IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.7842 of 2020

==

Ramesh Prasad Ranjan, aged about 60 years (Male), Son of Late Dashrath Ram, permanent resident of Village + P.S. + P.O. Chhatapur, District Supaul, presently residing at Near Axis School, P.O. Bahadurpur Housing Colony, P.S. New Agamkuan, District Patna.

... ... Petitioner

Versus

1. The State of Bihar through the Additional Chief Secretary, General Administration Department, Government of Bihar, Patna.
2. The Additional Secretary, General Administration Department, Government of Bihar, Patna.
3. The Under Secretary, General Administration Department, Government of Bihar, Patna.
4. The Accountant General (A & E), Bihar, Patna.

... ... Respondents

==

Appearance :

For the Petitioner	:	Mr. Ashok Kumar Choudhary, Advocate Mr. Akshansh Ankit, Advocate
For the Respondents	:	Mr. P.K. Verma, AAG 3 Mr. Suman Kumar Jha, AC to AAG 3
For the A.G.	:	Mr. (Dr.) Anand Kumar, Advocate

==

CORAM: HONOURABLE MR. JUSTICE PRABHAT KUMAR JHA
ORAL JUDGMENT
Date : 11-02-2021

Heard Mr. Ashok Kumar Choudhary, the learned counsel for the petitioner, Mr. P.K. Verma, the learned A.A.G. 3 for the State and Mr. (Dr.) Anand Kumar, the learned counsel appearing on behalf of the Accountant General.

2. The petitioner seeks following reliefs in this writ petition:

a) For a direction to the respondents to make payment of pension, gratuity, leave pay and other post retiral dues, if any, to which the petitioner is entitled to after having retired w.e.f. 29.02.2020 from the post of Additional Secretary, SC & ST Welfare Department, Government of Bihar, Patna.

b) To quash Memo No.5241, dated 03.06.2020 (Annexure-5) issued by the respondent no.2 to the extent payment of 10% pension, entire gratuity and amount of leave encashment to the petitioner was kept pending in a most mechanical and arbitrary manner.

c) To pass any other order/orders or the consequential relief to which the petitioner may be found to be legally entitled on the facts and in the circumstances of the case.

3. Admittedly the petitioner entered in the Bihar Administrative Service in the year 1989 and the petitioner worked in different capacities till his retirement. The petitioner retired from the post of Additional Secretary, SC & ST Welfare Department, Government of Bihar on 29.02.2020. While the petitioner was working as Municipal Commissioner, Nagar Nigam, Muzaffarpur, the petitioner was charged for committing financial irregularity in purchasing submersible pumps and garbage tripper. For that Vigilance P.S. Case No.56 of 2018, corresponding to Special Case No.26 of 2018 was registered under Sections 409, 467, 468, 471 and 120(B) of the Indian Penal Code and under

Sections 13(2) read with 13(1)(a) of the Prevention of Corruption Act. The petitioner after his retirement filled up his form for payment of pension and pensionary benefits but the General Administration Department vide Memo No.5241, dated 03.06.2020 ordered for only payment of 90% provisional pension to the petitioner. Payment of entire gratuity and leave encashment were withheld and, thus, the petitioner moved this Court.

4. Mr. P.K. Verma, the learned A.A.G. 3 filed counter affidavit and on the basis of such Mr. Verma submits that Vigilance P.S. Case No.56 of 2018 is pending against the petitioner and the same was instituted before retirement of the petitioner. The government has already accorded sanction for prosecution. Charges have already been served for initiation of departmental proceeding against the petitioner and, therefore, in view of the amended provisions of Rule 43(d), which is made effective from 21^{st} of January, 2019, the government has rightly withheld the entire gratuity and leave encashment along with 10% pension.

5. Mr. Ashok Kumar Choudhary, the learned counsel for the petitioner submits that the petitioner did not commit any financial irregularity in accepting the annual tender of M/s Maurya Motors for supply of garbage tripper. It is further submitted that even the departmental proceeding has not been initiated and the

same is under contemplation. Under Rule 43(b), the government can only withhold the pension and gratuity if the government servant is found guilty of grave misconduct and government servant is found guilty to have caused pecuniary loss to the government by misconduct or negligence during his service. Institution of mere FIR cannot be a condition precedent for withholding pension and gratuity as no sanction for prosecution of the petitioner was granted till the retirement of the petitioner. It is further submitted that the pension includes gratuity and in view of the provisions as inserted as Rule 43(c), 90% of pension and gratuity had to be paid to the government servant, if any departmental proceeding or criminal case is pending but the entire gratuity and leave encashment have been withheld.

6. Learned counsel for the petitioner in support of his contention placed reliance on the judgment of the Hon'ble Supreme Court in the case of Dr. Hira Lal vs. State of Bihar & Ors., reported in (2020) 4 SCC 346 and on a Single Bench judgment of this Court rendered in Dr. Aquil Ahmad's case (CWJC No.11974 of 2019).

7. Admittedly by order as contained in Memo No.5241, dated 03.06.2020, issued under the signature of Vimlesh Kumar Jha, Additional Secretary, General Administration Department,

Government of Bihar, 90% provisional pension is ordered to be paid to the petitioner and 10% pension, entire gratuity and unutilized leave encashment have been withheld. The issue which remained to be decided is with respect to payment of 10% pension, full amount of gratuity and unutilized leave encashment.

8. In order to decide this question, Rule 27 and Rule 43 of the Bihar Pension Rules can be reproduced for the sake of convenience, which are as follows:

> *"27. Pension includes gratuity except the cases under rule 43(d).*
>
> *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 withheld 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 14(i) (ii) and (v) of the said rules, payment of gratuity may be made to the government servant."

9. Rule 43(c) was inserted in the year 2012 and Rule 43(d) has been inserted in the Rule w.e.f. 21st of January, 2019. From bare perusal of Rule 43(b), it appears that the State Government reserve 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 or on re-employment after his retirement, but the government did not visualize the situation as to what action is required if a departmental proceeding or a criminal case is pending

at the time of retirement of a government servant or a departmental proceeding or criminal case is lodged for the misconduct and pecuniary loss is caused by the government servant during the period of his service but came to light within four years after his retirement and thereafter the government brought amendment and inserted clause (c) of Rule 43 with regard to grant of provisional pension upto 90% in case of pendency of departmental proceeding or the criminal case but clause (c) does not speak about the gratuity as Rule 27 says that pension includes gratuity. Thereafter the government brought about an amendment and inserted clause (d) of Rule 43 and also in Rule 27 of the Pension Rules. Rule 27 says that pension includes gratuity except the case under Rule 43(d) and Rule 43(d) says that if any departmental or judicial proceeding is pending against the government servant at the time of retirement, full amount of gratuity may be withheld till the final conclusion of the departmental or judicial proceeding.

10. In the case of Dr. Hira Lal, who retired on 17.09.2008 and he was granted provisional pension of 90%. The government withheld 10% of the pension and entire gratuity and leave encashment. The Hon'ble Supreme Court has held that on the basis of the two Circulars dated 22.08.1974 and 31.10.1974 and Government Resolution dated 31.07.1980, which were

administrative instruction and executive orders, the pension and gratuity cannot be withheld and accordingly ordered for payment of gratuity and pension but after insertion of Rule 43(c) w.e.f. 19.07.2012, the government is authorized to withhold 10% of pension. The Hon'ble Supreme Court in para 20 and 21 of the judgment considered the amended provision of Rule 43(c) and held that 10% of pension can be withheld till disposal of the departmental proceeding or the criminal proceeding. It is also held that Rule 43(c) is not retrospective, therefore, withholding of pension and gratuity of the government servant who retired before 19.07.2012 is illegal. In the case of Dr. Aquil Ahmad (CWJC No.11974 of 2019), it has been held that the rule cannot be applied retrospectively unless the legislature so intended. Dr. Aquil Ahmad retired from service on 31.07.2017 and, therefore, his entire gratuity and leave encashment cannot be withheld.

11. The case of the petitioner is that the petitioner retired on 29.02.2020. Admittedly on 12.12.2018, vigilance case was registered and sanction was also accorded for prosecution of the petitioner. Even charges were served on the petitioner asking him to show cause for holding departmental enquiry before the date of his retirement, therefore, in view of the amended provisions of Rule 43(d), the government can withhold the entire gratuity of the

petitioner till the final conclusion of the departmental or judicial proceeding. The payment of unutilized leave is not part of the pension but it has been held by a Full Bench judgment of this Court rendered in the case of Arvind Kumar Singh vs. The State of Bihar & Ors., reported in 2018 (2) PLJR 933 that the government by executive order can withhold the payment of unutilized leave encashment of a government servant during the pendency of departmental proceeding or the judicial proceeding, therefore, I find that the order as contained in Memo No.5241, dated 03.06.2020 (Annexure-5) of withholding 10% pension, gratuity and leave encashment of the petitioner does not require any interference.

12. Having considered the facts and discussions made above, I do not find any merit in this writ petition. Accordingly, the writ petition is dismissed.

(Prabhat Kumar Jha, J)

S.KUMAR/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	18.02.2021
Transmission Date	NA