

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.4760 of 2020

Pradip Kumar Srivastava, Retired Executive Engineer, Son of Late Kandh
Bihari Sahay, Resident of Village-Thawe, P.S.-Thawe, District-Gopalganj.

... .. Petitioner/s

Versus

1. The State of Bihar.
2. The Principal Secretary, Road Construction Department, Government of Bihar, Patna.
3. The Principal Secretary, Rural Works Department, Government of Bihar, Patna.
4. The Additional Secretary, Rural Works Department, Government of Bihar, Patna.
5. The Deputy Secretary (Vigilance), Road Construction Department, Government of Bihar, Patna.
6. The Officer on Special Duty, Rural Works Department, Government of Bihar, Patna.
7. The Accountant General, Bihar, Patna.
8. The Treasury Officer, Siwan.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr.Ranjan Kumar Srivastava, Adv. Ms. Rajnigandha, Adv. Mr. Sunny Raman, Adv.
For the Respondent/s	:	Mr. Satya Vrat, AC to GP-10
For the Accountant General	:	Mr. Prabhat Ranjan, Adv.

CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH
ORAL JUDGMENT

Date : 09-02-2021

The present writ petition has been filed for
quashing the order contained in memo no. 3481
dated 25.11.2019, passed by the Principal



Secretary, Rural Works Department, Government of Bihar, Patna, i.e. Respondent No. 3, whereby and whereunder the representation filed by the petitioner against the order of recovery of a sum of Rs. 3,99,900/- from the amount of leave encashment of the petitioner has been rejected.

2. The brief facts of the case are that the petitioner was appointed on 09.12.1980 as Assistant Engineer and subsequently, he was promoted to the post of Executive Engineer, whereafter he was promoted to the post of Assistant Engineer in the year, 2000. The petitioner was posted as Assistant Engineer, Road Construction Department, Patna West Pali, for a period of about 10 months i.e. from 06.03.2000 to 25.01.2001 and at that time, a work relating to construction of road from Dulhin Bazar to Rai Talab and from Pali to Kinjar was going on from 1998-1999 itself, however, the petitioner was transferred from the said place on 25.01.2001. Subsequently, the petitioner had superannuated from his services while working on the post of Executive Engineer,



Rural Works Department, Works Division,
Maharajganj, on 31.01.2015.

3. It is the further contention of the petitioner that without giving any show cause notice or without initiating any proceeding, an order has been passed by the respondents to recover a sum of Rs. 3,99,900/- from the amount of leave encashment payable to the petitioner herein. The petitioner had then filed a representation objecting to the said deduction from his leave encashment amount, however to no avail, necessitating filing of a writ petition before this Court bearing CWJC No. 6560 of 2019, which was disposed of by a coordinate Bench of this Court by an order dated 23.04.2019, granting liberty to the petitioner to file a representation before the Respondent No. 3, who was directed to dispose of the representation within a period of six weeks thereafter by a reasoned order in accordance with law. The petitioner had then filed his representation, which has been rejected by the impugned order dated



25.11.2019 passed by the Respondent No. 3.

4. The learned counsel for the petitioner has submitted that the impugned action of making deduction from the amount of leave encashment payable to the petitioner, in absence of any departmental or judicial proceeding having been held against the petitioner, is illegal, thus, no recovery can be made from the retiral dues of the petitioner herein.

5. Per contra, the learned counsel for the Respondents-State has submitted that the petitioner was posted as Assistant Engineer, Road Construction Department, Patna West Pali, and at that time, the work relating to construction of Road from Dulhin Bazar to Rani Talab and from Pali to Kinjar was not executed in accordance with specification, hence, an explanation was sought for vide letter dated 24.02.2011 from the Road Construction Department, whereupon reply was submitted, however, the same was not found satisfactorily. Hence, in the report no. 548 of the



CAG, Public Accounts Committee, recommendation was made for recovery of a sum of Rs. 26.66 lacs from the officers concerned and accordingly upon calculation, the proportionate share of the petitioner totals upto a sum of Rs. 3,99,900/-, whereafter a letter was issued by the Rural Works Department, Bihar, Patna, vide memo dated 02.08.2018 by which decision has been taken to recover a sum of Rs. 3,99,900/- from the leave encashment amount payable to the petitioner. It is thus submitted that there is no illegality in recovery of the aforesaid amount from the retiral benefits of the petitioner.

6. I have heard the learned counsel for the parties and gone through the materials available on record. It is a well-settled law that pension is not a bounty payable on the sweet will and pleasure of the Government, on the other hand, the right to pension is a valuable right vested in a government servant, hence the State has no power to withhold the retiral dues of a superannuated employee merely by an executive order. It is



equally a well-settled law that no order of deduction, either from the leave encashment amount or from any amount of retiral benefits payable to the petitioner, can be made in absence of any departmental or judicial proceeding having been held against the petitioner herein or without there being any finding of guilt. In this regard, it would be relevant to refer to a judgment rendered by the Hon'ble Apex Court, reported in **1995 Supp (3) SCC 56 (State of Bihar v. Mohd. Idris Ansari)**, paragraph No. 7 whereof is reproduced herein below:-

"7. A mere look at these provisions shows that before the power under Rule 43(b) can be exercised in connection with the alleged misconduct of a retired government servant, it must be shown that in departmental proceedings or judicial proceedings the government servant concerned is found guilty of grave misconduct."

7. Another Judgment rendered by the Hon'ble Apex Court, which is relevant to the issue under consideration in the present case, is the one



reported in **(2003) 12 SCC 293 (Kerala SRTC v. K.O. Varghese)**, paragraph No. 20 whereof is reproduced herein below:-

"20. From the aforesaid analysis three things emerge: (i) that pension is neither bounty nor a matter of grace depending upon the sweet will of the employer and that it creates a vested right subject to the statute, if any, holding the field, (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 heyday of their life ceaselessly toiled for employers on an assurance that in their ripe old age they would not be left in the lurch. It must also be noticed that the quantum of pension is a certain percentage correlated to the emoluments earlier drawn. 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."

8. Yet another judgment relevant to the issue under consideration is the one reported in **2000 (1) PLJR 99 (Kumud Ranjan Tiwari Vs. The**



state of Bihar & Ors.), paragraph No. 4 whereof is reproduced herein below:-

"4. This Court fails to appreciate as to how the said pensionary dues of the petitioner can be legally withheld without there being any finding of guilt. This Court in the case of Bajrang Deo Narain Sinha v. The State of Bihar and Ors. (L.P.A. No. 124 of 1999, disposed of on 26.8.1999) [1999 (3) PLJR 949] has held that the pensionary dues payable to the employee including gratuity, which is also pension within the meaning of the Bihar Pension Rules, cannot be withheld till such time as an order is passed under Rule 43(b) of the Bihar Pension Rules. Similarly, the leave encashment dues also cannot be withheld since that is paid in lieu of un-utilised leave and, therefore, partakes the character of salary."

9. It would also be relevant to refer to a judgment rendered by a coordinate Bench of this Court, reported in **(2002) 4 PLJR 676 (Gauri Shankar Singh v. Bihar State Food and Civil Supplies Corporation Ltd. and Ors.)**, paragraph no. 5 whereof is reproduced herein below:-

"5. In the aforesaid facts and



circumstances, it is not possible to accept the plea of the Corporation that Petitioner had admitted the entire claims of shortage. On the basis of alleged admission the Corporation cannot be permitted to justify demand for interest over alleged shortage. From unrebutted materials on record it is found that Petitioner admitted only a shortage of Rs. 941.35 paise in Annexure-1, his representation of the year 1991 as well as in Annexure-5, the representation of the year 2000. It appears that such shortage was demanded through letter dated 21.6.1980 and since Petitioner deposited a larger amount of Rs. 5754.31 paise on 31.1.1994, clearly he has deposited more than what he admitted even if interest be permitted in favour of the Corporation at any reasonable rate. Hence, no demand of interest can be justified from the Petitioner on the basis of alleged admission. So far as interest on the basis of resolution of the Board of Directors is concerned, such resolution cannot saddle any employee with a consolidated amount of damages on account of shortage in foodgrains in a store or godown under charge of such an employee. The Board of Directors can take



only policy decision and may fix rate of interest chargeable over a lawfully determined amount of dues or liability against an employee. The liability or damages can be ascertained only in accordance with procedure known to law. In case of employees/retired employees such procedure will be governed by service conditions and rules including pension rules. In case of Petitioner the amount of damages or loss could have been determined either in an earlier concluded departmental proceeding or through a judgment or decree of a competent court. Admittedly, there is no such determination, decree or order. A proceeding under the Pension Rules cannot now be initiated in view of bar of four years under Rule 43(b) of the Bihar Pension Rules. Hence, the impugned orders contained in Annexures 6 and 7 seeking to recover an amount of Rs. 46012.08 paise from the pension/gratuity of the Petitioner are against law and are, therefore, quashed. The concerned authorities are now directed to pay the pension and gratuity of the Petitioner including arrears as per authority issued by Accountant General, Bihar without any



delay and in any case within two months from the date of production/communication of a copy of this order."

10. It would also be relevant to refer to a judgment rendered by a coordinate Bench of this Court, reported in **(2000) 1 PLJR 169 (Gopal Prasad vs. The State of Bihar & Ors.)**, paragraph no. 1 whereof is reproduced herein below:-

"This relates to the payment of retiral benefit to the petitioner who retired from service as Supply Inspector on 31.7.98. Admittedly, nothing has been paid so far to the petitioner after his retirement from service. It appears that after the retirement of the petitioner a letter was sent to the District Magistrate, Bhagalpur directing the petitioner to refund a sum of Rs. 5, 78, 417.24 paise. From a perusal of the impugned letter it does not appear as to what is the basis of writing this letter with a direction aforesaid as no details of the amount and/or allegation has been made against the petitioner. It is further submitted that



neither any departmental proceeding was initiated while he was in service for the alleged misconduct nor the proceeding under section 43(b) of the Pension Rule was initiated against the petitioner even after his retirement. However, it appears that certain articles were found shortage in the year 1974 and accordingly the amount to the extent of shortage is sought to be recovered from the petitioner. Admittedly the amount sought to be recovered has not been ascertained in accordance with law as yet. In this case counter-affidavit has been filed earlier on behalf of the State as well as the respondent Bihar State Food & Civil Supplies Corporation wherein the factual aspect has not been denied in their pleadings. Since the petitioner has retired the aforesaid amount is sought to be recovered from the pensionary benefits legally payable to the petitioner. Though it is permissible for the State respondents to initiate proceeding in terms of Rule 43(b) of the Pension Rule even after retirement of the employee yet no such proceeding has been initiated against the petitioner who had retired in the year 1996. Learned counsel for the State submits that while



issuing last pay certificate it has been mentioned that certain amounts are recoverable from the petitioner but admittedly, no step has been taken to recover the said amount while he was in service. After having heard learned counsel for the parties and going through the materials on record I am of the view that the action of the respondents are wholly illegal, arbitrary and without jurisdiction in withholding the retirement benefits payable to the petitioner on flimsy grounds. It has neither been proved in the departmental proceeding nor it has been ascertained by appropriate authority and as such, retiral benefit payable to the petitioner cannot be withheld. Accordingly, I direct the State respondents to issue the sanction order with respect to all the retiral benefits legally payable to the petitioner, within two weeks from the date of receipt production of a copy of this order and forward the same to the Accountant General who will issue authority slip within two weeks therefrom. Learned counsel for the petitioner at this stage submits that the monetary benefits arising out of the time bound promotion has also not been paid to him. It goes



without saying that if the amount arising out of such promotion has not been paid, that must be paid to the petitioner within the time aforesaid. Since the retirement benefits has been illegally withheld on flimsy ground the petitioner is entitled to the interest at the rate of 12% per annum from the date of retirement till the respective payments alongwith the cost which:, is assessed at Rs. 1000/-. Both the interest and the cost shall be paid along with the principal amount within the time aforesaid."

11. It would also be relevant to refer to a judgment, reported in **(2005) 1 PLJR 513 (Jagdish Chandra Sinha vs The State Of Bihar And Ors.)**, paragraphs no. 4, 5, 6, 7, 14 and 15 whereof are reproduced herein below:-

"4. Learned counsel for the petitioner in reply submits that such recovery at this stage is impermissible In law. He relies on the following reported judgments :

(i) 1995 (2) PLJR 51 ([SC](#)), [State of Bihar and Ors. v. Mohd. Idrish Ansari](#);

(ii) AIR 1990 SC 1923, [D.V. Kapoor v. Union of](#)



[India and Ors.](#);

(iii) 1999 (3) PLJR 949, [Bajrang Deo Narain Sinha v. The State of Bihar and Ors.](#);

(iv) 2001 (3) PLJR 292, [Pramod Kumar Sinha v. The State of Bihar and Ors.](#);

(v) 2004 (4) PLJR 236, Smt. Shanti Choubey v. The State of Bihar and Ors.;

(v) 2004(4) PLJR 159, [Parmeshwar Dayal Verma v. State of Bihar and Ors.](#)

5. I have perused the materials on record and considered the submissions of learned counsel for the parties. The admitted position is that the petitioner had received the aforesaid sum of Rs. 4,58,919.40p. by way or advanced in instalments to complete the work. The work was undertaken and executed. The difference between the petitioner's case and that of respondents is that, according to the former, the entire work was completed according to the specifications, whereas according to the latter, only 85 per cent work was completed and executed poorly. According to the respondents, this position became clear to the respondent authorities from the report



dated 24.4.2003 (Annexure-J to the counter affidavit) which is an enquiry report submitted by the Additional Collector, West Champaran, Bettiah. This was an enquiry to ascertain the correct position and was not an enquiry contemplated in terms of Rule 43(b) of the Bihar Pension Rules (hereinafter referred to as the 'Rules'). Taking the case of the respondents at its highest, it seems to make out a case of misconduct and/or negligence in duties, resulting in loss to the Government.

6. Rule 43(b) of the Rules is relevant in the present context and is set out herein below for the facility of quick reference :

"43(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.

It is manifest from a plain reading of Rule 43(b) that the alleged acts of omission and commission on the part of the petitioner has led to pecuniary loss to the Government which can be determined either in a departmental proceeding or judicial proceeding provided the same is instituted in respect of an event which took place not more than four years before the institution of such proceedings. The admitted position in that no such proceeding in terms of Rule 43(b) has so far been instituted nor any judicial proceedings in pending in Court. It is not on record as to when was the project completed. In so far as the petitioner is concerned, it was surely prior to the petitioner's retirement on 31.12.1999. A period of more than four years has lapsed since then and, therefore, such a proceeding cannot now be initiated. Applicability of Rule 43(b) of the Rules in the facts and circumstances of the



present case is, therefore, obviated.

7. The position perhaps may have been different, had it been a case of recovery of advances simpliciter. The case of the respondents is incomplete execution of work in a deficient manner resulting in loss to the Government.

14. In so far as the present case is concerned, the petitioner's case appears to be on a better footing, namely, in the reported judgment the entire property of the State Government to the extent indicated therein were completely missing. In the present case, on the other hand, the work has been executed and according to the respondent authorities, work to the extent of 85 per cent has been executed and in a deficient manner. I am, therefore, of the view that the petitioner's case is fully covered by the judgment of this Court in Parmeshwar Dayal Verma (supra).

15. In the result, I am of the view that recovery of the aforesaid sum of Rs. 4,58,919.40p. is impermissible in the facts and circumstances of the present case. The respondent authorities are hereby



directed to release the pensionary benefits of the petitioner accordingly. The petitioner shall be entitled to interest at the statutory rate on the deposits of the general provident fund till the date of payment."

12. It would also be relevant to refer to a judgment, reported in **(2004) 4 PLJR 236 (Smt. Shanti Choubey v. The State of Bihar & Ors.)**, paragraphs no. 11 to 15 whereof are reproduced herein below:-

"11. 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 an event which took place not more than four years before the institution of such proceedings.

12. In the present case, obviously the periods in question relate to the years in between 3.2.1982 and 17.11.1989 whereas the order has been passed on 4.9.2001, i.e. much beyond four years and that too without initiating any action with respect to it while the deceased Government servant was alive. The deceased Government servant died after six and half years even from the last date of alleged advance given to him on 17.11.1989, but nothing has been brought on record to show that any step was taken for realisation of the same from the petitioner during his lifetime and it was only after lapse of ten years that the impugned order, contained in Annexure 14, has been passed for making recovery from the death-cum-retiral dues payable to the widow.

13. I fail to appreciate as to how after the death of the Government servant, the Government expects from the widow to meet such claim of the department when



no step at all was taken during the lifetime of the deceased Government servant. It is really shocking that such decision for recovery is taken after the death of the Government servant on the pretext of adjustment sought to be made from the death-cum-retiral dues payable to the widow who obviously cannot meet such claim of the Department that the works for which advances were taken were not executed and vouchers/bills were not produced by the deceased Government servant during his lifetime.

14. In the case of Radha Jha (supra), such recovery was held not permissible and, further, this Court strongly deprecated the sheer callousness on the part of the State authorities in discharging their responsibilities towards the widow of the deceased Government servant and thus awarded penal interest and cost as well. The said decision rendered in the case of Radha Jha (supra) has been upheld in L.P.A. No. 1251 of 2002, disposed of on 27.1.2003, by dismissal of the said appeal by the Division Bench of this Court.

15. In the result, the writ application is allowed. The impugned order, contained



in Annexure 14, is quashed. The State respondents are directed accordingly to release the remaining amount within a week, failing which the petitioner will be entitled for penal interest at the rate of 12% per annum on the entire due amount, which has been paid after filing of the writ application and is to be paid under this direction from the due date till the payment has been made, besides a cost of Rs.5,000/-(five thousand), which shall be paid by the State, but shall be recovered from the officer, who is found responsible for not complying with this order within the aforesaid time."

13. Admittedly, in the present case, neither any departmental proceeding has ever been held nor any steps were taken by the Respondents-State to recover the aforesaid amount from the petitioner during his service tenure nor the guilt of the petitioner has been proved. It must be remembered that the Leave Encashment is paid on account of unutilized leave and therefore, it partakes the character of salary. Pension is no longer considered as a bounty. The salary is a property given to the hands of the State which



cannot be withheld except under the powers derived by a statute or law as contemplated under [Article 300A](#) of the Constitution of India as laid down by the Hon'ble Supreme Court of India in a catena of decisions.

It is equally a well settled Law, as is evident from the decisions referred to herein above in the preceding paragraphs, rendered both by the Hon'ble Apex Court as also by this Court, that the pensionary dues payable to the employees including gratuity, which is also pension within the meaning of the Bihar Pension Rules, cannot be withheld till such time an order is passed under Rule 43(b) of the Bihar Pension Rules. Similarly, the leave encashment dues also cannot be withheld since the same is paid in lieu of un-utilised leave and, therefore, partakes the character of salary. Consequently, this Court finds that the recovery of a sum of Rs. 3,99,900/-, sought to be made from the leave encashment amount payable to the petitioner, is illegal and perverse, especially in view of the law laid by this Court in a catena of



decisions, as referred to hereinabove, hence, the order dated 25.11.2019 passed by the Respondent No. 3 is quashed and the respondents are directed to refund the aforesaid sum of Rs. 3,99,900/- to the petitioner within a period of four weeks from today.

14. The writ petition stands allowed.

(Mohit Kumar Shah, J)

Ajay/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	24.02.2021
Transmission Date	NA

