Petitioner/s

Versus

1. The Principal Secretary, RCD, Government of Bihar, Patna
2. The Secretary, Road Construction Department, Government of Bihar, Patna
3. The Special Secretary,Road Construction Department, Government of Bihar, Patna
4. The Joint Secretary, Road Construction Department, Government of Bihar, Patna
5. The Deputy Secretary (Vigilance), Road Construction Department, Government of Bihar, Patna
6. The Engineer-in-Chief, Road Construction Department, Government of Bihar, Patna ... ... Respondent/s

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Appearance :

For the Petitioner/s : Mr. J.S. Arora, Sr. Adv.
Mr.Manoj Kumar, Adv.

For the Respondent/s : Mr.Roy Shivaji Nath
Mr. Anil Kumar Verma, AC to AAG-9

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY
ORAL JUDGMENT
Date : 09-04-2019

In the present case, the petitioner has sought the number of reliefs. The prayer has been made to quash the Resolution No. 1609 (S) dated 10.02.2012 along with charge sheet issued by the Deputy Secretary (Vigilance), Road Construction Department, Government of Bihar, whereby decided to initiate a departmental proceeding under section 17 of the Bihar Government Servant (Classification Control and Appeal) Rules, 2005. Second prayer has been made of challenging the Resolution of the Road Construction Department, Government of Bihar issued under the signature of Deputy Secretary, Road Construction Department, Government of Bihar, vide Memo no. 2860 (S) dated 14.03.2012, thereby converted the departmental proceeding under Rule 43(B) of the Bihar Pension Rules. Later on, an interlocutory application, vide I.A. No. 9334 of 2013, has been filed, which has been allowed, vide order dated 07.01.2014, in which the prayer has been made to release the entire amount of pension, gratuity and leave encashment, as the Government has wrongly withheld 10% of gratuity, 10% of pension and the entire amount of leave encashment of the petitioner.

2. During argument, the petitioner has confined his prayer, with respect to prayer mentioned in the interlocutory application and did not press the prayer mentioned in the main writ application, submitted that after the superannuation, under the Bihar Pension Rules, the Government is bereft of power to withhold 10% of gratuity, 10% of pension and the entire amount of leave encashment, submitted, wrongly withheld 10% pension and gratuity as per the executive instruction of the State of Bihar which is not law enforce under Article 13 of the Constitution of India and the action of the Government for stoppage of payment of the aforesaid amount of pensionary benefit is illegal and it requires interference and this Court must give direction to release the rest amount of the pensionary benefit, which has been withheld by the Government.

3. In support of submission, the petitioner has placed reliance on the judgment of the Hon'ble Supreme Court passed in State of Jharkhand and others vs. Jitendra Kumar Srivastava and another, reported in (2013) 12 SCC 210 where the Hon'ble Supreme Court has held that the pensionary benefits are property that can be deprived of the same by due process of law and the executive instruction cannot be said to be a valid piece of the statutory provision, having force of law in terms of Article 13 of the Constitution of India and, as such, the action of the Government in retaining/withholding the pensionary benefit applying the executive instruction is illegal and not permissible in law and specifically the counsel for the petitioner has placed reliance on paragraph 16 of the said judgment, which is as follows:-

> *"The fact remains that there is an imprimatur to the legal principle that the right to receive pension is recognised as a right in "property". Article 300-A of the Constitution of India reads as under:*
>
> ***"300-A. Persons not to be deprived of property save by authority of law.*** *-No person shall be deprived of his property save by authority of law."*
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> *Once we proceed on that premise, the answer to the question posed by us in the beginning of this judgment becomes too obvious. a person cannot be deprived of his pension without the authority of law, which is the constitutional mandate enshrined in*

Article 13 of the Constitution of India. It follows that attempt of the appellant to take away a part of gratuity of pension or gratuity or even leave encashment without any statutory provision and under the umbrage of administrative instruction cannot be countenanced."

4. In the aforesaid judgment, the Hon'ble Supreme Court has held that a person cannot be deprived of his pension without the authority of law, which is the constitutional mandate enshrined in Article 300A of the Constitution of India. It follows that attempt of Respondents to take away a part of pension or gratuity or even leave encashment without any statutory provision and under the umbrage of administrative instruction cannot be countenanced.

5. The learned counsel for the petitioner submits that this judgment covers not only pension, gratuity but even leave encashment and that can only be taken away by the statutory provision, not by the executive instruction.

6. The learned counsel for the State has pointed out that after the said judgment, the Government of Bihar has amended the provision of Bihar Pension Rules, thereby ingrafted the provision of Rule 43 (c) of the Bihar Pension Rules and the question arose as to whether after the amendment of the Bihar Pension Rules, the pension will include the gratuity or it will be confined to pension only, this issue came for consideration in a Full Bench Judgment passed in C.W.J.C. No. 15328 of 2016 Arvind Kr. Singh vs. The

State of Bihar and others in which the Full Bench has held that the clause 43 (c) will only confine to the pension which cannot be extended to the gratuity and the Court has also considered Rule 27 of Bihar Pension Rules which defines, pension includes the gratuity, but the Full Bench has specifically held that while incorporating this provision 43(c) the word gratuity is absent meaning thereby carved out an exception, meaning thereby for the purpose of 43 (c) pension would not include gratuity, after full deliberation, finally the Court has concluded that by incorporation of section 43 (c) does not empower the Government to withhold the gratuity. While considering the issue of gratuity vis-a-vis pension, the Court considered the issue of withholding of leave encashment, the Court has held that the leave encashment is not arising from Bihar Pension Rules rather by an executive instruction. The Government employee has been made entitled to the leave encashment by executive instruction no. 4564 dated 6th July 1983, clause 2 of that executive instruction which itself comprises a provision, in case the Government servant, on the date of superannuation, departmental proceeding, criminal case or judicial enquiry is pending, the Government would have liberty to withhold the payment of leave encashment till the conclusion of proceeding.

7. The learned counsel for the petitioner submits that the provision of Rule 43 (c) which has been incorporated by making a Rule under Article 309 of the Constitution of India, vide no. 133/-2-2000 dated 19.07.2012 in which it has been specifically mentioned that the Government will have an authority to withhold 10% of pension but this provision has been enforced prospectively. The provision of 43 (c) does not have retrospective effect as having not been given retrospectivity, on this strength, the learned counsel for the petitioner submits that 43 (c) is not applicable in the present case as this case would remain covered by the judgment of Jitendra Kumar Srivastava (supra) whereby the Court has said that the Government has no authority to withhold the 10% of pensionary benefit, the amendment of Pension Rule would not change the situation, in present case, Government wrongly withheld the pensionary benefit but the Full Bench has explained under Rule 43 (c) pension does not include gratuity, the order withholding 10% of gratuity amount is illegal and not sustainable in law.

8. The State has also brought to the notice, the Government in exercise of power has again amended the Bihar Pension Rules and thereby added 43 (d), thereby the power has been conferred to withhold the gratuity amount partly or entirety till the pendency of departmental proceeding but this amended rule is not applicable in the present case and, as such, Rule 43 (d) cannot be put in service for the purposes of deprivation of the amount of gratuity as has been explained in the Full Bench judgment (supra).

9. In such view of the matter, the order vide memo no. 4115 dated 12.04.2012 is set aside, as no such statutory provision was available to the Government to withhold the 10% pension and the gratuity of the petitioner and so far the prayer with regard to the leave encashment as has been explained in Full Bench judgment that it is not part of the Bihar Pension Rules as the Government employees were made entitled to the leave encashment on account of executive instruction brought by the State of Bihar, thereby made them entitled to the certain number of leave which remained unused to be converted in the cash amount and that executive instruction itself provides that in what circumstance, the Government will have a jurisdiction to withhold the benefit of leave encashment. This Court interferes with the decision of the Government of withhold of 10% pension and 10% gratuity as against the petitioner decided by the Hon'ble Supreme Court in Jitendra Kumar Srivastava (supra). So far the amount of leave encashment arising from 6747 (s) dated 04.06.2012

(Annexure-7) does not arise from the Bihar Pension Rules but it has been made entitled by enforcement of executive instruction has been explained by this Court in Full Bench specifically held under executive instruction Government has power to withhold the entire amount of leave encashment during the pendency of the criminal case, departmental proceeding or judicial enquiry.

10. In such view of the matter, this petition is partly allowed. However, the petitioner has drawn attention of this Court, the disciplinary proceeding has remained pending for long period and it has reached to the fag end, as second show cause has already been served upon him which has already been replied and the final decision is yet to be taken by the Department. This Court directs the respondent to take decision with respect to departmental enquiry within a period of eight weeks from the date of receipt or production of a copy of this order.

(Shivaji Pandey, J)

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AFR/NAFR	NAFR
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