

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.4066 of 2019

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Lal Bahadur Sharma Son of Late Gagan Singh Retired Clerk, N.M.C.H.,
Patna, Resident of Mahavir Colony, Saichak Road No.2/B, Beur, Anishabad,
Patna-2

... .. Petitioner

Versus

1. The State Of Bihar through the Director-in-Chief, Health Department, Govt. of Bihar.
2. The Principal Secretary, Department of Health, New Secretariat, Govt. of Bihar, Patna.
3. The Commissioner, Patna Division, Bihar, Patna.
4. The Director-in-Chief, Health Department, Govt. of Bihar, Patna.
5. The Superintendent, N.M.C.H., Patna.

... .. Respondents

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Appearance :

For the Petitioner : Mr. Ajit Kumar, Advocate

For the Respondent State: Mr. S.D.Yadav, AAG-9

Mrs. Shama Sinha, AC to AAG-9

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CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

ORAL JUDGMENT

Date : 17-03-2021

The petitioner retired with effect from 31.03.2013, while working as an Assistant in Nalanda Medical College, Patna. Subsequent to his retirement, he was sanctioned payment of 90% of provisional pension and 90% of gratuity. He was paid his group insurance amount.

2. It is asserted in the writ application that by letter dated 18.03.2017 issued by the Superintendent of the College, the petitioner was asked to explain regarding his service from the period 05.02.1973 to 30.05.1980, which was not duly authenticated. His service book did not disclose his regularization.



The notice further required him to explain as to why there was no record of his joining in Nalanda Medical College, Patna, on 18.09.1980, after having been relieved from Patliputra Medical College, Dhanbad, on 17.09.1980.

3. This is to be noticed, at this stage, that it is the petitioner's assertion in the writ application that he was appointed as an Assistant in Patliputra Medical College, Dhanbad, which was a private institution and was subsequently taken over by the State of Bihar with effect from 01.01.1980. After having served there in the capacity of an Assistant, he was transferred to Nalanda Medical College, Patna, on 17.09.1980.

4. It is his case that upon his transfer from Patliputra Medical College, Dhanbad by order dated 17.09.1980, he was allowed one week transit period to join the place of his posting in Nalanda Medical College, Patna. He, however, joined even before expiry of the said transit period on 19.09.1980.

5. It transpires from letter dated 18.03.2017 that certain discrepancies, as noted above, were detected by the Office of the Commissioner, Patna Division, in the process of confirmation of the first time bound promotion granted to the petitioner. It also appears from the said letter that the objections were raised by the Office of the Divisional Commissioner, Patna, on 03.11.2014 itself



in this regard. The circumstance, in which the office of the Superintendent, Nalanda Medical College, Patna, issued letter dated 18.03.2017, two and a half years thereafter is not known nor has been explained anywhere in the pleadings. The petitioner is said to have responded to the said communication on 14.04.2017 with a plea that he was granted first time bound promotion with effect from 01.04.1983, which was already confirmed by the Divisional Commissioner by letter dated 05.02.1994. In the background of the aforesaid facts, the present writ application has been filed seeking a direction to the respondents to pay to the petitioner full pension and gratuity as also the amount of cash equivalent to unutilized earned leave for a period of 300 days.

6. From subsequent pleadings and the counter affidavit filed on behalf of the State respondents, it transpires that payment of remaining 10% of the pension and gratuity have also been authorized. It is also the stand of the respondents State of Bihar that admissible amount of cash equivalent of unutilized earned leave has been paid to the petitioner.

7. It, however, transpires that it was found by the sanctioning authority that the petitioner's pay was wrongly fixed leading to excess payment of salary to the tune of Rs.1,77,121/-. The petitioner was found entitled to a sum of Rs.4,10,510/- against



his total amount of leave encashment dues. The said amount of excess payment made to the petitioner has been decided to be deducted from the amount payable to him against leave encashment. Accordingly, payment of a sum of Rs.2,33,459/- has been authorized by the College.

8. Mr. Ajit Kumar, learned counsel appearing on behalf of the petitioner has submitted that the petitioner retired as a Class-III employee and even if it is accepted that certain amount was paid to him because of wrong fixation of salary, recovery from his post retiral dues is impermissible in view of the law laid down by the Supreme Court in case of *State of Punjab and Others vs. Rafiq Masih (White Washer) and Others*, reported in (2015) 4 SCC 334. Paragraph 18 of the said decision reads as under : -

“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.”

9. Mr. S.D. Yadav, learned AAG-9 appearing on behalf of the State respondents has submitted that it is not a case where the amount already paid to the petitioner against retiral benefits is sought to be recovered on the ground of excess payment because of wrong fixation of salary. He submits that in the present case, the petitioner has been found to have received more amount of salary than he was legally entitled to and, therefore, it is permissible for the respondents to recover the amount paid in excess from cash equivalent of unutilized leave.

10. The facts of the case which have been noted above are admitted. The petitioner retired in 2013 and no justification at all has been offered by the respondents to explain delay of nearly seven years in making payment of full pension, gratuity and



admitted amount of leave encashment. Claim of the petitioner that he is entitled for payment of cash equivalent of unutilized earned leave for 300 days has not been disputed by the respondents. Recovery from the said amount is sought to be made on the sole ground of excess payment made to the petitioner against his salary because of wrong fixation of pay.

11. Taking into account the entire facts and circumstances, apparent laches on the part of the respondents in making payment of post retiral dues and Supreme Court's decision in case of **Rafiq Masih** (supra), in my opinion, it will be unjust and improper for the respondents to recover/adjust the amount paid to the petitioner against salary on the basis of alleged wrong fixation of pay. What the respondents have done in clearing the petitioner's post retiral dues against the heads of pension, gratuity and unutilized earned leave could have been done soon after the petitioner's superannuation. In such view of the matter, in the Court's opinion recovery, on the ground of excess payment of salary made to the petitioner, from his entitlement against leave encashment should not be permitted.

12. Accordingly, the respondents are directed to release in favour of the petitioner, rest of the amount of leave encashment



of Rs.1,77,121/- within a period of one month from the date of receipt/production of a copy of this order.

13. The Court is further of the view that in the background of unexplained delay in clearing admitted dues of the petitioner against his post retiral dues including the amount of leave encashment, adequate cost deserves to be imposed.

14. Accordingly, this writ application is allowed with the aforesaid direction with a cost of Rs.10,000/- (Ten Thousand only) to be paid by the Respondent No. 5 to the petitioner within the said period of one month.

(Chakradhari Sharan Singh, J)

Pawan/-

AFR/NAFR	NAFR
CAV DATE	N/A
Uploading Date	17.03.2021
Transmission Date	N/A

