

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.20865 of 2018

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Rajendra Mandal Son of Late Kusheshwar Mandal, resident of Mohalla-
Kabirchak, P.S.- Sadar, Town and District- Darbhanga.

... .. Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, General Administration Department, Government of Bihar, Main Secretariat, Patna
2. In-charge Officer, Finance Personal Claim Redressal Cell P.C.F.C., Government of Bihar, Flat No.
3. The District Magistrate, Saran, Chapra.
4. The Deputy Collector Establishment, Saran, Chapra.
5. The Nagar Parishad, Motihari, through its Chairman.
6. The District Provident Fund Officer, Saran, Chapra.
7. The Accountant General, Bihar, Birchand Patel Path, Patna.

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Shivendra Kishor, Sr. Advocate Mr. Arun Kumar Gupta
For the State	:	Mr. Ravi Verma
For the Accountant General	:	Mr. Chaitanya Swaroop

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CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH

ORAL JUDGMENT

Date : 19.11.2019

The present writ petition has been filed for quashing the revised pay slip contained in Memo dated 12.01.2016 issued by the In-Charge Officer, Finance (Personnel Claims Redressal Cell), Department, Government of Bihar, Patna, whereby and whereunder the pay of the petitioner has been reduced from Rs. 33,560/- to Rs. 25,200/- by amending the pay slip dated 31.01.2012. The petitioner has further prayed for quashing the consequential pay slip, whereby and whereunder the pay of the petitioner, as on 01.07.2015 was determined as Rs. 29,988/- and



has also prayed for quashing the letter dated 18.03.2016, issued under the joint signature of the Deputy Collector (Establishment), Additional Collector and the District Magistrate, Saran at Chapra, whereby and whereunder recovery of a sum of Rs. 5,91,184/- on the head of excess salary paid to the petitioner for the period 20.05.2013 to 01.07.2015, has been directed to be made by adjusting the entire amount of leave encashment to the tune of Rs. 5,51,880/- and the remaining sum of Rs. 39,304/- has been suggested to be recovered from the gratuity amount. The petitioner has also prayed for quashing of that part of the gratuity payment order dated 24.06.2016, whereby and whereunder a sum of Rs. 39,304/- has been sought to be recovered from the gratuity amount and for directing the respondents to refund the entire sum of Rs. 5,91,184/- as also to fix pension and other pensionary benefits in the pay scale of Rs. 33,560/-, in light of the pay slip issued by the In-Charge Officer, Finance (Personnel Claims Redressal Cell), Department, Bihar dated 31.03.2012, which was the last pay drawn by the petitioner as on the date of his retirement.

The brief facts of the case, according to the petitioner, are that the petitioner was initially appointed as Deputy Collector on probation on 02.08.1983 whereafter he was posed



at various places. The petitioner was granted first financial progression in the pay scale of Rs. 10,000-15,200/- with effect from 09.08.1999 vide notification dated 03.04.2008. Thereafter, the In-Charge Officer, Finance (Personnel Claims Redressal Cell), Department, issued fresh pay slip dated 31.01.2012, determining the pay of the petitioner as on 01.07.2010 at Rs. 26,960/- along with grade pay of Rs. 6600/- totaling to a sum of Rs. 33,560/-. The petitioner had then functioned as Executive Officer, Nagar Parishad, Motihari with effect from 04.05.2010 to 19.05.2013. The last pay certificate of the petitioner on the post of Executive Officer, Nagar Parishad, Motihari dated 27.07.2013 mentions the basic pay of the petitioner as Rs. 33,610/- and on that basis the petitioner was paid his salary from June, 2013 to July, 2015, while the petitioner had worked on the post of Senior Deputy Collector, Saran Collectorate, Chapra. The petitioner had retired from service with effect from 31.07.2015.

It is the contention of the learned counsel for the petitioner that the entire service period of the petitioner had remained unblemished and neither any departmental proceeding nor any criminal proceeding had ever been initiated against him nor any adverse remarks has ever been communicated to the



petitioner, nonetheless, upon retirement of the petitioner, the respondent no. 2 had issued the impugned Memo dated 12.01.2016, whereby and whereunder the basic pay of the petitioner was determined as Rs. 18,600/- and grade pay was fixed as Rs. 6600/-, totaling to a sum of Rs. 25,200/-, for the period 20.05.2013 to 01.07.2015. Thus the pay scale of the petitioner was reduced to a sum of Rs. 25,200/-, after retirement of the petitioner and that too without following the principles of natural justice or issuing any show cause notice. Accordingly, the respondent no. 2 vide letter dated 26.02.2016 had requested the Senior Deputy Collector, Establishment Section, Saran Collectorate, Chapra to issue authority slip for payment of a sum of Rs. 5,51,880/- towards the leave encashment amount, however, the District Magistrate, Saran at Chapra vide letter dated 18.03.2016 had advised the Principal Secretary, General Administration Department, Bihar, Patna to recover the excess amount paid to the petitioner by way of salary by adjusting the aforesaid sum of Rs. 5,51,880/- from the leave encashment amount and the balance amount of Rs. 39,304/- from the gratuity amount. Accordingly, the aforesaid sum of Rs. 39,304/- was recovered from the gratuity amount of the petitioner and the leave encashment amount has also been forfeited.



The learned senior counsel for the petitioner has submitted that the respondents have not shown as to on what basis, the last pay salary of the petitioner has been reduced from a sum of Rs. 33,560/- to Rs. 25,200/- and moreover the petitioner has not been granted any opportunity to show cause before reduction of the pay of the petitioner herein. It is also submitted that there has been no misrepresentation or fraud on the part of the petitioner, hence the recovery sought to be made by the respondents is otherwise also bad. In this regard, the learned senior counsel for the petitioner has relied upon various judgments rendered by the Hon'ble Apex court i.e. the ones reported in **1995 Suppl. 1 SCC 80 (Sahib Ram vs. the State of Haryana)** and in **(2015) 4 SCC 334 (State of Punjab vs. Rafique Masih)**. The learned senior counsel for the petitioner has also referred to a judgment dated 19.03.2018 passed by the learned Division Bench of this Court in **L.P.A. No. 599 of 2015 (Ramadhar Thakur vs. The State of Bihar & Ors.)**, paragraph nos. 11 to 18 whereof are reproduced herein below:-

“11. Since we are of the view that the Clause (J) of Sub rule (3) of Rule 157, interpretation of which is at the core of the controversy, has been discussed threadbare in case of Maheshwar Prasad Singh (supra), we shall be referring to the said decision, first. The full bench in the said



case had the occasion to consider the interpretation of Rule 157(3)(J), with reference to certain State Government resolutions, to determine the question as to whether the Clerks of the mufassil offices could/can be promoted to selection grade post without passing the final examination in accounts, except during the period between 01.05.1980 and 29.03.1982, since correctness of the law laid down in the case of *Md. Shamsuddin & Ors. Versus State of Bihar reported in 1983 PLJR 347* was doubted. Considering the said Rule 157 (3) (J) and the correction slip No.30 dated 29.3.1982, which had the effect of amending rule 157(3)(J) (C) of the Rules, the full bench of this Court noticed in paragraph 6 that accounts examination had been treated as an essential qualification at all times, whether for the purpose of crossing the efficiency bar or for confirmation or for the purpose of promotion. The Court held, however, referring to the correction slip No. 30 dated 29.3.1982, that whereas earlier, the requirement of passing of accounts examination was applicable to promotion from lower division to upper division posts, after the amendment through the said correction slip, it was made applicable to promotion to the selection grade only. In substance, the full bench held that in view of the amendment in Rule 157 (3)(J)(c) of 'the Rules',



through correction slip dated 29.3.1982, the requirement of passing accounts examination was confined to promotion to selection grade. Paragraph 13 of the full bench decision in case of Maheshwar Prasad Singh (supra) is relevant for the present purpose and is being quoted herein below:

“13. On the basis of the above discussion, I have no hesitation in holding that the State Government was fully competent to amend rule 153(3)(J) of the Board’s Miscellaneous Rules by executive instructions and the amendment made vide correction slip no.30 dated 29.3.82 was a valid amendment. Thus, clerks were required to pass the final examination in Accounts as a condition for promotion to the selection grades after 29.3.1982.”

12. In our view, thus, the full bench does not support the case of the respondents rather it helps the Appellant’s case as it is clear from what has been laid down by the Full Bench that Rule 157(3)(J) requires passing of accounts examination for promotion to selection grade only.

13. Reliance placed by Mr. Amit Bhushan on the decision of this Court in the case of Rameshwar Roy (supra) is also of no help to him for the reason that in the said decision learned Single Judge has not noticed the Full Bench decision of this Court in case of



Maheshwar Prasad Singh (supra), which clearly lays down that the requirement of passing of Accounts Examination under Rule 157(3)(J) of the Bihar Boards Miscellaneous Rules is in respect of grant of promotion to selection grade and not for regular promotion. In our view, learned counsel for the appellant has rightly relied on this Court's decision in case of Mithilesh Kumar Sinha (supra) where the Court held that there was no requirement of passing departmental examination for becoming eligible for promotion from the post of Head clerk to Head assistant. The court held in the said decision that passing of Accounts Examination is necessary for earning selection grade and had no application for grant of substantive promotion. Similar view has been taken by a learned Single Judge of this Court in case of Syed Mozammil Ashraf (supra).

14. In the case of Shashi Sekhar Ambasta, (supra) reliance on which has been placed by the learned counsel for the appellant, the Court laid down the distinction between the substantive promotion and grant of ACP. The distinction between ACP and regular promotion has been noticed also by a Division Bench of this Court in the decision rendered on 20.04.2015 in L.P.A. No. 1260 of 2012(State of Bihar and Ors. Vs. Pramod Kumar) holding that the ACP is not a promotion, rather it is merely a



financial progression.

15. Let's now consider another Division Bench decision of this Court in the case of Rameshwar Roy (supra), reliance on which has been placed by Mr. Amit Bhushan. As is evident from the said decision, it does not lay down a law that passing of Accounts Examination is a condition precedent for grant of ACP under 'the ACP Rules, 2003'. In that case, the benefit of ACP was denied in view of an order of punishment against the Government servant of denying him regular promotion for a period of 10 years. In that background, referring to Sub rule 5 of Rule (4) ACP Rules, the Division Bench held that the Rules of promotion could not be said to be not applicable, while granting the benefits under the ACP Scheme. There is rather no controversy over this proposition. We are also of the considered view that the rules of regular promotion may be made applicable for grant of ACP under the ACP scheme.

16. The question however, in the present case, which has already been noticed, is, as to whether for grant of a regular promotion, passing of Accounts examination is a condition precedent or not and in the absence of any such bar for grant of regular promotion under any statutory provision, by invoking rule 157(J)(3) of 'the ACP Rules', the respondents can deny the benefit of Assured Career Progression. We



need not reiterate the fact that the respondents have not brought to our notice any statutory provision or executive instruction specifically providing that passing of departmental Accounts Examination is a sine qua non for grant of regular promotion. As a matter of fact, for the first time in the year 2015, the State Government of Bihar, in exercise of the powers conferred under Article 309 of the Constitution of India, appears to have made the rules for appointment and service condition of Clerical Cadre of General Provident fund Directorate and its subordinate offices with effect from 18.5.2015, Rule 12 (1) thereof stipulates 'passing in Hindi noting and drafting examination and in both papers of departmental Accounts Examination at higher level as conditions for grant of promotion to the post of Upper Division Clerk'. No provision in the rules, on which reliance is being placed, deals with promotion from the post of Lower Division Clerk to Upper Division Clerk. Though another set of rules namely, Bihar Secretariat Service Rules 2010 has no application in the present facts and circumstances of the case, yet for the purpose of drawing inference, the provisions under the said rules need to be noticed. The said 2010 Rules deal with the Bihar Secretariat Service, consisting of various posts, as referred to in Rule 3(4), including the post of Assistant.



Rule 6 of the said 2010 Rules deals with appointment in Assistant cadre through two modes i.e; by way of the Direct recruitment and by promotion from the Upper Division Clerks of the Bihar Secretariat Clerk service. The Rules do not provide for passing of the departmental Accounts Examination as a condition precedent for regular promotion from the grade of Upper Division Clerk of Bihar Secretariat Clerical Service to Assistant Grade. Further, Rule 10 of the said rules also deals with promotion from lower grade to higher grade. Nowhere the rules specify the requirement passing of accounts examination as a condition for grant of regular promotion.

17. Situated thus, and in view of the discussions, as above, there is no gainsaying that in view of Sub rule 5 of Rule 4 of 'the ACP Rules', the requirements for grant of regular promotion shall be applicable while considering cases for grant of ACP. Since, there is no provision prescribing passing of accounts examination for regular promotion, the appellant could not have been denied grant of ACP. We are of the clear view that the decisions in case of Rameshwar Roy (supra) and Daya Shanker Singh (supra) do not lay down the correct law and the same cannot be made applicable.

18. The impugned judgment and order of the learned Single Judge, in the aforesaid



background, requires interference. Accordingly, the judgment and order dated 10.02.2015 is set aside. The order dated 27.02.2018 brought on record by way of Annexure-7 to I.A.No.1922 of 2018 is also hereby set aside. Consequently, the writ application bearing C.W.J.C. No. 486 of 2014 is allowed. The respondents, particularly the Director, Provident Fund Directorate, Bihar are directed to consider the appellant's case for grant of ACP, in the light of discussion as above, since we have clearly held that passing of departmental Accounts Examination is not a condition precedent for grant of Assured Career Progression under „the ACP Rules“ nor does Rule 157 (J)(3) of the Bihar Boards Miscellaneous Rules conceive of such a requirement. The decision must be taken within a period of two months from the date of receipt/production of a copy of this order. It is held that the appellants shall be entitled for all consequential benefits arising out of the grant of ACP which also must be released within two months thereafter.”

The learned counsel appearing for the State has referred to the counter affidavit filed on behalf of the respondent nos. 3 & 4 wherein it has been admitted that the petitioner was paid salary for the period June, 2013 to July, 2015 at the rate of Rs. 35,610/- per month. However, it has also been submitted that



excess payment of salary amounting to a sum of Rs. 5,91,184/- was made to the petitioner herein pertaining to the period 20.05.2013 to 31.07.2015, hence a decision has been taken for recovery of the amount paid in excess by way of salary to the petitioner. Accordingly, a sum of Rs. 5,51,880/- has been adjusted against the leave encashment amount and the balance amount of Rs. 39,304/- has been directed to be adjusted from the gratuity amount. The learned counsel for the respondents has also referred to a counter affidavit filed on behalf of the respondent no. 2, wherein it has been stated that as per Rule 24 of the Rules of the Appointment Department, Government of Bihar, it is clear that an officer of Bihar Civil Service (Executive Branch) or the Bihar Junior Civil Service will be entitled to the third increment on completion of three years of service upon confirmation and submission of records of cases, whichever be later. It has been also stated that in response to the letter of the respondent no. 2 dated 18.01.2011 regarding the pay status of the petitioner, the petitioner had informed vide letter dated 24.01.2011 that his services had been confirmed with effect from 29.08.1998 and had requested to issue pay slip in light of first A.C.P. received with effect from 09.08.1999, however, nothing was stated with regard to the passing of departmental



examination nor any documents were attached regarding case records, hence, accordingly, fixation of salary of the petitioner was done and his pay status was communicated to the Executive Officer, Nagar Parishad, Motihari. It has further been submitted by the learned counsel for the respondents that since the petitioner had not submitted the requisite documents nor has submitted any application for issuance of pay slip even after his transfer from Motihari to Chapra, he has tried to suppress material facts, hence the respondent no. 2 had finally issued the amended pay status of the petitioner vide Memo dated 12.01.2016 along with pay slip bearing No.05011623014693, whereby and whereunder the salary of the petitioner had been fixed at Rs. 25,200/- with effect from 01.04.2007.

The petitioner has also filed rejoinder affidavit to the aforesaid two counter affidavits filed on behalf of the respondents and has denied the factum of either the respondents having demanded any documents from the petitioner or the petitioner having suppressed any documents/facts.

It may relevant to mention here that after this Court had heard the matter earlier, it had found that no reason whatsoever has been assigned for reduction of the salary of the petitioner from Rs. 33,560/- to Rs. 25,200/-, hence the learned counsel for



the respondents had sought sometime to file a supplementary counter affidavit to substantiate the stand of the respondents in reducing the pay scale of the petitioner. In this regard, it would be relevant to reproduce herein below the order dated 06.09.2019 passed by this Court in the present case:-

“The salary of the petitioner has been sought to be reduced from a sum of Rs. 33,560/- to Rs. 25,200/-, however in the entire pleadings made by the respondents by way of counter affidavit, supplementary counter affidavit etc., no reason whatsoever has been assigned for such reduction and it has been merely stated that w.e.f. 01.07.2013, the salary of the petitioner has been fixed as Rs. 18,600.00 with a grade pay of Rs. 6600/- which totals up to Rs. 25,200/-, however no explanation has been furnished as to why such pay along with the said grade pay has been fixed by revising the pay being paid to the petitioner herein. The learned counsel for the respondents submits that the respondents would file a supplementary counter affidavit to substantiate the stand of the respondents in reducing the pay scale, which was already being paid to the petitioner prior to retirement, backed with all relevant documents.”

A supplementary counter affidavit has been filed on 30th September, 2019, purportedly in compliance of the aforesaid



order of this Court dated 06.09.2019, wherein the same facts, as stated in the counter affidavits filed earlier by the respondents, have been reiterated and it has been stated that though the respondents had requested the petitioner to submit the case records and revenue records so that needful action can be taken with regard to the increment in the pay status of the petitioner but the petitioner never bothered to submit the requisite documents, hence it is evidently clear that the petitioner himself tried to suppress the true facts which has resulted in re-fixation of the salary of the petitioner and the consequent recovery. At this juncture, the learned counsel for the respondents was asked as to whether he could decipher from the various counter affidavits/ supplementary affidavit/second supplementary affidavit, filed by the respondents as to what is the reason for reduction of the salary of the petitioner from Rs. 33,560/- to Rs. 25,200/-, the learned counsel for the respondents has fairly submitted that the records do not demonstrate this aspect of the matter.

I have heard the learned senior counsel for the petitioner as also the learned counsel for the respondents and I find from the records that there is no justification much less any ground for reduction of salary of the petitioner from Rs. 33,560/- to



25,200/-. The entire records of this case clearly shows that no reason whatsoever has been assigned for arbitrarily and whimsically reducing the salary of the petitioner and merely by a stroke of pen, the salary of the petitioner has been reduced without any rhyme or reason. In such view of the matter, the impugned order dated 12.01.2016 issued by the respondent no. 2, whereby and whereunder the salary of the petitioner has been reduced from Rs. 33,560/- to 25,200/-, is not sustainable in the eyes of law, hence is quashed. Accordingly, the consequential pay slip dated 01.07.2015 is also liable to be quashed, hence the same is set aside. At this juncture, it may be relevant to state that the aforesaid orders dated 12.01.2016 and 01.07.2015 also suffer from another legal infirmity in as much as the same have been passed in violation of the principles of natural justice since no opportunity of hearing has been afforded to the petitioner herein, hence an order imposing cut in salary, pension and gratuity, which adversely affects a civil servant, cannot be passed without giving an opportunity of hearing to an employee, which in the present case has not been afforded, hence on this score as well, the aforesaid orders dated 12.01.2016 and 01.07.2015 are bad in the eyes of law.

At this juncture, it would be just and equitable to deal



with the judgments referred to by the learned counsel for the respondents, i.e. the one reported in **2013(3) PLJR 415 (Badri Nath Jha vs. The State of Bihar & Ors.)** and the one reported in **AIR 2012 SC 2951 (Chandi Prasad Uniyal & Ors. vs. The State of Uttarakhand & ors.)**, wherein it has been held that even after retirement, recovery can be made. In this regard, it is stated that first of all as far as the present case is concerned, the respondents have miserably failed to show any ground much less any reason for reducing and re-fixing the salary of the petitioner, as such this Court has already quashed the revised pay slip dated 12.01.2016 and 01.07.2015 respectively, hence the question of recovery, as a consequence of admitted wrong re-fixation of pay would not arise, thus the said judgments are distinguishable in the facts and circumstances of the present case. Moreover, the law regarding recovery is no longer *res integra* and has been well settled in a catena of decisions reported in reported in **(2009)3 SCC (Syed Qadir vs. State of Bihar)**; **(1995) Suppl.1 SCC 80 (Sahib Ram vs. State of Haryana)**; **(1994) 2 SCC 52 (Shyam Babu Verma vs. Union of India)** ; **(1997) 6 SCC 139 (B.Ganga Ram vs. Regional Joint Director)** ; **(2006) 11 SCC 492 (Purshottam Lal Das vs. State of Bihar)** ; **(2000) 10 SCC 99 (Bihar State Electricity Board**



vs. Bijay Bhadur); (2006) 11 SCC 7089 (*B.J. Akkara vs. Government of India University*) and (1995) suppl. 1 SCC 18 (*Sahib Ram vs. State of Haryana*) and the one reported in (2015) 4 SCC 334 (*State of Punjab vs. Rafique Masih*).

The Hon'ble Apex Court times without number has reiterated the well settled principle of law to the effect that no recovery can be effected from the petitioner, who has already attained the age of superannuation since there has been neither any misrepresentation nor any fraud has been committed by the petitioner herein leading to payment of excess amount of salary whereas it is the negligence and the laches on the part of the respondent authorities which has led to excess payment of salary. The present case is squarely covered, not only by a catena of judgments rendered by the Hon'ble Apex Court, referred to herein above, but also by the latest judgment rendered by the Hon'ble Apex Court in the case of *Rafique Masih (supra)*, paragraph-18 whereof is reproduced herein below:-

“18. It is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to hereinabove,



we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:-

(i) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).

(ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover".

Having regard to the facts and circumstances of the case, and for the reasons stated herein above, as a consequence of quashing of the impugned orders dated 12.01.2016 and 01.07.2015, as aforesaid, the consequential orders dated



18.03.2016 and 24.06.2016, whereby and whereunder recovery of a sum of Rs. 5,91,184/- has been sought to be made, i.e. a sum of Rs. 5,51,880/- from the leave encashment amount and a sum of Rs. 39,304/- from the D.C.R. gratuity payment order dated 24.06.2016, are also liable to be quashed, hence are set aside. Moreover, this Court finds that the instant case is squarely covered by the law laid down by the Hon'ble Apex Court in the case of Rafique Masih (supra), as aforesaid, hence the orders of recovery dated 18.03.2016 and 24.06.2016 are held to be bad in law on this score as well. The respondents are directed to refund the entire amount of Rs. 5,91,184/- to the petitioner herein forthwith. As a consequence of quashing of the aforesaid impugned orders dated 12.01.2016, 01.07.2015, 18.03.2016 and 24.06.2016, the respondents are further directed to calculate and pay the pensionary benefits to the petitioner accordingly.

The writ petition stands allowed on the aforesaid terms.

(Mohit Kumar Shah, J)

S.Sb/-

AFR/NAFR	AFR
CAV DATE	N/A
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