IN THE HIGH COURT OF JUDICATURE AT PATNA
(FROM RESIDENTIAL OFFICE VIA VIDEO APPLICATION)
Civil Writ Jurisdiction Case No.11974 of 2019

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Dr. Aquil Ahmad S/o Md. Taiyab R/v-Choty Baliya, P.O.- Lakhaminiya, P.S.- Baliya, District- Begusarai posted as a Incharge Medical Officer, Primary Health Center, Piprahi, Sheohar.

... ... Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar, Patna.
2. The Principal Secretary Health Department, Government of Bihar, Patna.
3. The Director in Chief Health Services, Government of Bihar, Patna.
4. The Civil Surgeon cum Chief Medical Officer Sheohar, Bihar.

... ... Respondent/s

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Appearance :
For the Petitioner/s : Mr.Arvind Kr. Srivastava, Adv.
For the Respondent/s : Mr.S.D.Yadav (AAG-IX)

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
ORAL JUDGMENT
Date : 01-10-2020

Heard learned counsel for the petitioner and learned AAG-IX for the State.

2. Mr. S.D. Yadav, learned AAG-IX has submitted that only yesterday an affidavit has been filed on behalf of the General Administration Department, Government of Bihar and a plea has been taken therein that there is no resolution of the General Administration Department whereby the 90% gratuity amount may be released in the cases where the departmental proceeding is still pending under the Bihar Pension Rules.

3. Pleadings are complete.

4. In this case, petitioner has moved this Court

seeking a writ in the nature of a writ of mandamus commanding the respondent authorities to fix the pension of the petitioner after releasing the post-retiral benefits. The petitioner has superannuated from service on 31.07.2017 while working as an Incharge Medical Officer, Primary Health Service, Piprahi, Sheohar, Bihar.

5. It is the case of the petitioner that he has been paid the GPF amount vide Annexure-2 to the writ application and Incharge Medical Officer, Primary Health Center, Piprahi, Civil Surgeon-cum-Chief Medical Officer, Sheohar has already sent the pension application of the petitioner to the Principal Secretary, Department of Health, Government of Bihar vide letter dated 372 dated 05.05.2018 as contained in Annexure-3 to the writ application, but the pension was not fixed by the Principal Secretary and the post-retrial benefits of the petitioner has not been released save and except the General Provident Fund (GPF) amount and group insurance amount.

6. It is his further submission that he represented before the Director-in-Chief, Health Services, Government of Bihar, Patna on 24.04.2019 and in this connection Annexure-4 and 5 to the writ application is brought on record.

7. In the counter affidavit filed on behalf of the

Principal Secretary, Department of Health, Government of Bihar a stand has been taken that after this Court passed the order on 16.06.2020 calling upon the Principal Secretary to explain the delay in not processing the pension papers of the petitioner, the Principal Secretary after having knowledge about the order took the following steps:-

(a) Vide Departmental Letter no.728(2) dated 08.07.2020 90% pension of the petitioner has been sanctioned and 10% pension has been kept in abeyance due to pendency of departmental proceeding already initiated against him vide memo no.905(9) dated 10.08.2006.

(b) Vide Departmental Letter no.727(2) dated 08.07.2020 necessary sanction order has also been issued for making payment of unutilized earned leave amount equivalent to 300 days.

(c) For colossal delay in processing the file of the petitioner erring officials have been identified and necessary explanations have been sought from them.

8. As regards the gratuity amount, it is stated that in the light of the notification of the Finance Department, Government of Bihar issued vide memo no.77 dated 21.01.2019 the gratuity of the petitioner has been kept in abeyance due to

pendency of the departmental proceeding. In this connection reference has been made to the memo no.77 dated 21.01.2019 as contained in Annexure-A to the supplementary counter affidavit filed on behalf of the State-respondents.

9. In this case matter was adjourned earlier on the request of learned AAG-9 and this Court passed the order dated 07.09.2020 which is extracted hereunder for a ready reference:-

> "A counter affidavit has been filed on behalf of the State. Mr. S.D. Yadav, learned counsel representing the State submits that the gratuity of the petitioner has not been paid in view of the amendment brought in the Bihar Pension Rules by which rule 43(c) has been inserted whereunder during pendency of a department proceeding the entire gratuity amount may be withheld.
>
> In this case, the departmental proceeding against the petitioner is said to have been initiated in the year 2006 i.e. about 14 years back, in the affidavit though stand has been taken that gratuity amount is not liable to be paid and the same has been kept in abeyance due to pendency of the departmental proceeding, it is completely silent as to why a departmental proceeding has remained pending for 14 years and whether such inaction on the part of the State would make him entitle to withhold the gratuity amount of the petitioner.
>
> Let it be answered specifically. Mr. Yadav shall also seek instruction as to whether any resolution of the General Administration Department, Government of Bihar has been issued after rule 43(c) was inserted whereunder like pension amount even the gratuity upto 90% is being released."

10. In the supplementary counter affidavit filed on 8th September, 2020 again the respondents did not come with any statement as to why the departmental proceeding is pending for 14 years and what is the present stage of the proceeding. All that has been reiterated is that the gratuity amount of the petitioner has been withheld due to pendency of the departmental proceeding against the petitioner.

11. In the aforesaid circumstance, learned counsel for the petitioner submits that on the pretext of insertion of sub-Rule (d) in Rule 43 and amendment by way of substitution of Rule 27 of the Bihar Pension Rules, 1950 the respondents cannot withhold the gratuity amount. It is his submission that sub-Rule (d) has been introduced by way of a notification of the Department of Finance, Government of Bihar said to have been issued under Article 309 of the Constitution of India. It is his submission that such amendments cannot be applied with retrospective effect in the cases where the departmental proceeding had been initiated 14 years back and the concerned employee has retired almost one and half year before such amendment came into force.

12. Learned counsel has also submitted that the amendment has been brought under belief that it would

circumvent the judgment of the Hon’ble Full Bench of this Court in the case of **Arvind Kumar Singh Vs. State of Bihar** reported in **2018(2) PLJR 933** in which law has been settled saying that under Rule 27 pension includes gratuity and the retired employee would be entitled to receive 90% of gratuity as well but now the amendment brought with effect from 21.01.2019 is being implemented retrospectively to deprive the petitioner from getting his post-retiral dues such as gratuity in the light of the judgment of the Hon’ble Full Bench of this Court. Learned counsel doubts that even under the amended and inserted provision 100% gratuity may be withheld during pendency of a departmenal proceeding. It is submitted that Hon’ble Full Bench judgment in the case of Arvind Kumar Singh (supra) has been noticed recently by Hon’ble Supreme Court in the case of **Dr. Hira Lal Vs. State of Bihar and Ors.** reported in **AIR 2020 SC 1027** and the Hon’ble Supreme Court directed the State to release the gratuity payable to the appellant in the said case and rest 10% will be released subject to the outcome of the criminal proceeding pending against the appellant.

13. Learned counsel has also relied upon Section 4 and Section 7 of the Gratuity Act, 1972 (hereinafter referred to

as 'the Act of 1972') and it is his submission that the Act of 1972 imposes a duty upon the employer to pay the gratuity amount within a period of thirty days from the date of superannuation of the employee and in case such payment is not made within the said period the employee would be entitled to get interest on the amount for the delayed period. If ultimately the amount is required to be recovered then the employer would be liable to pay the interest at the compounding rate for the delayed period. In such circumstance there being a clear duty upon the employer to pay the gratuity amount within a period of 30 days, the petitioner cannot be deprived of his gratuity amount in the garb of the provision as contained in sub-Rule (d) of the Rule 43 read with amended Rule 27 of the Bihar Pension Rules, 1950. Learned counsel for the petitioner has thus submitted that a direction be issued to the respondent-State and its authorities to pay the gratuity amount within a reasonable period.

14. Mr. Yadav, learned AAG-IX has though submitted that the departmental proceeding is likely to be concluded now but he is not aware of the exact stage of the departmental proceeding and so far issue of retrospective application of the Rule 43 (d) of the Bihar Pension Rules is concerned, it is his submission that because the said Rule talks of any pending

departmental proceeding therefore it will apply to the case of the petitioner. His entire submission is based on amended Rule 27 and Rule 43(d) which has been inserted by the notification issued by the Department of Finance, Government of Bihar. This Court had though informed the learned AAG-IX that the Court has come across some decisions at the government level wherein decision has been taken to pay 90% of gratuity in the pending cases of departmental proceeding but despite indulgence granted to learned AAG-IX he could not lay his hand over any such decision. In this regard adjournments were granted on 07.09.2020, 24.09.2020 and 25.09.2020.

Consideration

15. Having heard learned counsel for the parties and upon perusal of the records, this Court finds that in this case the departmental proceeding was initiated in the year 2006. On the date of retirement of the petitioner the relevant provisions such as Rule 27 and Rule 43 of the Pension Rules reads as under:-

> "27.Pension includes a gratuity."
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> X X X X X X
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> 43 (a) Future good conduct is an implied condition of every grant of pension. The Provincial Government reserve to themselves the right of withholding or withdrawing a pension or any part of it, if the pensioner is convicted of serious crime or be guilty of grave misconduct. The decision of the Provincial Government on any question of withholding or withdrawing the whole or any part of a pension under this rule, shall be final and conclusive.

(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 a 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:

Provided 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 Government 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.

Explanation- For the purposes of the rule-

(a) departmental proceeding shall be deemed to have been instituted when the charges framed, against the pensioner are issued to him or, if the Government servant has been placed

> under suspension from an earlier date, on such date; and
>
> (b) judicial proceedings shall be deemed to have been instituted:-
>
> (i) in the case of criminal proceedings, on the date on which a complaint is made or a charge-sheet is submitted, to a criminal court; and
>
> (ii) in the case of civil proceedings, on the date on which the complaint is presented, or as the case may be, an application is made to a civil Court."
>
> (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).
>
> (d)- if any departmental or judicial proceeding is pending against the govt. servant at the time of retirement, full amount of gratuity may be with held till the final conclusion of the departmental or judicial proceeding and issuance of order accordingly."

16. When this petitioner was looking for his post retiral dues and his pension papers were sent to the Principal Secretary, Department of Health, Government of Bihar, it remained pending for more than two years and only after this Court called upon the Principal Secretary to explain the delay in not processing the pension papers of the petitioner, steps were taken to fix the provisional pension to the extent of 90 per cent but at the same time a stand has been taken that because of the

amendment in Rule 27 and insertion of sub-rule (d) in Rule 43 of the Pension Rules now the entire gratuity of the petitioner shall remain in abeyance. In this regard the notification as contained in Memo No.77 dated 21.01.2019 has been relied upon and this Court reproduces hereunder the full contents of said memo no.77 for ready reference:-

"Govt. of Bihar
Finance Department
Notification
No-F(27) Pen. Cell-4712018 /tr, patna,Dated

In exercise of the powers conferred under Article-309 of the Constitution of India, the Governor of Bihar is hereby pleased to make the following Rules to amend the Bihar pension Rules, 1950 :-

l. Short title, extent and commencement- (l)These Rules may be called The Bihar pension (Amendment) rules, 2018.

(2) It shall extend to the whole of the State of Bihar.

(3) It shall come into force at once.

2. Rule- 27 of the Bihar pension Rules, l950 shall be substituted by the following:-

"27- Pension includes gratuity except the cases under rule 43(d)."

3. The following a new clause (d) shall be added after clause(c) of rule-43 of Bihar pension Rules, 1950 :_

"(d)- if any departmental or judicial proceeding is pending against the govt. servant at the time of retirement, full amount of gratuity may be with held till the final conclusion of the departmental or judicial proceeding and issuance of order accordingly

Provided that where Departmental proceedings has been instituted under Rule 19 of Bihar Government Servant Classification,

> Control and Appeal Rules, 2005 (As amended from time to time) for imposing minor penalties under rule l4(i) (ii) and (v) of the said rules, payment of gratuity may be made to the government servant."
>
> By Order of the Governor of Bihar.
> sd-
> (Rahul Singh)
> Secretary(Expenditure)."

17. The background of the notification contained in Memo No. 77 dated 21.01.2019 may be found in the judgment of the Hon'ble Full Bench of this Court in the case of Arvind Kumar Singh (Supra). The relevant paragraph of the said judgment is quoted hereunder:-

> "23. Now, when we analyse the entire sequence of events, we find that the pension rule when it was initially enforced on 20th of January, 1950 provided that pension shall include gratuity, meaning thereby that wherever the word "pension" is used in the pension rule, it would also include gratuity i.e. without any iota of doubt, the intention of the rule maker in incorporating Rule 27 by saying that pension includes gratuity. Rule 43, as it originally stood, had only sub rule (a) and (b) and these rules pertain to withholding or withdrawing of the pension in part or full after an employee has retired, subject to future good conduct and the effect of pecuniary loss caused to the State Government, pendency of departmental and judicial proceedings etc. Rule 43(b) was, therefore, only applicable in such cases where the employee is convicted or found guilty of misconduct. It is only after a finding of guilty is recorded in the departmental proceeding or the judicial

proceeding that action could be taken for withholding the pension in part or full. That being the position, the field with regard to action to be taken in cases where finality is not attained to the departmental proceedings or the criminal case, a decision was taken to release certain pension and withhold gratuity and leave encashment by virtue of the initial two circulars issued in the year 1974 i.e. 22nd of August, 1974 and 31st of October, 1974 and finally in the form of the so-called statutory amendment brought into force on 31st of July, 1980. Even though in the circulars of 1974 there is specific stipulations for withholding gratuity and leave encashment, but in the notification dated 31st of July, 1980, the provision is that the amount of provisional pension, as per rule, shall not be less than the maximum amount of pension admissible but it shall not be less than 90 per cent in any circumstances. Now, while incorporating this provision, in this circular (i.e. 31st July, 1980), the word "gratuity" is absent and if provisional pension as per rule is directed to be paid and if the meaning of pension as contemplated under Rule 27 is to include gratuity, it is very clear that the circular does not contemplate withholding of gratuity. However, learned Advocate General referred to sub-clause (c) of Clause 7 of this circular to say that it is only in furtherance to the circulars of 22.08.1974 and 31.10.1974 and, therefore, the word "gratuity" having been used in the circulars of 1974, withholding of gratuity as per the circular of 1974 is permissible because it is incorporated in a statutory form while issuing the circular dated 31st of July, 1980."

24. Even if we, for a moment, accept this contention of the learned Advocate General then also we find that with regard to payment of provisional pension and gratuity the field was initially occupied by two circulars and

one notification i.e. 22.08.1974, 31.10.1974 and 31st of July, 1980 respectively, the State Government in its own wisdom thought it appropriate to amend the pension rules again and incorporated Section 43 (c) on 19th of July, 2012 and when Section 43(c) was incorporated on 19th of July, 2012 in the matter of fixing the amount of provisional pension to be paid in cases where an employee is facing a departmental proceeding or a criminal case, the provision incorporated for the sake of repetition reads as under:-

"43(c) Where the departmental proceeding or judicial proceeding, in which the prosecution has been sanctioned against such servant, initiated during the service period of the government servant, is not concluded till the retirement of the government servant, the amount of provisional pension shall be less than the maximum admissible amount of pension but shall in no case be less than 90% (ninety percent).

This will come into force with immediate effect."

25. When this amendment was incorporated on 19th of July, 2012, the State Government was aware of the earlier statutory circular dated 31st of July, 1980 and the administrative circulars of 1974, but while incorporating a provision in the rule itself by amending it, i.e. Rule 43(c), the rule maker consciously used the word "pension" only without carving out an exception with regard to withholding of gratuity. The omission of the word "gratuity" in the amended provisions of Rule 43(c), in our considered view, is a deliberate and conscious omission on the

part of the rule maker. The rule maker knew that pension includes gratuity and when they speak about payment of provisional pension, the rule of interpretation mandates us to hold that it would mean payment of not only provisional pension but also gratuity until and unless the rule specifically provides for withholding of gratuity. That being so, once Rule 43(c) was incorporated into the statute and when Rule 43(c) does not empower the Government to withhold gratuity and when gratuity includes pension, in view of the provisions of Rule 27, the contention of the State Government and the learned Advocate General cannot be accepted. We have to hold that once Rule 43(c) was incorporated in the statutory rule, the effect of the earlier statutory notification dated 30th of July, 1980 is wiped out, nullified or deemed to have been repealed. Incorporation of Rule 43(c) on 19th of July, 2012 will have the effect of annulling the earlier notification dated 30th of July, 1980 or the circulars of 1974 and therefore, once a statutory provision- Rule 43(c) is incorporated in the rule itself, it has to be given its full and complete meaning, by adopting a literal meaning to each and every word used therein, and if this principle of statutory interpretation is followed, the contention of the State Government has to be rejected and we have no hesitation in holding that after coming into force of the amendment to the Pension Rules by incorporating Rule 43(c) on 19th of July, 2012, an employee who is facing departmental inquiry or judicial proceeding on the date of his superannuation would be entitled to provisional pension which would include gratuity to the tune of an amount not less than 90 per cent."

18. In the case of Dr. Hira Lal (supra) Hon'ble Supreme Court noticed the Hon'ble Full Bench judgment of this Court in the case of Arvind Kumar Singh (supra) and held as under:

> "14. In view of the above, we hold that the Respondent-State was unjustified in withholding 10% pension of the Appellant under administrative Circulars dated 22.08.1974 and 31.10.1974,and Government Resolution No. 3104 dated 31.07.1980after the Appellant had superannuated on 31.03.2008.We direct that10% of the pension amount which had been withheld after superannuation on 31.03.2008 till 19.07.2012 is liable to be paid to the Appellant within a period of 12 weeks from the date of this Judgment. After Rule 43(c) was inserted in the Bihar Pension Rules and brought into force on 19.07.2012, the State is empowered to legally withhold 10% of the pension amount of the Appellant, till the criminal proceedings in R.C. Case No. 48A/1996 are concluded. Consequently, the State will deduct 10% from the pension amount w.e.f. 19.07.2012 subject to the outcome of the criminal proceedings.
>
> 15.With respect to withholding of the full amount of gratuity, we find that as per Rule 27 of the Bihar Pension Rules, "pension" includes "gratuity". With the insertion of Rule 43 (c)in the statute book w.e.f. 19.07.2012,it is clear that gratuity also could not have been withheld under administrative circulars dated 22.08.1974

> and 31.10.1974,and Government Resolution No. 3104 dated 31.07.1980.The State is directed to release 90% of the gratuity payable to the Appellant within a period of 12 weeks from the date of this judgment. The balance 10% will be released subject to the outcome of the criminal proceedings pending against him in R.C. Case No. 48A/1996 "

19. It is evident from the judgment of the Hon'ble Full Bench of this Court that (i) the Rule 43(c) which was inserted w.e.f. 19.07.2012 could not be applied with retrospective effect i.e. 31.03.2008 when Dr. Hira Lal retired from service and (ii) as on the date of the said judgment the gratuity amount of a retired employee of the Government has been held liable to be paid to the extent of 90% as is the position with respect to pension under Rule 43(c) of the Pension Rules.

20. To come out of the rigorous of the Full Bench judgment of this Court the amendments were brought by substituting Rule 27 and then by inserting one sub-Rule (d) after Rule 43(c) of the Bihar Pension Rules. In these circumstances now the question arises as to whether the substituted provision of Rule 27 and newly inserted Rule 43(d) of the Bihar Pension Rules vide Memo No.77 dated 21.01.2019 may be applied with a retrospective effect so as to deprive the petitioner from getting

his admissible gratuity amount. This Court has already quoted the Memo No.77 dated 21.01.2019 in the preceeding paragraphs.

21. While dealing with the right of a retired employee to get his gratuity amount this Court would be required to take into consideration the relevant provisions of the Gratuity Act 1972. The background of the coming into force of the payment of gratuity Act was the fact that prior to this enactment the different States were having different enactment with respect to the payment of gratuity to the employees. It was thought necessary to have a central law on this subject so as to ensure an uniform pattern of payment of gratuity to the employees throughout the Country and it was also required to avoid different treatment to the employees of the establishments having branches in more than one State. The Statement of Objects and Reasons behind enactment of the Payment of Gratuity Act, 1972 may be referred to in this regard. According to Section '4' of the Payment of Gratuity Act the gratuity shall be payable to an employee on the termination of his employment after he has rendered continuance service for not less than five years and one of the modes of termination of the employment is his superannuation from service. Under Section

4(6) employer has power to forfeit gratuity payable to an employee in certain circumstances. Section 4(6) of the Act of 1972 reads as under:-

> "4(6) Notwithstanding anything contained in sub-section (i),-
> (a) the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused;
> (b) the gratuity payable to an employee [may be wholly or partially forfeited].
> (i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part; or
> (ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment."

22. Thus, withholding/forfeiture of gratuity should be strictly within the prescribed limit of Section 4(6) of the Act of 1972.

23. According to Section 7(3) the employer shall arrange to pay the amount of gratuity within 30 days from the date it becomes payable to the person to whom the gratuity is payable. Under sub-Section 3(a) of Section 7 if the amount of gratuity payable under sub-Section (3) is not paid by the employer within the period specified in sub-Section (3) the

employer shall pay from the date on which the gratuity becomes payable to the date on which it is paid, simple interest at such rate not exceeding the rate notified by the Central Government from time to time for repayment of long term deposits, as that Government may, by notification specify. The proviso to sub-Section (3a) states that no such interest shall be payable if the delay in the payment is due to the fault of the employee and the employer has obtained permission in writing from the controlling authority for the delayed payment on the said.

24. Section 14 of the Act of 1972 provides that the provisions of the Act or any rules made under the Act will have affect, notwithstanding anything inconsistent therewith contained in any enactment other than the Act or in any instrument or contract having effect by virtue of any enactment other than the Act.

25. In **Jaswant Singh Gill Vs. Bharat Coking Coal Limited and others** reported in **(2007) 1 SCC 663** the Hon'ble Apex Court has laid down the test for forfeiture of gratuity. For forfeiture of any amount two things are imperative, namely (i) termination of services for any of the causes enumerated under Section 4(6) of the Act and (ii) pecuniary loss. In **K.C. Mathew Vs. Plantation Corporation Of Kerala Limited** reported in

2000 LIC 1519 it has been held that gratuity of an employee can be withheld only in case of dismissal and not otherwise.

26. The Hon'ble Apex Court has while dealing with the right of a retired employee to receive his post retiral dues held in the case of **D.S. Nakara & Ors. versus Union of India** reported in **(1983) 1 SCC 305** and **Deokinandan Prasad Vs. State of Bihar & Ors.** reported in **(1971) 2 SCC 330** as also in the case of **D.V. Kapoor Vs. Union of India** reported in **AIR 1990 SC 1923** that the post retiral dues of an employee is in the nature of his property under Article 300A of the Constitution of India, it is his constitutional right to receive that and he cannot be deprived of the benefits of the post retiral dues unless it is in accordance with law.

27. So far as the retrospective applicability of a provision contained in a Statute is concerned, again it is well settled law that the provisions which are brought by way of an amendment which will have an effect of depriving a person from getting his vested rights and taking away the benefits such as post retiral dues cannot be given a retrospective effect unless it is so provided specifically in the Statute/Rule or by necessary intendment.

28. On the issue of retrospective applicability of a

statute or statutory provision touching upon the existing rights Lord Blanesburg while delivering the opinion of the Privy Council in the case of **Delhi Cloth & General Mills Ltd. v. C.I.T., Delhi** reported in **AIR 1927 PC 242** observed "Provisions, which, if applied retrospectively, would deprive of their existing finality or orders, which, when the statute came into force, were final, are provisions which touch existing rights. Accordingly, if the section now in question is to apply to orders final at the date when it came into force, it must be clearly so provided".

29. In the case of **United Provinces v. Atiqa Begum (Mt.), AIR 1941 FC 16** their Lordships were considering the issue with regard to a retrospective statute which affects rights in existence and held that retrospective statute which affects rights in existence is not readily construed to affect adjudication of pending proceedings. The Courts insist that to have that result the language should be sufficiently clear. [Refer Principles of Statutory Interpretation by Justice G.P. Singh (Tenth Edition, Page 518-519)].

30. The golden rule of construction is that, in the absence of anything in the enactment to show that it is to have retrospective operation, it cannot be so construed as to have the

effect of altering the law applicable to a claim in litigation at the time when the Act was passed. Thus, going by the principles of interpretation of statute, this Court does not find any clear intention on the part of the rule making authority to bring within its reach even those claims which were covered under the judgment of the Full Bench of this Court in the case of Arvind Kumar Singh (supra).

31. In the case of **Chandravathi P.K. and others v. C.K. Saji and others AIR 2004 SC 2717** their lordships of the Apex Court has while discussing the effect of retrospective rule observed in paragraph ‘33’ as under:-

> “.......The State in exercise of its power under Article 309 of the Constitution of India may give retrospective effect to a rule but the same must be explicit and clear by making express provision therefor or by necessary implication but such retrospectivity of a rule cannot be inferred only by way of surmises and conjectures.”

32. In this case, the rule making authority were fully aware of the pending claims and the judgment of the Hon’ble Full Bench of this Court in the case of Arvind Kumar Singh (supra) which had crystallized the law saying that the pension includes gratuity and the retired employee would be entitled to get gratuity in similar manner to the extent of 90% as is provided with respect to the payment of provisional pension.

While bringing amendment in Rule 27 and inserting a new provision in form of sub-rule (d) in Rule 43 there is no indication at all that there was any intention of rule making authority to touch upon the vested rights of the employee such as petitioner and it cannot be readily inserted in absence of any such provision that the rule making authority had any intention to take away the vested rights of the petitioner which were covered under the judgment of the Hon'ble Full Bench of this Court. The view taken by Hon'ble Supreme Court in Dr. Hira Lal's (supra) is a binding precedent.

33. Thus, considering the provisions of the payment of Gratuity Act, the judgment of Hon'ble Full Bench of this Court in the case of Arvind Kumar Singh (supra) and that of Hon'ble Supreme Court in Dr. Hira Lal's case as also the fact that the amendment in Rule 27 by way of substitution and then by inserting a new provision such as sub-rule (d) of Rule 43 in the Bihar Pension Rules 1950 have come into force w.e.f. 21.01.2019 the respondents cannot apply those provisions with a retrospective effect so as to take away the vested right of the petitioner to receive his gratuity amount in terms of the settled law in the case of Arvind Kumar Singh (supra). Any judgment of this Court cannot be negated by bringing a legislation much

less by way of a rule framed under Article 309 of the Constitution by applying the same with retrospective effect. Such amendment will only be prospective in nature. Judgment of the Hon'ble Supreme Court in **Madan Mohan Pathak Vs. Union of India** reported in **AIR 1978 SC 803** is an authority on this point. Taking recourse to the amendments the petitioner cannot be deprived of his vested right to receive the gratuity amount in terms of the law laid down by Hon'ble Full Bench in Arvind Kumar Singh (supra) which has been virtually approved by Hon'ble Supreme Court in the case of Dr. Heera Lal (supra)

34. At this stage, this Court would place on record that the stand of the respondent State in this case is totally diversed to their stand in CWJC No.16230 of 2018 (Sushma Jaiswal Vs. State of Bihar) disposed off by this Court recently on 21.09.2020. The entire order recorded in the said case are being reproduced hereunder: -

> " Learned counsel for the petitioner as well as Ms. Binita Singh, learned SC-28 for the State are present.
>
> This writ application has been preferred seeking issuance of a writ in the nature of mandamus to the respondents to pay the pension, gratuity and leave encashment as also other consequential benefits to the petitioner who has retired from the post of Principal from

Primary Teachers Training College, Shahpur, Aurangabad on 31.08.2017.

In the counter affidavit filed on behalf of the State a statement has been made in paragraph '4' that the provisional pension of the petitioner has already been sanctioned and she is receiving her provisional pension as per the P.P.O. issued. It is also pointed out that the name of the petitioner has transpired in an CBI enquiry which has been initiated by virtue of an order passed by this Court in CWJC No.9847/1998 in which the appointment/promotion of the primary teachers and others in the State from 1980 till 1998 is under investigation.

In paragraph '14' of the counter affidavit statement has also been made that the department has decided to sanction provisional pension and provisional gratuity to the petitioner in view of the order dated 02.05.2018 passed by Hon'ble Full Bench of this Court in CWJC No.15328/2016 (Arvind Kumar Singh Vs. the State of Bihar & ors.). The amount of GPF has already been paid to the petitioner.

On the last date, learned counsel for the petitioner was given time to seek instruction as to whether petitioner is receiving provisional pension and provisional gratuity or not. Today, learned counsel for the petitioner has informed this Court that the petitioner is receiving the provisional pension and she has already

> received gratuity amount, thus, presently the grievance of the petitioner has been redressed.
> In the aforesaid view of the matter, since for the present the grievance of the petitioner has been redressed and no other plea has been taken, this writ application is disposed of as having become infructuous.”

35. It is evident that in the case of Sushma Jaiswal she had retired on 31.08.2017, if in her case it was decided to follow the Full Bench judgment in the case of Arvind Kumar Singh (supra), there is no reason that the State will take a different plea in this matter.

36. There is yet another case being CWJC No. 11812 of 2019 (Bhuvneshwar Singh Vs. State of Bihar & Ors.) in which the State respondents have filed their counter affidavit stating therein that 90% of gratuity has been sanctioned during pendency of the departmental proceeding.

37. This approach of the State respondents would be contrary to their own litigation policy. The decision taken in the case of Sushma Jaiswal (supra) and in the case of Bhuvneshwar Singh (supra) only strengthens the view of this Court that there cannot be a retrospective application of amended Rule 27 and newly inserted Rule 43(d) in the Pension Rules as that would be violative of Article 14, 16 and 311 of the Constitution of India.

This Court having taken this view need not go into an issue as to whether the amendment in Rule 27 read with newly inserted Rule 43(d) may be interpreted to mean an absolute bar in making payment of gratuity to the extent of 90%.

38. This Court, therefore, finds that the petitioner has made out a case in which he has established his legal right to receive the admissible gratuity amount and this Court has found that the State respondents have a duty to pay the same, therefore, this Court hereby issues a writ in the nature of a writ of Mandamus directing the respondents to pay the gratuity amount due to the petitioner in terms of the judgment of Hon'ble Full Bench and with statutory interest as may be applicable.

39. Before this Court parts with this judgment, it is made clear that although this Court has taken note of the provisions contained under the payment of Gratuity Act for purpose of finding out the rights of the petitioner as contained therein but at this stage in the present writ application the Court has confined its consideration only with respect to the retrospective applicability of the amendments brought in Rule 27 and newly inserted sub-rule (d) in Rule 43 of the Bihar Pension Rules 1950 and in ultimate analysis this Court has

found that the respondent State in the case of Sushma Jaiswal (supra) and Bhuvneshwar Singh (supra) itself came with a stand that like pension they are paying gratuity to the extent of 90% in the cases in which a departmental proceeding is pending.

40. This writ application is, thus, allowed to the extent indicated above.

41. Let the entire payments be made to the petitioner within a period of 60 days from the date of receipt/production of a copy of this order.

(Rajeev Ranjan Prasad, J)

arvind/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	05.10.2020
Transmission Date	NA

Note: The ordersheet duly signed has been attached with the record. However, in view of the present arrangements, during Pandemic period all concerned shall act on the basis of the copy of the order uploaded on the High Court website under the heading ‘Judicial Orders Passed During The Pandemic Period’.