

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.11941 of 2017

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Sudhir Chandra Sah, son of Late Mithu Sah, Resident of Mohalla- Gola Ghat Road, P.S.- Tatarpur, Dist- Bhagalpur.

... .. Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Road Construction Department, Government of Bihar, Patna.
2. The Engineer in Chief cum Additional Secretary, Road Construction Department, Govt. of Bihar, Patna
3. The Joint Secretary, Road Construction Department, Govt. of Bihar, Patna.
4. The Executive Engineer, Saharsa, Road Division, Saharsa.

... .. Respondent/s

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Appearance :

For the Petitioner/s : Mr.Sanjay Kumar Ghosarvey, Advocate
For the Respondent/s : Mr.Manoj Kumar Ambastha, SC-26

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CORAM: HONOURABLE MR. JUSTICE ANJANI KUMAR SHARAN
ORAL JUDGMENT

Date : 21-05-2020

Heard the parties through the virtual court proceeding.

2. By way of filing the present writ application, the petitioner, inter alia, has sought direction to the respondents to make payment of leave encashment amounting to Rs.2,14,144/- and gratuity amount of Rs.81,711/- along with interest @ 18% per annum.

ii) Direction to the respondents to make payment of the leave encashment amount as well as the gratuity amount in view of the office order issued by the Engineer-in-Chief, Road Construction Department, which was communicated to the



petitioner vide Memo No.2144(E) dated 21.05.2002 (Annexure-3 of the writ petition).

iii) Any other relief or reliefs to which the petitioner is entitled may kindly be given.

3. Learned counsel for the petitioner submits that the petitioner was appointed to the post of Adhidarshak (Overseer) at Kahalgaon Block, Bhagalpur on 01.10.1964 and thereafter time to time transferred several places and lastly superannuated on 30.09.1999 while working to the post of Junior Engineer under the office of Executive Engineer, P.W.D., Road Division, Saharsa. Learned counsel for the petitioner further submits that the petitioner had filed one C.W.J.C. No.7498 of 1998 for payment of differences of salary which was disposed of on 03.11.1999 with a direction to the respondent no.2 to make calculation and thereafter to pay the differences of salary but the same was not paid thereafter one Contempt application was filed being M.J.C. No.1320 of 2000 then only the payment of differences of salary was paid to the petitioner after his retirement. Learned counsel for the petitioner further submits that while working in Godda (now in Jharkhand), there was an allegation of shortage of 58.81 M T Bitumen in the name of petitioner and for which the petitioner had written several



letters to each and every authorities that the shortage is manipulated and arithmetical mistake being recorded by the then Junior Engineer in collusion of other authorities who had taken the charge of bitumen from the petitioner in the year 1989. He further submits that if there would have been shortage of bitumen, no any F.I.R. was lodged against the petitioner rather entry was made in his service book after six years in the year 1995. The petitioner was also filed C.W.J.C. No.701 of 1999 in the Hon'ble Patna High Court but after separation of Bihar, the case was transferred to the Hon'ble Jharkhand High Court at Ranchi but the fate of the case is not known to the petitioner as he was not able to persuade the matter in Ranchi due to his illness.

4. Learned counsel for the petitioner submits that respondent no.2 had issued an office order on 21.05.2012 vide Office Order No.192 which was communicated to the petition vide Memo No.2144(E) dated 21.05.2002, whereby it has been stated that after due verification of show cause submitted by the petitioner he has been found guilty of shortage of 58.81 MT Bitumen hence, the cost of Bitumen which total comes to Rs.2,39,944/- was ordered to be deducted from 5% pension amount from the pension of petitioner in accordance with



provision of 139 of Bihar Pension Rules (Annexure-3 of the writ petition). Learned counsel for the petitioner further submits that prior to his retirement, there was no proceeding pending with respect to allegation of shortage except to have entered the same in the service book of the petitioner therefore, taking decision or punishment is illegal. The petitioner has immediately submitted a detail representation through registered post on 11.06.2002 saying after three years of his retirement and without any inquiry or verification of the facts placed by the petitioner the order has been passed which required being review (Annexure-4 of the writ petition). Learned counsel for the petitioner further submits that one hand the petitioner was asked to show cause by the respondent no.2 and respondent no.2 had issued an office order on 21.05.2012 vide office order no.192, which was communicated to the petitioner vide Memo No.2144(E) dated 21.05.2002 (Annexure-3 of writ petition) whereby it has been stated that after due found guilty of shortage of 58.81 MT Bitumen, the cost of Bitumen total comes to Rs.2,39,944/- was ordered to be deducted from 5% pension amount from the portion of the petitioner in accordance with provision of 139 of Bihar Pension Rules and other hand, respondent no.4 has deducted the amount of Rs.2(Two) Lacs from the Leave



Encashment amount and Rs.39,000/- from the Gratuity amount (Annexure-5 series of writ petition), which was done in gross violation of the order of respondent no.2 contained in Annexure-3 of this writ application therefore, entire recovery from the Leave Encashment and Gratuity is illegal and arbitrary because no any proceeding has been initiated against the petitioner.

5. Per contra, the respondent no.4 had filed the counter affidavit stating therein that the petitioner was posted as a Junior Engineer, Road Division, Godda, shortage of 58.81 M.T. of bitumen was found, cost of which was assessed as Rs.2,39,944/- and for which charge as pending in the Department, as such under letter no.4778(E) dated 19.09.2001 (Annexure-1 to the writ petition). Show cause was served upon the petitioner as to why 5% of pension be not deducted from his pension in view of provisions made under Rule 139 of Bihar Pension Rules. He further submits that under Annexure-2 to the writ petition, the petitioner replied the show cause and upon receipt of the same it was considered in the Department with the available documents and after due consideration, the reply to the show cause was rejected and under office order, as contained in Annexure-3 to the writ petition, 5% pension was reduced in view of provisions made under Rule 139 of Bihar Pension



Rules. He further submits that under the office order no.13 of 02-03, Annexure-5 series to the writ petition, provisional Gratuity for Rs.2,14,144/- was sanctioned to the petitioner. Similarly, under the office order no.12/02-03, Annexure-5 series to the writ petition, unutilized earned leave of 188 days, amounting to Rs.81,711.80/- was sanctioned to the petitioner. However, as Rs.2,39,944/- was found recoverable from the petitioner on account of shortage of bitumen as such Rs.2,00,000/- was recovered from the amount of provisional Gratuity and Rs.39,944.80/- from amount of unutilized earned leave under office order no.13/02-03 and 12/02-03, Annexure-5 series to the writ petition.

6. Learned counsel for the State submits that the petitioner has not been challenged the recovery order (Annexure-5 series). There is no pleading challenging Annexure-5 series, This Hon'ble Court on its own, without a specific pleading challenging Annexure-5 series, must not interfere with Annexure-5 series.

7. Learned counsel for the respondents conceded at the bar that the order passed by the authorities for recovery of an amount of Rs.2,39,944/- to be deducted from the amount of leave encashment and gratuity payable to the petitioner may not



legally sustainable as the petitioner has been proceeded for the same self-charge earlier pertaining to misappropriation of the said amount, when the competent authorities took recourse to Section 139 of Bihar Pension Rules and imposed a punishment, reducing of 5% of pension payable to the petitioner throughout his life but since there is no challenge in the writ petition questioning the order of recovery, albeit the order has been annexed as contained in Annexure-5 series passed by the competent authorities, no positive direction for release of entire amount of leave encashment and gratuity could be passed as the petitioner has accepted these orders, therefore, the Court does not require to pass any order in the present case. In view of the above, the writ is liable to be dismissed without any relief to the petitioner.

8. Considering the submission of the parties in the present case, it is admitted fact that no proceeding was initiated against the petitioner either to judicial or departmental before/after his retirement on 30.09.1999. It is a fact that there was shortage of bitumen but no departmental proceeding or any F.I.R. has been lodged against the petitioner. It is admitted fact by Annexure-3, the authority has passed the order for recovery of Rs.2,39,944/- was ordered to deduct for 5% of the pension



amount from the pension of the petitioner (Annexure-3).

9. From the aforesaid facts and circumstances, it is appeared that there is twice recovery from the petitioner one from the pension and another from the gratuity and leave encashment. Learned counsel for the petitioner has relied upon the judgment of this Court in the case of **Smt. Shanti Choubey vs. State of Bihar, 2004(4) PLJR 236** in which in paragraph-11 of the said judgment, it has been held that “ I am unable to appreciate the said submission of the learned counsel for the State. In view of the law settled that recovery is not permissible even after the retirement of a Government servant from service except after taking recourse to the provisions, contained in Rule 43(b) of the Bihar Pension Rules and that too only if the case is covered by the rider clause of the said provision, which provides 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 any event which took place not more than four years before the institution of such proceedings.”

10. In the same similar facts and circumstances, in the case of **Manju Jaiswal vs. State of Bihar reported in**



2009(3) PLJR 560, it has been held that without any proceeding being initiated it is not open to the State Government to effect the recovery from the retiral benefits of the government servant after his retirement. In this case also after retirement of the petitioner, respondents alleged that some adjustment were required to be made on account of some shortage of 58.81 M.T. of bitumen was found. It is admitted fact that neither any departmental nor judicial proceeding was initiated during his service. However, after retirement, recovery of the same is not justified and is permissible in law.

11. The submission advanced by the counsel for the respondents appears to be attractive at first blush but after having given my anxious consideration to submission advanced by the respondents on deeper scrutiny, the submission is not acceptable, in the peculiar facts and circumstances of the present case, as the remiss on the part of the counsel to make a direct challenge to these orders, would not deprive the power of writ court under Article 226 of the Constitution of India to exercise extraordinary jurisdiction to do complete and substantial justice and to hold that in case of grant of post-retirement benefit, the relief sought for in the writ petition for grant of entire leave encashment and gratuity would subsume the relief of quashing



an order, which would be an impediment in grant of the full payment of leave encashment and gratuity, as the authorities having exercised power of imposing a harsh punishment of deducting 5% of pension earlier for same self-charge, for an indefinite period, the subsequent exercise of power by a separate order as contained in Annexure-5 series of writ petition, ordering for recovery of the alleged misappropriated amount from leave encashment and gratuity is illegal and perverse as initiation of second limited enquiry resulting in passing of order as contained in Annexure-5 series on same-self charge is not permissible as there can be only one enquiry in respect of a charge for a particular misconduct and a person could not be vexed twice for the same charge and allowing such practice would not be in the interest of public service as law does permit departmental enquiry and not harassment. The Hon'ble Supreme Court in **Dwarkanath** reported in **AIR 1966 SC 81** held that Article 226 of the Constitution of India is couched in such a wide language to enable the High Court to reach injustice wherever it is found and to mold the relief to meet the peculiar and complicated requirement to do complete and substantial justice. Further, my view is fortified by another judgment of Supreme Court reported in **2011 (3) SCC 573**, wherein it was



held that High Court in exercise of power under Article 226 of the Constitution of India, could always mold relief in such a manner as to meet out justice to aggrieved person.

12. Further, it is well settled by a catena of judgment of the Hon'ble Supreme Court that right of receive pension and gratuity could not be taken away without authority of law as right to receive pension and gratuity of a public servant has been held to be covered under right to property under Article 31(1) of Constitution by the Constitution Bench of Supreme Court in **Deokinandan Prasad v. State of Bihar and others** reported in (1971)2 SCC 330. Relevant paragraphs 30, 31 and 33 are quoted herein below :

“30. The question whether the pension granted to a public servant is property attracting Article 31(1) came up for consideration before the Punjab High Court in *Bhagwant Singh v. Union of India* (AIR 1962 Punj 503). It was held that such a right constitutes “property” and any interference will be a breach of Article 31(1) of the Constitution. It was further held that the State cannot by an executive order curtail or abolish altogether the right of the public servant to receive pension. This decision was given by a learned



Single Judge. This decision was taken up in Letters Patent Appeal by the Union of India. Letters Patent Bench in its decision in Union of India v. Bhagwant Singh (ILR 1965 Punj 1) approved the decision of the learned Single Judge. The Letters Patent Bench held that the pension granted to a public servant on his retirement is “property” within the meaning of Article 31(1) of the Constitution and he could be deprived of the same only by an authority of law and that pension does not cease to be property on the mere denial or cancellation of it. It was further held that the character of pension as “property” cannot possibly undergo such mutation at the whim of a particular person or authority.

31. The matter again came up before a Full Bench of the Punjab and Haryana High Court in K.R. Erry v. The State of Punjab (ILR 1967 Punj & Har 278). The High Court had to consider the nature of the right of an officer to get pension. The majority quoted with approval the principles laid down in the two earlier decisions of the same High Court, referred to above, and held that the pension is not to be treated as a bounty payable on the sweet



will and pleasure of the Government and that the right to superannuation pension including its amount is a valuable right vesting in a Government servant. It was further held by the majority that even though an opportunity had already been afforded to the officer on an earlier occasion for showing cause against the imposition of penalty for lapse or misconduct on his part and he has been found guilty, nevertheless, when a cut is sought to be imposed in the quantum of pension payable to an officer on the basis of misconduct already proved against him, a further opportunity to show cause in that regard must be given to the officer. This view regarding the giving of further opportunity was expressed by the learned Judges on the basis of the relevant Punjab Civil Service Rules. But the learned Chief Justice in his dissenting judgment was not prepared to agree with the majority that under such circumstances a further opportunity should be given to an officer when a reduction in the amount of pension payable is made by the State. It is not necessary for us in the case on hand to consider the question whether before taking action by way of reducing or



denying the pension on the basis of disciplinary action already taken, a further notice to show cause should be given to an officer. That question does not arise for consideration before us. Nor are we concerned with the further question regarding the procedure, if any, to be adopted by the authorities before reducing or withholding the pension for the first time after the retirement of an officer. Hence, we express no opinion regarding the views expressed by the majority and the minority Judges in the above Punjab High Court decision on this aspect. But we agree with the view of the majority when it has approved its earlier decision that pension is not a bounty payable on the sweet will and pleasure of the Government and that, on the other hand, the right to pension is a valuable right vesting in a Government servant.

33. Having due regard to the above decisions, we are of the opinion that the right of the petitioner to receive pension is property under Article 31(1) and by a mere executive order the State had no power to withhold the same. Similarly, the said claim is also property under Article 19(1) (f) and it is not saved by sub-article (5) of



Article 19. Therefore, it follows that the order, dated June 12, 1968, denying the petitioner right to receive pension affects the fundamental right of the petitioner under Articles 19(1)(f) and 31(1) of the Constitution, and as such the writ petition under Article 32 is maintainable. It may be that under the Pension Act (Act 23 of 1871) there is a bar against a civil court entertaining any suit relating to the matters mentioned therein. That does not stand in the way of writ of mandamus being issued to the State to properly consider the claim of the petitioner for payment of pension according to law.”

13. The aforesaid judgment was followed in **D.S. Nakara and others v. Union of India, 1983(1) Labour Law Journal 104**. Relevant paragraphs 20, 29 and 31 are quoted herein below :

“ 20. The antiquated notion of pension being a bounty, a gratuitous payment depending upon the sweet will or grace of the employer not claimable as a right and, therefore, no right to pension can be enforced through Court has been swept under the carpet by the decision of the Constitution Bench in *Decki Nandan*



Prasad v. State of Bihar and others [1971-I.L.L.J. 557], wherein this Court authoritatively ruled that pension is a right and the payment of it does not depend upon the discretion of the government but is governed by the rules and a Government servant coming within those rules is entitled to claim pension. It was further held that the grant of pension does not depend upon any one's discretion. It is only for the purpose of quantifying the amount having regard to service and other allied matters that it may be necessary for the authority to pass an order to that effect but the right to receive pension flows to the officer not because of any such order but by virtue of the rules. This view was reaffirmed in State of Punjab and Another v. Iqbal Singh [1976-II L.L.J.377].

29. Summing up it can be said with confidence that pension is not only compensation for loyal service rendered in the past, but pension also has a broader significance, in that it is a measure of socio-economic justice which inheres economic security in the fall of life when physical and mental prowess is ebbing corresponding to aging process and, therefore, one is required to fall back on



savings. One such saving in kind is when you give your best in the hey day of life to your employer, in days of invalidity, economic security by way of periodical payment is assured. The term has been judicially defined as a stated allowances or stipend made in consideration of past service or a surrender of rights or emoluments to one retired from service. Thus the pension payable to a Government employee is earned by rendering long and efficient service and therefore can be paid to be a deferred portion of the compensation or for service rendered. In one sentence one can say that the most practical *raison d'être* for pension is the inability to provide for oneself due to old age. One may live and avoid unemployment but not senility and penury if there is nothing to fall back upon.

31. From the discussion three things emerge (i) that pension is neither a bounty nor a matter of grace depending upon the sweet will of the employer and that it creates a vested right subject to 1972 rules which are statutory in character because they are enacted in exercise of powers conferred by the proviso to Art. 309 and clause (5) of Art. 148 of the Constitution;



(ii) that the pension is not an ex gratia payment but it is a payment for the past service rendered; and (iii) it is a social welfare measure rendering socio-economic justice to those who in the hey day of their life ceaselessly toiled for the employer on an assurance that in their old age they would not be left in lurch. It must also be noticed that the quantum of pension is a certain percentage correlated to the average emoluments drawn during last three years of service reduced to ten months under liberalized pension scheme. Its payment is dependent upon an additional condition of impeccable behaviour even subsequent to retirement, that is, since the cessation of the contract of service and that it can be reduced or withdrawn as a disciplinary measure.”

14. Thus right to receive pension has been held to be a right to property protected under Article 300A even after repeal of Article 31(1) by the Constitution (Forty – Fourth Amendment) 1978 w.e.f 20-06-1979 as held in State of West Bengal v. Haresh C Banerjee and ors reported in (2006)7 SCC 651 and subsequently reiterated in Jitender Kuamr Shrivastava reported in (2013) 12 SCC 210 & in Civil Appeal No.1677-1678/2020, DR Hira Lal v. State of Bihar, decided on 18,



February 2020.

15. Thus, the counsel for the respondents did not countenance the passing of the second order and there being no authority to initiate second enquiry for same self-charge after the earlier punishment order passed by the respondents to deduct 5% of pension payable to the petitioner lifelong was accepted by the petitioner and acted by the respondent when they reduced pension by 5%, the act alleged to be a misconduct did not survive for consideration and thus the order contained in Annexure-5 series is wholly without jurisdiction and illegal.

16. Having considered the submission of learned counsel for the parties, in view of the settled principle of law as settled by Apex Court and by this Court in decision referred above, this Court is of the opinion that in the given fact of the case, letter no.13/02-03 and 12/2002-03 dated 23.05.2002 (Annexure-5 series) issued by the respondent no.4, Executive Engineer, P.W.D., Saharsa is hereby quashed.

17. The writ petition is allowed and respondent authorities are directed to release the amount of portion of gratuity and leave encashment recovered by Annexure-5 series within two months of date of production/receipt of this order,



failing which the petitioner is entitled for 9% of the interest on the aforesaid amount from the date of filing of the writ petition on till date of actual payment.

(Anjani Kumar Sharan, J)

Nasimul/-

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	10-06-2020
Transmission Date	N/A

